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CEQA Case Summaries

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Is it a Project?/Project Description

Friends of Juana Briones House v. City of Palo Alto, 190 Cal.App.4th 286 (2010)

This case involved a long-running dispute starting in 1988 regarding the renovation and rehabilitation of the Juana Briones House and, ultimately, the right to demolish the house. The house had been designated by the City of Palo Alto as an historic landmark. The then-owners of the house filed an application with the City for a demolition permit to demolish the house. After extended litigation, the City issued the demolition permit. The Friends of Juana Briones House then brought an action against the City alleging that issuance of the demolition permit required review of any significant adverse impacts under CEQA resulting from the demolition of a historic resource.

After the trial court ruled in favor of the Friends of Juana Briones House, the house owners appealed. The central issue in the appeal was whether issuance of the demolition permit by the City was "ministerial" (meaning that no CEQA review was required) or "discretionary" (meaning that before the City could issue a demolition permit, it was required to review the "project," i.e., demolition of the Juana Briones House pursuant to CEQA). Under the City's demolition ordinance, a 60-day moratorium on demolition is automatically imposed upon filing the permit application. As part of the City's process, the application for demolition is referred to either the Architectural Review Board or the Historical Resources Board, which can recommend to the City Council that the moratorium on demolition be extended for up to one year. Nothing in the City's demolition ordinance, however, allows the City to impose conditions on the demolition or recommend or pursue alternatives to demolition.

In analyzing the claim of the Friends of Juana Briones House that the City demolition application process was discretionary, the court undertook an extensive analysis of the difference between ministerial and discretionary actions. Ministerial decisions, such as building permits, are those decisions involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project, where the public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. Thus, a ministerial decision involves only the use of fixed standards or objective measurements rather than a public official's personal subjective judgment in deciding whether or how the project should be carried out. Discretionary projects are those requiring the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity that involves relatively personal decisions addressed to the sound judgment and enlightened choice of the administrator. As the court correctly pointed out, some decisions have aspects of both ministerial and discretionary characteristics and, in those circumstances, CEQA requires review of the project because of the discretionary elements.

Utilizing these standards, the court determined that the City's demolition application process was purely ministerial. The process vested no authority in any decision maker to condition issuance of the demolition permit, much less consideration of alternatives to demolition. The mere fact that the City demolition ordinance contained provisions for an initial moratorium and the potential for extension of the moratorium did not render what was otherwise a ministerial decision a discretionary one. The effect of the moratorium was simply to extend the time period before which the City was required to issue the demolition permit.

The bottom line for this court was that the issuance by the City of a demolition permit for the Juana Briones House was not a "project" for purposes of CEQA (requiring analysis of the environmental impacts of demolition), because issuance of the demolition permit was not "discretionary" but rather "ministerial." Only projects involving the issuance of discretionary approvals constitute a project for CEQA purposes.

Communities for a Better Environment v. City of Richmond, 184 Cal.App.4th 70 (2010)

In another long-running dispute, the plaintiffs sued the City of Richmond for its approval of a project proposed by Chevron that would allow its Richmond refinery to increase production of gasoline. The plaintiffs alleged, among other things, that because the project description required by CEQA was inadequate, the EIR failed to disclose and analyze the likelihood that Chevron's project would increase the refinery's ability to process heavier, lower-quality and more contaminated crude oil.

Among other requirements, the CEQA Guidelines require with respect to an EIR's project description a general description of the project's technical, economic and environmental characteristics and a statement of project objectives. Applying these standards to the project description used in the EIR, the court found that the description was unclear and inconsistent, even while the EIR disclosed that the project would result in an increase in sulfur content of the crude processed at the refinery. The EIR simply ignored the fact that the project would increase the refinery's ability to process heavier, lower-quality, more contaminated crude, which could potentially create serious environmental consequences. As a result, the EIR did not address the public health or other environmental consequences of processing heavier crude or analyze, quantify, or propose measures to mitigate those impacts. In addition, the court found the EIR inadequate because it did not adequately address the issue of whether the project included any equipment changes that would facilitate future processing of heavier crudes. In reaching this conclusion, the court observed that the EIR itself contained conflicting statements about the objectives of the project. Because of these defects, conflicting signals were given to decision makers and the public about the nature and scope of the activity Chevron was proposing and therefore the project description was inadequate and misleading. As the court observed, "the EIR fails as an informational document because the EIR's project description is inconsistent and obscure as to whether the Project enables the Refinery to process heavier crude." 184 Cal.App.4th at 89.[1]

[1] Emphasis in quotations is supplied, unless otherwise noted. Citations are omitted from quotations, unless otherwise set out.

Because the starting point of any EIR analysis is the project description, the project description should be a focal point of considerable attention to ensure that it meets the standards for adequacy under CEQA. Here, the project description failed in two critical respects by confusingly and incoherently addressing the project's technical, economic and environmental characteristics and failing to provide an adequate statement of project objectives.

Conversely, in a separate yet related section of the case, the court upheld the EIR against a challenge that it impermissibly segmented the impacts of the project by not analyzing as part of the project the impacts of a proposed pipeline to transport excess hydrogen from the plant. The court reasoned that "the hydrogen pipeline and the Refinery upgrade, are independently justified, separate projects with different project proponents – not piecemealed components of the same project." 184 Cal.App.4th at 99. The court also observed that the agency properly included the proposed pipeline in the cumulative impact analysis for the proposed Refinery upgrade.

California Oak Foundation v. Regents of University of California, 188 Cal.App.4th 227 (2010)

This case involved the infamous tree sitters in the oak trees outside of Memorial Stadium on the UC Berkeley campus. The plaintiffs challenged the adequacy of the EIR on many grounds. This summary focuses on the claim that the project description was inadequate and that the statement of project objectives was defective. The court's discussion and conclusions will be helpful going forward because of the court's conclusions regarding the requirements for an adequate project description and statement of project objectives.

The court first noted that only four items are mandatory for an adequate project description: (1) a detailed map with the precise location and boundaries of the proposed project; (2) a statement of project objectives; (3) a general description of the project's technical, economic and environmental characteristics; and (4) a statement briefly describing the intended uses of the EIR and listing the agencies involved with and the approvals required for implementation. The court then noted that the CEQA Guidelines state that a project description should not supply extensive detail beyond that needed for evaluation and review of a project's environmental impact. With this as a basis for the court's analysis, the court then examined the claimed defects in the project description, focusing on two particular aspects of the project claimed by the plaintiffs to be examples of the defects in the project description. After examining the plaintiffs' claims, the court found that the EIR's project description was compliant with the requirements of the CEQA Guidelines and therefore was adequate. Helpfully, the court also noted that, even though the EIR provided more detail with respect to the first phase of the project (which was the only phase of the project being presented for final approval), the commitment of the University to prepare additional EIRs in the future, if necessary, if the amount of detail provided for any other phase of the project proved inadequate was a proper use of tiering under CEQA. As the court observed, "Further, where an EIR covers several possible projects that are diverse and geographically dispersed, the agency has discretion to evaluate the potential environmental impacts of the individual projects in general terms in the EIR, while deferring more detailed evaluation of the projects for future EIRs." 188 Cal.App.4th at 271. Because the project description was compliant with CEQA, the EIR contained enough detail to permit reasonable and meaningful environmental review of each phase of the project in connection with the EIR's certification.

Turning to the statement of project objectives, the court observed that the CEQA Guidelines provide that a clearly written statement of objectives helps the lead agency develop a reasonable range of alternatives to evaluate in the EIR and aids decision makers in preparing findings. The statement of objectives must also include the underlying purpose of the project. In this case, the EIR identified seven primary project objectives that the EIR then fleshed out in more detailed discussion in other portions of the EIR. While noting that some of the project objectives were vague and amorphous (a common problem with the formulation of project objectives), they nevertheless served the requisite purpose of assisting in the development and evaluation of a reasonable range of alternatives. In analyzing the adequacy of the project alternatives, the court approved of "integrated" alternatives (i.e., alternatives that reflected all phases of the proposed project). This complied with the requirement that the range of alternatives applied to the project as proposed by the agency, based on whatever objectives the agency seeks to achieve.

Environmental Setting (Baseline)

Communities for a Better Environment v. South Coast Air Quality Management District, 48 Cal. 4th 310 (2010)

In this case involving modifications to an existing refinery, the California Supreme Court ruled that an agency failed to comply with CEQA in using maximum permitted operational levels as the baseline instead of the actual physical conditions (less than permitted levels) at the time of the analysis. ConcocoPhillips (CP) proposed to modify its existing petroleum refinery to comply with regulations requiring a reduction in the sulfur content of motor vehicle diesel fuel. CP applied to the South Coast Air Quality Management District for a permit to construct the project. The project entailed replacing or modifying various refinery infrastructure, including substantially increasing operation of four boilers that provide steam for refinery operations. The boilers were subject to prior permits that specified a maximum rate of heat production for each piece of equipment. While acknowledging that the project would result in increased emissions of nitrogen oxide (NOx) that exceeded the air district's significance threshold of 55 pounds per day, the district nonetheless concluded that there would be no significant impact because even the worst case increased emissions (estimated to be approximately 420 pounds per day) were within the maximum permitted capacities for the existing boilers.

This case, and the two discussed below, contemplate when and if a lead agency can deviate from the direction in CEQA Guidelines § 15125 that "the physical environmental conditions in the vicinity of the project, as they exist at the time" CEQA review begins "will *normally* constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." Here, the court ruled that the district should have compared the project's NOx emissions to existing conditions on the ground rather than to the hypothetical simultaneous operation of the boilers at their maximum permitted capacities. The court observed that operation of the boilers simultaneously at their collective maximum levels was not the norm and thus not a realistic description of existing environmental conditions. The court stated that "[b]y comparing the proposed project to what *could* happen, rather than to what was actually happening, the district set the baseline not according to established levels of a particular use, but by merely hypothetical conditions allowable under the permits." 48 Cal.4th at 322. In the court's view, apparently not disputed by the parties, CP's proposal consisted of an entirely new project and not a

change to an existing project. Based on this distinction, the court seemed to establish a new bright-line rule that the baseline includes fully permitted operations only in the context of either (1) supplemental environmental review under Public Resources Code § 21166 for modification of a previously analyzed project, or (2) approvals allowing the continuation of an existing operation without expansion and thus qualifying for a categorical exemption as an existing facility under CEQA Guidelines § 15301.

Cherry Valley Pass Acres and Neighbors v. City of Beaumont, 190 Cal.App.4th 316 (2010)

The Court of Appeal here upheld the use of an adjudicated water supply allocation as the baseline for water supply analysis and CEQA purposes, even though water use at the subject property had for several years before project approval been far below the adjudicated level. An EIR was prepared for a specific plan contemplating residential development of a 200-acre site formerly used as an egg farm. The egg farm had consumed an average of 1,340 acre feet per annum (afa) of water. After egg farm operations ceased, the property used only about 50 afa. However, a water rights adjudication allocated 1,484 afa of water to the land. The Water Supply Assessment (WSA) prepared pursuant to Government Code section 66473.7 and Water Code section 10910, as well as the EIR for the specific plan, employed the adjudicated 1,484 afa as the environmental baseline. Therefore, the WSA and the EIR found that the projected need for no more than 531 afa of water to serve the proposed residential development would generate no environmental effects because that amount fell well below the baseline figure.

The court examined numerous CEQA baseline cases, *including Communities for a Better Environment v. South Coast Air Quality Management District*, 48 Cal. 4th 310 (2010) (CBE), and noted that use of the word "normally" in CEQA Guidelines section 15125 naturally contemplates occasional use of conditions at some other point in time, particularly where environmental conditions fluctuate from time to time. The court stated that "[t]he City's selection of the 1,484 afa figure as the baseline for determining the [project's] impacts on area water supplies and resources was quintessentially a discretionary determination of how the existing physical conditions without the project could most realistically be measured." 190 Cal.App.4th at 337. The cessation of the egg farm operations did not affect the water rights adjudication. Distinguishing cases involving "hypothetical" or permitted but not being used conditions as the baseline, the court found that the property's 1,484 afa entitlement to groundwater was a condition that existed "on the ground" at the time that CEQA review commenced and was substantially the same as the amount of water previously used for the egg farm. Therefore, that amount was deemed a proper baseline. It may be challenging to square this decision with the bright line seemingly drawn in the *CBE* case that severely limits use of permitted levels as the baseline. However, the baseline for water supply purposes is frequently not a point-in-time number given historical fluctuations based on water conditions and needs. Furthermore, the egg farm had stopped operating shortly before EIR preparation so that the lapse in time when the higher levels of water were used had been fairly brief. The court relied on both the adjudication and historical pumping levels. It is unclear whether the result would be different if one of these circumstances did not exist, but it may be precarious to rely only on an adjudication of water rights if such rights have not been historically used.

The court also held that the water supply analysis did not need to establish that there was sufficient water available long-term to serve the entire area, but that the availability of a direct water source to serve the proposed

project was enough. In addition, the court upheld the City's finding that there were no feasible alternatives or mitigation measures to offset the impact of losing agricultural land (note that the EIR contained actual dollar figures and profit or loss scenarios for each option to facilitate and justify the comparisons).

Sunnyvale West Neighborhood Assn. v. City of Sunnyvale, 190 Cal.App.4th 1351 (2010)

In an EIR for a road extension project designed to alleviate congestion, the City's EIR used as the environmental baseline the traffic conditions that were projected to exist in the year 2020 assuming growth forecast by the City's General Plan and growth projected for the surrounding area. Such a future baseline was apparently consistent with the regional transportation authority's guidelines. The Court of Appeal held that such a future baseline was inappropriate, and that the individual project's effects should have been compared with existing conditions in order to avoid underportraying the project's true effect on current conditions.

The court construed CEQA Guidelines § 15125 (stating that existing physical conditions will "normally" constitute the CEQA baseline) as recognizing that the physical conditions existing precisely when the CEQA process starts may not represent "generally existing conditions," such as when a poor economy has temporarily decreased traffic or when it is clear that construction of other projects will increase traffic before the project is approved (but no later). In such limited circumstances, the baseline may be adjusted up or down. Here, the 2020 baseline extended many years beyond project approval, plus the City staff's comments indicated that a project implementation date of 2020 was only a "guesstimate," while construction might occur before that date. Thus, the court ruled that the "normal" baseline of existing conditions should have been used.

The court differentiated between methodologies that may be appropriate for regional transportation planning from those sufficient for CEQA review of individual projects. Increased future traffic resulting from projected growth and development may very well be relevant to – and required for – an analysis of cumulative impacts (where the growth projections should be layered on top of existing plus project conditions) and a key component of the "no project" alternative evaluation (which is supposed to look at the conditions that would likely result in the absence of the project, including additional growth). In addition, the court noted that it would be acceptable to evaluate impacts against both existing, "on the ground" conditions and against reasonably foreseeable future conditions. But it is not acceptable to merely skip ahead.

Greenhouse Gas Emissions

Case Law

In the first reported CEQA decision addressing greenhouse gas (GHG) emissions,[2] the Court of Appeal struck down an EIR for a refinery project based on, among other grounds, the impermissible deferral of mitigation of GHG emissions. *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70

[2] CEQA Guidelines section 15364.5 defines GHGs as including "carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride."

(2010). The refinery project was estimated to result in nearly 900,000 tons of new emissions of GHGs (equivalent to the GHGs produced by approximately 160,000 cars). It was only relatively late in the CEQA review process when the lead agency concluded that the project would result in a significant climate change impact. The agency then imposed a mitigation measure requiring the refinery operator to submit a plan for agency approval containing measures to ensure that the project would create no net increase in GHG emissions.

In ruling that the measure constituted impermissible deferral of mitigation, the court reasoned that the EIR "merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate" the significant impact. 184 Cal.App.4th at 93. Distinguishing cases where mitigation measures were upheld despite the fact that they were deferred, the court noted that the agency "delayed making a significance finding until late in the CEQA process, divulged little or no information about how it quantified the Project's greenhouse gas emissions, offered no assurance" that the mitigation plan would be both feasible and efficacious, "and created no objective criteria for measuring success." *Id.* at 95. The court's ruling emphasizes the importance of identifying and mitigating a project's significant GHG impact early in the environmental review process. If a mitigation measure relies on development of a future plan to mitigate a project's significant climate change impact, it will be important to identify a verifiable goal and establish clear and objective performance standards to support any determination that the significant impact will be reduced to a less than significant level.

In *San Diego Navy Broadway Complex Coalition v. City of San Diego*, 185 Cal.App.4th 924 (2010), the Fourth District Court of Appeal ruled that the City of San Diego was not required to analyze GHG emissions in connection with granting design review approval of a previously approved waterfront redevelopment project. The court reasoned that the scope of subsequent environmental review is circumscribed by the extent of discretion exercised by the agency. Since the agency's discretion in that case was limited to a consideration of the project's aesthetics, the court ruled that environmental review of the project's potential impacts on global climate change "would be a meaningless exercise." 185 Cal.App.4th at 940.

Amendments to the CEQA Guidelines

The new CEQA Guidelines (effective March 18, 2010) make clear that an analysis of GHG emissions is generally required in an environmental document prepared under CEQA. *See, e.g.*, CEQA Guidelines § 15064.4(a) ("A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.").[3] While the new guideline does not contain any standards or thresholds to measure the significance of GHG emissions, it does state that the following factors should be considered when assessing the significance of impacts from GHG emissions on the environment: (1) the extent to which the project may increase or reduce GHG emissions compared to the existing environmental setting, (2) whether the project emissions exceed a threshold of

[3] The topic has also been added as section VII to Appendix G to the CEQA Guidelines (Environmental Checklist Form). That section asks whether a project would: "a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment?" and "b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?"

significance that the lead agency determines applies to the project, and (3) the extent to which the project complies with specified regulations or requirements adopted to implement a statewide, regional or local plan for the reduction or mitigation of GHG emissions.

If a project's contribution to GHG emissions is deemed significant, lead agencies must identify feasible means of mitigating the impact to a less than significant level. CEQA Guidelines § 15126.4(c). Measures to mitigate these impacts may include, among others: (1) measures in an existing plan or mitigation program for the reduction of emissions that are required as part of the lead agency's decision, (2) reductions in emissions resulting from a project through implementation of energy-conserving measures or features, (3) off-site measures, including offsets that are not otherwise required, (4) measures that sequester GHGs, and (5) implementation of specific measures or policies aimed at reducing GHG emissions contained in an adopted plan, regulation or ordinance. *Id.*

CEQA Guidelines section 15183.5 specifically authorizes lead agencies to analyze and mitigate the significant effects of GHG emissions at a programmatic level, such as in a general plan, long-range development plan or a separate plan to reduce GHG emissions. CEQA Guidelines § 15183.5(a). Later project-specific environmental documents may then tier from and/or incorporate by reference that existing programmatic review. *Id.; see also,* CEQA Guidelines § 15150(e)(4). Section 15183.5(b) further provides that public agencies may choose to analyze and mitigate significant GHG emissions in a plan for the reduction of GHG emissions, which may be used in a cumulative impact analysis.[4] *See also*, CEQA Guidelines § 15130 (noting that previously adopted plans for the reduction of GHG emissions may be used in a cumulative impact analysis).[5] An environmental document that relies on a GHG reduction plan for a cumulative impact analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project. CEQA Guidelines § 15183.5(b). An agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project complies with the requirements in a previously adopted plan or mitigation program. *Id.* Conversely, if there is substantial evidence that the effects of a particular project may be cumulatively considerable notwithstanding the project's compliance with the specified requirements in the plan for the reduction of GHG emissions, an EIR must be prepared for the project. *Id.*

Bay Area Air Quality Management District GHG Standards

On June 2, 2010, the Bay Area Air Quality Management District (BAAQMD) became the first regulatory agency in the nation to adopt guidelines that establish thresholds for GHG emissions. The guidelines were an attempt to quantify the necessary action to achieve the State's goal of reducing GHG emissions to 1990 levels by 2020. A

[4] In order to qualify for this purpose, the plan should: (1) quantify GHG emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area; (2) establish a level, based on substantial evidence, below which the contribution to GHG emissions from activities covered by the plan would not be cumulatively considerable; (3) identify and analyze the GHG emissions resulting from specific actions or categories of actions anticipated within the geographic area; (4) specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level; (5) establish a mechanism to monitor the plan's progress toward achieving the level and to require amendment if the plan is not achieving specified levels; and (6) be adopted in a public process following environmental review. CEQA Guidelines § 15183.5(b)(1).

[5] CEQA Guidelines section 15125(d) further requires that an EIR discuss any inconsistencies between the project and an applicable regional plan, including plans for the reduction of GHG emissions.

project that results in emissions exceeding the threshold by definition has a significant impact unless the impact can be mitigated. For commercial, residential and related land use projects, the thresholds are: (1) compliance with a Qualified Greenhouse Gas Reduction Strategy, (2) 1,100 metric tons of carbon dioxide equivalent (CO2e) per year or (3) 4.6 metric tons of CO2e per service population per year. At least for now, the 1,100 metric tons of CO2e standard is the most likely to apply to new development given that very few Bay Area agencies have adopted a Qualified GHG Reduction Strategy and that the service population standard applies only to very GHG-efficient projects. This standard corresponds roughly to a 56-unit single-family housing project, an 83-room hotel, a 53,000-square-foot office building or a 19,000-square-foot regional shopping center. Even relatively small, infill development projects may exceed this low threshold (equivalent to the annual GHG emissions of 200 cars) and, as a result, be required to prepare a full EIR when such projects may have previously qualified for a more streamlined environmental review process. While other agencies are not required to employ the BAAQMD standards, selection of an alternative threshold would need to be supported by substantial evidence in the record. The thresholds apply prospectively for projects commencing environmental review on or after June 2, 2010.

Water Supply

Center for Biological Diversity v. County of San Bernardino, 185 Cal.App.4th 866 (2010)

The major issue in *Center for Biological Diversity* is whether the development of an open air human waste composting facility of 160 acres meets the definition of a "project" under Cal. Water Code § 10912(a) such that a Water Supply Assessment is required for an adequate analysis under the California Environmental Quality Act. The Appellate Court upheld the lower court's ruling that the CEQA analysis was inadequate because: (1) the proposed development is a project pursuant to Cal. Water Code § 10912(a); and (2) therefore, a Water Supply Assessment (WSA) should have been included in the DEIR, Cal. Water Code § 10911(b), *Public Resources Code* § 21151.9.

In its analysis, the Appellate Court relied principally on two sections of the Water Code. The first, § 10910 requires that either (a) the public water system that provides water for the project must prepare a WSA; or (b) the city or county, when no public water systems is identified, must prepare a WSA for the project. The County and Real Party in Interest, Nursery Products, argued that the development did not fit into the requirements of Cal. Water Code § 10910(a) or (b) because the development was not a "project" within the meaning of Cal. Water Code § 10912(a)(5). That section defines a project as, among other things, "(5) A proposed industrial, manufacturing or *processing plant*, or industrial park planned to house more than 1,000 persons, *occupying more than 40 acres of land*, or having more than 650,000 square feet of floor area." The Appellate Court first held that the development was in the nature of a "processing plant," and, thus, fit neatly within the definition of a "project" under the Cal. Water Code.

The court also rejected an argument based on the earlier opinion in *Gray v. County of Madera*, 167 Cal.App.4th 1099, 1131 (2008), which held that a WSA is required "only if a 'public water system' is impacted by the project." As the subject development would rely either on ground water or imported water trucked in on a daily basis, the respondent argued that no public water system was involved. The court, however, rejected that argument, and

relied instead on Cal. Water Code § 10910(b), which states, in pertinent part, that if a city or county is unable to identify any public water system that may supply water to the project, then it must prepare a WSA. In short, the court ruled that Cal. Water Code § 10910 conclusively establishes that a WSA is required for CEQA purposes for a project within the meaning of Cal. Water Code § 10912(a) even when a public water system is not involved in the development or maintenance of the project.

Watsonville Pilots Assn. v. City of Watsonville, 183 Cal.App.4th 1059 (2010)

This case involved a challenge by the Watsonville Pilots Association to the approval of a General Plan for the City of Watsonville that included the location of an approximately 2,500-unit development near the end of the runway at the Watsonville Airport. The pilots' primary argument was that the development violates Cal. Pub. Util. Code § 21670.1(e), which requires that in a county that does not have an Airport Land Use Commission, a city must incorporate into its General Plan the Airport Land Use Planning Handbook of the California Department of Transportation. The court upheld that claim, but rejected a second claim by the pilots that the EIR analysis of the General Plan was inadequate on the issue of water supply because it did not analyze the environmental impacts of supplying water to the development contemplated by the General Plan.

In rejecting the pilots' claim concerning the adequacy of the water supply analysis, the Appellate Court relied on *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412, 428, fn. 5 (2007), in which the California Supreme Court ruled that "the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for approval of a conceptual plan is much lower than for issuance of building permits." The Appellate Court went on to hold, with regard to the General Plan EIR, that "such a conceptual EIR need only adequately address the reasonably foreseeable *impacts* of supplying water to the project, note any uncertainties that preclude the identification of future water sources, and discuss the reasonably foreseeable alternatives and environmental impacts of those alternatives." 183 Cal.App.4th at 1092.

Sonoma County Water Coalition v. Sonoma County Water Agency, 189 Cal.App.4th 33 (2010)

The major issues in this case are less fact-specific than procedural, having to do primarily with the fundamental consideration of: (1) whether a court, in evaluating the sufficiency of an Urban Water Management Plan (Plan) under the Urban Water Management Planning Act, Wat. Code § 10610, *et seq*., (UWMPA) may weigh conflicting evidence and make *de novo* determinations or must accord deference to the expertise and discretion of the agency, in this case the Sonoma County Water Agency (Agency), water supplier subject to UWMPA; (2) what degree of specificity and certainty is required by the Act in addressing the necessary elements of the Plan; and (3) what is the scope of the agency's duty to coordinate with other agencies in preparation of a Plan.

The basic facts are that the Sonoma County Water Coalition (Coalition) sought a writ of mandate from the Sonoma County Superior Court seeking to enjoin the Agency from adopting or implementing the Plan, on the

grounds that: (1) the Agency failed to coordinate with other relevant agencies; (2) the Plan failed to include the degree of specificity required by UWMPA; (3) the Plan failed to adequately consider its environmental impacts on endangered Salmonid species; (4) the Plan failed to adequately address the effect of recycled ground water on the future water supply; and (5) the Plan failed to quantify with reasonable specificity the scope of demand management measures relied upon to address anticipated water shortfalls. The lower court granted the writ on the basis that the Plan failed to provide the detailed water supply information required by UWMPA, and the Agency had not coordinated with other water supply regulators.

The Appellate Court reversed on the grounds that the trial court failed to accord deference to the expertise and discretion of the Agency, improperly made *de novo* determinations, and imposed requirements not found in the Act. In doing so, it held that "our task is not to weigh conflicting evidence and determine who has the better argument" and stated that we "may not set aside an agency's [decision] on the ground that an opposite conclusion would have been equally or more reasonable . . .." 189 Cal.App.4th at 40. "Our inquiry instead, in reviewing the agency's exercise of its discretion, is to ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute, giving appropriate deference to the agency's authority and presumed expertise." *Id.* at 62. "In technical matters requiring the assistance of experts and the study of marshaled scientific data as reflected herein, courts will permit administrative agencies to work out their problems with as little judicial interference as possible." *Id.* at 62-63.

The Appellate Court ultimately held that the Plan was not deficient for failing to assert a level of certainty in its anticipated water supply that could not be justified, or for failing to plan an alternative supply that would necessarily be at least equally uncertain. *Id.* at 62. Nor is UWMPA intended to be a substitute for more detailed project specific planning documents such as those required under CEQA. *Id.* Rather, where a Water Management Plan is at issue, the agency and its experts are only required to articulate the predicates for assumptions on which the Plan is based, and provide the factual basis and expert opinion to support those assumptions while acknowledging the uncertainties inherent in the process. *Id.* at 63. In summary, appellate courts are conservative in their approach to the adjudication of agency created plans, and will defer to agency determinations except where they manifestly lack any evidence to support them.

Alternatives

Jones v. Regents of University of California, 183 Cal.App.4th 818 (2010)

This case involved a challenge to the range of alternatives that were provided in a program EIR for the Lawrence Berkeley National Laboratory's 2006 Long Range Development Plan (LRDP), which was prepared in order to serve as the comprehensive land use plan to guide the physical development of the Lab's main site. The plaintiffs argued that that the Regents abused their discretion in certifying the EIR because it did not include a "true" off-site alternative where all Lab growth took place away from the main site, and improperly rejected certain alternatives based on "undefined" project objectives. 183 Cal.App.4th at 824. The court found that the range of

alternatives provided was adequate, basing its opinion to a large degree upon CEQA Guidelines section 15126.6(a), which stipulates that the range of alternatives to be included in an EIR should focus on those that could "feasibly attain most of the basic objectives of the project but would or substantially lessen any of the significant impacts of the project."

The court noted that the "underlying purpose of the LRDP" was "to guide the physical development of land and facilities and to provide a framework for implementing the [Lab's] mission and scientific goals," and cited to the six project objectives in the EIR, which emphasized the need to rehabilitate and develop facilities to accommodate multiple disciplines and expanded partnerships and collaborations, as well as permitting staff from off-site facilities to return to the main site in order to "enhance collaboration, productivity, and efficiency." 183 Cal.App.4th at 826. It concluded that "the so-called true off-site alternative proposed by plaintiffs would prevent the realization of the project's primary objective of creating a more campus-like setting at the [main] site, and would nullify most, if not all, of the other project objectives as well." *Id.* at 827. The court further concluded that it was unnecessary for the EIR to include a "true off-site alternative" when it had already evaluated a "partial off-site alternative" (where part of the development would occur at an off-site location, rather than all at the Lab's main site) and concluded that it would not meet the goals of the project. *Id.* at 828. The court also rejected the plaintiffs' arguments that the project objectives were too narrowly defined, noting that any challenge to the description of the alternatives was not previously raised and thus barred, and also concluded that substantial evidence supported the EIR's conclusion that an off-site alternative would not achieve the Lab's objectives. *Id.* at 828-829.

The major lessons here are: (1) project objectives must be carefully crafted because they determine the feasibility of potential alternatives and (2) while an EIR is not required to study every possible alternative to a project, the range of alternatives provided must be broad enough to defend against claims that other, unstudied alternatives were feasible and/or met the project objectives.

Watsonville Pilots Assn. v. City of Watsonville, 183 Cal.App.4th 1059 (2010)

In this case, the plaintiffs successfully argued that the range of alternatives provided in an EIR for the City's adoption of its 2030 General Plan was too narrow. Here, the EIR addressed only three alternatives – two contemplated the reallocation of residential growth within the area but maintained the same level of overall new development, and the third was the "no-project" alternative, which contemplated only approximately half the total level of new development. The plaintiffs alleged that the range of alternatives also should have included a "reduced development" alternative that contemplated an amount of new development somewhere in between those two levels. The court agreed, rejecting the City's arguments that such an alternative was unnecessary because it would not meet a single project objective, or, even if it were necessary, that the "no project" alternative fulfilled that requirement.

The court pointed out that a "reduced development" alternative would avoid or lessen the significant environmental impacts of the project while, still meeting 10 out of the 12 project objectives (which identified

development strategies that were not specifically tied to the level of development contemplated in the 2030 General Plan). Thus, inclusion of that alternative would comply with Section 15126.6(a) of the CEQA Guidelines, which requires that the range of alternatives to be included in an EIR focus on those that could "feasibly attain *most of* the basic objectives of the project." 183 Cal.App.4th at 1090. By contrast, even though the "no project" alternative would similarly avoid or lessen the project's significant environmental impacts, it "would not create *any* plan for the future [and] would meet *almost none* of the project's objectives." *Id.* (emphasis in original). Thus, analysis of a "reduced development" alternative was necessary because it "would have provided the decision makers with information about how most of the project's objectives could be satisfied without the level of environmental impacts that would flow from the project." *Id.*

The take-away from this case is similar to that of *Jones v. Regents*, above; project objectives must be carefully crafted, and EIRs must include a full spectrum of potentially feasible alternatives that meet a majority (but not necessarily all) of those project objectives.

Center for Biological Diversity v. County of San Bernardino, 185 Cal.App.4th 866 (2010)

In this case, the proponents of an open-air composting facility argued in vain that it was unnecessary to include an enclosed composting facility among the alternatives evaluated in the project EIR, because such a facility would be both financially and technologically infeasible. To support the argument regarding financial infeasibility, the final EIR for the project included a memorandum from an environmental consulting firm that reviewed the economics of such an alternative and concluded that it would be extremely costly and not as profitable as the project itself. With respect to the technological feasibility issue, the final EIR noted only that electricity was not currently available at the project site.

The court rejected the project sponsor's arguments, finding that the EIR in fact should have included an "enclosed facility" alternative. First, it noted that the feasibility of an alternative did not rest solely on whether it would cost more, or yield less profit, than the project itself; rather, "it is the magnitude of the difference that will determine the feasibility." 185 Cal.App.4th 883. The court also noted that, because the environmental consulting firm's memorandum focused on a single composting facility in Rancho Cucamonga, rather than including several other facilities operating both nearby and throughout the country, there was "no meaningful comparative data pertaining to a range of economic issues." *Id.* at 884. Furthermore, it questioned whether the environmental consulting firm had the expertise to give advice on issues related to the economics of composting facilities, concluding that the memorandum was "at best an irrelevant generalization, too vague and nonspecific to amount to substantial evidence of anything." *Id.* Finally, the court determined that the "technological infeasibility" argument really boiled down to an argument that it was economically infeasible to provide electricity to the site, an argument for which no supporting evidence was provided. *Id.*

This case underscores the fact that, if an EIR includes arguments related to the financial feasibility of one or more alternatives, those arguments should be supported by as much data as possible, analyzed by acknowledged experts

in the specific field at issue. Also, it is not enough to say that a potential alternative is more expensive or would not be as profitable as a project; evidence must be supplied to establish the magnitude of that difference.

The above case summaries were compiled by the following members of Sedgwick's Land Use team:

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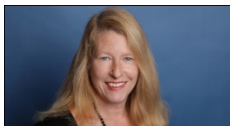

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