

**NOT TO BE PUBLISHED**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Sacramento)**

----

SISKIYOU COUNTY WATER USERS  
ASSOCIATION,

Plaintiff and Appellant,

v.

NATURAL RESOURCES AGENCY<sup>1</sup> et al.,

Defendants and Respondents.

C068829

(Super. Ct. No. 34-2010-  
80000642-CU-WM-GDS)

Plaintiff Siskiyou County Water Users Association (SCWUA) challenges a compromise reached among other stakeholders in the Klamath River watershed and government entities. Those parties had agreed to undertake a process for determining whether the

---

<sup>1</sup> We have corrected the name of the lead defendant from "California Natural Resources Agency" to "Natural Resources Agency" (hereafter NRA) to conform to its statutory designation. (Gov. Code, § 12800, 5th par.)

restoration of fisheries could be achieved through the removal of dams while maintaining adequate allocations of water and power. Those parties executed two agreements (hereafter compromise agreements), which set forth the process. SCWUA filed a petition for writ of mandate in the Sacramento County Superior Court, raising the California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21000 et seq.),<sup>2</sup> alleging that the execution of the compromise agreements should have been subject to the CEQA environmental review process before becoming effective. The trial court sustained demurrers to the original and amended pleadings on the ground the action was time-barred (and not ripe for judicial review in one regard), and thereafter entered a judgment of dismissal. SCWUA filed a timely notice of appeal.

In this court, SCWUA reiterates the unsuccessful arguments it made in opposition to the demurrers. It asserts its action is subject to the 180-day limitations period in section 21167 that is applicable where a public agency takes an action without any attempt to comply with CEQA, because a notice filed (of a determination that the execution of the compromise agreements was not within CEQA) was not effective to trigger any of the statute's shorter limitations periods. Alternatively, SCWUA contends the failure of the parties to the compromise agreements to seek legislation identified in the agreements—that

---

<sup>2</sup> Undesignated statutory references are to the Public Resources Code.

specifically would have exempted the execution of the compromise agreements from CEQA's mandates—was a modification of the nature of the activity that restarted the limitations period, or gave rise to equitable estoppel. Finally, SCWUA contends that the lead agency designated in one of the agreements as responsible for the CEQA reviews called for under the compromise is improper and must be set aside. We are not persuaded and shall affirm the judgment of dismissal.

### **FACTUAL AND PROCEDURAL BACKGROUND**

We assume the truth of all well-pleaded *factual* allegations in the amended petition (disregarding any legal conclusions), and then determine de novo whether they state a cause of action. (*Robison v. City of Manteca* (2000) 78 Cal.App.4th 452, 455, 456.) We disregard any factual allegations that conflict with the compromise agreements appended to the petition, along with any allegations as to their legal effect (*Barnett v. Fireman's Fund Ins. Co.* (2001) 90 Cal.App.4th 500, 505), because the interpretation of the compromise agreements is subject to our de novo review (*Sprinkles v. Associated Indemnity Corp.* (2010) 188 Cal.App.4th 69, 76).

In February 2010, 40-odd parties<sup>3</sup> executed an agreement, the Klamath Hydroelectric Settlement Agreement (settlement agreement), for the purpose of "establishing a process" for the

---

<sup>3</sup> The list of parties included federal, Oregon, and California public entities and regulatory bodies; sovereign Native American tribes; and numerous other stakeholders in the Klamath River.

potential removal of the dams associated with the generation of hydroelectric power on the Klamath River, if this would advance the restoration of the fisheries in its watershed. If federal authorities came to this conclusion after environmental review, both of the affected states (Oregon and California) then needed to concur as well after conducting their own environmental review; if not, the removal process in the settlement agreement would terminate.

The settlement agreement specifically recited that in the course of implementing its procedures the parties "shall comply with . . . CEQA" (among other environmental protections). It further provided that none of its provisions "shall be construed to predetermine the outcome of any Regulatory Approval or other action by a Public Agency Party necessary . . . to implement this Settlement." It designated California's Department of Fish and Game (DFG) as the "lead agency" (§§ 21067, 21165) for the environmental review of "Facilities Removal and associated actions prior to [the State of California's] decision whether to concur with" a federal determination in favor of removal.

Concurrent with the settlement agreement, many of the same parties (along with others) executed a Klamath Basin Restoration Agreement (KBRA). The purpose of the KBRA was to find solutions for the restoration of the fisheries while maintaining reliable water and power supplies.

The KBRA also expressly provided that it should not "be construed to modify the application of" CEQA to environmental

review of any project undertaken pursuant to the KBRA, and obligated each participating public agency to "undertake environmental review as required by Applicable Law . . . before commitment to, any . . . action . . . under this Agreement."

Appearing in appendices to the settlement agreement was proposed federal and California legislation. In a general recitation, "The Parties acknowledge that legislation is necessary to provide certain authorizations and appropriations to carry out this Settlement as well as the KBRA." In addition to promises to support the enactment of the federal legislation, the State of California agreed to recommend the state legislation, which would include provisions that the execution of the two compromise agreements was not a "project" (§ 21065) subject to CEQA review, and that the DFG was a proper lead agency (§ 21067) for any CEQA review required in the settlement agreement. However, only the failure to enact the *federal* legislation was identified as an event terminating the settlement agreement.

The KBRA also contained appendices of proposed federal and state legislation (including the same CEQA enactments as in the settlement agreement). It also recited the acknowledgement that the "implementation of certain obligations under this Agreement" required authorizing legislation or appropriations, and pledged the support of the parties for the enactment of such legislation.

The two agreements also expressly declared that they did not intend to create any third party beneficiaries: "This Settlement is not intended to and shall not confer any right or interest in the public, or any member thereof, or on any persons or entities that are not Parties hereto"; "This [KBRA] does not create any right in the public, or any member thereof, as a non-Party beneficiary."

On February 25, 2010, the NRA filed what it termed a "Notice of Determination" (NOD), citing former Public Resources Code section 21108, with the State Clearinghouse (Gov. Code, § 65040.10). The notice recited NRA's determination that the execution of the compromise agreements was not a "project" within the meaning of CEQA because it did not bind the NRA or any other public agency to any course of action and merely established a process that would include the necessary environmental reviews before taking any actions.

In June 2010, the DFG filed a notice of preparation (§ 21080.4; Cal. Code Regs, tit. 14, § 15375<sup>4</sup>) that it would be preparing a draft environmental impact report (EIR) "to evaluate whether to remove four dams on the Klamath River" pursuant to

---

<sup>4</sup> Further references to regulations are to title 14 of the California Code of Regulations (hereafter Regulations). The NRA promulgated these regulations as "guidelines" to the operation of CEQA, as directed in Public Resources Code section 21083, and they have "'great weight'" as interpretive aids (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, fn. 3).

the compromise agreements. In response, SCWUA<sup>5</sup> submitted comments that the DFG was not the proper lead agency, and that the DFG had previously taken a position that it was not the proper lead agency in connection with a dam removal.

In an apparent effort to apply its own pressure to the careful balance established in the compromise agreements applecart, SCWUA filed a petition for a writ of mandate (and complaint for declaratory and injunctive relief) in August 2010. SCWUA named a number of the California participants in the compromise agreements as defendants.<sup>6</sup> The trial court sustained a demurrer on various grounds in January 2011. Although it did not believe SCWUA could remedy the defects, the court granted leave to amend because this was the initial pleading.

In February 2011, SCWUA filed an amended petition for writ of mandate (which omitted the request for declaratory and injunctive relief). It reasserted that the execution of the compromise agreements was subject to environmental review under CEQA, and challenged the designation of the DFG as the lead agency. In an effort to forestall the issue of the limitations period, the amended petition challenged the legal validity of the NOD filed in February 2010. It also noted the failure of

---

<sup>5</sup> SCWUA was organized in June 2010 to defend the water use status quo in the Klamath River basin under a 1957 compact.

<sup>6</sup> These included the Governor, the NRA and its director, the DFG and its acting director, the Tulelake Irrigation District and its board, the Westside Improvement District No. 4 and its board, and Humboldt County and its board.

the parties to seek the proposed CEQA legislation; it contended this failure either estopped defendants from raising the defense of the limitations period, or was a substantial modification of a project subject to CEQA that resulted in a new project on which the limitations period did not begin to run until July 31, 2010, a point at which SCWUA alleged it was no longer "feasible" to introduce and pass legislation.

In its ruling on the demurrer, the trial court stated, "the amendments . . . contained in the Amended Petition do not cure the defects noted in the earlier ruling on demurrer." The trial court thus reiterated its earlier conclusions that defendants were entitled to file an NOD asserting that the execution of the compromise agreements was not a CEQA project, which triggered either a 30- or 35-day limitations period under section 21167;<sup>7</sup> the notice was neither procedurally nor substantively invalid;

---

<sup>7</sup> Although the trial court agreed with SCWUA that a no-project finding was more properly the subject of a notice of exemption (NOE) (former § 21108, subd. (b) ["Whenever a state agency determines that a project is not subject to [CEQA] pursuant to [statutory exemptions], and the state agency approves . . . the project, [it] . . . may file notice of the determination"]; Regs., § 15374) rather than an NOD (former § 21108, subd. (a) ["Whenever a state agency approves . . . a project that is subject to [CEQA], the state agency shall file notice of that approval . . . indicat[ing] the determination . . . whether the project will, or will not, have a significant effect on the environment and . . . indicat[ing] whether an environmental impact report has been prepared"; Regs., § 15373]), it concluded that the contents of the February 25, 2010 NOD complied with CEQA requirements and triggered the 35-day statute of limitations under section 21167, subdivision (d), which had long expired by August 2010.

and a challenge to the designation of the DFG as the lead agency under the settlement agreement was not ripe for judicial review (noting that the DFG had not yet completed its environmental review and SCWUA had not exhausted its administrative remedies). As for the added allegations regarding the failure to seek legislation, this did not restart the limitations period because it was not a substantial change in the nature of the compromise agreements. It also did not result in an estoppel: SCWUA could not have reasonably relied on a "promise" to seek legislation in the agreements, nor was it reasonable to have deferred filing the original pleading based on a mere expectancy of legislation.

## **DISCUSSION**

### **I. The Notice Was Subject to a Shorter Limitations Period**

SCWUA argues an NOD can follow only an approval of a *project* in connection with an appropriate environmental document (either a negative declaration or an EIR), and the NRA had decided that the execution of the compromise agreements was *not* a project. Exalting form over substance, SCWUA argues the title on the notice is determinative and therefore the February 25, 2010 NOD was invalid because it was not authorized. In the absence of a valid notice, SCWUA argues it was entitled to a 180-day limitations period under section 21167, subdivision (a). Alternately, SCWUA argues this longer limitations period applied because the notice was defective in its substance (adhering to its view that the contents must satisfy the criteria for an NOD).

### ***A. The Act of Notice Is the Proper Focus***

In its first tack, SCWUA takes a totemic approach to the nature of the NRA notice under which the title of the notice is conclusive on its effect. Before we can respond to this metaphysical argument, we first provide a simplified overview of the CEQA process and a summary of the limitations provisions of section 21167.

At the outset, before making a decision an agency must conduct a "preliminary review" during which it decides if this decision is a "project" within the meaning of CEQA, or if it is nonetheless a project within statutory or regulatory exemptions from CEQA review. (§ 21165, subd. (a) ["project"]; Regs., §§ 15002, subd. (k)(1) ["first step"], 15378, subds. (a) & (b) ["[p]roject"; exceptions from definition], 15060, subd. (c)(1) [must be discretionary action to be project], 15061, subds. (a) & (b) [projects exempt from CEQA].) We have also noted that an action that does not commit an agency to a definite course of action without CEQA review is not subject to CEQA. (*Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772, 781-782 (*Stand Tall*) [a resolution identifying building site but making any purchase contingent on CEQA compliance (relying in part on definition of project approval in Regs., § 15352, subd. (a))]; followed in *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181, 191-194 (*McCloud Citizens*) [contract to supply water contingent on CEQA review, reserved right to cancel

project].)<sup>8</sup> These cases have led at least one treatise to conclude that part of the preliminary review should also involve determining whether the action constitutes a commitment that as a practical matter forecloses any alternative to the proposed project. (Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11th ed. 2007) p. 71 (Remy Guide).) Nothing in statutory or regulatory CEQA provisions prescribes or authorizes any sort of notice of an agency determination that an agency action is not a project (or does not represent a commitment to a project), but an approval of an *exempt* project can be filed in an NOE at the option of the agency. (Former § 21108, subd. (b); Regs., §§ 15002, subd. (k)(1), 15062; Remy Guide, *supra*, pp. 113-114.)

If the action involves a commitment to a nonexempt project, the agency then must undertake an initial study to determine if there may be a significant effect on the environment. If there is an absence of any evidence of environmental effects, it can file some form of negative declaration. Otherwise, it must prepare an EIR. (Regs., §§ 15002, subd. (k)(2) & (3) [steps two and three], 15365 ["[i]nitial study"], 15070, 15071, subd. (c), 15369.5, 15371 [types and contents of negative declarations], 15362, 15120 et seq. [types and contents of EIR's]; Remy Guide,

---

<sup>8</sup> *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 did not dispute "the correctness of [our decisions] on their facts" (*id.* at p. 133) but cautioned that in making this determination a court must assess whether "in light of all the surrounding circumstances" the action "commits the public agency as a practical matter to the project" (*id.* at p. 132).

*supra*, pp. 181-182.) An NOD must be filed in connection with one of these documents after approval of the project. (Former § 21108, subd. (a); Regs., §§ 15373, 15075, subd. (b) [NOD for negative declaration], 15373, 15094 [NOD for EIR]; Remy Guide, *supra*, pp. 311, 406-408; 1 Manaster & Selmi, Cal. Environmental Law and Land Use Practice (2012) § 20.02[3], p. 20-11 (rel. 56-3/2012) (Manaster Practice Guide) [flowchart of all steps].)

"Section 21167 establishes statutes of limitation for all actions and proceedings alleging violations of CEQA."

(*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 43 (*Green Foothills*).) If an agency has undertaken or approved a project that has a significant effect on the environment without any attempt to comply with CEQA, a challenger has 180 days under subdivision (a) of the statute from the formal decision or the initiation of the project to file suit. Subdivision (d) allows 35 days after the filing of an NOE to challenge the determination that an approved project is exempt (or 180 days in the absence of an NOE from the formal decision or project initiation). Subdivision (b) allows 30 days after the filing of an NOD to challenge the determination that an approved project does not have a significant effect on the environment (i.e., a negative declaration). Subdivision (c) has an identical limitations period after the filing of an NOD to challenge the adequacy of an EIR on which a project approval is based, as does subdivision (e) for lawsuits contesting any other type of failure to comply

with CEQA following an NOD.<sup>9</sup> (*Green Foothills, supra*, 48 Cal.4th at p. 44.) In a pair of decisions, the Supreme Court has emphasized it is the *fact* of notice being given—whether or not the notice is specifically authorized under CEQA, or the substance or merits of the challenge—that triggers one of the shorter notice-based limitations periods in section 21167, rather than its 180-day periods.

*Green Foothills, supra*, 48 Cal.4th 32 and *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500 (*Stockton Citizens*) both emphasized the “key” public policy that underlies the short limitations periods: the prompt resolution of public agency decisions that involve land use, which applies as long as there is public notice of the decision. “[T]he determinative question, for purposes of defining the state of limitations, is . . . whether the action complained of was disclosed in a public notice.” (*Green Foothills, supra*, 48 Cal.4th at p. 47.) “Where the agency files a notification . . . of an action it has taken, the public is thereby deemed alerted to the action” and must file “any lawsuit challenging the agency’s action . . . with particular speed.” (*Stockton Citizens, supra*, 48 Cal.4th at pp. 502-503; accord, *id.* at p. 488 [posting of notice alerts public that attack on action “must be mounted immediately”], *id.* at p. 501 [CEQA establishes

---

<sup>9</sup> The parties have not directed us to any authority identifying or positing a circumstance in which section 21167, subdivision (e)’s catchall provision might apply other than *Green Foothills*, nor have we found any.

and emphasizes *public notification* of agency's action as event triggering shortest applicable limitations periods for lawsuits alleging noncompliance with statute].) If an agency gives notice in the form of an effective NOD or NOE, it "has at a minimum acknowledged CEQA and attempted compliance" and the 180-day limitations periods do not apply, as those are limited to situations under which notice of an action is less likely to be received. (*Green Foothills, supra*, 48 Cal.4th at p. 51; accord, *Stockton Citizens, supra*, 48 Cal.4th at p. 505.)

It did not matter in *Green Foothills* that the court could not identify a specific authorization for the NOD involved, a finding that "a subsequent activity is within the scope of a program EIR" (*Green Foothills, supra*, 48 Cal.4th at p. 56) and thus did not require any new environmental documents (*ibid.*; Regs., § 15168, subd. (c)(2)). The court noted the general obligation to file an NOD after a project approval (even though this was *not* a project but a subsequent activity), and that it was "sufficient to observe that NOD's are frequently filed for approvals of subsequent activities." (*Green Foothills*, at p. 56.) It also found that the catchall provision (with its 30-day limitations period) applied to an NOD even if it did *not* involve the preparation of an environmental document. (*Green Foothills*, at p. 52.)<sup>10</sup>

---

<sup>10</sup> The court also described it as being analogous to an NOE on this basis. (*Green Foothills, supra*, 48 Cal.4th at p. 47.)

The substance of the deficiency alleged in a challenge to the agency decision underlying a facially valid notice does not determine the statute of limitations, because this would play havoc with the certainty that the shorter periods promote. (*Green Foothills, supra*, 48 Cal.4th at pp. 48, 51, 54.) The same is true of a claim that the notice is not legally valid because it is materially deficient; the merits of such a claim must be pursued *within* the notice-based limitations period. (*Stockton Citizens, supra*, 48 Cal.4th at p. 489.)

Thus, the claim of SCWUA that the NRA's NOD was unauthorized because "CEQA neither authorizes nor requires the filing of a[n] [NOD] for a finding that an action is not a 'project' under CEQA" cannot succeed because *Green Foothills* countenanced the use of an NOD even in the absence of any specific authorization for it and even though a project was not involved, and suggested that a notice of a decision made without environmental review could also be analogous to an NOE. In short, the fact that the NRA gave notice of its action precludes resort to the 180-day limitations period unless the notice was defective.

***B. The Notice Was Not Defective in any Material Part***

SCWUA, again focusing on an NOD rather than an NOE, contends the NRA's notice did not contain the information prescribed for an NOD filed in connection with a negative declaration or an EIR. (*Green Foothills, supra*, 48 Cal.4th at p. 52; Regs., §§ 15075, 15094.) It contends the title that

NRA gave to its notice is controlling, based on the fact that the statutes and regulations have different provisions for the two types of notices (including limitations periods).<sup>11</sup> Neither argument bears the weight of scrutiny.

It is not surprising that the NRA's notice is materially defective with respect to the requirements for an NOD, because those criteria are inapposite to the context in which NRA filed it. As a treatise (cited in the trial court's ruling on the original demurrer) notes, the effect of determining that an action is not a project within the meaning of CEQA "is the same as if it were subject to a[n] . . . exemption." (Manaster Practice Guide, *supra*, § 21.06[4], pp. 21-31 (rel. 56-3/2012).) Thus, the substance of the NRA notice should be measured against the criteria for an NOE. (Regs., § 15062.)

A notice that is void for material defects does not trigger the shorter limitations periods. (*Green Foothills, supra*, 48 Cal.4th at pp. 52-53.) *Stockton Citizens* held that an NOE need only describe the project and its location, set forth the action taken, and detail the reasons for claiming an exemption

---

<sup>11</sup> SCWUA also appears to contend defendants are estopped from arguing that the notice was anything other than an NOD because the compromise agreements are an "admission" that the execution of them was a project under CEQA absent the proposed legislation exempting it from CEQA. As we explain further in the next section of the Discussion, neither of the compromise agreements contain any express provision to this effect, and SCWUA does not supply any authority why its own particular interpretation of those agreements should prevent defendants from arguing to the contrary.

from CEQA. (*Stockton Citizens, supra*, 48 Cal.4th at pp. 489, 498, 513.) If an agency provides at least notice of the project, the agency's decision, and the basis for claiming an exemption without being materially misleading, this is sufficient form and content to "minimally compl[y] with CEQA," serving to alert the public and trigger the shorter limitations periods for any challenge to the validity of the decision underlying the notice. (*Id.* at pp. 489, 514-515.)

As we noted above, the NRA's notice included a description of the action (execution of compromise agreements establishing the process for determining whether and how to remove dams and restore habitats on the Klamath River), the affected geographic areas, its decision that the execution of these agreements was not a CEQA project, and the basis for its decision (the absence of any resulting commitment on the part of any affected agency to undertake any course of action pursuant to the agreements without complying with CEQA).<sup>12</sup>

Notably absent from the criteria deemed material in *Stockton Citizens* (or in Regs., § 15062) is any requirement that the document be *titled* a notice of exemption. That there are distinct types of notice does not require us to give conclusive effect to the title on the notice (any more than a motion's

---

<sup>12</sup> It is not entirely clear whether the NRA was applying *Stand Tall* and *McCloud Citizens*, or determining that no reasonable possibility of an effect on the environment existed such as to make the execution a project (Regs., § 15378, subd. (a)).

label binds a trial court rather than its substance (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 187, 193)) if it is not otherwise materially misleading within the meaning of *Stockton Citizens*. Here, nothing about the title considered in conjunction with the contents of the notice would have misled anyone into believing the execution of the agreements was in conjunction with either a negative declaration or an EIR.

SCWUA asserts "[c]ase law supports [its] contention that the label of the document filed is determinative of the appropriate statute of limitations." Its cases, however, are inapposite:

*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523 involved an NOD containing the wrong date of the approval of the project. Five days later, a second NOD was filed that explained parenthetically the error in the first notice and included a corrected approval date. Because the approval date must be included in an NOD, the first notice was invalid because it did not comply with every essential requirement, and because the second notice was not titled a "corrected notice," the plaintiff was entitled to rely on the date of its filing as the start of the limitations period. (*Id.* at pp. 529, 532.) Putting aside the question of whether either of these holdings is correct, the case does *not* involve the issue of whether the title of a notice controls its characterization. As best we can tell from the terse ruling and its reference to reasonable reliance, the case apparently turned on an estoppel to raise the limitations period

because the title of the second NOD inadequately identified that it was intended to relate back to the first NOD.

*International Longshoremen's & Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265 (*International Longshoremen's*) is the font for the premise that an invalid notice does not trigger the shorter limitations periods in section 21167. (*Green Foothills, supra*, 48 Cal.4th at pp. 52-53 [citing and applying *International Longshoremen's*].) The "NOD" at issue (purporting to be in connection with a negative declaration) contained only a project description. The most notable of its omissions was the true nature of the agency decision (a conclusion that its action was categorically exempt) or the basis for that conclusion. (*International Longshoremen's, supra*, 116 Cal.App.3d at pp. 269-270, 272-273.) *International Longshoremen's* concluded the mislabeled "NOD" was materially defective with respect to the requirements for an NOE and thus would not apply that statute of limitations. It also declined to apply the statute of limitations for an NOD because the agency in fact did not make the environmental review for a negative declaration that its notice stated, and would not apply the catchall limitations period because the agency action was in fact an NOE.<sup>13</sup> (*International Longshoremen's*, at p. 274.)

---

<sup>13</sup> While *Stockton Citizens* cites *International Longshoremen's, supra*, 116 Cal.App.3d at pages 272 to 273 for the premise that an NOE "defective in form and substance" is void (*Stockton Citizens, supra*, 48 Cal.4th at p. 513), it does not expressly consider this latter holding that is inconsistent with the

Although SCWUA characterizes this holding as "labels matter," that is flatly contrary to the facts of the case. The *label* was an NOD, and *International Longshoremen's* held the agency to the *substance* of its action, not the label on the notice.

Since the title of the NRA's notice did not lead to any material misrepresentation, and the substance of the notice substantially complied with the standards for an NOE (whether or not such a notice is specifically authorized for a no-project determination), the notice was effective to trigger the limitation period for an NOE (§ 21167, subd. (d)), or might come within the catchall provision even though an NOE is involved (*id.*, subd. (e)), either of which had long expired. The present action consequently is untimely.

## **II. Lack of Legislation Does Not Matter**

### ***A. No Change in Nature of Action at Issue***

SCWUA asserts that the NRA notice could describe the execution of the compromise agreements as not being subject to CEQA *only* "because of anticipated imminent legislative action." Therefore, when the proposed legislation did not *in fact* come to pass, this was "tantamount" to filing a notice that a project was exempt and thereafter seeking to carry out a *nonexempt* project. As a result, the limitations period for a challenge to this "new" project did not begin to run until the point it was no longer "feasible" to enact the legislation

---

central approach of *Stockton Citizens* to the limitations period for notices valid on their face.

proposed in the agreements.<sup>14</sup> (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 938-939 [where actual project is substantially different from project description in environmental document, the limitations period recommences when party challenging it knows or should have known of a deviation]; see *City of Chula Vista v. County of San Diego* (1994) 23 Cal.App.4th 1713, 1720 [same].) Where SCWUA goes awry is its legal conclusion that the execution of the compromise agreements was subject to CEQA in the absence of legislation.

The compromise agreements themselves do not contain any recitation that the proposed CEQA legislation was essential as a condition precedent. In the settlement agreement, beyond the general recitation that "legislation is necessary to provide certain authorizations and appropriations to carry out this Settlement as well as the KBRA," only enactment of the *federal* legislation is expressly tied to the vitality of the settlement agreement; approval of the settlement agreement is not conditioned in any respect on the enactment of the CEQA legislation. Similarly, the general recitation in the KBRA described the enactment of legislation as necessary for the

---

<sup>14</sup> The amended petition did not allege any facts in support of its selection of July 31, 2010, as the date on which it became infeasible to introduce legislation. Although we do not need to decide the point, our observation over the years of the legislative process indicates that introduction of legislation remains "feasible" up to the final night of either the regular or any extraordinary session.

"implementation of certain obligations *under* this Agreement" (italics added), not the efficacy of the restoration agreement *itself*.

Similarly, the NRA did *not* premise its conclusion in the notice that CEQA did not apply on any anticipated litigation. Rather, after preliminary review, it made the "jurisdictional" finding (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380 (*Muzzy Ranch*)) that the execution of the agreements was not subject to CEQA because neither the NRA (nor any other public agency) was committed to any particular course of action as a result of the execution of the compromise agreements.

The amended petition did not allege *any* facts that the mere execution of the compromise agreements came within CEQA because as a practical matter it represented a commitment to a course of action. Indeed, as a matter of common sense (a standard we are to apply to all stages of CEQA review (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175)), we cannot discern any. On this question of law based on the record on appeal, we find SCWUA has thus failed to establish that the executions of the compromise agreements came within the meaning of CEQA. (*Muzzy Ranch, supra*, 41 Cal.4th at pp. 381-382; *McCloud Citizens, supra*, 147 Cal.App.4th at pp. 191-194; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1376-1377 (*San Lorenzo*); *Citizens to*

*Enforce CEQA v. City of Rohnert Park* (2005) 131 Cal.App.4th 1594, 1597, 1600-1601; *Stand Tall, supra*, 235 Cal.App.3d at pp. 781-782.)<sup>15</sup> As a result, the failure to enact legislation that would serve only to *confirm* this result did not change the nature of the action in any respect, and the limitations period thus did not run anew from whatever point in the legislative calendar it became infeasible to introduce legislation.

***B. This Fact Did Not Give Rise to an Estoppel***

Other than cite the criteria for establishing estoppel (without any attempt to apply them to the allegations of their amended petition), SCWUA simply reasserts that it was entitled to rely on the representation that the parties would be seeking legislation.<sup>16</sup> As a result, it was reasonable for them to have

---

<sup>15</sup> In the alternative, even if the execution of the compromise agreements came within CEQA, it would appear the record on appeal would also have supported invocation of the "common sense" or "feasibility study" exemptions from CEQA based on the finding in the notice, because it is also the equivalent of a finding of either a certainty that there is no possibility of a significant effect on the environment (along with a provision for any future effects to require CEQA analysis), or a finding that the project involved feasibility studies of *possible* future actions that have not yet been approved. (*Muzzy Ranch, supra*, 41 Cal.4th at pp. 380, 386, 388; *San Lorenzo, supra*, 139 Cal.App.4th at p. 1382; see *McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1149; Regs., §§ 15061, subd. (b)(2), (3), 15262.) Again, SCWUA failed to allege any facts to the contrary, so the absence of legislation confirming this exempt status did not change the nature of the executions.

<sup>16</sup> We may disregard the speculation of SCWUA that the proposed legislation was included in the compromise agreements for the purpose of discouraging any litigation because it is ultimately irrelevant to the issue: "An estoppel may arise although there was no designed fraud on the part of the person sought to be

concluded that a CEQA action was pointless until they “realized” that the legislation was not going to be forthcoming; “[h]ad [defendants] not committed to securing legislation, or not described the legislation as a necess[ity for] implementation, [SCWUA] would have challenged [defendants] within 30 days of its purported Notice of Determination.”

The gist of an estoppel is a misrepresentation of fact that reasonably induced another (who was justifiably ignorant of the misrepresentation) to take a course of action that led to the other’s detriment. (*Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1227; 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527-528.) To subject a government entity to an estoppel, a party must additionally demonstrate that the injury to the party outweighs any injury to the public interest from an estoppel. (*Brown, supra*, 198 Cal.App.4th at p. 1227.) Where the facts are undisputed (as on a demurrer), the existence of an estoppel is a question of law. (*Bertorelli v. City of Tulare* (1986) 180 Cal.App.3d 432, 440.) SCWUA has failed to allege either a reasonable reliance or an injury outweighing the public interest.

1. Reasonable reliance.

The compromise agreements expressly asserted that any promises contained in them were not for the benefit of any third party. SCWUA does not explain why it was reasonable to tailor

---

estopped.” (*Benner v. Industrial Acc. Com.* (1945) 26 Cal.2d 346, 349.)

its own conduct based on this covenant between other parties that might or might not have led to legislation.

Even if it was reasonable for a third party to take a course of action based on the covenant of others, it was not reasonable in February and March 2010 to refrain from filing an action based on the mere *expectancy* that legislation *might* be enacted to declare the execution of the compromise agreements exempt from CEQA review at some point well after the expiration of the statute of limitations. Up through 2010, the Legislature had fallen into the habit of enacting budgets well after the end of its regular session.<sup>17</sup> Moreover, while the Legislature has in one instance exempted a proposed project from CEQA, which we note the Governor did not approve until *late October* 2009 (see Gov. Code, § 65701 [exempting proposed City of Industry stadium from further CEQA review]; see also Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 30, § 1 [findings in support]), it has subsequently acted with greater restraint and provided only for streamlined judicial review of CEQA determinations for "leadership projects" (see Pub. Resources Code, § 21178 et seq.) and a stadium project in downtown Los Angeles (see *id.*, § 21168.6.5; see also Stats. 2011, ch. 353, § 1 [findings in support]), both of which the Governor approved in *late September* 2011. Other attempts to insulate actions from CEQA review have

---

<sup>17</sup> This led to the enactment in November 2010 of an amendment to our state charter at the general election to require only a simple majority vote to approve a budget. (Cal. Const, art. IV, § 12, subd. (e), par. (1).)

not been successful, such as Assembly Bill No. 1581 in the 2009-2010 legislative session that (in its August 2010 version) would have exempted the alteration of vacant large retail structures (so-called "big box" projects) from CEQA review<sup>18</sup> and the Governor's abandonment of his intention to seek to eliminate injunctive relief in CEQA review of the California bullet train project. Given the minimal administrative record that would have been necessary at this stage of the CEQA process and the expedited procedures applicable to CEQA litigation, it would have been just as reasonable for SCWUA to go forward with its challenge in a timely manner if it truly believed the NRA's conclusion was erroneous, because the probability of the action being legislatively mooted was negligible.

2. Private vs. public detriment.

As we noted above, there is a strong public interest in giving certainty to the land-use decisions of public agencies through the prompt resolution of challenges, to avoid disruption and financial prejudice. To permit SCWUA to avoid the limitations period would thwart this public interest on the basis of a reliance we have found less than reasonable. As any action under the compromise agreements will ultimately be subject to CEQA review, SCWUA has not demonstrated any injury that would outweigh the need for certainty with which the Legislature was concerned. SCWUA therefore cannot be allowed to

---

<sup>18</sup> Assembly Bill No. 1581 died in the Senate's inactive bill file in November 2010.

impose an estoppel against defendants' assertion of the limitations period as a defense.

### **III. Designation of Lead Agency**

SCWUA asserts its challenge to the designation of the DFG as the lead agency is ripe and justiciable *before* the DFG completes the draft EIR underway because this designation is final and not subject to any administrative review. SCWUA argues the facts on which a court must decide the issue are "sufficiently congealed," and it would work a hardship on its members to defer judicial review because they are paying a surcharge on their electric bills to fund the draft EIR process that would be wasted if the EIR were invalidated on the basis of the designation of an improper lead agency.

"The ripeness requirement[] [is] a branch of the doctrine of justiciability, [which] prevents courts from issuing purely advisory opinions." (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170.) It requires a set of facts that are no longer speculative, and the consideration of any hardship that would result in withholding judicial review of them. (*Id.* at p. 171.)

We initially reject the attempt of SCWUA to analogize to cases in which a litigant asserted an administrative agency did not have jurisdiction over the litigant. First, SCWUA does not explain how it can contest the DFR's "jurisdiction" to proceed in a matter in which it is not yet directly involved. More importantly, calling the DFG's authority to act as a lead agency

*jurisdictional* does not make it so. Upon completion of an EIR, a court will not invalidate an EIR for an improper lead agency designation absent *a showing of resulting prejudice* in the environmental review process. (*Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 906-907, 920.) It is therefore not a matter of an agency's "jurisdiction" to act, but an agency's *competency* to perform the lead role with which a court is concerned.

Moreover, the DFG's status as a lead agency is *not* final for all purposes. If there is another agency that believes it has a substantial claim to the designation of lead agency in the preparation of the draft EIR (and we note SCWUA did not allege the existence of any such agency), it could negotiate the issue with the DFG, or request an administrative review of the proper designation. (Regs., § 15053; see *City of Sacramento v. State Water Resources Control Bd.* (1992) 2 Cal.App.4th 960, 971.) In addition, if the DFG's performance as lead agency proves deficient, it becomes the responsibility of any other agency involved in preparation of the draft EIR to step into the role of lead agency in order to complete environmental review adequately before granting any necessary approvals within its authority. (Regs., § 15052; see *City of Sacramento, supra*, 2 Cal.App.4th at p. 970.)

Thus, a challenge to the DFG as lead agency is premature: some other agency might seek that status after notice of the draft EIR process, some other agency might step in if the DFG's

performance *is* deficient, and it is possible that the DFG's final product will not have any flaws as a result of the DFG's lead role in preparing it. We do not find that higher electric bills present such a risk of extreme hardship that we should wade into the issue this far upstream. We therefore find the trial court properly granted the demurrer as to this cause of action.

### **DISPOSITION**

The judgment is affirmed.

\_\_\_\_\_ BUTZ \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ HULL \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.