***Phillips 66 Company v. County of San Luis Obispo,* 16CV-0502**

Hearing: Motion to Intervene

Date: January 12, 2017

In late 2012, Petitioner Phillips 66 Company ("Phillips 66" or "Petitioner") began discussions with the San Luis Obispo County Department of Building and Planning ("Department") to extend the existing rail track at its refinery in Arroyo Grande ("Project").[1] The purpose of the proposed Project is to enable rail delivery of crude oil. On May 2, 2013, Phillips 66 filed an application with the Department for a development permit and a coastal development permit.

In June 2013, the environmental consultant hired by Phillips 66 provided the Department with an assessment of the ecological setting of the proposed Project. The consultant concluded that there was no unmapped environmentally sensitive habitat area ("ESHA") at the Project site.[2]

On July 13, 2013, the Department accepted the Project application; and in November 2013, circulated the first Draft Environmental Impact Report ("EIR"). After reviewing comments on the draft EIR, the Department revised and re-issued a recirculated Draft EIR in October 2014. The recirculated Draft EIR stated the "Project site would not be considered ESHA."

However, when the Final EIR was issued in December 2015, it concluded that "the potential for Unmapped ESHA" exists and the "the Project site … appears to meet the definition of Unmapped ESHA."

On February 4, 2016, the Planning Commission held its first hearing on the Project. The staff report prepared for the meeting determined that the Project site had Unmapped ESHA. The matter was then continued seven (7) times until October 5, 2016, when the Planning Commission denied the Project application, and adopted the Department's recommended findings for denial, which included the Unmapped ESHA determination.

On October 19, 2016, Petitioner filed a Petition for Writ of Mandate and a Complaint for Declaratory and Injunctive Relief against the Department, the Planning Commission, and the County of San Luis Obispo ("County"). Phillips 66 challenges ***the timing*** of the

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[1] Because the administrative record has not yet been prepared and lodged, the factual background is taken from Petitioner's opposition and the Verified Petition for Writ of Mandate.

[2] Mapped ESHA and Unmapped ESHA are defined in Land Use Ordinance ("LUO") section 23.11.030.

Department's determination that the Project site contains Unmapped ESHA (first cause of action; petition for traditional mandamus); and also challenges the County's land use ordinance on the issue as unconstitutional (second cause of action; complaint for declaratory and injunctive relief).

Motion to Intervene:

Moving parties, a group of six environmental organizations,[3] seek to intervene as respondents and defendants, stating they have participated in the four-year environmental review process of the proposed Project.

Phillips 66 does not oppose the motion to intervene as to the second cause of action (i.e., the due process challenge to the County's relevant land use ordinance), but does oppose their intervention as to the first cause of action (i.e., the Department's Unmapped ESHA determination).

Phillips 66 states the first cause of action involves a discrete legal issue: "Is the Department Unmapped ESHA determination consistent with the deadline imposed by the Unmapped ESHA ordinance?" (Opp., p. 13, ll. 25-27.)

Under the definition of ESHA set forth in LUO section 23.11.030, "[t]he existence of Unmapped ESHA is determined by the County ***at or before the time of application acceptance*** and shall be based on the best available information."[4] (Emphasis added.)

Phillips 66 argues the Moving Parties do not have an interest in the Court's disposition of the first cause of action because if successful and the Unmapped ESHA determination is set aside, the Planning Commission would still have the opportunity to consider the Project on the basis that the project site is not Unmapped ESHA. In other words, a ruling in Petitioner's favor would not entail approval of the Project; and thus, "not entail any environmental impacts." (Opp., p. 2, ll. 15-17.)

In response, the Moving Parties argue they and their members will suffer a direct and immediate harm if not allowed to intervene in the first cause of action because if successful on the first cause of action, Phillips 66 will undo any prior advocacy efforts before the Planning Commission, and more importantly, effectively silence any environmental opposition prior to the conclusion of the administrative process (i.e., the pending appeal before the County Board of Supervisors).

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[3] The six organizations are (1) Communities for a Better Environment, (2) Environmental Defense Center, (3) Sierra club, (4) the Center for Biological Diversity, (5) Stand.earth, and (6) Surfrider Foundation (collectively, "Moving Parties").

[4] "County" is defined as "The county of San Luis Obispo, including the county Board of Supervisors." (LUO, § 23.11.030.)

Discussion:

Under Code of Civil Procedure section 387, subdivision (a), the court has discretion to permit a nonparty to intervene in litigation pending between others, when:

1. The nonparty has a direct and immediate interest in the litigation;
2. The intervention will not enlarge the issues in the case; and
3. The reasons for the intervention outweigh any opposition by the existing parties.

(*Truck Ins. Exchange v. Superior Court (Transco Syndicate No. 1)* (1997) 60 Cal.App.4th 342, 346.)

The party seeking intervention has the burden of showing his or her case is a proper one for intervention. (*Hausmann v. Farmers Ins. Exchange* (1963) 213 Cal.App.2d 611, 615.) "[S]ection 387 [however] should be liberally construed in favor of intervention." (*Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1200.)

1. Direct and Immediate Interest in the Litigation

A party seeking to intervene must have a direct and immediate interest in the outcome of the litigation such that he or she "will either gain or lose by the direct legal operation and effect of the judgment." (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 303.)

> 'A person has a direct interest justifying intervention in litigation where the judgment in the action of itself adds to or detracts from his legal rights without reference to rights and duties not involved in the litigation.' Conversely, 'An interest is consequential and thus insufficient for intervention when the action in which intervention is sought does not directly affect it although the results of the action may indirectly benefit or harm its owner.' (*City and County of San Francisco v. State* (2005) 128 Cal.App.4th 1030, 1037 [citations omitted].)

The interest, however, need not be pecuniary and need not be a specific interest in the "property or transaction" involved. (*Simpson Redwood supra,* 196 Cal.App.3d at p. 1201.) Moreover, "[i]t is not necessary that an intervener's interest 'be such that he will inevitably be affected by the judgment. It is enough that there be a substantial probability that his interests will be so affected.' [Citation.]" (*Simpson Redwood, supra,* 196 Cal.App.3d at p. 1201.)

Phillips 66 states "[t]he only issue presented by the First Cause of Action is whether the Unmapped ESHA ordinance's strict deadline renders unlawful the Department's untimely Unmapped ESHA determination." (Opp., p. 14, ll. 11-13.) As noted above,

Phillips 66 argues the Moving Parties do not have an interest in the Court's disposition of the first cause of action because a ruling in Petitioner's favor does not equate to approval of the Project.

Petitioner, however, oversimplifies the scope of the inquiry. The first and second causes of action are two sides of the same coin, and resolution of one will affect resolution of the other. Both causes of action will require the Court to determine whether the County had any flexibility in the timing of its Unmapped ESHA determination.[5]

Petitioner concedes the Moving Parties have an interest in the second cause of action, which concerns the timing of the Unmapped ESHA determination in general. Accordingly, the Moving Parties also have an interest in the timing of the Unmapped ESHA determination in the first cause of action with respect to this specific project.

Phillips 66 focuses on the end result (i.e., that a favorable ruling on the first cause of action does not equate to approval of the Project). The Moving Parties, however, are focused on the environmental review process, and their ability to participate in it – whether generally under the second cause of action or specifically as to this Project under the first cause of action.

Here, a favorable ruling for Petitioner on the first cause of action would preclude any further public participation regarding the Unmapped ESHA determination in the administrative proceedings.

In light of the Moving Parties' missions to protect and conserve the environment, as well as their participation in the administrative proceedings on this Project, the Moving Parties have shown a direct and immediate interest in protecting their ability to continue to participate in and protect the environmental review process as it relates to this specific Project and the Unmapped ESHA determination made by the Department.

2. Intervention Would Not Enlarge the Issues of the Case

Phillips 66 argues that intervention by the Moving Parties would enlarge the issues of the case by "arguing straw men that are completely beyond the scope of the First Cause of Action." (Opp., p. 14, ll. 26-28.) In support of the argument, Phillips 66 points to other land use ordinances cited by the Moving Parties in the opening brief.

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[5] In the first cause of action, Petitioner alleges the Department had to make the Unmapped ESHA determination at or before the time of application acceptance, which they did not do. In the second cause of action, Petitioner alleges that LUO section 23.11.030 does not provide for notice or an opportunity to be heard in advance of any Unmapped ESHA determination since it must be done at or before the time of application acceptance. Thus, the meaning of "at or before the time of application acceptance" (i.e., when the determination must be made) will be at issue in both causes of action.

The Moving Parties respond that any reference to other land use ordinances (i.e., LUO 23.07.170 [Environmentally Sensitive Habitats]) are provided to highlight the history and legislative intent of ESHA; and are meant to show that Phillips 66 has prematurely challenged the County's determination (via traditional mandamus rather than through the administrative process and the Board of Supervisors). (Reply, p. 11, ll. 16-20.)

Intervention by the Moving Parties will not enlarge the issues of the case, as it appears that the current Respondents will be filing a demurrer on similar grounds (i.e., that traditional mandamus is not appropriate).

3. The Reasons for Intervention Outweigh Any Opposition

Phillips 66 argues that the Moving Parties "lose little (if anything) by not participating as parties." (Opp., p. 15, ll. 14-15.) As discussed above, a favorable ruling for Petitioner on the first cause of action will effectively cut the Moving Parties out of any discussion regarding the Unmapped ESHA determination; and remove the question from the ongoing administrative proceedings.

As the Moving Parties' intervention will not enlarge the issues of the case, their reasons for intervention outweigh Petitioner's opposition.

The motion to intervene is thereby granted.[6]

[6] In light of the Court's finding that the Moving Parties are entitled to intervene under permissive intervention (Code of Civ. Proc., § 387, subd. (a), the Court does not address the parties' arguments regarding mandatory intervention (Code of Civ. Proc., §387, subd. (b)).