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ENVIRONMENTAL JUSTICE

Environmental justice advocates have used laws such as the National Environmental Policy Act and the California Environmental Quality Act as vehicles to compel policymakers to incorporate their concerns for low income and disadvantaged communities into agency decisions in a more concrete way. In a case involving the controversial subject of climate change, they have gained the support of California Attorney General Kamala Harris, who has raised the stakes in this battle by intervening in a recent lawsuit challenging a ''sustainable communities strategy'' adopted by the San Diego Association of Governments. The authors of this article contend that if her efforts are successful, it would mark a radical expansion in the role played by CEQA—moving from environmental protection to social justice. It could also set a precedent for similar actions nationwide, the authors say.

Environmental Justice as Environmental Impact: The Intersection of Environmental Justice, Climate Change, and the California Environmental Quality Act

By Peter Hsiao, David Gold, Miles Imwalle, and Jennifer Jeffers

I. Introduction

Environmental justice (EJ)[1] has long been an area of significant policy interest in California. More recently, new social, demographic, and economic considerations, including new challenges associated with climate change, have become increasingly integrated with traditional ''environmental'' concerns. However, there have historically been few legal tools available to aggressively promote EJ principals, particularly with respect to the development and siting of major new projects. EJ advocates have recently attempted to change that, not by pursuing new legislation, but rather by presenting new and creative arguments based on ex-

[1] Environmental justice is defined in various ways, but the Environmental Protection Agency defines the term as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.''

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isting language in the California Environmental Quality Act (CEQA).[2] While it is commonplace for environmental advocacy organizations to push the law in new and novel directions, this latest effort is distinctive in being aggressively promoted by the California Attorney General Kamala Harris. If her efforts are successful, it would mark a radical expansion in the role played by CEQA from environmental protection to social justice.

Thus, these new developments in CEQA may provide important new precedent for nationwide actions. As compared to its federal counterpart, the National Environmental Policy Act, CEQA not only requires the analysis of environmental impacts, but also mandates that significant impacts be mitigated, if feasible. Agencies must comply with CEQA for any ''project'' that may cause direct or reasonably foreseeable indirect physical changes in the environment. Agencies must, at a minimum, complete an initial review of environmental effects, and may need to prepare a more substantial formal environmental impact report (EIR). Where a project has a significant impact, the lead agency may only approve the project after requiring mitigation, unless there are no feasible alternatives or mitigation measures that can substantially lessen the significant environmental effects.

A long-held maxim under CEQA is that it is only concerned with physical impacts on the environment, meaning that social and economic impacts are beyond its reach. As a result, EJ principles have historically not been included in CEQA documents. Until recently, the closest EJ considerations have come to entering the CEQA realm has been through a series of cases holding that adverse economic impacts could be accounted for, but only to the extent that the economic impacts in turn cause an impact on the environment, such as through blight.[3] Some advocates, including the California attorney general, are promoting interpretations of CEQA that would require EJ impacts to be more explicitly addressed, despite many years of courts limiting the analysis of economic and social impacts under CEQA. As recent cases make clear, distinguishing between an environmental impact and economic and social impacts can be a challenge. After all, under CEQA, impacts to the environment are not limited to the natural environment, but also include ''substantial adverse effects on human beings, either directly or indirectly.''[4]

Although CEQA does not mention EJ and no court has ever held that disparate impacts must be addressed under the statute, the attorney general has taken an aggressive position that EJ impacts must be addressed under CEQA. This is a divergence from CEQA's past and sets a new tone for the scope of CEQA considerations. Raising the profile of the issue, the recent California legal challenge is arising in the context of a regional effort to address statewide climate change mandates.

[2] Cal. Pub. Res. Code § 21000 *et seq.*

[3] *See, e.g., Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal.App. 4th 1184 (2004).

[4] CEQA Guidelines § 15065(d).

II. Environmental Justice and CEQA

Recent developments in California legislation and case law illustrate how EJ concepts have found their way into practical applications. Three court decisions in 2011 provide different examples of EJ principles being inserted into the broader environmental analysis.

A. Greenhouse Gas and Environmental Justice Issues Collide in *Cleveland National Forest Foundation v. San Diego Association of Governments.*

California agencies often struggle with incorporating EJ concerns in a structured, systematic way in the important task of planning urban development and transportation initiatives. However, on Jan. 25, 2012, the California attorney general filed a motion to intervene in a lawsuit challenging the San Diego region's ''sustainable communities strategy,'' or SCS, the first such strategy adopted in the state. By seeking to intervene in *Cleveland National Forest Foundation v. San Diego Ass'n of Governments*,[5] the attorney general sent a message that her office is not only closely scrutinizing the SCS process mandated by Senate Bill 375 (SB 375), but also that her office takes an aggressive—if not unprecedented—position that CEQA requires environmental review documents to analyze environmental-justice-related impacts.

California enacted SB 375 in 2008 to address and control greenhouse gas emissions. The law requires the state's metropolitan planning agencies to prepare a ''sustainable communities strategy,'' now commonly referred to as an SCS, as part of their regional land use and transportation plans. The development of an SCS is intended to connect land use, transportation, and housing decisions in order to meet SB 375's mandate to reduce per-capita GHG emissions by 2020, and even further by 2035. The San Diego Association of Governments (SANDAG) was the first region to adopt an SCS as part of a larger regional transportation plan.

SANDAG adopted its SCS in October 2011 after subjecting it to a lengthy public review process and preparing an EIR pursuant to CEQA. On Nov. 28, 2011, four environmental and environmental justice groups filed lawsuits challenging the San Diego strategy under CEQA.[6] The environmental petitioners challenged the adequacy of the EIR, in part on environmental justice

[5] *See* http://transitsandiego.files.wordpress.com/2011/12/cnff-v-sandag.pdf. *See also* 16 WCCR, 1/25/12.

[6] Two of the petitioners, Cleveland National Forest Foundation and Center for Biological Diversity, filed the instant suit, *Cleveland National Forest Foundation v. San Diego Ass'n of Governments*, in which the attorney general seeks intervention. Two other groups, the Counsel for CREED-21 and Affordable Housing Coalition of San Diego County, filed a related complaint on the same day. The lawsuits challenge the adequacy of the EIR that was developed for San Diego's SCS and the 2050 Regional Transportation Plan, which provides a blueprint for the San Diego region's transportation network over the next 40 years.

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grounds, asserting that it should have accounted for the public health impacts to communities already overburdened with pollution. Specifically, petitioners alleged that SANDAG ignored possible environmental impacts that would occur after 2035 as a result of widened freeways, additional urban sprawl, and increased overall emissions.

The attorney general first became involved in September 2011 by sending a comment letter on the draft EIR.[7] That letter suggested that the draft was faulty for failing to study the impact of increases in pollution on overburdened communities. Specifically, the attorney general alleged that SANDAG ''failed to analyze . . . significant effects of the [SCS] on communities currently experiencing environmental *in*justice'' (emphasis in original). The attorney general faulted the EIR for failing to identify ''whether the area affected by the [SCS] includes particularly sensitive communities that will be affected disproportionately by the acknowledged increase in pollution.'' In addition, the attorney general strongly criticized the SCS for insufficiently focusing on transit solutions and for allowing an increase in per-capita vehicle miles traveled, and hence GHG emissions, after 2020.

In her motion to intervene, the attorney general reasserts her position not only that the SCS is inadequate, but also that CEQA requires a thorough consideration of environmental justice impacts.[8] The attorney general's petition focuses on project impacts to air quality and GHG emissions and cites three reasons for the state's CEQA challenge, including the SCS's: (1) adverse effects on public transit and air quality due to its emphasis on highway expansion and extension; (2) adverse environmental effects on ''communities that already are overburdened by pollution;'' and (3) failure to reduce GHG levels to a sustainable level in the long term. The attorney general highlights the fact that the San Diego region suffers from serious air pollution, much of it due to traffic emissions, and that the final EIR inadequately determines ''how the health of the most vulnerable people in the region will be affected'' by the SCS's freeway and highway projects.

Although the CEQA statute and case law have never required that environmental justice be addressed, and very few environmental review documents ever reach that subject in practice, the attorney general presents novel arguments that existing law requires a discussion of EJ impacts and that SANDAG's EIR is legally deficient as a result. Attorney General Harris's decision to intervene in this litigation is similar to the action by former Attorney General Jerry Brown to file a lawsuit against San Bernardino County in 2007, which put lead agencies across the state on notice that GHG emissions must be analyzed under CEQA. That lawsuit almost instantaneously changed the conduct of CEQA review, at least with respect to GHG emissions, Similarly, by raising EJ claims in the SANDAG case, the Attorney General is effectively putting lead agencies across the state on notice that a failure to address EJ considerations in the implementation of climate change policies will risk challenges to the legal sufficiency of their environmental impact documents. In all probability, the result will be the incorporation of far more extensive analysis and potential mitigation of impacts in low income and minority communities based upon EJ principles.

B. Environmental Justice Concerns Applied to CEQA Review of Impacts from Environmental Protection Statutes: *Association of Irritated Residents v. California Air Resources Board*

One of the most important recent state climate change cases was brought by citizen groups to enjoin California's efforts to control GHG emissions, largely through implementation of a cap-and-trade program. To fully understand the EJ aspects of this case, some additional background about the statute's objectives and programs is helpful.

1. Global Warming Solutions Act of 2006 (AB 32)

In 2006, the California Legislature passed the landmark Global Warming Solutions Act of 2006 (AB 32) directing the California Air Resources Board (CARB) to prepare a scoping plan to identify how best to achieve its GHG emission reductions to 1990 levels by 2020. The cap-and-trade aspect of the program, intended as a flexible, market-based mechanism to reduce GHG emissions, is a controversial method to achieve this goal. The program sets a fixed limit on GHG emissions from major sources (the ''cap'') and reduces those emissions by gradually lowering the aggregate cap each year. Regulated businesses are issued allowances at the start of the program, and may purchase and sell those allowances, as well as offset credits, at auction or in private transactions (the ''trade''). Often, offset credits are generated by projects far outside the region or state and even internationally.

While economists have long promoted cap-and-trade as the most efficient way to reduce greenhouse gas emissions, EJ organizations have sometimes criticized the approach for allowing polluters the right to continue to pollute, provided that they just pay another entity to reduce emissions, which often occurs across the globe. Such critics argue that cap-and-trade will allow existing disparate impacts to continue, or even worsen.

2. *AIR v. CARB Lawsuit*

EJ organizations, community groups, and individuals opposed to CARB's cap-and-trade program filed a complaint in 2009, placing the immediate future of AB 32's mandate in jeopardy.[9] The Association of Irritated Residents (AIR) and other petitioners challenged CARB's implementation of AB 32, on the grounds that the board failed to meet the mandatory statutory requirements of AB 32 and CEQA by treating the scoping plan as a *post hoc* rationalization for CARB's pre-selected policy approaches.

The suit alleged that CARB violated the legislation in three instances, notably, by:

- excluding entire economic sectors from GHG controls and furthering a cap-and-trade program without confirming that potential reduction measures achieved maximum technologically feasible and cost-effective reductions;

[7] *See* http://oag.ca.gov/sites/all/files/pdfs/environment/comments_sandag_rtplan_deir.pdf

[8] *See* http://ag.ca.gov/cms_attachments/press/pdfs/n2614_2012-01-23_ex_parte_application_to_intervene.pdf.

[9] *Ass'n of Irritated Residents v. California Air Resources Board*, S.F. Superior Court No. CPF-09-509562. *See also* 110 WCCR, 6/11/09.

- failing to sufficiently consider the total costs and benefits to the economy, environment, and public health before adopting the scoping plan; and
- failing to meet AB 32's mandate that CARB account for information regarding GHG emission reduction programs on both a national and global level before recommending cap-and-trade regulatory measures.

Petitioners' CEQA challenge focused on CARB's Functional Equivalent Document (FED), which CARB must prepare pursuant to its certified regulatory program. The FED is a simplified version of an EIR that addresses the potential environmental impacts of a regulatory action. Petitioners alleged that CARB violated CEQA and its own certified regulatory program when preparing and certifying the FED by failing to adequately analyze the impacts of measures proposed in, and potential alternatives to, the scoping plan, and improperly approving and implementing the plan before completing environmental review.

The plaintiffs in the *AIR v. CARB* action were environmental organizations whose primary focus is on local EJ issues, rather than larger climate change matters. Interestingly, while the plaintiffs were motivated by EJ concerns, they did not claim that the FED violated CEQA for a failure to address EJ impacts. Instead, they made more traditional CEQA claims—that the FED lacked an adequate alternatives analysis—to achieve their EJ goals.

3. Court Enjoins the State's Cap-and-Trade Program

On March 18, 2011, the California Superior Court sided with petitioners and held that CARB failed to meet the procedural requirements of CEQA in adopting its cap-and-trade regulations. In particular, the court held that CARB violated CEQA because CARB (1) failed to adequately describe and analyze alternatives to a cap-and-trade market and (2) approved its scoping plan prior to completing its environmental review process. The court held in favor of CARB on all substantive challenges to promulgating its regulations in compliance with AB 32. The immediate effect of the court's decision placed cap-and-trade rulemaking on hold until such time as CARB complied with CEQA.

4. Current Status and Next Steps

On Aug. 24, 2011, CARB approved a supplement to its FED with an expanded alternatives analysis to respond to the lawsuit's assertions. Additionally, as part of its rulemaking on cap-and-trade, CARB adopted a program-specific FED, as well as an Adaptive Management Plan that addresses localized air quality impacts. The plan establishes a framework for CARB to determine whether unanticipated environmental impacts have occurred relating to implementation of cap-and-trade, and to respond accordingly. Thus, while petitioners may not have framed their allegations in the lawsuit in terms of EJ principles, this Adaptive Management Plan that resulted from the litigation is aimed at least in part at addressing EJ concerns.

On Oct. 20, 2011, California made history by adopting the nation's first statewide, comprehensive cap-and-trade program aimed at reducing GHG emissions. As the cornerstone of California's ambitious effort to implement AB 32, the cap-and-trade program was unanimously approved by CARB. Several CARB board members have acknowledged that the agency is stepping into uncharted territory, and commentators have noted the potential for unintended economic or environmental consequences. In recognition of this fact, CARB directed staff to closely monitor the effects of the regulations and report back frequently.

Agency officials claim that the success of AB 32 is critical to future national climate change efforts and will attract new ''green'' businesses to California. Those siding with EJ plaintiffs, on the other hand, prefer a tax on carbon emissions and remain concerned that cap-and-trade regulations may inadvertently produce increased air pollution in the least wealthy parts of the state. The *AIR v. CARB* litigation is still ongoing, with plaintiffs asserting that they may pursue additional claims relating to the cap-and-trade program. With the Attorney General's positions in the *Cleveland National Forest* case, it will be interesting to see whether plaintiffs more aggressively assert EJ claims in the actual litigation.

C. Environmental Justice and Analyzing the Impacts of the Environment on a Project: *Ballona Wetlands Trust v. City of Los Angeles*

One recurring problem for EJ advocates is the legal doctrine of ''coming to the nuisance.'' Often, a facility that causes environmental impacts is initially permitted and developed in a rural area adjacent to a more populated community. Over time, as the effects of urban sprawl occur, a surrounding community that subsequently grows around the perimeter of the facility will often find limited opportunities to challenge discharges and operational impacts due to the facility's existing vested permits and rights to operate.

In an illustrative and analogous case, *Ballona Wetlands Trust v. City of Los Angeles*,[10] a California court examined the duty under CEQA to analyze the impacts of the surrounding environment on the project, as compared to the project's impact on the environment. Although it is not an EJ-specific case *per se*, it has important implications for the EJ movement generally since, unlike the preceding cases, *Ballona* may serve to undermine efforts to incorporate EJ principles into the CEQA process.

1. An EIR Need Not Analyze Effects of Environment on a Project

On Dec. 2, 2011, the California Court of Appeal expressly held in *Ballona Wetlands* that an EIR need not identify or analyze potential effects on a project caused by locating a project in a particular environmental setting. Petitioners argued that an EIR prepared for a mixed-use development project approved by the City of Los Angeles did not adequately analyze the potential effects of rising sea level (such as flooding and inundation). Extending the line of reasoning initiated in *Baird v County of Contra Costa*[11] and continued in *City of Long Beach v. Los Angeles Unified School District*[12] and *South Orange County Wastewater Authority v. City of Dana Point*,[13] the *Ballona* court reiterated that an ''EIR is to identify the significant effects of a project on the environment, not the significant effects of the environment on the project.''

[10] 2011 Cal. App. LEXIS 1522.
[11] 32 Cal. App. 4th 1464 (1995).
[12] 176 Cal. App. 4th 889 (2009).
[13] 196 Cal. App. 4th 1604 (2011).

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The court also took its decision one step further and held that Section 15162.2(a) of the CEQA Guidelines is invalid to the extent that it requires a lead agency to analyze effects of the environment on a project, rather than vice versa. The court also noted that Appendix G of the CEQA Guidelines, which is used by many lead agencies to prepare initial studies and which recommends evaluation of potential effects on users of a project that may be caused by preexisting environmental conditions, ''cannot support an argument that the effects of the environment on the project must be analyzed in an EIR.''

2. Implications for Environmental Justice Challenges Under CEQA

The *Ballona* decision suggests that lead agencies may not be required to evaluate, among other things, the possible effects on a project or users of a project from locating a project near pre-existing, potentially risky environmental conditions—risks that have, in recent years, commonly been evaluated in EIRs and are recommended areas of evaluation in the CEQA Guidelines and appendices. Such risks include locating projects in areas on or near existing earthquake fault lines, areas subject to flooding or inundation from rising sea levels, or areas of high wildfire risk. Importantly for EJ proponents, this ruling also suggests that courts will strike down future CEQA challenges based on a claim that agencies must evaluate the potential effects on users due to a project's location near freeways or industrial activities that are sources of hazardous air emissions or odors.

III. Conclusion

As evidenced by the California legislation and these cases, the EJ movement has made significant gains in advancing environmental impact analysis as a supporting vehicle to reach their objectives. EJ advocates recently gained a significant and high-profile boost from the attorney general's office in these efforts. EJ supporters maintain that CEQA provides a logical framework within which to promote EJ principles, as they explore other tools by which to advance their cause. As social, demographic, and economic considerations continue to become more integrated with traditional ''environmental'' concerns and climate change mandates, there should be little doubt that this field of law is one that will continue to burgeon and influence future case law decisions.

About the Authors:

Peter Hsiao and David Gold are partners and Miles Imwalle and Jennifer Jeffers are associates in the West Coast offices of Morrison & Foerster LLP. All authors are members of the firm's Cleantech and Environment and Energy Groups.

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