The Other CEQA Shoe Drops: Third District Reverses Judgment Upholding Siskiyou County's EIR For Crystal Geyser Bottling Plant Project, Holds (1) Project Objectives Were Too Narrowly Stated And (2) County Should Have Recirculated EIR's Climate Discussion To Allow Comment On Substantially Higher GHG Emissions Estimate First Disclosed In FEIR

By Arthur F. Coon on May 27, 2022

On May 12, the Third District Court of Appeal belatedly ordered partially published an opinion it had filed on April 20, 2022, reversing the trial court's judgment upholding the EIR for lead agency Siskiyou County's approval of Crystal Geyser Water Company's water bottling plant project. *We Advocate Through Environmental Review, et al. v. County of Siskiyou, et al.* (*Crystal Geyser Water Company, Real Party in Interest*) (2022) ____ Cal.App.5th _____. The decision followed close on the heels of the Court's earlier decision in a related CEQA case brought by the same plaintiff and involving the same project in which it held that the City of Mount Shasta, acting as a responsible agency issuing a wastewater permit for the project, had violated CEQA by failing to make the required Public Resources Code § 21081 findings regarding potentially significant effects identified in the EIR. (My May 16, 2022 post on that earlier case can be found *here*.)

Only about 16 pages of the Court's 44-page slip opinion were ordered published; only those parts will be discussed in any detail here. The opinion's published portions rejected a number of Appellants' claims, but also held that County violated CEQA because (1) the EIR's project objectives were too narrowly stated and (2) County failed to recirculate the EIR's climate change section in light of significant new information contained in the FEIR showing the project's GHG emissions would be orders of magnitude higher than the DEIR disclosed. (Numerous of Appellants' other CEQA claims and their general plan consistency claims were rejected in the unpublished portion of the opinion.)

Background

Crystal Geyser bought a water bottling facility that had operated from 2001 to 2010 in Siskiyou County and sought to revive it. To do so, it needed, among other approvals (including the aforementioned City of Shasta wastewater permit), a permit from the County to build a caretaker's residence. The County, as lead agency, prepared and certified an EIR before granting that approval (with a statement of overriding considerations) and Appellants then judicially challenged it on numerous CEQA and general plan consistency grounds. The trial court rejected all challenges. Appellants appealed, and the Court of Appeal found merit in two of their claims and reversed.

Issues Regarding Project Objectives

An EIR's project description must contain a statement of the project objectives, which the lead agency must use to help it develop a reasonable range of alternatives to evaluate in the EIR. (CEQA Guidelines, § 15124; *In re Bay-Delta, etc.* (2008) 43 Cal.4th 1143, 1175.) The EIR must describe alternatives to the project or to its location which would feasibly attain most of the basic objectives of the project but also avoid or substantially lessen any of its significant effects. (CEQA Guidelines, § 15126.6.)

Per the Court, County's EIR stated Crystal Geyser's eight project objectives as: (1) "operate a beverage bottling facility and ancillary uses to meet increasing demand," (2) "site the proposed facility at the Plant previously operated . . . to take advantage of the existing building, production well, and availability . . . of existing spring water on the property"; (3) "utilize the full production capacity of the existing Plant"; (4) "initiate operation of the Plant as soon as possible to meet increasing market demand"; (5) "minimize environmental impacts . . . by utilizing existing facilities and infrastructure to the extent possible," (6) "modify the existing facilities at the Plant in a manner that incorporates sustainable building and design practices, recycling efforts, and other conservation methods, in order to reduce water use," (7) "withdraw groundwater in a sustainable manner" that doesn't negatively impact nearby springs or wells, aquifers, or the environment, and (8) "create new employment opportunities for the local and nearby communities, promote sustainable economic development, provide for adequate services and infrastructure to support the project, and contribute to the County's tax base."

Appellants argued, and the Court agreed, that these objectives were "so narrow[ ] as to preclude any alternative other than the Project," which the Court noted was defined essentially as the operation of a bottling facility on the site formerly operated as a bottling plant. It found the stated objectives "mirror[ed] the proposed project itself" and complained that "if the principal project objective is simply pursuing the proposed project, then no alternative other than the proposed project would do. All competing reasonable alternatives would simply be defined out of consideration." Per the Court, "this artificially narrow approach for describing the project objectives . . . ensured that the results of [the EIR's] alternatives analysis would be a foregone conclusion" and "transformed the EIR's alternatives section . . . into an empty formality."

The Court found the error prejudicial because "the County effectively described the principal project objective as operating the project as proposed" and "as soon as possible," causing it to "dismissively reject[ ] anything other than the proposed project" and thus preventing informed decision making and public participation. (Citing *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 668, 671.) More specifically, the Court found that the too-narrow stated project objectives prejudiced County's consideration of the "no project" alternative, which it found infeasible based on the "unreasonably narrow" objectives, i.e., it would not create new employment, utilize full production capacity of the existing plant, etc. Accordingly, it held the County "will need to redo its analysis."

Issues Regarding EIR's Climate Change Analysis and Recirculation Requirements

The next EIR flaw found by the Court concerned its discussion and mitigation of climate change impacts. Specifically, the DEIR estimated that, even with mitigation, the project would have GHG emissions of 35,486 $MTCO_2e$ per year, which it concluded was a significant and unavoidable impact because it exceeded County's 10,000 $MTCO_2e$ threshold of significance. While the FEIR contained the same "significant impact" conclusion, it estimated a far different level of emissions – 61,281 $MTCO_2e$ per year – that was orders of magnitude greater than the DEIR estimated and disclosed.

The Court held the increased emissions estimate was "significant new information" requiring recirculation of the EIR's GHG discussion under CEQA (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5(a)) to allow the public a meaningful opportunity to comment on the substantially increased environmental impacts. The Court reasoned that the increase in the estimate of emissions of 25,795 $MTCO_2e$ per year – a figure that by itself was orders of magnitude higher than what the County considered as the threshold of significance (i.e., 10,000 $MTCO_2e$ per year) – could not be considered an insignificant detail, and the EIR's climate change discussion required recirculation. It rejected the County's argument that recirculation was not required because the FEIR's "significant-and-unavoidable" impact conclusion remained the same, comparing it to a hypothetical scenario where a DEIR recognizes a significant impact from the projected loss of one endangered animal, while the FEIR revises the loss estimate to extinction of the entire species.

The Court rejected Appellants' other attacks on the GHG analysis's calculations as speculative and unsupported by substantial evidence, and their attacks on certain GHG mitigation as relying on misrepresentations of the record and unsupported by the evidence or the law.

Conclusion and Implications

The Court obviously felt that the County and Crystal Geyser were "gaming" the alternatives analysis by setting forth "artificially narrow" project objectives that ruled out everything but the project, but to me the Court's analysis of this issue seems superficial, unsupported by the law or logic, and problematic. It seems to me that it should be a perfectly permissible underlying purpose of the Project to efficiently reuse and revitalize the existing, but dormant and defunct, bottling facility to the extent feasible. It doesn't seem to me that offsite alternatives would be particularly relevant or feasible given this permissible purpose; further, the stated objectives as set forth in the opinion wouldn't seem to preclude consideration of various onsite alternatives that could potentially reduce significant impacts in such areas as GHG emissions and water consumption. Moreover, again based on the opinion, it doesn't appear that Appellants or anyone else actually brought forward any environmentally superior project alternatives that would achieve most of Crystal Geyser's business and development objectives. Saying that the stated objectives skewed analysis of the "no project" alternative seems to me to be a rather slender legal reed upon which to support the Court's conclusion. Particularly for an opinion that the Court has decided to publish in relevant part, the Court's analysis on this issue is not very rigorous, as it fails to thoroughly discuss the relevant case law, including numerous cases that would appear to support upholding the Project objectives; and it relies almost wholly on a single case – *North Coast Rivers Alliance v. Kawamura*, *supra,* 243 Cal.App.4th 647, my January 9, 2016 post on which can be found *here* – which it also fails to sufficiently describe and analyze, and which in my opinion is completely distinguishable from the case before it.

The Court's GHG impacts discussion and recirculation holding appear to be more solidly grounded in the law, given the huge magnitude of the difference between the DEIR's initial GHG emissions estimate and

the FEIR's "substantially more severe" (CEQA Guidelines, § 15088.5 (a)(2)) emissions estimate, although it, too, lacks the kind of robust legal reasoning and case law analysis one would expect to see in a published CEQA opinion.

In conclusion, it is easy to see why the Court initially chose *not* to publish this opinion. There are already a lot of published CEQA cases, and unless new cases address and provide well-supported and well-reasoned guidance on important issues, they probably shouldn't be published. And so, it seems to me, that while the Court here belatedly decided to publish only a relatively small part of its opinion, it should have simply let it all remain unpublished.

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.