

**SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL**

MINUTE ORDER

DATE: 07/30/2015

TIME: 02:50:00 PM

DEPT: C-71

JUDICIAL OFFICER PRESIDING: Gregory W Pollack

CLERK: Terry Ray

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT: L. Wilks

CASE NO: **37-2014-00013216-CU-JR-CTL** CASE INIT.DATE: 04/28/2014

CASE TITLE: **SAN DIEGO COASTKEEPER vs SAN DIEGO COUNTY WATER AUTHORITY [E-FILE]**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Judicial Review - Other

EVENT TYPE: Ex Parte

APPEARANCES

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 7/29/15 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

RULING AFTER ORAL ARGUMENT: The Court rules on petitioner San Diego Coastkeeper's (Petitioner) petition for writ of mandate as follows:

The Court's ruling will serve as the Court's Statement of Decision pursuant to California Rules of Court, rule 3.1590.

Petitioner is represented by Everett L. DeLano III and M. Dare DeLano of DeLano & DeLano.

Respondent San Diego County Water Authority's (Respondent) is represented by Mark J. Hattam and Kathryn D. Horning of Allen Matkins Leck Gamble Mallory & Natsis LLP and Daniel S. Hentschke, General Counsel of the San Diego Water Authority.

As a preliminary matter, the parties' requests for judicial notice are granted.

Petitioner challenges Respondent's decision, on March 27, 2014, to approve a Regional Water Facilities Optimization and Master Plan Update (Master Plan Update), Climate Action Plan (CAP) and Supplemental Program Environmental Impact Report (SPEIR). (Administrative Record (AR) 7926.)

The Court has reviewed the record in light of the parties' briefs, oral arguments and the applicable law and concludes the petition for writ of mandate should be denied for the reasons stated below.

Standard of Review. The substantial evidence test applies to the court's review of the agency's factual determinations. It means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines §15384(a); see *Laurel Heights Improvement Assn. of San Francisco, Inc. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 393 (hereafter *Laurel Heights I*.) It applies "to conclusions, findings, and determinations, and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions. (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.) All reasonable doubts must be resolved in favor of the agency's determination, and the court may not set aside the agency's decision even if the opposite conclusion is more reasonable. (*Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 572; *Laurel Heights I, supra.*) An agency's decisions are given substantial deference and are presumed correct; the petitioner bears the burden of proving the contrary. (*Cal. Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 613.)

Notably, the court in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898 (hereafter *Oakland Heritage Alliance*) stated that the substantial evidence standard applies to "conclusions, findings and determinations. It also applies to challenges to the *scope of an EIR's analysis of a topic, the methodology used for studying an impact* and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (Emphasis added.)

Climate Action Plan (CAP). Petitioner takes issue with Respondent's chosen methodology in preparing the CAP and the scope of the analysis in the 2013 Master Plan Update. Thus, pursuant to *Oakland Heritage Alliance*, the substantial evidence standard applies to this issue.

At the outset, Respondent correctly noted that there is no statute or regulation which states *how* an agency is supposed to analyze greenhouse gas (GHG) emissions. (Administrative Record (AR) 2691, Tab 7.) Here, Respondent utilized the Local Government Operations Protocol (LGOP), which was developed by the California Air Resources Board (CARB), to provide a "standardized set of guidelines to assist local governments in quantifying and reporting GHG emissions...." (AR 2698, Tab 7.)

The LGOP "recommends that local agencies define their boundary for emissions reporting by *operational control.*" A local government has operational control if it has the full authority to introduce and implement its operating policies at the operation." (AR 2699, Tab 7; AR 16797, Tab 5.) The LGOP recommends the use of a "scope" procedure by which emissions are placed into three categories or "scopes," as follows:

Scope 1: Direct GHG emissions by the agency.

Scope 2: Indirect emissions associated with the consumption of purchased or acquired electricity, steam, heating, or cooling (thus power purchases).

Scope 3: All other indirect emissions not in Scope 2. (AR 2700, Tab 7.)

Notably, the LGOP states that Scope 3 emissions include upstream production of materials and fuels (AR 16907, Tab 5) and that the reporting of such emissions is optional (AR 16807-08, Tab 5). Here, Petitioner argued that Respondent was *required* to report the GHG emissions of entities e.g., Carlsbad

Desalination Facility, who vend water to Respondent. (Moving Papers, pp. 11, 13.) However, the record indicates that Respondent acted in accordance with the above-noted guidelines set forth in the LGOP (AR 16797, Tab 5) and explicitly informed all interested parties that it did not include activities over which it had no operational control in the CAP based on its understanding of the LGOP guidelines (AR 2956, Tab 8).

As to the federal U.S. Community Protocol (USCP), a local agency has no obligation to comply with it. (Petitioner's Request for Judicial Notice, Exh. 1 (USCP), pp. 7, 10.) In fact, the USCP encourages local agencies to follow their own protocols. (*Id.*, at Exh. 1, p. 49.) This is what Respondent did in this case. In addition, like the LGOP, the USCP states that product sources are Scope 3, not Scope 2. (*Id.*, at Exh. 1, p. 57.)

Finally, Petitioner argues that Respondent violated CEQA by failing to address impacts of embedded energy associated with water treatment, storage and delivery of the potential desalination plant in Camp Pendleton in its emissions analysis. However, the record indicates that this potential plant was just one of a list of possible long-term options. (AR 2618, Tab 6; See also AR 7622, 7639.) In addition, the Master Plan Update states that "no specific action is recommended to proceed with immediate development of the long-term projects." (AR 2669, Tab 6; See also AR 7617.) Petitioner's reference to Table 7-2 does not assist its position since Respondent clarified that it only set forth project options. (AR 2549.) Notably, the court in *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs* (2001) 91 Cal.App.4th 1344, 1362 stated that "the mere fact that a lead agency acknowledges that it contemplates such a long-range goal is not, by itself, sufficient to conclude that it is a 'reasonably foreseeable consequence of the initial project.'"

Under these circumstances, substantial evidence exists to support Respondent's decision not to include an emissions analysis for this potential project in Camp Pendleton.

In sum, substantial evidence in the record exists to support Respondent's actions. As a result, Petitioner's contention that Respondent failed to properly account for GHG emissions fails.

Baseline Analysis. A CEQA "baseline" serves as a comparison point in determining whether any adverse environmental impact from *the proposed project* will be significant. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447.) Here, the 2003 Final Program Environmental Impact Report (PEIR) determined that the CAP would have no significant adverse environmental impact since it included no construction activities or new facilities. (AR 3304, 3313, 3329, 3341, 3351, 3364, 3383, 3394, 3403, 3422, 3431, 3437, 3448, 3456; Tab 8.) Petitioner argues that the baseline Respondent used was incorrect because it failed to count the emissions of water vendors such as Poseidon and MWD. However, as noted above, the record indicates that this was not, in fact, the case and that Respondent complied with the requirements set forth in the LGOP. Moreover, the Court agrees with Respondent that this case does not involve a CEQA baseline for project impacts but was, instead, a study baseline for emissions inventory and GHG reduction planning.

In sum, substantial evidence in the record exists to support Respondent's actions as to this issue.

Alternatives. CEQA requires an EIR to contain an analysis of a reasonable range of alternatives that could feasibly attain the project's basis objectives while reducing or avoiding any significant impacts. (Pub. Res. Code, §21100(b)(4).) "The core of an EIR is the mitigation and alternatives section.... 'The purpose of an [EIR] is to identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.'" (*Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52

Cal.3d 553, 564-565.)

Although Petitioner states that its argument is directed at the 2013 SPEIR, the state of the record indicates that it is really taking issue with the water supply decisions Respondent made via the 2003 Master Plan.

The 2003 Facilities Master Plan (2003 Master Plan) was designed to evaluate Respondent's ability to meet its mission through 2030 and serve as the roadmap for implementing major capital improvements needed to serve water demand. (AR 142, Tab 1.) The Master Plan addressed facilities needed for Respondent to meet its water reliability goals (*Ibid.*), and also examined potential new sources of water supply for Respondent (AR 144, Tab 1). It was accompanied by a PEIR. (AR 432-1198, Tab 2.) In accordance with CEQA Guidelines section 15126.6 subd. (a), the 2003 Master Plan reviewed the region's projected water demand and analyzed various alternatives for supplying that demand, including Alternative 1, Conveyance from the North; Alternative 2, Conveyance from the West; Alternative 3, Conveyance from the East; and the No Project Alternative. Two additional alternatives, Increased Water Conservation and Increased Local Supply, were screened out for failing to meet certain criteria. (AR 912, Tab 2.)

The Master Plan Update did not change these decisions but, instead, added five new infrastructure projects, i.e., P3/P4 Conversion Project, System Isolation Valves, Regulatory System Storage, San Vicente 3rd Pump Drive and Power Supply, and Asset Management Program (AR 3264, 3267, 3269, 3270, Tab 8), which were not challenged by Petitioner. Because the SPEIR is a supplement to an earlier EIR, it cannot be attacked based on things Respondent did *not* alter. (See *Abatti v. Imperial Irr. Dist.* (2012) 205 Cal.App.4th 650, 676; *Temecula Band of Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425, 437; *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 543.) Finally, as noted above, the record indicates that the Camp Pendleton desalination plant is only one of a list of *possible* long-term options (AR 2618, Tab 6; See also AR 7622, 7639, 2565, Tab 6, and 2565, Tab 6) and that no immediate plans exist for its development (AR 2669, Tab 6; AR 3147, Tab 8). Furthermore, Respondent concluded that new supplies would not likely be needed. (AR 2617, Tab 6; AR 3203, Tab 8.) As a result, the record supports Respondent's conclusion that it was not required to analyze alternatives in the SPEIR. (AR 3210, Tab 8; See also AR 3249, Tab 8.)

In sum, substantial evidence in the record exists to support Respondent's actions as to this issue.

Mitigation. CEQA requires an EIR to identify and describe any feasible mitigation measures that can reduce or eliminate any significant impact. (Pub. Res. Code, §21100(b)(3).) Petitioner argues that Respondent failed to adopt adequate and enforceable mitigation because it relied on federal and state reductions, over which it has no control, in order to state that the CAP met emissions targets. (AR 3384, 3884.) However, in making this argument, Petitioner is again attempting to require Respondent to include emissions from upstream providers that fell within Scope 3, which Respondent is not required to do. In addition, Respondent states that the federal and state emission reductions are GHG reporting parameters, not CEQA mitigation. Finally, the record shows that Respondent properly accounted for the energy associated with the treatment, storage and transport of water within its operational control. (AR 2682, 2703, 2710, 2713, 2750, 2765, Tab 7.)

Thus, substantial evidence in the record exists to support Respondent's actions as to this issue.

IT IS SO ORDERED.



Judge Gregory W Pollack