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Court Rejects Direct Challenge to SB 610 Water Supply Assessment

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While the *Vineyard Area Citizens* case may have made headlines and caused commotion among water supply planners and project proponents, the Los Angeles Superior Court recently faced an important question about the way in which a Water Supply Assessment (WSA) prepared under Senate Bill 610 (SB 610) may be challenged. In *California Water Impact Network v. Newhall County Water District* (*CWIN v. Newhall*), the court considered a challenge to the legal adequacy of a WSA prepared by the Newhall County Water District. The issue before the court was whether project opponents can directly challenge a WSA, in addition to challenging the CEQA document that relies upon the WSA, which would effectively give opponents two bites at the apple. In a blow to the project opponents, the court agreed with the District's argument that the challenge, brought by the California Water Impact Network (C-WIN), was inappropriate because a WSA is prepared as a part of the CEQA process and, thus, must be challenged within the CEQA framework.

Preparation of a WSA is a relatively recent requirement. As water supply issues have become more controversial, environmental organizations have begun to view WSAs as useful tools for attacking large projects. Although the trial court decision in *C-WIN v. Newhall* does not create binding precedent, if the District's arguments hold up on appeal the case would restrict the way in which project opponents can challenge WSAs and reduce the likelihood of a project being challenged in multiple lawsuits.

Brief Overview of SB 610

SB 610 was enacted in 2001 to improve the linkage between water and land use planning. It was intended to ensure greater communication between water providers and local planning agencies. Accordingly, SB 610 aims to ensure that land use decisions for certain large development projects are fully informed as to whether sufficient water supplies are available to serve the project.

The SB 610 process requires the interaction and cooperation of the water supplier and the CEQA lead agency. When a CEQA lead agency determines that a project meets one of the size or demand thresholds triggering SB 610, it requests that the water supplier prepare the WSA. The water supplier must assemble specified information relating to available water supplies and approve the WSA within 90 days, which it then passes on to the CEQA lead agency. SB 610 does not require public participation in the preparation of a WSA. The lead agency must include the WSA in the CEQA document and may also include an evaluation of the WSA. Finally, the CEQA lead agency—not the water supplier —must independently determine, "based on the entire record," whether adequate water supplies exist to serve the project. That is, regardless of the conclusions in the WSA, the CEQA lead agency makes the final decision regarding whether an adequate water supply is available to serve the project.

At its heart, a WSA is an informational document relied on by a CEQA lead agency in deciding whether to approve large projects. In this way, a WSA is similar to other informational documents used to support the analysis of impacts in an EIR, such as traffic or biological resource studies. Like such studies, other than its role in the CEQA process and the ultimate project approval, a WSA has

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no legal impact and effects no change.

CWIN v. Newhall

There have been few legal challenges involving WSAs since the enactment of SB 610. However, as long-term water planning continues to become an increasingly divisive issue in California, project opponents have begun to view WSAs—similar to EIRs and other informational documents related to project approvals—as useful tools for attacking development projects. Before the *CWIN v. Newhall* case, a basic question that had not been addressed in court is whether WSAs may be directly challenged independent of CEQA, or whether they must be challenged as part of a CEQA lawsuit. A direct challenge could consist of a suit against the water provider after it approves the WSA, claiming that the provider failed to comply with SB 610. On the other hand, in the CEQA context, a challenger would sue the lead agency alleging that the EIR is defective due to reliance upon an inadequate WSA. If the WSA can be directly challenged independent and separate from CEQA, a project proponent may face separate lawsuits challenging both the EIR and the WSA, as the developer faced in *CWIN v. Newhall*. However, if a challenge to a WSA must be brought under CEQA, both the WSA and EIR challenge would be in one suit.

After the Newhall County Water District prepared and approved a WSA for a large industrial project in the City of Santa Clarita, C-WIN sued the District alleging that the WSA failed to meet several substantive SB 610 requirements. C-WIN did not raise its objections to the WSA with the City or wait for the City to make its independent determination of whether adequate water supplies exist or its decision regarding project approval before bringing suit. The District approved the WSA and C-WIN sued.

The District subsequently asked the court to reject the challenge based on several arguments, each stemming from the basic premise that C-WIN's challenge was premature and improperly brought as a direct challenge rather than as part of a CEQA lawsuit. The trial court agreed and granted judgment against C-WIN.

The District presented several theories regarding why C-WIN's challenge was improper, including:

- *Failure to Exhaust Administrative Remedies*. Because C-WIN failed to raise its objections about the WSA to the City during the CEQA process prior to bringing suit, it had not exhausted its administrative remedies. Had it done so, the City might have agreed with C-WIN, found the WSA's analysis to be inaccurate and concluded that insufficient water supplies exist for the project.
- *No Final Agency Action*. The District's approval of the WSA was not the final agency action because the City had yet to consider the WSA, make its independent determination of whether adequate water supplies exist, and decide whether to approve the project.
- *The WSA Approval Was Not Ripe for Review*. The ripeness doctrine requires that courts only review concrete controversies so that they not issue advisory opinions. At the time C-WIN brought its action, the City still had the opportunity to disagree with the analysis in the WSA and reach a different conclusion regarding water supplies. By suing before the City considered the WSA and decided whether to approve the project, the controversy was not ripe for review in court.
- *C-WIN Lacked Standing*. A party lacks standing if it is not "beneficially interested" in the controversy or if it would not be impacted by the outcome of the litigation. Because WSAs are informational documents prepared for the benefit of the CEQA lead agency—not the general public —to help assess the availability of sufficient water supply, private parties lack a beneficial interest in the adequacy of the WSA. Only once a decision regarding a project has been made in reliance upon the WSA does a private party have a beneficial interest in the WSA giving it standing to bring a lawsuit. However, at the time C-WIN sued, the WSA had no legal impact.

Although these arguments are based on separate legal theories, each stems from the same central idea that a WSA is integrated with the CEQA process and, therefore, must be challenged within the CEQA framework. The court did not issue a statement of decision, so it is not clear which of these theories it relied on in throwing out C-WIN's suit. This issue will remain unresolved until addressed by a court of appeal or the California Supreme Court. If the arguments presented by the District in *CWIN v. Newhall* are accepted by an appellate court, project opponents would be confined to CEQA challenges, reducing the likelihood that development projects will face multiple suits and the potential for inconsistent rulings.

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Citations:

Cal. Water Impact Network vs. Newhall County Water Dist. (Los Angeles Superior Court Case No. BS103167)

SB 610, Ch. 643, § 1(a)(9)

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