

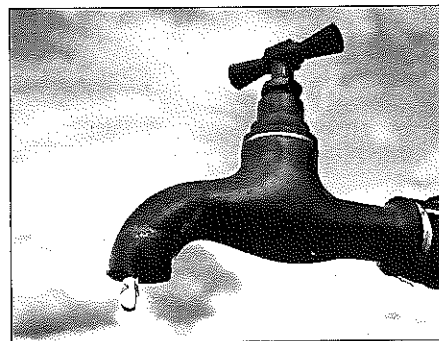
CEQA Protects Water Supply Reliability

By Roger B. Moore

The close and sometimes tortured relationship between water and land development has been a hallmark of California history since the state's inception. Yet until recently, the prevailing approach to that relationship was founded in a virtual secular faith in the ability of water to follow development wherever it may occur. Reinforcing that "Field of Dreams" approach to water supply reliability—"if you build it, the water will come"—the state's major water providers often responded with an unyielding optimism best captured by the familiar line from speeches of former Department of Water Resources Director Harvey Banks that "we must build now and ask questions later."

These declarations of faith helped shape much of California during the twentieth century. But they stood on a collision course with California's political, environmental, and hydrologic realities at the turn of the new millennium, which found the state's major water projects, many of its groundwater basins, and the Sacramento / San Joaquin Delta overextended and facing an unsustainable future. A series of challenges, ranging from the pressures of expanding population to the onset of climate change, have raised critical questions about the sustainable use of water and left the next generation of Californians with an urgent need to understand that which their forefathers simply assumed.

CEQA has been indispensable to recent efforts in California to move from faith-based development to an approach grounded in a more realistic appraisal of available water. Recent CEQA decisions and legislative changes have begun to usher in a new sense of realism about the reliability of water supplies. Once a footnote in CEQA jurisprudence, water supply reliability has now emerged as a central theme. Assessments of the water supply available to support devel-



opment decisions are germane to a wide range of CEQA issues, including the assessment and mitigation of environmental impacts, the analysis of growth inducement, the framing of the "no project" and project alternatives, and the definition of the appropriate lead agency.

A handful of CEQA decisions in the late twentieth century foreshadowed the transition toward greater realism in assessments of water supporting land uses. Inadequate water supply assessments led courts to demand a more rigorous environmental review of projects ranging from a major Kern County development in the

late 1970s to an Orange County mine in the 1980s. A mid-1990s court decision prevented Stanislaus County from approving a twenty-five year residential development project based upon present assessment of only just five years of water. In these CEQA cases, decision-makers were required to assess the environmental consequences of providing all water needed for the project, as well as the infrastructure needed to supply that water.

But even after California experienced prolonged drought in the late 1980s and early 1990s, the state's historic tendency to base development decisions on wishful thinking about water proved remarkably resilient. A dispute during the 1990s between the East Bay Municipal Utility District (EBMUD) and Contra Costa County over water supplies to support the controversial Dougherty Valley development project, although eventually settled, left little doubt that the reliability of California's water supplies closely related to statewide debates over sprawl and sustainable development. Researchers at EBMUD identified more than a hundred communities throughout California that had barely considered, or even ignored, water supply issues in approving new development.

These lingering questions, linking California's future in land and water, set the stage for the 2000 Sacramento appellate ruling in *Planning and Conservation League v. Department of Water Resources*

(DWR). After years of drought, Californians faced the grim reality that the State Water Project, which supplies some water to more than two-thirds of California's population, has historically been able to deliver only half or less of its total "entitlements" to water. Agricultural and urban water contractors disputed enforcement of the provision that would have required those entitlements to be brought in line with existing supplies based upon the system's long-term inability to meet full entitlement levels. Rather than making that adjustment, DWR met secretly with a select group of contractors in Monterey, California. The resulting "Monterey Agreement" gave rise to the most drastic contractual restructuring in the State Water Project's forty-five year history. Among other major contract revisions, it deleted the permanent shortage provision.

After five years of litigation, the *PCL* decision vindicated the role of CEQA in requiring responsible and accountable discussions of water reliability. The court affirmed that DWR, as CEQA "lead agency," must conduct the programmatic study of these amendments and could not delegate that task to a local agency. It also held that the permanent shortage provision could not be eliminated without DWR first studying the consequences of its enforcement. The court spoke bluntly about the "huge gap" between entitlements and existing supplies, connecting its holding to the risk of land-use planning decisions grounded in "paper water" rather than real, deliverable water. "Paper water," the court noted, was "always an illusion," steeped in the "unfulfilled dreams" of a water culture that had fostered an inflated

expectation of what could be reliably delivered.

Three developments since the *PCL* decision have bolstered hope for a new era of water realism. First, the settlement agreement in the *PCL* case deletes the term "entitlement" from key contract provisions, requires new statewide programmatic study, and requires biennial DWR reliability reports. Second, courts following *PCL* have invoked CEQA against the approval of sprawl development north of Los Angeles due to faulty reliance upon "paper water." Lastly, key legislative reforms have tightened the required nexus between water supply and development approval. These include SB 221, which requires land use agencies to verify a "sufficient water supply" before approving subdivisions exceeding 500 units; and SB 610, which requires water utilities to prepare detailed water supply assessments supporting local land use agencies' CEQA documents, and strengthens the state's Urban Water Management Plan law. These improvements are hardly a panacea against the powerful currents that marginalized the role of water in land use decisions for more than a century. But taken together, they offer promise that California's development future, unlike its past, will no longer rest on articles of faith.

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