C091012 (related Case No. C090840)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

WE ADVOCATE THOROUGH ENVIRONMENTAL REVIEW, INC.; and WINNEMEM WINTU TRIBE
Plaintiffs/Appellants
v.

CITY OF MOUNT SHASTA; and CITY OF MOUNT SHASTA CITY COUNCIL,
Defendants/Respondents

CRYSTAL GEYSER WATER COMPANY, INC.
Real Party in Interest/Respondent

APPELLATE CASE NO. **C091012**
Siskiyou County Superior Court Case No. SCCV-CVPT-180531
Honorable Karen Dixon

PETITIONER/APPELLANTS' REPLY BRIEF

MARSHA A. BURCH (SBN 170298)
DONALD B. MOONEY (SBN153721)
Law Offices of Donald B. Mooney
417 Mace Blvd., Suite J-334
Davis, California 95618
Telephone: 530-758-2377

Attorneys for Plaintiffs/Appellants
We Advocate Thorough Environmental Review
and Winnemem Wintu Tribe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Codes and Statutes

INTRODUCTION

Respondents and Real Party in Interest (collectively "Respondents") begin their opposition brief by claiming that the shortcomings of the Environmental Impact Report ("EIR") prepared for the Crystal Geyser Water Company ("Crystal Geyser") bottling facility and relied upon by the City in issuing the Industrial Waste Discharge Permit for Crystal Geyser IWD-2018-01 ("IWDP" or "Permit") are "irrelevant" and that Appellants seek to "take a second bite at challenging the sufficiency of the Environmental Impact Report." *See* Respondents' and Crystal Geyser Water Company's Joint Opposition Brief ("RJB"), pp. 9-10.

The issue on appeal here is not whether Siskiyou County erred in certifying the EIR for the bottling facility. The issues are (1) whether the City erred in failing to make any CEQA findings and failing to adopt the mitigation measures applicable to the portions of the project within the City's scope of authority; and (2) whether the City erred in relying on the EIR's analysis of the impacts of wastewater disposal in light of the significant changes made to the draft IWDP considered in the EIR. *See* Appellants' Opening Brief ["AOB"], p. 22.

Respondents argue at length that the City is a responsible agency and has very limited authority, and limited responsibility, when it comes

to issuing an IWDP. The City claims that the construction work Crystal Geyser must do to *City property* in expanding the City sewer segments is not within the City's jurisdiction. RJB, p. 34. The City argues that it has no authority to place conditions on the work on the City sewer segments, but that other agencies, such as the California Department of Fish and Wildlife, may be able to place conditions on that work. *Id*. The City, much like Siskiyou County, claims that it has virtually no authority over activities within its jurisdiction when it comes to Crystal Geyser.

As set forth in Appellants' Opening Brief and this Reply, the City failed to make findings as required by law, failed to adopt mitigation measures that the City itself has jurisdiction over, and failed to disclose changes in the wastewater stream to the public and the decision makers.

The trial court's decision is in error and must be reversed.

STANDARD OF REVIEW

CEQA's dual standard of review applies. Respondents would like the Court to bypass the well-settled dual standard of review under CEQA and simply apply the substantial evidence standard to all of the City's actions. RJB, p. 88. Contrary to this assertion, a court will "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA

requirements,' while according "greater deference to the agency's substantive factual conclusions." *Banning Ranch v. City of Newport Beach* (2017) 2 Cal.5th 918, 935, citations omitted. Thus, when reviewing an agency's CEQA compliance, the "court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of the improper procedure or a dispute over the facts." *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; and *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515-16.

Citing one case from 1979 and another from 1993, Respondents argue that this issue is quite simple: courts just apply the substantial evidence test to anything a responsible agency does under CEQA. RJB, p. 18. Respondents are incorrect. While an agency's decision not to prepare subsequent or supplemental environmental review is subject to the substantial evidence standard (*Committee for Re-Evaluation of T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237, 1247), the other issues raised by Appellants are subject to the less deferential standard.

The following issues have been raised: (1) whether the City erred in failing to make any CEQA findings and failing to adopt the mitigation measures applicable to the portions of the project being approved by the

City; and (2) whether the City erred in relying on the EIR's analysis of the impacts of wastewater disposal in light of the significant changes made to the draft IWDP considered in the EIR.

Item 1 alleges procedural missteps and/or failure to include essential information, all subject to a de novo standard. Additionally, item 2 involves the City's failure to do any additional environmental review of the new wastewater constituents, but it also includes the claim that the City failed to disclose the information, which is a procedural issue. *See* AOB, pp. 21-22. The dual standard of review may not be ignored in this case.

ARGUMENT

A. Appellants' Opening Brief fairly characterizes the facts.

Respondents include their standard claim that the facts were not fairly characterized in the Opening Brief. Respondents provide no information regarding what was left out. RJB, pp. 23-24.

The Opening Brief contains pages of factual information, including citation to the City staff reports, discussion of reports and analysis by the City's experts, as well as the City's bases for responses to comments during the administrative process. *See* AOB, pp. 10-20.

B. The trial court erred in denying the request for judicial notice of two letters submitted to the City and acknowledged by the City Attorney.

Respondents continue to argue that two letters submitted to the City during the administrative process, and responded to by the City attorney in the record (AR 19783-19784) constitute "extra-record" evidence that is not subject to judicial notice. RJB, pp. 24-28.

The record reveals that the two letters (referred to as the "Burch Letters") were submitted to the City (dated February 23, 2018 and March 16, 2018, respectively), and the City attorney replied to the letters. AA 224-235 and 346-351;[1] and AR 19783-19784.[2] On March 20, 2018, the City Attorney submitted a memorandum to the City Manager regarding the "Crystal Geyser Waste Discharge Permit. AR 19783. The memorandum began as follows:

> An attorney representing the parties challenging the Siskiyou County EIR for the Crystal Geyser Project has sent two letters to the City regarding the waste water discharge permit. The first letter suggests that further environmental review is necessary on behalf of the City. The most recent letter suggests there were substantial differences between the discharge permit studied in the EIR and the one proposed to be issued by the City. AR 19783.

[1] References to the Appellants' Appendix are cited as "AA" [page number].
[2] References to the administrative record of proceedings are to "AR" and the page number.

Respondents' arguments regarding the Burch Letters went off track from the start, and the misstep is signaled by the citation to *Western States Petroleum Assn v. Superior Court* (1995) 9 Cal.4th 559 (*"Western States"*). RJB, p. 25. Respondents' argument is that the Burch Letters are "extra-record" evidence – that is, evidence outside the record – and do not fit any of the narrow circumstances of admissibility. RJB, p. 25.

Although *Western States* is well-settled law, Appellants were not seeking to include extra-record evidence in the record before the trial court, they were seeking to include *record evidence* that was inadvertently left out of the record – specifically documents that Public Resources Code ("PRC") Section 21167.6 mandates to *be* in the record.

When the Record of Proceedings was completed and certified by the City, the Burch Letters had inadvertently been left out, and Appellants requested that the trial court take judicial notice of the letters. AA 224-34 and 346-47. Reference to the fact that the letters were part of the record and had been left out was the only information the trial court (and Respondents) needed to understand that the missing record documents must be included in the record, but Respondents objected and argued that the trial court should feel free to take a punitive

stance and refuse to the admit the documents. *See* AA 322; *cf.* RJB, p. 28.

The letters fall within the scope of PRC section 21167.6(e)(6). "All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation." It is entirely unclear why Respondents insist that these letters are "extra-record" evidence despite the fact that they fall squarely within the "administrative record of proceedings" as that is defined by the Public Resources Code, and they were submitted to the City and responded to by the City Attorney during the CEQA administrative process.

Respondents make a "gotcha" argument claiming that because Appellants' counsel mistakenly left the two letters out of the record when it was compiled, the letters may not be evaluated as to whether they are properly part of the record under PRC section 21167.6(e)(6). RJB, p. 26. This argument makes no sense.

The administrative record of proceedings in a CEQA action is defined by PRC section 21167.6(e)(6), and that record is an official document of the agency, it is the record that is *required* to be maintained by the agency under the PRC and must be included in the record to ensure meaningful judicial review. *Golden Door Properties,*

LLC v. Superior Court of San Diego County (2020) 52 Cal.App.5th 837, 765, *as modified on denial of reh'g* (Aug. 25, 2020), *review denied* (Nov. 10, 2020).

Respondents continue to argue that Appellants have failed to show that the Burch Letters were "authored" or "considered by any public agency in any official action." RJB, p. 28. The Burch Letters were submitted during the City's CEQA review proceedings and the substance of the letters was responded to by the City attorney in an official memorandum to the City Manager. AR 19783-19784. In other words, the Burch Letters are part of the "official" CEQA record of proceedings. Respondents' assertions are without merit.

The Court need not reach Respondents' argument that the letters are not "relevant" to an issue in the action. RJB, p. 27. The Burch Letters are part of the official record and so are, by statute, relevant.

The contents of the administrative record are governed by subdivision (e) of section 21167.6, which includes two categories that cover the Burch Letters: "(6) All written comments received in response to, or in connection with, environmental documents prepared for the project, including responses to the notice of preparation… (7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this

division or with respect to the project." *Id.* at subsections (6) and (7). Inclusion of these documents into the record is mandatory. *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 63.

The letters are part of the record of proceedings, and therefore are "official" records of the City. There is no basis for Respondents' claim that a clerical error in compiling the record would allow the trial court to mete out the "punishment" of having mandatory record documents excluded. The trial court's ruling was in error and should be reversed.

C. The City erred in failing to make CEQA findings and adopt mitigation measures.

Respondents argue that the City had limited discretionary authority over the issuance of the Permit, stating "[t]he scope of the City's authority to permit industrial discharges is limited to the discharge of liquids to the City's sewer system and WWTP." RJB, p. 43. Respondents cite to the Mount Shasta Municipal Code ("Municipal Code"), claiming that the "City's Authority is Limited to Regulating Discharges Once they Enter the City's Sewer System." RJB, p. 43. The Municipal Code itself, however, states that Chapter 13.56 is intended to provide "adequate regulation of *sewer construction*, sewer use, and industrial wastewater discharges." AA 274, Section 13.56.010,

emphasis added. The items regulated include "sewer construction in areas within the City." *Id.* section 13.56.020. Municipal Code section 13.56.270(B) specifically provides that the City may include conditions in an industrial permit that "may be required to effectuate the purpose of this chapter." Thus, the argument that the City has no authority over Crystal Geyser's construction of the sewer segment expansion required for the Permit is incorrect.

Respondents discuss the many mitigation measures identified in the EIR to be implemented during construction of the sewer segment expansion work required by the Project and then conclude that the City was not required to include these measures in its approval of the Permit. *See* RJB, pp. 32- 33. Even though the Municipal Code provides that the City indeed has authority over construction work done to the sewer system, Respondents insist that the City is only required to consider liquids entering the sewer system and that other agencies such as the California Department of Fish and Wildlife might implement mitigation measures. *Id.*

The City's discretionary decision to issue the IWDP to Crystal Geyser did not simply allow Crystal Geyser to discharge liquids to the City Sewer System, the IWDP specifically *requires* that Crystal Geyser complete the off-site improvements to the City wastewater system as

described in the EIR. AR 19650 and AA 274. The EIR required several mitigation measures for the work to be done to improve the City's sewer collection system (Mitigation Measures 4.3-1, 4.3-2, S-4.3-1, S-4.3-2, S-4.3-3, S-4.4-2, and S-4.5-1 at AR 1940-1946) and the City not only failed to consider or discuss these measures, it failed to adopt the measures and include them in a mitigation and monitoring plan. AR 370-419.

While the EIR is prepared by the lead agency, "[t]he responsible agency must, however, issue its own findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or avoid significant environmental effects." *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201; PRC § 21081; and CEQA Guidelines § 15091 and 15096.

In this case, the mitigation measures applicable to the off-site sewer improvements required by the City's IWDP were not even mentioned by the City in its review and approval.

Respondents did not respond to the argument in the AOB that the City not only issued the IWDP but *also* authorized sewer facility improvements requiring construction. AOB, pp. 29-32; and AR 7992-996. It may be that Respondents ignored this issue raised in the AOB

because there is no argument to be made in response. The facts are that the City approval included requirements for construction work on the City's sewer system (City property), and the City is listed as an implementing agency with respect to a number of mitigation measures related to the sewer line construction. *See* AR 1945. It appears that on this occasion, the City simply wished to avoid any responsibility, and so referred to the County's approvals and chose not to make its own findings and formalize its responsibility over the mitigation measures.

This behavior by the City belies the position it has taken in the past. The City has exercised its authority over the sewer system in the past and acted as the lead agency in conjunction with *exactly the same sewer system improvements* it now claims are not within the "scope of its authority." AR 20100-107. In 2014, the City issued a Notice of Preparation ("NOP") of an EIR for the same sewer line improvements it approved in conjunction with issuing the IWDP. *See* AR 20100-107. The NOP stated that the "City owns easements along the entire length of the existing interceptor… . all replacement interceptor reaches will be installed within the existing easements. AR 20104. One of the project objectives cited by the City in 2014 was, in addition to accommodating Crystal Geyser, to "provide sufficient sewer system capacity to meet both current demands and planned growth in the service area and

provide facilities which are compatible with those facilities needed to provide ultimate sewer system capacity, to be identified in the City's future sewer master plan update." AR 20106. The sewer improvements the City is requiring of Crystal Geyser are clearly within the City's jurisdiction.

Respondents also make no response to the argument that the City is *actually identified* as one of the agencies that will be responsible for monitoring mitigation measure compliance for some of the mitigation measures. AOB, p. 30. This contradicts the City's argument that the sewer improvement work is beyond the City's scope of authority. AA 252-53. Mitigation Measure S-4.4-1 requires a work stoppage in the event cultural resources are discovered. AR 1944. If artifacts are found, the *City and County* planning departments shall be immediately notified, and the *City and County* will develop mitigation measures. AR 1945.

Mitigation Measure S-4.5-1 also requires participation by the City for implementation and monitoring. AR 1946. The erosion control plan ("ECP") for the off-site sewer improvement activities shall be "prepared and submitted to the City and County for review and approval for the proposed construction activity." AR 1946. The ECP shall be consistent with the City land development manual. *Id.*

The City argues that it was not required to make any written findings regarding the potential impacts and mitigation measures for the off-site sewer improvements because the improvements are outside of the scope of its authority, and because the EIR dealt with the impacts and mitigation somehow excusing the City from the task of making findings regarding its own sewer system. These arguments are not compelling in light of the fact that the City is responsible for the facilities it owns, and is even identified as having a role in implementation of the applicable mitigation measures, and is one of the responsible agencies identified in the mitigation monitoring and reporting plan.

The trial court erred when it determined that the City has no authority or responsibility with respect to the construction activities approved and required by the City to be completed on City property.

D. The City failed to disclose and adequately review the addition of three unanalyzed waste-streams in the final IWDP.

Appellants raise the issue of whether the City was required to disclose the addition of the three waste streams added to the final IWDP that had not be included in the EIR for review. *See* AOB, pp. 36-39.

Respondents do not address the fact that the new waste streams were not disclosed and explained to the public. Instead, Respondents

argue that the only issue before the City was whether additional environmental review would be required, noting that the City determined not to prepare any additional environmental review, and made the "finding" that there would be "no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods." RJB, pp. 16 and 30-31. The City, in fact, did not make findings related to the need for additional environmental review, as it did not address the issue at the time of the approval of the IWDP.

As set forth in Appellants' Opening Brief, the City believed that the waste-streams from the Bottling Facility project *pose a risk* to groundwater quality, and yet the City allowed three additional waste-streams to be included, and these three new items were vaguely identified. AR 20190; and *see* AOB, p. 28. With little discussion, and no CEQA findings, the City attorney simply concluded that this "new information" did not trigger the need for additional environmental review. AR 1982. In responses to comments, the City also provided conclusory statements that the Public Works Director has discretion and detrimental effects are not "anticipated" and that "an evaluation was conducted and the current permit reflects that evaluation." AR 20904.

Respondents now argue that the decision by the City Attorney was supported by substantial evidence (RJB, p. 20191), but the conclusive

comment that Respondents' consultant anticipates "having no problems" was never revealed to the public nor was it subject to any peer review or scrutiny by the public. Respondents cite to a memorandum prepared by PACE Engineering where the City's expert asserts that there will be "no problems." RJB, pp. 36-37 and AR 20190.

Respondents rely now upon the "expert opinion" it received from Crystal Geyser's consultant, but the City failed to disclose the information to the public, and failed to consider and make findings in order to support any conclusion in this regard. PRC §21081.

Whether an EIR "omit[s] essential information," or fails to address an issue, is a procedural issue subject to de novo review. *Banning Ranch, supra,* 2 Cal.4th at 935. In this case, the failure to even discuss the impacts associated with constituents that had not been included in the EIR's analysis equates to a failure to disclose essential information, and it was a prejudicial abuse of discretion.

CONCLUSION

The trial court erred in finding that the City met its obligations as a responsible agency simply by submitting comments to the lead agency on the Draft EIR. The City overlooked its obligation as a responsible agency to exercise its independent judgment, make CEQA findings, and

adopt the mitigation measures applicable to the portions of the project it was approving and has authority over.

As set forth in detail above, the City issued the IWDP with a *condition* requiring construction upgrades to the City's sewer infrastructure, including work on City property that will be part of the City's future capacity to accommodate existing connections and population growth within the City. The City is also responsible for implementation of some of the mitigation measures identified to reduce some of the effects of this construction. The City may not avoid its responsibilities as a responsible agency in this circumstance.

The City also added hazardous constituents to the IWDP's allowed waste streams that had never been analyzed in the EIR, then failed to disclose or review these waste streams in a way that would have satisfied CEQA's informational requirements. For the foregoing reasons, Appellants respectfully request that the trial court judgment be reversed.

DATED July 12, 2021

LAW OFFICES OF DONALD B. MOONEY

By /s/
Marsha A. Burch
Attorneys for Appellants
We Advocate Thorough Environmental Review and the Winnemem Wintu Tribe

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204(c))

I certify that this brief contains 3,558 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to produce this brief.

DATED: July 12, 2021

/s/
Marsha A. Burch

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 417 Mace Blvd, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On July 12, 2021, I served a true and correct copy of

PLAINTIFFS/APPELLANTS' REPLY BRIEF

X via TruFiling.

John S. Kenny
Kenny & Norine
1923 Court Street
Redding, CA 96001
jskenny@lawnorcal.com

Representing Respondents City of Mount Shasta and City of Mounty Shasta City Council

Barbara Brenner
Churchwell White, LLP
1414 K Street, 3rd Floor
Sacramento, CA 95914
barbara@churchwellwhite.com

Representing Respondents Crystal Geyser Water Company

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 12, 2021.

/s/
Donald B. Mooney