

## COX CASTLE & NICHOLSON LLP QUARTERLY CEQA CASE LAW UPDATE

Cox Castle & Nicholson LLP is proud to present the Winter Quarter 2009 Quarterly CEQA Case Law Update. This is the inaugural issue of a publication that will cover the highlights (and lowlights) of case law concerning the California Environmental Quality Act four times a year. Rather than covering just the "big" cases, CCN's Quarterly CEQA Case Law Update will be a comprehensive review of all CEQA case law published that quarter, a reference resource for the public and private sector, for developers, consultants, attorneys, for all of us who follow the ins and outs of California's most significant environmental statute.

### AUTHORS

Michael H. Zischke  
415.262.5109

Sarah E. Owsowitz  
415.262.5122

Andrew C. Bell  
415.262.5148

Scott B. Birkey  
415.262.5162

Catrina L. Fobian  
415.262.5102

James R. Repking  
310.284.2214

Andrew K. Fogg  
310.284.2178

### CASES IN THIS ISSUE:

*California Native Plant Society v. City of Rancho Cordova,*

*California Native Plant Society v. County of El Dorado*

*Riverwatch v. Olivenhain Municipal Water District*

*Great Oaks Water Co. v. Santa Clara Valley Water Dist.*

### Winter Quarter 2009 CEQA Case Law

The first quarter of 2009 produced only four CEQA cases, but each may have implications for significant topics such as local governments use of mitigation fee programs as CEQA mitigation, water supply agreements, and the treatment of federally-protected habitat and species under CEQA.

#### ***California Native Plant Society v. City of Rancho Cordova, (2009) 170 Cal.App.4th 1026***

#### **Court of Appeal Provides Importance Guidance Regarding Off-Site Mitigation For Impacts To Wetlands and Listed Species Habitat**

The Third District Court of Appeal's decision in *California Native Plant Society v. City of Rancho Cordova* is significant for its views on off-site mitigation for impacts to wetlands and listed species habitat under the California Environmental Quality Act. It is also significant for its analysis of general plan consistency and the standards by which a court will review a city's determination of consistency. Finally, this case confirms that parties must raise issues before public agencies if they wish to preserve those issues for judicial review.

Development within the City of Rancho Cordova's Sunrise Douglas Community Plan area has seen its share of litigation over the past couple of years. Perhaps most notably, the California Supreme Court in 2007 issued its landmark decision *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho*

*Cordova*, which involved a challenge to the Plan's environmental impact report and its analysis of water supply and groundwater impacts. The Supreme Court established several key principles in *Vineyard Area Citizens* that continue to guide CEQA lead agencies in their evaluation of these environmental issues.

The *CNPS* case is the most recent decision involving litigation over development in the Plan area. In this case, the California Native Plant Society challenged Rancho Cordova's approvals and EIR for the Preserve at Sunridge project, a 530-acre residential and commercial development project located at the center of the Plan area. The project site includes vernal pools and other aquatic features, some of which would be filled for development of the project. Many of these features provide habitat for two species of vernal pool crustaceans listed as threatened and endangered under the federal Endangered Species Act. The EIR for the project determined that the loss of this habitat was a significant impact.

As mitigation for this impact, the EIR required the project applicant to prepare and implement a habitat mitigation and monitoring plan to compensate for the loss of acreage, function and value of these resources. Generally, the plan would require the applicant to preserve two acres of existing habitat or create one acre of new habitat for

each acre of habitat impacted by the project. The plan would be required to include “target areas” for these creation, restoration and preservation efforts, a “biological assessment” of the existing resources on these target areas, “specific creation and restoration plans” for each of the target areas, and “performance standards for success that will illustrate that the compensation ratios are met.” The EIR also required the applicant to mitigate indirect effects on habitat for these species within on-site and off-site preserve areas consistent with these same mitigation requirements.

CNPS alleged, among other things, that the City violated CEQA by improperly deferring this mitigation, because the EIR did not identify where the off-site mitigation might occur and did not sufficiently evaluate the impacts of that mitigation. To evaluate this argument, the court examined case law involving deferral of mitigation claims and discerned two guiding principles. On the one hand, it is improper for an agency to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur *before* the project is approved. On the other hand, when an agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. In addition, the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.

In light of these guiding principles, the court upheld the City’s mitigation for impacts to wetland and listed species habitats. The court found that the City did not defer a determination of whether the project would have a significant impact on these habitats or defer the identification of measures calculated to mitigate those impacts. The City determined the impact the project would have, *i.e.*, habitat loss, then identified a specific measure to mitigate that impact, *i.e.*, preservation or creation of replacement habitat off site in a specific ratio to the habitat lost as a result of the project. The court further found that the case law did not require the City to identify any specific proposed mitigation site.

This holding is significant because it countenances an approach often taken by public agencies and project applicants for the mitigation of impacts to wetlands and habitat for listed species. In many instances, the exact location and details associated with off-site mitigation lands for the preservation, restoration, or creation of wetlands and habitat are not fully worked out until later. This is often the case when project applicants are required

to negotiate the purchase of mitigation lands or credits or to negotiate the terms of a conservation easement or deed restriction. In those situations, the public agency or project applicant can commit to specific mitigation, such as mitigation ratios, for an identified impact to wetlands or listed species habitat, even if the exact location or parameters for those lands have not yet been identified. The *CNPS* case now authorizes this common approach to mitigation.

This case is also important for its discussion of the project’s consistency with the City’s General Plan. CNPS argued that the project approvals had to be set aside because the project was inconsistent with a number of policies and actions in the City’s General Plan. Although the court found that the project was consistent with most of the policies and actions identified by CNPS, it held that the project was inconsistent with an action in the General Plan requiring mitigation to be “designed . . . ‘in coordination with’ the U.S. Fish and Wildlife Service and the California Department of Fish and Game.” The court rejected the City’s argument that it “coordinated” with the Service by *consulting* with the Service. According to the court, “coordination” is not synonymous with “consultation,” and the City’s use of the word “coordination” implied a measure of cooperation, not “mere solicitation and rejection of input.”

This holding is troubling. For those cities with general plan policies requiring “coordination” with other agencies, this case would appear to require those cities to do more than consult with the agencies. In light of the *CNPS* case, merely soliciting comments may not be enough. Unfortunately, the case leaves uncertain just how much more is required. Nonetheless, and somewhat ironically, this case reaffirms the principle that a city’s finding of consistency with its general plan will be upheld if it is reasonable based on evidence in the record. Under this principle, a project need not be in perfect conformity with each and every general plan policy, and it is the province of the city to determine whether the specifics of a proposed project are “in harmony” with the policies set forth in the general plan.

Finally, this case is notable for its detailed application of the exhaustion of administrative remedies doctrine. This doctrine generally requires that an issue must be presented to the public agency during its decisionmaking process in order for a plaintiff to raise that issue in a later judicial proceeding against that agency. The court in the *CNPS* case determined that many of CNPS’s allegations against the City’s EIR were not exhausted at the administrative level, and therefore the court had no authority to consider them. Lead agencies interested in the careful application of this law to a set of facts should pay particular attention to this discussion in the case.

***California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026; 88 Cal.Rptr.3d 530.**

**Mitigated Negative Declaration Inadequate Where It Relied On Mitigation Fee Program Not Reviewed Under CEQA.**

In this case, the Third District Court of Appeal overturned the County's approval of a Mitigated Negative Declaration (MND) for a congregate care facility. The facility was proposed in an environmentally fragile area which contained two endangered plants. In order to mitigate these impacts, the MND relied upon the payment of a rare plant impact fee which would be used to create other rare plant habitats. The fee program had been previously adopted pursuant to a categorical exemption. Furthermore, although the program was described in the County's General Plan, the EIR for the General Plan was certified in conjunction with a statement of overriding considerations, which stated that cumulative biological impacts might result even with the fee program.

The County received numerous comments objecting to the MND's reliance on the fee program, including comments from the US Fish and Wildlife service. These comments claimed that the fee program was inadequate to save these rare plants. Furthermore, the County had never periodically updated or increased the fees as required by its program.

The trial court upheld the approval, and the Court of Appeal reversed. The Court held that the fee did not automatically establish sufficient mitigation. Furthermore, the Court found that the petitioner does not have to prove that the fee program is ineffective, only that there is a fair argument that the project may create an impact even after the fee is imposed.

The Court held that, for a fee mitigation program to "presumptively" establish full mitigation for an impact, that fee program must undergo CEQA review. The Court noted that fee based measures can be adequate mitigation under CEQA—citing *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99— but added that, in order for the fee program to be adequate, the fee program itself must have been reviewed under CEQA. That had not occurred here because the impact fee was adopted pursuant to a CEQA exemption and, therefore, had never been reviewed under CEQA.

This case could have far-reaching implications because, instead of merely holding that the payment of the fee did not avoid the fair argument standard applicable to MNDs, it went further and held that all fee mitigation programs require prior CEQA review. The broad language in the opinion could impact whether fee programs are adequate mitigation in EIRs as well as MNDs.

***Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186**

**[Request for Depublication and Petition for Supreme Court Review Pending]<sup>1</sup>**

**The Court of Appeal Highlights the 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

<sup>1</sup> Cox, Castle & Nicholson LLP filed amicus letters with the California Supreme Court supporting the petition for review and requesting that the decision be depublished.

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 unfortunate consequence of creating so much certainty that it 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*.

***Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956**

**Sixth District Upholds Application of CEQA Exemption to Increased Rates for Groundwater Extraction Charges Imposed by Water District.**

In this case, Great Oaks Water Company challenged the Santa Clara Valley Water District’s adoption of higher rates for groundwater pumping under a CEQA exemption. Under Public Resources Code section 21080 (b) (8), a public agency’s setting of rates, tolls, fares and other charges for the purposes of: meeting operating expenses; purchasing or leasing supplies, equipment or materials; meeting financial

reserve needs; and obtaining funding for capital projects necessary for maintaining continued service, are all exempt from CEQA review. Great Oaks argued that the Water District improperly proceeded under this exemption.

The Water District is a wholesale water supplier, responsible for providing water to Santa Clara County retail water suppliers. It imposes charges on groundwater extraction as its primary source of revenue. The Water District is also permitted to levy certain taxes, including a charge for the extraction of water from the groundwater basin managed by the Water District. Great Oaks, as a private water utility company within the Water District is subject to these charges and the corresponding increases at issue in this case.

In challenging the Water District’s findings, Great Oaks claimed that the Water District failed to specify the factual basis for the rate increases. Further, Great Oaks claimed that the rate increases would be used for the expansion of the Water District’s facilities, which is not a permitted use of proceeds under the exemption. The Court of Appeal found in favor of the Water District on both of these issues.

As to the first issue, Great Oaks claimed that the Water District was required by the statute to cite specific facts from the record and “provide and explanation in its findings of the rationale or analytical link between the evidence and the ultimate conclusion that the exemption applies.” The Court of Appeal disagreed, holding that the District met the requirement “by its identification of the statutory purposes for which it claimed its action be exempt.” The Court of Appeal went on to state that the statute does not require a lead agency to do more than state the specific basis for its finding. The Water District was not required to “set forth ‘with specificity’ its evidentiary subconclusions supporting this ultimate fact or its rationale.” The Court of Appeal did note that the Water District could have provided greater evidence to support the exemption.

The Court of Appeal also found in favor of the Water District on the second issue, holding that the Water District’s findings were supported by substantial evidence. Great Oaks claimed that the proceeds from the rate increases would be used to expand the Water District’s facilities. However, the record included evidence of the intended use of the proceeds, namely “for the purpose of meeting operating expenses, purchasing or leasing supplies, equipment or materials, and meeting financial reserve needs; and obtaining funds for capital projects necessary to maintain service within existing service areas.”

As a result, the Court of Appeal rejected Great Oaks’ challenges, concluding that the record contained substantial evidence demonstrating that the Water District’s rate increases were for statutorily exempt purposes.

# Practice Summary of the Land Use and Natural Resources Group

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- Land Use Entitlements
- Land Use Litigation
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- Water Supply/Quality
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**Los Angeles**  
2049 Century Park East, 28th Floor  
Los Angeles, CA 90067  
P (310) 277-4222  
F (310) 277-7889

**Orange County**  
19800 MacArthur Blvd., Suite 500  
Irvine, CA 92612  
P (949) 476-2111  
F (949) 476-0256

**San Francisco**  
555 California Street, 10th Floor  
San Francisco, CA 94104  
P (415) 392-4200  
F (415) 392-4250