

## Judicial Review of Environmental Impact Reports: Is There Really A Need for CEQA Reform?

Every few years, with El Nino-like regularity, a wave of interest in CEQA reform sweeps through the business community, accompanied by pleas to the legislature to overhaul the statute. In the end, few substantive changes are made. This year is no exception. (See June 14th [post](#)).

Many of the recurring concerns involve the unpredictability of litigation challenging EIRs. As is illustrated by the recent appellate court opinion in [North Coast Rivers Alliance v Marin Municipal Water District](#), that unpredictability arises not from deficiencies in CEQA's standard for judicial review, but from the failure of some courts to apply it. The trial court in *North Coast Rivers* put the EIR a water district had prepared for a desalination project under a microscope, and found its treatment of eleven separate issues "inadequate." By contrast, in a straightforward application of CEQA's standard of review -- which requires judicial deference to agency findings of fact and policy determinations -- the court of appeal reversed the lower court judgment and upheld the EIR. Among other things, the court of appeal's meticulous and carefully reasoned opinion addresses:

- AB 32 standards and greenhouse gas significance thresholds
- Significance thresholds for aesthetic impacts
- Mitigation standards and deferred mitigation
- Description of the affected environment
- Use of pilot studies to assess potential impacts
- Treatment of regulatory agency protocols for analyzing impacts
- Analysis of inconsistencies with relevant plans
- Triggers for recirculation of an EIR

A detailed summary of the trial and appellate courts' contrasting rulings follows. [Eleven CEQA Issues -- A Study in Contrasts](#):

1. **An agency may use AB 32 greenhouse gas reduction targets as a significance threshold.** The trial court determined that the EIR's conclusion that the project's greenhouse gas emissions would not be cumulatively considerable was invalid. The court of appeal rejected this determination, finding the threshold of significance the Water District used, which was based on AB 32 standards, was legally adequate. The EIR analyzed whether the project's power use would interfere with the county's goal of reducing countywide GHG emissions by 15% in comparison with 1990 levels, by 2020. The EIR concluded the project would not interfere with achieving that goal. This analysis, the appellate court found "more than satisfied the requirements of CEQA."
2. **An EIR's description of the environmental setting is sufficient if it provides the overall context for the impact analysis.** The trial court found the EIR's description of the environmental setting deficient, criticizing its description of the age, types and population of the aquatic species in the area likely to be affected by the project. The court of appeal disagreed. First, it noted that the EIR's description of the environmental setting was based on water sampling during the most critical periods of the year, a year-long study in the planned intake and discharge zones, and decades of CDFG data. Second, it summarized the information the EIR provided on the life stages of relevant species, spawning and migration patterns,

types of aquatic habitats in the area, and the organisms found in those habitats. Looking at this information as a whole, the court of appeal concluded the EIR's description of the environmental setting was "more than adequate."

3. **The significance of aesthetic impacts is a judgment call for the agency.** The EIR found that one of the project's ridge-top water storage tanks would not significantly degrade the visual character of the area. The trial court ruled the EIR's finding was not adequately supported. The court of appeal demurred, observing that the EIR's detailed discussion and analysis provided sufficient evidence that the tank would not be visible from most vantage points, and would not be visually imposing from others. The appellate court also noted that it was up to the water district to decide, as a matter of policy, whether to classify the visual impact as significant or not in light of the setting.
4. **A pilot study by a qualified expert may be used to support an EIR's impact findings.** The EIR examined whether wastewater discharged into the bay would adversely affect water quality. It found the impact insignificant because the wastewater would be treated to comply with permit and discharge limits on toxic contaminants and other pollutants. Despite the EIR's detailed analysis of the issues, and specific, detailed responses to comments, the trial court found the EIR's discussion of the impacts from periodic use of chlorine to clean bio-fouling organisms – primarily barnacles and mussels – from the seawater intake system was not "adequate." Once again the court of appeal found the trial court had it wrong. The EIR's conclusions were fully supported by an expert report, based upon a year-long pilot study, which found that the cleaning process could be operated safely and would not cause toxicity in receiving waters.
5. **An EIR need not follow standard protocols recommended by regulators in studying an impact.** The trial court concluded that the methodology used to study entrainment of aquatic organisms in the plant's water intake was deficient because the pilot program for the plant did not follow the recommendations of the Department of Fish and Game and NOAA Fisheries on the amount of source water sampling that should be conducted. The court of appeal addressed the issue by reviewing the extensive evidence in the record. It concluded that the trial court's ruling ignored the substantial evidence standard of review, a standard which clearly applies to disagreements about the methodology for studying an impact. The trial court erred by substituting its judgment for that of the agency in determining the appropriate method for studying the impact.
6. **EIRs need not discuss consistency with the applicable general plan, only any inconsistency with the plan.** The trial court determined the EIR violated CEQA because, in the court's view, it did not contain an adequate discussion of general plan policies that might be "affected" by one of the storage tanks. Again, the court of appeal disagreed. The CEQA Guidelines require only that an EIR identify and discuss any *inconsistencies* between the project and the governing general plan. The trial court's ruling could not be justified under this Guideline: it amounted to a requirement that the EIR undertake a full-blown analysis the project's *consistency* with the plan.
7. **A reviewing court looks to both the responses to comments and the EIR's analysis in determining if comments have been addressed.** The trial court opined that the EIR's failed to provide sufficient information regarding liquefaction and health and safety impacts related to earthquakes, particularly the effects on the water supply if the plant is damaged in quake. The court of appeal, however, found no violation of CEQA. The EIR contained detailed information on geologic conditions and the potential for seismic hazards and determined that compliance with seismic design requirements would reduce seismic risks to the project's facilities to an insignificant level. This conclusion was amply supported by evidence. "Nothing more was required."
8. **An EIR need not analyze alternative ways to mitigate impacts that will be less than significant.** The court of appeal also overruled the trial court's determination that the EIR had not adequately discussed the option of using green energy credits to mitigate the project's energy consumption effects. The EIR had discussed a range of scenarios for powering the project, including purchasing green energy credits. However, the EIR incorporated the alternative of reconductoring existing power transmission lines in the proposed project, and concluded that because energy would be used efficiently, the project's energy

consumption impact would be less than significant. The court of appeal ruled that given that conclusion, there was no need for a further discussion of green energy credits as a mitigation measure.

9. **Precise performance standards for mitigation are not required.** The EIR identified landscaping to mitigate visual impacts of two of the project's storage tanks. The measure called for the water district to work with a landscape architect to develop a plan for landscaping "that will soften the visual intrusion of the tanks and identify success metrics such as survival and growth rates for the plantings." The trial disapproved the measure, finding, among other things, that it did not contain criteria for evaluating the plan's adequacy and the objective to "soften" the tanks' "visual intrusion" was too vague and indefinite. The court of appeal upheld the measure, however, reasoning that its performance standard coupled with its commitment to implement the landscaping plan, and to monitor and maintain the landscaping, gave sufficient assurance mitigation will occur.
10. **Leaving the specifics of mitigation to be developed in consultation with a regulatory agency is not improper deferral.** To mitigate the impact on sensitive aquatic species of noise from pile driving in San Rafael Bay, the water district adopted a measure calling for consultation with NOAA Fisheries about steps to protect fish, which "normally include specifying allowable seasonal work windows" and "use of physical attenuators such as air bubble curtains." The trial court ruled this measure "impermissibly defers" identification of the specifics. The court of appeal overruled the trial court, finding that the required consultation with NOAA Fisheries under section 7 of the Endangered Species Act about ways to avoid a "take" of protected fish species was sufficient to ensure effective mitigation would be devised. The court noted that no impermissible deferral occurs where a regulatory agency is expected to impose mitigation requirements independent of CEQA and the EIR includes both performance standards and a commitment to mitigation.
11. **A final EIR's consideration of a new alternative that is rejected as infeasible does not trigger a duty to recirculate the EIR.** In response to comments, the final EIR added an alternative which would involve construction of a pipeline to deliver water from the Russian River along with additional conservation measures. But "after apparently conducting its own water supply and calculation and analysis" the trial court determined the alternative was a "significant new feasible solution to the project objectives" and required recirculation. The court of appeal rejected this approach, and ruled that substantial evidence supported the water district's determination that recirculation of the EIR was not needed: Substantial evidence in the record supported the district's conclusions that the availability of additional water from the river was highly uncertain, that the district did not have enough carry-over storage capacity, and that increased reliance on water from the river would not achieve the district's objective of diversifying its water portfolio.

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