Responsible Agency's Contract Fails CEQA Test

Riverwatch v. Olivenhain Municipal Water District, No. D052237, 09 C.D.O.S. 1355, 2009 DJDAR 1570. Filed January 9, 2009. Modified and ordered published January 30, 2009.

A San Diego County water district should have completed an environmental study before approving an agreement to provide recycled water to operators of a proposed landfill, the Fourth District Court of Appeal has ruled.

Even though Olivenhain Municipal Water District was not the "lead agency" for review of the landfill itself, the district was a "responsible agency" with obligations under the California Environmental Quality Act. The district did not fulfill those obligations with a contract that placed CEQA compliance in the hands of the landfill operator, the court ruled.

The ruling is the first published opinion to cite extensively the state Supreme Court's most recent CEQA ruling, *Save Tara v. City of West Hollywood*, (2008) 45 Cal.4th 116. In *Save Tara*, the state high court ruled West Hollywood should have completed an environmental impact report before signing a conditional agreement with the developer of an affordable housing project (see *CP&DR Legal Digest*, December 2008).

Like the city in *Save Tara*, the water district here committed itself to the project "'so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project,'" Justice Alex McDonald wrote, citing *Save Tara*.

San Diego County voters in 1994 approved a ballot measure providing for development and operation of a 1,700-acre landfill and recycling collection center at Gregory Canyon in the north part of the county. The Pala Band of Mission Indians – which has a reservation and casino near the landfill site – and some environmentalists have been fighting the project ever since. In 1998, the Fourth District ruled that San Diego County did not have to complete an environmental impact report on a solid waste management plan that identified Gregory Canyon as a potential landfill site (*Pala Band of Mission Indians v. County of San Diego*, 68 Cal.App.4th 556; see *CP&DR Legal Digest*, January 1999). In 2004, the Pala Band sponsored an initiative to overturn the 1994 ballot measure, but voters maintained support for the landfill.

The tribe had more success challenging the EIR for the landfill itself. San Diego County certified a final EIR for the landfill in 2003 and approved the project in 2004. The Pala Band, the City of Oceanside and the group Riverwatch sued over the EIR and won when a trial court judge found the EIR defective because it failed to identify the source of water necessary for constructing and operating the landfill, and did not analyze the impacts of obtaining that water.

The landfill proponent, Gregory Canyon Ltd. (GCL), responded by signing an agreement in early 2006 with Olivenhain Municipal Water District (OMWD). The district agreed to provide up to

244,000 gallons of recycled water per day for 60 years. Gregory Canyon would truck the water from a reservoir to the landfill site. During the meeting at which the district board approved the agreement, a statement from a Gregory Canyon attorney that the trucks would not have significant impact on traffic provided the only discussion of potential environmental impacts.

In July 2006, the county's Department of Environmental Health issued a revised partial draft EIR that addressed the impacts of Gregory Canyon's arrangement with OMWD. Shortly thereafter, the Pala Band and Riverwatch sued the water district for failing to comply with CEQA.

A San Diego County Superior Court judge determined the district's approval of the agreement did not constitute approval of a project for CEQA purposes. On appeal of Riverwatch and the Pala Band, a unanimous three-judge panel of the Fourth District, Division One, overturned that ruling.

"[T]he activity of trucking recycled water from OMWD to the landfill site is *part of the whole action* or operations of the landfill project for purposes of CEQA," Justice McDonald wrote. The activity would include building 1,000 lineal feet of roadway, constructing a concrete pad and six-inch meter, and up to 89 water-hauling truck trips per day, he noted. Although the county was the "lead agency" under CEQA for the landfill project, the water district was "a 'responsible agency,' under CEQA because it proposes to carry out and/or approved part of the landfill project," McDonald wrote.

After deciding the contemplated activity qualified for CEQA review, the court turned to the question of whether contract approval amounted to project approval. The district and Gregory Canyon argued that because the agreement contained conditions and placed on the landfill developer the responsibility for CEQA compliance, approval of the agreement did not trigger CEQA. They cited the landmark case *Stand Tall on Principles v. Shasta Union High Sch. Dist.*, (1991) 235 Cal.App.3d 772, and the more recent *Concerned McCloud Citizens v. McCloud Community Services Dist.*, (2007) 147 Cal.App.4th 181 (see *CP&DR Legal Digest*, March 2007). In *Stand Tall*, the court upheld a school district's conditional purchase of a potential high school site without environmental review. In *McCloud*, the court upheld a special district's approval of an agreement with Nestlé to purchase and bottle water from the district's sources without environmental review.

The Fourth District said those cases did not apply here. *Stand Tall* was based on a specific exception in CEQA Guidelines for land acquisitions conditioned on future CEQA compliance, and *McCloud* was based on the agreement's lack of specificity, or definiteness, regarding the potential water bottling project. The Fourth District instead relied on *Save Tara* to determine OMWD's contract approval equaled project approval.

"Because the agreement set forth the specific details regarding OMWD's 60-year obligation to deliver recycled water to GCL, and the construction required to allow that delivery, OMWD's approval and signing of the agreement satisfied the definiteness requirement," McDonald wrote. "Furthermore, when on February 17, 2006, OMWD's board approved the agreement and OMWD's execution of the agreement, OMWD clearly *committed* itself to the course of action set

forth in the agreement, which is a discretionary contract." Thus, the court concluded, the district had to comply with CEQA before approving the agreement.

The court rejected the argument from the water district and Gregory Canyon that the lawsuit was flawed because it did not also name the county Department of Environmental Health – the lead agency – as a respondent. That agency certified a revised final EIR in May 2007 and filed an addendum in July 2008. Late last year, a trial court judge in that litigation accepted the documents and ruled the county had met its CEQA obligations. That decision is now on appeal in *Riverwatch v. County of San Diego Department of Environmental Health*, No. D054471.