

## Can a Responsible Agency Impose Mitigation Measures Not Considered in the Lead Agency's EIR?

In *Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board*, No. A157127, 2020 WL 7706795 (Cal. Ct. App. Dec. 29, 2020), the court ruled that CEQA does not constrain an agency's authority to enforce the laws it administers, including those authorizing imposition of mitigation requirements. The court held that, after an EIR for a project has been certified, a regional water quality control board, acting as a responsible agency, can impose mitigation on the project through waste discharge requirements issued under the Porter-Cologne Water Quality Control Act, even though those measures were not described in the lead agency's EIR. The court's decision raises significant questions about the limits on a responsible agency's ability to depart from CEQA's requirements when deciding whether and how to approve a project. The Santa Clara Valley Water District brought this case to challenge the San Francisco Bay Regional Water Quality Control Board's WDRs for a flood control project on Upper Berryessa Creek near Milpitas and San Jose. The Army Corps of Engineers was responsible for the design and construction of the flood control project, while the District was the project sponsor. In January 2016, the District certified a final EIR, which found that impacts on water resources would be less-than-significant with mitigation. Pursuant to section 401 of the Clean Water Act, the Corps applied to the Regional Board for a certification that the project would not violate state water quality laws. Facing political pressure to issue the section 401 certification quickly (because the project was needed to protect a soon-to-open BART station and was at risk of losing federal funding if the certification was delayed), the Regional Board agreed to issue the certification in March 2016. The certification stated that the Regional Board, as a responsible agency under CEQA, found that water quality impacts during construction would be reduced to less-than-significant levels with the mitigation measures described in the final EIR. The Regional Board's certification also stated that the EIR lacked the detail necessary to assess the long-term water quality impacts relating to the project's design, operation, and maintenance, and that it would later issue WDRs to compensate for those impacts. In April 2017, the Regional Board issued a WDR order requiring additional mitigation to compensate for the project's water quality impacts. The WDR order required enhancing 15,000 linear feet or 15 acres of waters of the state, which could be satisfied by one of the District's other planned projects. The Regional Board purported to comply with CEQA by making findings in the WDR order that it had considered the District's EIR and determined that, with the addition of the WDR order's mitigation requirements, the project's impacts would be less than significant. **Waste Discharge Requirements** The court rejected the District's claim that the Regional Board lacked authority to issue WDRs under the Porter-Cologne Act because the project would not cause a discharge of waste. The District argued that substances must be useless, unneeded, or discarded to constitute waste for purposes of the Porter-Cologne Act, and that the project's sedimentation effects did not meet this test. The court ruled that even if the District's interpretation of the law were correct, the project would result in a discharge of waste: The project's widening of the creek bed would slow the flow of water and lead to increased sedimentation in the creek; this additional sediment would not be useful or necessary and would require periodic removal. **CEQA** The District also argued that the Regional Board's failure to impose mitigation through the CEQA process barred it from later imposing mitigation through WDRs issued under the Porter-Cologne Act. The District claimed that if the Regional Board disagreed with the mitigation findings in the EIR, it should have availed itself of the remedies available to a responsible agency that believes an EIR is not adequate, as set forth in CEQA Guidelines section 15096(e): filing a lawsuit within 30 days, preparing a subsequent EIR if permissible, or assuming the lead agency role. According to the District, the Regional Board, waived any objections to the adequacy of mitigation described in the EIR by failing to take any of these actions. The court ruled, however, that the Regional Board had independent authority to impose

mitigation through WDRs pursuant to the Porter-Cologne Act, citing Public Resources Code section 21174, which provides that CEQA does not limit an agency's power to administer or enforce any other law. This, the court held, means that CEQA's requirements cannot prevent the Regional Board from exercising its independent authority under the Porter-Cologne Act to require mitigation to protect water quality. This ruling rests on a shaky foundation. CEQA requires that a responsible agency rely on the EIR or negative declaration prepared by the lead agency rather than preparing its own environmental document. Consistent with this rule, the Regional Board was required to submit comments to the District when the District was preparing the EIR to ensure any water quality impacts of the project, and mitigation for any such impacts, would be examined in the District's EIR before it was certified. Here, the Regional Board failed to do so. Instead, over a year after the EIR was certified, the Regional Board adopted new mitigation without evaluating it under CEQA. While it is true that CEQA does not limit or restrict a regional water board's authority under the Porter-Cologne Act, it is equally true that the Porter-Cologne Act does not override a regional water board's mandatory duty to comply with CEQA when approving a project. Here, nothing in CEQA prevented the Regional Board from exercising its authority to impose the mitigation measures it ultimately insisted were necessary, and nothing in the Porter-Cologne Act prevented the Regional Board from complying with CEQA before doing so.

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