

## **Appendix K:** **Decision on Petition for Writ of Mandate**



APR 12 2012

LARAYNE CLEEK, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

Visalia Smart Growth Coalition,

Petitioners,

vs.

City of Visalia,

Respondent,

WAL-MART Stores, Inc.,

Real Party in Interest.

) Case No.: VCU243353

)  
) DECISION ON PETITION FOR WRIT OF  
) MANDATE

The above matter came on for argument on January 27, 2012. All parties appeared by counsel. After argument, additional briefing was requested. The final brief was filed March 2, 2012, and the matter was then submitted.

Having considered the administrative record, and the briefs and arguments of the parties, the Court finds as follows:

Petitioners assert that the certification of the EIR for the Project (expansion of the existing Wal-Mart store in Visalia) by Respondent ("City") should be set aside because of defects in its analysis of project noise impacts and cumulative air quality impacts, and for failure to recirculate for comments after City filed a "rebuttal memo" to late filed comments by Petitioners.

The record is reviewed to determine whether there has been an abuse of discretion. Abuse of discretion is established if the agency has not proceeded in the manner required by law, or if the decision is not supported by substantial evidence.

An agency applying standards inconsistent with the requirements of CEQA has not proceeded in the manner required by law and has thus abused its discretion.

NOISE CALCULATIONS

1 The DEIR section on noise impacts included expert analysis and opinions  
2 regarding the mitigating effect of barrier walls.

3 Petitioners' comments included a demand that they be provided the actual  
4 calculations of the experts. The response to this demand was to advise that it was  
5 "standard barrier theory".

6 Petitioners claim they need the calculations to "check the math". The  
7 calculations were ultimately provided after the comment period expired.

8 The goal of CEQA is to provide information that is "meaningful and useful to  
9 decision makers and the public." (Public Resources Code (PRC) § 21003(b)), and not  
10 just to generate paper (Guidelines, § 15003).

11 The actual calculations were utterly meaningless to a non-expert, and not  
12 necessary for an expert, who could use "standard barrier theory" to "check the math."

13 There was no error by City in the response to comments relating to barrier noise  
14 attenuation.

#### 15 CUMULATIVE IMPACTS ANALYSIS OF TACS

16 Petitioners argue that the EIR's cumulative impacts finding with respect to toxic  
17 air contaminants ("TACS") is defective as a matter of law because it failed to consider  
18 and analyze existing sources of TACS.

19 The DEIR (at p. 258) recites, in essence, that there are no other proposed  
20 projects nearby which could potentially contribute to TAC emissions; that the San  
21 Joaquin Valley Air Pollution Control District ("District") does not have specific  
22 significance criteria for assessing cumulative health risks; that the significance criteria  
23 for individual projects is an increase of less than 10 (additional deaths per one million  
24 people over 70 years), and that 10 can be used as a "conservative" measure of  
25 cumulative significance. The single paragraph on this issue then concludes from the  
26 above that "since the proposed project would result in an increase cancer risk of less  
27 than 10 in one million persons ... and there are no other potential sources of cumulative  
28 TAC emissions in the project vicinity, the cumulative impacts due to TAC exposures  
29 would be less than significant."  
30

1 In responses to comments pointing out that there was a failure to assess the  
2 significance of the combination of existing projects, including the existing Wal-Mart, and  
3 the project, the responder variously wrote:

- 4 • There were no other potential projects, so the project's impact was the  
5 total of all cumulative contributors (AR 12-3096);
- 6 • It would be "double counting" to add what was already in the "baseline"  
7 into the "cumulative" total (AR 2-370; 12-30);
- 8 • Science cannot accurately quantify a cumulative threshold, so this was  
9 deferred;
- 10 • There are no existing pre-established thresholds for "ambient" risk;
- 11 • The cumulative health risk associated with the project and other potential  
12 sources within a one-half mile radius is extremely small – 3.4 – compared  
13 to the ambient rate and well below the 10 for individual sources;
- 14 • The existing impacts are included in the baseline against which project  
15 specific and cumulative impacts are evaluated (AR 2-370);
- 16 • Ambient cancer risk is not to be included as a TAC impact under CEQA  
17 (AR 2-373);
- 18 • Common sense indicates there is no need to evaluate whether the project  
19 contributed to an impact because there is no cumulative impact (AR 2-373  
20 and 12-3098).
- 21 • They complied with District requirements for the TAC analysis (AR 12-  
22 3098).

23 The requirements of a cumulative impacts analysis are straightforward. They are  
24 set forth in statute, regulations, and numerous cases. They are even described  
25 correctly in the "methodology" section of the Air Quality Analysis (appendix I to the  
26 DEIR).

27 PRC § 21083(2) states that a project may have significant effects on the  
28 environment if the project effects are individually limited but cumulatively considerable.  
29 "As used in this paragraph, 'cumulatively considerable' means that the incremental  
30 effects of an individual project are considerable when viewed in connection with the

1 effects of past projects, the effects of other current projects, and the effect of probable  
2 future projects.”

3 The implementing regulations (“Guidelines”), include § 15130(2) which requires  
4 that when the cumulative impact is not significant, “...the EIR shall briefly indicate why  
5 the cumulative impact is not significant...” and “a lead agency shall identify facts and  
6 analysis supporting the ... conclusion that the cumulative impact is less than  
7 significant.” The same applies to a determination that the project’s contribution is not  
8 cumulatively considerable.

9 Additional applicable points of law include the following:

- 10 • While perfection is not required, even when sophisticated technical  
11 analysis is not feasible, the agency must prepare some reasoned analysis.
- 12 • If data is not available the agency should explain why the impact cannot  
13 be quantified and provide a “qualitative description” of the impact.
- 14 • Actual existing conditions are the criteria.
- 15 • The agency has discretion to decide how to realistically measure actual  
16 existing conditions.
- 17 • Assessment of a project’s cumulative impact on the environment is a  
18 critical aspect of the EIR.
- 19 • The relevant question is not the relative amount of the effect of the project  
20 compared with pre-existing effects, but whether any additional effect  
21 should be considered significant in light of the existing effect.
- 22 • A “ratio theory”, just looking at the degree of change contributed by a  
23 project, is not a correct method. It trivializes the project’s impacts by  
24 focusing on individual inputs rather than their collective significance.

25 There is a two step process. Step one is to identify and quantify all existing  
26 impacts; then to add the project’s new impacts, and then to add the impacts of any other  
27 potential (probable) projects. The next action in step one is to establish and justify a  
28 threshold of significance for the total of all such impacts. If the cumulative total impacts  
29 are below this threshold, a finding of non-significance can be made. If the total impacts  
30

1 exceed the threshold, then they are cumulatively significant and step two comes into  
2 play.

3 Obviously, if the existing condition, without the project, is already at a significant  
4 level, then there is cumulative significance even if the project contributes nothing.  
5 Hence the need for second step with such a finding.

6 Step two is to determine whether the contributions of the project alone are  
7 cumulatively "considerable".

8 The cases recognize that it is not necessarily the case that a project's  
9 contribution is automatically significant if it adds anything to an already significant  
10 existing condition, but they do point out that the higher the impact of the existing  
11 condition the less it takes for any additional impact to be significant.

12 If the project adds nothing, then it is obviously not a considerable contributor. If it  
13 adds anything, then agency must make a justified finding of significance, or not.

14 The purpose of this analysis is to recognize that the project does not stand alone.  
15 It adds to whatever is there. Thus the need to identify and quantify whatever is already  
16 there to evaluate the effect of the new impact.

17 At oral argument Real Party in Interest WAL-MART Stores Inc ("RPI") stated that  
18 there was evidence in the record showing that the proper analysis was done, in some  
19 place other than the section in the EIR devoted to cumulative TAC impacts. RPI was to  
20 point this out in post-argument briefs. It did not.

21 In fact, there is no place in the EIR documents where a proper determination of  
22 cumulative TAC impacts and their significance was even mentioned, let alone analyzed.

23 There is no way to tell from the EIR whether the existing condition is itself  
24 "significant" in terms of TACs.

25 In the "setting" context, there is an estimate of "about 100" for 2010 TACs near  
26 the project area. This was based on a California Air Resources Board ("CARB") web  
27 site estimating what it expected to be the improvement from 2001 levels (stated to be  
28 250-500 for "Visalia") created by CARB diesel risk reduction measures.

29 The Air Quality Report notes that TACs are particulate matter components of  
30 diesel exhaust. Table 27 notes local non-attainment for particulate matter, but has no

1 specific reference to TACs. It says impacts are significant if they contribute to an  
2 existing non-attainment category.

3 There is simply no analysis of the significance of the existing level – only  
4 statements to the effect that the District did not set a level for any cumulative  
5 significance, and that it is not scientifically possible to accurately assess it.

6 To add to the confusion, the comment responses about the “10” level selected for  
7 cumulative significance are inconsistent and erroneous.

8 Obviously, if the 100 level is the existing condition, as RPI at various times has  
9 suggested, then it vastly exceeds the 10 significance level before the project is even  
10 considered.

11 Responders (at the “Rebuttal Memo” stage) even attempted to add up “existing”  
12 projects to show it was less than 10. However, they omitted the existing WAL-MART,  
13 which takes the total per their list to 11.03 (even crediting the apparently strange  
14 situation where 16 existing trucks are assessed at 1.2, while 7 more trucks add an  
15 additional 3.4, and even though there appear to be other measurable existing impacts  
16 within the radius – The Social Security building; Ben Maddox; part of the auto mall, and  
17 possibly Lover’s Lane).

18 The attempts to compensate for the failure of the EIR to correctly address the  
19 issue of cumulative TAC impacts had lead to some “backfill” efforts which only add to  
20 the confusion.

21 RPI now shifts its focus and argues that such a determination is not required and  
22 that, consistent with the position taken in the responses to comments, cumulative  
23 impact means only change over a baseline.

24 RPI describes the process, in its brief, as follows:

- 25 1. Determine the project TAC emissions (here, 3.4 at the operational level);
- 26 2. Identify any other new sources not part of the ambient “baseline” condition  
27 (none here except the project);
- 28 3. Identify the “ambient basin” (which it says was done in the “setting” part of  
29 the EIR), and  
30



1           4. "Conclude" that a minimal new 3.4 addition is not enough to create  
2           cumulative impacts on the basin's ambient air quality.

3           The EIR and RPI's position suffer from a fundamental and erroneous conception  
4 of what is involved in a cumulative impacts analysis.

5           The responder to Petitioner's comments to the effect that the cumulative TAC  
6 analysis failed to account for existing conditions excoriates Petitioners for the "faulty  
7 assumption" that existing conditions are to be included in a cumulative effects analysis,  
8 and proceeds to state (citing § 15126.2 out of context) that the correct measure is  
9 change from the existing condition (AR 12/3095; 3096).

10          The responder could not be more wrong.

11          The fixation on "baseline" fits into this erroneous view, because the writer  
12 believes, wrongly, that all that is required in a cumulative effects analysis is to look at  
13 the degree of change over existing conditions.

14          "Baseline" is a concept more directed to the threshold significance screening (to  
15 see if there is any change, and to quantify the change). The cumulative effects analysis  
16 is more sophisticated.

17          The cases are clear that addressing the degree of change alone is not a proper  
18 cumulative effects analysis, yet that is what RPI insists on arguing here.

19          The law is also clear that a finding of cumulative non-significance is not  
20 something an agency has "discretion" to just arbitrarily decree, without discussion and  
21 analysis, yet RPI now appears to argue that it is proper to do so.

22          RPI states again that the threshold for cumulative risk applies only to new  
23 impacts, and thus there is no need for two separate thresholds of significance, and City  
24 may thus conclude that the project was not cumulatively considerable without setting a  
25 threshold for ambient conditions.

26          RPI seems to think "cumulative" applies only to the project and other potential  
27 now projects, hence their tautology that if the project is individually not significant, and  
28 there are no other potential projects, then there automatically can be no cumulative  
29 significance.

1 The EIR and RPI's position completely ignore the plain language of the statute  
2 and all applicable authority, to the effect that step one is to add together the existing  
3 conditions (from all past projects with related effect), plus the project, and plus any other  
4 potential projects, and determine whether that total imparts a significant impact. The  
5 "threshold" to be established is for the total – not the pre-existing condition by itself.

6 RPI contends that City is not required to set a cumulative threshold (citing §  
7 15064.7), and because it has discretion as to how to measure the "baseline", and  
8 because there are no published standards, it has only to "look at" the existing TAC risk;  
9 dropping levels over the past 10 years, and lack of new sources and then exercise its  
10 discretion to determine that there is no significant cumulative effect.

11 Even if this were so (and it is not) the record shows that City did not even do that.

12 RPI cites § 15064.7 as authority for the propositions that City need not establish  
13 a TAC cumulative significance threshold. That section does not so state. It says that  
14 agencies are encouraged to pre-set and publish general criteria for significance  
15 threshold, for it and other agencies to use in future analysis. This section is no  
16 authorization to omit a required step in the CEQA process – of an analysis of cumulative  
17 impacts.

18 RPI cites Communities for a Better Environment v. South Coast Air Quality  
19 Management District (2010) 48 C. 4<sup>th</sup> 310, for its "discretion" argument. The case does  
20 discuss the discretion an agency has in fixing an accurate, representative existing  
21 condition(in a case where conditions fluctuated), but it does not hold, nor even suggest,  
22 that an agency has discretion to skip the required cumulative effect analysis and  
23 arbitrarily decree a finding.

24 City here certainly could, in establishing its cumulative significance criteria,  
25 exercise its discretion to recognize the declining ambient TAC levels in assessing a  
26 reality based significant effects level. Given the lack of a precise scientific basis for the  
27 health risk projections, City certainly has wide discretion in this area. However, City can  
28 not arbitrarily "conclude" that there is no significant cumulative effect. There must be  
29 discussion and analysis, fact and reason based to the extent possible.

1 RPI also cites Citizens for Equitable Environmental Development v. City of Chula  
2 Vista (2011) 197 C.A. 4<sup>th</sup> 327, for its argument that it can look only at the ratio of change  
3 from the baseline instead of following CEQA's methodology.

4 That case was about the initial screening level of significance. It held that  
5 because the project omissions would not exceed significance levels set by the regional  
6 air district, the agency could find "no significance" for the project.

7 In context, it appears that these were standards for cumulative significance. If  
8 not, the case holding is only as to initial screening, not EIR analysis. If it held as RPI  
9 suggests, it would be contrary to all other authority, including decisions of the Fifth  
10 Appellate District, and this Court would decline to follow it.

11 RPI also claims its cumulative effects analysis was approved by a staff person at  
12 District. This is based on an e-mail string between David Miller, with Brandman  
13 Consultants, and Glenn Reed at District, with reference to policies in District's Guide for  
14 Assessing and Mitigating Air Quality Impact, 2002 Edition (of which David Miller was a  
15 principal author). It just says that District doesn't require an analysis of the health risks  
16 of more than the project itself. In context, this appears to be Districts' criteria for the  
17 degree of analysis required when seeking a permit from the District, and has nothing to  
18 do with the adequacy of an EIR. Even if it did, one staff member of District has no  
19 authority to validate an otherwise deficient EIR.

20 RPI also argues, apparently, that City has discretion to set the level of cumulative  
21 significance at 10 over whatever already exists, left undefined. This is not correct, and  
22 is just a restatement of its argument that degree, or ratio, of change over existing is the  
23 proper analysis. It is not.

24 The required analysis here is whether the existing condition, plus the project, is  
25 significant. No where in the record is that even stated, let alone analyzed.

26 City has thus failed to proceed as required by law, and therefore abused its  
27 discretion. Such failure is prejudicial because it deprived City, as well as the public, of  
28 information needed to make an informed decision, and informed comments.  
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With regard to the noise portion, the document does not meet the criteria required for re-circulation.

Judgment is entered in favor of Petitioners in this proceeding.


The EIR is remanded to Respondent City for reconsideration of the sole issue of the cumulative significance of the TAC emissions.

Respondent shall file a return to this Writ no later than August 10, 2012.

Petitioners are awarded costs of suit.

The Court shall retain jurisdiction to determine entitlement to attorney fees.

Petitioner shall prepare a Peremptory Writ consistent with this decision.

  
Judge Lloyd L. Hicks

APR 12 2012

LARAYNE CLEEK, CLERK  
BY: Suzanne Glen

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF TULARE  
Visalia Division  
County Civic Center, Room 201  
Visalia, CA 93291-4593

Visalia Smart Growth Coalition  
Plaintiff/Petitioner,

vs.

City of Visalia  
Defendant/Respondent.

Case No. VCU243353

CLERK'S CERTIFICATE OF SERVICE BY MAIL

I certify that I am not a party to this cause.

I certify that I placed the Decision on Petition for Writ of Mandate for collection and mailing on the date shown, so as to cause it to be mailed in a sealed envelope with postage fully prepaid on that date following standard court practices to the persons and addresses shown. The mailing and this certification occurred at Visalia, California on April 12, 2012.

LARAYNE CLEEK, CLERK OF THE SUPERIOR  
COURT, COUNTY OF TULARE

By Suzanne Glen  
Deputy Clerk

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