

# Daily Journal

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## Courts offer little clarity on CEQA cases

By Fiona Smith

Local governments across California are looking at climate change impacts on everything from housing developments to oil refinery expansions to county land use plans. But the question of how far to go remains up for debate.

Lawyers have been seeking answers in the courts, trying to nail down the details of what the California Environmental Quality Act requires when it comes to heat-trapping gases. Some appellate court decisions on the issue are trickling in, but they don't appear to be giving much more clarity to attorneys.

One of the most contentious issues is how to determine whether a project's greenhouse gas emissions are significant enough to require cutting back. In July, the 4th District Court of Appeal touched on that controversy in a case over a proposed Target store expansion in Chula Vista near San Diego. A local environmental group challenged the project's CEQA analysis, arguing, among other things, that the city did not properly calculate the project's greenhouse gas emissions.

The case raises the issue of so-called "thresholds of significance" - if a project surpasses that threshold,

CEQA requires emissions for the project to be cut back. Local governments have the power to set their own thresholds, but they must be reasonable and based on substantial evidence.

Chula Vista used the state's Global Warming Solutions Act as its threshold. When implementing the law, California regulators calculated how much emissions the state would release if it took no action, called business-as-usual, and found it would need to cut its emissions by roughly 25 percent from business-as-usual to meet the law's goals. Chula Vista reasoned that as long as the project cut its own business-as-usual emissions by the same percentage, its emissions would not be significant. The appellate court upheld the city's reasoning, finding it had deference in choosing a threshold and had enough evidence to back up its choice, *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*, 2011 DJDAR 10267.

"The gray area is what is substantial evidence to support that approach?" said Kristen Castaños, a partner with Stoel Rives LLP in Sacramento who represents government and private developers in CEQA cases. "I think agencies get into trouble when

using thresholds of significance that are not really well documented."

The ruling gives more support to the decision by several agencies to rely on the state global warming law in setting thresholds, but it has not settled the issue, said Michael Zischke, a partner with Cox, Castle & Nicholson LLP in San Francisco.

"I wouldn't say anything in climate change is free from controversy," Zischke said. "I think that parties will still argue that stronger thresholds should apply, and litigation will continue."

In the Chula Vista case, the appeals court did not address a key issue - whether the threshold jibes with CEQA's requirement to use current conditions as the starting point for analysis rather than hypothetical conditions, such as estimating what the business-as-usual emissions of the project would have been, said Matt Vespa, a senior attorney at the Center for Biological Diversity, a Tuscon, Ariz.-based nonprofit that's been pushing for strong climate change analysis under CEQA.

"Until a court does address that question, I think there's still going to be a lot of disagreement and potential litigation," Vespa said.

The center has a case pending in Riverside County Superior Court over whether a proposed housing development can rely on a business-as-usual threshold in its CEQA review, Center for Biological Diversity v. Riverside County, 10007574 (Riverside Super Ct., filed April 22, 2010).

Robert Thornton, a partner with Nossaman LLP in Irvine who represents local governments and private developers in CEQA cases, said the appellate courts have been careful about how they address CEQA cases as they relate to climate change, “and so we’re not seeing big across-the-board decisions.”

As in the Chula Vista case, the 4th District Court of Appeal deferred to agency authority in a dispute over a hospital expansion project in June, Thornton said. The appellate court sided with the City of Santa Clarita, north of Los Angeles, after a local group argued the city didn’t adopt enough measures to reduce the project’s greenhouse gas emissions, Santa Clarita Organization for Planning the Environment v. City of Santa Clarita, 2011 DJDAR 11239.

But in another ruling, the 4th District rejected the city of Richmond’s CEQA review for a Chevron refinery expansion. In that case, the appellate court held that the city failed to include specific measures Chevron would need to take to cut emissions before approving the project, Communities for a Better Environment v. City of Richmond, 184 Cal.App.4th 70 (Cal. App. 4th Dist. April 26, 2010).