

CEQA and Health Effects

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CEQA and Health Effects



Overall Message of Presentation

***45 years into the CEQA era,
the required scope of analysis for health
effects remains uncertain,
particularly regarding air quality***

CEQA and Health Effects

- The California Supreme Court has two pending cases regarding
 - ▣ Whether CEQA is concerned with effects of *existing* hazards on *future* project residents
 - ▣ Whether CEQA includes a specific analytical requirement to “*correlate*” air emissions with resulting health effects

CEQA and Health Effects

LEGISLATIVE BACKGROUND

- In enacting CEQA, the Legislature found and declared, among other things, that
 - ▣ “[i]t is necessary to provide a high-quality environment that at all times is *healthful and pleasing to the senses* and intellect of man”

(Pub. Resources Code, § 21000(b))

CEQA and Health Effects

- “[I]t is the intent of the Legislature that the government of the state take immediate steps to identify any *critical thresholds for the health and safety of the people* of the state and take all coordinated actions necessary to prevent such thresholds being reached”

(Pub. Resources Code, § 21000(d))

CEQA and Health Effects

- ▣ It is the policy of the state to
 - Take all action necessary to provide the people of this state with *clean air and water*
 - Ensure that the long-term protection of the environment, consistent with the provision of a decent home and *suitable living environment* for every Californian, shall be the guiding criterion in public decisions

(Pub. Resources Code, § 21001(b),(d))

CEQA and Health Effects

- The CEQA Guidelines are required to define a “*significant effect on the environment*” as occurring where, among other things,
 - ▣ “the *environmental* effects of a project will cause substantial adverse effects on *human beings*, either directly or indirectly”

(Pub. Resources Code, § 21083(a)(3))

CEQA and Health Effects

- Thus, project effects on the “*environment*” (e.g., on air or water) may directly or indirectly cause “substantial adverse effects on *human beings*” (e.g., on health, presumably)
- ▣ For example, air or water pollution from a new power plant might cause adverse health effects in an existing nearby residential area

CEQA and Health Effects

- It is less clear whether CEQA also applies to the effects of *existing environmental hazards on future project residents* (i.e., on people living or working within, rather than outside, the project area)
 - ▣ This precise issue is now before the California Supreme Court

CEQA statutes concerned with existing hazards

MORE LEGAL BACKGROUND

- CEQA includes several specific statutes revealing the Legislature's concern about locating projects in areas with existing hazards
 - 21084(c): Categorical exemptions cannot be used for projects on certain sites designated as contaminated by the Department of Toxic Substances Control
 - 21096: EIRs for proposed projects in "airport land use compatibility plan boundaries" must address "airport-related safety hazards and noise problems"

CEQA statutes concerned with existing hazards (cont.)

- ▣ 21151.8: EIRs for school construction or school site purchases must identify the following:
 - on-site hazardous waste disposal sites;
 - on-site hazardous substance release sites;
 - on-site pipelines carrying hazardous substances, extremely hazardous substances, or hazardous wastes; and
 - freeways and busy traffic corridors, large agricultural operations, and rail yards within one-quarter mile of the proposed school

CEQA statutes concerned with existing hazards (cont.)

- 21083.01 (2012): Directs OPR and the Natural Resources Agency to formulate new Appendix G Initial Study checklist questions “related to fire hazard impacts” for projects in “state responsibility areas” and “very high fire hazard severity zones”

CEQA statutes concerned with existing hazards (cont.)

- CEQA Guidelines must include “statewide standards for infill projects,” including standards addressing
 - “[p]rotection of public health, including the health of vulnerable populations from air or water pollution, or soil contamination”

(Pub. Resources Code, § 21094.5.5(b)(7))

CEQA statutes concerned with existing hazards (cont.)

- Qualified statutory exemptions for agricultural employee housing, affordable low-income housing, and infill housing do *not* apply where the project site is subject to
 - “[*r*]isk of a *public health* exposure at a level that would exceed the standards established by any state or federal agency”

(Pub. Resources Code, § 21159.21(h)(3))

CEQA Guidelines

Provisions on Health Effects

- The CEQA Guidelines assume that CEQA requires analysis of the potential effects of existing hazards on future project residents
 - ▣ The Office of Planning and Research and the Natural Resources Agency thus have effectively interpreted the “Environment” to include human life and health, even for people within a future project footprint

CEQA Guidelines Provisions on Health Effects (cont.)

- Questions in the Appendix G sample Initial Study checklist ask whether a proposed project would:
 - ▣ Expose sensitive receptors to substantial pollutant concentrations
 - ▣ Expose people to the *risk of injury or death* from
 - ruptures of earthquake faults
 - strong seismic groundshaking
 - seismic-related ground failure
 - landslides
 - wildland fires
 - flooding from a dam or levee failure
 - inundation by seiche, tsunami, or mudflow

CEQA Guidelines Provisions on Health Effects (cont.)

- Questions in Appendix G sample Initial Study checklist ask whether a proposed project would:
 - ▣ Be located on a geologic unit or soil that is unstable, or that would become unstable as a result of the project, and potentially result in an on- or offsite landslide, lateral spreading, subsidence, liquefaction, or collapse
 - ▣ Be located on expansive soil, creating substantial risks to life and property
 - ▣ Be located on a site included on the list of hazardous materials sites compiled pursuant to Government Code section 65962.5

CEQA Guidelines Provisions on Health Effects (cont.)

- Questions in Appendix G sample Initial Study checklist ask whether a proposed project would:
 - ▣ Result in safety hazards or excessive noise levels for people working or residing in project areas within airport land use plan areas, within two miles of a public airport or public use airport, or in the vicinity of a private airstrip
 - ▣ Expose persons to noise generation in levels in excess of established standards
 - ▣ Place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map or other flood hazard delineation map

CEQA Guidelines Provisions on Health Effects (cont.)

- EIRs must identify and focus on the significant effects of proposed projects
 - EIRs *should* include “health and safety problems caused by the physical changes”
 - EIRs *shall* analyze “the effect of attracting people to the location and exposing them to the hazards found there”

(CEQA Guidelines, § 15126.2(a))

CEQA Guidelines Provisions on Health Effects (cont.)

- Other existing hazards of concern:
 - ▣ Seismic hazards such as active fault lines
 - ▣ Other areas susceptible to hazardous conditions as identified in authoritative hazard maps, risk assessments or in land use plans, such as
 - Floodplains
 - Coastlines
 - Wildfire risk areas

(CEQA Guidelines, § 15126.2(a))

Definition of “Environment”

DIFFICULTY CREATING CONFUSION

- The statutory definition of “Environment” does *not* include the human body or human health
 - ▣ Rather, “Environment” is defined as “the *physical conditions* which exist within the area which will be affected by a proposed project, including land, *air, water*, minerals, flora, fauna, *noise*, objects of historic or aesthetic significance”

(Pub. Resources Code, § 21060.5)

Definition of “Significant Effect on the Environment”

- A *significant effect* on the environment is “a substantial, or potentially substantial, *adverse change* in the environment”

(Pub. Resources Code, § 21068)

Legal Issues to Sort Out

QUESTIONS FOR THE SUPREME COURT

- How can these two definitions be reconciled with legislative intent language expressing concern about human health and with other CEQA statutes revealing concern about the effects of existing hazards on future project residents?
 - ▣ Are these other, latter statutes mere “exceptions” to the “general rule”?

Legal Issues to Sort Out

QUESTIONS FOR THE SUPREME COURT

- Do the references to air, water, and noise in the definition of “Environment” reveal the Legislature’s concern about *human health effects from polluted* air and water and *excessive noise*?
- ▣ Does the definition thus indirectly and impliedly include the human body and human health?

Court cases grappling with exposure of future project residents to existing hazards

- Appellate Cases Holding that CEQA is *not* Concerned with “the Effects of the Environment on Proposed Projects”:
 - ▣ *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464 (on-site toxic contamination)
 - ▣ *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889 (air pollution)
 - ▣ *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604 (air pollution)
 - ▣ *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455 (sea level rise)

Will the California Supreme Court agree with this line of Court of Appeal cases?

- The matter is at issue in *California Building Industry v. Bay Area Air Quality Management District*, S213478 (218 Cal.App.4th 1171)
- Under what circumstances, if any, does CEQA require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project?

CBIA v. CARB (cont.)

RESULT IN COURT OF APPEAL

- *Court of Appeal rejected claim that, as applied to proposed development near existing traffic corridors, BAAQMD advisory CEQA thresholds of significance for toxic air contaminants, particulates, and greenhouse gases improperly protect “the project” against the impacts of the “environment”*
- Court avoided directly addressing the correctness of the line of cases holding that CEQA does not protect projects against the environment
- **NOT PRECEDENT – NOW ON REVIEW BEFORE CALIFORNIA SUPREME COURT**

CBIA v. CARB (cont.)

- Court rejected a challenge to the thresholds based on the line of cases (*Baird*, *City of Long Beach*, *South Orange County Wastewater Authority*, and *Ballona Wetlands*) holding that CEQA only protects the environment against projects, and does not protect projects against the environment

CBIA v. CARB (cont.)

- ▣ BAAQMD attorneys pointed out numerous statutes within CEQA that require consideration of impacts on project residents from existing environmental risks and hazards such as airport noise and on-site toxic contamination

CBIA v. CARB (cont.)

- ▣ Court stated that a “new project located in an area that will expose its occupants to preexisting dangerous pollutants can be said to have a *substantial adverse effect on human beings*” within the meaning of Public Resources Code section 21083(c)
 - Question: did the court forget that the statutory language refers to *environmental* effects that cause effects on human beings?

CBIA v. CARB (cont.)

- ▣ Court rejected facial attack on thresholds and avoided the need to opine on correctness of the disputed line of cases, citing situations in which each challenged threshold could be applied without “the project” being protected against “the environment”
 - For example, pollutants that could affect project residents could also contribute to cumulative air quality effects affecting people beyond the project site

Other Health-Related Issues Before the California Supreme Court

- In a separate case, *Sierra Club v. County of Fresno*, the California Supreme Court is considering a different set of health-related CEQA issues, all focused in *air quality*

Other Health-Related Issues Before the California Supreme Court

- Question at issue in *Sierra Club v. County of Fresno*, S219783, (226 Cal.App.4th 704)
 - ▣ Is an EIR adequate when it identifies the health impacts of air pollutants and quantifies a project's expected emissions, or must an EIR also *correlate* emissions with specific health impacts?

Sierra Club v. County of Fresno

RESULT IN COURT OF APPEAL

- *Court of Appeal set aside County's approvals of, and EIR for, 942-acre Friant Ranch Specific Plan, a proposed 2,500-unit "active adult" master-planned community north of City of Fresno and near, but not adjacent to, the San Joaquin River*
- **NOT PRECEDENT – NOW ON REVIEW BEFORE CALIFORNIA SUPREME COURT**

Sierra Club v. County of Fresno (cont.)

- ▣ The EIR failed to include an analysis that *correlated* the project's emissions of air pollutants to its impacts on human health

Sierra Club v. County of Fresno (cont.)

- EIR failed to sufficiently “correlate” the Project’s air emissions to impacts on human health
 - ▣ Proper analysis must both (i) “identify” potential health effects resulting from air quality effects and (ii) “analyze” such potential health effects
 - ▣ The County’s EIR
 - sufficiently identified health effects
 - insufficiently analyzed health effects

Sierra Club v. County of Fresno (cont.)

- EIR identified, *in a general manner*, the adverse health impacts that could result from the Project's effects on air quality; specifically, the EIR
 - ▣ listed many types of air pollutants that the project will produce
 - ▣ identified the tons per year of PM₁₀, ROG, NO_x, and other pollutants that the project is expected to generate
 - ▣ provided a general description of each pollutant that acknowledges how it affects human health

Sierra Club v. County of Fresno (cont.)

- But the EIR “*was short on analysis*”
 - ▣ It did not correlate the additional tons per year of emissions to adverse human health impacts that could be expected to result from those emissions
 - ▣ Readers can infer that the project will make air quality and human health worse, but “more information is needed to understand that adverse impact”
 - The *better/worse dichotomy* is just “a *useful starting point*” for analyzing adverse environmental impacts, including those to human health

Sierra Club v. County of Fresno (cont.)

- Using “extreme examples” to “illustrate this point,” the court says that a reader cannot tell whether Project emissions
 - “will require people with *respiratory difficulties* to wear filtering devices when they go outdoors in the project area or nonattainment basis”; or
 - “will be no more than a drop in the bucket to those people breathing the air containing the additional pollutants”

Sierra Club v. County of Fresno (cont.)

- Quantitative information in the EIR further demonstrated the lack of information about the potential magnitude of the impact on human health
 - ▣ Table 3.3-2 in Draft EIR sets forth the *days each year* that pollutants exceeded *federal and state standards* at three monitoring stations in the Fresno area

Sierra Club v. County of Fresno (cont.)

- ▣ Final EIR does not show “what impact, if any, the project is likely to have on the *days of nonattainment per year* —it might double those days or it might not even add a single a day per year”
 - Such information would give the public and decision makers “some idea of the *magnitude* of the air pollutant impact on human health”

Sierra Club v. County of Fresno (cont.)

- Similarly, the EIR made no connection or correlation between
 - the EIR's statement that exposure to ambient levels of ozone ranging from 0.10 to 0.40 parts per million for one to two hours has been found to significantly alter *lung functions*; and
 - the emissions that the Project is expected to produce

Sierra Club v. County of Fresno (cont.)

- “[I]nformation about the magnitude of the human health impacts is relevant to the board of supervisors’ *value judgment* about whether other considerations override the adverse health impacts”
- “[A] disclosure of respiratory health impacts that is limited to the better/worse dichotomy does not allow the decision makers to perform the required balancing of economic, legal, social, technological and other benefits of the project against the adverse impacts to human health”
 - Decision makers “have not been informed of the *weight to place on the adverse impact side of the scales*”

Sierra Club v. County of Fresno (cont.)

- Court was not saying that the County “*must* connect the project’s levels of emissions to the standards involving days of nonattainment or parts per million”
 - ▣ County has discretion in choosing what type of analysis to provide
 - ▣ But “there must be *some analysis* of the correlation between the project’s emissions and human health impacts”
 - “[*B*]are numbers” are insufficient to translate “into health impacts resulting from this project”