

SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY
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Re: Decision After Submission

URGENT FOR REVIEW AS REQUESTED

Gentlemen,
Please see attached Decision After
Submission in case M 810553 -
HOPE vs. Ca Dept of Food &
Agriculture et al.

- Christie Sitterly, Clerk
for the Hon. Robert O'Farrell

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

FILED

MAY 12 2008

HELPING OUR PENINSULA'S ENVIRONMENT,

Petitioner,

Case No. M86553

CONNIE MAZZE
CLERK OF THE SUPERIOR C
COUNTY DEPT
CHRISTIE SITTERLY

v.

Intended Decision

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, A.G. KAWAMURA,

Respondents.

This matter came on for court trial on May 8, 2008. All sides were represented through their respective attorneys. The matter was argued and taken under submission. This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein.

Background

Petitioner, Helping Our Peninsula's Environment (HOPE), is challenging Respondents', CA Department of Food and Agriculture and A.G. Kawamura (Department), decision to exempt the spraying of insect pheromone from California Environmental Quality Act (CEQA) review prior to completion of an environmental impact report (EIR). The Department seeks to "eradicate" the Light Brown Apple Moth (Apple Moth).

An Apple Moth was collected in a light trap in Berkeley, California in February 2006. In Monterey County, one was collected in April 2007. By July 2007, Apple Moths had been found in nine (9) counties in California.

The Department was concerned about the Moth's proliferation, as well as a threat of quarantine of plant material by Canada, Mexico and some sister states because of the Moth's presence in California.

In March 2007, a Technical Working Group was established to make recommendations to the Department regarding Apple Moth populations in California. One recommendation of the Technical Working Group was for the application of pheromone as part of the plan to eradicate the Moth.

The Department filed a CEQA Notice of Exemption, based on an emergency, with the Office of Planning and Research on August 20, 2007 to allow the treatment of the greater Monterey Peninsula with pheromone to disrupt Apple Moth mating behaviors.

Pheromone was applied by aerial application to the Monterey Peninsula and vicinity in September through October 2007.

The Department plans to continue the application of Apple Moth pheromone in the summer of 2008 to the same geographic area.

HOPE opposes any further spraying of the pheromone before the completion of the EIR.

Administrative Record

The administrative record (AR) was admitted into evidence.

Judicial Notice

HOPE's request for judicial notice was granted.

Discussion

In this action, Petitioner contends that Respondents' effort to exempt eradication efforts, specifically aerial spraying, from CEQA compliance is not supported by substantial evidence.

"Specific actions necessary to prevent or mitigate an emergency are exempt from CEQA. ([Public Resources Code] § 21080, subd. (b)(4).) 'Emergency' means 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. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage. ([Public Resources Code] § 21060.3.)." (*Calbeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 536 (*Calbeach*)).

"In *Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal. App. 3d 1104 [232 Cal. Rptr. 359], the court reasoned: 'The 'emergency' exception of [Public Resources Code] section 21080, subdivision (b)(4) is obviously extremely narrow. 'Emergency' as defined by [Public Resources Code] section 21060.3 is explicit and detailed. We particularly note that the definition limits an emergency to an '*occurrence*,' not a condition, and that the occurrence must involve a '*clear and imminent danger, demanding immediate action*.' [P] The theory behind these exemptions is that if a project arises for which the lead agency simply *cannot* complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the EIR requirements is justifiable. For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper.' [Citation.] When

counsel in *Western* contended that CEQA should not apply to specific actions necessary to prevent or mitigate serious future harm, the Court's response was, 'Such a construction completely ignores the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature and would be in derogation of the canon that a construction should give meaning to each word of the statute. [Citation.] Moreover, in the name of 'emergency' it would create a hole in CEQA of fathomless depth and spectacular breadth." (*Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257, 1267-1268.)

The Department is urging that because the Apple Moth was undetected in the "wild" until 2007, its collection and identification was a "sudden, unexpected occurrence". The Department then compares the ongoing presence and reproduction of the Apple Moth as being equivalent to the imminent collapse of the bluffs in *Calbeach*. However, the *Calbeach* court cited to the experts' specific opinions that there was an imminent danger of the bluff collapsing, a sudden occurrence, which required immediate action to protect damage to life and real property. One of the experts in *Calbeach* rendered the opinion that the bluff could collapse "within a few weeks". Another declared that it would likely collapse during the storms that winter. (*Calbeach, supra*, 103). Unlike the situation in *Calbeach*, the evidence does not support a finding that the Apple Moth presents the threat of a catastrophe that is imminent and that will happen suddenly on any given day.

HOPE argues that the current program to eradicate the Apple Moth cannot be described as an immediate response. HOPE states that while the spraying in 2007 may have constituted an immediate response, the same cannot be said of the proposed 2008

spraying because it is too remote in time. HOPE points out that the Department estimates the eradication will take approximately four years if it is successful. Such a program of annual, repetitive spraying cannot be considered an immediate response.

The Department contends that the Legislature has made findings regarding the urgency of dealing with the Apple Moth problem, and that the separation of powers doctrine prohibits the court from interpreting the evidence in the record otherwise. The Department also argues that the court cannot rely on legislative history to interpret the Light Brown Apple Moth Act of 2007 (Act) (Food and Agr. Code §6050.) (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775 (*Hughes*)).

The Department does not cite to any authority that “prevents” this court from examining the statute because of a separation of powers issue.

The citation to *Hughes* provides: “Our analysis commences with the premise that the objective of statutory interpretation is to ascertain and effectuate legislative intent. [Citation.] ‘Our first step [in determining legislative intent] is to scrutinize the actual words of the statute, giving them a plain and commonsense meaning.’ [Citations.] ‘In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose’ [Citation.] ‘Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction.’ [Citations.]” (*Hughes, supra*, 17 Cal4th at p. 775.)

The Court finds the Act ambiguous because it is silent on the applicability of CEQA, and the Department is claiming an emergency exemption from CEQA review.

The most compelling and pertinent information in the legislative history that defeats the Department’s argument is that (1) in section 6050.1(d), language which

provided that "the department's actions pursuant to this act shall be deemed an emergency," was deleted from the statute, and (2) section 6051.1 (c)(2)(C), provides that "[e]radication activities undertaken pursuant to this article shall comply with all applicable laws and regulations and shall be conducted in an environmentally responsible manner." (Request for Judicial Notice, Exhibit A, p 5, and pp. 18-19, respectively.)

The Legislature chose to remove the emergency exemption and to require the Department to comply with "all applicable laws and regulations," i.e., CEQA.

Finally, HOPE argues, and the court concurs, that the administrative record is barren of evidence of any actual damage from the Apple Moth that would justify an emergency exemption from CEQA.

The court finds that the claim of "emergency", pursuant to Public Resources Code sec. 21060.3, is not supported by substantial evidence. Therefore, the Department shall not continue aerial spraying over areas where people live, prior to the completion of the EIR that is presently being prepared and projected for completion this coming January.

The Department is not powerless to proceed with mitigation measures. It may employ more conservative means, short of aerial spraying over areas where people live, to slow and control Apple Moth propagation pending completion of the EIR.

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Disposition

HOPE's writ of mandate is granted.

The court directs the attorney for HOPE to prepare an appropriate judgment consistent with this ruling, present it to all counsel for approval as to form, and return it to this court for signature.

Dated: **MAY 12 2008**



HON. ROBERT A. O'FARRELL
Judge of the Superior Court

CERTIFICATE OF MAILING

C.C.P. SEC. 1013A

I do hereby certify that I am not a party to the within stated cause and that on **MAY 12 2008** I deposited true and correct copies of the following documents:

ORDER AFTER SUBMISSION in sealed envelopes with postage thereon fully prepaid, in the mail at Salinas, California, directed to each of the following named persons at their respective addresses, as hereinafter set forth:

Mr. Alexander Henson
13766 Center Street, Suite 27
Carmel Valley, CA 93924

Mr. Willian Jenkins
Deputy Attonrey General
455 Golden Gate Ave, Suite 11000
San Francisco, CA 94102

Dated: **MAY 12 2008**

CONNIE MAZZEI, Clerk of the
Monterey County Superior Court

By 
CHRISTIE SITTERLY, Deputy