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Can a Responsible Agency Get A Second Bite At The CEQA Apple? First District Says "Sometimes, Yes," Upholds Regional Water Board's Imposition of Additional Mitigation On Flood Control Project Through "Independent" Porter-Cologne Act Authority Exercised Subsequent To Grant Of CWA § 401 Water Quality Certification Based On Lead Agency's Unchallenged Final EIR

By Arthur F. Coon on January 6, 2021

In a published opinion filed December 29, 2020, the First District Court of Appeal affirmed a judgment denying a petition for writ of mandate filed by the Santa Clara Valley Water District (District) challenging waste discharge requirements (WDRs) belatedly imposed by a responsible agency, the San Francisco Bay Regional Water Quality Control Board (Board), on lead agency District's flood control project. *Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board* (2020) ___ Cal.App.5th ___. The case involved highly unique facts, and a number of interesting legal issues concerning the Board's authority under the Federal Clean Water Act (CWA), the state Porter-Cologne Act, and CEQA.

The key CEQA issue was whether the Board could validly impose additional wetlands mitigation requirements on the District through a WDR order, issued under its Porter-Cologne Act authority, long after it had issued a CWA § 401 water quality certification approval for the flood control project when acting in its role as a CEQA responsible agency in ostensible reliance on the District's unchallenged final EIR. The Court of Appeal held that, despite the Board's "apparent violation of CEQA" by issuing the CWA § 401 certification (under political pressure to allow rapid completion of the flood control project to protect a new BART station) prior to completion of its CEQA review responsibilities, the WDR order would be allowed to stand. It reached this result under CEQA's "savings clause" (Pub. Resources Code, § 21174), which it held preserved the Board's "independent authority" under the Porter-Cologne Act to later impose the mitigation requirements in its WDR order; the Court observed that under "the unique circumstances of

this case it was not feasible for the board to formulate additional mitigation requirements while at the same time meeting the timetable the District and key state and federal stakeholders insisted upon, a set of circumstances the District understood would lead to independent pursuit of WDRs by the Board."

While the case is likely aberrational, and probably limited in its precedential value, due to its unique facts and circumstances, it may nonetheless be expected to result in additional uncertainty and complexity – and likely additional litigation – concerning the scope of the hitherto strictly circumscribed role of responsible agencies in the CEQA process.

Relevant Factual Background: The District's And Army Corps' Berryessa Creek Flood Control Project

Upper Berryessa Creek in Santa Clara County, which drains into Coyote Creek and ultimately San Francisco Bay, floods areas of Milpitas and San Jose every decade or two. The U.S. Army Corps of Engineers (Corps) revived plans for a flood control project, dormant since the 1980s, in 2013 when construction of a new BART station that could be impacted by flooding sparked renewed interest. The Corps completed a federal environmental impact study in 2014 for a project which named the District as project sponsor; by agreement, the Corps would design and construct, and the District would operate and maintain the project, utilizing property acquired by the District. In September 2015, the District as lead agency under CEQA issued a draft EIR, and in January 2016, it issued a final EIR (FEIR), finding the project would have substantial impacts on some aspects of water resources which could be reduced to a less-than-significant level through various mitigation measures.

In September 2015, the Corps applied to the Board for a CWA § 401 water quality certification that the project complied with applicable state water quality laws, an approval generally needed for the Corps to approve a project involving a discharge into navigable waters. (33 U.S.C. § 1341(a)(1).) The Board first notified the Corps its application was incomplete because it did not include proposed compensatory mitigation for waters/wetlands impacts, but after pressure from California's congressional delegation and the Governor's office to approve the project to protect the BART station being built and preserve associated federal funding, the Board, Corps and District reached a compromise agreement whereby the Board issued its CWA § 401 certification quickly – in March 2016 – so the Corps could proceed with construction, although the Board made clear to the District it would subsequently issue WDRs under the Porter-Cologne Act to address design issues and impacts not addressed in the certification.

Consistent with the agreement, the Board's CWA § 401 certificate stated it was being issued to facilitate project construction relative to opening of the BART station, but that the Board would later consider the adoption of WDRs to address "compensation" for project impacts for which it would consider the District the responsible entity. It also stated the Board, as a CEQA responsible agency, found the project's construction impacts within the Board's purview would be mitigated to less-than-significant levels, but added again that the Board would later consider WDRs to address the need to "compensate for temporal and permanent losses of functions and values" from the project's design, operation and maintenance. The District later admitted it understood the Board meant to pursue WDRs in a separate proceeding, although it disagreed that additional mitigation and WDRs for project design were necessary and believed only operational impact mitigation was contemplated.

Over a year later, in April 2017, at a time when construction of the flood control project was almost complete, and after two public hearings, the Board issued its WDR order requiring additional compensatory mitigation from the Corps and District for the project's water quality impacts. The WDR order stated it was rescinding and superseding the previous CWA § 401 certification and replacing it with a new certification and WDRs, and purported to be issued under authority of the Porter-Cologne Act.

(See Wat. Code, § 13263(a); 23 Cal. Code Regs., § 3857.) The District then sought State Water Resources Control Board Review (which was ultimately denied) and filed a writ petition challenging the Board's WDR order, raising various legal issues. The trial court denied the petition and the District appealed.

The District's Claims And The Court Of Appeal's Decision

The District raised the following four arguments in its challenge to the Board's WDR order: (1) the attempted rescission and reissuance of the CWA § 401 water quality certificate was invalid because it violated the one-year time limit for action under CWA § 401; (2) the Board had no authority under the Porter-Cologne Act because the project didn't involve a discharge of "waste" into state waters; (3) the Board's failure to impose the WDR order's mitigation requirements as part of its earlier CEQA review of the project barred the later order; and (4) the Board's mitigation requirements were not supported by substantial evidence.

Federal Clean Water Act Issue

In what was undoubtedly an understatement, the Court of Appeal held the District's argument that the Board's purported rescission and reissuance of the 2016 CWA § 401 certificate was invalid because it violated the federal law's one-year time limit for a certificate "may be correct." (See, 33 U.S.C. § 1341(a)(1).) However, it stated that it need not examine the issue in detail because the District did not show that it justified reversal. More specifically, and as discussed further below, the Court held the Porter-Cologne Act provided sufficient independent authority for the Board's WDR order. (Notably, the Corps was not a party to this state court action and is undoubtedly beyond both the state courts' jurisdiction to enforce, and the Board's jurisdiction to impose, any CEQA mitigation requirements.)

Porter-Cologne Act Issue

The Porter-Cologne Act *mandates* that regional boards prescribe WDRs for any proposed discharges of waste within their respective jurisdictions (Wat. Code, §§ 13260(a)(1); 13263(a)), and case law holds that a project's sedimentation effects quality as "waste." The Court held that, even assuming (without deciding) the correctness of District's contention that sediment must be "useless, left over, or discarded" to qualify as "waste," that test was met. The flood project's widening of the creek would admittedly slow the flow of water and lead to increased sediment left behind in the creek which is not useful or needed, and which would likely require periodic removal. This was therefore "waste" which gave the Board jurisdiction to impose mitigation requirements under the Porter-Cologne Act.

CEQA Issue

In its "main event" holding of most concern and interest to readers of this blog, the Court rejected the District's argument that CEQA barred the Board's imposition of mitigation requirements through the WDR order because it failed to impose them in the earlier CEQA process leading to the CWA § 401 water quality certification. The District's argument rested on CEQA Guidelines § 15096, which specifies the roles of, and governs the division of CEQA compliance responsibility between, lead and responsible agencies. In brief, a responsible agency (like the Board) complies with CEQA by considering the CEQA document (here, an EIR) prepared by the lead agency (here, the District), and then reaching its own conclusions about whether and how to approve the project (or, more specifically, those aspects of the project within its jurisdiction and authority). The District argued that the Board violated § 15096(e), which sets forth the following four options for a responsible agency that believes a final EIR or negative declaration prepared by the lead agency is inadequate for its use: (1) sue within 30 days of the lead

agency's NOD filing; (2) be deemed to have waived any objection to the CEQA document's adequacy; (3) prepare a subsequent EIR if permissible; or (4) assume the lead agency role. The District contended that since the Board disagreed with its EIR's conclusion that the mitigation measures it identified were sufficient to reduce project impacts to less than significant, yet failed to raise this disagreement through any of the Guideline's available options, the Board therefore must be deemed under CEQA to have waived its objections and mitigation concerns, thus precluding the exercise of its Porter-Cologne Act authority to issue the WDR order.

The Court ultimately rejected the District's argument, but not before observing that the Board appeared to have violated CEQA by approving the project (through its CWA § 401 certification) while at the same time taking the position that the EIR lacked the detail necessary to assess long-term impacts which the Board intended to address (along with necessary compensation) at a later time. In its subsequent WDR order, the Board purported to make CEQA findings again, and to address all project impacts, in apparent violation of the well-established rule that CEQA compliance must precede project approval.

The Court nonetheless concluded that, "whatever the flaws in its CEQA procedure, the Board has the better of the dispute as the parties have framed it." It held that "CEQA Guidelines section 15096 may prevent a responsible agency from requiring additional environmental review after a lead agency has completed its CEQA review, so long as the responsible agency does not have its own independent authority to enforce or administer an environmental law. [Citation] But here, the Board has independent authority – and indeed the obligation – to administer and enforce the Porter-Cologne Act [by prescribing WDRs]." The Court invoked CEQA's "savings clause" contained in Public Resources Code § 21174 to support its holding that "the Board's duties under CEQA did not deprive it of its independent authority under other laws to impose the mitigation requirements in its [WDR] order." It chided the District for not citing this statute in its briefs, and quoted its pertinent text as follows: "No provision of this division is a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted to enforce or administer …" (Pub. Resources Code, § 21174.) Thus, per the Court, and contrary to the District's argument, Guidelines § 15096 did not, and could not, limit the Board's power to administer and enforce the Porter-Cologne Act; the Court deemed the District's contrary argument based on the "finality and preclusive effect of its EIR under CEQA" to be "fruitless." The WDR order was not a CEQA challenge to which those principles applied, and according to the Court: "No matter how final and unassailable the EIR might be under CEQA, because the Board's WDR order rests on the Porter-Cologne Act and not CEQA, section 21174 dictates that the EIR's finality cannot prevent the Board from exercising its independent Porter-Cologne Act authority to protect water quality."

The Court buttressed its conclusion with CEQA statutory and Guideline provisions indicating "that even though unified CEQA review and environmental regulation should be the norm, there may be times when a public agency's own environmental regulation can take place after CEQA review, as permitted by section 21174." (Citing Pub. Resource Code, § 21003(a); CEQA Guidelines, § 15080.) It also found support in an analogous Supreme Court decision interpreting the Forest Practice Act's nearly identical savings clause. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 933-934.) Further, that case provided authority for the Court to reject the District's argument that the Board was collaterally estopped by its CEQA administrative proceedings on the EIR, which proceedings did not have the requisite "judicial character" for the doctrine to apply.

In rejecting the District's arguments 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[,]" the Court noted they were based on the unwarranted assumption that such agencies would not discharge their CEQA

responsibilities in good faith. It also noted that the rule (violated by the Board here) that public agencies must complete CEQA review before granting an approval would allow project opponents (who happened not to emerge in this case) to sue to prevent an agency from splitting its CEQA review into two stages, as the District agreed the Board could do here. Finally, the Board's robust public process leading to the WDR order, which involved extensive consultation with the District and Corps, two rounds of public comment, and two public hearings, ensured that the Board's CEQA process violations did not deprive the Board, the District or the public of the ability to participate in, understand, or comment on the Board's action.

Excessive Mitigation Issue

Finally, the Court held that substantial evidence supported the Board's WDR order mitigation, and that the District failed "engag[e] in the extensive analysis of the evidence supporting and opposing the trial court's findings that is necessary for substantial evidence review." By failing to cite the evidence relied on by the Board and demonstrate it is not substantial evidence, the District failed to carry its burden to rebut the presumption that the record contained substantial evidence to support the trial court's findings on the relevant issues.

Conclusion And Implications

It's a well-known adage that "bad facts make bad law," but hopefully that saying will not apply to this case. Only time will tell if all the unique facts and circumstances of this case will serve to cabin its holdings, and prevent future erosion of CEQA's established rules governing the limited and circumscribed role and options of responsible agencies in the CEQA process. Hopefully, future cases in which responsible agencies are politically pressured to issue premature project approvals, despite allegedly incomplete and inadequate CEQA review, and to do so with the lead agency's express or tacit agreement that they may conduct belated CEQA review and impose additional mitigation at a later date, will be rare. Hopefully, it is not just wishful thinking that responsible agencies will discharge their CEQA compliance obligations in good faith, and be checked by NGOs or other litigation opponents when they don't, as the Court of Appeal seemed to assume would be the case. Perhaps most importantly, hopefully, responsible agencies having independent authority and obligations to enforce environmental laws – and there are many such agencies – will not view CEQA's "savings clause" in Public Resources Code, § 21174 as an invitation to take a second bite at the CEQA apple whenever they decide their first was insufficient. Here's to hope!

Questions? Please contact Arthur F. Coon of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate treatise in California and is cited by practicing attorneys and courts throughout the state. The firm has expertise in all real property matters, including full-service litigation and dispute resolution services, transactions, acquisitions, dispositions, leasing, financing, common interest development, construction, management, eminent domain and inverse condemnation, title insurance, environmental law and land use. For more information, visit www.msrlegal.com.