SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 04/09/21 TIME: 1:30 P.M. DEPT: E CASE NO: CV1004866

PRESIDING: HON. ANDREW SWEET

REPORTER: CLERK:

PETITIONER: SALMON PROTECTION AND WATERSHED NETWORK vs. RESPONDENT: COUNTY OF MARIN, ET AL	

NATURE OF PROCEEDINGS: WRIT

RULING

Petitioners Salmon Protection and Watershed Network ("SPAWN") and Center for Biological Diversity (together, "Petitioners") have filed a petition for writ of mandate and opposition to Respondent County of Marin's ("County") return of the peremptory writ of mandate issued on April 2, 2015. Petitioners' objections to the return of writ are well taken. The writ is not discharged but remains in force, and the County is directed to take reasonably expeditious action to comply with it.

JURISDICTION AND STANDARD OF REVIEW

The court which issues a writ of mandate retains jurisdiction to make any order necessary to its enforcement. Accordingly, a court presented with a return to writ must determine whether the public agency charged with compliance has, in fact, complied. (*See City of Carmel-By-The-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 91; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 204.)

When reviewing an agency's compliance with CEQA, the court considers whether there was a prejudicial abuse of discretion, which is established "if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code § 21168.5.) The court's role is "not to determine whether the EIR's ultimate conclusions are correct but only whether they are supported by substantial evidence in the record and whether the EIR is sufficient as an information document." (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898 (citation and internal quotations omitted).) Substantial evidence is defined in the CEQA Guidelines as "enough relevant information and reasonable inferences from this information that a fair argument can be made to

support a conclusion, even though other conclusions might also be reached." (14 Cal. Code Regs. § 15384(a).) Argument, speculation and unsubstantiated opinion or narrative do not constitute substantial evidence. (*Id.*)

FACTUAL BACKGROUND

I. The 2007 FEIR

In 2007, the County adopted an update to its countrywide plan (the "2007 CWP"). The County certified the final EIR for the 2007 CWP (the "FEIR") in November 2007. Policy BIO-4.1 in the FEIR restricted land use in stream conservation areas ("SCA"s) by requiring setbacks from the streams and requiring the use of best management practices. One program identified to implement this policy was BIO-4.a, which required the adoption of a SCA ordinance. Specifically, BIO-4.a required the County to "[a]dopt a new SCA ordinance that would implement the SCA standards for parcels traversed by or adjacent to a mapped anadromous fish stream and tributary," and which would also meet other requirements to "improve conditions that may be impacting sensitive resources." (AR 7573.) The FEIR stated that the measure would be implemented within five years and would reduce the impact of development on sensitive natural communities in unincorporated Marin County to a less-than-significant level. (AR 640.)

II. The FEIR Litigation

In September 2010, SPAWN filed a petition for writ of mandate challenging the sufficiency of the FEIR's treatment of the impacts of the 2007 CWP on coho salmon and steelhead trout in the San Geronimo Valley watershed. (Case No. CIV10044866.) In this action, SPAWN challenged the adequacy of the 2007 EIR and the County's failure to adopt an SCA ordinance as required under BIO 4.a.

The court upheld the adequacy of the FEIR, denied SPAWN's request to compel the County to adopt an SCA ordinance within a specific time period, and entered an injunction prohibiting the County from approving any applications for development within the SCA areas in the San Geronimo Valley watershed until such an ordinance was adopted. Both sides to the action appealed.

The First District Court of Appeals reversed, finding that the 2007 FEIR failed to properly analyze the potential cumulative impacts of the potential buildout of the watershed, and that the mitigation measure that required the County to actively participate in the FishNet 4C program was deficient because it did not define specific actions or performance standards and did not commit the County to adopt recommendations made by FishNet 4C. (*Salmon Protection and Watershed Network v. County of Marin*, Case No. A137062, 2014 WL 845416 ("*SPAWN Appeal*".)[1]

[1] The Court of Appeal did not consider SPAWN's argument that the superior court erred in failing to issue a writ of mandate to compel the County to comply with its mandatory duty to adopt a SCA ordinance, noting that the "issues raised by this argument are considered in connection with the county's cross-appeal." (*SPAWN Appeal*, at *5 n. 8.)

With respect to the County's appeal, the court noted that there was no basis to issue a writ to compel the County to adopt the SCA ordinance because "it remains within the discretion of the county to determine when to enact the required ordinance." (*Id.* at *10.) The court further noted that its conclusion was "supported by the evidence that was proffered that the county is not ignoring its duty to adopt such an ordinance and has been conscientiously pursuing efforts preparatory to the adoption of the ordinance." (*Id.*)

The Court of Appeal directed that a writ be entered directing the County to set aside its approval of the 2007 CWP and certification of the related FEIR with respect to the San Geronimo watershed only, pending preparation of a supplemental EIR that analyzed cumulative impacts and described mitigation measures in conformity with the CEQA Guidelines and the court's order. (*Id.* at *11.)

On April 2, 2015, the court issued a peremptory writ of mandate directing the County to set aside its approval of the 2007 CWP in the San Geronimo Valley and certification of the related FEIR, pending preparation of a supplemental EIR that analyzes cumulative impacts and describes mitigation measures in conformity with CEQA. The writ also stated that the court would retain jurisdiction by way of a return to this peremptory writ of mandate until the court has determined that the County has complied with the relevant portions of CEQA.

III. The SEIR

Thereafter, the County prepared a supplemental EIR (the "SEIR"). The SEIR focuses on two issues: (1) the analysis of potential cumulative impacts on salmonids in the San Geronimo Valley resulting from future buildout in the watershed; and (2) a description of mitigation measures relevant to salmonids in San Geronimo Valley. (SAR 1271.)

The SEIR identifies and addresses two potentially significant impacts. The first, Impact 5.1, is reduced survival of fry and juvenile and salmonid life stages due to reduced winter rearing habitat quality. The SEIR identifies two mitigation measures to reduce this impact to a less-than-significant level: (1) MM 5.1-1 – Expanded SCA Ordinance; and (2) MM 5.1-2 – Require Biotechnical Techniques and Salmonid Habitat Enhancement Elements for All Bank Stabilization Projects. (SAR 1271-72.)

The second potentially significant impact, Impact 5.2, is reduced salmonid spawning success due to elevated sediment delivery and increased high flow frequency and magnitude. (SAR 1271-72.) The SEIR identifies two mitigation measures to reduce this impact to a less-than-significant level: (1) MM 5.1-1; and (2) MM 5.2-1 – Control and Reduce Production and Delivery of Fine Sediment to Streams. (SAR 1272.)

Petitioners challenge MM 5.1-1 in their petition.

MM 5.1-1: Expanded SCA Ordinance, provides:

> The County shall adopt an Expanded SCA Ordinance consistent with Goal BIO-4 and associated Implementing Programs under the Proposed Project. The County shall commence with the development of the Expanded SCA Ordinance following certification of the Final SEIR and, barring unforeseen delays caused by continuing, new, or threatened litigation related to the SEIR process and/or the Ordinance, shall complete the Expanded SCA Ordinance within five years of Final SEIR certification. The County shall report on progress toward completing the Expanded SCA Ordinance to the Marin County Board of Supervisors no less than twice annually, and shall provide public noticing of the forthcoming Marin County Board of Supervisors meeting within 10 days prior to the meeting.

(SAR 1248.)

The SEIR requires that the Expanded SCA Ordinance incorporate five provisions as follows:

- "Provision 1 - Expand the set of development activities that require a discretionary permit and site assessment to include activities within the SCA that require vegetation clearing, increase impermeable area, increase surface runoff, result in exposed soil, or alter the bed, bank or channel of any stream, with the following [specified] exemptions . . .
- Provision 2 – Enact consistent permit and site assessment requirements for development in planned zoning districts and conventional zoning districts.
- Provision 3 – Require site assessments to be conducted by a qualified professional with at least five years of field experience assessing potential impacts to stream ecology, riparian ecology, and hydrology in coastal California, and the potential for impacts to anadromous salmonids from changes to these processes and conditions.
- Provision 4 – Require Standard Management Practices (SMPs) to be incorporated into all development activities within the SCA, as defined in Provision 1, for the protection of hydrologic processes, stream and riparian habitat, and water quality. SMPs shall be reviewed and approved by CDFW or NMFS to ensure the SMPs are adequate to avoid or minimize impacts to salmonids. The SMPs will include, at a minimum, the following [specified] information . . .
- Provision 5 – Require that discretionary permits for development projects within the SCA include low impact development (LID) practices and designs that are demonstrated to prevent offsite discharge from events up to the 85th percentile 24-hour rainfall event . . ."

(SAR 1248-54.)

The SEIR was certified and the 2007 CWP was reapproved, and a Notice of Determination was issued on August 27, 2019. (SAR 1-3, 8-11.) The County thereafter filed a return to the writ on September 12, 2020 "to demonstrate that the County has satisfied its obligations pursuant to the writ of mandate issued by the Court on April 5, 2015."

Petitioners filed the petition for writ of mandate on September 26, 2020, challenging the County's adoption of the SEIR.

ANALYSIS

Petitioners contend that MM 5.1-1 violates CEQA in two ways. First, Petitioners argue that it is invalid and unenforceable because a current board of supervisors cannot bind a future board of supervisors to enact legislation and cannot relinquish implementation to a board over which it has no control. Second, Petitioners argue that MM 5.1-1 is unlawfully deferred because the County failed to justify its decision to postpone enactment to a later date and failed to include specific performance standards to evaluate its effectiveness.

The court agrees with Petitioners that MM 5.1-1 is unlawfully deferred and therefore that the County abused its discretion by failing to proceed as required by law. (*Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467, 519 (approving agency abuses its discretion by improperly deferring mitigation measure).)

"Formulation of mitigation measures shall not be deferred until some future time." (14 CCR § 15126.4(a)(1)(B).) "Essentially, the rule prohibiting deferred mitigation prohibits loose or open-ended performance criteria . . . . If the measures are loose or open-ended, such that they afford the applicant a means of avoiding mitigation during project implementation, it would be unreasonable to conclude that implementing the measures *will* reduce impacts to less than significant levels." (*Rialto Citizens for Responsible Growth v. City of Rialto,* (2012) 208 Cal.App.4th 899, 945.)

"The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review provided that the agency (1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will considered, analyzed, and potentially incorporated in the mitigation measure." (14 CCR § 15126.4(a)(1)(B).)

"Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275 (citations omitted).) "On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report." (*Id.* at 1275; *see also Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280-281 ("[i]mpermissible deferral of mitigation measures occurs when [the agency] puts off analysis or orders a report without either setting standards or demonstrating how the impact can be mitigated in the manner described . . . ").)

Courts have recognized that deferral may be permissible where practical considerations prohibit devising such measures early in the planning process, e.g., at the general plan amendment stage. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) However, those practical considerations must "prevent[] the formulation of mitigations [sic] measures at the usual time in

the planning process." (*POET, LLC v. State Air Resources Board* (2013) 281 Cal.App.4th 681, 735.) EIRs have been found to be deficient where the EIR does not explain why it was impractical or infeasible for the agency to implement the measure at the time the EIR was certified. (*See Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280-281; *Save the Agoura Cornell Knoll v, City of Agoura Hills* (2020 46 Cal.App.5th 665, 688-89.)

As the parties are well aware, the County's EIR process has been going on for several years, beginning in 2007. The Court of Appeal's decision from 2014, over five years before the SEIR was certified, noted the county's evidence that it has "been conscientiously pursuing efforts preparatory to the adoption of the ordinance." (*SPAWN Appeal*, 2014 WL 845416 at *10.) The SEIR does not explain why the County could not, and did not, develop and enact a SCA Ordinance at the time the SEIR was prepared and certified in August 2019, or why it needed up to five additional years, and possibly more, to enact one. (See SAR 21974.)

The County argues that the SEIR is developed in connection with a general plan amendment, with the focus on the overall effect of the general plan on salmonids in the San Geronimo watershed rather than site-specific projects. The County explains that the 2007 SWP and SEIR are designed to provide a generalized foundation for County-wide activities only, which can be relied upon later to address more specialized and localized activities.

The County also argues that deferral is appropriate due to the amount of resources required to adopt an SCA ordinance. The legislative process required includes preparing and presenting an ordinance for approval by the Planning Commission and then the Board of Supervisors, as well as a public participation and input process. The County refers to its previous attempt to adopt a SCA ordinance which involved an 88-page staff report reflecting communications with numerous interested groups as well as public hearings and open houses, and the draft of the ordinance itself was 23 pages. The County contends there is thus "substantial evidence that it was impractical for County to include a completed expanded SCA ordinance at the same time that it adopted the 2007 CWP and SEIR." (Oppo. at p. 22:13-15.)

While the court appreciates that the SCA Ordinance is to be passed in connection with a general plan amendment, and that the enactment of an ordinance is an involved and potentially lengthy process, the County has not submitted any evidence or reasonable explanation as to why it was impractical or infeasible to draft or enact the ordinance at the time the SEIR was adopted and certified. According to evidence submitted to the Court of Appeal, at least some work was being done on the ordinance around the time of the appeal, and the record reflects that a draft ordinance was prepared in or around 2013 but never adopted due to litigation that was filed. However, the County fails to explain how far along it is in the process and why it needed up to five additional years to finalize and adopt an ordinance it has apparently been working on for several years. The fact that the ordinance is to be passed at a general plan amendment stage is not an automatic pass allowing the County to defer its obligations for such a lengthy period of time without question as to the feasibility or practicality of performing those obligations sooner.

The court also finds that MM 5.1-1 also fails to include objective performance criteria for measuring whether the stated goals will be achieved. (*Poet, LLC v. State Resources Board* (2013) 218 Cal.App.4th 738, 740.) While MM 5.1-1, in

Provisions 1-5, references certain standards the ordinance is to include to mitigate impacts, it does not commit the County to specific performance criteria for evaluating the efficacy of the measures implemented in the SCA ordinance. The County does not appear to dispute that MM 5.1-1 does not include performance standards which would evaluate the efficacy of the measures to be implemented and has not identified any in its brief.

Because the court finds that the County abused its discretion by improperly deferring the adoption of an SCA Ordinance, the court does not address the other arguments made by the parties.

All parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. Parties who request oral argument are required to appear remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.

The Zoom appearance information for April 9, 2021 is as follows:
Meeting ID: 982 6407 3327
Passcode: 700683
https://zoom.us/j/98264073327?pwd=Vmg4SE82Rk1hNDNCS0VscjlpS24vdz09

If you are unable to join by video, you may join by telephone by calling (669) 900-6833 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marincourt.org/

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REPORTER: CLERK:

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The County argues that the SEIR is developed in connection with a general plan amendment, with the focus on the overall effect of the general plan on salmonids in the San Geronimo watershed rather than site-specific projects. The County explains that the 2007 SWP and SEIR are designed to provide a generalized foundation for County-wide activities only, which can be relied upon later to address more specialized and localized activities.

The County also argues that deferral is appropriate due to the amount of resources required to adopt an SCA ordinance. The legislative process required includes preparing and presenting an ordinance for approval by the Planning Commission and then the Board of Supervisors, as well as a public participation and input process. The County refers to its previous attempt to adopt a SCA ordinance which involved an 88-page staff report reflecting communications with numerous interested groups as well as public hearings and open houses, and the draft of the ordinance itself was 23 pages. The County contends there is thus "substantial evidence that it was impractical for County to include a completed expanded SCA ordinance at the same time that it adopted the 2007 CWP and SEIR." (Oppo. at p. 22:13-15.)

While the court appreciates that the SCA Ordinance is to be passed in connection with a general plan amendment, and that the enactment of an ordinance is an involved and potentially lengthy process, the County has not submitted any evidence or reasonable explanation as to why it was impractical or infeasible to draft or enact the ordinance at the time the SEIR was adopted and certified. According to evidence submitted to the Court of Appeal, at least some work was being done on the ordinance around the time of the appeal, and the record reflects that a draft ordinance was prepared in or around 2013 but never adopted due to litigation that was filed. However, the County fails to explain how far along it is in the process and why it needed up to five additional years to finalize and adopt an ordinance it has apparently been working on for several years. The fact that the ordinance is to be passed at a general plan amendment stage is not an automatic pass allowing the County to defer its obligations for such a lengthy period of time without question as to the feasibility or practicality of performing those obligations sooner.

The court also finds that MM 5.1-1 also fails to include objective performance criteria for measuring whether the stated goals will be achieved. (*Poet, LLC v. State Resources Board* (2013) 218 Cal.App.4th 738, 740.) While MM 5.1-1, in

Provisions 1-5, references certain standards the ordinance is to include to mitigate impacts, it does not commit the County to specific performance criteria for evaluating the efficacy of the measures implemented in the SCA ordinance. The County does not appear to dispute that MM 5.1-1 does not include performance standards which would evaluate the efficacy of the measures to be implemented and has not identified any in its brief.

Because the court finds that the County abused its discretion by improperly deferring the adoption of an SCA Ordinance, the court does not address the other arguments made by the parties.

All parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. Parties who request oral argument are required to appear remotely by ZOOM. Regardless of whether a party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.

The Zoom appearance information for April 9, 2021 is as follows:
Meeting ID: 982 6407 3327
Passcode: 700683
https://zoom.us/j/98264073327?pwd=Vmg4SE82Rk1hNDNCS0VscjlpS24vdz09

If you are unable to join by video, you may join by telephone by calling (669) 900-6833 and using the above-provided passcode. Zoom appearance information may also be found on the Court's website: https://www.marincourt.org/