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Mining and Reclamation, Water Quality and Endangered Species: Reconciling Conflicts and Recognizing Opportunities

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A presentation by Wayne Whitlock to the California Mining Association Annual Conference in May 2005 addressed the impacts of growing water quality and endangered species requirements on the already heavily regulated mining industry. These requirements add increasing complexity and conflicting demands to the permitting, operation and reclamation of the state's mines and quarries. The presentation suggested a strategic approach to addressing these challenges and reconciling the conflicts.

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The Increasing Impact of Endangered Species and Water Quality Requirements

Mining is already one of California's most heavily regulated industries, but endangered species and water quality issues are adding increasing complexity and regulatory burdens to the challenge of permitting, operation and reclamation of California's mines and quarries. In the endangered species area, the listing of a number of species under the federal and State Endangered Species Acts (such as various Pacific salmon species, the California Red-legged Frog and California Tiger Salamander), and the designation of critical habitat have added multiple layers of analysis and regulation to mine permitting projects and operations.

Under Clean Water Act Section 303(d), many of the State's waterbodies have been designated as water quality impaired, requiring that Total Maximum Daily Loads ("TMDLs") be developed for those waterbodies, with the result that increasingly greater restrictions are being imposed to control the release of pollutants from mining operations and other industries. Particular emphasis is being placed on control of stormwater pollution.

Conflicting Regulatory Requirements

In many cases, endangered species and water quality regulations are targeted at protecting essentially the same resource. Nevertheless, their requirements may overlap and conflict, putting mine operators in a very difficult situation. For example, many rivers that support Pacific Salmon listed under the Endangered Species Act also have been designated under Clean Water Act Section 303(d) as water quality impaired by sediment due to excessive erosion. In order to avoid liability under the Endangered Species Act mine operators may be required to control sediment in order to prevent discharges into streams that could cause a prohibited "take" of listed salmon. Similarly, mine operators' water quality permits will impose strict sediment control measures in order to avoid discharges that



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would worsen the impaired condition of the river or interfere with improvement of the water quality.

A hypothetical example demonstrates the type of conflicts that may arise. In areas where mine operators use sediment catch basins to comply with sediment control requirements, these “ponds” could develop habitat for other endangered species, such as the California Red-legged Frog. Once these listed frogs occupy the ponds, the operator would be faced with the impossible choice of complying with its water quality permit and protecting salmon in downstream creeks by cleaning out the ponds or protecting red-legged frogs by not cleaning out the ponds. The landowner could have potential liability — for violating either the Endangered Species Act or the Clean Water Act and Porter-Cologne Water Quality Act. Ironically, if not cleaned out, the ponds would not only fill up and fail to function as sediment catch basins but also would dry up, lose their habitat characteristics and cease to provide habitat for the frogs.

Conflicts such as this are increasingly common in our regulatory system. Multiple government agencies have jurisdiction over these resources: NOAA Fisheries over the salmon, U.S. Fish and Wildlife Service over the red-legged frog and the Regional Water Quality Control Board over water quality. However, none of these agencies believes it has the authority to “excuse” its own regulatory requirements (such as the take prohibition for endangered species or a prohibition on discharges outside the scope of a discharge permit) where its requirements conflict with those of other agencies — even for the “greater good” such as protecting a more valuable or rare resource. Finally, some or all of these conflicting requirements may be incorporated or duplicated in the mining permit and reclamation plan, and no one agency may have the mandate or the motivation to address the conflicts. If these conflicts are to be reconciled successfully, the mine operator must lead the process.

Reconciling the Conflicts

While it can be difficult, time consuming and expensive, it is possible to reconcile conflicts among different agencies and their regulatory requirements in the water quality and endangered species areas. Under the federal and State Endangered Species Acts, an operator may obtain authorization for incidental take of listed species; this authorization will allow some take of listed species to occur where the operator has developed a Habitat Conservation Plan or similar conservation strategy that will compensate for impacts on the species. Other authorizations, such as Candidate Conservation Agreements and Safe Harbor Agreements, may be used to anticipate future endangered species listings and establish baseline activities that may be carried on even if endangered species move into an area where habitat becomes established. Water quality permits and Stormwater Pollution Prevention Plans may be fashioned or modified to allow use of control methods and structure the timing of maintenance activities to address the needs of endangered species.

Some of the greatest challenges operators face in pursuing a successful resolution include:

- ▶ Operating (surviving) during the period while the sometimes very long regulatory processes are being completed;



- ▶ Motivating agencies to dedicate necessary resources to the planning and coordination efforts and to be as flexible as their legal authorities allow; and
- ▶ Resisting “piling on” of mitigation and control requirements where multiple agencies are involved.

Keys to success include:

- ▶ Making conservation/resource planning an integral part of the overall mine planning effort;
- ▶ Anticipating issues, areas of overlap and solutions that address multiple demands;
- ▶ Having a biological or water quality predicate for the plans the operator proposes and insisting that agencies have the same — not just negotiating a “deal” that can fall apart when other agencies or project opponents complain the plans aren’t stringent enough or do not address other important issues; and
- ▶ Aggressively applying the legal and constitutional principle of proportionality of regulatory requirements described in California Endangered Species Act (“CESA”) Sections 2052.1 and 2081(b) and the Supreme Court’s *Dolan*¹ decision.

The proportionality concept defines the limits of the regulatory burden that agencies may impose on landowners in exchange for a permit. In the context of CESA, the legislature has clarified that it is the obligation of the State — not those who are regulated under CESA — to provide for the recovery of listed species. Obligations imposed on mine operators in exchange for endangered species authorizations must be “roughly proportional in extent to any impact” on the species caused by the operator. This principle imposes welcome barriers to government agencies imposing unreasonable conditions in the permitting process.

Conclusion

Conflicting demands have been placed on California’s mining industry to address endangered species, aquatic wildlife habitat and water quality issues. However, using the regulatory tools and strategic approaches discussed in this presentation, mine operators can navigate successfully through the challenges.



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¹ *Dolan v. City of Tigard*, 512 US 687 (1994)