

May 13, 2008

Via Hand Delivery

Presiding Justice William K. McGuiness
California Court of Appeal
First Appellate District
Division Three
350 McAllister Street
San Francisco, CA 94102

RE: *Center for Biological Diversity, Inc., et al. v. FPL Group, et al.*
Appellate Case No. A116362

Dear Judge McGuiness:

The Supplemental Reply Brief of FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Altamont Power, LLC, and Green Ridge Power, LLC to CBD's Supplemental Brief in Response to the Inquiries Stated in the Court's January 31, 2008 Order is submitted herein.¹

¹ As referenced herein, defendants and respondents are referred to collectively as **"Respondents"** and includes FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Grep Bay Area Holdings, LLC, Green Ridge Power LLC, Altamont Power LLC, Enxco, Inc., Seawest Windpower, Inc., Pacific Winds, Inc., Windworks, Inc., and Altamont Winds, Inc.

References herein to **"the FPL Group"** collectively includes FPL Group, Inc., FPL Energy, LLC, ESI Bay Area GP, Inc., ESI Bay Area, Inc., Altamont Power, LLC, and Green Ridge Power, LLC.

Plaintiffs and appellants Peter Galvin and the Center for Biological Diversity, Inc., are referenced herein collectively as **"CBD."**

Citations to appellants' Supplemental Brief in Response to the Inquiries Stated in the Court's January 31, 2008 Order are referenced herein as **"ASB."**

I. ARGUMENT

**A. *NATIONAL AUDUBON* DOES NOT SUPPORT CBD’S
ARGUMENT THAT THERE IS NO BASIS FOR
ABSTENTION.**

In claiming that there is no basis for abstention in this case, CBD relies almost exclusively upon its interpretation of *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. (ASB 19-21.) CBD’s reliance on *National Audubon* is misplaced.

National Audubon does not address or consider the issue of abstention.² Therefore, it is not authority for the abstention doctrine. (See generally *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 [A case is not authority for a proposition that is not considered.].)³

CBD maintains that *National Audubon* supports the argument that if the Court were to abstain in our case, the rights of the public to bring environmental lawsuits would be “eviscerated”. (ASB 19.) CBD asserts that the public’s right to bring such environmental lawsuits is grounded in *National Audubon*’s holding that members of the public may bring an action for violation of the Public Trust Doctrine. (ASB 19.) CBD’s

² The only discussion of abstention in *National Audubon* was a passing reference in two footnotes to the federal court having abstained from hearing the dispute because there were unsettled questions of California law. (See *National Audubon, supra*, 33 Cal.3d at p. 432 fn. 12, 13.)

³ Although the abstention doctrine was neither raised nor considered in *National Audubon*, in seeking to balance competing complex public policy matters, an “abstention-like” result was realized. The Court did not resolve the dispute, but instead sent the matter back to the Water Board with instructions for it to take into consideration the relationship between the Public Trust Doctrine and the California water rights system in deciding appropriate water allocations. (See *National Audubon, supra*, 33 Cal.3d at pp. 445-47.)

argument overlooks *National Audubon's* finding that the plaintiff's standing in that case was premised upon there being a Navigable Waterway that was being harmed, and because a Navigable Waterway was at issue, the Public Trust Doctrine applied. (See *National Audubon Society, supra*, 33 Cal.3d at pp. 435-37.) In our case, unlike *National Audubon*, there is no Navigable Waterway at issue. Consequently, there is no basis for a Public Trust Doctrine cause of action, and CBD, as well as other members of the public, have no standing to sue. (See *Golden Feather Community Assn. v. Thermalito Irrigation District* (1989) 209 Cal.App.3d 1276, 1284-86.) Therefore, the court by abstaining in our case would not, as claimed by CBD, be "eviscerating" the rights of the public to bring such environmental suits because no such rights now exist.

CBD further argues that if the court were to abstain here, there is no administrative mechanism, comprehensive or otherwise, that provides an administrative remedy by which CBD can seek relief. (ASB 21.) CBD ignores the existence and ongoing work of the California Energy Commission, the County of Alameda (including its Board of Supervisors and its Board of Zoning Adjustment), the National Renewable Energy Lab, the Wind Power Working Group, and the Scientific Review Committee.⁴

CBD is not now and never has been shut out of this collaborative group process. Rather, CBD has participated and been very vocal in the Wind Power Working Group, the Alameda County proceedings and the Scientific Review Committee, including filing appeals from Alameda

⁴ The Scientific Review Committee is charged with the responsibility of "collectively balance[ing] the fundamental interests and input of all stakeholders...." (Respondents' Appendix 127.)

County's issuance of the conditional use permits.

B. ABSTENTION IS PROPER BECAUSE IT WOULD BE DIFFICULT IF NOT IMPOSSIBLE FOR THE COURT TO GRANT INJUNCTIVE RELIEF IN THIS CASE.

CBD makes the sweeping assertion that the court, in the exercise of its equitable powers, will be able to fashion appropriate injunctive relief in this case. (ASB 29.) This argument fails to acknowledge the difficult if not impossible task of a court to craft, supervise and enforce an injunctive order that balances competing public goals, monitors the wind turbine industry and periodically revises the injunctive relief to provide an effective solution for reducing avian impacts at the Altamont Pass Wind Resource Area ("APWRA").

It is precisely because of the impracticality of fashioning and supervising an injunction that abstention is appropriate here. (See *Desert Health Care Dist. v. PacifiCare FHP, Inc.* (2001) 94 Cal.App.4th 781, 795; see also *People ex rel. Department of Transportation v. Naegle Outdoor Advertising Co. of California, Inc.* (1985) 8 Cal.3d 509, 523; see also *Diaz v. Kay-Dix Ranch* (1970) 9 Cal.App.3d 588, 599; see also *Samura v. Kaiser Foundation Health Plan, Inc.* (1993) 17 Cal.App.4th 1284, 1301-12 [Holding that "courts cannot assume general regulatory powers over health maintenance organizations through the guise of enforcing Business and Professions Code section 17200."]; see also *California Grocers Ass'n, Inc. v. Bank of America, Nat'l Trust & Savings Ass'n* (1994) 22 Cal.App.4th 205, 218 [Reversing the trial court's grant of an injunction because a court's "overseeing bank service fees ... implicates a question of economic policy ... [and it is] not a judicial function to determine economic policy."]; see also *Shamsian v. Dept. of Conservation* (2006) 136 Cal.App.4th 621,

626, 642 [Refusing to interfere with the Department of Conservation's "administration ... and regulation of beverage container recycling and potentially risk throwing the entire complex economic arrangement out of balance."].)

In our case the task of the court in trying to draft and then supervise an injunction would be almost impossible and it would certainly place an undue burden on the court now and in the future. In trying to draft an injunction, the court would have to review the various scientific studies and related information (constituting thousands of pages of materials) in order to try to understand what programs to implement. Then the court would have to choose between conflicting scientific recommendations.⁵

Assuming that an injunction could be fashioned, the court would then have to have periodic reviews in order to supervise and monitor the programs to determine the ones that are effective, to employ an "adaptive management" approach, keeping the successful programs and abandoning the ones that are not working.

Additionally, there are numerous bodies currently working to effectively encourage and maintain wind energy at the APWRA, while at the same time, mitigating the impact on the avian population. These groups are not only better equipped than a court to address such multifaceted issues, they should be afforded an adequate opportunity to complete their task.

⁵ Even now, there is great uncertainty as what programs will be effective in this area. That is why the approach currently in place is referred to as "adaptive management." These programs will be "adapted" and adjusted as experience dictates.

C. THE COURT MAY TAKE JUDICIAL NOTICE OF DOCUMENTS IN THIS CASE.

CBD concedes that this Court may take judicial notice of the existence of documents and acts. (ASB 2, 8.) Nevertheless, CBD argues that the Court may not take judicial notice of the contents of those documents or acts. (ASB 6.)

The number of documents relating to judicial notice in this case are substantial. Thousands of pages demonstrate the amount of time and energy already spent working to resolve this difficult and complex case. The extensive number of documents and acts also substantiates the numerous and often conflicting recommendations that have been proposed. These suggestions and proposals are not being offered for the truth of the matter, but simply to show that they exist and have been made.

D. CBD IMPROPERLY REFERS TO MATTERS THAT ARE NOT IN THE RECORD.

CBD references a number of facts and events that have no evidentiary support, and even if such facts and events were true, they are not a part of the record in this case. (ASB 10-11.) For example, CBD maintains that it was not a party to the CEQA litigation and that it was excluded from the negotiations that led to the CEQA Settlement Agreement. (ASB 10.) Not only is there no evidence to support CBD's assertion, it is untrue. For tactical reasons known only to CBD, it chose not to join in the CEQA action or file such an action on its own behalf.

CBD also references an alleged failure of Respondents to comply with the conditional use permits and the provisions of the CEQA Settlement Agreement. (ASB 10.) Once again, there is no evidence of this, and there is nothing in the record to suggest CBD's allegations are true.

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What we do know from the record is that Respondents have entered into the CEQA Settlement Agreement and are engaging in the three-year adaptive management program (identified in the Settlement Agreement) designed to reduce avian impacts.

II. CONCLUSION

For all of the reasons set forth above and as stated in the earlier briefs submitted by Respondents, this Court should sustain the trial court's dismissal of CBD's Public Trust Doctrine cause of action and case.

Respectfully submitted,

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