

Order Following Hearing Held on July 8, 2002
State Water Resources Control Board Cases, No. JC 4118

This coordinated proceeding came before the Court for a previously scheduled hearing on July 8, 2002. The purpose of the hearing, the first phase in the trial in this matter, was to hear oral arguments on the standard of review to be employed by the Court to decide the issues pending in this proceeding. Oral arguments were also heard on pending procedural motions and other matters. The Court considered all memoranda and briefs submitted in advance of the hearing on the issues addressed.

Pursuant to my powers as the Coordination Trial Judge, the following orders are entered and considered binding on all of the parties in the coordinated cases that remain a part of Coordinated Special Proceeding JC 4118. Any objections to the form or content of this order should be filed on or before July 26, 2002, and served by way of a document clearly designated as "Objections to Order Following Hearing Held on July 8, 2002". Once the Court receives and considers the objection(s), the Court will determine whether to overrule the objection(s), grant the objection(s) in whole or in part and modify the order, or set the matter for further hearing on the objection(s). If no objections are received, then this order will become the Court's final order.

The Court rules as follows on the preliminary matters heard on July 8, 2002:

Requests for Judicial Notice

Over the last year, numerous requests have been made for judicial notice: Anderson Petitioners (Aug. 23, 2001); San Joaquin County Petitioners (Aug. 21, 2001; May 23, 2002; additional request, May 23, 2002); Santa Clara Valley Water Dist. Petitioners (May 23, 2002); Central Delta Petitioners (May 23, 2002). Some of these requests are opposed; others are unopposed, have been withdrawn, or any dispute otherwise has been rendered moot. Specifically:

1. **State Respondents' opposition to Anderson Petitioners' request for judicial notice of excerpts and resolutions from the minutes of the Westlands Water Dist. Board of Directors.** Notice is proposed only for the limited purpose of Petitioners' arguments concerning the appropriate standard of review in this proceeding, a subject that would not have been relevant to prior proceedings before the State Water Resources Control Board. While *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal. 4th 559, relied upon by the State Respondents, limits the discovery and introduction of extrinsic evidence in mandate proceedings, the supreme court does so in the context of determining

“whether a quasi-legislative decision was supported by substantial evidence” In the pending case, the Anderson Petitioners offer evidence of participation in the Westlands Water Dist., not to contradict the factual determinations made by the State Water Resources Control Board (SWRCB), but to advance their legal argument that the standard of review should be less deferential to the agency because of their fundamental vested water rights. The legal standard of judicial review was not an issue pending before the SWRCB. For the limited purpose of supporting petitioners’ legal arguments concerning the standard of review, judicial notice will be taken of petitioners’ documents. The objection is OVERRULED.

2. **State Respondents’ opposition, joined by others, to Department of Water Resources Memo (May 26, 1966).** Stockton East Water District has withdrawn the request for judicial notice. The objection is DISMISSED as the matter is now moot.

3. **State Respondents’ opposition to Santa Clara Valley Water Dist. Petitioners’ request for judicial notice of the San Felipe Water Distribution System EIR (Dec. 1974 & Mar. 1976).** The document predates the D-1641 proceedings before the SWRCB and petitioners have not demonstrated why, in reasonable diligence, this document could not have been offered in those proceedings. *See Western States Petroleum Ass’n v. Superior Court, supra.* Santa Clara attempts to distinguish this rule and case by suggesting the EIR relates to the District’s request for a declaratory judgment concerning the District’s authorized place of use. Santa Clara argues that the EIR can be used as independent evidence of the SWRCB’s “practices and policies” concerning place of use determinations, citing *East Bay Municipal Utility Dist. v. Department of Forestry & Fire Protection* (1996) 43 Cal. App. 4th 1113. The *EBMUD* case, however, allowed evidence of entirely different proceedings to establish agency practices and policies in addressing cumulative impacts of forest harvests. Santa Clara has not previously made this argument in its April 2000 petition for writ of mandate nor in its opening brief (Aug. 28, 2001). The San Felipe EIR, totaling 900 pages, does not appear to address the SWRCB’s place of use determinations at all. Santa Clara’s attempted use of the San Felipe EIR is not to demonstrate the SWRCB’s practices and policies in other cases but to submit “further, compelling evidence that the Bureau and the State Board intended all of Santa Clara to be within the authorized place of use.” Santa Clara’s Reply Brief at 9 (May 25, 2002). This place of use issue was addressed as one of the principal inquiries before the SWRCB in the D-1641 proceedings. The request for judicial notice appears as an attempt to circumvent the normal rule that administrative mandamus, not declaratory relief, is the proper means to review such administrative decisionmaking. *State of California v. Superior Court* (1974) 12 Cal. 2d 237. The State Respondents’ objection is SUSTAINED.

4. State Respondents' opposition to Central Delta Petitioners' request for judicial notice of map contained in DWR Water Supply Bulletin (Nov. 1965).

The document predates the D-1641 proceedings before the SWRCB and petitioners have not demonstrated why, in reasonable diligence, this document could not have been offered in those proceedings. Additionally, a more recent map and narrative of the SWP (1998) is already part of the administrative record (AR/11/2427/099555 to -57). The State Respondents' objection is SUSTAINED.

5. Several requests for judicial notice made by the San Joaquin County Petitioners have been withdrawn and are now moot: SWRCB's Notice in WRA Nos. 30680, 30681 & 30682; file in App. No. 30358.

6. The San Joaquin County Petitioners have requested judicial notice of the SWRCB's D-1635 (Oct. 2, 1996). The State Respondents argue that the County failed to request notice of the Board's subsequent order upon reconsideration. The Court will take judicial notice of D-1635 and the Board's subsequent order upon reconsideration. A copy of the order upon reconsideration was submitted to the Court by the State Respondents.

All other requests for judicial notice (including requests where missing documents have now been provided by the proponent) are GRANTED.

Declarations of Karna Harrigfeld

The first Harrigfeld Declaration (June 14, 2002) has been withdrawn, so the State Respondents' opposition is moot. The San Joaquin County Petitioners submitted an application, no longer timely, to provided expedited briefing on their motion to augment the record with documents attached to a second Harrigfeld Declaration (June 24, 2002). The ex parte application for an order shortening time is DENIED. The matter now appears to be one that should be resolved by noticed motion.

Request to File Amicus Curiae Brief

Northern California Water Ass'n has filed a request to file an amicus brief on the issue of standard of review. The matter is entirely within the discretion of the Court. Leave is GRANTED to file the amicus brief, attached to NCWA's request, and to participate in oral argument on July 8, 2002.

Oral Argument on Standard of Review

The Court heard oral argument on the standard of review to be employed by the Court in this case. In its discretion, the Court may issue interlocutory rulings on the standard of review issues, while the phased trial continues, or reserve the

Court's determinations until the final decision is rendered. Without limiting the Court's discretion or intent to provide a complete review of the applicable standards at the appropriate time, the Court is satisfied that the standards of review are as follows. The applicable standard of review under CEQA is the substantial evidence standard set out in the governing statutes. The standard of review for purely legal SWRCB determinations where the evidence and inferences therefrom are undisputed is the de novo standard. The standard of review for other SWRCB determinations is the substantial evidence standard, *United States v. State Water Resources Control Bd.* (1986) 182 Cal. App. 3d 82, 114-15, unless a fundamental vested right is affected. If the decision affects a fundamental vested right of the petitioner, then the standard of review would be the independent judgment standard.

Other Matters

Several of the documents submitted electronically to the Court appear to be corrupted. The State Respondents are requested to submit another version of their Combine Reply Brief (May 23, 2002), this time formatted in MS Word. The Northern California Water Ass'n is requested to resubmit an electronic version of its amicus curiae brief.

Roland L. Candee
Coordination Trial Judge