

Cases Prove Need to Follow CEQA Requirements

Kristina Lawson

Three recent cases have confirmed the California Environmental Quality Act's presence as a fundamental component of real estate development in the state.

Highlighting the impact that committed, well-organized and legally-sophisticated community groups can have - when real property owners, developers and public agencies fail to strictly comply with the act's detailed procedures and legal requirements - these three cases underscore the overriding need for all parties involved in the development process to have a thorough, day-to-day working knowledge of the act.

The seemingly basic question of whether a particular action or activity constitutes a "project" under the provisions of the act continues to be the subject of litigation. In October 2001, the Yosemite Community College District approved a motion to close and relocate a firing range and conduct lead abatement without conducting any California Environmental Quality Act review whatsoever. *Association for a Cleaner Environment v. Yosemite Community College District*, 116 Cal.App.4th 629 (Cal. App. 5th Dist. Feb. 4, 2004). Three days after this motion was approved, the district issued a statement that the decision to dismantle and demolish the range had not been formally made and was in question.

On review, the 5th District Court of Appeal rejected the district's argument that, in merely approving the motion, it had not committed to a specific course of action, making any review under the environmental quality law premature. As the district board's own minutes indicated, the plans for removal of the range had been in place for a decade. The court concluded that, in light of the total record, the closure and removal of the range, the cleanup activity and the transfer of shooting-range activity to another facility were one "coordinated endeavor" which constituted a "project" subject to the act.

As the court correctly concluded that, if activity has been undertaken directly by a public agency and if that activity will result in either a direct or reasonably foreseeable indirect change to the physical environment, then that activity is a "project" subject to the state Environmental Quality Act. The court's conclusion that the district's activities with respect to the firing range are a "project" subject to review under the act, is consistent with the general rule that the act is triggered at the time a public agency "approves" a particular project or, in other words, at the time the public agency commits itself to a definite course of action. Although the district argued it had not decided to remove the firing range, on review, the bulk of the record evidence showed that the district had, in fact, voted to destroy the range in October 2001. The court ruled that the vote established the time the district committed itself to a definite course of action, even if after October 2001, the district took a more vigorous approach to closing the facility.

Just as the 5th District's *Association for a Cleaner Environment* serves as a reminder to conduct review under the act at the time the project is "approved," the 3rd District's *Protect the Historic Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099 (Cal. App. 3rd Dist. March 12, 2004), hammers home the need for an environmental impact report to explain fully the reasons why a particular impact is not significant.

In *Amador*, the Amador Water Agency tried to replace the unlined earthen Amador Canal with a pipeline that would improve water quality and reliability. The agency acknowledged that the pipeline project would increase the canal's efficiency vastly by eliminating all leakage from the existing canal. The impact report's hydrology section further concluded that the canal leakage was keeping parts of six local streams from becoming intermittent during drier years.

After identifying the potential for an impact on the six local streams that no longer would receive leakage from the canal, to the agency's dismay, the impact report cursorily addressed the significance of that impact: "The change in local hydrology associated with dewatering the Amador Canal and eliminating all leakage is not considered to be a significant hydrological impact per se. The hydrological changes may have effects on other resources dependent on hydrology, for example, water quality or wildlife, and these

effects are discussed elsewhere in the [environmental impact report]. Consequently, changes in hydrology are not significant."

The agency arrived at this conclusion after answering "no" to the question of whether the reduction in flow to the local streams would constitute a significant environmental effect. While the plaintiffs asserted that the agency answered "no" because the environmental checklist form did not address flow reduction as a possible impact, the court could not determine whether this assertion was correct or incorrect because "the EIR fails to explain the reasons why the Agency found the reduction in stream flow would not be significant." Had the impact report merely contained the required "statement briefly indicating the reasons for determining" why the changes in hydrology were not significant, the court likely would have upheld the environmental impact report.

This case serves as a reminder that, just as with other required public-agency findings, an agency's statements about the significance of a particular impact in an environmental impact report must include an explanation of how the agency processed and weighed the evidence when deliberating and reaching its conclusion.

This case also impliedly confirmed what many state Environmental Quality Act practitioners have thought for years: Reliance only on the standardized environmental checklist form found in Appendix G to the act's guidelines to identify the significant environmental impacts of a particular project is ill-advised. While the Appendix G checklist may contain useful guides for determining whether a project may have significant impacts, the checklist questions may be "too narrowly focused" and "irrelevant" to address all the potentially significant impacts of a particular project.

Last, in *Ocean View Estates Homeowners Ass'n Inc v. Montecito Water District*, 116 Cal.App.4th 396 (Cal. App. 2nd Dist. March 2, 2004), the 2nd District Court of Appeal reminded both developers and public agencies that state Environmental Quality Act review, including the formulation of mitigation measures, must take place in public. Noting that the public must be informed of all significant impacts before the adoption of documentation under the act and that significant aesthetic impacts must be evaluated, the 2nd District invalidated the Montecito Water District's adoption of a mitigated negative declaration for a project that would have covered a 4-acre reservoir with an aluminum roof.

The court first considered Ocean View Estates' argument that the environmental impacts of a mitigation measure, necessarily designed to prevent significant environmental impacts, must itself be analyzed. Ocean View Estates argued that the mitigation measures employed to prevent downstream flooding may have the significant environmental impact of causing excess runoff to flow into the reservoir, potentially causing contamination of the drinking water. Further, it argued that, if the runoff potentially caused by the mitigation measures were not allowed to flow into the reservoir, it might result in a dam failure. In fact, these effects had been identified by the district's own engineering consultant as potential problems. In response to these concerns, the district asserted that changes in the project design after the approval of the mitigated negative declaration addressed these issues and mitigated into insignificance the potential for contamination and/or dam failure.

Although these changes indeed may have mitigated fully the potentially significant impacts, the court said this post-approval mitigation was not sufficient to satisfy the state Environmental Quality Act because "[e]nvironmental review derives its vitality from public participation." Not only was the district required to analyze the potential impacts of its proposed mitigation measures, but it was also required to discuss all mitigation measures in the mitigated negative declaration and prohibited from formulating them in secret without the benefit of public participation.

The court also evaluated the issue of whether potential impacts on "view and other features of beauty could constitute a significant environmental impact under CEQA." Confirming that the district was required to consider the impact of its project on private views, the court, after analyzing the administrative record, also found substantial evidence to support a fair argument that the project would have a significant impact on view.

While these cases do not stand for entirely new or unique points of state Environmental Quality Act law, they do underscore the need to pay careful attention to the act's numerous and detailed requirements and emphasize the ability of sophisticated plaintiffs to derail projects that appear to be otherwise well-planned. The act's continuing presence as an integral part of real estate development in the state cannot be questioned, and its reach likely will continue to expand and develop.

Kristina Lawson practices land use and environmental law with Miller, Starr & Regalia in Walnut Creek.

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