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FILED
 ALAMEDA COUNTY

JAN 29 2014

By

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 16 FOR THE COUNTY OF ALAMEDA

17 CENTER FOR BIOLOGICAL
 18 DIVERSITY, EARTHWORKS,
 ENVIRONMENTAL WORKING GROUP,
 19 and SIERRA CLUB, non-profit
 corporations,

20 Plaintiffs,

21 vs.

22 CALIFORNIA DEPARTMENT OF
 CONSERVATION, DIVISION OF OIL,
 23 GAS, AND GEOTHERMAL
 RESOURCES; DOES I through X,
 24 inclusive,

25 Defendants.

26 WESTERN STATES PETROLEUM
 ASSOCIATION, CALIFORNIA
 INDEPENDENT PETROLEUM
 27 ASSOCIATION, and INDEPENDENT OIL
 PRODUCERS AGENCY,

28 Defendants-in-Intervention.

Case No. RG12 652054 (Related to Case No. RG13-664534).

Assigned for All Purposes to the Hon. Evelio Grillo

~~[PROPOSED]~~ ORDER GRANTING
 DEFENDANTS-INTERVENORS WESTERN
 STATES PETROLEUM ASSOCIATION,
 CALIFORNIA INDEPENDENT PETROLEUM
 ASSOCIATION, AND INDEPENDENT OIL
 PRODUCERS AGENCY IN SUPPORT OF THEIR
 MOTION TO DISMISS OR ALTERNATIVELY,
 FOR JUDGMENT ON THE PLEADINGS

FAXED

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[PROPOSED] ORDER

On October 21, 2013, the Western States Petroleum Association, Independent Oil Producers Agency, and California Independent Petroleum Association (the "Industry Groups") made a motion to dismiss, or in the alternative for judgment on the pleadings ("Motion"). Defendant Department of Conservation concurred in Industry Groups' Motion. Plaintiffs opposed the motion and concurrence. The Court heard argument on November 21, 2013 and continued the motion to a hearing on December 19, 2013. For that hearing, the Court issued a tentative ruling that Plaintiffs contested. The Court heard argument on December 19, 2013 and then continued the hearing to January 13, 2014.

On January 9, 2014, the Court issued a new tentative ruling on Industry Groups' Motion and on the Department of Conservation's Concurrence. As Plaintiffs did not contest this tentative ruling, the Court adopts its tentative ruling as the order of the Court. The tentative ruling, with minor corrections, is set forth below:

The Motion of Industry Groups to dismiss complaint or for judgment on the pleadings is GRANTED without prejudice to any claims for failure to comply with 14 CCR 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

1 her rights or duties with respect to another, ... may, in cases of actual controversy relating to the legal
2 rights and duties of the respective parties, bring an original action ... in the superior court....”
3 Therefore, “declaratory relief is appropriate only where there is an actual controversy, not simply an
4 abstract or academic dispute.” (*Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 746.) In
5 the Order of 5/1/13 the court stated, “The complaint asserts a current justiciable controversy.” The
6 Industry Groups assert that the court should dismiss the case on the ground that the State has enacted
7 SB 4, that SB 4 directs how the DOGGR must proceed regarding its environmental review of
8 applications for hydraulic fracking, and that SB 4 is a comprehensive legislative solution that moots
9 the claims in this case. The DOGGR issued draft emergency regulations on 12/11/13, the public can
10 make comments through approximately 12/26/14, and the regulations have a proposed effective date
11 of 1/1/14. The Industry Groups frame the motion as presenting issues of mootness. The court agrees
12 that the issue is one of justiciability generally, but finds that it concerns both ripeness and mootness.
13 (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574-1585.) For
14 ease of analysis, the court divides the justiciability analysis into four parts: (1)The DOGGR’s policy
15 or practice before 1/1/15; (2) The DOGGR’s policy or practice after 1/1/15; (3) The DOGGR’s
16 review of individual wells before 1/1/15; and (4) The DOGGR’s review of individual wells after
17 1/1/15.

18 **THE DOGGR’S POLICY OR PRACTICE BEFORE 1/1/15.** Motion to dismiss as moot
19 is GRANTED without prejudice to any claims for failure to comply with 14 CCR 1761 et seq.

20 Section 3161(b) states:

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

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

1 fracking when the conditions are met. Section 3161(b)(1) and (2) set forth conditions that the owner
2 or operator must meet. The plain text of the statute suggests that if the owner or operator meets those
3 conditions, then the DOGGR must issue a permit. Section 3161(b)(3)-(5) set forth conditions that the
4 DOGGR must meet. If the DOGGR fails to meet those conditions, then the DOGGR will no longer
5 be required to issue permits under section 3161(b). These state that DOGGR must “conduct” an EIR
6 while it is preparing the final regulations, but also suggest somewhat incongruously that DOGGR
7 must complete the EIR before issuing any of the permits suggested by Section 3161(b)(1) and (2).

8 Section 3161(b)(6) grants the DOGGR authority to implement emergency regulations to
9 implement the provisions of the section and the regulations address this incongruity. The DOGGR’s
10 emergency regulations state, “As directed by Public Resources Code 3161, the Division must allow,
11 and will allow, well stimulation to proceed if the operator has provided all of the required information
12 and certifications.” The court is directed to give the regulations substantial deference. (*Estrada v.*
13 *City of Los Angeles* (2013) 218 Cal.App.4th 143, 148-149 [“While the interpretation of a statute is
14 ultimately a question of law, appellate courts will defer to an administrative agency’s interpretation of
15 a statute or regulation involving its area of expertise, unless the interpretation flies in the face of the
16 clear language and purpose of the interpreted provision.”].) On 12/30/13, the Office of
17 Administrative Law approved emergency regulations. Emergency Regulation 14 CCR 1783 states
18 that when an applicant submits a written notification with the information required by 14 CCR
19 1783.1, then “As directed by Public Resource Code 3161, the Division must allow, and will allow
20 well stimulation to proceed.” The legislature has given the DOGGR clear directions to issue permits
21 if the requirements of 3161(b) are met. The court finds that the complaint’s challenge to the
22 DOGGR’s policy or practice before 1/1/15 is moot because under Section 3161 and 14 CCR 1783
23 DOGGR is now required to issue permits when the requirements of 3161(b) are met.

24 **THE DOGGR’S POLICY OR PRACTICE AFTER 1/1/15.** Motion to dismiss as not ripe
25 is GRANTED. SB4 mandates that on or before 1/1/15 the DOGGR will complete a study and have
26 fracking regulations in place. Section 3160(a) states that on or before 1/1/15 the State will complete
27 a scientific study of fracking and Sections 3160(b) and 3161(a) state that on or before 1/1/15 the State
28 will adopt rules and regulations regarding fracking. Regarding CEQA, Section 3161(b)(3) states that

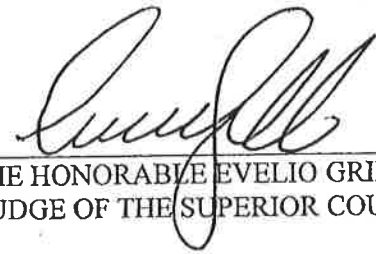
1 the DOGGR will conduct an EIR regarding fracking in the state and Section 3161(b)(4)(A) states that
2 the EIR will be certified by the lead agency on or before 7/1/15. Section 3161(b)(4)(C) states that the
3 DOGGR's EIR must not conflict with an EIR certified by a local lead agency before 7/1/15. The
4 legislature has given the DOGGR clear directions to study fracking and to have regulations in place
5 by 1/1/15. The court finds that the complaint's challenge to the DOGGR's policy or practice after
6 1/1/15 is not ripe for judicial review because the DOGGR has not yet completed its regulations. The
7 court takes judicial notice that on 11/18/13 the DOGGR released proposed fracking regulations and
8 that the proposed regulations do not appear to address environmental review under CEQA.

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

12 **THE DOGGR'S REVIEW OF INDIVIDUAL WELLS AFTER 1/1/15.** The complaint
13 never sought relief based on the DOGGR's review of individual wells. Motion to dismiss is
14 GRANTED.

15 **The case is DISMISSED.**

16 29
17 Dated: January __, 2014


THE HONORABLE EVELIO GRILLO
JUDGE OF THE SUPERIOR COURT

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