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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

SLPR, LLC, et al.

vs.

THE SAN DIEGO UNIFIED PORT DISTRICT; UNITED STATES ARMY CORPS OF ENGINEERS, and UNITED STATES NAVY,

Defendants.

CASE NO. 06 CV 1327 MMA (POR)

ORDER DENYING FEDERAL DEFENDANTS' MOTION FOR RECONSIDERATION

[Doc. No. 191]

Now before the Court is the Federal Defendants' motion for reconsideration of the Court's August 4, 2009 Order which granted Plaintiffs' motion for summary judgment on their fifth cause of action and denied the Federal Defendants' cross motion [Doc. No. 161]. The Court submitted the motion without oral argument. Local Civ. R. 7.1.d.1. For the following reasons, the Court **DENIES** the motion for reconsideration. *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985).

DISCUSSION

1. Legal Standard

Rule 60(b)¹ of the Federal Rules of Civil Procedure provides for reconsideration

¹ A motion to alter or amend a judgment must be made within twenty-eight (28) days of entry of judgment. Fed. R. Civ. P. 59(e). Here, the Court's order was entered on August 4, 2009, and the present motion was filed on November 24, 2009, well beyond the twenty-eight day period. As such, the motion to reconsider is untimely under Rule 59(e) and

1 where one or more of the following is shown: (1) mistake, inadvertence, surprise or
2 excusable neglect; (2) newly discovered evidence which by due diligence could not have
3 been discovered before the court’s decision; (3) fraud by the adverse party; (4) voiding of
4 the judgment; (5) satisfaction of the judgment; (6) any other reason justifying relief. Fed.
5 R. Civ. P. 60(b); *School Dist. 1J v. A Cand S Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).
6 Federal Defendants do not reference Rule 60(b) in their moving papers, and do not argue
7 that reconsideration should be based on subparagraphs (1) through (5). Therefore the Court
8 *sua sponte* considers the motion pursuant to Rule 60(b)(6). Subparagraph (6) requires a
9 showing that the grounds justifying relief are extraordinary; mere dissatisfaction with the
10 court’s order or belief that the court is wrong in its decision are not adequate grounds for
11 relief. *Twentieth Century -- Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir.
12 1981).

13 The Court notes that Rule 60(b)(6) “is used sparingly as an equitable remedy to
14 prevent manifest injustice and is to be utilized only where extraordinary circumstances
15 prevented a party from taking timely action to prevent or correct an erroneous judgment.”
16 *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1103 (9th Cir. 2006). Here,
17 Federal Defendants fail to show how the Court’s August 4, 2009 order is manifestly unjust,
18 nor do they demonstrate that extraordinary circumstances exist. Nevertheless, the Court
19 addresses the substantive issues raised in the motion below.

20 2. Analysis

21 Federal Defendants first request the Court reconsider its determination that the
22 Army Corps’ of Engineers (“ACOE”) consistency determination was arbitrary and
23 capricious because it failed to address the ACOE’s 2001 Coronado Shoreline Report. After
24 the hearing, the Ninth Circuit decided *River Runners for Wilderness v. Martin*, 574 F.3d
25 723 (9th Cir. 2009). Federal Defendants argue this case shows that an apparent
26 inconsistency between the ACOE’s consistency determination *and* the earlier Coronado

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should be considered under Rule 60(b). *Am. Ironworks & Erectors, Inc. v. N. Am. Contr. Corp.*, 248 F.3d 892, 898-99 (9th Cir. 2001).

1 Shoreline Report does not automatically render the agency’s action arbitrary and
2 capricious. Federal Defendants focus on the discussion as to whether the policy at issue in
3 *Martin* had the “force and effect of law” and argue that the Coronado Shoreline Report in
4 the instant case does not qualify as a binding legal obligation. *See id.* at 731-33.

5 The *Martin* decision does not require this Court to reconsider its decision.² The
6 plaintiffs in *Martin* sought to characterize a agency document as a binding policy and
7 argued they had the right to enforce it in court. By contrast, no one in this case ever
8 suggested that the Coronado Shoreline Report was policy, that it was mandatory, that it
9 created a substantive right, or that ACOE did not give a “reasoned analysis” for changing
10 an earlier policy decision. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*,
11 463 U.S. 29, 57 (1983). The issue in the fifth cause of action was whether the Federal
12 Defendants considered (or not) the impact that the 2004 dredging project would have on
13 shoreline erosion and the analysis in the Coronado Shoreline Report illustrated that it was
14 an important issue to the Plaintiffs’ homes on First Street. The Court found that Federal
15 Defendants “entirely failed to consider an important aspect of the problem” in violation of
16 the Administrative Procedures Act (“APA”). *Id.* at 57; 43 5 U.S.C. § 706(2)(A). In
17 *Martin*, 574 F.3d at 730, the agency had exhaustively considered the “aspect of the
18 problem” that the plaintiffs wanted enforced (there, whether motorized rafts impacted the
19 wilderness character of a river).

20 As to the related assertion that the Court incorrectly framed the issue and should
21 have required the Plaintiffs to establish a causal connection between ship wakes and
22 erosion, the Court agrees with Plaintiffs’ analysis. “[T]he precise point of Plaintiffs’
23 complaint” is that “[t]he record provides no connection between ship wakes and the

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25 ²Federal Defendants’ citation to *Southwest Center for Biological Diversity v. United*
26 *States Forest Service*, 100 F.3d 1443 (9th Cir. 1996) is unavailing. In that case, the plaintiffs
27 argued that the Forest Service failed to comply with a Memorandum of Agreement in which
28 it committed to involving the Fish and Wildlife Service in decisions to sell salvaged timber.
The Ninth Circuit held the document was not binding. Moreover, the document conflicted
with the statutory provision that the Forest Service had no obligation to consider the views of
other agencies before it approved a salvage sale as that discretion was vested solely in the
Secretary of Agriculture. *Id.* at 1445 n.1 & 1449; *Inland Empire Public Lands Council v.*
Glickman, 88 F.3d 697, 702 (9th Cir. 1996).

1 dredging project because the Army Corps didn't consider it." Pls.' Opp. Br. at 5. The APA
2 requires agencies, in the first instance, to "consider[] the relevant factors and articulate[] a
3 rational connection between the facts found and the choice made." *Baltimore Gas & Elec.*
4 *Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 105 (1983); *Wildlife*
5 *Federation v. National Marine Fisheries Serv.*, 422 F.3d 782, 798 (9th Cir. 2005)
6 ("[d]eference is not owed when the agency has completely failed to address some factor
7 consideration of which was essential to making an informed decision") (quotation and
8 citations omitted). Save one handwritten note, the record was silent on an important aspect
9 of the agency's decision to conduct additional dredging near Plaintiffs' homes.

10 In its reply brief, the Federal Defendants emphasize that the Coronado Shoreline
11 Report was prepared to determine whether the ACOE had jurisdiction to mitigate the
12 erosion in Coronado under the Rivers and Harbors Act of 1899. That Act gives the ACOE
13 authority to "investigate, study, plan, and implement structural and nonstructural measures
14 for the prevention or mitigation of damages attributable to Federal navigation works." 33
15 U.S.C. §§ 426i(a); *e.g.*, *Save the Dunes Council v. Alexander*, 584 F.2d 158, 165 (7th Cir.
16 1978) (Congress enacted provision "to permit the Corps to apply its expertise and
17 discretion to the problem of erosion damage caused by existing navigational structures.").
18 By regulation, the ACOE established a general policy that it would not use this authority
19 for construction of works for prevention or mitigation of shore damages such as those
20 caused by . . . vessel generated wave wash." 33 C.F.R. § 263.27 (c)(1)(i). The Federal
21 Defendants argue that the Court confused the Rivers and Harbors Act with the issue
22 involved in Plaintiffs' fifth cause of action. They argue that the Coronado Shoreline Report
23 answered the jurisdictional question in the negative because the erosion was caused by
24 vessel generated wave wash.

25 The Court did not apply the Rivers and Harbors Act. The Federal Defendants'
26 argument returns to its proposition that the Coronado Shoreline Report was an informal
27 document that does not embody a change in policy and does carry the force of law, but the
28 Court has already addressed that contention.

1 Second, they argue the Court should reverse its findings that the failure to disclose
2 the Coronado Shoreline Report to the California Coastal Commission was a “separate”
3 violation of the APA which “automatically” meant it violated the Coastal Zone
4 Management Act (“CZMA”) and governing regulations. 16 U.S.C. § 1456. Federal
5 Defendants repeat their assertion that they gave the California Coastal Commission
6 adequate information on the dredging project.

7 The Court rejects this recycled argument for the reasons stated in the original Order,
8 and as articulately stated in the Plaintiffs’ brief. Pls.’ Opp. Br. at 6-7. The purposes of the
9 CZMA include preserving, protecting, restoring, or enhancing coastal waters, including
10 shorelines and beaches; minimizing the loss of life and property caused by improper
11 development in erosion-prone areas; and encouraging cooperation and coordination
12 between federal, state, and local agencies. 16 U.S.C. §§ 1452(1), (2)(B), (4), (5) &
13 1453(1). The statute fulfills those purposes by requiring federal activities to comply “to the
14 maximum extent practicable” with the state’s coastal management plans (here, the
15 California Coastal Act) and require the federal agency to share information with the
16 relevant state agency (here, the California Coastal Commission) on the planned federal
17 activity. *Id.* § 1456(c)(1)(A). The California Coastal Commission is entitled to
18 comprehensive information on reasonably foreseeable direct and indirect environmental
19 effects. 15 C.F.R. § 930.33(a)(1), (d) (“Federal agencies shall broadly construe the effects
20 test”); *id.* § 930.58 (when federal permit required, the state agency must receive “all
21 material relevant to a State’s management program”). The federal agency’s consistency
22 determination “must be based upon an evaluation of the relevant enforceable policies” of
23 the California Coastal Act. 15 C.F.R. § 930.39(a) (“A description of this evaluation shall
24 be included in the consistency determination, or provided to the State agency
25 simultaneously with the consistency determination if the evaluation is contained in another
26 document.”). California’s “management plan” contains at least two mandates that make
27 information about the erosion of Coronado’s shoreline that is jeopardizing the Plaintiffs’
28 homes materially relevant to the ACOE’s dredging project. One, state law mandates that

1 new development “shall” “assure stability and structural integrity, and neither create nor
2 contribute significantly to erosion” of the coastal area. Cal. Pub. Res. Code § 30253(b).
3 Two, feasible mitigation measures must be provided “to minimize adverse environmental
4 effects” of dredging. *Id.* § 30233. Because Federal Defendants did not evaluate or inform
5 the California Coastal Commission of the information contained in the Coronado Shoreline
6 Report about ship wakes, deep sinks, and steep slopes, its decision was not in accordance
7 with the CZMA.

8 In a related point, Federal Defendants move for reconsideration of the remedy to the
9 extent it requires them to submit the Coronado Shoreline Report to the California Coastal
10 Commission. The Court reaffirms its decision that this is an appropriate remedy that is
11 tailored to the specific deficiency. *National Wildlife Federation v. National Marine*
12 *Fisheries Service*, 524 F.3d 917, 937-38 (9th Cir. 2008) (remand with specific directions);
13 *California Coastal Com’n v. United States*, 5 F. Supp. 2d 1106, 1111-12 (S.D. Cal. 1998)
14 (enjoining Navy from offshore dumping of dredged materials until it complied with
15 CZMA, including consideration of reports); *see* Pls.’ Opp. Br. at 11-13 (collecting cases).

16 As a fourth point of disagreement, Federal Defendants ask the Court to reconsider its
17 decision to supplement the administrative record with a declaration from Skelly and to
18 reject documents submitted by the ACOE. The Court rejects the Federal Defendants’
19 argument that they were “denied the opportunity to explain the irrelevance of the 2001
20 Coronado Shoreline Report.” Mot. at 6. At the hearing, the Court asked the government
21 about its “federal interest” argument and the Court addressed it in the Order. Nor did the
22 Court conduct a “comparison” of the Plaintiffs’ expert opinion with the ACOE’s expertise.
23 The Court explained that the agency’s omission was evident from the face of the record,
24 but used the expert testimony to illustrate the importance of the omission. *Asarco, Inc. v.*
25 *United States EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (“It will often be impossible,
26 especially when highly technical matters are involved, for the court to determine whether
27 the agency took into consideration all relevant factors unless it looks outside the record to
28 determine what matters the agency should have considered but did not.”).

1 Fifth, Federal Defendants ask the Court to strike the unnecessary factual finding that
2 the Plaintiffs are adversely affected by the dredging. The government states the “finding
3 extends beyond the Court’s powers.” Mot. at 7. The Court’s concluding paragraph must
4 be read in the context of the decision on the fifth cause of action. The language merely
5 recognizes that the Plaintiffs’ homes are in serious jeopardy.


6 Finally, Federal Defendants argue the Court lacks jurisdiction to compel the Federal
7 Defendants to perform mitigation. The Court did not identify any specific steps because
8 mitigation, if any, is an issue for the ACOE and/or the California Coastal Commission to
9 decide. The Order remanded the action to the agency and set a time line given the ongoing
10 erosion under Plaintiffs’ homes. *National Wildlife Federation*, 524 F.3d at 937 (setting
11 deadline for remand in light of urgency).

12 **CONCLUSION**

13 Based on the foregoing, the Court finds that Federal Defendants fail to demonstrate
14 that they are entitled to relief pursuant to Federal Rule of Civil Procedure 60(b).
15 Accordingly, the Court **DENIES** Federal Defendants’ motion for reconsideration.

16 **IT IS SO ORDERED.**

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18 DATED: June 8, 2010

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20 Hon. Michael M. Anello
21 United States District Judge
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