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Attorneys for Respondents NORTH YUBA WATER DISTRICT, NORTH YUBA WATER DISTRICT BOARD OF DIRECTORS, DOUG NEILSON, FRED MITCHELL, GARY HAWTHORNE, GRETCHEN FLOHR and ERIC HANSARD in their official capacities

EXEMPT FROM FILING FEES PURSUANT TO GOV. CODE, § 6103

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SUTTER

SOUTH FEATHER WATER AND POWER AGENCY, Petitioner, v. NORTH YUBA WATER DISTRICT, NORTH YUBA WATER DISTRICT BOARD OF DIRECTORS, DOUG NEILSON, FRED MITCHELL, GARY HAWTHORNE, GRETCHEN FLOHR and ERIC HANSARD in their official capacities; and DOES 1 to 20, inclusive, Respondents.	CASE NO. CVCS21-0002073 Filed Under Cal. Environmental Quality Act (CEQA) NORTH YUBA WATER DISTRICT'S MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING THE DEMURRER Hearing Date: January 3, 2022 Time: 9:00 a.m. Assigned to Hon. Perry Parker Date Action Filed: April 2, 2021

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I. INTRODUCTION

Respondents North Yuba Water District, et al. (District) hereby demur to South Feather Water and Power Agency's (Agency) Verified First Amended Petition for Writ of Mandate and Complaint for Declaratory Relief (Amended Petition [attached to District's Request for Judicial Notice (RJN) as Exhibit A]). The District demurs to the Amended Petition because Agency failed to exhaust its administrative remedies, which is a jurisdictional prerequisite to bringing an action under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), and because it is barred by CEQA's statute of limitations. Furthermore, the District demurs to the Amended Petition because there is no ongoing controversy regarding the District's obligation to provide CEQA notices to Agency.

Agency may not challenge District's approval of the Oroleve Pipe Line project (Project) because Agency did not object to the Project orally or in writing at any point prior to District's approval of the Project on February 27, 2020. Further, Agency's claims were subject to a 180-day statute of limitations[1] that began running on February 27, 2020, when District approved the Project and determined that it was exempt from CEQA. Despite having full knowledge of District's intent to approve the Project and find it exempt from CEQA before District acted on February 27, 2020, Agency waited well over a year to file its CEQA challenge, and months after the limitations period expired. Finally, Agency cannot state a claim for declaratory relief because there is no ongoing controversy regarding District's obligation to provide requested CEQA notices. Agency's allegations rest solely on District's past delay in providing two CEQA notices, and District never disputed its obligation to provide Agency with CEQA notices in the future. For these reasons, Agency's complaint for declaratory relief also fails. The District requests an order sustaining the demurrer without leave to amend and dismissing the Amended Petition and Complaint in its entirety.

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[1] As extended by Judicial Council action in response to the Covid-19 pandemic; see Section II, *infra*.

II. BACKGROUND

District is a public agency organized as a water district under Division 12 of the California Water Code. (RJN Exh. A [Amended Petition], ¶ 17.) Agency is a public agency organized as an irrigation district under Division 11 of the California Water Code. (*Id.*, ¶ 16.) District owns and operates a water conveyance facility known as the Forbestown Ditch. (*Id.*, ¶ 34.) District also owns and operates a water conveyance facility known as the Oroleve Ditch. (See *Id.*, ¶ 40.)

On October 29, 2019, Agency's general manager sent a letter to District requesting CEQA notifications related to the "Forbestown Ditch Piping Project." (Amended Petition, ¶ 54.)

District posted an agenda for its February 27, 2020 Board meeting that included Action Item H: "Resolution 20-742: CEQA exemption and approval for solicitation of bids for the Oroleve Ditch Pipe line project." (RJN Exh. B at p. 2.) Included with the Board packet for the agenda was a CEQA Notice of Exemption (NOE) for Project. (RJN Exh. C at pp. 50-60.)

On February 25, 2020 (two days before District's Board meeting), Agency held a public meeting at which a member of the public, Charles Sharp, addressed Agency's General Manager (who verified Agency's original and Amended Petitions) and Board of Directors and asked if they had "ever heard of the Oroleve Ditch Pipeline Project," stating that he had "found the [District] agenda . . . [for] this coming Thursday [February 27, 2020], for a CEQA exemption and approval for solicitation of bids for the Oroleve Ditch Pipeline Project." (RJN Exhs. D at p. 10, E at 1:6-19.) Agency's counsel (who is also counsel of record on Agency's Amended Petition) was present at this meeting. (RJN Exh. D at p. 1.) Agency representatives acknowledged they were aware of District's agenda and intent to approve the Project. (RJN Exhs. D at p. 10, E at 1:6-19.)

At its February 27, 2020 meeting, consistent with the proposed action on its agenda, District approved the Project, finding it exempt from CEQA. (RJN Exhs. B at p. 2, C at pp. 50-60.) At this meeting, District representatives described the Project and explained why it was exempt from CEQA. (RJN Exhs. F at pp. 4-5, G at pp. 2-9.)

Agency did not provide written or oral comment on the Project or District's intent to find it exempt from CEQA at any time prior to Project approval. (See RJN Exh. A [Amended Petition], ¶¶ 20-24; see also RJN Exh. G.)

Moreover, on April 17, 2020, Agency wrote District requesting an opportunity to bid on "the pipe project for portions of the Oroleve ditch." (RJN Exh. H.)

On April 28, 2020, Agency held a regular meeting during which its General Manager discussed Agency's April 17, 2020, request to District to bid on the Project. (RJN Exhs. I at p. 3, J at 1:17-19.)

On December 23, 2020, District completed construction of the Project. (RJN Exh. K at p. 1.)

III. PROCEDURAL HISTORY

On April 2, 2021, Agency filed its initial Verified Petition in Butte County Superior Court alleging violations of CEQA with respect to District's approval of the Oroleve Ditch Pipe Line Project, and also with respect to District's failure to provide Agency with its CEQA notice of exemption for the Project. On May 10, 2021, District notified Agency of its intent to demur to the Verified Petition because (a) the lawsuit was barred by the CEQA statute of limitations, (b) Agency failed to exhaust its administrative remedies, and (c) there is no remedy for the failure to provide a CEQA notice. (Taber Decl., Exh. 1.) On May 28, 2021, District further communicated the bases for an intended demurrer. (Taber Decl., Exh. 3.) Further communications regarding the demurrer occurred on September 10, 2021 and in subsequent correspondence in September 2021. (See Taber Decl., Exhs. 4, 5.)

On June 24, 2021, District filed a motion to transfer the case to a neutral venue under Code of Civil Procedure section 394, subdivision (a). That motion was resolved in September 2021, after Agency unsuccessfully sought to avoid transfer to a neutral venue by moving to consolidate its case with another (*Charles Sharp v. North Yuba Water District*) pending in Yuba County Superior Court. (See Butte County Superior Court Register of Actions, Case No. 21CV00815 (Butte ROA).) District opposed Agency's motion to consolidate, and the motion was denied.

On August 13, 2021, District filed a demurrer to Agency's Verified Petition in Butte County Superior Court. (Butte ROA.)

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On August 16, 2021, Agency filed its Amended Petition and Complaint, adding the complaint for declaratory relief. (RJN Exh. A; see also Butte ROA.) District subsequently withdrew its demurrer. (Butte ROA.)

On September 10, 2021, counsel for District notified counsel for Agency of District's intent to file a demurrer to the Amended Petition and Complaint based on Agency's failure to exhaust administrative remedies, because the Verified Petition was filed after the expiration of the statute of limitations, and because there is no case and controversy between the parties because District does not dispute that it is required to provide CEQA notices to Agency. (Taber Decl., Exh. 4.)

On September 23, 2021, Butte County Superior Court granted District's motion to transfer venue and ordered transfer to this Court. (*Ibid*.) The transfer was completed on November 24, 2021. (Sutter County Superior Court Register of Actions, Case No. CVCS21-0002073.)

IV. STANDARD OF REVIEW

"When any ground for objection to a complaint . . . appears on the face thereof, or from any matter of which the court is required to or may take judicial notice, the objection on that ground may be taken by a demurrer to the pleading." (Code Civ. Proc., § 430.30, subd. (a).) In reviewing the sufficiency of a complaint subject to a demurrer, courts treat the demurrer as admitting all material facts properly pleaded – but not contentions, deductions, or conclusions of fact or law – and may consider matters that may be judicially noticed. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (*Blank*); *Pich v. Lightbourne* (2013) 221 Cal.App.4th 480, 489-490 (*Pich*), citing *Serrano v. Priest* (1971) 5 Cal.3d 584, 591.) Moreover, courts "will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed." (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 (*Del E. Webb*), citing *Alphonzo E. Bell Corp. v. Bell View Oil Syndicate* (1941) 46 Cal.App.2d 684, and *Chavez v. Times-Mirror Co.* (1921) 185 Cal. 20.) The court may disregard any allegations that are inconsistent with exhibits to the petition or judicially noticed matters. (*Pich*, *supra*, at p. 490, citing *Del E. Webb*, *supra*, at p. 604.) A demurrer must be sustained without leave to amend if there is no reasonable

possibility that the complaint can be cured by amendment. (*Blank, supra*, at p. 318; *McDonald v. Superior Court* (1986) 180 Cal.App.3d 297, 303-304.)

V. ARGUMENT

A. PETITIONER FAILED TO EXHAUST ADMINISTRATIVE REMEDIES, AND THERE IS NO EXCUSE FOR ITS FAILURE TO DO SO; THIS COURT LACKS JURISDICTION OVER THE AMENDED PETITION

CEQA requires all potential petitioners present the specific alleged grounds for noncompliance orally or in writing during the public comment period or before the close of the public hearing on a project. (Pub. Resources Code, § 21177, subds. (a)-(b).) Petitioners bear the burden of proving that administrative remedies were exhausted. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) Exhaustion of administrative remedies is a "jurisdictional prerequisite" to a CEQA lawsuit and "not a matter of judicial discretion." (*Schmid v. City and County of San Francisco* (2021) 60 Cal.App.5th 470, 490 (*Schmid*), citing *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 589.)

Agency's Amended Petition alleges: "To the extent [the District] undertook any administrative process allowing the Agency to present the issues raised in this [Amended Petition] prior to approving and carrying out the Segmented Project, Agency did so," and "because [District] failed to comply with CEQA's procedural mandates by providing advance notice of its alleged exemption determination, there was no opportunity to raise objections and thus no obligation to exhaust administrative remedies." (RJN Exh. A [Amended Petition], ¶ 20.) Agency further alleges it requested CEQA notices for "the Project" on October 29, 2019, and only failed to participate in the District's meeting to approve the NOE because it believed the piping of the Oroleve Ditch was included in the Forbestown Ditch Project. (*Id.*, ¶¶ 21-22.) The Amended Petition claims that exhaustion of the available administrative remedy would have been futile because numerous commenters challenged the NOE during the February 27, 2020 board meeting during which it was adopted, and during which the "precise grounds for violation of CEQA were presented," and District still adopted the Project. (*Id.*, ¶ 23.) Each of these allegations, however, are inconsistent with judicially noticeable facts or simply irrelevant, and the

Court may therefore disregard them. For purposes of this demurrer, the only relevant facts are the following:

On February 27, 2020, the District Board held a properly noticed public meeting during which it determined that Project was exempt from CEQA and approved the Project. (RJN Exhs. C at pp. 50-60, E at pp. 4-5.)

The corresponding Board agenda included an item described as "CEQA exemption and solicitation of bids for the Oroleve Ditch Pipe line project." (RJN Exh. B at p. 2, item H.)

At no time prior to District's action to approve the Project did Agency object, orally or in writing, to District's determination that the Project was exempt from CEQA.

Agency attempts to plead around its decision to ignore the proposed Project approval[2], alleging that "Given [the District's] lack of notice of its decision to piecemeal and segment the Project and to proceed with the Segmented Project, Agency did not *more fully participate* in [the District's] meeting to consider a resolution adopting the Segmented Project. (RJN Exh. A [Amended Petition], ¶ 22, emphasis added.) This phrasing implies that Agency participated in, at minimum, a partial capacity, in District's February 27, 2020, board meeting, which is inaccurate. (See RJN Exhs. F, G.)

In the next paragraph, Agency asserts that District "has demonstrated that no amount of public participation or comment would have affected or swayed its decision to proceed with piecemealing the Project by proceeding with the Segmented Project," noting that commenters "commented that the action to piecemeal the Project violated CEQA," and that "[t]he precise grounds for violation of CEQA were presented . . . when [District] considered the Segmented Project." (RJN Exh. A [Amended Petition], ¶ 23.) This verbiage implies that District received comments asserting that the NOE was invalid due to piecemealing. This is contradicted by the transcript of the portion of the District Board meeting during which the NOE was considered, which establishes that segmentation was not alleged by anyone present. (See RJN Exh G.)

[2] Agency expressed no concern about the Project before filing its lawsuit. Notably, the lawsuit was filed only after District requested opportunity to inspect financial records maintained by Agency under the parties' facility operating agreement. (See *North Yuba Water District v. South Feather Water and Power Agency*, Sutter Co. Superior Court, Case No. CS21-0001857.)

Agency staff, directors, and counsel were aware of and discussed the "Oroleve piping project" and associated NOE during Agency's February 25, 2020 board meeting, two days prior to District's adoption of a resolution approving the Project and finding it exempt from CEQA. (RJN Exhs. D at p. 10, E at 1:6-18.) Specifically, Charles Sharp addressed the Agency Board and General Manager, stating the following:

> Well, I found the North Yuba Water District agenda next Thursday, this coming Thursday, for a CEQA exemption and approval for solicitation of bids for the Oroleve Ditch Pipeline Project. Anyone know anything about that?

(RJN Exh. E at 1:7-9.)

An unidentified Agency representative responded, "I do, as a result of a PRA inquiry this morning," clarifying that he was aware that the cited information was included in the District's agenda. (RJN Ex. D at 1:10-14.) Nonetheless, despite Agency's alleged strong interest in any project on the Forbestown Ditch or Oroleve Ditch, Agency did not contact District about the proposed Project, attend the District Board's public hearing to request further details regarding the Project or object to the Project orally or in writing at any point prior to the close of the District Board's public hearing on the Project, nor does it allege that it did. (RJN Exh. A [Amended Petition], ¶¶ 12-13.)

There are limited exceptions to the exhaustion requirement if (a) the CEQA lead agency does not hold a public hearing or other opportunity for members of the public to provide oral or written objections to a project, or (b) the agency failed to provide notice of its intended CEQA decision. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 290.) Neither exception applies here. The California Supreme Court made clear that the critical issue is whether the agency held a public hearing prior to its exemption determination during which prospective petitioners have an opportunity to object. (*Ibid*.) Sufficient constructive notice is provided when a project is approved during a public meeting properly noticed under the Brown Act. (*Bridges v. Mt. San Jacinto Community College Dist.* (2017) 14 Cal.App.5th 104, 116-117 (*Bridges*) [community residents failed to exhaust administrative remedies under Pub. Resources Code, § 21177, subds. (a) & (b), because they raised no environmental objections to land purchase agreement at regularly scheduled public meeting of college's board of trustees].)

This Court must presume District complied with the Brown Act because Agency has not provided evidence to the contrary. (Evid. Code, § 664; *Bridges*, *supra*, 14 Cal.App.5th at pp. 117-118, citing *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 40 Cal.App.4th 911, 925 [public agency is presumed to have "regularly performed" its official duties absent contrary evidence].) And even if Agency did not have actual notice of the Project (as judicially noticeable documents plainly demonstrate it did), it had constructive notice because District properly approved the Project and made its CEQA determination following a public hearing during a lawfully noticed general meeting. (RJN Exhs. B at p. 2, C at pp. 50-60, F at pp. 4-5; *Bridges*, *supra*, 14 Cal.App.5th at pp. 116-117.)

Even if Agency's allegations that it misunderstood the nature of the "Oroleve Ditch Pipeline Project" are credible (which they are not), Agency is not excused from the requirement to exhaust administrative remedies because District took the challenged action at a properly noticed public meeting. Thus, the Amended Petition must be dismissed. (Pub. Resources Code, § 21177; *Schmid, supra,* 60 Cal.App.5th at p. 490.)

B. THE AMENDED PETITION MUST BE DISMISSED BECAUSE PETITIONER FILED ITS ACTION AFTER THE STATUTE OF LIMITATIONS EXPIRED

Agency's failure to exhaust its administrative remedies is fatal to its attempt at a CEQA challenge, but even if Agency's failure is excused, its action also is barred by the statute of limitations. The Legislature intentionally created an extremely short statute of limitations for CEQA actions. (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 50.) This is because "the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted." (*Stockton Citizens for Responsible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500 (*Stockton Citizens*), internal quotes omitted.) The Legislature recognized the need for prompt resolution of CEQA claims "so as to prevent it from degenerating into a guerilla war of attrition by which project opponents wear out project proponents." (*Ibid*., citing *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12.)

Consistent with these policies, a party challenging an agency's determination that a project is exempt from CEQA must file its action within 35 days of the date the agency files an

NOE with the relevant county or the State Clearinghouse. (Pub. Resources Code, § 21167, subd. (d).) If no NOE is filed, or there are errors in the NOE filing, the statute of limitations for any challenge is 180 days from the date the project is approved. (*Ibid.*; *Stockton Citizens*, *supra*, 48 Cal.4th at p. 502.) "Section 21167 does not establish any special notice requirements for the commencement of the 180-day limitations period from project approval. [A]ll that is required is that the public agency make a formal decision to 'carry out or approve the project.' [Citation.]" (*Save Lafayette Trees v. East Bay Regional Park Dist.* (2021) 66 Cal.App.5th 21, 40 (*Save Lafayette Trees*), some internal quotes omitted.)

Agency alleges that a 35-day limitations period to file its petition began on March 9, 2021, which Agency alleges is the date the State Clearinghouse posted the NOE on its website. (RJN Exh. A [Amended Petition], ¶ 30.) These allegations are legally incorrect and irrelevant because District approved the Project and made its CEQA determination on February 27, 2020, during a properly noticed meeting of the District's Board of Directors, thus giving constructive notice of the Project and starting the 180-day statute of limitations for any CEQA challenge. (Pub. Resources Code, § 21167, subd. (d); RJN Exh. A [Amended Petition] at Exh. L [email dated Aug. 3, 2020]; RJN Exh. B; *Save Lafayette Trees, supra,* 66 Cal.App.5th at pp. 40-42.) But for subsequent action by the Judicial Council of California (Judicial Council), the 180-day statute of limitations would have expired on August 25, 2020.

On April 6, 2020, however, following the Governor's March 4, 2020 declaration of a state of emergency due to the Covid-19 pandemic, the Judicial Council adopted a court rule (Emergency Rule 9) tolling statutes of limitations for all civil causes of action until 90 days after the Governor declares that the state of emergency is lifted. (RJN Exh. L at p. 3.) On May 29, 2020, the Judicial Council amended Emergency Rule 9, effective immediately, providing that statutes of limitations for causes of action that are 180 days or less (including all claims brought under CEQA), were tolled from April 6, 2020, until August 3, 2020, a total of 119 days.[3] (Cal.

[3] "Notwithstanding any other law, the statutes of limitations and repose for civil causes of action that exceed 180 days are tolled from April 6, 2020, until August 3, 2020." (Cal. Rules of Court, appen. I, emergency rule 9, subd. (b).)

Rules of Court, appen. I, emergency rule 9; RJN Exh. L at pp. 11, 14.) As a result of the tolling provided by Emergency Rule 9, as amended, Agency's deadline to file its CEQA challenge was extended to no later than December 22, 2020. Agency filed its initial Verified Petition on April 2, 2021, more than 14 months after District approved the Project and, critically, 101 days after the Covid-19 pandemic-extended statutory deadline of December 22, 2020.

Agency's allegations that it misunderstood the Project approval before February 2021 (RJN Exh. A [Amended Petition], ¶ 74) are inconsistent with judicially noticeable facts showing Agency was aware at least as early as February 25, 2020 that District intended to approve the Project and find it exempt from CEQA on February 27, 2020. (RJN Exhs. D, E; see also Section I, *supra*.) Agency's verified allegations are particularly incredible in light of the dialogue at its February 25, 2020 Board meeting and its subsequent request in April 2020 to bid on a contract to construct the approved Project. (RJN Exh. H, proposing to construct the "pipe project for portions of the Oroleve ditch" and citing Agency's "100 years' experience in ditch . . . piping. . . .") Agency's General Manager, who authored Agency's April 2020 letter to the District and who verified both Petitions, further illustrates his significant knowledge of the Project in Agency's April 28, 2020 board meeting:

> [District was] going out to bid for piping portions of the Oroleve Ditch. So the Oroleve Ditch, if you remember, you've heard about it in the past, which used to be part of the South Feather Project, is a natural runoff and then feeds into the Upper Forbestown Ditch and that water travels on down. There's a portion of that ditch that is in need of repair, from what I understand. So it's going out to bid. So what I did is I submitted a letter to [District] requesting consideration for [Agency] to have the opportunity to bid on that project and perform the work. And the reason for that is twofold. One, as a public agency and a not-for-profit, here's an opportunity to help [District] with potential costs, right? Because outside contractors and bidders will obviously have a profit margin, mobilization, those types of things. For us, we're familiar with the ditch, we know the spots, we know where the problem spots are, we know what needs to be done to perform work, and do it correctly, again, without a profit margin necessarily tied to it. And it would also help us, you know, particularly during times like this, kind of as a job shop, be able to offset some of our labor and overhead costs, etc., on as needed through the process. So I felt it was a really good opportunity to start that type of concept.

(RJN Exh. J at 1:13-2:4.)

Agency omits or ignores the significance of these facts in its Amended Petition, alleging that the statute of limitations was triggered by the alleged March 9, 2021 posting of the NOE on

the State Clearinghouse website. (Amended Petition, ¶ 76.) This position is contrary to both statute and case law. As discussed above, the statute of limitations for a CEQA challenge to a local agency action begins to run on the date the project is approved. (See Pub. Resources Code, § 21167, subd. (d).) Case law provides that the statute for limitations in CEQA actions is not restarted by subsequent agency actions that, absent the first action, would trigger the period set by section 21167 of the Public Resources Code. (*Van de Kamps Coalition v. Bd. of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036, 1045 ["The limitations period starts running on the date the project is approved by the public agency and is not retriggered" by subsequent public agency action toward implementing the project].)

District lawfully approved the Project on February 27, 2020, after providing public notice of its intent to do so, including its determination that the Project was exempt from CEQA. Agency was required to bring any CEQA challenge within 180 days of that posting, not including the additional 119 days afforded under Emergency Rule 9, and no later than December 22, 2020. District is not responsible for Agency's alleged misunderstanding of the scope of the Project, particularly considering Agency's proven knowledge of technical aspects of the Project at least seven months before the statute of limitations expired.

Therefore, the Amended Petition also must be dismissed because Agency did not file it until April 2, 2021, 101 days after the applicable statute of limitations expired. (Pub. Resources Code, § 21167, subd. (d); see *Stockton Citizens*, *supra*, 48 Cal.4th at p. 500.)

C. THERE IS NO REMEDY FOR AN AGENCY'S FAILURE TO PROVIDE A REQUESTED CEQA NOTICE, AND AGENCY'S FAILURE TO FILE WITHIN THE STATUTE OF LIMITATIONS IS NOT EXCUSED BY DISTRICT'S ALLEGED INACTION IN THIS REGARD

Agency's First Cause of Action alleges that District failed to provide notice of its actions with respect to the Project as required by section 21092.2 of the Public Resources Code (Section 21092.2). (Amended Petition, ¶¶ 93-96.) Significantly, Agency's request was for notices related to the "Forbestown Ditch Pipeline Project," not the Oroleve Pipe Line Project that is the subject of the Amended Petition. (RJN Exh. A [Amended Petition] at Exh. J [Oct. 29, 2019 Agency-District Letter].) Regardless, there is no remedy under CEQA or otherwise for violation of

Section 21092.2. (See Pub. Resources Code, § 21092.2, subd. (b).) In similar circumstances, a court recognized that "[t]he [defendant] violated [S]ection 21167, subdivision (f) by failing to [provide notice]. But . . . CEQA contains no remedy for that violation, and it is not properly our role to create one where the Legislature has not." (*Organizacion Comunidad de Alviso v. City of San Diego* (2021) 60 Cal.App.5th 783, 792 (*OCA*).) Thus, the court upheld the trial court's decision sustaining respondent lead agency's demurrer without leave to amend on statute of limitations grounds. Similarly, this Court may not create a remedy for District's alleged violation of Section 21092.2. Thus, Agency's First Cause of Action is subject to demurrer on these additional grounds.

Moreover, as discussed in Section I, *supra*, Agency had actual and constructive notice of Project approval and CEQA determination, including the NOE. Agency had constructive notice of District's intent to find the Project exempt from CEQA in February 2020 because the exemption was identified on the District's agenda for the February 27, 2020 meeting, and the agenda and NOE were available for review on the District's website.[4] The NOE was included in the Board packet posted on the District's website for the February 27, 2020 meeting. (RJN Exh. C at pp. 50-60.) Also as discussed in Section I, *supra*, contrary to its Amended Petition, Agency had actual notice of District's intent to approve the Project in reliance on a CEQA exemption before the Project was approved. (RJN Exhs. D at p. 10, E at 1:6-18.) Agency's failure to further investigate the NOE and corresponding Project are not excused by its alleged misunderstanding of the meaning of the "Oroleve Ditch Pipeline Project."

Agency's allegations that it was unaware of the Project approval until February 2021 are further contradicted by its April 17, 2020 letter to District requesting an opportunity to bid on Project construction and subsequent discussion of the Project during Agency's April 28, 2020 board meeting. (RJN Exhs. H, I at p. 3, J.) Agency can show no harm from District's alleged failure to provide any additional notice given its actual and constructive notice of the Project prior

[4] As discussed in Section I, *supra*, District is entitled to a presumption that it complied with the Brown Act absent evidence to the contrary. (Evid. Code, § 664; *Bridges*, *supra*, 14 Cal.App.5th at 117-118, citing *Gilroy Citizens for Responsible Planning, supra*, 40 Cal.App.4th at p. 925.) Approval of a CEQA project during a public meeting noticed in accordance with the Brown Act provides constructive notice. (*Bridges*, *supra*, at pp. 116-117.)

to its approval not only is the alleged failure to provide notice not actionable, it does not excuse Agency's failure to exhaust administrative remedies or file its lawsuit before the statute of limitations expired. District's demurrer must be sustained, and Agency's Amended Petition must be dismissed in its entirety without leave to amend. (*OCA*, *supra*, 60 Cal.App.5th at pp. 792-794.)

D. AGENCY CANNOT STATE A CLAIM FOR DECLARATORY RELIEF BECAUSE THERE IS NO ONGOING CONTROVERSY REGARDING DISTRICT'S OBLIGATION TO PROVIDE CEQA NOTICES TO AGENCY

Following District's initial demurrer, which demonstrated, as set forth again herein, that Agency could not maintain a CEQA action against District relating to its approval of the Oroleve Ditch Pipe Line project, Agency amended its Verified Petition to add a complaint for declaratory relief. In a blatant attempt to manufacture a cause of action against District (Amended Petition, ¶107 "As an alternative claim if this Court finds that Agency cannot challenge NYWD's purported decision to approve the Segmented Project due to untimeliness, or for any other reason, NYWD is engaged in a pattern and practice of refusing to provide Agency notices and information as legally required under CEQA, as follows . . ."), Agency alleges that there is "an actual controversy . . . in relation to [District's] procedural obligations under CEQA," as "[District believes that it is not obligated to provide notices of its CEQA actions to Agency, or to provide honest and complete responses to Agency concerning Agency's inquiries as to NYWD's CEQA compliance." (RJN Exh. A [Amended Petition], ¶ 107.F.).)

These allegations are contrary to correspondence from District's counsel to Agency's counsel, in which District's counsel stated that "[District] does not dispute that it is required to provide notices related to the Forbestown Ditch as described in SFWPA's November 2019 request, nor does it believe that it is excused from providing honest and complete responses to SFWPA concerning SFWPA's inquiries as to NYWD's CEQA compliance." (Taber Decl., Exh. 4, see also Taber Decl., Exh. 5.) As such, there is no "actual controversy relating to the legal rights and duties of the respective parties" as is requisite to bring a cause of action for declaratory relief. (See Code of Civ. Proc., § 1060.)

Further, Agency claims that District engaged in a pattern of practice wherein it "acts with disregard with CEQA." (Amended Petition, ¶ 106(F).) This is not sufficient to establish a claim for declaratory relief in this instance. As discussed in *East Bay Municipal Utility District v. California Department of Forestry and Fire Protection* (1996) 43 Cal.App.4th 1113 (*East Bay*), circumstantial evidence of a pattern and practice are not the only evidence relevant to a declaratory relief inquiry. (*Id*. at p. 1123.) Regardless of the plaintiff's evidence of past practice, the appellate court found that "the trial court could reasonably conclude that once [the defendant] had changed its policy, there was no longer an ongoing controversy because the challenged practice had been abandoned." (*Id*. at p. 1132.) The *East Bay* court distinguished the facts from a case in which the defendant continued to assert that it was not required to take the requested action, therefore the issue was likely to recur. (*Ibid*., citing *Cook v. Craig* (1976) 55 Cal.App.3d 773, 780 (*Cook*).)

Here, as in *East Bay*, Agency alleges District's past failure to provide CEQA notices. (RJN Exh. A [Amended Petition], ¶ 107.) Unlike *Cook*, Agency has not alleged that it is not required to provide notices, and at no time did District have a policy or express intent not to provide such notices. (*Cook*, *supra*, 55 Cal.App.3d at p. 780.) District acknowledged that it is obliged to provide CEQA notices to Agency, and Agency has not alleged facts establishing that Agency will not provide the notices. (See Taber Decl., Exh. 3.) This Court must therefore presume that District will act in accordance with the law. (*East Bay*, *supra*, 43 Cal.App.4th at p. 1132, citing *State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 748-749, and *Environmental Protection Information Center, Inc. v. Maxxam Corp.* (1992) 4 Cal.App.4th 1373, 1382.) Therefore, District's demurrer must be sustained, and Agency's Fourth Cause of Action must be dismissed without leave to amend.

VI. CONCLUSION

Agency has failed to allege adequate facts to support its assertion that it has exhausted administrative remedies (or supporting a finding that it should be excused from that obligation), filed its Petition within the required statutory period, or that there is any present controversy regarding District's obligation to provide CEQA notices. There are no additional facts Agency

could plead that would revive its claims. District requests that the Court sustain its demurrer to the Amended Petition and Complaint, and all causes of action therein, and dismiss the Amended Petition and Complaint with prejudice.

SOMACH SIMMONS & DUNN
A Professional Corporation

Dated: December 7, 2021

By: 

Michael E. Vergara
Kelley M. Taber
Attorneys for Respondents
NORTH YUBA WATER DISTRICT, ET AL.

PROOF OF SERVICE
(State of California)

I am employed in the County of Sacramento; my business address is 500 Capitol Mall, Suite 1000, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On December 7, 2021, I served the following document(s):

NORTH YUBA WATER DISTRICT'S MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING THE DEMURRER

XX (by personal delivery) I caused to be personally delivered a true copy of the above-referenced document to the person(s) and at the address(es) set forth below:

Dustin C. Cooper Jackson Minasian Aidan Wallace MINASIAN, MEITH, SOARES, SEXTON & COOPER LLP 1681 Bird Street, P.O. Box 1679 Oroville, CA 95965 dcooper@minasianlaw.com jminasian@minasianlaw.com awallace@Minasianlaw.com atoohey@Minasianlaw.com ljanowski@minasianlaw.com	*Attorneys for SOUTH FEATHER WATER AND POWER AGENCY*

XX Via electronic service to the electronic mail addresses set forth below:

Mark A. Habib PETERS, HABIB, MCKENNA, JUHL-RHODES & CARDOZA 414 Salem Street P.O. Box 3509 Chico, CA 95927 mhabib@peterslawchico.com	*Attorneys for NORTHSTAR ENGINEERING*

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 7, 2021, at Sacramento, California.

Michelle Bracha

Michelle Bracha

SOMACH SIMMONS & DUNN
A Professional Corporation