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Third District Affirms Judgment Upholding State Lands Commission's Supplemental EIR For Desalination Plant Lease Modification, Rejects CEQA Claims That Commission Piecemealed Review And Should Have Assumed Lead Agency Status And Prepared A Subsequent EIR

By Arthur F. Coon on May 11, 2021

In a lengthy opinion filed April 8, and ordered published on May 7, 2021, the Third District Court of Appeal affirmed a judgment rejecting a number of CEQA challenges to the California State Land Commission's (Lands Commission) supplemental EIR for and related approval of a lease modification to facilitate a desalination plant in Huntington Beach. *California Coastkeeper Alliance v. State Lands Commission (Poseidon Resources (Surfside) LLC, Real Party in Interest)* (2021) ___ Cal.App.5th ___. In holding that the Commission properly elected to prepare a supplemental (rather than subsequent) EIR, did not err in refusing to assume lead agency status, and did not unlawfully piecemeal environmental review, the Court provided guidance on a number of significant CEQA issues.

Factual and Procedural Background
The Site and Desalination Plant Project

The 11.78-acre project site includes tide and submerged lands in the Pacific Ocean off Huntington Beach occupied by a "once-through" cooling system used in connection with an upland power generating station. The Commission initially authorized a 49-year lease of the site to Southern California Edison (SCE) in 1957, then approved an assignment from SCE and a subsequent 20-year lease to another entity (AES) expiring in 2026; in 2010, it approved a lease amendment adding real party Poseidon to the AES.

Poseidon has been seeking since 1999 to establish a desalination plan on the site to provide Orange County with a local drought-proof water supply. After it applied to Huntington Beach to obtain the necessary land use approvals for the plant and water delivery system, the City certified an EIR in 2005 and granted the project's conditional use permit and coastal development permit in 2006, but the project

did not proceed at that time. Poseidon submitted a modified application and Huntington Beach prepared and certified a 2010 Subsequent EIR (2010 SEIR) based on changed circumstances and new information, which evaluated co-located, stand-alone operations and onshore facility and distribution pipeline revisions. Despite no legal challenges being made to the 2010 SEIR, the project again did not move forward.

The State Water Board's 2015 Desalination Amendment And the Interagency Framework Agreement Among Responsible Agencies Concerning CEQA Compliance

In 2015, the State Water Resources Control Board (SWRCB) amended its Ocean Plan to address desalination facilities through a consistent statewide regulatory approach, essentially requiring a new analysis from regional boards intended to ensure development and adoption of feasible alternatives (including alternative sites) and mitigation to minimize intake and mortality of marine life. The new regulations mandated subsurface (as opposed to surface) ocean water intakes if feasible, and specified new minimum screening requirements for surface water intakes if subsurface intakes were not feasible, as well as preferred methods for minimizing intake and mortality from brine discharge.

To comply with the SWRCB's desalination amendment, Poseidon sought, in 2016-2017, to amend its lease with the Commission to install new intake pipeline screening, a new diffuser to its offshore discharge pipe to better mix the brine discharge with seawater, and a 30% reduction of seawater intake from what the Lands Commission had approved in 2010. By an interagency framework agreement, the Lands Commission, the Regional Water Board, and the Coastal Commission agreed the Lands Commission would consider the project first in connection with the proposed lease amendment, and would rely on Huntington Beach's 2010 subsequent EIR and prepare any additional analysis required by CEQA; they also agreed the Lands Commission would consider the other agencies' comments and obtain from them a description of the CEQA analysis of Poseidon's proposed seawater intake and discharge technology modifications that they would need to rely on the Lands Commission's certified CEQA analysis in next acting on the NPDES permit (to be issued by the Water Board) and coastal development permit (to be issued by the Coastal Commission).

The Lands Commission's 2017 Supplemental EIR And Approval of the Lease Modification

The Lands Commission, as responsible agency, then proceeded to prepare a 2017 Supplemental EIR, consisting of 2,816 pages, after determining that the City's 2010 Subsequent EIR retained relevance and informational value, and that only minor additions or changes would be needed to make it adequately apply to the changed circumstances. The 2017 Supplemental EIR incorporated, supplemented and revised the 2010 Subsequent EIR; its scope was limited to changes to the 2010 lease and the incremental effects of those modifications; and it repeatedly stated it should be read in conjunction with the 2010 SEIR. The Lands Commission held a public hearing at which an Orange County Water District representative stated it was not, at the time, requiring any changes to the water distribution system studied in the 2010 SEIR; the Lands Commission certified the 2017 Supplemental EIR and approved the lease modification project, adopting a statement of overriding considerations for any impacts that could not be mitigated to a less than significant level.

Plaintiffs filed a writ petition alleging the Lands Commission violated CEQA by certifying the 2017 Supplemental EIR and approving the lease amendments. The trial court denied the petition and plaintiffs appealed.

The Court of Appeal's Decision

The Court of Appeal was faced with competing arguments framed in dramatically different ways. Plaintiffs and appellants argued that the Lands Commission committed *procedural* CEQA errors – failure to assume lead agency role and piecemealing review – that were subject to de novo review; the Lands Commission and real party Poseidon argued that the issue boiled down entirely to whether, under CEQA's subsequent review rules, the Lands Commission properly prepared a Supplemental EIR in 2017, an issue subject to review for substantial evidence. The Court of Appeal determined that it needed to consider the subsequent review issue first in order to address and provide needed context for discussing plaintiffs' other arguments.

Subsequent Review And Supplemental Versus Subsequent EIRs

The Court of Appeal extensively reviewed and analyzed CEQA's subsequent review rules, initially observing an important CEQA prohibition: that when an EIR has been prepared for a project *no subsequent or supplemental* EIR shall be required by the lead or any responsible agency *unless* one or more specified events occurs. The events include substantial proposed project changes, or substantial changes in the circumstances under which the project is undertaken, that will require *major revisions of the EIR* due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified effects. They also include new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified, which discloses such effects, or which reveals mitigation measures newly found feasible or significantly different that would substantially reduce effects that the project proponent declines to adopt. (Citing Pub. Resources Code, § 21166; CEQA Guidelines, § 15162(a).) Further, once a project is approved, the lead agency's role is complete unless further discretionary review is required, in which case if any of the above events occurs a subsequent EIR or negative declaration shall *only* be prepared by the *public agency that grants the next discretionary approval*. (§ 15162(c).) To require a subsequent or supplemental EIR, the agency must determine based on *substantial evidence* the existence of "substantial changes" that require "major revisions" of the prior document due to the involvement of new or significantly more severe effects. (Citing *Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, 957, my September 22, 2016 post on which can be found *here*.)

The reason for the section 21166 and CEQA Guidelines § 15162 limitations is to balance CEQA's primary purpose of promoting environmental review with interests in finality and efficiency. (*Id.* at 949.) Only changed circumstances are at issue in the subsequent review process, which rests on the agency's implicit or explicit determination that the original document retains some relevance and informational value, and project changes do not constitute an occasion to revisit environmental concerns laid to rest in the original EIR analysis. The issues whether the prior document retains relevance and whether major revisions are required by changed circumstances are predominantly *factual* in nature, and therefore an agency's decision to proceed under CEQA's subsequent review rules is subject to the deferential *substantial evidence* standard of review.

In proceeding to distinguish "supplemental" from "subsequent" EIRs, the Court reviewed in detail Guidelines § 15163, which authorizes the agency to prepare a "supplement to an EIR rather than a subsequent EIR" if any of section 15162's conditions would require a subsequent EIR, but only minor additions or changes to the previous EIR are needed to make it adequately apply to the changed situation; the supplement need contain only that necessary and limited information, and the prior EIR need not be "rewritten from the ground up," although the Supplemental EIR must still be given the same kind of notice and public review as an initial draft EIR.

Applying these rules to the case before it, the Court noted that Huntington Beach's 2010 Subsequent EIR was, without dispute, relevant, and was also never challenged and thus conclusively presumed to comply with CEQA for purposes of its use by the Lands Commission. (§ 21167.2.) Substantial evidence thus supported the Lands Commission's decision to proceed under CEQA's subsequent review rules. Further, under Guidelines § 15163's "may choose" language, the Lands Commission had *discretion* to choose whether to proceed by a supplemental, rather than subsequent, EIR; its decision to do so based on its determination that only minor additions or changes to the prior EIR were needed was supported by the requisite substantial evidence, and was not a procedural issue subject to de novo review.

When A Responsible Agency Properly Proceeds By Way of A Supplemental EIR, It Is Not Required To Assume the Lead Agency Role

Plaintiffs' argument that the Lands Commission erred by failing to assume the lead agency role also lacked merit. CEQA Guidelines § 15052 does not mandate the assumption of lead agency status where, as here, a subsequent EIR was not required, and a Supplemental EIR was properly prepared instead. Plaintiffs' argument, based on § 15163(a)(1)'s language, that a Subsequent EIR is *always* required before an agency elects to prepare a Supplemental EIR was meritless: because the Lands Commission had the option to prepare a Supplemental EIR based on its evidence-supported determination that only minor revisions of the prior EIR were necessary, a subsequent EIR was not required and the Lands Commission was thus not required to assume lead agency status. The Court noted its conclusion was buttressed by other statutory and regulatory language indicating that a Supplemental EIR may be prepared by a responsible agency. (§ 21166; CEQA Guidelines, §§ 15163(a), 15096(f).) Per the Court: "[T]he statutory and regulatory language clearly contemplates that responsible agencies can prepare supplemental EIRs under the appropriate circumstances and need not assume the lead agency status to do so. … Where the election to prepare a Supplemental EIR is proper, we conclude that the determination to do so does indeed remove the subsequent review from the scope of the CEQA Guidelines section 15052 requirement to step in as lead agency."

No Piecemealing Occurred

The Court also rejected plaintiffs' assertion that the Lands Commission impermissibly "piecemealed" review by "cleaving off" the lease modification project as a discrete CEQA activity subject to a "narrowly-drawn EIR." CEQA mandates that a project is "the whole of an action" for which an approval is sought, and prohibits avoiding full environmental review by splitting a large project into smaller ones which, analyzed separately, appear more innocuous. Citing its decision in *East Sacramento Partnership For a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 293 (my November 10, 2016 post on which can be found *here*), the Court explained that an EIR must analyze future expansion or other action only if: (1) it is a reasonably foreseeable consequence of the initial project, and (2) it will be significant in likely changing the initial project's scope, nature or environmental effects. Piecemealing occurs when such analysis is omitted where the reviewed project has as its purpose serving as a first step toward future development, or where it legally compels or practically presumes completion of another action; conversely, "specific future action that is merely contemplated or a gleam in a planner's eye" need not be analyzed.

Here, the 2010 Subsequent EIR prepared by Huntington Beach, which was conclusively presumed to comply with CEQA, analyzed the desalination project in its entirety, and the 2017 Supplemental EIR incorporated the 2010 SEIR and quite properly added only the necessary information to make it adequate for the project as revised by the lease modifications (which were designed to address the SWRCB's 2015

desalination amendment regulatory changes). By proceeding in this manner, the Lands Commission merely followed CEQA's statutorily-authorized subsequent review procedures, and its actions did not constitute improper piecemealing or segmenting the project. Per the Court: "The Supplemental EIR supplements the previous EIR, and the two are considered as a comprehensive whole." Plaintiffs' piecemealing cases were inapposite, and the Lands Commission did not improperly defer any required analysis to other responsible agencies; rather, the 2010 subsequent EIR prepared by Huntington Beach together with the Lands Commission's 2017 supplemental EIR analyzed the entire project, including all the recently proposed enhancements.

Nor did the combined EIRs omit any essential information or alternatives analysis, including analysis of the feasibility of potential subsurface intake alternatives, which was contained in the 2010 SEIR, as explained and supplemented in the 2017 Supplemental EIR. There was no improper deferral of alternatives analysis to the Regional Water Board, and the Lands Commission was not required to *reevaluate* all the alternatives that were analyzed in the 2010 SEIR.

Other Issues

Further, plaintiffs' claims that reduced Orange County water demand obviated the desalination project failed to lay out contrary evidence in the record from the Orange County Water District concerning the need for the project to add to the County's water supply, and thus failed under the substantial evidence standard. Finally, there was no need for the Lands Commission's review to address un-proposed and speculative future potential changes in the upland water distribution system.

Conclusion and Implications

The bottom line is that – despite plaintiffs' creative arguments attempting to ignore or obliterate the distinctions between subsequent and supplemental EIRs, and to conjure procedural errors regarding lead agency status and piecemealing to obtain de novo review – the Lands Commission properly prepared a supplemental EIR addressing the limited proposed lease modifications before it, and it did not need to "start from scratch" with a wholly new EIR. Lead and responsible agencies have substantial discretion to proceed under CEQA's subsequent review rules, and once they properly choose to do so they have further substantial discretion in deciding *how* to do so. The latter type of discretion extends to the decision to prepare a supplemental EIR when the agency determines only minor revisions are needed to make a prior EIR adequate to apply to changed circumstances.

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.