
*Mitigating Climate Change Impacts:
CEQA's Existing Rules Apply.
Don't They?*

A Discussion of *Comm. for a Better Env't et al. v. City of Richmond* (2010) 184 Cal. App. 4th 70 with AEP,
San Francisco Bay Area Chapter
October 27, 2010

Comm. for a Better Env't et al. v. City of Richmond (2010) 184 Cal. App. 4th 70

- First CEQA case addressing greenhouse gas emissions
- ***Spoiler Alert:*** City lost
- Offers new twist on rules on deferral of mitigation
- Suggests that different standards apply to climate change impacts

Oil Refinery Project

- Project: Upgrade an existing refinery
- Purpose: Allow the facility to refine various grades of crude oil from a wider variety of sources
- Components:
 - (1) the “Hydrogen Plant Replacement,”
 - (2) the “Power Plant Replacement,”
 - (3) the “Catalytic Reformer Replacement,” and
 - (4) the “Hydrogen Purity Improvements.”

Timing is Everything

■ City's Review

- June 2005: Notice of Preparation
- May 2007: Draft EIR
- Jan 2008: Final EIR
- May 2008: Revised Final EIR

■ External Developments

- Sept 2006: Global Warming Solutions Act
- April 2007: Cal. AG Sued County of San Bernardino
- Jan 2008: CAPCOA White Paper

Project Was Big, Very Big

- Estimated GHG Emissions
 - 898,000 metric tons CO₂

- Putting the Number into Perspective
 - BAAQMD Threshold = 10,000 tons
 - CARB Reporting Threshold = 25,000 tons
 - Scoping Plan Reductions from Refineries = 340,000 tons
 - Emissions equivalent to 160,000 cars

How Does One Mitigate GHG Emissions from an Oil Refinery?

- “No Net Increase”
 - Baseline established in the EIR
 - Demonstrate reductions before approaching baseline
- Inventory Emissions from Entire Refinery
- After Approval, Develop a Plan to Keep Emissions at Baseline
 - Implement AB32 Measures
 - Engage Energy Efficiency Engineers to Audit and Identify Reductions
 - Retrofits: swap diesel for electric engines, replace old heaters
 - Carbon capture and sequestration
- Annually Report Emissions Levels

Is Deferral of Mitigation OK?

- CEQA's General Rule
 - Identify project mitigation in EIR
 - Requirement to conduct a study and implement recommendations is not adequate mitigation

- Limited Exception: *SOCA* and Progeny
 - When specifying mitigation is not feasible:
 - Identify a performance standard
 - Identify a menu of mitigation options to consider
 - Commit to ultimate mitigation

Was Chevron's Deferral OK?

- Court: deferral is proper only -
 - ❑ “for kinds of impacts for which mitigation is known to be feasible,” and
 - ❑ only where the lead agency:
 - (1) undertook a complete analysis of the significance of the environmental impact,
 - (2) proposed potential mitigation measures early in the planning process, and
 - (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.

What Went Wrong?

- According to the court, the City:
 - ❑ Delayed making a significance finding until late in the CEQA process;
 - ❑ Divulged little or no information about how it quantified the Project's greenhouse gas emissions;
 - ❑ Offered no assurance that the plan for how the Project's greenhouse gas emissions would be mitigated to a net-zero standard was both feasible and efficacious; and
 - ❑ Created no objective criteria for measuring success.

Different Standards?

- Courts Will be Skeptical
- What Assurances of Feasibility Are Required?
 - Some “brief explanation,” but...
- What is the Difference Between a Performance Standard and a Generalized Goal?
 - Objective standard, suggested by experts

Does This Mean Climate Action Plans are Not Allowed?

- No!

- Project vs. Plan Level Review
 - Plan
 - State CEQA Guidelines § 15126.4(c)(5)
 - Project
 - Follow standards in *CBE*

Questions / Discussion

Contact Information:

Christopher Calfee

Best Best & Krieger LLP

2001 N. Main Street, Ste 390

Walnut Creek, CA 94596

(925) 977-3308

Christopher.Calfee@bbklaw.com