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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CENTER FOR BIOLOGICAL DIVERSITY AND SIERRA CLUB

Plaintiffs/Petitioners,

v.

CALIFORNIA DIVISION OF OIL, GAS, AND GEOTHERMAL RESOURCES, and DOES 1 through 20, inclusive,

Defendants/Respondents.

Case No: RG15769302

ASSIGNED FOR ALL PURPOSES TO JUDGE ROBERT B. FREEDMAN DEPARTMENT 20

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Reservation No.: R1629817

Date: June 11, 2015
Time: 2:00 p.m.
Dept: 20
Judge: Robert B. Freedman

Action Filed: May 7, 2015
Trial Date: None set

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INTRODUCTION

After years of allowing the oil industry to contaminate California's underground sources of drinking water in direct violation of law, the Division of Oil, Gas and Geothermal Resources ("DOGGR") has pushed through emergency regulations that would allow this unlawful contamination to continue for almost another two years – all during the worst drought on record. Emergency regulations must protect the public from serious harm to peace, health, safety, or general welfare. DOGGR's regulations do the opposite, ratifying the agency's admitted dereliction in protecting California's underground sources of drinking water ("protected aquifers") from harmful oil industry activity. The drought is the true emergency facing California, but DOGGR's regulations allow the ongoing and unlawful contamination of protected aquifers. Instead of responding to the true emergency and shutting down these unlawful injections, DOGGR has issued sham regulations that allow continued illegal injections, resulting in irreparable harm that is exacerbated by the drought. Unless this Court takes action, DOGGR will continue to disregard the public health laws designed to protect drinking water. Plaintiffs urge this Court to enjoin DOGGR's emergency regulations and to order DOGGR to comply with the law and take all necessary, immediate action to stop these illegal injections.

BACKGROUND

I. The Regulatory Framework.

Congress enacted the Safe Drinking Water Act ("SDWA" or "Act") to ensure the quality of the nation's drinking water and to protect it from harmful chemicals. As part of the SDWA's statutory regime, the Act creates an underground injection control ("UIC") program that governs the permitting, operation, and closure of injection wells, and governs state management of these wells. (42 U.S.C. § 300f *et seq.*; 40 C.F.R. § 144.1 *et seq.*) The wells, referred to as Class II wells, literally "inject" fluids underground for storage, disposal, or for so-called enhanced oil recovery. "The [SDWA] requires an underground source of drinking water (USDW) be protected from contamination by injection wells." (Exh. A to Declaration of T. Zakim In Support of Plaintiffs' Motion for Preliminary Injunction Zakim ("Zakim Decl.") at 1 [Aquifer Exemption Compliance Schedule Regulations, DOGGR Revised Finding of Emergency]; 42 U.S.C. § 300h(b).) The SDWA defines "underground sources of drinking water" to include all non-exempt aquifers containing groundwater with less than 10,000 mg/L of total dissolved solids ("TDS") at a quantity sufficient to supply a public water system. (40 C.F.R. § 144.3.) These constitute "protected aquifers."

In 1983, the United States Environmental Protection Agency ("EPA") delegated to DOGGR the regulatory responsibilities for California's UIC program. State UIC programs must be at least as stringent as the SDWA's minimum requirements. (42 U.S.C. § 300h(b).) A Memorandum of Agreement ("MOA" or "primacy agreement") between EPA and DOGGR establishes DOGGR's regulatory responsibilities with respect to Class II injection wells pursuant to the SDWA. (Exh. B to Zakim Decl. [MOA (Sept. 29, 1982)]; 40 C.F.R. § 147.250 [incorporating MOA into federal regulations].) The MOA states in unequivocal language that "an aquifer exemption must be in effect prior to or concurrent with the issuance of a Class II permit for injection wells into that aquifer." (Exh. B at 6-7.) An aquifer may be exempted only if (a) it does not currently serve as a source of drinking water; and (b) it cannot now and will not in the future serve as a source of drinking water. (40 C.F.R. § 146.4; see also Exh. B at 6.) The MOA also requires that DOGGR "maintain a timely and effective compliance monitoring system." (Id. at 3.)

II. Factual and Procedural Background.

As early as 2011, DOGGR has been aware of its failure to implement the UIC program. Specifically, in 2011, EPA alerted DOGGR to the results of an audit that showed numerous deficiencies in DOGGR's Class II UIC program. (Exh. C to Zakim Decl. at 1 [EPA Letter to DOGGR (July 18, 2011)].) Then, in 2012, EPA "performed a preliminary review of aquifer exemptions in California" that "raised questions about the alignment of Class II injection wells with approved aquifer exemption boundaries." (Exh. D to Zakim Decl. at 1 [EPA Letter to CalEPA (Jul. 17, 2014)].) Subsequently, "DOGGR determined that it had authorized some injection of oil and gas-related disposal fluids such as brines into non-exempt aquifers containing high quality water" and admitted that "operators have operated UIC projects without meeting all the requirements in statutes and regulations." (Id. at 1-2.)

More than three years since EPA's audit, in a February 2015 letter to EPA, DOGGR admitted approving nearly 2,500 wells for injections into protected aquifers contrary to law.[1] (Exh. E to Zakim Decl. at 3 [Feb. 2015 DOGGR Letter to EPA stating"[t]he Division acknowledges that in the past it has approved UIC projects in zones with aquifers lacking exemptions"]; see also Exh. A, *supra*, at 1; Exh. F to Zakim Decl. at 1 [CalEPA Review of UIC Program (March 2, 2015)].) In the

[1] The number may be higher. DOGGR identified 2,477 total wells that could be illegally injecting into protected aquifers. DOGGR is in the process of reviewing thousands more wells that may lead to the identification of more violations. (Exh. E, *supra*, at 3-4.) Yet, for 189 of the already identified wells, DOGGR does not know the quality of water being contaminated. (Id. at Enc. B.)

same letter, DOGGR explained that it was performing "injection project review" of an additional 30,000 plus wells. (Exh. E., *supra*, at 3-4.) DOGGR admitted that it will have a full understanding of the extent of the problem only after this review is complete sometime in 2016. (Ibid.)

On March 10, 2015, at a joint committee oversight hearing on the effectiveness of California's Class II UIC Program, the Chief Deputy Director of the State Water Resources Control Board confirmed that ongoing Class II well operations, under DOGGR's mismanagement, were contaminating the receiving aquifers. "Any injection into the aquifers that are not exempt has contaminated those aquifers . . . What we found is that the aquifer, no surprise, has the material that was injected into it." (Exh. G to Zakim Decl. at 73-4 [Transcript of Joint Hearing (March 10, 2015)].) In a subsequent letter to Governor Brown, eight legislators explained that the hearing "revealed that California's UIC program is broken and the state's groundwater resources are not being adequately protected." (Exh. H to Zakim Decl. at 1 [Leg. Letter to Gov. Brown (March 20, 2015)].)

On April 2, 2015, DOGGR published a public notice that it intended to promulgate emergency regulations, titled "Aquifer Exemption Compliance Schedule Regulations" ("Emergency Regulations"), that would allow nearly 2,300 wells to continue illegally injecting, most of them through February 2017. (Exh. I to Zakim Decl. [Notice of Proposed Action]; Exh. J to Zakim Decl. [Text of Proposed Regulations].) The proposed Emergency Regulations also established two interim deadlines for certain subclasses of wells. (Ibid.) DOGGR proffered two reasons justifying the emergency rulemaking: (1) failure by DOGGR to phase out illegal injections by the stated compliance deadlines would "seriously jeopardize the federal government's ongoing approval of the State's UIC Program;" and (2) "codification of the compliance schedule as an emergency regulation will provide the level of certainty operators need in order to revise their business plans." (Exh. I, *supra*, at 3-4.)

The Office of Administrative Law ("OAL") posted the proposed regulations on its website on April 9, 2015, triggering a five-day public comment period. The Center for Biological Diversity and Sierra Club (collectively "Plaintiffs") each submitted timely comments explaining, *inter alia,* that DOGGR must use its existing powers to immediately close down the illegal injections; that the regulations' timeline does not protect California's groundwater and is unnecessary as the injections are already illegal; and that the regulations are inconsistent with state and federal mandates to protect groundwater. (Exh. K to Zakim Decl. [Center for Biological Diversity comments]; Exh. L to Zakim

Decl. [Sierra Club comments]; see also Exh. M to Zakim Decl. at 1 [DOGGR comment response describing public comments received].) In response to public comments, OAL published DOGGR's Revised Finding of Emergency, which asserted that the decision to allow illegal and harmful injection to continue was actually beneficial to public health and safety, because it would take substantially more state resources to pursue individual enforcement actions. (Exh. A, *supra*, at 3.) DOGGR also added that an "abrupt disruption" to the oil industry would be detrimental to "general welfare." (Id. at 4.)

On April 20, 2015, OAL approved the proposed Emergency Regulations, which are now in effect. (Exh. N to Zakim Decl. [Notice of Approval]; Exh. O to Zakim Decl. [Final Text of Regulations].) Plaintiffs filed suit on May 7, 2015.

LEGAL STANDARDS

I. Standard for a Preliminary Injunction.

Courts evaluate two interrelated questions when deciding whether to issue a preliminary injunction: (1) is there a reasonable probability that Plaintiffs will prevail on the merits, and (2) will Plaintiffs suffer greater injury from denial of the injunction than respondents will from its granting. (*Robbins v. Superior Court* (1985) 38 Cal.3d 199, 206.) In striking this balance, the court considers the advancement of the public interest. (*County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 100.) Moreover, a court's decision to issue a preliminary injunction "must be guided by a 'mix' of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction." (*Butt v. State of California* (1992) 4 Cal.4th 668, 678.) Where the showing of the likelihood of success is sufficient, plaintiffs need not show that the balance of harms tips in their favor. (*Right Site Coalition v. Los Angeles Unified School Dist.* (2008) 160 Cal.App.4th 336, 339; *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 281-82 [granting PI where success on the merits was "reasonably probable."].)

II. Standards under the California Administrative Procedures Act.

Emergency regulations are "invalid" under the APA "upon the ground that the facts recited in the finding of emergency … do not constitute an emergency" as defined by the Act, section 11346.1. (Gov. Code § 11350(a).) A regulation is also "declared invalid if … the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute … or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence." (Gov. Code § 11350.) Regulations promulgated must meet basic standards of

"consistency," "necessity" and "non-duplication." (Gov. Code §§ 11349.1, 11350(a).) An agency's finding of emergency is reviewed for abuse of discretion. (*Doe v. Wilson* (1997) 57 Cal.App.4th 296, 306.) "Courts reviewing regulations for compliance with the APA owe no deference to the promulgating agency's opinion that it complied with the prescriptions of the APA." (*Sims v. Dep't of Corr. & Rehab*. (2013) 216 Cal.App.4th 1059, 1071.)

III. Standards for Issuance of a Writ of Mandate.

Mandamus under California Code of Civil Procedure Section 1085 is appropriate when challenging an agency's failure to perform an act required by law. (Code Civ. Proc. § 1085; *Conlan v. Bonta* (2002) 102 Cal.App.4th 745, 752; see also *Morris v. Harper* (2001) 94 Cal.App.4th 52, 58 [mandate will lie to compel performance of a non-discretionary duty].) Mandate will also issue to correct an abuse of discretion or "the actions of an administrative agency which exceed the agency's legal powers." (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 562; see also *Cal. Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 202.)

ARGUMENT

I. Plaintiffs Are Likely to Succeed on the Merits.

A. The Emergency Regulations Are Contrary to Law.

DOGGR's Emergency Regulations contravene the requirements for adoption of emergency regulations in California. The APA requires that agencies seeking an emergency rulemaking demonstrate, by substantial evidence, both the existence of an emergency and the need for the requested regulations to directly address only that demonstrated emergency. (Gov. Code § 11346.1(b)(2).) DOGGR cannot meet these standards because the Emergency Regulations fly in the face of the definition of an emergency by undermining environmental laws and allowing continued harm, rather than alleviating it. The regulations are also unsupported by substantial evidence.

1. DOGGR'S Findings of Emergency Do Not Support Adoption of the Emergency Regulations.

a. DOGGR's Admitted Failure to Safeguard Groundwater Does Not Justify Adoption of the Emergency Regulations.

DOGGR improperly uses its own regulatory oversight failures to justify continued violations of the law. An "emergency" is a situation that calls for immediate action to "avoid serious harm to the public peace, health, safety, or general welfare." (Gov. Code § 11342.545.) In contrast, here, DOGGR's failures to prevent contamination have caused the true public emergency – ongoing contamination of California's protected aquifers during a historic drought. (See Exh. P to Zakim

Decl. [Executive Order describing a state of emergency and drinking water shortages "across the state" due to "severe drought conditions."].) Paradoxically, DOGGR's Emergency Regulations increase, rather than stem, this public emergency by perpetuating ongoing contamination that threatens public health and general welfare.

Though DOGGR seeks to portray the Emergency Regulations as a mere compliance schedule (Exh. N, *supra*), the agency has no authority to promulgate Emergency Regulations that allow admittedly illegal injections to continue. "An administrative agency has only that authority conferred upon it by statute and any action not authorized is void." (*City of Lodi v. Randtron* (2004) 118 Cal.App.4th 337, 359; see also *Ontario Cmty. Foundations, Inc. v. State Bd. of Equalization* (1984) 35 Cal.3d 811, 816 ["there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute."].) Numerous California cases have held that the promulgation of state emergency regulations is proper "to conform state regulations to governing federal law." (See, e.g., *Doe, supra*, 57 Cal.App.4th at 306-7 [holding that state agency properly promulgated emergency regulations to bring state into compliance with change in federal law and discussing similar cases.].) Here, however, DOGGR does the opposite by using Emergency Regulations to extend illegal conduct at the expense of California public health and welfare. DOGGR already has the regulatory tools to prevent such conduct immediately. (40 C.F.R. § 145.13; Pub. Res. Code § 3226; Cal. Code. Regs. tit. 14 §§ 1724.6-7, 1724.10(h).)

Moreover, the SDWA and the implementing MOA do not confer DOGGR with the authority to enact compliance schedules via state regulation. In fact, the SDWA expressly prohibits a state agency's promulgation of regulations that relieve it or other parties from the Act's requirements, stating, "no law or regulation" adopted or enforced by a state agency "shall relieve any person of any requirement otherwise applicable under" the SDWA. (42 U.S.C. § 300h-2(d); see also 42 U.S.C. § 300f [defining "person" to include state agencies].) DOGGR's claim that it has discretion to "codify" illegal activity is wrong. "Administrative regulations that violate acts of the Legislature are void . . . ." (*Morris v. Williams* (1967) 67 Cal.2d 733, 737.)

In any event, compliance schedules must be promulgated pursuant to the SDWA's enforcement provisions, not via state emergency rulemaking. Under the SDWA, compliance schedules must be established via EPA "administrative order," and require public notice and comment opportunities. (42 U.S.C. § 300h-2.) Here, no administrative order has been issued by EPA

and no public process has been afforded in the establishment of DOGGR's purported compliance measures. (See, e.g., Exh. D, *supra*.)

DOGGR's Revised Finding of Emergency is internally inconsistent, and demonstrates the agency's reluctance and/or inability to perform its regulatory duties. "A finding of emergency based only upon expediency, convenience, best interest . . . or speculation, shall not be adequate to demonstrate the existence of an emergency." (Gov. Code § 11346.1.) DOGGR avers that the Emergency Regulations are needed for "public health and safety" because, without the two-year schedule, DOGGR's adjudication of individual enforcement orders will be a "substantial undertaking" that takes "time and resources" resulting in "longer" time to reach SDWA compliance and "greater state resources … to completely unwind" all unlawful activities. (Exh. A, *supra*, at 3.) But agency proclamations that it cannot meet its obligations under the law in a timely manner do *not* constitute an emergency. (*Sonoma Cnty. Org. etc. Employees v. Cnty. of Sonoma* (1991) 1 Cal.App.4th 267, 277 [an "[e]mergency is not synonymous with expediency, convenience, or best interests."].) Indeed, DOGGR's claims are unsupported; DOGGR can stop the injections now, as it already demonstrated by shutting down 23 illegally operating wells. (Exh. M, *supra*, at 2.)

DOGGR also unreasonably justifies the "wind down" of illegal injections via Emergency Regulations by claiming that, without this plan, DOGGR could lose its delegated regulatory responsibility for the UIC program. (Exh. A, *supra*, at 3-4.) DOGGR asserts that, should EPA resume authority over the UIC program, "it would be a decade-long process for US EPA to develop an effective regulatory presence [in California] … and the ability to effectively enforce regulations would certainly suffer." (Id. at 2.) This would, in turn, "lower the quality of environmental protection while increasing the regulatory burden on industry." (Id. at 2-3.) But these statements are speculative and unsupported. "The anticipation that harm will occur if such action is not taken must have a basis firmer than simple speculation … Emergency comprehends a situation of grave character and serious moment."[2] (See *Sonoma Cnty., supra*, 1 Cal.App.4th at 277.) DOGGR provides no evidence that EPA will withdraw California's primacy, or that doing so would in fact be a situation of "grave character and serious moment" so as to justify an emergency. To the contrary, DOGGR simply speculates that, despite its abysmal record, it can do a better job than EPA.

[2] In *Sonoma*, the court held that the likelihood of work stoppage by public health workers constituted an endangerment to public health and safety justifying a county emergency ordinance. Though the facts are distinguishable, the definition of emergency in *Sonoma* is applicable here. (See *Doe, supra*, 57 Cal.App.4th at 306 [applying *Sonoma Cnty*. definition of "emergency" in APA context].)

b. Speculative Economic Effects on the Oil Industry from Enforcing the Law Do Not Justify Adoption of Emergency Regulations.

DOGGR's "harm to private industry" justification does not and cannot pass muster for purposes of a lawful emergency rulemaking. The "best interest" of private industry actors does not constitute a public emergency. (Gov. Code § 11342.545.) DOGGR argues that the Emergency Regulations "will provide the level of certainty operators need in order to revise their business plans" and will prevent "abrupt disruption of their operation" that is otherwise "detrimental to general welfare." (Exh. A, *supra*, at 4.) But harm to private industry is not a *per se* public harm. Unsubstantiated claims of private harm, in particular, are insufficient to justify an emergency rulemaking.

DOGGR's allegations of harm to oil industry and to "general welfare" from the absence of the Emergency Regulations in its Revised Finding are wholly speculative and unsupported by substantial evidence or documentary evidence, as required under the APA. "The finding of emergency shall also identify each technical, theoretical, and empirical study, report, or similar document, if any, upon which the agency relies." (Gov. Code § 11346.1(b)(2).) Instead, DOGGR's Revised Finding offers a parade of conclusory statements. For example, DOGGR "estimates" that "capital investment to the affected injection wells and their attendant facilities to be roughly $1.3 billion." (Exh. A, *supra*, at 4.) DOGGR provides no concrete evidence of harm to the oil industry, however, that will occur in the absence of these emergency regulations; nor does it provide any explanation as to how "estimates" of capital investments have any bearing on harm to "general welfare" in the absence of these regulations. There is no evidence anywhere in the Revised Findings that substantially supports a claim of public harm to justify these regulations. At the same time, DOGGR fails to consider the harm it perpetuates by failing to protect water sources during a historic state-wide drought. Indeed, instead of suffering harm, oil operators have already improperly benefited at the expense of California's underground sources of drinking water by illegally disposing of wastewater and conducting enhanced oil recovery ("EOR") in protected aquifers. The industry's "estimated" capital investment into thousands of unlawful injection wells has likely already paid for itself many times over.

Further, there is nothing unforeseen about the current regulatory situation that DOGGR claims justifies the Emergency Regulations. An "emergency" for rulemaking purposes must be "an unforeseen situation calling for immediate action." (*Doe*, *supra*, 57 Cal.App.4th at 306.) Requiring Class II well operations to operate lawfully and in accordance with governing laws is not unforeseen,

nor are findings regarding the unlawfulness of DOGGR's current Class II program unforeseen. DOGGR has been aware of the illegal injections for years. (See, e.g., Exh. M, *supra*, at 2.)

In sum, DOGGR's claims of regulatory uncertainty, adjudicatory burdens and delay, and disruption to certain oil and gas operations reflect concerns of convenience, expediency and speculation. Promulgation of emergency regulations on these bases is an abuse of agency discretion, especially when the regulations allow the continued illegal injections and attendant harm to protected aquifers during a historic drought. Since DOGGR's findings provide no support for a public emergency, the Emergency Regulations are invalid.

2. The Emergency Regulations Do Not Meet APA Standards of Consistency, Necessity and Non-Duplication.

DOGGR's Emergency Regulations fail to conform to the basic standards for approval of emergency regulations. California Government Code Section 11349.1 requires that emergency regulations meet standards of "consistency," "necessity" and "nonduplication." (Gov. Code § 11350(a); Gov. Code § 11349.1.)

a. The Emergency Regulations Are Not Consistent with Existing Law.

DOGGR's Emergency Regulations conflict with current law, in direct violation of the APA's consistency requirement. Emergency regulations must be "in harmony with, and not in conflict with or contradictory to, existing statutes, or other provisions of law" in order to be valid. (Gov. Code § 11349(d).) The consistency standard applies both when the subject regulation contravenes a statute governing the agency's administrative authority and when the regulation contravenes any other applicable statute. (See, e.g., *Canteen Corp. v. State Bd. of Equalization* (1985) 174 Cal.App.3d 952, 962.) Where regulations conflict with existing statutory authority, the court's review is *de novo*. (See *Neighbors in Support of Appropriate Land Use v. Cnty. of Tuolumne* (2007) 157 Cal.4th 997, 1004 ["The reviewing court exercises independent judgment in determining whether the agency action was consistent with applicable law."]; see also *Sims*, *supra*, 216 Cal.App.4th at 1071.) Here, the Emergency Regulations directly violate federal and state law, as DOGGR admits that the injections are illegal. (See Exh. E, *supra*, at 3.)

The SDWA and the MOA, which govern DOGGR's actions here, prohibit Class II well injections into non-exempt aquifers. (Exh. B, *supra*, at 6-7; see also 42 U.S.C. § 300h [a state must prohibit all injections by Class II wells unless a valid permit exists]; *Legal Envt'l Assistance Foundation, Inc. v. U.S. Envt'l Protection Agency* (11th Cir. 1997) 118 F.3d 1467, 1469-70 [same].)

In 2014, EPA reiterated to DOGGR that "[a]ny injection from Class II wells into an aquifer that meets the definition of an underground source of drinking water, absent an EPA-approved aquifer exemption, is inconsistent with UIC regulations and State Program primacy requirements." (Exh. D, *supra*, at 2.) The SDWA also requires DOGGR to ensure that injection well operators "satisfy [the] state that injection will not endanger drinking water sources." (42 U.S.C. § 300h(b)(1)(B).) Here, DOGGR's Emergency Regulations allow prohibited injection activities into non-exempt aquifers – nearly 2,300 wells and probably more – in direct contravention of the law.

The Emergency Regulations are also inconsistent with state law. For example, the California Public Resources Code requires that DOGGR prevent harm to "life, health, property and natural resources," including underground waters "suitable for irrigation or domestic purposes by the infiltration of, or the addition of, detrimental substances." (Pub. Res. Code § 3106(a); see also Pub. Res. Code §§ 3236, 3236.5 [criminalizing failures to comply with any provisions of the Code.].) The California Code of Regulations also contains provisions prohibiting the disposal of "oilfield waste" that "may cause harm to … freshwater aquifers." (Cal. Code Regs. tit. 14 § 1775(a).) Injection "shall be stopped" if there is evidence that "damage to life, health, property, or natural resources is occurring by reason of the project." (Id. § 1724.10 (h).) The Emergency Regulations directly conflict with these requirements. Director Bishop of the Water Board specifically testified that the contamination from the injections cannot be remediated: "We have a lot of history in addressing remediation of aquifers; and what I'll tell you is that you don't clean up aquifers, you contain the spread of contamination." (Exh. G, *supra*, at 73.)

DOGGR claims that it expects many aquifers to become exempt at future dates, as if to suggest that concerns about the ongoing illegal injections are unwarranted. (See, e.g., Exh. A, *supra*, at 3 [DOGGR "anticipates that many of the aquifers previously approved to receive injections without an aquifer exemption in place will in fact quality for exemptions."].) But claims that aquifers may qualify for exemptions in the future are speculative and unsupported by substantial evidence. Indeed, the administrative record contains not a single meritorious aquifer exemption application, let alone one pending before EPA. Even if applications were being considered, exemptions must be formally approved before injections can occur. DOGGR's reversal of this process – illegal injections first, exemptions later – subjects California's water resources to the very harms the law is designed to prevent. Indeed, the ongoing degradation of aquifers by illegal injections perversely increases the likelihood an aquifer will qualify for a future exemption.

b. The Emergency Regulations Are Unnecessary and Duplicative.

DOGGR's Emergency Regulations are also invalid because they are unnecessary and duplicative of existing law. Under the APA, "the record of rulemaking proceeding [must] demonstrate[] by substantial evidence the need for a regulation to effectuate the purpose of the statute … that the regulation implements." (Gov. Code § 11349(a).) Regulations must also be nonduplicative to be valid; they cannot serve the same purpose as a state or federal statute or another regulation already in existence. (Gov. Code § 11349(f).)

Here, the Emergency Regulations are both unnecessary and duplicative, because existing law fully addresses UIC program non-compliance. A regulation is invalid for not being reasonably necessary to effectuate the purpose of the applicable statute. (Gov. Code § 11350(b)(1); see also *Sims, supra,* 216 Cal.App.4th at 1065.) The purported purpose of the Emergency Regulations, to bring DOGGR's UIC program into compliance with the SDWA, is not necessary to effectuate the purpose of the SDWA, which prohibits injections into protected aquifers. DOGGR already possesses the authority to bring unlawful injections into immediate compliance. (Exh. B, *supra*, at 2; 42 U.S.C. § 300h(b)(1)(B); 40 C.F.R. § 145.13.) Under the SDWA, DOGGR must have the ability to "restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or environment." (40 C.F.R. § 145.13.) DOGGR has that authority, and has exercised it. (See 40 C.F.R. § 145.13; Pub. Res. Code § 3235; Cal. Code. Regs. tit. 14 §§ 1724.6-7, 1724.10(h); see also Exh. M, *supra*, at 2 [DOGGR comment response noting that DOGGR has already ordered the shut-down of 23 wells].)

Moreover, as previously noted, these injections are already illegal under applicable law. To the extent the Emergency Regulations make underground injections unlawful at future dates, they duplicate existing law that already renders them illegal, and are thus unnecessary. (See Exh. B, *supra*, at 6-7; Pub. Res. Code §§ 3106, 3236; 40 C.F.R. § 144.12.) The Emergency Regulations, which contain penalty provisions effective after 2017, are also needlessly duplicative of federal and state law that criminalizes unlawful injections and provides corresponding penalties. (See 40 C.F.R. § 144.12; 42 U.S.C. § 300h-2(a); Cal. Code. Regs. tit 14 § 1775; Pub. Res. Code §§ 3236, 3236.5.) The Emergency Regulations duplicate DOGGR's existing regulatory authorities and duties, while arbitrarily and capriciously allowing continued violations to occur when the historic drought places a premium on sources of drinking water.

B. DOGGR Has Failed to Perform Its Non-Discretionary Duty Pursuant to the Safe Drinking Water Act.

DOGGR does not have the authority to allow illegal injections into protected aquifers. Accordingly, plaintiffs are also likely to succeed in showing that a writ of mandate should issue to force DOGGR to comply with its non-discretionary duty to take all necessary, immediate action to stop them. "An administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands and a court cannot ignore the ongoing violation of a statutory mandate on the ground that the violation will eventually be halted by untimely administrative action." (*Cal. Trout, supra*, 218 Cal.App.3d at 203 [State Water Board ordered to comply with its obligations under the law].) An "[a]ction that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion." (Id. at 202; see also *Neighbors in Support of Appropriate Land Use, supra,* 157 Cal.4th at 1004.) DOGGR has a non-discretionary duty to ensure that aquifer exemptions are in place at the time of issuance of the injection permit for that aquifer. (Exh. B, *supra*, at 6-7.) Yet, DOGGR has admitted to repeatedly violating this mandate for about 2,500 wells.

The facts of this case are akin to those in *Cal. Trout,* where the court found that the State Water Resources Board ("Board") had issued water appropriation licenses that violated mandatory stream flows required by law. The court held the Board had a non-discretionary duty to ensure the flow requirements were met. (*Cal. Trout, supra*, 218 Cal.App.3d at 201.) Similarly here, DOGGR has a non-discretionary duty to prohibit injections into protected aquifers. (Exh. B, *supra*, at 6-7.) The SDWA requires that DOGGR "restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or environment." (40 C.F.R. § 145.13.) Even though DOGGR identified nearly 2,500 wells that injected into protected aquifers or potentially protected aquifers, DOGGR has halted only 23 of them. DOGGR's issuance of illegal Emergency Regulations does not relieve DOGGR of its non-discretionary duty.

DOGGR's failure to prohibit unlawful injections, despite knowing about SDWA violations for years and the worst drought on record, is also an abuse of discretion warranting a writ of mandate to stop those injections immediately. (*Morris, supra*, 94 Cal.App.4th at 60 [an agency has no discretion to delay the implementation of statutory commands.].)

Plaintiffs have a clear, present, and beneficial right to DOGGR's performance of its non-discretionary duty. (Code Civ. Proc. § 1085.) Where "the question is one of public right and the

object of the mandamus is to procure the enforcement of a public duty…" the petitioner "need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced . . . ." (*Green v. Obledo* (1981) 29 Cal.3d 126, 144.) Here, Plaintiffs' interests in protecting protected aquifers fall within the scope of "beneficial rights" under section 1085. The public interest exception to the beneficial interest requirement also applies, because a public right is at stake. (Ibid.) Additionally, Plaintiffs have no plain, speedy, and adequate remedy at law, as no statutory cause of action under state or federal law provides Plaintiffs with an alternative remedy against the agency.

II. Plaintiffs Will Be Irreparably Harmed Without a Preliminary Injunction.

In the face of a devastating, multiyear drought in California, Governor Brown has proclaimed a state of emergency and ordered unprecedented statewide mandatory water restrictions, directing cities and communities to reduce water usage by 25 percent. (Exh. P, *supra*.) The Proclamation states that "[d]rinking water supplies are at risk in many California communities," causing "extreme peril" to public safety. (Exh. U to Zakim Decl. [Gov. Brown State of Emergency Proclamation (Jan. 17, 2014)].) Yet, DOGGR is concurrently operating an unlawful Class II injection well program that is and will continue to actively contaminate the state's protected aquifers in direct violation of applicable law, something DOGGR has knowingly done for years. (See Exh. S to Zakim Decl. [October 2011 Department of Conservation memorandum acknowledging that DOGGR's "practices do not adequately protect" underground sources of drinking water]; see also Exh. C-D, *supra*.) DOGGR's Emergency Regulations will result in ongoing and irreversible degradation of and harm to aquifers that California may rely on for potable or otherwise useable water in the future. Given Plaintiffs' likelihood of success on the merits and the irremediable nature of ongoing harm to California's water resources during this drought, DOGGR's Emergency Regulations must be vacated and preliminarily enjoined, and DOGGR should be further ordered to take all necessary actions to prohibit all illegal Class II well injections into protected aquifers.

Injunction is warranted on the basis of Plaintiffs' likelihood of success on the merits alone. "If the party seeking the injunction can make a sufficiently strong showing of likelihood of success on the merits, the trial court has discretion to issue the injunction notwithstanding that party's inability to show that the balance of harms tips in his favor." (*Right Site Coalition, supra,* 160 Cal.App.4th at 339.) "The more likely it is that plaintiffs will ultimately prevail, the less severe must be the harm that they allege will occur if the injunction does not issue." (Id. at 338-39.) Here,

Plaintiffs have demonstrated the likelihood of success in invalidating the Emergency Regulations and obtaining a writ mandating the immediate cessation of injections into protected aquifers.

The balance of harms also favors injunctive relief. The permanent contamination of California's increasingly scarce drinking water cannot be outweighed by speculative financial concerns of private industry actors that have already benefited from illegal activity or by inconvenience or burden to the regulatory agency. The State's admission of ongoing and irreparable aquifer contamination from this unlawful activity exceeds the showing Plaintiffs are required to provide for preliminary injunctive relief. "Courts have never required proof that the nuisance *will* occur; rather, it is sufficient that the *risk* of its happening is greater than a reasonable man would incur." (*Monsanto Co. v. Geertson Seed Farms* (2010) 561 U.S. 139, 180 [emphasis in original, internal quotations omitted].) Even absent the State's admission, the risk of contamination of California's scarce water sources is one that no reasonable Californian would or should have to incur.

The aquifer groundwater at issue is or can be made suitable for drinking water and other public beneficial purposes. For this reason, the aquifers are expressly protected by applicable law. Yet, close to 2,300 of the nearly 2,500 illegal wells identified by DOGGR have been injecting directly into these protected, non-exempt aquifers known to contain potential underground sources of drinking water as defined by the SDWA. (Exh. E, *supra*, at Encl. B.) As a result, millions of gallons of oil industry wastewater and other fluids are unlawfully being injected into California's aquifers *per day* via Class II wells. (See, e.g., Exh. Q to Zakim Decl. at 5 [DOGGR 2014 Monthly Oil and Gas Injection Report].) Chemicals in Class II injection fluids have been found to include benzene, a carcinogen. (See Exh. R to Zakim Decl. at 14 [Table 1] [DOGGR report "Benzene in Water Produced from Kern County Oil Fields Containing Fresh Water" finding that wastewater contained dangerous levels of benzene, a known carcinogen]; see also Exh. V to Zakim Decl. at 10 [2014 technical report showing benzene and other chemicals in Class II waste disposal fluid].) California's State Water Board – the state's expert agency in matters relating to protection of California's water resources – has confirmed that "*any injection* into the aquifers that are not exempt *has contaminated those aquifers*." (Exh. G, *supra*, at 74:5-12 [emphasis added].) Indeed, "the aquifer, no surprise, has the material that was injected into it." (Ibid; see also Exh. T to Zakim Decl. at 32:11-5, 24:19-25, 47:13-7, 58:12-4, 65:8-10 [transcript of State Water Board April 8, 2015 groundwater workshop noting same and explaining that full scope of contamination risk from Class II wells is unknown].)

Contamination by wastewater injection constitutes irreparable harm. Once an aquifer is contaminated, it is nearly impossible to clean up. As Mr. Bishop testified: "We have a lot of history in addressing remediation of aquifers; and what I'll tell you is that you don't clean up aquifers, you contain the spread of contamination." (Exh. G, *supra*, at 73.) The continuing illegal injections may also degrade the aquifers to a point that ensures future exemption status for otherwise potable water. Injections thus cause irreparable damage that cannot be compensated by money damages. (*Geertson Seed Farms*, *supra*, 561 U.S. at 180 ["Environmental injury, by its nature, can seldom be remedied by money damages and is often permanent or at least of long duration, i.e. irreparable."].) These are not speculative risks; these are ongoing, irreversible harms occurring every day.

Significantly, only the federal and state protections described herein currently protect California's groundwater resources. In response to the drought, the California Legislature recently enacted groundwater management legislation because "groundwater provides a significant portion of California's water supply" and accounts for more than one-half of the water used by Californians in a drought year. (Assembly Bill No. 1739, Ch. 347 (Sept. 16, 2014) (Dickson) at Section 1.) However, these new requirements do not take effect until 2020. (Water Code § 10720.7.) In the interim, strict enforcement of existing law is critical. A captured agency's attempt to bypass applicable laws should be rejected. Because Plaintiffs have demonstrated likelihood of success on the merits and the balance of harm favors Plaintiffs, a preliminary injunction should be granted.

III. The Court Should Require No More Than A Nominal Bond.

Plaintiffs ask that the Court waive the bond requirement or require no more than a nominal bond. Since Plaintiffs are nonprofits, requiring a bond would be an impediment to maintaining this action. Courts have recognized that "[a]ny bond other than a nominal one could effectively deny access to judicial review or close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing to raise an environmental challenge." (*Mangini v. J.G. Durand Int'l* (1994) 31 Cal.App.4th 214, 217; see also *South Pasadena v. Slater* (C.D. Cal. 1999) 56 F.Supp.2d 1106, 1148 ["courts routinely impose either no bond or a minimal bond in public interest environmental cases."].)

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs a preliminary injunction.

Respectfully submitted,

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