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Land Use and Greenhouse Gas Emissions Intersect in the Courtroom

By Tilde Herrera
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The 28-acre swath of undeveloped land sits on the outskirts of the town of Yucca Valley, near the fabled Joshua Tree National Park in Southern California. The spot is slated to become home to a 184,000 square foot [Wal-Mart](#) Supercenter with more than 900 parking spaces, fast food restaurant and 12-pump gas station.

Yucca Valley's town council approved the project in late June. But the climate may not be right for giving it the green light: Last week, an environmental group sued the town and council, claiming Wal-Mart didn't adequately measure and mitigate the greenhouse gases (GHG) the store will produce. Other air quality issues are also a concern.

For the time being, the Yucca Valley Wal-Mart project will be tied up in court. "We hope not for too long. It's hard to say because it's at the preliminary stage," said Wal-Mart Spokeswoman Daphne Davis Moore.

Climate change laws are triggering a small but growing wave of lawsuits and legal threats to force California counties, developers and companies to count and lessen greenhouse gases as part of their plans for large projects. Similar legal challenges may be on the horizon in the handful of other states with similar climate change goals and laws.

"I think we're going to see this in other parts of the country because we have a lack of leadership at the federal level," said Jonathan Evans, staff attorney for the Center for Biological Diversity (CBD), which filed a lawsuit against the Yucca Valley Wal-Mart project. "Until then, it will be up to the states to find innovative ways to address the climate issue."

In the meantime, there are many steps project planners can take to avoid a legal morass, Evans said, adding that the CBD doesn't want to derail the projects; its goal is to improve them and the impact they will have on the environment.

"There are ways to reduce the carbon footprint and move projects forward," Evans said. "The positive impact from creating a better project for the community and business can be readily achieved."

CBD, a nonprofit pursuing legal, scientific and policy remedies to address climate change, has unleashed several lawsuits against cities and counties in California's fast-growing Inland Empire region.

The CBD isn't alone. California Attorney General Jerry Brown sent a letter (pdf) last week to the Siskiyou County Planning Department with a warning. Greenhouse gases must be studied in the Environmental Impact Report (EIR) of a water bottling plant [Nestle](#) wants to build near Mt. Shasta, the letter said.

The letter joins three-dozen or so [others](#) sent to counties and private interests around the state since 2006 calling for GHG analyses for large projects or growth plans. CBD has challenged five projects for not considering GHG impacts. Four cases are pending on appeal or at the lower court level, and another overturned an EIR, but not on the GHG issue.

The 'Baby NEPAs'

In the lawsuits and comment letters, CBD and California Attorney General Brown demand GHG analyses under the California Environmental Quality Act (CEQA).

Under CEQA, public agencies must prepare EIRs for projects that will probably have negative impacts because of the size or the way they are sited. Alternatives and mitigation must be explored if a project will hurt the environment.

CEQA is California's version of the National Environmental Policy Act (NEPA). Fewer than 20 states have their own version of the law, which CBD's Evans calls "baby NEPAs."

California's Global Warming Act of 2006 set a goal of cutting GHGs to 1990 levels by 2020. A year later, Senate Bill 97 affirmed emissions must be measured and reduced in projects subject to CEQA if the potential impacts from climate change are significant.

Around the same time the 2007 legislation was passed, Brown successfully settled the state's only lawsuit related to GHGs under CEQA. San Bernardino County agreed to amend its general plan, take a GHG inventory and create a reduction strategy.

Outside California, Massachusetts just last year started requiring climate change analyses for new projects. King County, Wash., which includes Seattle, also forces its agencies to do the same.

"We're actually shocked we haven't seen that type of litigation in Washington," said Dustin Till, a Seattle attorney with the Marten Law Group. Voter referendum torpedoed some transportation projects that could've been litigation targets. The law now requires planners to count emissions, not reduce them. King County is considering making projects reduce GHGs 15 percent below business-as-usual levels.

The nonprofit Minnesota Center for Environmental Advocacy sued the state's Department of Natural Resources last year under the Minnesota Environmental Policy Act (MEPA) in a case that is awaiting a decision. The department approved the reopening of an old taconite mining plant that will produce 5 million tons of carbon dioxide emissions each year.

"When they did the Environmental Impact Statement, they only gave passing notice to global warming," said Chuck Laszewski, the nonprofit's communication's director. "They didn't look at alternatives and basically gave it a pass. We said, 'You've got to go back and do it right.'"

Keeping the Blueprints Out of the Courtroom

States like California and Washington get much of their energy from low-carbon sources, such as hydroelectric power, Till said. As states set climate change laws, they must consider a variety of measures, including focusing on land use to meet their mandated emissions-reduction goals.

"In order to meet California's or Washington's targets, they're looking at the built environment -- how and where we build," Till said. "All of that impacts transportation, which is a big proportion of our GHG profiles."

The California governor's Office of Planning and Research (OPR) issued an advisory in June to help public agencies evaluate GHGs under CEQA. Formal guidelines will be adopted in 2010. In the meantime, there is debate over what makes a project's potential climate change impact "significant." Projects with significant impacts must include measures to reduce emissions.

Some say that until the guidelines are adopted, GHG analyses are speculative. Others argue that because California aims to reduce GHGs, any emissions increase is "significant." A few potential thresholds exist, such as one, proposed by California Air Pollution Control Officers Association that would set a limit of 900 tons of carbon dioxide equivalent, the amount generated by a typical 50-unit housing development.

The advisory -- like the lawsuits and letters -- is aimed at public agencies but companies can take a cue from the warnings and try to avoid situations that could lead to litigation.

"Companies should make it clear to the lead agency that they are willing to have this GHG analysis done on their project," said Terry Roberts, the director of OPR's State Clearinghouse, which reviews CEQA documents.

She estimates that fewer than 10 percent of EIRs and negative declarations filed this year included a GHG analysis, and those were mostly for large housing developments, regional-scale projects, county growth plans and major energy utility facilities.

"If one can draw some conclusion, we are seeing EIRs and mitigated negative declarations for larger projects that presumably do generate a good amount of GHGs," Roberts said.

The situation presents a great chance for companies to take a leadership position, and in some cases, help educate public agency staff by sharing information, techniques and data, Roberts said.

"Environmentally friendly design can be a positive thing for CEQA analysis," Roberts said. "You can show how the project has been designed to minimize GHG emissions."

Wal-Mart, however, said it would incorporate sustainable design features in its Yucca Valley store, such as a reflective roof to save energy and parking lot lights to prevent excess light at night.

Evans contends the company has the knowledge and experience to do more. In general, he said, a project that proceeds in a business-as-usual fashion, without the proponent making a good faith effort to measure and lessen GHG impacts, can be an obvious target for a legal challenge.

He suggests that project planners look at ways of reducing the carbon footprint by building in energy efficiencies or using renewable energy. Offsets have also been used to reach CEQA-related settlements.

California and ConocoPhillips, for example, reached a settlement (pdf) related to a refinery expansion through a one-time \$7 million investment in a carbon offset fund. The company will spend \$200,000 on a wetlands carbon sequestration project and put \$2.8 million toward state forestry projects. It also will buy offsets to reduce 500,000 metric tons.

Making adjustments at the design stage is cheaper than adding them after a project is underway, Evans said.

"Doing energy efficiency on front end has a little more upfront cost," Evans said. "But they'll save money in the long run and avoid the litigation risk."

Tilde Herrera is associate editor at GreenBiz.com.