

California Supreme Court Clarifies Scope of De Novo and Substantial Evidence Standards Of Review In CEQA Cases

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In [*Sierra Club v. County of Fresno* \(S219783\)](#), the California Supreme Court unanimously reaffirmed that the substantial evidence standard of review does not always apply when a lead agency prepares an environmental impact report (“EIR”) for a development project. Rather, the court determined that the less deferential *de novo* standard applies if the EIR’s discussion of a potentially significant impact has been omitted or is factually insufficient. In other words, while a lead agency has considerable discretion as to the methodology and analysis it employs to analyze a potentially significant impact, an EIR must reasonably describe the nature and magnitude of the impact (i.e., include a meaningful explanation of why an impact is significant or not) if it is to survive judicial scrutiny. In *County of Fresno*, the court employed the *de novo* standard, the Court held that the EIR’s air quality analysis was inadequate because it did not explain the connection between the project pollutants and negative health effects or explain why it could not make such a connection.

While some may view this decision as narrowing the scope of the substantial evidence standard, the court’s analysis relied heavily on existing precedent, including *Laurel Heights Improvement Ass’n v. Regents of Uni. of Cal.* (1988) 47 Cal.3d 376 and *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215. Following the rationale in these cases, the court in *County of Fresno* furthered the fundamental principle that, if an EIR omits basic information necessary for informed decisionmaking and public participation, that failure is prejudicial.

It is unclear how project opponents will attempt to exploit *County of Fresno*, in particular its discussion of the two standards of review: *de novo* and substantial evidence. Going forward, CEQA practitioners will not only need to ensure that the air quality analyses in EIRs (and perhaps, to some extent, in initial studies) include meaningful discussions of how project pollutants would affect people, but also consider whether other project impacts (e.g., construction noise) implicate human health and require similar discussion. In the meantime, we recommend the following best practices:

1. Do not assume you can rely on the substantial evidence standard of review if your EIR includes insufficient information or analysis of a project impact. An impact analysis that does not disclose the nature and magnitude of the impact will likely not survive *de novo* review if challenged, even if the EIR concludes that the impact would be significant.

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2. Your EIR should make a reasonable effort to connect a project impact with its likely health consequences, at least with respect to air quality. If it is not scientifically possible to demonstrate fully the connection, the EIR should explain why.
 3. The air quality analysis in your EIR should (a) provide a description of the impact each pollutant would have on human health and (b) provide the concentration levels at which pollutants would trigger the identified symptoms. However, a full-blown health risk assessment is not necessarily required.
 4. If a proposed mitigation measure would “substantially mitigate” a significant project impact, or mitigate it to a level of insignificance, your EIR should explain why, in quantitative terms (e.g., quantified reduction in pollutant levels) where possible and qualitative terms otherwise.

A more detailed analysis of the case follows.

Background

In 2011, the County of Fresno approved the Friant Ranch project, a master-planned, pedestrian-friendly community with 2,500 single-family and multi-family residential units, 250,000 square feet of commercial space and 460 acres of open space on a 942-acre site (the “Project”).

The petitioners challenged the County’s certification of the EIR on several grounds, including that: (1) the EIR was inadequate because it failed to include an analysis that correlated the Project’s emission of air pollutants to its impact on human health; (2) the mitigation measures for the Project’s long-term air quality impacts were vague, unenforceable and lacked specific performance criteria; and (3) the statement that the air quality mitigation measures would substantially reduce the Project’s significant air quality impacts was unexplained and unsubstantiated.

The trial court rejected all of those claims, but the Court of Appeal reversed. The Supreme Court granted the developer’s petition for review and framed the issues as follows:

1. The standard of review a court must apply when adjudicating a challenge to the adequacy of an EIR’s discussion of adverse environmental impacts and mitigation measures.
2. Whether CEQA requires an EIR to connect a project’s air quality impacts to specific health consequences.
3. Whether a lead agency impermissibly defers mitigation measures when it retains the discretion to substitute later adopted measures in place of those proposed in the EIR.
4. Whether a lead agency may adopt mitigation measures that do not reduce a project’s significant and unavoidable impacts to a less than significant level.

The Court’s Decision

1. Standard of Review

The court first discussed the appropriate standard of review. Under CEQA, a lead agency can abuse

its discretion either by (1) failing to proceed in the manner required by law (*i.e.*, in the manner CEQA provides) or (2) by reaching factual conclusions unsupported by substantial evidence. The court recognized that “[j]udicial review of these two types of errors differs significantly: While we determine *de novo* whether the agency has employed the correct procedures...we accord greater deference to the agency’s substantive factual conclusions.”

The court found that whether an EIR provides sufficient information is a mixed question of law and fact that requires courts to apply the less deferential *de novo* review. According to the court, the key question when determining whether an impact analysis contains sufficient information to satisfy CEQA is whether the EIR includes “sufficient 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 court noted that, if an agency omits a required discussion or provides a “patently inadequate one-paragraph discussion devoid of analysis,” the EIR will be inadequate as an informational document. Similarly, an EIR with a conclusory discussion of a significant environmental impact that does not disclose the nature and magnitude of the impact can be determined by a court to be inadequate as an informational document without reference to substantial evidence. The court rejected the developer’s argument that the *de novo* standard should only apply if a required discussion has been omitted altogether, while the substantial evidence standard should govern if the claim is that a required discussion is insufficient, and held that the *de novo* standard applies in either case. Simply put, if the analytical discussion itself is insufficient, the more deferential substantial evidence standard cannot be employed.

The court confirmed, on the other hand, that the substantial evidence standard would continue to apply to (1) an agency’s decision to determine the manner of the discussion of the potentially significant impacts in an EIR and (2) an agency’s decision to select (or reject) a particular methodology to analyze a project impact, which are factual questions that warrant more deference.

The court reiterated past precedent that “technical perfection or scientific certainty” is not required and that “[a]n agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR.”

2. Air Quality and Specific Health Impacts

The court then applied the *de novo* standard to assess the sufficiency of the air quality discussion in the EIR. It acknowledged that the EIR described the types of pollutants and tons per year and provided a general description of each pollutant and how it affects human health (including symptoms).

The court held, however, that this was not enough. It stated that the EIR failed to disclose the nature and magnitude of the significant impact by failing to correlate the increase in Project emissions with the adverse impacts on human health. The court determined the EIR should have provided the concentration levels at which pollutants would trigger the identified symptoms. In addition, even though the EIR provided some detail about ozone concentration levels, it did not provide the anticipated parts per million that would have resulted from the Project. Without this, the health impacts disclosed could not meaningfully inform the public of the Project’s impact on human health.

As the court succinctly put it, “after reading the EIR, the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.”

The County and the developer attempted to explain why the connection between emissions and human health could not be provided, given the current state of environmental science modeling. That might be true, the court somewhat glibly stated, but that explanation belonged in the EIR, not court briefs. The upshot is that, if an environmental impact cannot be analyzed, or fully analyzed, in an EIR, the EIR needs to say that and explain why. The EIR “must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further.”

Importantly, the court recognized that CEQA does not mandate an in-depth health risk assessment for all projects. However, it remains to be seen how far much information and analysis regarding human health impacts will be “enough.” It also remains to be seen if the court’s reasoning will be applied to other impact analyses that may affect human health, such as noise and vibration, greenhouse gas emissions and hazards. Project opponents may also attempt (wrongly, we believe) to apply the court’s reasoning to the more limited analysis in an initial study supporting a mitigated negative declaration.

3. Mitigation Measures

With regard to the Project’s significant air quality impacts, the EIR stated that the proposed mitigation measures would “substantially reduce” that significant impact, but not to a level that was insignificant. This “bare conclusion” was not supported by any explanation or factual support. The court determined this was unlawful because it did not satisfy CEQA’s disclosure requirement.

The court rejected three other claims relating to the air quality mitigation measures. First, it addressed whether the County impermissibly deferred mitigation, based on a mitigation measure that partially reduced impacts and included a clause for the County to substitute new measures as “new technology and/or other feasible measures become available.” The court held that “[a]llowing future substitutions for equal or more efficient technology to mitigate a project’s acknowledged significant effects promotes CEQA’s goal of environmental protection and is not an impermissible deferral of mitigation or an abuse of discretion.”

Second, the court determined that the County did not violate CEQA by including mitigation measures that would not reduce significant environmental impacts to a less-than-significant level. It affirmed that a public agency may approve a project with unmitigated significant impacts after adopting all feasible mitigation measures and a statement of overriding considerations.

Finally, the court turned aside the petitioners’ claim that mitigation measures requiring installation of HVAC systems and tree planting were vague and unenforceable. It found the measures sufficiently enforceable since the HVAC measure specified the brand and feasible cost of the units and the tree planting measure provided guidance to select appropriate shade trees.

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