Are Effects of the Environment on People Subject to CEQA? Yes!

By Gary D. Jakobs, AICP, Principal
Curtis E. Alling, AICP, Principal
Ascent Environmental, Inc.
455 Capitol Mall, Suite 205
Sacramento, CA 95814
(916) 444-7301

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If a tree falls in the forest and lands on you, does it create an impact? Should an EIR evaluate whether future residents of a proposed housing project will be exposed to toxic air contaminants from an adjacent freeway? Should we analyze and recommend mitigation for seismic risks, if a project is proposed near an active earthquake fault? According to one 2011 court decision, the answer is an emphatic “no.” But does this decision jibe with CEQA’s legislative intent and with the statute, itself? We believe it does not, and a close inspection of the full array of CEQA provisions indicates that effects of the environment on people are, indeed, within the purview of the statute. Although a handful of decisions align with Ballona, others have come to the opposite conclusion. We believe the correct decision is that CEQA covers the people who would be exposed to environmental hazards associated with the location of a project, consistent with the statute’s legislative intent. However, because there is ambiguity resulting from a lack of an explicitly worded mandate, court decisions have gone both ways. Ballona, with very strident language, has raised the profile and subsequent debate about this issue.

At issue in the Ballona case was whether an EIR should address as a significant effect the potential for sea level rise to flood a coastal project. The court opined that effects of the environment on a project and the people using the project are “neither consistent with CEQA’s legislative purpose nor required by the CEQA statute;” instead, the Court said CEQA is only concerned with whether a project causes effects on the environment, and excluded effects that may be caused by locating people in proximity to an environmental hazard.

The Ballona Case

Citing similar prior appellate decisions on the issue, the decision by California’s 2nd District Court of Appeal, in Ballona Wetlands Land Trust v. City of Los Angeles (filed November 9, 2011), has tried to remove as a required subject of CEQA documents the effects of the environment on people that result from locating a proposed project in harm’s way of an existing or potential future hazardous condition.
The Ballona EIR evaluated impacts of developing the second phase of the mixed-use Playa Vista project on a low-lying property, known as the Ballona Wetland, near the coast in the City of Los Angeles. The Playa Vista project’s history, including previous CEQA reviews, has included multiple conflicts with project opponents and prior court actions. Among other topics, the draft EIR evaluated the project’s contribution to greenhouse gases and, according to the Court, “briefly noted that global warming could result in a rise in sea level and the inundation of coastal areas.” The final EIR expanded the analysis in response to comments to address the potential for sea level rise to inundate the project site. The EIR concluded that the project would not be subject to inundation as a result of potential sea level rise and provided substantial evidence to support that conclusion.

The Court examined two issues related to sea level rise in response to challenges to the EIR’s adequacy: (1) did the EIR need to discuss impacts of sea level rise on the project in the first place, and (assuming it did) (2) was the EIR’s analysis adequate? The Court first concluded that the EIR need not discuss impacts of sea level rise on the project or the people who may live there. It then determined, without reference to its first conclusion, that the EIR adequately addressed the issue. This paper will not address why the Court ruled on the adequacy of the analysis after it found the evaluation to be unnecessary, but rather will focus on the first issue, the necessity of evaluating impacts of environmental conditions, including natural or human-caused hazards, on a project and the people using the project.

The Court’s Rationale

The Ballona decision stated the following:

The purpose of an environmental impact report is to identify the significant effects on the environment of a project...” (Public Resources Code[PRC], § 21002.1, subd. [a]; see also id., §21061), “‘Significant effect on the environment’ means a substantial...adverse change in the environment.” (PRC §21068; see also Guidelines, §15382.) “‘Environment’ means 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.” (PRC, §21060.5; see also Guidelines §15360.)

Thus, the purpose of an EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project (City of Long Beach v. Los Angeles Unified School Dist. [2009] 176 Cal.App.4th 889, 905 [City of Long Beach]). The petitioner in City of Long Beach challenged the adequacy of an impacts analysis in an EIR for the construction of a new high school, arguing among other things that the EIR failed to address the impacts on staff and student health of emissions for nearby freeways. We held that the EIR was not required to discuss the impacts on staff and student health of locating the project near the freeways...

The Court cited two additional cases (South Orange County Wastewater Authority v. City of Dana Point and Baird v. County of Contra Costa) where conclusions were similarly reached that CEQA is only
concerned with impacts of a project on the environment. But this Court went further, expressing that using certain parts of CEQA Guidelines to support the validity of evaluating effects of environmental hazards on projects and people was inconsistent with the statute. The Court noted the following:

- Guidelines §15162.2 states, in part, that EIRs should evaluate the impacts of bringing people and development into an area. “For example, an EIR for a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future occupants of the subdivision…” Here, the Court agreed that evaluating environmental effects of bringing development and people to an area is consistent with CEQA, “…but identifying the effects on the project and its users of locating the project in a particular environmental setting is neither consistent with CEQA’s legislative purpose nor required by the CEQA statutes.”

- Appendix G (Initial Study Checklist): “A few of the questions on the (checklist) form concern the exposure of people or structures to environmental hazards and could be construed to refer to not only the project’s exacerbation of environmental hazards but also the effects on the users of the project and structures in the project of preexisting environmental hazards…We believe that to the extent that such questions may encompass the latter effects, the questions do not relate to environmental impacts under CEQA and cannot support an argument that the effects of the environment on the project must be analyzed in an EIR.”

- Footnote 9 in the decision states: “In our view, the statement in the Guidelines §15126.2, subdivision (a) that ‘the EIR should evaluate any potentially significant impacts of locating development in other areas susceptible to hazardous conditions (e.g., floodplains, coastlines, wildfire risk areas) as identified in authoritative hazard maps, risk assessments or in land use plans addressing such hazards areas’ is consistent with CEQA only to the extent that such impacts constitute impacts on the environment caused by the development rather than impacts on the project caused by the environment.”

Thus, the Court did not overturn these CEQA Guidelines. Rather, the decision stated they were not to be used to require evaluation under CEQA of “impacts on the project caused by the environment.”

**Was the Decision Correct in Light of CEQA’s Full Provisions and Legislative Intent?**

In supporting its decision, the Ballona Court cited one subdivision of one section of legislative policy in Chapter 1 of CEQA (PRC §21002.1 [a]) and two sections in Chapter 2.5 of CEQA, Definitions (PRC §§21060.5 and 21068), all focusing on the purpose of an EIR or the definition of significant effect on the environment. None of the fundamental statements of legislative intent from PRC §§21000 and 21001 was cited in the decision. A careful reading of these legislative intent provisions reveals a high priority
for protecting people from adverse environmental conditions. This was not addressed in the Ballona decision. By not considering this aspect of legislative intent, the decision headed in the wrong direction.

CEQA includes specific legislative intent in PRC §§ 21000 and 21001 that addresses the relationship between the environment and people’s health and welfare. This includes:

“The Legislature finds and declares as follows: The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern. It is necessary to provide a high-quality environment that at all times is healthful and pleasing... There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state...” (PRC §21000 [a-c])

“The Legislature further finds and declares that it is the policy (of California) to: (b) Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise. ... (e) Create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations. (PRC §21001 [b] and [e])

This legislative intent language is fundamental to CEQA. It expresses the importance of issues that relate to the interaction between the environment and people, including bringing people into contact with the existing environmental conditions. Clean air and water, freedom from excessive noise, and enjoyment of environmental qualities are important primarily, or only, because of the relationship between people and their environment. Thus, the Legislature, in creating CEQA, believed it was important to determine environmental effects from people’s exposure to environmental conditions.

Further, the CEQA statute is replete with direct and indirect references to the need to evaluate environmental impacts from exposing a project to environmental conditions, which are, in effect, impacts of the environment on the project. Several are noted as follows:

- PRC §21083 requires that the State Office of Planning and Research prepare guidelines for implementation of the CEQA statute and PRC §21083(b)(3) states, in part, that the guidelines “...shall include criteria to follow in determining whether or not a proposed project may have a significant effect on the environment,” including if the “environmental effects of a project will cause substantial effects on human beings, either directly or indirectly.”

- PRC §21084 does not allow the use of categorical exemptions for projects located on a site with hazardous materials. By disallowing exemption from environmental analysis, the Legislature was not intending to protect the hazardous materials. Rather, the Legislature was concerned with the potential effect of those hazardous materials on a project and its users.

- PRC §21096 requires use of the Airport Land Use Planning Handbook for projects proposed within airport land use compatibility boundaries concerning exposure of the project and people to noise and aircraft hazards (among other issues). Aircraft safety and noise, in this instance, are
existing environmental conditions that could affect a project and its users.

- PRC §21151.8, requires the environmental analysis for a school site to determine if the site is exposed to hazardous substances or air emissions, including from freeways.

These provisions clearly confirm that CEQA is concerned not only with changes in environmental conditions caused by a project, but also with environmental impacts caused by exposing the project and people using a project to adverse environmental conditions. We note that for both types of effects, a physical change to the environment (i.e., development of a project) is the cause of the impact.

How does this square, then, with the Court’s determination that CEQA is only intended to address a project’s effect on the environment, and not how environmental conditions affect a project and its users? Key citations in the Ballona decision are repeated below:

The purpose of an environmental impact report is to identify the significant effects on the environment of a project...” (PRC §21002.1, subd. [a]; see also id., §21061), “‘Significant effect on the environment’ means a substantial...adverse change in the environment.” (PRC §21068; see also Guidelines, §15382.) ‘Environment’ means 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. (PRC, §21060.5; see also Guidelines §15360.)

The Ballona Court neither cited nor considered CEQA’s statutory intent language, specific statutory provisions that direct examination of environmental impacts from exposure of projects to environmental hazards, nor the requirement to evaluate indirect effects, all of which clearly address this issue. Maintaining the health and welfare of the people of the state, as declared to be the intent of CEQA, would necessitate consideration of the effects of existing natural hazards and adverse environmental conditions on people. A project is defined as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...” (PRC §21065); a project’s effects are defined as “...all the direct or indirect environmental effects of a project...” (PRC §21065.3); and a significant effect is defined as a “...substantial, or potentially substantial, adverse change in the environment” (PRC §21068). Although the statute does not define indirect changes, the CEQA Guidelines do: “An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. If a direct physical change in the environment in turn causes another change in the environment, then the other change is an indirect physical change in the environment. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution” (Guidelines §15064[d][2]). An indirect consequence caused by a project’s physical location that would result in changes to the “health and welfare of the people of the state” would meet this concept of an indirect environmental effect.
Conclusion

Limiting environmental review to only the effects of a project on the environment ignores CEQA's clear legislative intent for “maintenance of a quality environment for the people” of California and the requirement to address indirect impacts, which can include locating a project and people in harm’s way of an adverse environmental condition or natural hazard. Taken as a whole, it is clear that CEQA is concerned about direct and indirect environmental impacts caused by locating a project proximate to an existing or reasonably foreseeable environmental hazard (in addition to the effects of the project on the environment). To conclude otherwise, i.e., to exclude coverage of risks to people's health and safety from environmental conditions, would run counter to the legislative intent that CEQA should “provide a high-quality environment that at all times is healthful and pleasing.”

The broader point is that CEQA requires consideration of the direct and indirect effects of a project, and, as indicated by the discussion herein, is specifically concerned with protecting the health and welfare of people and understanding the effects on people of placing a project in proximity to existing or reasonably foreseeable hazardous environmental conditions. For instance, the proposed construction of a freeway would require evaluation of toxic air effects to people living, going to school, and working next to the freeway (i.e., the effect of the project on the environment, including people). It makes no sense then, and is inconsistent with CEQA's legislative intent and certain statutory provisions, to ignore the same effects from an existing freeway on a school and its users where the school is proposed on an adjacent site (i.e., the same type of impact, but from the perspective of the environment's effect on the project and its people). In fact, in a decision by the same 2nd Appellate District, made after Ballona, the Court recognized the validity of exposing people (i.e., students) to an existing hazard as a significant effect under CEQA. In City of Maywood v. Los Angeles Unified School District (LAUSD), filed July 18, 2012, an EIR addressed a proposed high school project on a site located straddling an existing, busy street in the City of Maywood. The trial court concluded that “the LAUSD failed to investigate whether the presence of an active roadway bisecting the campus, traversed by a pedestrian bridge, would have significant impacts on pedestrian safety.” In other words, the lead agency failed to adequately evaluate how the project’s proposed location exposed students to an existing hazardous condition (i.e., the existing busy street bisecting the campus). The appellate court affirmed the trial courts conclusion and overturned the EIR.

Thus, the Ballona decision offers a view of CEQA that runs counter to the overall legislative intent of the statute. Moreover, while the Ballona decision suggested that using certain parts of the Guidelines to justify addressing evaluation of impacts of exposing a project to adverse environmental conditions was not correct, it did not invalidate those guidelines, and they still stand. Also, another decision by the same appellate district contradicted the premise of Ballona. It would be incorrect, then, to change the current practice of CEQA document preparation by not considering environmental effects caused by exposing a project and people to existing or reasonably foreseeable natural hazards and adverse, human-caused environmental conditions.

What’s Next?

Because the Ballona decision has caused confusion about this issue and the Supreme Court has declined to review the decision, an explicit legislative clarification would be beneficial. This could be
accomplished with a straightforward amendment of the definition of significant effect on the environment (§21068) or the requirements regarding the contents of the guidelines (§21083). Potential statutory amendment language is offered below. These suggested amendments would not expand the reach of CEQA nor increase the burden of environmental review, but rather, they would add certainty and clarity to the statute and would confirm the current professional practice of addressing exposure of projects and people to environmental hazards in CEQA document preparation.

- **§ 21068. SIGNIFICANT EFFECT ON THE ENVIRONMENT**
  “Significant effect on the environment” means a substantial, or potentially substantial, adverse change in the environment, including an adverse change in exposure of people by a proposed project to a substantial, existing or reasonably foreseeable, natural hazard or adverse physical environmental condition.

- **§ 21083. OFFICE OF PLANNING AND RESEARCH; PREPARATION AND DEVELOPMENT OF GUIDELINES; CONDITIONS**
  (a) The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division by public agencies. The guidelines shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with this division.
  (b) The guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a “significant effect on the environment.” The criteria shall require a finding that a project may have a “significant effect on the environment” if one or more of the following conditions exist:
    1. A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.
    2. The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, “cumulatively considerable” means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.
    3. The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly, including effects resulting from the location of a project in relation to an existing or reasonably foreseeable natural hazard or adverse physical environmental condition.

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*Please note that the above discussion reflects the opinions of experienced environmental planners. Ascent Environmental, Inc. is a forward-looking environmental and natural resources consultancy. We do not practice law nor give legal advice, but rather apply our extensive CEQA experience in our environmental practice with the goal of developing defensible environmental documents. Please consult with a qualified attorney for counsel regarding the CEQA compliance requirements of your projects.*