WATER SUPPLY ASSESSMENTS IN CALIFORNIA: NEW COURT DECISION EXPLORES REACH OF SB 610

Since it became effective in 2002, California's principle water supply planning statute – SB 610 – has been interpreted by only a handful of courts. Just last week, however, the Fourth District Court of Appeal published a new decision creating new law under SB 610.

The case – *Center for Biological Diversity v. County of San Bernardino* – involved an EIR prepared for a proposed 160-acre open-air facility to compost bio-solids and green material to agricultural-grade compost. According to the Court, the information in the County's EIR pertaining to water supply was "sparse," and no water supply assessment ("WSA") was prepared for the project under SB 610. The County argued that no WSA was required because the proposed facility was not a "project" within the meaning of SB 610. Both the trial court, and the Court of Appeal, disagreed.

SB 610 requires a WSA in connection with the CEQA review of, among other things, any "processing plant" on more than 40 acres of land. In defending its decision not to prepare a WSA, San Bernardino County argued that SB 610 applies only to "large scale buildings located on large square footage or plots of land," and not to land on which significant buildings would not be constructed. The Court rejected this argument, holding that a processing facility is a "project" within the meaning of SB 610 if it meets the 40-acre threshold, even if only small structures will be constructed on-site.

The County also argued that, even if such an open-air facility is subject to SB 610, a WSA is required *only* if the project's water demands exceed the water demand associated with a 500-unit residential project. The Court rejected this argument, based on what it characterized as the "plain language" of the statute, which includes no water usage limitation for processing plants.

The Court also rejected the County's claim that, because there was no independent "public water system" charged with supplying water to the project, it had no obligation to engage in a water supply consultation as required by SB 610. Again relying upon what it characterized as the plain language of SB 610, the Court concluded that, where no independent public water system exists, a lead agency has an obligation under SB 610 to prepare its own WSA.

In addition to the water supply rulings, the decision includes a surprising ruling on the feasibility of project alternatives to be considered in an EIR. The County rejected suggestions that it evaluate an enclosed composting facility, based on a determination that an enclosed facility was financially and technologically infeasible. This determination was based in part on a consultant's memorandum that evaluated a nearby covered facility and concluded that such a facility would be 28 to 41 times more expensive. The court found that several conclusions

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in the consultant memorandum were not sufficiently explained, and thus that substantial evidence did not support the determination that the alternative was infeasible.

The decision in *Center for Biological Diversity* is only the fifth published decision interpreting SB 610. Some of the holdings provide helpful resolution of ambiguities in the statute. The holdings on the processing plant issue and the feasibility of alternatives, however, depart from the normal "substantial evidence" standard that is applied to review of EIR conclusions.

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