

2007 CEQA Case Law Update

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**Cases Concerning
Environmental Impact Reports:
Definition of Project/
Whole of the Action**

Muzzy Ranch Co. v. Solano County

ALUC

(2007) 41 Cal. 4th 372

- Airport Land Use Plan is a “project” subject to CEQA
 - Displacement of development demand to other areas was a physical impact of the Plan that could be “reasonably anticipated.”
 - ALUP is a “project” because it can trump local land use planning authority
- ALUP entitled “common sense exemption” (Section 15061(b)(3))
 - ALUP incorporated existing general plan restrictions on housing so any potential displacement already caused by existing land use policies.

Tuolumne County Citizens v. Tuolumne County

(2007) 155 Cal. App.4th 1214

- Negative Declaration for a home improvement center
- Road realignment was a condition of project approval
- Neg Dec overturned for failure to consider realignment
- Court of Appeal relied heavily on early CEQA case *Plan for Arcadia, Inc. v. City of Arcadia* (1974) 42 Cal.App.3d 712 re: rule against “project chopping.”

Cases Concerning Environmental Impact Reports: Alternatives

Preservation Action Council v. City of San Jose (2006) 141 Cal.App.4th 1336

- Proposed large-scale home improvement store (Lowe's) would result in demolition of an historic resource
- EIR included a reduced-size project alternative to avoid demolition of the historic resource
- City rejected reduced-size alternative as infeasible on grounds it would place Lowe's at a "competitive disadvantage."
- EIR overturned for failing to adequately evaluate alternative
 - EIR did not discuss whether reduced-size alternative was consistent with Lowe's "small market" prototype
 - EIR did not compare reduced-size alternative to other home improvement stores in the area

Preservation Action Council v. City of San Jose (2006) 141 Cal.App.4th 1336

- City failed to make specific findings regarding the infeasibility of the reduced sized alternative
- Record did not contain substantial evidence supporting City's infeasibility finding
- City required to:
 - Revise Draft EIR to include adequate analysis of reduced-size alternative
 - Recirculate revised portion of amended Draft EIR
 - Include substantial evidence in the record regarding feasibility of reduced-size alternative

Uphold Our Heritage v. Town of Woodside (2007) 147 Cal.App.4th 587

- EIR for a single family residence that required demolition of an historic mansion
- Town Council issued findings that alternatives to demolition of historic property were infeasible due to:
 - cost of rehabilitating the mansion
 - inability to compel applicant (Steve Jobs) to preserve mansion

Uphold Our Heritage v. Town of Woodside (2007) 147 Cal.App.4th 587

- Findings rejected:
 - Feasibility of alternatives must be evaluated in the context of the proposed project
 - Evidence that rehabilitation would cost \$4.9 to \$10 million not sufficient to reject preservation alternatives without information on comparative cost of new construction
 - Lack of authority to compel rehabilitation was not evidence of legal infeasibility
- Affirms *Citizens of Goleta Valley v. Board of Sups.* (1998) 197 Cal.App.3d 1167
 - “that an alternative may be more or less profitable is not sufficient to show that the alternative is financially infeasible”

*In re Bay-Delta Programmatic
Environmental Impact Report
(2005) 133 Cal.App.4th 154*

- Decision currently under review by Supreme Court
- Court of Appeal overturned EIR for Cal-Fed Bay Delta water program on three grounds:
 - Did not look at a reasonable range of alternatives (failed to analyze an alternative that would export less water south)
 - Did not sufficiently evaluate impacts of proposed water diversions
 - Improperly deferred analysis of impacts of “environmental water account” to be used to bank excess water

Cases Concerning Environmental Impact Reports: Baseline/ Cumulative Impacts

*Communities for a Better Environment v.
SCAQMD*
(2007 Cal.App. LEXIS 2145)

- Challenge to SCAQMD's issuance of an air permit for a refinery project pursuant to a Negative Declaration
- An agency's determination of baseline emissions for a project must be based on actual existing emissions, rather than a facility's permitted potential to emit
- Existing permitted emissions granted subject to prior CEQA review may be used as a proper baseline

San Joaquin Raptor Center v. County of Merced

(2007) 149 Cal.App.4th 645

- EIR for the expansion of an existing aggregate mine
 - Court upheld use of permitted production of the mine as proper baseline, but baseline was not clearly stated in EIR, leading to improperly curtailed analysis of impacts
 - EIR also failed to analyze environmental impact the peak production possible from the expanded mine
 - EIR's mitigation for potential impacts to vernal pools overturned for improper deferral of identification of potential special status species in and around vernal pool areas.

*Eureka Citizens for Responsible
Government et al. v. City of Eureka*
(2007) 147 Cal.App.4th 357

- EIR for modifications to a permit that legalized an outdoor school playground on church property
- Key findings upholding the EIR:
 - Fact that EIR was prepared by counsel for applicants was not error as City conducted detailed review of draft EIR and applied its independent judgment to the work product
 - EIR not required to consider prior illegal activities on the site
 - CEQA requires that impacts be examined in light of the environment *as it exists when the project is approved*

*Eureka Citizens for Responsible
Government et al. v. City of Eureka*
(2007) 147 Cal.App.4th 357

- Disagreement among experts on noise impacts did not render EIR inadequate where record showed that City considered conflicting evidence and explained why it accepted one set of judgments over another
- No evidence in the record supported contention that the project would have impacts on the “historic character” of the neighborhood or aesthetic impacts
- Safety issues at playground were not CEQA issues - risk to users of playground equipments would not result in an environmental impact – just impact to playground users

Environmental Council of Sacramento
v. City of Sacramento
(2006) 142 Cal.App.4th 1018

- EIR for Natomas Habitat Conservation Plan
- Petitioners alleged that a “Joint Vision Memorandum of Understanding” between City and Sacramento County regarding land use in Natomas Basin was insufficiently evaluated in the EIR
- EIR upheld: “an environmental analysis now of the unspecified and uncertain development that might be approved in the future under the Joint Vision MOU was speculative, wasteful, and of little value to the consumers of the EIR.”

*Woodward Park Homeowners
Association v. City of Fresno
(2007) 149 Cal.App.4th 892*

- EIR for commercial/residential development on vacant land
- EIR overturned:
 - EIR improperly measured project's impacts against those of a hypothetical office park rather than against the true baseline condition – vacant land – and so created a misleading analysis of project impacts
 - Court rejected City's claim that it was not responsible for imposing a traffic impact fee to mitigate impacts to state highways given lack of nexus study by Caltrans

*Woodward Park Homeowners
Association v. City of Fresno*
(2007) 149 Cal.App.4th 892

- City's statement of overriding consideration found to be invalid as there was no basis in the record for the City's claim that proposed project had economic benefits superior to the project alternatives

Cases Concerning Environmental Impact Reports: Water Supply Analysis

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova
(2007) 40 Cal.4th 412

- Key Water Supply Principles:
 - EIR must present facts sufficient to allow evaluation of pros/cons of supplying needed water
 - EIR for a multi-year project cannot limit water supply analysis to the first few years of the project
 - Future water must bear a likelihood of proving available and EIR must address impact of obtaining water from these likely sources
 - Where future water is uncertain, EIR must discuss replacement sources. It is not adequate to limit development in event water is not available.

*Vineyard Area Citizens for Responsible
Growth, Inc. v. City of Rancho Cordova*
(2007) 40 Cal.4th 412

- Framework for Adequate Water Supply Analysis
 - Adequate Factual Record
 - Record must have internally consistent facts and accurate citation to all sources of information relied on
 - No Deferred Analysis
 - Must assume all phases of a project will be built and analyze providing water to the entire project
 - Acknowledge Level of Uncertainty
 - Disclose degree of uncertainty for each water supply source

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412

- Framework for Adequate Water Supply Analysis (cont'd)
 - Discuss Alternative Supplies
 - “where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources. . .”
 - Disclose All Significant Impacts
 - Including all reasonably foreseeable effects associated with each water source – including alternative water sources
 - Make Findings for Each Alternative Supply
 - CEQA findings regarding mitigation measures, infeasibility of mitigation, and overriding considerations for each alternative water supply source

SCOPE v. County of Los Angeles
(2007)

157 Cal.App.4th 149

- West Creek development of 2,545 housing units and 180,000 square feet of commercial space
- Recertified EIR's water supply analysis relied, in part, on 41,000 afy transfer between Kern and Castaic water agencies but disclosed that litigation concerning the Monterey Agreement could affected certainty of transfer, but concluded that this was "unlikely."

SCOPE v. County of Los Angeles
(2007)

157 Cal.App.4th 149

- Court held that West Creek EIR satisfied the third principle of *Vineyard* by demonstrating a reasonable likelihood that the 41,000 afy transfer water would be available.
- Court rejected contention that *Vineyard's* fourth principle required the EIR to identify replacement sources for the transfer water, finding that the transfer "will likely not be affected," and that, "per principle four" the Court can "confidently determine that the water will be available."

Cases Concerning Supplemental Environmental Impact Reports

*Mani Brothers Real Estate Group v.
City of Los Angeles*
(2007) 153 Cal. App.4th 1385

- Addendum evaluated approval of residential development on a redevelopment site approved for hotel/retail uses 16 years prior.
 - Addendum upheld in most respects on the basis that residential use would generally have reduced impacts to previously approved development
 - Supplemental EIR was required to consider potential impact of residential development's increased need for police services.
- Court criticized *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App. 1288 and reaffirmed that a lead agency's decision as to whether or not project changes constitute a "new project" is subject to review under the substantial evidence test.

2006 - 2007 CEQA Legislation

- AB 97 (2007) OPR Must Supply Guidelines for Feasible Mitigation of Greenhouse Gases
 - Public Resources Code section 21097(d)
 - OPR must prepare, develop and transmit to Resource Agency guidelines for the feasible mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions by July 1, 2009.
 - Resource Agency must certify and adopt guidelines by January 1, 2010 – however AB 97 is also repealed as of January 1, 2010 unless extended by statute.
 - Exempts environmental review documents not final by January 1, 2008 which pertain to certain transportation and flood prevention projects.

2006 - 2007 CEQA Legislation

- AB 1039 (2006) CEQA Exemptions and Master EIR Provisions for State Bond and Other Infrastructure Improvements:
 - Public Resource Code Section 21080.12
 - Exempts from CEQA the repair of critical levees of the Sacramento River Flood Control Project to meet standards of public health and safety, if the repair is within an existing levee footprint. This section has a sunset date of July 1, 2016.
 - Public Resource Code Section 21080.14
 - Exempts from CEQA five highway seismic retrofit projects; Caltrans as the lead agency must conduct public outreach, comply with standard construction practices including compliance with local air regulations, and use alternatives to conventional diesel fuel to the extent feasible.

2006 - 2007 CEQA Legislation

- AB 1039 (2006) CEQA Exemptions and Master EIR Provisions for State Bond and Other Infrastructure Improvements (Continued):
 - Public Resource Code Section 21080.16
 - Exempts from CEQA seismic retrofit projects on certain existing local bridges. Unlike the other AB 1039 exemptions, however, this exemption is expressly subject to the various exceptions set forth in Guideline 15300.2, which exceptions normally apply only to categorical exemptions. This section has a sunset date of January 1, 2011.
 - Public Resource Code Section 21157.7
 - Authorizes Caltrans to prepare a master EIR for a plan to improve regional segments of Highway 99.

2006 - 2007 CEQA Legislation

- AB 1387 (2006) No Override Required for Traffic Impacts of Some Residential Infill Projects
 - Public Resources Code Section 21081.2
 - Authorizes a lead agency to approve a residential project on an urban infill site without having to mitigate or make a finding of overriding consideration for significant impacts on traffic in an EIR if specific criteria are met.

2006 - 2007 CEQA Legislation

- AB 1814 (2006) Master EIR Authorized for School Project Plans
 - Public Resources Code Section 21157(a)(10)
 - A master EIR may be prepared for a plan for district projects to be undertaken by a school district that also complies with applicable school facilities requirements, such as those requirements found in the state's Education Code.
- SB 974 (2006) Repeal of Exemption for Rural Economic Development Infrastructure Panel Funding
 - Repealed exemption for any approval necessary for the funding of projects by the Rural Economic Development Infrastructure Panel. (Panel was abolished in 2003)

Climate Change

- No appellate case law considering the evaluation of climate change under CEQA
- Federal law likely to be cited - *Center for Biological Diversity v. National Highway Traffic Safety Administration*, Case No. 06-71891 (November 15, 2007)
 - 9th Circuit set aside the FONSI issued for NHTSA's new corporate average fuel economy standards for light trucks
 - Fuel economy standard found to be a "legally relevant cause" of cumulative greenhouse gas emissions
 - Impact of greenhouse gas emission was "precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."

Climate Change

- Two 2007 trial court opinions rejected claims that climate change should have been considered in supplemental EIRs.
 - *National Resources Defense Council v. Reclamation Board of the Resources Agency of California*
 - Climate change was not “new information” under Public Resources Code section 21166
 - Petitioners failed to present new information as to the specific effects of climate change on the project site
 - *American Canyon Community United for Responsible Growth v. City of American Canyon*
 - Climate change not “new information”
 - AB 32 was not “new information” pertaining to the project

Climate Change

- Trial court review of CEQA analysis of impact of climate change on water supply
 - *Santa Clarita Oak Conservancy v. City of Santa Clarita* (under appeal- decision possible in 2008)
 - Upheld supplemental EIR's determination that impact of climate change on future water supplies for project was too speculative to allow for a quantitative analysis.
 - EIR's determination was based on survey of technical reports, including reports from Department of Water Resources