SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 04/16/14 TIME: 8:30 A.M. DEPT: B CASE NO: CV1301469

PRESIDING: HON. ROY O. CHERNUS

REPORTER: CLERK: STACI HENDRYX

PETITIONER: PHYLLIS FABER, ET AL vs. RESPONDENT: CALIFORNIA COASTAL COMMISSION, ET AL	

NATURE OF PROCEEDINGS: 1) WRIT – PEREMPTORY WRIT OF MANDATE [PETR] DRAKES BAY OYSTER COMPANY, A CALIFORNIA CORPORATION
2) NOTICE OF MOTION – FOR LEAVE TO FILE SECOND AMENDED PETITION AND COMPLAINT [PETR] DRAKES BAY OYSTER COMPANY, A CALIFORNIA CORPORATION

RULING

The court grants, in part, this consolidated petition for writ of administrative mandamus challenging Respondent California Coastal Commission's Cease and Desist Order and Restoration Order. (Code Civ. Proc. § 1094.5; Pub. Res. Code § 21168.)

Violations of CEQA – Respondent Coastal Commission does not dispute Petitioners' contention that the Cease and Desist Order and the Restoration Order (the Orders) are "projects" under CEQA Pub. Res. Code § 21065; 14 Cal. Code Regs. § 15378, hereafter Guidelines §), but argues that the Class 21 Categorical Exemption for "Enforcement Actions by Regulatory Agencies" applies. (Guidelines § 15321(a).) (Oppo. p. 7-8)

The court finds that the Class 21 Categorical Exemption applies to all of Petitioner Drakes Bay Oyster Co.'s onshore and offshore shellfish farming operational activities addressed in the Orders.

The court also finds that Petitioners have presented substantial evidence showing that for some of these activities, an exception to the exemption exists, because "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines § 15300.2(c); generally *Voices for Rural Living v. El Dorado Irr. Dist.* (2012) 209 Cal.App.4th 1096, 1108.)

Here, given the competing aquaculture operations with the delicate nature of the Estero and the important habitat for plants, seals, migratory birds and other species it provides (as clearly recognized by the Secretary of the Interior), the court concludes that the Orders require Drakes Bay Oyster Co. to undertake activities under "unusual circumstances." (*Voices for Rural Living, supra,* 209 Cal.App.4th at p. 1108 [whether unusual circumstances exist is an issue of law.)

Whether these "usual circumstances" may have a significant effect on the environment is viewed under the liberal "fair argument standard." (*Voices for Rural Living v. El Dorado Irr. Dist., supra,* 209 Cal.App.4th at p. 1108.) This is a low threshold that requires preparation of an EIR where the record contains "any substantial, credible evidence of which a fair argument can be made that a reasonable possibility of a significant effect on the environment exists . . . ." (*Voices, supra,* 209 at p. 1110.)

Petitioners argue there is substantial evidence that the activities required by the Orders; e.g., removing the filtering benefits of the oysters, removing the invasive organism *Didemnum* from shells and equipment, removing hundreds of thousands of board feet of oyster racks, the demolition and removal of onshore equipment and structures, will adversely impact the physical environment by degrading the water quality, damaging eel grass, causing air and noise pollution, and disturbing native wildlife and persons who use the Estero for recreation. (MPA p. 3-4, 6-10; Reply p. 6-7)

In support of their contention, Petitioners rely on hundreds of pages of declarations and exhibits from Drakes Bay Oyster Co.'s owner Kevin Lunny and experts, prepared for the concurrent federal litigation, and submitted to the Coastal Commission's Staff on February 5, 2013, two days before the hearing. (3 AR 621 – 4:1192, 5:1229-38.) (MPA p. 6,8 -10) The Coastal Commission voted to exclude this evidence, which action the court concludes was an abuse of discretion, *post.*

That evidence supports a fair argument that some of the removal and restoration activities required by the Orders may have a negative impact on the physical environment of the Estero and its ecosystem.

Additionally, the Administrative Record shows that the Coastal Commission itself recognizes the reasonable possibility its removal and restoration orders have the potential to impact the Estero and its surrounding plant and wildlife; e.g., The Orders require that the Restoration Plan be prepared by a Specialist (¶ 7.1.A), that handtools be used whenever possible, and that if mechanized equipment is needed that it will not impact the resources, including: geological stability, water quality, integrity of landforms, native vegetation, erosion, and biological productivity. (¶ 7.1.C.) Use of mechanized is limited in duration. (¶ 7.1.C.1) No demolition, waste or materials be performed or stored where it may enter sensitive habitat. (¶ 7.1.D.) There is even a section entitled <u>Erosion Control and Turbidity Management</u> (¶ 7.2) to address ground disturbance during construction, removal and restoration activities in order to minimize "turbidity across the site and sedimentation of Drake's Estero, . . ." (¶ 7.2.B)

Accordingly, the court finds that for certain activities described below, the Categorical Exemption does not apply.

Much of the activities detailed in the Cease and Desist Order will not have a negative impact on the environment and are not excepted from the Categorical Exemption: prohibiting further unpermitted development (¶ 1.1.A, 4.3.C, 5.1.D); requiring Drakes Bay Oyster Co. to obtain a development permit for ongoing farming operations under the 2007 limits (¶ 4.4, 5.1.A); barring placement of bottom culture bags on or within eelgrass, and providing a Plan to the Executive Director for removal of bottom bags located within the eelgrass habitat (¶ 5.1.C); prohibiting discharge of marine debris, and cleaning up that debris pursuant to a Debris Management Plan (¶ 4.3.E, 5.3); restricting boat operation in the Lateral Channel as required by the National Park Service's Special Use Permit (SUP) and submitting a Vessel Transit Plan (¶ 4.3.D, 5.7); adhering to the Harbor Seal Protection Measures (¶ 5.2); and prohibiting cultivation of non-triploidy Manila clams. (¶ 5.5)

The writ is denied as to these activities, and they may be allowed to proceed while the Coastal Commission remedies the CEQA violations on the remaining removal and restoration requirements, discussed below. (See Pub. Res. Code § 21168.9.)

The court has authority to fashion a remedy that allows some part of the project to go forward while the agency seeks to remedy its CEQA violations, where: 1 – the tainted portions of the project are severable from other aspects of the project; 2 – the severance of the noncomplying portions will not prejudice "complete and full compliance with CEQA"; and 3 – the remaining aspects of the project were not found to violate CEQA. (Pub. Res. Code § 21668.9(b); see *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1181.)

But for other portions of the Cease and Desist Order and the Restoration Order, a "fair argument" can be made that these activities may have a negative environmental impact, and the Categorical Exemption from a CEQA environmental review cannot be applied to these activities: removal of invasive *Didemnum* species (¶ 5.4); removal of all non-triploidy Manila claims pursuant to an approved Plan (¶ 5.5); removal of abandoned cultivation equipment pursuant to an approved Equipment Management Plan (¶ 5.6); the removal of unpermitted onshore structures, fixtures and equipment for which the Coastal Commission has denied a development permit. (¶ 6.1); and to restore areas impacted by the unpermitted development. (¶ 7.0, et seq.)

The nature and extent of these activities is conditioned in part on the outcome of the federal litigation seeking to reverse the decision by the Secretary of the Interior not to extend Petitioner's lease. (¶s 6.0, 6.1.)

The Coastal Commission is directed to conduct an environmental review of these proposed activities in compliance with CEQA. Since the Coastal Commission has overlapping authority over these resources with other federal and state agencies, it is highly recommended the Coastal Commission coordinate any review and proposals with these other agencies before approving a particular course of conduct.

Jurisdiction – Contrary to Petitioners' allegation that the Orders "duplicate or exceed" the regulatory controls of the wildlife and fishery management authority of the Department of Fish and Game and the Fish and Game Commission in violation of Pub. Res. Code §30411, the court finds the Coastal Commission has jurisdiction over the aquaculture operations involved here, and acted within its jurisdiction in issuing these Orders.

" 'Where a party alleges that the Commission has acted beyond its statutory jurisdiction, it may challenge the agency's order or decision in an action for administrative mandamus under Code of Civil Procedure section 1094.5.' (*Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 414.) 'When the determination of an administrative agency's jurisdiction involves a question of statutory interpretation, "the issue of whether the agency proceeded in excess of its jurisdiction is a question of law."' '[C]ourts do not defer to an agency's determination when deciding whether the agency's action lies within the scope of authority delegated to it by the Legislature.' (*Burke v. California Coastal Com.* (2008) 168 Cal.App.4th 1098, 1106." (*Citizens For A Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4th 1577, 1583-1584.)

Under the Coastal Act, the Commission is required to protect the coastal zone's delicately balanced ecosystem. (§ 30001, subds.(a)-(c); § 30001.5, subd. (a); *City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 233; *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 611.) In reviewing all programs and projects governed by the Coastal Act, the Commission must consider the effect of proposed development on the environment of the coast. (See *City of San Diego v. California Coastal Com., supra*, 119 Cal.App.3d at p. 234.)

"The Coastal Act 'assigns chief responsibility for regulating the use and development of the "coastal zone" to [the] California Coastal Commission. [Citation.] The Commission's 'regulatory functions are coordinated with those of other state agencies having overlapping responsibilities.' [Citation.]" (*McAllister v. County of Monterey, supra,* 147 Cal.App.4th at pp. 271-272.)

Development is broadly defined for these purposes by Pub. Res. Code § 30106. (*McAllister, supra*, at p. 273.)

Having reviewed the statutory scheme, the court concludes the onshore and offshore Aquaculture operations here are not "wildlife and fishery management" activities within the meaning of § 30411.

Section 17 of the Fish & Game Code defines "Aquaculture" as: "that form of *agriculture* devoted to the propagation, cultivation, maintenance, and harvesting of aquatic plants and animals in marine, brackish, and fresh water." (Emphasis added.)

This is expressly different from the definition of "Fish" in Section 45 of the Fish & Game Code: " 'Fish' means *wild* fish, mollusks, crustaceans, invertebrates, or amphibians, including any part, spawn, or ova thereof." (Emphasis added.)

The oyster and clam seeds and adults are not "wild" but cultivated.

Section 94 defines "Fishery" as: "both of the following: (a) One or more populations of marine fish or marine plants that may be treated as a unit for purposes of conservation and management and that are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics. (b) Fishing for, harvesting, or catching the populations described in (a)."

Again, because the oysters and clams are not "wild", they are not included in Section 94.

Importantly, Fish & Game Commission regulations 14 C.C.R. § 238.5 expressly distinguish when aquaculture products are not "fish" within the meaning of Fish & Game Code § 45:

> **Upon stocking, aquaculture products are wild and therefore "fish" as defined by Section 45 of the Fish and Game Code, except when stocked into a registered aquaculture facility. (Emphasis added.)**

There is no argument that Drakes Bay Oyster Co. was not a "registered aquaculture facility."

But even if Pub. Res. Code § 30411(a) can be said to apply to these operations, these Orders did not violate the statute. Without a doubt, the Fish & Game Commission is tasked with authority to issue permits and to regulate certain aspects of the business of Aquaculture, including: leasing state water bottoms, registration of aquaculture facilities. (Fish & Game Code §§ 15000 et seq., 15400); and issuing permits for the importation of oyster seed and other shellfish. (14 Cal. Code Regs. § 236.)

But similarly, the Coastal Act (Pub. Res. Code § 30411(c)), recognizes the Coastal Commission's concurrent jurisdiction over this activity occurring in the coastal zone as being a "coastal-dependent use which should be encouraged . . . ." (See also §§ 30222, 30222.5, 30233(a)(7).)

Importantly, the Commission conducts its own environmental review when deciding to issue coastal development permits. The California Coastal Act provides for environmental regulation of projects in certain coastal regions and is certified as a regulatory program that is in compliance with CEQA. (See CEQA Guidelines, 14 C.C.R. § 15251, subd. (c).) Petitioners would read this entire statutory scheme out of the Code if, as they contend, the Coastal Commission cannot issue regulatory or enforcement orders involvement coastal-dependent aquaculture development.

Harmonizing and reconciling these seeming inconsistencies between the two Codes (see *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805), the court finds that Petitioner's offshore and onshore farm operations constitute a "Development" within the coastal zone pursuant to § 30106, *ante*, and for which the Coastal Commission had the jurisdiction to issue the Cease and Desist Order and Restoration Order pursuant to Pub. Res. Code §§ 30810, 30811.

Failure to Proceed as Required by Law – Petitioners allege the Coastal Commission's refusal to accept the declarations and exhibits cited above, was an abuse of discretion because the Coastal Commission did not proceed in the manner prescribed by law, in violation of Pub. Res. Code § 21167.6(e); and its own procedures for Cease and Desist hearings, 14 Cal. Code Regs. § 13185.

Pub. Res. Code § 21167.6 subd. (e) provides in pertinent part:

> **Notwithstanding any other provision of law, in all actions or proceedings brought pursuant to Section 21167, the record of proceedings must include:**
> **[ ]**
> **(3) All ... documents *submitted* by any person relevant to any findings ... adopted by the ... agency pursuant to [CEQA]. (Italics added.); and**
> **[ ]**
> **(7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project.**

"[T]he actual text of subdivision (e), . . contemplates that the administrative record will include pretty much everything that ever came near a proposed development *or* to the agency's compliance with CEQA in responding to that development. (*County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 7-8.)

Since the express policy behind CEQA is to provide for a full public airing of comments and evidence of possible significant environmental impacts, and to inform the public and government decision makers about the potential, significant environmental effects of the proposed activities (Guidelines § 15002), the court concludes that the Coastal Commission abused its discretion in excluding this evidence from the Administrative Record.

On remand, when the Coastal Commission conducts further environmental review on the portion of its removal and restoration orders, *supra*, it should consider these declarations and exhibits.
Due Process – Petitioner has dismissed its Due Process allegation. (Drakes Bay Reply p. 1. n.1.)

Failure to Certify the Administrative Record – Respondent argues the writ petition is defective because Petitioners have not lodged a record that was certified as accurate by the Coastal Commission.)

Pub. Res. Code § 21167.6 (a) requires that in actions brought pursuant to Pub. Res. Code § 21167, the petitioner must serve on the agency a request for the record, or notice that it elects to prepare the record itself, no later than 10 business days after the action is filed. Regardless of who prepares the record, the agency must certify its accuracy within 60 days of receiving the request. (Pub. Res. Code § 21167.6 (b),(c).)

Petitioners concede they prepared the record themselves, and do not deny they did not request the Coastal Commission to certify it. (Faber Reply p. 2:4-9) This is not a reason to dismiss the petition.

"[T]he Legislature has not provided explicitly for *any* sanctions against CEQA petitioners who fail to submit an ROP within the time frames established by statute, even though dismissal of CEQA petitions is mandatory in other situations. [Citation.]" (*Leavitt v. County of Madera* (2004) 123 Cal.App.4th 1502, 1525.)

Since there is no dispute as to the accuracy of the documents in the record submitted by Petitioners, many of which were generated by the Coastal Commission or received by the Coastal Commission, and the Coastal Commission does not contend it was prejudiced or surprised by these documents, the court denies the request to dismiss the Petition for this defect.

Failure to Exhaust Administrative Remedies – Next, Respondent argues that Petitioners have waived many of the issues raised in this consolidated Petition (e.g., that removal and restoration would have an adverse environmental impact), because they did not adequately raise these issues at the Cease and Desist hearing, or in their supporting documents submitted to the Coastal Commission. This contention is denied.

"A CEQA challenge is not preserved 'unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing. (Pub. Resources Code, § 21177, subd. (a).) Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action. [Citations.]" (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (*CREED*) (2011) 196 Cal.App.4th 515, 520, internal quotations and citations omitted; Pub. Res. Code § 21177(a),(b).)

The exhaustion requirement applies where the agency approves a project based on an exemption finding. (*Tomlinson v. County of Alameda* (2012) 54 Cal. 4th 281, 291.)

As discussed above, these documents adequately raised these issues but were improperly rejected by the Coastal Commission.

Additionally, at the hearing Petitioners' counsel raised the following issues: removal of the filtering abilities of the oysters will cause a reduction in water quality resulting in eutrophication and algae blooms (6 AR 1421); demolition and removal of the racks will harm the eelgrass (6 AR 1422); and the restoration order "would result in a physical change in the environment" and create an exception to the Categorical Exemption. (6 AR 1422-1423.) These comments adequately raised the issues of possible environmental harm from the removal and restoration conditions.

Declaratory Relief – Each petition seeks a judicial declaration that the Orders exceeded the Coastal Commission's jurisdiction in violation of Pub. Res. Code § 30411(a), *supra.*

Declaratory Relief is not available to challenge the agency's quasi-judicial decision. "The law is well established that an action for declaratory relief is not appropriate to review an administrative decision. (*State of California v. Superior Court* (1974) 12 Cal.3d 237, 249; *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 127; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 546.)" (*Walter H. Leimert Co. v. State ex rel. California Coastal Com'n* (1983) 149 Cal.App.3d 222, 230-231.)

Petitioners are essentially seeking to review the validity of the Coastal Commission's administrative decision to exercise jurisdiction over their operation, and as discussed above, such review is properly brought under the provisions of Code Civ. Proc. § 1094.5(b) rather than by means of declaratory relief. Furthermore, this claim is duplicative of the jurisdiction claim discussed above.

This allegation is dismissed.

No sufficient cause being demonstrated, the motion to file an amended petition is denied.

In the event that no party requests oral argument in accordance with Marin County Superior Court Local Rules, Rule 1.6 B., the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.7.