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The Relationship Between Water Supply and Land Use Planning: Leading Cases Under the California Environmental Quality Act

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THE RELATIONSHIP BETWEEN WATER SUPPLY AND LAND USE PLANNING: LEADING CASES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

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I. INTRODUCTION

In the last fifteen years or so, the relationship between land use planning and water supply development has received considerable attention in the California Legislature and in California Supreme Court and court of appeal decisions interpreting the California Environmental Quality Act ("CEQA").[1] The relevant legislation and case law direct cities and counties, when acting as CEQA lead agencies for substantial land use projects, to work with water suppliers to assess the availability of water for such projects in light of other anticipated demands. As California struggles to contend with both its growing human population and its increasing environmental challenges, local agencies must be careful not to approve new development at levels that cannot be

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[1] CAL. PUB. RES. CODE, § 21000 *et seq.* (Westlaw 2010).

adequately served with dependable long-term water supplies.

In 1995, in legislation commonly known as "SB 901," the Legislature created a process whereby cities and counties approving certain types of large development projects were required to seek "water supply assessments" (WSA) from the "public water systems" responsible for serving such projects with water. These assessments were intended to inform the preparation of the environmental documents for the development projects.[2] In 2001, in legislation commonly known as "SB 610," the Legislature closed some of the perceived loopholes in the original WSA mechanism and altered some of the procedures created by SB 901.[3] At the same time, the Legislature, through parallel legislation known as "SB 221," created what has been called a "fail-safe" procedure mandating that, before a city or county can approve a final subdivision map for a residential project that will include more than 500 dwelling units, the city or county must first receive from the applicable water supplier a written verification of the availability of a water supply for the project.[4]

Even before the Legislature created water supply assessment and verification requirements,[5] the courts began to grapple with how land use and water supply planning should be coordinated through the adjudication of CEQA cases related to substantial development projects. These cases have created a body of law that complements, but is independent of, the requirements of SB 610 and SB 221.

The most significant judicial event on the subject of CEQA and water supply in recent years was the California Supreme Court's issuance in early 2007 of its decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*.[6] In its first opinion since 1988 addressing the adequacy of an environmental impact report

[2] 1995 Cal. Stat. 6701.

[3] *See* CAL. WATER CODE §§ 10910-10915 (Westlaw 2010); CAL. PUB. RES. CODE § 21151.9; CAL. CODE REGS. tit. 14, § 15155 (2010).

[4] Although "subdivision," for purposes of this requirement, generally means a subdivision creating more than 500 dwelling units, in situations in which a water supplier ("public water system") is a relatively small entity, the requirement applies to "any residential development that would account for an increase of 10 percent or more in the number of the public water system's existing service connections." CAL. GOV'T CODE § 66473.7(a)(1) (Westlaw 2010). Furthermore, in-fill and low-income housing projects are excluded from the requirement, regardless of the number of units involved. *Id.* § 66473.7(i).

[5] *See* CAL. PUB. RES. CODE § 21159.1; CAL. WATER CODE §§ 10910-10915; CAL. GOV'T CODE § 66473.7.

[6] Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412 (2007).

(EIR), the high court set forth a set of principles, derived from over a decade of court of appeal case law, governing the manner in which cities and counties must address water-related issues in land use EIRs.

This Article will survey and analyze this 2007 California Supreme Court decision and the key appellate court cases leading up to and following it, all of which address the relationship between land use planning and water supply planning under CEQA. The Article will also address a subsequent California Supreme Court decision addressing the adequacy of the EIR for one of the most significant water supply programs in recent decades, the so-called CALFED Record of Decision, which reflected, as of the year 2000, a long-term strategy for addressing ecological problems occurring in the Sacramento-San Joaquin River Delta while increasing the reliability of southbound water exports from that water body.[7] Lessons from the case law as it currently exists may be broadly described as follows:

> 1) According to CEQA case law (as opposed to SB 610 and SB 221), EIRs for substantial development projects should analyze the availability of existing or realistically available water supplies for proposed development, and cannot get by simply by identifying theoretical water rights or contract rights that may be very difficult to translate into actual water for human use within any foreseeable time frame. "CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" [8] The focus of the analysis should be on whether particular supplies "bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA."[9]
>
> 2) "If the uncertainties inherent in long-term land use and water planning make it impossible to confidently identify the future water sources, an EIR may satisfy CEQA if it acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable

[7] *In re* Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 43 Cal. 4th 1143 (2008).

[8] *Vineyard Area Citizens for Responsible Growth*, 40 Cal. 4th at 431 (quoting Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 829 (Ct. App. 1981)).

[9] *Id.* at 432 (quoting Santa Clarita Org. for Planning the Env't v. County of Los Angeles (*SCOPE I*), 106 Cal. App. 4th 715, 720-23 (Ct. App. 2003)).

alternatives—including alternative water sources and the option of curtailing the development if sufficient water is not available for later phases—and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact."[10]

3) EIRs for substantial development projects should also analyze or disclose the physical impacts associated with obtaining new water supplies for development projects.[11]

4) Finally, EIRs for land use plans should formulate mitigation measures that prevent physical development from occurring before water supplies are physically available for delivery, though land use plans may be approved without all of the water necessary for build-out being immediately available. However, "[t]he law's informational demands may not be met, in this context, simply by providing that future development will not proceed if the anticipated water supply fails to materialize. But when an EIR makes a sincere and reasoned attempt to analyze the water sources the project is likely to use, but acknowledges the remaining uncertainty, a measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis."[12]

II. LEADING CEQA CASES INVOLVING WATER SUPPLY AND LAND USE PLANNING

The first notable appellate court decision to address the interplay between CEQA and water supply issues was *Santiago County Water District v. County of Orange*, decided in 1981, involving a proposed sand-and-gravel mining project.[13] There, the court considered a project-level EIR that contained limited analysis of the project's water supply needs and impacts.[14] Fifteen years later, the court of appeal decision in *Stanislaus Natural Heritage Project v. County of Stanislaus* dealt with water supply issues in a broader land use planning context.[15] Five years after that decision, another appellate court in *Napa Citizens for Honest*

[10] *Vineyard Area Citizens for Responsible Growth*, 40 Cal. 4th at 434.

[11] *Id.* at 431 (citing Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 206 (Ct. App. 1996)).

[12] *Vineyard Area Citizens for Responsible Growth*, 40 Cal. 4th at 432.

[13] *Santiago County Water Dist.*, 118 Cal. App. 3d 818.

[14] *Id.*

[15] *Stanislaus Natural Heritage Project*, 48 Cal. App. 4th 182.

Government v. Napa County Board of Supervisors added nuances to the discussion in *Stanislaus Natural Heritage Project*.[16]

In addition to grappling with the *timing* of water supply and land use planning, courts have also been forced to address the *uncertainties* inherent in California water law, drought supplies, and delivery infrastructure, as well as the impacts of these and other uncertainties on effective water supply planning and environmental review.[17] For instance, the decisions in *Santa Clarita Organization for Planning the Environment v. County of Los* Angeles *(SCOPE I*) and *California Oak Foundation v. City of Santa Clarita* involved water suppliers' reliance on uncertain State Water Project ("SWP") "entitlements," and, more specifically, a single water transfer for the annual contract rights to up to 41,000 acre-feet of water from the SWP, some portion of which was "paper water."[18] These cases teach that, at least in some instances, EIRs for development projects partly dependent on SWP supplies must disclose the fact that SWP "entitlements" are not the same as actual supplies.[19]

In early 2007, the California Supreme Court finally weighed in on all of these points, issuing the landmark opinion in *Vineyard Area Citizens for Responsible Growth*.[20] In its decision, the court reviewed and considered the prior court of appeal case law and drew together the different strands into a single set of principles governing the preparation of water supply analyses in land use EIRs.[21] In late 2007, the court of appeal decision in *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (*SCOPE II*), applying standards announced in *Vineyard Area Citizens for Responsible Growth*, handed the first published appellate victory to a respondent agency in the series of cases involving the above-referenced 41,000-acre-feet water transfer.[22]

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[16] Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors, 91 Cal. App. 4th 342 (Ct. App. 2001).

[17] *See, e.g.,* Santa Clarita Org. for Planning the Env't. v. County of Los Angeles (*SCOPE I*), 106 Cal. App. 4th 715 (Ct. App. 2003); Cal. Oak Found. v. City of Santa Clarita, 133 Cal. App. 4th 1219 (Ct. App. 2005).

[18] *See id.*

[19] *Id.*

[20] Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412 (2007).

[21] *Id.*

[22] Santa Clarita Org. for Planning the Env't v. County of Los Angeles (*SCOPE II*), 157 Cal. App. 4th 149 (Ct. App. 2007); *see also* Friends of the Santa Clara River v. Castaic Lake Water Agency, 95 Cal. App. 4th 1373 (Ct. App. 2002) (setting aside EIR for 41,000 acre feet transfer);

Finally, in June 2008, the California Supreme Court issued its long-awaited decision entitled *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, in which the court upheld a program EIR for a thirty-year program for various actions associated with the Sacramento-San Joaquin River Delta.[23] Although this last decision addresses an EIR for a water supply/ecosystem restoration program rather than an EIR for a land use plan,[24] the decision is nevertheless relevant to the interplay between water supply planning and land use planning.

Each of these precedent-setting cases is discussed in detail below.

A. SANTIAGO WATER DISTRICT V. COUNTY OF ORANGE

In *Santiago Water District v. County of Orange*,[25] a county water district challenged the approval of an EIR for a proposed sand and gravel mining operation.[26] The EIR contained no information demonstrating that any water supplier had agreed to provide water to the project, and no analysis regarding the environmental effects of any such water delivery and usage.[27] The respondent county nevertheless found the EIR to be adequate and approved the project subject to the condition that the operator subsequently establish an adequate water supply for the project.[28]

The court of appeal found merit in the petitioner's challenge, stating that in general, an EIR "'should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.'"[29] Here, the EIR failed to provide sufficient information about the delivery of water to the proposed mining site, and it did not include any description of the facilities that would

SCOPE I, 106 Cal. App. 4th 715 (setting aside EIR for land use plan reliant on same transfer); *Cal. Oak Found.*, 133 Cal. App. 4th 1219 (setting aside another EIR for land use project reliant on transfer). *But cf.* Planning & Conservation League v. Castaic Lake Water Agency, 180 Cal. App. 4th 210 (Ct. App. 2009) (upholding second EIR for proposed transfer, prepared on remand from *Friends of the Santa Clara River*, 95 Cal. App. 4th 1373).

[23] *In re* Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 43 Cal. 4th 1143 (2008).

[24] *Id.*

[25] Santiago Water Dist. v. County of Orange, 118 Cal. App. 3d 818 (Ct. App. 1981).

[26] *Id.* at 822.

[27] *Id.* at 830-32.

[28] *Id*. at 828.

[29] *Id.* at 831 (quoting CEQA Guidelines, CAL. CODE REGS. tit. 14, § 15150).

have to be constructed to deliver water to the project.[30] The court noted that, because the construction of additional water-delivery facilities was "undoubtedly one of the significant environmental effects of the project," "a description of the necessary construction had to be included if the EIR was to serve its informational purpose."[31] Also, while the EIR did state that a large quantity of water would be consumed by the project, the EIR did not include any discussion of the environmental impacts of supplying such a large quantity of water.[32] Nor did the document address the effects of that delivery on water service elsewhere in the water district's jurisdiction.[33] For these reasons, the court concluded that the EIR was inadequate.[34]

B. STANISLAUS NATURAL HERITAGE PROJECT V. COUNTY OF STANISLAUS

In *Stanislaus Natural Heritage Project v. County of Stanislaus*,[35] the court of appeal not only addressed the need for local agencies to identify future water supply sources before approving large new development projects, but also announced principles requiring such agencies to consider the *environmental effects* of developing new supply sources.[36] In this respect, the opinion goes beyond the requirements of SB 610 and SB 221 and creates CEQA obligations that apply to a universe of projects that includes, but extends further than, the kinds of projects subject to that legislation.[37]

In *Stanislaus Natural Heritage Project*, the court of appeal invalidated an EIR for a specific plan because the document had not adequately dealt with the environmental consequences associated with acquiring a long-term water supply for the proposed development.[38] The specific plan would allow 5,000 residential units on 29,500 acres to be built in four phases over twenty-five years.[39] The EIR evaluated the

[30] *Santiago Water Dist.*, 118 Cal. App. 3d at 829.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 830-32.

[34] *Id.* at 829.

[35] Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182 (Ct. App. 1996).

[36] *Id.*

[37] *Id.*

[38] *Id.* at 187.

[39] *Id.* at 186.

effects related to providing water during the first five years of the fifteen-year first phase, but it did not address impacts that would occur beyond that initial period.[40] Instead, the document treated the potential long-term water supply shortfall as a significant and unavoidable impact, but it identified as "mitigation" a commitment that further construction, beyond the first increment, could not occur unless adequate water supplies could be found.[41] The EIR also stated that additional environmental review would be required in connection with future water-acquisition projects serving such future development.[42]

In holding that the EIR was inadequate, the court stated that "the County's approval of the project under these circumstances defeated a fundamental purpose of CEQA: to 'inform the public and responsible officials of the environmental consequences of their decisions before they are made.'"[43] The court rejected the respondent agency's argument that, because the EIR was only a "first tier" document, to be augmented in the future with additional negative declarations or EIRs, the county was not required to analyze long-term water supply impacts to the degree advocated by the petitioners.[44] The court explained that:

> a decision to "tier" environmental review does not excuse a governmental entity from complying with CEQA's mandate to prepare, or cause to be prepared, an environmental impact report on any project that may have a significant effect on the environment, with that report to include a detailed statement setting forth "[a]ll significant effects on the environment of the proposed project."[45]

Even though the respondent and applicant recognized, in effect, that large portions of the project might not be built should water supplies not be forthcoming, the willingness to bear that risk was no substitute for proper CEQA compliance.[46] The approval of a specific plan embodies a decision to encourage or permit the full complement of development contemplated by the plan.[47] The EIR for such a specific plan should therefore look at water issues assuming full build-out:

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[40] *Id.* at 194-95.

[41] *Id.* at 195.

[42] *Id.*

[43] *Id.* (quoting Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of the Univ. of Cal., 6 Cal. 4th 1112, 1123 (1993)).

[44] *Id.* at 197.

[45] *Id.* (quoting CAL. PUB. RES. CODE § 21100).

[46] *Id.* at 199.

[47] *Id.*

> No matter what subsequent environmental review might take place, and no matter what additional mitigation measures might be adopted to ameliorate adverse environmental impacts on each of the four "phases" of planned development, the project was going to need water from some source or sources. To defer any analysis whatsoever of the impacts of supplying water to this project until after the adoption of the specific plan calling for the project to be built would appear to be putting the cart before the horse.[48]

The court made the following statements regarding what steps the respondent would have to take to comply with CEQA:

> We are not concluding respondent must first find a source of water for the "project" before an EIR will be adequate. We are concluding that an EIR for this project must address the impact of supplying water for the project. It is not mitigation of a significant environmental impact on a project to say that if the impact is not addressed then the project will not be built. The decision not to build may well rest upon the absence of a suitable or adequate water source. However, the decision to approve the EIR of this project does require recognition that water must be supplied, that it will come from a specific source or one of several possible sources, *of what the impact will be if supplied from a particular source or possible sources and if that impact is adverse how it will be addressed*. While it might be argued that not building a portion of the project is the ultimate mitigation, it must be borne in mind that the EIR must address the project and assumes the project will be built.[49]

Notably, like SB 610,[50] the *Stanislaus Natural Heritage Project* decision stops short of prohibiting legislative land use approvals in the absence of a guaranteed water supply sufficient for full buildout. Furthermore, the decision required that a specific plan EIR address the *environmental impacts* associated with developing whatever new water sources would be needed to serve the planned development.[51]

This latter directive, though perhaps arguably always implicit in CEQA principles, required a departure from prior standard practice, as witnessed by the author in the decade preceding the decision. Before the *Stanislaus Natural Heritage Project* decision was issued in 1996, land

[48] *Id.* at 199-200.

[49] *Id.* at 205-06 (emphasis added).

[50] CAL. WATER CODE § 10911 (Westlaw 2010).

[51] *Stanislaus Natural Heritage Project*, 48 Cal. App. 4th at 205-06.

use EIRs had very seldom gone beyond merely identifying potential water sources. In the aftermath of the decision, however, land use EIRs, at least in some instances, were required to focus on the question of whether the use of surface water or groundwater in new development could harm distant fisheries or aquifers.[52]

C. NAPA CITIZENS FOR HONEST GOVERNMENT V. NAPA COUNTY BOARD OF SUPERVISORS

In *Napa Citizens for Honest Government v. Napa County Board of Supervisors*, [53] petitioners challenged a Final Subsequent EIR ("FSEIR") and specific plan prepared by Napa County to facilitate the industrial development of an unincorporated area south of the City of Napa.[54] Petitioners alleged, among other things, that the FSEIR failed to adequately analyze and mitigate identified significant impacts regarding water distribution.[55] The court agreed.[56]

The court characterized as follows the manner in which the FSEIR dealt with water issues:

> [T]he FSEIR assumes that water to the Project area will be supplied in the future, as it is supplied now, by [the City of] American Canyon. American Canyon receives water from the State Water Project via the North Bay Aqueduct. The FSEIR reports that at present, American Canyon uses less than one-half of the amount of water allocated to it, but it appears that by the year 2015, the combined needs of the city and the Project will exceed American Canyon's aqueduct allotment. The FSEIR further reports that American Canyon is in the process of reaching an agreement with the City of Vallejo that will permit American Canyon to purchase additional water from a water treatment facility in that nearby town. The FSEIR assumes that this water will prevent the anticipated shortfall. It therefore concludes that the Project's demand for water will not result in a significant effect.[57]

The court then discussed the applicable legal principles derived from prior case law:

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[52] *See, e.g.*, *Stanislaus Natural Heritage Project*, 48 Cal. App. 4th 182.

[53] Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors, 91 Cal. App. 4th 342 (Ct. App. 2001).

[54] *Id.*

[55] *Id.* at 354.

[56] *Id.* at 375.

[57] *Id.* at 372.

> It has been held that an EIR is inadequate if it fails to identify at least a potential source for water. In *Stanislaus Natural Heritage Project v. County of Stanislaus*, (1996) 48 Cal.App.4th 182, for example, the failure to identify a source of water beyond the first five years of development rendered the EIR inadequate, although the developer was pursuing several possible sources. It also has been held that an EIR is inadequate if the project intends to use water from an existing source, but it is not shown that the existing source has enough water to serve the project and the current users. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818.) On the other hand, it has been held that an EIR is not required to engage in speculation in order to analyze a "worst case scenario." (*Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671 (hereafter *TRIP*).) In that case, the court held that an EIR was not required to analyze the effects that would result from the construction of a sewage treatment facility, when (1) all indications suggested that the facility would never be needed, and (2) the facility – if it was constructed – would be subjected to its own environmental review.[58]

The court then applied these precedents to the situation before it:

> The present situation falls somewhere between that at issue in *TRIP* on the one hand, and those in *Stanislaus* and *Santiago*, on the other. In *TRIP*, affected cities had entered into agreements designed to provide service sufficient to meet the project's needs. In the present case, the necessary agreements have not yet been reached, and as the Project has no control over those agreements, it cannot ensure that they will be reached. Unlike the EIR in *Santiago*, the FSEIR does consider the impact of the Project's needs on the area's resources and the ability of those resources to meet the demands of other users. Unlike the situation in *Stanislaus,* the FSEIR has identified sources for water and facilities for the treatment of wastewater, although their availability has not been absolutely established. Moreover, the FSEIR analyzes the capacities of the existing systems and concludes that the anticipated resources, if available, will be able to handle the Project area's needs for water and disposal of wastewater.
>
> It follows that a compromise between the positions adopted in those cases is in order. We concluded that the FSEIR need not identify and analyze all possible resources that might serve the Project should the anticipated resources fail to materialize. Because of the uncertainty surrounding the anticipated sources for water and wastewater

[58] *Id.* at 372-73.

> treatment, however, the FSEIR also cannot simply label the possibility that they will not materialize as "speculative," and decline to address it. The County should be informed if other sources exist, and be informed, in at least general terms, of the environmental consequences of tapping such resources. Without either such information or a guarantee that the resources now identified in the FSEIR will be available, the County simply cannot make a meaningful assessment of the potentially significant environmental impacts of the Project.[59]

After explaining why the FSEIR had a flawed approach in its treatment of water supply impacts, the court next addressed the kind of "mitigation" that would have been appropriate under the circumstances:

> [A]s we have found that the FSEIR is inadequate in failing either to identify new sources or to report that none is available, the FSEIR also is inadequate in failing to identify and analyze appropriate mitigation measures related to the alternative sources, if any. *In theory, at least, the FSEIR also could state a mitigation measure that would prevent development if the identified sources fail to materialize*.[60]

The language italicized immediately above provides important guidance to local lead agencies faced with a temporary water supply shortfall at the time of project approval. A mitigation measure "prevent[ing] development" until "identified sources" of water "materialize" is a form of "phasing" of development. Well established in other contexts,[61] such a strategy should ensure that actual physical development does not occur until such time as there is adequate water to serve it. Thus, where a city or county has identified a *possible* water source for new development, but that source is not yet certain to be available at the time of discretionary project approval, the city or county may approve the project subject to a mitigation measure that permits actual development only as water supplies become certain and reliable.[62]

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[59] *Id.* at 373-74.

[60] *Id.* at 374 (emphasis added).

[61] *See, e.g.*, Mira Dev. Corp. of San Diego v. City of San Diego, 205 Cal. App. 3d 1201, 1215-16 (Ct. App. 1988); Dateline Builders, Inc. v. City of Santa Rosa, 146 Cal. App. 3d 520, 529-32 (Ct. App. 1983).

[62] The *Napa Citizens* court's enthusiasm for phasing as a legitimate form of mitigation provides a counterbalance to the seemingly sweeping language in *Stanislaus Natural Heritage Project* to the effect that "[i]t is not mitigation of a significant environmental impact on a project to say that if the impact is not addressed then the project will not be built." Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 205 (Ct. App. 1996). Read together, *Napa Citizens* and *Stanislaus Natural Heritage Project* should be understood to treat phasing as a

D. SANTA CLARITA ORGANIZATION FOR PLANNING THE ENVIRONMENT V. COUNTY OF LOS ANGELES (SCOPE I)

"An environmental impact report for a housing development must contain a thorough analysis that reasonably informs the reader of the amount of water available." [63] With that succinct statement, the court in *Santa Clarita Organization for Planning the Environment v. County of Los* Angeles *(SCOPE I*) cemented the CEQA requirement that an EIR for a substantial development project must address the adequacy of the water supply for the project. Further elucidated in *Vineyard Area Citizens for Responsible Growth*, this requirement is independent of statutory mandates requiring water suppliers to provide information to land use planning agencies.[64]

The project at issue in *SCOPE I* was a mixed residential and commercial development composed of 2,545 dwelling units, 180,000 square feet of commercial retail space, and 46 acres of community facilities.[65] The Valencia Water Company ("Valencia"), a water retailer supplied by the Castaic Lake Water Agency ("Castaic"), a water wholesaler, was to provide water to the project.[66] The EIR estimated that project would demand 2,194 acre-feet per year (AFY).[67]

Castaic's current supply was reported to be between 97,700 and 106,700 AFY.[68] The sources of Castaic's supply included groundwater, recycled water, and 54,200 AFY of "current entitlements" from the SWP.[69] Because Castaic's water demand at that time was only 48,858 AFY, the draft EIR concluded that there was sufficient water to meet the Project's demand.[70] Valencia was also reported to have sufficient water

legitimate form of mitigation but an inadequate substitute, by itself, for an EIR's failure to identify and analyze the likely sources of water for a proposed development project. *See also* Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412, 432 (2007) ("[A] measure for curtailing development if the intended sources fail to materialize may play a role in the impact analysis."); Santa Clarita Org. for Planning the Env't. v. County of Los Angeles (*SCOPE I*), 106 Cal. App. 4th 715, 723 (Ct. App. 2003) (holding that a mitigation measure requiring a showing of adequate water supplies prior to tract map recordation does not obviate the need for an EIR to fully analyze a project's impacts on water supply).

[63] Santa Clarita Org. for Planning the Env't v. County of Los Angeles (*SCOPE I*), 106 Cal. App. 4th 715, 717 (Ct. App. 2003).

[64] *Vineyard Area Citizens for Responsible Growth*, 40 Cal. 4th at 428, 432.

[65] *SCOPE I*, 106 Cal. App. 4th at 718.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

to supply the Project.[71]

In the discussion of cumulative impacts, however, the Draft EIR disclosed that buildout in the entire Santa Clarita Valley would result in a water shortage.[72] The Draft EIR further claimed, though, that Castaic had the opportunity to purchase additional entitlements under the so-called "Monterey Agreement" between the California Department of Water Resources (DWR) and its contractors, and that these additional entitlements, along with water banking and other storage, would provide enough water for growth in the valley.[73] The Draft EIR also determined that there would be no significant and unavoidable cumulative impacts because each project would be required to demonstrate water availability prior to construction.[74]

Plaintiffs challenged the EIR's adequacy, claiming that the EIR did not "state accurately the amount of water available."[75] As explained below, the court of appeal agreed.

The court began its analysis by referring to passages in an earlier appellate decision, entitled *Planning & Conservation League v. Department of Water Resources,*[76] explaining the difference between SWP paper "entitlements" and the amount of real water the SWP can actually deliver.[77] In relevant part, the *SCOPE I* court noted that, because the SWP has never been completed, "there is a huge gap between what is promised [to holders of entitlements] and what can be delivered."[78]

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[71] *Id.* at 719.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 719.

[75] *Id.* at 720.

[76] Planning & Conservation League v. Dep't of Water Res., 83 Cal. App. 4th 892, 908 (Ct. App. 2000).

[77] *SCOPE I*, 106 Cal. App. 4th at 720-21.

[78] *Id*. at 721 (quoting *Planning & Conservation League*, 83 Cal. App. 4th at 908). *Planning & Conservation League* involved the efforts of DWR and several of its large customers (water contractors) to modify the operations of the massive (but only partially completed) SWP. These agencies' goals included making the SWP more efficient, and thus more dependable as a source of long-term water supplies for its vast service area, by eliminating standard contract provisions requiring agricultural contractors to forgo water deliveries during drought conditions before urban contractors were required to do so, and facilitating water transfers from agricultural to urban contractors. The proposed SWP operational modifications were embodied in the "Monterey Agreement."

Because the proposed Monterey Agreement was a project subject to CEQA, an EIR was necessary. Interestingly, the court of appeal, in finding the EIR inadequate, focused not on the impacts of the Monterey Agreement itself, but on impacts that might occur if it were *not* implemented. Specifically, the No Project Alternative was inadequate for failing to spell out the potential negative environmental consequences that might occur if DWR carried out the pre-existing

The court then explained that the purpose of an EIR "is to inform the public and its responsible officials of the environmental consequences of decisions before they are made."[79] "To be adequate, the EIR must include sufficient detail to enable those who did not participate in its preparation to understand and 'meaningfully' consider the issues raised by the proposed project."[80]

The EIR in this case relied heavily on SWP entitlements to demonstrate the sufficiency of water supplies for the project.[81] The EIR made no attempt, however, "to calculate or even discuss the differences between entitlement and actual supply."[82] Further, the EIR did not provide any evidence to support the assertion that the SWP could supply 100 percent of entitlements in wet years, and 50 percent in extreme drought years.[83]

The real party in interest in this case attempted to show that there was sufficient information regarding the availability of SWP entitlements by pointing to various documents in the record, including a report in an appendix and information submitted by project opponents, but without

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arrangements for allocating water shortages. These arrangements, the court explained, would carry forward the fiction that actual water molecules were available to support the full SWP "entitlements" mentioned in various water supply agreements between DWR and its contractors:

> Paper water always was an illusion. "Entitlements" is a misnomer, for contractors surely cannot be entitled to water nature refuses to provide or the body politic refuses to harvest, store, and deliver. Paper water represents the unfulfilled dreams of those who, steeped in the water culture of the 1960's, created the expectation that 4.23 maf of water could be delivered by a SWP built to capacity. . . . DWR and the contractors have forsaken their expectation that the SWP facilities will be built as planned and will deliver 4.23 maf of water annually. . . . Indeed, fiscal and environmental pressures militate against completion of the project.
>
> . . . .
>
> . . . [L]and use decisions are appropriately predicated in some large part on assumptions about the available water supply. There is certainly the possibility that local decision makers are seduced by contractual entitlements and approve projects dependent on water worth little more than a wish and a prayer.

Planning & Conservation League, 83 Cal. App. 4th at 914-15 & n.7 (emphasis added).

In making the pronouncements quoted above, the court of appeal, in effect, warned land use planners across California – particularly in areas, such as much of Southern California, currently served by the SWP – that they must not be "seduced" by SWP "paper water" that may never become available. Thus, although the holding of the *Planning & Conservation League* decision will not affect day-to-day land use planning, the *Planning & Conservation League* decision nevertheless demands local agencies' attention. These agencies ought not plan for new development based on paper water supplies that may never materialize.

[79] *SCOPE I*, 106 Cal. App. 4th at 721.

[80] *Id.*

[81] *Id.*

[82] *Id.* at 722.

[83] *Id.*

serious response.[84] The court reasoned, however, that "[i]t is not enough for the EIR simply to contain information submitted by the public and experts. Problems raised by the public and responsible experts require a good faith reasoned analysis in response."[85] The EIR in this case did not contain such good-faith reasoning. According to the court, "[w]ater is too important to receive such cursory treatment."[86]

The court also briefly explained that the fact that a project may not record a tract map until an adequate supply of water is demonstrated did not excuse the inadequacies in the EIR itself.[87] Again, the court noted that "[a]n EIR's purpose is to inform," and emphasized that this purpose "is not satisfied by simply stating information will be provided in the future."[88] Even if supplies will be obtained in the future, the EIR must contain adequate information about supplies currently available, as well as disclose the likelihood of the actual availability of future supplies.

As is evident from the preceding discussion, the court's analysis focused on the fact that SWP entitlements played a significant role in the EIR's consideration of water supply for the project. A quirk of history and California water supply planning resulted in a situation where many water suppliers hold "paper water."[89] The opinion concluded with the observation that:

> [T]he EIR fails to undertake an adequate analysis of how much water the SWP can actually deliver in wet, average and dry years. Without such information, the general public and its responsible officials cannot make an informed decision on whether to approve the project. The County's approval of the West Creek EIR is not supported by substantial evidence.[90]

The court's holding in *SCOPE I* could, therefore, be read narrowly to require only that, for projects dependent on SWP supplies, EIR preparers must fully disclose the fact that paper SWP "entitlements" are not the same as actual water supplies and must provide specific evidence regarding the availability of real SWP water. A somewhat broader interpretation can be drawn, however, from the court's statement, at the

[84] *Id.*
[85] *Id.* at 723.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 721.
[90] *Id.* at 724.

very beginning of the opinion, that "[a]n environmental impact report for a housing development must contain a thorough analysis that reasonably informs the reader of the amount of water available."[91] Even this statement, however, could be narrowly construed to suggest that such analysis is necessary only for projects that both (i) propose housing and (ii) require an EIR.[92]

While the facts in *SCOPE I* involve the unique nature of SWP entitlements, the court's reasoning could be understood to apply by analogy to other situations in which vagaries of climate, infrastructure limitations, or quirks of California water law make water supplies unreliable or questionable. Language within the opinion supports a broader interpretation, as do the policies underlying CEQA and, more importantly, the later pronouncements of the California Supreme Court in *Vineyard Area Citizens for Responsible Growth*.

The statement quoted above, for example, that an EIR must contain a "thorough analysis that reasonably informs the reader of the amount of water available" did not specifically limit such analysis to the amount of water available from SWP entitlements.[93] Indeed, the court stressed that "[t]o be adequate, the EIR must include sufficient detail to enable those who did not participate in its preparation to understand and 'meaningfully' consider the issues raised by the proposed project."[94] Notably, SWP entitlements are not the only area of California water law that involves a degree of uncertainty.

Riparian and overlying rights, for example, have been described as major sources of uncertainty in California law.[95] As explained by the California Supreme Court:

> [a] riparian owner has no right to any mathematical or specific amount of the water of a stream as against other like owners. He has only a right in common with the owners to take a proportional share from the stream — a correlative right which he shares reciprocally with the other riparian owners. No mathematical rule has been formulated to determine such a right, for what is a reasonable amount varies not only with the circumstances of each case but also varies from year to year

[91] *Id.* at 717.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 721.
[95] *In re* Waters of Long Valley Creek Stream Sys., 25 Cal. 3d 339, 354-55 (1979).

and season to season.[96]

Rights to groundwater are also correlative and are thus subject to similar limitations.[97] According to the logic of the court's decision in *SCOPE I*, an EIR that relies on such uncertain sources must explain the uncertainty and provide substantial evidence for any assumptions regarding supply availability.[98] This broader interpretation is consistent with CEQA policies requiring that an EIR include sufficient detail to permit informed decisionmaking.[99] More importantly, though, this broader interpretation accords with the principles set forth in *Vineyard Area Citizens for Responsible Growth*, which are discussed in detail below, after consideration of the one other intervening CEQA water supply case.

E. CALIFORNIA OAK FOUNDATION V. CITY OF SANTA CLARITA

The next installment of the Castaic Lake Water Agency's water saga was reported in *California Oak Foundation v. City of Santa Clarita*.[100] In that case, the court found that the EIR for the proposed project was inadequate because the document failed to disclose that the project's prospective water supply was uncertain, failed to describe the nature and extent of the uncertainty, and—perhaps most importantly—failed to realistically analyze the availability of water to serve the project given these uncertainties.[101]

Before reaching the merits, the court summarized a series of published decisions from the courts of appeal that it considered highly relevant to water supply issues in this case. First, in *Planning & Conservation League v. Department of Water Resources*,[102] the court

[96] Prather v. Hoberg, 24 Cal. 2d 549, 559-60 (1944).

[97] Tehachapi-Cummings County Water Dist. v. Armstrong, 49 Cal. App. 3d 992, 1001 (Ct. App. 1975).

[98] *SCOPE I*, 106 Cal. App. 4th at 721-24; *see also* Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors, 87 Cal. App. 4th 99, 131-34, 143 (Ct. App. 2001) (remanding EIR for housing project for, among other things, further discussion of alleged "subterranean riparian water rights" claimed by applicant).

[99] *See, e.g.*, CAL. PUB. RES. CODE § 21061 (Westlaw 2009) ("The 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; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.").

[100] Cal. Oak Found. v. City of Santa Clarita, 133 Cal. App. 4th 1219 (Ct. App. 2005).

[101] *Id.* at 1244.

[102] Planning & Conservation League v. Dep't of Water Res., 83 Cal. App. 4th 892 (Ct. App. 2000).

struck down the EIR for the Monterey Agreement, which revised allocations of water from the SWP between agricultural and urban contractors and allowed for voluntary transfers of water "entitlements."[103] The court made several comments, essentially in dicta, that have been frequently cited by other courts and thus have proven to be key concerns for water purveyors using SWP water. The court said that SWP "entitlements" were established on the assumption that the entire SWP would be constructed to enable delivery of about 4.2 million acre-feet of water per year.[104] In fact, though, the SWP was never completed, is not expected to be completed, and can only deliver about half of that amount.[105] As such, SWP "entitlements" are essentially half water and half "paper."[106]

Second, in *Friends of the Santa Clara River v. Castaic Lake Water Agency* (*Friends of the Santa Clara River I*),[107] Castaic Lake Water Agency ("Castaic") certified an EIR and entered into an agreement to purchase 41,000 acre-feet per year (AFY) from the Kern County Water Agency pursuant to the Monterey Agreement.[108] Ultimately, the court struck down the EIR because it "tiered" off the Monterey Agreement EIR that had been invalidated by the court in *Planning & Conservation League*.[109] The court allowed Castaic to use the water from Kern County—apparently on Castaic's declaration that the 41,000 AFY was absolutely needed to serve existing water supply demands—but left open, until Castaic properly complied with CEQA, the question whether such supplies might be relied on to approve new development.[110]

Third, in *SCOPE I*,[111] the court held the EIR for a mixed-use project in the Santa Clarita Valley was inadequate because the water supply analysis relied on "paper water" from the SWP, a fiction criticized by the *Planning & Conservation League* court.[112] In *SCOPE I*, the EIR failed to undertake an adequate analysis of the amount of water the SWP could

[103] *Id.* at 897-98.

[104] *Id.* at 908 n.5.

[105] *Id.*

[106] *Id.*

[107] Friends of the Santa Clara River v. Castaic Lake Water Agency, 95 Cal. App. 4th 1373 (Ct. App. 2002).

[108] *Id.* at 1375.

[109] *Id.* at 1375-76.

[110] Cal. Oak Found. v. City of Santa Clarita, 133 Cal. App. 4th 1219, 1238 nn.15 & 16 (Ct. App. 2005).

[111] Santa Clarita Org. for Planning the Env't v. County of Los Angeles (*SCOPE I*), 106 Cal. App. 4th 715 (Ct. App. 2003).

[112] *Id.* at 721.

actually deliver in wet, average, and dry years.[113]

Fourth, in *Friends of the Santa Clara River v. Castaic Lake Water Agency* (*Friends of the Santa Clara River II*),[114] the court held that the urban water management plan ("UWMP") prepared by Castaic did not comply with the statutory requirements for such a plan because the document did not adequately describe the reliability of groundwater supplies in light of perchlorate contamination located in groundwater.[115] While the UWMP mentioned that a groundwater cleanup plan was being developed, the document did not discuss whether the plan had been completed, or the date when the plan would be completed and implemented.[116] Moreover, the UWMP did not state how fast the perchlorate contamination was spreading, or how any uncertainty on timing issues would affect the reliability of the supply of groundwater.[117]

These cases form the legal backdrop of the court's decision in *California Oak Foundation*. In that case, the respondent city certified an EIR for a 161-acre industrial park.[118] The industrial park would be constructed on previously undeveloped property and would require about 386 AFY of water.[119] The EIR identified Newhall County Water District as the agency that would serve the project with water.[120] Newhall, however, is only a water retailer; it gets its water from the Castaic, which in turn gets its water from the SWP and from groundwater.[121] Castaic claims entitlements to about 95,200 AFY of water from the SWP; additionally, it claims groundwater supplies of between 8,000 AFY and 85,700 AFY.[122] Castaic estimated that over the next twenty years, water demand in the area would be about 75,100 AFY.[123] Assuming that groundwater was available only at the lower figure, 8,000 AFY, Castaic estimated that it would have a water supply surplus of about 28,100 AFY in the twenty-year planning horizon.[124] According to the draft EIR, the project's demand of roughly 386 AFY would easily be accommodated

[113] *Id.* at 724.

[114] Friends of the Santa Clara River v. Castaic Lake Water Agency, 123 Cal. App. 4th 1 (Ct. App. 2004).

[115] *Id.* at 14.

[116] *Id.* at 12-13.

[117] *Id.* at 13.

[118] Cal. Oak Found. v. City of Santa Clarita, 133 Cal. App. 4th 1219, 1225 (Ct. App. 2005).

[119] *Id.* at 1224, 1231.

[120] *Id.* at 1232.

[121] *Id.* at 1227.

[122] *Id.* at 1229, 1230-31 n.11.

[123] *Id.* at 1230-31.

[124] *Id.*

within Castaic's "surplus" supply.[125]

Petitioners argued that the EIR was inadequate because it did not fairly describe the actual water supply available to serve the project. Specifically, petitioners argued that the EIR was defective because (1) it failed to acknowledge that 41,000 AFY of Castaic's SWP "entitlements" were entangled in litigation and might not be available in the future, (2) it failed to acknowledge that half of Castaic's entire 95,200 AFY SWP "entitlements" was merely "paper water" rather than actual water likely to be available for delivery to serve the project, and (3) it failed to acknowledge the extent to which groundwater supplies would be unavailable due to perchlorate contamination.[126] The court agreed with the first two contentions.[127]

One of the prevailing themes in the opinion is that water supply vulnerabilities must be fully disclosed in an EIR, and the effect of that vulnerability on supply reliability must be evaluated. The court explained that one of the primary purposes of an EIR "is to reveal to the public 'the basis on which its responsible officials either approve or reject environmentally significant action,' so that the public, 'being duly informed, can respond accordingly to action with which it disagrees.'"[128] "[T]o be adequate, the EIR must include sufficient detail to enable those who did not participate in its preparation to understand and 'meaningfully' consider the issues raised by the project."[129] "This standard is not met in the absence of a forthright discussion of a significant factor that could affect water supplies."[130] "[T]he EIR is intended to serve as an informative document to make government action transparent. Transparency is impossible without a clear and complete explanation of the circumstances surrounding the reliability of the water supply."[131]

The court first addressed the reliability of the 41,000 AFY of SWP entitlements, which Castaic acquired, indirectly, from the Kern County Water Agency.[132] Petitioners argued that the EIR was inadequate

[125] *Id.* at 1231.

[126] *Id.* at 1236, 1241-42.

[127] *Id.* at 1244.

[128] *Id.* at 1237 (quoting Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of the Univ. of Cal., 47 Cal. 3d 376, 392 (1988)).

[129] *Id.* at 1237 (quoting Santa Clarita Organization for Planning the Env't v. County of Los Angeles (*SCOPE I*), 106 Cal. App. 4th 715, 721 (Ct. App. 2003).).

[130] *Id.* at 1237.

[131] *Id.* at 1237-38.

[132] *Id.* at 1236.

because the EIR, without analysis or discussion, relied on Castaic's 41,000 AFY entitlement to SWP water despite the fact that the EIR for Castaic's purchase of the entitlement was decertified[133] in *Friends of the Santa Clara River I*[134]. The court agreed: "the EIR does not 'directly address' the issue, which arose when [*Friends of the Santa Clara River I*] was decided in January 2002, contemporaneously with circulation of the draft EIR. The final EIR contains an inadequate discussion—in fact, no discussion at all—of the uncertainty surrounding the transfer of the 41,000 AFY entitlement. The text of the EIR does not mention the decertification of the EIR for the Castaic purchase . . . ."[135]

The court went on to note that an appendix buried at the end of the final EIR did to some degree address these issues, but the court held this discussion was inadequate.[136] Acknowledging in an appendix to the final EIR that the 41,000 AFY was in doubt, and that, absent this water, supplies might not be sufficient, was "too little and too late . . . . We are troubled by the fact that the only discussion in the EIR of the uncertainty created by the decertification of the EIR for the Castaic purchase appears in an appendix added to the final EIR shortly before certification. The seriousness of water supply issues . . . merits discussion in the text of the EIR, where it is most readily accessible."[137] At a minimum, the court held, the information should have been contained in an appendix that was actually referenced in the text of the EIR.[138] The court further chided the City for failing to explain the possible limitations on the water entitlements because of ongoing legal challenges: "Without a discussion of the nature of the limitations, . . . it is impossible to know the contours of the potential limitation on the water supplies."[139] In other words, the City had to go beyond simply acknowledging the deficiency; the City had to take the additional step of discussing the likelihood of the deficit and alternative sources of water supply to meet the deficit.[140]

Moreover, while the final EIR appendix acknowledged uncertainty as to whether the 41,000 AFY purchased from Kern would be available, the final EIR concluded supplies would nevertheless be adequate for the

[133] *Id.*

[134] Friends of the Santa Clara River v. Castaic Lake Water Agency, 95 Cal. App. 4th 1373, 1388 (Ct. App. 2002).

[135] *Cal. Oak Found.*, 133 Cal. App. 4th at 1236.

[136] *Id.* at 1239.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1238.

[140] *Id.* at 1239.

project because Castaic held entitlements for 56,800 AFY of SWP water, independent of the water it obtained from the Kern County Water Agency.[141] The court was troubled that the draft EIR gave "no hint" that SWP entitlements cannot be taken at face value.[142] While the final EIR acknowledged elsewhere that the SWP entitlements would be available at a 50% level 80% of the time and at a 37% level about 20% of the time, the EIR failed to discuss the import of these admissions.[143] Moreover, the EIR appendix made misleading comments that contradicted these admissions.[144] As noted above, the final EIR appendix reasoned that the 56,000 AFY of SWP entitlements exceeded by 18,844 AFY Castaic's existing demand for 35,356 AFY of water.[145] These figures assumed that the full entitlement would be delivered. In fact, employing the agency's own estimates, Castaic could expect only about 28,000 AFY of its entire 56,000 AFY entitlement to be delivered the majority of the time.[146] Thus, absent the 41,000 AFY from the Kern County Water Agency, Castaic would already be seriously short of water to meet even its existing demand.[147]

The court concluded that the final EIR contained no substantial evidence or analysis indicating that there was adequate water to serve the project "in light of the uncertainty flowing from the decertification of the EIR for the Castaic purchase."[148] The absence of this information undermined the information functions of the EIR for the project and required decertification of the EIR: "[W]ithout the 41,000 AFY entitlement, substantial evidence of sufficient water supplies simply does not exist."[149]

The court upheld, however, the EIR's discussion of perchlorate contamination of groundwater.[150] The draft EIR had not mentioned perchlorate contamination; however, it did rely on and incorporate by reference Castaic's UWMP, which noted that the discovery of such contamination could affect groundwater supply availability.[151] The court

[141] *Id.* at 1233.
[142] *Id.* at 1238.
[143] *Id.* at 1239.
[144] *Id.*
[145] *Id.*
[146] *Id.* at 1239.
[147] *Id.*
[148] *Id.* at 1240.
[149] *Id.* at 1242.
[150] *Id.*
[151] *Id.*

concluded that the City had discretion to rely on the information in the UWMP, in large part because the court's ruling in *Friends of the Santa Clara River II*,[152] which found the plan deficient under the Water Code, came after the EIR was certified.[153] The court described the City's victory on this issue as Pyrrhic, however, because the court's ruling on the 41,000 AFY transfer from the Kern County Water Agency had "the practical effect of requiring the City to come to grips with the perchlorate issue as well, because reliance on groundwater supplies will acquire additional significance if less imported water is available" from the SWP.[154]

F. VINEYARD AREA CITIZENS FOR RESPONSIBLE GROWTH, INC. V. CITY OF RANCHO CORDOVA

In a landmark decision addressing the intersection of CEQA and water supply analysis for major development projects, the California Supreme Court pulled together the threads of court of appeal case law discussed above.[155] In doing so, the high court created a very significant precedent that now represents the single most significant EIR case for CEQA practitioners to study carefully.

Factually, the Supreme Court held that the EIR for the "Sunrise Douglas Community Plan" and the "SunRidge Specific Plan" in what was now the City of Rancho Cordova contained an adequate analysis of near-term water supplies.[156] The court also held, however, that the EIR did not provide an adequate analysis of long-term supplies needed to serve the community plan, together with other anticipated development in the area.[157] The court also held the agency should have recirculated the Draft EIR to disclose impacts from groundwater pumping on listed species.[158] A detailed discussion of the facts of *Vineyard* will help to understand the legal principles announced in the opinion.

A coalition of landowners proposed to develop 6,000 acres in southeastern Sacramento County, in an area subsequently annexed to the

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[152] *See generally* Friends of the Santa Clarita River v. Castaic Lake Water Agency, 123 Cal. App. 4th 1, (Ct. App. 2004). Parenthetical explantion is encouraged after *see generally*

[153] *Cal. Oak Found.*, 133 Cal. App. 4th at 1243.

[154] *Id.*

[155] Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412 (2007).

[156] *Id.* at 421.

[157] *Id.* at 444-45.

[158] *Id.* at 448-49.

City of Rancho Cordova.[159] The Sunrise Douglas Community Plan proposed 22,000 residential units, as well as office, industrial and public uses.[160] The coalition also proposed the SunRidge Specific Plan – a subset encompassing 2,600 acres and 9,886 residential units to be developed as an initial phase of the project.[161] The County prepared an EIR analyzing the impacts of implementing both plans.[162] The County Board of Supervisors certified the EIR and approved the plans.[163] A coalition of citizens' groups (the "Citizens") sued, and the trial court and court of appeal denied the petitions.[164] The California Supreme Court granted a petition for review on two issues: (1) the adequacy of the EIR's water supply analysis, and (2) impacts of groundwater pumping on the Cosumnes River.[165]

The Supreme Court's discussion of the County's water supply analysis focused on two distinct aspects of the EIR: (1) the analysis of near-term water supplies needed to serve the Specific Plan, and (2) the analysis of long-term supplies necessary for the entire Community Plan.[166]

To serve the initial phase of the project, as embodied in the Specific Plan, the EIR stated that the project would rely on a newly developed "North Vineyard Well Field" located southwest of the project area.[167] This well field could safely yield up to 10,000 acre-feet annually.[168] The Sacramento County Water Agency would make this water available on a first-come-first-served basis to the SunRidge and Sunrise Douglas areas, and to other anticipated development in the area.[169] The record showed this new well field would initially connect solely to the project area, whose developers would pay a fee to compensate any nearby well owners harmed by pumping; and other near-term development would require only 3,000 AFY, leaving the balance – 7,000 AFY – to meet the anticipated demand of 5,500 AFY from the SunRidge Specific Plan

[159] *Id.* at 421.
[160] *Id.* at 422.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.* at 421.
[165] *Id.*
[166] *Id.* at 436, 438.
[167] *Id.* at 423.
[168] *Id.*
[169] *Id.* at 436.

area.[170] Thus, the court observed, "[w]hile much uncertainty remains, . . . the record contains substantial evidence demonstrating a reasonable likelihood that a water source the provider plans to use for the Sunrise Douglas project . . . will indeed be available at least in substantial part to supply the Sunrise Douglas project's near-term needs."[171] The EIR did not defer analysis of the impacts of developing these supplies, or rely on demonstrably illusory supplies.[172] Nor did the EIR need to demonstrate certainty regarding the project's future water supplies.[173] To the extent anticipated water supplies did not materialize, or the agency proposed new or different supplies, the agency could perform supplemental analysis to address changes to the project or to the circumstances surrounding the project.[174]

With respect to long-term water supplies intended to serve the Community Plan as a whole, the court found that the record contained substantial evidence supporting the County's conclusion that up to 15,000 AFY in new surface-water diversions from the American River – so-called "Fazio water" – would be available to serve the project.[175] The problem, however, was that the Final EIR's discussion of total long-term water supply and demand in the broader region "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 FEIR leave the reader—and the decision makers—without substantial evidence for concluding that sufficient water is, in fact, likely to be available for the Sunrise Douglas project at full build out."[176]

The EIR's analysis stated that long-term water demand in "Zone 40" – a large swath of southeastern Sacramento County that included the Community Plan area – would be approximately 113,000 AFY at build-out of the general plan.[177] Another EIR prepared to analyze the impacts of increased diversions from the American River – the "Water Forum EIR" – had estimated Zone 40 demand at 87,000 AFY at build-out.[178] The Sunrise Douglas EIR did not explain the reason for this

[170] *Id.* at 436-37.
[171] *Id.* at 437.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 438.
[175] *Id.*
[176] *Id.* at 439.
[177] *Id.*
[178] *Id.*

discrepancy.[179]

On the supply side, the Sunrise Douglas EIR stated that surface-water deliveries would total roughly 64,000 AFY; elsewhere, the same EIR estimated new surface-water deliveries at 45,000 AFY.[180] The Water Forum EIR stated that up to 78,000 AFY in new surface water would become available.[181] Again, the Sunrise Douglas EIR did not explain why these numbers differed.[182] In adopting findings approving the Community Plan, the County used the Final EIR's estimated demand of 113,000 AFY and estimated surface-water supply of approximately 64,000 AFY, but it did not explain the differing estimates.[183] Although such an explanation might have existed, it did not appear in the Final EIR.[184]

Nor did the EIR explain how the this gap – 113,000 AFY in Zone 40 demand, versus approximately 64,000 AFY in new surface-water supplies – would be bridged.[185] When commentators pointed out this gap, the Final EIR responded that "new surface water supplies are to be used conjunctively with groundwater supplies."[186] This explanation, however, was too "vague and unquantified" to be relied upon, because it did not explain how groundwater and surface water would be managed during wet and dry years to bring long-term demand and supply into balance.[187]

The Final EIR stated a full analysis of the conjunctive use program would be included in the environmental analysis prepared for the Water Agency's Zone 40 Master Plan Update, which was pending at the time the County released the Sunrise Douglas Final EIR.[188] The court rejected this approach, stating that the County could not avoid its obligation to analyze the likely water sources for the Sunrise Douglas Community Plan by referring to a future report; rather, the County either had to include its analysis in the Sunrise Douglas EIR, or had to await the completion of the master plan updated analysis, and then tier off it.[189]

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[179] *Id.*
[180] *Id.*
[181] *Id.*
[182] *Id.*
[183] *Id.* at 439-40.
[184] *Id.* at 440.
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] *Id.* at 440-41.

Nor was it apparent how the 10,000 AFY in new groundwater would bridge the gap between surface-water supplies and anticipated demand, even using the most optimistic numbers from the Sunrise Douglas and Water Forum EIRs.[190]

The County did not need to demonstrate with certainty that the total anticipated water supply would be sufficient to meet total demand at build-out.[191] "But CEQA did require that the FEIR show a *likelihood* water would be available, over the long term, for this project. Without an explanation that shows at least an approximate long-term sufficiency in total supply, the public and decision makers could have no confidence that the identified sources were actually likely to fully serve this extraordinarily large development project."[192]

The real parties in interest pointed to a discussion in the Water Forum proposal for additional details regarding how the conjunctive use program would be implemented.[193] The Sunrise Douglas EIR, however, did not spell out how the EIR related to, incorporated by reference, or tiered off the Water Forum proposal or accompanying EIR.[194] Thus, the EIR did not provide an adequate road map to the information or analysis drawn from other documents.[195] Nor did the EIR expressly incorporate the impacts and mitigation measures identified in the Water Forum Proposal's EIR.[196]

The real parties also pointed to the Final EIR's "mitigation measure WS-1."[197] This measure stated that entitlements for development within the Sunrise Douglas Community Plan would not be granted without "firm proof of available water supplies" at each phase of development.[198] According to the court, a measure of this sort could serve to supplement an EIR's water supply analysis.[199] Under CEQA, however, it could not substitute for such an analysis. Indeed, in order to rely on such a measure, the EIR would have to "discuss the probability that the intended water sources for later phases of development will not eventuate, the environmental impacts of curtailing the project before completion, and

[190] *Id.* at 441.
[191] *Id.*
[192] *Id.* (footnote omitted).
[193] *Id.* at 442.
[194] *Id.* at 442-43.
[195] *Id.* at 443.
[196] *Id.*
[197] *Id.* at 444.
[198] *Id.*
[199] *Id.*

mitigation measures planned to minimize any such significant impacts."[200] The Sunrise Douglas EIR was inadequate because it did not include such an analysis.[201]

The court provided the following summary of the requirements for an adequate water supply analysis for a large-scale, long-term development project:

> (1) The EIR must contain information on planned long-term development in the area and identify the competing water demands associated with such development.[202]
>
> (2) The EIR must demonstrate a reasonable likelihood of adequate long-term supply by showing "a rough balance between water supply and demand."[203] If, "despite a full discussion, 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 of the environmental consequences of those contingencies."[204] The estimate of demand must include not only the proposed project, but also other planned development in the area.[205]
>
> (3) To the extent the EIR relies upon water-supply analyses prepared for other projects (such as the Water Forum EIR in this case), the EIR must adhere to the rules governing tiering and incorporation by reference. Among other things, the EIR for the development project must incorporate and adopt the mitigation measures identified in the EIR that is being relied upon.[206]
>
> (4) Although an agency may rely on a provision calling for curtailing the later stages of development if water supplies do not materialize, the EIR must disclose or propose mitigation for "the environmental effects of such truncation."[207]

The court then turned to the recirculation issue. The so-called Revised Recirculated Draft EIR, which the County prepared after the

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[200] *Id.*
[201] *Id.*
[202] *Id.* at 445.
[203] *Id.* at 445-46.
[204] *Id.* at 432
[205] *Id.*
[206] *Id.* at 446.
[207] *Id.* at 447.

first proposed well field ran into regulatory problems and was replaced by a different proposed well field, stated that the Cosumnes River was located south of the second proposed well field but did not otherwise analyze impacts of groundwater extraction on river flows or habitat.[208] Several agencies and other commentators expressed concern that groundwater extraction would decrease summertime flows in the river and have an adverse impact on steelhead and Chinook salmon migration through the area.[209] The Final EIR responded to these comments by stating that the change in groundwater elevations in the area would be no more than two feet.[210] The Final EIR concluded that the resulting impact on river flows would be restricted to low-flow periods, would be limited to changing the timing and areal extent of the dewatering of the river, and would not be significant.[211] The County adopted this conclusion in its findings approving the project.[212]

The court held that substantial evidence did not support this finding because the Final EIR disclosed a potentially significant impact associated with reduced river flows on aquatic species, including migrating salmon.[213] The Final EIR's response conceded groundwater extraction during low-flow periods could lengthen the period during which the Cosumnes River was dewatered and thus could hinder fish migration.[214] Moreover, the migratory reach of the river overlapped with the area potentially affected by project-related pumping.[215] For this reason, the response did not constitute substantial evidence that the loss of stream flows would have no adverse impact on salmon migration, and the County should have recirculated the analysis in the Final EIR to address this issue.[216]

Justice Baxter concurred with the majority's opinion that the EIR contained an adequate analysis of the SunRidge Specific Plan's near-term water supply.[217] He dissented, however, from the majority's opinion regarding the EIR's analysis of long-term water supplies.[218] In Justice

[208] *Id.* at 424.
[209] *Id.* at 425.
[210] *Id.* at 425-26.
[211] *Id.* at 426.
[212] *Id.* at 448.
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 449.
[217] *Id.* at 450.
[218] *Id.* at 451.

Baxter's view, the majority erred by requiring the EIR to analyze long-term water supplies not merely for the project, but also for all conceivable development in the region.[219]

G. SANTA CLARITA ORGANIZATION FOR PLANNING THE ENVIRONMENT V. COUNTY OF LOS ANGELES (SCOPE II)

In *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (*SCOPE II*),[220] the court of appeal reviewed the new EIR prepared on remand from the decision in *SCOPE I* in light of *Vineyard Area Citizens for Responsible Growth*.[221] Still not satisfied with the new EIR, the Santa Clarita Organization for Planning the Environment ("SCOPE") had sued again. The trial court had denied the petition, and SCOPE had appealed.[222]

SCOPE challenged the adequacy of the new EIR's water supply analysis as it related to a water-transfer agreement between the Castaic Lake Water Agency and the Kern County Water Agency (the "Kern-Castaic transfer").[223] The new EIR indicated that this transfer would provide 41,000 acre-feet per year, a significant portion of the supplies needed for the various projects slated for the Santa Clarita Valley, including the West Creek project.[224] The court of appeal evaluated this claim in light of four principles articulated by the California Supreme Court in *Vineyard Area Citizens for Responsible Growth*. The court distilled those principles as follows:

> (1) The EIR must contain sufficient information to allow decisionmakers to "evaluate the pros and cons of supplying the amount of water" that the project will need.[225]
>
> (2) The EIR for a large land use plan, to be built out over the course of years, cannot limit its water-supply analysis to initial phases. Although tiering principles can be used to defer some details to future phases, the analysis of future phases cannot be entirely avoided at the

[219] *Id.* at 452-53.

[220] Santa Clarita Org. for Planning the Env't v. County of Los Angeles (*SCOPE II*), 157 Cal. App. 4th 149 (Ct. App. 2007).

[221] *See generally id.*

[222] *Id.* at 152.

[223] *Id.* at 154.

[224] *Id.*

[225] *Id.* at 158.

outset.[226]

(3) "[T]he future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient." The EIR must include a discussion of the circumstances affecting the likelihood of the water's availability.[227]

(4) "Where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available," the EIR must identify and analyze the impacts of developing replacement or alternative sources of water.[228] The agency can include a measure curtailing development in the event water sources do not materialize.[229] Such a measure, however, cannot substitute entirely for analyzing alternative sources.[230]

The court held the EIR prepared for the West Creek project adhered to these principles.[231] First, the EIR did not ignore or assume a solution to the problem of supplying water to the project. Rather, the EIR identified specific water sources, including the Kern-Castaic transfer.[232] Second, the EIR did not limit its analysis to the first development phase, but considered the Kern-Castaic transfer as part of the permanent supply for the entire project.[233]

With respect to the third principle, SCOPE argued that uncertainties surrounding the Monterey Agreement litigation threatened the reliability of the Kern-Castaic transfer.[234] That litigation had resulted in invalidating the EIR for the Monterey Agreement between the Department of Water Resources and various water districts to allocate water from the State Water Project.[235] That litigation, in turn, resulted in invalidating an EIR that tiered off the Monterey Agreement EIR that was prepared to analyze the impacts of Kern-Castaic water transfer.[236] Since

[226] *Id.* at 158-59.
[227] *Id.* at 159.
[228] *Id.*
[229] *Id.*
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *See* Planning & Conservation League v. Dep't of Water Res., 83 Cal. App. 4th 892 (Ct. App. 2000).
[236] Friends of the Santa Clara River v. Castaic Lake Water Agency, 95 Cal. App. 4th 1373,

then, the parties to the *Planning & Conservation League* litigation had entered into a settlement agreement.[237] In addition, the Castaic Lake Water Agency had prepared and certified a new EIR for the Kern-Castaic transfer, which had provoked another lawsuit.[238]

The EIR responded to this uncertain state of affairs by noting that, even if the litigation resulted in setting aside the Monterey Agreement, a court was unlikely to require the parties to unwind other agreements (such as the Kern-Castaic transfer agreement, which had not been set aside in the aftermath of *Friends of the Santa Clara River I*).[239] Existing law and contracts authorized the transfer, even without relying on the Monterey Agreement.[240] Although the settlement agreement arising out of the Monterey Agreement litigation did not identify the Kern-Castaic transfer as a permanent transfer, nothing suggested that the parties to the Agreement considered the transfer to be temporary.[241] Nor did the record contain evidence suggesting that the Department of Water Resources opposed the transfer.[242]

SCOPE argued the West Creek EIR improperly tiered off a future EIR – in this case, the new EIR to be prepared for the Monterey Agreement after the old one was invalidated in the *PCL* litigation.[243] The court disagreed, noting that the West Creek EIR did not tier off future Monterey Agreement environmental documents; rather, the West Creek EIR's water supply analysis was based on the premise that the Monterey Agreement litigation was unlikely to affect the Kern-Castaic transfer.[244] Thus, the record contained substantial evidence demonstrating a reasonable likelihood that water from the Kern-Castaic transfer would be available for the project's near- and long-term needs.[245]

As to the fourth principle, SCOPE argued that West Creek EIR failed to analyze the project's water supply in the absence of the Kern-

1388 (Ct. App. 2002).

[237] Planning & Conservation League v. Castaic Lake Water Agency, 180 Cal. App. 4th 210 (Ct. App. 2009).

[238] *See SCOPE II*, 157 Cal. App. 4th at 154; Planning & Conservation League v. Castaic Lake Water Agency, 180 Cal. App. 4th 210.

[239] *SCOPE II*, 157 Cal. App. 4th at 160; *see Friends of the Santa Clara River*, 95 Cal. App. 4th at 1388.

[240] *SCOPE II*, 157 Cal. App. 4th at 160.

[241] *Id.*

[242] *Id.*

[243] *Id.* at 161-62.

[244] *Id.* at 162.

[245] *Id.*

Castaic transfer.[246] Under *Vineyard*, the EIR had to acknowledge such uncertainty, regardless of the reason for it; thus, legal uncertainty had to be considered.[247] As the court noted, however, "[t]he water is now available, and for years has been available for the project under executed agreements. The [West Creek] EIR notes that the Kern-Castaic transfer can legally occur without the Monterey Agreement. Suffice it to say, however the Monterey Agreement litigation is eventually decided, the Kern-Castaic transfer will likely not be affected. Per the fourth principle, we can confidently determine that the water will be available."[248]

Turning to groundwater, SCOPE argued the West Creek EIR was deficient because it did not discuss the impact of inadequate funding to remediate contaminated water wells.[249] The EIR stated some water would be supplied from two local aquifers tapped by 67 wells.[250] The record showed that six of these wells were contaminated with perchlorate, and the estimated cost of remediation was $500,000 per well.[251] The EIR did not identify a source of funding to carry out the remediation.[252] The EIR did state, however, that due to the high value of this water, local water purveyors had placed a high priority on installing wellhead treatment.[253] Nothing suggested remediation was illusory, notwithstanding its cost.[254]

H. IN RE BAY-DELTA PROGRAMMATIC ENVIRONMENTAL IMPACT REPORT COORDINATED PROCEEDINGS

In another major decision dealing with the intersection of water supply and CEQA, the California Supreme Court upheld the CEQA analysis for the so-called "CALFED project." [255] The high court's

[246] *Id.*

[247] *Id.*

[248] *Id.* at 162-63. Notably, more than two years after publication of the *SCOPE II* decision, the court of appeal for the same appellate district – the Second – upheld the adequacy of the second EIR prepared by Castaic for the 41,000 AFY transfer, retroactively validating the optimism reflected in the EIR at issue in *SCOPE II*. *See* Planning & Conservation League v. Castaic Lake Water Agency, 180 Cal. App. 4th 210 (Ct. App. 2009).

[249] *SCOPE II*, 157 Cal. App. 4th at 163.

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *In re* Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 43 Cal. 4th 1143 (2008).

opinion in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* addressed consolidated CEQA challenges to the CALFED Programmatic Environmental Impact Statement and Environmental Impact Report ("PEIS/R").[256] In summary, the Supreme Court held that the CALFED PEIS/R was not required to include an analysis of a possible project alternative that, by reducing existing water exports from the southern part of the Sacramento-San Joaquin River Delta to agricultural and urban users in the San Joaquin Valley and Southern California, would not have met one of the project's primary objectives of water supply reliability.[257] The court also held that generalized analyses of the environmental effects of both various potential additional long-term water supply sources and the "Environmental Water Account" ("EWA") were sufficient in light of the programmatic, first-tier character of the document.[258]

The Bay-Delta estuary is created by the convergence of California's two largest rivers, the Sacramento and the San Joaquin, which terminate in the San Francisco Bay.[259] As the court noted, "the Bay-Delta's watershed encompasses 37 percent of the state's surface area, and its average annual in-flow is 22 million acre-feet of water . . . ."[260] The Bay-Delta supplies water throughout California via two major water-diversion projects, the Central Valley Project ("CVP") and the State Water Project ("SWP").[261] The two projects export an average of 5.9 million acre-feet of water each year, primarily for agricultural and urban uses.[262]

The Bay-Delta faces significant water supply and water quality challenges in addition to broader environmental degradation.[263] More specifically, the ecology of the estuary has long been in decline; water exports have grown increasingly unreliable due to these environmental concerns; the water quality of exports is not optimal; and levees throughout the Delta could collapse in an earthquake, creating a water supply crisis for much of California, as export pumps would be inundated with brackish water.[264]

In 1994, the CALFED program was established as a cooperative

[256] *Id*. at 1152.
[257] *Id*. at 1143, 1152.
[258] *Id*. at 1169.
[259] *Id*. at 1151.
[260] *Id*. at 1152.
[261] *Id*. at 1154.
[262] *Id*. at 1154-55.
[263] *Id*. at 1156.
[264] *Id*.

effort of eight California agencies and ten federal agencies to develop and implement long-term solutions to the problems facing the Bay-Delta.[265] The program was divided into three phases. Phase I defined the problems facing the Bay-Delta and analyzed a wide range of alternatives for potential solutions.[266] Phase II added further "program elements" to the previously identified potential alternatives analysis and was the subject of two draft PEIS/Rs.[267] In the summer of the year 2000, at the end of Phase II, the lead agency on the project, the California Resources Agency, certified the final PEIS/R, and the CALFED agencies together issued a Record of Decision for the program.[268] As envisioned at the time, Phase III would implement the preferred alternative identified in the final PEIS/R.[269]

Two lawsuits were filed challenging the CALFED PEIS/R for alleged noncompliance with CEQA and were subsequently consolidated in Sacramento County Superior Court.[270] The trial court ruled that the CALFED PEIS/R satisfied the requirements of CEQA; the court therefore denied the two petitions for a writ of mandate.[271] The Third District Appellate Court reversed that judgment, however, and instructed the trial court to issue a peremptory writ of mandate due to what the appellate court considered to be three violations of CEQA.[272] First, according to the court of appeal, the PEIS/R improperly failed to include a full discussion of an alternative to the CALFED Program that would reduce water exports from the Bay-Delta to CVP and SWP facilities to the south.[273] Second, the court thought that the PEIS/R lacked an adequate analysis of the environmental impacts of diverting (and exporting) additional water from various potential sources.[274] And third, the PEIS/R, the intermediate court said, did not include sufficient information detailing impacts associated with the EWA.[275] The Supreme Court reversed and held that the CALFED final PEIS/R for the Bay-

[265] *Id.*
[266] *Id.* at 1157.
[267] *Id.* at 1159.
[268] *Id.* at 1160.
[269] *Id.*
[270] *Id.* at 1160-61.
[271] *Id.* at 1161.
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*

Delta complied with CEQA as to all three of these issues.[276]

One of the primary objectives of the CALFED project was to improve water supply reliability by reducing the mismatch between supply and demand for Bay-Delta water (most water in California comes from streams flowing into the Delta, while most of the water demand occurs in areas far to the south).[277] Even so, CALFED studied a reduced exports alternative during Phase I of the project.[278] This reduced export alternative was not carried over into Phase II, however, and thus was not included in the formal alternatives analysis portion of the PEIS/R.[279] This omission reflected the CALFED agencies' conclusion that a reduced export alternative would not meet the water supply objective of the project.[280] These agencies instead opted, as part of the strategy for meeting CALFED's water supply objective, to include a water-use-efficiency program in each of the alternatives that were carried forward in the PEIS/R.[281]

The Supreme Court held that "CALFED properly exercised its discretion when it declined to carry the reduced export alternative over for detailed study in the final PEIS/R after concluding that such an alternative would not achieve the CALFED Program's fundamental purpose and thus was not feasible."[282] In support of its conclusion, the court relied on the "rule of reason," which provides that an EIR need only analyze "those alternatives necessary to permit a reasoned choice."[283] The rule of reason also allows lead agencies to eliminate from consideration alternatives that would not "feasibly obtain most of the basic objectives of the project."[284] Here, the court determined the exclusion of the reduced export alternative was consistent with the rule of reason in light of CALFED's finding that such an alternative would not achieve the water supply reliability objective, which the court considered a "basic goal" of the project.[285]

The Supreme Court also determined that, in finding a need for a reduced export alternative, the court of appeal had erroneously given too

[276] *Id.* at 1152.
[277] *Id.* at 1157.
[278] *Id.* at 1164.
[279] *Id.* at 1164-65; *see* CAL. CODE REGS. tit. 14, § 15126.6 (2010).
[280] *In re Bay-Delta*, 43 Cal. 4th at 1164.
[281] *Id.*
[282] *Id.* at 1166.
[283] *See* CAL. CODE REGS. tit. 14, § 15126.6(f) (2009).
[284] *Id.*
[285] *In re Bay-Delta*, 43 Cal. 4th at 1166.

much weight to *preexisting* adverse environmental conditions in the Bay-Delta.[286] The Supreme Court pointed out that the purpose of the EIR under CEQA is to analyze the environmental effects of the proposed project.[287] Regardless of how severe they may be, preexisting environmental conditions are considered part of the baseline conditions against which the effects of the project are assessed, and such existing problems must be distinguished from the new effects that a project may cause.[288] The court of appeal reasoned that the reduced export alternative may have been the best alternative to address preexisting environmental conditions and thus should have been included in the PEIS/R.[289] In contrast, the Supreme Court found that those preexisting conditions would continue regardless of the CALFED program and were therefore part of the baseline under CEQA.[290] Notably, however, the high court acknowledged that laws other than CEQA (e.g., the state and federal endangered species acts) might someday lead to diminished exports:

> As the CALFED PEIS/R itself recognizes, Bay-Delta ecosystem restoration to protect endangered species is mandated by both state and federal endangered species laws, and for this reason *water exports from the Bay-Delta ultimately must be subordinated to environmental considerations*. The CALFED Program is premised on the theory, as yet unproven, that it is possible to restore the Bay-Delta's ecological health while maintaining and perhaps increasing Bay-Delta water exports through the CVP and SWP. If practical experience demonstrates that the theory is unsound, Bay-Delta water exports may need to be capped or reduced. At this relatively early stage of program design, however, we conclude that CALFED properly applied the rule of reason when it decided to consider in the PEIS/R only alternatives that have the potential to both achieve ecosystem restoration goals and meet current and projected water export demands, and that will provide balanced progress in all four of the program areas.[291]

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[286] *Id.* at 1167.

[287] *Id.*

[288] *Id.*

[289] *Id.*; *see also* CAL. CODE REGS. tit. 14, § 15125(a).

[290] *In re Bay-Delta*, 43 Cal. 4th at 1168.

[291] *Id.* at pp. 1168-69 (emphasis added). There is no indication that the Supreme Court shared the court of appeal's view that a reduction of exports would necessarily translate, as an empirical matter, into reduced population growth in California. On that subject, the Third District Court of Appeal had said the following:

> In order to meet the water supply reliability objective of the Program, all of the alternatives proposed in the PEIS/R call for increased exports of water to areas south of the Delta, or at

The final consideration with regard to the missing reduced export alternative related to the adverse environmental effects associated with water-storage facilities and dam construction.[292] On that subject, the Supreme Court held that "although the PEIS/R did not analyze a reduced exports alternative, it did analyze no-additional-storage alternatives that would avoid any adverse environmental consequences of constructing new dams or enlarging existing ones. Under CEQA, this was sufficient."[293] The court also explained that no new water-storage facilities were included in the CALFED project as of the completion of Phase II, emphasizing that any proposed facilities would be subject to

> least no reduction in the amount of water exported. . . . However, a reasonable alternative to this approach would be to reduce the amount of water exported south of the Delta, thereby reducing the amount of water that must be redirected from other users or impounded in new or existing reservoirs. Although such an alternative would not completely satisfy the CALFED goal of reducing the mismatch between Bay-Delta water supplies and beneficial uses, it could satisfy the other Program goals.
>
> The feasibility of such a reduced exports alternative is clear, notwithstanding the projected population growth that undergirds the commitment not to reduce exports. As stated previously, it is projected that the state's population will grow from 30 to 49 million by the year 2020, and that half of this growth will be in Southern California. Such population growth requires water. However, if there is no water to support the growth, will it occur as projected? Population growth is not an immutable fact of life. Stable populations have been established in such states as New York, Pennsylvania, Connecticut, and Rhode Island. Inflow of new residents to California continues to exceed outflow because conditions in the State are conducive to population growth. One aspect of these conditions is the availability of water. However, as the State reaches the limit of available water and must seek other sources such as desalination, water will become more expensive to obtain and California's appeal will lessen.
>
> Years ago some argued that people should follow the water, not vice versa. While it is not the function of this court to advocate one position or the other, this argument nevertheless points out a glaring defect in the PEIS/R. CALFED conducted its environmental analysis by assuming certain population growth in the State over the next 15 years and then finding ways to provide water to that population. But CALFED appears not to have considered, as an alternative, smaller water exports from the Bay-Delta region which might, in turn, lead to smaller population growth due to the unavailability of water to support such growth. Taking an assumed population as a given and then finding ways to provide water to that population overlooked an alternative that would provide less water for population growth leaving more for other beneficial uses. CALFED apparently assumed that the California population would grow as projected regardless of the availability of water and did not consider whether, if less water was supplied, population growth would be affected accordingly, leading to less demand.

In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings, 34 Cal. Rptr. 3d 696, 774 (Ct. App. 2005) (citation omitted), *rev'd*, 43 Cal. 4th 1143 (2008).

[292] *In re Bay-Delta*, 43 Cal. 4th at 1168.

[293] *Id.*

later, lower-tier environmental review.[294]

The CALFED PEIS/R included a general discussion of the potential sources of water that the project would require.[295] The document did not undertake, however, detailed environmental-impact analysis of diverting water from each of the potential sources (e.g., "enlarging Shasta Lake, expanding the Los Vaqueros reservoir, and constructing an in-Delta storage facility").[296] Rather, the PEIS/R stated that specific analyses of the water sources would be included in second-tier environmental reviews and were not appropriate at this stage of planning.[297] The court of appeal found that deferring the identification and CEQA analysis of specific sources of water violated CEQA, citing the *Stanislaus Natural Heritage Project* decision.[298] The Supreme Court disagreed, stating that "at the first-tier program stage, the environmental effects of obtaining water from potential sources may be analyzed in general terms, without the level of detail appropriate for second-tier, site-specific review. The CALFED PEIS/R satisfies these requirements."[299]

CALFED is a multi-stage program that will be implemented over a thirty-year period.[300] The specific sources of water to supply the project have not yet been identified.[301] Distinguishing the facts at issue in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, the court held that it was appropriate for CALFED to defer detailed analysis of the environmental effects until CALFED has identified the specific sources of water that will someday augment existing exports from the CVP and SWP.[302] Because detailed environmental review at the Phase II stage would be speculative and inefficient, the CALFED agencies properly chose to defer site-specific review of the potential water sources to second-tier environmental documents.[303]

Moving on to the final issue it addressed, the court noted that the

[294] *Id.*

[295] *Id.* at 1169.

[296] *Id.* at 1168 n.8.

[297] *Id.*

[298] *Id.* at 1171.

[299] *Id.* at 1169; *see also* Rio Vista Farm Bureau Ctr. v. County of Solano 5 Cal. App. 4th 351 (Ct. App. 1992) (cited with approval in *In re Bay-Delta*, 43 Cal. 4th at 1171-72).

[300] *In re Bay-Delta*, 43 Cal. 4th at 1172.

[301] *Id.*

[302] *Id.* at 1170.

[303] *Id.* at 1172.

EWA is a part of CALFED's ecosystem restoration strategy.[304] The EWA allows the agencies to "acquire, bank, transfer and borrow water" to protect fish habitat without reducing deliveries to water users.[305] CALFED identified the EWA as a second-tier project and thus discussed its environmental effects only in general terms in the PEIS/R.[306] The EWA was discussed in greater detail in a document entitled "California's Water Future: A Framework for Action" ("Action Framework").[307] The Action Framework was released before the certification of the PEIS/R.[308] The court of appeal held that, because the PEIS/R did not discuss the EWA in what it considered to be sufficient detail, the document failed to comply with CEQA.[309]

The Supreme Court disagreed and found that the PEIS/R had adequately addressed the EWA by discussing its effects in general terms and deferring a more detailed analysis to a second-tier CEQA document.[310] The EWA is a statewide program that will eventually require various water-acquisition projects that, as of the year 2000, had not yet been identified. Thus, until specific water-acquisition projects were identified, the general discussion of the EWA in the PEIS/R was sufficient to satisfy CEQA.[311] Furthermore, the court held, the specific details discussed in the Action Framework were not required in a first-tier CEQA analysis.[312] As the court explained, "[t]he PEIS/R fulfills the function of a first tier document because it analyzes the environmental impacts of the mechanisms that will establish and develop the EWA – water transfers (including purchases from willing sellers), reservoirs, groundwater storage, and more flexible operations of water projects."[313]

In summary, the court upheld the PEIS/R against three broad-based attacks, in each instance emphasizing the programmatic character of the document and the fact that, under applicable legal standards, the kind of detailed analysis demanded by the various petitioners was simply not necessary in order to meet applicable CEQA standards.

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[304] *Id*. at 1173-74.
[305] *Id*. at 1174.
[306] *Id*. at 1173.
[307] *Id*. at 1174.
[308] *Id*.
[309] *Id*.
[310] *Id*. at 1175.
[311] *Id*.
[312] *Id*.
[313] *Id*.

III. CONCLUSION

As California's population has continued to grow, creating an ever-greater demand for development, the Legislature and courts have struggled with addressing the nexus between water supply and land use planning. This effort has been no simple feat and has occurred against the backdrop of ever-increasing uncertainties about the reliability of water supplies in the state.

Nevertheless, after over two decades of appellate decisions dealing with EIR challenges for substantial development projects, the California Supreme Court weighed in, announcing a set of legal principles and requirements that local agencies should follow in addressing water supply issues within EIRs for such projects. Although the *Vineyard Area Citizens for Responsible Growth* decision helped to clarify principles previously found only within a sometimes confusing array of court of appeal decisions, the rules announced by the Supreme Court are easier to articulate than to satisfy in practice. Without doubt, the water-related challenges facing California after the first decade of the twenty-first century will likely continue to tax the creativity and intelligence of the environmental consultants and planners charged with preparing EIRs, of agency decisionmakers faced with demands for new development, and of members of the public. The coming years will see a reduction in water resources, due to a reduced snowpack resulting from climate change, as well as the continuing deterioration of aquatic ecosystems attributable to past societal failures to sufficiently account for environmental concerns in the design of major water storage and delivery systems. Water issues will only grow more complex as water resources become less plentiful.