

Center for Biological Diversity v. County of San Bernardino (As modified June 23, 2010)
185 Cal.App.4th 866

San Bernardino County approved a biosolids composting facility on a 160-acre site near the town of Hinkley in the Mojave Desert. The facility was proposed to compost up to 200,000 tons yearly of biosolids and green plant material to produce agricultural grade compost. The facility was proposed to be open-air, utilizing both windrow and static pile composting methods. The site had no utilities and the facility would use chemical toilets, cellular phone service, and diesel-generated and solar electrical power. The County prepared an EIR for the project identifying significant effects on air quality, water quality, hazardous materials, biological resources, and cultural resources. The EIR examined three alternatives to the project, including no-project, reduced capacity, and alternative site.

The Center sued and the trial court decertified the final EIR on the grounds that it didn't adequately analyze the feasibility of an enclosed composting facility as an alternative or address the issue of water supply for the facility. In addition, the trial court concluded that a water supply assessment should have been prepared for the project. The Court of Appeal upheld the decision of the lower court.

The EIR concluded that even after implementing mitigation measures the project would have a significant, unavoidable impact on air quality. Emissions of hydrogen sulfide and ammonia from the composting process would exceed the daily and annual thresholds set by the Mojave Desert AQMD. The EIR examined the alternative of an enclosed composting facility, but determined that its emissions would still exceed the AQMD's thresholds and that it would be substantially more expensive than the open-air facility. The County relied upon a consultant's analysis of the costs of constructing and operating an enclosed facility, which found the cost to be 28-41 times more than the proposed project, in finding this alternative to be economically infeasible. The consultant also stated that it was unlikely that a private firm could obtain the necessary financing for this alternative, given the financial risk, and that this would place it at a disadvantage in competition with other facilities. The County also concluded that the alternative was technologically infeasible because the site lacked electricity that would be needed to operate the blowers and biofilters associated with an enclosed facility. Therefore, this alternative was not further analyzed in the EIR.

Case law provides that if an alternative is identified as potentially feasible, an in-depth discussion is required in the EIR. The CEQA Guidelines provide that an EIR must explain its reasons for rejecting an alternative. The Court concluded that the County's dismissal of the enclosed facility alternative was not supported by substantial evidence. Although the County consultant's study concluded that an enclosed facility would be much more expensive than the project, it relied upon information from a single enclosed facility located in Rancho Cucamonga. Because comments on the DEIR advised that there were other enclosed facilities operation in Los Angeles and Riverside Counties, as well as throughout the country, the Court held that the EIR should have looked at the costs of those other facilities as well in order to provide a broader view of what might be economically feasible. In the Court's words:

“If enclosed facilities are gaining in popularity, perhaps they are economically feasible, in that a reasonable profit can be made despite increased capital costs. Because the FEIR ignores all enclosed facilities besides the Rancho Cucamonga facility, however, there is no meaningful comparative data pertaining to a range of economic issues. Since the proposed project's impact on air quality is substantial, and the most detrimental aspect of the project, a look at more than one enclosed facility is paramount.”

The Court dismissed the consultant's conclusions regarding the financial feasibility of the enclosed alternative. The consultant was from an environmental engineering consulting company and had no record expertise in financing. Nor, was there evidence that the consultant had contacted lenders or other sources of financing to determine its availability. Further, the consultant did not analyze the total cost of doing business and the prices that could be charged by its competitors in concluding that an enclosed facility would be non-competitive.

The technological feasibility conclusion was similarly dismissed. In the Court's point of view, the “real question” was not whether electricity could be brought to the site (the nearest line was 1 mile away), but how much that would cost and how much time would be involved.

The EIR stated that the proposed project would use approximately 1,000 gallons of water per day, mostly for dust control, and mentioned that water would come from an on-site well, by trucking from off-site, or a combination of both. Otherwise, the EIR had no substantive discussion of water supply, and no formal water supply assessment (WSA) had been prepared. Comments on the DEIR suggested that water supply discussion was inadequate, the necessary amount of water was underestimated, and that the site would also need water for fire fighting and sanitation.

Water Code Section 10910, et seq establishes the requirements for undertaking a WSA in conjunction with a CEQA analysis. The Court reviewed Section 10912's definition of “project” requiring a water supply assessment. Subsection 10912(a)(5) includes a processing plant occupying more than 40 acres of land. The project proponent argued that the composting facility was not a “processing plant” since it involved only a small administration building. The Court dismissed this argument, stating that “[a]n open-air composting facility is a ‘project’ within the meaning of subdivision (a)(5) of section 10912 if it meets the acreage threshold, even if the only structures on site are small ones.” The proponent further argued that a water supply assessment is only required when the project would demand at least as much water as a 500 dwelling unit project. The Court rejected that argument as well, because subdivision (a)(5) “contains no limitation pertaining to water usage.” The proponent also argued that the water supply assessment required did not apply because the project was not to be supplied by a public water system or the County. The language in Section 10910 states that a WSA must be undertaken for qualifying projects by either the water system that would supply the project or the city or county within whose jurisdiction the project is located. The Court

concluded that “Section 10910 establishes that a WSA is required for a ‘project’ within the meaning of section 10912, subdivision (a), even when a public water system is uninvolved.”

Finally, the proponent argued that plaintiffs had failed to exhaust their administrative remedies regarding the WSA because no one had raised the specific issue of compliance with Section 10910 et seq during the CEQA process. The Court was not convinced. It concluded that by means of comments alleging the inadequacy of the EIR’s water supply analysis “the County was apprised of the relevant facts and issues, and the purpose of the exhaustion doctrine was satisfied without the citation of Water Code provisions during the administrative proceedings.”

Plaintiffs claim for attorneys fees under the “private attorney general doctrine” was upheld. The Court found that the claim was consistent with Civil Procedure Code Section 1021.5: enforcing the provisions of CEQA is “an important right” and the action in bringing this suit conferred a “significant benefit” on the public. After reviewing the trial court’s decision to reduce the fees awarded from the total amount originally requested by the Center for Biological Diversity, the Court upheld that reduction in fees and the reasoning behind it. There was, however, no reason to reduce the fee further on the theory that the Center had only partially prevailed in the case.