SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT

BESS BAIR, et al.,

Petitioner,

vs.

CALIFORNIA DEPARTMENT OF TRANSPORTATION, et al.,

Respondent.

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CASE NO. CV170543

RULING AND ORDER ON PETITION FOR WRIT OF MANDATE AND INJUNCTIVE RELIEF

Before the Court is the petition for writ of mandate and injunctive relief filed by Bess Bair, Trisha Lee Lotus, Jeffrey Hedin, David Spreen, the Center for Biological Diversity, Environmental Protection Information Center (EPIC), Californians for Alternatives to Toxics (CATS) and Friends of Del Norte. The Court has considered the papers submitted by Petitioners and Respondent State of California Department of Transportation and has considered arguments presented by their counsel. This case is a subsequent filing by the same involved parties in Lotus et al v. California Department of Transportation (Caltrans), Humboldt County Superior Court case CV110002. In CV110002, the parties agreed that there was such significant overlap in the issues from the Lotus case filed in 2011 to this case filed in 2017 that matters will be determined in

this case. The question before this Court extends past whether Caltrans fully complied with the previously issued Writ, but whether they complied in a manner consistent with the requirements of CEQA in their efforts to comply with the writ. The Court rules as follows:

DISCUSSION

"The standard of review in a CEQA case, as provided in Public Resource Code §21168.5 and §21005 is abuse of discretion. Section §21168.5 states in part: "In any action or proceeding ... to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion." (See § 21005, subd. (a) [noncompliance with information disclosure requirements may "constitute a prejudicial abuse of discretion"].)

"[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564) we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task is 'not to weigh conflicting evidence and determine who has the better argument.'" (*Sierra Club v. County of Fresno* (2018) 5 Cal.5th 502, 512.)

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On May 18, 2010, Respondent certified a Final Environmental Impact Report ("FEIR") under the California Environmental Quality Act ("CEQA") for the Richardson Grove Operational Improvement Project (RGOIP). On June 17, 2010, Petitioners filed a Petition for Writ of Mandate in case number CV110002, captioned *Lotus et al. v. State of California Department of Transportation et al.* The petition in that matter asserted ten causes of action, presenting a broad array of challenges to the 2010 FEIR. The Superior Court denied the petition and an appeal followed.

The First District Court of Appeals affirmed the denial of the petition except as to one issue: the 2010 FEIR's analysis of impacts on the root health zones of old growth redwood trees. The Court of Appeal found that the 2010 FEIR violated CEQA in that it failed to "separately identify and analyze the significance of the impacts to root zones of old growth redwood trees before proposing mitigation measures..." (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 658.)

The Court of Appeal directed this Court to issue a Peremptory Writ of Mandate ordering Respondent to "set aside its certification of the final EIR pending modification of those portions of the EIR discussing impacts on old growth redwood trees and proposed mitigation measures in compliance with CEQA. Caltrans is not required to start the EIR process anew. Caltrans need only correct the deficiencies we have identified before considering recertification of the EIR." (*Id.*) On October 21, 2014, this Court entered judgment in accordance with the opinion of the Court of Appeal.

Respondent prepared an Addendum to the 2010 FEIR addressing the issues identified by the Court of Appeal. Respondent re-certified the 2010 FEIR along with Addendum on May 1, 2017 and approved the Project on May 22, 2017.

Petitioners argue that the state violated CEQA in a number of respects. First, they take issue with the state's choice to prepare and approve an Addendum to the

2010 FEIR rather than a revised or subsequent EIR. Second, they argue that this choice deprived the public of its right to review and comment on the contents of the Addendum. Third, they argue that the Addendum makes substantial changes to the project, resulting in significant environmental effects that the state fails to address. As to this last contention, the Court cannot agree. There are changes and modifications identified in an effort to have an overall smaller footprint and impact on the area, nothing about the changes alter the scope of purpose of the project. As to whether Caltrans deprived the public and other agencies of review and input, the Court does agree.

When the 2010 draft EIR was circulated, the arborist's report did not exist, nor did the rating system developed and utilized by the arborist. This information was developed and submitted by way of an Addendum. By using an Addendum, the state prevented the public and other agencies from providing comment on the rating system. It therefore made a significance determination without considering any critique of the arborist's rating system and methodology. This was done without input that the public and/or other agencies may have provided.

The *Lotus* decision cited at some length a letter sent from the Department of Parks and Recreation to Caltrans in which that department raised the very same issues that compelled the *Lotus* court to invalidate the 2010 FEIR. (*Lotus*, *supra*, 223 Cal.App.4th at 657-8.) While the state is correct that the *Lotus* decision did not explicitly direct it to prepare a revised or supplemental EIR (which would have required public comment), the logic of the decision demands re-circulation.

"The failure of the EIR to separately identify and analyze the significance of the impacts to the root zones of old growth redwood trees before proposing mitigation measures is not merely a harmless procedural failing. Contrary to the trial court's conclusion, this shortcutting of CEQA requirements subverts the purposes of CEQA by

omitting material necessary to informed decision making and informed public participation. It precludes both identification of potential environmental consequences arising from the project and also thoughtful analysis of the sufficiency of measures to mitigate those consequences. The deficiency cannot be considered harmless." (*Id.* at 658.)

The decision squarely identifies a separate analysis of impacts to root health zones as "material necessary to informed decision making and informed public participation." The 2010 FEIR did not provide this analysis and therefore violated CEQA because even though that EIR was circulated for public comment, the compression of impacts with mitigation analyses deprived the public and other agencies of the ability to evaluate an impacts analysis and provide comment to the agency. Now the agency has provided the missing analysis, but has done so in such a way that prevented comment and feedback from the public and, in particular, from the Department of Parks of Recreation.

Public Resources Code § 21092.1 provides that "[w]hen significant new information is added to an environmental impact report after [public] notice…and consultation [with other agencies]…but prior to certification, the public agency shall give notice again…and consult again…before certifying the environmental impact report." When the state circulated the 2010 draft EIR, it did not include the arborist's report because that report did not exist yet, nor did the rating system devised by the arborist to predict impacts on tree health from project activities. The state developed this information after the entry of judgment in *Lotus*. By utilizing an Addendum, the state prevented the public and other agencies from providing comment on the rating system. It therefore made its significance determination without considering any critique of the arborist's rating system that the public or other agencies could have provided.

The concerns of the Department as set forth in the letter cited by the *Lotus* decision may or may not persist in the face of the Addendum and the arborist report that it relies on. Without formal consultation pursuant to the relevant provisions of CEQA, any concerns that the Department has will remain outside the administrative record and thus evade judicial review of any legal issues that those concerns may raise. The same is true for the concerns of other stakeholders and members of the public at large.

Moreover, the rating system devised by the arborist may or may not rest on sound scientific footing. Without review and critique by others with expertise in the relevant fields, this footing remains untested. Peer review is essential to sound science. The choice of the state to approve an Addendum without soliciting public comment foreclosed any possibility that this newly constructed rating system would be scrutinized and evaluated by other experts. The case of *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, is instructive. In that case, the court held that the agency violated CEQA by accepting as "minor" changes to the cumulative impacts analysis contained in two timber harvest plans because the agency did so without public comment on the changes. (*Id.* at 577.)

"Public review is essential to CEQA. The purpose of requiring public review is " ' "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Sierra Club, supra*, 7 Cal.4th at p. 1229) Public review permits accountability and " 'informed self-government.' " The court in *Friends of the Old Trees, supra*, 52 Cal.App.4th at p. 1402, 61 Cal.Rptr.2d 297 stressed the critical need to re-circulate to the public all information relating to a cumulative effects analysis prior to adding the documents to the agency file. "[P]ublic review and comment ensures that appropriate alternatives and mitigation measures are considered, and permits input from agencies with expertise in timber resources and

conservation." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 525). Thus, public review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources. The necessity for public review does not diminish simply because the forester and CDF determine the change in operation will not have any environmental impact. Under CEQA, even when the agency determines a project will have no significant environmental impact, the agency must prepare a negative declaration. The documents supporting this decision are still subject to public review." (Cal.Code Regs., tit. 14, § 15071, subd. (c). (*Schoen, supra,* 58 Cal.App.4th at 573-4.)

All of the cases cited by the state in support of its argument that using an Addendum was appropriate and therefore public comment is not required involved CEQA documents that had in fact been circulated. (*See* Respondent's Brief, p. 12-14.) In *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, the city approved an EIR regarding a shopping center project that it subsequently de-certified in response to litigation (*Id.* at 302.) The city then prepared a revised EIR that it circulated for public comment. (*Id.* at 303.) Similarly, in *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, the city approved an EIR for a development project that the trial found violated CEQA. (*Id.* at 891.) The city then prepared a revised EIR that it circulated for public comment and for which it held a public hearing. (*Id.* at 895.)

The case law is clear that an agency's significance determinations in an EIR must be made after circulation for comment by the public and after consultation with other agencies. This is so even where the agency concludes that a project will not result in significant environmental effects. The public must have a say. Here, the state proceeded in such a way as to deprive the public and other agencies of the opportunity

to provide comment on the impacts analysis required by the *Lotus* decision (the Court does not believe this was done in bad faith). The certification of the 2017 EIR and Addendum must be reversed so that the agency can fulfill its obligations to the public under CEQA.

A peremptory writ of mandate shall issue under seal of this Court ordering Caltrans to set aside approvals and certifications of the FEIR and the Addendum adopted and approved in May 2017. Caltrans is to circulate the 2017 FEIR and Addendum for public review and comment pursuant to Public Resources Code §21092 and the CEQA Guidelines contained in Title 14, Article 7 of the California Code of Regulations to include consultation with the Department of Parks and Recreation via §15086(a).

Caltrans is enjoined from any and all Project activities that could physically alter the Project area. This Court will retain jurisdiction by way of a return to the writ until a determination has been made that Caltrans has complied.

Dated: June 5, 2019

KELLY L. NEEL

Kelly L. Neel
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

I am a citizen of the United States, over 18 years of age, a resident of the County of Humboldt, State of California, and not a party to the within action; that my business address is Humboldt County Courthouse, 825 5th St., Eureka, California, 95501; that I served a true copy of the attached RULING AND ORDER ON PETITION FOR WRIT OF MANDATE AND INJUNCTIVE RELIEF by placing said copies in the attorney's mail delivery box in the Court Operations Office at Eureka, California on the date indicated below, or by placing said copies in envelope(s) and then placing the envelope(s) for collection and mailing on the date indicated below following our ordinary business practices. I am readily familiar with this business practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service at Eureka, California in a sealed envelope with postage prepaid. These copies were addressed to:

Stacy Lau/Janet Wong – Department of Transportation Legal Division, 111 Grand Avenue, Suite 11-100, Oakland, CA 94612

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I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on the 7 day of June 2019, at the City of Eureka, California.

Kim M. Bartleson, Clerk of the Court

By _____
Deputy Clerk