

The Dirt Report

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Greenhouse Gas Emissions Heat Up Environmental Review

The California Environmental Quality Act (CEQA) generally requires analysis of a development project's greenhouse gas emissions (GHG) or climate change impacts before government permits are approved. In two recent decisions, the Court of Appeal upheld the analysis of climate change impacts, lending scope and substance to this relatively new and previously untested requirement. Particularly given the limited case law on this topic, these decisions provide important and helpful guidance to agencies and practitioners in determining how to perform an adequate GHG analysis.

Under CEQA, a government agency must analyze a proposed development's environmental impacts before issuing permits for the project; in particular, an analysis of GHG emissions is generally required in an environmental document prepared pursuant to CEQA. *See, e.g.,* CEQA Guidelines § 15064.4 ("A lead agency should make 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."). If a project's contribution to GHG emissions is deemed significant, a lead agency must identify feasible means of mitigating the impact to a less than significant level. CEQA Guidelines § 15126.4(c). Other than *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70 (2010), in which the court struck down an environmental impact report for a refinery project based on, among other grounds, the impermissible deferral of developing mitigation measures for GHG emissions, the courts have offered little guidance on how to analyze climate change impacts under CEQA. (For further information regarding the *Communities for a Better Environment* case, *see*, "Recent Developments in the Environmental Review of Climate Change Impacts.") Two recent appellate court decisions have begun to fill that gap.

In *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita*, 197 Cal.App.4th 1042 (2011) (*SCOPE*), opponents challenged an environmental impact report (EIR) for the proposed expansion of hospital and medical office building facilities. The EIR concluded that the increased GHG emissions associated with vehicles and transportation sources would be significant and that there were no feasible mitigation measures to reduce the impact to a less than significant level. The opponents challenged this latter claim, citing a comprehensive list of suggested mitigation measures for GHG emissions prepared by the California Attorney General's office. In response, the court ruled that the city was not required to address the feasibility of each of the numerous measures recommended by the Attorney General, distinguishing cases where courts faulted an agency for not considering specific, potentially feasible measures. *See, e.g.,* 197 Cal.App.4th at 1055 ("Considering the

large number of possible mitigation measures . . . as well as the [opponent's admission] that not all measures would be appropriate for every project, it is unreasonable to impose on the city an obligation to explore each and every one." The court further observed that the city did in fact consider and impose several measures on the project that were consistent with the Attorney General's recommendations (e.g., mitigation related to energy efficiency and solid waste reduction) and noted that the city was planning to consider a number of the measures as part of its general plan update.

The court noted that emissions from vehicle exhaust are controlled by the state and federal governments and are therefore outside the control of the project. The court pointed out that the EIR nonetheless contained mitigation measures requiring the addition of traffic lanes to ease the flow of traffic around the project site and the addition of two new bus stops to allow the public to access the hospital through public transportation. In addition to these traffic mitigation measures, the project was required to comply with various city policies designed to reduce the number and length of vehicle trips. In particular, the court noted that the project was consistent with the city's requirements for the construction of bus turnouts, efficient site design for both motorists and pedestrians and other conditions that promote a reduction in vehicle miles traveled. Further, by locating the medical office space at the hospital campus, the project would reduce the amount of vehicle trips by 20 percent compared to the situation without the project where the hospital and medical office buildings are separated. The court concluded that substantial evidence supported the city's finding that mitigation of the project's significant climate change impact to a less than significant level was not feasible.

In *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*, 197 Cal.App.4th 327 (2011) (*CREED*), project opponents challenged a mitigated negative declaration (MND) for a project to replace an existing Target store and other ancillary facilities with a new, larger Target store. Although the Court of Appeal ultimately remanded the case to the trial court to determine whether a specified plan addressed the project's potential impacts to soil contamination, it did uphold the MND's analysis of GHG impacts. Citing CEQA Guidelines section 15064.4, the court stated that an agency is allowed to decide what threshold of significance it will apply to an analysis of GHG impacts. In this case, the city used as its threshold whether the project would conflict with or obstruct the goals or strategies of the California Global Warming Solutions Act of 2006 (also known as AB 32). AB 32 sets a target of reducing GHG to 2000 levels by 2010 (requiring an 11 percent decrease from business as usual emissions) and to 1990 levels by 2020 (requiring a 25 percent decrease from business as usual emissions). "Business as usual" is an industry term that refers to the projected GHG emissions that would occur if no remedial actions are taken. Here, the city established a target of 20 percent below business as usual as its threshold, reasoning that this was "an appropriate midpoint between the 2010 and 2020 targets set forth in AB 32 considering the timeframe for Project operations is within these dates." 197 Cal.App.4th at 336.

The opponents argued that the city arbitrarily picked a number falling somewhere in between AB 32's 2010 and 2020 targets and that the standard selected was not supported by substantial evidence. The court observed that the MND did not use the 25 percent below business as usual that would be needed to be consistent with AB 32. However, since the city's environmental analysis made clear that the project would reduce GHG emissions by 29 percent from business as usual, the court stated that it was irrelevant whether the city used a 20 percent reduction or a 25 percent reduction as its threshold since the 29 percent reduction exceeded both goals. The court further agreed with the city's assessment that AB 32 does not require cities or counties to reduce emissions by a certain amount. In response to opponent's claims that the city erred in not using a more stringent 33 percent reduction below business as usual required by San Diego County, the court ruled that the city had properly exercised its discretion in using compliance with AB 32 as its threshold and thus was not required to employ the county's different threshold.

In short, both the *SCOPE* and the *CREED* cases provide useful guidance for addressing a project's climate change impacts. The *SCOPE* case emphasizes that while an agency is required to impose feasible mitigation measures related to the GHG impacts of a project, it is not required to consider and impose all mitigation pertaining to GHG emissions. It also provides an important example where further mitigation of a project's significant GHG emissions was deemed to be infeasible and the project was approved despite the significant and unavoidable GHG impact. The *CREED* case underscores an agency's discretion to select the threshold it will use to judge the significance of GHG impacts (which will be upheld if supported by substantial evidence in the record) and reflects an important judicial recognition of the business as usual concept as a significance standard.

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