

Agency's CEQA Analysis Must Consider the Project's Long-Term Impacts

The Third Appellate District's opinion in [North Coast Rivers Alliance v. A.G. Kawamura](#) (January 4, 2016) has left some practitioners scratching their heads trying to decipher the court's holdings regarding CEQA requirements for projects that might continue operating past their initial termination date, project objectives, alternatives and cumulative impacts. The California Department of Food and Agriculture prepared a program EIR for a seven-year program to eradicate the light brown apple moth, an invasive pest. The EIR determined that because an alternative of controlling the moth would not achieve the project objective of eradicating the moth, a control program would not be studied. After the EIR was completed the USDA advised that the moth infestation had spread to such an extent that eradication was no longer feasible. The Department then approved a seven-year control program, based on the program EIR, finding the control program would use the same methods as were proposed for the eradication program, but to a lesser degree, resulting in lesser impacts. The cities of Albany, Berkeley, Richmond and San Francisco, together with environmental organizations and anti-spray groups sued, challenging the Department's approval on CEQA grounds. The appellate court agreed with several of their claims. Fundamentally, the court found that the Department failed to evaluate the ongoing long-term impacts of the control program, in light of the EIR's concession that a control program "would have to go on forever." Because of these EIR statements, the court rejected the Department's argument that it would be speculative to assume the control program would continue after the initial seven-year period. As might be expected, the petitioners had argued that the Department's approach amounted to unlawful piecemeal review of the first stage of an activity that would continue to operate over an indefinite period of time, but the court did not rule on that ground. Somewhat surprisingly, it instead identified a CEQA violation due to the Department's reluctance to promise to prepare another EIR in the future. The court acknowledged that CEQA sometimes allows use of an earlier EIR for later activities, making it unnecessary to prepare a further EIR. The court, however, did not consider whether that rule could be applied to the control program, concluding that despite the possibility a new EIR might be prepared for the continuation of control activities after seven years, the EIR violated CEQA because it did not examine the impacts of those later activities. The court also held that the EIR failed to address a reasonable range of alternatives. It did not discuss whether the alternatives that were considered – amounting essentially to a menu of potential methods of eradicating the moth and a no project alternative – comprised too narrow a range. In a novel ruling, it concluded that CEQA required study of a specific alternative that might have greater impacts than the proposed project -- a never-ending control program. The court then discussed whether the failure to study this alternative amounted to prejudicial error. To assess prejudice, it impliedly raised a question whether recirculation was required to address the impacts of a control program alternative. It cited case law to the effect that recirculation is only required when new significant information is added after circulation of a Draft EIR. The court, however, concluded that the new information "was clearly significant," because it caused the Department "to change the program." The court labelled as "supposition" the Department's reasoning that a control program would have lower impacts than an eradication program because it would employ the same measures but to a lesser degree. Noting that the record "supports an opposing inference" because a control program would need to go on forever, the court concluded that the EIR's failure to study a control program left the record devoid of evidence to resolve the dispute. The court concluded that, as a result, there was no substantial evidence in the Department's record sufficient to support its determination the new information was not significant.

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