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### Monterey Water Saga Continues: County's Approval of Desalination Plant Upheld Against CEQA Challenges



A court of appeal has upheld Monterey County's approvals for a desalination plant, rejecting challengers' claims that uncertainty regarding the availability of source water for the plant necessitated additional CEQA review.

*Marina Coast Water District v. County of Monterey*, 96 Cal.App.5th 46 (2023).

In 2018, the California Public Utilities Commission, acting as the CEQA lead agency, certified an EIR for and approved a Water Supply Project that had two principal components: a desalination plant in Monterey County and slant wells in the City of Marina that would supply brackish water to the desalination plant. The CPUC approval acknowledged that many additional approvals would be needed from other agencies if the project were to be built and operated.

In 2019, the County approved construction and operation of the desalination plant. The County determined that it could rely on the CPUC EIR and did not need to prepare a supplemental or subsequent EIR in its role as a CEQA responsible agency. The County also issued a statement of overriding considerations explaining its decision to approve the project despite its significant and unavoidable environmental impacts. Plaintiffs challenged both the County's decision not to prepare an additional CEQA analysis and the bases for the statement of overriding considerations.

#### **Plaintiffs Showed No New Information Triggering a Supplemental or Subsequent EIR**

Plaintiffs identified five categories of new information that they alleged required the County to re-study the project in a supplemental or subsequent EIR. The court dismissed all of the challengers' claims, primarily on the basis that the claimed new information was either not new or not relevant to the County's approvals:

- The City of Marina's denial of approvals for the slant wells did not require additional CEQA review. Uncertainty regarding the project's water source was not new. In addition, the City's denial would undergo

*de novo* review by the Coastal Commission; accordingly, when the County made its decision, it was not clear whether the project would need a new water source.

- The County's condition of approval describing steps the project sponsors would need to take if the plant could not obtain source water, or if construction ceased for more than five years, did not require environmental analysis of those scenarios. The court cited *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1120 (2015) for the rule that the potential consequences of an approved project's failure need not be analyzed when the project is approved.
- A battle of the experts concerning the existing and future direction of groundwater flow was not new; nor was uncertainty created by the Sustainable Groundwater Management Act. Substantial evidence supported the County's conclusion that regardless of these uncertainties, the vast majority of the project's intake water would come from the ocean.
- Substantial evidence supported the County's (and earlier, the CPUC's) conclusion that the expansion of a different water supply project, Pure Water Monterey, was speculative and even if approved and constructed would not represent an adequate alternative supply.
- The availability of excess groundwater storage capacity, which could in theory be used along with Pure Water Monterey water to provide an alternative supply, was not new information given the decades of groundwater overdraft that had created that capacity.

### **The County's Statement of Overriding Considerations Permissibly Relied on Project Benefits That Would Accrue Only if Source Water Became Available**

Plaintiffs argued that the County's statement of overriding considerations for the project's significant unavoidable environmental impacts was invalid because it relied on water-related benefits that would never materialize if source water could not be obtained. Plaintiffs claimed that the County should have relied only on benefits from the portion of the project that was subject to its jurisdiction – the desalination plant. The court rejected this argument, holding that for purposes of a statement of overriding considerations by a responsible agency, the "project" whose benefits are described is the whole project, not only the portion of the project that is within the responsible agency's jurisdiction to approve.

Finally, plaintiffs argued that the County's statement of overriding considerations was defective because it did not describe the uncertainty of the project's source water supply. The court, citing extensive evidence in the record of robust public debate on this issue, held that neither the decisionmakers nor the public were deprived of information on this topic.

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