COX CASTLE NICHOLSON

LAND USE & NATURAL RESOURCES

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# COURT HIGHLIGHTS RISK OF VIOLATING CEQA WITH WATER SUPPLY CONTRACTS

In holding that a water district must comply with CEQA before entering into a contract to supply water to a proposed development, the Fourth District Court of Appeal has highlighted the risk of prematurely triggering CEQA review during early attempts to substantiate sufficient water supplies for large development projects.

*Riverwatch et al. v. Olivenhain Municipal Water District* arose out of the permitting process for the proposed Gregory Canyon landfill in northern San Diego County. The original EIR on the project was set aside by a trial court for failing to identify and analyze the impacts of water sources necessary to construct and operate the landfill. In response to the court decision, the landfill developer asked a local water district to enter into a contract to supply the required water, and the district approved that contract, without a prior CEQA review. The agreement required the developer to comply with all CEQA requirements regarding the environmental impacts of supplying the water. The County Health Department subsequently recirculated a revised EIR that identified the new water source and assessed the impacts of the water supply agreement. *Riverwatch* challenged the water district's decision to approve the agreement before the revised landfill EIR was completed and certified.

After holding that the water supply agreement was part of the landfill "project" under CEQA and that the water district was a responsible agency, the court turned to the question of whether the water district's approval of the water supply agreement was subject to CEQA. In deciding this issue, the court extensively relied on the 2008 California Supreme Court decision of *Save Tara v. City of West Hollywood*, which held that agreements conditioned upon subsequent CEQA compliance violate CEQA if, in light of all surrounding circumstances, the agreement effectively commits the public agency to a definite course of action.

The court ordered the water supply agreement to be set aside because the contract committed the water district to a definite course of action without prior CEQA review. That the agreement was conditioned on the landfill developer's later compliance with CEQA was beside the point; the provision did not provide that the *water district* "retained its complete discretion under CEQA (as a responsible agency) to consider a final EIR certified by [the San Diego Department of Health] and thereafter approve or disapprove its part of the Landfill project pursuant to the [water supply] Agreement or to require mitigation measures or alternatives to its part of the project." Moreover, even if the water supply agreement had included such a provision, it still triggered CEQA review because surrounding circumstances indicated that the water district never acknowledged its duties under CEQA to consider the revised EIR before approving the water supply agreement.

This decision has significant implications in light of the California Supreme Court's 2007 decision in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*. The Vineyard decision held that, to satisfy CEQA, EIRs for large development projects must include substantial evidence demonstrating a reasonable likelihood that identified supplies will be available to serve the project, disclose all uncertainties associated with such supplies, and evaluate the impacts of their delivery to the project. If it is "impossible to confidently determine" that long-term water supplies are available, the EIR must identify and assess the impacts of potential water supply alternatives. In this case, the attempt to obtain contractual water rights to satisfy *Vineyard's* reasonable likelihood standard had the

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unfortunate consequence of creating so much certainty that it of ran afoul of the new *Save Tara* holdings that require CEQA review to precede actions that effectively commit a public agency to a project.

How, then, shall developers satisfy *Vineyard* without running afoul of *Save Tara*? In theory, at least, by procuring substantial evidence of water supply that is reasonably certain, but that – in light of all surrounding circumstances – is not so certain that it commits the agency generating that evidence to a definite course of action before CEQA review of the project in question is complete. In practice, this means public agencies and developers of projects that must demonstrate adequate water supplies will likely need to structure pre-EIR water supply agreements with public agencies as preliminary and non-binding in order to meet the requirements of *Riverwatch* and *Save Tara*. The trick will be to make such preliminary agreements sufficiently certain to meet the requirements of *Vineyard*.

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