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[Court Affirms CEQA Does Not Require Cumulative Impact Analysis Where Project Makes No Contribution to Groundwater Impacts](#)

In [Santa Monica Baykeeper v. City of Malibu](#), the Court of Appeal considered Santa Monica Baykeeper's ("Plaintiff") claim that the City of Malibu ("City") abused its discretion in certifying the environmental impact report ("EIR") for the City's Legacy Park project ("Project") because it failed to adequately analyze (1) construction-related water quality impacts; (2) the impact of using treated effluent from the adjoining Malibu Lumber Yard; and (3) cumulative groundwater impacts of the project. The appellate court concluded that the construction-related water quality impacts were moot since the Project had already been constructed during the pendency of the appeal and that there was substantial evidence to support the City's findings that the Project's use of Lumber Yard wastewater effluent and stormwater did not create a cumulative groundwater impact within an area of the City known for significant groundwater problems.

Background

In 2009, Defendant City approved Project to construct a 15-acre park near the Malibu Civic Center at the terminus where Malibu Creek drains into the Malibu Lagoon, which periodically discharges to Surfrider Beach. As originally proposed, the Project would have collected both area stormwater and the Lumber Yard's treated wastewater for irrigating the park. In addition, the Project proposed to transfer portions of the stormwater and treated wastewater into a subsurface disposal field through a series of underground perforated pipes. The City received public comments from Plaintiff and the Regional Water Quality Control Board asserting that there was a groundwater mounding problem in the area. The concern was that rising water tables in the winter would interfere with the ability of these subsurface disposal fields to function properly. The City was aware of this problem, but initially concluded the Project would not have a significant impact on groundwater because the City was planning a future Groundwater Mounding Study to confirm the capacity of the underground disposal fields and required implementation of mitigation measures to protect groundwater based upon the future study. However, prior to issuing the final EIR, the City deleted the groundwater percolation features of the Project entirely.

Despite removal of the connection between the Project and the area groundwater mounding problems, Plaintiff filed its CEQA claim, in part, because the groundwater mounding problems were caused by the City's decision two years earlier to allow the Lumber Yard to dispose of its treated wastewater at the Legacy Park site. The City's

approval of the Lumber Yard project in 2007 was never challenged and the statute of limitations had long since expired. Plaintiff believed the Legacy Park Project should have evaluated the environmental impacts of the Lumber Yard project on groundwater as part of the Legacy Park Project's cumulative impact analysis.

Lumber Yard Wastewater Effluent Issue

Baykeeper argued that the City improperly deferred the analysis of the Project's groundwater impacts to the future Groundwater Mounding Study and therefore the EIR violated its central purpose to disclose to the public and decision makers the Project's potential impacts and feasible mitigation measures. The Court disagreed and found that the Project EIR properly analyzed the Lumber Yard Project wastewater impacts for several reasons.

First, the Court found that the environmental impact from Lumber Yard project's use of the dispersal field at the Legacy Park Project site was already the subject of a 2007 environmental review that had not been timely challenged.

Second, the Project EIR's scientific studies demonstrated that the portion of the Lumber Yard's wastewater effluent used in the dispersal field was well within the percolation capacity of that dispersal field.

Third, Project EIR demonstrated that the scaled back Legacy Park Project would not have any adverse impact on area groundwater because the stormwater detention pond was clay-lined to prevent infiltration into the groundwater and all the stormwater and wastewater effluent used for park irrigation would be applied in a manner that would not exceed evapotranspiration rates. This controlled irrigation prevents infiltration to the groundwater table.

Cumulative Impact Issue

CEQA Guidelines 15064(h)(1) requires preparation of an EIR "if the cumulative impact may be significant and the project's incremental effect, though individually limited, is cumulatively considerable. 'Cumulatively considerable' means that the incremental effects of an individualized project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."

Plaintiff alleged that because the Lumber Yard project was on the list of projects in the vicinity of the Legacy Park Project, the EIR was required to analyze the cumulative impacts of the Lumber Yard on groundwater, in combination with the Legacy Park Project, but instead the City improperly deferred the analysis to the future Groundwater Mounding Study.

Citing *Sierra Club v. West Side Irrigation District*, the Court found that the Final EIR properly established that "the project will not create new groundwater impacts on the

site. Rather, it will reduce the groundwater impact resulting from percolation of treated wastewater from the Lumber Yard project by using that water for controlled irrigation ten months of the year. Under these circumstances, no cumulative analysis of groundwater impacts was required.”

Significance of the Case

The significance of this case is a reminder that some level of impact is always necessary before a project can be required to analyze whether it has a cumulatively considerable contribution to an environmental impact. It further clarifies that previously approved project EIRs are not subject to judicial review after the statute of limitations has passed merely because such projects are in the vicinity of new development projects undergoing CEQA review. Finally, it is an example of how lead agencies can respond to public comments on a draft EIR through project revisions that eliminate any link to a potential adverse environmental impact, but eliminating a potential adverse environmental effect comes at the expense of achieving project goals and does not necessarily reduce the potential for litigation from project opponents. As the appellate court concluded, “We find no abuse of discretion in the City’s conclusion that, even though the project did not meet all water quality goals for the Civic Center area, it is a significant improvement over existing conditions.”

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