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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CHINO BASIN MUNICIPAL WATER DISTRICT, Plaintiff, v. CITY OF CHINO, et al., Defendants.	CASE NO. RCV 51010 Assigned For All Purposes to The Honorable J. Michael Gunn Department R-8 **MONTE VISTA WATER DISTRICT MEMORANDUM OF POINTS AND AUTHORITIES REGARDING APPLICATION OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT TO THE OPTIMUM BASIN MANAGEMENT PLAN FOR THE CHINO BASIN** Date: November 18, 1999 Time: 1:30 p.m. Dept: R-8

I.

CEQA IS A POTENT TOOL TO DELAY OR DEFEAT PUBLIC PROJECTS

Over ten years have transpired since Judge Turner's Order directing completion of an OBMP within a two year time period (*i.e.* by 1991). This court's Order directed completion of the OBMP by September 30, 1999. That deadline had to be extended to March, 2000. Now, if CEQA compliance is required before the Optimum Basin Management Program ("OBMP") can be put into place, the time before the OBMP will be approved and adopted by the court will be extended a minimum of one year, and most likely two to three years.

The provisions of the California Environmental Quality Act can be a potent tool for the delay or to defeat a public project:

> Environmental protection laws such as CEQA provide a series of procedural hurdles to be overcome by an applicant proposing a project. These procedures are rich in opportunities for abuse by those opposing the project. (Pickerton, *Conflicting Statutes in No-Growth Environments: CEQA and the PSA* (1985) 4 UCLA J. Envtl. L. & Pol'y 173.)

The courts have recognized that CEQA can be a tool by opponents to defeat or delay a public project. The California Supreme Court and the courts of appeal have repeatedly warned that CEQA should not be "subverted into an instrument for the oppression and delay of social, economic or recreational development and advancement." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576; *see also City of Fremont v. San Francisco Bay Area Rapid Transit Dist.* (1995) 34 Cal.App.4th 1780, 1790; *Board of Supervisors of Riverside County v. Superior Court* (1994) 23 Cal.App.4th 830, 837.)

Monte Vista Water District strongly supports prompt completion of the OBMP for the Chino Basin. However, application of the CEQA process to the OBMP has great potential for further delay. If the court directs the OBMP to provide prohibitions and incentives, leaving commitment to implementation of physical projects to public agencies who wish to avail themselves of the Chino Basin groundwater resources, then CEQA compliance will follow in logical order.

II.

THE COURT CAN AVOID THE APPLICATION OF CEQA TO THE OBMP PROCESS IF THE OBMP PROVIDES FOR MANAGEMENT GOALS AND OBJECTIVES AND PROVIDES INCENTIVES FOR IMPLEMENTATION THROUGH COURT SANCTIONED PROHIBITIONS AND ASSESSMENTS

The court can take two very diverse paths concerning implementation of the OBMP. The path chosen by this court will likely determine whether the OBMP will be governed by CEQA.

One path would be for the court to issue orders and directives as part of the OBMP, identifying specific projects and locations for the projects, and identifying the specific public entity(ies) that would be the lead agency on the projects. If such orders and directives were based upon stipulation of the parties, there is little question that CEQA would apply to the OBMP. (Cal. Code of Regs., tit. 14 § 15352(a); *City of Vernon v. Board of Harbor Comrs.* (1998) 63 Cal.App.4th 677, 688 ["The agency commits to a definite course of action not simply by being a proponent or advocate of the project, but by agreeing to legally be bound to take that course of action."]) Furthermore, even if the orders and directives were not based upon stipulation of the parties, the potential exists that an appellate court would find that the OBMP is governed by CEQA:

> It is not clear what effect this exclusion [excluding state courts from CEQA] has on public agency action affecting the environment taken in response to a court order. One view is that an agency action carrying out a court order is an exempt ministerial activity. The agency is required to comply with the terms of the court order and does not have discretion to do otherwise. The opposing view is that, even though courts are exempt, they do not have authority to order relief that would excuse a public agency from complying with CEQA. No reported case has addressed this issue. (S. Kostka & M. Lischke, *Practice Under the California Environmental Quality Act* (1st ed. 8/99) §4.11, p. 143.)

Additional problems may also result from the court using the OBMP to issue orders and directives identifying specific projects and locations for projects, as an appellate court would likely treat these orders and directives as mandatory injunctions. (*Davenport v. Blue Cross of*

Calif. (1997) 52 Cal.App.4th 435, 448 ["An injunction is prohibitory if it requires a person to refrain from a particular act and mandatory if it compels performance of an affirmative act that changes the position of the parties."]) These types of injunctions are only permitted in extreme cases and subject to very strict review on appeal. (*Teachers Ins. & Annuity Ass'n v. Furlotti* (1999) 70 Cal.App.4th 1487, 1493 ["The granting of a mandatory injunction pending trial is not permitted except in extreme cases where the right thereto is clearly established."])

The second path the court could take is to issue orders and directives prohibiting certain activities by the parties and to provide for proper economic incentives through OBMP. For example, a court order implementing the OBMP could provide that no party may pump water from the basin unless the party pays an assessment to defray the costs of a wet water recharge. As another example, a court order implementing the OBMP could provide that no party may pump water from the basin until it pays its share of a desalting plant to be built.[1] Along this path, the OBMP would contain no commitment by any party to any specific project and no mandatory injunction by the court.

Further, there would be no CEQA implications by such orders and directives, as none of the parties have legally committed to proceeding with a project. (*See e.g., Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464 [Formation of community facilities district to provide funding for district activities not a project, because agency not committed to definite course of action relating to expenditure of funds].) When one or more of the parties decided to commit to a public works project, and, thereby, avoid the prohibitions and reap the financial benefits under the OBMP, those parties would then be required to comply with CEQA. (*City of Vernon, supra,* at 688.)

The advantage to avoiding CEQA compliance at this junction is to hasten the completion of the OBMP at or near the schedule previously set forth by the court. Requiring CEQA compliance would likely delay completion of the OBMP by years. Additionally, this course of action avoids the risk of a premature CEQA process, but ensures CEQA compliance at the time a

[1] These are meant as only very crude examples.

commitment to a project is made by a party. Furthermore, avoiding CEQA compliance now will save the all of the parties money, as under the above alternative, the party who will incur the expense of compliance with CEQA is the party who decides the incentives under the OBMP outweigh the costs of compliance with CEQA. Finally, the above described orders are clearly prohibitory and more likely to withstand appellate scrutiny if the court cannot obtain the stipulation of all the parties. (*See Davenport, supra*, at 448.)

III.

A COURT ORDER ADOPTING THE OBMP DOES NOT TRIGGER THE NEED TO COMPLY WITH CEQA; THE CEQA PROCESS SHOULD BE DEFERRED UNTIL AN IDENTIFIABLE PROJECT COMMITS A PUBLIC AGENCY TO A COURSE OF ACTION, WHEREBY MEANINGFUL ENVIRONMENTAL ANALYSIS CAN THEN BE PERFORMED

A. CEQA Does Not Apply to Court Orders

CEQA only applies to *governmental action*,[2] and a court order adopting the OBMP or even ordering the implementation of the OBMP is not an action by a governmental agency. An activity is exempt from CEQA review if: (1) the activity does not involve the exercise of discretionary powers by a public agency; (2) the activity does not result in a direct or reasonable foreseeable indirect physical change in the environment; or (3) the activity is not a project as defined in Section 15378.[3] CEQA Guidelines § 15060(c).

By definition, a court ordered OBMP is not an activity involving the exercise of discretionary powers by a public agency. The San Bernardino County Superior Court and the appointed watermaster are judicial entities, separated from the legislative power under the California Constitution, Article III, Section 3. CEQA Guidelines, section 15379 states: "'Public

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[2]CEQA applies to governmental actions which may involve activities directly undertaken by a governmental agency, activities financed in whole or in part by governmental agency, or private activities which require approval from a governmental agency. California Code of Regulations, Title 14, Article 1 (CEQA Guidelines, § 15002(b)).

[3] Only an activity undertaken, supported, or authorized by a public agency is considered to be a "project." Pub. Res. Code § 21065.

agency includes a state agency, board, or commission and any local or regional agency, as defined in these guidelines. It does not include the courts of the state." (Cal. Code of Reg., tit. 14 §15379 (emphasis added). Simply, the court is not a public agency, and its decisions are not subject to the CEQA review process.

B. The OBMP Is Not a "Project" That Triggers the CEQA Process by Committing a Public Agency to a Definite Course of Action

CEQA's application is predicated on an identifiable "project." An activity that is not a "project" is not subject to CEQA. (Cal. Code of Regs., tit. 14 § 15060(c)(3).) A "project" has two essential elements. First, it is an activity that may cause a direct (or reasonably foreseeable indirect) physical environmental change. Second, it is an activity directly undertaken by a public agency, an activity supported in whole or in part by a public agency or an activity involving the issuance by a public agency of some form of entitlement or permit. (Pub. Resources Code § 21065; Cal. Code of Regs., tit. 14 § 15378.)

CEQA does not apply until the time a public agency proposes to "approve" a project. (Cal. Code of Regs., tit. 14, § 15378(c).) Importantly, governmental "approval" is defined as a public agency decision that commits the agency to a definite course of action in regard to a project intended to be carried out by any person. (Cal. Code of Regs., tit. 14 § 15352(a).)

CEQA review cannot begin before a "project" is identified because meaningful environmental analysis of project alternatives cannot be conducted until a public agency commits to a definite course of action. *Rio Vista Farm Bureau Center v. County of Solana* (1992) 5 Cal.App.4th 351, 372; *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143 [An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity]; *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 576 [designation of potential waste disposal sites as "tentatively reserved" in waste management plan does not trigger duty to prepare an EIR, as no commitment to development exists]. CEQA review, however, is required before commitment by an agency to a course of action so that the review does not become a "post-hoc rationalization."

(*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306.)

In *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772, the court held that a resolution selecting a preferred site for a new school did not commit a public agency to a definite course of action. Because the future decision to acquire the site would be subject to CEQA review, the resolution to select a preferred site was not a "project" subject to CEQA review. *Stand Tall* 235 Cal.App.3d at 107, 110.

In *Rio Vista, supra*, the court upheld a decision to dismiss the plaintiff's action challenging a County's adoption of a hazardous waste management plan. The court stated:

> The flaw in [plaintiff's] argument is that the Plan makes no commitment to future facilities other than furnishing siting criteria and designating generally acceptable locations. While the Plan suggests that new facilities may be needed by the County, no siting decisions are made; the Plan does not even determine that future facilities will ever be built. *Rio Vista Farm Bureau Center v. County of Solana* (1992) 5 Cal.App.4th 351, 370.

The court further stated: "CEQA requires consideration of the potential environmental effects of the project actually approved by the public agency, not some hypothetical project. Where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences." *Rio Vista Farm Bureau Center v. County of Solana* (1992) 5 Cal.App.4th 351, 372; *citing Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 738.

The sine qua non of CEQA's application is an identifiable "project." The court's adoption of the OBMP, however, is not a governmental activity, and the OBMP does not commit any public agency to a definite course of action. Therefore, an identifiable project does not exist. Accordingly, the CEQA process must be deferred to a time when meaningful environmental analysis can be performed. Present undertaking of environmental review of the OBMP would involve speculation and conjecture and would frustrate the purpose of CEQA.

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The above is also consistent with CEQA's exemption for feasibility and planning studies:

> A project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded does not require the preparation of an EIR or negative declaration but does require consideration of environmental factors. (Cal. Code of Regs., tit. 14 § 15262.)

The OBMP is nothing more (and should be nothing more) than a feasibility and planning study. It should not contain commitment, approval, adoption or funding by any party to any future action. Rather, the OBMP should provide general goals and objectives for proper management of yield and water quality of the Chino Basin. It should not commit any public agency to any course of action and it should not subject any particular Basin locations to environmental change. Rather, the OBMP should provide for management goals and objectives and provide incentives for implementation through court sanctioned prohibitions and assessments. Any future projects undertaken directly or indirectly by a public agency to avail itself of the incentives in the OBMP will be properly subject to a future CEQA review process.

IV.

THE COURT HAS THE OBLIGATION TO EXPEDITE CREATION, APPROVAL AND ADOPTION OF THE OBMP

In both Judge Turner's 1989 Order and the in this court's 1997 Order, it was clearly recognized that the creation of an OBMP was critical to effective management of the Basin. Once this fact was accepted by the court, the Judgment mandates that the court exercise its broad equitable powers to ensure that an OBMP is created, approved and adopted in an expeditious fashion. (*See* Judgement, ¶¶ 39-40.) Such a mandate is consistent with Article X, Section 2 of the California Constitution:

> Since the adoption of the 1928 Constitutional Amendment, it is not only within the power but is also the **duty** of the trial court to admit evidence relating to possible physical solutions, and if none is satisfactory to it to suggest on its own motion such physical solution. [Citation omitted] **The court possesses the power to enforce such solution regardless of whether the parties agree.** (*City of Lodi. East Bay Municipal Utility District* (1936) 7 Cal.2d 309, 341 [Emphasis added].)

It, therefore, follows, given the court's previous findings regarding the need for an

It, therefore, follows, given the court's previous findings regarding the need for an OBMP, that the court, under the Judgment and under Article X, Section 2, has the duty to issue orders that avoid undue delay in the OBMP process. This would include orders that **legally** avoid the delay of CEQA compliance at this juncture. This can be done by drafting the OBMP with the following constraints:

1. The OBMP should provide goals and objectives for management of the Chino Basin;
2. The OBMP should avoid commitment to any specific projects or specific location of projects; and
3. The OBMP should specify prohibitions and financial incentives for the projects needed to achieve the goals and objectives.

With the above constraints, the OBMP will not be a document in which the court is ordering a specific project to be done, or a document in which any party is committing to a specific project. This will avoid the need for CEQA compliance before the court may approve and adopt the OBMP and will leave CEQA compliance to the party who subsequently commits to a particular project.

Dated: October 27, 1999

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