

**2007 WL 2820851**

2007 WL 2820851 (S.D.Cal.)

For opinion see 2007 WL 2900475

**Motions, Pleadings and Filings**

United States District Court, S.D. California.

MANCHESTER PACIFIC GATEWAY LLC,

v.

CALIFORNIA COASTAL COMMISSION.

No. 07CV01099.

August 24, 2007.

(Report or Affidavit of Antonin Scalia)

**Name of Expert:** Antonin Scalia

**Area of Expertise:** Legal >> Corporate Governance

**Case Type:** Environmental >> Federal Acts

**Jurisdiction:** S.D.Cal.

**Representing:** Defendant

Mr. William C. Brewer, Jr.

General Counsel

National oceanic and Atmospheric Administration

Rockville, Maryland 20852

Dear Mr. Brewer:

The Coastal Zone Management Act of 1972, 86 Stat. 1280. 16 U.S.C. §§1451-64 (Supp. IV, 1974) as amended by the Coastal. Zone Management Act Amendments of 1976, Pub. L. 94-370 90 Stat. \_\_\_\_ [FN1] (July 26, 1976) (the "Act") is design to encourage the States to prepare and implement management programs, i.e., planning and regulatory programs, with respect to their "coastal zones." Subject to the more detailed definition provided by the Act, a coastal zone may generally be considered as comprising coastal waters, the land thereunder and the adjacent shorelands. The incentives which the Act provides to the States for this purpose consist of federal grants to finance a portion of their costs in developing and administering management plans. S. Rep. No. 92-753, 92d Cong., 2d, Sess. 2 (1972) ("Senate Report").

FN1. The 1976 Amendments made a number of significant changes in the Act, none of which are pertinent to the question considered herein.

You have requested our opinion concerning which lands owned by the United States are subject to the state planning and regulatory, process under the Act. The pertinent provision is found in the last sentence of - section 304(1) of the Act, [FN2] which excludes federal lands from the definition of the Coastal zone in the following terms:

FN2. This section was redesignated section 304(1) by the 1976 Amendments. Pub. L. 94-370 §1. 90 Stat. \_\_\_\_ (July 26, 1976). This new designation is used herein.

... Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

You have taken the position that the only federal lands excluded from this definition are those as to which the Federal Government has "exclusive legislative jurisdiction," relying primarily on the argument that "sole discretion as to use" is intended to be synonymous with "exclusive legislative jurisdiction." The Departments of Agriculture, Defense, Interior and Transportation are of the view that all federally-owned lands used by the Federal Government for federal purposes are excluded from the Coastal Zone regardless of the character of the Federal Government's jurisdiction over such lands.

In considering this question, it is useful to bear in mind the varying sorts of jurisdiction which the Federal Government may have over lands. In this respect, Federal lands fall into four separate categories:

1. *Lands over which the United States is empowered to exercise exclusive legislative jurisdiction.*

This type of jurisdiction derives from Article I, section 8, clause 17 of the Constitution which provides that Congress shall have power To exercise exclusive Legislation in all Cases whatsoever over such District ... as may ... become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.... Generally speaking, the States have no jurisdiction within the "Federal enclaves" described in this clause. [FN3]

FN3. See, e.g., *Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U.S. 285, rehearing denied 318 U.S. 801 (1943); *Bowen v. Johnston*, 306 U.S. 19 (1939) (no criminal jurisdiction); *Surplus Trading Co. v. Cook*, 281 US. 647 (1930) (no power to tax

private property); Arlington Hotel v. Fant, 278 U.S. 439 (1929) (no power to legislate with respect to enclave),

## 2. *Lands over which the United States and a State exercise concurrent jurisdiction.*

These are lands within a State that have been acquired by the United States by the cession or with the consent of the State but with the State retaining certain jurisdiction and authority within the boundaries of the acquired land. In general, such reservation is permitted so long as it does "not operate to deprive the United States of the enjoyment of the property for the purposes for which it was acquired . . . ." [FN4]

FN4. James v. Dravo Contracting Co., 302 U.S. 134, 149 (1937) (land purchased with consent of the State); *accord*, Fort Leavenworth R.R. v. Lowe, 114 U.S. 525 (1885) (land acquired by State cession).

## 3. *Lands held by the United States as a proprietor.*

With respect to these lands, the State has not ceded any jurisdiction to the United States. The authority and power of the United States over these lands derives from Article IV, section 3, clause 2 of the Constitution which provides:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.... While some private activity on such lands is subject to the powers of the State, [FN5] the disposition and use made of such lands by the United States has been repeatedly described as being without limitations. [FN6]

FN5. James v. Dravo Contracting Co., *supra* note 4.

FN6. Kleppe v. New Mexico, -- U.S. --, 96 Sup. Ct. 2285 (1976); Alabama v. Texas, 347 U.S. 272, 274 (1954) and cases quoted therein.

## 4. *Trust lands.*

Indian lands owned by the United States have been held to be owned in trust for Indian tribes or for individual Indians. [FN7]

FN7. United States v. Chase, 245 U.S. 89, 99-100 (1917) (in trust for tribe); United States v. Bowling, 256 U.S. 484, 487 (1921) (in trust for individual Indian).

Only the Department of Interior addresses separately the question of whether lands held in trust by the Federal Government are excluded from the Coastal Zone, asserting that they are. Since §304(1) of the Act expressly provides that "lands held in trust by the Federal Government" are excluded from the definition of Coastal Zone, it appears that this view is correct. The legislative history discussed below confirms this view.

The significance of the question of what federal lands are excluded from the Coastal Zone is made evident by the fact that about 95% of the land owned by the Federal Government is held in a proprietary capacity. [FN8] If all federal lands, other than those over which the United States has exclusive legislative jurisdiction or trust lands, are held to be included within the Coastal Zone, the States will gain a considerable degree of control over the uses of these lands pursuant to the so-called consistency requirements of section 307(c) of the Act, 16 U.S.C. §1456(c) (Supp. IV, 1974). Pursuant to section 307(c)(1) of the Act., federal activities "directly affecting" the Coastal Zone must be conducted, to the maximum extent practicable, in a manner which is consistent with the State's approved management program. If all federal lands otherwise within the Coastal Zone except those subject to federal exclusive legislative jurisdiction and trust lands are included within the Coastal Zone of the State in which such lands are situated, the State will have substantial authority over the uses made of all such lands without regard to whether the consequences of such use are confined to the federal lands or whether there is any spill-over to state lands. As noted in your submission, if the exclusionary provision is narrowly read, the consistency provisions would "assimilate a limited body of State law [the State's Coastal Zone management program] into Federal law for the purpose of governing the conduct of Federal agencies." [FN9]

FN8. U.S. Public Land Review Comm., *Federal Legislative Jurisdiction*, Study Report No 1 163-4 (1969). The Department of Agriculture advises that more than 90% of the national forests are held in proprietorial status. Memorandum of the Department of Agriculture, Office of General Counsel to Chief, Forest Service, *Coastal Zone Management* 7. (Feb. 25, 1976).

FN9. National Oceanic and Atmospheric Administration, Department of Commerce, *Excluded Lands Paper* 8 (1976).

To determine the Congressional intent with respect to the federal exclusion provision, one must first look at the plain words of the exclusionary provision in the statute. Section 304(1) of the Act provides:

Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

It is your view that the extent of this exclusion is limited to those lands as to which the United States has "exclusive legislative jurisdiction" because with respect to concurrent jurisdiction lands or proprietary lands there remains the possibility of valid State action so long as such action is not inconsistent with Federal law. [FN10] However, this is not true with respect to the use made by the Federal Government of federal lands, such use not being subject to regulation by the States regardless of the scope of the Federal Government's jurisdiction within the boundaries of such land. [FN11] More importantly, this argument confuses discretion regarding the use of land (the statutory test for exclusion) with the constitutionally derived power to exercise exclusive legislative jurisdiction within certain geographical boundaries.

Legislative power is not synonymous with the power to utilize land. This distinction has been recognized by the Supreme Court in rejecting the contention that lands of the United States within a State when not used for a governmental purpose are subject to State power to the same extent as would be lands owned privately.

FN10. *Id.* at 6. See text at notes 4 and 5.

FN11. Constitution, Art. VI, cl. 2, the "supremacy clause;" *id.* Art. IV, sec. 3, cl. 2; *Hunt v. United States*, 278 U.S. 96 (1928); *McKelvey v. United States*, 260 U.S. 353 (1922); *Utah Power & Light Co. v. United States*, 243 U.S. 389 (1917); *Ohio v. Thomas*, 173 U.S. 276 (1899); *Camfield v. United States*, 167 U.S. 518 (1897); *Fort Leavenworth R.R. Co. v. Lowe*, *supra* note 4; *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

True, for many purposes a State has civil and criminal jurisdiction over lands within its limits belonging to the United States, but this jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, *to control their use* and to prescribe in what manner others may acquire rights in them .... And so we are of the opinion that the inclusion within a State of lands of the United States does not take from Congress the *power to control their occupancy and use* .... [FN12]

FN12. *Utah Power & Light Co. v. United States*, *supra* at 404-405 (emphasis added). In *Kleppe v. New Mexico*, *supra* note 6, the Supreme Court recently reaffirmed the unlimited nature of Congress's power over public lands in the broadest terms.

If full power to control the use of lands of the United States resides in Congress, such power must also be the sole power, for power is not full if subject to the actions of another. Thus, the plain language of the federal lands exclusion makes it clear that all federal lands are excluded from the Coastal Zone.

Even were the statutory language ambiguous, the same result would obtain for, as the Supreme Court has recently stated:

Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of State regulation is found only where and to the extent there is "a clear congressional mandate," "specific congressional action" that makes this authorization of State regulation "clear and unambiguous." [FN13]

FN13. *Hancock v. Train*, -- U.S. --, 96 Sup. Ct. 2006, 2013 (Federal installations not required to obtain State permits under Clean Air Act); *accord*, *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, -- U.S. --, 96 Sup. Ct. 2022, 2028 (1976) (Federal installations not required to obtain State permits under Federal Water Pollution Control Act Amendments of 1972).

The conclusions reached by examining the other sources of legislative intent are in accord with the plain meaning of the statute. Section 307(e) of the Act, 16 U.S.C. §1456(e) (Supp. IV, 1974) provides as follows:

Nothing in this chapter shall be construed -

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River

Basin Treaty, signed at Washington, January 17, 1961, or the International Boundary and Water Commission, United States and Mexico.

This language is not consistent with the view that the Act was intended to work a virtual revolution in Federal-State relations by vesting the States with substantial authority over the use the Federal Government makes of federal lands. [FN14] The Senate Report describes this provision, originally found in section 314(d) of the bill as first passed by the Senate, as "a standard clause disclaiming intent to diminish Federal or State authority in the fields affected by. the Act." Senate Report at 20. The House Report states that there is nothing in the coordination provisions of the Act "which shall be construed to diminish either Federal or State jurisdiction, responsibility or rights in the field of planning, development or control of water resources or navigable waters." House Report 92-1049, 92d Cong. 2d Sess. 20 (1972). Such language hardly seems compatible with the suggestion that the Congress intended the Act to change the long established order with respect to the use and management of Federal lands.

FN14. As originally passed by the Senate, this section contained an additional subsection providing that the Act was not to be construed "to change or otherwise affect the authority or responsibility of any Federal official in the discharge of the duties of his office except as required to carry out the pro-visions of this title." §314(d)(2), S. 3507, 118 Cong. Rec, 14190, 92d Cong. 2d Sess. (1972).

Similarly, the legislative history of the exclusionary sentence itself indicates that all Federal lands were intended to be excluded. The Senate Report said of section 304(1); [FN15]

FN15. Then designated section 304(a); see note 2, *supra*.

The coastal zone is meant to include the non-Federal coastal waters and the non-Federal land beneath the coastal waters and the adjacent non-Federal shore lands including the waters therein and thereunder. Senate Report at 9.

The phrase "*non-Federal land*" implies that all federal lands are excluded from the Coastal Zone. The passage contains no hint of an intent to distinguish, for the purposes of this statute, between federal land subject to exclusive federal legislative jurisdiction and other federal land The Senate Report also states that the consistency requirements do not "extend State authority to land subject solely to the discretion of the Federal Government such as national parks, forests and wildlife refuges, Indian reservations and defense establishments." *Ibid*. Since only a small minority of the national

parks, forests and wildlife refuges [FN16] are subject to exclusive federal legislative jurisdiction, the use of those examples again indicates a Congressional intent to exclude all federal lands no matter in what manner they are held by the United States. To reach the contrary result one must argue, as you do, that this sentence should be read as referring only to those national parks, forests and wildlife refuges etc. which are subject to sole federal legislative jurisdiction. In our view, such an interpretation is strained, and it would render the clear implication of the passage to the average reader misleading.

FN16. See note 8, *supra*.

The exclusionary language was absent from the bill as first passed in the House. The Conference Committee, however, included it with the following comment:

The Conferees also adopted the Senate language in this section which *made it clear* that Federal lands are not included within a State's coastal zone. H.R. Rept. No. 92-1544, 92d Cong., 2d Sess., 12 (1972) (emphasis added).

This language indicates that it was the view of the conferees that federal lands were excluded from a State's Coastal Zone even in the absence of this explicit exclusionary provision and that the Senate language merely made the exclusion clear. But the subtle distinction between proprietary and nonproprietary federal lands could hardly be considered implicit in the bill before the exclusionary language was added. The Conference Committee Report provides additional support in its section explaining the decision to vest responsibility for the program in the Department of Commerce, as provided in the Senate version, rather than in Interior, as the House had provided. In connection with this discussion the conferees noted that "those lands traditionally managed by the Department of Interior or the Department of Defense, such as parks, wildlife refuges, military reservations, and other such areas covered by existing legislation, were specifically excluded from the coverage of the bill." *Id.* at 13. Finally, it is worthwhile to examine the origin of the language of the federal exclusionary provision. It seems to have first appeared as part of S. 3354, 91st Congress, a land use planning bill. Section 305(b)(1)(A) of that bill excluded from the State plan "lands the use of which is by law subject solely to the discretion of ... the Federal Government ..." The Report of the Senate Committee on Interior and Insular Affairs noted with respect to this provision that *Federal lands and the Federal trust-Indian lands are excluded in order that the Federal Government's independence in the management of its lands will not be compromised. The Committee acknowledges the need for improved Federal land use policies and practices ... but feels that*

the comprehensive substantive planning responsibilities of the Federal Government with respect to Federal lands should be considered separately from the present legislation .... Sen. Rept. No. 91-1435, 91st Cong. 2d Sess. 38-39 (emphasis added).

In short, the plain language of the statute appears to exclude all lands owned by the United States, since the United States has full power over the use of such lands and "sole discretion" with respect to such use. This conclusion is supported by the legislative history of the Act. Nowhere is there any suggestion that Congress intended to exclude some federal land from the Coastal Zone, and hence from State regulation, while including other such land within the Zone. We might add that the results of such an intent would be whimsical; as the submission of the Department of Defense notes, by way of example, part of the Naval base at Sewells Point in Norfolk is subject to exclusive federal legislative jurisdiction, part is subject to concurrent jurisdiction and part is held in a purely proprietary capacity. [FN17]

FN17. Department of Defense, *Position on Federal Lands Exclusion of the Coastal Zone Management Act* Appendix. (1976).

Accordingly, it is my opinion that the exclusionary clause excludes all lands owned by the United States from the definition of the Coastal Zone.

### **Motions, Pleadings and Filings (Back to top)**

- [2007 WL 2975704](#) (Trial Motion, Memorandum and Affidavit) Defendants' Reply in Support of Motions to Dismiss and Strike (Aug. 30, 2007)
  - [2007 WL 2975703](#) (Trial Motion, Memorandum and Affidavit) Manchester Pacific Gateway LLC's Opposition To Defendants' Motion To Dismiss And Motion To Strike The First Amended Complaint (Aug. 24, 2007)
  - [2007 WL 2975702](#) (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss and Motion to Strike First Amended Complaint (Aug. 10, 2007)
  - [2007 WL 2975701](#) (Trial Motion, Memorandum and Affidavit) Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss and Motion to Strike First Amended Complaint (Aug. 8, 2007)
  - [3:07cv01099](#) (Docket) (Jun. 15, 2007)
- END OF DOCUMENT

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**Manchester Pacific Gateway LLC v. California Coastal Com'n  
Slip Copy, 2007 WL 2900475  
S.D.Cal., 2007.  
Oct 02, 2007  
Slip Copy, 2007 WL 2900475 (S.D.Cal.)**

**Motions, Pleadings and Filings**

Only the Westlaw citation is currently available.

United States District Court,  
S.D. California.  
MANCHESTER **←PACIFIC GATEWAY→** LLC, Plaintiff,  
v.  
CALIFORNIA COASTAL COMMISSION, et al., Defendant.  
No. 07cv1099 JM(RBB).  
Oct. 2, 2007.

Steven M. Strauss, Summer J. Wynn, Cooley, Godward, Kronish, San Diego, CA, for Plaintiff.

Attorney General, State of California, Office of the Attorney General,  
Jamee Jordan Patterson, State of California, San Diego, CA, for Defendant.

ORDER DENYING MOTIONS TO DISMISS AND TO STRIKE

JEFFREY T. MILLER, United States District Judge.

**\* 1** Defendants California Coastal Commission ("Commission"), all twelve members of the Commission (Steve Blank, Sara Wan, Dr. William A. Burke, Steven Kram, Mary K. Shallenberger, Patrick Kruer, Bonnie Neely, Mike Reilly, Dave Potter, Khatchik Achadjian, Larry Clark, and Ben Hueso), the Executive Director of the Commission (Peter M. Douglas), and three Commission staff persons (Sherilyn Sarb, Deborah Lee, and Diana Lilly) move to dismiss the First Amended Complaint ("FAC") pursuant to Rules 12(b)(1), (2), and (6) of the Federal Rules of Civil Procedure and to strike the FAC based upon California's law regarding Strategic Lawsuits Against Public Participation ("SLAPP"), Cal.Code Civ. Proc. § 425.16. Manchester Pacific Gateway LLC ("MPG") opposes the motion. For the reasons set forth below, the motions to dismiss and to strike are denied.

## BACKGROUND

On June 15, 2007, MPG commenced this action seeking, among other things, a declaration that the Commission "cannot require Manchester to obtain a CDP (Coastal Development Permit) as a condition to Manchester's developing the Project." (FAC ¶ 35). MPG contends that the Commission's position with respect to obtaining a CDP violates the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 et seq. The present action relates to a real estate ground lease entered into between MPG and the Navy on November 22, 2006 for the development of 16 acres of land in downtown San Diego, California, known as the Navy Broadway Complex ("NBC"). (FAC Exh. B at p. 81). In 1987 Congress authorized the Navy to enter into a public-private venture to re-develop the NBC site. The plan allowed the federal government to retain ownership of the land and allow the Navy to obtain replacement office space at no cost to taxpayers. (FAC ¶ 10; Oppo. at p. 2:24-25). In June 1987 the Navy and the City of San Diego entered into a Memorandum of Understanding ("MOU") concerning the development of the NBC site. The City and Navy established general guidelines for the project regarding maximum use intensity, building program, architectural standards, building form and scale, site access and parking treatment, and landscape considerations. (FAC ¶ 12).

In August 1990 the Navy completed a Coastal Consistency Determination of the NBC site pursuant to its statutory obligations under the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1456. The Navy concluded that the project was consistent to the maximum extent possible with California's Coastal Management Program ("CCMP"). (FAC ¶ 14). In 1991, the Commission analyzed and considered the proposed NBC project, concluding that the NBC project was consistent to the maximum extent practicable with the CCMP. On May 7, 1991 the Commission concurred in the Navy's Federal Consistency Determination and, on October 8, 1991, the Commission issued its Adopted Findings on Consistency Determination. (FAC ¶ 14). The 1991 Commission Findings noted that its findings were premised on the assumption that construction of the NBC site would comply with the plans and guidelines developed between the City of San Diego and the Navy. The 1991 Findings concluded that "no further Commission action is required for the redevelopment to proceed as presented in the consistency determination." (FAC ¶ 17).

**\*2** At the heart of MPG's declaratory relief claims, MPG seeks a declaration that the only "remaining approvals required of the [NBC] project are from CCDC (Centre City Development Corporation) and the City." (FAC ¶ 40). MPG alleges that the Commission asserts that it must obtain a supplemental federal consistency review and a CDP

before proceeding with the NBC project. (FAC ¶ 47).

Defendants now move to dismiss the complaint based upon two main grounds: (1) the action is barred by the Eleventh Amendment; and (2) the Commission may require a CDP pursuant to the Supreme Court's opinion in Granite Rock v. California Coastal Commission, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987). Defendants also move to strike the FAC under California's Anti-SLAPP law. All motions are opposed.

## DISCUSSION

### Legal Standards

Federal Rule of Civil Procedure 12(b)(6) dismissal is proper only in "extraordinary" cases. United States v. Redwood City, 640 F.2d 963, 966 (9th Cir.1981). Courts should grant 12(b)(6) relief only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir.1990). Courts should dismiss a complaint for failure to state a claim when the factual allegations are insufficient "to raise a right to relief above the speculative level." Bell Atlantic Corp v. Twombly, --- 550 U.S. ----, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). The defect must appear on the face of the complaint itself. Thus, courts may not consider extraneous material in testing its legal adequacy. Levine v. Diamantheset, Inc., 950 F.2d 1478, 1482 (9th Cir.1991). The courts may, however, consider material properly submitted as part of the complaint. Hal Roach Studios, Inc. v. Richard Feiner and Co., 896 F.2d 1542, 1555 n. 19 (9th Cir.1989). Finally, courts must construe the complaint in the light most favorable to the plaintiff. Concha v. London, 62 F.3d 1493, 1500 (9th Cir.1995), cert. dismissed, 517 U.S. 1183, 116 S.Ct. 1710, 134 L.Ed.2d 772 (1996). Accordingly, courts must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. Holden v. Hagopian, 978 F.2d 1115, 1118 (9th Cir.1992). However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a Rule 12(b)(6) motion. In Re Syntex Corp. Sec. Litig., 95 F.3d 922, 926 (9th Cir.1996).

### The Eleventh Amendment

Ordinarily, the Eleventh Amendment bars suits by a private party against a State and its agencies. Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 446, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004).

However, actions against state officials to enjoin them from enforcing state laws or regulations which violate federal law do not offend the Eleventh Amendment. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); Flint v. Dennison, 488 F.3d 816, 825 (9th Cir.2007) ("suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity"). By violating federal law, individual state officials are stripped of immunity and may be sued personally for the consequences of their illegal conduct. Young, 209 U.S. at 160.

**\*3** "An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). In *Idaho*, the Coeur d'Alene Tribe brought an action against the state of Idaho, various state agencies, and numerous state officials in their individual capacities. The Tribe sought a declaratory judgment establishing its entitlement to exclusive use and possession of certain submerged lands under Lake Coeur d'Alene. The District Court held that the Eleventh Amendment barred certain claims and dismissed the claim for injunctive relief on the merits. The Ninth Circuit reversed in part and affirmed in part, holding that the *Young* doctrine allowed the claims for declaratory and injunctive relief to proceed against the state. The Supreme Court reversed, emphasizing that a case-by-case approach must be taken when applying the *Young* doctrine to ensure "a careful balancing and accommodation of state interests." Id. at 278. Following an analysis and review of the historical development of the sovereign attributes of navigable waters, the development of the equal footing doctrine as the various states joined the Union, and a state's unique interests in such lands, the Supreme Court concluded that lands underlying navigable waters have historically been considered sovereign lands and form an integral attribute of sovereignty. Id. at 283-284. The court also emphasized that Idaho had a unique interest in the public waters of Lake Coeur d'Alene and adopted statutes expressly preserving the waters for public use and enjoyment. Id. at 287. The relief sought by the Tribe, characterized by the Supreme Court as "the functional equivalent of a quiet title action," directly implicated historically strong state interests. While stressing the continued vitality of the *Young* doctrine, the Supreme Court concluded that "particular and special circumstances" supported Idaho's unique interests in the land. Id. at 287. These paramount sovereign interests outweighed the interests articulated in *Young* and allowed "Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts. Id. at 287-88." Here, in contrast to *Idaho*, Defendants fail to articulate particular and special circumstances warranting the setting aside of the *Young* doctrine. MPG alleges that Defendants continue to violate the CZMA

and seek prospective relief only to remedy the alleged federal violation. These allegations are sufficient to implicate the *Young* doctrine. *Idaho*, 521 U.S. at 281 ("An allegation of an ongoing violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction."). To avoid application of *Young*, Defendants must identify sufficiently compelling reasons to invoke the Eleventh Amendment bar--something they fail to do. Consequently, the court concludes that the Eleventh Amendment does not bar this action.

\*4 Finally, Defendants contend that the individual defendants are not proper parties to the action. The court rejects such argument as the individual defendants are sued in their official capacity and MPG only seeks prospective relief, not damages. See *Verizon MD Inc. v. Public Serv. Comm'n of MD*, 535 U.S. 535 (2002) (rejecting Eleventh Amendment bar under *Young* and permitting action to go forward against state commissioners of the Maryland Public Service Commission); *Exxon Corp. v. Fischer*, 807 F.2d 842, 845 (9th Cir.1987) (finding that the Eleventh Amendment did not bar claims against individual members and executive director of the California Coastal Commission, sued in their official capacities). In sum, the motion to dismiss the action based upon the Eleventh Amendment is denied.

### **The NBC Project Is Not Excluded from the Coastal Act**

Defendants contend, as a matter of law, that the Commission may require a permit for the NBC project. Defendants argue that there has been no violation of the CZMA and therefore California's Coastal Act of 1976 authorizes the Commission to exercise jurisdiction over the NBC property. By way of background, on November 7, 1977, the federal government approved California's CCMP which included the California Coastal Act of 1976. The CZMA definition of coastal zone provides that the only lands "[e]xcluded from the coastal zone are those lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its offices or agents." 16 U.S.C. § 1453(1).

Defendants argue that the NBC property "is not under the sole discretion of the federal government or held in trust by it," and therefore the property is not excluded from the scope of the Coastal Act of 1976. Defendants cite portions of the Navy/MPG lease agreement to support their argument that MPG, as lessee to the Real Estate Ground Lease, has some discretion with respect to the use of the property. Defendants do not cite any authority interpreting the

contours of the phrase "subject solely to the discretion of" the Federal Government. However, Defendants argue that California Coastal Com. v. Granite Rock Co., 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987) supports their argument that the Commission may require a permit for private development on federal lands. There, pursuant to the Mining Act of 1872, Granite Rock held certain unpatented rights to mine minerals on federal land and the Coastal Commission sought to regulate Granite Rock's development of the site. Id. at 575. The issue before the court was whether certain federal statutes and regulations, including the CZMA, preempted the Coastal Act of 1976. The Ninth Circuit concluded that the Coastal Act's CDP requirement was preempted by the Mining Act of 1872 because "an independent state permit system to enforce state environmental standards would undermine the Forest Service's own permit authority." Id. at 577. The Supreme Court reversed, concluding that "Congress specifically disclaimed any intention to pre-empt pre-existing state authority in the CZMA ... [and therefore] the CZMA does not automatically pre-empt all state regulation of activities on federal lands." Id. at 593.

\*5 Defendants' arguments, the court concludes, do not establish that MPG fails to state a claim for declaratory relief as a matter of law. Viewed in the best light to MPG, the FAC adequately alleges that the NBC property is subject to the discretionary control of the federal government such that the NBC property may ultimately, upon development of a complete evidentiary record, be excluded from definition of coastal zone. MPG alleges that the NBC Project was authorized by Congress, and that the legislation required the Navy to form a joint venture between the Navy and a private developer. (FAC ¶ 10). The legislation authorized the Navy to enter into a long-term lease with the private developer and the Memorandum of Understanding between the Navy and the City of San Diego established guidelines regarding the maximum use intensity, building program, architectural standards, and other project parameters. (FAC ¶ 12). Further, MPG alleges that in August 1990, the Navy filed with the Commission a CZMA Federal Consistency Determination for the NBC project site. The Navy, pursuant to § 307(c) of CZMA, also analyzed the NBC project for consistency with the CZMA, including the Coastal Act of 1976. (FAC ¶ 13). The Commission concurred with the Navy's consistency review. (FAC ¶ 14).

Based upon the FAC's allegations, the court concludes that MPG adequately alleges that the federal government exercised deliberate, extensive discretion and control over the development and planning of the NBC project such that the NBC site may be excluded from the scope of CZMA. The present case does not raise any preemption argument and is factually dissimilar to *Granite Rock*. There, a private company planned and conducted mining related activities without

Federal involvement—there was simply no argument challenging the exercise of the Federal Government's discretion over the property because it did not exercise any discretion over the mining related activities. Here, in contrast, the Federal Government is the moving force behind the planning and development of the NBC project and the Navy acted pursuant to legislative mandate. [FN1]

FN1. The court notes that the parties do not attempt to define the contours of what is meant by the phrase "subject solely to the discretion of or which is held in trust by the Federal Government, its offices or agents." 16 U.S.C. § 1453(1). Here, use of the NBC property was subject to federal legislation authorizing the Navy to enter into a development contract with a private party and authorizing the Navy to set the project's parameters in conjunction with the City of San Diego. (FAC ¶¶ 1-12). On one level it could be argued that Federal Government has exercised sole discretion over the NBC project by enacting legislation and by selecting a private developer and working with the City to define the project's parameters. On the other hand, one could argue that both the private developer and the City exercise discretion to some degree in defining the scope of the project and therefore the discretion may not be "solely" with the Federal Government. This issue is raised to highlight the court's concern regarding the interpretation and application of § 1453(1) to the present action.

Finally, the court notes that whether the Navy exercised sufficient discretion over the NBC site to fall outside the scope of 16 U.S.C. § 1453(1) raises mixed legal and factual issues not properly resolved on a motion to dismiss. [FN2] Accordingly, the motion to dismiss on the above cited grounds is denied without prejudice subject to a further showing. [FN3]

FN2. Defendants raise two other arguments in support of their motion to dismiss, neither of which is persuasive. First, Defendants contend that there is no private right of action under the CZMA and therefore all claims must be dismissed. Defendants cite several authorities holding that there is no private right of action under CZMA. The difficulty with Defendants' argument is that the present action is brought pursuant to the Declaratory Judgment Act, not the CZMA. MPG neither seeks to assert a claim under CZMA nor obtain a CZMA related remedy. Consequently, the motion to dismiss on this ground is denied. Second, "[t]o the extent Manchester contends that [Commission] staff improperly refused to file its coastal development permit application," (Motion at p. 16:11-13), Defendants argue that the court must dismiss the action because MPG failed to exhaust available state administrative and judicial remedies. This argument appears

misplaced as MPG does not contend that Defendants wrongfully failed to file its application. Rather MPG challenges the ability of Defendants to require a CDP under the Coastal Act and whether a supplemental CZMA consistency review is required under the circumstances.

FN3. Defendants also argue that the Commission may require a consistency determination or a CDP based upon changed circumstances. (FAC

Exh. A at 43). The court declines to reach such a fact intensive inquiry on a motion to dismiss.

### **Anti-SLAPP**

Defendants contend that the FAC should be stricken under California's Anti-SLAPP law, Cal.Code Civ. Proc. § 425.16. Defendants generally argue that MPG seeks declaratory relief and that such claims "preclude defendants from exercising their rights of petition and free speech; [and] that suffices for purposes of the Anti-SLAPP law." (Reply at p. 10:9-10). The Anti-SLAPP law was enacted in response to concerns about civil actions aimed at private individuals to deter or punish them for exercising their political or legal rights. United States v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963, 970 (9th Cir.1999). As explained in *Lockheed Missiles*,

**\*6** [t]he hallmark of a SLAPP suit is that it lacks merit, and is brought with the goals of obtaining an economic advantage over a citizen party by increasing the cost of litigation to the point that the citizen party's case will be weakened or abandoned, and of deterring future litigation. *Id.* at 970-71.

Here, the present action does not reflect any of the hallmarks of a SLAPP suit because the action ostensibly has merit and MPG does not seek an economic advantage over Defendants. Significantly, MPG has alleged potentially meritorious claims, thus removing the present case from the Anti-SLAPP paradigm. To state a claim for declaratory relief, MPG must sufficiently allege: (1) an actual controversy within the meaning of Article III; and (2) that the actual controversy relates to a claim within the court's subject matter jurisdiction, upon which relief could be granted. 28 U.S.C. § 2201(a); Calderon v. Ashmus, 523 U.S. 740, 745-47, 118 S.Ct. 1694, 140 L.Ed.2d 970 (1998). Stated another way, the question is whether there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Cas. Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273, 61

S.Ct. 510, 85 L.Ed. 826 (1941).

Defendants do not challenge the FAC on the ground that MPG fails to identify a substantial controversy between the parties of sufficient immediacy to warrant declaratory relief. The purpose of the anti-SLAPP law is to address judicial abuse by targeting lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Cal.Civ.Proc.Code § 425.16(a). While the FAC generally challenges Defendants' assertion of regulatory authority over the NBC project, it does not primarily seek to limit Defendants' first amendment rights. Rather, the present action seeks to prevent avoidable damages without waiting until the Commission takes injurious action against MPG. *See Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1405 (9th Cir.1996)* (purpose of the Declaratory Judgment Act is to give litigants an early opportunity to resolve federal issues to avoid "the threat of impending litigation"). Seen in this light, Defendants fail to establish that the FAC should be stricken.

In sum, the court denies the motion to strike based on anti-SLAPP law.

## **IT IS SO ORDERED.**

S.D.Cal., 2007.

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### **Motions, Pleadings and Filings (Back to top)**

- 2007 WL 2975704 (Trial Motion, Memorandum and Affidavit)  
Defendants' Reply in Support of Motions to Dismiss and Strike (Aug. 30, 2007)
- 2007 WL 2820851 (Expert Report and Affidavit) (Report or Affidavit of Antonin Scalia) (Aug. 24, 2007)
- 2007 WL 2975703 (Trial Motion, Memorandum and Affidavit)  
Manchester Pacific Gateway LLC's Opposition To Defendants' Motion To Dismiss And Motion To Strike The First Amended Complaint (Aug. 24, 2007)
- 2007 WL 2975702 (Trial Motion, Memorandum and Affidavit)  
Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss and Motion to Strike First Amended Complaint (Aug.

10, 2007)

- 2007 WL 2975701 (Trial Motion, Memorandum and Affidavit)  
Defendants' Memorandum of Points and Authorities in Support of  
Motion to Dismiss and Motion to Strike First Amended Complaint (Aug.  
8, 2007)

- 3:07cv01099 (Docket) (Jun. 15, 2007)

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