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Editor's Note...

by Scott B. Birkey

This issue is dedicated to the memory of Professor Joseph L. Sax. Professor Sax was a pioneer in environmental law, as well as a good colleague, mentor, and friend to many of us in the environmental law community. Our first article in this issue is a tribute to Professor Sax, delivered by Tony Rossmann at the State Bar Environmental Law Section's Yosemite Environmental Law Conference in 2014, just a few months after Joe passed away. The next article is written by Professor Holly Doremus at the University of California, Berkeley School of Law (Boalt Hall), where Professor Sax taught for many years, and features Professor Sax' takings scholarship. Given Professor Sax' interest in water law, it seems very appropriate that the next three articles pertain to water law issues: first, a look at recent decisions regarding the State Water Resources Control Board's administrative jurisdiction to prevent illegal or unreasonable water diversion and use; second, a commentary on whether better information may help resolve conflicts over water in the Delta; and finally, an analysis of some implications of the recently enacted Sustainable Groundwater Management Act. These water articles are followed by an article on AB 32's "pollution markets" and a discussion on whether such an approach is a step backward for reducing the effects of climate change. Next up is an article that looks at the standard of review under CEQA when a project changes. We close out this issue with an article on the Desert Renewable Energy Conservation Plan, and whether that ambitious effort is doomed to collapse under its own weight. This cross-section of substantive topics certainly would have appealed to Joe, and it is in that spirit that we dedicate this issue to his memory.

Table of Contents

A Tribute to Joseph L. Sax 3
by Antonio Rossmann

In Honor of Joe Sax:
Appreciating His Takings Scholarship 5
by Holly Doremus

Appellate Confirmation of State Water Board Administrative Jurisdiction to Prevent Illegal or Unreasonable Water Diversion and Use: *Young*, *Millview*, and *Light* 12
by Rebecca R. Akroyd and Andrew J. Ramos

Data Drought: Could Better Information Help Resolve Longstanding Conflicts Over Delta Water? 19
by Colleen Flannery

Regulating Groundwater in California:
Will the Landscape Change with GSA Formation? 29
by Wesley A. Miliband

AB 32's Pollution Markets: A Technology-Drive Solution or A Step Backward for Climate Change? 38
by Suma Peesapati

While the Project May Change, the Standard of Review Should Remain the Same 43
by Linda C. Klein

The Desert Renewable Energy Conservation Plan:
An Impossible Task? 53
by Arielle Harris and David Cameron

While the Project may Change, the Standard of Review should Remain the Same

by Linda C. Klein[1]

INTRODUCTION

The California Environmental Quality Act (CEQA) encourages agencies to "tier" environmental analysis when possible, which means to rely on previously prepared environmental documents when those documents studied a project that is the same as or encompasses the subsequently proposed project. This approach is logical. If the agency has already considered the environmental impacts of its decision, there is no need for the agency to repeat the same studies. Repeating studies of environmental impacts that have already been adequately reviewed serves no purpose and wastes valuable resources. CEQA's purpose is not to generate paper, but rather to compel government to make decisions with environmental consequences in mind.[2]

But what if the subsequent project is not the same as the original project? The agency must carefully determine whether the existing environmental review fully covered that subsequent project. The agency's decision not to prepare a new environmental impact report (EIR) because the existing environmental review covers the potential impacts of the subsequent project is, of course, subject to legal challenge. This article explores the standard of review that applies when such challenges occur.

Through a series of cases, the California Court of Appeal has confirmed that an agency's determination that a later project is "within the scope" of a project already considered in a programmatic EIR is reviewed under the traditional, deferential substantial evidence standard. Now the California Supreme Court is poised to decide whether the same standard of review applies to an agency's decision that a changed project is within the scope of a project previously considered in a mitigated negative declaration (MND).[3] For the reasons discussed in this article, the same standard should apply.

A SHORT REVIEW OF CEQA'S STANDARDS OF REVIEW AND WHEN THEY APPLY

When a local agency considers the environmental effects of a proposed project in the first instance, the agency undertakes a three-step inquiry.[4] First, the agency determines whether the project is exempt from CEQA.[5] "If the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary."[6] Second, if the project is not exempt and the agency determines the project will not have a significant effect on the environment, either as designed or with mitigation, it can prepare a negative declaration[7] or MND.[8] Third, if the agency determines the project "may have a significant effect on the environment," the agency must prepare and certify an EIR.[9]

Linda Klein

Courts apply one of two standards when considering whether an agency properly determined a project's potential environmental impacts have been adequately analyzed, and if found significant, mitigated to less than significant: the "fair argument" standard and the "substantial evidence" standard. If the agency determined an EIR was not required and approved the project based on a negative declaration or MND, that decision is reviewed under the fair argument standard.[10] The fair argument standard "is derived from [Public Resources Code] section 21151," which "mandates preparation of an EIR in the first instance 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.'"[11] Under this standard, if there is substantial evidence of a significant impact, "contrary evidence is not adequate to support a decision to dispense with an EIR."[12] For example, under the fair argument standard, "if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR."[13] This standard reflects CEQA's "low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted."[14]

"The test is markedly different, however, if a project is evaluated after an initial environmental review has occurred."[15] Once review has occurred, courts review a challenge to an agency's decision not to prepare additional environmental review under the deferential substantial evidence standard.[16] Under this standard, an agency's decision is upheld as long as it is supported by substantial evidence, even if other substantial evidence in the record contradicts the agency's conclusion.[17] This standard reflects Public Resources Code section 21166, which prohibits agencies from requiring a subsequent or supplemental EIR unless there would be

new, significant environmental impacts.[18] Under Public Resources Code section 21166, once an EIR has been prepared for a project, no additional EIR is required unless one of the following occurs: "(a) substantial changes are proposed in the project which will require major revisions of the environmental impact report"; "(b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report"; or "(c) new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."[19] Public Resources Code section 21166 indicates an intent "to restrict the powers of agencies 'by prohibiting them from requiring a subsequent or supplemental environmental impact report' unless the stated conditions are met."[20]

The standard of review applied to agency decisions regarding tiered environmental review involves both the fair argument and substantial evidence standards. The tiering provisions in Public Resources Code section 21094 apply when a later project appears related to a program, plan, policy, or ordinance for which an EIR has already been prepared.[21] Under those circumstances, an agency first must determine whether the events listed in Public Resources Code section 21166 have occurred.[22] That decision, if challenged, is reviewed under the substantial evidence standard.[23] If an event listed in section 21166 has occurred, then under section 21094(a) the agency must prepare additional environmental review for environmental impacts that would not be mitigated or avoided as a result of the prior EIR or were not examined at a sufficient level of detail in the prior EIR to enable the agency to devise a way to avoid those environmental impacts.[24] The lead agency determines whether the later project "may cause significant effects on the environment that were not examined in the prior [EIR]" by completing an initial study. The similarities between the "may cause significant effects" language in Public Resources Code section 21094(c) and the "may have a significant effect" language in Public Resources Code section 21151 have led courts to conclude that an agency's decision not to prepare a tiered EIR when Public Resources Code section 21094(a) applies (i.e., the later project may have significant impacts not considered in the previously prepared EIR) is reviewed under the fair argument standard.[25]

SAME OR DIFFERENT? A SIMPLE QUESTION WITH A COMPLICATED ANSWER

When an agency receives an application seemingly related to a project for which it previously conducted environmental review, it must decide whether the later project requires additional environmental review because it has new or more significant impacts than already disclosed.[26] This is the "within the scope" inquiry that arises when an agency reviews a later project after a programmatic EIR has been prepared[27] or when an agency is determining whether to prepare an addendum to existing environmental review rather than new review.[28] In each case, the determination turns on whether the events listed in CEQA Guidelines section 15162, which clarifies Public Resources Code section 21166, have occurred.[29]

The answer to the "within the scope" question is significant, particularly if the agency decides not to prepare an EIR for the later "project," because different standards of review apply depending on the answer if the decision is challenged. As discussed in more detail below, if the agency correctly concludes the later project is within the scope of a project that already has undergone environmental review, then the decision not to prepare additional environmental review will be reviewed for substantial evidence. But if the agency is mistaken, then, because no prior environmental review has been prepared, the fair argument standard would apply. And when an agency decides to proceed without further environmental review, the agency's determination of the relationship between the two projects is often contested.

The above issue has arisen where the initial project was a plan or program, reviewed in a programmatic EIR, and the later project is found to be part of the plan or program.[30] But the cases most associated with this issue, *Save Our Neighborhood v. Lishman*[31] and *Mani Brothers Real Estate Group v. City of Los Angeles* ("*Mani Brothers*"),[32] arose when the project applicant made changes to a project that had undergone project-level environmental review and the lead agencies choose to prepare addenda. These cases are important because they highlight the controversy over how a court should review an agency's determination that a later project is the same as or within the scope of an earlier project.

Save Our Neighborhood held that the "threshold question [of] whether we are dealing with a change to a particular project or a new project altogether"[33] "is a question of law for the court."[34] Reviewing a question of law involves "a certain degree of independent review of the record, rather than the typical substantial evidence standard which usually results in great deference being given to the factual determinations of an agency."[35] A court exercises a similar degree of independent review under the fair argument standard.[36] The practical effect of *Save Our Neighborhood*'s "new project" test is that an agency's decision that a later project is not new, but instead adequately covered by existing environmental review, could be overturned if a petitioner presents substantial evidence of a fair argument supporting the opposite conclusion.

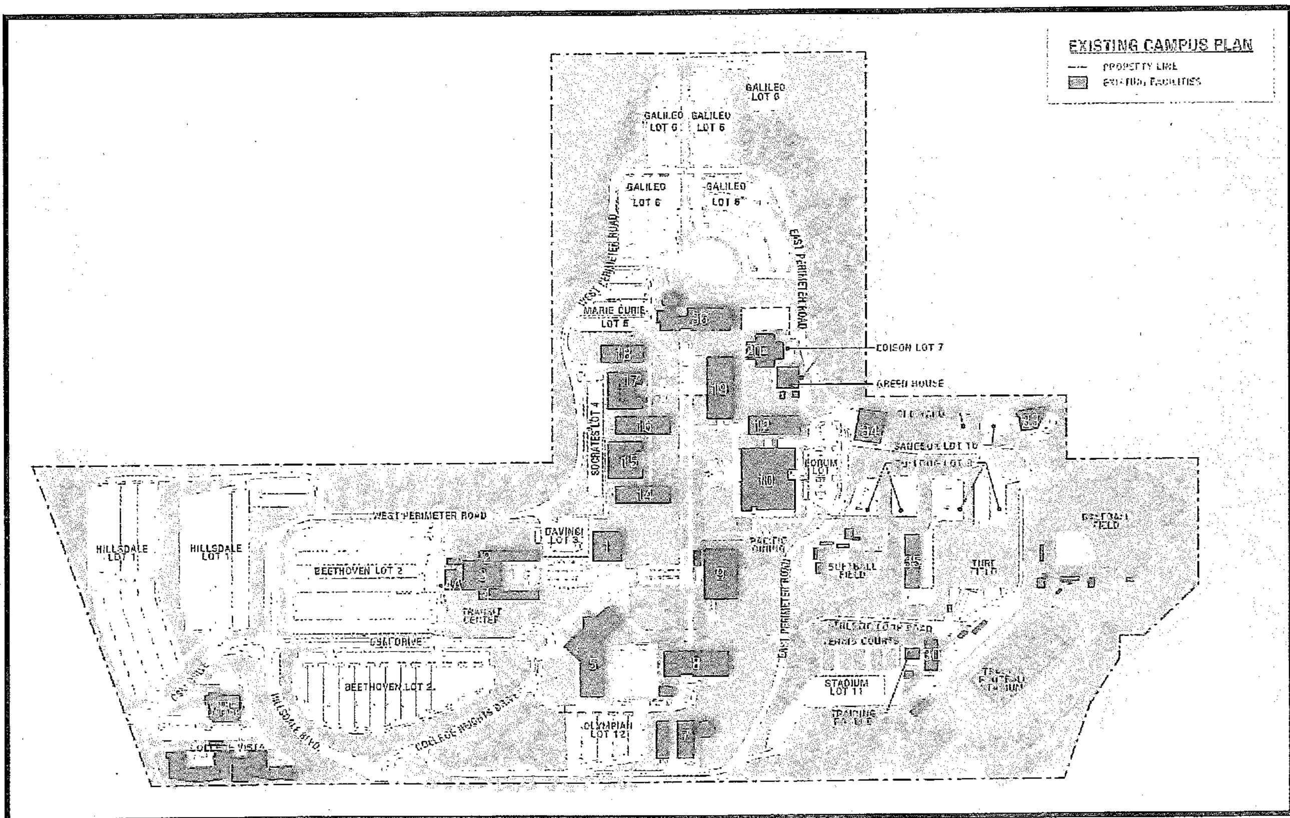
Mani Brothers strongly criticized the "new project test" created by *Save Our Neighborhood,* observing, "[d]rastic changes to a project might be viewed by some as transforming the project to a *new* project, while others may characterize the same drastic changes in a project as resulting in a dramatically modified project. Such labeling entails no specific guidelines and simply is not helpful."[37] According to *Mani Brothers,* the "question of law" approach would inappropriately permit courts to decide the appropriate level of environmental review for a modified project without considering the environmental impacts of the modifications.[38] *Mani Brothers* found that the determination of whether a later project is "new" involves factual questions under Public Resources Code section 21166 about whether the later project would have new or greater environmental impacts than those already disclosed.[39] The court concluded that it should therefore apply the substantial evidence standard of review.[40] *Mani Brothers* has been followed by several other courts, including *Latinos Unidos v. City of Napa,*[41] and appears to be the preferred approach.[42]

The question left unresolved by the conflicting holdings in *Save or Neighbors* and *Mani Brothers* will be resolved soon by the California Supreme Court's decision in *Friends of San Mateo Gardens v. San Mateo County Community College District.*[43] There, the San Mateo County Community College District (the "District") prepared an MND and approved certain upgrades to its campus. The District subsequently modified the original project, deciding to rehabilitate rather than demolish two buildings (Buildings 15 and 17) and demolish rather than restore one other building (Building 20). To determine what type of environmental review to prepare for this "later" project, the District examined whether the changes would have new or more severe impacts than those disclosed in the MND. After concluding that the evidence showed the changes would not cause new, significant environmental impacts, the District prepared an addendum.

The District's decision was challenged, and after losing in the Court of Appeal, the District obtained California Supreme Court review of the following question:

> When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the

San Mateo Community College Campus Plan, showing the existing facilities



project constitutes a "new project altogether," as a matter of law (*Save [O]ur Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?[44]

One difference between *Save Our Neighborhood* and *Mani Brothers* that may influence the California Supreme Court's decision is that *Save Our Neighborhood* concerns an addendum to an MND whereas *Mani Brothers* concerns an addendum to an EIR. The Court could rely on this distinction to require a different standard in situations involving MNDs.[45] But other MND cases that address the issue have followed *Mani Brothers*.[46] These cases note that although section 21166 addresses only EIRs, CEQA Guidelines section 15162 applies "to project changes following an agency's adoption of a negative declaration or a mitigated negative declaration as well as an EIR."[47] According to these cases, the same rule applies to MNDs as EIRs: if a later project is within the scope of the earlier project (whether analyzed in an MND or EIR), no further environmental review is required.

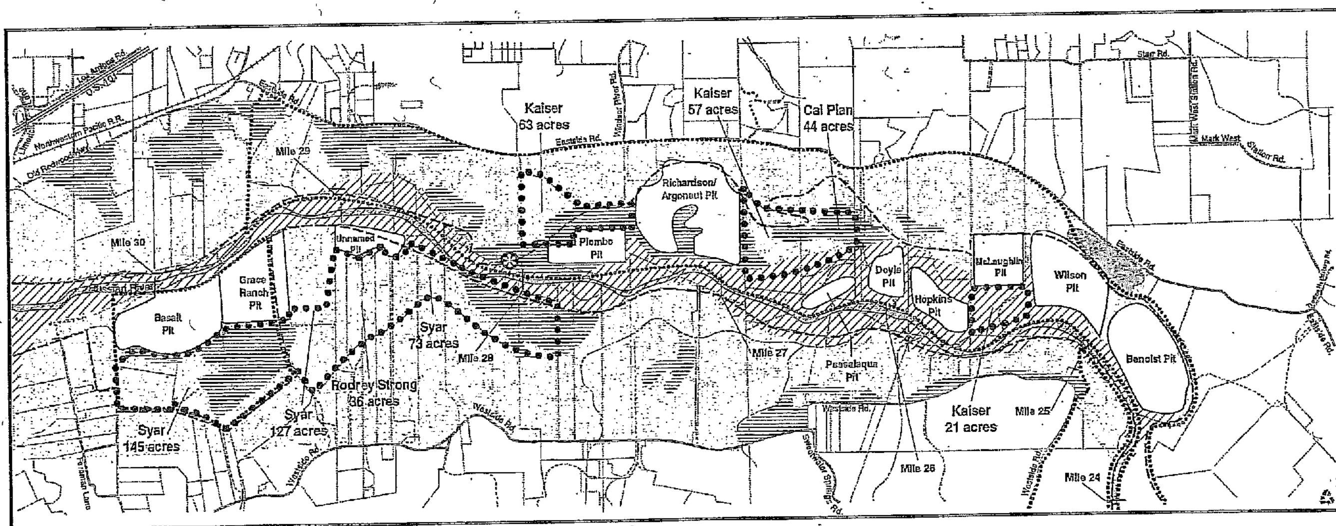
When making its decision, the California Supreme Court should consider the appellate opinions from the past three years that analyze the appropriate standard of review to apply to an analogous question: whether a project contemplated by a plan or program analyzed in a programmatic EIR is within the scope of that plan or program, or instead requires supplemental environmental review. Although the issue is analogous to that considered by *Save Our Neighbors* and *Mani Brothers,* those cases have not been the focus of the programmatic EIR cases. Instead, those lawsuits generally have arisen based on a petitioner's claim that *Sierra Club v. County of Sonoma* holds a court should review an agency's decision whether to prepare additional environmental review after preparing a programmatic EIR under the fair argument standard. As shown by examining *Sierra Club* and tracing the cases that interpret that decision, courts considering the standard applicable to an agency's decision that a later project is the same as or within the scope of the earlier project reviewed in a programmatic EIR have uniformly held the substantial evidence standard applies. The reasoning supporting that conclusion should be persuasive to the California Supreme Court in *San Mateo Gardens.*

SIERRA CLUB V. COUNTY OF SONOMA CAUSES CONFUSION

Sierra Club is one of the earliest cases examining a claim that a later project was not within the scope of a project that had already been analyzed in a programmatic EIR, but was instead a new project. Because *Sierra Club* found that the later project was "new" and not "within the scope" of the plan that had been analyzed in the programmatic EIR, it concluded the decision of the County of Sonoma ("Sonoma") to forego environmental review of the later, new project is reviewed under the fair argument standard.[48] This conclusion comports with CEQA's preference for preparation of an EIR in the first instance.[49] But *Sierra Club* is written in a way that causes some readers to mistakenly believe the court held that Sonoma's decision about whether the later project was within the scope of the earlier project also should be reviewed under the fair argument standard.

Sierra Club concerned a 1981 programmatic EIR that analyzed the environmental impacts of an aggregate resources management plan (the "Mining Plan"). The Mining Plan designated areas as either "'Managed Resource: Mineral,' a category which included 'all mineral resource deposits in Sonoma County necessary for

Diagram from Sonoma County's 2010 Aggregate Resources Management Plan. Syar Industries' mine (labeled on the diagram) is the mine at issue in *Sierra Club v. County of Sonoma*.



a future supply of aggregate materials'" or "Managed Resource: Agriculture," which "included all lands overlying mineral resource deposits within the Study area which are proposed for preservation for their value as both an agricultural resource and as groundwater recharge."[50]

Approximately eight years later, Syar Industries ("Syar") proposed an amendment to the Mining Plan that would change an area along the Russian River designated as "Managed Resource: Agriculture" to "Managed Resource: Mineral," so that the area could be mined.[51] The amendment also would have allowed terrace pits to be refilled with processing sediments and other earth materials rather than by diversion of river-borne sediments from the Russian River.[52] Even though Sonoma received conflicting evidence on the environmental effect of the change in the method of reclamation,[53] Sonoma concluded all of the environmental impacts that might result from the amendment had already been considered in the 1981 programmatic EIR, and adopted a negative declaration and approved the amendment.[54]

The Sierra Club challenged Sonoma's finding that no additional environmental review was necessary for the amendment, arguing that it constituted a new project with new environmental impacts.[55] The trial court agreed, finding "substantial evidence in the record supporting a fair argument" that the new project may have significant environmental effects, and thus required an EIR.[56]

On appeal, Syar claimed the trial court erred by applying the "fair argument" standard to assess whether the project was new.[57] The appellate court realized the project applicant's claim raised two distinct standard-of-review questions: (1) the standard when reviewing an agency's decision that a later project is within the scope of a project analyzed in a previously prepared programmatic EIR, and (2) the standard when reviewing an agency's decision not to prepare an EIR for a later project not in the scope of the earlier project. Regarding the first issue, the appellate court held that the agency makes its "within the scope" decision pursuant to Public Resources Code section 21166 (and CEQA Guidelines section 15168(c)(2)) and the court thus reviews that decision for substantial evidence.[58] The appellate court found no substantial evidence supported Sonoma's decision that the amendment was within the scope of the Mining Plan.[59] The court thus had to reach the second question and held that based on the wording of Public Resources Code section 21094(c) the fair argument standard applied to Sonoma's decision to forgo environmental review for the amendment.[60]

Sierra Club is confusing because it presents the court's holdings in reverse order, explaining the answer to the second question first and not disclosing the court's finding that the amendment was outside the scope of the Mining Plan until almost the end of the opinion.[61] By that time, it is unsurprising that a reader may have forgotten that the court was examining two standard-of-review questions or missed that the answers to those two questions differed.

SUBSEQUENT CASES CLARIFY *SIERRA CLUB*

Any confusion caused by *Sierra Club* should have been dispelled by *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* ("*CREED*").[62] *CREED* concerned an agency's finding that a 30-story, 450-room hotel was within the scope of a programmatic EIR that had been prepared to analyze a redevelopment plan. The programmatic analysis of the redevelopment plan did not specifically analyze a hotel at the site of the subsequent project, but did assess the environmental impacts of buildout under the plan, which permitted hotels in an area that included the subsequent project's site.[63]

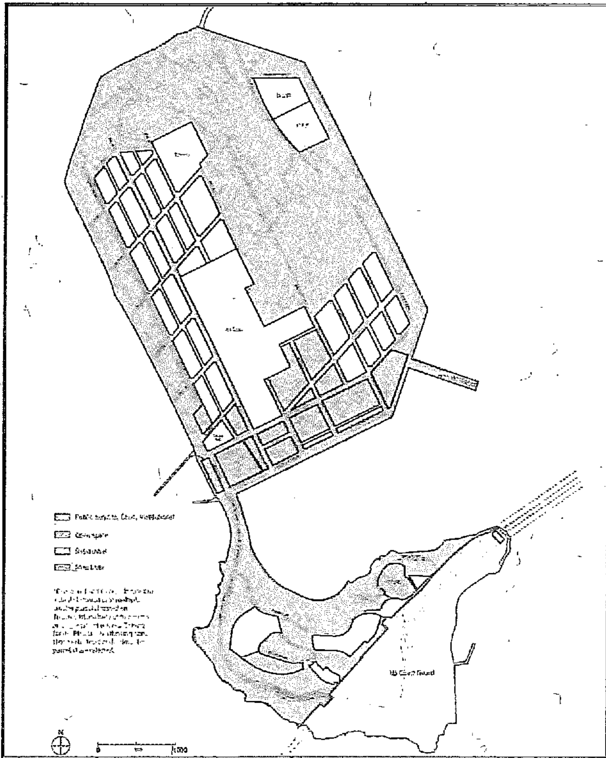
Project opponents relied on an incorrect reading of *Sierra Club* to argue that the court must review the agency's finding that the hotel was within the scope of the redevelopment plan under the fair argument standard.[64] *CREED* rejected that argument, finding *Sierra Club*, as well as *Santa Teresa Citizen Action Group v. City of San Jose*,[65] held "the fair argument standard does not apply to judicial review of an agency's determination that a project is within the scope of a previously completed EIR."[66] Nor does the fair argument standard "apply to review of an agency's determination that a project's potential environmental impacts were adequately analyzed in a prior program EIR."[67]

Although *CREED* clarified that *Sierra Club* never held the fair argument standard applies to the review of an agency's decision that a subsequent project is within the scope of a project reviewed in a programmatic EIR, project opponents continued to make the argument. For example, appellants in *Latinos Unidos de Napa* relied on a misreading of *Sierra Club* to argue that the court should review the agency's decision that proposed general plan and zoning code amendments had been adequately analyzed in a prior programmatic EIR under the "fair argument test."[68] Based on prior case law, including *Mani Brothers* and CEQA's "express legislative intent," *Latinos Unidos de Napa* concluded that the substantial evidence standard applied because review under the fair argument standard "inappropriately undermines the deference due the agency in administrative matters," including the matter of "whether a project is 'new.'"[69]

Concerned Dublin Citizens v. City of Dublin[70] reached the same conclusion. There, appellants urged the court to apply the fair argument standard to review an agency's finding that a project was exempt from

environmental review because it was consistent with a previously adopted specific plan reviewed in a programmatic EIR.[71] The court rejected appellant's contention and found that the substantial evidence standard applied, and the agency correctly determined no additional environmental review was required.[72]

Conceptual Land Use Plan from the Project Description for the Treasure Island and Yerba Buena Island Redevelopment Project EIR



Treasure Island confirmed the substantial evidence standard applies to a court's review of an agency's decision regarding whether a later project is within the scope of an earlier one reviewed in a programmatic EIR.[73] Project opponents again relied on *Sierra Club* to argue the agency inappropriately prepared a project-level rather than a programmatic EIR for a specific plan to "circumvent the fair argument standard of review that would have been applied to a program EIR for evaluating whether subsequent environmental review is necessary."[74] *Treasure Island* explained that "[f]or purposes of the standard of review, the same substantial evidence standard applies to subsequent environmental review for a project reviewed in a program EIR or a project EIR."[75] The court further explained that "[n]othing in *Sierra Club* . . . mandates that the fair argument standard should be unilaterally applied to later projects proposed under a program EIR."[76] According to *Treasure Island, Sierra Club* held that only if "an agency attempts to tier its environmental review for a materially different project onto a prior program EIR, [is] the fair argument test required."[77]

Recently, the Governor's Office of Planning and Research proposed changes to CEQA Guidelines section 15168 to clarify the standard courts should use to review an agency's decision that a later project is within the scope of a project analyzed in an earlier, programmatic EIR.[78] If the proposed changes are adopted, CEQA Guidelines section 15168(c) would state, "Determining that a later activity is within the scope of a program covered in the program EIR is a factual question that the lead agency determines based on substantial evidence in the record."[79] This change, along with the numerous decisions explaining the holdings of *Sierra Club,* should eliminate any remaining confusion about the standard of review applicable to the "within the scope" decision.

THE PROGRAMMATIC EIR CASES SUGGEST A HOLDING IN *SAN MATEO GARDENS*

Whether an agency originally prepared a programmatic EIR or a project-level MND, when a subsequent project is proposed, the agency must answer the same question: are the potential environmental impacts of the subsequent project adequately addressed by previously prepared environmental review.[80] This question arises under both the CEQA Guideline for programmatic EIRs[81] and under the CEQA Guideline for preparing an addendum to a negative declaration.[82] In either case, if the answer is "yes," no additional environmental review is required.[83] If no, the subsequent project is "new" and should be treated as such.[84]

No reason exists for the Court to create a rule whereby the agency's answer to this question is reviewed differently depending on the type of environmental document originally prepared. An agency's decision whether a project change or a subsequent project is within the scope of a previously analyzed project turns on the factual determinations required by Public Resources Code section 21166 regardless of the type of environmental review initially prepared.[85] Courts should therefore review such decisions under the same standard to review, which should be the substantial evidence standard.[86]

Even if Public Resources Code section 21166 does not expressly apply to negative declarations, the question whether a later project will have different environmental impacts than one that has already been analyzed is fact intensive and involves scientific expertise. The differences between the earlier and later projects are not always indicative of the changes in the later project's environmental impacts. For example, a project can undergo substantial changes, but due to context, the type and scale of that project's environmental impacts may remain unchanged.[87] As the California Supreme Court has acknowledged, courts "have neither the resources nor scientific expertise to engage in such

analysis" about environmental impacts.[88] For this reason, when reviewing an agency's decision about "an essentially factual inquiry," "a reviewing court should apply the traditional substantial evidence standard," with its "relatively deferential standard of review."[89] This deferential standard recognizes that "administrative agencies to which the Legislature has delegated regulatory authority in particular areas often develop a high degree of expertise in those areas and the body of law that governs them."[90]

Thus, regardless of whether the original environmental review was a project-level MND or programmatic EIR, "[w]hen a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum,"[91] the agency's decision should be reviewed under the deferential substantial evidence standard. Any other level of review would "inappropriately undermine[] the deference due the agency in administrative matters."[92] Whether the Supreme Court will agree awaits to be seen.

End of Article Quiz

Is the later project within the scope of the original project?

	Time between the Initial Environmental Review and Later Project	**Differences Introduced by the Later Project**
1.	11 years	Increased minimum residential densities in several General Plan areas from 10 to 20 residential units per acre, increased the permitted density for eight multi-family sites, amended the zoning to allow emergency shelters and transition, supportive, and farm worker housing, amended the zoning to require a use permit for conversion of certain types of stores and to provide for 'co-housing,' and amended the General Plan and zoning to permit single-family detached homes at the same densities as single-family attached homes
2.	9 years	Added 100 more high-density dwelling units and removed ground floor retail
3.	7 years	Changed the land use designation of 145 acres in a mining plan and changed the materials allowed for fill
4.	7-8 years	Extended a pipeline system in several directions, including beyond the original program area, changed the pipeline's route, and increased the diameter of the pipeline to increase its capacity
5.	7 years	Shifted the planning horizon year from 2010 to 2027 and amended an airport master plan as follows: (1) changed the size and location of future air cargo facilities, (2) replaced previously planned future air cargo facilities with 44 acres of general aviation facilities, and (3) modified two taxiways by adding new segments to provide better access for corporate jets
6.	5 years	Increased the number of buildings from 22 to 23, increased the project square footage by 107,000 square feet, increased the parking spaces by 75, changed the building arrangement on the site, and changed the water supplier, as well as increased the size of the on-site water tank by 250,000 gallons

Answers: 1. Yes (*Latinos Unidos de Napa v. City of Napa*, 164 Cal. Rptr. 3d 274 (Cal. Ct. App. 2013)); 2. Yes (*Concerned Dublin Citizens v. City of Dublin*, 154 Cal. Rptr. 3d 682 (Cal. Ct. App. 2013)); 3. No (*Sierra Club v. Cnty. of Sonoma*, 8 Cal. Rptr. 2d 473 (Cal Ct. App. 1992)); 4. Yes (*Santa Teresa Citizen Action Group v. City of San Jose*, 7 Cal. Rptr. 3d 868 (Cal. Ct. App. 2003)); 5. Yes (*Citizens Against Airport Pollution v. City of San Jose*, 173 Cal. Rptr. 3d 794 (Cal. Ct. App. 2014)); 6. Yes (*Fund for Environmental Defense v. County of Orange*, 252 Cal. Rptr. 79 (Cal. Ct. App. 1988))

ENDNOTES

1. Linda C. Klein is an attorney on the Land Use and Natural Resources team of Cox, Castle & Nicholson, LLP. She thanks Jerry George, the editor, and Andrew Sabey, her colleague, for their valuable input and help with this article. She also thanks Scott Birkey for encouraging her to publish this article, which she otherwise would have abandoned to the electronic circular file.
2. *W. States Petroleum Ass'n v. Superior Court,* 888 P.2d 1268, 1275 (Cal. 1995).
3. The case is *Friends of San Mateo Gardens v. San Mateo County Community College District,* California Supreme Court Case No. S214061. The author helped draft an amicus brief on behalf of several building groups in support of San Mateo County Community College District.
4. *San Lorenzo Valley Cmty. Advocates for Responsible Educ. v. San Lorenzo Valley Unified Sch. Dist.,* 44 Cal. Rptr. 3d 128, 138 (Cal. Ct. App. 2006).
5. *Id.*
6. *Id.* (internal quotation marks omitted).
7. Pub. Res. Code § 21080(c)(1); 14 Cal. Code Regs. § 15064(f)(3). Courts afford the CEQA Guidelines (14 Cal. Code Regs. § 15000 et seq.) great weight except when a provision is clearly unauthorized or erroneous. *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.,* 764 P.2d 278, 282 n. 2 (Cal. 1988).
8. Pub. Res. Code § 21080(c)(2); 14 Cal Code Regs. § 15064(f)(2). CEQA allows the use of a MND when "[a]n initial study identifies potentially significant effects on the environment, but (a) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (b) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment." Pub. Res. Code § 21080(c)(2).
9. Pub. Res. Code § 21151(a).
10. *Friends of Davis v. City of Davis,* 100 Cal. Rptr. 2d 413, 422 (Cal. Ct. App. 2000); *Sierra Club v. Cnty. of Sonoma,* 8 Cal. Rptr. 2d 473, 478 (Cal Ct. App. 1992).
11. *Sierra Club,* 8 Cal. Rptr. 2d at 478; see *Berkeley Hillside Preservation v. City of Berkeley,* 343 P.3d 834, 850 (Cal. 2015) (explaining the "fair argument approach derives from [the Court's] application of [Public Resources Code section] 21168.5 in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68," where the Court "construed section 21151 to require preparation of an EIR for a nonexempt project 'whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact'" (alteration omitted)). The fair argument approach is now incorporated into CEQA Guidelines section 15064(f)(1). *Id.* at 851.
12. *Sierra Club,* 8 Cal. Rptr. 2d at 478.
13. *Id.*
14. *Id.*
15. *Moss v. Cnty. of Humbolt,* 76 Cal. Rptr. 3d 428, 436 (Cal. Ct. App. 2008).
16. *Id.* at 435–36.
17. *Laurel Heights Improvement Ass'n,* 764 P.2d at 283.
18. *Id. See* 14 Cal. Code Regs. § 15162 (CEQA Guidelines clarifying the events that trigger additional environmental review under Public Resources Code section 21166).
19. Pubic Resources Code section 21166 is further explained by CEQA Guidelines section 15162.
20. *Bowman v. City of Petaluma,* 230 Cal. Rptr. 413, 417 (Cal. Ct. App. 2008).
21. Pub. Res. Code § 21094(a)(1). The explanation of Public Resources Code section 21094 is limited to the procedures applicable for EIRs for programs, plans, policies, and ordinances that did not find significant and unavoidable impacts. If the EIR found such impacts, the procedures in Public Resources Code section 21094(a)(2) would apply for later projects that tier from the EIR.
22. § 21094(b)(3).
23. *Id.;* see *Sierra Club,* 8 Cal. Rptr. 2d at 480 ("by its own terms, section 21094 [subdivision (a)] does not apply to later projects which are subject to section 21166").
24. Pub. Res. Code § 21094(a)(1).
25. *Sierra Club,* 8 Cal. Rptr. 2d at 480; see *Citizens for a Sustainable Treasure Island v. City & Cnty. of S.F.,* 174 Cal. Rptr. 3d 363, 375 n.6 (Cal. Ct. App. 2014).
26. *See, e.g.,* 14 Cal. Code Regs. § 15153(d) ("An EIR prepared for an earlier project shall not be used as the EIR for a later project if any of the conditions described in Section 15162 would require preparation of a subsequent or supplemental EIR.").
27. § 15168(c)(2) ("Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared. . . . If the agency finds that pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.")
28. § 15164(a), (b) ((a) "The lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some change or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred." (b) "An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequ4ent EIR or negative declaration have occurred.")
29. *See supra* Notes 15–19.
30. *See, e.g., Citizens for a Sustainable Treasure Island,* 174 Cal. Rptr. 3d 363; *Sierra Club,* 8 Cal. Rptr. 2d 473.

31. 45 Cal. Rptr. 3d 306, 311–12 (Cal. Ct. App. 2006).

32. 64 Cal. Rptr. 3d 79, 92–93 (Cal. Ct. App. 2007).

33. *Save Our Neighborhood*, 45 Cal. Rptr. 3d 306 at 314.

34. *Id.* at 311.

35. *N. Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors*, 157 Cal. Rptr. 3d 240, 250 (Cal. Ct. App. 2013) (alteration and internal quotation marks omitted).

36. *See id.* (explaining the standard used to review an MND).

37. *Mani Brothers*, 64 Cal. Rptr. 3d at 92.

38. *Id.*

39. *Id.*

40. *Id.*

41. 164 Cal. Rptr. 3d 274, 282.

42. *See* 2 Stephen L. Kostka, Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 19.34, at 906 (Ann H. Davis ed., 2d ed. 2008) ("[T]he *Mani Brothers* analysis is the proper analytical approach to determining whether a new approval or action should be treated as a separate project rather than as a change in the previously approved project. In contrast to *Save Our Neighborhood v. Lishman*, it follows well-established principles of using the substantial evidence standard of review for determining whether Pub[lic] Res[ources] C[ode section] 21166 has been triggered.").

43. California Supreme Court, Case No. S214061.

44. California Courts, Appellate Courts Case Information (Aug. 14, 2015, 10:50 AM), http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2059337&doc_no=S214061.

45. *Compare Save Our Neighborhood*, 45 Cal. Rptr. 3d 306 at 307 *to Mani Brothers*, 64 Cal. Rptr. 3d at 84–85, 91.

46. *Am. Canyon Cmty. United for Responsible Growth v. City of Am. Canyon* 52 Cal. Rptr. 3d 312, 319–20 (Cal. Ct. App. 2006); *Benton v. Bd. of Supervisors*, 277 Cal. Rptr. 481, 487–90 (Cal. Ct. App. 1991); *see Moss*, 76 Cal. Rptr. 3d at 436–37 & n.6 (holding that it did not need to reach the issue of whether the later project was the same as an earlier project after discussing *Save Our Neighborhood* and *Mani Brothers* and agreeing "with *Mani Brothers* to the extent its discussion meant to suggest that a court should tread with extraordinary care before reversing a local agency's determination about the environmental impact of changes to a project").

47. *Moss*, 76 Cal. Rptr. 3d at 436 (citing *Am. Canyon Cmty. United for Responsible Growth*, 52 Cal. Rptr. 3d. at 319–20; *Benton*, 277 Cal. Rptr. at 487–90).

48. *Sierra Club*, 8 Cal. Rptr. 2d at 482 (holding an expert's opinion constitutes substantial evidence supports a fair argument that the project may have significant environmental impacts).

49. *See, e.g., Bowman v. City of Berkeley*, 18 Cal. Rptr. 3d 814, 820–21 (Cal. Ct. App. 2004) (City's decision not to prepare an EIR for a new project is reviewed under the fair argument standard).

50. *Sierra Club*, 8 Cal. Rptr. 2d at 476 (alteration, ellipsis, and internal quotation marks omitted).

51. *Id.*

52. *Id.*

53. *Id.* at 482.

54. *Id.* at 476.

55. *Id.* at 476–77.

56. *Id.*

57. *Id.* at 478.

58. *Id.* at 481.

59. *See id.* The court does not state that it applied the substantial evidence standard when making this determination, but the court appears to have applied this standard, reviewing the evidence and finding "the evidence does not support a determination that [the project applicant's] proposed site-specific project was either the same as or within the scope of the project, program, or plan described in the program EIR." *Id.*

60. *Id.* at 479–80.

61. *Id.* at 481.

62. 36 Cal. Rptr. 3d 249 (Cal. Ct. App. 2005).

63. *Id.* at 262–63.

64. *Id.* at 257.

65. 7 Cal. Rptr. 3d 868, 878–81 (Cal. Ct. App. 2003).

66. *CREED*, 134 Cal. App. 4th at 258–59.

67. *Id.* at 259.

68. *Latinos Unidos de Napa*, 164 Cal. Rptr. 3d at 281.

69. *Id.* at 282 & n.8.

70. 154 Cal. Rptr. 3d 682 (Cal. Ct. App. 2013).

71. *Id.* at 690.

72. *Id.* at 690–92; see *id.* at 695 (holding that CEQA does not "mandate a particular level of environmental review in evaluation g later projects within the scope of a certified program EIR").

73. 174 Cal. Rptr. 3d at 374–76.

74. *Id.* at 374.

75. *Id.*

76. *Id.*

77. *Id.* at 375 n.6 (emphasis omitted).

78. Governor's Office of Planning and Research, *Proposed Updates to the CEQA Guidelines, Preliminary Discussion Draft* (Aug. 11, 2015), available at http://www.opr.ca.gov/docs/Preliminary_Discussion_Draft_Package_of_Amendments_to_the_CEQA_Guidelines_Aug_11_2015.pdf.

79. *Id.*

80. 14 Cal. Code Regs. § 15162; *cf.* 14 Cal. Code Regs. §§ 15164(b), 15168(c)(2).

81. *See* § 15168(c) ("Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared. (1) If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration. (2) If the agency finds that pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.")

82. *See* § 15164(b) ("An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.")

83. *Id.* Both CEQA Guidelines sections 15164 and 15168 refer back to section 15162. Under that section, no subsequent EIR should be prepared for a project unless there are new significant environmental impacts.

84. 14 Cal. Code Regs. § 15064 (outlining the steps to determine whether a project may have a substantial impact on the environment and thus require review in an EIR).

85. *See, e.g.*, *Mani Brothers*, 64 Cal. Rptr. 3d at 92 (explaining that whether an action is a new project under CEQA depends on analysis under section 21166); *CREED*, 36 Cal. Rptr. 3d at 262–63 (examining whether the proposed project would have any significant environmental impacts not disclosed in prior environmental review to determine if the project was new); *Benton*, 277 Cal. Rptr. at 488–89 (explaining that once an agency has prepared a MND, no further environmental review is required for subsequent projects except as prescribed by section 21166 and CEQA Guidelines section 15162); see also 14 Cal. Code Regs. § 15162(b) ("If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under [section 15162] subdivision (a). Otherwise the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation."); § 15168(c)(2) (When deciding whether to tier from a program EIR, "[i]f the agency finds that pursuant to Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required.").

86. *See Concerned Dublin Citizens*, 154 Cal. Rptr. 3d at 692 ("Thus, insofar as the exemption under Government Code section 65457 turns on whether Public Resources Code section 21166 requires updating of the program EIR, we apply the same substantial evidence standard of review that governs review of a determination that a supplemental EIR is not required under section 21166."); *Abatti v. Imperial Irrigation Dist.*, 140 Cal. Rptr. 3d 647, 667–68 (Cal. Ct. App. 2012) ("In reviewing an agency's decision not to require additional environmental review pursuant to section 21166, courts are not reviewing the record to determine whether it demonstrates a possibility of environmental impact, but are viewing it in a light most favorable to the [agency's] decision in order to determine whether substantial evidence supports the decision not to require additional review" (internal quotation marks omitted).).

87. *See Mani Bros.*, 64 Cal. Rptr. 3d at 90–91 (listing cases where the project at issue had undergone large changes or many years had passed since the agency prepared the initial environmental review, but addenda were nevertheless upheld); *see also* the end of article quiz on page 49, examining the facts of several of the cases cited in this article and other cases considering the issue of whether additional environmental review was required). As these facts show, the answer whether a later project will have no different or more significant environmental impacts than the original project is not necessarily obvious to attorneys (or judges). This is one reason courts should review the agency's under the more deferential substantial evidence standard.

88. *W. States Petroleum Ass'n v. Superior Court*, 888 P.2d 1268, 1275 (Cal. 1995).

89. *Berkeley Hillside Preservation*, 343 P.3d at 853. *Berkeley Hillside Preservation*'s conclusion "that both prongs of [Public Resources Code] section 21168.5's abuse of discretion standard apply on review of an agency's decision with respect to the unusual circumstances exception" (*id.* at 852) applies equally well to review of an agency's decision with respect to whether a later project is "within the scope" of an earlier one. The initial "within the scope" determination is fact intensive and thus reviewed under the traditional substantial evidence standard. (*Cf. id.* at 852–53.) If the agency concludes the later project is not fully within the scope of the earlier project, then it is appropriate for the agency to apply the fair argument standard in determining whether there is a reasonable possibility that the project may have a significant effect on the environment and thus requires a subsequent or supplemental EIR. (*Cf. id.* at 853–54.)

90. *W. States Petroleum Ass'n v. Superior Court*, 888 P.2d at 1274–75.

91. *See supra* Note 44.

92. *Mani Bros.*, 6 Cal. Rptr. 3d at 92.