SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

COMMUNITIES FOR A BETTER ENVIRONMENT and CENTER FOR BIOLOGICAL DIVERSITY, non-profit corporations, Plaintiffs, v. ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION, Defendant.	No. RG13681262 ORDER AFTER HEARING ON PARTIES' CROSS-MOTIONS FOR SUMMARY JUDGMENT

Defendant Energy Resources Conservation and Development Commission ("ERCDC") is a California public entity charged with planning and policymaking responsibility for the energy policy in California. The ERCDC has the responsibility to consider applications for construction of thermal power plants with generating capacities over fifty megawatts. (Pub. Res. Code §§ 25110, 25120, 25500.) It conducts its review to the exclusion of other state and local land use authorities, considering environmental, health, safety, and other factors.

ERCDC's proceedings are subject to judicial review under two different statutes: Public Resources Code section 25901 and section 25531. Section 25901 is the default statute and provides that provides for judicial review of most ERCDC decisions by writ of mandate in a

superior court and the ERCDC's findings reviewed under a substantial evidence standard. (Pub. Res. Code § 25901.) Section 25531, on the other hand, governs decisions on applications for power plant siting certificates and a few related decisions. (Pub. Res. Code § 25531; *see also* Pub Res. Code §§ 25500.1, 25520.5.) When 25531 applies, the scope and venue of judicial review are both limited in ways that they are not under Section 25901. Under Section 25531, the ERCDC's decision is "subject to judicial review by the Supreme Court of California." (§ 25531(a).) When reviewing the ERCDC's decision, the parties may not introduce "new or additional evidence"; the case is heard only "on the record of the [ERCDC] as certified by it." (§ 25531(b).) The issues under review are limited to "whether the [ERCDC] has regularly pursued its authority, including a determination of whether the order or decision under review violates" a petitioner's constitutional rights. (*Ibid.*) The ERCDC's findings of fact are "final and are not subject to review." (*Ibid.*)

Plaintiffs Communities for a Better Environment and Center for Biological Diversity are nonprofit environmental organizations who have raised objections in ERCDC siting decision proceedings. Plaintiffs have brought this action seeking declaratory and injunctive relief holding that Section 25531(a) and (b) are an unconstitutional legislative abridgment of the jurisdiction of the courts and enjoining further enforcement of these subdivisions.

Plaintiffs have moved for summary judgment, and ERCDC has also moved for summary judgment. Both motions came before the Court for hearing on March 7, 2019.

The Court has considered the arguments of counsel and the papers submitted by all parties. For the reasons stated below, Plaintiffs' motion is **GRANTED**. ERCDC's motion is **DENIED**.

I. LEGAL STANDARDS

The purpose of summary judgment procedures is to allow this Court to "cut through the parties' pleadings in order to determine whether . . . trial is in fact necessary to resolve their dispute." (*Miller v. Fortune Commercial Corporation* (2017) 15 Cal.App.5th 214, 220, citing

Aguilar v. Atlantic Richfield Co. (2001) 25 Cal. 4th 826, 843.) Summary judgment is proper only when "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civil Procedure ["CCP"] § 437c(c).)

When a plaintiff moves for summary judgment, it is the plaintiff's burden as movant to show admissible evidence on each elements of a cause of action entitling him to judgment. (CCP § 437c(p)(1); *see Hunter v. Pac. Mech. Corp.* (1995) 37 Cal.App.4th 1282, 1287; *Aguilar, supra*, 25 Cal. 4th at p.851.) If the plaintiff makes a prima facie showing that evidence exists to support all elements of a cause of action, then the burden shifts to the defendant to show that one or more triable issues of material fact exist. (CCP § 437c(p)(1).) The Plaintiff has no burden to disprove affirmative defenses and cross-complaints. (*Ibid.*; *Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 468.)

To establish triable issues of material fact, the opposing party must "set forth the specific facts showing" that they exist. (*Miller, supra*, 15 Cal. App. 4th at pp.220-221.) "A triable issue of material fact may not be created by speculation or a 'stream of conjecture and surmise.' Instead, the plaintiff must produce 'substantial responsive evidence.'" (*Ibid.*, internal citations omitted.) The parties may not rely on the allegations in their pleadings to show that a triable issue of material fact does or does not exist (CCP § 437(p)(2)). The parties must instead offer evidence supporting claims.

When deciding matters on summary judgment, the Court considers the evidence offered in support and opposition to the motion. (CCP § 437c(c).) Mere statements unsupported by evidence are not sufficient to defeat summary judgment. (*See Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 616 ["A party cannot defeat summary judgment by the expedient of averring he or she has evidence to support a cause of action; instead, such evidence must be presented in opposition to summary judgment."].) Evidence must be admissible under the evidence code, and objections not raised are deemed waived. (CCP § 437c(c) ["[T]he court shall consider all of the evidence set forth in the papers, except the evidence to which objections

have been made and sustained by the court . . . ."]; *id.* § 437c(b)(5) ["Evidentiary objections not made at the hearing shall be deemed waived."].)

II. DISCUSSION

A. PLAINTIFFS' MOTION IS PROCEDURALLY DEFICIENT BUT THE DEFICIENCIES ARE NOT FATAL TO ITS MOTION

Plaintiffs' motion papers lack a statement of undisputed facts and did not include a Separate Statement of Undisputed Material Facts. The separate statement is required by statute and by rule of court. (Code of Civ. Proc. § 437c(b)(1); Cal. R. Ct. 3.1350(c).) Nevertheless, the Court has discretion to hear the matter and consider all evidence even if it does not appear in a separate statement of undisputed material facts. (*See King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 437 [holding that "court had discretion to consider all the evidence presented by the moving party even if that evidence did not appear in the separate statement."].) Because the actual issues presented by Plaintiffs' motion are questions of statutory and constitutional interpretation, rather than fact, the Court exercises its discretion to consider Plaintiffs' motion in the absence of a separate statement.

B. DECLARATORY RELIEF IS PROPERLY CONSIDERED ON A MOTION FOR SUMMARY JUDGMENT

1. Plaintiffs Have Standing to Seek Declaratory Relief

To state a claim for declaratory relief under CCP section 1060, a plaintiff must show "(1) a proper subject of declaratory relief, and (2) an actual controversy involving justiciable questions relating to [his] rights or obligations." (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582.) An "actual controversy" includes a sufficiently probable future controversy between the parties, but does not include controversies that are "conjectural, anticipated to occur in the future, or an attempt to obtain an advisory opinion from the court." (*Ibid.*)

The ERCDC has admitted in its answer that Plaintiffs have participated in ERCDC power plant siting decisions. (Compl. ¶¶ 9, 11; Answer of ERCDC ¶¶ 9, 11.) This admission removes the issue from contention. It is reasonable to infer on that basis that Plaintiffs are likely to do so again. It is not materially in dispute that Plaintiffs wish to be able to file legal challenges to ERCDC approvals and believe they will have better chances of receiving substantive relief in Superior Court whereas the ERCDC believes that Supreme Court review serves public policy by expediting placement and construction of new power generation capacity.

The parties have an actual dispute over the constitutionality of Section 25531, subdivisions (a) and (b) that is likely to affect the venue for future lawsuits challenging ERCDC siting certificate approval decisions.

2. The Constitutionality of a Statute Is a Proper Subject for Declaratory Relief

This action for declaratory relief is amenable to summary judgment because the disputed issues are questions of statutory interpretation and constitutionality, which may be settled by the court as issues of law. (*Walker v. Munro* (1960) 178 Cal.App.2d 67, 70–71 [constitutional issue properly addressed by summary judgment motion on action for declaratory relief], *recognized as superseded on other grounds by Lockyer v. City and Cty. of San Francisco* (2004) 33 Cal.4th 1055; *see Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22 ["Since the answer to this question turns on an interpretation of the two statutes, it is an issue of law that a court may resolve in a summary judgment motion."]; *California Public Records Research, Inc. v. County of Yolo* (2016) 4 Cal.App.5th 150, 185 ["Summary judgment is appropriate in a declaratory relief action when only legal issues are presented for the court's determination."]; *Dollinger DeAnza Associates v. Chicago Title Ins. Co.* (2011) 199 Cal.App.4th 1132, 1156 ["The court may properly grant summary adjudication of a claim for declaratory relief."].)

The Court must therefore turn to whether Plaintiffs are entitled to a favorable declaration.

C. SECTION 25531(a) UNCONSTITUTIONALLY DEFEATS OR IMPAIRS THE JURISDICTION OF THE SUPERIOR COURT

Section 25531(a), by its plain terms, limits review of ERCDC siting certificate approvals to the Supreme Court alone. Section 25531(a) provides that "[t]he decisions of the commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California." (Pub. Res. Code § 25531(a).) In statutory construction, the expression of one thing generally implies the exclusion of all others. (*See* 7 Witkin, Summary 11th Const Law § 136 (2018) [discussing principle of *expressio unius est exclusio alterius* as a tool to determining plain meaning of a statute or constitutional provision], citing *United Farm Workers of America v. Agricultural Lab. Rel. Bd.* (1995) 41 Cal.App.4th 303, 316; *In re Christopher T.* (1998) 60 Cal.App.4th 1282, 1290; *Dean v. Superior Court* (1998) 62 Cal.App.4th 638, 641; *O'Grady v. Superior Court* (2006) 139 Cal.App.4th 1423, 1443; *Kunde v. Seiler* (2011) 197 Cal.App.4th 518, 531.) The expression of "judicial review by the Supreme Court of California" intends the exclusion of the Superior Court and Court of Appeal. This reading is also confirmed by construing the provision together with Section 25903, which states that, if Section 25531(a) is held invalid, judicial review may be had in superior court. (Pub. Res. Code § 25903.) Section 25903 would be nonsensical if Section 25531 did not preclude the superior courts from reviewing administrative decisions.

The original jurisdiction of California's constitutional courts, including the superior courts, is set by Article VI, Section 10 of the California Constitution, which states as follows: "The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction. [¶] Superior courts have original jurisdiction in all other causes." (Cal.

Const. art. VI, § 10.) If a court has been vested with original jurisdiction by the Constitution, the Legislature does not have power under the constitution to "defeat or impair" that jurisdiction, barring another superseding constitutional provision. (*See Gerawan Farming, Inc. v. Agricultural Labor Relations Board* [hereafter "*Gerawan*"] (2016) 247 Cal.App.4th 284, 294, citing *Cal. Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 242-253; *Chinn v. Superior Court* (1909) 156 Cal. 478, 480.) The ERCDC argues that Article VI Section 10 should not be construed in this manner because, in 1966, the Legislature rejected a constitutional provision proposed by the Constitutional Review Commission that provided as follows "The Legislature may provide for judicial review in a court of record of any administrative action of state or local government, but may not place review in the Supreme Court in the first instance or give trial court functions to the Supreme Court or courts of appeal." (ERCDC's RJN, Ex. B. at p.92 [proposing the preceding language as Article VI Section 15]; *see also id.* Ex. D [stating the Constitution as amended in 1966, which does not include the proposed Section 15].)

The ERCDC has not offered a reason why the Legislature rejected this language. It might have done so because it found the proposed language too restrictive. It might more plausibly be that the Legislature found the section unnecessary in light of already longstanding case law. (*See, e.g., Pac. T. &. T. Co. v. Eshleman* [hereafter "*Eshleman*"] (1913) 166 Cal. 640, 652 ["[T]he legislature has with deliberation restricted and curtailed the jurisdiction vested in the superior courts of this state by the constitution. And upon this but one thing can be said. If there be not in the constitution itself warrant and power to the legislature to do this thing, its effort must be declared illegal."]; *Chinn, supra* 156 Cal. at p.480 ["It is a well-recognized principle that where the judicial power of courts, either original or appellate, is fixed by constitutional provisions, the legislature cannot either limit or extend that jurisdiction."].) Even if the Court were convinced that the ERCDC's speculation regarding the Legislature's reasons for rejecting Section 15, the Court is bound by the longstanding appellate construction of Article VI, Section 10—namely, that it prevents the Legislature from abridging the original jurisdiction of the superior courts

unless authorized by another provision of the Constitution. (*See Gerawan, supra,* 247 Cal.App.4th at p.294; *Cal. Redevelopment Assn., supra,* 53 Cal.4th at p.252; *County of Sonoma* [hereafter "*County of Sonoma*"] (1985) 40 Cal.3d 361, 369-370; *Eshleman, supra,* 166 Cal. at p.652.)

The ERCDC argues that Section 25531(a) is constitutional because Article VI Section 10 allows mandamus proceedings to begin in the Supreme Court. (*See* Cal. Const. art. VI, § 10 ["The Supreme Court . . . [has] original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition."].) To support this argument, the ERCDC relies on the rule in *Tex-Cal Land Management, Inc. v. Agricultural Labor Relations Board* (hereafter, "*Tex-Cal*") (1979) 24 Cal.3d 335. In *Tex-Cal*, the Supreme Court upheld a statute limiting initial review of Agriculture Labor Relations Board ("ALRB") decisions to the Court of Appeal in the first instance. (*Id.* at p.345.) But the constitutional question answered by *Tex-Cal* is not the constitutional question at issue here. In *Tex-Cal*, the Supreme Court was asked whether a decision of the ALRB should be vacated because review began as an appeal in the Court of Appeal rather than the Superior Court. (*See id.* at p. 347 ["The legislature may not give to courts a jurisdiction beyond that conferred or authorized by the Constitution."].) Although Article VI, Section 11 limits the appellate jurisdiction of the Court of Appeal to reviewing decisions of the Superior Court, the Court found that the review proceedings were in the nature of mandamus, not appeal. (*Id.* at p.349 [finding that language providing for review of ALRB proceedings "more appropriately describes a petition for extraordinary relief than an appeal"]; *see also* Cal. Const. art. VI, § 11(a) ["With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction . . . ."].) The Supreme Court held that, "[t]hough appellate courts often decline for nonconstitutional reasons to assume jurisdiction in nonconstitutional extraordinary writ matters deemed more appropriate for the superior court [citations], a mandate proceeding initiated in an appellate court is a constitutionally permitted vehicle for reviewing an administrative determination." (*Tex-Cal, supra,* 24 Cal.3d at p.350.) The Court relied on the

language in Article VI, Section 10 saying that the court of appeal has "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition." (*Id.* at p. 349.) In *Tex-Cal*, then, the Court held that a statute allowing for writ review beginning in the Court of Appeal did not unconstitutionally expand the appellate jurisdiction of the Court of Appeal. (*See Gerawan, supra*, 247 Cal.App.4th at p.305 ["As should be apparent from the above summary of the *Tex–Cal* case, the issue of whether an ALRA statute may divest the superior court of original jurisdiction was not before the court. Rather, *Tex–Cal* merely considered whether an ALRA statutory provision (§ 1160.8) initially directing judicial review to the appellate courts violated the grant of original jurisdiction to appellate courts by impermissibly expanding on that jurisdiction. The court held it did not do so."].) Here, the question is whether writ review beginning in the Supreme Court unconstitutionally *defeats or impairs* the original jurisdiction of the Superior Court. Because Section 25531 prescribes that review must begin in the Supreme Court, and cannot begin in the Superior Courts even though they have constitutional jurisdiction, Section 25531 unconstitutionally defeats or impairs the Superior Court's jurisdiction. (*See Gerawan, supra*, 247 Cal.App.4th at pp.294-301.)

At hearing, as in its papers, the ERCDC attempted to distinguish *Gerawan* because it was brought as an action for declaratory relief, not a writ of mandamus. The ERCDC points out that Article VI, Section 10 provides that only the Superior Courts have original jurisdiction over actions for declaratory relief. (*See* Cal. Const. art. VI, § 10 ["Superior courts have original jurisdiction in all other causes."].) The trial court in *Gerawan* sustained a demurrer without leave to amend on the grounds that it lacked jurisdiction under Labor Code section 1164.5, subdivision (a). At the time, that statute provided that a party could seek review of certain ALRB orders only by writ in the Court of Appeal or Supreme Court. The Court of Appeal held that the statute was unconstitutional because it limited the original jurisdiction of the superior court, extensively citing and discussing writ cases. The procedural posture of the challenge as an action

for declaratory judgment was irrelevant to the Court's reasoning and is not a basis to distinguish *Gerawan.*

The ERCDC also argues that Section 25531(a) is constitutional because the Supreme Court could transfer the case to a Court of Appeal for review under Rule of Court 8.528(d). (*See also* Cal. Const. art. VI, § 12(a), cl.2 ["The Supreme Court . . .may, before decision, transfer a cause from itself to a court of appeal or from one court of appeal or division to another."].) This procedure has no basis in Section 25531(a), which plainly provides that ERCDC siting certificate approvals are "subject to judicial review by the Supreme Court of California," not that they are subject to judicial review by the Court of Appeal if originated in the Supreme Court. (Pub. Res. Code § 25531(a).) Furthermore, this procedure still does not allow for the superior courts to exercise their constitutional jurisdiction because the rule allows only for transfer to a court of appeal.

There is an important exception to the general rule that the Legislature cannot defeat or impair the constitutional jurisdiction of a court of record. "[S]tatutes barring judicial review of certain administrative decisions except in the courts of appeal and/or Supreme Court have been upheld, but only where the Legislature's authority to enact such laws was found to be expressly or impliedly granted by other constitutional provisions." (*Gerawan, supra*, 247 Cal.App.4th at p.294, citing *County of Sonoma, supra*, 40 Cal.3d at pp. 369-370.) The ERCDC also argues that this constitutional exception applies, citing the *County of Sonoma* decision. In *County of Sonoma*, the Supreme Court held that the ERCDC's decisions on siting applications were so intertwined with other necessary approvals by the California Public Utilities Commission ("PUC") that direct appeals to the Supreme Court were appropriate.

The PUC is a constitutionally established organ of California government. (Cal. Const. art XII, § 1.) The California grants the legislature "plenary power, unlimited by the other provisions of this constitution . . . , to establish the manner and scope of review of commission

action in a court of record . . . ." (Cal. Const. art. XII, § 5; *see also* art. VI, § 1 [defining the Supreme Court, Court of Appeal, and superior courts as courts of record].)

At the time of the *County of Sonoma* decision, every power plant built in the state required approval from the PUC. (*County of Sonoma*, *supra*, 40 Cal.3d at p.365 ["If the [ERCDC]'s certificate is issued to a public utility, however, construction of the certified facility cannot proceed without issuance by the PUC of a certificate of public convenience and necessity."], citing Pub. Util. Code § 1001 (1974).) By statute, ERCDC citing approval had to be received before the PUC could approve the new power plant. (*Ibid.* ["[W]ith respect to a thermal powerplant or electric transmission line for which an [ERCDC] certificate is required, . . . the PUC may not grant a certificate of public convenience and necessity until after the [ERCDC] certificate has been obtained . . . ."].) Section 25531 provided that the ERCDC's siting decision could not be appealed until the PUC's decision had been made. (*Ibid.* at p.366 ["[T]he operative effect of [Section 25531] is to give [the Supreme Court] exclusive jurisdiction over Energy Commission decisions that comprise a necessary ingredient of the certificate issued by the PUC."].) When the PUC's decision was appealed, Section 25531 provided that the ERCDC's decision was subject to the same procedures and deference on review. (*Ibid.* at pp.365-66 ["[ERCDC] decisions on applications for certification of sites and related facilities that also must be certified by the PUC . . . is made subject to judicial review in the same manner as PUC decisions on the application for a certificate of public convenience and necessity for the same site and related facility."].) The *County of Sonoma* decision holds that, given this necessary, close connection between the ERCDC's decision and the PUC's decision, it was within the Legislature's plenary power over review of PUC decisions to declare that the ERCDC's decision would be reviewed at the same time and under the same terms. (*Id.* at pp.370-371 ["Section 25531 was carefully tailored to apply only to [ERCDC] action on certifications that are prerequisite to issuance of certificates of public convenience and necessity by the PUC. The legislature thereby sought to expedite the state's ultimate authorization of electric generating

plants through not only the [ERCDC] but also the PUC itself. Since section 25531 is a means of implementing and facilitating the PUC's licensing of thermoelectric power facilities sought to be constructed and operated by public utilities, its enactment was authorized by Article XII"].)

A number of things have changed since *County of Sonoma*. First, Section 25531 no longer provides that "the decisions of the [ERCDC] on any application . . . for certification of a site and related facility shall be subject to judicial review in the same manner as the decisions of the [PUC] on the application for a Certificate of Public Convenience and Necessity for the same site and related facility." (Pub. Res. Code § 25531(a), as amended by Stats. 1978, ch. 1013, § 22.) This is because, after the Legislature deregulated California's energy market, PUC approval is no longer legally required for the construction of a thermal power plant over 50 megawatts by a private party who is not a regulated utility. (*See* Pub. Util. Code § 216(h); Stats. 1996, ch. 854, §§ 9, 9.5 [adding that provision as Pub. Util. Code § 216(i)].)

The ERCDC offers evidence that, as a practical matter, PUC approval is often required, either because the company building the plant is a regulated utility on another grounds or because the PUC's approval is required as a practical matter because the PUC must approve collateral matters such as power purchase agreements with public utilities or the construction of transmission lines to connect the plant to the public grid. In its papers and at hearing, the ERCDC argues that this facial challenge must fail because, in such circumstances, Section 25531's limitations on judicial review may be constitutional.

The ERCDC's argument relies on the idea that the Legislature may extend the PUC's jurisdiction to matters that are "cognate and germane" to the regulation of public utilities. (*See Pickins v. Johnson* (1954) 42 Cal.2d 399, 404.) This line of cases is not relevant, however, because the Legislature removed power plant siting decisions from the PUC's jurisdiction when it deregulated the electricity generation market. This total removal of PUC jurisdiction means that, under California law, a non-utility party could build a power plant over 50 megawatts with an ERCDC certificate and no PUC involvement at all, and the ERCDC's siting decision would

still be subject to appeal only in the California Supreme Court even though the ERCDC's decision is no longer a "necessary ingredient" of a decision by the PUC and no longer serves the goal of "expedit[ing] the state's ultimate authorization of electric generating plants through not only the [ERCDC] but also the PUC itself." (*Cf. County of Sonoma*, *supra*, 40 Cal.3d at pp.366, 370-371.) Article XII, section 5 of the Constitution allows the Legislature to limit the power of judicial review only over "[PUC] action." (Cal. Const. art. VI, § 5 ["The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain"].) If the Legislature does not grant the PUC jurisdiction over the siting decision, that provision does not give the Legislature the "plenary power" to limit judicial review in contravention of Article VI, Section 10.

The Court therefore finds that Section 25531(a) is unconstitutional and that Plaintiffs' are entitled to a declaration to that effect.

D. SECTION 25531(b) UNCONSTITUTIONALLY ABRIDGES THE ESSENTIAL JUDICIAL POWER TO REVIEW AGENCY FINDINGS OF FACT

Section 25531(b) states "No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution. The findings and conclusions of the commission on questions of fact are final and are not subject to review, except as provided in this article. These questions of fact shall include ultimate facts and the findings and conclusions of the commission." (Pub. Res. Code § 25531(b).)

The California Constitution prescribes separation of powers. (Cal. Const. art. III, § 3 ["The powers of the state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."].) As a result, administrative agencies may not exercise the judicial power unless they are constitutionally vested with that power. (*See Strumsky v. S.D. Cty. Empls. Ret. Assn.* (1974) 11 Cal.3d 28, 34-36; *Do v. Regents of Univ. of Cal.* (2013) 216 Cal.App.4th 1474, 1484-1488.) An administrative agency may make "quasi-judicial" determinations, subject to certain guidelines: "An administrative agency may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief—including certain types of monetary relief—so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372.)

The Court need not reach whether Section 25531(b)'s prohibitions on review of the facts as determined by ERCDC is "reasonably necessary" because Section 25531(b) removes the "essential" judicial power from the Courts by insulating the ERCDC's factual findings (including findings of ultimate fact) from review by any court.

The ERCDC argues that there is no actual dispute suitable for declaratory relief on this subject because it has taken the position before the Supreme Court that its findings are subject to review under the substantial evidence standard. As support, the ERCDC cites its own rules, which require that its factual findings be supported by substantial evidence, and the identical position it has taken in writ proceedings before the Supreme Court. Although the parties may not dispute the proper standard of review for ERCDC factual findings that is not the issue on which Plaintiffs seek a declaration. Plaintiffs seek a declaration of the constitutionality of Section 25531(b), and the constitutionality of that subdivision is disputed by the parties in their papers.

The ERCDC bases its position on the language that the Supreme Court may review whether the ERCDC "has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution." (Pub. Res. Code § 25531(b).) This language, the ERCDC argues, has been interpreted to include an inquiry into whether the findings of fact are supported by evidence, a question of law. (*See Camp Meeker Water Sys., Inc. v. Pub. Util. Com.* (1990) 51 Cal.3d 845, 863.) This reading is contradicted, however, by the plain language of the statute providing that "[t]he findings and conclusions of the commission on questions of fact are final and are not subject to review." (Pub. Res. Code § 25531(b).)

The Court finds that this language is not ambiguous. For that reason, the principle that statutes should be construed to avoid unconstitutionality only operates when a statute is fairly susceptible to two or more readings, and it therefore does not apply here. (*See* 7 Witkin, Summary 11th Const Law § 133 (2018) ["A statute susceptible of two interpretations will if possible be construed as constitutional."].) Section 25531(b) is unconstitutional on its face, and Plaintiffs are entitled to a declaration to that effect as a matter of law.

E. PLAINTIFFS DISMISS THEIR CAUSE OF ACTION FOR TAXPAYER INJUNCTION, AND THEIR MOTION THEREFORE RESOLVES ALL CAUSES OF ACTION

Plaintiffs assert a third cause of action under Code of Civil Procedure section 526a for a taxpayer injunction against illegal expenditure of public funds. In their motion papers, Plaintiffs have not offered evidence or argument in favor of the fact that they pay taxes that fund the ERCDC. The Court lacks power to grant summary adjudication of specific causes of action when the motion was noticed only for summary judgment. (*See Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 974 ["[i]n its notice of motion Maryland did not identify the coverage provided by particular policies as discrete issues on which it was seeking summary adjudication. Thus we do not have the power to direct the trial court to enter an order in

Maryland's favor as to the coverage provided by particular policies.].) The Court tentatively denied Plaintiffs' motion for summary judgment on that basis.

At hearing, Plaintiffs requested that the Court dismiss their third cause of action to remove that obstacle from resolution of their case. The Court ordered that the Plaintiffs' third cause of action be deemed dismissed before Plaintiffs' motion was filed. The Plaintiffs' third cause of action therefore no longer stands as an impediment to granting Plaintiffs' motion.

III. ORDER

Plaintiffs' motion for summary judgment is **GRANTED.**

The ERCDC's motion for summary judgment is **DENIED**.

Plaintiffs are **ORDERED** to prepare a proposed judgment to the effect that, in accordance with the Court's order of April 2, 2019, it is adjudged and decreed that Public Resource Code section 25531, subdivisions (a) and (b) are void and unenforceable as unconstitutional. The proposed judgment shall be submitted to the Clerk of Department 19, Administration Building (Third Floor), 1221 Oak Street, Oakland, CA, 94612, on or before April 12, 2019. A Compliance Hearing is set for May 7, 2019 at 3 p.m. in Department 19. If a final judgment has been entered, this date will be vacated.

Dated: April 2, 2019

Stephen Kaus
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG13681262

Case name: COMMUNITIES FOR A BETTER ENVIRONMENT AND CENTER FOR BIOLOGICAL DIVERSITY, non-profit corporations' v. ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISION

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of **Order After Hearing on Parties' Cross-Motions For Summary Judgment** filed on April 3, 2019, 2019 was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 4, 2019.

Chad Finke, Executive Officer/Clerk of the Superior Court

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