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Published July 2008

By: Grant Degginger

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### OPERATIONS: LAW

#### Climate Change Regulation is Coming

##### Prepare to reduce development impact on global warming

As fast as you can say "climate change and greenhouse gas emissions," local governments are initiating regulations aimed at reducing the impact of development on global warming. Whether or not you agree that climate change is an issue, or one that can be addressed in a meaningful way, the regulatory trend is inevitable and represents a significant change in the traditional way environmental laws and regulations have been adopted.

Historically, environmental protection efforts in the U.S. were initiated at the federal level with regulatory responsibilities migrating to the states. Thus, the National Environmental Policy Act, the Clean Air Act, the Clean Water Act and the Comprehensive Environmental Response Compensation and Liability Act each became "top-down" templates for states to use and adapt for their jurisdictions. By contrast, beginning with the decision not to ratify the Kyoto Protocol, the federal government largely has chosen not to get involved in regulating greenhouse gas emissions.

As Congress and the executive branch have failed to pass substantive climate protection legislation, the states and local governments, along with citizen groups, have been using existing federal environmental laws to get the courts to implement regulatory changes. These efforts gathered significant momentum last year when the U.S. Supreme Court ruled in *Massachusetts v. EPA* that greenhouse gas emissions from automobiles are a pollutant to be regulated under the Clean Air Act. Although the Court ordered the Environmental Protection Agency to decide whether or not such emissions endanger human health, or explain why it cannot or will not make a finding, the agency has effectively delayed any decision until after the next president takes office.

#### LAND USE IMPACT

Other federal statutes, such as the Endangered Species Act (ESA), and state statutes such as the California Environmental Quality Act (CEQA), also are being used to prompt consideration of climate change in land use decisions. Two federal court decisions in California have mandated that climate change impacts must be considered in preparing biological opinions under the ESA. In *State v. San Bernardino County*, California state and public interest groups sued the largest county in California under CEQA because it did not evaluate the increases in greenhouse gas emissions that could arise from its growth plan. The suit was settled late last year when the county agreed to amend its plan to add a policy describing the county's efforts to reduce greenhouse gas emissions, prepare an environmental review of its emissions reduction plan and adopt measures to control diesel exhaust.

These statutes, however, are imperfect vehicles for climate change regulation, which has resulted in states and local jurisdictions filling the vacuum. For example, the U.S. Conference of Mayors decided to tackle the problem and, to date, more than 800 mayors representing over 80 million people in the U.S. have signed on to reduce their carbon

emissions. Many states have passed legislation that sets aggressive goals to reduce greenhouse gas emissions below specified levels. For example, 1990 levels by 2020, 25 percent below 1990 by 2035, and 50 percent below 1990 by 2050. Nearly 30 states have convened, or are in the process of creating, climate advisory teams to develop recommendations for reducing greenhouse gas emissions.

The proposals by a number of Western states, including California, Washington and Oregon, have been focusing on buildings and transportation because both represent substantial sources of greenhouse gas emissions—40 percent in the case of buildings and between 33 percent and 50 percent for transportation. Thus, it is not surprising that the proposals involve reducing vehicle miles traveled and improving the energy efficiency of the built environment.

#### **EFFECT ON DEVELOPMENTS**

A key component in the local and state regulatory toolboxes is modifying the permitting process to consider the amount of and ways to reduce greenhouse gas emissions in development projects. King County, the most populous county in Washington, as well as the cities of Seattle and Portland, have adopted changes to their environmental checklists that require a project applicant to quantify the impact of their proposed development on greenhouse gas emissions and what efforts will be made to mitigate those impacts.

While these efforts no doubt will challenge the development community to approach projects differently, the changing landscape also will present opportunities. Expect incentives to develop housing closer to places of employment, as well as initiatives for Green construction, including LEEDcertified residential housing. Local governments will be looking favorably on developers who can implement low-impact developments. The most sizeable challenge may be in finding the funding for transit investments necessary to achieve the aggressive emission reduction goals.

#### **OUTCOME**

We are at the outset of a new era in environmental and development regulation. The marketplace is supportive of the change and, to the extent that the benefits can be made to outweigh the costs, will continue to be supportive. Local governments will need the input and expertise of the development community to help achieve the carbon reduction goals, while at the same time meeting the housing and workplace needs in their communities.

Grant S. Degginger is a shareholder at Lane Powell and chair of the firm's Construction Litigation Practice Group, focuses on construction, environmental and commercial disputes.

[deggingerg@lanepowell.com](mailto:deggingerg@lanepowell.com)

206-223-7390