SUMMARY of BRIEFS for COUNTY CASE on Appeal of Crystal Geyser EIR

Introduction

This case is about the relevance and validity of the Environmental Impact Report (EIR) prepared by Siskiyou County (County) and paid for by Crystal Geyser (CG). The County/CG claimed that an EIR was not required because it claims "no authority" over groundwater extraction to supply bottling facilities. After a couple of years of opposing any environmental study at all, in 2015 CG realized it did indeed need an EIR so the Air Pollution Control District and the City could justify issuing discretionary air quality and wastewater permits. An EIR was thereby prepared by the County, ostensibly just for a caretaker's residence which (as it turns out) would have been uninhabitable because of toxic air contaminants. We Advocate Thorough Environmental Review (WATER) and the Winnemem Wintu Tribe (WWT) viewed the EIR as entirely inadequate in many scientifically and legally important areas and are co-petitioners in the case. A lower court in Yreka (Siskiyou County Superior Court, Judge Dixon, Aug. 29, 2019) decided against WATER and WWT, without judging the details of the EIR itself. The case is now in state Appellate court.

The case paperwork consists of WATER and WWT's "opening brief", County/CG's "response", and WATER and WWT's "reply". Here, we briefly summarize the positions of each of these (color-coded as indicated) for each argument,

Must this project meet the standards of the California Environmental Quality Act (CEQA)?

WATER and WWT argue that the project is ill-defined since it proposes NO upper limit as to the quantity of water extraction, and would even allow transport of any amount of extracted ground water by truck in unlimited quantities to an off-site facility for processing and bottling elsewhere. WATER and WWT question why the County even lists itself as the "lead agency" if it claims no authority over the matter. Because there is no inherent limit to the project's size, the project description is thereby "not stable". [Explanatory note: "not stable" means it could be interpreted differently at different times by different parties. An "unstable" project description, if allowed, would be a significant weakening of CEQA cases statewide. Therefore, this case has a broader significance.]

The County/CG claims that the County, by its own ordinance, has no authority over water extraction for bottlers, so they are “exempt from CEQA”. "Operation of the Plant is allowed by right under the Plant’s heavy industrial zoning designation.", so it is ministerial. The only discretionary issues are building permit for the caretaker's residence, a pH neutralization building, a wastewater permit from the City, and a County Air Pollution Control District permit for the operation of three propane generators and four boilers. In any case, the EIR properly concluded that there would be no significant impacts from the water extraction and bottling activities, so no CEQA-consistent mitigations would be required. The County and CG believe that the court should not "pass upon the correctness of the EIR’s environmental conclusions, but only upon its sufficiency as an informative document." They claim that the EIR was done by experts so it should be validated. They do not recognize that any issues were essentially left unexplored.

WATER and WWT point out that if the plant is ever expanded to three production lines, the County would still consider the environmental approval at that time to be ministerial, and not within their discretionary power, so there would still be no permitting obstacle to unlimited extraction. CA law allows Counties to regulate groundwater; Siskiyou has merely chosen to not do so except in narrowly-defined mandated SGMA groundwater basins (which do not include the water sources for the CG plant).

Have alternatives been considered (as would be required by CEQA)?

WATER and WWT argue that alternatives were not seriously considered, including the most obvious, which is to set an upper limit on allowable extraction, (presumably, an upper limit projected to leave the local water supply undepleted and undamaged). The project "goal" was so narrowly defined (to allow CG to meet market demand and be profitable) that it necessarily conflicts with the County "goals" (to collect taxes and create jobs), except by approving the project as is. In other words, no room for viable alternatives was allowed. So downsizing, limiting water intake, other industries, etc. were not even considered.

County/CG argues that the objectives were identified and used to evaluate the Project based on the specific characteristics of the Project site, not to unnecessarily foreclose the alternatives to the Project. The Project objectives demonstrate that other Project alternatives do not offer feasible solutions to the Project's "goals".

WATER and WWT argue that the EIR by law must contain a reasonable range of feasible alternatives, even if they (except the favored one) are rejected. But the three alternatives that were actually listed (no project, trucking terminal, limit to one bottling line) were chosen specifically to ensure that none of them are feasible in achieving any of the "goals".

Environmental impacts: aesthetics

WATER and WWT claim that the plant is an eyesore, noting that the plant is *the* dominant visual feature when looking over toward Mt. Shasta from the Eddies, Black Butte, or along the Pacific Crest Trail. Mitigations are left as optional and essentially unenforceable because the County denies any authority.

County/CG claims the aesthetic s existed prior to CG ownership ("baseline conditions"), even if some of those conditions were the result of ignoring the 1998 Mitigation Agreement by a previous owner Danone with the County. The EIR was not required to analyze the aesthetic impacts of the pre-existing Plant. In addition, the plant is not the most prominent feature in the larger landscape: "Other visual features are more prominent than the plant building, including the mountainous terrain and snowcapped mountains surrounding the City. "

WATER and WWT claim that The County itself found the Bottling Facility has a negative aesthetic impact when the County found that it required mitigation, as set forth in the 1998Mitigation Agreement. The County included compliance with the 1998 Mitigation Agreement as a condition on the CUP for the caretaker's residence, so why is the CG not held to that 1998 Mitigation Agreement for the overall project?

Environmental impacts: air quality

WATER and WWT claim that the EIR misestimates the number of trucks/day, and the type of trucks ("fleet" mix). Updated estimates and data were employed inconsistently and incorrectly, with poorly chosen thresholds of significance. The consequently quionable result thereby underestimates the risk to health (Health Risk Assessment, HRA), always modifying the data to bring it down to "less than significant", and incorrectly modifying which standards are applicable. The most relevant and recent data was not even used to calculate the HRA, with the excuse that it would take a whole day to do it.

County/CG argue that their estimates are correct, and in the case of "mobile source emissions", "CEQA does not require a quantitative threshold of significance; a qualitative threshold is sufficient ". If the HRA were re-analyzed with more current 2018 emissions factors, "the resulting diesel emissions would be at least 30% lower...", so re-running the program with updated data was not necessary. This issue is, in any event, a "battle of the experts", which is not to be decided in Appellate Court. The County is free to choose its methodology of evaluating data.

WATER and WWT argue that an agency may choose a methodology supported by substantial evidence but may not choose a methodology for the purpose of justifying a no-significance finding. With regard to the County/CG's attempt to apply no-threshold standard at all to mobile sources (i.e., anything is OK), a lead agency may not analyze an impact without using a threshold of significance, and the fact that another agency has not established a threshold does not excuse the County from this requirement. "A single day (spent rerunning the HRA program) to ensure the safety of the citizens near the Plant would be worth the time, and it certainly was required by CEQA and common decency."

Environmental impacts: greenhouse gas emissions (GHG)

WATER and WWT argue that GHG emissions would be significant, a fact even acknowledged by the EIR . However, the County erred in disclosing only a fraction of the estimated emissions in the draft EIR, and failed to recirculate the EIR when the radically new and increased estimates were included in the final EIR. In addition, GHG emissions produced elsewhere in the production of the plastic preforms used to make bottles should have been included, and they were not. Possible mitigations mentioned in the EIR are paltry. The County/CG "solution" is to purchase additional carbon offset credits, but that ignores local impacts.

County/CG argues that the Project is "not expected to significantly increase market demand for disposable beverage containers." The implied conclusion is that GHG will not be changed much whether or not the Plant operates. County/CG does not address the local GHG effect, but it may not be clear that this local vs global issue has any legal standing. Also, any GHG emission can/will be offset with the purchase of "carbon credits."

The GHG cost of the production of preforms can be easily estimated from known data, and this should have been included.

Environmental impacts: HVAC

WATER and WWT argue that the EIR greatly underestimates the amount of time that heating/cooling would operate.

County/CG says they revised the hours upward from 2 hours/day for 160 days to 18 hours a day for 182 days, but WATER did not acknowledge the change in their opening brief.

Environmental impacts: noise

WATER and WWT argue that the final EIR analysis picks and chooses from data in the draft EIR and from the revised noise study presented with the final EIR, and uses noise thresholds that have been superseded and are *not* the standard for the industry.

County/CG argues that adopting a different noise standard is just a difference of opinion about how to interpret data, and "the existence of differing opinions arising from the same pool of information is not a basis for finding an EIR to be inadequate."

WATER and WWT argue that "While a lead agency has discretion with respect to choose its analytical methodology, it may not rely on an inapplicable method to justify a no-significance finding."

Environmental impacts: hydrology

WATER and WWT argue that the EIR did not use any actual studies on the impacts of the proposed pumping at DEX-6 and the nearby domestic wells. Rather, it used inappropriate and outdated modeling based on overly short-term results of testing on the wrong wells, ignored the geologic specificity of the site in question. The County/CG did not answer the appropriate question in all of its wordage about hydrology: will industrial pumping at DEX6 adversely affect neighboring residential wells? The studies cited in the EIR and its appendices address the wrong wells at the wrong time of year and for the wrong testing period. There is no substantial evidence to support the County's conclusion of no significant impact to the groundwater aquifer. Previous owner Coca Cola demonstrated that trucking water from site-to-site is feasible and common: what is to stop them from loading up trucks and shipping the water elsewhere, and thereby exceeding the water extraction use by their own production lines? Anecdotal reports from neighbors say that Danone/CC pumping did indeed negatively affect their wells.

County argues that the tests outlined in the EIR appendices are indeed a sufficient basis for extrapolation to the DEX6/residential well pair. WATER is merely "speculating" about long-term effects. The PUMPIT model (used in the EIR), which assumes a single basin pool aquifer, is adequate because it will overestimate, not underestimate, drawdowns in more complicated aquifer systems. WATER's arguments about unlimited extraction are speculative because CG said clearly what is their "anticipated" use, and those numbers are believable. Anecdotal reports about problems with wells can be ignored because: "A lead agency may reject lay or non-expert criticism on an issue as long as its determination is supported by substantial evidence", and there is no documentation as to when the damage to wells occurred." County/CG also argue that their 2017 study contains important information on hydrology which WATER downplays or ignores.

WATER and WWT reiterate that, even with the 2017 study included, there has never been a study that directly evaluates the potential impacts on neighboring wells. Whether an oversimplified analysis based on PUMPIT over- or under-estimates drawdowns cannot be known without a greater knowledge of the aquifer structure. The main problem is the same as with all previous hydrology tests: neither the pumped well nor the observation wells are the same as or even close to the wells of interest. No hydrological studies have ever indicated that the subjects of the 2017 study (the Domestic Well and the various Crystal Geyser-property wells) do or do not share the same aquifer as the residential wells. Residential wells were not considered in the study. The 2017 study (very short-term) is useless in predicting whether the aquifer will be depleted (or not) over the long term.

Consistency with the General Plan

The Project will not be consistent with the surrounding land uses. It will be harmful to the citizens of both the County and the City, in violation of their respective General Plans, in particular regarding noise impacts. But no mitigation measures are discussed to align the Project better with the General Plan. The County even denies it has any enforcement powers, except for the Caretaker's Residence, which will not be built anyway.

The County/CG response is somewhat legalistic in tone. They argue that the Conditional Use Permit is subject to the General Plan for the Caretaker's residence. The County's conclusions that Plant operations and the CUP are consistent with the General Plan can only be overcome by showing an "abuse of discretion". For purposes of CEQA, however, an EIR is only required to identify and analyze any inconsistencies between the Project and the County's General Plan. The Draft EIR noted that Plant operations are a permitted use under the County's zoning for Light and Heavy Industrial. Because the Plant would not require a site rezone or General Plan amendment, the Draft EIR found that the Plant would not implicate any of the County's General Plan Land Use Policies, zoning code, or Woodland Productivity Overlay. The Draft EIR therefore properly concluded that Plant operations are consistent with the County's General Plan.

WATER and WWT argue that "consistency" of the caretaker's residence (and the plant in general) with zoning does not mean just consistency with the General Plan. Consistency goes beyond zoning, here in particular with respect to exceedance of mandatory noise thresholds.

Are mitigations enforceable?

The County argues that CG has "agreed" to the conditions of the CUP (which applies to the caretaker residence).

WATER and WWT argue that this is irrelevant because the caretaker's cabin is not habitable for full-time residence (as acknowledged in the EIR) and would therefore likely never be built. WATER argues that the denial of enforceability by the County is only a result of their own declaration that they have no authority. They are not forced to have no authority.