

CASE NOTE

I Can't Promise I'll Try, but I'll Try to Try: Current Changes in California's Water Planning Policies for Large-Scale Land Developments

KATHLEEN MULLINS HENDERSON AND MAUREEN REILLY*

I. Introduction

Every year California experiences vast population increases. In the last year alone, California's population increased by 500,000 residents, solidifying California's position as the most populous state in the United States.¹ Developers responded to this influx of people by building new communities out of open space. While this increase in infrastructure may provide needed jobs and housing, the natural resources required to provide these necessities remain finite. California may have the land to physically house both new and existing residents, but does it have the water?

The recent California Supreme Court decision in *Vineyard Area Citizens for Responsible Growth, Inc., et al., v. City of Rancho Cordova, Sunrise Douglas Property Owners*, 40 Cal. 4th 412 (2007), demonstrates the tension between ensuring water resources for future generations and providing homes and jobs to the state's residents. In *Vineyard Area Citizens*, the Court held that an Environmental Impact Report (EIR) for a large-scale land use project must consider the long-term water needs for the area surrounding the proposed project, as well as the short and long-term water needs for the project itself.²

In *Vineyard Area Citizens*, AKT Development Corporation (Developer) intended to develop in excess of 6,000 acres in eastern Sacramento

* Kate Mullins Henderson and Maureen Reilly are both graduates of Empire College School of Law.

1. Dan Walters, Population Increases Drive State, *Sacramento Bee*, December 30, 2007. California's population is 38 million according to a 2007 census.

2. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, Sunrise Douglas Property Owners Assn.*, 40 Cal. 4th 412, 421-22 (2007).

County, now known as the City of Rancho Cordova (the City).³ The plan included approximately 22,000 residential units sufficient to house 60,000 people, as well as schools, parks, and commercial buildings for the city's inhabitants.⁴ This plan never actualized, and the Supreme Court of California held that although the EIR adequately described water sources available to the project in the short-term, it failed to provide adequate information regarding long-term water supply.⁵

II. Facts and Procedural History

The Vineyard Area Citizens for Responsible Growth, Inc. (Citizens) sued the City alleging that the EIR approved by the County of Sacramento (County) was an inadequate means of identifying and evaluating the future sources of water for a large-scale development.⁶ The trial court denied the Citizens' petition challenging the validity of the EIR and the California Court of Appeal, for the Third Appellate District, upheld the trial court's decision, concluding the EIR was, in fact, sufficient.⁷

The EIR projected that the development would require approximately 22,000 acre-feet of water annually (afa), and identified two sources of water: groundwater and surface water.⁸ The County Water Agency would provide all of the water to the City.⁹ According to the "conjunctive use" plan, in wet years, the American River would provide the surface water.¹⁰ In dry years, ground water would be pumped from a well field.¹¹ Although not yet built, projections showed the well field would be capable of generating nearly twice the water needed by the Development.¹² However, the Development would not necessarily have exclusive access to the well field's groundwater resources.¹³ The EIR concluded that the Development's planned use of the well fields would cause the water table to drop 10-15 feet.¹⁴ Such a drop would have potentially significant effects on residential wells.¹⁵

3. *Vineyard Area Citizens*, 40 Cal. 4th at 421-22.

4. *Id.* at 421-22.

5. *Id.* at 421.

6. *Id.* at 423.

7. *Id.* at 426.

8. There were actually two EIRs circulated for review. The second superseded the first and was approved as the Final EIR. Use of the term EIR in reference to the *Vineyard Area Citizens* case refers to the second approved (final) EIR.

9. *Vineyard Area Citizens*, 40 Cal. 4th at 423.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 424.

15. *Vineyard Area Citizens*, 40 Cal. 4th at 424. The municipal wells in the County, dug to a deeper depth and drawing from a different aquifer, would not be affected by this drop in the water table.

California Public Resources Code section 21100, et seq. requires that any potentially significant effects identified in an EIR be mitigated.¹⁶ The EIR explains that any significant impact on residential wells would be mitigated by the conjunctive use described above, and, as necessary, by deepening dried-up domestic wells.¹⁷ As another mitigation method, the EIR indicated that the Development would not be granted entitlements unless and until contracts and funding for additional water supplies were established.¹⁸

The Citizens argued that by postponing environmental analysis of these future entitlements, the Developer circumvented its obligation to study the impact of providing water to the project as a whole.¹⁹ Because the entire project had not been subject to an environmental review, and because no enforceable contract or legal agreements actually existed, the Citizens argued that the proposed mitigation measures were legally inadequate.²⁰

The Developer argued, and the California Court of Appeal for the Third Appellate District agreed, that the EIR merely relied on future water supplies, and not on illusory water supplies struck down by earlier case law and ridiculed as “paper water.”²¹ Taking the position that California’s Environmental Quality Act (CEQA)²² required only use of its “best efforts” to determine the source of future water supplies, the Developer maintained that it was not required to work out each and every competing demand in order for an EIR to be adequate.²³ The California Supreme Court granted review to determine, “[w]hat level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan?”²⁴

III. Standard of Review

While a certified EIR on appeal is subject to judicial review, the Court’s inquiry in this case was limited to whether there was a prejudicial abuse of discretion.²⁵ Challenges to the factual accuracy of an EIR are subject to a different standard of review than claims regarding the propriety

16. Cal. Pub. Resources Code, § 21100(b) (2007).

17. *Vineyard Area Citizens*, 40 Cal. 4th at 423. A per-hookup fee would be charged and those funds used to purchase insurance against the possibility that wells would have to be deepened.

18. *Id.* at 424. Examples of “entitlements” are: subdivision maps, parcel maps, use permits, building permits, etc.

19. *Id.* at 427.

20. *Id.*

21. *Id.* at 428.

22. CEQA is a statutory creation and can be found as Cal. Pub. Resources Code, § 2100 et seq.

23. *Vineyard Area Citizens v. City of Rancho Cordova*, 40 Cal. 4th at 412, 428 (2007) (quoting § 15144 of the CEQA guidelines).

24. *Vineyard Area Citizens*, 40 Cal. 4th at 428.

25. *Id.* at 427.

of procedure employed in approving an EIR.²⁶ Questions regarding alleged procedural flaws are reviewed *de novo* so that all legislatively mandated requirements are “scrupulously enforce[ed].”²⁷ Factual conclusions reached prior to approving an EIR are given greater deference and agency approval of an EIR will only be set aside if the outcome is not supported by substantial evidence.²⁸ Therefore, a court reviewing an EIR may not set it aside merely because the contrary conclusion could have been reasonably reached.²⁹

IV. Current Case Law and the Public Policy Purposes of an EIR

The fundamental purpose of an EIR is “to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment.”³⁰ CEQA requires that the information presented in an EIR include details regarding “all significant effects on the environment of the proposed project.”³¹

Although this case is one of first impression, several appellate courts have voiced their opinions, four of which are specifically affirmed by this decision. First, the Court recognized that an EIR is insufficient in its discussion of future water sources when it “ignores or assumes a solution to the problem of supplying water to a proposed land use project.”³² Second, an EIR for a large project to be built and occupied over a number of years must incorporate a discussion of the long-term water sources as well as the near-term water sources.³³ Third, “the future water supplies identified and analyzed must bear a likelihood of actually proving available.” In other words, so called “paper water” is insufficient to satisfy CEQA requirements.³⁴ Finally, for proposed developments where, despite a full discussion about potential sources of water, “it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and an analysis of the potential environmental impacts of those alternatives.”³⁵

26. *Id.* at 426-27.

27. *Id.* at 435.

28. *Id.* at 426-27.

29. *Vineyard Area Citizens*, 40 Cal. 4th at 435.

30. Cal. Public Resources Code. § 21061 (2007).

31. Cal. Public Resources Code. § 21100(b)(1) (2007) .

32. *Santiago Water District v. County of Orange*, 118 Cal. App. 3d 818, 829 (App. Ct. 1981).

33. *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, 723 (App. Ct. 2003).

34. *California Oak v. City of Santa Clarita*, 133 Cal. App. 4th 1219 (App. Ct. 2005).

35. *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, 91 Cal. App. 4th 342, 373 (2001).

V. Certainty and Foreseeing the Unforeseeable

At what point does a proposed future water supply become too speculative or too uncertain to be the basis of an EIR? Previous case law focused on foreseeability, holding that an EIR must provide a detailed analysis of the project's "reasonably foreseeable" future impacts.³⁶

In *Laurel Heights Improvement Assn. v. Regents of the University of California*, 47 Cal. 3d 376 (1988), the court held the general purpose of an EIR is to inform the public and its responsible officials of the environmental consequences of decisions before they are made.³⁷ *Laurel Heights* states that EIRs must specifically discuss the effect of all "reasonably foreseeable" future activities, and agencies must use their "best efforts" to unearth and disclose as much as is reasonably possible.³⁸ However, the case also recognizes that "foreseeing the unforeseeable" is impossible.³⁹

Competition for future water sources exacerbates the uncertainty of securing tangible water sources. An EIR document must address the issue of competition so that multiple projects do not earmark the same water supply.⁴⁰ Failure to address this issue creates files of so-called "paper water" rights, void of reference to the total planned use in relation to the total planned water supply.⁴¹ Under CEQA, an EIR must discuss the issue of competition for planned water sources.⁴² The threshold test is whether the proposed sources of water are "reasonably likely" to materialize.⁴³

In *Vineyard Area Citizens*, the near-term water needs were to be served by drawing from the proposed well fields.⁴⁴ Applying an abuse of discretion standard, the court found that the EIR met this test for near-term groundwater use.⁴⁵ In so doing, the Court concluded that the mitigation measures described in the EIR created a reasonable likelihood that the Development would receive an adequate supply of water.⁴⁶ Hence, the near-term groundwater needs were found to be sufficiently mitigated by solutions proposed in the County's EIR.⁴⁷

The court was not as optimistic about the sufficiency of the long-term water plan as described in the EIR. Assured sources of surface water were "clearly inadequate to meet long-term water demands in the southern part of

36. *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of California*, 47 Cal. 3d 376, 398-99 (1988).

37. *Id.* at 405.

38. *Id.* at 399.

39. *Id.*

40. *Id.* at 436-37.

41. *Id.* at 436.

42. 14 California Code of Regulations, § 15130 (2006).

43. *Vineyard Area Citizens*, 40 Cal. 4th at 436-37.

44. *Id.* at 436.

45. *Id.* at 437.

46. *Id.*

47. *Id.*

the County.”⁴⁸ The long-term demand in this area includes the Development, other planned growth, as well as plans to replace contaminated groundwater.⁴⁹ All of these projects relied on drawing surface water from the American River as part of their long-term water plans.⁵⁰ To mitigate the uncertainty created by competing future uses, the EIR discloses the situation, and notes that the actual, “provision of a long-term reliable water supply . . . cannot be ensured until facilities are approved.”⁵¹ The California Court of Appeal for the Third Appellate District accepted this as a sufficient discussion of the future water supplies under CEQA.⁵² However, the Supreme Court refused to uphold it and held the substantial evidence contained in the EIR supported only the conclusion that some of the planned water would flow to the Development.⁵³ In so doing the court remarked:

[T]he . . . EIR’s discussion of the *total* long-term water supply and demand in [this part of the County] . . . leaves too great a degree of uncertainty regarding the long-term availability of water for this project. Factual inconsistencies and lack of clarity in the . . . EIR leave the reader—and the decision makers—without substantial evidence for concluding that sufficient water is, in fact, likely to be available for [the Development] . . . at full build-out. Most fundamentally, the . . . EIR provide[s] no consistent and coherent description of the future demand for new water due to growth in [this part of the County] . . . or of the amount of new surface water that is potentially available to serve that growth.⁵⁴

In essence, the EIR failed to meet the requirements set forth in CEQA.⁵⁵

Although the EIR attempted to explain the proposed sources of water for the Development, it failed to make clear how the Development’s future needs would fit in with the future needs of the area.⁵⁶ CEQA requires that an EIR demonstrate a likelihood of available water to serve a project’s long-term needs and this EIR failed to meet this standard.⁵⁷ The factual conclusions reached in this EIR were not supported by substantial evidence, causing the EIR itself to be fatally flawed. “The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project.”⁵⁸ Restricting access to future entitlements was seen as a valid mitigation measure for the near-term, but

48. *Id.* at 438.

49. *Id.*

50. *Id.* at 439.

51. *Id.* at 438.

52. *Vineyard Area Citizens*, 40 Cal. 4th at 439.

53. *Id.*

54. *Id.*

55. *Id.* at 447.

56. *Id.* at 441-42.

57. *Id.* at 442.

58. *Id.*

was deemed an inadequate means of mitigating the Development's uncertain long-term water supply.⁵⁹

VI. Paper Water Origami and the Art of Tiering

Long-term, linked and highly complex projects have the added difficulty of phased Development.⁶⁰ It is often impractical to formulate mitigation measures for site-specific (e.g. grading) or aesthetic elements (e.g. landscaping) when a large-scale project is first approved.⁶¹ Tiering an EIR defers review of the environmental effects of elements specific to later phases of a project.⁶² However, *Vineyard Area Citizens* makes it clear that, "CEQA's demand for meaningful information is not satisfied by simply stating information will be provided in the future."⁶³ An agency reviewing the environmental effects of a proposed project may not postpone proper review merely by stating that the "information will be provided in the future."⁶⁴

Proposed sources of water must be analyzed in the first-tier of an EIR.⁶⁵ An approved EIR may be relied on for later build-out of secondary phases, but the overall water needs for a project must be evaluated under the assumption that the project will be built-out in its entirety and that the final project will need access to water.⁶⁶

Water supplies must be identified at the outset and, if any of the identified sources are only potentially available to a given development, CEQA requires that potential replacements and alternatives be identified as well as the "environmental consequences of those contingencies."⁶⁷ Uncertainty requires discussion, and it may not be postponed until further phases of the project have begun.⁶⁸ Moreover, "water supplies must be identified with

59. *Vineyard Area Citizens*, 40 Cal. 4th at 438-39.

60. It is important to note that this case does not attempt to reinvent the "water planning wheel," and acknowledges that an existing statutory scheme already requires urban water providers to periodically review water resources for 20 years into the future in an Urban Water Management Plan. (*Id.* at 434; California Water Code, §§ 10620-10631.) When the water demand for a project is contemplated in the Urban Water Management Plan, such findings may be incorporated in an EIR. (California Water Code, § 10910, California Public Resources Code, § 21151.9) This is a concept distinct from tiering.

61. *Vineyard Area Citizens*, 40 Cal. 4th at 431.

62. *Id.*

63. *Id.*

64. *Vineyard Area Citizens v. City of Rancho Cordova*, 40 Cal. 4th 412, 441 (2007) (citing *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, 723 (App. Ct. 2003)).

65. *Vineyard Area Citizens*, 40 Cal. 4th at 431.

66. *Id.*

67. *Id.* at 432.

68. *Id.* at 446.

more specificity at each step as land use planning and water supply planning move forward from general phases to more specific phases.”⁶⁹

VII. Conclusion

Vineyard Area Citizens demonstrates that California is increasing the level of individual planning for a proposed development as well as regional water planning. The EIR prepared in conjunction with large-scale land development must reflect the anticipated use of the same water resource by other projects, both existing and planned. By expanding the realm of “reasonably foreseeable” to include impacts outside the development, California is applying the public policy behind EIRs and CEQA much more exclusively.

69. *Vineyard Area Citizens v. City of Rancho Cordova*, 40 Cal. 4th 412, 433-34 (2007) (citing the amicus curie brief from Association of California Water Agencies).