Opinion Analysis: Sierra Club v. City of Fresno S219783

In this recent unanimous opinion (authored by Justice Chin) the California Supreme Court clarified the standard of review for a claim that an Environment Impact Report (EIR) inadequately discusses an issue required by the California Environmental Quality Act (CEQA). Although this issue and its discussion were framed within the specialized area of CEQA law, the court's opinion is significant to the appellate standard of review and a court's role in reviewing expert scientific findings.

I had the opportunity to be one of the mock justices in a moot court oral argument presented by the plaintiffs, as part of the California Constitution Center's California Supreme Court moot court program.[1] Having read some of the opposition briefs and seeing the issues the plaintiffs anticipated, I find the court's opinion to be bold and decisive in laying down a general rule of appellate review for CEQA. Specifically, the opinion does not shy away from announcing a rule that applies to all future EIR adequacy challenges, thereby implicating a potentially very broad swath of CEQA litigation.

The EIR at issue was prepared in connection with a project called Friant Ranch, which is a master-planned community for active adults age fifty-five or older. Friant Ranch is to be located on former agricultural land near the San Joaquin river in North Central Fresno County.[2] The county prepared the EIR. Plaintiffs took issue with two things: the EIR's analysis of an increased production of hazardous air pollutants — particularly those resulting from the influx of cars from project residents; and the EIR's discussion of the possible human health effects due to increased air pollution.

Plaintiffs challenged the county's certification of the EIR by a writ of administrative mandamus. The trial court rejected plaintiffs' claims and certified the EIR.[3]

Plaintiffs appealed, and the court of appeal agreed with the plaintiffs, holding that the EIR's treatment of the increased air pollution caused by the project was inadequate "because it does not analyze the adverse human health impacts that are likely to result from the air quality impacts identified in the EIR."[4]
The panel pointed to the EIR's inadequate explanation of the impact from additional ozone residents would create by using automobiles to come and go from the project. The San Joaquin Valley Air Basin, where the project would be, already has one of the most severe ozone pollution problems in California.[5]
The court of appeal noted that the information in the EIR did not enable a reader to determine whether this "will require people with respiratory difficulties to wear filtering devices when they go outdoors in the project area or nonattainment basis or, in contrast, will be no more than a drop in the bucket to those people breathing the air containing the additional pollutants."[6]

Real party in interest Friant Ranch successfully petitioned the California Supreme Court for review. The two main issues for consideration were: does the substantial evidence standard of review apply to a court's review of whether an EIR provides sufficient information on a topic required by CEQA, or is this a question of law subject to independent judicial review; and is an EIR adequate when it identifies the health impacts of air pollution and quantifies a project's expected emissions, or does CEQA further require the EIR to *correlate* a project's air quality emissions to specific health impacts?[7]

The first issue reflects a central administrative law concern, where the courts generally give a high degree of deference to the decisions

administrative agencies make, in recognition of their expertise in specified areas.[8]

The standard of review an appellate court generally uses to review the findings of an expert agency reflects this — the substantial evidence standard for factual determinations. If substantial evidence supports an agency's factual determination, then a court will uphold such a finding on appeal.[9]

Friant Ranch contended that such deference should be shown if the inadequacy challenge involved *any* discussion of a factual issue and that independent judicial review (de novo review) should be reserved only for those instances where a required topic of discussion was entirely omitted.

The standard of review for an inadequacy challenge also has significant practical implications for appellate challenges to future contested EIRs. A substantial evidence standard of review for an inadequacy challenge would make such challenges more difficult. Practically, few appeals based on inadequacy of discussion in an EIR would be filed. But if the standard is de novo, then this might have the effect of inviting appeals based on inadequacy of discussion for every contested EIR.

Although the stakes for future litigation were high, the California Supreme Court did not hesitate to agree with the court of appeal that the standard for appellate review of an inadequacy of discussion claim should be de novo.[10] The California Supreme Court held that the usual deference to factual determinations by agencies does not extend to the adequacy of an EIR's discussion of a required topic. The court viewed this as a *legal* issue not a factual one, even though the discussion involved factual determinations. Because the adequacy of a discussion is a legal determination, the court is in as good a position to make a determination as any expert agency. By focusing on the EIR as an informational document designed to provide decisionmakers (politicians and the public) with sufficient information

to foster informed public participation about the environmental issues involved, the court asserted its competence as a representative reader.[11]

Of course, what determines the adequacy or inadequacy of a discussion is specific to the nature of the topic being discussed. Here, the claim of inadequacy pertained to the EIR's failure to adequately discuss the connection between the increased air pollutants and the possible significant impacts on human health that the project might cause. This leads to the second question accepted for review — does CEQA require the EIR to *correlate* a project's air quality emissions to specific health impacts?

The court essentially answered yes, but with a significant caveat: only when the scientific methodology employed by the agency is able to show the connection between the increased air pollutants and specific health impacts. Furthermore, the court also placed the burden on the EIR to explain why, given the scientific methodology the agency employs, it cannot provide a more specific connection to health impacts. [12]

The court acknowledged that the EIR did include some discussion of the health impacts of various pollutants.[13] Nevertheless, the court concluded that, after reading the EIR, the public would have no idea of the health consequences that result when more pollutants are added to the already polluted county environment.[14] The court stated that a sufficient discussion of significant health impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of that impact.[15]

The court was less specific regarding how the EIR could have framed the analysis so as to adequately inform the public and decision makers

of possible adverse health effects. The court noted that the court of appeal identified several ways but only mentioned one in the opinion — that the county could have identified the project's impact on the number of days per years that the air quality would not attain an acceptable level ("days of nonattainment per year.")[16] Notably, the court did not endorse the appellate panel's "extreme example" of specifying that people with respiratory difficulties would have to wear filtering devices when they went outdoors in the project area.[17]

Rather, the court emphasized the agency's *discretion* in choosing what type of analysis to provide, stating the agency's duty as follows: "The EIR must provide an adequate analysis to inform the public how its bare numbers translate to create potential adverse impacts or it must adequately explain what the agency *does* know and why, given existing scientific constraints, it cannot translate potential health impacts further."[18]

Overall, the court summed up the EIR here as generally outlining some of the unhealthy symptoms associated with exposure to various pollutants, but not giving any sense of the nature and magnitude of the health and safety problems caused by the physical changes resulting from the project as was required by the CEQA guidelines.[19] The court acknowledged that "[p]erhaps it was not possible to do more."[20] "But even in that case, we would have found the EIR inadequate because it failed to explain why it was not feasible to provide an analysis that connected the air quality effects to human health consequences."[21]

It is in this area of the second alternative — when it is not feasible to provide an analysis that connects the air quality effects to human health consequences — that the court appears to return some deference to scientific expertise. The court had initially appeared to withdraw deference by announcing

that the standard of review for a claim of inadequacy of discussion was de novo rather than substantial evidence. Yet while the court categorically announces that the standard of review for an inadequacy claim is de novo, it makes an important distinction for "instances where the agency's discussion of significant project impacts may implicate a factual question that makes substantial evidence review appropriate."[22]
One such instance is "a decision to use a particular methodology and reject another."[23] In
such an instance the standard is substantial evidence review.

If one connects this substantial evidence review standard
for the choice of methodology (a deferential standard) with the court's acknowledgement that an adequate discussion in an EIR can be satisfied by explaining why a more detailed analysis is not scientifically possible given the methodology used, one can imagine the following scenario. What happens when an agency justifies not producing more specific correlations between air pollutants and health effects on the grounds that more specific correlations are not possible, *based on the scientific*
methodology the agency had chosen to
employ. When critics of the EIR contend that a more specific connection is possible based on *another methodology,*
what standard of review will an appellate court employ in reviewing this claim? Based on the court's discussion in this case, it appears that the agency's decision to use one methodology and reject another would be subject to substantial evidence review. This might return one significant area of inadequacy discussion — whether further explanation is not possible given the scientific methodology chosen — to the deferential standard.

This does appear to be an area that fits within the
traditional model of legal deference to scientific authority. Typically, a court does not have the scientific expertise to adjudicate between competing scientific methodologies. But one could think of a situation in which an agency

chooses a methodology that is arguably "junk science." Could the court then engage in de novo review? What about a less extreme example, in which the methodology chosen is generally recognized as science, but simply has less followers in the scientific community than another methodology?

These are further questions that may have to be litigated in the area of CEQA inadequacy claims.

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All the views expressed here are purely my own and do not purport to represent the views of the litigants or the California Constitution Center.

[2] *Sierra*
Club v. County of Fresno (2018) at 1–2.

[3] *Id.* at 3–4.

[4] *Sierra Club v. County of Fresno*, (Cal.App. 2014)

[5] *Id.* at 302.

[6] *Id.* at 305.

[7] The two additional issues accepted for review, which I am not discussing in this piece, were: does a lead agency impermissibly defer formulation of mitigation measures when it retains discretion to substitute the adopted measures with equally or more effective measures in the future as better technology becomes available, or does CEQA prohibit the agency from retaining this discretion unless the mitigation measure specifies objective criteria of effectiveness; and do mitigation measures adopted by a lead agency to reduce a project's significant and unavoidable impacts comply with CEQA when substantial evidence demonstrates that, on the whole, the measures will be at least partially effective at mitigating the impact, or must such measures meet the same (or even heightened) standards of adequacy as those adopted to reduce an impact to a less-than-significant level?

The court of appeal held that the lead agency impermissibly deferred the mitigation measures when it approved the EIR, but the California Supreme Court held that the substitution clause in the EIR that allowed an agency to substitute different air pollution measures as they become available did not violate CEQA. (*Sierra Club, supra* note 1, at 25–28.) The California

Supreme Court held "that as long as the public is able to identify any adverse health impacts clearly, and the EIR's discussion of those impacts includes relevant specifics about the environmental changes attributable to the project, the inclusion of mitigation measures that partially reduce significant impacts does not violate CEQA." (*Id.* at 28.)

[8] See, e.g., *Western States Petroleum Assn. v. Superior Court* (1995) at 571–574.

[9] "'In reviewing for substantial evidence, the reviewing court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable," for, on factual questions, our task is "not to weigh conflicting evidence and determine who has the better argument."'" (*Sierra Club, supra* note 2, at 9, citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) at 435.)

[10] *Sierra Club, supra* note 2, at 15.

[11] "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.'" (*Sierra Club, supra* note 2, at16, quoting *Laurel Heights Improvement Assn. of San Francisco, Inc., v. The Regents of the University of California,* (1988) at

405).

[12] *Sierra Club, supra* note 2, at 22 & 24.

[13] *Id*.at 19.

[14] *Id*.at 20.

[15] *Id*.at 20–21.

[16] *Id*.at 24.

[17] *Sierra Club v. County of Fresno*, (Cal.App. 2014) at 305.

[18] *Sierra Club, supra* note 2, at 24.

[19] *Ibid.*

[20] *Ibid.*

[21] *Ibid.*

[22] *Id.* at 12.

[23] *Ibid.*