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ALAMEDA COUNTY

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CLERK OF THE SUPERIOR COURT
By Donna Ceras
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

BUTTE ENVIRONMENTAL COUNCIL,
CALIFORNIA SPORTFISHING
PROTECTION ALLIANCE, AND
CALIFORNIA WATER IMPACT
NETWORK,

Petitioners,

v.

CALIFORNIA DEPARTMENT OF
WATER RESOURCES, et al.

Respondents, and

ALAMEDA COUNTY WATER
DISTRICT, et al.,

Real Parties in Interest.

RG09446708

ORDER AND DECISION ON
PETITION FOR WRIT

The petition of Butte Environmental Council, California Sportfishing Protection Alliance, and California Water Impact Network was heard on January 25, 2010, in Department 707 of the court. Thomas N. Lippe and Keith Wagner appeared for

Petitioners. Anita Ruud appeared for Respondents California Department of Water Resources, California Natural Resources Agency, and Governor Arnold Schwarzenegger. Eric N. Robinson appeared for Intervenors State Water Contractors, Kern County Water Agency, Napa County Flood Control and Water Conservation. Andrea A. Matarazzo appeared for Real Parties in Interest Broadview Water District, Westlands Water District and San Luis & Delta Mendota Water Authority.¹

The petition has two causes of action. The first challenges respondents' approval of the 2009 Drought Water Bank (DWB) on the grounds that its approval violated the California Environmental Quality Act, Public Resources Code section 21000 et seq.² and the CEQA Guidelines, 14 California Code of Regulations section 15000 et seq.³ Specifically, petitioners argue that respondents improperly relied on the statutory exemptions in Public Resources Code section 21080, subdivisions (b)(3) and (b)(4) in approving the project.

The second cause of action is a mandamus action against respondent Department of Water Resources (DWR) for violation of the ministerial duties imposed upon it by the Governor's February 25, 2009 Emergency Proclamation, specifically the duties imposed on the agency by paragraph 17 of the proclamation.

¹ Dustin C. Cooper appeared for Real Parties in Interest Butte Water District, Richvale Irrigation District, Reclamation District 1004, and Western Canal Water District. Joshua M. Horowitz appeared for Real Party in Interest Sacramento Suburban Water District. Joseph M. Carpenter appeared for Real Parties in Interest Glenn-Colusa Irrigation District and Garden Highway Mutual Water Company. Andrea P. Clark appeared for Real Parties in Interest Reclamation District No. 108, South Sutter Water District, South Sutter Extension Water District, Pelger Mutual Water Company, Pleasant Grove-Verona Mutual Water Company and River Garden Farms. C. Wesley Strickland appeared via conference call for Real Party in Interest Sacramento River Ranch. Marco Al Kropf appeared via conference call for Real Party in Interest City of Sacramento.

² All section references are to the Public Resources Code unless otherwise specified.

³ Further references the regulations are indicated as being to the Guidelines.

The court rules on several preliminary matters first and then discusses the issues raised in the petition.

I. PRELIMINARY MOTIONS

A. *Petitioners' Motion to Augment the Record*

Petitioners moved to augment the Administrative Record of Proceedings (ROP). Petitioners argue that the record certified by respondents is incomplete because it fails to include items required by section 21167.6, subdivision (e).

The ROP was lodged with the court on November 24, 2009 and includes eight TAB items.⁴ These eight items are listed in the Index of Record of Proceedings with the following TABs:

1. TAB 1: March 9, 2009; March 5, 2009; February 27, 2009: Notice of Exemption for the Drought Water Bank, Request for concurrence from Secretary for Natural Resources, and Governor's Emergency Proclamation
2. TAB 2: March 4, 2009: Addendum to the Environmental Water Account EIS/EIR Re 2009 Drought Water Bank
3. TAB 3⁵: October 2007: Environmental Water Account—Draft Supplemental Environmental Impact Statement/Environmental Impact Report—to the EWA Final EIS/EIR (and various other supporting

⁴ All references to documents in the ROP or Supplemental Administrative Record are labeled by date and corresponding TAB number (in either the Index for the ROP or Index for the Supplemental ROP) as provided to the court.

⁵ The index of record provided to the court listed this document as March 2008, but the court uses the October 2007 date it found on each page of the document instead.

documents such as comments on the draft)

4. TAB 4: July 2003: Environmental Water Account—Draft Environmental Impact Statement/ Environmental Impact Report
5. TAB 5: February 18, 2009: Global Change-Local Impacts: Managing Drought in the Golden State by Wendy Martin (Statewide Drought Coordinator DWR)
6. TAB 6: March 2009: California's Drought: March 2009 Update by Wendy Martin (Statewide Drought Coordinator DWR)
7. TAB 7: March 30, 2009: California's Drought: Water Conditions & Strategies to Reduce Impacts, Report to the Governor
8. TAB 8: March 12, 2009: Request for Concurrence to Secretary for Environmental Protection in the use of the Emergency Exemption Provisions of CEQA for 2009 Drought Water Bank

Respondents argue that the ROP is both complete and provides substantial evidence supporting the decision to approve the DWB.

Section 21167.6, subdivision (e) identifies the documents that must be included in the ROP. The section lists eleven categories in subdivisions (e)(1) through (e)(11). The court finds that most of the evidence petitioner moves to augment the record with is properly included under one or more of these eleven subdivisions.

The standard for including documents in an ROP is broad. In *County of Orange* the court noted that the record should include "everything that ever came near [the] proposed development..." and applied the "whole of the action test." (*County of Orange v. Superior Court* (2003) 113 Cal.App. 4th 1, 8; see also *Burbank-Glendale-Pasadena*

Airport Authority v. Hensler (1991)233 Cal.App. 3d. 577, 591 [finding that “a project under CEQA is the whole of an action”].)

It appears that the first reference to the DWB in the record before the court is in an email from Teresa Geimer, Acting Water Transfer Coordinator for the DWR, to Curt Spencer (also from DWR) dated August 12, 2008. Ms. Geimer’s email asks for help on hiring consultants for the 2009 Drought Water Bank (TAB 30). The court assumes that there must have been discussion about the project before this date if a staff member at DWR is seeking help finding consultants for it, but none has been presented to the court. For this reason, the court uses the August date of this email as the starting date for the project. As to the last date for the record of this project, the court notes section 15062, subdivision (a) of the guidelines, which provides that “[t]he notice [referring to the Notice of Exemption] shall be filed, if at all, after approval of the project.” Because the DWR chose to file a Notice of Exemption (NOE) with the Office of Planning and Research, it had to do so after the project was approved. The record is clear that the NOE was filed March 9, 2009.

These two dates provide the brackets for documents clearly within the definitions provided in section 21167.6, subdivision (e). Records concerning the DWB that are dated after August 12, 2008 and before March 9, 2009 are thus properly included in the ROP.⁶

The parties argue about whether certain informal documents dated within the period described above should be excluded from the ROP because they are the internal

⁶ Respondents agreed at the hearing that if the court finds the project was approved on or before March 9, 2009, the document included as TAB 7 (dated after March 9, 2009) in the record as certified should not be included. The parties stipulated that the court could take judicial notice of the request for concurrence from the Secretary of CalEPA dated March 12, 2009.

comments or personal opinions of individual staff members that do not reflect agency positions on the project. While the court finds this description accurate about some of the documents, subdivision (e)(10) does not on its face exclude documents that meet this description. Subdivision (e)(10) requires inclusion of "...[a]ny other written materials relevant to the respondent public agency's compliance with [CEQA] or to its decision on the merits of the project including...*all internal agency communications including staff notes and memoranda related to the project or to compliance with [CEQA].*" (Emphasis added.)

The following list describes each of the documents that this court finds should be included in the ROP together with a brief explanation of the basis for its inclusion (reference is to TABs in the Index of Supplemental ROP):⁷

Included under Public Resources Code section 21167.6, subdivision (e)(6) and (e) (10)

1. TAB 1: February 20, 2009: Internal DWR document requesting discussion regarding fallowing alfalfa to make water available for DWB. (e)(10)
2. TAB 9: December 17, 2008: Addendum regarding the 2009 DWB entitled "Addendum to the Environmental Water Account Environmental Impact Statement/ Environmental Impact Report Re: 2009 Drought Water Bank Transfers," with a cover letter from Mike Hendrick, DWR to the Office of Planning and Research. This is an internal document that relates to compliance with CEQA. (e)(10)
3. TAB 10⁸: December 10, 2008: Internal DWR document entitled "Giant Garter

⁷ The court ruled at the hearing that the two undated documents omitted from this list were not admissible.

Snake Baseline Monitoring and Research Strategy for the Sacramento Valley.”

The document is relevant as to compliance with CEQA because it discusses mitigation measures as part of DWB project. (e)(10)

4. TAB 13: September 2008: DWR document entitled “2009 Drought Water Bank Overview.” (e)(10)
5. TAB 14: August 19, 2008: Draft entitled “Addendum to the Supplemental Environmental Water Account: Environmental Impact Statement/Environmental Impact Report.” Relevant as to compliance with CEQA. (e)(10)
6. TABs 30-45: varying dates from August 12, 2008 to March 5, 2009: Email correspondence regarding the 2009 DWB project received or sent by DWR staff. These items are relevant to the 2009 DWB’s compliance with CEQA and to the project on the merits. (e)(10)
7. TABs 2-8 and 11-12: varying dates from November 2008 and January 2009: Comment letters re 2009 DWB Addendum. (e)(6)

B. *The Request to Admit Extra-record Material*

In addition to their motion to augment the record, petitioners ask the court to admit extra record evidence in support of the petition. Petitioners argue that the decision made regarding DWB’s exemption from CEQA is a ministerial or informal decision and therefore is a quasi-adjudicative decision. Respondents contend that this decision is not quasi-adjudicative as there was no hearing required for the decision and because facts are not in dispute. The distinction between quasi-legislative and quasi-

⁸ The court could not find a date for this document, and uses the December 2008 date provided by petitioners located on the index to the supplemental record. This date appears reasonable as the document makes reference to September 2008 being in the past and May 2009 being in the future.

adjudicatory is relevant for the purposes of admitting extra-record evidence. However, because the court finds most of the evidence petitioner moves to admit comes in under judicial notice, a brief discussion on this topic will suffice.

The standard for admitting extra-record evidence is generally found in *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559. The *Western States* court clearly articulated that “a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence within the meaning of Public Resources Code section 21168.5” and that “extra record evidence is generally not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions on the ground that the agency ‘has not proceeded in a manner required by law’ within the meaning of Public Resources Code section 21168.5” (*Id.* at 573-74). The court articulated a few limited exceptions, one of which is in actions that challenge ministerial or informal actions. Legislative (or quasi-legislative) actions are ones in which an administrative agency makes a decision based on public needs, whereas an adjudicatory (or quasi-adjudicatory) action involves applying existing rules to specific facts (e.g., granting discretionary permits). (See generally, *Meridian Ocean Systems, Inc. v. California State Lands Commission* (1990) 222 Cal.App. 3d 153, 167; *Pacifica Corp v. City of Camarillo* (1983) 149 Cal.App. 3d 168, 176; *Fishman v. City of Palo Alto* (1979) 86 Cal.App. 3d 506, 509.)

The court finds that the action of exempting the DWB was a quasi-legislative decision and therefore the exception in *Western States* does not apply. Even though the action of filing a NOE is informal, the decision was made by the DWR to address the public needs for the drought situation. This decision is more akin to a legislative one

than an adjudicatory one, and it is the decision to approve the project, not whether or not to file a NOE, that is significant for this characterization.

However, the court does grant petitioners' motion for judicial notice as to several documents. The court admits the following documents, which pre-date the approval of the DWB:

1. TAB 24: April 2008: Update on the California Drought
2. TABs 54-56: Varying dates of May 25, 2007; April 16, 2008; and October 21, 2008: Judge Oliver W. Wagner's order on protected species.

Any request to admit a document not addressed in this decision is overruled. As to documents that post-date the decision to approve the DWB, the court finds that they are not relevant to the merits of the petition, nor are they necessary for the court to have ruled on respondents' motion to dismiss for mootness.

II. PROCEDURAL AND FACTUAL BACKGROUND

On February 27, 2009, Governor Schwarzenegger issued a proclamation under the authority of the California Emergency Services Act⁹ declaring a state of emergency in California due to a water shortage caused by drought. The Governor ordered certain actions to be taken for "the water transfers made through the 2009 Drought Water Bank." Petitioners filed their writ challenging the DWB arguing that it was implemented without the review required by CEQA.

Several of the more significant provisions of the proclamation are set forth below.

Paragraph 1 of the proclamation reads:

⁹ Government Code section 8550 et seq.

The California Department of Water Resources (DWR) shall, in partnership with other appropriate agencies, launch a statewide conservation campaign calling for all Californians to immediately decrease their water use.

In paragraph 2 of the proclamation, the Governor directed that:

DWR shall implement the relevant mitigation measures identified in the Environmental Water Account Environmental Impact Report, Environmental Impact Statement, Supplement and Addendums for the water transfers made through the 2009 Drought Water Bank.¹⁰

Paragraph 3 of the proclamation reads:

DWR and the State Water Resources Control Board (SWRCB) shall expedite the processing of water transfers and related efforts by water users and suppliers that cannot participate in the 2009 Drought Water Bank, provided the water users and suppliers can demonstrate that the transfer will not injure other legal users of water or cause unreasonable effects on fish and wildlife.¹¹

Paragraph 17 of the proclamation reads:

The emergency exemptions in Public Resources Code sections 21080(b)(3), 21080(b)(4) and 21172¹², and in California Code of Regulations, title 14, section 15269(c), shall apply to all actions or efforts consistent with this Proclamation that are taken to mitigate or respond to this emergency. In addition, Water Code section 13247¹³ is suspended to allow expedited responses to this emergency that are consistent with this Proclamation. The Secretary for the California Environmental Protection Agency [CalEPA] and the Secretary for the California

¹⁰ This language might be read to imply that a decision had already been made to implement the DWB before the proclamation was drafted, given the omission of conditional phrasing. If the DWB were a planned or potential action but not an approved one on February 27, 2009, one might have expected this recital to read "DWR shall implement ... if any water transfers are made through the DWB."

¹¹ Other than this mention of efforts to assist water suppliers that could not participate in the DWB, there is not other specific reference to the DWB in the proclamation.

¹² Section 21172 states:

This division shall not apply to any project undertaken, carried out, or approved by a public agency to maintain, repair, restore, demolish or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor pursuant to Chapter 7 (commencing with Section 8550) of Division 1, Title 2 of the Government Code.

¹³ This section states:

State offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the state board unless otherwise directed or authorized by statute, in which case they shall indicate to the regional boards in writing their authority for not complying with such plans.

Natural Resources Agency shall determine which efforts fall within these exemptions and suspension, ensuring that these exemptions and suspension serve the purposes of this Proclamation while protecting the public and the environment. The Secretaries shall maintain on their web sites a list of the actions taken in reliance on these exemptions and suspension.

As noted above, the paragraph 2 of the proclamation refers to mitigation measures in the "Environmental Water Account Environmental Impact Report, Environmental Impact Statement, Supplement and Addendums." The ROP reflects that DWR staff had been considering whether environmental review of the DWB could be included in the environmental review of the ongoing Environmental Water Account (EWA) project. DWR released a document on December 17, 2008 entitled "Addendum to the Environmental Water Account Environmental Impact Statement / Environmental Impact Report" for public comment. The draft addendum described several changes to the EWA project, including addition of the DWB. The draft addendum stated that:

The 2009 Drought Water Bank (DWB) thus will be the mechanism for acquiring and transferring water to replace Project supplies lost and that will be lost due to the judicially mandated operational curtailments, aggravated by the conditions of drought.

Petitioners submitted written comments to DWR objecting to the DWB project, contending that the project would cause significant environmental effects and that review of the DWB by use of an addendum did not comply with CEQA.

On March 4, 2009, DWR issued a final "Addendum to the Environmental Water Account Environmental Impact Statement / Environmental Impact Report re: 2009 Drought Water Bank Transfers." The final addendum stated that the changes proposed in the draft do not involve "new significant environmental effects, a substantial increase

in the severity of the previously identified significant effects, or substantial changes in the circumstances under which the project will be implemented."

On March 9, 2009, DWR filed a NOE pursuant to CEQA for its approval of the DWB. The NOE describes the DWB project as:

a one-year transfer program to obtain water from willing sellers upstream of the Delta for sale to water users experiencing shortages due to extreme drought conditions and regulatory pumping curtailments.

The NOE states that the DWB is exempt from CEQA pursuant to the emergency exemptions in sections 21080, subdivisions (b)(3) and (b)(4). It further states that:

the project is subject to the Governor's Proclamation of a State of Emergency of February 27, 2009 (attached), among whose purposes is to protect the safety of persons and property from the natural disaster created [sic] by the critical drought conditons [sic] currently existing in the State. Section 17 of said Proclamation directs that CEQA exemptions under these sections as well as CCR title 14, section 15269(c) shall apply. The Secretary for the Natural Resources Agency has determined that the 2009 Drought Water Bank falls within this exemption (see attached).

Attached to the NOE is a memorandum dated March 5, 2009, from the Director of DWR to the Secretary for CNRA, entitled "Request for Concurrence in the use of the Emergency Exemption Provisions of CEQA for the 2009 Drought Water Bank." At the end of the memorandum is the word "CONCUR" just above the signature of Mike Chrisman, Secretary for Natural Resources, also dated March 5, 2009. The NOE does not have a similar attachment for CalEPA, or any other attachment or reference to a concurrence from CalEPA. The court has taken judicial notice of a similar document dated March 12, 2009, from the Secretary of CalEPA.

The parties have stipulated that respondents do not contend that they complied with CEQA in approving the DWB either by preparing the draft addendum or the final addendum.¹⁴

III. THE CEQA EMERGENCY EXEMPTIONS: THE FIRST CAUSE OF ACTION

The NOE for the DWB cites the two CEQA emergency exemptions in section 21080. These exemptions provide that CEQA's requirements do not apply to:

(b)(3): [p]rojects undertaken, carried out, or approved by a public agency to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster-stricken area in which a state of emergency has been proclaimed by the Governor [; or to]

(b)(4): [s]pecific actions necessary to prevent or mitigate an emergency.

Section 21060.3 defines the word "emergency" as used in these two provisions as "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services."

On review of a determination that a project falls under one of the statutory exemptions to CEQA, the court must review the record to determine whether there is substantial evidence that the project meets the statutory definition. (See *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 535-536; *Western Municipal Water District v. Superior Court* (1986) 187 Cal.App.3d 1104, 1113-14.) As stated in *Western Municipal Water District*, "where an agency seeks to avoid an EIR under section 21080, subdivision (b)(4), a reviewing court on petition for mandate must

¹⁴ See Stipulation Identifying Issues Not in Dispute, filed November 13, 2009.

determine if there exists substantial evidence in the record to support the agency finding of an emergency." (*Western Municipal Water District*, supra, 187 Cal.App.3d at pages 1113-14.)

As a preliminary matter, the court notes that findings in a gubernatorial proclamation are not themselves evidence. Though the Governor's February 27, 2009 proclamation includes recitals regarding certain facts, these recitals are not findings of fact but are instead conclusions or references to facts and evidence that the Governor relied on in making the proclamation. A report of, or reference to, facts in findings without any indication of underlying factual support or analysis is not evidence entitled to judicial deference. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376 at 410.)

A. *The Proclamation Emergency Exemption*

The court does not find substantial evidence in the record before it that the DWB meets the requirements of the proclamation emergency exemption of subdivision (b)(3). Neither CEQA nor the Emergency Services Act itself defines the terms "disaster" or "disaster-stricken area"¹⁵ that appear in the proclamation emergency exemption. However, the Emergency Services Act provides that a state of emergency can be declared by the Governor when there exist:

conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as air pollution, fire,

¹⁵ Respondents noted that the California Disaster Assistance Act provides a definition of "disaster" as being a "fire, flood, storm, tidal wave, earthquake, terrorism, epidemic, or other similar public calamity that the Governor determines presents a threat to public safety." However, that definition is at best illustrative, not binding, since it is found in a different chapter of the code than the Emergency Services Act. (Cal. Government Code sections 8680.1 and 8680.3.) Moreover, it arguably has no congruence with the drought here, as it refers to events that are generally sudden occurrences with imminent dangerous consequences.

flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease¹⁶

The Governor's proclamation declares that, "under the provisions of section 8558(b) of the California Government Code," a state of emergency existed in California, and directed a number of actions to be taken statewide. The proclamation itself does not declare that there was a disaster, or identify a specific geographically described disaster-stricken area. However, the Governor did state that he found that "conditions of extreme peril to the safety of persons and property exist in California caused by the current and continuing severe drought conditions and water delivery restrictions."

Reading the proclamation as declaring a state of emergency due to a disaster,¹⁷ it does not follow that any project undertaken pursuant to the proclamation necessarily meets the requirements of the proclamation emergency exemption in CEQA. To meet the terms of the proclamation exemption, the project must be approved for the purposes of maintaining, repairing, restoring, demolishing, or replacing property or facilities damaged or destroyed as a result of the declared disaster. Here, there is no substantial evidence that the DWB would repair, restore, or otherwise affect any property or facilities damaged as a result of the drought.¹⁸ Indeed, there is no evidence in the record that property or facilities were damaged or destroyed as a result of the drought, other being unplanted or otherwise not used for productive economic advantage.

It is also significant for analyzing whether the proclamation exemption is properly invoked that there is no evidence in the record that the DWB targets any transfers of

¹⁶ California Government Code section 8558, subdivision (b).

¹⁷ Petitioners argue that the proclamation cites "extreme peril," which is not terminology found in the CEQA exemptions. While this observation is accurate, the court does not find it determinative of the issues raised in the writ.

¹⁸ Respondents offer the argument that a court might find that watering parched land is "repairing" or "restoring" the land. The court does not find the argument persuasive.

water to properties that were thought to be "damaged;" instead the DWB permits transfers between willing sellers of water to willing buyers of water independently of the location of either or the ultimate use of the water. Much like the facts in *Castaic Lake*, the court finds that the DWB project appears to be designed to address issues other than property damaged as a direct result of drought conditions. (*Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257, 1267 -1269.) In *Castaic Lake*, the appeals court disapproved the use of the proclamation exemption for a project that was predominantly focused on infrastructure and economic revitalization for a broad area of the city of Santa Clarita, even though part of the project was addressed to restoring and replacing property and facilities that had been destroyed in the Northridge earthquake. The evidence in this record indicates that the purposes of the DWB are not confined to restoring real property or facilities that were damaged or destroyed as a result of the drought but appear to be addressed in larger part to the economic and social consequences of reduced availability of water during the drought.

B. *General Emergency Exemption*

As to the general emergency exemption, respondents argue that a drought, though not as sudden or unexpected as a fire or an earthquake, can be an emergency and was one in early 2009 when the proclamation was issued and the DWB approved. They argue that whether sufficient precipitation will occur is not predictable, and that circumstances made it impossible to complete a CEQA review in time to respond to the drought emergency that occurred at the time of the Governor's February 2009 proclamation.

The court does not find these arguments persuasive. First, the only evidence cited by respondents in support of the argument is the Governor's proclamation itself. As noted above, the recitals in the proclamation are not evidence. Respondents' arguments are not persuasive for the further reason that, even if the recitals in the proclamation were factual evidence, they do not establish an "emergency" for purposes of section 21080, subdivision (b)(4). The proclamation states that the drought has continued for years, and had worsened. These words describe a condition that is ongoing, not one that is sudden or unexpected. In addition, the proclamation cites more than weather and climate conditions as a basis for implementing the actions it directs. It cites curtailments in water transfers as a result of new biological opinions and orders to comply with environmental regulations. It also cites increases since 1991 in California's population, and "significant increases in planting of permanent, high-value crops not subject to fallowing." In short, none of the recitals in the proclamation, even if evidence, provide substantial evidence of a "a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services."

Moreover, even if the court were to assume the drought could be considered an emergency, and were to assume further that the proclamation's recitals could be considered evidence, those findings do not indicate that the DWB will prevent or mitigate any emergency, as required by section 21080 subdivision (b)(4). The DWB only sets up a system of transfers from willing sellers to interested buyers. It is not targeted to mitigate or prevent any of the consequences presumed to result from the drought, as enumerated in the proclamation. Unlike the situation in *CalBeach*

Advocates, the kinds of consequences indicated in the proclamation are not the direct and imminent effect of an immediate source of danger, nor is the project one that will prevent those imminent effects. (See *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529 at 538.) In *CalBeach*, two professional engineers examined a seaside bluff and determined that it would collapse within a few weeks if not stabilized, putting the residences on the bluff in immediate peril. Here, the recitals in the proclamation, to the extent they are specific about the time period in which the consequences will occur at all, are framed in terms of consequences months or years in the future. Further, the consequences that appear to be emphasized in the proclamation are the economic consequences of the drought, such as loss of revenue for agricultural businesses, increased food prices, loss of income and jobs, and increased losses of businesses and property due to those economic problems. Projects to address these broader consequences of the drought are more akin to the infrastructure and economic revitalization measures that, while related to the aftermath of an earthquake, were found by the court in *Castaic Lake Water Agency* to be outside the "extremely narrow" emergency exemption in CEQA. (See *Castaic Lake*, *supra*, 41 Cal.App.4th at 1267 -1269).

Respondents argue that an emergency really means that the circumstances giving rise to the project are ones "for which the lead agency simply cannot complete the requisite paperwork within the time constraints of CEQA," citing *Western Municipal Water District*, *supra*, at 1111. The court does not agree that this is an accurate description of the holding in *Western Municipal*. While the court in that case did make note of the logic of a statutory exemption cutting through the time-consuming paperwork

due to the need for a quick response to a clear and imminent danger, it did not hold that any action an agency wishes to take sooner than it could if it complied with CEQA constitutes an "emergency." To the contrary, the court in *Western Municipal* held that:

a construction [of the emergency exemption that ignored] the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature [] would be in derogation of the canon that a construction should give meaning to each word of the statute. Moreover, in the name of 'emergency' it would create a hole in CEQA of fathomless depth and spectacular breadth.¹⁹

The evidence in this record, showing that DWR had taken steps to try to include the DWB in the EWA Addendum, but did not complete that review prior to February 27, 2009, does not establish that there was an "emergency" for purposes of exemption from CEQA.

Thus, the court finds that there is not substantial evidence to support a determination that the DWB was exempt from CEQA under the general emergency of section 21080, subdivision (b)(4).

C. Compliance with the Proclamation as an Alternative to CEQA Review.

Respondents' primary argument concerning the first cause of action in the petition is that the DWB fell within the actions directed in the Governor's proclamation and, by its terms, the Governor's proclamation made the determination that the CEQA exemptions applied. Stated differently, respondents' argument is that the analysis of the two CEQA emergency exemptions provided above is unnecessary because there was no need for any state official to determine that the project met one of the emergency exemptions under CEQA. Respondents argue that as long as the project

¹⁹ *Western Mun. Water Dist.*, *supra*, 187 Cal.App.3d at pages 1111 -1112.

fell within the terms of the proclamation, it was "exempt from CEQA in virtue of the Governor's authority" and no analysis of whether or not the terms of the two emergency exemptions apply is required.

Respondents base their argument principally on the words in paragraph 17 of the proclamation. As noted above, paragraph 17 states that the emergency exemptions under CEQA *shall apply* to efforts consistent with the proclamation. It requires the secretaries of CNRA and CalEPA to *determine* which efforts *fall within the exemptions*, "ensuring that these exemptions ... serve the purposes of [the proclamation] while *protecting* the public and *the environment*." (Emphasis added.)

The first task in addressing this argument is to determine the correct construction of this provision of the Governor's proclamation. A proclamation is subject to the same rules of judicial interpretation as a statute. The court must construe the plain meaning of the terms of the proclamation in a manner that gives meaning to all of the terms but avoids an absurd result.

Petitioners argue that the correct construction of the proclamation is that it required the secretaries not only to determine that the CEQA emergency exemptions applied to the project, but also that the projects protect the environment, and to make these determinations prior to approval of a project.

Respondents argue the proclamation must be construed to have created a streamlined CEQA compliance determination, or created an alternate process, by which the usual requirements of the law would not apply so long as the secretaries agreed that a project fit the purposes of the proclamation and "protects the environment." They argue that petitioners' interpretation would lead to the absurd result that a proclamation

of emergency would make approval of a project harder and more time-consuming than it would otherwise have been.

The court finds that the best way to construe all four of the sentences of paragraph 17 is to read it as requiring the secretaries to make all of the following determinations: (1) that one of the CEQA emergency exemptions applies to any given action that would constitute a project; (2) that the action or project fits the purposes of the proclamation; and (3) that, even if a project was completely exempt from any environmental review under CEQA because it met one of the emergency exemptions, measures were being adopted that would protect the environment. Thus, the third sentence should be read to require the secretaries to affirm that the actions to be taken, even if exempt from CEQA and any environmental review, would include mitigation measures to protect the environment. This is logical since, as both parties acknowledge, and as the CEQA authorities hold:

the question of [environmental] impact is irrelevant to the emergency exemption. In contrast to negative declarations [] and “categorical exemptions”[], the text of the emergency exemption does not address the question of impact. Indeed, the self-evident purpose of the exemption is to provide an escape from the EIR requirement despite a project’s clear, significant impact.²⁰

The proclamation, while directing the secretaries to consider an exemption from CEQA for projects that further its purposes, at the same time directed the secretaries to ensure that environmental consequences were taken into consideration and mitigated.

This interpretation of paragraph 17 also gives meaning to paragraph 2 and is to be favored for that additional reason. If an effort is subject to an emergency exemption, no mitigation measures would be required. Paragraph 2 of the Governor’s proclamation

²⁰ *Western Mun. Water Dist.*, *supra*, 187 Cal.App.3d at pages 1113 -1114.

requires DWR to implement identified and relevant mitigation measure from the EWA environmental documents for water transfers made under the DWB.

The court does not interpret the words "ensur[e] that these exemptions. . . protect[] the public and the environment" language in the proclamation to be equivalent to a requirement that the secretaries determine that a project has "no significant environmental effects," nor does it understand that language to impose the kinds of requirements that are contained in the Guidelines concerning categorical exemptions.²¹ The proclamation does not state that it is modifying the CEQA emergency exemptions, nor does it establish any additional procedures to require a particular kind or level of environmental review before a project may be considered exempt from CEQA. The proclamation does however state that the secretaries must take into consideration the environmental effects of a project, considerations that would be unnecessary if the project qualified for a statutory exemption from CEQA.

The court has further concerns about respondents' argument that the proclamation renders analysis of the CEQA emergency exemptions unnecessary. First, the interpretation urged by respondents would effectively suspend CEQA for projects found to be consistent with the proclamation. This is inconsistent with the words of the proclamation that specifically suspend Water Code section 13247, but say the CEQA exemptions "shall apply." The interpretation urged by respondents also reads out the clause "ensuring that these exemptions and suspension serve the purposes of this Proclamation while protecting the public and the environment." The more logical interpretation and one that gives some meaning to each word of the proclamation is that

²¹ Cf. Guidelines section 15300.2.

the secretaries must determine which efforts meet the requirements of the two exemptions.

The court's interpretation is also consistent with the fact that the Governor could clearly have suspended CEQA and declared that compliance with CEQA would prevent, hinder, or delay the mitigation of the effects of the emergency, as he is allowed to do under Government Code section 8571. The Governor did not provide such a suspension with respect to CEQA in the proclamation. Instead, the Governor left the determination of which efforts taken under the proclamation fit the emergency exemptions to the secretaries of the two named state agencies. Finally, though not determinatively, there should be some significance given the fact that the agencies named in paragraph 17 of the proclamation to make the described determination are those with expertise on the issue of environmental impact of various actions. Why include these agencies in the process if they are not to weigh in with their specific expertise? If paragraph 17 were included only to provide a process involving high-ranking state officers to insure that an "effort" or "action" was consistent with the proclamation, it might be as logical to name the Lieutenant Governor or Director of Finance to make the determination.

IV. VIOLATION OF MINISTERIAL DUTIES: THE SECOND CAUSE OF ACTION

In their second cause of action, petitioners seek a writ of mandate against DWR for violating its ministerial duty to obtain findings that the DWB served the purposes of the proclamation, thereby "ensuring that the[] exemptions and suspension serve the purposes of th[e] [p]roclamation while protecting the public and the environment."

Petitioners contend that paragraph 17 requires the secretaries of CalEPA and CNRA to make factual findings, but that the secretaries only made one-word concurrences to DWR's request that they agree to DWR's use of the emergency exemptions.

A writ of mandate may be issued by any court...to compel the performance of an act which the law specially enjoins.²² Petitioner must show that a "clear, present, ministerial duty" existed to obtain a writ. (See *People v. Karriker* (2007) 149 Cal.App.4th 763, 774; *Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44 Cal.App.4th 1391, 1414.)

Petitioners argue that CalEPA and CNRA had a ministerial duty under the Governor's proclamation to make certain determinations before applying for an exemption under CEQA. The difficulty with petitioners argument is that the second cause of action is addressed to DWR, not the two agencies named in paragraph 17 of the proclamation.

There are no duties imposed upon DWR in the proclamation. DWR cannot be said to have violated duties not assigned to it. Given this fact, the court declines to reach the question of whether the proclamation required the secretaries to set forth findings to "bridge the analytic gap between the raw evidence and the ultimate decision or order." (See *Topanga Association for Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.).

V. CONCLUSION

The court grants the petition for writ of mandate. A writ of mandate shall issue commanding respondents to comply with the requirements of CEQA.

²² Code of Civil Procedure section 1085, subdivision a.

Petitioners are ordered to prepare a form of judgment for execution by the court and a form of writ for approval as to form by the court and execution by the clerk of the court.

IT IS SO ORDERED.

DATED: 9/15/10

Alice Vilardi
Alice Vilardi
Judge of the Superior Court