



# CLIENT NEWS BRIEF

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## CEQA SPOTLIGHTED IN RECENT CALIFORNIA SUPREME COURT CASE AND NEW GREENHOUSE GAS EMISSIONS GUIDELINES

The California Environmental Quality Act (“CEQA”) requires all government agencies, including school districts, to identify whether a project may have potentially significant effects on the environment and to consider alternatives or mitigation measures to reduce or avoid effects. The public can challenge an agency’s compliance with CEQA only within certain designated time periods following agency action, which are set forth in Public Resources Code sections 21000, *et seq.* A recent California Supreme Court case has confirmed that these relatively short time periods for bringing a legal challenge against a government agency are to be strictly enforced, which is a welcome development for public agencies. At the same time, new guidelines (“Guidelines”) regarding Greenhouse Gas (“GHG”) emissions have been adopted, requiring public agencies to include the potential impact of GHG emissions in their CEQA analysis of a project. While the Guidelines provide some needed guidance for analyzing GHG emissions, questions are likely to remain regarding their proper implementation.

### Court Upholds 30 Day Period for Filing a Suit Challenging Certain CEQA Decisions

After conducting its CEQA analysis, if an agency approves or determines to carry out a project, the agency must file a notice of determination (“NOD”) within five working days. (Pub. Res. Code § 21152(a).) The NOD indicates whether the project will have a significant effect on the environment and whether an Environmental Impact Report (“EIR”) was prepared. In the alternative, the agency may file a notice of exemption (“NOE”) if it concludes that the project is exempt from CEQA. The purpose of the NOD and the NOE is to alert the public about the agency’s environmental decisions and to give the public an opportunity to challenge the project under CEQA.

If someone seeks to initiate such a challenge, a lawsuit must be filed within the time limits, or statute of limitations, set forth in section 21167 of the Public Resources Code. Generally, the statute of limitations for an NOD runs for only 30 days and the statute of limitations for an NOE runs for only 35 days. (Pub. Res. Code § 21167 (b)-(e).) However, subsection (a) of section 21167 includes a 180-day statute of limitations. This longer period applies to challenges alleging that an agency has approved or undertaken a project without having determined whether or not it may have a significant effect on the environment or is exempt from CEQA review.

In a unanimous decision, the California Supreme Court in Committee for Green Foothills v. Santa Clara County Board of Supervisors (S163680, Feb. 11, 2010, ) \_\_ Cal. 4th \_\_, ruled that the filing of an NOD triggers a 30-day statute of limitations for all CEQA challenges, regardless of their merit. This ruling is a positive outcome for agencies undertaking public projects.

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In 2000, Stanford University (“Stanford”) sought to construct additional student housing and administrative facilities on its campus. An EIR was prepared, which found that the development would severely impact the public’s access to recreational facilities. As a result, one of the mitigation measures required Stanford to develop and maintain two public trails. During negotiations with the county, a dispute arose about the location of one of the trails. In the final agreement (“Agreement”), the location of the disputed trail was left to be determined at a future date, subject to further CEQA review. An NOD was filed and posted, announcing the county’s decision. 171 days later, the Committee for Green Foothills (“Committee”) filed a complaint, alleging that the county had violated CEQA by approving the location of the disputed trail without conducting necessary CEQA review. The question facing the California Supreme Court was whether the Committee’s legal challenge was time-barred since it was brought outside the 30-day statute of limitations for NODs.

The Committee argued that the longer 180-day statute of limitations in Public Resources Code section 21167(a) applied because the Agreement constituted a “project,” which the county approved without determining the environmental effects of the disputed location of one of the trails. The lower appellate court agreed with the Committee, concluding that there was a “reasonable possibility” that the Committee could have alleged facts sufficient to bring its legal challenge within the 180-day time period.

The appellate court’s ruling threw into doubt whether a public agency could still rely on the shorter 30 day statute of limitations for an NOD. This, in turn, created questions regarding the statute of limitations for an NOE. Under the court’s reasoning, whenever an allegation could be made that an NOD (or possibly an NOE) was filed unlawfully, the limitations period for a lawsuit would expand to 180 days.

The California Supreme Court disagreed, overturning the lower appellate court’s ruling. The Court held that the Legislature intended that the filing of an NOD triggers a 30-day statute of limitations, regardless of the merits of the CEQA challenge. In enacting Public Resources Code section 21167, the Legislature sought to place strict time limits on CEQA challenges, promoting certainty for government agencies and allowing them to proceed with projects without the threat of delayed CEQA litigation. Prior to this decision, public agencies were understandably concerned about moving forward on a project even after expiration of the 30-day period for fear of future CEQA challenges. The court’s decision restores CEQA’s bright line deadlines and provides much needed certainty.

## **New CEQA Greenhouse Gas Emissions Guidelines Take Effect**

In 2007, the California Legislature passed Senate Bill 97, requiring the California Natural Resources Agency (“CNRA”) to adopt new Guidelines under CEQA for the analysis of a project’s potential emission of GHG and related mitigation measures. After much review and discussion, the Guidelines finally took effect on March 18, 2010. The Guidelines can be found in the California Code of Regulations, Title 14, section 15064, et seq. (all references hereinafter are to the specific section numbers).

With the adoption of the Guidelines, agencies will now have some guidance in meeting the statutory obligation to analyze a project’s GHG emission impacts. Such an analysis will likely encompass a wide range of agency projects, since CEQA defines the term “project” very broadly. What follows is a brief summary of the more significant requirements in the Guidelines.

- The Guidelines define GHG as carbon dioxide, methane, and hydrofluorocarbons, among others. (§ 15364.5.)

# CLIENT NEWS BRIEF

March 2010

Number 10

- When assessing the environmental impacts of GHG emissions from a project, the agency must consider the following factors: (1) the extent to which the project may increase or reduce GHG emissions as compared to the existing environmental setting; (2) whether the emissions from the project exceed a threshold of significance; and (3) the extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of GHG emissions. (§ 15064.4(b).)
- Agencies must analyze any significant environmental effects the project might cause by bringing development and people into the affected area. The analysis should also evaluate potential climate change-related hazards (e.g., coastal flooding and wildfires) that might impact people brought to the area by the project. (§ 15126.2(a).)
- If an agency determines that a project's GHG emission impacts are significant, it should consider "feasible means" supported by substantial evidence and subject to monitoring or reporting to mitigate such impacts. (§ 15126.4(c).) Such measures may include energy and water conservation, reducing the production of solid waste and using renewable energy sources.

While the Guidelines provide some guidance for evaluating GHG emission impacts, a great deal of uncertainty remains. In particular, the Guidelines fail to specify the standards or thresholds that should be applied to determine the significance of a project's GHG emission impacts. The Guidelines instead give broad discretion to the lead agency in choosing a particular model or methodology for conducting the analysis. (§ 15064.4.) The Guidelines only require that the agency makes a "good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of (GHG) emissions resulting from a project." (*Id.*) To date, some agencies adopting their own standards of review for GHG emission impacts have already been subject to legal challenge.

Despite this uncertainty, lead agencies must follow the Guidelines in the same manner in which they undertake their other CEQA analyses. Absent further clarification on the appropriate standards or thresholds to apply, these Guidelines may provide more opportunities for someone to challenge a project for any number of additional reasons. As a result, navigating and understanding the Guidelines will become increasingly more important.

For general questions on CEQA, NODs or NOEs, or to discuss ways to structure your GHG emissions impact analysis to help withstand legal scrutiny under the Guidelines, please contact any one of our [seven](#) offices located statewide.

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