

Judgment entered
FILED
ENDORSED
JUL 18 2007
D. RIOS, SR.
Deputy Clerk

1
2 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
3
4 IN AND FOR THE COUNTY OF SACRAMENTO

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6 PACIFIC RIVERS COUNCIL, and
7 CENTER FOR BIOLOGICAL
8 DIVERSITY, nonprofit corporations,

9 Petitioners,

10 v.

11 CALIFORNIA DEPARTMENT OF
12 FISH AND GAME, a state agency,

13 Respondent.

Case No.: 06CS01451

~~PROPOSED~~ JUDGMENT GRANTING
PEREMPTORY WRIT OF MANDATE

14 This cause came on regularly for trial on May 4, 2007, at 9:00 a.m., in Department 19 of
15 the above-entitled court, the Honorable Patrick Marlette sitting without a jury. Paul Spitler,
16 Stanford Law School Environmental Law Clinic, appeared on behalf of Petitioner, Center for
17 Biological Diversity. Deputy Attorney General Russell B. Hildreth appeared on behalf of the
18 Respondent California Department of Fish and Game. The cause was argued and submitted for
19 decision. Having considered the arguments of counsel and the documents and administrative
20 record on file in the action, and having issued a Tentative Ruling, the Tentative Ruling is now the
21 final Statement of Decision in this matter,

22 IT IS ORDERED, ADJUDGED, AND DECREED as follows:

23 A peremptory writ of mandate shall issue directing Respondent California Department of
24 Fish and Game to comply with the California Environmental Quality Act by preparing an
25 Environmental Impact Review ("EIR") in connection with its fish stocking program.

26 The writ shall require Respondent to complete the EIR and submit a Notice of
27 Determination to the Office of Planning and Research by no later than December 31, 2008 and to
28 file a return to writ with the Court by no later than January 15, 2009.

1 Petitioners may file a motion seeking their attorneys' fees within 60 days after the entry
2 of judgment and their bill of costs within 15 days after the entry of judgment. Respondent may
3 respond to a motion seeking attorneys' fees and/or a bill of costs within the time provided by law.
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6 Dated: JUL 18 2007, 2007.

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8 **PATRICK MARLETTE**

9 The Honorable Patrick Marlette

10 Judgment entered on JUL 18 2007, 2007, in Vol. of the Judgment Book,
11 page .

12 D. Jones, Clerk
13 By D. RIOS SR., Deputy Clerk
14

15 Submitted by:

16 Deborah A. Sivas
17 *Deborah A. Sivas*
18 Deborah A. Sivas
19 Stanford Environmental Law Clinic
Attorneys for Petitioners
20

21 Approved as to form by:

22 Russell B. Hildreth
23 *Russell B. Hildreth*
24 Russell B. Hildreth
25 Deputy Attorney General
Attorneys for Respondent
26
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PACIFIC RIVERS COUNCIL, et al., v. CALIFORNIA DEPARTMENT OF FISH AND GAME, Case No. 06 CS 01451:

The following shall constitute the Court's tentative ruling on the petition for writ of mandate, set for hearing in Department 19 on Friday, May 4, 2007. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

This is a petition for writ of mandate under Code of Civil Procedure section 1085 in which petitioners allege that respondent Department of Fish and Game is, and has been, violating the California Environmental Quality Act ("CEQA", Public Resources Code sections 21000 et seq.) by carrying on its annual fish stocking program without conducting an environmental review of the effects of that program. Petitioners seek a writ of mandate directing respondent to comply with CEQA along with an order enjoining any further fish stocking activities until respondent has complied with the law.

Respondent argues that its fish stocking program is exempt from CEQA.

As a preliminary evidentiary matter, respondent's objection to the reply declaration of Roland Knapp is overruled. Although the matters set forth in the declaration are largely cumulative of matters already cited in the administrative record, the declaration has been offered in rebuttal to respondent's argument that the fish stocking program does not have significant environmental effects, and to clarify the extent of the management plans respondent cited in its opposition as evidence for that argument. The declaration is therefore properly filed with the reply brief. Furthermore, it is not improper under the usual rules limiting the admission of extra-record evidence because this is a case in which an agency is alleged not to have taken required action, so there is not a defined "administrative record" as there would be after a trial-type administrative hearing or a full CEQA review process.

The facts relevant to this matter are not really disputed and may be summarized as follows:

1. Fish stocking has taken place in California since the mid-1800s. In the early 1900s, the California Fish and Game Commission assumed responsibility on behalf of the State for stocking hatchery trout into California lakes and rivers. Since 1945, respondent Department of Fish and Game has coordinated virtually all fish stocking programs in the State.
2. CEQA was enacted in 1970.
3. Since the enactment of CEQA, respondent has not performed any environmental review of its fish stocking program pursuant to the terms thereof.
4. In a document published in April 2006, respondent announced that it would initiate preparation of an "environmental document describing impacts of the Department's fish stocking program". (A.R. 5331, Item 6.) Respondent anticipates having a contractor retained to begin work on the document by mid-June 2007, with completion of the document expected within one year of the date on which a Notice of Preparation is filed with the State Office of Planning and Research. (Declaration of James A. Starr, par. 3.) Even so, as demonstrated by its position in this action, respondent does not admit that it is subject to the

provisions of CEQA, and it is unclear whether the environmental review it proposes to undertake will be done under the procedural and substantive rules of CEQA.

5. In October 2005, Assembly Bill 7 became effective as Fish and Game Code section 13007. Among other things, AB 7 imposed upon respondent production goals and minimum releases of trout beginning on July 1, 2007. (See, Exhibit 2 to respondent's opposition brief.)

6. AB 7 earmarks a significant amount of money for respondent's fish stocking program, such funds being derived from a percentage of sport fishing license fees. Respondent's implementation plan for AB 7 indicates that present levels of funding for the program will increase from approximately \$7.83 million in fiscal year 2005-2006 to \$15.04 million in fiscal year 2006-2007 and beyond, which will result in an increase in production of hatchery trout. (A.R. 5334, 5342.)

The standard of review in this action alleging a violation of CEQA is whether there has been a prejudicial abuse of discretion. (See, Public Resources Code section 21168.5.) An abuse of discretion is established if the agency has not proceeded in the manner required by law, or if the determination or decision is not supported by substantial evidence. (See, *Western States Petroleum Association v. Superior Court* (1995) 9 Cal. 4th 559, 573.) Where, as here, the claim is that an agency should have prepared an environmental impact report under CEQA for a program or activity, the applicable standard is that an EIR must be prepared and certified "...whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75.) This legal threshold is intentionally low, in large part because thorough consideration of the potential impacts is necessary through the EIR process to resolve uncertainties created by conflicting assertions. (See, *Ocean View Estates Homeowners Association, Inc. v. Montecito Water District* (2004) 116 Cal. App. 4th 396, 399.)

In this case, there is little doubt that there is substantial evidence in the record that supports at least a "fair argument" that respondent's fish stocking program has significant environmental impacts on the aquatic ecosystems into which hatchery fish are introduced, and, in particular, on native species of fish, amphibians and insects, some of which are threatened or endangered. Such evidence is thoroughly discussed in petitioner's opening brief on pages 17-23, with extensive citations to evidence in the record. Respondent's assertions that no such "fair argument" can be made are unpersuasive.

It appears clear, then, that respondent's fish stocking program is an activity for which it would have to perform environmental review under CEQA, unless, as respondent argues, it is somehow exempt from the provisions thereof.

Respondent advances several potential bases for finding such an exemption.

The first such basis is a provision of CEQA, Public Resources Code section 21169, which validates any project as "defined in subdivision (c) of Section 21065" that was undertaken, carried out or approved on or before the effective date of CEQA. While the fish stocking program was undertaken before the effective date of CEQA, section 21169 does not provide respondent with an exemption. It validates only those projects defined in Section 21065(c), which are defined as "an activity that involves the issuance to a person of a lease, permit, license, certificate or other entitlement for use by one or more public agencies." The fish stocking program is not such an activity. Instead, it is an "activity directly undertaken by [a] public agency", as defined in Public Resources Code section 21065(a). Section 21169 does not validate, or provide an exemption from CEQA for such projects.

Alternatively, respondent argues that its fish stocking program is “categorically exempt” from CEQA. So-called “categorical exemptions” have been established by the State Secretary of Resources under the authority of Public Resources Code section 21084(a) and the CEQA regulatory guidelines, specifically, 14 C.C.R. section 15300, for classes of projects which have been determined not to have a significant effect on the environment. Respondent argues that the fish stocking program falls within the Class 1 exemption for “existing facilities” contained in 14 C.C.R. section 15301. That regulation exempts the operation of “existing public structures, facilities, mechanical equipment or topographical features involving no expansion of use beyond that existing at the time of the lead agency’s determination”, with the key consideration being “whether the project involves negligible or no expansion of an existing use.” Example (j) of a Class 1 exemption is “Fish stocking by the California Department of Fish and Game”.

The availability of categorical exemptions is, however, controlled by the limits contained in 14 C.C.R. section 15300.2(b), which states: “All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.” The fish stocking program is one that operates successively, on a yearly basis, in many of the same bodies of water. As noted above, petitioners have made a persuasive showing, based on evidence in the record, that there is at least a “fair argument” that the cumulative effect of years of fish stocking in certain bodies of water has been significant. The Court therefore finds that the Class 1 categorical exemption found in 14 C.C.R. section 15301(j) is not applicable to those aspects of respondent’s fish stocking program that involve the physical planting of fish in state water bodies (as opposed to the operation of facilities associated with the program, such as hatcheries, which are not at issue here).

As another alternative, respondent argues that it is exempt from CEQA pursuant to 14 C.C.R. section 15261(a), which provides that a project carried out by a public agency is exempt from CEQA if it was approved prior to November 23, 1970. As noted above, respondent has had responsibility for the fish stocking program since 1945, and thus arguably “approved” the project long prior to 1970. But even if the program is viewed in this way, instead of being “approved” on a year-to-year basis as petitioners argue, the exemption is not available to respondent. Under 14 C.C.R. section 15261(a), the exemption for pre-existing projects is not available if certain conditions exist. One of those conditions is set forth in section 15261(a)(1): “A substantial portion of public funds allocated for the program have not been spent, and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of ‘no project’ or halting the project.” In this case, it is evident from , among other things, the provisions of AB 7, that a substantial portion of the public funds allocated for the program have not yet been spent for future years of the program. Moreover, it appears still to be feasible to modify the project to mitigate potentially adverse environmental effects. In fact, respondent admits that it has been attempting to do so. (See, Respondent’s Opposition Brief, Section II.D., pages 11-15.)

Finally, respondent argues that AB 7 represents a Legislative mandate to continue the fish stocking program within certain defined parameters, thus rendering the program a non-discretionary, ministerial project that is not subject to CEQA. (See, Public Resources Code section 21080(b)(1).) This argument is without merit. Even though AB 7 directs respondent to release certain minimum quantities of trout each year, nothing therein appears to control respondent’s discretion to determine where it will do so, and how much trout to plant in any given location. The fish stocking program therefore is not exempt from CEQA as a merely ministerial project.

The Court therefore concludes that respondent's fish stocking program is not exempt from CEQA. Given respondent's admission that it has never performed an environmental review of the program pursuant to CEQA, and the Court's finding that petitioners have demonstrated, on the basis of substantial evidence, that there is a "fair argument" that the program may have a significant environmental impact, the Court finds that respondent is violating CEQA by proceeding with the program without performing the appropriate environmental review. The Court therefore grants the petition for writ of mandate, and finds that the writ should be issued to require respondent to comply with CEQA in connection with its fish stocking program.

The issue remains whether the relief granted in this action should include an order enjoining further operation of the fish stocking program until respondent has complied with CEQA.

Public Resources Code section 21168.9(a)(2) gives the Court discretion to grant such relief in appropriate circumstances, stating: "If the court finds that a specific project activity or activities will prejudice the consideration of particular mitigation measures or alternatives to the project, [the court may enter an order including] a mandate that the public agency...suspend any or all specific project activity or activities...that 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 [its action] into compliance with this division." Traditional equitable principles are applied in determining whether additional injunctive relief should be granted. (See, *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 714, 741.)

The Court has considered the circumstances surrounding respondent's fish stocking program as presented by the record in this case and finds that injunctive relief is not necessary or appropriate at this time, because petitioners have not demonstrated that permitting the program to go forward for a reasonable time while respondent performs an appropriate environmental review under CEQA will necessarily prejudice the consideration of particular mitigation measures or alternatives to the project.

The Court makes this determination based on the following factors. The fish stocking program has been in existence for over a century and, it appears, already has caused significant environmental impacts. Some may well already be final or irreversible, but stopping the program now will not change that. Where impacts are significant but not final or irreversible, stopping the program now will not necessarily make those impacts instantly disappear, or even diminish significantly. On the other hand, petitioners have not demonstrated that continuing the program for a limited time pending full environmental review will make such impacts irreversible. Because the program appears to operate on a year-by-year basis, respondent may adjust it to reduce impacts, perhaps by shifting it from certain sensitive areas to other, less-sensitive areas, after a full environmental study. Thus, respondent may still consider appropriate mitigation measures or alternatives. Indeed, the record demonstrates that respondent has begun doing so (although not under the provisions of CEQA), by taking action to reduce some of the impacts of the program in some sensitive areas. (See, Respondent's Opposition Brief, Section II.D., pages 11-15.) Finally, this year's fish stocking program is already well-advanced; respondent has produced millions of hatchery fish that would have to be dealt with or disposed of at an unknown cost to the state and, potentially, to the environment. Granting an injunction thus might cause problems as severe as those it might forestall.

Finally, petitioner's argument that the entire fish stocking program must be shut down goes too far. The implicit predicates of this argument are that the negative effects of the program have been unequivocally established as to the program as a whole and that upon

completion of environmental review under CEQA, the entire program will be terminated. This is not necessarily so. Ordering environmental review does not compel the conclusion that respondent will be prohibited in the future from conducting any and all fish stocking activities. At this point, the ultimate conclusions of the environmental review are unknown, as is respondent's final decision as to whether potential adverse impacts can be mitigated or are outweighed by the benefits of the program. Under such circumstances, the Court may permit on-going activities to proceed while an environmental review is completed. (See, *Meridian Ocean Systems, Inc. v. State Lands Commission* (1990) 222 Cal. App. 3d 153, 171-172.)

The Court therefore finds that the writ of mandate to be issued in this matter should include provisions setting forth a reasonable schedule for respondent to comply with CEQA. Because this matter has not been briefed by the parties, the Court directs counsel to meet and confer in an attempt to work out a schedule that will be acceptable to both parties, and incorporate such schedule into the writ. If the parties are unable to reach agreement on a schedule, then counsel are directed to set the matter of a schedule for CEQA compliance for further hearing by the Court, with simultaneous briefs to be filed at least ten (10) days prior to the date set for hearing.

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In the event that this tentative ruling becomes the final ruling of the Court, counsel for petitioners is directed to prepare the final order and judgment granting the petition, as set forth above, and an appropriate writ of mandate, according to the procedures set forth in Rule of Court 3.1312.