



FILED
ALAMEDA COUNTY

DEC - 4 2009

CLERK OF THE SUPERIOR COURT
By Miranda Edgerly
DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

**CENTER FOR ENVIRONMENTAL
HEALTH, et al**

Petitioner,

vs.

**CALIFORNIA BUILDING STANDARDS
COMMISSION, et al**

Respondents,

Case No: RG09-437040

**ORDER GRANTING PETITION FOR
WRIT OF MANDATE**

The matter of the hearing on the Petition for Writ of Mandate herein came regularly before the court on August 28, 2009, Judge Frank Roesch presiding.

Appearing for the Petitioners was Thomas A. Enslow, Esq. of Adams, Breadwell, Joseph and Cardozo; appearing for the Respondents were Whitman F. Manley, Esq. and Sabrina V. Teller Esq. of Remy, Thomas, Moose and Manley; and appearing for Real Party in Interest, Plastic Pipe and Fittings Association was Kelly M. Taber, Esq. of Somach, Simmons and Dunn.

The matter was argued and the court took the matter under submission.

1 Upon review and careful consideration of all the papers and pleadings on file, the
2 administrative record lodged with the court and the arguments of counsel, the court ORDERS
3 that the Petition for Writ of Mandate is GRANTED IN PART as follows:
4

5 Procedural Background.
6

7 The California Building Standards Commission (“BSCom”), a Respondent herein, is a
8 Commission of the State of California within the State and Consumer Services Agency. It is
9 charged with the responsibility of, inter alia, adopting, approving and implementing California’s
10 building codes and building standards which are found in the California Building Standards
11 Code. It is the “lead agency” of the CEQA project that is the subject of this Petition. The
12 remainder of the Respondents are public agencies who are “responsible agencies” within the
13 CEQA context of the project.
14

15 The CEQA project that is the subject of the Petition is the set of plumbing regulations
16 promulgated by the BSCom on January 22, 2009, removing the prohibition on the use of cross-
17 linked polyethylene pipe and fittings (PEX pipe) in potable water plumbing applications.
18

19 The Petitioners timely filed this Petition challenging the sufficiency of the Environmental
20 Impact Report and the Notices of Determination for the EIR approved by each of the
21 Respondents.
22

23 The Petition
24

25 Petitioners raised three principal arguments relating to asserted insufficiencies of the EIR:
26 1) Failure of the EIR to support, with substantial evidence, the finding of “less than significant
27 impact” relating to health risks of contaminants leaching into drinking water;
28
29

1 2) Failure of the EIR to properly address "taste and odor" impacts caused by the leaching
2 of contaminants into drinking water and the related failure to support, with substantial evidence,
3 the finding of "less than significant" taste and odor impacts; and
4

5 3) Failure of the EIR to support, with substantial evidence, the findings of a "less than
6 significant impact" relating to property damage impacts with regard to premature failure due to
7 chemical or ultraviolet light exposure and with regard to fittings failures.
8

9 Respondents assert that the Petitioner is not correct and that substantial evidence exists in
10 the record to support each allegedly unsupported finding.

11 CEQA

12 1. Standard of Review

13 The goal of CEQA is to "compel government at all levels to make decisions with
14 environmental consequences in mind." (Laurel Heights Improvement Assn v. Regents of
15 University of California (1988) 47 Cal.3d 376, 393.) The role of the court in a review of an EIR
16 is to "ensure that the public and responsible officials are adequately informed "of the
17 environmental consequences of their decisions before they are made.""
18 (Berkeley Keep Jets Over the Bay Com. V. Board of Port Comrs. (2001) 91 Cal.App.4th 1344,
19 1356). That is the task required of the court in this matter.
20
21

22 It is fundamental that "[i]f the substantive and procedural requirements of CEQA are
23 satisfied, a project may be approved even if it would create significant and unmitigable impacts
24 on the environment. [Citation.] 'In reviewing an agency's determination under CEQA, a court
25 must determine whether the agency prejudicially abused its discretion. (Section 21168.5.)
26 Abuse of discretion is established if the agency has not proceeded in a manner required by law or
27 if the determination is not supported by substantial evidence.' [Citation.] Courts are 'not to
28
29

1 determine whether the EIR's ultimate conclusions are correct but only whether they are
2 supported by substantial evidence in the record and whether the EIR is sufficient as an
3 information document.' [Citation.]" (Bakersfield Citizens for Local Control v. City of
4 Bakersfield (2004) 124 Cal.App.4th 1184, 1197.)

5
6 However, ""The EIR must contain facts and analysis, not just the bare conclusions of the
7 agency." [Citation.] "An EIR must include detail sufficient to enable those who did not
8 participate in its preparation to understand and to consider meaningfully the issues raised by the
9 proposed project." ' [Citations.] 'CEQA requires an EIR to reflect a good faith effort at full
10 disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive.'
11 [Citation.] (Bakersfield, supra, 124 Cal.App.4th at p. 1197, citing § 21005, subd. (b).) "The
12 question whether an EIR is sufficient as an informative document depends on the lead agency's
13 compliance with CEQA's requirements for the contents of an EIR: whether the EIR reflects a
14 reasonable, good faith effort to disclose and evaluate environmental impacts and to identify and
15 describe mitigation measures and alternatives; and whether the final EIR includes reasonable
16 responses to comments on the draft EIR raising significant environmental issues. [Citations.]" "
17 (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2009)
18 Section 11:37, p. 566.)

19
20 It is also fundamental that "[f]ailure to comply with the information disclosure
21 requirements constitutes a prejudicial abuse of discretion when the omission of relevant
22 information has precluded informed decisionmaking and informed public participation,
23 regardless whether a different outcome would have resulted if the public agency had complied
24 with the disclosure requirements. [Citations.]" (Bakersfield, supra, 124 Cal.App.4th a p. 1198,
25
26
27
28
29

1 quoting from Dry Creek Citizens Coalition v. County of Tulare (1999) 70 Cal.App.4th 20, 26 and
2 Association of Irrigated Residents v. County of Madera 107 Cal.App.4th 1383, 1391.)

3
4 Courts apply the substantial evidence test to conclusions, findings, and determinations,
5 and to challenges to the scope of analysis of a topic in an EIR, the methodology used for studying
6 an impact, and the reliability of accuracy of the data upon which the EIR relied because these
7 types of challenges involve factual questions. (Bakersfield, supra, 124 Cal.App.4th at p. 1198.)
8
9 “Substantial evidence” is defined as “enough relevant information and reasonable inferences
10 from this information that a fair argument can be made to support a conclusion, even though
11 other conclusions might also be reached.” “Substantial evidence is not ‘[a]rgument, speculation,
12 unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or
13 evidence of social or economic impacts which do not contribute to, or are not caused by, physical
14 impacts on the environment Substantial evidence shall include facts, reasonable assumptions
15 predicated upon facts, and expert opinion supported by facts.” (Bakersfield, supra, at p.1198,
16 quoting from Section 21082.2, subd.(c); Guidelines, Section 15384, subds.(a) & (b).)

17
18
19 The substantial evidence test is the test used here to analyze each of the Petitioners’ contentions.

20 2. Discussion

21 Application of the substantial evidence standard here leads to the conclusion that the EIR
22 fails as an informational document. It was a prejudicial abuse of discretion to approve the EIR
23 because the omission of relevant information from the EIR precluded informed decisionmaking
24 and precluded informed public participation. The EIR did not include substantial evidence to
25 support findings of less than significant impact relating to: 1) the cancer related health risks of
26 MTBE leaching into drinking water in the short term, 2) the non-cancer health risks of MTBE
27
28
29

1 leaching into drinking water, 3)the taste and odor impacts on drinking water, and 4) property
2 damage in systems that use chloramine or chorine dioxide as a disinfectant.

3
4 1. Health risk of contaminants leaching into drinking water - short term contamination.

5 A) Non-cancer health risks.

6 Petitioners point to expert comments submitted by toxicologist Dr. James Clark and to
7 the OEHHA 1999 MTBE Public Health Goal Report, two sources cited in the EIR which clearly
8 raise a fair argument of a significant non-cancer health effect that needs be addressed by the EIR.
9 The evidence submitted from both sources relates back to the same Robinson, et al study, a "90
10 day gavage study in rats" finding non cancer kidney disorders caused by ingesting MTBE.
11

12 Petitioners argue that the health risk was not evaluated at all notwithstanding the issue
13 having been clearly raised and, moreover, that substantial evidence does not exist in the record to
14 support a "less than significant" finding. Respondent rebuts this argument in the opposition brief
15 (pages 3-4) and in oral argument by reference to the following citations to the Administrative
16 Record: Pages 573-575, 589-590, 598,603, 755-756, 767-771, 787,791, 2482-2487, 3010-3015,
17 9016, 9587-9588, 9593, 9594-9595, and 9597-9598, asserting that substantial evidence in the
18 EIR addressing both the non-cancer health risk and the absence of a significant impact is found
19 therein.
20
21

22 Respondent is mistaken in its argument. A review of those citations reveals as
23 follows:
24

25 AR 573-575. This is the introduction to the RDEIR. It identifies the protocol and
26 results of the study which prompted the recirculation of the Draft EIR. It states that the
27 study managers tested ten samples of PEX piping (of the over 270 different PEX products
28 available on the market) and found that in all ten of the samples the amount of MTBE
29

1 leaching from the piping into the water flowing through the piping lessened to an amount
2 less than 13 parts per billion (the maximum contaminant level "MCL") over a 90-day
3 period of use and that six of the ten chosen samples reached a contaminant level amount
4 of 5 parts per billion or less in those 90 days.
5

6 While the issue of kidney damage as described in the Robinson Study is not
7 specifically addressed, the drafter of the introduction reasons that exposure to a "chemical
8 concentration that is higher than a California standard for a short period of time is not
9 necessarily a valid indicator of human health risk. Thus, this standard is not a reasonable
10 threshold of significance." (AR 575) The drafter further reasons that the California
11 standard is based on the consumption of "water on a daily basis over a lifetime" (AR
12 575), and since the new evidence demonstrates that the amount of contaminates leaching
13 from the PEX tubing declined over time, "[t]herefore, short term exposure to TBA or
14 MTBE at levels exceeding California standards would not cause a substantial impact on
15 human health." The introduction does not evaluate the short term non-cancer risks like
16 those identified in the Robinson Study and does not provide the information of the level
17 of MTBE contamination leaching into water passing through PEX piping at the inception
18 of the test. The introduction reasons that while MTBE contamination begins at an
19 unacceptably high level, it reduces through use to an acceptable level after three months
20 and since the MCL is a long term standard, the short term exposure to the unacceptably
21 high level of contamination during those three months "would not cause a substantial
22 adverse impact on human health." (AR 575).
23
24
25
26
27

28 Other than the enunciation of that theory, the introduction does not present any
29 factual basis to support it or identify any expert opinion that validates the theory or

1 quantifies just how many parts per billion of MTBE it would take to tip the scale above
2 the "no substantial impact" level.

3
4 In short, pages 573-575 do not contain substantial evidence that supports the
5 contention that short term non-cancer risks were evaluated in the EIR.

6 Pages 589-590 do not address the issue. These pages of the RDEIR recite the
7 statutory prohibitions of allowing drinking water contamination and the regulatory
8 standards that have been promulgated.

9
10 Page 598 makes reference to MTBE, identifying it as one of the two "chemicals found to
11 exceed California's MCLs...in some proportion of pipes tested," and includes a short discussion
12 concluding that "[b]oth the California MCL of 13ug/l [parts per billion] and the NSF standard of
13 100 ug/l are acceptable given current U.S. EPA risk management criteria...." The only portion
14 relevant to the discussion of non-cancer risks of short-term exposure to MTBE on page 598 is a
15 statement from the drafter of the RDIER that "NSF creates action levels (aqua TAC, SPACs and
16 short term exposure levels [STELs]). The basis for the action levels is the oral reference dose for
17 noncancer risk assessment...."

18
19
20 While this statement, if supported by substantial evidence elsewhere (the RDIER drafter
21 is not an expert on the subject) might satisfy the notion that NSF had evaluated the short term
22 non-cancer risk of MTBE contamination at the levels found in PEX piping, it is abundantly clear
23 that NSF did not establish a STEL for MTBE in drinking water, and absent an NSF determined
24 STEL, one cannot conclude that a short-term non-cancer risk assessment was performed or that
25 the threshold of significance is properly determined to be at the amount of contaminant level
26 identified by NSF as an MCL.
27
28
29

1 Page 603 repeats the RDEIR drafter's introduction at pages 573-575 but provides no
2 additional evidence.

3 Pages 2482-2487 contain a portion of the response to comments made by petitioners after
4 release of the RDIER.¹ The response to the comment relating to the threshold of significance (pp
5 2481-2485) mentions short-term health risks in passing and refers the reader to the response to
6 the C-4 comment response. The C-4 response (AR 2485-2487) acknowledges that the comment
7 criticized the failure to evaluate the short term health impacts and initially dismisses it as being
8 unsupported by any substantial evidence in the comment. The response continues, however, and
9 details the same rationale as previously stated in the introduction with a significant difference.
10

11 Here the comment response attributes to Dr. Chaudhuri, the toxicologist, the conclusion
12 "Typically, cancer effects are more of a concern from long term exposure. Exposures [to MTBE
13 at concentrations several times greater than permitted by the California Clean Water Act] on the
14 order of a few days are typically not expected to result in cancer concerns" and "The highest
15 concentrations detected at initial sampling were approximately 2-and 3-fold higher than NSF
16 TAC of 100 ug/L. Therefore, the exceedances were not orders of magnitude higher than 100
17 ug/L. It is unlikely that exposure for a short period of time to these relatively small exceedances
18 would cause substantial health risks." (p2486)
19
20
21
22

23 Irrespective of whether Dr. Chaudhuri's conclusion is supported or supportable, it is clear
24 that it addresses only "cancer concerns" and does not address any non-cancer risk. Pages 2481-
25

26 ¹ The commenter had criticized the ambiguity of the threshold of significance and
27 questioned the lawfulness of the use of threshold of significance permitting chemical
28 contamination of drinking water that is greater than the maximum contaminant level
29 permitted by law (Response C-3 of the Comments and Responses) and the failure to
evaluate Public Health risks from short term exposure to MTBE (Response C-4).

1 2487 do not provide substantial evidence that supports a conclusion that non-cancer risks of short
2 term exposure to MTBE or ETBE are less than significant.

3
4 Pages 3010-3015 consist of the testimony of the EIR consultant, Ms. Coatsworth,
5 confirming her opinion that she believes that all the issues raised at the final hearing had been
6 addressed in the EIR and that she believes that the commission's experts determined that the
7 leaching from some PEX pipe did not rise to the level of a significant adverse effect on the
8 environment. These pages of the administration record do not contain any substantial evidence
9 supportive of a conclusion that the EIR evaluated the non-cancer risks of short-term exposure to
10 MTBE or anything else.
11

12 Page 9016 is page 4 of a 5-page comment from Lori Besterveldt, Ph.D., Senior Vice
13 President and Chief Technical Officer of NSF International, the private company whose
14 standards are those accepted in the EIR as the threshold of significance for chemical
15 contamination of drinking water. On the cited page, there is discussion that the NSF's
16 acceptance criteria for MTBE contamination of drinking water (100 parts per billion) differs
17 from California's maximum contaminant level of MTBE contamination of drinking water (13
18 parts per billion) is based on a different level of safety utilized by each entity. She states that the
19 NSF numbers are higher because the NSF tests new materials while the California Maximum
20 Contaminate Level has an assumption of continuous exposure. She reaches the conclusion that a
21 direct comparison between the NSF's higher maximum contamination level acceptance criteria
22 and the lower California maximum contamination level is difficult to conduct.
23
24
25

26 This evidence is not substantial evidence that the BSCom evaluated short-term risks of
27 non-cancer health effects. Indeed, it stands for quite the contrary proposition as it is clear that the
28
29

1 NSF acceptance criteria are founded on the premise that the contaminant level will decrease over
2 time.

3
4 Pages 9587-9588 is a memo from toxicological expert Ishrat Chaudhuri. It does not make
5 any conclusions relating to health impacts other than to describe that the "day 1" concentration of
6 a contaminant such as MTBE, in order to satisfy NSF standard 61, must meet the Short Term
7 Exposure Level (STEL) and, in addition, the "day 90" concentration must meet the totally
8 allowable concentration level (TAC). With regard to MTBE, this memo states that the TAC is
9 50 parts per billion, and that there is no established STEL. These pages of the AR cannot be read
10 to provide substantial evidence that the EIR considered non-cancer short-term health risks of
11 MTBE contamination at high levels during the initial use of the pipe.
12

13
14 Page 9593 is a memorandum from toxicological expert Ishrat Chaudhuri discussing her
15 opinion of short-term cancer risks of drinking water with MTBE in a higher concentration than
16 that allowed by NSF or California standards. The memo does not mention non-cancer health
17 risks.
18

19 AR pages 9594-9595 appear, from the hand-written notation at the top, to be part of an e-
20 mail from toxicologist Ishrat Chaudhuri to Jason Barrett. It discusses the OEHHA basis for
21 determining the level at which it sets Public Health Goals for drinking water and sets forth the
22 OEHHA conditional exception allowing a higher standard when it is not feasible to set it at a
23 lower level. Dr. Chaudhuri opines that both the lower standard and the higher standard are
24 acceptable with regard to the cancer risk but does not opine that it is not feasible to produce PEX
25 to the lower 13 parts per billion standard. The e-mail does not address any non-cancer health risk
26 and does not contain substantial evidence of consideration in the EIR of non-cancer short term
27 exposure risks.
28
29

1 AR page 9597 read in conjunction with page 9598 is a list of questions to toxicologist,
2 Ishrat Chaudhuri, and her responses. She criticizes NSF for not determining a STEL for MTBE
3 based on a non-cancer endpoint and does not agree that NSF's statement that a STEL should be
4 the same as the TAC is realistic. But she does not opine that the short-term non-cancer impacts
5 of MTBE at the levels found in the NSF study are significant impacts or that they are not
6 significant impacts. Nor does she address the non-cancer kidney disorder occurrences mentioned
7 in the Robinson study.
8

9
10 Pages 755 and 756 are a portion of the introduction to the February 2008 NSF MTBE oral
11 Risk Assessment Document. The introduction details the methodology in the determination of
12 both "non-cancer endpoints" and "endpoints related to cancer," and discusses the general
13 methodology to determine the safe short term exposure level (STEL) of a contaminant. Again,
14 with the absence of an NSF determined STEL calculation, one cannot conclude that a short term
15 exposure level for a non-cancer endpoint has been evaluated or that there is substantial evidence
16 to support the finding of less than significant impact.
17

18
19 Pages 767-771 are in part 8 of the February 2008 NSF Oral Risk Assessment Document
20 and pages 787 and 791 are in part 9 of the document. On page 767, in the introduction to part 8,
21 the document states: "This section includes only the oral studies for methyl t-butyl ether, due to
22 their significance in the development of lifetime drinking water levels for methyl t-butyl ether,
23 since studies by the inhalation and/or dermal routes have been critically reviewed elsewhere."
24 And, while several studies involving short term exposure are cited, the Risk Characterization
25 found in the next section (part 9 of the document) at pages 787-800 make clear that short term
26 impacts were not assessed. Part 9 concludes with the comment "Since methyl t-butyl ether is
27 being evaluated as a genotoxic carcinogen, exposure to drinking water levels higher than the TAC
28
29

1 set at the 10^{-5} risk level [100 parts per billion], cannot be justified and it is not appropriate to
2 derive a STEL for this chemical.” (AR p 800.)

3
4 While one may argue that a STEL ought or ought not to be set at any particular level, the
5 finding of the NSF document is that even a short-term exposure ought not be higher than the TAC
6 level of 100 parts per billion. The EIR does not, in this document, evaluate short-term,
7 non-cancer effects of drinking the water flowing through PEX pipes during the first three or four
8 months of their use.

9
10 A review of each of the portions of the Administrative Record cited and asserted
11 by the Respondents as a place in the record where substantial evidence can be found to
12 demonstrate that the EIR and/or the BSCOM considered the impact on non-cancer health issues of
13 drinking water contaminated by MTBE over a short term reveals the respondents are mistaken in
14 their assertion. From that, the court concludes that the BSCOM failed to consider such short term
15 impacts and/or necessary mitigations to reach a less than significant impact level.

16
17 The Petitioners are correct in their argument that the EIR does not contain substantial
18 evidence to support a finding of less than substantial impact for short term non-cancer impacts of
19 MTBE contamination of drinking water that has passed through PEX pipes.

20
21 B. Short Term Genotoxic Cancer Health Risks.

22
23 Petitioner next raises an issue of the cancer risks arising from short term exposure to
24 MTBE at a level greater than the 13 parts per billion or 100 parts per billion level standards
25 respectively of the State of California and the NSF. Petitioner argues that Dr. Chaudhuri’s
26 opinion that typically, cancer effects are more of a concern from long-term exposure, is not
27 supported by any identified fact or stated opinion from Dr. Chaudhuri that MTBE is a typical
28 genotoxic chemical.
29

1 Respondent argues that Petitioners are estopped from raising this argument because of
2 their failure to exhaust the administrative remedy of raising the issue prior to the approval of the
3 EIR. However, Respondents' argument fails. Petitioners commented (at pp 2466 & 2467)
4 "Furthermore, NSF's own documents reveal that short term health standards for MTBE exposure
5 are identical to the long term standard. In other words, it doesn't matter if MTBE leaching would
6 quickly fall below the California standard because short term exposure to MTBE poses the same
7 risk as long term exposure. *** Accordingly, the RDEIR must be revised to evaluate the short
8 term impacts from MTBE leaching. *** An evaluation of short term impacts also requires
9 disclosure of initial MTBE leaching levels." (AR 2466-2467.) This comment was sufficient to
10 satisfy Petitioners' burden to exhaust the issue at the agency level.
11
12
13

14 Respondents also assert that substantial evidence to support a finding of less than
15 significant impact relating to cancer risks arising from short term contamination can be found on
16 AR pages 9597-9598, 777-778, 791-792, 800 and 9141.
17

18 AR 9597 and 9598 are an e-mail interchange between Jason Barrett and Ishrat Chaudhuri,
19 the toxicologist. The e-mail from Barrett to Chaudhuri makes clear that the Petitioners have
20 raised the issue of NSF's stated opinion that "[a]ny exposure to MTBE greater than 100 parts per
21 billion TAC for any length of time is a significant health effect."
22

23 Dr. Chaudhuri's response to Mr. Barrett's questions does not provide any factual or
24 substantial evidence supportive of the assertion that MTBE is "typical," but more significantly,
25 Dr. Chaudhuri's statements do not sanction the short-term contamination of drinking water at a
26 level higher than "exposure to levels that are protective of long-term exposure," i.e., levels
27 higher than 100 parts per billion. Such a statement is not substantial evidence that a short-term
28 exposure at greater than 100 parts per billion is less than a substantial impact.
29

1 AR 777-778, 791-792, and 800 are all portions of the NSF Oral Risk Assessment and
2 cannot be read to provide substantial evidence of a finding contrary to the statement at page 800
3 “[s]ince methyl t-butyl ether is being evaluated as a genotoxic carcinogen, exposure to drinking
4 water levels higher than the TAC [i.e. 100ppb]... cannot be justified and it is not appropriate to
5 derive a STEL for this chemical.”
6

7 C. Taste and Odor Impacts
8

9 Petitioners next argue that the EIR does not contain substantial evidence to support a
10 finding of a less than significant impact to public health deriving from taste or odor impacts on
11 drinking water. Petitioners point to AR pages 550, 600 and 5989 as the evidence in the record
12 demonstrating a significant impact relating to taste and odor.
13

14 The DEIR evidence at AR 550, a memo from Ishrat Chaudhuri, identifies a study of
15 PEXb flatly stating that the concentrations of ETBE and/or MTBE found in PEXb could
16 “contribute to the taste and odor of drinking water and potentially have adverse health
17 implications.”
18

19 Respondents assert that Dr. Chaudhuri’s opinion elsewhere, at AR 9589, provides
20 substantial evidence of the absence of significant impact on health and/or odor and/or taste.
21 However the court does not agree. The court reads AR 9589 differently than Respondents for
22 two reasons. The first is that a finding that CalEPA has not set a standard for a contaminant does
23 not provide substantial evidence that the contaminant does not contribute to taste and odor and
24 does not establish that there is only an insubstantial health impact. The second reason is that The
25 Durand Study found that “ETBE in pipe leachate ranged from 23 micrograms per liter [parts per
26 billion]... to greater than 100 [parts per billion].” Thus the analysis suggested by Dr. Chaudhuri
27 at AR 9589 analogizing ETBE to MTBE cannot be considered as substantial evidence of a less
28
29

1 than significant taste and/or odor impact when the taste and odor threshold level is 5 parts per
2 billion. The only conclusion one could reach regarding taste and odor is that the concentration of
3 ETBE in PEX-b piping does affect the odor and taste of drinking water.
4

5 It does not seem to be controverted by the Respondents that there are odor and taste
6 impacts in some PEX piping; nor is it controverted that taste and odor impacts need to be
7 addressed. Rather, Respondents argue (see Respondents' Memo in Opposition to the Petition p.
8 15-19) that the threshold of significance initially considered of 5 parts per billion (the California
9 secondary MCL) was too stringent and so applied a more appropriate threshold of "a level of a
10 contaminant in drinking water that would substantially exceed a federal or state secondary MCL
11 for taste and odor." The court has not been cited to any place in the Administrative Record that
12 can actually support the changed threshold and there does not appear to be any evaluation of
13 whether there is an odor or taste impact of those varieties of PEX that leach out MTBE in
14 amounts vastly in excess of 5 parts per billion.
15
16

17 The EIR does advise that 40% of the 10 samples tested for MTBE in the NSF over-time
18 testing did not reach the "secondary MCL for taste and odor for MTBE by day 90" (AR p.601)
19 but does not advise if or when those samples ever do reach that "secondary MCL for taste and
20 odor." The EIR does not advise whether the 40% of the ten samples that do not reach the
21 secondary MCL for taste and odor within 90 days comprise a large or small percent of the PEX
22 actually sold elsewhere. Absent such information, it is impossible for the Commission or the
23 public to evaluate impact.
24
25

26 D. Property Damage Impacts.
27

28 A) Premature Failure in Continuously Recirculating Hot Water Systems.
29

1 Petitioners argue that Mitigation Measure 4.2-1 (designed to address impacts in chlorine
2 disinfectant water distribution systems) fails to address water jurisdictions that use chloramine or
3 chlorine dioxide as water disinfectants and that the mitigation fails to account for those water
4 jurisdictions that may change their disinfectant from chloramines or chlorine dioxide to chlorine
5 after having permitted the use of PEX piping that did not meet the mitigation measure
6 requirements for chlorine disinfectant systems.
7

8 Respondents argue that the EIR did consider Petitioners' comments on the subject at
9 2623-2624 and pointed to two Jana Laboratory studies and the ASTM F2023-8 methodology to
10 support a position that the degradation of PEX by chloramines or chlorine dioxide is less than the
11 degradation the chlorine alone.
12

13 However, the studies relied upon (see AR 1737-1740) do not provide substantial evidence
14 to support a finding that, if a mitigation is needed in chlorine disinfectant systems, no mitigation
15 is needed in a water system using chlorimine disinfectant or chlorine dioxide disinfectant. At AR
16 1740 the Jana study finds "significant depletion of the stabilizer is observed in all three
17 disinfectants..." There is no substantial evidence to support the non-application of the
18 mitigation measure to all disinfectant systems.
19

20
21 B) Premature Failure from Exposure to Sunlight.

22 Petitioners argue that the EIR does not contain substantial evidence to support a finding
23 of less than significant impact caused by the need to shield PEX pipe from sunlight.
24

25 Respondents point to evidence of special packaging and warning labels and to evidence
26 of the addition of ultraviolet resistant material in most pipes as substantial evidence of a finding
27 of less than significant impact caused by PEX failure from sunlight.
28
29

1 While the evidence of "most manufactures" does not provide substantial evidence of the
2 Commission's finding, the finding is supported by the Commission's conclusion that a consumer
3 of the product will follow the instructions for proper use and that the packaging and warnings are
4 prominent and universal.
5

6 E) Fitting Failures.

7 Petitioners argue that the EIR did not consider the impact of PEX fitting failures as
8 evidenced by class action lawsuits in other states. However, it is clear that the EIR does address
9 this impact and dismissed the concern as the fittings that were the subject of those out of state
10 lawsuits were evaluated (AR 448) and determined to be individual instances of shoddy
11 manufacture ("a specific resin source that failed" or "the brass the (sic) fittings manufactured by
12 Zurn [company]"). The EIR concluded that those instances were anomalies and not sufficient to
13 create any significant impact. This finding was within the Commission's discretion and is
14 supported by substantial evidence.
15
16

17 For the reasons set forth above, the Petition is GRANTED IN PART. A Peremptory Writ
18 of Mandate shall issue commanding Respondents, and each of them, to
19

20 1) vacate and set aside their certification of the EIR of the PEX Regulations,
21 2) vacate and set aside the PEX Regulations and any actions taken founded on those
22 Regulations until such time as the Respondents, and each of them, have fully complied with the
23 requirements of the CEQA, and
24

25 3) file a return to this court within 60 days of receipt of this court's writ specifying what
26 each Respondent has done to comply with the Writ.
27
28
29

1 Petitioner shall prepare a formal Judgment and also a Peremptory Writ of Mandate,
2 submit them to opposing counsel for approval as to form and thereafter submit them to the Court
3 for signature and entry of judgment in accord with California Rules of Court, Rule 3.1312.
4

5 Dated: December 4, 2009



6
7 Frank Roesch
8 Judge of the Superior Court
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: CENTER FOR ENVIRONMENTAL HEALTH, et al
vs.
CALLIFORNIA BUILDING STANDARDS COMMISSION, et al

ACTION NO.: RG09-437040

I certify that, I am not a party to the within action. I served the foregoing
ORDER GRANTING PETITON FOR WRIT OF MANDATE by depositing a true copy thereof
in the United States mail in Oakland, California on 12/7/09 in a sealed envelope with postage
fully prepaid thereon addressed to:

Thomas A. Enslow, Esq.
Adams, Breadwell, Joseph, and Cardozo
520 Capitol Mall, Suite 350
Sacramento, CA 95814

Whitman F. Manley, Esq.
Somach, Simmons and Dunn
455 Capitol Mall, Suite 210
Sacramento, CA 95814

Sabrina V. Teller, Esq.
Somach, Simmons and Dunn
455 Capitol Mall, Suite 210
Sacramento, CA 95814

I declare under penalty of perjury that the following is true and correct

Executed on 12/7/09 at Oakland, California.

Pat Sweeten
Executive Officer/Clerk

by Miranda Edgerly
Miranda Edgerly, Deputy Clerk