EVENT DATE: 01/15/2016 EVENT TIME: 01:30:00 PM DEPT.: C-72

JUDICIAL OFFICER: Timothy Taylor

CASE NO.: 37-2014-00038672-CU-WM-CTL

CASE TITLE: COASTAL ENVIRNMENTAL RIGHTS FOUNDATION VS CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION [IMAGED]

CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Hearing on Petition

CAUSAL DOCUMENT/DATE FILED: Memorandum of Points and Authorities, 09/01/2015

Tentative Ruling on Petition for Writ of Mandate

CERF v. California RWQCB, Case No. 2014-038672

January 15, 2016, 1:30 p.m., Dept. 72

1. Overview and Procedural Posture.

In this case, the petitioner seeks a writ of mandate pursuant to Code of Civil Procedure section 1094.5 ordering respondent "to immediately set aside and rescind its approval of the General Fireworks Permit, Order No. R9-2011-0022," relating to 4th of July fireworks displays at La Jolla Cove and Heisler Park in Laguna Beach. Petitioner contends the RWQCB is failing to require proper monitoring of discharge of pollutants from fireworks, and that as a result, the NPDES permit "approved on May 11, 2011 does not comply with the Clean Water Act and Water Code."

This action was filed November 13, 2014. ROA 1. The case was assigned to Judge Pressman. ROA 5. The RWQCB filed a motion to strike portions of the petition. ROA 11. Rather than oppose the motion, petitioner filed the amended petition. ROA 12. The motion went off calendar, and the RWQCB answered. ROA 13-14.

When the parties had not moved the case forward by scheduling a hearing on the writ (or even lodging the administrative record) five months after the petition was filed, Judge Pressman issued an OSC re dismissal. ROA 15. Promptly thereafter, the parties filed a stipulation setting the case on calendar, rendering the OSC moot. ROA 17-19.

CERF filed its opening brief on September 1, 2015. ROA 20-21. The RWQCB's opposition brief was filed, and the administrative record lodged, in early December. ROA 22, 26. Shortly after this occurred, Judge Pressman recused so that the case could be "reassigned to a Judge who handles CEQA cases" (even though this is not a CEQA case). ROA 27.

The case was reassigned to Judge Hayes, who is a CEQA-designated judge pursuant to General Order 010215-07 and Public Resource Code Section 21167.1(b). ROA 24. Petitioner challenged Judge Hayes (ROA 29), and the case was thereupon reassigned to Dept. 72. ROA 28. Even though the

reassignment did not occur until December 9, 2015, and even though the agreed-upon hearing date of January 15, 2016 was by then already fully spoken for on the Dept. 72 calendar, the court elected to retain the hearing date. ROA 30-32. This was so for two interrelated reasons: first, because the trial courts are not final, it is important that they be prompt. Second, because the permits attacked are for July 4, 2016, and because of the seemingly high likelihood of appellate review, the court felt it best to facilitate such review in an orderly fashion in the months preceding Independence Day by retaining the hearing date.

Petitioner filed reply on December 22. ROA 33. The court has considered all the papers.

2. Disclosure.

The court lives near San Diego Bay, and for many years has enjoyed the annual 4th of July fireworks show on Glorietta Bay (and less frequently the larger display on San Diego Bay). In addition, the court not infrequently pursues catch and release recreational activity on San Diego Bay, including Glorietta Bay. See Taylor, *Fly Fishing and the Judging Life*, Los Angeles *Daily Journal*, September 6, 2013.

In view of the allegations of the amended petition (which do not include San Diego Bay or Glorietta Bay), the court concludes that the foregoing facts do not create a disqualifying situation, but discloses them in accordance with Canon 3E2 of the California Code of Judicial Ethics.

3. Applicable Standards.

The amended petition challenges the RWQCB's action in granting a permit and imposing conditions within same. This involved the application of existing law to a permit application. Thus, the RWQCB's action was quasi-adjudicatory, and administrative mandamus procedures apply.

Code of Civil Procedure section 1094.5 provides that a trial court reviewing the decision of an administrative agency must exercise its independent judgment in reviewing the evidence; and that an "abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence." *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811. "Weight of the evidence" is synonymous with "preponderance." *Chamberlain v. Ventura County Civil Service Comm'n* (1977) 69 Cal.App.3d 362, 369.

Courts consider "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. 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." Code of Civil Procedure §1094.5(b). Where it is claimed that the findings are not supported by the evidence and the case, as here, does not involve a fundamental vested right, "abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." *Id.*, § 1094.5(c); *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 607.

"Substantial evidence" is evidence of "ponderable legal significance." *People v. Bassett* (1968) 69 Cal.2d 122, 138-139. "It must be reasonable in nature, credible, and of solid value." *Id.* at p. 139; accord, *Ofsevit v. Trustees of Cal. State University & Colleges* (1978) 21 Cal.3d 763, 773, fn. 9. In determining whether an administrative decision is supported by substantial evidence, "[w]e may not isolate only the evidence which supports the administrative finding and disregard other relevant evidence in the record. [Citations.] On the other hand, [we may not] disregard or overturn the Commission's finding 'for the reason that it is considered that a contrary finding would have been equally or more reasonable.' [Citations.] The ultimate issue in an administrative mandamus proceeding is whether the agency abused its discretion. An abuse of discretion is ' "discretion exercised to an end or purpose not justified by and clearly against reason, all of the facts and circumstances being considered." ' [Citations.] Unless the finding, viewed in the light of the entire record, is so lacking in evidentiary support as to render it

unreasonable, it may not be set aside." *Northern Inyo Hosp. v. Fair Employment Practice Com.* (1974) 38 Cal.App.3d 14, 24; accord, *Johnson Controls, Inc. v. Fair Employment & Housing Com*. (1990) 218 Cal.App.3d 517, 531-532.

4. <u>Discussion and Ruling</u>.

The petition is denied. The court does not consider this a close call. The court finds petitioner has failed to overcome the presumption of correctness accorded to agency decisions regarding the granting, withholding, or conditioning of a permit. *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 812; *Building Industry Ass'n of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 879.

The court finds petitioner has failed to carry its burden to demonstrate an abuse of discretion by the RWQCB in distinguishing between annual fireworks shows, such as the two at issue here, and the more frequent shows (such as those put on by SeaWorld). AR 2025-29. The difference between the fireworks shows at issue in this case and the Sea World situation could not be more chasmal, and it is apparent to the court that in its zeal to protect every molecule of littoral waters the petitioner has lost perspective. This case involves one show per year at each of the two locations, lasting between 15 and 25 minutes, one of which (Heisler) occurs partly over land. Sea World, by contrast, puts on up to 150 shows per year over the same part of the shallow confines of Mission Bay, and has for decades. AR 2046. This is not apples to oranges; it is apples to giant pumpkins. The RWQCB properly exercised its discretion is discerning the differences in scale and frequency, and by varying the permit conditions accordingly. AR 2051-2052. It would be fair to characterize petitioner's request that the court step into the middle of what petitioner concedes is a first-of-its kind permit regime as an invitation to a naked power grab by the court. The court declines this invitation, and instead chooses to defer to the far superior expertise of the RWQCB in matters relating to water quality. *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.

Petitioner has also failed to carry its burden to demonstrate an abuse of discretion in the RWQCB's decision to rely on visual monitoring and detailed BMPs* to demonstrate compliance with the permit's terms for all dischargers other than SeaWorld. AR 1794; 1975; 1979; 1983; 2023-34; 2074. The court also finds petitioner has failed to carry its burden to demonstrate an abuse of discretion by the RWQCB in finding the "Ocean Plan" exceptions applied to the limited annual Fourth of July shows at or near La Jolla Cove and Heisler Park. AR 1991-92, 2076.

In addition to the foregoing, the court finds there is, implied in the relevant law, an "Independence Day Exception" which provides a separate, independent grounds for denying the petition.

The 4th of July is not just another day on the calendar. It is not just about parades or remembering the brave patriots who pledged their lives, their fortunes and their sacred honor to give birth to the new nation in 1776. It is not just about honoring those who gave their lives in the ensuing 240 years in wars of freedom both at home and abroad. It is the day we rejoice in all that distinguishes the United States of America from all the other countries on earth. Every flash, every crack, every sparkle and every bang of every fireworks display represents, at least for many, one of the many freedoms and rights and opportunities we enjoy in this blessed country. And as those booms and brilliant lights dissipate into the night, we are reminded that the liberties we have can likewise disappear if we are not vigilant. Among those advantages we symbolize and celebrate (and are reminded to protect) is the rule of law.

In the United States, the rule of law is characterized (among other things) by compromise and an abhorrence of absolutism. The Declaration of Independence, the Constitution of 1787, the Bill of Rights – all products of compromise. The same can be said of the Clean Water Act and the legislative enactments comprising the Water Code (the two statutory schemes sued upon here). Both statutory schemes were the product of legislative bodies with a range of members considering a range of interests and finding common ground leading to enactment of legislation.

The court, applying simple common sense, just cannot imagine that the members of Congress, members of the Legislature (or the presidents and governors who signed the legislation) intended that the law be extended to shut down fireworks shows on the 4th of July as prayed by petitioner. If petitioner is to secure that relief – if the Legislature and the Congress intended such an absolutist reading of the Water Code and the CWA – that relief will have to come from the legislative and executive branches directly accountable to the electorate, not the Court.

This view is not without intellectual foundation in California and federal law. In 2011, a unanimous California Supreme Court held that common sense is an important consideration at all levels of environmental review. *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175. Common sense suggests that the environmental laws simply were never intended to forever darken the skies at 9:00 p.m. on Independence Day at two venues enjoyed by thousands of Americans year after year. And some things are just so ingrained in American life that they get a free pass from otherwise stringent legislative proscriptions. As the High Court observed in *Partee v. San Diego Chargers Football Co*. (1983) 34 Cal.3d 378, 400:

"Over the years, baseball was able to withstand intermittent antitrust attacks on the authority of *Federal Baseball* [*v. National League* (1922) 259 U.S. 200, 209, 42 S.Ct. 465, 466, 66 L.Ed. 898]. The baseball exemption question again reached the Supreme Court in 1953, at a time when that court's decisions had greatly expanded federal commerce clause authority. In *Toolson v. New York Yankees* (1953) 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64, the court, with two justices dissenting, declined to reconsider *Federal Baseball* despite the considerable change during the intervening thirty years in the definition of "interstate commerce." The court referred to four reasons for its holding: (1) Congressional awareness of and inaction with respect to *Federal Baseball;* (2) baseball's development on the understanding that it was not subject to existing federal antitrust laws; (3) a reluctance to overrule *Federal Baseball* with a consequent retroactive effect; and (4) a professed desire that any remedy be supplied by Congress rather than by court decision. (346 U.S. at p. 357, 74 S.Ct. at p. 79.)"

See generally Stuart Banner, *The Baseball Trust: A History of Baseball's Antitrust Exemption* (2013); *City of San Jose v. Office of the Com'r of Baseball*, (9th Cir. 2015) 776 F.3d 686, 688, *cert. denied sub nom. City of San Jose, Cal. v. Office of the Com'r of Baseball*, (2015) 136 S.Ct.36.

There are some things that are just different, that are exceptional, that are so much a part of the unifying American experience that judges simply should not shut them down at the request of even a well-intentioned private litigant. Baseball. Mom. Apple pie. And, for now at least, fireworks on the 4th of July.

Petition denied.

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*See page 7 of the RWQCB's brief for the minimum standards. Petitioner has not demonstrated that the event sponsors for either the La Jolla Cove show or the Heisler Park show have failed to meet any aspect of these permit requirements.