

California Supreme Court Upholds CALFED's Bay-Delta Program EIS/EIR

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On June 5, 2008, the California Supreme Court issued an opinion upholding CALFED's Bay-Delta Program EIS/EIR against challenges under CEQA. (See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 2008 Cal. LEXIS 6737.) Most significant to developments relying on State Water Project water supplies, the California Supreme Court reversed the Court of Appeal's determination that the program EIS/EIR should have analyzed an alternative for reduced water exports from the Sacramento Bay-Delta ("Bay-Delta"). At a time when the courts have issued decisions forcing reduced pumping from the Bay-Delta, this stands as a positive decision that will allow CALFED to continue its development of programs to improve the reliability of those water supplies.

I. Background.

At issue in this decision was a program environmental impact report prepared by CALFED, an organization consisting of various state and federal agencies that has come together to address problems associated with the Bay-Delta region of California. CALFED's stated purpose is two-fold: to restore ecological health to the Bay-Delta, and to improve water management for beneficial uses of the Bay-Delta system. Because the Bay-Delta region has long

been the subject of controversy, litigation and legislative battles, an underlying goal of the CALFED program is to reduce conflicts among various interest groups by providing solutions for the Bay-Delta region that competing interests could support.

CALFED's mission was to prepare and execute a long-term comprehensive plan, referred to as the "CALFED Program," to achieve its purpose. CALFED developed a program environmental impact report ("PEIS/R") over several years, which was adopted by the CALFED agencies in July, 2000. The PEIS/R described the CALFED Program as "a general description of a range of actions that will be further refined, considered, and analyzed for site-specific environmental impacts as part of second- and third-tier environmental documents prior to making a decision to carry out these later actions." It identified four primary objectives:

"(1) Ecosystem Quality – Improve and increase aquatic and terrestrial habitats and improve ecological functions in the Bay-Delta to support sustainable populations of diverse and valuable plant and animal species;

(2) Water Supply – Reduce the mismatch between Bay-Delta water supplies and the current and projected beneficial uses dependent on the Bay-Delta system;

(3) Water Quality – Provide good water quality for all beneficial uses;

(4) Vulnerability of Delta Functions – Reduce the risk to land use and associated economic activities, water supply, infrastructure, and the ecosystem from catastrophic breaching of Delta levees.”

The PEIS/R was challenged by several petitioners in the Sacramento County Superior Court for failure to comply with CEQA requirements. The trial court disagreed with the petitioners and held the PEIS/R satisfied CEQA. Petitioners appealed, and the Court of Appeal reversed the trial court to hold that the PEIS/R was defective on three grounds: (1) it failed to analyze an alternative to the CALFED Program that would require reduced exports of Bay-Delta water; (2) it did not adequately discuss the environmental impacts of diverting water from various potential sources to meet the program’s goals, and (3) it failed to include sufficient detail regarding the Environmental Water Account.

II. Analysis.

A. Reduced Exports Alternative

The first issue examined by the Supreme Court was whether the PEIS/R was defective for failing to consider the alternative of planned reduction of water exports, or the “reduced exports” alternative. The parties challenging the PEIS/R argued that CALFED should have discussed the alternative of smaller water exports from the Bay-Delta region, because a reduced supply of water might ultimately result in smaller population growth. The Court of Appeal had agreed, and reasoned that CALFED, by simply assuming a given population and then examining methods to meet water demands of that population, missed an alternative that would ultimately lead to smaller population growth. While the Court of Appeal had admitted that the reduced exports alternative compromised CALFED’s primary objective to improve water supply reliability, it had held that the reduced exports alternative was still feasible, and

disagreed with CALFED’s assumption that an alternative must meet all program objectives to be considered feasible.

The California Supreme Court examined the CALFED’s twofold purpose of both restoring ecological health and improving water management for beneficial uses, along with CALFED’s emphasis in the PEIS/R on conflict avoidance. CALFED stated in the PEIS/R that because the Bay-Delta had been the center of controversy for decades, only alternatives that satisfy all competing interests should be considered. The PEIS/R reasoned that conflict avoidance could only be achieved if the four primary program objectives were addressed “concurrently” and in “an integrated manner.” By addressing all objectives, competing interests would support solutions, and the litigation and legislative battles that had come to mark the Delta region could be avoided.

Due to the PEIS/R’s emphasis on conflict avoidance, the California Supreme Court found that feasibility is “strongly linked” to achievement of each of the primary program objectives. It noted that during Phase I of the PEIS/R’s preparation, CALFED had analyzed the feasibility of a reduced export alternative by using a “demand reduction approach.” Following public comment, however, CALFED decided not to study the reduced export alternative because it was inconsistent with the program’s primary objective of water supply reliability. Alternatives underlying the demand reduction approach included alternatives that emphasized water use efficiency and de-emphasized or eliminated action to improve export water supplies and improve the adequacy of Bay-Delta water to meet outflow needs. While noting that water use efficiency is a significant part of the CALFED program, the PEIS/R concluded that it was not enough to achieve the water supply reliability objective, and that other alternatives, such as reducing or capping exports, would also contradict the water supply reliability objective.

Ultimately, the California Supreme Court held that CALFED had “properly exercised its discretion” by not including the reduced export alternative after determining that it was not feasible because it would compromise the primary objective of water supply reliability, and thus contradict the CALFED program’s fundamental purpose of conflict avoidance.

The parties objecting to the PEIS/R also argued that the reduced exports alternative could still meet the water supply reliability objective, by pointing to alternatives that would improve water supply reliability for certain beneficial users but not others. The Supreme Court disagreed, stating that if CALFED’s objective of water supply reliability was to apply to all beneficial uses, it cannot be deemed satisfied by an alternative that benefits only certain users and not others.

The Supreme Court also considered the Court of Appeal’s finding that the reduced export alternative should have been included in the PEIS/R because it might have been “environmentally superior” to other alternatives and thus would meet CALFED program objective to restore ecological health (and thus alleviate Bay-Delta’s current environmental issues). The Supreme Court disagreed, however, and said that the Court of Appeal had failed to distinguish between preexisting environmental issues and impacts generated by the CALFED program itself. The Supreme Court noted that impacts from a proposed project dictate the range of alternatives to be analyzed in an environmental impact report, not baseline conditions that would exist regardless of the CALFED program. CALFED did not have to consider alternatives that would merely alleviate preexisting environmental conditions.

To support its argument, the Court of Appeal had pointed to the adverse environmental impact associated with the CALFED program’s reference to dam construction to increase water storage facilities. The Supreme Court found that the PEIS/R included a reasonable range of

alternatives to reduce or avoid the adverse effects of dam construction to increase storage. Specifically, the Supreme Court noted that the PEIS/R considered each program alternative both with and without additional storage, and also considered a “no-additional-storage” alternative, which satisfied CEQA requirements.

The Supreme Court concluded by acknowledging that CALFED may indeed need to implement a reduced exports strategy in the future, if the CALFED program cannot otherwise simultaneously restore ecological health and maintain and possibly increase water exports. The Supreme Court noted that it was only holding that CALFED correctly followed the rule of reason (and thus did not abuse its discretion) by only considering alternatives that met both its program goals and its four primary objectives.

B. Water Source Identification

The Court of Appeal had also found the PEIS/R defective because it lacked detail regarding the sources of water that are necessary to execute the program, and failed to include an assessment of the impacts of supplying water from each identified potential source.

The Supreme Court disagreed on both points. The PEIS/R is a “first-tier, program” environmental impact report, as distinguished from a project environmental impact report, and CEQA does not require the inclusion of such analysis in a program environmental impact report. Rather, the identification of specific sources of water, as well as the impacts of obtaining water from such specific sources, should be analyzed in a second-tier, project-specific environmental impact report. The Supreme Court also noted that the PEIS/R identifies potential sources of water and discusses the associated environmental impacts in general terms.

The Supreme Court distinguished the precedent on which the Court of Appeal had relied as involving project-specific environmental impact reports that were found defective for failing to

identify specific sources of water and discussing the effects of using such water. The Supreme Court distinguished those cases from CALFED’s PEIS/R, however, because the CALFED program is “broad, general, multi-objective, policy-setting, geographically dispersed,” rather than projects involving identified sites with quantifiable water requirements. The Supreme Court focused on the fact that the CALFED program will be administered over a 30 year period and its direction will be dictated by supply and demand of future buyers and sellers. Potential water sources that may appear viable now could prove to be less so in future years. Given the nature of the CALFED program, including such analysis would be impracticable or speculative at this stage.

C. Environmental Water Account

The third issue before the court involved the Environmental Water Account (“EWA”), described as a “second-tier” project which permits state and federal governments to “acquire, bank, transfer and borrow water beyond that available through existing regulatory actions.”

Although the PEIS/R discussed the EWA in general terms, the Court of Appeal had found that the PEIS/R provided insufficient detail. The Court of Appeal had focused on the fact that additional, project-level details regarding the EWA were included in a separate “Action Framework” report, which was circulated shortly before the certification of the PEIS/R, but omitted from the PEIS/R. The Court of Appeal had held that such information should have been included in the PEIS/R.

The Supreme Court determined that the PEIS/R adequately discussed the impacts of the PEIS/R. Because the EWA was a second-tier project, the more detailed information contained in the Action Framework was only required to be included in the second-tier CEQA analysis for such a project. As a first-tier document, the PEIS/R was required to identify the environmental impacts of the mechanisms that will establish and develop the EWA (such as impacts of using water transfers and groundwater storage), but not to provide a “big picture” impact of EWA’s overall need for water acquisitions.



If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings lawyers:

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