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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

LANDWATCH SAN LUIS OBISPO COUNTY,

Petitioner,

v.

CAMBRIA COMMUNITY SERVICES DISTRICT; COUNTY OF SAN LUIS OBISPO; STATE WATER RESOURCES CONTROL BOARD DIVISION OF DRINKING WATER; and GOVERNOR'S OFFICE OF PLANNING AND RESEARCH,

Respondents.

Case No. 14CVP-0258

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date: March 10, 2015
Time: 9:00 a.m.
Dept: 2, Hon. Ginger Garrett

Action Filed: October 14, 2014
Trial Date: June 8, 2015

INTRODUCTION

Each of Respondent's legal arguments turns on the same erroneous theory – that LandWatch should have challenged the San Luis Obispo County Planning Director's issuance of a stopgap "emergency" coastal development permit on May 15, 2014, and its failure to do so forever bars any claim related to the Cambria Community Services District's ("District") ongoing operation of the water supply project ("Project"). The District insists that this suit effectively challenges issuance of the emergency permit, that such a challenge is subject to a 90-day statute of limitations, and that LandWatch's failure to sue or join *the County* within 90 days insulates *the* District from any claim for ongoing violations of law. E.g., Opposition at 7, 8, 11, 12. Although superficially logical, each part of this syllogism is legally flawed. First, LandWatch is not challenging issuance of the "emergency" permit (although the motion does describe concerns with the emergency permit process in order to provide the Court with appropriate context for the claims LandWatch does allege). The emergency permit was not, in fact, appealable. Rather, LandWatch is challenging *the District's* illegal Notice of Exemption from the California Environmental Quality Act ("CEQA") filed on September 9, 2014, *the District's* ongoing failure to comply with the mandatory permit requirement to obtain a regular coastal development permit under the Coastal Act, and *the District's* ongoing operation of the Project in violation of these laws. Building atop its first misguided argument, the District then draws a second, startlingly wrong conclusion that LandWatch cannot maintain a timely-filed CEQA action *against the lead CEQA agency for, and proponent of, the Project*. Finally, the District compounds these two legal errors by misapplying the joinder statute to try and shield itself from any responsibility for a project that *the District* conceived, permitted, funded, constructed, and is now operating in a harmful manner.

At the same time, the District offers no credible evidence that an interim injunction will cause harm. Ignoring its *own data* showing present water levels on par with average water levels in prior years, the District claims imminent harm based on nothing more than the speculative and unsupported statements of its employee. Opposition at 13-14; Declaration of Robert C. Gresens ("Gresens Decl."). These are the same unsupported statements the District offered to the County of San Luis Obispo, the Division of Drinking Water, and the Office of Planning and Research

throughout 2014, when it repeatedly and incorrectly claimed that Cambria would soon run out of water. See Opening Brief at 11-12. In fact, with appropriate conservation measures similar to those being implemented everywhere across the state, water continued to flow to Cambria residents and businesses throughout the dry summer and fall seasons. The District now concedes that it need not operate the Project at this time to supply adequate water to the community. Declaration of Cynthia Hawley ("Hawley Decl."), Exh. C. Yet it continues to run the hastily-constructed Project even as doing so is causing the kind of human and ecological impacts – chemical spills into creeks, overspray of wastewater onto neighboring lands, noise impacts disrupting local residents, livestock, and wildlife, etc. – that CEQA and the Coastal Act are intended to evaluate and mitigate *before* they occur. Weighing the balance of harms, the Court should enjoin Project operations until the District studies and mitigates these significant impacts.

ARGUMENT

I. The District Does Not Offer Any Viable Legal Defense to LandWatch's Claims.

A. None of Petitioner's Claims Are Barred by Any Statute of Limitations.

The District erroneously contends that San Luis Obispo ("SLO") County Code section 23.01.080 bars all of Petitioner's claims in this action because it establishes a 90-day statute of limitations for judicial challenges to final County decisions. As a threshold matter, it bears repeating that this motion does *not* challenge the County Planning Director's May 15, 2014 issuance of an "emergency" permit. Rather, it is premised on two independent claims against *the District* as the lead agency and operator of the Project. The First Cause of Action alleges that "[t]he District's failure to satisfy its CEQA environmental review and public disclosure requirements constitutes a prejudicial abuse of discretion and is actionable under California Public Resources Code section 21168 and/or 21168.5 and California Code of Civil Procedure section 1094.5 and/or 1085." First Amended Verified Petition for Writ of Mandate, ¶ 58. The Second Cause of Action alleges that the District failed to file a complete application for a regular coastal development permit by June 15, 2014, and its ongoing operation "without a valid coastal development permit violates the Coastal Act and is subject to declaratory and equitable relief under Public Resources Code section 30803." Id. ¶ 64. These claims are against *the District* for

ongoing non-compliance with law. Having issued the 180-day emergency permit, the County's only continuing role is (1) to process a permanent coastal development permit when and if the District ever applies for one and (2) to exercise its enforcement authority against the District for failure to timely obtain a permanent permit application. Where the County, as the delegated local coastal agency, fails to enforce the law against a non-compliant party, the Coastal Act authorizes concerned citizens to step in and do so. Pub. Res. Code § 30803. That is precisely what LandWatch is doing here, and the County need not be party to such a claim.

Contrary to the District's central legal theory, the County's issuance of an "emergency" permit was not challengeable – which is the reason LandWatch did not challenge it. While regular coastal development permits are subject to extensive hearing and exhaustion requirements, see, e.g., SLO County Code §§ 23.01.042 and 23.01.060, the County's "decision to issue an emergency permit is solely at the discretion of the Planning Director although subsequent coastal permits required for the project are subject to all applicable hearing requirements as specified in Title 23." SLO County Code § 23.03.045(b)(8). County Planner Airlin Singewald confirmed this fact in a May 21, 2014, response to Petitioner's request about the appeal process, explaining that "[t]he Director's decision to issue an emergency permit is not appealable to the Planning Commission. CZLUO Section 23.03.045(b)(8) states that 'The decision to issue an emergency permit is **solely** at the discretion of the Planning Director . . .' Your remedy for challenging the facility would be through an appeal of the regular 'follow-up' Coastal Development Permit that the District will be required to file by June 15, 2014." Hawley Decl., Exh. E.

Accordingly, the statute of limitations set forth in County Code section 23.01.080 is inapplicable here. That provision requires that any judicial challenge be filed no later than "90 days after the date [a] decision *becomes final*." SLO County Code § 23.01.080 (emphasis added). "[A] county decision on an application for a development *shall not be deemed final until* . . . all county rights of appeal have been exhausted as set forth in Section 23.01.043b (Exhaustion of county appeals)." Id. § 23.02.036(c)(2) (emphasis added). The Code's exhaustion provisions require initial appeal to the County, id. § 23.01.042, followed by subsequent appeal to the Coastal Commission, id. § 23.01.043b. Because there is no administrative appeal process for

"emergency" permits, there can be no exhaustion under section 23.01.043b and thus no finality triggering section 23.01.080. As County Planning staff explained at the time of the stopgap "emergency permit," LandWatch's only remedy was and is to challenge the regular coastal development permit, an application for which should have been submitted nine months ago.

Footnote 7 of the District's opposition brief underscores the flaw in its "statute of limitations" argument. As the District explains, administrative mandamus actions challenging agency decisions under Civil Procedure Code section 1094.5 are subject to a 90-day statute of limitations. Civ. Proc. Code § 1094.6(b). But administrative mandamus is available only where there is a "final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . . ." Id. § 1094.5(a). Here, there was no hearing held (or allowed), no evidence taken, and no final agency order. As County Planning staff explained, issuance of a regular coastal development permit will, after proper exhaustion, constitute the County's final decision subject to the timelines of SLO County Code section 23.01.080 and Civil Procedure Code section 1094.5.[1]

Because the District seems to misapprehend LandWatch's Coastal Act claim, we reiterate it briefly here. Under the certified Local Coastal Program, the Planning Director may grant an "emergency" coastal development permit only if he makes certain findings and includes certain terms and conditions, including an expiration date and a requirement that the permit holder apply for a regular coastal development permit. SLO County Code § 23.03.045(b)(5). The Code specifically provides: "Within 30 days . . . the property owner shall apply for a land use permit as

[1] For this reason, the Court need not concern itself with the District's discussion of cases attempting to reconcile CEQA's statute of limitations with various sections of the Government Code that relate to administrative mandamus actions challenging final conditional use permits, general plan amendments, subdivision approvals, and the like. Opposition at 8-9. Even if the "emergency" permit were subject to judicial review, the challenge would sound in traditional mandamus under Code of Civil Procedure section 1085, not administrative mandamus. There is no statute of limitations applicable to section 1085 claims; rather, the limitations period depends on the nature of the underlying obligation. Where a petitioner seeks to enforce a right created by statute, the normal statute of limitations applicable to a section 1085 traditional mandamus action is three years. See, e.g., Ragan v. City of Hawthorne, 212 Cal. App. 3d 1361, 1367 (1989) (citing Civ. Proc. Code § 338 and noting that statute of limitations period is determined "not by the remedy prayed for but by the nature of the underlying right or obligation that the action seeks to enforce").

required by this title and any construction permits required by Title 19 of this code. *Failure to file the applications and obtain the required permits shall result in enforcement action pursuant to Chapter 23.10 of this code*." Id. § 23.03.045(b)(6) (emphasis added).

To comply with these provisions, the "emergency" permit for the Project required that all construction be completed within 180 days and that "[w]ithin 30 days of the date of issuance of this permit, the permittee shall apply for a regular coastal development permit." Declaration of Abigail Barnes ("Barnes Decl."), Exh. A. Failure to file and obtain the required regular permit "shall" result in enforcement under Chapter 23.10. SLO County Code § 23.03.045(b)(6). The term "shall" is "always mandatory and never discretionary." Id. § 23.01.041(b)(1). Chapter 23.10, in turn, provides that "[i]t shall be the duty" of code enforcement officers designated by the Planning Director to issue stop work orders, to revoke permit entitlements, and to take other actions for permit violations. Id. § 23.10.020. Despite the unequivocal nature of the requirement that the District apply for and obtain a regular permit and despite the County's mandatory duty to enforce that requirement, the County has failed, for whatever reason, to do so. But the Coastal Act provides an alternative remedy – a private attorney general provision that allows concerned members of the public to enforce the law directly against the violator when the certified local agency fails to do so. Ojavan Investors, Inc. v. Cal. Coastal Comm'n, 54 Cal. App. 4th 373, 385 (1997) ("Section 30803(a) authorizes an action for declaratory and equitable relief to restrain any violation of the Coastal Act").[2] Through this motion, LandWatch invokes the Coastal Act citizen suit provision, which provides that "[o]n a prima facie showing of a violation of [the Coastal Act], preliminary equitable relief shall be issued to restrain any further violation." Pub. Res. Code § 30380(a) (no bond required). LandWatch has made the requisite showing of an ongoing Coastal

[2] LandWatch may independently be able to compel the County's mandatory duty. While the exercise of prosecutorial discretion is generally unreviewable, "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." Carrancho v. Cal. Air Res. Bd., 111 Cal. App. 4th 1255, 1267 (2003); see also Pub. Res. Code § 80304 ("Any person may maintain an action to enforce the duties specifically imposed upon the commission, any governmental agency, any special district, or any local government by this division."). Such a claim is not a prerequisite, however, to Petitioner's citizen suit against the District.

Act violation and the District has not refuted it, choosing instead to spend its opposition papers deflecting blame onto others. Interim equitable relief is, therefore, warranted.

B. The District Offers No Defense to Petitioner's CEQA Claim.

The District's CEQA argument is similarly unavailing. The District relies entirely on the recent decision in CREED-21 v. City of San Diego, No. D064186, __ Cal. App. 4th ___, 2015 WL 682777 (Jan. 29, 2015), but its description and discussion of that case are highly misleading. There, the "emergency" project – reconstruction of a failed storm drain and replacement of failed pipes – was conducted by the City of San Diego pursuant to its declared emergency exemption from CEQA and an emergency coastal development permit issued by the City to itself. As the court explained, *no party disputed* that propriety of the emergency CEQA exemption and the emergency coastal development permit under the circumstances:

> As CREED's counsel argued below, "no one disputes the emergency or the emergency exemption. That was totally fine, totally appropriate." Likewise, on appeal CREED states: "Public safety being crucial, [CREED] does not challenge the need for the emergency work to protect residents living at the top of the canyon" and "[CREED] is not challenging the propriety of operating under an emergency exemption for the emergency work.'"

Id. at *8. The legal issue in the case was whether the subsequent regular coastal development permit and accompanying CEQA exemption for necessary revegetation work around the new drain should use the pre-construction environmental condition or the post-construction condition as the baseline against which to evaluate impacts from the revegetation work. CREED-21 is thus entirely inapplicable here, where LandWatch *is* challenging the CEQA emergency exemption.

In selectively quoting language from the CREED-21, the District fails to alert the Court to the only discussion relevant to the case at bar. In a footnote, the CREED-21 court explained that:

> We note, however, there may be cases in which the issuance of the emergency exemption and permit may be timely challenged based on contentions that there was not a qualifying 'emergency' under CEQA or the work to be done exceeded the nature and/or scope of the emergency exemption. . . . That is not the contention in this case, and there is no evidence to support an assertion City improperly issued an emergency exemption and permit for the storm drain repair work to subvert CEQA and improperly avoid environmental review of that work.

Id. at *9 n.6 (citing CalBeach Advocates v. City of Solana Beach, 103 Cal. App. 4th 527 (2002); Castaic Lake Water Agency v. City of Santa Clarita, 41 Cal. App. 4th 1257 (1995); W. Mun. Water Dist. v. Superior Court, 187 Cal. App. 3d 1104 (1986)). Here, of course, issuance of the

1 emergency CEQA exemption is precisely what LandWatch challenges.

2 The District's insistence that Petitioner's CEQA challenge was untimely is perplexing –
3 and flatly wrong as a matter of law. Although the District fails to fully articulate its underlying
4 legal theory, its papers suggest that Landwatch's CEQA challenge should be directed at the
5 County, not the District. This argument fundamentally misconstrues CEQA and, once again,
6 improperly attempts to deflect the District's unequivocal CEQA obligations onto the County.

7 As LandWatch explained in its opening brief, CEQA applies to every public agency
8 carrying out a discretionary project. Pub. Res. Code § 21080(a). "If the project will be carried out
9 by a public agency, that agency shall be the lead agency even if the project would be located
10 within the jurisdiction of another public agency." 14 Cal. Code Regs. § 15051(a)); see also Pub.
11 Res. Code § 21067 (lead agency is "the public agency which has the principal responsibility for
12 carrying out" a project). "[C]ourts have concluded that the public agency that shoulders primary
13 responsibility for creating and implementing a project is the lead agency, even though other public
14 agencies have a role in approving or realizing it." Planning & Conservation League v. Castaic
15 Lake Water Agency, 180 Cal. App. 4th 210, 239 (2009).[3] There is no dispute that *the District* is
16 the public agency carrying out the Project here and is, therefore, the "lead agency" for purposes of
17 CEQA compliance, even though the Project needs discretionary permits or approvals by other
18 public agencies, such as the County. As such, the District, not the County or anyone else, "plays a
19 pivotal role in defining the scope of environmental review." Id.[4]

20 In particular, the District was responsible for preparing the EIR or negative declaration (or,
21 in this case, determining an exemption), and any responsible public agency, like the County, is

22

23 [3] *See also* Planning & Conservation League v. Dep't of Water Res., 83 Cal. App. 4th 892, 903 (2000); Friends of Cuyamuca Valley v. Lake Cuyamuca Recreational Dist., 28 Cal. App. 4th 419, 427 (1994) (explaining that "[l]ead agency is to be distinguished from 'responsible agency,' which 'means a public
24 agency, other than the lead agency, which has responsibility for carrying out or approving a project'").

25 [4] *See also* Eller Media Co. v. Cmty. Redevelopment Agency, 108 Cal. App. 4th 25, 45-46 (2003)
26 (community agency charged with responsibility for redevelopment measures within designated area was lead agency regarding billboard placement, even though city issued building permits for billboards);
27 Friends of Cuyamaca Valley, 28 Cal. App. 4th at 426-29 (state agency that determined duck hunting policy, rather than wildlife district that enforced it, was lead agency regarding duck hunting policy); City of
28 Sacramento v. State Water Res. Control Bd., 2 Cal. App. 4th 960, 971-73 (1992) (state agency that created pesticide pollution control plan, rather than water district that enforced it, was lead agency regarding plan).

entitled to rely on that determination. 14 Cal. Code Regs. § 15050. The *only* exception to this rule is where the responsible agency assumes lead agency status because there has been a significant change in the project since the CEQA document was certified or because the lead agency fails to comply with CEQA *and* the time for challenging that failure has expired. Id. § 15052. Neither of those circumstances applies here. Because the District did not take formal action to approve the Project, but merely commenced work without conducting any CEQA review, the applicable statute of limitations (as the District concedes) was 180 days from the date of commencement of the project. Pub. Res. Code § 21167(a). The statutory period thus began running sometime after May 15, 2014, whenever construction commenced. There was no legal basis for the County to assume CEQA lead agency status and it did not so. The District was and is the project proponent, the lead agency responsible for satisfying CEQA, and the proper CEQA respondent in this lawsuit.

The District itself acknowledged its lead agency status and responsibilities when it finally filed its Notice of Exemption with the Office of Planning and Research on September 9, 2014. That notice identifies the District as the CEQA "Project Lead Agency" and claims an emergency exemption. Barnes Decl., Exh. K; Hawley Decl., Exh. B. The District's filing of the Notice of Exemption triggered a shorter 35-day statute of limitations, and presumably was filed for that very purpose. Pub. Res. Code § 21167(d). Landwatch then timely filed its CEQA lawsuit challenging the District's Notice on October 14, 2014. There simply is no statute of limitations defect here.

C. The District's Joinder Argument Is Meritless.

The District's related argument that the County and the Office of Planning and Research are "indispensable" parties similarly misses the mark. As to CEQA, the Legislature has carefully prescribed which parties must be joined. There are three types of "projects" subject to CEQA – those directly undertaken by a public agency, Pub. Res. Code § 21065(a), those receiving financial assistance from a public agency, id. § 21065(b), and those involving an entitlement from a public agency, id. § 21065(c). For the second and third types of CEQA projects, any judicial challenge to the lead agency's CEQA process must also name the recipient of the financial assistance or entitlement as a "real party in interest" (most typically a private developer). Id. § 21167.6.5 (a). Failure to name any other person "is not grounds for dismissal pursuant to section 389 of the Code

of Civil Procedure." Id. § 21167.6.5(d). Thus, "responsible" agencies like the County or the Office of Planning and Research, which might issue permits or other approvals for a project, are never considered "indispensable" parties who must be joined in a CEQA suit.[5]

As to the ongoing Coastal Act violation, the District does not provide any facts or arguments – and there are none – which demonstrate that the County's interests or rights will be impaired or impeded by a preliminary injunction or that such an injunction will leave the District subject to inconsistent obligations. Civ. Proc. Code § 389(a). The mere fact that LandWatch alleges improprieties in the County's issuance of the emergency permit does not make the County a "necessary" party. Van Zant v. Apple Inc., 229 Cal. App. 4th 965, 976 (2014). In any event, the County is not an "indispensable" party requiring dismissal; it *has* been joined and served on the Third Cause of Action for violation of the public trust doctrine. Because the Coastal Act claim alleges an *ongoing* violation of law, there was and is no applicable statute of limitations that prevented LandWatch from joining the County in February, even if joinder was required.

II. The Balance of Harms Tips Sharply in Petitioner's Favor.

As LandWatch explained in its opening brief, there is no evidence to suggest that Cambria will run out of water without the Project. To the contrary, the District's own data reveal that water levels have not been, and are not now, unusually low. Barnes Decl., Exh. M; Hawley Decl., Exh. D. As recently as January 29, 2015, the District confirmed that it need not operate the Project to provide sufficient water to the Cambria at this time. Hawley Decl., Exh. C. Given these facts, the District was required to come forward with some actual contrary *evidence* – other than merely unsupported, self-serving statements by employees – of harm. It failed to do so.

In contrast, the environmental harm caused by operating the Project without environmental

[5] Kaczorowski v. Mendocino County Board of Supervisors, 88 Cal. App. 4th 564 (2001), which preceded enactment of section 21167.6.5, is not to the contrary. There, the County issued a coastal permit to a private developer, who then appealed that permit to the Coastal Commission. The Coastal Commission issued the final permit and its CEQA "functional equivalency" process superseded the County's CEQA process, making the Coastal Commission the proper lead agency for any CEQA challenge. The developer sued only the County, and the case thus stands for the unremarkable proposition that the correct lead agency must be named. Here, of course, the District is the lead CEQA agency and was timely named. Deltakeeper v. Oakdale Irrigation Dist., 94 Cal.App.4th 1092 (2001) (lead CEQA agency is sufficient respondent to protect other agency interests).

study or required mitigation – harm that many expert agencies predicted (*see* Opening Brief at 18-22) – is more evident every day. In addition to the recent chlorine spill into Van Gordon Creek (Supp. Declaration of Deborah Sivas, Exh A, file in opposition to ex parte), the Project is causing significant ongoing harm to neighbors, nearby campers, and local wildlife from excessively noisy brine pond evaporators, wastewater overspray, and unauthorized discharges. Declaration of Leslie Richards, ¶¶ 1-21 (explaining her futile efforts to get District or County to address excessive noise level and overspray, and describing how blower noise led to the death of her horse); Declaration of Mary Webb, ¶¶ 2-4 (documenting the uncontrolled blowing of wastewater beyond the waste pond); Declaration of Greg Sesser, ¶ 2 (documenting unauthorized discharge from the waste pond to nearby waterway); Hawley Decl., Exh. F (local news article documenting ongoing problems).

Indeed, the situation is now so dire that the Regional Water Quality Control Board, which like the County relied on the District's claim of a CEQA "emergency" exemption to issue waste discharge permits, issued a Notice of Violation on February 27, 2015, setting out repeated, deliberate violations of three different permits, including illegal discharges from certain processes, illegal switching of discharge points, illegal discharges of brine pond waste, and failure to monitor and report, among other things. Hawley Decl., Exh. A. These ongoing violations are the result of a hastily-conceived and hastily-constructed public works project without public scrutiny, without environmental review, or without mitigation. The residents, visitors, and wildlife of San Simeon Creek watershed should not be guinea pigs in the District's evolving lab experiment. The Court should halt Project operations until the proper environmental analysis and mitigation is completed.

CONCLUSION

The opposition brief is an exercise in misdirection, attempting to displace responsibility on other agencies for the District's failure to evaluate and mitigate environmental impacts from the Project it constructed and is now operating. No agency but the District is responsible for the Project's continuing non-compliance, and no other agency has a beneficial interest in the Project's operation. LandWatch has demonstrated both a reasonable probability of success and ongoing interim harm. The Court should, therefore, grant its motion for preliminary injunction.

Dated: March 3, 2015

Respectfully submitted,

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PROOF OF SERVICE

LYNDA F. JOHNSTON declares:

I am over the age of eighteen years and not a party to this action. My business address is 559 Nathan Abbott Way, Stanford, California 94305-8610.

On March 3, 2015, I served the foregoing **PETITIONER'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** on all persons identified below by placing a true and correct copy thereof for Federal Express next-business-day delivery at Stanford, California, addressed to each recipient respectively as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed March 3, 2015 at Stanford, California.

LYNDA F. JOHNSTON