

FEATURE ARTICLE

**RECENT COURT DECISIONS AND PUBLICATIONS
PROVIDE GUIDANCE IN PIECING TOGETHER WATER SUPPLY
ANALYSES FOR DEVELOPMENT PROJECTS**

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It has been two and a half years since Senate Bill 221 (Kuehl) and SB 610 (Costa) were enacted in an effort to further synergize land use and water supply planning. While there has not yet been a reported case discussing the adequacy of a water supply analysis in the context of SB 221 or SB 610, recent cases and reports provide insightful guidance and information that aid in preparing water supply assessments and verifications under SB 221 and SB 610, and in discussing water supply for development projects in California Environmental Quality Act (CEQA) documents.

This article initially discusses the legislative and judicial context of SB 221 and SB 610. However, the primary focus of the article is on providing practical guidance in piecing together water supply analyses under CEQA, SB 221, and SB 610, gleaned from recent court decisions and recently-published reports.

Legislative Precursors to SB 221 and SB 610

In 1995, the California legislature encouraged collaboration between water agencies and cities and counties through its enactment of SB 901. Water Code §§ 10910-15 required cities and counties to obtain a water assessment prior to approving larger projects, and also mandated the incorporation of the assessments into environmental impact reports (EIRs) prepared under CEQA. Cities and counties retained ultimate decision-making authority to approve or disapprove projects despite the outcome of the assessments. Nevertheless, the courts demonstrated an increasing commitment to holding land use agencies and water suppliers accountable for ensuring adequate water supplies to serve the projected demands of new

development “as part of the CEQA process.”

The legislation included no method to compel the preparation of water assessments and no consequences for the failure to do so. As a result, SB 901’s requirements were frequently ignored in the land use approval process.

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Judicial Precursors to SB 221 and SB 610

For example, in a 1996 case, *Stanislaus Natural Heritage Project v. County of Stanislaus*, the Fifth District California Court of Appeal rejected the county’s EIR analyzing a 29,500-acre development project because the county was unable to demonstrate an adequate water supply past the first five years of the project.

On the flip side, in 1999, the Third District Court of Appeal invalidated an EIR prepared for a water project by the El Dorado County Water Agency. In *County of Amador v. El Dorado County Water Agency*, the court concluded that a water supply project was not properly based on water demand assessments premised on a draft, unadopted general plan. The court also found the EIR to be inadequate because it failed to adequately describe the baseline environment and historic operations.

Furthermore, in 2000, the Third District Court of Appeal invalidated the EIR for the “Monterey Agreement” that was intended to allocate State Water Project supplies among the state water contractors in

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Planning and Conservation League v. Department of Water Resources, 83 Cal.App.4th 892 (3rd Dist. 2000), chiefly because it failed to discuss an appropriate “no project” alternative. The court illuminated the consequences of land use agencies approving development based on “paper water” entitlements that are unlikely to result in wet water deliveries because the State Water Project itself is unlikely to be completed. (For additional information, see “Court Approves Settlement in Litigation Over Monterey Amendments,” 13 *Cal. Water Law & Pol’y Rptr.* 288 (July 2003) and “California Supreme Court Declines to Review Court of Appeal’s Decision Invalidating the Monterey Agreement EIR,” 10 *Cal. Land Use Law & Pol’y Rptr.* 155 (Feb. 2001).)

Also, in 2001, the Sixth District Court of Appeal assessed groundwater as a source of water supply in *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 104 Cal.Rptr.2d 326 (6th Dist. Feb. 15, 2001). The court invalidated the EIR prepared by Monterey County for an overdrafted groundwater basin, primarily because the EIR did not accurately describe the baseline condition of the groundwater usage conditions. The court found the baseline “clearly faulty” because it must represent the environmental condition existing on the property prior to the project. While there is not a “rigid rule” with respect to the date in which the baseline must be established, the court stated that, in general, the baseline must be determined as the first step in the environmental review process. (For additional information, see “Court of Appeal Holds Project EIR Inadequate for Failure to Adequately Analyze Property’s Historic Water Use ‘Baseline’ as of Date Environmental Review Commenced,” 11 *Cal. Water Law & Pol’y Rptr.* 224 (May 2001).)

SB 221 and SB 610 were enacted as the state legislature’s efforts in furtherance of this trend toward coordinating local water supply and land use decision-making.

A Review of SB 221 and SB 610

Both SB 221 and SB 610 subject certain larger projects to heightened water availability analyses by public water systems (those serving 3,000 or more drinking water service connections). SB 221 applies at the tentative map stage of the development process to residential projects of more than 500 dwelling units, or residential developments that would increase

the public water system’s connections by ten percent or more.

SB 610 applies earlier in the development process, at the CEQA review stage, to a broader range of projects including: residential developments of more than 500 dwelling units; shopping centers and other business establishments employing more than 1,000 persons or having more than 500,000 square-feet of floor space; proposed commercial office buildings employing more than 1,000 persons or having more than 250,000 square-feet of floor space; proposed hotels or motels, or both, having more than 500 rooms; proposed industrial, manufacturing, or processing plants, or industrial parks planned to house more than 1,000 persons, occupying more than 40 acres of land, or having more than 650,000 square-feet of floor area; mixed use projects that include one or more of the projects specified in the subdivision; projects that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project; any such project that would increase the number or amount of water system’s connections by ten percent or more; and any mixed use project that would increase the public water system’s demand by an amount of water equal or greater than the amount required by residential development that would represent an increase of ten percent or more in the number of the public water system’s existing service connections.

SB 221 Requirements

SB 221 requires an affirmative written verification, based on “substantial evidence,” of a sufficient water supply for the proposed residential subdivision as well as existing and planned future uses. Under Government Code § 66473.7(b), a sufficient water supply means total water supplies during normal and drought periods in a 20-year projection that will meet the projected demands of the proposed subdivision, in addition to existing and future planned uses. The legislation also amends the Development Agreement law to make this limitation on subdivision approvals equally applicable to development agreements that include subdivisions subject to SB 221.

If there is no public water system that would serve the project, then the local agency is required to make the written finding of sufficient water supply, thereby assuring that a water supply verification will be

prepared prior to approving tentative maps for larger residential development projects.

SB 221 sets forth the kinds of information considered to be “substantial evidence” that must support the water supply verification in Government Code § 66473.7(c), including urban water management plans, SB 610 water supply assessments, and information about water service reliability during normal and drought years, similar to the assessment required to be included in urban water management plans.

An SB 221 verification need not conclude that sufficient water supplies are currently on-line to serve the project. If the verification relies on projected water supplies, then additional information listed in Government Code § 66473.7(d) must be provided, including proof of water contracts or other valid rights to the water supply, financing methods, and permits required for delivering the water supply and constructing the associated infrastructure. An SB 221 verification must also include information on the project’s water supply impacts to agricultural and industrial uses within the public water system’s service area that are not currently receiving water from the public agency, but are using the same resources. (For additional information, see “SB 221 Forges a Link Between Water Supply and Land Use Planning,” 12 *Cal. Water Law & Pol’y Rptr.* 57 (Dec. 2001).)

SB 610 Requirements

SB 610 mandates that a water supply assessment be provided to local governments for certain projects, as defined in Water Code § 10912, that are subject to CEQA. Thus, SB 610 ensures the consideration of water supply as part of the CEQA review process for negative declarations as well as EIRs. SB 610 also includes specific requirements for public water suppliers to analyze groundwater supplies that they may tap to serve the project.

SB 610 sets forth the information required to be included in a water supply assessment at Water Code § 10910, including: Projected 20-year water supply during “normal” and drought years; Identification and information on existing water supply entitlements and water rights, including quantities of water actually received in prior years, or, if no water has been received, information on others entitled to receive water from the same source; Information on any groundwater supplies that the public water system may supply to the project, including information on

the groundwater basin’s characteristics, the supplier’s groundwater rights, and historical use.

The water supply assessment need not result in a finding of adequate available water supplies. Rather, if the assessment concludes that the water supplies are currently insufficient, the assessment must also include information on plans for acquiring additional water supplies as set forth in Water Code § 10911, including the estimated total costs of, and financing methods for, acquiring the additional water supplies; permits required to acquire and develop the additional water supplies; and estimated timeframes within which additional water supplies are expected to be acquired.

If the city or county ultimately determines that the water supplies will not be sufficient, the city or county must include that determination in its findings for the project.

Recent Cases Provide a Useful Framework for Discussing Water Supply Availability

The previously discussed cases predating SB 221 and SB 610 highlight some key considerations when evaluating water supply availability in negative declarations and EIRs, and in preparing water supply assessments and verifications: availability of long-term water supply must be demonstrated; demand projections in a draft general plan are not, in themselves, evidence of water need justifying a water development project; and contractual entitlements are not evidence in themselves of available water supplies.

Recent court decisions provide further instruction for analyzing the adequacy of water supplies to serve new development.

Santa Clarita Organization for Planning the Environment v. City of Los Angeles

In *Santa Clarita Organization for Planning the Environment v. City of Los Angeles*, 106 Cal.App.4th 715 (2003) (SCOPE), the Second District Court of Appeal again addressed the issue of relying on “paper water” entitlements to demonstrate available water supply. Los Angeles County’s EIR analyzing a large residential and commercial development project in the Santa Clarita Valley concluded that present water supplies are sufficient to meet the project’s water demands. However, the EIR’s cumulative water demand analysis that considered projected demands for the

buildout of the valley concluded that there would be a shortfall under existing circumstances. The EIR discussed the availability of additional State Water Project water under the Monterey Agreement that was the subject of the Amador case discussed above, and assumed a 50 percent cut-back in State Water Project supplies during periods of extreme drought.

Among other reasons, the court rejected the EIR for being deficient as an informational document because it relied on the full amount of the Castaic Lake Water Agency's State Water Project entitlements in calculating the available water supply for the project and future development. In the first paragraph of its opinion, the court makes clear that an EIR for a development project must contain a thorough analysis that reasonably informs the reader of the amount of water available, and that the "dream of water entitlements" is not a substitute for the actual amount of water that can be delivered. In addition, reiterating its discussion of "paper water" in *Planning and Conservation League v. Department of Water Resources*, the court emphasized the important distinction between entitlements and the demonstration of actual water supply. The court also criticized the EIR's lack of justification for wet year projections of 100 percent of delivery of State Water Project entitlements because the State Water Project system has not been completed; including no justification for drought year projections of 50 percent of State Water deliveries; failing to include water supply information in the EIR itself; and failing to include either estimates by the Department of Water Resources as to how much State Water Project water it can actually deliver under normal and drought cycles, or a disclosure that no such reliable estimates are available. The court deemed the county's approval of the project unsupported by substantial evidence and invalidated the EIR.

Notably, the SCOPE court was not persuaded by the EIR's discussion of the requirement that each development project in the Santa Clarita Valley, including the proposed project, would be required to demonstrate water availability as part of the subdivision approval process. The court pointed out that the EIR's deficiency is not cured by the requirement that the developer demonstrate an adequate water supply before the tract map is recorded. The EIR must independently and adequately discuss available supply. Its purpose is not satisfied by simply stating that the information will be provided in the future. (For

additional information, see "Newhall Project Delayed Again by Appellate Court; More Water Supply Analysis Required," 13 *Cal. Water Law & Pol'y Rptr.* 218 (April 2003); and "Castaic Water Agency Releases Long-Range Water Study Predicting Adequate Supplies for the next Two Decades," 11 *Cal. Water Law & Pol'y Rptr.* 90 (Jan. 2001).)

Santa Clarita Organization for Planning the Environment v. City of Los Angeles

Santa Clarita Organization for Planning and the Environment v. County of Los Angeles (2nd Dist. 2003) (SCOPE II), though unpublished, is also instructive as to substantial evidence supporting a finding of a sufficient water supply in a CEQA analysis (See, 13 *Cal. Water Law & Pol'y Rptr.* 218 (April 2003)). In SCOPE II, the Second District Court of Appeal upheld an addendum to an EIR prepared to evaluate the potential impacts, including water supply impacts, of project amendments. The addendum concluded that the Valencia Water Company had sufficient supplies to serve the new development. In reaching this conclusion, Los Angeles County did not solely rely on letters from Valencia Water Company confirming adequate supplies, or even on the Urban Water Management Plan that had accounted for the project's water demands. In conjunction with the letters and UWMP, the county based its decision on: an analysis of water availability which was more conservative than the UWMP; the testimony of an environmental consultant concluding that, even with more conservative estimates, there is sufficient available supply; a forecast of projected demands based upon the county's development monitoring system; and, expert testimony about water quality concluding that even if all of the perchlorate-contaminated water supplies were unavailable, there would still be a sufficient water supply.

San Joaquin Raptor Wildlife Rescue Center v. Regents of the University of California

In another unpublished decision, *San Joaquin Raptor Wildlife Rescue Center v. Regents of the University of California* (June 24, 2003) (*Wildlife Rescue Center*), the Fifth District Court of Appeal evaluated the adequacy of a water supply impact analysis in an EIR for a new University of California campus in Central California. Groundwater served by the City of Mer-

ced would supply a significant portion of the campus's projected water demands.

The EIR in *Wildlife Rescue Center* did not identify specific well sites, but rather discussed general on-site and off-site wells. In addition, the EIR discussed different operational strategies that the city would employ to reduce the potential impacts to nearby wells. In analyzing quantities, the EIR considered worst-case water demand projections that excluded conservation expected for the campus's use of recycled water. Furthermore, the EIR evaluated and dismissed claims of overdraft by relying on a Merced Water Supply Plan that is described as a comprehensive examination of the water supply needs for the more than 500,000 acre Merced groundwater basin area, and projects water demands through the year 2040.

The court held that the EIR was sufficient as an informational document to support the conclusion of adequate water supplies with no significant environmental impact. Though critics concede that the reasoning of the case is instructional, they caution that the underlying analyses reviewed by the court may not be as favorably evaluated for a more typical development project.

Recent Water Supply Publications Provide Additional Resource Materials

Several recent publications provide useful information to assist in the analyses of water supply reliability.

DWR's SB 610/SB221 Guidebook

The California Department of Water Resources has published a "Guidebook for Implementation of Senate Bill 610 and Senate Bill 221," dated October 2003, to assist water suppliers, cities, and counties in coordinating water supply and land use planning. The guidebook provides flow charts and step-by-step instructions for preparing water supply assessments and verifications, as well as background documentation on SB 221 and SB 610. It also includes suggestions for local water suppliers to integrate from other sources, such as the State Water Project, into their analyses. The guidebook is available on DWR's website, at <http://www.owue.water.ca.gov/>. DWR's website also provides useful links to additional information on SB 221 and SB 610.

DWR's "State Water Project Delivery Reliability Report"

DWR issued a "State Water Project Delivery Reliability Report" dated 2002. The reliability of state water is an important part of any analysis of overall water supply reliability for those who use state water as part of their supply. The report provides local officials with a single source of the most current data available on state water delivery reliability for existing and future development under wet, normal and drought scenarios. The report is also a useful resource for information on an overview of the State Water Project delivery system, local agency management of state water as part of their water supplies, and evaluating water supply reliability under SB 221 and SB 610.

The report can be downloaded off of DWR's website at <http://swpdelivery.water.ca.gov/>. DWR's Bay-Delta Office can be contacted at 916-653-1099 to assist local agencies in developing Urban Water Management Plans and water conservation programs, and in understanding and applying the information contained in the State Water Project Reliability Report to specific water users.

California's Groundwater, DWR Bulletin No. 118 - Update 2003

Groundwater comprises 30 to 40 percent of California's urban and agricultural water supplies, with 40 to 50 percent of Californians relying to some extent on groundwater for part of their supply. DWR's most recent report on California's Groundwater, Bulletin No. 118 – 2003 Update, includes comprehensive information on groundwater basins and groundwater management throughout the state. The report can be accessed at <http://www.groundwater.water.ca.gov/bulletin118/update2003/>.

California Water Plan, DWR Bulletin No. 160 – Update 2004 (June 7, 2004 Advisory Committee Review Draft)

DWR publishes updates every five years to its "California Water Plan," a comprehensive document that discusses how population, land use, and water allocations for the environment affect water resource management in California. The next update is scheduled to be finalized in January 2005. The report is to be comprised of five volumes (a strate-

gic plan, resource management strategies, regional reports, reference guide, and technical guide), which together provide an overview of strategic alternatives for California's water resource planning to ensure reliable supplies. The reference guide (Volume 4 of the report) includes general reference information on California's water resources organized by topic that will be updated periodically. Further information pertaining to the California Water Plan Update, as well as portions of the draft update report, are available at www.WaterPlan.water.ca.gov/.

Report on Metropolitan's Water Supplies

The Metropolitan Water District of Southern California wholesales water, including State Water Project water and Colorado River water, to 26 member agencies that supply water to nearly 18-million people in parts of Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura counties. Recognizing that retail water supply reliability is

dependent upon both development of local resources and imported water, in March 2003, Metropolitan issued a "Report on Metropolitan's Water Supplies." The report provides information to assist in complying with SB 221 and SB 610, including the actual and projected demands for water from Metropolitan, and water supplies available to Metropolitan to meet those demands. A link to the report is available on Metropolitan's website at <http://www.mwd.dst.ca.us/mwdh2o/pages/yourwater/ywater01.html>.

Conclusion

The adequacy of documenting a sufficient water supply is now a differentiating factor in land use approval or denial. The recent water supply cases and reports discussed in this article provide useful guidance and resources to assist local agencies and project proponents in documenting an adequate water supply to serve development projects under CEQA, SB 221 and SB 610.

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