Federal District Court Dismisses Lawsuit Alleging San Francisco Harmed Endangered Species at Sharp Park

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In an order issued on December 6, 2012, the United States District Court for the Northern District of California dismissed a lawsuit brought by Wild Equity and other plaintiffs alleging violations of the Endangered Species Act's take prohibition by the City and County of San Francisco. The decision, in *Wild Equity Institute v. City and County of San Francisco*, N.D. Cal. Case No. C 11-958, closes a chapter in the longstanding effort of local environmental groups to shut down the historic Sharp Park golf course, which is located along the Pacific Ocean in the City of Pacifica and owned and operated by the City and County of San Francisco. Furthermore, it clarifies that an applicant may rely on take authorization provided by a biological opinion before an action agency has issued a permit to the applicant provided the applicant complies to the terms in the biological opinion and associated incidental take statement (ITS) and those terms do not make take authorization contingent upon permit issuance. Nossaman served as outside counsel to San Francisco in the matter.

In filing the lawsuit, plaintiffs alleged that, by operating the Sharp Park golf course, San Francisco illegally and routinely harmed endangered San Francisco garter snakes and threatened California red-legged frogs. Among other things, plaintiffs claimed that operation of pumps to manage water bodies at Sharp Park, golf cart use, and routine maintenance operations, such as mowing, resulted in take of the listed species. After filing the complaint in early 2011, plaintiffs moved for a preliminary injunction later that year that would have effectively shut down the course. The court denied plaintiffs' motion and subsequently stayed the lawsuit after San Francisco informed the court that the Army Corps of Engineers was engaged in consultation with the Fish and Wildlife Service with respect to an application from San Francisco for a Clean Water Act section 404 permit.

After the Service issued a biological opinion in October 2012, San Francisco and golfers that had intervened in the action filed a motion to dismiss the case as moot. Plaintiffs argued that the biological opinion and ITS did not moot the matter because the Corps had not issued the section 404 permit. They also claimed that the ITS, itself, included language indicating it does not take effect until the Corps acts by issuing a permit. The court rejected both arguments holding that the statute and caselaw establish that an ITS shields persons from liability provided that they comply with its terms and that the "language in the ITS clearly contemplates that the document is self-effectuating." The holding is consistent with the language and structure of the ESA, and its holding that an ITS can be self-effectuating is particularly helpful to applicants faced with a lag between issuance of an ITS by the consulting agency and a permit or other authorization by the action agency.