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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

PUVUNGA WETLANDS PROTECTORS, et al.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

BEACH OIL MINERALS, LLC, et al.

Real Parties-in-Interest.

Case No.: 19STCP00435

PETITIONERS' REPLY BRIEF

Judge: Hon. Mary H. Strobel
Date: March 11, 2021
Time: 1:30 p.m.
Dept.: 82

Action Filed: February 11, 2019

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I. INTRODUCTION

"…I think everybody hopes someday we never have to trade wildlife for oil."

- Commission Chair Bochco (AR20103).

In approving Real Party Beach Oil Minerals, LLC's oil and gas drilling project, the Commission made a tradeoff for the promise of habitat restoration. In and adjacent to the sensitive Los Cerritos Wetlands complex, an oil spill would be catastrophic. Impacts to cultural and visual resources would remain even after mitigation. As Petitioners explained in their brief, the Commission's approval was founded on an erroneous interpretation and resultant application of the Coastal Act override provision.

Respondent Coastal Commission, Real Parties Beach Oil Minerals, LLC, Lyon Housing (Pumpkin Patch) XLV, LCC and Los Cerritos Wetlands, LLC (collectively Real Parties) and Real Party Los Cerritos Wetlands Authority (LCWA) attempt to discredit Petitioners' arguments based on procedural and jurisdictional grounds, claiming administrative remedies were not exhausted. As Respondent and Real Parties admit, however, Petitioner Anna Christensen participated extensively throughout the administrative process. Her admonitions were largely ignored. Substantively, Respondent and Real Parties argue the Commission's process is free from error, relying heavily on the deferential standard of review. However, where the Commission fails to proceed as required by law, as it did here, its is entitled to no such deference. As explained in detail below, Respondent and Real Parties' arguments are without merit. Because the Commission abused its discretion in approving the Coastal Development Permit (CDP), its decision must be overturned.

II. REPLY

A. Petitioners Met Coastal Act Exhaustion and Preservation of Issues Requirements

Respondents and Real Parties both contend Petitioners failed to exhaust administrative remedies. Respondent takes issue with Petitioners' exhaustion of two issues, while Real Parties would foreclose all of Petitioners' arguments. Both are incorrect.

As Real Parties and Respondent note, Coastal Act Section 30801 "codifies" the Commission's exhaustion requirement and provides an "aggrieved person" has the right to seek

judicial review of the Commission's decision. (Resp. Opp., p. 8; Pub. Res. Code §30801).[1]

> …[A]n "aggrieved person" means any person who, in person or through a representative, appeared at a public hearing of the commission, local government, or port governing body in connection with the decision or action appealed, or who, by other appropriate means prior to a hearing, informed the commission, local government, or port governing body of the **nature of his concerns or who for good cause was unable to do either**. (Pub. Res. Code §30801, emphasis added).

None of the Parties disputes that Petitioner Anna Christensen appeared before the Commission in opposition to the project.[2] (See, Resp. Opp., p.9; RPI Opp., p. 16).

Though sometimes articulated as one and the same, the preservation of issues doctrine differs from the exhaustion of remedies doctrine. "The latter is jurisdictional, while the former does not bar a reviewing court from considering an issue not raised before the agency when circumstances warrant (e.g., when an injustice would result)." (California Administrative Hearing Practice (2d ed. Cal. CEB 2020) §8.108). As to preservation of issues, Section 30801 requires a would-be petitioner inform the Commission of "the nature of his concerns." (Pub. Res. Code §30801). It does not, as Real Parties suggest, require petitioners fully brief their arguments before the administrative tribunal. (RPI Opp., pp. 15-16). "[L]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172

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[1] Therefore, the Parties' authorities concerning a petitioner's failure to avail itself of administrative procedures or file a timely challenge to the Commission's decision are inapplicable. (See, e.g. *Walter H. Leimert Co. v. California Coastal Com*. (1983) 149 Cal.App.3d 222, 232–233 [petitioners failed to timely file an administrative mandamus action]; *McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 286-288 [petitioners failed to appeal real parties' CDP to the Coastal Commission before filing lawsuit]; *South Coast Regional Com. v. Gordon* (1977) 18 Cal.3d 832, 837 [defendant therein bypassed the administrative agency altogether]); *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 71 [plaintiff exhausted his administrative remedies but failed to seek timely judicial relief from the City's administrative determination]; *Abelleira v. District Court of Appeal, Third Dist.* (1941) 17 Cal.2d 280, 291–292 [petitioners prematurely filed writ petition prior to completion of administrative appeal hearing]).

[2] Petitioner Puvunga did not exist until after the Commission rendered its decision. (See, First Amended Petition, ¶51; Real Parties' Demurrer, p. 1 [Petitioner Puvunga came into existence two months after the Commission's CDP hearing]). Because it was impossible for Petitioner Puvunga to appear before the Commission good cause exists for its failure to do so.

Cal.App.3d 151, 163.[3]

For example, in *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, the Court found respondent therein used an incorrect legal standard in determining its school closure and student transfer project was exempt from CEQA because it improperly limited its analysis to physical changes to receptor schools. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 174). At the administrative level, petitioner's members raised concerns about traffic and safety and "impacts in the long term." (*Id*. at p. 176). The Court found this sufficient to exhaust the cumulative impacts issue and that it properly alerted respondent "to the fact that its method of analysis was faulty and should be expanded to include analysis of long-term impacts, traffic and safety." (*Id*. at pp. 176-177 ["The fact that the above comments do not refer to specific statutory language is not dispositive."]; see also, *Gonzales v. City of Santa Ana* (1993) 12 Cal.App.4th 1335, 1348 [plaintiff's complaint about "displacement of residents and businesses" was enough to preserve the issue of the inadequacy of a housing plan as to relocation of residents in redevelopment area]).

Real Parties' authorities on this issue are factually distinguishable. In *Hagopian v. State of California*, petitioners developed their property without first obtaining a CDP. (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 355). At their enforcement hearing, they "made no substantive showing," "objecting primarily on due process and jurisdictional grounds." (*Id*. at p. 371). At trial and on appeal they argued their construction did not constitute "development" under the Coastal Act because it was exempt under an agricultural exemption. (*Id*. at p. 370-371). The Court found petitioners failed to exhaust this issue because, before the Commission, they made no substantive showing, presented no evidence, and did not make similar arguments. (*Id*. at pp. 371-372). Therefore, the Court was in "no position to examine the historical use of petitioners' property" to determine whether it qualified for an agricultural exemption as a matter

[3] Real Parties claim Petitioners were represented by counsel at the CDP hearing. (RPI Opp., p. 15, FN 4). This is false. Petitioners were not represented until after the administrative decision. The comment letter cited was on behalf of a different, unrelated entity. (AR4617-4620).

of law. (*Id*.).

Likewise, in *Greene v. California Coastal Com*, petitioners' "general arguments" did not put the Commission on notice of a takings issue. (*Greene v. California Coastal Com*. (2019) 40 Cal.App.5th 1227, 1238; RPI Opp., p. 15). There, petitioners challenged the Commission's imposition of a five-foot setback requirement in their CDP, arguing it should have been a one-foot setback. (*Id*. at p. 1231-1233). At the hearing, petitioners' representative's "entire presentation" concerned "the Commission's historic reliance on the City's zoning to approve a one-foot setback on similar properties." (*Id*. at p. 1238). Petitioners' representative did not reference an unconstitutional taking, the federal or state constitutions, case law or any other authority on the takings issue. (*Id*.). Therefore, the Court found petitioners failed to exhaust this issue. (*Id*.).

In contrast here, as explained below, Petitioner Anna Christensen and others raised all issues briefed in the administrative proceedings below.

B. Petitioners Argued the Commission Should Focus on the Oil and Gas Development

In their opening brief, Petitioners detailed the Commission's failure to proceed as required by law by misapplying the Coastal Act Section 30260 "Location or expansion" override provision within Article 7 "Industrial Development." (Opening Brief, pp. 8-10). [4] Instead of focusing on the "coastal-dependent industrial facility," the Commission improperly included the non-industrial land swap and mitigation bank in its welfare analysis. Petitioner and numerous others took issue with the Commission's override consistency determination, including the project description. (AR19964[Marcia Hanscom, Ballona Institute and Wetlands Defense, CDP hearing, first and second prong of override provision not met]; AR19973 [Steve Brothers, CDP hearing, second prong not met]; AR14837 ["Again, I understand that the promise of Wetlands restoration is driving today's hearing and the pressure to approve the modified LCP document before you."]; AR4618-4619; AR15044; AR15192).

[4] Respondent claims Puvunga did not meet its burden to identify records showing it preserved this issue. (Resp. Opp., p. 10, FN 4). While Petitioners bear the burden of proving exhaustion, there is no jurisdictional requirement "they argue the issue in a separate section of their opening brief." (*Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 678).

Just as in *East Peninsula Ed. Council, Inc.,* public participants articulated the basis for their concerns in simple terms, but nonetheless alerted the Commission to the problematic framing of the development as a restoration project. Indeed, Commission staff made this observation during the City's CEQA review process:

> While I don't disagree with any of the project components described above, **to characterize the proposed project as a wetlands restoration project, first, and a relocation of oil extraction and processing equipment, second, is a misrepresentation of the overall project and could be misleading to the public**. **The impetus behind the development of the proposed project was the updating and more importantly, the expansion of oil extraction and processing operations at the Synergy Oil Field**. ... **The proposed project represents both an expansion and a relocation of BOMP's existing oil operations**. This should be explicit and thoroughly described in the project description.

(AR12871, emphasis added [Commission staff letter to City]; see also, AR427). Others, including Commissioners themselves, similarly complained that the justification for the new and expanded oil and gas development was the accessory land swap and restoration.

> *"I am rattled by the fact that the sliver of wetland that remains in an otherwise greenspace pore and totally urbanized and industrialized part of our coast is hostage to the expansion of the very thing that is destroying it, and us." (AR20077 [Commissioner Escalante]).*

> *"But I think, you know, what Commissioner Groom is saying is also a little troubling is that, you know, it's an oil project in the beginning and it's an oil project in the end. And not only is it an oil project, it's a bigger oil project." (AR20083 [Chair Bochco]).*

> *"Thank you all for your patience…and I think everybody hopes someday we never have to trade wildlife for oil" (AR20103 [Chair Bochco after Commission vote]).*

> *"To frame this project with its profuse detrimental impacts and enormous risks as a boon to our community because the ravaged Synergy property will have less junk on it 20 years from now is really troubling." (AR19976-19980 [Steve Brothers testimony])*

> *"They indicated that the cultural resource mitigations were not adequate and emphasized the site's cultural resources and ancestral activity. They asserted their conclusion that the permit was not really a restoration but more a vehicle for increased drilling…" (AR19486 [Commissioner Padilla Ex Parte Communication Disclosure Form]).*

> *"But I do want just to say as a local tribal person that I think it's a very dangerous game we're playing when we say that we support more extractive industries because that's the only option to get restoration. I think that that's a dangerous precedent to set and I think that we need to demand other options. I think we need to demand restoration and no new extraction." (AR19215 [Angela D'Arcy testimony at LCP hearing]).*

"This policy, this amendment, is divisive. You're saying it's pro or against restoration of the wetlands; that's not it. We are pro-restoration. We are not looking to deal with the devil. We are not looking to be extorted. We're not looking to have a tradeoff." (AR19249 [Sarah McGovern testimony at LCP hearing]).

"The explanation of this project is misleading. It states that this is 'oil consolidation and restoration,' but the semantics used in this scheme represent a logical fallacy. They are a trick." (AR19257 [Melinda Manlowe testimony at LCP hearing]).

"Wetlands protection and restoration is ongoing, enjoys public and private support, and is not contingent on the expansion of oil drilling operations. One of the most commonly stated objections to the proposed amendments and project was that 'wetlands restoration' relied on new and expanded oil drilling operations. Rather than holding polluters accountable, the wetlands were being held hostage to the same industry that had destroyed them in the first place and would do so again." (AR14858 [Comment letter from Anna Christensen and others]).

"I mean, we could spend all day debating or discussing or inventing potential theories about how we might force an end to the current activity there and still achieve restoration. And I think the sad reality is we don't have a whole lot of cards to play in that regard." (AR19286 [Commissioner Padilla LCP hearing testimony]).

"I don't like being in this position. I am not a fan of fossil fuels, I'm on the record about that my whole adult career. I don't like the fact that there's any kind of anything–drilling going on in the coastal zone, I don't like it." (AR19287 [Commissioner Padilla LCP hearing testimony]).

"Let's be real and state the facts: This is nor a restoration nor a consolidation project, this is an oil expansion project. This is a temporary fix with permanent damage." (AR19942 [Angelica Gonzalez of Sierra Club, CDP hearing testimony]).

Though the Commission viewed the restoration activity and oil and gas development as inextricably intertwined, the public repeatedly urged the Commission to focus on the oil and gas expansion instead of the restoration and land swap. As a result, the exact issue was presented to the Commission. Unfortunately, the Commission failed to do as suggested, instead improperly focusing on the benefits of the restoration to justify the oil and gas drilling expansion.

C. The Commission's Interpretation of Section 30260 Remains Incorrect

> …[W]here **new or expanded coastal-dependent industrial facilities** cannot feasibly be accommodated consistent with other policies of this division, **they may nonetheless be permitted** in accordance with this section and Sections 30261 and 30262 if …(2) to do otherwise would adversely affect the public welfare... (Pub. Res. Code §30260).

The plain language of the statute requires the Commission to balance the need to permit the

industrial facility (i.e. the oil and gas development) against its negative impacts. Going beyond the clear language, Respondent concedes it heavily weighed the non-industrial component of the project in its analysis. (Resp. Opp., p. 12). It argues *Gherini* instructs a consideration of both the preservation and protection of the wetlands and the need for the oil and gas infrastructure. (*Id*., p. 13-14). Real Parties similarly argue the Commission properly considered the impacts of denying the oil and gas project *and* "impacts to natural resources if it denied the Project as a whole (i.e. no wetlands restoration, no public access, and no conveyance of land into public ownership)…" (RPI Opp.,p.20). *Gherini* does not support such a distortion of the statute. Rather, it confirms the Commission should consider the positive and negative direct impacts of the oil and gas development, not non-industrial incentives as the Commission did here.

In *Gherini*, the applicants challenged the Commission's override determination arguing "the Commission improperly weighed environmental effects of development against public benefit in making this determination, rather than solely considering the adverse impact on the public welfare of prohibiting energy development." (*Gherini v. California Coastal Com*. (1988) 204 Cal.App.3d 699, 707; RPI Opp., p. 20). The Court found the Commission properly balanced the risk of harm to the sensitive natural resources against the public's need for oil and gas in ascertaining whether refusal to permit hydrocarbon development would adversely affect the public welfare. (*Gherini, supra*, 204 Cal.App.3d at p. 708). Therefore, the Commission correctly determined that "in balance, the public welfare would not be adversely affected by prohibition of energy development on Santa Cruz Island and thus that the second requirement for exception under section 30260 was not satisfied." (*Id.*, pp. 708–709).

Here, in contrast, the Commission did not simply balance pros and cons of the coastal-dependent industrial facility. Had it done so, it would have focused on the risk of harm to the sensitive Los Cerritos Wetlands from the new, expanded oil and gas development and balanced it against the need for the oil and gas – not the need for the adjacent land thrown in to sweeten the deal. (AR143). If Respondent and Real Parties' overly broad interpretation of Section 30260 were correct, applicants could simply add infinite project features until the scales tipped in their favor. For example, an oil and gas drilling project could be coupled with a cash donation to a

local agency or foundation for a land purchase. A new liquefied natural gas pipeline could be tied to a homeless shelter. The possibilities are endless when the statute is stretched beyond its literal and logical confines.

Moreover, a plain reading of the statute does not, as Real Parties suggest, require the Commission to evaluate a hypothetical version of the project or result in piecemealing. (RPI Opp., p. 21). Rather, it merely focuses the Commission's review upon the coastal-dependent industrial facility to which the override provision applies. (See, Pub. Res. Code §30263 [similar language applicable to "Refineries or petrochemical facilities"]). Under some circumstances, an industrial facility will arguably provide public benefits that outweigh Coastal Act inconsistencies. Perhaps a coastal-dependent power plant or desalination facility would provide much needed energy or drinking water supply such that denial of the development would adversely affect the public welfare. While oil production may have once been viewed as a significant public benefit, today, expanded oil drilling in a sensitive wetlands complex does not meet the standard. (AR142-143; see also, AR17388 [California Energy Commission]).

Real Parties further argue the third prong of Section 30260 – which requires adverse environmental impacts be mitigated to the maximum extent feasible – inherently requires the Commission to evaluate project components not directly related to oil and gas development and, therefore the second prong requires consideration of ancillary project benefits. (RPI Opp., pp. 20-21). First, if the second prong required consideration of project "benefits" otherwise characterized as mitigation measures under the third prong, such analysis would be redundant. (Pub. Res. Code Section 30260). Further, to characterize a project's mitigation measures as project benefits would allow the applicant to receive credit under the second prong for mitigating a project's negative environmental impact as required under the third prong. (RPI Opp., p. 20). This is especially true where, as here, the wetland restoration is required as both mitigation for the oil and gas development and is part of a mitigation bank[5] which will be used to offset

[5] "Mitigation banking is the preservation, enhancement, restoration, or creation (PERC) of a wetland, stream, or habitat conservation area, which offsets, or compensates for, expected adverse impacts to similar nearby ecosystems." (AR4959, FN 2).

environmental impacts of future projects. (See, AR14995 [creation of wetland mitigation bank]; AR4531 ["BOMP is also required to perform at least some of the work to fulfill its mitigation obligations."], emphasis in original; AR70 [12.68 acres of mitigation required for project impacts to wetlands]).

Lastly, Real Parties and Respondent claim Petitioners disregard the public benefit of the new oil and gas infrastructure and future decommissioning. (RPI Opp., p. 21-22; Resp. Opp., p. 14). In reality, it was the Commission that found these measures alone unpersuasive.

> The public welfare test requires more than a finding that, on balance, a project is in the interest of the public. It requires that the Commission find that there would be a detriment to the public welfare were the Commission to deny. ¶ In sum, the main benefits to the public from the proposed project are the restoration of a small area of wetlands and the ability to restore a much larger area in the future. Also, certainty on the timeline for removal of existing aging oil infrastructure from wetland areas. (AR19873 [Commission Staff Testimony at Hearing on CDP]

Real Parties themselves stressed the land swap and restoration as the public benefit. (AR20013). LCWA likewise views restoration as the central project benefit. (LCWA Opp., pp. 3-4).

None of Real Parties' or Respondent's arguments counsel a departure from the plain reading of the statue. Because its Section 30260 public welfare analysis improperly included the adjacent potential wetland restoration, the Commission failed to proceed as required by law.

D. Deferral and Delegation Issues Were Properly Raised

i. Proceedings Before the Commission

Respondent and Real Parties claim Petitioners also failed to exhaust administrative remedies because they did not raise the issue of deferral before the Commission. (Resp. Opp., p. 10, RPI Opp., p. 30). However, Respondent admits Petitioners and others commented that the plans required via Special Conditions should have been submitted to the Commission prior to project approval. (Resp. Opp., p. 10). "Much of the mitigation relied on by the Staff Report to reduce these impacts and risks is included in 25 Special Conditions and remains to be fully developed and evaluated." (AR2863). "Plans required for the 25 Special Conditions should be submitted before being approved by the Commissioners." (AR2789). "There are 24 other Special Conditions, many requiring plans be submitted to the director before the issuance of the CDP.

These plans should be submitted and agreed to by both parties before this project is approved." (AR2778[Sierra Club, Anna Christensen, and others]; see also, AR4528 [email requesting postponement of hearing "as it appears there are many missing plans that are required by the special conditions"]; AR3542 [Anna Christensen email to Commission staff noting Cultural Resources Study was required but could not be conducted in time for Commission hearing]; AR3584 attachment [same]). This issue was therefore properly preserved.

ii. Petitioners' Pleadings

"In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452). Here, Petitioners properly alleged a violation of the Coastal Act, including allegations that the project conflicted with all three prongs of the Section 30260 override provision. (First Amended Petition ("FAP"), 67). Petitioners also alleged the project conflicted with Chapter 3 of the Coastal Act generally, including Sections 30231, 30232, 30233, 30240, 30244, 30251, and 30260. (FAP, ¶56). Petitioners likewise alleged the Commission failed to require all feasible mitigation measures to minimize adverse environmental impacts to wetlands and cultural resources. (FAP, ¶¶59-64). This is entirely consistent with Petitioners' argument that because the Commission improperly delegated and failed to perform its quasi-judicial function it did not ensure the project was consistent with the Coastal Act and the project's adverse environmental impacts were mitigated to the maximum extent feasible under Section 30260.

Moreover, if the Court finds Petitioners' pleading insufficient to allege a Coastal Act violation on this basis, amendment to conform to proof is proper. The Court has great discretion in allowing an amendment to any pleading. (*Fortenberry v. Weber* (1971) 18 Cal.App.3d 213, 222; Cal. Code Civ. Proc. §576). "Granting leave to file such an amendment is not an abuse of discretion unless the amendment brings new and substantially different issues into the case." (*Nelson v. Gaunt* (1981) 125 Cal.App.3d 623, 636). "Where additional investigation and discovery is not required to meet the new issue, it would appear that it would constitute an abuse of discretion not to permit the amendment of a complaint even at the outset of a trial, where the amendment merely adds a new theory of recovery on the same set of facts constituting the cause

of action." (*Rainer v. Buena Community Memorial Hosp*. (1971) 18 Cal.App.3d 240, 254; see also, *Youngblood v. City of Los Angeles* (1958) 160 Cal.App.2d 481, 489 [When the basic facts are the same a shifting from one theory of liability to another is not the substitution of a new cause of action.]). The Court should therefore consider Petitioners' arguments on this issue.

E. The Commission's Delegation Remains Improper

Respondent argues the delegation and deferred analysis of numerous project mitigation measures is proper because the Commission is empowered to hire an Executive Director and promulgate regulations, and the Director is authorized to issue permits in certain instances and grant permit extensions. (Resp. Opp., p. 18). Respondent's argument proves the opposite. As Petitioners noted, the Coastal Act and the Commission's regulations do envision some delegation to the Executive Director. (Opening Brief, p. 13). However, such delegation must be expressly authorized either by statute or regulation, as with Respondent's cited examples. (*Id*.).

Respondent and Real Parties further claim it is impractical for the Commission to review and approve everything. (Resp. Opp., pp. 18-19; RPI Opp., p. 32). This, however, is no excuse for the Commission to abdicate its responsibilities. If Real Parties had completed all the requisite studies and plans prior to the Commission's approval, the Commission could have reviewed and approved everything at once. (See, e.g., AR1977-1982 [Commission Notice of Incompleteness]).

Real Parties also claim the Special Conditions do not amount to deferred mitigation as they provide sufficient performance standards. (RPI Opp., pp. 30-32). Special Condition 21, they argue, requires a plan with specified content and concrete performance metrics and timeframes. (*Id*. at p. 31). Real Parties detail the specifics of the analysis they are to complete thereunder but omit the fact that a mitigation plan is to be developed based on the results of such analysis. (AR39). The mitigation plan is to, among other things, demonstrate "structures would be designed and constructed to withstand expected levels of ground shaking, liquefaction and ground settlement as determined in the geotechnical analysis" and describe the "specific design elements and mitigation measures that would be used to assure the integrity of each structure."

(*Id*.). This is exactly the type of deferred mitigation deemed inappropriate in the CEQA context.[6] Deferral of the specifics of mitigation is permissible where the agency "commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275). "On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report." (*Id*.).

Special Condition 19, which is intended to address oil spills, includes similar language, requiring a risk assessment and thereafter a demonstration that the prevention and response measures address the deferred assessment. (AR37). Special Condition 19 also requires the Oil Spill and Prevention and Response Plan to "maximize" secondary containment of all tanks to the "extent feasible." (AR38). This is the exact problematic language Real Parties reference in their opposition. (RPI Opp., p. 31, citing *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 855 ["Applicant shall *increase* the re-use of produced water and shall *reduce* its use of municipal and industrial quality ground or surface water *to the extent feasible*."]).

Delegation of both the analysis of the seismic hazards and oil spill and response and deferral of formulation of mitigation measures to address such impacts is particularly inappropriate here, where the project is inconsistent with Section 30232, oil and hazardous substance spills. (AR90-92). In its determination that the project's adverse environmental impacts were mitigated to the maximum extent feasible under the third prong of Section 30260, the Commission specifically relied on Special Conditions 3 (Perimeter Pipeline Alignment Implementation Plan) and 19 (Revised Oil Spill Prevention and Response Plan) to fill the data gaps and formulate appropriate mitigation measures in response thereto. (AR144-145). Because the Commission improperly deferred such analysis and delegated it to its Executive Director, it

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[6] Though Petitioners did not include a CEQA cause of action, as a certified regulatory program, the Commission's Coastal Act approval is subject to the same CEQA standards as any other agency. (See, *POET, LLC v. State Air Resources Bd*. (2013) 218 Cal.App.4th 681, 712, 739 [finding Air Resources Board violated CEQA by deferring formulation of mitigation measures]; 14 Cal. Code Regs. §15251(c) [Commission's CDP approval process is certified regulatory program]).

failed to ensure the project's adverse environmental impacts were mitigated to the maximum extent feasible.[7] As a result, the Commission improperly found the project met the third prong of the Section 30260 override.

F. Additional Cultural Resources Mitigation Measures Were Suggested and Available

As to the cultural resources impacts, Respondents and Real Parties here again claim Petitioners failed to exhaust administrative remedies. (Resp. Opp., p. 10, RPI Opp., p. 23). This is false. Petitioners and others specifically raised the lack of appropriate mitigation for cultural resource impacts. (See, e.g., AR19939 [Ann Cantrell testimony: "The staff report on page 131 concedes that the cultural resource impacts cannot be fully mitigated. It asserts without justification there are no other mitigational (sic) measures available. This is obviously false, since there are ways to scale back the project to reduce the impacts."]; AR3546 ["A Cultural Study must include impacts on the Los Cerritos Wetlands and surrounding areas that hold cultural significance for tribal peoples and take into consideration the loss of and lack of access to tribal sites and cultural resources, making what remains rare and endangered."]).

Likewise, numerous individuals suggested the Commission's mitigation measures and Special Conditions 23 and 24 were not enough. For example, Petitioners suggested: "Any Archaeological Research Plan and/or Archaeological Monitor and Mitigation Plan for the project area shall not be designed, conducted, supervised, or controlled by the BOM, the LCWA or its member organizations. With the assistance of the NAHC, an independent panel, including members of affected tribal groups having a connection to the Los Cerritos Wetlands and surrounding areas, and qualified experts agreed upon by these same tribal groups shall design these plans and conduct the research and testing." (AR2784). These measures were not included in the project conditions.

Real Parties and Respondent further posit that all of the mitigation measures proposed in Petitioners' Opening Brief are already part of the project, in part because they can be

[7] Real Parties claim Petitioners' Opening Brief did not substantively challenge the third prong of the override provision as to visual resources or the oil spills policy. (RPI Opp., p. 18). Petitioners did so and do here again. (See, Opening Brief, pp. 13-15).

"suggested" as part of the Tribal Culture Education Plan. (RPI Opp., p. 29; Resp. Opp., pp. 16-17). First, Petitioners' ability to suggest salte panne landscape and harvest activities is constrained because, as part of the Special Condition, only Native American Heritage Commission (NAHC) Groups will be consulted (AR20209-20210, 20213) and there is no opportunity for public review and comment. More importantly, suggestion of a particular feature does not ensure its inclusion in the project. Further, there is no indication the LCWA suggested cultural resources considerations and approaches are binding on Real Party Beach Oil Minerals, LLC as it develops the new oil properties or on the Synergy parcel. (See, AR3493).

Real Parties also contend the Commission went above and beyond the Coastal Act in mitigating the project's impacts, maintaining the project does not require any mitigation. (RPI Opp., pp. 26-27). Nonetheless, the Commission's findings acknowledge current analysis of the project area is inadequate and the area may qualify for the National Register. (AR126, 130-131). The Commission further found the "project would also result in adverse impacts to cultural resources by approving development that is not consistent with the characterization of the project area as a Tribal Cultural Landscape." (AR132). The Commission concluded mitigation measures would partially address but not eliminate this impact. (*Id*.). Real Parties did not challenge this determination. Further, the Commission's definition of Tribal Cultural Resources is broader in its Tribal Consultation Policy (See, AR17334-17335) and the City's LCP, as guidance, requires all development that would adversely impact archaeological or paleontological resources include reasonable mitigation measures. (AR2917-2918, ¶7; AR2927, ¶c.vi.).

Lastly, Real Parties argue the third prong of Section 30260 only applies to aspects of the project that are inconsistent with Chapter 3. (RPI Opp., p. 24). However, the text is not so qualified. To require an inconsistent project to mitigate all adverse impacts to the maximum extent feasible is entirely consistent with its qualification for an extraordinary tool (an override), including where a lesser standard otherwise applies. (*Id*. at p. 25). This is also in line with the Commission's CEQA responsibilities.

In that regard, Real Parties and Respondent point to the Commission's general CEQA findings as proof the cultural resource impacts were mitigated to the maximum extent feasible.

(RPI Opp., p. 23 FN6; Resp. Opp., p. 15). However, as noted above, the Commission acknowledged it mitigated impacts only to a "reasonable" standard. (See, Pub. Res. Code §30108 [definition of "feasible"]).

Because the Commission focused on the "reasonable" mitigation measures available for such cultural impacts, it did not mitigate impacts to the maximum extent feasible as required pursuant to Section 30260 and failed to proceed in the manner required by law.

III. CONCLUSION

Enticed by the prospect of obtaining Real Parties' dried up and unmaintained drilling sites – the mitigation bank and potential restoration parcels – the Commission stretched the Coastal Act override provision beyond its literal and legal confines. As a result, the Commission approved a massive new and expanded oil and gas facility (and associated infrastructure) that would have devastating consequences to surrounding wetlands in the event of a spill. To deny the new oil and gas development would benefit the public, including the environment, in innumerable ways. But because the Commission misapplied the override provision and impermissibly deferred analysis and mitigation of the project's impacts, it found the opposite, abusing its discretion. Respondent and Real Parties' arguments to the contrary are unavailing. Therefore, Petitioners respectfully reiterate their request that the Petition for Writ of Mandate be granted.

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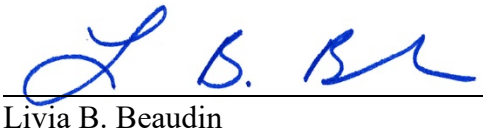
COAST LAW GROUP, LLP



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