

FILED

DEC 05 2005

SUPERIOR COURT OF CALIFORNIA
COUNTY OF HUMBOLDT**SUPERIOR COURT OF CALIFORNIA, COUNTY OF HUMBOLDT**THE PACIFIC LUMBER COMPANY,
And SCOTIA PACIFIC COMPANY LLC,

NO: CV050674

Plaintiff/Petitioners,

RULINGS ON MOTIONS TO
INTERVENE and OSC'S RE
PRELIMINARY INJUNCTIONS

vs

NORTH COAST REGIONAL WATER
QUALITY CONTROL BOARD, et al.,

Defendant./Respondents.

FRESHWATER CREEK AND ELK RIVER
WATERSHEDS LAND, RANCH AND PROPERTY
OWNERS, RESIDENTS AND MANAGERS
("OWNERS")

NO. CV050675

Plaintiffs/Petitioners,

vs.

NORTH COAST REGIONAL WATER QUALITY
CONTROL BOARD, et al.,

Defendants/Respondents.

1 Preliminary Comments. Since the hearing held on November 9, 2005, the court
2 has reviewed and considered all pleadings (including all exhibits) and all oral arguments
3 presented by counsel. The comments that follow the rulings below are not intended to
4 be an exhaustive discussion of all points raised or a complete discussion of the court's
5 analysis of all issues.

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7 Because PALCO in Case No. CV 050674 and the petitioner in Case No. CV
8 050675 ("Owners") have advanced many of the same arguments they are generally
9 referred to herein collectively as "PALCO".

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11 Motions to Intervene

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13 Both motions to intervene are granted.

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15 Comments. The petition of PALCO, and to a lesser extent the petition of
16 Owners, seeks to delay the hearings, to have the court structure the hearings, and to
17 have certain agency jurisdictional issues ruled on by the court before the hearings.
18 Those jurisdictional issues involving Water Code Sections 13225(b) and 13360 and
19 PRC Section 4582.71, in turn, go to the heart of the subject matter of the hearings.

20 The standard of CCP Section 387(b) is satisfied in both cases. Interveners have
21 long term, identifiable interests in the subject matter of the proposed hearings before the
22 Regional Board concerning WDR's as well as interests in having the hearings move
23 forward toward resolutions.

24 The complaints in intervention previously submitted shall be filed and deemed
25 denied by all other parties; provided, however, that other parties may plead to said

1 complaints within 30 days of service if they so choose.

2
3 **TRO's and OSC's re Preliminary Injunctions**

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5 Both TRO's are dissolved and both petitions for preliminary injunctions are
6 denied.

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8 Comments. PALCO's arguments contain many criticisms of the staff of the
9 respondent Regional Board. The staff is alleged to have an abiding bias against
10 PALCO that is manifested by improper prejudgments, conspiracies with PALCO's
11 critics, suppression of legitimate comment on staff recommendations, and prejudicial
12 manipulation of hearing notices and structure. PALCO contends that the showing made
13 against the staff is so strong that this court should conclude that the results of hearings
14 before the Regional Board are preordained, and therefore the court should put a halt to
15 the Regional Board's administrative process and then structure that process fairly
16 through a special master or otherwise. Further PALCO urges the court to conclude that,
17 as a matter of law, the Regional Board does not have the power to establish WWDR's
18 that set rate of timber harvest limitations, and therefore rate of harvest limitations should
19 be adjudged to be in excess of the Regional Board's jurisdiction.

20 PALCO has not demonstrated a likelihood of prevailing with a permanent
21 injunction in the case, nor has PALCO demonstrated a likelihood of irreparable injury if
22 a preliminary injunction is not granted. To conclude otherwise would not only involve
23 speculation about the final construct and results of the administrative process but, more
24 importantly, would ignore the doctrines of ripeness and exhaustion of remedies. Simply
25 put, all relevant statutes and appellate authorities dictate that this court should not usurp

1 the role of the Regional Board or its staff by intervening in the administrative process
2 before that process has reached final decision(s). Rather, the Board should be allowed
3 to proceed at its own risk concerning all of the issues raised, including the procedural
4 due process issues and the legal jurisdictional issues.

5 Hunt v. Superior Court (1999) 21 C. 4th 984 does not support PALCO's
6 contentions concerning the ripeness issue. In Hunt, respondent county had completed
7 the administrative process of adopting the questioned eligibility standards, but had not
8 implemented them. The court ruled that the petitioners need not wait until they were
9 affected by the standards before bringing the action challenging the standards. If the
10 petitioners had sought court intervention before the county adopted the standards then
11 the ripeness doctrine would have precluded judicial intervention.

12 Coachella Valley Mosquito & Vector Control District v. CPERB (2005) 35 C 4th
13 1072, 1083 does explain and apply the administrative jurisdiction exception to the
14 exhaustion of remedies doctrine, but does not assist PALCO's arguments. In Coachella
15 a PERB hearing officer ruled on certain issues concerning PERB jurisdiction, the
16 petitioner District requested the PERB to reverse the hearing officer, and the PERB
17 refused. Then the action was filed. In the present cases the Regional Board has not
18 taken any final action, although PALCO forcefully argues that the Regional Board's
19 adoption of WWDR's that contain rate of harvest restrictions is a foregone conclusion. If
20 PALCO's predictions prove true, then Coachella could lend support to an argument that
21 PALCO need not exhaust its remedies with the State Board before seeking court
22 determinations concerning the agency jurisdiction issues. Similarly, if PALCO or
23 Owners are unable to fully present their positions before the Regional Board because of
24 their failure to comply with procedural requirements that were contained in misleading
25 notices, then McQueen v. Mid-Peninsula Regional Open Space District (1988) 202 Cal.

1 App. 3d 1136 could forgive any alleged failure to exhaust remedies before the Regional
2 Board. However, neither Coachella, or Hunt, or McQueen, or any other authority cited
3 by PALCO can be read to give PALCO what it seeks here—a preliminary injunctive
4 order stopping a statutorily created administrative body from carrying out its mandated
5 functions based on a showing that the agency will probably will get it wrong. If the law
6 were otherwise the courts would be swamped with requests for orders directing
7 administrative agencies how to do their jobs.

8 Thus, PALCO's shots at the staff of the Regional Board amount to a preemptive
9 salvo across the bow, but cannot at this stage prevent the Board from steering its own
10 course. As emphasized by PALCO, the Board is legally obligated to exercise
11 independent decision-making that is legally correct, no matter what infirmities there may
12 or may not be in the staff analyses and recommendations. Assuming *arguendo* that
13 PALCO'S allegations of staff bias were valid, the Board must still be given an
14 opportunity to discharge its duties fairly. The Board's functions should not be judicially
15 usurped by presuming the board is guilty by association, even if its staff and associates
16 were proven to be guilty.

17
18 The interlude caused by the issuance of the TRO's in these cases has allowed
19 PALCO and the Board three additional months to analyze and evaluate the public
20 comment received in response to the preliminary staff recommendations issued in June
21 2005. It has also allowed the Board and its attorneys time to weigh the jurisdictional
22 arguments advanced by PALCO and to consider what changes, if any, should be made
23 in hearing procedures in light of the various constitutional arguments. All in all, if
24 PALCO's or the Owner's substantive arguments have merit, the delay should result in
25 less vulnerable final decisions by the Regional Board. However, for the reasons

1 explained in the authorities that discuss the ripeness doctrine, the court cannot at this
2 juncture give any preliminary or advisory opinions on those subjects.

3 The Regional Board should now proceed with its administrative processes
4 forthwith. Setting of trial dates will be discussed at the appearance presently scheduled
5 for December 8, 2005.

6 Dated: December 1, 2005

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11 John R. Letton, (ret.) Assigned Judge of
12 The Superior Court
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STATE OF CALIFORNIA,)
COUNTY OF HUMBOLDT) SS. AFFIDAVIT OF SERVICE BY MAIL

I, Linda Galovich say:

That 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, Eureka, California; that I served a true copy of the attached

RULINGS ON MOTIONS TO INTERVENE AND OSC'S RE PRELIMINARY INJUNCTIONS 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:

FRANK SHAW BACIK, P O BOX 720, UKIAH CA 95482 (AND FAXED TO 462-7839)

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HON. JOHN K. LETTON

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

Executed on the 5 day of December, 2005, at the City of Eureka, County of Humboldt, State of California.

DWIGHT W. CLARK, Clerk of the Court

By Linda Galovich
Deputy Clerk