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Global Warming and Droughts Not New Information; Project Opponents Must Fairly Present Claims Before Filing CEQA Lawsuit

Citizens for Responsible Equitable Environmental Development v. City of San Diego (May 19, 2011, D057524) __ Cal.App.4th __

By Jeffrey Forrest & Robyn Christo

On May 19, 2011, the California Court of Appeal for the Fourth Appellate District upheld an Addendum to an Environmental Impact Report ("EIR Addendum") over claims that the lead agency failed to follow statutory procedures for adopting a Water Supply Assessment ("WSA") and that a supplemental EIR ("SEIR") was required to analyze "new" environmental impacts related to drought and global warming.
Citizens for Responsible Equitable Environmental Development v. City of San Diego involved an Addendum to an EIR initially prepared for a 664-acre master planned community in the City of San Diego in 1994. The EIR Addendum addressed environmental impacts from the last phase of the master planned community -- a 1,500-unit multi-family project ("Project").

WSA Approval Procedure

Before the lead agency approved the Project, the City's water department prepared a WSA, which was then approved by the City Council at the Project's public hearing through a resolution certifying the EIR Addendum. The resolution did not specifically reference the WSA. The Citizens for Responsible Equitable Environmental Development ("CREED") argued the California Water Code1[1] required the City Council, acting as the water department's legislative body, to approve the WSA in advance at a separate hearing because the Legislature deemed the coordination of water supply planning and land use planning too important to adopt as just an ordinary technical report supporting the EIR Addendum's water supply analysis.

The Court of Appeal disagreed. Unlike many other jurisdictions that have a separate water agency governing board, the City's water department is governed by the same entity (the City Council) as the lead agency; thus no separate hearing or resolution was required. The court held that requiring the same legislative body to hold two different hearings on the matter, or approve a WSA and CEQA document in different motions, would not enhance public review or local agency decision-making. Instead, it affirmed that the "purpose of CEQA is to inform government decision-makers and their constituency of the consequences of a given project, not to derail it in a sea of administrative hearings and paperwork." (*Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency* (1986) 188 Cal. App. 3d 249, 263.)

Drought Not New Information

The City Council adopted the project despite then Governor Schwarzenegger's drought declaration and a notice from the Department of Water Resources that it would be reducing water deliveries to the City due to the statewide drought and a separate court order to reduce water pumping from the Bay/Delta area to protect endangered Delta Smelt. CREED argued that the drought declaration and notice of reduced water deliveries occurred after the WSA was completed and therefore was the type of "new" information that required the City to process a SEIR, instead of an EIR Addendum.

The court dismissed CREED's claim finding that CREED failed to satisfy its burden of proof to address all the information regarding available water supply, including the WSA's references to water supply during multiple dry years. The court affirmed that it was proper for the City to rely on testimony from the City's planning staff during the public hearings that the drought was only temporary and the City had adequate water supply to serve the project in the long term.

Global Warming Not New Information

CREED argued that the 1994 EIR contained no references to global warming and that the passage of state global warming laws, such as AB 32 and SB 97, revealed new information about the scientific link between global warming and human development activities. The court dismissed this claim because lead agencies may not require preparation of a SEIR unless "[n]ew information, which was not known and could not have been known at the time of [EIR] was certified as complete, becomes available." (Cal. Pub. Res. Code § 21167(c).) The court found that by the time the EIR was certified in 1994, there was enough information available from various executive orders, international scientific panels, and the National Academy of Sciences demonstrating the link between global warming and human activities that an impact analysis could have been included in the 1994 EIR. Because the statute of limitations on the 1994 EIR had long since passed, CREED was time-barred from raising those issues in a legal challenge against the 2009 EIR Addendum, where public policy favors finality. The evidence that there was sufficient information about global warming in 1994 came from

the City of Los Angeles' 1990 lawsuit against the National Highway Safety Administration2[2] and the U.S. Supreme Court opinion in *Massachusetts v. EPA* (2007) 549 U.S. 497, where the high court summarized the history of official government actions related to global warming from the 1970s to 2007.

Failure to Exhaust Administrative Remedies

During the six years the City reviewed the Project, CREED did not submit a comment opposing the Project when the Notice of Preparation was issued, the Draft EIR Addendum was circulated, community outreach hearings were held, the Planning Commission's hearing was held or participate in the City Council hearings for the Project. Instead, hours before the City Council was scheduled to review the Project in a January 20, 2009 public hearing, CREED attempted to preserve its right to sue the Project approval in court by filing with the City Clerk's office a two page letter with general allegations that the Project violated CEQA and referring to an attached DVD with 5,000 pages of general information about water supply, drought, global warming, and copies of previous EIRs around the state discussing water supply and global warming issues. The City Council postponed the hearing until February 17, 2009 for other reasons and only later discovered CREED had submitted the letter. During the month between the two letters, the Project's air quality consultant provided a letter analyzing the Project's greenhouse gas impacts.

Then, on the morning of the February 17, 2009 hearing, CREED filed a second two-page letter with an attached DVD with several thousand more general documents about global warming and droughts. CREED did not participate in the City Council's hearing to elaborate on its comments. When the City refused to include the second DVD in the administrative record, the trial court judge denied CREED's Motion to Augment the Record, finding that under the totality of the circumstances, CREED failed to fairly present its arguments to the City Council in a manner that the City could reasonably be expected to respond. CREED did not appeal the motion.

The CEQA statute prohibits judicial review "unless, the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing…" (Cal. Pub. Res. Code § 21177(a).) Nevertheless, the Court of Appeals took the next step and found that CREED's January 20, 2009 letter with 5,000 pages of exhibits was insufficient to exhaust the administrative remedies available to CREED even though it was submitted a month in advance of the City Council's final hearing on the Project.

The court noted that "To advance the exhaustion doctrine's purpose '[t]he "exact issue" must have been presented to the administrative agency….' [Citation omitted] and "[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th,

523, 535-536.) The court held that CREED failed to satisfy the exhaustion doctrine because its letters only contain general, unelaborated objections. The letters did not contain the term “drought” or object to the content of the WSA. The letters made only general, unelaborated objections such as, “global climate change has been raised as a significant environmental issue that has been frequently analyzed in current environmental documents” and the “project will cause direct and indirect greenhouse-gas emissions that, when considered cumulatively, are significant.”

The court affirmed that “The City cannot be expected to pore through thousands of documents to find something that arguably supports CREED’s belief the project should not go forward. Additionally, CREED did not appear at either CEQA hearing to elaborate its position. It appears from CREED’s haphazard approach that its sole intent was to preserve an appeal.” The court noted that if Petitioners were not required to give specific objections so the agency has the opportunity to evaluate and respond to them, every project approval would be subject to litigation on new or expanded issues.

Significant Conclusions from the Case

The case is significant for a number of reasons.

First, for a developer or lead agency that wants to amend entitlements to respond to market changes, but is concerned that the state’s new global warming laws will automatically require an exhaustive SEIR, this case affirms that holders of post-1994 entitlements can likely amend their entitlements without an SEIR. The expedited EIR Addendum procedure is available where development project changes do not otherwise trigger new or more severe unmitigated environmental impacts compared to those disclosed in the original EIR, even where the original EIR contains no information on the project’s global warming impacts. With the passage of state and local legislation (SB 1185, AB 333, and possibly SB 208 later this year), the “life” of projects with vesting tentative maps, tentative maps, and parcel maps has been extended due to the economic downturn. There are likely more older, unfinished development projects whose build-out can be facilitated with an EIR Addendum.

Second, the opinion may improve the quality of the debate at public hearings on development projects because it discourages “stealth” legal attacks and encourages a clear discussion of the merits of a project. Project opponents who wait to the last day to submit a long list of CEQA based project objections risk losing their right to appeal on those grounds if the information is not presented in an organized manner that gives the lead agency a fair opportunity to respond. Even project opponents who submit documents a month in advance of a public hearing must be cautious to present the information in an organized manner that identifies the exact issue so the lead agency has a fair opportunity to respond to the specific issues raised. Furthermore, the risk of courts finding that a project opponent failed to exhaust remedies is likely greater where the project opponent is represented by legal counsel and fails to indentify the specific issues that are the basis for its claims. CEQA attorneys will therefore now need to identify carefully what specific evidence support their legal claims against a project.

Third, it may improve the quality of the response from lead agencies, resulting in better development projects. When specific objections to a project are made, the lead agency can better decide whether those objections have merit and either make necessary changes in the project or determine if there is other substantial evidence to rebut the claim. Where the objections do not have merit, the lead agency is assured it can rely on expert opinion from its planning staff during a public hearing.

Fourth, WSA findings that address the availability of water during multiple dry years can be used to reject claims that drought conditions trigger the need to prepare an SEIR.

Fifth, cities and counties that govern water supply departments without a separate governing board can approve a project's WSA without conducting duplicative hearings or special approvals for the WSA. The WSA can be treated like any other technical report supporting a CEQA document.

Finally, the case affirms that CEQA petitioners who repeat the evidence in opposition to a project fail to satisfy their legal burden of proof when they do not address all the evidence in the record supporting the lead agency's decisions. The court is not a forum to revisit debate over a project's public policy merits, but instead is a forum to determine if the lead agency had any substantial evidence to support its findings.

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3[1] Water Code section 10910(g)(1) provides, "[T]he governing body of each public water system submit the assessment to the city or county not later than 90 days from the date on which the request was received. The governing body of each public water

system … shall approve the assessment prepared pursuant to this section at a regulator or special meeting."

4[2] *City of Los Angeles v. National Highway Traffic Safety Admin.* (D.C. Cir. 1990) 912 F.2d 478, 483)