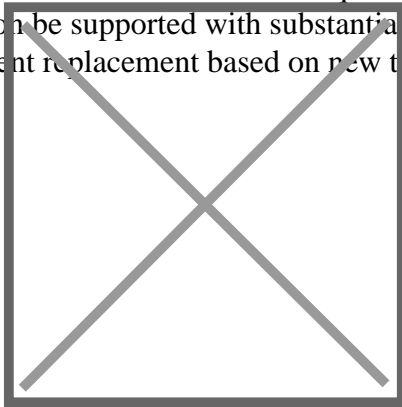


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### California Supreme Court Sets Standard for Air Quality Impact Analyses Under CEQA

The California Supreme Court has overturned the environmental impact report for a mixed-use development project, holding that the EIR inadequately explained the human health consequences of significant air pollutant emissions that would result from the development. *Sierra Club v. County of Fresno*, Cal. Supreme Court Case No. S219783 (Dec. 24, 2018). In so doing, the court has both clarified the standard of review that courts must apply to an EIR's explanation of significant environmental impacts, and increased the obligation of EIR preparers to provide those explanations. The court also responded to challenges to the EIR's air quality mitigation measures. The court required that the EIR's claim of "substantial" pollution reduction through mitigation be supported with substantial evidence, but the court upheld mitigation measures that allowed for subsequent replacement based on new technologies and provided for implementation through future County



review.

*Facts* In the case presented to the Supreme Court, the County's analysis

of criteria air pollutants appears to have been typical. The EIR generally explained the health impacts of exposure to ozone, particulate matter, carbon monoxide and nitrogen dioxide but, except for ozone, did not identify the concentrations at which symptoms would be expected. The EIR then quantified the tonnages of air pollutants that would be emitted each year as a result of the project, compared those amounts to the regional air district's tonnage-based significance thresholds, and concluded that the project's air quality impacts would be significant because the emissions would substantially exceed the thresholds. The EIR then identified mitigation measures that would reduce the emissions, but not enough to bring them below the thresholds. The EIR did not attempt to quantify the extent to which each of the project's air pollutant emissions might affect human health in the air basin. *Standard of Review* The Sierra Club and other parties challenged the EIR's discussion of air quality impacts as well as the mitigation measures it identified. The court began by addressing the standard of review courts must apply to such challenges. Under CEQA, courts are to apply a deferential "substantial evidence" standard of review to an EIR's factual determinations (e.g., which scientific methodology to use for analysis of a particular impact), but a non-deferential "de novo" standard to the question whether the agency preparing the EIR has followed the correct procedures. The court acknowledged that some questions that arise under CEQA are both factual and procedural, and create uncertainty regarding the appropriate standard of judicial review. Where the question is whether an EIR's discussion of significant environmental impacts is adequate, the court identified "three basic principles":

- An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR;
- However, a reviewing court must determine whether "the EIR comports with its intended function of including 'detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project'"; and
- The determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions. The court explained: "For example, a decision to use a particular methodology and reject another is amenable to substantial evidence review . . .

. But whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence."

*The EIR's Air Quality Discussion* Applying these principles, the court found the County's EIR inadequate because it did not explain how the proposed project would change air quality in the air basin; did not indicate the concentrations at which PM, CO and sulfur dioxide would trigger health symptoms; and, even as to ozone, for which the EIR did identify concentrations that would trigger symptoms, the EIR did not identify how many parts per million of ozone would result from the project. Briefs submitted to the court attempted to explain that the connection between emissions and human health that plaintiffs sought could not be provided given the current state of environmental science modeling. The court responded that this explanation should have been provided in the EIR rather than in litigation: "[I]f it is not scientifically possible to do more than has already been done to connect air quality effects with potential human health impacts, the EIR itself must explain why, in a manner reasonably calculated to inform the public of the scope of what is and is not yet known about the Project's impacts." *Mitigation Measures* The plaintiffs also challenged the EIR's air quality mitigation measures on four grounds. The court upheld the first of these challenges, holding that the EIR lacked facts or analysis to explain its conclusion that the mitigation measures would "substantially reduce air quality impacts." The court rejected the plaintiffs' three remaining challenges. First, the court approved a "substitution clause" in the mitigation measures that allowed the County to substitute new mitigation measures for those listed in the EIR if the new measures were shown to be equally effective. Whereas the plaintiffs considered this unlawfully deferred mitigation, the court responded that allowing future substitutions for equal or more efficient technology would promote CEQA's goal of environmental protection. Second, the court rejected plaintiffs' challenge to mitigation measures that would not reduce a project's impacts below the threshold of significance. The court noted that under CEQA, agencies may approve projects that have significant unavoidable environmental impacts so long as they adopt all feasible mitigation measures and issue a statement of overriding considerations. Finally, the court held that the mitigation measures were not vague or otherwise unenforceable. The County's Mitigation Monitoring Plan explained when in the development process the various mitigation measures were to be implemented and imposed the duty on the County to ensure that the measures were implemented. If the County were to fail in this duty, its abuse of discretion could be corrected in a court mandamus proceeding. *Conclusions* The *Sierra Club* decision reinforces the importance of careful explanations of significance determinations in EIRs, and in particular the importance of presenting the analytical connection between raw data and the resulting impacts to the physical environment. Every effort should be made to provide clear explanations in an EIR, including a discussion of the evidentiary basis for health-based significance standards, so that decision makers and members of the public can better understand the magnitude of a project's contribution to risks to human health. Notably, the court recognized that an EIR need not be exhaustive, and perfection is not the legal standard. But this decision raises the bar for achieving legal adequacy under CEQA.

## **Authors**