

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Center for Biological Diversi Plaintiff/Petitioner(s)
vs.
California Department of Co Defendant/Respondent(s) (Abbreviated Title)

No. RG12652054

Minutes

Department 31 Honorable Evelio Grillo, Judge
Reporter Nancy Cardoza CSR #3815

Cause called for Motion: January 13, 2014.

WSPA, CIPA, IOPA appearing by counsel Jeff Dintzer and Mathew Wickershap.

WSPA appearing by counsel Blaine Green.

CIPA appearing by cpimse; Jack Yeh.

The motion of the California Dept. of Conservation, Division of Oil, Gas, and Geothermal Resources ("DOGGR") for joinder in the motion to dismiss complaint or for judgment on the pleadings is GRANTED.

The order on the underlying motion is as follows:

The Motion of Western States Petroleum Association, Independent Oil Producers Agency, and California Independent Petroleum Association (the "Industry Groups") to dismiss complaint or for judgment on the pleadings is GRANTED without prejudice to any claims for failure to comply with 14 CCP 1761 et seq.

The complaint filed 10/16/12 seeks declaratory and injunctive relief. The Complaint asserts that the California Dept. of Conservation, Division of Oil, Gas, and Geothermal Resources ("DOGGR") has a pattern and practice of failing to comply with CEQA in issuing permits for oil and gas wells that involve "fracking." Rather than engage in the environmental review required by law, DOGGR exempt oil and gas well projects or issues negative declarations based on boilerplate findings. The complaint is addressed to the DOGGR's alleged "pattern and practice" and not to the issuance of a permit for any specific well.

The Order of 5/1/13 stated, "A plaintiff can ... file an action for declaratory relief to challenge an agency's policy even if the plaintiff would need to file a petition under CCP 1094.5 to challenge the agency's application of that policy to a specific project." The Order then cited *K.G. v. Meredith* (2012) 204 Cal.App.4th 164, 177, for the proposition that "An action for declaratory relief is an appropriate means of challenging an alleged "overarching" policy or practice of an agency where there is an actual and present controversy over the policy."

Regarding the claim for declaratory relief, CCP 1060 states: "Any person ... who desires a declaration of his or her rights or duties with respect to another, ... may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action ... in the superior court...." Therefore, "declaratory relief is appropriate only where there is an actual controversy, not simply an abstract or academic dispute." (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746.) In the Order of 5/1/13 the court stated, "The complaint asserts a current justiciable controversy."

The Industry Groups assert that the court should dismiss the case on the ground that the State has enacted SB 4, that SB 4 directs how the DOGGR must proceed regarding its environmental review of applications for hydraulic fracking, and that SB 4 is a comprehensive legislative solution that moots the claims in this

case.

The DOGGR issued draft emergency regulations on 12/11/13, the public can make comments through approximately 12/26/14, and the regulations have a proposed effective date of 1/1/14.

The Industry Groups frame the motion as presenting issues of mootness. The court agrees that the issue is one of justiciability generally, but finds that it concerns both ripeness and mootness. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574-1574.)

For ease of analysis, the court divides the justiciability analysis into four parts: (1) The DOGGR's policy or practice before 1/1/15; (2) The DOGGR's policy or practice after 1/1/15; (3) The DOGGR's review of individual wells before 1/1/15; and (4) The DOGGR's review of individual wells after 1/1/15.

THE DOGGR'S POLICY OR PRACTICE BEFORE 1/1/15. Motion to dismiss as moot is GRANTED without prejudice to any claims for failure to comply with 14 CCP 1761 et seq. Section 3161(b) states:

(b) The division shall allow, until regulations governing this article are finalized and implemented, and upon written notification by an operator, all of the activities defined in Section 3157, provided all of the following conditions are met:

(1) The owner or operator certifies compliance with subdivision (b) of, subparagraphs (A) to (F), inclusive, of paragraph (1) and paragraphs (6) and (7) of subdivision (d) of, and subdivision (g) of, Section 3160.

(2) The owner or operator provides a complete well history, incorporating the information required by Section 3160, to the division on or before March 1, 2015.

(3) The division conducts an environmental impact report (EIR) pursuant to the California Environmental Quality Act (Division 13 (commencing with Section 21000)), in order to provide the public with detailed information regarding any potential environmental impacts of well stimulation in the state.

(4) Any environmental review conducted by the division shall fully comply with all of the following requirements:

(A) The EIR shall be certified by the division as the lead agency, no later than July 1, 2015.

(B) The EIR shall address the issue of activities that may be conducted as defined in Section 3157 and that may occur at oil wells in the state existing prior to, and after, the effective date of this section.

(C) The EIR shall not conflict with an EIR conducted by a local lead agency that is certified on or before July 1, 2015. Nothing in this section prohibits a local lead agency from conducting its own EIR.

(5) The division ensures that all activities pursuant to this section fully conform with this article and other applicable provisions of law on or before December 31, 2015, through a permitting process.

(6) The division has the emergency regulatory authority to implement the purposes of this section.

Section 3161(b) starts with the statement that the division "shall allow" all of the activities defined in Section 3157 [fracking] provided certain conditions are met. "Shall" is mandatory language. Therefore, giving effect to the plain language of the statute, the DOGGR "shall" allow fracking when the conditions are met.

Section 3161(b)(1) and (2) set forth conditions that the owner or operator must meet. The plain text of the statute suggests that if the owner or operator meets those conditions, then the DOGGR must issue a permit.

Section 3161(b)(3)-(5) set forth conditions that the DOGGR must meet. If the DOGGR fails to meet those conditions, then the DOGGR will not longer be required to issue permits under section 3161(b). These state that DOGGR must "conduct" an EIR while its it preparing the final regulations, but also suggests somewhat incongruously that DOGGR must complete the EIR before issuing any of the permits suggested by Section 3161(b)(1) and (2).

Section 3060(b)(6) grants the DOGGR authority to implement emergency regulations to implement the provisions of the section and the regulations address this incongruity.. The DOGGR's emergency regulations state, "As directed by Public Resources Code 3161, the Division must allow, and will allow, well stimulation to proceed if the operator has provided all of the required information and certifications."

The court is directed to give the regulations substantial deference. (*Estrada v. City of Los Angeles* (2013) 218 Cal.App.4th 143, 148-149 ["While the interpretation of a statute is ultimately a question of law, appellate courts will defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the clear language and purpose of the interpreted provision."].)

On 12/30/13, the Office of Administrative Law approved emergency regulations. Emergency Regulation 14 CCR 1783 states that when an applicant submits a written notification with the information required by 14 CCR 1783.1, then "As directed by Public Resource Code 3161, the Division must allow, and will allow well stimulation to proceed."

The legislature has given the DOGGR clear directions to issue permits if the requirements of 3061(b) are met. The court finds that the complaint's challenge to the DOGGR's policy or practice before 1/1/15 is moot because under Section 3060 and 14 CCR 1783 DOGGR is now required to issue permits when the requirements of 3061(b) are met.

THE DOGGR'S POLICY OR PRACTICE AFTER 1/1/15. Motion to dismiss as not ripe is GRANTED. SB4 mandates that on or before 1/1/15 the DOGGR will complete a study and have fracking regulations in place. Section 3160(a) states that on or before 1/1/15 the State will complete a scientific study of fracking and section 3160(b) and 3151(b) state that on or before 1/1/15 the State will adopt rules and regulations regarding fracking. Regarding CEQA, Section 3161(b)(3) states that the DOGGR will conduct an EIR regarding fracking in the state and Section 3161(b)(4)(A) states that the EIR will be certified by the lead agency on or before 7/1/15. Section 3161(b)(4)(C) states that the DOGGR's EIR must not conflict with an EIR certified by a local lead agency before 7/1/15.


The legislature has given the DOGGR clear directions to study fracking and to have regulations in place by 1/1/15. The court finds that the complaint's challenge to the DOGGR's policy or practice after 1/1/15 is not ripe for judicial review because the DOGGR has not yet completed its regulations. The court takes judicial notice that on 11/18/13 the DOGGR released proposed fracking regulations and that the proposed regulations to no appear to address environmental review under CEQA.

THE DOGGR'S REVIEW OF INDIVIDUAL WELLS BEFORE 1/1/15. The complaint never sought relief based on the DOGGR's review of individual wells. Motion to dismiss is GRANTED without prejudice to any claims for failure to comply with 14 CCP 1761 et seq.

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The case is DISMISSED.

Minutes of 01/13/2014
Entered on 01/17/2014

Executive Officer / Clerk of the Superior Court
By  Deputy Clerk

Earthjustice
Attn: Rostov, William
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Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Center for Biological Diversi Plaintiff/Petitioner(s)	No. <u>RG12652054</u>
VS.	Order
California Department of Co Defendant/Respondent(s) (Abbreviated Title)	Motion for Joinder Granted

The Motion for Joinder was set for hearing on 01/13/2014 at 01:30 PM in Department 31 before the Honorable Evelio Grillo. The Tentative Ruling was published and has not been contested.

IT IS HEREBY ORDERED THAT:

The tentative ruling is affirmed as follows: The motion of the California Dept. of Conservation, Division of Oil, Gas, and Geothermal Resources ("DOGGR") for joinder in the motion to dismiss complaint or for judgment on the pleadings is **GRANTED**.

The order on the underlying motion is as follows:

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Dated: 01/13/2014



Facsimile

Judge Evelio Grillo