

A Legal Setback for Environmental Activists

Judge Rejects Demand To Halt Development In Sacramento-San Joaquin River Delta

By Dennis Pfaff
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SAN FRANCISCO — Environmentalists might have a tougher time than they anticipated in forcing planning authorities to consider climate change when they review development projects.

Last week, in what is believed to be the first legal test applying state environmental laws to the issue of global warming, a Sacramento Superior Court judge turned back a demand to halt a large housing development in the Sacramento-San Joaquin Delta until planners study the potential impact of global warming on the area.

Environmentalists had argued that enlargement of levees surrounding the site could cause problems in nearby areas, problems that would worsen if global warming raises water levels.

Judge Patrick Marlette, in a decision made final Friday, held that critics had not been specific enough in linking possible climate-change effects to the levee construction when they demanded further environmental reviews. He also suggested that the critics had raised the issue too late in the process.

Marlette's ruling comes during intensifying legal activity on the issue of climate change, which scientists have linked to pollution from cars, power plants and other sources.

Attorney General Jerry Brown has begun pressuring local and regional planners in California to account for the effects of global warming in writing their develop-



Photo courtesy of River Islands at Lathrop

New housing, shown in the upper right corner, is the Mossdale Village area of the River Islands at Lathrop development. Roughly 300 feet along the San Joaquin River Delta have been filled up to the levee height with material from a lake.

ment blueprints.

In this case, Marlette found that the environmentalists "have not demonstrated that significant new information has become available with regard to climate change and its effect on this particular project."

At the same time, Marlette called his ruling "a narrow one," and he wrote that it does not foreclose examining the effects of climate change under the California Environmental Quality Act.

"As the projected effects of climate change become clearer and can be related to specific sites, there is little doubt that those effects will have to be factored into the analysis of many projects under CEQA," Marlette wrote. "The present ruling in no way detracts from that reality."

An attorney for the developer hailed the outcome.

"I think what it indicates is that parties simply can't show up to court and just start singing the mantra of global warming and change the processing of an environmental impact report," said Steven Herum, of Stockton's Herum Crabtree Brown, who represented the project's developer.

However, it wasn't a complete victory for the developer.

Marlette ruled that the state Reclamation Board, which approved the permits at issue in the case, had not properly followed regulations governing flood control easements. One effect of the board's action would be to allow structures to be built on top of the levees, which is prohibited under state law unless an exception is granted, Marlette wrote.

Herum and an attorney for the environmentalists in the case split

on the impact of that part of the decision. Herum said it would not hold up the project, but Katherine Poole, a San Francisco lawyer for the Natural Resources Defense Council, said it could mean the permit would be rescinded.

Marlette's ruling on the climate-change issue raises questions about what information would be considered specific enough to trigger an analysis, Poole said.

"The difficult thing is, What in fact do you need to show?" she said. Poole said the evidence cited by the plaintiffs was "pretty specific for this geographic area."

Deborah Barnes, a deputy attorney general representing the Reclamation Board, said she did not read Marlette's ruling as requiring so much specificity that governments could never be required to analyze

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climate change. She said the judge focused on the fact that the information should have been brought up earlier in the process.

She said that, if the issue had been brought up when the city of Lathrop was preparing its environmental reviews of the project, "maybe less specificity would be necessary."

However, the plaintiffs targeted the Reclamation Board, a seven-member panel appointed by the governor that oversees flood control efforts along the Sacramento and San Joaquin rivers. The groups had wanted the board, housed in the state Resources Agency, to conduct its own environmental review of the levee project.

But Barnes said the board was obligated to rely on the city's analyses. She said that raised the legal threshold for requiring additional reviews.

Herum, the developer's lawyer, said the information relied on by the plaintiffs "was so doggone generalized I don't think it would have mattered when it was brought in."

The litigation created what could have been a delicate situation for Brown's office. While having to defend the board in this litigation, Brown is also in court trying to force local governments to include climate-change analyses in their long-term development plans.

An attorney for Brown, however, said there was no conflict between the cases.

The Sacramento lawsuit challenged permits issued by the board that governed filling in the area between two levees, effectively creating 300-foot-wide "super levees" and clearing the way for structures to be built on top of the berms. The levees are meant to shield a development known as River Islands at Lathrop, which would include 11,000 houses and 5 million feet of commercial space.

Among the concerns expressed by the critics was that strengthening the existing levee system for the development, making it less prone to failure, could indirectly threaten levees downstream. That's because water that might have poured through the breached levee now would go roaring downstream.

The environmentalists noted studies showing that climate change could produce more frequent and severe flooding in the Delta, which is also the heart of the state's water projects, serving millions of people.

Environmental studies "did not analyze the impacts of climate change in the Delta and how those changed circumstances would impact the River Islands project," the complaint argued.

As evidence, it cited documents and testimony produced by officials at the state Department of Water Resources, the California Environmental Protection Agency and the U.S. Environmental Protection Agency.

Marlette, however, said the con-

cept of climate change is "not really 'new information'" that required additional study. Officials could have known about the information when they prepared the most recent round of environmental documents in 2005, he wrote.

The judge noted that no one, including the environmentalists, raised the issue at the time.

Second, he found that the plaintiffs had not presented new information "regarding the specific effects that are to be expected in the area of the Delta where this project is being built."

Marlette wrote that the studies and papers the Natural Resources Defense Council cited contained only "generalized information" regarding possible effects on the state or the Delta as a whole.

Although he said that suggested a higher flood risk existed, Marlette concluded that wasn't enough to trigger a new review under the California Environmental Quality Act.

The environmentalists, he wrote, "have not presented any specific new information which would permit the increase in high-severity events to be quantified at this site, for this project, in a way that could lead to a conclusion that overall impacts of the project would be significantly increased as the result of climate change."

He also found little evidence to support the plaintiffs' theory that

strengthening the levees would threaten downstream developments.

Earlier this month, Brown sued San Bernardino County for failing to fully analyze and do something about the effects of global warming. *People v. County of San Bernardino* CIVSS700329. The attorney general also has sent letters to planners in other counties formally requesting them to include global warming in their development documents.

Private groups, including the Center for Biological Diversity have brought similar lawsuits. The organization last year sued the city of Banning in Riverside County Superior Court for failing to consider the effects of greenhouse gases coming from new homes and increased traffic generated by a new development. *Center for Biological Diversity v. City of Banning*, RIC460967.

Like Brown, that group and other environmental organizations recently sued San Bernardino County for failing to include climate-change analyses in its general plan. Deputy Attorney General Susan Durbin, who is working on Brown's San Bernardino case, said Marlette's ruling should have no effect on that litigation.

"The [River Islands] case was factually distinguishable from what we're doing in San Bernardino," Durbin said. "We do actually think about these things."