

MEMORANDUM

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To: McCloud Watershed Council

From: Donald B. Mooney

Date: October 9, 2007

Subject: Authority of McCloud Community Services District Regarding Nestle's
Proposed Water Bottling Facility

The McCloud Watershed Council ("MWC") requested a legal opinion as to the effect of the Third District of Appeal's decision in *Concerned McCloud Citizens v. McCloud Community Services District*. Specifically, MWC requested a legal opinion as to what authority the McCloud Community Services District ("District") has over the approval of Nestle's proposed water bottling facility in McCloud and whether the District has the authority to change or modify the proposed project in such a manner that would require modification of the Agreement between the District and Nestle.

As discussed below, the District, as a responsible agency under the California Environmental Quality Act ("CEQA"), Public Resources Code, section 21000 *et seq.*, has limited discretion to change or modify the proposed project in order to lessen or avoid the direct or indirect environmental effects of that part of the project to be approved by the District.

A. The District is a Responsible Agency Under CEQA

Under the California Environmental Quality Act, Public Resources Code, section 21000 *et seq.* the public agency with the primary responsibility for decisions regarding compliance with CEQA and approval of the project. (Pub. Resources Code, 21067; CEQA Guidelines, § 15050.) For private project, the lead agency is the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose. (CEQA Guidelines, § 15051(b)(1).) All other public agencies that have a discretionary approval over the project are "responsible agencies." (CEQA Guidelines, § 15381.)

With regard to the proposed Nestle project, Siskiyou County is serving as the lead agency and the District is serving as a responsible agency under CEQA. As a responsible agency, before reaching a decision on a project, the District must consider the environmental effects of the project as shown in the EIR and feasible mitigation measures or alternatives within the District's powers. (CEQA Guidelines, § 15096(f)-(g).) If the

District finds that any alternative or mitigation measures within its powers are feasible and would substantially lessen or avoid a significant effect of the project, the District must adopt the feasible mitigation measures or alternatives. (CEQA Guidelines, § 15096(g).)

As a responsible agency, the District has the authority to mitigate environmental impacts and to disapprove the project on the basis of its environmental impact. (CEQA Guidelines, § 15041, 15096(g).) The District's authority to mitigate, however, is more limited than the County's (lead agency) as the District may only require changes in a project only to lessen or avoid the direct or indirect environmental effects of that part of the project to be carried out or approved by the District. (CEQA Guidelines, § 15041, 15096(g)(1); Pub. Resources Code, § 21002-21002.1.) The District's authority to disapprove the project (assuming it was approved by the County) is limited to a disapproval based upon an environmental impact of the part of the project that the District would carry out or approve. (CEQA Guidelines, § 15042.) The District, like a lead agency, may approve a project despite its significant impacts on the environment, if the responsible agency adopts a statement of overriding considerations that is supported by substantial evidence. (CEQA Guidelines, §§ 15043, 15093, 15096(h).)

B. The Appellate Court's Decision Was Based Upon the District's Continuing Discretion Over the Proposed Nestle Project

In upholding the District's actions under CEQA, the Third Appellate District discussed the District's continuing authority and discretion over the proposed Nestle project. The Court stated that the Agreement:

when read as a whole and in light of section 9.1 (expressly providing the parties will not be bound by the agreement until compliance with CEQA is completed and there is no possibility of a CEQA challenge), does not commit the District to a definite course of action in regard to a project (CEQA Guidelines, § 15352, subd. (a)) nor does it amount to a commitment to issue or the issuance of a contract or other entitlement for use of a project. (CEQA Guidelines, § 15352, subd. (b).) The Agreement, while admittedly a binding contract, is conditional (see Civ. Code, §§ 1434, 1439) and does not grant Nestle a vested right of use of the project. The Agreement is predicated on a series of ifs and commits the District to sell water to Nestle under the described terms only if the described terms are successfully completed. (147 Cal.App.4th 181, 192-193.)

The Court further stated:

The biggest "if," in the agreement however is *if* all discretionary permits, expressly defined as including CEQA documentation, review and approvals, along with the final adjudication of any legal challenges based on CEQA, are secured and all environmental, title, physical, water quality and economic aspects of the project are assessed. (147 Cal.App.4th at p. 193.)

The Court held that:

the terms of the Agreement demonstrate the District retains the right to participate in and approve or disapprove of or modify major aspects of the prospective project. Moreover, section 9.1 of the agreement expressly recognizes the ultimate water bottling project is subject to CEQA, will be reviewed pursuant to CEQA, and the agreement may be modified as a result. The District has not limited its discretion in conducting its part of such review. Indeed, the agreement nowhere precludes consideration by the District of a "no project" alternative. (See CEQA Guidelines, § 15126.6, subd. (e).) We view the agreement as temporarily holding in place a set of preagreed financial terms between the parties, while conceptually outlining a proposal for a project to be subjected to and conditioned upon full environmental review. In exchange for the District's forbearance from negotiating with any other water bottler while such CEQA review takes place and other governmental permits and approvals are sought, Nestle has agreed to make certain contingency fee payments and to shoulder the costs of, among other things, CEQA compliance. Clearly, the District is favorably disposed to the ultimate success of this project, but the agreement does not preclude it from considering a full range of options depending on subsequent CEQA review.

During the December 2006, oral argument before the Third District Court of Appeals, Nestle's lawyer, Lizabeth Rothman, acknowledged that the District had not committed itself to a definite course of action and that the District retains discretion to make changes to the Agreement in connection with the District's compliance with CEQA. Ms. Rothman further stated that the District retained discretion to make changes in facilities and/or quantity of water based upon the District's compliance with CEQA. To have argued otherwise would have resulted in an admission that the District had committed itself to a definite course of action and the Court would have concluded that the Agreement was subject to compliance with CEQA.

Thus, based upon the Court's opinion and the admissions by Nestle's attorney, neither the District nor Nestle can argue that the District does not have the authority or the discretion to modify or change the project as it is described in the Agreement. The Court's

opinion and Nestles' argument were based upon the acknowledgment that the District retained discretion to modify or change the project.

3. The District Retains Discretion to Modify the Project in Conjunction with its CEQA Compliance

Based upon CEQA, as well as the Court's Opinion in *Concerned McCloud Citizens v. McCloud Community Services District*, the District, as a responsible agency, retains limited discretion to modify or change the Project. If the County certifies the environmental impact report, the District will have to rely upon the EIR as certified. Thus, the District will have to presume that the EIR is valid for the District's review of the proposed project.¹ The District will then have the discretion to require changes in the project in order to lessen or avoid the direct or indirect environmental effects of that part of the project to be approved by the District. Any changes or modifications the District makes to the project must be supported by the EIR and substantial evidence in the administrative record. One of the alternatives the District could select is the "no project" alternative if the proposed project had direct or indirect environmental effects regarding the part of the project over which the District would have jurisdiction, such as facilities and/or water quantity.

¹ CEQA requires that a responsible agency presume as valid an EIR that has been certified by a lead agency, unless the responsible files a legal challenge to the EIR or determines that a supplemental EIR is required based upon the criteria for preparing a supplemental EIR. (Pub. Resources Code, § 21166; CEQA Guidelines, § 15096(e).)