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Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 150 P.3d 709 (Cal. 2007)

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summary judgment in favor of Reclamation because the Contracting Parties failed to meet their burden of proof.

Sarah A. Quinn

STATE COURTS

CALIFORNIA

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 150 P.3d 709 (Cal. 2007) (holding that an environmental impact report for a large development project need not show that the project has definite long term water supplies, but that while the report adequately analyzed the near-term groundwater supply, it failed to do so in regard to the long-term surface water supply and the potential impact on salmon migration).

Vineyard Area Citizens for Responsible Growth, Inc. (“Group”) filed a petition for a writ of mandate challenging the County of Sacramento’s (“County”) approval of a community development plan. Group claimed that the approval violated the California Environmental Quality Act (“CEQA”). The Superior Court, Sacramento County, denied the petition after a bench trial. On appeal, the California Court of Appeal affirmed, finding that the discussion of water supply in the environmental impact report (“EIR”) met the requirements of CEQA, because its conclusions did not rely on “speculative or illusory sources” and substantial evidence illustrated that the effect of the proposed groundwater extraction would be insignificant. The Supreme Court of California granted Group’s petition for review, reversed and remanded. The court reviewed the administrative record for legal error and the County’s factual findings using the substantial evidence standard. On review the court addressed two issues. First, the court addressed the adequacy of the final EIR in regard to its identification and evaluation of future water sources for the development project. Second, the court determined whether the County’s findings regarding the potential impacts on migratory salmon, which the County first disclosed in the final EIR, should have been open to public comment.

Group contended that the final EIR was deficient because it failed to assure that the actual water sources would meet the project’s demand. Therefore, the final EIR failed to disclose all the possible environmental impacts that would result from the project. Further, when such a failure occurs, it is impossible to evaluate all available mitigation measures. The question presented to the court concerned how much uncertainty is allowable in an EIR under CEQA in regard to water supplies for a land use plan. The court first acknowledged that neither CEQA nor its guidelines address this issue specifically. On a general level, the court notes that CEQA guidelines assert that an agency must use its best efforts to find all available information and “disclose all that

it reasonably can.” The court then discussed the precedent on the “sufficiency of an EIR’s analysis of future water supplies” from the California Courts of Appeal and concluded that the cases do not clearly define a standard. However, the court did decipher four over-arching principles from the precedent.

First, CEQA requires that an EIR must contain factual information that allows the decision makers to properly weigh the advantages and costs of supplying the water allotted under a proposal. The court advised that an EIR, which “simply ignores or assumes a solution to the problem of supplying water to a proposed land use project,” does not meet CEQA. Second, if the proposed land use project is for multiple years, an EIR is inadequate if it only addresses the water supply for the first stage or first few years of the project. The court held that an EIR does not meet this requirement by simply stating that the drafters will provide the information in the future. Further, the court explained that while tiering is proper in some instances, the future water supply for a land use project is not an issue that decision makers can defer using such a technique. The court reasoned that the drafters of an EIR for a land use project must assume that the project will be built and will need water, and therefore, the EIR “must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project.” Third, an EIR must identify and address the impacts of “likely” future water sources. To qualify as likely, the sources must not be speculative to the extent that they are unrealistic and “must bear a likelihood of actually proving available.” Included in the EIR’s analysis should be a discussion of the circumstances surrounding the availability of identified future water sources. Fourth, an EIR must discuss either possible replacement sources or alternatives to the proposed future water sources. Further, decision makers must include the environmental impact of those actions in that discussion.

Moreover, the court held that CEQA does not require “assurances of certainty” in regard to long-term future water supplies in a final EIR. However, the burden to attain such assurances and certainty increases as the project moves from more general to more specific phases of planning. To determine the adequacy of an EIR in regard to the future water supply for a land use project, courts should determine the likelihood of development of the identified source of water and whether or not the EIR adequately addresses the “reasonably foreseeable impacts” of the proposed water allocation. In applying these principles to the EIR at issue, the court broke its analysis of the EIR into two parts. It first looked at the analysis of the near-term water supply and then the analysis of the long-term water supply.

In regard to the near-term water supply outlined in the EIR, the Group contended that other competing uses for the identified source make the source inadequate for the project. Therefore, the Group argued that the project would use other unidentified sources, of which

the County has not analyzed the environmental impact. The court found that the County's factual conclusions regarding the adequacy of the water supply to meet the near-term water needs of the project met the substantial evidence standard. The facts indicated that the project needed 5,000 afa of the total 10,000 afa available from the source. Further, the competing project projected that it would require 3,000 afa. Therefore, the court concluded that the remaining 7,000 afa was sufficient to meet the project's near-term needs. The court reasoned that the supply was available "at least in substantial part" to meet the project's near-term needs. Further, in respect to the analysis of the near-term water supply, the court found that the County did not rely on an illusory supply of water or use tiering.

The Group asserted the same claim of competing demands in regard to inadequacy of the EIR's analysis of the long-term water supply. The EIR identified a water source with 15,000 afa available. However, the allocation of that source was uncertain. The court found that the EIR presented substantial evidence that some part of this water supply would be developed and made available for use by the project. Yet, the court further held that the uncertainty in regard to how the County planned to meet the entire demand of the long-term water supply was insufficient to meet CEQA. In holding such, the court pointed to the EIR's failure to outline the total future water demand that would result from the long-term growth of the project. The long-term demand numbers varied without explanation among different proposal documents. Further, the EIR produced gaps between the amount of future growth demands and source supplies. The EIR addressed these discrepancies by referring to "new" water supplies that were unidentified and not quantified. The court held that this explanation was too vague to meet CEQA. While CEQA does not require a land use project EIR to identify long-term future water supplies with certainty, here the court found that "a discussion of total supply and demand is necessary."

The court then compared how the EIR for near-term water supply analysis differed from the long-term. The court found that while the near-term analysis included substantial evidence that competing users would not interfere with the planned allotment of water for the project, that the EIR did not lay out any evidence other than inconsistent demand numbers that illustrated that the long-term water supply would be both attainable and allocated for use by the project. The court concluded that the EIR in regard to the long-term water supply was defective both factually and procedurally. The court found that the County's attempt to tier the long-term supply to constitute a procedural defect and that the inconsistent evidence on future demand and lack of evidence of future water supplies to be factually inadequate under CEQA.

In regard to the future water supply issue, the court found that while the County's EIR adequately addressed the near-term supply, it did not do so in regard to the long-term supply. The County's assessment of the long-term supply did not "clearly and coherently" state what the long-term demand would be or the sources that would meet it, what the environmental impacts of meeting such a demand would be, and any possible mitigation measures that could be taken. The court also found that the County must make the potential impacts on migratory salmon available for public comment by first issuing such findings in a draft EIR. The court remanded and directed the County to prepare a revised EIS that adequately addressed the long-term water supply and to allow for public comment on the project's impact on migratory salmon.

One judge entered a dissenting opinion. The dissent interpreted the majority opinion to impose the requirement that all proposed land use projects cannot gain approval under CEQA or California's Water Code until the "entire region's projected long-term water supply and demand are in balance." The dissent argued that CEQA did not require this regional threshold. Moreover, the dissent found that this threshold was not in the spirit of California's Water Code, since the legislature essentially rejected a similar rule in its 1995 amendments. The dissent further asserted that a regional standard imposed costs, such as discouraging development, increasing project costs, and encouraging litigation.

Mary Byrne

Divers' Env'tl. Conservation Org. v. State Water Res. Control Bd., 51 Cal. Rptr. 3d 497 (Cal. Ct. App. 2006) (holding that the Regional Water Quality Control Board issued a valid industrial storm water discharge permit which allowed the Navy to formulate a pollution prevention plan utilizing best management practices rather than specific numeric effluent limitations).

The Court of Appeal for the Fourth District of California reviewed the decision of the Superior Court of San Diego County denying a petition for writ of administrative mandate filed by Divers' Environmental Conservation Organization ("Divers"). Divers' petition challenged the validity of a storm water discharge permit issued by the California Water Quality Control Board ("Board") to the United States Department of the Navy ("Navy").

The court began by reiterating that the goal of the Clean Water Act ("CWA") is to "restore and maintain . . . the integrity of the Nation's waters" and to generally prohibit "the discharge of any pollutant." One statutory exception to this prohibition involves obtaining a valid National Pollutant Discharge Elimination System ("NPDES") permit from either the Environmental Protection Agency ("EPA") or an EPA-