Lockey, Heather@CNRA

From: Jonathan Parker <jparker@kwb.org>
Sent: Wednesday, March 14, 2018 4:01 PM
To: CEQA Guidelines@CNRA
Cc: rthornton@nossaman.com; Conant, Ernest@YOUNGWOOLDRIDGE
Subject: Proposed CEQA Guidelines
Attachments: Kern Water Bank Authority Comments on Proposed Amendments to CEQA Guidelines January 2018.pdf

Please see the attached comments on the proposed changes to CEQA guidelines.

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KERN WATER BANK AUTHORITY

Via Email
CEQA.Guidelines@resources.ca.gov

March 15, 2018

Christopher Calfee
Deputy Secretary and General Counsel
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, CA 95814

RE: Comments on Proposed Amendments to the CEQA Guidelines dated January 26, 2018

Dear Mr. Calfee:

This letter provides the comments of the Kern Water Bank Authority ("Authority") regarding the above-referenced proposed amendments to the California Environmental Quality Act ("CEQA") Guidelines ("Amendments"). The Authority is a public joint powers authority that owns and operates the Kern Water Bank – a 20,000 acre groundwater banking project in Kern County, California. The Kern Water Bank is critical to management of the State's water resources – particularly in drought conditions such as California has experienced over the last decade. The Kern Water Bank stores water underground in wet years for recovery and use in dry years for agriculture, urban (in the Kern County area) and environmental purposes.

The Kern Water Bank provides the California Central Valley with an insurance policy against drought, reduces demands on the State Water Project ("SWP") and surface reservoirs, reduces use of native groundwater, and provides over seven thousand acres of wetland habitat for migratory birds and other wildlife, including several threatened and endangered species. The Kern Water Bank is recognized as one of the most successful and important groundwater banking projects in the western United States.

The Authority requests that the Natural Resources Agency delete proposed section 15234 from the Amendments. Section 15234 is inconsistent with the Public Resources Code section 21168.9, and the cases interpreting section 21168.9. Section 15234 violates the "clarity" and "consistency" standards of the Administrative Procedure Act. It is in conflict with the common law governing the equitable discretion of California courts, and violates the separation of powers provisions of the California Constitution.

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Section 15234 will add to the enormous confusion and complexity of CEQA litigation, and thereby increase the enormous costs associated with CEQA compliance. The history of the twenty-three years of CEQA litigation regarding the Kern Water Bank and the Monterey Amendments to the State Water Project water delivery contracts is evidence of the enormous cost of CEQA litigation. In 1995, the Department of Water Resources and 27 of 29 state water contractors signed the "Monterey Amendments" to the State Water Project water delivery contracts. The 23 years of litigation that followed includes five trial court judgments, a decision of the Court of Appeal, years of mediation, a settlement agreement, dismissal of two reverse validation lawsuits, three Environmental Impact Reports ("EIR"), a final judgment dismissing prior CEQA challenges, and two CEQA lawsuits notwithstanding a final judgment that Department of Water Resources complied with CEQA. (See, *Central Delta Water Agency v. Department of Water Resources* (California Court of Appeal, Third Appellate Dist. Case No. C078249; *Center for Food Safety v. California Department of Water Resources* (California Court of Appeal, Third Appellate District Case No. C086215.)

The experience with CEQA litigation regarding the Monterey Amendments is replicated in other critical infrastructure projects in California. One need look no further than the decades-long CEQA compliance and litigation regarding Governor Brown's two signature infrastructure projects – the High Speed Rail Project and the California WaterFix. The Amendments should seek to simplify and streamline the CEQA compliance and litigation process – not make it more complex.

Proposed Section 15234 Conflicts With the Text and Judicial Interpretations of Public Resources Code Section 21168.9.

Section 15234 should be deleted from the Amendments because the section:

1. Is inconsistent with Public Resources Code section 21168.9;

2. Is inconsistent with judicial interpretations of section 21168.9;

3. Purports to narrow the equitable discretion of California courts in violation of the California Constitution; and

4. Violates the "clarity" and "consistency" standards of the Administrative Procedure Act.

Proposed section 15234, subdivision (b) is inconsistent with subdivisions (b) and (c) of Public Resources Code section 21168.9 and the court decisions interpreting these subdivisions. Public Resources Code section 21168.9 reserves to the courts broad equitable discretion to fashion an appropriate CEQA remedy. Section 15234 purports to limit the courts' equitable discretion and to impose limitations on agency actions notwithstanding a court's exercise of its equitable discretion.

Subdivision (b) of Public Resources Code section 21168.9 provides that:

> (b) An order pursuant to subdivision (a) **shall include only those mandates** which are necessary to achieve compliance with this division, **and only those specific project activities in noncompliance with this division . . . .**

(Pub. Resources Code, § 21168.9, subd. (b).) Thus, the "default" under section 21168.9 is that CEQA remedies are **required** be limited to those necessary to achieve compliance with CEQA and **shall** be limited to activities found not to be in compliance. One of the mandates expressly authorized by subdivision (a) of section 21168.9 is that "an agency take specific action as may be necessary to bring the determination, finding or decision into compliance with [CEQA]." Thus, the statutory text leaves broad discretion to courts to limit a CEQA mandate to revisions to the agency's CEQA findings without requiring any changes to an EIR or other CEQA document, or any changes to the project activities. Proposed section 15234 turns the text of the statute on its head to limit an agency action on remand to those that satisfy all three of the criteria in subdivision (b).

A long line of CEQA cases holds that courts retain broad equitable discretion to fashion an appropriate remedy where the court finds a CEQA violation – including allowing project activities to continue even where the agency did not make a severability finding. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 422-424 [Authorizing construction and operation of university research facility notwithstanding CEQA violation]; *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* ("*Golden Gate*") (2013) 215 Cal.App.4th 353, 374; *Preserve Wild Santee v. City of Santee*, (2012) 210 Cal.App.4th 260, 288; *POET LLC v. Cal. Air Resources Bd.* ("*POET*") (2013) 218 Cal.App.4th 681, 760-762; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* ("*County Sanitation*") (2005) 127 Cal.App.4th 1544, 1605; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960-961; *San Bernardino Valley Audubon Society v. Metropolitan Water Dist. of So. Cal.* (2001) 89 Cal.App.4th 1097, 1103-1105; *Californians for Alternatives to Toxics v. Dept. of Food and Agriculture* ("*Californians for Alternatives to Toxics*") (2005) 136 Cal.App.4th 1, 22.)

Golden Gate discusses the legislative history of section 21168.9 and concludes that this too indicates that the Legislature did not intend to foreclose court's broad equitable discretion to fashion an appropriate remedy based on the facts and circumstances of each case. (*Golden Gate*, *supra*, 215 Cal.App.4th at p. 372, fn. 12.) Interpreting the original version of section 21168.9, the California Supreme Court held that courts retain broad equitable discretion to fashion an appropriate remedy in CEQA cases. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 422-424 [Authorizing construction and operation of university research facility notwithstanding CEQA violation].) *Golden Gate* concludes that the 1993 amendments expanded the trial court's discretionary authority:

> The 1993 amendments to section 21168.9 expanded the trial court's authority and 'expressly authorized the court to fashion a remedy that permits some part of the project to go forward while

> an agency seeks to remedy its CEQA violations. In other words, the issuance of a writ need not always halt all work on a project.'

(*Golden Gate*, *supra*, 215 Cal.App.4th at p. 372, quoting Remy et al., Guide to the Cal. Environmental Quality Act (10th ed. 1999).) The above cited cases decided after the 1993 amendment also conclude that trial courts have discretion to keep the agency approval in effect where the court found a CEQA violation.

Section 15234, subdivision (a) purports to restrict the equitable discretion of courts "where the court has exercised its equitable discretion to permit project activities to proceed . . . because the environment will be given a greater level of protection if the project remedies remains operative than if it were inoperative during that period." The Resources Agency's explanation of subdivision (c) of section 15234 claims that the subdivision "codifies the outcome" in *POET, LLC v. State Air Resources Board, supra.* The language in *POET, LLC* relied upon is at best *dicta,* is limited by the facts in *POET, LLC,* and is certainly not the holding of the court. No California court has **held** that the courts' equitable discretion in CEQA cases is limited to circumstances where "the environment will be given a greater level of protection if the project remedies remains operative than if it were inoperative during that period." The Resources Agency does not have the authority to adopt a regulation of general applicability based on *dicta* in one court decision that reflects the particular facts of one case, and that is inconsistent with the **holdings** of numerous court decisions.

In *POET* the Court found that the Air Resources Board violated CEQA by approving an air quality regulation before complying with CEQA, by improperly delegating CEQA compliance to the Air Resources Board's Executive Officer, and by deferring adoption of required mitigation measures. (*POET*, *supra*, 218 Cal.App.4th at pp. 725-726, 731, 740.) Nevertheless, the Court declined to vacate the air quality regulation or to enjoin the regulation. *POET* expressly affirmed the conclusion in *County Sanitation* that courts have discretion under section 21168.9 to preserve the status quo as reflected in the choice of the parties in a settlement agreement. (*POET*, *supra*, 218 Cal.App.4th at p. 763, fn. 56.)

The plaintiffs in *POET* argued that CEQA required the Court to vacate the approval of the regulation because the Court could not make the severability findings in section 21168.9, subdivision (b). Indeed, the Court acknowledged that it could not separate the part of the regulation that complied with CEQA and the part that violated CEQA. (*POET*, *supra*, 218 Cal.App.4th at pp. 760-761.) Nevertheless, the Court did not vacate the Air Resources Board's approval of the regulation, concluding that courts retained the equitable discretion to keep project approvals and the regulation in place – even in circumstances where the court could not make severability findings of section 21168.9, subdivision (b):

> Another question of statutory interpretation is whether section 21168.9, either expressly or impliedly, prohibits courts from allowing a regulation, ordinance or program to remain in effect pending CEQA compliance. We have found no express prohibition. In addition, we conclude that such a prohibition

> should not be implied because section 21168.9, subdivision (c) states that the equitable powers of the court are subject only to limitations expressly provided in section 21168.9. We interpret the reference in subdivision (c) to "equitable powers" to include "the court's inherent power to issue orders preserving the status quo." Thus, under section 21168.9, subdivision (c), courts retain the inherent equitable power to maintain the status quo pending statutory compliance, which permits them to allow a regulation, ordinance or program to remain in effect.

(*Id.* at p. 761 [citations omitted]; quoting *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 341.) The attempt in section 15234 to limit the court's equitable discretion to circumstances where the court makes the severability finding is flatly contrary to the acknowledgement in *POET, LLC* that the courts retain "**inherent power** to maintain the status quo pending statutory compliance" (emphasis added.)

Section 15234 is also invalid because it violates the principle of separation of powers established in the California Constitution. (Cal. Const., Art. III, § 3 ["The power of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."]; *Serrano v. Priest* (1982) 131 Cal.App.3d 188, 201; *Mandel* v. *Myers* (1981) 29 Cal.3d 531.)

Sincerely,
Kern Water Bank Authority

Jonathan Parker,
General Manager

cc: KWBA Board of Directors and Counsel