Hot Water for New Development! The California Supreme Court Ruling in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*

David A. Gold and Zane O. Gresham

A recent decision by California's highest court explains how future water supply for proposed projects must be analyzed under the California Environmental Quality Act.

The California Supreme Court's decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (Vineyard)* turns up the heat on the vexing question of how future water supply for proposed projects must be analyzed under the California Environmental Quality Act (''CEQA''). Appellate courts recently had produced numerous and sometimes conflicting rulings regarding future water supply analysis under CEQA; *Vineyard* marks the first time the California Supreme Court has weighed in. Unfortunately, while the court's opinion provides some clarity, it also muddies the waters in other respects.

The central issue in this debate and in *Vineyard* is how clearly future water supplies for a proposed project must be identified and assured in an environmental impact report (''EIR'') for a development project or land use plan—or, conversely, what level of uncertainty regarding the availability of water supplies is acceptable.

At issue in *Vineyard* was the sufficiency of the water supply analysis contained in an EIR prepared for the Sunrise Douglas development project, a multi-phased 6,015-acre mixed-use project with 22,500 homes, with a nearly 20 year buildout horizon, located within the City of Rancho Cordova. The EIR's water supply analysis identified near-term supplies sufficient to serve the first phase of the project, as well as *potential* long-term water supplies for the later phases. Project opponents alleged various deficiencies in the analysis of both the near- and long-term water supplies, claiming that the EIR failed to demonstrate with sufficient certainty that water will be available for the project. As described more fully below, the court found

David A. Gold is a partner in the Walnut Creek, CA, office of Morrison & Foerster LLP, and Zane O. Gresham is a partner in the firm's San Francisco office. The authors can be reached at dgold@mofo.com and zgresham@mofo.com, respectively. **Associate Miles H. Imwalle provided great assistance in the preparation of this article.**

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that the analysis of near term water supplies was sufficient, but the EIR failed to adequately analyze long-term water supply and the environmental effects of potential sources for long-term provision of water.

Principles Governing CEQA Water Supply Analysis

Before the court examined the facts of the case, it reviewed prior case law and set forth several rules governing water supply analysis in a CEQA document:

- An adequate CEQA analysis for a large, multi-phase project must assume that all phases of the project will eventually be built and will need water. As such, an EIR must analyze, to the extent reasonably possible, the impacts of providing water to the entire project. Tiering cannot be used to defer analysis of water supplies to serve later project phases.
- An EIR may not simply assume that a solution to potential supply issues will be found. Instead, uncertainties regarding future water supplies must be fully examined in order to satisfy CEQA's informational purposes.
- Future water supplies must bear a ''likelihood of actually proving available'' and the EIR must discuss the circumstances affecting the likelihood of the water's availability. An EIR cannot rely on ''paper water'' to slake the project's thirst; a reasonable probability of accessing a source of ''wet water'' must be shown.
- If there is uncertainty about the availability of identified future water supplies, CEQA requires an examination of possible alternative sources and the environmental consequences of using such sources.
- If long-term water supply is uncertain, an EIR's informational purpose is not met by simply prohibiting future development from going forward if anticipated water supplies never materialize. However, a measure for curtailing future development if intended sources become unavailable may form one part of the EIR's approach, so long as the uncertainty is fully examined and alternative sources are analyzed.
- The burden of identifying likely water sources varies with the stage of project approval. For example, the degree of confidence in water supplies necessary for a conceptual plan need not be as high as for issuance of building permits.
- An EIR need not show that water supplies are definitely assured, such as through a signed contract with a provider and built or approved treatment and delivery facilities. Such a requirement for a long-term project would be ''unworkable, as it would require water planning to far outpace land use planning.''
- The ultimate question under CEQA is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project.
- An EIR may rely on the water supply analysis contained in a previously prepared urban water management plan, if the plan accounted for the individual project's demand in its analysis.

Although most of these principles had previously been set forth in other cases, the California Supreme Court previously had not considered or endorsed them. After *Vineyard*, interested persons may rely on these rules with more certainty.

EIR's Analysis of Long-Term Water Supplies Found Defective

Applying these principles, the court found that although the near term water supply analysis was sufficient, the EIR had failed adequately and coherently to analyze the long-term water supply sources and the environmental effects of long-term provision of water to the project.

For the near-term supplies, the EIR indicated that the project would initially rely on groundwater extracted from a new well facility that was yet to be constructed. The project opponents argued that the new well field could not be relied upon because other competing projects were planning to use the same water. However, the court explained that ''[u]ncertainty in the form of competition for identified water sources is an important point that should be discussed in an EIR's water supply analysis . . . but it does not necessarily render development of the planned water supply too unlikely.'' The court found that ''while much uncertainty remains,'' the EIR fully analyzed the near-term water source and other projects which may compete for the same water, and it contained ''substantial evidence demonstrating a reasonable likelihood'' that the anticipated water source ''will indeed be available at least in substantial part.'' Even though other projects potentially could seek to use the same water source, the source had not been fully built, and the project did not have an established legal right to the water, the court was satisfied with the EIR's full analysis of all uncertainties and demonstration of a ''reasonable likelihood'' that the water would be available.

On the other hand, the court found that the EIR's treatment of long-term supplies was both factually and procedurally defective. The court emphasized that certainty is not required for long term supplies. Although the EIR contained extensive analysis of potential sources of long term water supply, the court concluded it was inadequate under CEQA because the EIR failed to coherently and consistently explain how it concluded that adequate future water supplies would reasonably likely be available. The court described the

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EIR as presenting ''a jumble of seemingly inconsistent figures for future total area demand and surface water supply, with no plainly stated, coherent analysis of how the supply is to meet the demand.''

The court was particularly concerned that the EIR failed to explain how competing long term water demands in the region would impact the project's procurement of water. In this regard, the court explained that the EIR failed to make clear how the available water supply was expected to meet total demand in the relevant water agency zone over the long term and, consequently, why a sufficient amount of the identified supply should reasonably be expected to be available for the project at issue. Further, the EIR did not provide information, other than General Plan projections, regarding what other development projects within the same water service zone were in prospect in the long term, what their specific water needs would be, or when they would draw on available supplies. Thus, the EIR failed to demonstrate a likelihood that in the project area, there would be ''at least a rough balance between water supply and demand.''

The court also found a number of what it termed ''procedural'' defects. One was that the EIR attempted to rely on a mitigation measure that would curtail future development if water supplies prove unavailable. The court found that this impermissibly deferred conducting a full analysis of the impacts of providing long-term water supplies until a later date. The court also rejected an argument by the developer that conjunctive use of groundwater would reduce uncertainty of surface water supplies, because this argument relied upon a discussion of impacts and mitigation contained in a separate document, the ''Water Forum Proposal'' and its attendant EIR, that evaluated the water supply resources and needs of the Sacramento region. The court explained that since the EIR did not tier off of, explicitly incorporate by reference, summarize, or otherwise guide the reader to the relevant information in the Water Forum Proposal of the Water Forum Proposal EIR, this information did not constitute substantial evidence in the record of the proceedings on the project to support the analysis in the project EIR. As the court further explained, ''[t]he question is therefore not whether the project's significant environmental effects *can* be clearly explained, but rather whether they *were*.'' Finally, the court also held that the EIR's claim that a full analysis of conjunctive use would need to await environmental review which was then being prepared for a separate regional water supply analysis was, in effect, an improper attempt to tier from a *future* environmental document.

Potential New Requirement for a CEQA Water Supply Analysis to Balance Long-Term Regional Supply and Demand

Justice Baxter dissented in part from the majority opinion, finding that the EIR demonstrated adequate water supplies for all phases of the project. He was particularly troubled by the implications of the section of the majority opinion which faulted the EIR for failing to demonstrate that there will be a long term, region-wide balance between water supply and demand. According to Justice Baxter, this appears to mean that the EIR should have assessed the potential for ''increased long-term demand from other, purely hypothetical projects that *could* be developed under the . . . general plan for the . . . area—even if . . . those projects have not yet been entitled, approved, or even proposed.''

The majority opinion responded to this concern by stating that CEQA does not necessarily require an EIR to show that such a regional balance of total supply and demand will exist. The majority indicated that an EIR ''may by other means demonstrate a reasonable likelihood that water will be available for the project by an identified source,'' or ''even without a showing that water from the identified source is likely to be sufficient, . . . may satisfy CEQA by fully disclosing the uncertainty, the other possible outcomes, their impacts and appropriate mitigation measures.'' In addition, the majority noted that a local agency may rely on the long-term water planning in existing urban water management plans in a project EIR, so long as the expected demand of the project was accounted for in such plans.

If Justice Baxter's interpretation of the majority opinion is correct, the court has significantly raised the bar for CEQA water supply analysis, particularly for large, multi-phase projects in growing areas of the state, since an EIR for a single project apparently would need to analyze not only where that project will get its water, but also where all other regional projects that may draw from similar sources will get their water. The majority did, however, point to alternatives to providing a new analysis of total regional water supply and demand.

Because of this continuing ambiguity, future litigation is likely over the adequacy of future water supply analysis. Project opponents understandably will be inclined to test whether the Supreme Court really intended to impose the stringent requirements that Justice Baxter posited. Thus, only future cases will clarify what will be required to satisfy the standards set forth in this decision. In the meantime, however, *Vineyard* will likely engender CEQA challenges based on water supply issues. For that reason, the water supply analysis in pending EIRs should be given very careful attention early on, with the factual underpinnings and conceptual basis for it being structured carefully and rigorously reviewed in anticipation of such challenges.

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