SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
North Justice Center
1275 N. Berkeley Ave
Fullerton , CA 92838

SHORT TITLE: Baldwin & Sons, Inc. vs. California Regional Water Quality Control Board San Diego Region

CLERK'S CERTIFICATE OF MAILING/ELECTRONIC SERVICE	CASE NUMBER: **30-2022-01291447-CU-WM-NJC**

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SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
NORTH JUSTICE CENTER

MINUTE ORDER

DATE: 09/04/2025 TIME: 04:30:00 PM DEPT: N15

JUDICIAL OFFICER PRESIDING: Nathan Vu
CLERK: R. Castro
REPORTER/ERM: None
BAILIFF/COURT ATTENDANT: S. Howard

CASE NO: **30-2022-01291447-CU-WM-NJC** CASE INIT.DATE: 11/04/2022
CASE TITLE: **Baldwin & Sons, Inc. vs. California Regional Water Quality Control Board San Diego Region**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT ID/DOCUMENT ID: 74652367

EVENT TYPE: Under Submission Ruling

APPEARANCES

There are no appearances by any party.

In chambers.

The Court, having taken the above-entitled matter under submission on 06/10/2025 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules. A copy of said ruling is attached hereto and incorporated herein by reference.

Baldwin & Sons, Inc., et al. vs.
California Regional Water Quality Control Board San Diego Region

Case No. 30-2022-01291447

Superior Court of the State of California

County of Orange

RULING ON SUBMITTED MATTER

This matter came on for hearing on February 20, 2025; February 21, 2025; March 20, 2025; March 21, 2025; and April 17, 2025.

The court has carefully reviewed and considered the record, evidence, and argument properly presented and admissible at hearing or in documents filed with the court. The court has also reviewed and considered all matters properly judicially noticed and all applicable laws.

Having taken the matter under submission on June 10, 2025, the Court rules as follows:

The Verified Petition for Writ of Mandate is **GRANTED in part and DENIED in part.**

The court hereby **ISSUES** a peremptory writ of mandate commanding the Respondent California Regional Water Quality Control Board San Diego Region to set aside Order No. R9-2022-0094 in accordance with this ruling.

The matter is remanded to Respondent California Regional Water Quality Control Board San Diego Region with directions to vacate Order No. R-9-2022-0094 and instead enter a new order consistent with this ruling.

Petitioners are **ORDERED** to prepare a [Proposed] Judgment Granting Peremptory Writ of Administrative Mandamus and a [Proposed] Peremptory Writ of Administrative Mandamus, and serve them upon Respondent California Regional Water Quality Control Board San Diego Region and submit them to the court pursuant to Rules of Court rule

3.1590(h). The Court **FINDS** good cause to allow Petitioners 30 days from the date of this ruling to prepare, serve, and submit the proposed judgment and proposed peremptory writ.

Respondent California Regional Water Quality Control Board San Diego Region's Request for Judicial Notice in Support of Respondent's Opposition to Petitioner's Memorandum is **GRANTED** as to Exhibits A-D. (See Evid. Code, s 452, subd.s (c), (h); *Center for Biological Diversity, Inc. v. Public Utilities Comm'n* (2023) 98 Cal.App.5th 20, 26 fn.2 [taking judicial notice of administrative agency "decisions, legislative history materials, and other state agency documents"]; *L&S Framing, Inc. v. Occupational Safety & Health Appeals Bd.* (2023) 93 Cal.App.5th 995, 1007-1008 [taking judicial notice of administrative agency decisions cited by parties].)

Respondent California Regional Water Quality Control Board's Objections to Powerpoint Presentation Slides Presented by Petitioners During Hearing on Petition for Writ of Mandate are **SUSTAINED** to the extent that Respondent objects to the use of any evidence in slides that is not contained in the administrative record and to the extent that Respondent objects to the use of the slides as evidence.

Respondent California Regional Water Quality Control Board's Objections to Powerpoint Presentation Slides Presented by Petitioners During Hearing on Petition for Writ of Mandate are **OVERRULED** to the extent that Respondent objects to the use of evidence in the slides that is also contained within the administrative record and to the extent Respondent objects to the consideration of statements in the slides that are argument only.

Accordingly, the court's ruling below relies upon and will cite to evidence contained in the slide deck only to the extent that the evidence also is contained in the administrative record.

Pending Matter

Petitioners Baldwin & Sons, Inc. (B&S Inc.); Sunranch Capital Partners, LLC (Sunranch); Sunrise Pacific Construction, Inc. (Sunrise); SRC-PH Investments, LLC (SRC-PH); Baldwin & Sons, LLC (B&S LLC); Shawn M. Baldwin (Baldwin); Randall G. Bone (Bone); and Jose Capati (Capati) (collectively, Petitioners) petition this court for a writ of administrative

mandamus pursuant to Civil Procedure Code section 1094.5, directing Respondent California Regional Water Quality Control Board San Diego Region (Board) to set aside Regional Board Administrative Civil Liability Order No. R9-2022-0094 (ACLO).

Standard for Writ of Administrative Mandamus

Civil Procedure Code section 1085 states that "[a] writ of mandate may be issued by any court to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person." (Code Civ. Proc., § 1085.)

Further, Civil Procedure Code section 1094.5 authorizes the court to issue a writ "for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer . . . ." (Code Civ. Proc., § 1094.5, subd. (a).)

In the case of a proceeding brought under Section 1094.5, the court, sitting without a jury, shall determine "'whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.'" (*Boermeester v. Carry* (2023) 15 Cal.5th 72, 85, quoting Code Civ. Proc., § 1094.5, subd. (b.)

"Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).)

"Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court

determines that the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).)

The Court of Appeal has explained that:

> The usual meaning of "substantial evidence" is "evidence that is 'of ponderable legal significance,' 'reasonable in nature, credible, and of solid value,' and ' "substantial" proof of the essentials which the law requires in a particular case.'"

(*Environmental Law Foundation v. State Water Resources Control Board* (2023) 89 Cal.App.5th 451, 482, quoting *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1006.)

"The 'in light of the whole record' language means that the court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. [Citation] Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence." *(Lucas Valley Homeowners Ass'n v. County of Marin* (1991) 233 Cal.App.3d 130, 141-142.)

At the same time, "[t]he trial court presumes that the agency's decision is supported by substantial evidence, and the petitioner bears the burden of demonstrating the contrary." (*McAllister v. California Coastal Comm'n* (2008) 169 Cal.App.4th 912, 921.)

"In substantial evidence review, the reviewing court *defers* to the factual findings made below. It does not weigh the evidence presented by both parties to determine whose position is favored by a preponderance. Instead, it determines whether the evidence the prevailing party presented was substantial — or, as it is often put, whether any rational finder of fact could have made the finding that was made below. If so, the decision must stand." (*Alberda v. Board of Retirement of Fresno County Employees' Retirement Ass'n* (2013) 214 Cal.App.4th 426, 435.)

Therefore, the trial court may reverse the agency's decision "only if, based on the evidence before it, a reasonable person could not have reached the

conclusion reached by it." (*Kirkorwoicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 986.)

Fair Trial

Petitioners first argue that the writ of mandate should issue because they did not receive a fair trial in the administrative proceedings before the Board.

Section 1094.5's requirement of a "fair trial" "means that there must have been 'a fair administrative hearing.'" (*Gonzalez v. Santa Clara County Department of Social Services* (2014) 223 Cal.App.4th 72, 96.)

However, "[t]he use of the words 'fair trial' does not mean that [petitioner] was entitled to a formal hearing under the due process clause." (*Pomona College v. Superior Court* (1996) 45 Cal.App.4th 1716, 1730.)

"A challenge to the procedural fairness of the administrative hearing is reviewed *de novo* on appeal because the ultimate determination of procedural fairness amounts to a question of law." (*Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.)

Petitioners contend that they did not receive a fair trial below because each side was allotted only six hours in the hearing before the Board, when the case involved eight petitioners, technical factual issues, complex legal theories, and a request for the largest penalty assessment in the state's history.

However, the law does not mandate that administrative hearings last any specific amount of time and courts have found that it is not a deprivation of due process rights to be accorded significantly less time than Petitioners here. (See *Sweeney v. San Francisco Bay Conservation and Development Comm'n* (2021) 62 Cal.App.5th 1, 27 [not denial of due process rights where each side was given 60 minutes].)

"'[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'" (*Machado v. State Water Resources Control Board* (2001) 90 Cal.App.4th 720, 725, quoting *Mathews v. Eldridge* (1976) 424 U.S. 319, 321.) In some instances, due process may not be violated even where there is no hearing at all. (See *Machado v. State Water*

Resources Control Board, *supra*, 90 Cal.App.4th at pp. 725-726 [due process not violated even where petitioner was not given any hearing issuance of cleanup and abatement order].)

This points to another critical consideration – that Due Process does not require a specific manner for Petitioners to present their evidence. As the Board points out that there were no page limits on the documents that could be submitted by the parties and, in fact, Petitioners submitted an opening brief with 151 exhibits, deposition transcripts, and written declarations. (See AR Index at pp. 14-21, 33-36.) These included Petitioners' expert's opinions and supporting documentation, which comprised over 25,000 pages. (See AR29587-55784.)

Thus, even if Petitioners did not have as much time to present live testimony to the Board as they wished, no showing has been made that they were unable to present the evidence they wished in some form.

Petitioners also argue that they were not afforded an impartial adjudicator because the prosecuting team was comprised of Board attorneys and staff presenting the case for decision by the Board, that some Board members were not present during part of Petitioners' presentations at the hearing, and because one Board member prejudged the case.

However, administrative hearings often involve agency prosecutors making arguments to agency adjudicators, and this is allowed so long as the different parts of the agency are separated from each other. (See Gov't Code, s 11425.10, subd. (a)(4) ["[T]he governing procedure by which an agency conducts an adjudicative proceeding is subject to [the requirement that] [t]he adjudicative function . . . be separated from the investigative, prosecutorial, and advocacy functions within the agency . . . ."]; *Drakes Bay Oyster Co. v. California Coastal Comm'n* (2016) 4 Cal.App.5th 1165, 1175 ["[D]ue process right to an impartial administrative decisionmaker is protected when staff counsel performing a prosecutorial role are distinct from counsel playing an advisory role in the same matter and the counsel are screened from each other."].)

In addition, there is no requirement that a Board member be present for the entirety of a hearing so long as the Board member has access to all the relevant evidence. (See *Old Santa Barbara Pier Co. v. California* (1977) 71 Cal.App.3d 250, 256 ["[P]articipation in a decision by a board member who

has read and considered the evidence, or a transcript thereof, even though he was not physically present when the evidence was produced, does not violate the requirements of due process"].)

Finally, a review of the transcript reveals that the Board member in question had not prejudged the case but was asking questions relevant to the issues he needed to decide. (See AR84650-84653; AR 84783-84787; AR85001-85002.)

Petitioners also contend that they were not afforded a fair trial because the Board required simultaneous post-hearing briefing rather than allowing Petitioners to file a responsive brief to the prosecutors' post-hearing brief; the Board allowed testimony to be given in a narrative format and only allowed objections at the end, and the Board admitted exhibits that lacked foundation.

However, Due Process does not require that an administrative hearing be conducted in the same manner as a trial in court or that the agency apply the Civil Procedure Code or Evidence Code in an administrative hearing. Petitioners do not point to any specific instance in which these issues caused the administrative proceedings to be fundamentally unfair, such as wholly depriving Petitioners of the right to put forth any relevant argument, or allowing the presentation of testimony or exhibits that were false.

Petitioners have not carried their burden to show that the administrative proceedings before the Board were unfair.

Basis of Liability As to Each Petitioner

Petitioners next argue that the writ of mandate should issue because the Board acted in excess of its jurisdiction when it imposed the entire amount of the civil liability penalties ($6,660,503) on each of the eight Petitioners.

Whether an agency has proceeded lawfully is a legal question that the trial court and appellate court both review de novo. (*Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410, 420.)

Petitioners contend that the General Construction Storm Water Permit (CGP) only allows for civil liability penalties to be imposed on a "discharger," which is defined in the CGP as "the [Legally Responsible

Person] (see definition) or entity subject to this General Permit." (AR1644-1645.)

Petitioners contend that the only party in this case that was ever a Legally Responsible Person (LRP) was Sunranch, because it signed a Notice of Intent to be bound by the CGP in October 2014.

However, Petitioners point out that Sunranch transferred the property to SRC-PH, its wholly-owned subsidiary, on July 29, 2015, and that SRC-PH transferred the property to an unrelated third-party in November 12, 2015. Thus, Petitioners reason that Sunranch was not the LRP after November 12, 2015, when it had no ownership interest, direct or indirect, in the property.

A party that wishes to withdraw their Notice of Intent must file a Notice of Termination. (See 40 C.F.R. 123.23, subd. (c) ["Permittees that wish to terminate their permit must submit a Notice of Termination (NOT) to their permitting authority."].) The evidence shows that Sunranch never filed a Notice of Termination, and in fact, filed a second Notice of Intent on February 17, 2016. (AR85730-85731; AR2144; AR 7876.) Petitioners also previously admitted in their January 21, 2021 brief that Sunranch was the LRP for the entire violation period. (AR75282-75283.)

Petitioners concede that SRC-PH, as the wholly-owned subsidiary of Sunranch and subsequent owner of the property, may have been the LRP after July 29, 2015. However, Petitioners contend that SRC-PH could not have been an LRP after November 12, 2015 and therefore, the Board could not assess any civil liability penalties for violations occurring after November 12, 2015.

Petitioners also argue that whatever the status Sunranch and SRC-PH, there is no evidence that any of the other Petitioners – B&S Inc., B&S LLC, Sunrise, Baldwin, Bone, and Capati – were ever LRPs, ever filed a Notice of Intent, or ever owned the property.

The Board responds that even if they were not LRPs, SRC-PH, B&S Inc., B&S LLC, and Sunrise may all be liable as Site Operators pursuant to *United States v. Bestfoods* (1998) 524 U.S. 51. (See *id.* at p. 65 ["Under the plain language of the statute, any person who operates a polluting facility is directly liable for the costs of cleaning up the pollution."].)

The parties argue vigorously whether the *United States v. Bestfoods*' theory of Site Operator liability applies in this case. The court finds that the Board has the better argument.

It is true, as Petitioners contend, that *United States v. Bestfoods*' holding was based on the U.S. Supreme Court's interpretation of a provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, et seq., and here, we are concerned with the Clean Water Act (CWA), 33 U.S.C. § 1251, *et seq.*

However, as the Board notes, Site Operator liability has been imposed in many contexts outside CERCLA, including with respect to water pollution. (*Atlantic Richfield Co. v. California Regional Water Quality Control Board* (2022) 85 Cal.App.5th 338, 359-361 [applying *United States v. Bestfoods*' site operator liability with respect to water pollution abatement order under Water Code]; *California Sportfishing Protection Alliance v. Shiloh Group, LLC* (N.D. Cal. 2017) 268 F.Supp.3d 1029, 1045 ["Two district courts within the Ninth Circuit held that a party may be liable under the CWA for unlawful storm water discharges associated with industrial activities if the party exercises sufficient control over a facility that discharges unlawful pollutants, even if the party did not create the discharges."].)

In addition, the CWA makes clear that any person, not just a permit holder, may be liable. (See 33 U.S.C., § 1319, subd. (a)(3); *United States v. Smithfield Foods, Inc.* (E.D. Va. 1997) 965 F. Supp. 769, 781-82 ["[D]efendants contend that Smithfield Packing and Gwaltney did not have any obligations or duties under Smithfield Foods' Permit, and thus cannot be held liable for violations of the Permit, because they are not named in the Permit. The court disagrees. First, Section 309(a)(3), 33 U.S.C. § 1319(a)(3), clearly states that 'persons'—not permit holders—are liable for permit violations."], reversed in part on other grounds, *United States v. Smithfield Foods, Inc.* (4th Cir. 1999) 191 F.3d 516.)

Petitioners also argue that substantial evidence does not support the finding that SRC-PH, B&S Inc., B&S LLC, and Sunrise were Site Operators at the property.

In finding that SRC-PH was a Site Operator, the Board relied upon change order authorizations between SRC-PH and subcontractor Varner

Construction, Inc. for work related to stormwater issues in this case. (AR85731-32, citing to AR10326, AR10334, AR10337, AR10352, AR10356.)

However, none of these change order authorizations occurred after November 12, 2015. Nor does the Board point to any other evidence that SRC-PH was the Site Operator after November 12, 2015. Thus, the Board's finding that SRC-PH was liable as Site Operator for violations occurring after November 12, 2015 is not supported by substantial evidence.

On the other hand, the finding that B&S Inc., B&S LLC, and Sunrise were liable as Site Operators is supported by substantial evidence. (See AR85732-85734, AR9896-9899, AR10000, AR10201-10205, AR10234-10237, AR10244-10246 [relating to B&S Inc.]; AR85734-85735, AR10244-10246, AR10247-10251, AR10252-10297, AR10298-10300, AR10301-10303, AR10304-10305, AR10306-10310, AR10311-10316, AR26223-26224, AR10252-10297; AR85732, AR3854-3855 [relating to B&S LLC]; AR56236-56240 [relating to Sunrise].)

The Board asserts that, with respect to the individual Petitioners – Baldwin, Bone, and Capati, each was liable under the Responsible Corporate Officer theory.

Petitioners respond that there is nothing in the CWA, the Water Code, or the CGP that allows for the imposition of Responsible Corporate Officer liability. However, the Board points out that Water Code section 13385 states that "[a] person who violates any of the following [provisions of the Water Code] shall be civilly liable" without any further limitations." (Water Code, § 13385, subd. (a).) Nor do Petitioners point to any authority for the proposition that the Responsible Corporate Officer theory does not apply here.

"Three essential elements must be satisfied before liability will be imposed upon a corporate officer under the [Responsible Corporate Officer] doctrine: (1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; (2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions

facilitated the violations." (*People v. Roscoe* (2008) 169 Cal.App.4th 829, 839.)

Petitioners contend that there is not substantial evidence that Baldwin, Bone, and Capati were corporate officers or managers such that they could "person to influence corporate policies or activities."

However, the Board cited to evidence that showed that Baldwin "was a Director for [Baldwin Inc.] and the Chief Executive Officer, President, and Responsible Managing Officer for [Sunrise]," and that he "managed day-to-day operations at [Sunrise]," and during the violation period he "had significant authority to enter into contracts and act on behalf of [Baldwin Inc.]." (See AR85738-85740.)

The Board also relied on evidence showing that Bone was "the Chief Executive Officer for [SRC-PH]; the Chief Executive Officer of Sunranch; a 50 percent owner, Director, and Vice President for [Sunrise]; and the Chief Executive Officer and sole manager of ASSR Pacific Investments, Inc.," which is "the sole manager of Sunranch and [SRC-PH]"; and that he "had regular meetings with the construction team in his role as part owner of [Sunrise]" and "had significant authority to enter into contracts and act on behalf of [Baldwin Inc.]". (See AR85740-85741.)

Further, the Board pointed to evidence that Capati was the Vice President of Site Development for Sunranch, SRC-PH, Sunrise, and Baldwin Inc.; that he led the construction team for Sunrise; that he certified and was listed as the contact person for Sunranch's February 2016 Notice of Intent; and had "substantial authority to enter into contracts and act on behalf of [Baldwin Inc.]" during the violation period. (See AR85736-85737.)

Thus, the Board acted within its authority and relied on substantial evidence in imposing liability on each of the Petitioners, except for SRC-PH for violations occurring after November 12, 2015.

Connection Between Evidence and Agency Order

Next, relying upon *Topanga Ass'n for Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, Petitioners contend that the Board, in issuing the ACLO failed to make findings that "bridge the analytic gap between the raw evidence and ultimate decision or order." (*Id.* at p. 515.)

Petitioners assert that there are at least four dozen instances in which the Board made findings without any citation to evidence in the administrative record. (fn.1)

(fn.1) When the Supreme Court stated that the agency was required to "bridge the analytic gap between the raw evidence and ultimate decision or order," it meant that the agency needed to make findings that connected the evidence, on the one hand, to the agency's ultimate order, on the other hand. The Supreme Court was not concerned about the issue of which Petitioners complain here – the failure to support findings with evidence.

However, Petitioners point to nothing in *Topanga Ass'n for Scenic Community v. County of Los Angeles* that would allow this court to issue the writ of mandamus simply because the Board failed to provide a citation to the evidence for every finding, even if the finding was undisputed or irrelevant to the issues here.

Therefore, to the extent that a finding is undisputed or irrelevant, no purpose is served by the court determining whether it is supported by substantial evidence. And to the extent a finding is relevant, the court will consider it below when addressing critical issues on the merits.

The court therefore declines Petitioners' invitation to scour the ACLO to determine if *every* finding contained in the ACLO is supported by a citation to the evidence.

Violation 1

Petitioners contend that the writ of mandate should issue because the Board's determination of the amount of stormwater discharged that underlies the amount of the civil liability penalty for Violation 1 is not supported by substantial evidence.

Here, the ACLO finds that 6,317,220 gallons of stormwater were discharged during the four days of violation, leading to a total civil liability penalty of $5,246,188 for Violation 1.

The Board's finding in this regard relied exclusively upon the calculations of a Board staff member, Bryan Elder, who used the Natural Resources Conservation Service (NRCS) method. (AR85752-85754.)

Petitioners contend that the Storm Water Management Model (SWMM) method of calculation should have been used instead to determine the amount of stormwater discharged.

Petitioners argue that the NRCS method overestimates the amount of stormwater discharged, and that this issue was further exacerbated by the fact that Elder applied the NRCS method incorrectly in a manner that even further increased the estimate.

In support of their arguments, Petitioners presented the opinion and analyses of two experts, Dr. Theodore Hrmodka and Taylor Walker, who explained why the NRCS method should not have been used in the first place, how Elder applied the NRCS method incorrectly, and how the proper application of the SWMM method would have lead to a lower calculation of the amount of stormwater discharged.

Petitioners also pointed to Elder's own testimony admitting that:

> Elder had no prior experience utilizing the NRCS Method to calculate stormwater runoff from a construction site (AR66000);
>
> Elder never previously provided expert opinion testimony regarding the volume of stormwater discharge calculations (AR65968);
>
> Elder had never previously prepared a written report analyzing volume discharge calculations in any other matter (AR65972-65973);
>
> Elder never performed any hydrologic study using the NRCS Method, Orange County Hydrology manual, or U.S. EPA's SWMM Model (AR65925-65926); and
>
> Elder had never been retained or served as an expert witness on behalf of anyone other than the State Water Resources Control Board or one of the other nine Boards (AR65969).

In order to qualify as an expert, a witness must have "special knowledge, skill, experience, training, or education sufficient to qualify

him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).)

As the Court of Appeal has explained:

> It is the function of the trial court or other presiding officer [citation] to determine the qualifications of an expert . . . . The essential questions which must be favorably answered to qualify a witness as an expert are two: Does the witness have the background to absorb and evaluate information on the subject? Does he have access to reliable sources of information about the subject?

(*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 658.)

Expertise is "relative to the subject matter" and an expert's qualifications can be established by "'a showing that the expert has the requisite knowledge of, or was familiar with, or was involved in, a sufficient number of transactions involving the subject matter of the opinion.'" (*ABM Industries Overtime Cases* (2017) 19 Cal.App.5th 277, 294, quoting *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1115.)

Here, the calculation of the amount of stormwater discharged over the period of the violations is a subject requiring an expert because the testimony of an expert "would be likely to assist the [factfinder] in the search for the truth." (*Brown vs. Colm* (1974) 11 Cal.3d 639, 645.)

However, with respect to the subject matter here, Elder had little to no knowledge or experience. For example, one of the most important issues in the proceedings below was whether the NRCS method or the SWMM method should be used to calculate the amount of stormwater discharge. Yet Elder admitted that he had never used either the NRCS method nor the SWMM method to perform a hydrologic study.

Another critical matter was how NRCS method should be applied to the circumstances of this case. Yet, Elder testified that he had never utilized the NRCS method to calculate stormwater runoff from a construction site and had never prepared a written report analyzing volume discharge calculations in any other matter. This does not constitute "'a sufficient

number of transactions involving the subject matter of the opinion.'" (*ABM Industries Overtime Cases*, *supra*, 19 Cal.App.5th at p. 294 quoting *Howard Entertainment, Inc. v. Kudrow*, *supra*, 208 Cal.App.4th at p. 1115.)

Elder's lack of expertise was made apparent when he testified that he did not know "how accurate the model output that [he] generated" was and further admitted he could not state whether his estimate was up to "70% off the actual discharge volumes." (AR65992.)

In its pre-hearing rulings, the Board overruled Petitioners' objections to Elder's expertise and found that "Mr. Elder has adequate education and experience to testify about the use and application of the SWMM and NRCS models." (AR77903.) However, the Board only cites to the entirety of Elder's deposition transcript in support of this proposition and does not point to any specific indicia of expertise held by Elder.

The Board also noted that "[t]he Advisor Team assumes that the Prosecution Team will expand on Mr. Elder's credentials at the hearing," although the Board does not point to any evidence that Elder's expertise was expanded upon at the hearing. (AR77903.)

The Board then asserted that "[a]ny doubts regarding the degree of his expertise go to the weight of the evidence, not its admissibility." (*Ibid.*) However, this is only true if the threshold question of "'whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth'" is first met. (*ABM Industries Overtime Cases*, *supra*, 19 Cal.App.5th at p. 294 quoting *Brown v. Colm*, *supra*, 11 Cal.3d at p. 645.)

Here, the evidence does not show that Elder had the requisite skill or experience. Even by his own admission, Elder's calculations were little better than a guess as he could not even estimate the accuracy of his calculations.

In its brief to this court, the only evidence the Board relies upon in support of the contention that Elder was qualified as an expert was that he was a Senior Water Resource Control Engineer with the Board and a registered civil engineer. (See Resp.'s Opp'n to Pet.'s Mem. in Supp. of Petition for Writ of Admin. Mandate at pp. 41-42.)

However, expertise is "relative to the subject matter" and the Board does not point to any evidence or provide any explanation as to how Elder's job title and the fact that he was a registered civil engineer, by themselves, are sufficient to qualify him to testify as to the amount of stormwater discharged over the four days in which violations occurred.

Thus, Elder did not meet the standard of Evidence Code section 720 and his testimony cannot be considered. (See Evidence Code, ¶ 720, subd. (a) ["Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert."].)

However, even if Elder had met the requirements to testify as an expert witness, that would not change the outcome here. As the Court of Appeal has explained:

> The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. [Citations] Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. [Citations] In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. [Citation] When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence.

(*Pacific Gas and Elec. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136.) Here, Elder's testimony and calculation did not rise to the level constituting substantial evidence.

Nor can the Board rely upon its own unsupported opinions and ignore the testimony of Petitioners' expert witnesses, who even the Board admitted had "impressive credentials." (AR85758; see *Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180 Cal.App.3d 152, 158-161 [Commission's conclusions were not based on substantial evidence where only credible evidence presented was by petitioner's expert and only

justification to disregard that expert was "on the basis of the experience and knowledge of members of the Commission in local real estate matters."]

Here, because there is no proper evidentiary basis for the Board's conclusions as to the amount of stormwater discharged, there is no basis for the conclusion that the Board's findings were supported by substantial evidence. (See *id.* at p. 161 ["Since there is no proper evidentiary basis for the Commission's conclusions on a fair rate of return, there is no basis for the trial court's conclusion the Commission's findings were supported by the evidence."].)

The court will issue the writ of mandate on this basis.

Penalty Calculation Methodology

Petitioners also claim in determining the amount of the civil liability penalty, the Board used the 2010 Enforcement Policy Penalty Calculation Methodology in a manner was unsupported and arbitrary. This methodology required the Board to select a score with respect to certain factors and Petitioners contend that the Board's scoring was erroneous.

Petitioners' argument with respect the scoring of all the violations is, essentially, that the evidence presented by Petitioners is stronger and more persuasive than the evidence relied upon by the Board.

However, this is not the standard which this court must apply. The court is limited, in this instance, to determining whether the scoring selected by the Board was supported by substantial evidence. Here, the ACLO included a 58-page comprehensive analysis of the scoring that is replete with citations to specific evidence. (See AR85790-85848.)

While Petitioners point to the fact that not every finding by the Board includes a citation to the evidence, there is no such requirement. The Board only abuses its discretion if "the findings are not supported by substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) The court finds no such abuse of discretion here.

Further, Petitioners' argument assumes that the determination of the appropriate score for each factor is a task that requires technical expertise. However, Petitioners do not cite to any authority for this assumption.

To the contrary, scoring each factor requires the application of judgment and the weighing of multiple factors – a decision about which reasonable minds might differ. For example, Factor 1 is "Potential for Harm to Beneficial Uses." When determining potential rather than actual harm, there is necessarily a range of conclusions which the Board might reasonably reach.

In scoring each factor, Board is not being asked to undertake a technical analysis for which there is a precise and objective answer. While the Board may rely upon evidence from experts in order to score a factor, determining the appropriate score itself is not a task requiring expertise.

Finally, Petitioners argue that the ACLO does not apply the 2010 Enforcement Policy in a manner that is fair and consistent, bemoaning the fact that the civil liability penalty imposed in this case is "the single highest assessment for a CPG enforcement action in the State's history." (Pet.s' Opening Brief in Supp. of Petition for Writ of Mandate at p. 66.)

However, as explained above, scoring the factors and determining the appropriate civil liability penalty is an act that may lead to range of supportable conclusions. The fact that this civil liability penalty is larger than other penalties is not, by itself, a sufficient basis to find that the Board abused its discretion.

Accordingly, the Verified Petition for Writ of Mandate is granted to the extent it seeks a writ of mandate based on the Board's finding that SRC-PH is liable for violations occurring after November 12, 2015, and based upon the stormwater discharge calculations of Bryan Elder

The Verified Petition for Writ of Mandate is denied on all other grounds.

The court clerk shall give notice of this ruling.