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**Environmental Impact Report For Open-Air Human Waste Composting Facility Failed To Adequately Analyze Enclosed Alternative**

In *Center for Biological Diversity v. County of San Bernardino*, (--- Cal.Rptr.3d ----, Cal.App. 4 Dist., May 25, 2010), a court of appeal considered whether a trial court erred in decertifying an environmental impact report (“EIR”) because the EIR did not adequately analyze the feasibility of an alternative, an enclosed composting facility, and did not adequately address the issue of water supply for the proposed open-air human waste composting facility. The court of appeal held the trial court did not err in decertifying the EIR.

**Facts**

Nursery Products, LLC (“Nursery Products”) proposed to build an open-air human waste composting facility in an unincorporated area of San Bernardino County (“County”) that lies within the Mojave Desert. The Hawes Composting Facility (“Project”) would compost human waste and “green material” that has been derived from plants “to produce agricultural grade compost.” As proposed, Project would receive daily an average of 1,100 tons of raw material. The site for the proposed project is a 160-acre undeveloped parcel of land that has no utilities. The proposed facility would use cellular phone service, solar equipment, a portable diesel-fueled generator, and chemical toilets.

County prepared a draft EIR that indicated the Project would have a significant adverse impact on air quality. The draft EIR evaluated three project alternatives: (1) the no project alternative, (2) a reduced capacity alternative, and (3) an alternative site. The draft EIR found all three alternatives were potentially feasible; however, an enclosed composting facility was not included as a potential alternative. Although the EIR recognized that an enclosed facility would reduce emissions, the EIR concluded that an enclosed system would be very expensive, and therefore not feasible.

Objections were made to the EIR on the ground

that enclosed facilities have been shown to be effective in controlling emissions and that the EIR should have, but failed to, address building an enclosed facility on either the proposed site or close to the sewage treatment plants to reduce emissions from trucks transporting materials to the facility.

County issued a final EIR (“FEIR”) that rejected “the alternative of an enclosed facility as financially and technologically infeasible, and thus the alternative was not ‘evaluated in detail.’” The FEIR relied on a memorandum that compared an enclosed facility to this Project and determined it would cost an estimated \$83.3 million to build an enclosed facility for the Project. The memorandum also concluded that private financing would not be available for an enclosed composting facility. The FEIR repeats the memorandum’s statements as to economic infeasibility of an enclosed facility and also notes that there is no infrastructure at the site to construct a building large enough to contain an enclosed composting facility.

The draft EIR stated that the Project would use approximately 1,000 gallons of water per day, most of which would be used for dust control. The water would either be imported groundwater or come from a well. Many citizens voiced concerns about the cursory analysis of the water issue. In response, the FEIR stated, “Water for operations will be provided by an on-site well or be purchased and stored or a combination of both. The water will be stored in a water truck with a 2,000 gallon capacity. As necessary, the water truck will be filled using the on-site well and/or purchased water.”

County’s Planning Commission certified the FEIR. Helpinkley.org and the Center (collectively, “Center”) filed a petition for writ of mandate and a complaint against County in which they alleged violations of the California Environmental Quality Act (“CEQA”). The trial court ordered County to set aside the

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certification of the FEIR.

**Decision**

The court of appeal affirmed the order of the trial court. The court rejected Nursery Product's argument that the finding in the FEIR that an enclosed composting facility is economically and technically infeasible is supported by substantial evidence.

"Feasible" is defined by CEQA as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." That an alternative to the proposed project "may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible." Instead, "[w]hat is required is evidence that the *additional* costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." If "the cost of an alternative exceeds the cost of the proposed project, 'it is the magnitude of the difference that will determine the feasibility of the alternative.'"

The local agency is required to make the initial determination of whether an alternative is feasible. "If an alternative is identified as at least potentially feasible, an in-depth discussion is required." However, if it is readily apparent that an alternative is infeasible, the EIR need not extensively consider that alternative. Even if an alternative is rejected "the EIR must explain why each suggested alternative either does not satisfy the goals of the proposed project, does not offer substantial environmental advantages, or cannot be accomplished."

The court of appeal concluded the discussion of the infeasibility of an enclosed composting facility in the FEIR was "insufficient to allow informed decisionmaking." In regards to the economic aspect of the feasibility of an enclosed facility, the FEIR based the estimated cost on only one enclosed composting facility located in Rancho Cucamonga. Instead, the FEIR should have looked at other facilities in the area and throughout the country.

The FEIR also stated private financing would not be available, but included no facts or information to support the statement. The FEIR also does not contain any information that shows an enclosed facility is technologically infeasible other than a statement that there is no electricity at the site and no electrical lines within a mile. However, there is no indication that electricity cannot be supplied to the project site. The court of appeal concluded "substantial evidence does not support the FEIR's position that an enclosed facility is infeasible and unworthy of more in-depth consideration."

The court of appeal further found that a water supply assessment ("WSA") is required for the Project. A WSA is intended to help local government in deciding whether to approve a project. A project in this context includes a "proposed industrial, manufacturing, or *processing plant*, or industrial park planned to house more than 1,000 persons, *occupying more than 40 acres of land*, or having more than 650,000 square feet of floor area." The public water system that may provide water for a project prepares the WSA. If a city or county identifies no public water system, then the city or county must prepare the WSA. The WSA must include a discussion of whether the water supply will meet the projected water demand for the proposed project. If the water supply for the proposed project includes groundwater, the WSA must include information on the sufficiency of the groundwater supply.

Here, the FEIR did not include a WSA. The information included in the FEIR about the availability of water was "pure speculation." Although well water is listed as an option, there is no indication that a well has been drilled to determine the actual availability of ground water. Imported water was listed as another source, but the FEIR does not indicate the actual availability or source of the imported water.

Nursery Products asserted no WSA was required because the Project is not a project for WSA purposes. The court found Project is a "project" because it is a processing plant that will be located on more than 40 acres of land. Also, the fact that Project will not demand high

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amounts of water does not relieve it from the WSA requirement. Furthermore, a WSA is required for a project even if a public water system is not involved. Accordingly, the court of appeal concluded the FEIR was inadequate because it did not include a WSA.

**Questions**

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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