

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

**SOUTH SAN LUIS OBISPO COUNTY
SANITATION DISTRICT**

v.

**CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD;
CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD,
CENTRAL COAST REGION; and
DOES 1 through 10, inclusive**

Case Number: 34-2015-80002033

TENTATIVE RULING

Date: September 25, 2015

Time: 11:00 a.m.

Dept.: 29

Judge: Timothy M. Frawley

Proceeding: Demurrer

Tentative Ruling: Sustained in Part, with Leave to Amend

Respondents/Defendants State Water Resources Control Board and the Central Coast Regional Water Quality Control Board demur to the Petition for Writ of Administrative Mandamus and Complaint for Declaratory Relief filed by Petitioner/Plaintiff South San Luis Obispo County Sanitation District. The court shall sustain the demurrer, in part, with leave to amend.

Background Facts and Procedure

The District filed this action to challenge the Regional Board's Administrative Civil Liability Order No. R-3-2012-0041, imposing an administrative penalty of \$1,109,812.80 against the District for a sewage spill incident in December 2010.

In December 2010, an unprecedented flood occurred in the area of the District's wastewater treatment plant. The flooding was caused by a combination of heavy rain over two days combined with the failure of county-operated flap gates, creating a "bathtub" effect in the area surrounding the plant site. As flood waters pooled around the plant's generator building, water entered portions of the electrical system, tripping the emergency shunt trip (circuit) breaker and instantly removing power to all of the plant's influent pumps.

Although District staff were able to start an emergency diesel-powered backup pump, staff discovered that the backup pump discharge valve was closed and needed to be opened for the pump to function properly. Due to rising water, staff only was able to partially open the valve before rising water submerged the valve. In addition, staff discovered that due to a manufacturer setting the backup pump would shut down for a brief period of time approximately every hour.

Due to the lack of sufficient influent pumps, the sewer trunk system backed up and sewage overflowed from manholes and (in a few instances) residential homes. The total amount of sewage discharged is estimated at approximately 417,000 gallons.

After failed settlement attempts, the Regional Board issued an Administrative Civil Liability Complaint to the District, charging the District with violations of the California Water Code, federal Clean Water Act, the District's NPDES permit, the State Water Board Sanitary Sewer Collection System Order No. 2006-003-DWQ, and the related Monitoring and Reporting Program No. 2009-002-EXEC. The Board's staff recommended an administrative penalty against the District of \$1,383,007.50.

The hearing before the Board on the "enforcement action" was scheduled for September 7, 2012. The "Advisory Staff" for the enforcement action initially consisted of two attorneys from the State Board's Office of Chief Counsel, plus the Executive Officer of the Regional Water Board. After the Executive Officer retired, he was replaced by the State Board's Assistant Deputy Director in the Division of Water Quality, who was temporarily serving as the Regional Board's interim Executive Officer. The "Prosecution Staff" for the enforcement action consisted of four employees of the State Board's Office of Enforcement, four employees of the Regional Board, and the Assistant Executive Officer of the Regional Board. Senior staff counsel for the State Board's Office of Enforcement served as the lead counsel for the Prosecution Staff.

Prior to the hearing on the administrative complaint, the District attempted to obtain copies of the investigative files related to the enforcement action. The District contends that Respondents refused to provide their entire investigative files, and only selectively

disclosed records or portions of records that Respondents intended to use against the District. Respondents claimed the withheld records are privileged under the deliberative process and/or official information privileges.

The adjudicative hearing commenced at approximately 8:30 a.m. on September 7, 2012, and ended nearly 17 hours later, at approximately 1:00 a.m. on September 8, 2012. The only significant breaks in the proceeding were a one-hour lunch break and a 45-minute dinner break. The Prosecution Staff and the District each were limited to 180 minutes to present their case, including opening statements, closing statements, and examination of witnesses. Most of the remaining time was devoted to questioning of witnesses by the members of the Regional Board and the Regional Board's interim Executive Officer.

Because the Prosecution Staff presented its case first, the District did not begin presenting its case until approximately 9:00 p.m., more than twelve hours after the hearing began and after the air conditioning had shut down in the hearing room. Before the dinner break and near the conclusion of the Prosecution Staff's case, the District requested that the hearing be continued because the witnesses, counsel, and Board members were tired. The Board denied this request.

Following the close of the hearing, the Regional Board decided to continue the hearing to a later date for purposes of conducting deliberations, and to deliberate in closed session. Approximately, one month later, after deliberating in closed session, the Board issued Order No. R-3-2012-0041, imposing a penalty of \$1,109,812.80 for the sewage spill incident.

In November 2014, the District filed this action. The Petition alleges five counts. The first four counts seek a peremptory writ of mandamus directing Respondents to set aside Administrative Civil Liability Order No. R-3-2012-0041. The District alleges that the Regional Board abused its discretion by, among other things, ignoring key evidence, failing to make findings, failing to support its findings with evidence, refusing to consider/apply the "upset defense," and penalizing the District for sewer overflows outside the jurisdictional reach of the District's permit. The District also contends that Respondents deprived the District of a fair hearing and violated the District's right to due process right by refusing to make the investigation files available to the District, allowing staff to serve concurrently in advisory and prosecutorial roles, allowing State Board staff to advise the Regional Board members, refusing the District's request to continue the hearing, failing to provide the District adequate time to present its defense, and deliberating in closed session.

The fifth count seeks a declaratory judgment that Respondents failed to provide due process and a fair hearing to the District; that Respondents must disclose potentially exculpatory evidence to the District and cannot shield such evidence by characterizing it as "investigative;" that Respondents waived the official information and/or deliberative process privileges by disclosing portions of their investigative files; and that the State Board's involvement in the administrative proceeding in an advisory capacity created an unconstitutional conflict of interest.

Respondents demur to all causes of action in the Petition on the grounds the State Board is not a proper party to this litigation because the Petition contains no charging allegations against the State Board and requests no relief relating to any action or decision by the State Board.

Respondents also demur to the fifth count of the Petition on the grounds it does not state facts sufficient to constitute a cause of action because declaratory relief is not available to challenge an administrative agency's quasi-adjudicative decision.

Standard of Review

In reviewing the sufficiency of a complaint against a demurrer, the court is guided by long-settled rules. A demurrer cannot be used to determine the truth of disputed facts or resolve competing inferences. (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 635.) For purposes of evaluating the sufficiency of the complaint, the court treats the demurrer as admitting the truth of all factual material allegations properly pleaded in the complaint, regardless of possible difficulties of proof. However, a demurrer does not admit contentions, deductions, or conclusions of fact or law alleged in the complaint; facts impossible in law; or allegations contrary to facts of which a court may take judicial notice. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Martinez v. Socoma Companies, Inc.* (1974) 11 Cal.3d 394, 399.) "[I]f upon a consideration of all the facts stated it appears that the plaintiff is entitled to any relief at the hands of the court against the defendants, the complaint will be held good" (*Hardy v. San Fernando Valley Chamber of Commerce* (1950) 99 Cal.App.2d 572, 577-578.)

Discussion

The court shall sustain the demurrer to the declaratory relief cause of action. While an action for declaratory relief may be used to determine whether a public entity has engaged in conduct or established policies in violation of law, an action for declaratory relief may not be used to review a specific adjudicative order or decision. (See *County*

of *Los Angeles v. State Water Resources Control Board* (2006) 143 Cal.App.4th 985, 1002; *Rezai v. City of Tustin* (1994) 26 Cal.App.4th 443, 448.)

The District denies that its declaratory relief is aimed at a specific administrative decision; rather, the District claims, it is seeking review of “general practices.” However, the allegations of the Petition betray the District’s claim. Although the Petition discusses Respondents’ “practices,” it does so only in the context of challenging how such practices were applied to the District, in violation of the District’s constitutional rights to due process and a fair hearing. Thus, the District essentially is challenging the validity of the administrative decision. As discussed above, such challenge is properly brought under administrative mandamus, rather than as an action for declaratory relief. (See *State v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 251; *Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 307.)

The court shall overrule the demurrer to the remaining cause(s) of action. California Code of Civil Procedure section 379 provides:

All persons may be joined in one action as defendants if there is asserted against them:

(1) Any right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action; or

(2) A claim, right, or interest adverse to them in the property or controversy which is the subject of the action.

In this case, the Petition requests no relief against the State Board, but the Petition alleges that State Board staff contributed to the violation of the District’s constitutional rights because State Board staff advised the Regional Board even though the State Board had a financial interest in upholding a penalty against the District. If the District prevails on this claim, the court conceivably would remand for a new hearing, at which State Board staff would be prohibited from serving in an advisory role. Thus, based on the allegations of the Petition, the State Board has an “interest” in the controversy that is the subject of the action, even if the District is not challenging the State Board’s decision to deny review. There is no misjoinder.

In their Reply, Respondents raise a new argument that, even if the State Board can be joined, the allegations of the Petition are not sufficient to state a cause of action for

bias/conflict of interest. Because this argument was not raised in the demurrer, the court declines to consider it. (Cal. Civ. Proc. Code § 430.60.)

Disposition

The demurrer to the declaratory relief cause of action is **SUSTAINED**, with leave to amend. As to the remaining causes of action, the demurrer is **OVERRULED**. The District shall have fifteen days from entry of this court's ruling to file an amended petition.

In the event that this tentative ruling becomes the final ruling of the court, this order shall be effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice shall be required.

This tentative ruling shall become the ruling of the court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear. Any party desiring an official record of this proceeding shall make arrangements for reporting services with the clerk of the department where the matter will be heard not later than 4:30 p.m. on the day before the hearing. The fee is \$30.00 for civil proceedings lasting under one hour, and \$239.00 per half day for proceedings lasting more than one hour. (Local Rule 1.12 and Government Code § 68086.)