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Califonia Department of Conservation,
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Resources

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

Center for Biological Diversi Plaintiff/Petitioner(s) VS. Califonia Department of Con Defendant/Respondent(s) (Abbreviated Title)	No. RG15769302 Order Motion for Preliminary Injunction Denied

The Motion for Preliminary Injunction filed for Sierra Club and Center for Biological Diversity was set for hearing on 07/02/2015 at 02:30 PM in Department 17 before the Honorable George C. Hernandez, Jr.. The Tentative Ruling was published and was contested.

The matter was argued and submitted, and good cause appearing therefore,

IT IS HEREBY ORDERED THAT:

The Motion of Plaintiffs/Petitioners Center for Biological Diversity et al. ("Plaintiffs") for Preliminary Injunction is DENIED, for the reasons that follow.

Plaintiffs attack the validity of emergency regulations enacted by Respondent/Defendant California's Division of Oil, Gas and Geothermal Resources ("DOGGR" or "Defendant") on April 20, 2015, under two legal theories. First, Plaintiffs allege that the emergency regulations are invalid under the Administrative Procedures Act. Plaintiffs contend that the facts recited in the finding of emergency do not, in fact constitute an emergency, and that the finding of necessity is not supported by substantial evidence. Second, Plaintiffs seek a writ of mandate on the grounds that DOGGR has failed to perform ministerial duties required by law, i.e., that applicable law (the Federal Safe Drinking Water Act, SDWA) and implementing regulations do not allow DOGGR to permit injections into non-exempt aquifers and require DOGGR to take specific enforcement action against all violators.

APPLICABLE LEGAL STANDARD. The standard for issuance of a preliminary injunction is well-established: The court must weigh two interrelated factors: (1) the likelihood that the moving party will ultimately prevail on the merits and (2) relative interim harm to the parties from issuance or nonissuance of the injunction. (See, e.g., Butt v. State of California (1992) 4 Cal.4th 668, 677-78.) The greater the Plaintiffs' showing on one factor, the less must be shown on the other to support an injunction. (Id. at 678.) The court cannot grant a preliminary injunction unless there is some possibility that the Plaintiffs would ultimately prevail on the merits of the claim. (Id.)

Plaintiffs suggested that because the underlying statutory framework is preventative in nature, presuming harm by making injections unlawful unless and until an exemption is obtained, Plaintiffs need only show that they are likely to prevail on the merits. However, People ex rel. San Francisco Bay Conservation etc. Com. v. Smith (1994) 26 Cal.App.4th 113 does not clearly dispense with the balancing-of-harms requirement; there, the court cited to record evidence of continuing violations causing actual harm (impeding public use of bay waters) and found this was sufficient to support an injunction. Further, Plaintiffs have not pointed to any statutory provision, in the SDWA or otherwise,

specifically authorizing an injunction without any determination regarding the relative hardships. (Compare, e.g., Health & Safety Code §§ 25184, 111910.) Even if such a provision existed, a showing of probable merit would only give rise to a presumption that the potential harm to the public outweighs the potential hardship to defendant, which Defendant may rebut. (IT Corp. v. Cnty. of Imperial (1983) 35 Cal.3d 63, 72.)

ANALYSIS. Because, as discussed below, the balance of harms heavily favors the public and the State, the court assumes arguendo that Plaintiffs are likely to prevail on one or more of their legal theories.

The question presented is which approach poses a more imminent and serious threat of harm to the public (mainly to the integrity of California's drinking water supply) - Plaintiffs' proposed injunction or Defendant's emergency regulations (also referred to as the "corrective action plan".) The corrective action plan essentially create an "en masse" administrative proceeding, grouping wells together based upon the quality of water in their associated aquifers (and thus, the risk of contaminating drinking water), and require operators to establish their entitlement to an exemption by certain deadlines. (See Turner Decl. Exs. B, G.) The plan was devised in cooperation with the U.S. Environmental Protection Agency, which since 1983 has supervised DOGGR's enforcement of the SWDA pursuant to a grant of primacy. (Id. Exs. B, C.) Defendant notes that the EPA expressly contemplated that the corrective action plan would not supplant, but complement, DOGGR's existing authority to take corrective action. (Turner Decl. Ex. C at p. 3.) Plaintiffs do not dispute this.

The court agrees with the general proposition that DOGGR's failure to enforce the SWDA's exemption requirements threatens irreparable harm (contamination) to the State's underground drinking water supply. The court also accepts Plaintiff's evidence that once an aquifer is contaminated, it cannot be remediated. However, these are general propositions, and do not constitute evidence of the risk of imminent harm to protected (non-exempt) aquifers. Plaintiffs' evidence - generalized admissions by the DOGGR that it has not effectively enforced existing law and statements concerning actual harm which are, at best, ambiguous - is unpersuasive. They repeatedly cite to the Bishop Testimony; however, Mr. Bishop admits that "[w]e have not found...that an active drinking water well has been impacted...." Similarly, in the course of Defendant's review under the emergency regulations, in which it has prioritized noncompliant injection wells with the highest risk of contamination, DOGGR has found no contamination. (Zakim Decl. Ex. E at p.5.) Defendant and intervenors contend that most of the wells that have not already been shut-in are low-risk wells, due to the poor quality of the water there (e.g., they are located in hydrocarbon bearing zones). Plaintiff argued at the hearing that this is not true, but admits that no one knows, because the issue has not been studied by DOGGR. Lack of knowledge does not establish a risk of imminent harm.

On the other hand, the potential harm to the public, if this court were to vacate the emergency regulations and order DOGGR to proceed against over 2,000 (and possibly up to 6,100) wells via individual enforcement actions is substantial and almost certain to occur. The costs and strain on State resources, if the State were ordered to proceed in this fashion, would be significant. Nor would relief be immediate or certain. As DOGGR explained at the hearing on this motion, regular shut-in orders could be stayed until all appeals are exhausted; the time it would take to issue shut-in orders and complete the administrative appeals process on a case-by-case basis would likely extend beyond the outer deadlines under the emergency regulations (corrective action plan). Thus, in cases where DOGGR does not already have evidence to support an actual threat to the environment, administrative enforcement actions would cost more, and provide less certain relief, in a longer amount of time, than the emergency regulations.

Plaintiffs argue that DOGGR could issue emergency (as opposed to regular) shut-in orders, which have immediate effect and cannot be stayed. For this, DOGGR must have evidence of an actual threat to the public/environment and thus, must investigate the wells/aquifer at issue before issuing the order. (See, e.g., Supp. Zakim Decl. Ex. W.) Plaintiffs suggested at the hearing that DOGGR already has a factual basis for issuing emergency shut-in orders for thousands of wells, but this contention is based upon the admission that many aquifers are nonexempt (and/or that wells lack permits), not an admission of any actual threat to drinking water. Not only would substantial resources would be required to request immediate shut-ins of each of the injection wells at issue, more resources would then be required to litigate the administrative proceedings. Given the substantial losses imposed by immediate shut-ins of thousands of wells across the state (see, e.g., Piron Decl. ¶¶ 20-22, Coppersmith Dec. ¶¶ 20-23; Rosenlieb Decl. ¶¶ 20-23; Butler Decl. ¶¶ 17-20), it is likely that blanket emergency shut-in orders will

be vigorously contested. (By comparison, the Energy Company intervenors noted that they did not challenge the DOGGR's selective determination, under the emergency regulations, that the 23 wells immediately needed to be shut down.) Thus, enforcement via with individual administrative proceedings is plainly far more costly, less efficient, and - overall, when dealing with thousands of wells - less effective.

Plaintiffs' proposed injunction would also force DOGGR to attempt to proceed with respect to thousands of wells at once and thereby deprive DOGGR of the ability to focus its resources on the wells posing the greatest risk to aquifers that are most likely to contain drinking water. This would not result in the orderly or effective enforcement of the SWDA or benefit the public.

The emergency regulations address a difficult situation (admittedly one caused mainly by DOGGR) in a systematic, rational fashion. They address the EPA's concerns, and thus avert (at least, for now) the threat that the EPA will rescind California's "primacy," which could result in less effective enforcement in the near-term. They use DOGGR's limited resources wisely by pursuing compliance en masse and minimizing unnecessary litigation. They promise to speed compliance and incentivize cooperation by providing fair notice to industry operators. In so doing, enforcement via the emergency regulations also appears likely to minimize collateral harm to the public, including the impact on California's economy of an immediate, across-the-board shut-down of injection wells. (See, e.g., Piron Decl. ¶¶ 20-22, Coppersmith Dec. ¶¶ 20-23; Rosenlieb Decl. ¶¶ 20-23; Butler Decl. ¶¶ 17-20.) Vacating the emergency regulations and forcing DOGGR to proceed in the manner preferred by Plaintiffs appears likely to cause greater harm to the environment than allowing the corrective action plan to remain in place.

CONCLUSION. In sum, contamination of nonexempt drinking water aquifers is theoretically possible and could occur prior to judgment, absent an injunction. However, Plaintiffs bear the burden of proof. As noted almost a century ago, and repeated countless times since, "[t]o issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion, and rarely, if ever, should be exercised in a doubtful case. 'The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.'" (Willis v. Lauridson (1911) 161 Cal. 106, 117; accord Anocora-Citronelle Corp. v. Green (1974) 41 Cal.App.3d 146, 148; West v. Lind (1960) 186 Cal.App.2d 563, 569.) On this record, the threat of such contamination is theoretical and speculative and plainly outweighed by the other harms, discussed above, which are virtually certain to occur if an injunction issues. Thus, the motion is DENIED.

Dated: 07/16/2015

facsimile

Judge George C. Hernandez, Jr.

SHORT TITLE:	CASE NUMBER:
Center for Biological Diversi VS Califonia Department of Con	RG15769302

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DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document 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 1225 Fallon Street, Oakland, California.

Executed on 07/16/2015.

Leah T. Wilson Executive Officer / Clerk of the Superior Court

By Yestrada Digital

Deputy Clerk