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LANDWATCH SAN LUIS OBISPO COUNTY

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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Date:	March 10, 2014
Time:	9:00 a.m.
Dept:	2, Hon. Ginger Garrett
Action Filed:	October 14, 2014
Trial Date:	June 8, 2015

INTRODUCTION

This case challenges the Cambria Community Services District's construction and operation of a major public works project without any environmental review or a valid development permit and over the objections of several state and federal agencies. After trying unsuccessfully for years to permit an environmentally problematic permanent desalination facility, the District used the specter of "projected water supply shortages by the end of summer, 2014" to exempt its permanent water supply project from the state's environmental laws under the guise of a sudden, unexpected "emergency." Declaration of Abigail Barnes ("Barnes Decl."), Exh. A, at 3. While construction of the project over the summer and fall adversely affected the environment in and around the footprint of the new facility, its ongoing operation will cause much more significant adverse impacts on ecological resources and nearby land uses. Extracting 400 gallons of water per minute from the San Simeon Creek aquifer system, the new facility's operation is likely, in the view of several expert agencies, to dewater critical endangered and threatened species habitat, expose nearby campers and residents to aerosolized toxic brine waste, and violate a host of state coastal protection policies.

The 180-day "emergency" permit, issued by the San Luis Obispo County Planning Department last May and now expired, required the District to submit a completed application for a permanent coastal development permit by June 14, 2014. This permanent permit process is critical because it must be accompanied by full environmental review, by appropriate environmental mitigation, by public disclosure and hearings, and by an opportunity for appeal and California Coastal Commission review. Yet the District has now begun operating the project without having completed its application for a permanent coastal development permit, in violation of the California Coastal Act, the California Environmental Quality Act, and the San Luis Obispo County Code. Accordingly, pursuant to California Code of Civil Procedure section 526, Petitioners hereby seek a preliminary injunction against operation of the water supply Project, except during times of statutorily established emergency, until the District complies with its legal responsibilities.

LEGAL BACKGROUND

I. The California Coastal Act

The District's new water supply project, which lies just east of Highway 1, is within the coastal zone and thus subject to the requirements of the California Coastal Act, which was "enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California." Yost v. Thomas, 36 Cal. 3d 561, 565 (1984). "The Legislature found that 'the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people'; that 'the permanent protection of the state's natural and scenic resources is a paramount concern'; that 'it is necessary to protect the ecological balance of the coastal zone' and that 'existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . .'" Id. (quoting Cal. Pub. Res. Code § 30001(a), (d)). The primary purpose of the Coastal Act is to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment," including its "wildlife, marine fisheries, and other ocean resources," by preserving "the ecological balance" and preventing its "deterioration and destruction." Cal. Pub. Res. Code §§ 30001, 30001.5.

To achieve the statute's liberally-construed purposes and objectives, the Coastal Act requires that "any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit 'in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency.'" Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, 55 Cal. 4th 783, 794 (2012) (quoting Cal. Pub. Res. Code § 30600(a)).[1] The statute "expressly recognizes the need to 'rely heavily' on local government" by requiring "local governments to develop local coastal programs, comprised of a land use plan and a set of implementing ordinances designed to promote the act's objectives of protecting the coastline and its resources and of maximizing public access." Id. (citing Cal. Pub. Res. Code §§ 30004(a), 30001.5, 30500-30526). Once the California Coastal Commission

[1] A "person" under the Coastal Act includes government agencies. Cal. Pub. Res. Code § 30111.

certifies a local government's program, called a Local Coastal Program (which then becomes an element of the local land use plan), authority over issuance of coastal development permits is delegated to the local government. Cal. Pub. Res. Code §§ 30519(a), 30600.5(a)-(c). Permits issued by local governments are, however, generally appealable to the Coastal Commission to ensure consistency with the statute. Id. § 30603. "Thus, '[u]nder the Coastal Act's legislative scheme, . . . the [local coastal program] and the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy. In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government." Pacific Palisades, 55 Cal. 4th at 794 (citations omitted); see also Cal. Pub. Res. Code §§ 30210-30265.5 (establishing extensive, protective Coastal Act policies for public access, recreation, marine environment, land resources, development, and industrial activities).

II. The California Environmental Quality Act

The California Legislature enacted the California Environmental Quality Act ("CEQA") to "'[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions.'" No Oil, Inc. v. City of Los Angeles, 13 Cal. 3d 68, 74 (1974); Cal. Pub. Res. Code § 21001. "In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties." Mountain Lion Found. v. Fish & Game Comm'n, 16 Cal. 4th 105, 112 (1997); Cal. Pub. Res. Code § 21000. For this reason, the California Supreme Court has repeatedly held that CEQA must be interpreted to "afford the fullest possible protection to the environment." Wildlife Alive v. Chickering, 18 Cal. 3d 190, 206 (1976) (quotation omitted); see also Friends of Mammoth v. Bd. of Supervisors, 8 Cal. 3d 247, 259 (1972).

CEQA applies to all "discretionary projects proposed to be carried out or approved by public agencies." Cal. Pub. Res. Code § 21080(a). Unless the project falls within a CEQA exemption, "the agency must 'conduct an initial study to determine if the project may have a significant effect on the environment.'" Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n, 41 Cal. 4th 372, 380 (2007) (quoting 14 Cal. Code Regs. § 15063(a)). If the initial study

indicates that there is no substantial evidence of any significant environmental impact, the agency may adopt a "negative declaration." Nelson v. Cnty. of Kern, 190 Cal. App. 4th 252, 267 (2010). Where, however, there is a fair argument that a project may have a significant effect on the environment, the agency must prepare a full environmental impact report ("EIR"). Cal. Pub. Res. Code §§ 21100, 21151; 14 Cal. Code Regs. § 15064(a)(1), (f)(1); Communities for a Better Env't v. So. Coast Air Qual. Mgmt. Dist., 48 Cal. 4th 310, 319 (2010); No Oil, Inc., 13 Cal.3d at 82.

The EIR is "'the heart of CEQA,'" Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 392 (1998), and "the key to environmental protection under [the Act]." No Oil, Inc., 13 Cal. 3d at 75. It is "the primary means of achieving the Legislature's considered declaration that it is the policy of the state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.'" Laurel Heights, 47 Cal. 3d at 392. The EIR serves as an "'environmental alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the point of ecological no return." Id. It is "intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." Id. If CEQA is "scrupulously followed," the public will know the basis for the agency's action and "being duly informed, can respond accordingly to action with which it disagrees." Id. Thus, an EIR is a "document of accountability," and the CEQA process "protects not only the environment but also informed self-government." Id.

FACTUAL BACKGROUND

The Cambria Community Services District ("District" or "CCSD") provides water and sewer services to the Cambria community, drawing groundwater from aquifers beneath both San Simeon and Santa Rosa Creeks and discharging treated wastewater to a percolation recharge field adjacent to San Simeon Creek, near the San Simeon State Park campground. To meet long-term water supply demands associated with new development, the District has been attempting to build a desalination plant in one form or another for more than 20 years. Barnes Decl., Exh. B. Past efforts were unsuccessful, however, because the District continued to locate proposed projects in protected areas where development is prohibited or severely limited under ordinary circumstances.

See, e.g., id. at 2.

In 2014, the District decided to sidestep these concerns – and applicable environmental laws – by proposing an "emergency" water supply project that would withdraw water from an unused well near the confluence of San Simeon and Van Gordon Creeks, operate the well to induce salt water intrusion, treat the pumped water to remove the salt, re-inject the treated water back into the aquifer, and discharge the concentrated brine waste from the de-salting process into an adjacent holding pond (the "Project"). Barnes Decl., Exh. A. To avoid mandatory requirements associated with such a major public works project, the District suspended public contract bidding requirements and declared a "Stage 3 Water Shortage Condition" on January 30, 2014. Id. at 3, 10. In April, the District applied to the County of San Luis Obispo for an "emergency" coastal development permit under the Coastal Act. The District justified its need for an emergency permit by claiming to the County that Cambia would very soon run out of potable water. Id. at 10-11 (claiming that "uncertainty" over future summer creek flows "could result in CCSD well levels dropping at an accelerated rated during the late summer to early fall" and that "[t]he consequences of inaction or significant delay in constructing this emergency project are potentially disastrous for the community of Cambria").

Based on these representations – which were not supported by the evidence and did not accurately depict current conditions[2] – the County Planning and Building Director issued a six-month "emergency" coastal development permit to construct a brackish water treatment system. Issuance of that permit was not accompanied by the normal environmental review process under CEQA, was not subject to public hearings or County Board of Supervisors approval, and did not provide the normal opportunity for administrative appeal to the California Coastal Commission, which oversees local implementation of the Coastal Act. The emergency permit did require that all Project construction be completed before expiration of the 180-day permit and that, as mandated by state and local law, the District apply for "a regular Coastal Development Permit to authorize the emergency project" within 30 days of receiving the emergency permit. Id. at 4

[2] As discussed below, water levels in the San Simeon and Santa Rosa aquifers from which CCSD draws drinking water are consistent with historic averages.

(explaining that "[t]he regular permit will be subject to all applicable" requirements and policies of the Coastal Act and the Local Coastal Program). The regular permit application requires detailed information on Project impacts, including hydrogeologic modeling on water drawdown impacts to nearby wetlands, streams, and coastal waters; evaluation of impacts from Project operations on biological resources and recreation; results of consultation with expert wildlife agencies concerning impacts to endangered and threatened species; brine waste pond impacts; and more. See id.; Barnes Decl., Exh. P.

On June 20, 2014, the District circulated a draft Initial Study/Mitigated Negative Declaration ("Neg Dec") – a truncated form of CEQA review – for public comment. Barnes Decl., Exh. C. Several expert state and federal agencies, including the California Coastal Commission, the California Department of Fish and Wildlife, the California Department of Parks and Recreation, and the U.S. Fish and Wildlife Service, as well as members of the general public, expressed serious concerns about potentially significant impacts associated with construction and operation of the Project. For example, these agencies identified possible Project-induced changes to San Simeon Creek, which is designated as critical habitat for threatened and endangered species, and adverse health, recreational, and aesthetic impacts on people living nearby or using the adjacent campground. See, e.g., Barnes Decl., Exhs. D-G. Many of the agencies' concerns mirrored their earlier comments on the District's previously proposed desalination projects. In response to these stinging criticisms, the District essentially withdrew the Neg Dec and suggested at a public hearing in September 2014 that it will instead prepare a "focused EIR" to accompany its application for a regular coastal development permit. Barnes Decl., Exh. H, at 5-6. The District has not provided any timetable for doing so, however, or initiated CEQA's public process.

In the meantime, the District proceeded to construct the Project over the summer and fall and began operating the facility in January. Barnes Decl., Exh. I. In an attempt to shield its activities from any environmental review, the District filed a CEQA Notice of Exemption for the Project with the Office of Planning and Research on September 9, 2014, claiming that the Project was necessary "over a six dry-month period" to provide water for health, safety sanitation, and fire protection. Barnes Decl., Exh. K. In that notice, the District asserted that the Project is exempt

from any CEQA review or compliance under the statute's "emergency" provisions[3] and that it is "consistent with a state of emergency proclaimed by the Governor on January 17, 2014 and his executive orders issued on April 25, 2014."[4] Based on the Coastal Act and CEQA exemption provisions, the District apparently believes it can now indefinitely operate this permanent public works Project without any further public process, without a permanent coastal development permit (or even a completed application for such a permit), and without any environmental review – despite the fact that the emergency coastal development permit expired on November 15, 2014 and the Governor's Executive Order expired on December 31, 2014.

STANDARD OF REVIEW

California courts evaluate two factors to determine whether parties meet the standard for a preliminary injunction: (1) the reasonable probability that Petitioners will succeed on the merits of their claims; and (2) the interim harm Petitioners are likely to suffer if the injunction is denied, as compared to the harm that Respondents are likely to suffer if the injunction is granted. Cal. Civ. Proc. Code § 526(a); Robbins v. Superior Court, 38 Cal. 3d 199, 206 (1985). Courts "must exercise [their] discretion in favor of the party most likely to be injured." Id. at 205.

ARGUMENT

I. Petitioners Are Likely to Succeed on the Merits Because the District Is Operating the Project in Violation of the California Coastal Act and CEQA.

Although the Coastal Act and the County's Local Coastal Program allow for short-term "emergency" coastal development permits, the District's water supply Project does not qualify for such a permit because it is a long-term public works facility, not a temporary response to a sudden,

[3] In particular, the Notice claimed a statutory exemption under Public Resources Code section 21080(b)(4), which exempts from CEQA "specific projects necessary to prevent or mitigate an emergency." As discussed below, this exemption is extremely narrow and applies only for responses to "sudden, unexpected" occurrences or events, not long-term public works projects.

[4] As discussed below, the April 25 executive order did not unilaterally exempt projects from CEQA. Rather, in Directive 12, the order provided: "The California Department of Public Health, the Office of Emergency Services, and the Office of Planning and Research will assist local agencies that the Department of Public Health has identified as vulnerable to acute drinking water shortages in implementing solutions to those water shortages." Barnes Decl., Exh. J, at 2. Then, Directive 19 provides that for "actions taken pursuant to directive 12 when the Office of Planning and Research concurs that local action is required," CEQA is suspended until December 31, 2014. Id.

unexpected event. Likewise, the Project does not qualify for an "emergency" exemption from the environmental review requirements of CEQA because it is not responding to a sudden, unexpected occurrence or a documented acute drinking water shortage. Indeed, the data continue to show that water levels in District wells remain at or near their historic averages. But even if the "emergency" permit issued by the County Planning Director in May 2014 was legally proper, that permit has now expired and the District has unlawfully failed to obtain a permanent coastal development permit to operate the Project or undertaken the required CEQA review. Because these basic facts and legal requirements are indisputable, Petitioner is likely to prevail on the merits of their claims.

A. The District's Construction and Operation of the Water Supply Project Does Not Qualify for an "Emergency" Coastal Development Permit or an "Emergency" Exemption from CEQA.

The Coastal Act allows for the issuance of short-term "emergency" permits that do not require full public process, environmental review, or a vote by the Local Coastal Program decision body – here, the County Board of Supervisors – but only in very limited circumstances. Under a certified Local Coastal Program such as the County's, the designated official may issue a temporary coastal development permit for emergencies (other than those under section 30611[5]) and for certain small nonemergency developments not at issue here. Cal. Pub. Res. Code § 30624(a). The applicable Coastal Commission regulations, and similar language in the County Coastal Zone Land Use Ordinance, define an "emergency" for purposes of section 30624 as "a sudden unexpected occurrence demanding immediate action to prevent or mitigate loss or damage to life, health, property or essential public services." 14 Cal. Code Regs. ("CCR") § 13009; San Luis Obispo County Code ("SLO Code") 23.03.045(a).[6]

[5] The Coastal Act also allows permit waivers for a person performing a public service (i) "to protect life and public property from imminent danger," or (ii) "to restore, repair, or maintain public works, utilities, or services destroyed, damaged or interrupted by natural disaster, serious accident, in in other cases of emergency." Cal. Pub. Res. Code § 30611. Work under such a permit cannot exceed $25,000 in value and the Coastal Commission must be notified "within three days of the disaster or discovery of the danger." Id. This exemption is not applicable to the District's new, multi-million dollar water supply Project.

[6] Coastal Act regulations govern emergency permits issued directly by the Coastal Commission in those areas where it retains original jurisdiction, 14 Cal. Code Regs. §§ 13136-13143, and by designated local

CEQA contains nearly identical emergency exemption language – "sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services" – and further explains that the term "emergency" "includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage." Cal. Pub. Res. Code § 21060.3; 14 Cal. Code Regs. § 15359; see id. § 21080(b)(4) (exempting specific actions necessary to mitigate an emergency).[7] The CEQA implementing regulations explain further that the statutory emergency provision "does not include long-term projects undertaken of preventing or mitigating a situation that has a low-probability of occurrence in the short-term." 14 Cal. Code Regs. § 15269(c).

This definition is "obviously extremely narrow" and applies only where "the lead agency simply cannot complete the requisite paperwork within the time constraints of CEQA." W. Mun. Water Dist. v. Superior Court, 187 Cal. App. 3d 1104, 1111 (1986) (holding that generalized assumptions regarding likelihood of future seismic events were not sufficient evidence to support an emergency exemption for the drilling of two dewatering wells); see also SLO Code § 23.03.045(b)(5) (providing that Planning Director may only grant emergency coastal development permit if he finds, among other things, that "[a]n emergency exists that requires action more quickly than permitted by the procedures for regular permits administered pursuant to this title"). "For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper." W. Mun. Water Dist., 187 Cal. App. 3d at 1111.

The water supply Project at issue here does not qualify for an emergency coastal development permit or a CEQA emergency exemption because it is intended and designed to respond to long-term water supply concerns, not a "sudden unexpected occurrence" like a

officials where a Local Coastal Program has not yet been certified, id. §§ 13329-13329.4. Because the County of San Luis Obispo has a certified Local Coastal Program, the emergency provisions are incorporated into the County Code. See SLO Code § 23.03.045.

[7] The Public Contracts Code, from which the District also exempted itself to circumvent competitive bidding requirements for the Project, also uses the same language. Cal. Pub. Cont. Code § 1102.

mudslide, earthquake, or other disaster. In its application for the emergency permit, the District acknowledged that the Project responds to a "prolonged drought" that was "unlike other natural disasters, which occur suddenly." Barnes Decl., Exh. A, at 11. The now-withdrawn Neg Dec likewise stated that the Project is needed because the District "anticipates continued water shortages and drought conditions over the course of the next 20 years, as a result of climate change impacts, and the likely need for use of the emergency water supply facilities in 8 to 10 years of the next 20 years." Barnes Decl., Exh. C, at 4.9-9. In a recent billing insert, District General Manager Jerry Gruber confirmed that the Project was constructed "[a]fter decades of debate over what to do about our chronic water shortage," and now provides Cambria with a new "level of drought protection." Barnes Decl., Exh. L, at 1-2 (emphasis added). The Project, in short, is a major public works project undertaken as a preventive measure to address long-term water supply concerns.

As such, the Project simply does not qualify as an "emergency" under the Coastal Act, the County Code, or CEQA. Like the City of San Luis Obispo in Los Osos Valley Associates v. City of San Luis Obispo, 30 Cal. App. 4th 1670, 1681-83 (1994), the District here "was well aware of the need to conserve water for years," and its decision to build a desalination facility to address a long-standing water supply condition does not constitute an "emergency" occurrence presenting "a clear and imminent danger, demanding immediate action." Rather, "it constituted a choice among many that the [District] made over a considerable period of time." Id. (noting that drilling of groundwater wells to alleviate seismic threat was not an "emergency" justifying CEQA exemption). Reading either the Coastal Act or CEQA to exempt the District's water supply Project from review and permitting "completely ignores the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature and would be in derogation of the canon that a construction should give meaning to each word of the statute." W. Mun. Water Dist., 187 Cal. App. 3d at 1111. "Moreover, in the name of 'emergency' it would create a hole in CEQA of fathomless depth and spectacular breadth. Indeed, it is difficult to imagine a large-scale public works project, such as an extensive deforestation project or a new freeway, which could not qualify for emergency exemption from an

EIR on the grounds that it might ultimately mitigate the harms attendant on a major natural disaster." Id. at 1112.

As the Los Osos court explained, the term "emergency" "has long been accepted in California as an unforeseen situation calling for immediate action. . . . Emergency is not synonymous with expediency, convenience, or best interests, and it imports 'more . . . than merely a general public need.' Emergency comprehends a situation of 'grave character and serious moment.' It is 'evidenced by an imminent and substantial threat to public health or safety.'" 30 Cal. App. 4th at 1680. Thus, the District cannot use the narrowly-constrained statutory emergency provisions in the Coastal Act, the County Code, and CEQA to construct and operate a major water supply facility based on prognostications of future water shortages as the community of Cambria grows. The District's actions here were nothing more than "an attempt to use limited exemptions contained in CEQA as a means to subvert rules regulating the protection of the environment." Castaic Lake Water Agency v. City of Santa Clarita, 41 Cal. App. 4th 1257, 1268 (1995) (ordering agency to vacate CEQA Notice of Exemption for city plan).

Beyond the legal arguments regarding the meaning of "emergency," the facts here do not support the District's alarmist rhetoric to the County, the media, and various state agencies about the water situation. In its January 2014 resolution declaring a "severe water conditions" and exempting itself from competitive public contracting requirements, the District stated that "without some alternative supply of water, CCSD will effectively run out of water in approximately four (4) to six (6) months." Barnes Decl., Exh. Y, at 1. The following month, the District told the Coastal Commission and the County that the community had "approximately 3-4 months of water left before running out." Barnes Decl., Exh. Z. Then in its April application for the emergency coastal development permit, the District claimed that "uncertainty" over future summer creek flows "could result in CCSD well levels dropping at an accelerated rate during the late summer to early fall." Barnes Decl., Exh. A, at 10-11. In May, to support its application, the District predicted depletion of all groundwater between October and December. Barnes Decl., Exh. AA, at 3. In September, relying on District claims that "[e]ach day that passes . . . increases the probability of Cambria running out of Water," Barnes Decl., Exh. BB, and the Division of

Drinking Water's statement that the Project was "necessary to avoid a water shortage or water outages in the future," Barnes Decl., Exh. S, at 3, OPR concluded that the District would run out of water within 60 to 90 days. Barnes Decl., Exh. N. Two months later, the Central Coast Regional Water Quality Control Board repeated the same claim. Barnes Decl., Exh. W, at 19.

Throughout this time, water kept flowing to the taps. The District's own well data demonstrate that there has been no significant deviation from historic water levels. See Barnes Decl., Exh. M. Indeed, water supply levels over the last six months were and are roughly average for the relevant time of year. Id. Every year, well levels drop steadily during the dry season (May through October), as pumping occurs but recharge does not. And then the aquifer is recharged again by winter infiltration. Water levels throughout 2014 were entirely consistent with this historic pattern. Id. Despite these hard facts, the District continued to cry wolf throughout all of 2014.

Having suggested that Cambria would run dry by the end of summer 2014 and having insisted that the Project was necessary to meet this dry season emergency, the District did not actually turn on the Project until January 2015, in the heart of the wet season after winter rains had replenished the groundwater supply. The District, of course, knew that construction of the "emergency" Project would take several months and could not, therefore, alleviate any anticipated water shortage during the summer of 2014. But it used public concern about the general statewide drought to evade and subvert California's key environmental protection and public participation laws. The fact that the District insists, now that the Project is built, that it operate through the wet season merely confirms what has always been true – that the Project was and is intended as a public works water supply plant designed to address chronic shortages and the District's thirst for more water to fuel development. Accordingly, until the District complies with these environmental rules (or demonstrates a true statutory emergency from a sudden and unexpected event), it should not be allowed to continue operating the Project.

B. Because the "Emergency" Coastal Development Permit Has Expired and the District Has Failed to Obtain a Permanent Permit as Required by Law, No Valid Permit Currently Authorizes Operation of the Project.

Even assuming for the sake of argument that the facts supported issuance of an

"emergency" coastal development permit last May, that permit was issued improperly and has since expired. Moreover, a key condition of the District's emergency permit and a strict requirement in the County Code governing emergency permits – that the permit holder submit a completed application for a permanent permit within 30 days – has never been satisfied. Accordingly, the District does not currently hold a valid coastal development permit to operate the Project and is operating in violation of the Coastal Act.

As a threshold matter, before issuing an emergency permit, the County Planning Director was required to: (1) verify the facts concerning the existence and nature of the emergency and to consult with the Coastal Commission regarding claims of emergency – a "critically important" part of the process; (2) make a finding based on supporting facts that "[a]n emergency exists that requires action more quickly than permitted by the procedures for regular permits administered pursuant to this title, and the work can and will be completed within 30 days unless otherwise specified by the terms of the permit"; and (3) make a finding that "[t]he work proposed would be consistent with the requirements of the certified Local Coastal Program." SLO Code § 23.03.045(b)(3), (5). As discussed above, the District's own well monitoring data show that no finding of a statutory emergency was made or supportable on the facts as they existed in May 2014 – or as they exist now. In issuing the emergency permit, the Planning Director did not include any findings verifying the existence of a true statutory emergency or provide any supporting analysis. Barnes Decl., Exh. A. That fact alone renders the County's issuance of the emergency permit unlawful. Cal. Code Civ. Proc. § 1094.5(b) ("Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.")

Equally important, the Planning Director did not include any analysis of the proposed Project's consistency with the requirements of the Local Coastal Program, which implements the resource protection provisions of the Coastal Act. Nor, based on the available facts, could he have done so. As the Coastal Commission has repeatedly explained, the Project is not consistent with many Coastal Act provisions. Barnes Decl., Exh. D; Barnes Decl., Exh. O, at 6-7 (listing at least 26 Coastal Act policies with which the Project appears to be inconsistent).

Finally, and of particular significance here, within 30 days of notifying the Planning Director of the "emergency," the permit applicant must apply for a permanent permit, and failure to do so "shall" result in a County enforcement action under the Local Coastal Program. SLO Code 23.03.045(b)(6). The emergency permit itself requires that the District submit an application for a permanent permit within 30 days of May 15, 2014. Barnes Decl., Exh. A, at 4 ("Within 30 days of the date of issuance of this emergency permit, the permittee shall apply for a regular Coastal Development Permit to authorize the emergency project. The regular permit will be subject to all applicable provisions of the California Coastal Act and the Local Coastal Program, including the specific requirements for desalination facilities in the North Coast Area Plan Community Wide Policy 4D and the policies applicable to protecting creek and stream resources, and may be conditioned accordingly."). Among other things, that application must include the results of hydrologic impact modeling and monitoring on aquifer drawdown and surface aquatic resources and measures to mitigate such impacts, as well as an analysis of Project noise and light impacts on adjacent human and biological communities. Id. In July, the County notified the District that it was in violation of the requirement to submit a complete application for a permanent permit, Barnes Decl., Exh. P, and the District still has not produced an environmental analysis or completed the permit application process.

In sum, the District has never held a valid emergency coastal development permit for the Project because the County never made the properly supported verifications and findings of a sudden, unexpected occurrence required for such a permit. Moreover, despite the County's failure to enforce its own ordinance, the District has been in violation of the permit terms (and thus in default of the permit) since June 15, 2014, when it failed to timely submit an application and accompanying environmental analysis for a permanent permit to operate. And, in any event, the emergency permit has now expired by its own terms (180 days after issuance or on November 15, 2014). Barnes Decl., Exh. A, at 1.[8] Without a valid coastal development permit under the Coastal

[8] The County Code requires that all emergency coastal development permits include an expiration date. SLO Code § 23.03.045(b)(5). The emergency permit for the Project limits construction to 180 days, but purports to allow operation to continue "until such time that the CCSD-declared Stage 3 Water Shortage

Act, the Project cannot legally continue to operate and thus its operations should be enjoined. Cal. Pub. Res. Code § 30803; Pacific Legal Found. v. Cal. Coastal Comm'n, 33 Cal. 3d 158, 169 (1982) ("injunctive relief [is] broadly available to review possible violations of the Coastal Act").

C. The District Is Operating the Project in Violation of CEQA.

The Court can enjoin Project operations based solely on the absence of a current and valid coastal development permit, but the District is also in ongoing violation of CEQA. As discussed in Section A, supra, the District was and is not entitled to a statutory emergency exemption from CEQA because the Project responds to a perceived long-term water supply need, not a "sudden, unexpected occurrence, involving a clear and imminent danger," such as a fire, flood, or earthquake. Cal Pub. Res. Code § 21060.3. In the Notice of Exemption from CEQA, however, the District also invoked the Governor's April 25, 2014 Executive Order as a separate basis for its emergency CEQA exemption. Although Petitioners need not refute the applicability of this exemption to obtain an injunction under the Coastal Act, we address the issue here because it further illustrates the District's subterfuge and subversion of California's core environmental requirements.

Directives 12 and 19 of the Executive Order allow limited suspension of CEQA environmental review for local agency projects responsive to acute drinking water shortages when the California Department of Public Health, now the Division of Drinking Water ("Division"),[9] has identified those agencies as vulnerable to acute drinking water shortages and the Office of

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Emergency has ended, or the project has been authorized to continue to serve existing development through approval of a regular Coastal Development Permit, whichever is sooner." Barnes Decl., Exh. A, at 3. Given the County's refusal to enforce its own ordinance requiring mandatory termination of the permit for failure to timely submit a permanent permit application and the District's ability to control when it declares a local Stage 3 Water Shortage Emergency, this permit term is really no term at all. Thus, the Court should properly read the permit to have expired, at the latest, by its own terms on November 15, 2014.

[9] On July 1, 2014, the Drinking Water Program was transferred from the California Department of Public Health to the State Water Resources Control Board as the Division of Drinking Water. The determination of vulnerable local agencies under the Governor's executive order apparently became the responsibility of the Division of Drinking Water at that time. In response to Petitioner's request under the California Public Records Act for records related to the Project's CEQA exemption, the Department of Public Health responded that the request fell under the jurisdiction of the State Water Resources Control Board. Barnes Decl., Exh. Q. As discussed below, the Division of Drinking Water did not undertake any supporting analysis.

Planning and Research ("OPR") concurs that local action is required. Barnes Decl., Exh. J, at 3. The Division maintains a list of water districts that may be vulnerable to acute drinking water shortages on its website. On September 26, 2014, the Division updated its list of water districts that may be vulnerable to acute drinking water shortages. Cambria was not on the list. The Division last updated this list on November 20, 2014, to note that no water systems were at extreme risk of drinking water shortages. Barnes Decl., Exh. R. On September 11, 2014, however, at the request of the District and OPR, the Division sent an email message to OPR stating that:

> The Division of Drinking Water has been monitoring the progress of this project for the last several months. The project is necessary to avoid a water shortage or water outages in the future. The water system has done a remarkable job conserving water to avoid water outages to this point. The system's vulnerability to water outages in the future is high without the emergency water supply project.

Barnes Decl., Exh. S, at 3. Pursuant to the California Public Records Act, Petitioner subsequently requested from the Division all public documents related to or supporting this conclusion and, in response, received no supporting analysis or evidence from the Division; apart from the above-quoted email, the Division provided only a copy of the Neg Dec and the Project's Title 22 Engineering Report. Barnes Decl., Exh. T, at 2-3. Thus, the facts demonstrate that the Division did not undertake or review any analysis that would support its September 11, 2014, statement to OPR.

OPR then issued a concurrence on September 12, 2014, following the receipt of the Division's email, which stated that the:

> California Department of Public Health has identified the Cambria Community Services District (district) as having critical drinking water shortages, meaning that the city will deplete its available supplies within 60 to 90 days. The Office of Emergency Services has indicated that the project described in the attached Notice of Exemption is necessary to solve this critical drinking water shortage. The State Water Resources Control Board and Department of Fish and Wildlife have issued the necessary permits. The Office of Planning and Research concurs that local action is required.

Barnes Decl., Exh. N. Pursuant to the California Public Records Act, Petitioner subsequently requested from OPR all public documents related to or supporting this concurrence and, in response, received no supporting analysis or evidence from OPR. Barnes Decl., Exh. U. In response to separate California Public Records Act requests for all public documents related to or

supporting this concurrence, the Office of Emergency Services verbally responded that it had no responsive documents, while the California Department of Fish and Wildlife also responded that it had no responsive documents and confirmed it had not issued a permit for the Project. Barnes Decl., Exh. V. Moreover, at the time of the concurrence's issuance, the State Water Resources Control Board (through the Central Coast Regional Water Quality Control Board) had not yet issued permits for the Project. See, e.g., Barnes Decl., Exh. W (order issued November 14, 2014). Despite a complete lack of analysis to support OPR's concurrence on Sept. 12, 2014, the District – three days earlier, on Sept. 9, 2014 – filed its Notice of Exemption from CEQA based on OPR's concurrence.

The Division apparently concluded that Cambria was vulnerable to an acute drinking water shortage, despite months of monitoring that showed average water table levels, based entirely on the District's unsupported statements. OPR apparently premised its concurrence on the support and approval of the Project by other agencies, yet those agencies never gave the approval or issued the permits it described. It is unclear how OPR was given to believe that the Project had been approved by other agencies. What is clear is that any approval of the Project as exempt from CEQA under the Governor's order was done without any factual findings or analytic basis.

There is not now, nor was there at the time of issuance, any credible evidence to support the District's insistent that the Cambria community is in danger of running out of drinking water, that the Project qualifies for an emergency coastal development permit under the Coastal Act, or that the Project is necessary to prevent or mitigate an emergency as defined by CEQA. Petitioners are thus highly likely to prevail on the merits of their Coastal Act and CEQA claims, and operation of the Project should be enjoined until the District fully complies with these laws.

II. Irreparable Harm to the Environment Outweighs Any Injury to Respondent.

Continued operation of the Project will cause irreparable harm to the environment, which outweighs any potential injury to Respondent. The Court should enjoin the Project until the District fully complies with the Coastal Act and CEQA in order to preserve the environmental status quo, for the following reasons. First, operation of the Project may negatively impact sensitive habitats and protected wildlife. Second, operation of the Project's brine evaporation

pond and spray evaporators may result in adverse changes to the surrounding habitats and protected wildlife. Third, operation of the Project is likely to prejudice CCSD's consideration or implementation of mitigation measures or alternatives during CEQA review while, on the other hand, the District will not be substantially injured by the issuance of a preliminary injunction. Because the needs of Petitioner in this instance outweigh any potential harm to Respondent, the issuance of a preliminary injunction is proper in this case.

A. Operation of the Project May Negatively Impact Affected Sensitive Habitats and Protected Wildlife.

Petitioner and the public's recreational, aesthetic, and conservational interests will be irreparably harmed without a preliminary injunction because operation of the Project may negatively impact affected sensitive habitats and protected wildlife. Operation of the Project will affect water levels in the San Simeon Creek and lagoon and Van Gordon Creek habitats, which can significantly compromise the survival of several endangered and threatened species. The Project will extract 400 gallons of groundwater per minute – or 100 million gallons per year – from the San Simeon Creek aquifer system, a substantial portion of the water that feeds these habitats for several protected species. The Project will lower water levels in the San Simeon aquifer, reduce instream flows that result from groundwater entering these creeks and lagoons, change the creek sediment regimes and salinity, raise the temperature of the creek water, and lower dissolved oxygen. Barnes Decl., Exh. E, at 8. Significantly, withdrawals will occur during the dry season, the time of year when the habitat and species are most vulnerable to loss or diminishment. Barnes Decl., Exh. D, at 3.

Survival of native wildlife depends on these affected creeks and lagoons, which are designated as critical habitat for several species identified as endangered or threatened under the federal Endangered Species Act. These species include: tidewater goby (federally endangered); the California red-legged frog (federally threatened); steelhead trout (federally threatened); and western snowy plover (federally threatened). Barnes Decl., Exh. X, at 5-9.

The South Central California Steelhead Recovery Plan of 2013 identifies San Simeon Creek as "critical" to ensuring recovery of the steelhead trout population and concludes that

groundwater extraction poses a "very high threat" to steelhead. Barnes Decl., Exh. D, at 3-4; Barnes Decl., Exh. F, at 3. Historic flow reductions in San Simeon and Van Gordon Creeks may have already irreparably harmed steelhead, and the Project's operation is likely to cause additional damage to future runs. Barnes Decl., Exh. E, at 1.

The Tidewater Goby Recovery Plan of 2013 designates San Simeon Creek as a "critical habitat" for the tidewater goby. Designation of Critical Habitat for Tidewater Goby, 78 Fed. Reg. 8746, 8771 (Feb. 6, 2013); see also Barnes Decl., Exh. F, at 3; Barnes Decl., Exh. G, at 1. The U.S. Fish and Wildlife Service warned the District that the Project could cause "a reduction in surface flows to the estuary [which] could have adverse impacts to the tidewater goby, such as stranding and desiccation of individual tidewater gobies or making them more vulnerable to predation." Barnes Decl., Exh. G, at 2.

The Project area also is designated "critical habitat" for the California red-legged frog. Barnes Decl., Exh. D, at 2; Exh. F, at 3; Exh. G, at 2. The U.S. Fish and Wildlife Service warned the District that a reduction in the water levels of San Simeon Creek could "affect the ability of California red-legged frog eggs to hatch or could cause egg masses to desiccate. Tadpoles, in turn, could desiccate, be stranded, or be subjected to increased predation if the creek dries more quickly as a result of the proposed project." Barnes Decl., Exh. G, at 2. The California Coastal Commission likewise advised the District more than six months ago that the Project is likely to "diminish function and value of that habitat" and result in a "take" of these four listed species. Barnes Decl., Exh. D, at 2. Both the California Department of Parks and Recreation and the U.S. Fish and Wildlife Service recommended that the District evaluate these effects of the Project prior to implementation. Barnes Decl., Exh. F, at 3-4; Exh. G, at 2.

The District, however, failed to heed the warnings and advice of these expert federal and state agencies. The current mitigation proposal to return 100 gallons per minute of treated water, as proposed in the IS/MND, was criticized by the Coastal Commission as unsupported by data and "contradicted by known information about the San Simeon watershed." Barnes Decl., Exh. D, at 10. No study has been done to ensure that this volume of water will adequately mitigate the Project's operational effects on habitat and affected wildlife. Id. Only appropriate environmental

review under CEQA and the Coastal Act – the kind of modeling and monitoring required by the County as part of the (non-existent) permanent permit application – can produce the information necessary to properly mitigate these potentially significant environmental effects.

In addition to altered water levels, Project operation is likely to significantly alter the chemical makeup of the adjacent creeks and lagoons due to the extraction of brackish water and subsequent discharge of treated water. The District has not evaluated how the treated water may affect the chemical profile of the affected creeks/lagoons over time. The relevant percentages of effluent water, brackish water, and freshwater to be combined over time remain unknown and unstudied, as are their effects on the lagoon's long-term water quality. Barnes Decl., Exh. F, at 2. Similarly, the effects of ammonia and chlorine chemicals, which will be used in the filtration process (and thus will be put into the treated water to be returned to the creeks), on benthic macro-invertebrates (essential to fish diets) have not been considered. Id.

Without the required environmental review, it is not possible to determine the full extent of the Project's impacts on the local ecosystem. Indeed, that is the very purpose of conducting CEQA and Coastal Act review before a project commences. At a minimum, the District should have conducted a baseline assessment of affected endangered and threatened species, including population data and an assessment of the extent and function of existing habitat types and conditions, prior to operation of the plant, as several state and federal agencies urged. See, e.g., Barnes Decl., Exh. D, at 8. Given the endangered and threatened status of at least four wildlife species in harm's way, any loss of habitat may be considered a significant adverse impact. Id. Thus, Petitioners are entitled to a preliminary injunction until CCSD complies with CEQA and the Coastal Act by completing an environmental analysis of the Project's impacts on nearby creeks and lagoons and their associated wildlife.

B. Operation of the Project's Brine Evaporation Pond and Spray Evaporators May Result in Adverse Changes to Surrounding Habitats and Protected Wildlife.

Petitioners and the larger public also will suffer irreparable harm from the Project's brine evaporation pond and spray evaporators, which may result in adverse changes to the surrounding habitats and protected wildlife. In addition to the extraction of groundwater and the return of

treated water discussed above, the Project will discharge concentrated brine wastes into a nearby evaporation pond. Brine wastes are composed of the waste removed from the extracted water during the treatment process, including all salts and other contaminants removed from the treated water by the reverse osmosis process.

The brine evaporation pond is located a mere 300 feet from the San Simeon state campground and two State Park residences. Because the natural evaporation of the pond is insufficient to dispose of the wastewater, five spray evaporators are being used to accelerate evaporation from the pond, shooting brine mist hundreds of feet into the air. The District proposed to operate spray evaporators approximately 12 hours per day, 350 days per year, dispersing brine water onto nearby trails, wetlands, and sensitive habitats. Barnes Decl., Exh. F, at 4.

The brine evaporation pond and spray evaporators pose several risks to the area, potentially resulting in irreparable harm. First, the chemical constituency of the brine evaporation pond is unknown, and the District has not conducted any study or evaluation of the pond's impacts to nearby wildlife. It may be an attractive nuisance for waterfowl and other avian species, bats, pond turtles, red-legged frogs, and other wildlife, where the long-term evaporation concentration of salts in wastewater creates hypersalination conditions that harm wildlife. Barnes Decl., Exh. E, at 4. Similar conditions in hypersaline industrial water ponds, for example, cause bird mortality due to salt crystallization in feathers and brine ingestion. Id.

Second, the chemical constituency of the aerosolized brine is unknown and may contain trace metals, such as copper, chromium, steel, lead, mercury, and arsenic, with attendant potential harms to both the environment and any persons in the area. Id. The water treatment process used at the Project likely result in wastes containing ammonium, barium, strontium, chlorine, and other chemicals at levels that may be harmful or toxic when airborne. Barnes Decl., Exh. D, at 6. Thus, the chemicals in the aerosolized brine mist and dry brine solids may be toxic and pose health risks to humans or wildlife frequenting the area or the surrounding dispersal area – such as killing vegetation, harming the surrounding wetlands, or causing long-term damage to soils. Barnes Decl., Exh. E, at 4; Exh. F, at 4.

Third, it remains unknown whether the spray evaporators will adequately control the flow of the brine mist away from homes and campgrounds once projected into the air – even with the District's proposed "shut-off system" for unfavorable weather conditions. Barnes Decl., Exh. D, at 5, 6-7; Exh. F, at 4. Likewise, no data exist on the natural evaporation rate at the pond and whether the proposed schedule (12 hours a day, 350 days per year) is necessary or adequate to control water levels in the brine evaporation pond. Id., Exh. D, at 5.

C. Potentially Irreparable Harms from Operating the Project Without Adequate Environmental Review and Mitigation Strongly Outweigh the District's Short-Term Concerns, Especially During the Wet Season.

Not only are these potential ecological and human impacts unevaluated as a result of the District's failure to undertake appropriate and required environmental review, but unless the Project is temporarily enjoined, we may never know what has been lost. That is so because the Project may irrevocably alter the environmental baseline – the native plants, wildlife, and ecological function – against which we measure adverse impacts. For this reason, where an agency has failed to complete adequate environmental review, it is proper for the Court to preserve the environmental status quo by "issu[ing] an order enjoining [the public agency] from undertaking any actions which could result in 'an adverse change or alteration to the physical environment, until the public agency has taken any actions that may be necessary to bring the . . . decision into compliance with [CEQA].'" San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus, 27 Cal. App. 4th 713, 741-42 (1994) (noting that without an injunction, the project "could result in an adverse and irreparable change in the physical environment").

On the other side of the scale, the District can offer no compelling counterbalance for why it should be allowed to continue operating the unlawfully constructed Project in violation of CEQA and the Coastal Act. As the data show, there is no unusual water shortage that differs from the recent past. While water conservation may have to continue, that is true throughout California and does not provide justification for tossing aside the state's most important environmental protection laws. The fact that new development, which puts new water demands on the community, may be delayed while the District goes through the appropriate public process and environmental review and permitting steps to evaluate and mitigate Project impacts is not an

irreparable harm worthy of the Court's concern. If a true emergency arises – one that credible scientists can document to show that, indeed, existing homes and business will run dry – the Court is always free to lift the injunction and allow the Project to operate. Unless and until that occurs, however, the Court should not allow the District to circumvent the law at the expense of irreplaceable public resources in the coastal ecosystem and those members of the public concerned about them. If the Court does not act, the District will be free to indefinitely ignore CEQA and the Coastal Act even as it diminishes the environmental baseline and threatens the ecological balance of the Project area.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court issue a preliminary injunction suspending any and all operation of the Project pending full compliance with CEQA and the Coastal Act.

Dated: February 11, 2015

Respectfully submitted,

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