

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 04/19/2013

TIME: 03:36:00 PM

DEPT: C-72

JUDICIAL OFFICER PRESIDING: Timothy Taylor

CLERK: Patricia Ashworth

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2012-00101054-CU-TT-CTL** CASE INIT.DATE: 07/20/2012

CASE TITLE: **SIERRA CLUB vs. County of San Diego [E-FILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

The Court, having taken the above-entitled matter under submission on 04/19/2013 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

1. Overview and Procedural Posture.

In this CEQA case, this court for the second time in the last 6 months is required to address the controversial topic of global climate change. The court last addressed this subject in *Cleveland Nat'l. Forest Foundation v. SANDAG*, Case No. 2011-00101593; that case is now on appeal (D063288). As noted in its December 2012 ruling, this court recognizes it is but a way station in the life of most CEQA cases, and it seems this one will likely fit this pattern.

Because the trial courts are not final, it is important that they be prompt, and the court has done its best in that regard. The petition was filed on July 20, 2012. The case was assigned to Judge Hayes, but the Sierra Club challenged her, and the case was reassigned to Dept. 72. ROA 9, 11. The petition was promptly served. ROA 10.

The parties were first before the court on November 6, 2012, when they sought a hearing date and supplied the court with a stipulated briefing schedule. The court granted the requests. ROA 15, 16. The County filed its answer on January 9, 2013 (ROA 19), and the briefing began in February, 2013. ROA 21-25. The 4300+ page Certified Administrative Record (AR) is contained on a compact disk which was lodged on April 4 (the CD lodged with the opening brief, ROA 22, was either blank or incompatible with the court's aging desktop computers). The court has reviewed the briefing and the record.

Sierra Club contends that the County's June 20, 2012 "Climate Action Plan" (CAP), which is AR 002-126, is insufficient and violates CEQA in several respects: it does not comply with mitigation measures spelled out in the County's 2011 Program EIR (PEIR), adopted in connection with the 2011

General Plan Update (GPU)(AR 0441 ff); it fails to satisfy the requirements for adopting thresholds of significance for greenhouse gas emissions (GHG); and it should have been set forth in a stand-alone environmental document rather than in an addendum to the PEIR. The County denies these claims, and asserts the CEQA challenge is time-barred, the CAP complies with all legal requirements, the use of an addendum was appropriate, and that all relief is barred by the Sierra Club's failure to notify the AG as required by Pub. Res. Code section 21167.7. Although briefed by Sierra Club, neither standing nor exhaustion are challenged by the County.

Following publication of a tentative ruling on April 16, the case was argued on the afternoon of April 19 by Cory Briggs, Esq. on behalf of Sierra Club, and Ellen Pilsecker, Deputy County Counsel, on behalf of the County. The arguments were focused and thoughtful. Following the arguments, the court took the matter under submission. The court's ruling follows.

2. Overview of the CEQA Process.

A. The Court's Role in CEQA Cases.

In *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal.App.4th 477, 486 (2004) (*Mira Mar Mobile Community*), the court explained that "[i]n a mandate proceeding to review an agency's decision for compliance with CEQA, [courts] review the administrative record de novo [citation], focusing on the adequacy and completeness of the EIR and whether it reflects a good faith effort at full disclosure. [Citation.] [The court's] role is to determine whether the challenged EIR is sufficient as an information document, not whether its ultimate conclusions are correct. [Citation.]" An EIR is presumed adequate. Pub. Res. Code § 21167.3, subd. (a).

Courts review an agency's action under CEQA for a prejudicial abuse of discretion. Pub. Res. Code § 21168.5. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." *Id.*; see *Mira Mar Mobile Community*, supra, 119 Cal.App.4th at 486; *County of San Diego v. Grossmont-Cuyamaca Community College Dist. ("Grossmont")*, 141 Cal. App. 4th 86, 96 (2006)(same).

In defining the term "substantial evidence," the CEQA Guidelines state: "'Substantial evidence' ... means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made ... is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion[,] narrative [or] evidence which is clearly erroneous or inaccurate ... does not constitute substantial evidence." CEQA Guidelines, § 15384(a). "In applying the substantial evidence standard, [courts] resolve all reasonable doubts in favor of the administrative finding and decision. [Citation.]" *Mira Mar Mobile Community*, supra, 119 Cal.App.4th at 486; *Grossmont*, supra, 141 Cal. App. 4th at 96.

Although the lead agency's factual determinations are subject to the foregoing deferential rules of review, questions of interpretation or application of the requirements of CEQA are matters of law. While judges may not substitute their judgment for that of the decision makers, they must ensure strict compliance with the procedures and mandates of the statute. *Grossmont*, supra, 141 Cal. App. 4th at 96.

B. The Three Steps of CEQA.

CEQA establishes "a three-tiered process to ensure that public agencies inform their decisions with

environmental considerations." *Banker's Hill, et al v. City of San Diego*, 139 Cal. App. 4th 249, 257 (2006)("Banker's Hill"); see also CEQA Guidelines, § 15002(k)(describing three-step process).

First Step in the CEQA Process.

The first step "is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity." *Banker's Hill, supra*, 139 Cal. App. 4th at 257; see also Guidelines, § 15060. The Guidelines give the agency 30 days to conduct this preliminary review. (Guidelines, § 15060.) The agency must first determine if the activity in question amounts to a "project." *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380. "A CEQA ...project falls into one of three categories of activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (§ 21065.)" *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907.

As part of the preliminary review, the public agency must also determine the application of any statutory exemptions or categorical exemptions that would exempt the proposed project from further review under CEQA. See Guidelines, § 15282 (listing statutory exemptions); Guidelines, §§ 15300–15333 (listing 33 classes of categorical exemptions). The categorical exemptions are contained in the Guidelines and are formulated by the Secretary under authority conferred by CEQA section 21084(a). If, as a result of preliminary review, "the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary. The agency may prepare and file a notice of exemption, citing the relevant section of the Guidelines and including a brief 'statement of reasons to support the finding.' " *Banker's Hill, supra*, 139 Cal.App.4th at 258, citing Guidelines, §§ 15061(d), 15062(a)(3).

Second Step in the CEQA Process.

If the project does not fall within an exemption, the agency proceeds to the second step of the process and conducts an initial study to determine if the project may have a significant effect on the environment. (Guidelines, § 15063.) If, based on the initial study, the public agency determines that "there is substantial evidence, in light of the whole record ... that the project may have a significant effect on the environment, an environmental impact report [(EIR)] shall be prepared." [CEQA, § 21080(d).] On the other hand, if the initial study demonstrates that the project "would not have a significant effect on the environment," either because "[t]here is no substantial evidence, in light of whole record" to that effect or the revisions to the project would avoid such an effect, the agency makes a "negative declaration," briefly describing the basis for its conclusion. (CEQA, § 21080(c)(1); see Guidelines, § 15063(b)(2); *Banker's Hill, supra*, 139 Cal.App.4th at 259.)

The Guidelines and case law further define the standard that an agency uses to determine whether to issue a negative declaration. "[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." (Guidelines, § 15064(f)(1), italics added.) This formulation of the standard for determining whether to issue a negative declaration is often referred to as the "fair argument" standard. See *Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal.4th 1112, 1134–1135 (1993). Under the fair argument standard, a project "may" have a significant effect whenever there is a "reasonable possibility" that a significant effect will occur. *No Oil v. City of Los Angeles*, 13 Cal.3d 68, 83-84 (1974). Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." § 21080, subd. (e)(1).

Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts unrelated to physical impacts on the environment. § 21080, subd. (e)(2).

If the initial study reveals no substantial evidence that the project may have a significant environmental effect, the agency may adopt a negative declaration. Pub. Res. Code § 21080, subd. (c)(2); Guidelines, § 15070, subd. (b); Grand Terrace, supra, 160 Cal.App.4th at 1331; Save the Plastic Bag Coalition v. City of Manhattan Beach, 52 Cal. 4th 155, 175 (2011)(holding common sense is part of the substantial evidence analysis). "Alternatively, if there is no substantial evidence of any net significant environmental effect in light of revisions in the project that would mitigate any potentially significant effects, the agency may adopt [an MND]. [Citation.] [An MND] is one in which '(1) the proposed conditions "avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment." (§ 21064.5 . . .)' [Citations.]" Grand Terrace, supra, at 1331-1332. The MND allows the project to go forward subject to the mitigating measures. Pub. Res. Code §§ 21064.5, 21080, subd. (c); see Grand Terrace, supra, 160 Cal. App. 4th at 1331.

Third Step in the CEQA Process.

If no negative declaration is issued, the preparation of an EIR is the third and final step in the CEQA process. Banker's Hill, supra, 139 Cal. App. 4th at 259; Guidelines, §§ 15063(b)(1), 15080; CEQA, §§ 21100, 21151.

C. The Environmental Impact Report.

Central to CEQA is the EIR, which has as its purpose informing the public and government officials of the environmental consequences of decisions before they are made. [Citation.] "An EIR must be prepared on any 'project' a local agency intends to approve or carry out which 'may have a significant effect on the environment.' Pub. Res. Code §§ 21100, 21151; Guidelines, § 15002, subd. (f)(1). The term 'project' is broadly defined and includes any activities which have a potential for resulting in a physical change in the environment, directly or ultimately. Pub Res. Code § 21065; Guidelines, §§ 15002, subd. (d), 15378, subd. (a); [Citation].) The definition encompasses a wide spectrum, ranging from the adoption of a general plan, which is by its nature tentative and subject to change, to activities with a more immediate impact, such as the issuance of a conditional use permit for a site-specific development proposal." CREED v. City of San Diego, 134 Cal. App. 4th 598, 604 (2005).

"To accommodate this diversity, the Guidelines describe several types of EIR's, which may be tailored to different situations. The most common is the project EIR, which examines the environmental impacts of a specific development project. (Guidelines, § 15161.) A quite different type is the program EIR, which 'may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways.'" Guidelines, § 15168, subd. (a); CREED, supra, 134 Cal. App. 4th at 605. As the court held in CREED, a program EIR may serve as the EIR for a subsequently proposed project only to the extent it contemplates and adequately analyzes the potential environmental impacts of the project. CREED, supra, 134 Cal. App. 4th at 615.

As noted in part 1 above, the EIR at issue in this case is of the latter variety, a PEIR.

Under CEQA, an EIR is presumed adequate (Pub. Resources Code, § 21167.3), and the plaintiff in a CEQA action has the burden of proving otherwise. (Preserve Wild Santee v. City of Santee, 210 Cal. App. 4th 260, 275 (2012), internal quotation marks omitted, quoting Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist. (1994) 24 Cal.App.4th 826, 836.) Courts review an agency's determinations and decisions for abuse of discretion. An agency abuses its discretion when it fails to proceed in a manner required by law or there is not substantial evidence to support its determination or decision. [§§ 21168, 21168.5; Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 426-427 (2007) ("Vineyard")]. "Judicial review of these two types of error differs significantly: While [courts] determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' [citation], [courts] accord greater deference to the agency's substantive factual conclusions." (Vineyard, supra, 40 Cal. 4th at 435.)

Consequently, in reviewing an EIR for CEQA compliance, courts adjust "scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (Vineyard, supra, 40 Cal.4th at 435.) For example, where a petitioner claims an agency failed to include required information in its environmental analysis, the court's task is to determine whether the agency failed to proceed in the manner prescribed by CEQA. Conversely, where a petitioner challenges an agency's conclusion that a project's adverse environmental effects are adequately mitigated, courts review the agency's conclusion for substantial evidence. (Vineyard, supra, 40 Cal. 4th at 435.)

D. Further Requirements of CEQA.

In addition to the foregoing public process/decision maker information steps, the Legislature in enacting CEQA also intended to "provide certain substantive measures for protection of the environment. [Citations.] In particular, one court noted [Public Resources Code] section 21002 requires public agencies 'to deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects.' [Citation.] (Quail Botanical Gardens Foundation, Inc. v. City of Encinitas (1994) 29 Cal.App.4th 1597, 1601-1602, citing No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75 and Laurel Heights Improvement Assn. v. Regents of University of California (1993) 6 Cal.4th 1112, 1123 . . .). The Legislature declared its intention in enacting CEQA "that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (Mountain Lion Foundation v. Fish & Game Com. (1997) 16 Cal.4th 105, 112.)

3. RFJN.

Sierra Club, with its reply briefing, filed a Request for Judicial Notice to which was attached a copy of the AG's letter acknowledging receipt of a copy of the petition in July of 2012 (shortly after it was filed). The court grants the request for judicial notice under Evid. Code section 452(c) and (g). This conclusively eliminates the County's third affirmative defense and the argument under Pub. Res. Code section 21167.7 contained on pp. 14-15 of the County's brief. In fact, this argument was meritless from the outset, as Sierra Club filed a proof of service on the AG last July (ROA 8). In other words, the County's

argument that "the case file contains no indication that [the AG notification requirement] was met" was demonstrably untrue when the County's answer was filed and when its brief was filed. County Counsel forthrightly acknowledged this at the April 19 hearing.

4. Discussion and Ruling.

Former Governor Schwarzenegger issued, in 2005, Executive Order S-03-05, which for the first time set a state goal of reducing greenhouse gas emissions. This Executive Order gave rise to the Global Warming Solutions Act of 2006 (AB 32), which is codified at H&S Code section 38500 et seq. Section 38550 provides:

"By January 1, 2008, the [Air Resources Board] shall, after one or more public workshops, with public notice, and an opportunity for all interested parties to comment, determine what the statewide greenhouse gas emissions level was in 1990, and approve in a public hearing, a statewide greenhouse gas emissions limit that is equivalent to that level, to be achieved by 2020. In order to ensure the most accurate determination feasible, the state board shall evaluate the best available scientific, technological, and economic information on greenhouse gas emissions to determine the 1990 level of greenhouse gas emissions."

In the 2011 PEIR for the GPU, the County concluded that the GHG and climate-change impacts from the County's own operations and from community sources were "potentially significant" both in relation to compliance with AB 32 and with regard to the updated general plan itself. AR 488 (end of first paragraph under "Summary"), 493 (end of "Summary" paragraph). Consequently, the County had to adopt a series of mitigation measures to render these impacts insignificant. AR 494-500. Among those mitigation measures was CC-1.2, which is the focus of Sierra Club's attack:

"Prepare a County Climate Change Action Plan with an update[d] baseline inventory of greenhouse gas emissions from all sources, more detailed greenhouse gas emissions reduction targets and deadlines; and a comprehensive and enforceable GHG emissions reduction measures that will achieve a 17% reduction in emissions from County operations from 2006 by 2020 and a 9% reduction in community emissions between 2006 and 2020. Once prepared, implementation of the plan will be monitored and progress reported on a regular basis." [AR 496]

The County undertook to prepare the CAP, in accordance with Mitigation Measure CC-1.2, within six months [AR 313-314]. The County did not do so; the CAP was not approved until nearly a year after the PEIR was certified.

The central questions in this case are whether the CAP was properly approved, and whether it meets the requirements of Mitigation Measure CC-1.2. Thus, the court rejects the County's first affirmative defense which is addressed on pp. 5-7 of the County's brief. These arguments are premised on the notion that because the GPU and PEIR were adopted in the summer of 2011, an action filed in July of 2012 cannot pass muster under the 180 day limitations period of Pub. Res. Code section 21167. But the court agrees with Sierra Club that the gravamen of its petition is not an attack on the PEIR, but rather an effort to enforce the PEIR's requirement of enforceable mitigation measures. The case law relied on by the County all arose in settings in which the mitigation measures themselves were challenged as inadequate, or the cases are otherwise inapplicable. This case was filed 30 days after the June 20, 2012 approval by the County of the CAP, and it is not time-barred.

Regarding the first central question identified above: the court finds the CAP should have been the subject of a supplemental EIR instead of an addendum to the PEIR that concluded the CAP is within the scope of the PEIR. (AR 16:1372, second sentence of last paragraph.) Thus, the CAP was not properly approved and violates CEQA.

There is no explanation and no substantial evidence to justify why the CAP was not subject to a supplemental EIR with public notice and opportunity for comment. There is no showing that the County properly considered whether the CAP is within the scope of the PEIR; a supplemental EIR would require the Board of Supervisors to confront this issue. Further, environmental review is necessary to ascertain whether the CAP met the necessary GHG emission reductions when considering the CAP is merely hortatory and contains no enforcement mechanism for reducing GHG emissions.

In this regard, the case has some similarities to *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156 (County of El Dorado). That case, like this one, involved a program EIR for a general plan. *Id.* at 1175. One of the mitigation measures called for implementation of a mitigation fee program. The county later did an initial study for the fee program, and stopped short of a more complete environmental review. The court of appeal held a tiered EIR was required to examine the specific mitigation measures and fee rate, rejecting the argument that the fee program was merely implementation of the general plan. Here, the CAP "provides the specific details associated with the ... General Plan ... strategies and measures for greenhouse gas (GHG) emissions and reductions that were not available during program-level analysis of the General Plan" (AR 16:1357), and as such, the CAP should have been the subject of a supplemental EIR [as opposed to an IS followed by addendum to the PEIR]. Thus, the CAP was not properly approved and violated CEQA.

Turning to the second central question identified above: the court finds that even if the CAP was properly approved, it does not comport with the requirements of Mitigation Measure CC-1.2; thus, the CAP violates CEQA. In this regard, there is no substantial evidence in the AR that the CAP satisfies Mitigation Measure CC-1.2; in fact, the evidence in the AR discloses the reverse is true.

For instance, the AR shows the CAP fails to meet Mitigation Measure CC-1.2 GHG emission reduction goals and targets. The CAP admits "The CAP itself does not itself ensure reductions ..." [AR 2:74]; the CAP regards its goals and strategies as mere recommendations [AR 2:27 - "The goals and strategies recommended in the CAP ..."]; and the CAP describes itself as a "living document," a "working document," and "a platform for the County to build strategies to meet its emission-reduction targets" [AR 2:15, 73.] As the court noted in its December 2012 decision, the County's adoption of the CAP occurs "in a setting in which hundreds of thousands of people in [the County] live in low-lying areas near the coast, and are thus susceptible to rising sea levels associated with global climate change." There is no time for "building strategies" or "living documents;" as the PEIR quite rightly found, enforceable mitigation measures are necessary now.

The AR shows the CAP contains no detailed deadlines for GHG emission reductions. This is borne out by the consultant who prepared the CAP for the County pointing out early on "[t]he Draft CAP neglects to describe how the County will monitor the effectiveness of the plan and its component measures over time" [AR 83:1947, last paragraph]; the County's admission "the CAP did not set such dates" [County's opposition memorandum, page 11:21-22]; and the word "deadline" appears but once in the CAP, in describing Mitigation Measure CC-1.2 [AR 2:76.]

Further, the AR shows the CAP contains no enforcement mechanism for reducing GHG emissions. The

CAP's goals and strategies are mere recommendations [AR 2:27 - "The goals and strategies recommended in the CAP..."]; there is no indication in the CAP how the measures described for community activities (Chapter 3) and the County's operations (Chapter 4) can or will be enforced [AR 2:26-57, 59-63]; the County contends five of the CAP's twenty-seven GHG reduction measures are required under state law and thus enforceable but fails to address the other twenty-two reduction measures [County's opposition memorandum, page 9:1-8; and Exhibit A to County's opposition memorandum]; and no evidence is related in the AR that supports the "belief" of the County staffer that GHG emissions reductions can be achieved through only education and incentives [AR 20:1581 and AR 23:1629 -"It is important to note that, as currently written, none of these measures are mandates. We believe that the emission reduction can be achieved through education and incentives."]

At the April 19 argument, County Counsel suggested that some of the absent benchmarks can be found in the Minutes of the Board reflecting its approval of the CAP. Having reviewed the minutes, the court agrees with Sierra Club that the minutes do not set forth enforceable standards or create any mandatory duty that could later be enforced if not carried out.

As such, the CAP, even if it was properly approved, does not comport with the requirements of Mitigation Measure CC-1.2, and thus violates CEQA.

In view of the foregoing, the court finds it unnecessary to address the subsidiary dispute over whether the guidelines for determining thresholds of significance for GHG were adopted or not. Compare *Natter v. Palm Desert Rent Review Comm'n.*, 190 Cal. App. 3d 994, 1001 (1987); *Young v. Three for One Oil Royalties*, 1 Cal. 2d 639, 647-648 (1934).

Let a writ of mandate issue forthwith, directing respondent the County of San Diego to set aside its June 20, 2012 approval of the CAP. Counsel for petitioners is directed to forthwith submit same to the court for signature.

IT IS SO ORDERED.



Judge Timothy Taylor