



State of California - The Resources Agency

DEPARTMENT OF FISH AND GAME

Office of the General Counsel
1416 Ninth Street, 12th Floor
Sacramento, CA 95814
(916) 654-3821

GRAY DAVIS, Governor



June 1, 2001

Zachary R. Walton
Paul, Hastings, Janofsky & Walker, LLP
345 California Street, 29th Floor
San Francisco, California 94104-2635

Re: Union Pacific – Phases 2 and 3 of the Yuma Subdivision

Dear Mr. Walton:

This in response to your letter of March 29, 2001, in which you argued in part that Union Pacific ("UP") is not legally required to comply with Fish and Game Code section 1603 before commencing the above-referenced project ("project"). As I stated in our previous telephone conversations, and as discussed in more detail below, the Department of Fish and Game ("Department") agrees with your position. As a result, UP is not required to notify the Department and obtain a Streambed Alteration Agreement ("agreement") before commencing its project.

As you explained in your letter, under the Interstate Commerce Commission Termination Act, the federal Surface Transportation Board ("STB") has exclusive jurisdiction over the "construction . . . of spur, industrial, team, switching, or side tracks or facilities . . ." (49 U.S.C. § 10501(b)(2).) As a condition of approval for the merger between UP and Southern Pacific ("SP"), the STB required UP/SP to "... obtain all necessary Federal, state, and local permits if construction activities require alteration of wetlands, ponds, lakes, streams, or rivers, or if these activities would cause soil or other materials to wash into these water resources." (1 S.T.B. 233, 286 (August 6, 1996).) However, as you clarified, this requirement applies only to "all new construction sites *not* on existing right-of-way and also apply to the new construction projects that result from the [Burlington Northern Santa Fe] agreement." (*Id.* at 286 (emphasis added).) Because the project will be constructed within UP's existing right-of-way and is not the result of the Burlington Northern Santa Fe agreement, you concluded that UP is not required to obtain an agreement from the Department in accordance with Fish and Game Code section 1603. As stated above, the Department agrees with your analysis; therefore, UP may commence its project without an agreement.

Notwithstanding the above, you stated that UP would voluntarily agree to the terms of an agreement, provided that the mitigation conditions are reasonable and the agreement is not

Zachary R. Walton

June 1, 2001

Page 2

subject to review under the California Environmental Quality Act ("CEQA"). In our subsequent telephone conversations, we agreed that rather than executing an agreement for the project, the Department would provide UP with recommended mitigation conditions, which UP would make its best efforts to incorporate into the project. Those conditions are attached hereto as Attachment "A."

16215
You also argued in your letter that UP's project is statutorily exempt from CEQA pursuant to Public Resources Code section 21080(b)(10). That section exempts from CEQA "[a] project for the institution or increase of passenger or commuter services on rail or highway rights-of-way already in use, including the modernization of existing stations and parking facilities." As you know, before the Department may execute an agreement, it must first comply with CEQA. In this instance, because the Department is not executing an agreement for UP's project, CEQA does not apply. Therefore, the Department does not believe it is necessary to address the issue of whether the project is statutorily exempt from CEQA at this time.

If you have any questions or concerns regarding this letter, please contact me at (916) 653-6590 or at the above letterhead address. In the meantime, I recommend that UP keep a copy of this letter at all project work sites. Thank you for your assistance in this matter.

Sincerely,



STEPHEN G. PUCCINI
Staff Counsel

Attachment

cc: Jeff Drongesen
Kim Nicols

ATTACHMENT "A"**VOLUNTARY MITIGATION MEASURES**

1. To mitigate for the temporary and permanent loss of desert wash and/or riparian habitat, Operator will contribute to an approved mitigation bank for the impacts to 1.98 acres (0.87 acres permanent/1.11 acres temporary), permanent impacts will be mitigated at a ratio of 3:1 (2.61 acres); temporary impacts will be mitigated at a ratio of 1:1 (1.11 acres).
2. The Operator will ensure that all construction and/or work areas are delineated by stakes and flag boundaries.
3. The Operator will diligently monitor all phases and aspects of construction activities.
4. The Operator will allow Department of Fish and Game employees access to all construction and/or work areas for purposes of monitoring compliance with these Voluntary Mitigation Measures.
5. Exclusion zones, where construction will be avoided, will be established and observed by Operator, all contractors and subcontractors. Zones where listed species have been located will be off-limits to every extent possible.
6. All contractors, subcontractors, construction crews and the Operator's project supervisors will attend a biological resource education program conducted by Operator. The Operator will diligently enforce construction restrictions as specified in these Voluntary Mitigation Measures.
7. General surveys will be conducted prior to work and/or construction only in those areas affected by that particular day's work and/or construction to insure that no listed species are present that were not present in earlier surveying efforts.
8. Individuals acting as biological field monitors will be onsite during all phases of construction for the rail route at the bridge and/or culvert crossings, and during the grading and filling activities for the remaining affected areas of the track bed.
9. If any listed (or other sensitive) species are encountered during construction, all work will cease until mitigation measures have been instituted for the particular organism, including, but not limited to, physical animal relocation, establishment of flag boundaries around plants or animal burrows and transplanting of plants to similar habitats outside the construction areas.
10. The Operator will implement the provisions of its Storm Water Pollution Prevention Plan for the project.
11. All culverts and associated water passage structures will be constructed, maintained, and placed in operation, so that sufficient water and sediment will be allowed to pass between downstream and upstream locations.

12. Culverts should be oversized to allow placement below streambed grade while still ensuring adequate size to accommodate storm or runoff flows.
13. Areas of disturbed soils which slope toward a stream will be stabilized to reduce erosion potential. Stabilization will include the revegetation of stripped or exposed areas with vegetation native to the area. Source of seeds for revegetation will be from source species found within 10-15 miles of the project site.
14. Mitigation for the removal of riparian vegetation will include the revegetation of suitable areas with native vegetation.
15. Vehicles will not be driven or equipment operated in water covered portions of a stream or lake or in wetted areas, or where wetland vegetation, riparian vegetation, or aquatic organisms may be destroyed, except as when necessary to complete authorized work.
16. If a stream channel has been altered during project operations, its low flow channel will be returned, as nearly as possible, to pre-project conditions without creating a possible future streambed or bank erosion problem, or a flat wide channel or sluice-like area. The disturbed portions of any stream channel within the high water mark of the stream will be restored to as near original condition as possible.
17. Fill length, width, and height dimensions will not exceed those of the original installation or the original naturally occurring topography, contour, and elevation; fill will be limited to the minimal amount necessary to accomplish the activities; fill construction materials, other than on-site alluvium, will consist of clean uncontaminated soil, silt-free gravel, and/or river rock, except as described in the submitted application or as otherwise specified in these Voluntary Mitigation Measures.
18. Vegetation removed from the stream will not be stockpiled in the stream bed or on its bank. The sites selected on which to push this material out of the stream should be selected in a manner consistent with these Voluntary Mitigation Measures. Where possible, brush piles will be left to provide wildlife habitat.
19. In ephemeral streams, it is anticipated that all construction will be done while the work site is dry and that vehicles will not be driven or equipment operated in water-covered portions of the stream, or where wetland vegetation, riparian vegetation, or aquatic organisms may be destroyed. Trench material from ephemeral stream channels will be placed outside the stream's normal high water mark or on dry portions within the stream's high water mark when the material is placed on filter fabric. If streams are flowing at the time work is to be done, the contractor will implement a water diversion plan which allows stream flows to gravity flow around or through the work site using temporary culverts or stream flow is pumped around the work site using pumps and hoses. Any temporary dam or other artificial obstruction constructed will only be built from materials such as clean gravel or sandbags, which will cause little or no siltation. Normal flows will be restored to the effected stream immediately upon completion of work at that location.
20. Equipment will not be operated in the drainage or its margins during excavation and unless as may be necessary to construct barriers or fills.

21. Precautions to minimize turbidity/siltation will be taken into account during project planning and implementation. This may require that the work site be isolated and/or the construction of silt catchment basins, so that silt or other deleterious materials are not allowed to pass to downstream reaches. The placement of any structure or materials in the stream for this purpose, not included in the original project description, will be coordinated with the Department of Fish and Game.
22. Spoil sites will not be located within a stream/lake, where spoil can be washed back into a stream/lake, or where it will cover aquatic or riparian vegetation. The Operator will remove all human generated debris, such as garbage and trash.
23. Structures and associated materials, including debris, not designed to withstand high seasonal flows will be removed to areas above the high water mark before such flows occur.
24. No equipment maintenance will be done within or near any stream channel or lake margin where petroleum products or other pollutants from the equipment may enter these areas under any flow.
25. The Operator will comply with all litter and pollution laws. All contractors, subcontractors and employees will also obey these laws and it will be the responsibility of the Operator to ensure compliance.
26. The clean-up of all pollution spills will begin immediately. Operator will notify the Department of Fish and Game immediately of any spills and will consult with the Department of Fish and Game regarding clean-up procedures and requirements.
27. All debris, bark, slash, sawdust, rubbish, silt, cement or concrete or washings thereof, asphalt, paint or other coating material, oil or other petroleum products, or any other substances resulting from project related activities which could be hazardous to aquatic life or waters of the state, will be prevented from contaminating the soil and/or entering the waters of the state. None of these materials will be allowed to enter into or be placed within or where they may enter or be washed by rainfall or runoff into waters of the state. When operations are completed, any excess materials or debris will be removed from the work area. No rubbish will be deposited within 150 feet of the high water mark of any stream or lake.
28. The Operator will provide a copy of these Voluntary Mitigation Measures to all contractors, subcontractors, and the Operator's project supervisors. Copies of these Voluntary Mitigation Measures will be readily available at work sites at all times during periods of active work.
29. The Department of Fish and Game will receive written notice by the Operator at least five (5) days prior to initiation of construction (project) activities, and at least five (5) days prior to completion of construction (project) activities. Notification will be sent to the Department of Fish and Game at 4775 Bird Farm Road, Chino Hills, California, 91709, Attn: Environmental Services.

30. Upon completion of construction activities, the Operator will conduct a project area inspection and prepare and submit to the Department of Fish and Game a mitigation summary report. In addition, and as necessary, the Operator will implement a habitat compensation plan and provide additional site cleanup and reclamation.