WATER DEVELOPMENT: A PUBLIC FORUM ON WATER AND LAND USE POLICY

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Today’s Overview/Roadmap

- Recent/Current Events Affecting California’s Water Supply Landscape

- Current Questions / Issues

- Fundamentals
  - Overview / Comparisons of UWMPs, WSAs and WV
  - Recent Court Decisions and Other Practical Considerations
Current Events Affecting California’s Water Supply Landscape

- FWS/Salazar; NMFS/Locke; QSA Cases; Longfin Smelt; Other Listing Issues and Litigation; Drought Conditions; Water Quality Issues; DWR 2009 Draft SWP Delivery Reliability Report; Etc.

  - Real Effects (See, e.g., DWR Charts - 12/15/08)
  - Public Perception
  - Perception of Public Boards/Councils
  - Litigation Perspective
Current Questions / Issues (Examples)

- Do all these litigation and other factors affect my local water supply agency and its water supply analyses?
- What are the roles between water agencies, cities and counties in approving projects?
- When is a WSA and/or WV technically required for a project?
- Can the city/county “rely” on WSA in an EIR? What if facts change b/w adoption of the WSA and approval of the CEQA document?
- How does groundwater basin overdraft factor into these issues?
- Can a water agency simply refuse to adopt a WSA? Can it impose a shelf-life on a WSA?
“All Water Supply Analyses Are Not Created Equal”

- UWMPs / WSAs / WVs / CEQA – All Different Animals
- These different water supply analyses have different functions, different requirements, and different potential pitfalls
- Too often treated interchangeably and differences overlooked
- Do the differences really matter? (Absolutely)
Take-Home Message

• This is the Era of Full Disclosure
Has CEQA Set The Bar For Water Supply Analyses?

- Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412
  - Discuss, Analyze … Discuss, Analyze … Disclose … Disclose … Disclose …
Has CEQA Set The Bar For Water Supply Analyses?

• Vineyard (cont.)
  – CEQA case *discussing* SB 610 / SB 221 (WSA/WV not challenged; not at issue)
  – Water supply analysis cannot be limited to initial stages/years of the project (See *Stanislaus*)
  – Speculative sources and unrealistic allocations ("paper water") are insufficient bases for analysis (See *PCL; SCOPE; California Oak*)
  – Must analyze the reasonably foreseeable *environmental impacts* of supplying water to the project
  – Must address reliability/likelihood of supplies proving available
  – If supplies uncertain, must identify/analyze alternative sources & related impacts
  – Decision does *not* amend UWMP, WSA or WV requirements

• Do *Vineyard* requirements (i.e., impacts analysis, etc.) apply to UWMPs, WSAs WVs? Perhaps only in spirit.
Urban Water Management Plans (Overview)

- UWMPs are the backbone of water supply planning to ensure that adequate water supplies are available to serve existing and future demands.

- All cities, counties, water agencies and other special districts that provide water for municipal purposes to more than 3,000 customers or supply more than 3,000 acre-feet of water per year are “urban water suppliers” that must prepare an UWMP (Water Code § 10617.)
Urban Water Management Plans (Overview)

- UWMPs are due every five years and the next round are due in 2010 / 2011 (SB X7 issue)

- Specific procedures and timelines must be followed in preparing and adopting an UWMP, including public review, comment and hearing processes
Urban Water Management Plans (Overview)

- UWMPs require comprehensive data and analyses
  - 20-year supply and demand projections, demand management measures, groundwater supply assessment & other requirements (Water Code § 10631)
  - Water Shortage Contingency Analysis (Water Code § 10632)
  - Recycled Water Plan (Water Code § 10633)
  - Water Service Reliability Analysis (Water Code § 10635)
Urban Water Management Plans
(Overview)

• Recent factors affecting the availability and reliability of statewide, regional and local water supplies must be fully addressed in UWMPs
  – Drought conditions
  – Regulatory cutbacks to SWP, CVP and Colorado River supplies due to environmental and other constraints (as applicable)
  – Water quality restrictions and issues
  – Climate change
  – Etc., Etc.

• These and other developments will present serious challenges in preparing the next round of UWMPs and will require thorough analysis to meet standards set forth in the UWMP Act
Urban Water Management Plans
(Overview)

- Demand is the “other half of the battle” . . .

- Regional growth forecasts can play an important, if not predominant, role in the preparation of an UWMP

- These forecasts should be evaluated early-on in the UWMP process and closely coordinated with other growth analyses undertaken as part of any general plan, housing and infrastructure element, sustainable community standard, or other planning process
Urban Water Management Plans (Overview)

- UWMPs are subject to direct legal challenge against the water supply agency

- Court cases have shown that an UWMP can be invalidated for an agency’s failure to adequately describe all factors covering all aspects of providing water service

Urban Water Management Plans (Overview)

• UWMP Summary
  – Due dates (December 2010 vs. July 2011)
  – A rigorous approach is the wise approach
  – For reasons discussed above, the process of preparing UWMPs should begin now
What triggers preparation of a WSA?

- If City/County determines “project” as defined by Water Code section 10912 is subject to CEQA

  - Section 10912(a) sets forth seven categories of “projects”
  
  - “Project” may also exist where public water system has fewer that 5,000 service connections. (Water Code § 10912(b).)
WSAs: Nuts & Bolts (Procedure)

• Who prepares the WSA?

  – City/County must identify – at the time it determines whether EIR, ND or MND is required – the “public water system” that may provide water service to the project, and request that agency to prepare the WSA

  – Generally, “public water system” defined as a system for the provision of piped water to the public for human consumption that has 3,000 or more service connections

  – If City/County not able to identify any public water system that may supply water for the project (or if the City/County itself is the public water system), the City/County must prepare the WSA
WSAs: Nuts & Bolts (Procedure)

• What is the timing of a WSA?

  – WSA must be adopted by the governing body of the water supply agency at a regular or special meeting and submitted to the city or county w/in 90 days of receiving the request. (Water Code § 10910(g)(1).)

  – The water supply agency may request an extension of time not to exceed 30 days to prepare and adopt a WSA. (Water Code § 10910(g)(2).)

  – Failure to timely prepare, adopt and submit a WSA subjects the water supply agency to writ of mandamus. (Water Code § 10910(g)(3).)
WSAs: Nuts & Bolts (Procedure)

• How is a WSA utilized?

  – WSA must be submitted to the city or county and included in the CEQA document for the proposed project. (Water Code § 10911(b)-(c); see also Pub. Res. Code § 21151.9.)

  – If the WSA concludes water supplies are not or will not be sufficient under the SB 610 standard, the water agency must describe its plans for acquiring additional supplies needed to serve the project, setting forth measures being undertaken to acquire and develop those supplies. (Water Code § 10911(a).)

  – The city or county as lead agency makes the final determination based on the entire record whether water supplies are sufficient to serve the project in addition to existing and planned future uses. (Water Code § 10911(c); CW/N, below.) If water supplies found insufficient, that determination must be included in the findings, but city/county not required to disapprove the project.
WSAs: Nuts & Bolts (Substance)

- What must be included in a WSA?
  - Water Code section 10910 provides a detailed roadmap with specific requirements
  - Existing data and documentation (UWMPs, contracts, agreements, judgments, studies, reports, etc.) typically provide a starting point and framework
WSAs: Nuts & Bolts (Substance)

• Documenting Supply

  – Identify any existing water supply entitlements, water rights or water service contracts relevant to the identified water supply for the proposed project and describe quantities of water received in prior years pursuant thereto, based on specific information. (Water Code § 10910(d).)

  – Specific requirements for sources of supply that have not been received in prior years from the water supplier. (Water Code § 10910(e).)

  – Specific requirements if the water supply for the proposed project includes groundwater. (Water Code § 10910(f).)

  – Practical Issue: General standard v. particular sources for the project
WSAs: Nuts & Bolts (Substance)

- Documenting Demand
  - Projected demand associated with the proposed project
    - Water use factors: regional differences; local practices; conservation and water saving techniques and/or requirements; project design features
  - Existing demand
    - Current customers, system uses and losses; other factors may be considered (see DWR Guidebook, pp. 23, 31.)
    - May differentiate among different water sources utilized
  - Demands associated with planned future uses
    - WSAs frequently (if not universally) use projected demand associated with forecasted population increases
    - Did SB 610 establish/intend this standard? Maybe not …
WSAs Not Subject To Direct Legal Challenge


  - Petitioner challenged water district’s adoption of a WSA; District moved for judgment on the pleadings
  - Court held WSA must be challenged and reviewed as part of CEQA action (Exhaustion issues; WSA must be in DEIR)
  - Implications:
    - “Adequacy” of WSA falls into local/lead agency’s lap
    - Who’s the “expert” regarding water supply availability and reliability?
    - What to do upon receiving a WSA from the water agency?
    - What if facts change b/w issuance of WSA and CEQA approval?
Having Say In The WSA


  - Challenge against WSA adopted by City (as lead agency and retail water supplier) to assess sufficiency of groundwater for several projects

  - Court generally upheld CWIN decision – that challenge against a WSA must be brought as part of CEQA suit against adoption of the EIR

  - Court found that water supply agencies have broad discretion in analyzing the sufficiency of groundwater supplies for purposes of preparing a WSA under Water Code section 10910(f)
Courts Looking Behind The WSA

• Highland Springs Conf. & Training Center v. City of Banning (Riverside County Sup. Ct. Case No. RIC 460950) (January 2008)

  – CEQA case. Court invalidated EIR water supply analysis for moderately-sized project (1,453 residential units, school, park, etc.)

  – Court looked behind the WSA and critically reviewed supporting documentation (i.e., UWMP) relied upon in the WSA and CEQA analysis (see CWIN)

  – Implications:
    • Signals that local/lead agencies cannot take WSAs at face value
    • Communication with water agency and particularized knowledge of water supply issues are critical
Written Verifications (Overview)

• WVVs triggered by land use agency’s approval of a development agreement or tentative map that includes a “subdivision” – defined as 500 or more residential units (or 10% increase in connections if water agency serving less than 5,000 connections)

• Such approvals must be conditioned on obtaining a WV from the retail water agency that sufficient water supplies will be available

• Same general “sufficiency” standard as for WSAs
Written Verifications (Overview)

- Subtle differences in requirements for WVs as compared to WSAs

- WVs are not required to be incorporated into the CEQA document being prepared for the project

- Adequacy of WV subject to direct legal challenge upon being adopted by the water agency (Govt. Code § 66473.7(o))

- If WV makes insufficiency determination, lead agency still has the final say and finding on water supply issues (Govt. Code § 66473.7(b)(3))
Practical Issues

• Is a WSA technically required?
  – **Example:** 450-unit residential development in an area served by a water supplier with 2,500 service connections
    • Would not trigger the size threshold in 10912(a)(1)
    • Would not appear to constitute a “public water system” under 10912(c) even after serving the project
  – Do other project features trigger the catch-all definition of Section 10912(a)(7)?
  – Close calls …
  – CEQA’s independent requirements still apply
Other Practical Issues

- Sufficiency Standard for WSAs / WV
  - Whether the total projected water supplies available to the water provider during normal, single-dry, and multiple dry years during a 20-year projection will meet the projected demand of the proposed project in addition to existing and planned future uses
  - Total projected supplies available over next 20 yrs.
  - Existing and planned future uses
Other Practical Issues

• Total Projected Supplies Available Over the Next 20 Yrs.
  – SB 610 / SB 221 do not require “guaranteed” water supply for a project
    • Legislative History
    • Vineyard
      – EIR for land use plan not required to show the project is “definitely assured” water
      – Specificity increases from general to specific phases
      – Discuss, Analyze … Discuss, Analyze … Disclose … Disclose … Disclose …
Other Practical Issues

- *Existing and Planned Future Uses*
  - WSAs and WVs are not UWMPs
  - UWMP Act expressly requires population forecasts for demand planning
    - Wat. Code § 10631(a): “Describe the service area of the supplier, including current and projected population … [P]rojected population estimates shall be based upon data from the state, regional, or local service agency population projections … .”
  - WSAs / WVs do NOT have this requirement
  - Legislative Intent? First in time?
Other Practical Issues

• Existing and Planned Future Uses (cont.)
  – DWR Guidebook for Implementation of SB 610 and SB 221 (October 8, 2003)
    • “Planned future used may include … proposed developments that have a reserved (or entitlement to) future water supply and are considered to be moving towards construction. Proposed projects that are included in a general or specific plan need not be included if the lead agency determines that they are not likely to begin construction during the period under consideration.” (See p. 23.)
Other Practical Issues

• Existing and Planned Future Uses (cont.)
  – Cumulative impacts analysis under CEQA should encompass “past, present, and reasonably anticipated future projects.” (Pub. Res. Code § 21083(b); 14 Cal. Code Regs. § 15130(b)(1)(A).)
  – Laurel Heights Improvement Assn. of San Francisco, Inc. v. Regents of the Univ. of California (1988) 47 Cal.3d 376
    • EIR does not require discussion of future action “that is merely contemplated or a gleam in a planner’s eye.”
Water Conservation Programs

• Water agencies are authorized to adopt formal water conservation programs (Water Code § 375 et seq.)

• General procedures:
  – Hold a noticed public hearing
  – Publish notice of the hearing in newspaper of general circulation
  – Adopt a resolution or ordinance making appropriate findings of necessity
  – Publish the full resolution or ordinance within 10 days of adoption
Water Shortage Emergencies

• Water agencies are authorized to declare water shortage emergencies (Water Code § 350 et seq.)

• General standard: “The ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply of the distributor to the extent that there would be insufficient water for human consumption, sanitation and fire protection.”

• General procedures:
  – Hold a noticed public hearing
  – Publish notice of the hearing in newspaper of general circulation
  – Adopt regulations and restrictions governing water use
  – May establish “stages” of emergency and water use priorities and allocation methodologies
Back to Current Questions/Issues

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Water Supply Analyses in a Water Scarce California
For Additional Questions

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