

Proving Water Availability under SB610, SB221 and CEQA

September, 2009

R. Clark Morrison
Cox, Castle & Nicholson LLP

cmorrison@coxcastle.com
415/262-5113



The Governing Laws

- CEQA (Pub. Res. Code 21000 *et seq.*
Vineyard Area Citizens decision)
- SB 610 (Water Code 10910 *et seq.*)
- SB 221 (Gov't Code 66473.7)



What's to be Proved?

- CEQA – Availability of Near-Term and Long-Term Water Supplies
- SB 610/221 – Cumulative Sufficiency of Water Supplies; Over 20 Years; during Normal, Dry and Multiple-Dry Years



The Three CEQA Standards

- Basic *Substantial Evidence* Standard under CEQA
- The *Standard of Certainty* defined in Vineyard Area Citizens
- The *Stopgap Standard* defined in Vineyard Area Citizens



The “Likely Water” Standard

- Must “Bear a Likelihood” of Actually Proving Available
- Solutions cannot “Simply be Assumed”
- No “Speculative Sources” or “Unrealistic Allocations”



Stopgap Evidentiary Standard

- “Impossible to Confidently Determine” Availability?
- Then Evaluate “Possible” Replacement Sources; and
- Impose a Phasing Requirement;
- But Only if you’ve been “Sincere and Reasoned”



What's Not Needed under CEQA

- “Definite Assurances” through Signed Enforceable Agreements
- Already Built or Approved Treatment and Delivery Facilities
- Water Planning need not Far Outpace Land Use Planning



SB 610 Standard

- No Identified “Standard of Certainty”
- Only “Sources of Evidence” for WSA
- Lead Agency makes Final Determination based upon the Entire Record
- In the end, it’s all about Substantial Evidence



SB610 Evidentiary Sources

- UWMP
- Existing Entitlements, Rights, Contracts
- Contracts, Cap Programs, Permits and Approvals
- Other Systems Using Same Sources
- Detailed Groundwater Provisions
- Plans for Acquiring Additional Supplies



SB221 Standard

- “Proof” Required in Written Verification
- But what Level of Proof?
- If WSV Shows a Shortfall, the Lead Agency may nonetheless Find Sufficiency if Supported by Substantial Evidence (Again)



SB221 Evidentiary Sources

- 20-Year Historical Record
- Water Shortage Contingency Analyses
- Supply Reductions imposed by Provider
- “Reasonable” Other Supplies, including Reclaimed and Conservation, and CALFED
- UWMPs and WSAs
- SB610 Evidentiary Sources



The Vineyard Gloss

- Water Supplies must be identified with more specificity at each step as land use planning and water supply planning move forward from general phases to more specific phases
- But SB 610 “Plans and Estimates” must be replaced under SB221 with “Firm Assurances”



Developing Areas

- Who Gets Sued
- Evaluating Groundwater Supplies
- Climate Change
- Delta Litigation and BDCP