Glendening, Susan@Waterboards

From: Austin, Tamarin@Waterboards
Sent: Wednesday, July 13, 2016 2:18 PM
To: Rita Chan (rchan@valleywater.org); Peter Prows (pprows@briscoelaw.net)
Cc: Glendening, Susan@Waterboards; Lichten, Keith@Waterboards; Hurley, Bill@Waterboards; Whyte, Dyan@Waterboards
Subject: Upper Berryessa Legal Discussion

Rita and Peter,

Thanks again for your call this past week. The following is intended to address the issues you raised in our call.

1. You contend that because the Regional Water Board has already issued the 401 Water Quality Certification (WQC), and because the WQC states that the project complies with the Clean Water Act, there is nothing left to mitigate, so the WDRs should not contain provisions concerning mitigation.

The WQC, however, explicitly directs that mitigation would be deferred to the WDRs to be considered later this year:

> Mitigation necessary for future O&M activities is intended to be considered as a part of the WDRs for the Project to be brought before the Water Board later this year.

(WQC, at p. 6.)

> As noted elsewhere herein, the Water Board will also consider WDRs to address other needs for the Project, including the need to compensate for temporal and permanent losses of functions and values by the Project design and future O&M activities and to monitor vegetation establishment and success.

(WQC, at p. 10.)

> The EIR does not include necessary detail for long-term impacts and mitigation and impacts from O&M activities (see Finding I.E). The need for compensation of impacts from the Project design and future O&M will be addressed as a part of the WDRs for the Project to be brought before the Water Board later this year.

(WQC, at p. 10.)

An email from Keith Lichten to Melanie Richardson dated January 21, 2016, quite clearly states that the Board was issuing the WQC "fairly quickly" to accommodate the "tight construction schedule. The email goes on to state that the WDRs would necessarily "address aspects of the project in greater detail" including the need for "mitigation to address the project design issues."

The need for appropriate mitigation, and the intent to supplement the WQC with more comprehensive WDRs including mitigation provisions, has been an ongoing discussion item at numerous in-person meetings and in

correspondence, including the October 23, 2015, letter stating that the WQC application was incomplete, specifically noting that the application did not contain appropriate compensatory mitigation. An email from Susan Glendening to Amanda Cruz and others on December 29, 2015, details not only the Regional Water Board's requirement for mitigation, but also reflects that U.S. Fish & Wildlife Service had noted the failure of the Corps to appropriately mitigate the impacts of the project. The January 4, 2016, in-person and telephonic meeting reiterated issues related to mitigation. These are but a few examples.

2. You have raised the issue of a potential CEQA issue; if the Regional Water Board requires significant new mitigation, it must conduct environmental review, which it has not done.

The types of mitigation which may be acceptable for the Upper Berryessa project are in flux at this time. We agree that, depending upon what project the District ultimately proposes, additional environmental review may be necessary. On the other hand, there are many types of mitigation that were contemplated in the EIR or may be subject to a categorical exemption or a finding of no significant impact, which would not necessarily require substantial time or effort by the District to prepare CEQA documentation.
As I understand the facts, it is premature to say one way or the other what additional environmental review will be necessary.

The court's reasoning in *Laurel Heights Improvement Assn v. Regents of University of California*(1988) 47 Cal.3d 376, noted the chronology of when mitigation measures would ultimately be approved for a specific project:

> As a matter of logic, the EIR must be prepared before the decision to approve the project. Not until project approval does the agency determine whether to impose any mitigation measures on the project. (§ 21002.1, subd. (b).) One cannot be certain until then what the exact mitigation measures will be, much less whether and to what degree they will minimize environmental effects… The decision imposing mitigation measures, however, is not made, and cannot be made under CEQA, until after the EIR has been completed.

(*Id.* at pp. 401-402.) In the case of the Upper Berryessa project, the final project requirements under the WDRs continues to unfold through negotiations between Regional Water Board staff and the District; not to mention the Regional Water Board has the ultimate decision of whether to accept the draft order. As more details are known about the environmental impacts of any proposed mitigation measures, we will almost certainly revisit this topic.

3. You believe that the Regional Water Board is constrained from finding new impacts or identifying additional mitigation because the District is the CEQA lead agency and has certified that the project, as designed, causes no significant impacts.

In our conversation last week, Peter suggested that once a CEQA lead agency has adopted an EIR, the responsible agencies are bound by those findings and limited to the mitigation in the EIR. In that vein, Peter suggested that *Ogden Environmental Service v. City of San Diego* (S.D. Cal. 1988) 687 F.Supp. 1436, 1450-1452 supports that position. We respectfully disagree.

In *Ogden*, the issue was whether or not an EIR was required. The lead agency made the determination that an EIR was not required; a responsible agency (the City) believed that an EIR was necessary and denied approval of the project because there was no EIR. The court construed sections 15096, subdivision (e) and 15162 of the CEQA Guidelines, pertaining to the steps a responsible agency must take to challenge the lead agency's where

the responsible agency believes the final EIR or negative declaration is no adequate for use by the responsible agency.

More on point, the CEQA Guidelines explicitly contemplate that a responsible agency may require *additional* mitigation, and in fact imposes a duty to do so upon the responsible agency.

> When considering alternatives and mitigation measures, a responsible agency has responsibility for mitigating or avoiding the direct or indirect environmental effects of those parts of the project which it decides to approve.

(Cal. Code Regs., tit. 14, § 15096, subd. (g) (1).)

> When an EIR has been prepared for a project, the Responsible Agency *shall not approve the project as proposed* if the agency finds any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment.

(*Id.* at § 15096, subd. (g)(2) [emphasis added].) *Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1207 reiterates that a responsible agency has an independent duty to review the EIR and "issue *its own* findings regarding the feasibility of relevant mitigation measures or project alternatives that can substantially lessen or avoid significant environmental effects." (Emphasis added.) (Citing Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11th ed.2007) ch. III, subd. (B)(2), p. 53; Pub. Res. Code § 21081; and 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed.2008), § 3.22, p. 126.)

The Regional Water Board has been extremely vocal in identifying the shortcomings of the EIR as it pertains to biological and hydrological impacts and mitigation. The Regional Water Board sent a 93-page letter identifying deficiencies with the Draft EIR. (Letter from William Hurley to Santa Clara Valley Water District (Nov. 12, 2015).) With respect to mitigation, that letter noted:

- Inconsistencies related to sediment and vegetation maintenance activities and mitigations. (p. 2.)
- Mitigation for impacts on waters of the U.S. and waters of the State does not comply with the State and Regional Water Board policies. (p. 2.)
- [T]he DEIR does not adequately describe the potential post-Project impacts or mitigations necessary to address impacts for sediment removal maintenance activities. (p. 2.)
- Please revise the DEIR to include appropriate mitigation to compensate for both temporal and spatial losses in functions and values of the open water/aquatic vegetation and transitional vegetation. (p. 5.)
- The details [of the types, numbers, densities, and locations of vegetation plantings, and success criteria] would need to be further developed in a mitigation and monitoring plan. (p. 5.)
- Please revise the DEIR to recognize the Project reach's designated beneficial uses and a plan to appropriately mitigate any unavoidable impacts on the creek habitat, especially the REC-2 and WILD beneficial uses. (p. 5.)
- [T]he DEIR does not include any mitigation for this potential impact [of exposing the water table and resultant alterations in the creek's hydrology] on the post-Project hydrology. (p. 5.)

- The DEIR is well-organized, but it does not adequately describe the proposed Project's environmental impacts and associated mitigations. (p. 8.)

As described above, the Regional Water Board "*shall not"* approve the project as the District has proposed where, as here, the Regional Water Board has found feasible alternatives or mitigation measures within its powers that will substantially lessen or avoid significant effects. (Cal. Code Regs., tit. 14, § 15096, subd. (g)(2).) Finally, applying Peter's logic deprives section 15096, subdivision (g)(2) of all meaning. There is no requirement to sue or take any of the other actions under subdivision (e) before adopting feasible alternatives or mitigation measures under subdivision (g)(2).

4. You contend that Water Code 13270 restricts the Regional Water Board from issuing WDRs to the Corps for this project where, as you clarified in follow-up emails, the District is the equivalent of the "lessor" for purposes of that section, making its property available, by agreement, for use by another public agency.

Section 13270 states:

> Where a public agency … leases land for waste disposal purposes to any other public agency …, the provisions of Sections 13260, 13263, and 13264 shall not require the lessor public agency to file any waste discharge report for the subject waste disposal, and the regional board … shall not prescribe waste discharge requirements for the lessor public agency as to such land….

The State Board has provided useful guidance on this section in State Water Board Order WQ 90-3 (*San Diego Unified Port District*). In that Order, the State Board considered whether it was appropriate to name the Port District as a discharger on National Pollutant Discharge Elimination System (NPDES) permits held by various ports and boatyards. The State Board first noted that Water Code Section 13270 "supports the conclusion that it is appropriate to name non-operating landowners in waste discharge requirements." (*San Diego Unified Port District* at *4.) The State Board ultimately remanded the NPDES permits to the Regional Water Board with instructions to more clearly specify that the Port District was not responsible for monitoring or day-to-day operations, "or at most it should be held only secondarily liable for permit obligations." (*Id* at *4 and *5.)

Here, if the District is the "lessor," then, theoretically, you would be making the argument that the WDRs are not applicable to the *District*. As I understand the argument, however, you are suggesting that the Regional Water Board should not issue WDRs to the *Corps*. Under the facts of the Upper Berryessa project, the proposed WDRs contemplate terms and conditions pertaining to the capital project (for which both the Corps and the District have some responsibility) and ongoing operations and maintenance (O&M), for which the District is solely responsible. This is not a situation, like the *Port of San Diego*, where there is an entity who only holds title to the land, but is not actively involved in the discharge. Based upon the *Port of San Diego*, however, it would be appropriate to note that the O&M tasks are solely the District's responsibility. We can discuss that further on Friday if you would like that edit to the WDRs.

5. Finally, you have requested that the Regional Water Board remove any mention of mitigation from the WDRs, and consider approving some kind of "environmental enhancement project." Your request stems from restrictions on the availability of bond money and grants for "mitigation," where those monies could fund "environmental enhancement projects."

I spoke with Board staff this afternoon, and it sounds like this is an issue to address with the entire group at the meeting on Friday. I can, however, give you some foresight into my legal concerns. Normally we would want mitigation requirements to appear in the order to maximize and streamline the Regional Water Board's ability to enforce in the event of non-compliance. Additionally, to have such a significant project occur with no apparent mitigation is not a precedent I would recommend setting. Finally, I have concerns about having a 401 that defers mitigation to a WDR and then a WDR that is silent on the issue. It may be there is a pragmatic solution that addresses your concerns, staff's concerns and my concerns as well. I look forward to brainstorming with you further on Friday.

Thanks again for your time and detailed attention to these important issues.

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