

Decision 03-10-063 October 16, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Valencia Water Company
(U-342-W) Seeking Approval of its Updated
Water Management Program as Ordered in
Commission Resolution W-4254 dated
August 15, 1999.

Application 99-12-025
(Filed December 17, 1999)

**ORDER STAYING DECISION 01-11-048, IN PART AND DENYING
REHEARING OF DECISION 03-06-033**

I. SUMMARY

On July 7, 2003 Sierra Club applied for rehearing of Decision (D.) 03-06-033, arguing that rehearing should be granted because the Second District Court of Appeal recently invalidated the West Creek Environmental Impact Report (EIR), which was one of the EIRs that we relied on in a decision precedent to D.03-06-033, D.01-11-048.¹ We have carefully considered each argument presented by Sierra Club and conclude that no ground for rehearing has been shown. While Sierra Club has failed to identify any legal error in our decision, we find, on our own motion, that we should stay D.01-11-048 insofar as it approves the West Creek EIR. This stay will be effective pending recertification of the West Creek EIR by the lead agency, Los Angeles County and resubmission of the West Creek EIR to the Commission.

¹ Sierra Club also applied for rehearing of D.01-11-048. The Commission hereby dismisses Sierra Club's application for rehearing of D.01-11-048 because it is out of time, pursuant to Public Utilities Code section 1731(b).

II. BACKGROUND

In D.03-06-033, we denied Sierra Club's Petition for Modification of D.01-11-048. In its Petition for Modification, Sierra Club argued that many of the facts upon which D.01-11-048 was based have changed or not come to pass, thereby affecting Valencia Water Company's (Valencia) ability to serve new customers. (D.03-06-033, p. 1.) In particular, Sierra Club requested that if we received notice that the West Creek EIR has been set aside, "that portion of Valencia's service area should be deleted" until recertification of the West Creek EIR. (Sierra Club's Petition for Modification, filed December 2, 2002, p. 4.) In denying Sierra Club's Petition for Modification, we stated that "it would serve no useful purpose to revisit Valencia's 1999 Water Management Project (WMP), since the Decision was based on the evidentiary record existing at the time [and that] [a] preferable approach is to look to Valencia's next WMP . . ." (D.03-06-033 at p.2.) We also found in D.03-06-033, that "Sierra Club's assertions regarding the West Creek EIR do not justify reopening this proceeding or modifying D.01-11-048." (D.03-06-033, p. 14, Finding of Fact 11.) At that point, the fact that the Court of Appeal invalidated the West Creek EIR was not in our record.

In D.01-11-048,² we approved Valencia's 1999 WMP and Advice Letters (ALs) 88 and 90, requesting permission to expand its service area. D.01-11-048 rejected County of Ventura's (Ventura) and Sierra Club's contention that we should assume the role of lead agency and issue an EIR on the WMP and all water supplies shown as available in the WMP before we address ALs 88 and 90.

² Ventura and Sierra Club applied for rehearing of D.01-11-048, challenging D.01-11-048 primarily on the grounds that the Commission erred in not acting as lead agency on the WMP, and therefore, the Commission failed to follow the requirements of the CEQA. The Commission denied Ventura's and Sierra Club's applications for rehearing of D.01-11-048 in D.02-04-002. Ventura and Sierra Club also filed petitions for writ of review of D.01-11-048 before the California Supreme Court, making identical arguments to their applications for rehearing. On June 19, 2002, the Court denied Ventura's and Sierra Club's petitions for writ of review.

In Application (A.) 99-12-025, Valencia sought approval of its updated WMP as ordered in Commission Resolution W-4154 dated August 5, 1999. Our approval of ALs 88 and 90 authorized Valencia to provide water service to the North Valencia 2, Mountain View, West Creek and Tesoro del Valle development projects. Under the particular circumstances of the proceeding, we decided that the California Environmental Quality Act³ (CEQA) should apply. We determined that the WMP combined with ALs 88 and 90 constituted a “Project” under the CEQA. The EIRs⁴ for these four development projects were previously certified by either Los Angeles County or the City of Santa Clarita acting as lead agency pursuant to CEQA. Therefore, we found it was unnecessary to duplicate the EIRs that had already been conducted by local lead agencies, and determined that our proper role on the Project was as a responsible agency. After considering the WMP in conjunction with ALs 88 and 90, we concluded that the WMP’s demonstration of available water supplies gave a sufficient margin of safety to allow Valencia to serve new customers as delineated in ALs 88 and 90.

Sierra Club argues in its Application for Rehearing of D.03-06-033 that rehearing should be granted because the Second District Court of Appeal of California recently invalidated the West Creek EIR, which was one of the EIRs we relied on in approving the Project in D.01-11-048.⁵ Sierra Club further contends that the court’s invalidation of the West Creek EIR also negates the validity of the North Valencia-2 EIR because the North Valencia-2 EIR purportedly relies on the same water availability table as that in the West Creek EIR. (App. for Rehearing, p. 3.) As a result of the court’s action, Sierra Club requests that we assume the role of lead agency under CEQA to review the WMP and ALs 88 and 90.

³ CEQA is found at California Public Resources Code, Division 13, § 21000, et seq.

⁴ Actually there were three EIRs and one mitigated declaration, but all four are hereafter collectively referred to as “EIRs.”

⁵ In D.03-06-033, we found that Sierra Club did not present sufficient evidence of problems regarding the West Creek EIR to justify reopening the proceeding.

III. DISCUSSION.

A. The Appellate Court Decision.

On February 27, 2003, the California Court of Appeal issued *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, 106 Cal. App. 4th 715, directing the trial court to issue a writ of mandate vacating the certification of the West Creek EIR and to retain jurisdiction until the Los Angeles County, the lead agency, certifies an EIR that complies with CEQA.⁶ The Court of Appeal found that the West Creek EIR was inadequate because: (1) it did not calculate or discuss the differences between entitlement and actual supply with respect to the State Water Project (SWP); (2) there were no estimates from SWP as to how much water it could have delivered in wet years and in periods of drought; and 3) it was not sufficient for the EIR to simply contain information submitted by the public and experts, but rather, a detailed analysis of the information was required. (*Santa Clarita Organization for Planning the Environment*, 106 Ca. App. 4th, p. 716, 721-724.) Thus, the appellate court made it clear that the West Creek EIR was insufficient for CEQA purposes.

AL 88, filed on March 20, 2000 sought to expand Valencia's service area to the North Valencia Annexation-2, which includes Tracts 44831, 52667 and 52111, and Mountain View Tracts 46564, 46564-04, 46564-05 and 52302. On September 19, 2000, Valencia filed AL 90, which included West Creek Tract # 52455 and Tesoro del Valle Tract #56144. It is the portion of AL 90 relating to West Creek Tract # 52455 that was the subject of the Court of Appeal's decision. Acting as a responsible agency, we relied, in part, on the West Creek EIR attached

⁶ In accordance with the Court of Appeals' Ruling, Judge James Brown of Santa Barbara Superior Court issued a Judgment Granting Peremptory Writ of Mandate. The Peremptory Writ of Mandate ordered the County of Los Angeles, lead agency on the West Creek EIR, to vacate and set aside the certification of that EIR, and ordered the lead agency to revise the water supply analysis in the EIR. Judge Brown also suspended all West Creek project activity that could have an adverse affect on the physical environment. (Judgment Granting Peremptory Writ of Mandate filed June 30, 2003 in the matter *Santa Clarita Organization for Planning the Environment v. County of Los Angeles*, Santa Barbara County Superior Court, Case No. 1043805, at 2:28-4:10.)

to AL 90 in deciding to approve the Project under CEQA in D.01-11-048. (D.01-11-048, pp. 13-20; 44, Ordering ¶ 2.) In D.03-06-033, we determined that Sierra Club did not present us with adequate evidence to justify changing our reliance on the West Creek EIR.

In its application for rehearing, Sierra Club has now brought the Court of Appeal decision to our attention. Because we relied on an EIR that the Court of Appeal has determined is insufficient for CEQA purposes, we will, on our own motion, stay that portion D.01-11-048 that approves the West Creek EIR until an updated West Creek EIR is certified by the lead agency, Los Angeles County. After certification by the lead agency, Valencia should file the updated West Creek EIR for our approval.

B. Sierra Club’s Assertion that the Commission Should Assume the Role of Lead Agency for CEQA Purposes.

Sierra Club also contends that we should assume the role of lead agency and prepare a subsequent EIR on Valencia’s WMP to “address and correct the deficiencies in the West Creek EIR and North Valencia-2 EIR . . .” (App. for Rehearing, p. 4.) Sierra Club’s argument that the Court of Appeal’s invalidation of the West Creek EIR necessarily invalidates the Valencia-2 EIR is untenable because Sierra Club did not challenge the North Valencia-2 EIR in court. Sierra Club’s argument concerning the West Creek EIR is flawed because there is already a lead agency on the West Creek EIR, as the Court of Appeal recognized in its decision. (*Santa Clarita Organization for Planning the Environment*, 106 Ca. App. 4th, p. 716.)

Moreover, we have repeatedly rejected Sierra Club’s request to be lead agency for purposes of CEQA review in this matter.⁷ We determined that the

⁷ The Commission rejected becoming the lead agency in the following decisions: D.01-11-048, Decision Approving WMP and Authorizing Service Area Expansion; D.02-04-002, Decision Denying Rehearing of D.01-11-048; D.03-06-033, Opinion Deny Petition for Modification of D.01-11-048; and Answer of Respondent Commission to Petitions for Writ of Review, Certiorari,

Project in this proceeding for CEQA purposes is the WMP in conjunction with ALs 88 and 90. (D.01-11-048 at 17.) Because the four projects at issue in ALs 88 and 90 received environmental review from other local agencies, we concluded that we would best fulfill our duties under CEQA as a responsible agency.⁸ (D.01-11-0148 at 13.) We reviewed the four EIRs and approved ALs 88 and 90 in compliance with our duties as a responsible agency.

Contrary to Sierra Club's position, the fact that the Court of Appeal invalidated the West Creek EIR because it determined that the analysis of water supplies was lacking does not signify that we committed legal error in acting as a responsible agency, rather than a lead agency, on the Project. The County of Los Angeles remains the lead agency on the West Creek EIR, and is responsible for correcting any deficiencies in the West Creek EIR per the Court of Appeal's decision. Therefore, our proper role on the Project, which includes the West Creek Development, remains that of a responsible agency.

IV. CONCLUSION

For the foregoing reasons, the Sierra Club's application for rehearing is denied and the D.01-11-048 is stayed insofar as it approves the West Creek EIR. This stay will remain in effect pending recertification of the West Creek EIR by the lead agency, and resubmission of the West Creek EIR to the Commission.

Mandamus, or Other Appropriate Relief filed by County of Ventura and Sierra Club (Case Nos. S105292, S105571; the California Supreme Court denied the Petitions for Writ of Review on June 19, 2002.)

⁸ A responsible agency as defined under the CEQA Guidelines, is a "public agency which proposes to carry out or approve a project, for which a lead agency is preparing or has prepared an EIR or negative declaration." (D.01-11-048 at 15 (citing 14 Cal. Regs. 15381).)

Therefore **IT IS ORDERED** that:

1. Rehearing of D.03-06-033 is hereby denied.
2. D.01-11-048 is stayed insofar as it approves the West Creek EIR. This stay is effective pending recertification of the West Creek EIR by the lead agency, and resubmission of the West Creek EIR to the Commission.
2. This proceeding shall remain open.

This order is effective today.

Dated October 16, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners

I dissent and I reserve the right to file
a dissent.

/s/ Loretta M. Lynch
Commissioner