

### Impact of New Water Laws on Development in California

01.29.2002

Under new legislation which takes effect in January 2002, most large development projects in California will be required to comply with a new set of rules intended to assure that the adequacy of the water supply to serve the project has been addressed before the project wins approval. These new laws will require an increased effort to identify and assess the reliability of the anticipated water supplies, and envision an increased level of communication between municipal planning authorities and local water suppliers. The new laws also require additional documentation and set specific criteria in order to demonstrate the adequacy of the water supply. There is also the possibility, however, that the newly-legislated water supply assessment process may be used to delay or challenge project approvals.

The new "water management" legislation includes *Senate Bill 221*(Kuehl) and *Senate Bill 610*(Costa). Although SB-221 has attracted most of the attention, and criticism, because of its significant changes to the subdivision map process for large development projects, it is the less-noted SB-610 that is likely to impact a wider range of development projects.

SB-610 builds on Senator Costa's 1995 water supply legislation (then known as "SB-901") and recites a legislative intent to "strengthen the process" to assure that water supply issues are thoroughly considered as part of the environmental review process. Whereas SB-901 currently requires detailed water supply assessments only as to a narrow spectrum of major planning activities [such as general plan amendments or specific plans which require a full EIR and which result in increased density], new SB-610 will apply these water assessment requirements to a much-expanded range of land use planning and development actions. Under SB-610, if a city or county determines that *any* "project" (as broadly defined under the Water Code) is subject to the California Environmental Quality Act ("CEQA") it must comply with the water supply assessment procedure as detailed in Part 2.10 of the Water Code. This applies to residential projects of more than 500 units, and to specified commercial and industrial projects, or any project which would demand as much water as a 500 unit residential development. Thus any non-exempt project that requires any form of CEQA review must include a water supply assessment – containing specified information – from the local public water supply system(s) likely to provide water in the project area. Projects which were previously covered by a water supply assessment containing the detailed information described in the legislation may be exempt from further assessments. However, that exemption is not available if significant changes in the water demands of the project or the water supplies available to serve the project have occurred, or if new information regarding water availability has arisen.

For the broad range of projects which will now be subject to this regime, the statutory "water supply assessment" must be requested by the city or county considering the project from the local water provider at the time the city determines whether an EIR, a negative declaration or a mitigated negative declaration is required for the project under CEQA. The water agency must then provide the assessment within 90 days (but

may request a time extension under certain circumstances). The water supply assessment must include specific information as detailed in the legislation, including an identification of existing water supply entitlements and contracts. If groundwater is anticipated as a source of water, the assessment must contain additional information. The governing board of the water agency must approve the assessment at a public meeting.

The information from this water supply assessment must then be included in the CEQA document being considered by the city or county. It would therefore appear that if the water assessment is delayed, similar delays in the CEQA processing and certification for the project should be anticipated. SB-610 includes a provision for the city to bring a writ of mandamus action to compel the water agency to comply with its duties to timely prepare a water assessment, but does not specify what remedy an applicant may have if the city chooses not to compel action by the water supply agency. While SB-610 does not preclude approval of a project, regardless of the conclusions of the water assessment, it does require the city or county to make findings based on an evidentiary record as to whether there are sufficient water supplies to meet the project's anticipated water demands.

SB-221 takes a different approach and addresses the other end of the approval process. SB-221 creates a new requirement that cities and counties must impose a new condition of tentative subdivision map approval, requiring that a subdivider demonstrate that a sufficient water supply will be available to serve the subdivision before the final subdivision map can be approved. SB-221 initially targeted projects of 200 units or more, but was amended so that it will generally apply only to large subdivisions of 500 units or more, subject to two exemptions. Under SB-221, such large subdivisions will be required to produce proof of water availability in the form of a "written verification" from the applicable public water supplier.

This new obligation to prepare such a "written verification" of water availability prior to final map approval which is imposed on public water supply agencies by SB-221 is separate and distinct from the "water supply assessment" responsibility imposed by SB-610. The water agency is again required to provide its Verification within 90 days of the request under SB-221, and is required to include specific information. The Verification must be based on "substantial evidence" which may include the current Urban Water Management Plan ("UWMP"), a water supply assessment pursuant to SB-901 (or new SB-610, above), or "other information relating to the sufficiency of the water supply" (per Water Code § 10635). If the Verification relies on "projected" water supplies that are not currently available, then the Verification must include detailed information including the source of the new water, the financing for any capital outlays required, the securing of applicable federal, state and local permits for any necessary infrastructure to deliver the water, and "any necessary regulatory approvals." These requirements pose the potential for additional legal or regulatory challenges to delay or impede the issuance of the necessary Verification where projects look to new water sources to meet their demands. The legislative history of SB-221 includes indications, however, that a water agency should not be precluded from basing its Verification on projected new supplies even though some permits or approvals remain outstanding, so long as there is substantial evidence that it is reasonably likely that the water will be available at the time of construction of the project.

Conclusion: These new laws add several significant new hoops to the planning and development process in California, making the quest for reliable water supplies even more critical and challenging for property owners, developers, planners and local agencies. Critics have pointed out that the Legislature took no action to increase the state's overall water supply, and contend that SB-221 mandates its analysis of water supplies at the wrong end of the subdivision map process.

The detailed and lengthy provisions of SB-610 and SB-221 will need to be integrated into the existing complex processes of land use planning, environmental review, subdivision map processing, and urban water management planning. Uncertainties in the new laws and possible turbulence in the envisioned interaction between water providers and planning agencies will need to be carefully addressed. Providing and proving the water supplies necessary to meet the demands of development will continue to be a subject of increasing regulatory and legal scrutiny. The *Land Use and Natural Resources Practice Group* at SHEPPARD MULLIN provides a broad range of expertise and legal counsel in this area.

This publication is intended to be used for informational purposes only. The information published here is not intended to be legal advice for application to specific development projects. For specific legal advice you should contact legal counsel.

© 2002, Sheppard, Mullin, Richter & Hampton LLP.