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First District Court of Appeal Rules that Responsible Agencies May Impose Mitigation Measures That Were Not Identified During CEQA Review of a Project

The First District Court of Appeal recently held that the California Environmental Quality Act ("CEQA") does not prevent responsible agencies from imposing mitigation requirements that are more stringent than those identified in a certified Environmental Impact Report ("EIR"). The holding came December 29, 2020, and the case is captioned *Santa Clara Valley Water Dist. v. San Francisco Bay Regional Water Quality Control Board* (A157127).

The action was filed by the Santa Clara Valley Water District to challenge Waste Discharge Requirements ("WDRs") that were imposed by the San Francisco Regional Water Quality Control Board ("Regional Board") for the construction of a Bay Area Rapid Transit station and flood control project adjacent to Berryessa Creek in Santa Clara County. The United States Army Corps of Engineers was responsible for design and construction and the District was acting as the project sponsor and lead agency for purposes of CEQA.

The facts leading up to the issuance of the WDRs are unique. The Regional Board was a responsible agency and submitted comments on the EIR, which determined that impacts to wetlands would be mitigated to a less-than-significant level. Following certification of the EIR, the Regional Board refused to issue its Section 401 Certification for the project until the District agreed to mitigation measures not identified in the EIR. Because the project was facing federal funding deadlines, the Regional Board agreed to issue a Section 401 Certification with the caveat that it would later issue WDRs to address impacts to wetlands attributable to the project's design, operation, and maintenance. One year later, the Regional Board issued a new Section 401 Certification for the project that rescinded and superseded the prior Certification and included WDRs which required the District to provide additional mitigation for impacts to wetlands.

The District challenged the new Section 401 Certification and WDRs on four separate grounds, all of which were dismissed by the Court. Two causes of actions alleged that the Regional Board had exceeded its authority under the Clean Water Act and the Porter Cologne Water Quality Control Act. The other two causes of actions were based on CEQA grounds and alleged that the Regional Board did not comply with CEQA in imposing new mitigation measures on the project. Of moment was the District's allegation that the Regional Board's failure to discharge its obligation to raise concerns regarding mitigation measures during preparation of the EIR, assume the lead agency role, or prepare a subsequent EIR prevented it from imposing new mitigation requirements in its later WDR order. The portions of the Court's decision that address this cause of action are discussed below.

At the heart of the Court's ruling regarding the Regional Board's role as a responsible agency is the determination that the "Legislature did not intend for the EIR process under CEQA to be used to defeat an agency's authority under other statutes." The Court's reasoning stemmed from its interpretation of Public Resources Code section 21174, which it describes as a "savings

clause." The Court's interpretation of section 21174 is guided by the holding in *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921) which interpreted a "virtually identical" savings clause in the Z'berg-Nejedly Forest Practice Act. *Pacific Lumber* rejected the contention that the approval process for timber harvesting plans displaced the Regional Board's authority under Porter-Cologne because the savings clause in the Forest Practice Act controlled the relationship between the two legal regimes. Based on the reasoning in *Pacific Lumber*, the Court ruled that CEQA savings clause in section 21176 does not prevent the Regional Board from fulfilling its independent obligation to enforce the Porter-Cologne Act, regardless of its role in the preparation of an EIR.

Missing from the Court's reasoning is a balancing of the Regional Board's separate requirement to comply with CEQA by engaging in the EIR process to evaluate its anticipated mitigation measures. Under section 15096(f) of the CEQA Guidelines, a responsible agency shall participate in the preparation of the EIR and must "consider the environmental effects of the project as shown in the EIR or negative declaration." Additionally, CEQA Guidelines section 15126.4 requires that an EIR consider and discuss mitigation measures proposed to minimize significant effects. Because the Regional Board's mitigation measures were never brought to light during preparation of the EIR, the Regional Board appears to have unnecessarily deviated from the requirements of CEQA. The Regional Board's authority to impose mitigation measures under Porter-Cologne is not inconsistent with its ability to comply with CEQA as a responsible agency by proposing mitigation measures for evaluation in an EIR.

The Court's ruling creates uncertainty as to extent to which responsible agencies can deviate from the requirements of CEQA when fulfilling their independent obligations under separate statutes such as Porter-Cologne. The Court dismisses amici curiae who "are concerned that the CEQA process will become a meaningless exercise if responsible agencies with authority to enforce environmental laws are permitted to impose additional environmental mitigation requirements on projects after CEQA review is complete." It states that these concerns are based on the "unwarranted assumption that government agencies will not discharge their CEQA responsibilities in good faith." For many CEQA practitioners who have experienced reluctant participation from responsible agencies during preparation of an EIR, these assurances from the Court may ring hollow.

If the Court's decision is not overruled or subject to depublication, then regulated parties conducting CEQA review in concert with responsible agencies will need to adopt new strategies to adapt to this ruling.

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