

California Supreme Court Clarifies Standards for Judicial Review and Air Quality Analyses

The Sierra Club decision affects both the preparation of EIRs and judicial review of agency decisions certifying EIRs.

Key Points:

- An environmental impact report's (EIR) discussion of potential environmental impacts must include sufficient detail to enable those who did not participate in its preparation to understand and consider the issues the proposed project raised.
- The issue of whether a discussion in an EIR is sufficient is a mixed question of law and fact subject to de novo review, though underlying factual determinations in an EIR are subject to a more deferential standard.
- An EIR must either make a reasonable effort to correlate a project's significant air quality impacts to potential health consequences, or explain why providing such an analysis is not feasible.
- A lead agency does not impermissibly defer mitigation if it leaves open the possibility of employing better mitigation efforts consistent with improvements in technology.
- A lead agency may adopt mitigation measures that do not reduce a project's significant and unavoidable impacts to a less-than-significant level, so long as the agency can demonstrate in good faith that the mitigation measures will be at least partially effective in mitigating impacts.

In *Sierra Club v. County of Fresno*¹ — a unanimous decision posing ramifications for projects throughout California — the California Supreme Court held that an EIR did not adequately discuss the potential human health consequences that could be caused by a significant increase in air pollutants resulting from a proposed development project.

Background

The Project

In 2005, a developer submitted an application to the County of Fresno (County) for a master-planned community in the Central Valley, as well as a specific plan and community plan update (collectively, the Project). The community would sit on a 942-acre site adjacent to the unincorporated community of Friant. The Project included more than 2,500 residential units and 250,000 square feet of commercial space on 482 acres, along with 460 acres of open space. Construction would occur in five phases over a period of 10 years.

In February 2011, the County approved the Project and certified the EIR. In approving the Project, the County found that the Project would result in significant and unavoidable impacts to air quality. As such, the County adopted a Statement of Overriding Considerations in which it found the Project's benefits outweighed the Project's significant and unavoidable impacts. Furthermore, the County also adopted a mitigation program, which noted that the County would enforce compliance with the mitigation measures through subsequent conditions of approval for future discretionary actions.

The Litigation

Various organizations (Petitioners) petitioned for writ of mandate, challenging the County's certification of the EIR. In December 2012, the trial court denied the petition for writ of mandate. In denying the petition, the trial court explained that, in reviewing California Environmental Quality Act (CEQA) decisions, the court may not exercise its independent judgment on the evidence, but must determine only whether the act or decision is supported by substantial evidence. Under this standard, the trial court determined that the County's findings were supported by substantial evidence and that the EIR was sufficient as an informational document. Petitioners appealed.

The Court of Appeal reversed the trial court's judgment as to air quality only, agreeing with Petitioners that the EIR failed to comply with CEQA because its discussion of air quality impacts was inadequate.² In reversing the judgment, the Court of Appeal concluded that Petitioners' challenges to the sufficiency of the EIR's discussion of air quality impacts raised predominantly procedural issues subject to the Court of Appeal's independent judicial review. The Court of Appeal remanded the matter to the trial court with directions to the trial court that it enter a writ commanding the County to vacate its approval of the Project. The County appealed.

Discussion

In affirming in part and reversing in part the Court of Appeal's decision, the California Supreme Court analyzed the following four discrete issues,³ which are discussed in detail below:

- What standard of review must a court apply when adjudicating a challenge to the adequacy of an EIR's discussion of adverse environmental impacts and mitigation measures?
- Does CEQA require an EIR to correlate a project's significant air quality impacts to specific human health consequences?
- Does a lead agency impermissibly defer mitigation when it retains discretion to substitute later adopted measures in place of measures proposed in the EIR?
- Can a lead agency adopt mitigation measures that do not reduce a project's significant and unavoidable impacts to a less-than-significant level?

An EIR's Discussion of Environmental Impacts: Adequate or Not?

The Court first analyzed the proper standard of review that courts must apply when adjudicating a challenge to the adequacy of an EIR's discussion of adverse environmental impacts and mitigation measures.

The Court offered the following principles on the standard of review for an EIR:

- “The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail ‘to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’”
- “The inquiry presents a mixed question of law and fact. As such, it is generally subject to independent review.”
- “However, underlying factual determinations — including, for example, an agency’s decision as to which methodologies to employ for analyzing an environmental effect — may warrant deference.”
- “Thus, to the extent a mixed question requires a determination whether statutory criteria were satisfied, de novo review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted.”

Accordingly, the Court recognized the “ultimate inquiry” of whether the EIR includes sufficient detail presents a mixed question of law and fact requiring de novo review,⁴ meaning a reviewing court would not defer to the agency’s determination.⁵ But to the extent factual questions predominate, a reviewing court should apply the more deferential substantial evidence standard, including to the underlying factual determinations in an EIR.⁶

While the Court stated that it was merely summarizing existing law, the Court’s articulation of the above principles may give lower courts greater discretion to apply de novo review when evaluating the sufficiency of an EIR’s “discussion of a potentially significant effect,” which often constitutes the core of an EIR. Thus, a court could find that an agency has not satisfied its obligations under CEQA if the court finds an impact discussion is not sufficiently detailed, even if the agency can point to substantial evidence supporting its significant impact conclusion. Until more relevant case law is developed to define what constitutes a sufficient analysis, the sufficiency standard may be applied in a variable and subjective manner. For example, what one court finds sufficient to “understand and to consider meaningfully the issues raised by the proposed project” might be different than another court merely due to subjective preferences on the level of detail, clarity of explanation, or ease of finding the relevant discussion.

An EIR Must Correlate Significant Project Emissions to Potential Human Health Impacts or Explain Why Analysis is Infeasible

The Court then discussed whether the EIR properly analyzed the impact of the Project’s significant emissions of air pollutants on human health. The EIR analyzed the Project’s potential impact on air quality, which estimated the Project’s annual emissions of criteria air pollutants and described the generalized health effects from exposure to those pollutants. The EIR concluded the Project would have a significant and unavoidable adverse effect on air quality. Despite the EIR’s discussion of air quality impacts, the Court held that the EIR did not adequately correlate the Project’s significant air quality emissions to potential public health consequences.⁷ The Court determined that while the EIR included a general discussion of the health effects of the air pollutants the Project emitted, the EIR did not indicate the concentrations at which the pollutants would trigger the symptoms discussed.⁸ The EIR also did not adequately translate the bare numbers of the significant emissions into the Project’s adverse human health impacts.⁹

In explaining its decision, the Court discussed amici curiae briefs — including from the South Coast Air Quality Management District (SCAQMD) and San Joaquin Valley Air Pollution Control District — that

argued the current science does not allow a close correlation between criteria pollutant emissions from a single development project and health impacts given the state of environmental modeling.¹⁰ Even if this correlation were technically possible, the results would not have been reliable or meaningful, the SCAQMD argued.¹¹ The Court acknowledged “[t]he parties may be correct” but expressed no view on the subject except to note that scientific certainty is not the standard.¹² The Court concluded, however, that information in amici curiae briefs could not cure the lack of data or analysis in the administrative record.¹³ Thus, if connecting a project’s significant air quality emissions with potential human health impacts is not feasible, the EIR “must adequately explain what the agency *does* know and why, given existing scientific constraints, it cannot translate potential health impacts further.”¹⁴

In the future, EIRs with significant air quality impacts will need either to provide the analysis identified by the court or to adequately explain why such analysis is not feasible. Depending on the complexity of the EIR in question, the relevant analysis may be qualitative in nature or, if feasible, it may provide quantitative estimates of health risks. Nevertheless, because most EIRs have not historically included such analysis and limited case law is available on point, there will be legal uncertainty surrounding the sufficiency of health risk analyses for projects with significant air quality impacts until greater agency guidance or judicial precedent is provided over time.

Deferring Mitigation Measures

The Court next addressed whether the EIR had impermissibly deferred selection of mitigation measures by including a clause that allowed the County to substitute different mitigation measures in the future. Generally, an EIR cannot defer the formulation of mitigation measures until after project approval. However, here, the Court held that the EIR’s substitution clause did not impermissibly defer selection of mitigation measures.¹⁵ The Court reasoned that the substitution clause should be encouraged because it allows for additional and better mitigation measures when they become available, thereby furthering CEQA’s goal of environmental protection.¹⁶ As such, the County may retain the discretion to modify or substitute the adopted mitigation with equally or more effective measures in the future, so long as the changes do not increase the Project’s significant impacts.¹⁷ Therefore, the substitution clause was not an impermissible deferral of mitigation.¹⁸

Mitigation Measures to Reduce Impacts: Level of Significance

The Court also analyzed whether the County had violated CEQA by including mitigation measures in the EIR that would reduce the Project’s impacts, but would not reduce those impacts below the level of significance. Although a lead agency must adopt all feasible mitigation measures to reduce potential impacts to a level below the threshold of significance, an EIR can include mitigation measures that only partially reduce significant impacts without violating CEQA. The Court recognized that, in enacting CEQA, the California Legislature did not seek to prevent all development.¹⁹ Instead, CEQA allows a project to proceed even if there are significant environmental effects that cannot be fully mitigated.²⁰ If, as in this case, a project still has significant environmental effects after all feasible mitigation measures have been implemented, the project may nonetheless be approved if the agency finds that the project’s benefits outweigh the unmitigated effects.²¹ As such, the Court ruled that the EIR properly included mitigation measures that partially reduce potential environmental impacts, even if the measures will not reduce the impacts to below the level of significance.²²

Implications

The California Supreme Court's decision in *Sierra Club* affects both the preparation of EIRs and judicial review of agency decisions certifying EIRs.

Impact on Future EIR Preparation

Following *Sierra Club*, an EIR's discussion of significant air quality impacts must go beyond identifying the significant environmental impacts associated with a project's air quality emissions and potential mitigation measures. EIRs must also correlate potential significant air quality impacts to potential impacts on human health. If correlating air quality impacts with potential human health impacts is not scientifically possible, the EIR must disclose that fact and "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."²³ Further, the Court specifically rejected the argument that an EIR can account for any lack of specificity by explaining that such analyses would be included in a later-prepared health risk assessment.²⁴

In addition, *Sierra Club* gives agencies more flexibility in how they design and impose mitigation measures to reduce a project's environmental impacts. Under *Sierra Club*, a lead agency can retain discretion to impose equally or more stringent mitigation in the future without violating CEQA. This discretion allows mitigation programs to evolve as better technology becomes available. However, notably, on January 3, 2019, the California Natural Resources Agency enacted a number of changes to the state guidelines for implementing CEQA, including changes related to deferred mitigation.²⁵ These changes clarify that a lead agency cannot defer the identification of mitigation measures except under certain circumstances. Deferral may be appropriate as part of a future regulatory process if compliance is mandatory and substantial evidence confirms that the regulatory process would achieve the requisite performance standards.²⁶ The new guidelines further provide that, subject to certain conditions, a lead agency may defer a mitigation program's specific details if formulating the mitigation program fully at the time of project approval is impracticable or infeasible.²⁷ Finally, the guidelines provide that deferral may also be appropriate if another regulatory agency is required to issue a permit for the project and that agency is expected to impose mitigation requirements independent of the CEQA process.²⁸

Impact on Judicial Review of Future Challenges to the Adequacy of EIRs

The Court in *Sierra Club* purports to articulate a framework to guide reviewing courts in deciding which standard of review applies to challenges to the sufficiency of an EIR's analysis of environmental impacts. However, the framework may not prove to be straightforward in its application. On the one hand, *Sierra Club* provides guidance on how a court should review a claim that an EIR's analysis is deficient. On the other hand, the line between factual and procedural issues raised by challenges to an EIR's adequacy is not always so clear. The Court in *Sierra Club* did not have to grapple with the nuances raised by truly mixed questions of law and fact. The Court did not delve into any factual issues because the Court determined that the EIR's "patently inadequate one-paragraph discussion devoid of analysis" was no different from an entirely omitted analysis, and thus, the County violated CEQA's procedural requirements.²⁹ Consequently, the Court's opinion provides little practical guidance on how courts should navigate mixed questions of law and fact, and how a reviewing court would apply the *Sierra Club* framework to CEQA challenges raising such questions remains unclear.

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Endnotes

¹ Cal. Supreme Court, Case No. S219783 (December 24, 2018).

² *Sierra Club v. County of Fresno* (2014) 226 Cal.App.4th 704.

³ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 510.

⁴ *Id.* at 516.

⁵ *Ibid.*

⁶ *Ibid.*

7 Id. at 519-522.

8 Id. at 519-520.

9 Id. at 521.

10 Id. at 520-521.

11 See Application of the South Coast Air Quality Management District for Leave to File Brief of Amicus Curiae in Support of Neither Party and Proposed Brief of Amicus Curiae (April 13, 2015), 2015 CA S. Ct. Briefs LEXIS 674, at *30-*31.

12 6 Cal.5th at 520.

13 Id. at 520-521.

14 Id. at 521.

15 Id. at 523-524.

16 Id. at 524.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

21 Ibid.

22 Id. at 525.

23 Id. at 520.

24 Id. at 521.

25 See 14 Cal. Code Regs., § 15126.4, subd. (a)(1)(B).

26 Ibid.

27 Ibid.

28 Ibid.

29 6 Cal.5th at 516.