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RG09437040

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
 COUNTY OF ALAMEDA

BY FAX

14 CENTER FOR ENVIRONMENTAL HEALTH;
 15 CONSUMER FEDERATION OF
 16 CALIFORNIA; PLANNING AND
 17 CONSERVATION LEAGUE; CALIFORNIA
 18 STATE PIPE TRADES COUNCIL; CALIFORNIA
 19 PROFESSIONAL FIREFIGHTERS; SIERRA
 20 CLUB CALIFORNIA and DOES 2 through 10,
 21 inclusive,

Petitioners and Plaintiffs,

v.

22 CALIFORNIA BUILDING STANDARDS
 23 COMMISSION, a public agency; CALIFORNIA
 24 DEPARTMENT OF HOUSING AND
 25 COMMUNITY DEVELOPMENT, a public agency;
 26 CALIFORNIA DIVISION OF THE STATE
 27 ARCHITECT, a public agency; CALIFORNIA
 28 OFFICE OF STATEWIDE HEALTH PLANNING
 29 AND DEVELOPMENT, a public agency;
 30 CALIFORNIA DEPARTMENT OF PUBLIC
 31 HEALTH, a public agency; CALIFORNIA
 DEPARTMENT OF FOOD AND AGRICULTURE,
 a public agency; and DOES 11 through 20, inclusive,

Respondents and Defendants.

PLASTIC PIPE and FITTINGS ASSOCIATION;
 and DOES 21 through 30, inclusive,

Real Parties in Interest.

CASE NO. RG09437040

RESPONDENTS' RETURN TO
PEREMPTORY WRIT OF
MANDATE

ASSIGNED FOR ALL
PURPOSES: Hon. Frank Roesch
Department: 31

Filing Date of Action: February 20,
2009

Trial Date: August 28, 2009



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I. INTRODUCTION

Respondents California Building Standards Commission (Commission) et al. make the following return to the peremptory writ of mandate issued by this court on December 30, 2009.¹ The court directed the Commission to take certain actions with respect to the Commissions' environmental analysis and approval of regulations authorizing the statewide use of crosslinked polyethylene pipe (PEX).

Respondents have already embarked on the process of preparing a Second Revised Draft Environmental Impact Report (EIR). The Second Revised EIR will address the defects in the previous Final EIR identified by the court.

Because of the statutory requirements that apply to the adoption of building standards, the Commission cannot effectively repeal the PEX regulations within the 60 days provided in the judgment. Respondents will be able to cure the EIR's defects, rescind the PEX regulations and consider whether to re-adopt regulations (or amended regulations) within the current "code cycle." As discussed below, this approach represents the most reasonable and feasible means of both responding to the writ and complying with the statutory requirements for adopting building standards.

II. FACTUAL BACKGROUND

In this action, the California Pipe Trades Council and other groups (Petitioners) challenged the decision by the Commission to approve state plumbing code standards (i.e., regulations) authorizing the statewide use of PEX tubing. (Administrative Record (AR) 580-582.) Respondents California Department of Public Health, California Department of Housing and Community Development, California Office of Statewide Health Planning and Development, Division of the State Architect and California Department of Food and

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¹ / The Court did not issue a separate, stand-alone peremptory writ of mandate pursuant to the Court's December 4, 2009 Order Granting Petition for Writ of Mandate. Rather, the requirements of the writ, with which Respondents are ordered to comply, are contained within the Judgment and Order entered on December 30, 2009.

1 Agriculture (collectively, the Responsible Agencies) are all state public agencies vested by state
2 law with the authority to propose building standards for adoption or approval by the
3 Commission. Each of these Responsible Agencies proposed the building standards authorizing
4 the use of PEX at issue in this action. The regulations eliminate certain restrictions on the
5 statewide use of PEX tubing for hot and cold water (including potable water) distribution for
6 applications under the jurisdiction of the Agencies, including drinking water, irrigation and
7 wastewater. The PEX regulations apply to all occupancies, including commercial, residential
8 and institutional building construction, rehabilitation and repair in all areas of the State. (AR
9 580-581.)
10

11 As a precursor to its decision, the Commission, as the lead agency for this project under
12 the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000, *et seq.*),
13 released a Draft EIR to analyze the proposed regulations' potential effects on the environment.
14 The Draft EIR addressed a variety of issues, including the potential for PEX to leach chemicals
15 at levels that would exceed drinking water standards and the potential public health impacts if
16 PEX tubing were to fail after installation. The Draft EIR identified mitigation measures to guard
17 against any adverse effects. (AR 468-470, 476.) In addition to describing potential adverse
18 effects, the Draft EIR described various environmental benefits associated with increased use of
19 PEX, including a reduction in harmful air emissions associated with the transport and installation
20 of other forms of tubing (the use of which would decrease as PEX is used more frequently), a
21 reduction in copper contamination of surface water bodies (from copper leached from copper
22 pipe), and a decrease in greenhouse gas emissions. (AR 436, 474, 483, 485, 620, 622, 624.)
23

24 Prior to the Draft EIR's release, additional testing of PEX was also initiated. Based on
25 this new information, the Commission determined that the Draft EIR should be revised and
26 recirculated. On October 16, 2008, the Commission released a Revised Draft EIR for a second
27 round of public and agency review and comment. (AR 566 *et seq.*)
28

29 On January 9, 2009, the Commission released the Final EIR for the project. (AR 2438 *et*
30 *seq.*) The Final EIR included the Draft EIR, the Revised Draft EIR, revisions to the text of those
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1 documents, and detailed responses to comments received on the Draft EIR and Revised Draft
2 EIR, supported by additional technical analysis. (*Ibid.*)

3 On January 22, 2009, the Commission certified the Final EIR and approved the Project
4 (i.e., the PEX regulations), and each Responsible Agency posted a Notice of Determination.
5 (AR 2777-2968, 166-174.) Pursuant to State law, the PEX regulations were scheduled to, and
6 did, take effect in August 2009. (AR 379, 418, 420, 579, 581.)

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8 On February 20, 2009, Petitioners filed a lawsuit challenging the Final EIR's adequacy.
9 On April 13, 2009, Petitioners amended the petition to add the Sierra Club of California as a
10 petitioner.

11 This case, which sounds in traditional mandamus, is governed by section 1085 of the
12 Code of Civil Procedure and Public Resources Code section 21168.5. (*Western States Petroleum*
13 *Assn. v. Superior Court (Air Resources Bd.)* (1995) 9 Cal.4th 559, 567-568 [judicial review of
14 quasi-legislative agency actions occurs under traditional mandamus].) After the case was fully
15 briefed, the court conducted a hearing on August 28, 2009. At the conclusion of the hearing, the
16 matter was submitted.
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18 On December 4, 2009, the court issued an Order Granting Petition for Writ of Mandate
19 ("Order"). The Order granted the petition in some respects, and denied the petition in other
20 respects. The court entered judgment in favor of Petitioners on four out of six issues raised in
21 the Petition and ordered the issuance of a writ requiring Respondents to vacate and set aside the
22 approval and adoption of the PEX regulations, including certification of the EIR and any actions
23 taken founded on the regulations. Judgment was entered on December 30, 2009. The Judgment
24 and Order Pursuant to Public Resources Code Section 21168.9 ("Judgment and Order") directed
25 Respondents to file a return to the writ within 60 days of receipt of the writ.
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27 On December 31, 2009, Real Party in Interest Plastic Pipe and Fittings Association
28 ("PPFA") filed a notice of appeal of the court's December 30, 2009, Judgment and Order. (Cal.
29 Rules of Ct. 8.100.) Petitioners subsequently filed a notice of cross-appeal of the Judgment and
30 Order on February 25, 2010.
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III. DISCUSSION

A. Respondents Have Taken Timely Action to Comply with the Court's Order.

1. Respondents have commenced the process to remedy the specific issues described in the Judgment with respect to the regulations and EIR during the 60-day period set forth in the Order.

In accordance with the Judgment and Order entered by this Court on December 30, 2009, Respondents have initiated the process to repeal the PEX regulations, and to consider whether to re-adopt the PEX regulations, or adopt amended regulations. In particular, Respondents have begun preparing a Second Revised EIR that will address the defects identified by the Court and allow the Commission to decide whether to certify the EIR, as revised, in a manner that best comports with the Building Standards law and will be the least confusing and disruptive to the public. Such action, however, requires compliance with the procedures for adopting amendments to the California Building Standards Code ("Building Code") set forth in the California Building Standards Law (Health & Saf. Code § 18901 et seq.) and the California Administrative Code (Cal. Code Regs. Title 24, Part 1, Chapter 1.). Any change to the Building Code -- whether repealing, amending or approving building standards -- must adhere to this process. (24 Cal. Code Regs., §1-901.)²

There are two adoption processes for approving changes to the Building Code, one that applies to "proposing state agencies" (see Health & Saf. Code, § 18917.2 ["a state agency that has authority and responsibility to write proposed building standards" but not adopt them]) and another that applies to "adopting state agencies" (see Health & Saf. Code, § 18905.5 ["a state agency responsible for the adoption of building standards"]). Some of the Responsible Agencies in this action are proposing state agencies (i.e., the Department of Housing and Community Development, the Division of the State Architect, and the Office of Statewide Health Planning

²/ Adopting building standards is accomplished through the Building Standards Law's specific process that meets "the intent" of the Administrative Procedures Act (APA). (Health & Saf. Code, § 18929.1, subd. (a)(5).) Unless the APA is expressly made to control (e.g., when adopting emergency standards under Health and Safety Code section 18937), the Building Standards Law and its regulations control.

1 and Development), and some are adopting state agencies (i.e., the Department of Public Health
2 and the Department of Food and Agriculture). (Declaration of Dave Walls in Support of
3 Respondents' Return to Peremptory Writ of Mandate [Walls Decl.], ¶ 5.)

4 The proposing agency process, in particular, requires the Commission staff to review the
5 submittals and the Commission's Code Advisory Committees (CAC) to review the technical
6 content of the building standard proposals, to consider public comments, and to make
7 recommendations to the Commission. (24 Cal. Code Regs. §1-901; see also Walls Decl., ¶ 7.)

8 Both processes require at least a 45-day public review and comment period for the
9 proposed code changes, require time for the agencies to consider and respond to public
10 comments, and require a public hearing, if requested. (24 Cal. Code Regs., §1-901; see also
11 Walls Decl., ¶¶ 7, 8.) Pursuant to Health and Safety Code section 18930, the Commission must
12 review the adopted and proposed code changes from the Responsible Agencies to ensure that the
13 agencies have complied with required procedures and submitted required justifications for the
14 changes. (Walls Decl., ¶ 4.) After reviewing the Responsible Agencies' proposed or adopted
15 code changes,³ considering the technical advisory bodies' recommendations, and considering
16 public comments, the Commission holds a noticed, public meeting to take action (to approve, to
17 approve if amended, or to disapprove) on the code change proposals. (Health & Saf. Code, §§
18 18930, 18935; see also Walls Decl., ¶ 9.) Thus, both the proposing agency process and the
19 adopting agency process involve a significant amount of time and Commission resources to
20 complete. And because the Responsible Agencies here include both proposing and adopting
21 agencies, in order to repeal the regulations at issue in this matter, both processes must be
22 completed. (Walls Decl., ¶ 6.)

23 In addition, regarding the timing of the repeal and potential re-adoption or amendment of
24 the PEX regulations, Respondents are bound by the Building Standards Law, which intends that
25 amendments to the Building Code will be adopted in an orderly manner during an annual code

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30 ³ / Depending on the responses to comments, the proposal may be circulated for an additional
31 public comment period or periods.

1 cycle. (See Health & Saf. Code, § 18929.1 [“The commission shall receive proposed building
2 standards from state agencies for consideration in an annual code adoption cycle”].) Adopting
3 changes to building standards within a code cycle allows agencies to timely propose changes and
4 helps bring certainty to builders, regulators and the public.

5
6 The 2009 cycle began in June 2009 and continues through January 1, 2011, when the
7 codes approved in that cycle take effect. The 2010 cycle will begin this November and conclude
8 in approximately July 2012, when the codes approved in that cycle take effect.⁴ (Walls Decl., ¶
9 10.) Rather than waiting until the 2010 code cycle begins, Respondents have initiated the
10 process to both repeal and potentially re-adopt or amend the PEX regulations during the current
11 code cycle.⁵

12
13 A Second Revised Draft EIR is being prepared to review and revise the Final EIR’s
14 analysis of the specific issues described in the Order. Within the 2009 code cycle, the
15 Commission will have the ability to repeal the current PEX regulations and rely on the Second
16 Revised Draft EIR to determine whether the regulations should be re-adopted or amended.

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18 Prior to considering whether to re-adopt or amend the PEX regulations, the Commission
19 will have to decide whether to certify the Second Revised Draft EIR (along with whatever
20 information is set forth in the Final EIR encompassing that analysis). (Pub. Resources Code, §
21 21082.1, subd. (c).) If the Commission does not certify the Second Revised Draft EIR, then the
22 Commission will repeal the PEX regulations, but will not be able to consider whether to re-adopt
23 or amend the PEX regulations. Thus, Respondents have begun the code amendment process
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25 ⁴/There is a small period of overlap in the 2009 and 2010 code cycles, but that is not uncommon.

26 ⁵/Respondents are both repealing and considering whether to re-adopt the PEX regulations during
27 the same code cycle (rather than repealing during the 2009 cycle and considering re-adoption
28 during the 2010 cycle) to promote efficiency and avoid serious disruption and confusion to both
29 the public and industry. The purpose of the standard adoption cycle is to allow for consistency in
30 the effective date of the annual code changes. (Walls Decl., ¶ 11.) To repeal the regulations
31 during a code adoption cycle, followed by another code adoption cycle to re-adopt regulations
based on a Second Revised Draft EIR would likely cause unnecessary confusion to builders,
plumbing contractors, the code enforcement community and the public. (Walls Decl., ¶ 11.)

1 required by the Order within the 60-day period set forth in the Judgment. Because the code
2 promulgation process entails specific requirements that may take significant time to complete,
3 however, Respondents are unable to complete the process within the 60-day period set forth in
4 the Judgment. However, Respondents are confident full compliance with the writ can be
5 achieved within the 2009 code cycle.
6

7 **2. Respondents' manner of compliance with the court's Order is reasonable**
8 **under these circumstances because the California Building Standards**
9 **Law does not recognize a process that would allow Respondents to repeal**
10 **or adopt regulations within a 60-day period.**

11 The California Building Standards Law does not permit code adoption cycles for building
12 standards outside of the annual code adoption cycle unless a Responsible Agency makes a
13 finding, and the Commission concurs, that the need for the repeal qualifies as an emergency.
14 (Health & Saf. Code, § 18937; Walls Decl., ¶ 12.) Emergency is defined in the Administrative
15 Procedures Act (APA) (Gov. Code, § 11340, et seq.) as necessary for the immediate preservation
16 of the public peace, health and safety or general welfare. (See Health & Saf. Code, §§ 18913,
17 18934.8, 18937; Gov. Code, § 11346.1, subd. (b).)

18 There is no basis for such a finding in this case. Even if such a finding could be made,
19 initiating the emergency repeal process would not, in fact, shorten the time necessary to repeal
20 the PEX regulations as required by the Writ. (Walls Decl., ¶ 13.) Rather, an emergency order of
21 repeal is authorized to remain in effect for only 120 days, and the agency must still initiate a
22 code adoption cycle, which would take an additional 180 days to complete, for the repeal to take
23 effect. (See Health & Saf. Code, § 18934.8, subd. (b); Gov. Code, §§ 11346.1, subd. (e),
24 11346.2.) In the same amount of time, Respondents can complete the removal of the regulations
25 by following the standard process for the 2009 annual code adoption cycle. (Walls Decl., ¶ 13.)

26 Furthermore, initiating a code adoption cycle outside of the annual process would result
27 in an unnecessary fiscal burden for the proposing and adopting Responsible Agencies as well as
28 for the Commission, as it would essentially require duplication of all the annual adoption cycle
29 steps. (Walls Decl., ¶ 14.) These steps, as discussed above, would include separate notice
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1 requirements, separate public review periods, separate Responsible Agency and Commission
2 staff time and separately convening the Commission to take action on the proposed repeal.
3 (Walls Decl., ¶ 14.) Given the state's current fiscal climate, it would be imprudent to initiate a
4 separate process to repeal the PEX regulations when such action can be accomplished, in the
5 same amount of time, through the standard annual code cycle.
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7 **3. Respondents' inability to comply within 60 days is excepted because the**
8 **effectiveness of the Judgment and Order is stayed on appeal.**

9 An order or judgment granting a writ of mandate pursuant to Code of Civil Procedure
10 1085 is stayed on appeal unless the superior court or the court of appeal orders otherwise. (Code
11 Civ. Proc., § 1110b; see also Code Civ. Proc., § 916.) As noted above, the underlying action in
12 this matter is governed by section 1085 of the Code of Civil Procedure and Public Resources
13 Code section 21168.5. PPFA's appeal of the December 30, 2009 Judgment and Order, along with
14 Petitioners' cross-appeal on February 25, 2010, therefore, automatically stay the proceedings on
15 the judgment directing issuance of the writ. (*Hayworth v. City of Oakland* (1982) 129 Cal.App.3d
16 723, 727; *Johnston v. Jones* (1927) 74 Cal.App. 272, 273.) The automatic stay is intended to
17 protect the appellate court's jurisdiction by preserving the status quo and effectively preventing
18 the trial court from rendering an appeal "futile" by altering the appealed judgment or order or by
19 conducting other proceedings that may affect the judgment or order. (*Varian Md. Systems, Inc. v.*
20 *Delfino* (2005) 35 Cal.4th 180, 189; *City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 362.)
21 For this reason, in addition to the grounds explained above, Respondents have not yet repealed
22 and set aside the approval and adoption of the PEX regulations, as doing so immediately would
23 necessarily render PPFA's and Petitioners' appeals futile.
24

25
26 Respondents have elected not to appeal the court's Judgment and Order. Instead,
27 Respondents have elected to comply with the court's Judgment and Order. (*Save Our Residential*
28 *Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745.) Respondents have therefore
29 initiated the necessary steps, discussed above, to timely repeal, and then to consider whether to
30 re-adopt or amend, the PEX regulations.
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IV. CONCLUSION

PPFA's appeal of the December 30, 2009, Judgment and Order automatically stayed proceedings on the judgment directing issuance of the writ. Respondents have nevertheless initiated the process to repeal and potentially re-adopt or amend the PEX regulations in accordance with the Judgment and Order entered by this court on December 30, 2009. Respondents are unable to complete this process within the 60-day period set forth in the Judgment and Order, due to the statutory requirements of the processes set forth in the governing statutes and regulations.

If it pleases the court, Respondents will continue to keep the court apprised of their progress in complying with the Judgment and Order. Respondents will do so by filing supplemental returns with the court at the key public steps in the process outlined above (i.e., at the time Respondents publish the Second Revised Draft and Final EIRs and immediately after Respondents take action to repeal and potentially re-adopt or amend the PEX regulations). In any event, Respondents will file a supplemental return to the writ no later than six months from the date of filing of this return or as otherwise ordered by the court.

Respectfully submitted,

Dated: March 1, 2010

REMY, THOMAS, MOOSE & MANLEY, LLP

By: Sabrina Teller
Sabrina V. Teller

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