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#### **Leading Water to the Horse: Practical Guidance for CEQA Water Supply Analysis in the Wake Of *Vineyard Area Citizens***

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Gone are the days when nothing more than a divining rod was needed to locate water supplies for new development. The recent landmark decision in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (*Vineyard Area Citizens*), one of the California Supreme Court's rare forays into the realm of CEQA jurisprudence, potentially raises the bar regarding the requirements for analyzing water supplies. Although the decision clarifies many of the rules for preparing a water supply analysis under CEQA, it also creates a great deal of uncertainty for project proponents and agency planners as to whether a particular water supply analysis will meet the standards articulated by the Court. Future litigation is inevitable and will result in additional clarification regarding the application of these standards. Meanwhile, to minimize vulnerabilities to legal challenge, the water supply analysis in an EIR (or other CEQA document) should be carefully drafted keeping in mind the principles announced in *Vineyard Area Citizens*.

This article is intended to provide practical guidance in crafting the water supply analysis in an EIR, rather than an overview of the Court's decision or the facts of the case. Readers interested in an extended summary with additional analysis of the *Vineyard Area Citizens* decision are referred to Morrison & Foerster's earlier client alert regarding the case, available at <http://www.mofo.com/news/updates/files/update02326.html>.

The major standard articulated in *Vineyard Area Citizens* is that a CEQA water supply analysis must be supported by substantial evidence in the record demonstrating there is a "reasonable likelihood" that an identified water source will be available to serve the project. The Court's opinion also underscored the need to analyze the environmental impacts of supplying water to the project from the identified sources—a primary reason the Court held that it was insufficient merely to include a mitigation measure requiring that agreements and financing for water supplies be in place before issuance of development entitlements.

The *Vineyard Area Citizens* opinion appears to lay out at least four different methods for a water supply analysis to comply with CEQA. The first approach, applicable to multi-phased projects requiring procurement of additional supply for each phase, is for the EIR to indicate whether there likely would be a rough regional balance between water supply and demand by analyzing competing long-term water demands within the applicable region (e.g., the relevant water agency zone) and the potential effect of such competing demands on the project's ability to obtain sufficient water. The Court indicated that in utilizing this approach, an EIR should provide a consistent and coherent description of future demand for new water due to growth in the region and the amount of new water potentially available to serve that growth. If there are inconsistencies between the estimates of future water demand and supply in the EIR and in other documents relied upon for the EIR's water supply analysis, or if there are internal inconsistencies within such supporting documents, the EIR should include an explanation of why the estimates are different. If the water supply will rely on conjunctive use of surface water and groundwater supplies, the analysis should indicate the amounts of each that are expected to be used and in what combinations these sources will be used during wet and dry years.

The second approach is to demonstrate a “reasonable likelihood” that water will be available for the project from an identified source “by other means.” Such a demonstration could be supported by a description of infrastructure proposed to connect the water supply to the project, the scheduled timing for constructing such infrastructure, a funding mechanism that is in place for the infrastructure construction, and evidence that available supply will not be allocated to other competing development. Evidence of contractual or other rights to water supply would also support a demonstration that an identified source is reasonably likely to be available. Demonstrating a “reasonable likelihood” of available water supply in this manner might be easier for single-phased projects, but also would be an excellent approach for longer-term, multi-phased projects if evidence to support such a demonstration is available.

The *Vineyard Area Citizens* decision does *not* require that an EIR indicate with certainty that there will be adequate water supplies available to serve the project. The Court indicated that a third possible approach to CEQA compliance could be used in circumstances where it is not possible to demonstrate a reasonable likelihood that water from identified sources will be sufficient. In such circumstances, the EIR must identify potential sources of water, the environmental impacts of relying on those sources, and the likelihood the identified sources will be available. Additionally, the EIR must disclose any uncertainty regarding the supply, and where uncertainty exists, identify possible replacement sources or alternatives to use of the anticipated water, discuss their environmental consequences, and identify mitigation measures to minimize each adverse impact.

The Court also indicated that a fourth approach would be for the EIR to incorporate or rely on an existing urban water management plan (UWMP), provided the UWMP accounted for the expected new demand of the development project at issue. Urban water suppliers are required to prepare and periodically update UWMPs, which must describe and project estimated past, present, and future water sources, supply, and demand for at least a 20-year planning horizon. *Vineyard Area Citizens* makes it clear that in relying upon the information in the UWMP, or for that matter in relying upon any evidence in other outside documents, the drafter of a CEQA water supply analysis must be careful to properly reference, summarize, or otherwise guide the reader to the relevant information in that document. A conservative approach might involve including in the analysis both a statement explicitly incorporating relevant portions of the UWMP by reference and a summary of the relevant information contained in the UWMP.

In many instances, it would be wise to combine two or more of the above approaches, especially where one of these approaches can technically satisfy the standards set forth in *Vineyard Area Citizens*, but some uncertainty remains regarding the availability or amount of future water supplies. For example, even if the water provider that will serve the project has prepared and adopted an UWMP that accounts for the project’s anticipated water demands, there may be weaknesses in the UWMP’s methodology or calculations. Arguably, the water supply analysis in the EIR for the project nevertheless would be sufficient under *Vineyard Area Citizens* merely by relying on and properly referencing and summarizing the information in the UWMP. Even so, the prudent approach may be to provide additional analysis that addresses and compensates for the weaknesses in the UWMP to the extent possible.

The Court’s statement that certainty of water supply is not required, while providing some degree of flexibility for long-term, multi-phased projects, also has some implications for the analysis of cumulative water supply impacts for smaller projects that will be fully developed within a shorter timeframe. Arguably, if an EIR does not need to demonstrate definite assurance of water supply for later phases of the project being analyzed, it follows that the document also does not need to demonstrate with certainty that water supply will be available for other proposed uses in the area. Availability of water supply for other planned projects should be discussed in analyzing cumulative water supply impacts and the document should disclose uncertainties regarding the availability of water for such projects. However, the *Vineyard Area Citizens* Court does not appear to require the EIR to demonstrate that the water supply for the project will not preempt other future projects from obtaining a water supply.

An important caveat, however, is that single-phased projects that trigger the requirement for a water supply assessment (WSA) under Senate Bill 610 (SB 610), such as projects that include 500 or more dwelling units, are not off the hook to demonstrate that water supply will be available for other planned future development. If a WSA is required, the CEQA water supply analysis should rely upon and be consistent with the WSA. SB 610 generally will require the WSA to demonstrate that there will be an available water supply to serve the project at issue plus all other existing and future water supply demands over a 20-year period. This appears to be a higher standard than articulated by the Court in *Vineyard Area Citizens*, and the Court’s decision will not trump this requirement of SB 610.

**Citations:**

*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal. 4th 412 (2007)