NO. A142449

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FOUR

SAN FRANCISCO BAYKEEPER, INC.,

Petitioner and Appellant,

v.

CALIFORNIA STATE LANDS COMMISSION,

Defendant and Respondent

HANSON MARINE OPERATIONS, INC., et al.

Real Parties in Interest

San Francisco County Superior Court, Case No. CPF-12-512620
The Honorable Teri L. Jackson, Judge, Department 503

AMICUS BRIEF OF BAY PLANNING COALITION AS AMICUS CURIAE IN SUPPORT OF DEFENDANT-RESPONDENT CALIFORNIA STATE LANDS COMMISSION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The undersigned certifies that there are no interested entities or persons required to be listed under rule 8.208 of the California Rules of Court.

March 11, 2015 By: /s/ William M. Sloan
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STATEMENT OF INTEREST

The Bay Planning Coalition ("Coalition") is a not-for-profit California corporation formed in 1983 for the purpose of urging balanced government regulation of the waters and shoreline areas of San Francisco Bay and the California Delta. Its membership then and now comprises the Bay Area port authorities, many of the shoreline cities of the Bay and Delta, large and small private landowners, and engineering and consulting firms. The cooperation between representatives of public entities and private enterprise within the Coalition has served its overall goal of proactively influencing the sustainable management of the Bay Area. Since its founding, it has successfully argued, in courts or in the administrative arena, both for and against various regulatory actions of state and federal agencies. When in 1995 the Governor of California proposed to abolish the San Francisco Bay Conservation and Development Commission, a regional planning agency, the Bay Planning Coalition initiated an alliance with environmental interest groups and led the successful effort to keep that agency in existence.

The Coalition has an interest in clarifying the scope of the public trust doctrine and the reach of public trust uses so that the Coalition may continue advocating for sustainable management of the Bay in a manner consistent with the doctrine. The Coalition also has an interest in clarifying the scope of California Environmental Quality Act ("CEQA") rules and regulations pertaining to baselines and recirculation to promote efficient resolution of the environmental impact analysis process, a process in which the Coalition frequently participates.

SUMMARY OF ARGUMENT

The California State Lands Commission's (the "Commission") decision to allow sand mining in the San Francisco Bay Area is plainly in compliance with the public trust doctrine and its requirements under CEQA.

Contrary to the arguments of San Francisco Baykeeper, Inc. ("Baykeeper"), sand mining is a public trust use that has a long history of precedential approval. Moreover, the Commission's decision is subject to the utmost deference. The Legislature has the sole authority to select and prefer public trust uses, and has delegated that authority, in this case, to the Commission. To the extent the Commission's decision is subject to review, Baykeeper has provided no evidence that it was arbitrary, capricious, or without substantial evidentiary support. Even if there were a plausible argument that sand mining was not a public trust use, although it clearly is under years of precedent, Baykeeper has brought forth no evidence to show that sand mining will substantially impair other public trust uses.

Baykeeper's argument that the Commission should have recirculated its Final Environmental Impact Report ("FEIR") is also without merit. The alleged new information only restated conclusions previously reached in the FEIR, and thus did not require recirculation. Moreover, clear precedent shows that recirculation is the exception, not the rule. In this scenario, requiring recirculation would allow the exception to swallow the rule.

Finally, Baykeeper's argument that the Commission erroneously calculated the project area's baseline conditions is contrary to the explicit language of the applicable statute. CEQA only requires that the lead agency take into account conditions existing at the time of the notice of preparation. The Commission did exactly that by incorporating mining

conditions in the Bay Area from 2002-2007, the year of the notice of preparation. Requiring the Commission to do more would be erroneously expanding the statute.

ARGUMENT

I. THE STATE LANDS COMMISSION'S DECISION TO ALLOW SAND MINING IS CONSISTENT WITH THE PUBLIC TRUST AND ENTITLED TO UTMOST DEFERENCE

The Plaintiff in this case, Baykeeper, seeks to impose severe and unprecedented limitations on public trust lands—limitations that would effectively defeat the very trust purposes that are to be preserved through application of the doctrine. As our nation's and this state's courts have repeatedly reaffirmed, public trust lands are held by the State as trustee to serve the uses traditionally defined as "commerce, navigation and fisheries." (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 435 (*Illinois Central*); *Shively v. Bowlby* (1892) 152 U.S. 1, 49, 57; *City of Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 183-185 (*Oakland*); *People v. California Fish Co.* (1913) 166 Cal. 576, 597-602.) In a dictum in *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 (*Marks*), Justice McComb wrote to expand public trust uses to include recreation and environmental purposes.

A hallmark of the public trust doctrine is its flexible nature. Nearly fifty years ago, the California Supreme Court observed:

> The demands of modern commerce, the concentration of population in urban centers fronting on navigable waterways, the achievements of science in devising new methods of commercial intercourse —all of these factors require that the state, in determining the means by which the general welfare is best to be served through the utilization of navigable waters

> held in trust for the public, should not be burdened with an outmoded classification favoring one mode of utilization over another.

(Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks. (1967) 67 Cal.2d 408, 421-422 (*Colberg*).) Guided by these principles, the State as trustee has been vested with discretion to administer trust lands. On public trust lands, the California Supreme Court has approved such uses as a YMCA facility (*People v. City of Long Beach* (1959) 51 Cal. 2d 875, 879-880) and a port convention center. (*Haggerty v. City of Oakland* (1958) 161 Cal.App.2d 407, 413.) Contrary to the assertions made by Baykeeper in its briefing, courts have also approved of oil drilling as a consistent public trust use in aid of commerce. (*See Boone v. Kingsbury* (1928) 206 Cal.148, 192-194 (*Boone*).) Under this precedent, it is almost rudimentary to conclude that mining sand is a public trust-consistent use much like oil drilling, commercial fishing, or crabbing on the Bay bottom. A contrary ruling would, overnight, render the Bay off limits to uses that have been in operation for years.

A. The California Legislature Has the Exclusive Power to Select and Prefer Public Trust Uses

As administrator of the lands in the public trust, the California Legislature holds the power to select and change public trust uses. (*County of Orange v. Heim* (1973) 30 Cal.App.3d 694, 707 (*Heim*) ["[Whether a harbor should be developed or preserved in its natural state is] not [a] matter[] to be decided by the courts. . . . [I]t is the Legislature that administers the trust, and it is within the province of the Legislature to prefer one trust use over another."] [citations omitted].) In the instant case,

the Legislature has delegated the power to select and prefer public trust uses to the State Lands Commission. (*See* Public Resources Code § 6009.)

Because of this clear grant of authority to the Legislature, and by extension, the Commission, the Court should defer to the judgment and authority of the Commission. (*Lyon v. Western Title Ins. Co.* (1986) 178 Cal.App.3d 1191, 1202 [quoting *Marks*, 6 Cal.3d at 260-261] ["It is a *political* question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified . . . ."].)

B. To the Extent Courts Have the Power to Review the Commission's Decision, that Review is Limited to Whether the Commission Has Acted Arbitrarily and Capriciously

Even if the Commission's decision is reviewable, that judicial review is limited to whether the Commission's decision was arbitrary and capricious. (*Heim*, 30 Cal.App.3d at 719.) This Court in *Heim* explained the scope of review:

> Determinations of the [Commission] pertaining to administration of the [public] trust pursuant to an express delegation of authority from the Legislature must be classified as quasilegislative. It is established that in reviewing quasilegislative actions of administrative agencies the scope of judicial review is limited to an examination of . . . whether [the agency's] actions have been arbitrary, capricious, or entirely lacking evidentiary support, or whether it has failed to follow the procedure or give the notices required by law.

(*Id.* at 718-719 [citations omitted].)

Baykeeper disagrees with the Commission's conclusion that sand mining will not adversely affect coastal sediment supplies, but has brought

forth no evidence to show that the Commission's conclusion was "entirely lacking evidentiary support," or that it was arbitrary and capricious. Baykeeper contends that the Commission did not follow formal procedural steps to evaluate the impacts of the project on a public trust resource—the sediment supplies to the outer coast. Rather, the Commission clearly found that the project would have no adverse effect on the outer coast. Baykeeper is attempting to impose an unprecedented procedural burden on the Commission simply because it does not agree with its conclusion. That is no basis to require the entirely separate impacts analysis Baykeeper is suggesting. The Court should affirm the Commission's considered and deliberate decision.

II. SAND MINING IS ADDITIONALLY PERMISSIBLE BECAUSE THERE IS NO EVIDENCE THAT SAND MINING WILL IMPAIR PUBLIC TRUST USES

A. Baykeeper Has Not Met Its Burden of Proving that the Sand Mining Operation Will Impair Public Trust Uses

Baykeeper dedicates much of its public trust doctrine discussion to arguing that sand mining is not a public trust usage. (Appellant's Opening Br. pp. 41-49.) For the reasons already stated, that argument has no merit. Sand mining squarely falls within the existing precedent establishing permissible public trust uses. Sand mining squarely falls within the existing precedent establishing permissible public trust uses. (*See, e.g.*, *City of Berkeley*, 26 Cal. 3d at 537; *Boone*, 206 Cal. 192-194; *People ex rel. State Lands Comm'n v. City of Long Beach* (1962) 200 Cal.App.2d 609, 616 (*SLC*); *City of Long Beach v. Marshall* (1938) 11 Cal.2d 609, 620.) However, even if Baykeeper had been correct, that is still only half of the

equation. Many decisions of the courts of this State have upheld numerous uses on public trust lands so long as they do not impair public trust uses. (*See, e.g.*, *Colberg*, 67 Cal.2d at 419; *Boone*, 206 Cal. at 192-194.) To be permissible, the use need not exactly fit a particular public trust pigeonhole.

The sheer variety of uses that California courts have approved as not seriously impairing public trust uses illustrates this point. On public trust lands, California courts have approved a freeway bridge over a harbor channel (*Colberg*, 67 Cal.2d at 419), private ownership of docks and wharves not in aid of commerce (*People v. S. Pac. R.R. Co.* (1913) 166 Cal. 614, 622), and a nuclear power plant (*Carstens v. California Coastal Comm'n* (1986) 182 Cal.App.3d 277, 289 (*Carstens*).)

Even the progenitor case of the public trust doctrine in the United States, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387, recognized the paths to public trust compliance. In that case, the High Court held that the state may dispose of parcels of public trust land when the land is used "for the improvement of the navigation and use of the waters, *or* when parcels *can be disposed of without impairment of the public interest in what remains*." (*Id.* at 453 [emphasis added].) In reaching its conclusion, the High Court reasoned that "grants of parcels under navigable waters that may afford foundation for wharves, piers, docks, and other structures *in aid of commerce*, *and* grants of parcels which, being occupied, *do not substantially impair the public interest in the lands and waters remaining.*" (*Id.* at 452 [emphasis added].) The High Court clearly differentiated between parcels hosting "structures in aid of commerce[]" *and* other parcels that do not "aid . . . commerce," but also do not "impair the public interest in the lands and waters remaining" (*See id.*)

The plaintiff bears the burden of producing evidence that a given use will seriously impair public trust uses. (*See Santa Teresa Citizen Action Grp. v. City of San Jose* (2003) 114 Cal.App.4th 689, 709 (*Santa Teresa*) ["To the extent that [the public trust doctrine] applies to Coyote Creek itself, there is no evidence in the record from which we may conclude that the potential irrigation of the surrounding area threatens the public interest in this waterway."]; *City of Newport Beach v. Fager* (1940) 39 Cal.App.2d 23, 29 ["There is no showing that the land in question is required for navigation, commerce or fisheries, nor is there any evidence that the public interest in the remaining land and waters has been impaired in any way."] [emphasis added].) Given that *Santa Teresa* and *Newport Beach* suffer from a lack of evidence of impairment, it follows that these cases place the burden of proving impairment of public trust purposes squarely on the plaintiff. (*See Santa Teresa*, 114 Cal.App.4th at 709; *Newport Beach*, 39 Cal.App.2d at 29.)

Although Baykeeper argues vehemently (but incorrectly) that sand mining is not a public trust use, nowhere does it provide evidence that sand mining will impair public trust uses.

As such, even if the sand mining operation did not meet the definition of "commerce," there is still no evidence to show that it would seriously impair public trust uses, be it commerce or otherwise. Moreover, given the relatively small scope of its impact area, underwater sand mining operations has for a long time now coexisted with fishing, navigation, recreation, shipping, and many other public trust uses, without impairing them. Under all existing law, Baykeeper has not shown that allowing sand mining violates the public trust doctrine.

B. The Mere Fact that Private Parties Engaged in Commerce May Benefit from the Commission's Decision Is Irrelevant

Baykeeper's assertion that the sand mining operation is an improper favoring of private interests ignores years of precedent. Numerous California decisions have allowed uses on public trust land that provide profits to private parties. (*See, e.g.*, *Boone*, 206 Cal.192-194 [allowing private oil drilling on tidelands]; *Zack's, Inc. v. City of Sausalito* (2008) 165 Cal.App.4th 1163, 1182-1183 [allowing lease of tidelands street to private boat storage company]; *Carstens*, 182 Cal.App.3d at 289 [allowing construction of additional nuclear power plant units on public trust land].) The fact that the sand mining enterprise may generate a profit is not dispositive of the propriety of the Commission's decision—so long as the public interest is also served, the decision is valid. It is almost a tautology to say that the recognized trust use for "commerce" will presumably result, at times, in profit. The Commission has concluded, after extensive fact gathering, analysis, and comment, that the public interest would be served by the sand mining operation. The prospect of private profits is not enough to override that determination.

C. The Common Law Public Trust Doctrine Does Not Require a Separate Impacts Analysis

Because Baykeeper cannot meet its burden of proving that the public trust will be adversely affected, it argues that the Commission was required to undertake an entirely separate public trust impacts analysis beyond the in-depth analysis already conducted for the EIR. (Appellant's Reply Br. 50-53.) In this situation, clear precedent completely forecloses this argument. When the public trust impacts are exactly the same as the

impacts addressed in an EIR under CEQA, there is no basis to impose a separate and additional procedural requirement on the lead agency to evaluate the public trust impacts. (*See, e.g.*, *Citizens for East Shore Parks* (2011) 202 Cal.App.4th 549, 576-78 (*Citizens*); *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 777-778 [environmental plaintiff not entitled to writ relief where State Board's implementation of a water quality control plan—even though it failed to implement flow objectives—fulfilled the Board's public trust duties].)

The common law public trust doctrine does not mandate the additional and separate procedural burden of that Baykeeper proposes. Although Baykeeper argues that the Commission did not address the public trust in the EIR, that argument is plainly false. (*See, e.g.*, AR 593 ["Together [the mitigation measures for biological and other resources] would ensure consistency with plans and policies specifying that mining operations be conducted in an environmentally sound manner; *that agencies protect public trust resources*; and that mining operations be conducted in a manner that minimizes interference with critical wildlife activities."] [emphasis added].)[1] Evaluating public trust impacts "within a regulatory scheme like CEQA is sufficient 'consideration' for public trust

[1] *See also* AR 165 ["These mitigation measures, taken together, *will ensure* consistency with plans and policies specifying that sand mining operations be conducted in an environmentally sound manner, *that agencies protect public trust resources*, and that sand mining operations be carried out in a manner that minimizes interference with critical wildlife activities."]; AR 577 ["The CSLC manages State-owned lands that underlie California's navigable and tidal waterways. The State holds these lands, known as 'sovereign lands' for the benefit of all the people of the State, subject to the Public Trust for water related commerce, navigation, fisheries, recreation, open space and other recognized Public Trust uses.].

purposes." *Citizens*, 202 Cal.App.4th at 577 [citing *Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 445-446].) Baykeeper cannot extend this common law doctrine beyond its clearly precedential limits.

III. THE LAW AND POLICY OF RECIRCULATION DID NOT REQUIRE THE COMMISSION TO RECIRCULATE THE FINAL ENVIRONMENTAL IMPACT REPORT

Baykeeper also seeks through this case to impose a highly restrictive and unprecedented procedural framework through CEQA. First, Baykeeper posits that a project proponent should be subjected to a potentially endless loop of recirculation by establishing an almost imperceptibly low standard for triggering such a requirement. "[A] new EIR is not required whenever *any* new, arguably significant information or data is proposed, regardless of whether the information reveals environmental bad news." (*Silverado Modjeska Recreation & Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 305 (*Silverado*) [internal quotation marks omitted].) Recirculation is required only in the exceptional case; it is not the "general rule." (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Calif.* (1993) 6 Cal.4th 1112, 1132 (*Laurel Heights II*) [reasoning that in enacting CEQA, "the Legislature did not intend to promote endless rounds of revision and recirculation"].) The Supreme Court of California recognized that "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576 (*Goleta Valley II*).)

Whether recirculation is required depends on whether the allegedly new information is necessary to provide "the public a meaningful

opportunity to comment upon a *substantial* adverse environmental effect." (*Laurel Heights II*, 6 Cal.4th at 1129.) "New information justifying a subsequent EIR must be 'of substantial importance' and must show that the project will have 'significant effects not discussed in the previous EIR or negative declaration,' [and] that 'significant effects previously examined will be *substantially more severe*' than stated in the prior review." (*Silverado*, 197 Cal.App.4th at 305 [quoting *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1057-1058 (*Moss*)].)

Under these clear precedents, the Commission was not required to recirculate the FEIR after the publication of the Barnard Studies and the Coast and Harbor Engineering supplemental analysis (the "Studies"). The subject of erosion had been addressed extensively in the FEIR, and the Studies did not demonstrate "'significant effects . . . [that would] be substantially more severe than stated in the prior review.'" (*See id.* [quoting *Moss*, 162 Cal.App.4th at 1057-1058].) As such, the previous discussion of erosion effects in the FEIR had already served the recirculation rule's policy—it gave the public a "meaningful opportunity to comment" on the effect. To force the Commission to recirculate after its efforts had already served the statutory purpose would contravene the equally important policy concern of avoiding "delay of social, economic, or recreational development and advancement" through overextension of the statute. (*See Goleta Valley II*, 52 Cal.3d at 576.)

Ruling in favor of the Commission does not favor environmentalism or industry—it favors a rational limit on endless rounds of review. Requiring the Commission to recirculate the FEIR in this instance would set a negative precedent by creating uncertainty and confusion for lead agencies in future scenarios where previously addressed impacts are

subsequently critiqued even though no alteration of the conclusions is justified. The Studies do not demonstrate "substantially more severe" effects of the sand mining operation, and thus requiring a recirculation would allow the exception to swallow the rule. (*See Laurel Heights II*, 6 Cal.4th at 1132; *Silverado*, 197 Cal.App.4th at 305 [quoting *Moss*, 162 Cal.App.4th at 1057-1058].)

IV. THE FEIR'S BASELINE WAS APPROPRIATE BECAUSE NO LAW REQUIRES INCORPORATION OF CONDITIONS EXISTING AFTER THE NOTICE OF PREPARATION (NOP)

Baykeeper also attempts to severely constrain the lawful approach for establishing a baseline under CEQA. "Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured . . . ." (*Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 328 (*CBE*).) "An EIR must include a description of the physical environmental conditions in the vicinity of the project, *as they exist at the time of the notice of preparation . . . . This environmental setting will normally constitute the baseline* physical conditions by which a lead agency determines whether an impact is significant." (Cal. Code Regs. § 15125 [emphasis added]; *see also CBE*, 48 Cal.4th at 328; *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2014) 231 Cal.App.4th 1056, 1085 n.16.)

Although Baykeeper repeatedly lambastes the Commission for failing to take into account mining activity after the NOP, the plain language of the statute does not require, or even suggest, that procedure.

(*See* Cal. Code Regs. § 15125.) The statute only requires that the baseline incorporate the conditions existing "at the time of the notice of preparation"—the Commission did exactly that. The Commission filed the NOP in 2007, and the FEIR used a baseline calculated as an average of mining rates from the years 2002 to 2007. This plainly meets the definition of "the physical environmental conditions . . . as they exist at the time of the notice of preparation." (*See id.*) Moreover, case law suggests that baselines calculated with data that post-dates the notice of preparation is impermissible unless the agency "justif[ies] its decision by showing an existing conditions analysis would be misleading or without informational value." (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Authority* (2013) 57 Cal.4th 439, 457 (*Smart Rail*).) Putting aside the fact that *Smart Rail* refers to the agency's duty to justify the use of post-NOP data in calculating baselines, Baykeeper has not shown that "an existing conditions analysis would be misleading or without informational value." (*See id.*) Baykeeper's argument that the FEIR is deficient because it failed to incorporate post-NOP data in its baseline is untenable—it cuts against the plain language of the statute.

CONCLUSION

For the foregoing reasons, the Bay Planning Coalition respectfully requests that the Court deny Baykeeper's Petition in its entirety and affirm the decision of the Superior Court.

Respectfully submitted,

Dated: March 11, 2015

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CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this brief, counsel certifies that this Amicus Curiae Brief was produced using at least 13 point font and contains 3,718 words.

March 11, 2015 /s/ William M. Sloan
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