RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT HOLDS STATUTORY CRITERIA FOR WATER SUPPLY ASSESSMENTS ARE NOT AMBIGUOUS— PROPOSED OPEN-AIR COMPOSTING FACILITY IS A 'PROJECT'

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

The California Court of Appeal for the Fourth Appellate District held in late June that the criteria for requiring a water supply assessment (WSA) pursuant to Senate Bill (SB) 610 are plain and unambiguous as set forth in Water Code § 10910 *et. seq.* and that the environmental impact report (EIR) for a proposed open air composting facility with minimal requirements for potable water in an area with no public water system, but which would occupy more than 40 acres of land, must include a WSA.

Legal Background

The California Legislature adopted SB 610 as part of its efforts to ensure that land use decisions include meaningful consideration of water supply for a proposed project at an early stage. SB 610 requires analysis of water supply for proposed projects at the time that compliance with the California Environmental Quality Act (CEQA) is implemented and is codified in Water Code § 10910 *et seq.* Once a city or county determines that a project is subject to CEQA, it must comply with Water Code § 10910 *et seq.* If it is determined that an EIR, a negative declaration or a mitigated negative declaration is required for a project, the city or county must identify any water system that is or may become a public water system (as defined in the Water Code) that may supply water for the project. The water system must prepare the WSA but if no public water system exists or is unlikely to be formed to serve the project, the city or county must prepare a WSA. Water Code § 10910(b).

Water Code § 10912(a) defines "Project" as:

> A proposed residential development of more than 500 dwelling units;
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> A proposed shopping center or business establishment employing more than 1,000 persons or having more than 100,000 square feet of floor space;
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> A proposed commercial office building employing more than 1,000 persons or having more than 250,000 square feet of floor space;
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> A proposed hotel/motel or both, having more than 500 rooms;
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> A proposed industrial, manufacturing or processing plant, or industrial park 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;
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> A mixed-use project that includes one or more of the projects specified in a subdivision; or
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> A project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project.

"Public Water System" is defined as a "system for the provision of piped water to the public for human consumption that has 3,000 or more service connections." California Water Code § 10912(c). California Water Code § 10910 specifies the information that must be provided in a WSA and includes additional requirements if the water supply for a proposed project includes groundwater. Water Code § 10919(f).

Factual Background

Real-party-in-interest Nursery Products proposed to develop and operate a composing facility that would compost biosolids and green material to produce agricultural compost. Agricultural compost can improve productivity of soils that are deficient in organic materials. The proposed facility would compost approximately 200,000 tons per year, an

amount sufficient to serve most of the Inland Empire region. The compost product would be created by using a combination of windrow (mechanically turning composting piles to control the process) and static pile composting (a forced air and/or vacuum system to pull air through piles of compost material). The facility was proposed to be located on an undeveloped 160 acre parcel within an unincorporated area of San Bernardino County, would not be enclosed and would operate 365 days per year. The facility would include approximately 720 square feet of office space, a parking area, a scale, screening and finished product storage, and a 2,000-gallon above ground fuel tank. The proposed site has no utilities, would use chemical toilets, cellular phone service, and obtain electricity from a portable diesel-fuel generator and solar equipment. The county's approval of the Project included a conditional use permit for the initial 80-acre phase of the project and a condition that any expansion of operations beyond 80 acres would require an additional application and public hearing.

Plaintiff sued the lead agency, County of San Bernardino, and real-party-in-interest alleging deficiencies in the final environmental impact report (FEIR). The trial court decertified the FEIR on two grounds, one of which was that the FEIR did not include a WSA, and awarded attorneys fees to plaintiffs. (The trial court held that the FEIR's conclusion that an enclosed facility was infeasible as an alternative was not supported by substantial evidence. That finding and the award of attorney's fees were also the subject of the appeal but will not be discussed in this summary).

The trial court also required the county to withdraw all approvals for the project, including the conditional use permit, and enjoined the project proponent from proceeding with any aspect of the project until the county certifies and adopts an FEIR that complies with CEQA.

The Court of Appeal's Decision

The court noted that it was undisputed that the FEIR contained no WSA. The court referred to the draft EIR and comment letters submitted on the draft EIR, most of which criticized the lack of specificity about the proposed uses of water and the quantity of water required for the project. The draft EIR stated that the project would either use groundwater from a well or imported water or a combination, that the facility would use about 1,000 gallons per day, primarily for dust control. However, comment letters from the Mojave Water Agency and others pointed out the estimated water demand seemed too low for a project that would need substantial dust control and also water for fire fighting and sanitation. Comments also pointed out that the project site is located within the regional Mojave groundwater basin, that the region relies on groundwater as its primary supply, and that increasing groundwater extraction is causing overdraft of the basin.

The court criticized the FEIR's responses to such comments.

> The FEIR's information about the availability of water for the proposed Hawes Project is pure speculation. It merely states that perhaps Nursery Products would use well water, perhaps it would have water trucked on to the site, and perhaps it would use a combination of those sources. There is no indication as to whether a well had been drilled to determine *actual* availability, or as to the *actual* availability of any imported water.

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The court also noted that the purpose of a WSA is to ensure that availability of water supplies are considered by local land use authorities before approval of major new developments.

The court then addressed real party's arguments.

First, Nursery Products contended that the open-air facility is not a "project" within the meaning of Water Code 10912(a)(5). The court found that the language of Water Code § 10912 is not ambiguous and that, under the plain language of that section, the proposed project qualifies as project because it is a "processing plant conducted on more than 40 acres of land."

Real Party argued that §10912(a)(5) applies only to "large-scale buildings located on large square footage or plots of land." *Id.* at 888. Real party apparently attempted to refer to the legislative history of the statute in support of its argument, which request was denied because the court had ruled that the language was clear and unambiguous.

Nursery Products also argued that § 10912(a)(5) applies only to operations with substantially higher water demands than those estimated for the proposed

project. It based this argument on subdivision (a)(7) of § 10912, which defines a project for the purposes of a WSA as one that would demand an amount of water equivalent to the amount of water required by a 500 dwelling unit project. Nursery Products apparently wanted subdivision (a)(7) to be construed as modifying (a)(5). *Id.* The court rejected this argument, pointing out that § 10912 contains no limitation pertaining to water usage and stated that "Had the legislature intended to include a water usage limitation, it could easily have done so."

Lastly, Nursery Products argued that § 10912(a)(5) is inapplicable because the water for the proposed project would not be supplied by a "public water system" or the county. The court's decision "respectively disagrees" with *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099 which stated that a WSA is required "only if a 'public water system' is impacted by the project." The Court of Appeal points out that the Water Code specifically provides that when there is no identified "public water system," the city or county must prepare a WSA itself, and must approve the WSA prepared pursuant to the Water Code at a regular or special meeting of the city or county. *Id.* at 889.

It is interesting that none of the parties focused on the fact that the definition of "public water system" includes entities or persons that collect, treat, store, distribute or provide water for human consumption, *i.e.*, potable water. Water Code § 10912(c). Most of the definitions of "project" include references to numbers of persons or square footage of buildings, the implication being that the WSA is required for water for human consumption. The Hawes project's water demand was driven almost solely by needs that can be satisfied using non-potable water. Even if such an argument had been made, it seems clear that this court would have still held that a WSA was required based upon the plain language of "occupying more than 40 acres of land" in § 10912(a)(5).

Conclusion and Implications

This decision furthers the trend of case law that requires early, realistic and thorough analyses of water supply for proposed projects. It is evident that the failure of the FEIR to include more definitive responses to comments concerning water supply and projected demand troubled the court. The court made it clear that each of the seven subdivisions of Water Code § 10912(a) provides a discrete, independent basis for determining whether a proposed development is a "project" that requires a water supply assessment. The court also refused to infer that the last seemingly catch-all definition of "A project that would demand an amount of water equivalent to or greater than the amount of water required by a 500 unit dwelling unit" somehow limits or amends the other six definitions of "Project" listed in § 10912(a). Cities and counties should determine early in the CEQA process whether a proposed development fits any of the definitions of "project" and be prepared to request a WSA from the relevant public water system or prepare a WSA themselves if there is no public water system that can or will serve the project. (J. Driscoll, D. Osias)