

Panel Discussion: Climate, Energy & Air



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BAAQMD CEQA Guidelines and Development Challenges

BAAQMD 2022 CEQA Guidelines

What it is:



- Guides lead agencies in evaluating air quality and climate change impacts.

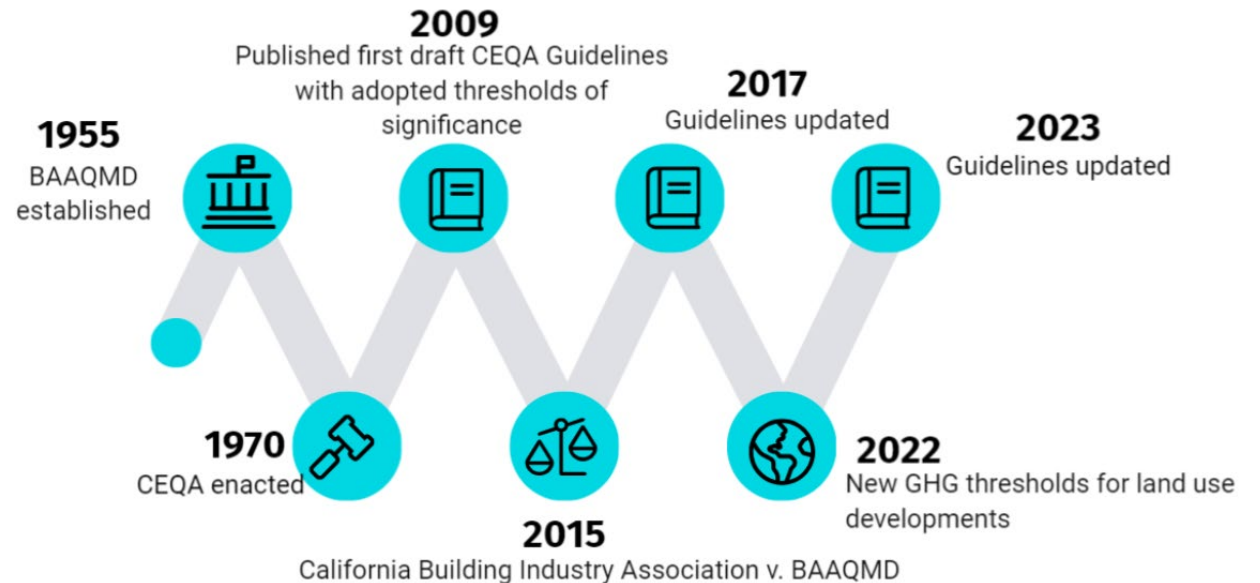


- Recommends significance criteria.
- Offers methods for evaluation.



- Suggests best practices, mitigation measures, and strategies.

History:



BAAQMD 2022 CEQA Guidelines

Summary of Primary Changes



- Does not modify any air quality thresholds of significance, but updates methods for evaluating against the thresholds.
- Added Environmental Justice, Health and Equity Best Practices



- Provides more guidance on developing a “qualified” Climate Action Plan
- Removes quantitative GHG thresholds (except for stationary sources)
- Includes worker receptors, as well as onsite receptors during phased construction



- Discusses inclusion of fugitive dust in health risk assessment
- Provides much more prescriptive guidance on analytical methods



- Expands scope of emergency generator operations
- Formally incorporates Friant Ranch ruling and subsequent guidance

Greenhouse Gases

GHG Thresholds – Project Level

2010 – 2022

- Compliance with Qualified GHG Reduction Strategy

OR

- 1,100 MT of CO₂e/yr

OR

- 4.6 MT CO₂e/SP/yr (residents+employees)

April 2022 - now

A. Projects must include, at a minimum, the following project design elements:

1. Buildings



a. No natural gas appliances or plumbing (in both residential and nonresidential development).

b. Not result in any wasteful, inefficient, or unnecessary energy usage as determined by the analysis required under CEQA Section 21100(b)(3) and Section 15126.2(b) of the State CEQA Guidelines.

2. Transportation

a. Reduction in VMT below the regional average consistent with the current version of the California Climate Change Scoping Plan (currently 15 percent) or meet a locally adopted Senate Bill 743 VMT target:



i. Residential projects: 15% below the existing VMT per capita

ii. Office projects: 15% below the existing VMT per employee

iii. Retail projects: no net increase in existing VMT

b. Achieve compliance with off-street electric vehicle charging requirements in the most recently adopted version of CALGreen Tier 2.

OR

B. Projects must be consistent with a local GHG reduction strategy that meets the criteria under State CEQA Guidelines Section 15183.5(b).

Not changed: 10,000 MT CO₂e/year for stationary sources.

Pros and Cons of the 2022 GHG Thresholds

+

Pros

- Prescriptive performance standard
- No additional analyses (e.g. quantification) required for project operations
- Consistency potentially shown through code compliance* for many jurisdictions

*(with add on for EV charging)

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Challenges

- Applicable to residential, commercial & retail projects. No guidance on appropriate threshold for many project types:
 - Industrial (potential use of stationary source threshold)
 - Transportation
 - Institutional
- In practice, meeting CalGreen Tier 2 EV charging may not be cost-effective for some projects.
- Potential concerns with electricity supply/infrastructure and sizing all-electric buildings + EV needs
- No offramp for any natural gas usage (culinary, laboratory, public safety)
- VMT criteria may be challenging for rural projects
- Many Climate Action Plans haven't been recently updated

Guidance on Construction GHG emissions

- “...the Lead Agency should **quantify** and disclose GHG emissions that would occur during construction.”
- Even though the significance of construction-related GHG emissions is not determined, in order to minimize GHG emissions and emissions of other air quality pollutants, projects **should** incorporate the best management practices for reducing GHG emissions.
- Some BMPs are relatively easy to meet:
 - Require all diesel-fueled off-road construction equipment be equipped with EPA Tier 4 Final compliant engines or better as a condition of contract.
 - Minimize idling time either by shutting equipment off when not in use or reducing the time of idling to no more than 2 minutes ... Provide clear signage that posts this requirement for workers at the entrances to the site and develop an enforceable mechanism to monitor idling time to ensure compliance with this measure.
 - Use California Air Resources Board–approved renewable diesel fuel in off-road construction equipment and on-road trucks.
 - Where grid power is available, prohibit portable diesel engines and provide electrical hook ups for electric construction tools, such as saws, drills and compressors, and using electric tools whenever feasible.

Guidance on Construction GHG emissions

- Other suggested BMPs can be more difficult to meet:
 - Use zero-emission and hybrid-powered equipment to the greatest extent possible, particularly if emissions are occurring near sensitive receptors or located within a BAAQMD-designated Community Air Risk Evaluation (CARE) area or Assembly Bill 617 community.
 - Require all on-road heavy-duty trucks to be zero emissions or meet the most stringent emissions standard, such as model year (MY) 2024 to 2026, as a condition of contract.
 - Where grid power is not available, use alternative fuels, such as propane or solar electrical power, for generators at construction sites.
 - Use low-carbon concrete, minimize the amount of concrete used and produce concrete on-site if it is more efficient and lower emitting than transporting ready-mix.

Air Quality

Emission-Related Changes

Topic	2017 Guidelines	2022 Guidelines
Screening Levels	More stringent (i.e., lower) screening levels	<ul style="list-style-type: none"> • Less stringent (i.e., higher) screening levels • Added screening tool for projects with more than one type of land uses. • E.g., General office building 346 ksf → 452 ksf; Apartments 451 - 510 units → 638 units.
Friant Ranch Analysis	No guidance	Guidance on what components should be included in this analysis.
Phased Project	No guidance	Where construction and operations overlap: total = construction + interim operations;
Emergency Generators	50 non-emergency hours/year	<ul style="list-style-type: none"> • Use maximum potential to emit (PTE) • Include expected emergency and PSPS hours (suggested at 100 hours/year) • Similarly for other stationary sources, use PTE for emissions calculation.

Changes Related to Health Risk Assessment (HRA)

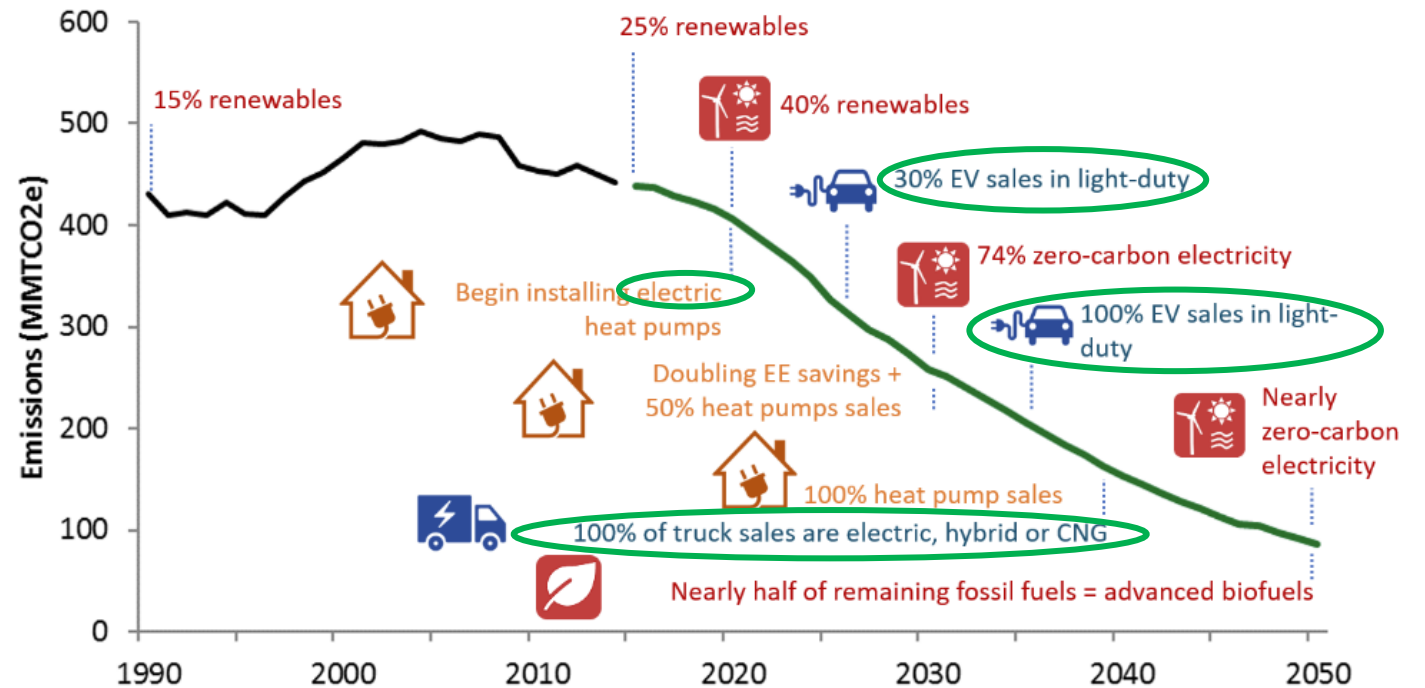
Topic	2017 Guidelines	2022 Guidelines
Tiered Approach	Not specified	<ul style="list-style-type: none"> • Tier 1: SCREEN3 or AERSCREEN; • Tier 2: AERMOD
Receptor Definition	"Sensitive receptors" did not include workers	Added places of business (e.g., workers), residential hotels, temporary housing, shelters, encampments, etc.
Fugitive Dust	Not specified	Quantification of construction-related fugitive dust in addition to exhaust emissions to evaluate the project's local risks and hazards impact is at the <i>discretion of the lead agency</i> .
Phased Project	No guidance	Max receptor after completion of each phase should be identified. Onsite receptors should be considered during phased construction.
Screening Out Operational Traffic	(From a 2011 document) Screen out unless a project adds 10,000 vehicles per day	No explicit screening levels provided

Discussion Topics

Development Challenges

- GHG thresholds
- Electric load and availability
- Energy evaluation

Milestones in decarbonizing California's economy



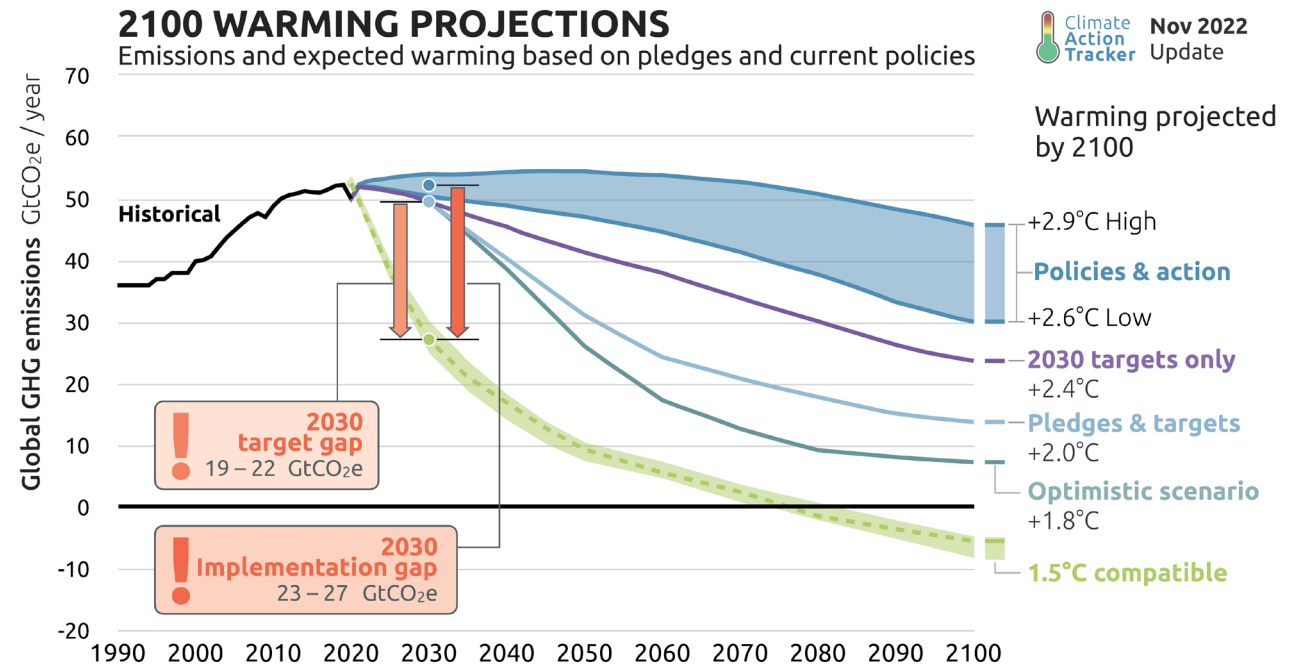
Milestones in reducing California emissions 80% by 2050 in a High Electrification scenario, as identified by E3's PATHWAYS model. (Source: California Energy Commission, "Deep Decarbonization in a High Renewables Future," 2018.)

<https://www.ethree.com/tools/pathways-model/>

Where were we in 2022?

Threshold Uncertainty

- Few air districts had published a 2030 GHG threshold
- Many jurisdictions had not updated their Climate Action Plans
- Courts had found two numeric thresholds (BAU and service population) deficient based on use of statewide data
 - *Center for Biological Diversity v. Department of Fish and Wildlife (2015)*
62 Cal.4th 204
 - *Golden Door Properties, LLC v. County of San Diego (2018)*
27 Cal.App.5th 892



Where were we in 2022?

The lack of a clear threshold caused some lead agencies to use a net zero threshold, as endorsed in the 2017 Scoping Plan and the California Supreme Court (*SANDAG*) →

Mitigation Uncertainty

- CEQA requires the adoption of all feasible mitigation. (Pub. Resources Code, § 21002)
- To get to zero or net zero, projects generally require carbon credits.
- But it was questionable whether carbon credits were “mitigation.” *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467

Carbon Credit

“Carbon credits are instruments that **monetize** quantifiable **reductions in greenhouse gas emissions** achieved by certified **climate action projects**.”



carbon credit

= 1 ton CO₂e

avoided / removed

What has changed?

- CARB published the 2022 Scoping Plan (December 2022)
- BAAQMD updated its GHG threshold (April 2022) (as discussed by Taylor)
- Courts have issued some clarifying cases (to be discussed next)



California Environmental Quality Act
Air Quality Guidelines

These guidelines are nonbinding recommendations, intended to assist lead agencies with navigating the CEQA process. They may be updated as needed in the future, and any updates will likewise be nonbinding and advisory.

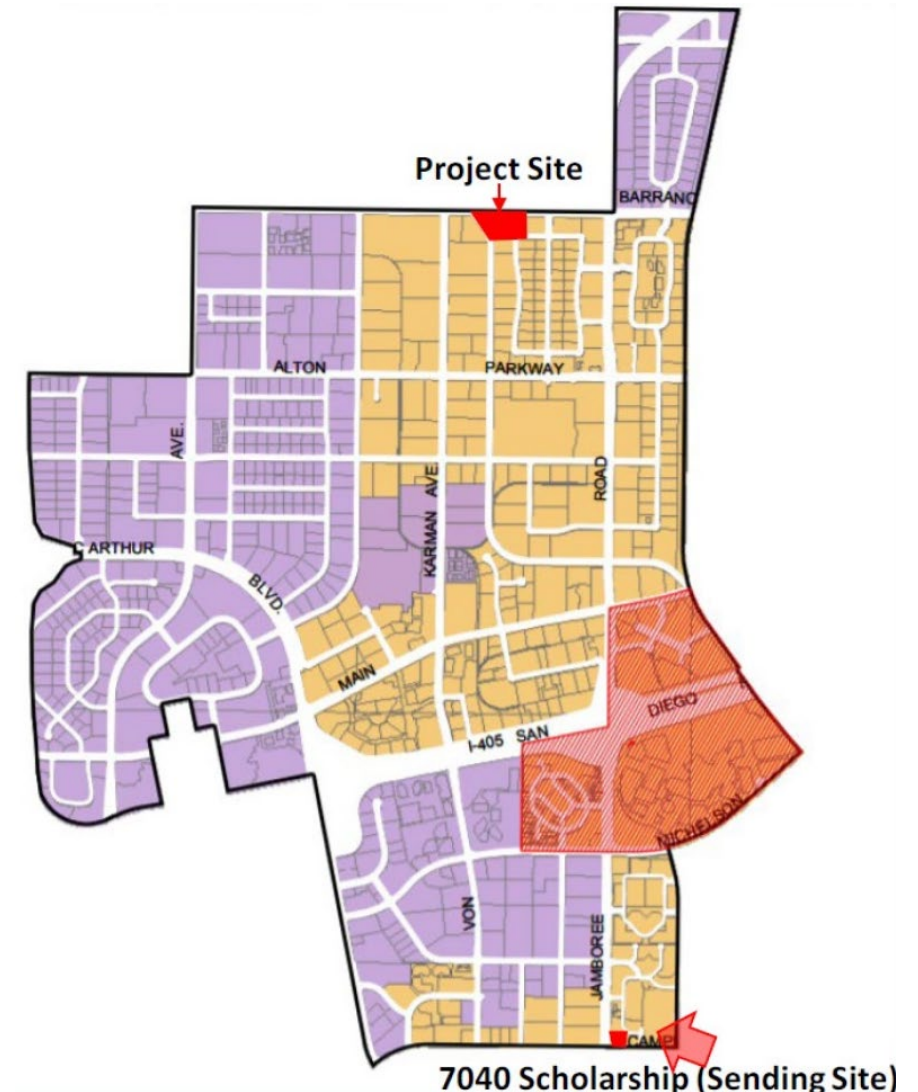
DRAFT 2022 SCOPING PLAN UPDATE

MAY 10, 2022



IBC Business Owners for Sensible Development v. City of Irvine (2023) 88 Cal.App.5th 100

- City adopted a plan for the 2,800-acre Irvine Business Complex (IBC) and certified a PEIR in 2010. The plan allowed density transfers.
- 9 years later, a developer proposed to redevelop a 4.95-acre parcel using transfer development rights equal to 221,014 square feet of office space. The sending parcel was on the other side of the IBC from the project.



IBC Business Owners for Sensible Development v. City of Irvine

(2023) 88 Cal.App.5th 100

Claim: Project's emissions not within the scope of the 2010 PEIR

Threshold: Net zero compared to 2008 baseline conditions

Holding: Incorporation of the 2010 PEIR mitigation measures alone did not constitute substantial evidence that the project was consistent with net zero target because:

- Even with mitigation, the project's large size could cause it to emit a disproportionate level of greenhouse gases.
- Addendum did not examine whether the project's emissions would allow the IBC to maintain net zero emissions at full buildout.
- *It is unclear from the record whether TDRs simply shift the source of greenhouse gas emissions or may impact total emissions.*



IBC Business Owners for Sensible Development v. City of Irvine

(2023) 88 Cal.App.5th 100

Defense: Project was categorically exempt from CEQA under the Infill Exemption; City was not obligated to perform any environmental review and, therefore, no prejudice.

Court: Project did not qualify for the exemption due to **unusual circumstances:**

- The project was not a standalone project but part of a plan to guide development in the IBC.
- The project is big (275,000 square feet) and would “tower over” neighboring buildings.
- Project requires the largest TDR of the 29 approved TDRs.
- Due to the unusual circumstance (mainly size), project may have a significant impact on the environment:
- Record showed that the project would exceed SCAQMD’s tier 3 standards and mitigation may be infeasible due to mobile emissions



East Oakland Stadium Alliance v. City of Oakland (2023) 89 Cal.App.5th 1226

Mitigation Measure GHG-1

- Prohibits city from approving construction-related permit for project unless an air quality consultant has prepared a plan showing that the project's GHG emissions would meet a "no net additional" emissions standard.
- Specifies how emissions are to be measured and estimated, requires monitoring, and lists five pages of possible measures to meet the standard, some of which are mandatory.



East Oakland Stadium Alliance v. City of Oakland

(2023) 89 Cal.App.5th 1226

Claim: GHG mitigation improperly deferred.

Holding: GHG-1 satisfies 3 requirements of Section 15126.4:

1. Commits the City to the mitigation measure.
2. Adopts a specific performance standard that the mitigation will achieve
3. Identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be potentially incorporated in the mitigation measure.

No improper deferral of GHG mitigation



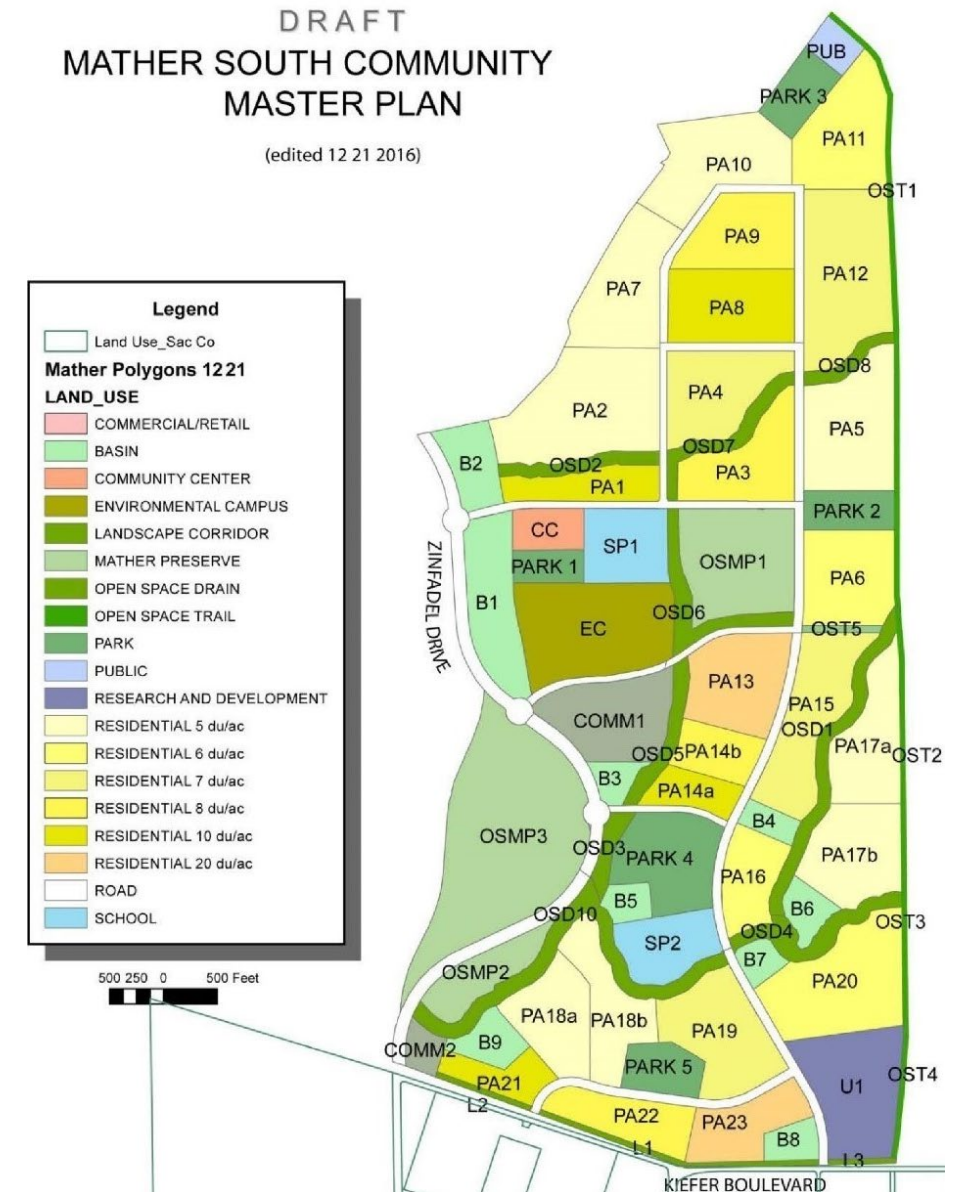
Tsakopoulos Investments, LLC v. County of Sacramento

(2023) 95 Cal.App.5th 280

Claim: County's threshold produced through faulty methodology, namely, reliance on statewide data

Facts: County relied on 2017 Scoping Plan guidance for how communities can develop a GHG threshold:

- "Local governments can start by developing a community-wide [greenhouse gas] emissions target consistent with the accepted protocols as outlined in [the Office of Planning and Research's] General Plan Guidelines Chapter 8: Climate Change. They can then calculate [greenhouse gas] emissions thresholds by applying the percent reductions necessary to reach 2030 and 2050 climate goals (i.e., 40 percent and 80 percent, respectively) to their community-wide [greenhouse gas] emissions target."



Tsakopoulos Investments, LLC v. County of Sacramento

(2023) 95 Cal.App.5th 280

Court: Threshold upheld because based on County-wide data and not state-wide data.

- Distinguished from *Center for Biological Diversity*: In developing the 2032 thresholds of significance, the County used the same framework **(but not the same data)** that the Air Board used in the 2008 Scoping Plan to calculate the County's 1990 greenhouse gas emission goals. The County tailored the data inputs **to account for local conditions and different kinds of development.**
- Distinguished from *Golden Door I*: Unlike San Diego County, which created a single threshold for all project types, County “developed **different county-specific thresholds of significance for different sectors** and then compared the estimated [GHG] emissions for the project’s residential, commercial and industrial, and transportation sectors against those thresholds of significance.”

Tsakopoulos Investments, LLC v. County of Sacramento

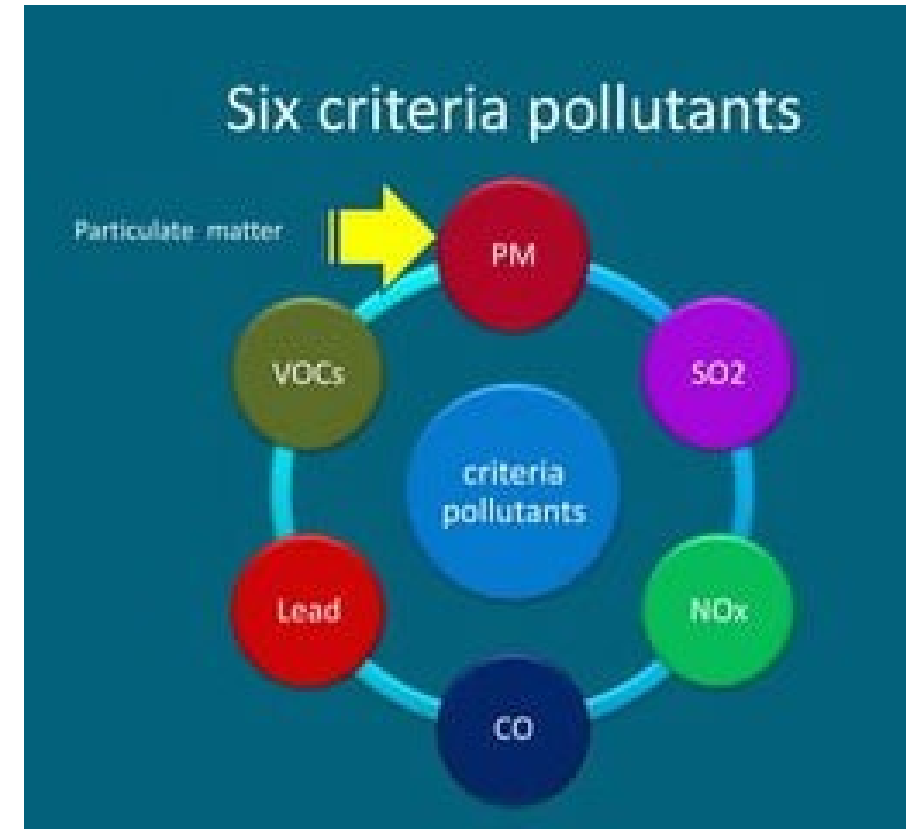
(2023) 95 Cal.App.5th 280

Claim: EIR inadequately analyzed the human health impacts associated with the project's impacts from criteria pollutants because the County failed to "explain why" it could not provide that analysis. (Quoting *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 520 (*Friant Ranch*).)

EIR: Explained why it was not feasible to correlate criteria air pollutant emissions to health impacts.

- Lack of an adopted methodology that would provide a consistent, reliable, and meaningful analysis to correlate specific health impacts from a proposed project's mass emissions.
- Different models and tools were dismissed from use in the analysis because they could not assist in analyzing the impacts.

Holding: EIR discussion sufficient.



County of Butte v. Department of Water Resources

(2023) 90 Cal.App.5th 147

- **Claim:** DWR's **2008 EIR** should have discussed climate change's potential effects on hydrologic conditions in the Feather River basin over the proposed **50-year licensing term**, discussed how these potential effects could potentially alter project operations, and discussed how these potential alterations to project operations could potentially impact the environment. Petitioners raised other related claims trying to undermine the substantial evidence on which DWR relied.
- This project has been in litigation a **LONG** time



County of Butte v. Department of Water Resources

(2023) 90 Cal.App.5th 147

EIR: Potential project operation changes necessitated by climate change **too uncertain to evaluate.**

- Cited several reports to support that "there is a significant amount of uncertainty over the magnitude of climate change that will occur over this century" and "also uncertainty about changes in hydrologic conditions, aquatic ecosystems, and water demand that could occur as the result of various amounts of climate change."

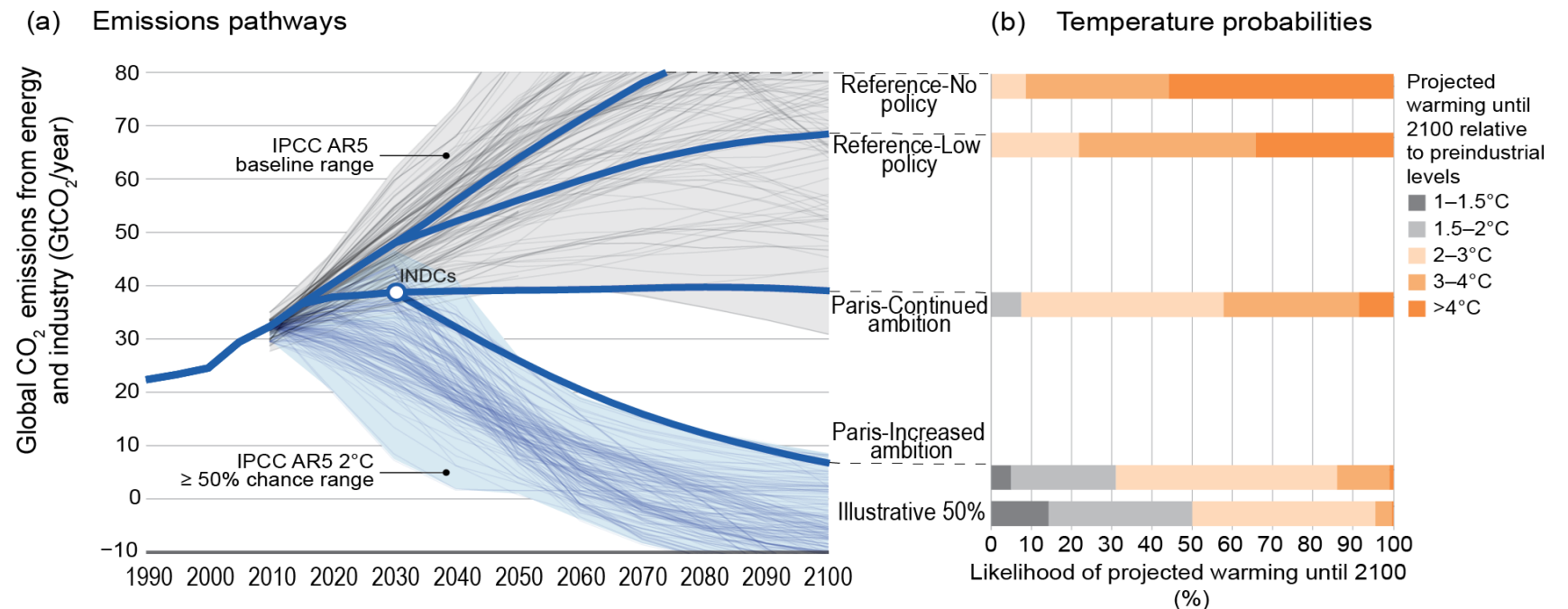


County of Butte v. Department of Water Resources

(2023) 90 Cal.App.5th 147

Court: Upheld the EIR's conclusion.

- Considering documented uncertainties at the time of the EIR, particularly the uncertainties about local impacts in the Feather River basin, DWR reasonably concluded that "any discussion of potential changes to operations of the Oroville Facilities necessitated by climate change **would be speculative** at this time."
- Court cautioned that DWR may not be able to reach the same conclusion today.



California Restaurant Association v. City of Berkeley (9th 2023) 65 F.4th 1045

Facts and Claim

- City of Berkeley adopted an ordinance prohibiting natural gas infrastructure in new buildings under its police powers.
- Restaurant association sued, claiming ordinance preempted by the federal 1975 Energy Policy & Conservation Act (“EPCA”), which sets federally mandated minimum efficiency standards to a multitude of consumer products and industrial equipment, including furnaces, HVAC equipment, and hot water heaters.



California Restaurant Association v. City of Berkeley (9th 2023) 65 F.4th 1045

Holding

- Ninth Circuit found Berkeley's ordinance was preempted, holding EPCA preempts state and city standards that interfere with "the end-user's ability to use installed covered products at their intended final destinations."
- Would the outcome be different if the City used its building code authority? Or if an air district used its authority to regulate air pollution?



Take Aways

Show your work. Compare *Tsakopoulos* to *IBC*.

Don't speculate. But do include substantial evidence supporting that analysis would be speculative. *Butte v. DWR; Tsakopoulos*.

GHG Thresholds

- Scoping Plan guidance. *Tsakopoulos*.
- Net zero and regional air district guidance. *IBC, East Oakland*.

Mitigation

- Plans acceptable. *IBC, East Oakland*. But, when a future project is proposed, see *IBC*.
- *Credits??* See the unpublished portion of *Yerba Buena Neighborhood Consortium, LLC v. Regents of the University of California*