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Bloom, co-trustee of the Lynn Bloom Trust; James C. Roth;
9 Dolores D. Michaelson; and Michele Karpé

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

E&B NATURAL RESOURCES
MANAGEMENT CORPORATION, a
California corporation; LAURIE VOLM;
SHARYL G. BLOOM, co-trustee of The Lynn
Bloom Trust; RICHARD S. BLOOM, co-trustee
of The Lynn Bloom Trust; JAMES C.
ROTH; DOLORES D. MICHAELSON; and
MICHELE KARPE,

Plaintiffs and Petitioners,

v.

COUNTY OF ALAMEDA; ALAMEDA
COUNTY BOARD OF SUPERVISORS; and
DOES 1-50,

Defendants and Respondents.

Case No. 4:18-cv-05857-YGR

THIRD JOINT CASE MANAGEMENT
STATEMENT

Date: July 27, 2020
Time: 2:00 p.m.
Courtroom 1, 4th Floor
Judge Hon. Yvonne Gonzalez Rogers

1 Plaintiffs E&B Natural Resources Management Corporation (“E&B”), Laurie Volm,
 2 Sheryl Bloom, Richard S. Bloom, James C. Roth, Dolores D. Michaelson, and Michele Karpé
 3 (together, “Plaintiffs”), and Defendants County of Alameda (the “County”) and the Alameda
 4 County Board of Supervisors (the “Board”) (together, “Defendants”), jointly submit this Third
 5 Joint Case Management Statement pursuant to the *Standing Order for All Judges of the Northern*
 6 *District of California*, Civil Local Rule 16-9.

7 **1. JURISDICTION & SERVICE**

8 All Defendants have been served. There have been no changes or challenges to
 9 jurisdiction or service since the last Case Management Conference.

10 **2. FACTS**

11 Plaintiffs’ Statement of the Facts and Summary of Factual Issues

12 E&B and its predecessors have lawfully operated the Livermore Oil Field since
 13 approximately 1965 with the County’s knowledge and consent, and the County has issued permits
 14 allowing E&B and its predecessors to engage in those operations since 1967. E&B and its
 15 predecessors have made substantial investments in permanent production facilities at the
 16 Livermore Oil Field since the 1960s, and the County had full knowledge of those operations
 17 throughout this time period. Indeed, in 1987, 2007, and 2008, the County granted permits
 18 allowing E&B’s predecessor to continue operations at the field, which permits could only be
 19 revoked upon a showing of good cause. After obtaining its interests to operate the Livermore Oil
 20 Field between 2006 and 2008, E&B invested substantial sums in its operations there in good-faith
 21 reliance on the permits.

22 E&B is the sole operator at the Livermore Oil Field, and it currently operates several wells
 23 and associated, necessary equipment to produce oil. The potential of the Livermore Oil Field has
 24 been limited due to the Defendants’ conduct. E&B previously held three conditional use permits
 25 (“CUPs”) from Alameda County relating to the long-standing operations—it now holds only one.
 26 In July and October 2017, respectively, E&B submitted two applications to renew the GIG Lease
 27 CUP and the Nissen Lease CUP. The Alameda East County Board of Zoning Adjustments
 28 (“BZA”) held its initial public hearing to consider the two applications on February 22, 2018.

1 BZA continued its consideration of the renewal of the CUPs so that BZA staff could obtain
2 information from the Alameda County Environmental Health Department (“Environmental
3 Health Department”) concerning the Livermore Oil Field.

4 The Environmental Health Department ultimately determined that E&B’s operations at
5 the Livermore Oil Field do not present ongoing concerns or issues. The BZA held a second
6 hearing on May 24, 2018, and received further public comment on E&B’s renewal applications.
7 Following the May 24 hearing, BZA unanimously approved renewal of the CUPs.

8 The Center for Biological Diversity (“CBD”), an environmental activist group, together
9 with its local Livermore affiliate, the Livermore Eco Watchdogs, (together, “CBD”) appealed the
10 BZA’s approval of the CUPs to the Board. CBD contended that E&B’s operations at the
11 Livermore Oil Field might lead to groundwater contamination. E&B provided evidence
12 demonstrating that its Livermore Oil Field operations have not contaminated groundwater and
13 would not lead to groundwater contamination, and, in any event, groundwater protection was
14 regulated by state agencies and the U.S. Environmental Protection Agency under the federal Safe
15 Drinking Water Act, as well as other federal and state laws.

16 E&B representatives and others met with Members of the Board and Board staff prior to
17 the appeal hearing. Subsequent to those meetings, E&B representatives and others understood
18 that political pressure against fossil fuel-related industries would influence the Board to overturn
19 the BZA’s approval and grant CBD’s appeal, notwithstanding the meritless nature of the appeal,
20 the weight of evidence supporting approval of E&B’s CUP renewal, and the lack of evidence
21 supporting CBD’s appeal. Additionally, and prior to the hearing, on July 5, 2018, E&B sent a
22 detailed explanation to the County of its vested rights to operate the Livermore Oil Field, and
23 requested that the County take into account E&B’s fundamental, vested property rights in the
24 event that the Board was unduly influenced to grant the appeal, despite the evidence before it.

25 On July 24, 2018, the Board voted to grant CBD’s appeal and deny E&B’s two CUP
26 renewal applications. Members of the Board made on-the-record remarks indicating that political
27 pressures and activists’ fears concerning oil and gas production methods – whether justifiable or
28 not - compelled them to approve the appeal notwithstanding the weight of the evidence. In fact,

1 certain members of the Board also admitted prior to the hearing on the appeal that they expected
2 their approval of the appeal to be successfully challenged in court. As they were proceeding to
3 vote, county counsel interjected to clarify that the Board was basing its motion on four mandatory
4 factors enumerated in County Code 17.54.130, which effort was too little too late to give the
5 decision any facade of propriety. Notably, when the issue of vested rights came up at the hearing,
6 it was quickly brushed aside by county counsel as an inappropriate topic for the hearing.

7 On September 11, 2018, E&B received from the County Planning Department the
8 Defendants' final, written decision granting the appeals of the decisions of the BZA and denying
9 the applications for CUP renewals for the Livermore Oil Field, which were memorialized in
10 Resolutions R-2018-266 and R-2018-267.

11 The parties do not dispute the contents of the record, that the BZA approved renewal of
12 E&B's CUPs, or the fact that Defendants approved CBD's appeal. Factual issues that need to be,
13 and will be, developed in discovery include, but are not necessarily limited to: (1) Plaintiffs have
14 a vested legal right to conduct oil and gas operations at the Livermore Oil Field by virtue of the
15 fact that oil and gas production has taken place at the Livermore Oil Field for over fifty years,
16 which issue involves the substantial investments made in the field's development and operations,
17 as well as with the County's refusal to examine the vested right as part of its proceedings below;
18 (2) Defendants were motivated by political animus toward oil and gas developers by virtue of
19 political pressure from anti-oil activists, notwithstanding the legitimate regulatory justifications
20 that existed for denying CBD's appeal; (3) Defendants had forsaken their role as unbiased
21 decision-makers by deciding the merits of the appeal before the hearing actually occurred;
22 (4) Defendants' denial of the CUPs was unsupported by the evidence in the record and is, in any
23 event, not consistent with the best available scientific evidence, which E&B presented at and
24 before the hearing from numerous experts and state regulatory officials; (5) Defendants' approval
25 of the appeal had a serious economic impact on Plaintiffs; (6) Defendants' approval of the appeal
26 interfered with Plaintiffs' legitimate investment-backed expectations; and (7) the value of
27 Plaintiffs' property interest in conducting oil and gas operations at the Livermore Oil Field at its
28 highest and best use.

1 Defendants' Statement of the Facts and Summary of Factual Issues

2 The Board of Supervisors considered the issues regarding the renewal of the conditional
3 use permits based on the evidence before them. The Board of Supervisors, or members of the
4 Board or their staffs, met with representatives for E&B and with representatives of appealing
5 parties (the Center For Biological Diversity and the Livermore Eco Watchdogs) prior to the
6 hearing. Substantial public comment was received by the Board in written form from persons in
7 favor of renewal and persons opposed. Additionally, a lengthy hearing was held on July 24,
8 2018, with extensive public comment. The Board made a decision that was averse to E&B, but
9 this fact is insufficient to establish what E&B contends, i.e., bias or animus against E&B and a
10 disregard on the part of the Board of the evidence presented.

11 Since submitting the first Joint Case Management Conference Statement on July 1, 2019,
12 the parties have served supplemental initial disclosures, requested and received discovery, briefed
13 and argued the issue of vested rights and have received the Court's ruling on that issue. The next
14 round is to be briefing on Plaintiffs' Petition For Writ of Administrative Mandamus.

15 **3. LEGAL ISSUES**

16 Plaintiffs' Statement of the Legal Issues

17 The parties previously agreed that the principal legal issue that should be litigated first,
18 insomuch as it will inform Plaintiffs' Fourteenth Amendment claims under section 1983, is
19 whether Plaintiffs have vested rights to continue oil and gas operations at the Livermore Oil
20 Field.

21 Now that the Court has ruled on Plaintiffs' motion for partial summary judgment,
22 Plaintiffs propose that the Court next adjudicate Plaintiffs' claim under Code of Civil Procedure
23 section 1094.5.

24 Federal Rule of Civil Procedure 42(b) (Rule 42) provides that "[t]he court, in furtherance
25 of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and
26 economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim,
27 or any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims,
28 or issues, always preserving inviolate the right of trial by jury as declared by the Seventh

1 Amendment of the Constitution or as given by statute to the United States.” Fed. R. Civ.

2 P. 42(b). Having a bench trial on Plaintiffs’ Code of Civil Procedure section 1094.5 claim would
3 help expeditiously frame the issues remaining for trial and may lead to a negotiated resolution of
4 those claims.

5 After ruling on the writ of mandate claim, the other remaining, key legal issue is whether
6 Defendants violated Plaintiffs’ constitutional rights under the due process and equal protection
7 clauses of the 14th Amendment. This analysis requires an examination of various claims that
8 Plaintiffs have alleged. For the procedural due process claim, Plaintiffs must show that
9 Defendants deprived Plaintiffs of a fair, neutral, and impartial proceeding concerning their vested
10 rights to conduct oil and gas operations at the Livermore Oil Field. They must also show that
11 Defendants deprived Plaintiffs of a fair, neutral, and impartial proceeding concerning their right
12 to devote their property toward a legitimate use: lawful oil and gas operations under the
13 Plaintiffs’ vested rights and the County’s own Oil and Gas Ordinance.

14 For the substantive due process claim, Plaintiffs must show that Defendants acted
15 arbitrarily and irrationally by interfering in their liberty and property interests due to political
16 pressure. *See Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508-09
17 (9th Cir. 1990). Their liberty interests consist of their rights to devote their property to a
18 legitimate use and to pursue oil and gas development as their chosen occupation. Their
19 protectable property interests consist of their vested rights, which encompass what they are
20 entitled to do under the CUPs: to conduct oil and gas operations at the Livermore Oil Field.

21 For the equal protection claim, Plaintiffs must show that they were arbitrarily and
22 irrationally singled-out due to Defendants’ impermissible political motivations. *Id.* at 1508-09.

23 For the Fifth Amendment takings and inverse condemnation claims, Plaintiffs must
24 demonstrate that, at the time of taking, Defendants did not provide just compensation, interfered
25 with Plaintiffs’ distinct investment-backed expectations, and that Plaintiffs are owed such
26 compensation from this taking based on the value of the Livermore Oil Field’s highest and best
27 use. *See Knick*, 588 U.S. at slip op. 11; *see also Penn Central Transp. Co. v. New York City*, 438
28 U.S. 103 (1978). These claims should be tried last, as the nature of the relief is compensatory.

1 Defendants' Statement of the Legal Issues

2 The Court's decision on the vested rights issue has clarified the case with respect to
3 whether Plaintiffs have vested rights to continue extracting oil, the standard of review for
4 Plaintiffs' Petition For Writ of Administrative Mandamus, and property rights with respect for the
5 takings claims. Defendants are also in agreement with Plaintiffs that the Petition For Writ Of
6 Administrative Mandamus proceed next and are in agreement with the Court's sequencing.

7 After the Section 1094.5 review of the administrative action are addressed, what remains
8 are Plaintiffs' federal constitutional claims. As the Defendants understand, Plaintiffs would like a
9 jury trial on the due process and equal protection claims, and typically the jury determines
10 damages after the court rules on takings liability.

11 **4. MOTIONS**

12 Plaintiffs

13 Defendants filed a motion to dismiss on November 16, 2018. The Court granted that
14 motion with leave to amend on April 12, 2019. After Plaintiffs filed a First Amended Verified
15 Petition and Complaint on May 6, 2019, Defendants answered on May 20, 2019.

16 Plaintiffs filed their Motion for Partial Summary Judgment on November 4, 2019, with a
17 hearing date of January 7, 2020. The Court issued an order denying Plaintiffs' Motion for Partial
18 Summary Judgment on June 8, 2020 [Dckt. 89].

19 Proposed Intervenor, CBD, filed a Motion to Intervene. This Motion was denied on
20 November 1, 2019. CBD initially appealed the decision; it has since dismissed its appeal.

21 Plaintiffs intend to brief their Petition for Writ of Mandate claim. Although initially an
22 agreed upon briefing schedule had been set, it has since been vacated at the Parties' request in
23 order to allow additional time to conduct settlement negotiations.

24 Plaintiffs may also file discovery motions as needed, motions regarding expert witness
25 testimony, and motions *in limine*.

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1 Defendants

2 It is too early at this point to evaluate whether a motion for summary judgment or
3 adjudication would be productive. It is also too early to evaluate whether evidentiary issues will
4 require motions in limine.

5 **5. AMENDMENT OF PLEADINGS**

6 No amendment of the pleadings is anticipated.

7 **6. EVIDENCE PRESERVATION**

8 Counsel for Plaintiffs have advised Plaintiffs of their obligation to preserve relevant
9 evidence through a litigation hold notice.

10 Last year, the County collected and produced to E&B almost 10,000 pages of documents
11 and additional other materials that comprise all or nearly all the administrative record, thereby
12 preserving evidence. The County has also filed with the Court the Administrative Record.

13 **7. DISCLOSURES**

14 The parties served Initial Disclosures on July 31, 2019. In accordance with the obligation
15 to supplement these disclosures, Plaintiffs served supplemental disclosures on September 27,
16 2019, and a second supplement set on November 18, 2019. Defendants served supplemental
17 disclosures on October 9, 2019.

18 **8. DISCOVERY**

19 Plaintiffs' Position on Discovery

20 Plaintiffs have issued requests for production of documents and request for genuineness to
21 Defendants. In addition, Plaintiffs intend to re-notice the depositions of the County planner and
22 senior planner who recommended that the County approve E&B's CUPs. No discovery has been
23 propounded by Defendants.

24 Because their claim under Code of Civil Procedure section 1094.5 is limited to the
25 administrative record, Plaintiffs believe that remaining discovery should be focused on the issue
26 of their claims under Section 1983 (which includes the issue of vested rights). Discovery should
27 then proceed to Plaintiffs' takings claims, which will entail expert discovery. Plaintiffs have no
28 other proposals on how discovery should be limited.

1 Defendants' Position on Discovery

2 Defendants filed 41 volumes of the Administrative Record on November 8, 2019, and a
3 42nd volume on November 25th containing transcripts of hearings. In October 2019, Defendants
4 also produced about 1,250 pages of documents relating mostly to permitting on the relevant
5 parcels from County archives. This production was in conjunction with the briefing on the issue
6 of whether Plaintiffs have vested rights in the oil and gas extraction at the Livermore facility.

7 Discovery into matters relevant to the constitutional issues may or may not be necessary
8 depending how the petition for writ of mandate proceedings are resolved. Plaintiffs have noticed
9 depositions of personnel from the County Planning Department. While this evidence would not
10 be admissible for purposes of the Section 1094.5 proceeding that is based on the Administrative
11 Record, Plaintiffs are entitled generally to take discovery on their constitutional claims.

12 Leaving aside the vested rights and Section 1094.5 claims, Plaintiffs have plead violations
13 of procedural due process, substantive due process, equal protection under Section 1983, and
14 inverse condemnation and regulatory taking claims. Discovery for these causes of action is likely
15 to involve significant exploration of the following factual and expert issues: valuation of
16 Plaintiffs' property, the environmental impact of Plaintiffs' operations, whether decision-makers
17 were somehow biased, political pressure brought to bear on the County, the bases for the
18 County's exercise of police powers, and the nature of similar permit applications granted by the
19 County, among other issues. Discovery methods are likely to include requests for documents,
20 depositions, and inspections of facilities.

21 **9. CLASS ACTIONS**

22 This case is not a class action.

23 **10. RELATED CASES**

24 There are no related cases currently.

25 **11. RELIEF**

26 There have been no changes to the relief sought. Plaintiffs seek: (1) injunctive and
27 declaratory relief vindicating their vested and constitutional rights by reversing the Board's
28 decision and directing the Board to deny CBD's appeal and renew the CUPs; (2) compensatory,

1 exemplary, and all other available damages for the violation of their Fourteenth Amendment
2 rights; (3) a judicial declaration that they can continue to conduct oil and gas operations at the
3 Livermore Oil Field pursuant to its CUPs; (4) the issuance of an alternative and peremptory writ,
4 or other decree, directing Defendants to (a) vacate and set aside its July 24, 2018 decision to deny
5 E&B's application for issuance of the CUPs, and renew the permits, and/or (b) conduct further
6 proceedings on the applications consistent with the Court's decision, and corresponding
7 injunctive relief; (5) alternatively, an award of just compensation for the taking of their property
8 under the Fifth Amendment and California law; (6) attorneys' fees; and (7) any other relief the
9 Court deems just and proper.

10 **12. SETTLEMENT AND ADR**

11 Since the January 7, 2020 hearing on Plaintiffs' motion for partial summary judgment, the
12 Parties have focused significant effort and resources on private mediation before the Hon. W.
13 Scott Snowden (Ret.) of JAMS. The Parties participated in an initial mediation session on
14 January 16, 2020 in San Francisco, a second session on February 24, 2020 in Sacramento, a third
15 via telephone on April 24, 2020, and a fourth on July 10, 2020 via Zoom. In addition to these four
16 sessions, the Parties have participated in numerous other telephonic conferences among counsel
17 without the mediator present, and separate calls directly with Judge Snowden.

18 Because the County of Alameda Board of Supervisors is the ultimate decision-maker for
19 any settlement-related decisions on Defendants' behalf, the length of time it has taken to engage
20 in settlement negotiation has been extensive. The Board meets periodically, and the issue of this
21 pending litigation must be noticed on its meeting agendas in advance of such meeting.
22 Nevertheless, despite these logistical challenges, including those caused by the COVID-19
23 pandemic and civil unrest, the Parties have made significant progress toward settlement, and
24 counsel for Defendants again will be going before the Board of Supervisors on July 28, 2020
25 regarding settlement of this case. In light of the progress the Parties have made, and because it
26 appears very possible the case could settle before the end of August, the Parties jointly and
27 respectfully request that the Court continue the current stay of all litigation-related deadlines, and
28 set a further case management conference for a date in early September that is convenient to the

1 Court.

2 **13. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

3 The Parties did not consent to a magistrate judge for all purposes.

4 **14. OTHER REFERENCES**

5 The parties agree that this case should not be referred to other tribunals at this time.

6 **15. NARROWING OF ISSUES**

7 Plaintiffs' Position

8 Plaintiffs do not believe any issues at this time can be narrowed unless Defendants are
9 willing to withdraw certain affirmative defenses. Regardless, Plaintiffs believe that there is a
10 sensible ordering of the issues that this Court should adopt, for reasons explained below and
11 herein.

12 Prior to the trial on Plaintiffs' Fourteenth Amendment claims, and now that the
13 administrative record has been certified and lodged with the Court, the Court should set a separate
14 hearing/bench trial for Plaintiffs' writ of mandate claim before trial preparations begin, as a
15 determination of this claim will help narrow the issues for trial. Fed. R. Civ. P. 42(b).

16 Defendants' Position

17 Defendants continue to believe that the course of proceeding that is most judicially
18 efficient is to determine issues raised by the petition for writ of administrative mandate. If the
19 E&B plaintiffs had no vested rights to continue the extraction, and the County acted within its
20 police power, then there is not likely to be a constitutional takings or due process issue. If the
21 County's decision was not founded on appropriate evidence, then the County would likely be
22 ordered to reconsider its decision by the Court's writ of mandate. In either case, the takings
23 issues are not reached.

24 It is only if the County takes property that is vested, and by use of its police power
25 deprives the property owner of all economic benefit of its property, that a taking occurs, and the
26 constitutional claims are substantially at issue. These issues are still down the road and should be
27 reserved to the end point in the litigation and trial sequence.

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1 **16. EXPEDITED TRIAL PROCEDURE**

2 Not applicable.

3 **17. SCHEDULING**

4 See Section 12., *supra*, concerning settlement and ADR, wherein the Parties respectfully
5 request that the Court set a further case management conference in September considering the
6 progress the parties have made in settlement negotiations to date this year.

7 **18. TRIAL**

8 A Trial Setting Conference has been scheduled for October 13, 2020.

9 **19. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS**

10 E&B has filed this disclosure. Such a disclosure is not required for the individual
11 Plaintiffs and Defendants.

12 **20. PROFESSIONAL CONDUCT**

13 All attorneys of record for Plaintiffs and Defendants have reviewed the Guidelines for
14 Professional Conduct for the Northern District of California.

15 **21. OTHER**

16 None.

17 Dated: July 20, 2020

STOEL RIVES LLP

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By: /s/ Michael N. Mills
Michael N. Mills
Michael B. Brown
Sarah M. Taylor
Attorneys for Plaintiffs and Petitioners

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22 Dated: July 20, 2020

SEVERSON & WERSON

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By: /s/ John L. Kortum (approved by email 7/20/20)
Kenneth C. Ward
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