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CITY'S "BUSINESS-AS-USUAL" THRESHOLD OK FOR EVALUATING GREENHOUSE GAS EMISSIONS UNDER CEQA

Citizens for Responsible Equitable Environmental Development ("CREED") v. City of Chula Vista, Docket No. D05779

By [Jeff Forrest](#) and [Ashley Hirano](#)

In this clean-tech era, Citizens for Responsible Equitable Environmental Development ("CREED") v. City of Chula Vista marks only the third time that a court has published a case addressing greenhouse gases in California. In CREED, the City of Chula Vista certified a mitigated negative declaration ("MND") and approved development permits for a project that would demolish an existing Target store, a smog check facility, and a small market, and construct in its place a larger Target store. CREED filed suit, claiming that CEQA required the City to certify a full environmental impact report because the project would have a significant environmental impact on hazardous materials, air quality, particulate matter and ozone, and greenhouse gas emissions. While the court held that an EIR was likely required for other reasons, the court also held that, to demonstrate the project's consistency with the GHG emissions reduction goals established by California's "Global Warming Solutions Act" (AB 32), the City had properly relied upon evidence the project's emissions were below the GHG threshold of significance. The City established this threshold of significance using what has become known as the "Business-As-Usual" ("BAU") method. The court also held that the City properly relied on the thresholds of significance in the South Coast Air Quality Management District's CEQA Air Quality Handbook to conclude that the project's air quality impacts (particulate

matter and ozone) were not cumulatively considerable even though the San Diego air basin is in non-attainment for particulate matter pollution.

BAU Model For GHG Threshold Appropriate to Demonstrate Project Consistency with AB 32 Goals

The most notable holding in the case was the court's sanctioning of the City's adoption of the BAU significance threshold to determine whether the project's GHG emissions were cumulatively considerable under CEQA. Under the BAU method, a project demonstrates that it can achieve a certain percentage reduction in its GHG emissions by constructing the project with various greenhouse gas reducing features that promote waste reduction, water and energy efficiency, and traffic reductions compared to the type of building features that were common (or "Business As Usual") in 2005.

In this case, the court found that operating the project with GHG emissions that were 25% below the GHG emission that normally result if operated with BAU methods would demonstrate a project was consistent with AB 32. Even though the court found that the City should have used 25% below BAU as its threshold, instead of 20%, it was a moot issue because the project's air quality model demonstrated that it would operate at 29% below BAU.

The court noted that the project was approved prior to the March 10, 2010 effective date for the new CEQA Guidelines for analyzing GHG. Nevertheless, the court held that both the pre-CEQA Guideline amendments and the post-CEQA Guidelines amendments afforded the City wide discretion to adopt the GHG threshold of significance it believed was appropriate, specifically stating:

The amendment confirms that lead agencies retain the discretion to determine the significance of greenhouse gas emissions and should "make a good faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from the project." (Guidelines, § 15064.4(a).) When assessing the significance of

impacts from greenhouse gas emissions on the environment the lead agency should consider: the extent the project may increase or reduce greenhouse gas emissions; whether project emissions exceed a threshold of significance that the lead agency determines applies to the project; and the extent the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. (Guidelines, § 15064.4(b).) Thus, under the new guidelines, lead agencies are allowed to decide what threshold of significance it will apply to a project. Here, the City properly exercised its discretion to utilize compliance with AB 32 as the threshold. Accordingly, we reject Citizens' argument that the City erred by not applying a different threshold.

Finally, the court rejected CREED's argument that a 33% below BAU threshold should have applied based upon data supplied in a San Diego County Greenhouse Gas Inventory report. The court noted the City had discretion to premise its threshold on data other than the County-specific inventory report, which were not binding and described the report's reductions as "theoretical." As such, there was no fair argument that the Project will have a significant greenhouse gas emissions and climate change impact.

Compliance With Air District's Significance Thresholds Adequate Even in Non-Attainment Basin

The court also denied CREED's petition regarding other air quality impacts, finding that the City properly relied upon the thresholds of significance in the South Coast Air Quality Management District's CEQA Air Quality Handbook to conclude that the project's air quality impacts (particulate matter and ozone) were below a level of significance even though the San Diego air basin is in non-attainment for particulate matter pollution. The court noted that CREED had failed to introduce any evidence that the project exceeded the thresholds or that it was impermissible for the City to rely on the air district's thresholds.

Fair Argument of Hazardous Materials Impact Triggers EIR

Notwithstanding the foregoing, the court agreed with CREED that the record contained substantial evidence of a fair argument that the project could have a significant impact on the environment because the project would require remediation of contamination from a leaking underground storage tank from a former on-site gas station and the record did not contain a corrective action plan demonstrating how the site would remediate contaminated soils in manner that would allow grading at the site to begin. The court remanded the matter back to the trial court for a determination of whether the corrective action plan addresses contaminated soil. If not, then the City would need to prepare an EIR.

Significance of the Case

Although information about global warming impacts and the human causes of global warming have been available and could have been included in project CEQA documents for several decades, attorneys, environmental professionals, and lead agencies have struggled with the lack of court-sanctioned guidance for an appropriate threshold of significance. In particular, the BAU method, while a clear choice for many lead agencies precisely because it demonstrates whether or not a project is contributing its fair share toward achieving AB 32's emissions reduction targets, has been criticized by the California Attorney General's Office and the California Natural Resources Agency. Indeed, the Attorney General's Office has often sent threatening letters to lead agencies that adopted the BAU method.

This case provides much needed authority on the implementation of, and compliance with, greenhouse gas emissions standards in environmental impact reports and other environmental documents. Compliance with AB 32 and the evaluation and reduction of GHG emissions have been one of the most vital, and most active, areas of public policy analysis and debate in California. Hundreds of lead agencies and thousands of project applicants have had to deal with uncertainty over whether or not their efforts to reduce global warming

emissions was legally valid and enough to demonstrate their project's contribution was no longer significant or cumulatively considerable. In this current fog, the court's opinion is a beacon for lead agencies and applicants to follow.

Finally, even though the percentage reduction from BAU necessary to meet AB 32's emissions reduction target has varied from time to time, agency to agency, and report to report, this court's decision indicates that when a public agency chooses to rely on a particular source's BAU percentage from a particular expert or agency report, it is important for the lead agency to require the project to meet at least that specific percentage if the lead agency's purpose is to demonstrate there is evidence the project is consistent with AB 32's reduction targets. To require less breaks the logical chain in the threshold and normally would require both a finding that further mitigation was infeasible and a statement of overriding considerations. Here, the permittee and the City were fortunate that the air quality report demonstrated that the project would achieve and exceed the report's stated 25 percent BAU standard.

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