SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

FILED
San Diego Superior Court
MAY 02 2025
Clerk of the Superior Court
By: T. Crandall, Deputy

Ruling on Petitioners' Motion Under CCP Section 1097 (MM AQ-9)

Natural Resources Defense Council, Inc., et al. v. City of Los Angeles, et al.; SCAQMD v. City of Los Angeles, et al., Case No. 2021-23385

Argued and submitted: May 2, 2025, 9:00 a.m., Dept. 2004

1. Background and Procedural Posture.

This is a CEQA case involving the China Shipping Terminal at the Port of Los Angeles. The court incorporates its own 2022 merits decision (ROA 154), as well as the opinion of the Fourth District Court of Appeal, Div. 1, filed 12/29/23 in Case No. D080902 (and thereafter ordered published, 98 Cal. App. 5th 1176), remanding the case to this court to exercise its discretion to fashion an appropriate remedy in the first instance.

Following the spreading of the appellate mandate, the court has, among other things: a) set an OSC regarding why port activities at the China Shipping Terminal should not be suspended (ROA 185); b) decided (after full briefing) not to suspend those operations (ROA 210); c) signed an amended writ and judgment (ROA 212, 217); d) conducted an extensive site visit (ROA 225); reviewed respondent's initial return to the writ (ROA 227-236) and petitioners' response thereto (ROA 244); e) worked up a fully briefed attorneys' fee motion (ROA 226); and f) continued to monitor respondent's compliance via review of further status reports and objections thereto (ROA 300, 304-305, 312, 320, 351). The court held several status conferences while a glacial meet and confer process went forward among the parties.

The March 7, 2025 status conference was set at the conclusion of the January 17, 2025 status conference, at which the parties reported they were close to agreement on a second amended judgment. The parties appeared remotely at the March 7 status conference having already submitted a proposed second amended judgment. However, during the hearing it became clear that the parties were still far apart as to MM AQ-9 (AMP). The City withdrew its consent to the second amended judgment, and the court did not sign it. ROA 333, 349.

The court informed the parties of its impending retirement, and noted that the disagreements regarding MM AQ-9 (AMP) must be resolved before May 30, 2025. A further status conference was set for April 4, 2025. ROA 333. The court informed the parties if they had not reached

agreement by April 4, the court would expect petitioners to have secured a date to present an affidavit in support of an OSC re contempt. *Ibid.*

No agreement was reached. In lieu of pursuing a finding of contempt, petitioners and intervenors filed, on April 1, a "Motion to Enforce Under CCP Section 1097." ROA 346-347. The City filed opposition, to which Cosco and West Basin filed joinders. ROA 353-357. Petitioners/intervenors filed reply. ROA 360. The court reviewed the moving, opposition and reply papers, and published a tentative ruling on April 28. ROA 361. The court heard spirited argument on May 2, 2025, and took the motion under submission. The court now decides the motion.

2. <u>Applicable Standards</u>.

A. CCP Section 1097 provides:

> If a peremptory mandate has been issued and directed to an inferior tribunal, corporation, board, or person, and it appears to the court that a member of the tribunal, corporation, or board, or the person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the writ, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and **may make any orders necessary and proper for the complete enforcement of the writ.**

This provision was enacted in 1872 as part of the Field Code, and has been amended only once (in 2016, non-substantively). Petitioners/intervenors invoke the last (highlighted) clause of the statute. Justice O'Rourke has observed that the Court of Appeal will "review the trial court's order under section 1097 of the Code of Civil Procedure, which permits the court to 'make any orders necessary and proper for the complete enforcement of the writ,'" by focusing on the respondent's "response to the writ and the trial court's assessment of that response." *San Diego Unified Port Dist. v. California Coastal Com.*, 27 Cal. App. 5th 1111, 1128 (2018), citing *Brown v. California Unemployment Insurance Appeals Board*, 20 Cal.App.5th at p. 1114; *Robles v. Employment Development Department* (2015) 236 Cal.App.4th 530, 546; *Los Angeles Internat. Charter High School v. Los Angeles Unified School District*, 209 Cal.App.4th at p. 1355 ("*Charter High School*"); and *City of Carmel-by-the-Sea v. Board of Supervisors of Monterey County*, 137 Cal.App.3d 964, 971-971.

B. The City contends the court lacks jurisdiction to amend the judgment (as prayed by the moving parties). Petitioners/intervenors respond the court can avoid this issue by just making an "order" instead of a judgment. Initially it did not seem to the court that the City, in raising this side dispute, had considered how it may affect its appellate rights. A common law exception to the one final judgment rule is

> "the collateral order doctrine, under which some interim orders are deemed appealable "judgments" because they are essentially the same as a final judgment. (See *Curtis v. Superior Court* (2021) 62 Cal.App.5th 453, 464, 276 Cal.Rptr.3d 676.) To be appealable, a collateral order must satisfy three elements: the order must (1) finally determine (2) a matter collateral to the litigation and (3) require the payment of money or performance of an act. (*Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 297-298, 50 Cal.Rptr.2d 493; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2020) ¶ 2:77.)"

Reddish v. Westamerica Bank, 68 Cal. App. 5th 275, 278, 283 Cal. Rptr. 3d 398, 400 (2021). Under this rule, if an order is not a "collateral order" (and thus not appealable), the Court of Appeal would have to dismiss any appeal the City might take:

"Civil cases in California are governed by the " 'one final judgment' " rule, which "prohibits review of intermediate rulings by appeal until final resolution of the case." (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 697, 107 Cal.Rptr.2d 149, 23 P.3d 43.) The rule is a bedrock principle of appellate practice, codified in Code of Civil Procedure, section 904.1. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 756, 122 Cal.Rptr.3d 153, 248 P.3d 681.) The rationale for the rule " ' "is that piecemeal disposition and multiple appeals in a single action would be oppressive and costly, and that a review of intermediate rulings should await the final disposition of the case." ' " (*Id.* at p. 756, 122 Cal.Rptr.3d 153, 248 P.3d 681.) Courts should not recognize exceptions to the one final judgment rule unless " 'clearly mandated.' " (*Id.* at p. 757, 122 Cal.Rptr.3d 153, 248 P.3d 681.)

Reddish, supra at 277(footnote omitted). Neither side's briefing cited the court to a case resolving the tension between CCP section 1097, which contains no 75 day time limitation, and sections 629, 663, 663a, and 659, which do. The court raised this during the May 2 argument, and the City cited *Charter High School, supra,* 209 Cal.App.4th at p. 1354: "The order following the hearing into the adequacy of the [respondent's] return on the writ is appealable as an order enforcing the judgment."

C. As already noted, the Court of Appeal ordered the undersigned to exercise its discretion to fashion an appropriate remedy in the first instance. That discretion "must be exercised within the confines of the applicable legal principles." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773.) Judicial discretion "is not a whimsical, uncontrolled power, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 364, p. 420.) "The legal principles that govern the subject of discretionary action vary greatly with context. [Citation.] They are derived from the common law or statutes under which discretion is conferred." (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297-1298.) The reviewing court must consider the legal principles and policies that should have guided the trial court's actions to determine if it abused its discretion. (See *People v. Carmony* (2004) 33 Cal.4th 367, 377.)

3. <u>Discussion and Rulings</u>.

A. The amended writ of mandate provides, in relevant part:

4. Within 60 days of service of the Writ and continuing every six months until the final return, Respondents shall file reports with the Court detailing the status of the implementation of all mitigation Measures and Lease Measures in the Permit.

...b. The status reports shall be signed under penalty of perjury by the appropriate officials/representatives on behalf of Respondents and Real Parties. The reports shall include 1) a list of all Mitigation Measures and Lease Measures in the Permit and the Permit Amendment, 2) a detailed explanation of the status of implementation of those measures, and 3) supporting evidence proving progress towards implementation (e.g., logs, purchase orders, invoices, photographs, etc.). **If any Mitigation Measure or Lease Measure is not being fully implemented as required by the Permit or Permit Amendment, Respondents must explain why and describe the actions being taken to reach compliance with the Permit or Permit Amendment.**

(ROA 212, ¶ 4, bold type added.)

B. The Mitigation Measure at issue in this motion is MM AQ-9, relating to shore power:

MM AQ-9: Alternative Maritime Power (AMP).

China Shipping ships calling at Berths 97-109 must use AMP at the following percentages while hoteling in the Port: ***

• January 1, 2011, and thereafter: 100 percent of ship calls

Additionally, by 2010, all ships retrofitted for AMP shall be required to use AMP while hoteling at a 100 percent compliance rate, with the exception of circumstances when an AMP-capable berth is unavailable due to utilization by another AMP-capable ship.

AR 6561.

C. In her January 30, 2025 sworn declaration (ROA 320), Lisa Ochsner, the City's Marine Environmental Manager,* testified as follows:

"Mitigation Measure AQ-9 Alternative Maritime Power (AMP). The status of this measure is **in compliance** for this reporting period. This information is derived from WBCT's reporting to the California Air Resources Board (CARB) and the Department's review of documentation regarding the exceptions claimed by the vessels calling at the terminal. (See Exhibit B, 2008 MM AQ-9.) According to WBCT, **100% shore power or an equivalent CARB approved emission control strategy (CAECS) was utilized for all vessels during the reporting period from July 2, 2024 through December 31, 2024. Of the fifteen (15) "exceptions" in the CARB report: four (4) were for safety and emergency events including power outages weather, and a vault explosion; three (3) were for vessel incident events including problems with a grounding switch, soaked electrical cables, and disconnecting early for the sock barge to be used on a tanker; three (3) were for research events; and five (5) were for vessel commissioning, which were all ultimately successful and used shore power after the commissioning. All 15 of these "exceptions" are counted in the 100% compliance rate because these vessels either initially or eventually used shore power or CAECS during the vessel visit as evidenced by the documentation provided with this report."**

The table of Monitoring Measures and Lease Measures appended to the Ochsner declaration repeats at page 9 the assertion that the City was "IN COMPLIANCE" with MM AQ-9. This is the "nub" of the present dispute. In summary, the City contends it is in compliance as Ms. Ochsner reported, while petitioners/intervenors contend 1) the language quoted immediately above in bold type presumes exceptions never contemplated by MM AQ-9; and 2) Ms. Ochsner should have reported that MM AQ-9 is not "being fully implemented" and then "explain[ed] why and describe[d] the actions being taken to reach compliance with" MM AQ-9.

D. After careful consideration, the court concludes the petitioners/intervenors have the better side of the debate, and exercises its discretion to grant the motion in part. While isolated emergencies and equipment failure deviations were "baked into" the 2008 EIR (AR 5834),** MM AQ-9 does not provide an exception for "an equivalent*** CARB approved emission control strategy (CAECS)." And MM AQ-9 does not provide an exception for "research events." As to MM AQ-9, the City's "response to the writ," at least as of January 30, has been to conflate compliance with the writ (which requires compliance with a 2008 Monitoring Measure) and compliance with a 2020 CARB at-berth regulation. While some deference to the lead agency's interpretation of the mitigation measure may be appropriate, not so here where the City's track record led this court to observe that the City had "committed a profound violation of CEQA." 98 Cal. App. 5th at 1231. Not so here where the Court of Appeal determined that the City led this court into error by resisting a more robust remedial regime. *Ibid.* Not so here where there is nothing in MM AQ-9 suggesting it left room for a swing from 2-3% non-compliance to 22% non-compliance (as petitioners contend, with ample support, the January 30 reporting reflects). And not so here where the City's interpretation "allows the Port to continue

its illegal operation of the [T]erminal without enforceable mitigation measures" in place." 98 Cal. App. 5th at 1231.

The City cries "foul" by pointing out that CARB is both the enforcer of the 2020 at-berth regulation and an intervenor seeking relief in this motion. The court can understand that Ms. Ochsner might feel "whipsawed" by this dual role of CARB. But there is a proper cure for this: the City may, in the new SEIR it is preparing, propose to weave the at-berth regulations into the monitoring measure, and then put that new environmental document out for comment and otherwise invite public participation. Only then will the City's hoped-for monitoring measure be part of a "document of accountability," and only then will the public "know the basis on which its responsible officials either approve or reject environmentally significant action." 98 Cal. App. 5th at 1200. What the City may not do is what it proposes to do here: unilaterally engraft the 2020 CARB at-berth regulation into MM AQ-9 as written, and then blithely claim compliance with the latter. And this effort is particularly disconcerting given the City's position less than one year ago:

> Mr. Kulkarni: "What the Court did here was basically the Port had attempted to modify MM AQ-9 in the SEIR. The Court found there was not substantial evidence to support that modification. What the Port has decided to do here, and as effectuated in the Fifth [Lease] Amendment, is **MM AQ-9 would default back to the original measure from the 2008 SEIR**. ...And because the **Port has decided not to modify the 2008 MM AQ-9,** therefore those arguments challenging are also moot now. So it makes no sense, you Honor, if you're reverting back to ... the 2008 measure, which is for at-berth emissions, there's absolutely no need to reanalyze anything because **we're doing exactly what the original document said**."

5/24/24 RT, 34:19-25, 35:11-18 (**bold** type added).

Contrary to these representations, the January 30 reporting reflects that the City is not doing exactly what the 2008 monitoring measure said, and that the City is attempting to modify MM AQ-9 by watering it down with exceptions never contemplated in 2008. And contrary to Ms. Ochsner's January 30 declaration, the court's assessment is that the City was not in compliance with MM AQ-9 and the Amended Judgment on January 30, 2025 because the reporting on that date was not accurate.

E. Remedy: The court will sign an order enforcing the writ along the lines of the amended judgment heretofore rejected (ROA 349), with one interlineation on page 6, lines 6-7. After the phrase "...during the applicable reporting period" the following must be added: "The statement 'not in compliance,' standing alone, shall not be construed as an admission by the City that it has willfully disobeyed the Amended Judgment (though it may be considered as evidence of willful disobedience)." The court orders this change because the court has formed the impression that doing so will enhance the candor with which the City reports the at-berth shore power connections of vessels hoteling at the China Shipping Terminal.

Petitioners/intervenors are ordered forthwith to submit an order enforcing the writ consistent with the foregoing for signature by the court. Further, Ms. Ochsner must forthwith**** submit to the court (and otherwise publish as required by the writ) a revised version of her January 30, 2025 declaration, consistent with the foregoing rulings. The court declines the invitation of the petitioners/intervenors to require Ms. Ochsner to revise the July 30, 2024 status report. Given the passage of time since the latter report, and the extensive back-and-forth between the parties since then, and the December update to the June 30 report, the court perceives little to be gained by imposing such a make-work exercise. Further, to the extent the original moving papers asked

the court to enter the previously rejected "Proposed Stipulated Second Amended Judgment," the motion is denied.

The court concludes that the foregoing orders are necessary and proper for the complete enforcement of the writ.

Petitioners'/intervenors' request for attorneys' fees may be the subject of a future motion if not resolved by negotiation as the previous fee motions were.

The court thanks counsel for their work on this matter over the last four years.

IT IS SO ORDERED.

May 2, 2025

Timothy B. Taylor

Judge of the Superior Court

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*The same declaration recites that Ms. Ochsner is responsible for overseeing "environmental compliance of Port tenant leases and permits, including but not limited to, mitigation measures and lease measures implemented through Mitigation Monitoring and Reporting Programs, environmental conditions imposed through project approvals, and other environmental requirements contained in tenant Environmental Compliance Plans."

**Petitioners/intervenors also take issue with the City's "vessel commissioning" exceptions. Any fair-minded person who has visited the China Shipping Terminal (as the court has), will understand that connecting a massive, complex ocean-going vessel to shore power is not at all like plugging in a toaster or a blender in a suburban home.

***Petitioners/intervenors vigorously dispute that it is "equivalent." ROA 346 at 14-16. The City does not convincingly meet this argument.

****The revised declaration and revised Order Enforcing Writ are due in Dept. 2004 by noon on May 14, 2025. The editing of the latter must also remove any suggestion that it is an amended judgment.