SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

Center For Biological Diversity Plaintiff/Petitioner(s) vs. California Geologic Energy Management Division, a political subvision of the State of California et al Defendant/Respondent(s)	No. RG21090952 Date: 12/22/2021 Time: 1:15 PM Dept: 21 Judge: Evelio Grillo AMENDED ORDER re: Ruling on Submitted Matter

The Court, having taken the matter under submission on 12/07/2021, now rules as follows:

The Motion for Judgment on the Pleadings Filed for Defendant filed by California Geologic Energy Management Division, a political subvision of the State of California on 09/28/2021 is Denied.

The motion for judgment on the pleadings of Cal Geological Energy Mgt (CalGEM) is DENIED. The motion for judgment on the pleadings of Western States Petroleum Association, Independent Oil Producers Agency, and California Independent Petroleum Association (Industry Groups) is DENIED.

EVIDENCE

CalGEM, the Industry Groups, and CBD have each made request for judicial notice. The requests for judicial notice are all GRANTED.

The court is cautious given the volume of material submitted for judicial notice. The parties seek judicial notice of court records and public filings by public agencies.

"The hearing on demurrer may not be turned into a contested evidentiary hearing through the guise of having the court take judicial notice of documents whose truthfulness or proper interpretation are disputable." (Fremont Indem. Co. v. Fremont General Corp. (2007) 148 Cal.App.4th 97, 114.) "[A] court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show." (Fremont, 148 Cal.App.4th at 115.)

The court takes judicial notice of the matters submitted because the factual background of the case has evolved since the complaint was filed. The court exercises its discretion to take judicial notice of undisputable developments and make a decision now rather than to require the filing on

a supplemental complaint with the more recent developments and to defer its decision. (Evid Code 452.)

COMPLAINT – GENERAL ALLEGATIONS

For purposes of a demurrer the court assumes the truth of all facts asserted. (Californians for Native Salmon etc. Assn. v. Department of Forestry (1990) 221 Cal.App.3d 1419, 1426-1427,)

CalGEM is the state agency charged with supervising the drilling, operation, maintenance, well stimulation, injection, and plugging and abandonment of oil and gas in California. (Cpt para 19, 60. 61.)

CalGEM must provide a permit before an operator drills a new oil or gas well. (Cpt para 61) Under CEQA, CalGEM can be the lead agency or the responsible agency. (Cpt para 65, 96.) (PRC 3106.)

CalGEM must also provide a permit before an operator uses a well simulation treatment (fracking). (Cpt para 71, 76)

California became the primary regulator for oil and gas injection activity in the state by obtaining "primacy" from the U.S. Environmental Protection Agency in 1983. CalGEM issues injection project approvals pursuant to the agency's Underground Injection Control ("UIC") regulations. (Cpt 76.) (14 CCR 1724.5-1724.10)

CalGEM categorizes issuance of "permits" and of "project approval letters" for injection projects as "typical projects" under CEQA that require "discretionary action" from CalGEM. (Cpt 93)

CalGEM has a pattern and practice of failing to comply with CEQA in issuing permits for oil and gas wells without adequate environmental review. The complaint identifies three categories:

1. CalGEM is lead agency and approves projects with no publicly available documentation that it has conducted environmental review or issued a determination as to whether the proposed oil and gas projects may cause significant environmental impacts. (Cpt 100-104)

2. CalGEM is lead agency and issues a Notice of Exemption with no significant analysis. (Cpt 105-112.)

3. CalGEM is the responsible agency and issues Notices of Determination after relying on a prior environmental review conducted by a lead agency, but conducts no significant analysis. (Cpt 113-125.)

KERN COUNTY – PERMITS ISSUED IN 2014

The large number of the oil and gas wells in California are in Kern County. In 2014, CalGEM (then known as DOGGR) issued 213 permits to Aera Energy drill new oil wells within the South Belridge oil field, which is located in Kern County. The Association of Irritated Resitents and

other sued DOGGR, alleging that it failed to comply with CEQA. The trial court denied the petition on the ground the permit approvals were ministerial and therefore not subject to CEQA.

The Court of Appeal in Association of Irritated Residents v. California Department of Conservation, Division of Oil, Gas, and Geothermal Resources (2020) 2020 WL 1698749 (AIR v. CalGEM), held that the permits were ministerial. The court stated, "Under the narrow facts of this case, including DOGGR's adoption of specific field rules applicable to drilling wells in the South Belridge oil field, we hold that DOGGR's

approvals to drill the new wells in question were ministerial in nature." (2020 WL 1698749 at 1.)

The court later states: "we conclude that the 213 permit approvals in this case were ministerial, rather than discretionary. Although some statutory provisions and regulations reflect that, under other circumstances, DOGGR would ordinarily exercise discretion in making well drilling permit decisions, that was not the case here. On the limited and narrow circumstances presented here, DOGGR did not exercise discretionary judgment or deliberation, but merely determined in a mechanical fashion whether there was conformity with applicable standards set forth in the regulations and especially the field rules." (2020 WL 1698749 at *20.))

KERN COUNTY – 2015 ORDINANCE, 2021 ORDINANCE, AND RELATED CEQA LITIGATION

In November 2015, Kern County approved an ordinance to streamline the permitting process for new oil and gas wells and certified an environmental impact report (EIR) as compliant with CEQA. Litigation followed.

The trial court found the Kern 2015 EIR was inadequate in certain aspects. The Court of Appeal decided that the Kern 2015 EIR and the related ordinance must be set aside. The Court stated that (1) "permits issued before that date may remain in effect and oil and gas activities under those permits may continue" and (2) "if any permit is issued after [the date of the writ], the writ of mandate's invalidation of the ordinance also shall invalidate the permit retroactively." (King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814, 830.) The Court of Appeal stated "pending CEQA compliance, the County will return to the regulatory scheme in place prior to the ordinance's adoption." (Id.)

On 3/8/21, Kern County certified a Supplemental Recirculated EIR and adopted a new ordinance. (Industry Group RJN.)

On 10/4/21, the trial court in Kern County ordered that the 2021 Kern Ordinance was suspended while the court examines the SREIR and that the County must cease review any approval of applications for oil and gas permits until the court determines whether the SREIR the complies with CEQA.

CalGEM notes that although the trial court suspended the ordinance while the litigation proceeded, that under PRC 21167.3(b) that CalGEM as "responsible agency" can still rely on the Kern County SREIR in making its decisions. PRC 21167.3(b) also states that if the Responsible

agency approves a matter while the underlying EIR is under review that the applicant then proceeds at its own risk.

THE CLAIM IN THE COMPLAINT

The Complaint alleges a single cause of action for declaratory relief (CCP 1060) asserting that CalGEM has an ongoing pattern and practice of approving oil and gas

permits, including permits and approvals to conduct drilling, well stimulation, and injection without conducting environmental review of potentially significant impacts as required by CEQA. (Cpt 128.)

CalGEM and the Industry Groups focus on the issue of whether CalGEM as "responsible agency" has properly relied on and can in the future properly rely on the environmental review of Kern County as "lead agency." The court focuses its attention on that issue, but it is not the only basis for the claim.

CalGEM is the "responsible agency" for issuing permits for oil and gas wells. (PRC 3106.)

A "responsible agency" under CEQA is any public agency that "proposes to carry out or approve a project, for which a lead agency is preparing or has prepared an EIR or negative declaration" and for which it has discretionary approval over all or part of that project. [(14 CCR 15381.) See also PRC 21069.)] If an agency's approval is required for any activity "integral to the project" and the agency could, in its discretion, deny approval, then that agency is a responsible agency under CEQA." (RiverWatch v. Olivenhain Municipal Water Dist. (2009) 170 Cal.App.4th 1186, 1205-1206.)

A "responsible agency" must consider the EIR or other environmental review of the "lead agency." 14 CCR 15096(a) states: "A responsible agency complies with CEQA by considering the EIR or negative declaration prepared by the lead agency and by reaching its own conclusions on whether and how to approve the project involved." "Although "the lead agency is responsible for considering all environmental impacts of the project before approving it, a responsible agency has a more specific charge: to consider only those aspects of a project that are subject to the responsible agency's jurisdiction." (RiverWatch v. Olivenhain Municipal Water Dist. (2009) 170 Cal.App.4th 1186, 1205-1206.)

A "lead agency" under CEQA is "the public agency which has the principal responsibility for carrying out or approving a project. The lead agency will decide whether an EIR or negative declaration will be required for the project and will cause the document to be prepared." (14 CCR 15367.) (See also PRC 21067.) (California Coastkeeper Alliance v. State Lands Commission (2021) 64 Cal.App.5th 36, 54-55.)

The Complaint alleges in part that CalGEM has a pattern and practice of failing to exercise its independent obligations as "responsible agency." The suggestion by the Industry Groups that the Kern ordinance is dispositive leads to the legal questions of (1) can a responsible agency rely entirely on an EIR or other determination of a lead agency and (2) if not, what is a responsible

agency's required level of independent investigation or evaluation. (PRC 21069; King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814, 897 fn 50.) This then leads to the fact question of whether CalGEM has had a pattern and practice of CEQA non-compliance in the past and whether declaratory relief is appropriate to direct it to meet its statutory responsibilities going forward.

PROCEDURE

The motions of CalGEM and the Industry Groups are not addressed to the merits of the case. Both motions are both based on procedure – the complaint cannot allege pattern or practice, the complaint is vague, the declaratory relief claim is an end run around the CEQA procedure for challenging individual decisions, the claims are actually directed to Kern County, the claims in the complaint are moot, the complaint is duplicative of the Kern County action, etc.

The CalGEM motion presents substantially the same issues that the same parties presented in Cntr for Biol. Diversity v. California Dept. Cons, RG12-652054, and that the court resolved in the Order of 5/1/13. The court reaches the same conclusion on that issue.

GALGEM MOTION FOR JUDGMENT ON THE PLEADINGS

The motion for judgment on the pleadings of Cal Geological Energy Mgt ("CalGEM") is DENIED.

AS A MATTER OF LAW, PETITIONERS CAN CHALLENGE A PATTERN OR PRACTICE OF ALLEGEDLY INADEQUATE CEQA REVIEW BY DECLARATORY RELIEF.

CalGEM argues that because this action concerns CalGEM's obligations under CEQA that petitioners must challenge the CalGEM's practices by filing a petition for a writ of mandate under CEQA. (Pub. Res. Code 21168 and 21168.5.) "An action for declaratory relief is not appropriate to review the validity of an administrative decision. ... Rather, the proper method to challenge the validity of conditions imposed on a building permit is administrative mandamus under [CCP 1094.5]." (City of Santee v. Superior Court (1991) 228 Cal.App.3d 713, 718.)

A plaintiff can, however, 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.

In Californians for Native Salmon etc. Assn. v. Department of Forestry (1990) 221 Cal.App.3d 1419, 1422, the court held that a plaintiff can pursue an action for declaratory relief "against an administrative agency when it is alleged that the agency has a policy of ignoring or violating applicable laws and regulations, but when no specific agency decision is attacked." The court explained, "Appellants ... challenge not a specific order or decision, or even a series thereof, but an overarching, quasi-legislative policy set by an administrative agency. Such a policy is subject to review in an action for declaratory relief." (Id., 221 Cal. App.3d at 1429.) Later the court stated, "Declaratory relief directed to policies of administrative agencies is not an unwarranted control of discretionary, specific agency decisions." (Id., 221 Cal. App.3d at 1429.)

In East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection (1996) 43 Cal.App.4th 1113, 1119-1128, the court held that in an action for declaratory relief, the matter at issue is the agency's policy and therefore the scope of evidence is wider than the specific projects identified in the complaint. Finally, in K.G. v. Meredith (2012) 204

Cal.App.4th 164, 177, the court held that because "The practices and procedures Petitioners challenge do not vary based on the unique facts of any particular ... proceeding" that therefore "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."

More recently, in K.G. v. Meredith (2012) 204 Cal.App.4th 164, 177, the court held that a plaintiff can seek declaratory relief where a "Public Guardian routinely seeks guardianships without individual judicial determinations of decisional incapacity. The court reaffirmed 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." (204 Cal.App.4th at 177.) (See also Clovis Unified School Dist. v. Chiang (2010) 188 Cal.App.4th 794, 807-809.)

In Protecting Our Water and Environmental Resources v. County of Stanislaus (2020)

10 Cal.5th 479, the Court addressed "a pattern and practice" of approving well construction permits without CEQA review. The case was submitted on stipulated facts. The decision concerned the merits at trial. The court did not expressly address whether it was procedurally appropriate as a general matter to seek declaratory relief based on a "a pattern and practice" of inadequate CEQA review. Rather, the court held that declaratory relief was appropriate on the facts of that case as presented at trial.

THE COMPLAINT ASSERTS A POLICY OR PRACTICE THAT COULD BE ADDRESSED BY DECLARATORY RELIEF

The complaint adequately alleges that CalGEM has a consistent pattern or practice that might be unlawful.

The complaint alleges that CalGEM is lead agency and approves projects with no publicly available documentation that it has conducted environmental review or issued a determination as to whether the proposed oil and gas projects may cause significant environmental impacts. (Cpt 100-104) The Complaint asserts that in 2020, CalGEM issued about 400 new well permits for which there was not public documentation. About 400 instances of non-compliance could be a pattern or practice.

The complaint alleges that CalGEM is lead agency and issues a Notice of Exemption with no significant analysis. (Cpt 105-112.) The Complaint asserts that in 2020 there were 123 notices of exemption for 396 new oil and gas wells under three exemptions were consistently not appropriate for new oil and gas wells. Notices for 396 wells could be a pattern or practice.

The complaint alleges that CalGEM is the responsible agency and issues Notices of Determination after relying on a prior environmental review conducted by a lead agency, but conducts no significant analysis. (Cpt 113-125.) The complaint assert that in 2020 CalGEM improperly relied on prior environmental review when approving 705 wells in Kern County and 11 wells in Monterey County. Improper reliance on prior environmental review for over 700 wells could be a pattern or practice.

The claim in the complaint concerns whether CalGEM has business practices or procedures that consistently fail to comply with CEQA. The claim is not about whether CalGEM's approval of any given oil or gas well was proper.

This is at the MJOP stage. Following discovery, the court may entertain a motion on an evidentiary record regarding whether CalGEM has a policy or a consistent practice that permits plaintiffs to pursue declaratory relief.

At the hearing, CalGEM and the industry groups argued that even if plaintiff could pursue declaratory relief, the claim had no merit because in AIR v. CalGEM, 020 WL 1698749, the Court held that CalGEM properly treated permits as ministerial. The Court of Appeal decision was narrowly focused on CalGEM's issuance of 213 permits in 2014, whereas the complaint in this case alleges facts about CalGEM's business practices in 2020 and the trial will be about CalGEM's current business practices as demonstrated by its recent and current practices. The court is also wary about letting a motion that was filed about the proper use of declaratory relief transform into a motion about the merit of the claim.

THE COMPLAINT IS NOT UNCERTAIN

The Complaint alleges that CalGEM has a consistent pattern or practice of failing to comply with CEQA. The Complaint alleges three separate ways that CalGem fails to comply with CEQA. (Cpt 100-104, 105-112, 113-125, and 128.)

THE COMPLAINT WILL NOT CIRCUMVENT CEQA'S REQUIREMENTS

A plaintiff may challenge an agency approval of a specific project for failure to comply with CEQA. A plaintiff may also seek declaratory relief regarding an agency pattern or practice.

CBD has committed to pursuing claims regarding the alleged pattern or practice. (Oppo at 16:11.)

CBD will therefore need to prove a pattern or practice. (EBMUD, 43 Cal.App.4th at 1122-1123.) This will require proof of more than occasional failures or isolated incident. (Chin v. Port Authority of New York & New Jersey (2nd Cir 2012) 685 F.3d 135, 147-148) "In order to show a "pattern or practice," one must prove the conduct "was the [defendant's] standard operating procedure the regular rather than the unusual practice." (United States v. Maricopa, County of (D. Ariz. 2015) 151 F.Supp.3d 998, 1030.) Regarding evidence, CBD may present evidence of CalGEM's historical patterns and practices as probative of current agency practice and CalGEM can present evidence of its current practice. (EBMUD, 43 Cal.App.4th at 1122-1123.) If

CalGEM prevails, then the relief will be prospective and will not provide relief for any past violations. "Declaratory relief operates prospectively." (Kirkwood v. California State Auto. Assn. Inter-Insurance Bureau (2011) 193 Cal.App.4th 49, 59.)

The Complaint seeks as relief that the CalGEM must prospectively bring its actual practice into compliance with the law, but the complaint does not seek specific relief as to any specific CalGEM decision regarding any specific oil or gas well.

CalGEM expresses concern that the claim for declaratory relief is an end run around the law that a challenge to an agency finding following an administrative process is limited to the administrative record. (CCP 1094.5.) (CalGEM brief at 20-21.) The reference to an administrative record might not be appropriate given that the claim is in part that CalGEM approved permits with no public administrative process. (Cpt 100-104, 128(a)) The parties can devise procedures for effective discovery that limits the burden. The parties could stipulate to facts. Or the parties could agree to use a sample of well applications and then determine the number and selection process by agreement or by following a process similar to that outlined in Duran v. Superior Court (2014) 59 Cal.4th 1.

MOTION OF INDUSTRY GROUPS

MOOT

The Industry Groups argue that the developments in the Kern County moot the claims in this case. They do not. The claims in this case are against CalGEM regarding is alleged practice and procedure. The claims in the Kern County case are against Kern County and concern the Kern 2021 SREIR.

The claims in the two cases will overlap to the extent that CalGEM might be failing to comply with its responsibilities as "responsible agency" by relying on the determinations of Kern County as "lead agency" if the Kern County ordinance was adopted without compliance with CEQA and is unlawful.

The case is not moot to extent it presents the legal questions of (1) can a responsible agency rely entirely on an EIR or other determination of a lead agency and (2) if not, what is a responsible agency's required level of independent investigation or evaluation. (PRC 21069; King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th 814, 897 fn 50.) The case is not moot to extent it presents the fact question whether CalGEM has, and continues to have, a pattern and practice of unlawfully relying on an EIR or other determination of a lead agency in CalGEM's approvals of oil and gas wells.

AVAILABILITY OF REMEDY

Industry Groups argue that the court cannot void the permits that CalGEM approved under the 2015 Kern EIR and ordinance. That argument has merit, but CBD acknowledges the limits of what it can seek in this case and seeks only prospective declaratory relief. Second, the Court of Appeal ordered relief in King & Gardiner Farms, LLC v. County of Kern (2020) 45 Cal.App.5th

814, 897, directing that the certification of the EIR shall be set aside, that the related Ordinance is invalidated effective 30 days from the date the opinion is filed, and "with respect to permits issued under the Ordinance before the date of its invalidity, those permits may remain in effect."

DUPLICATION OF KERN COUNTY LITIGATION

Industry Groups argue that the court should dismiss or stay this case as duplicative of the Kern County litigation. This case is not duplicative of the Kern County litigation. The claims in this case are against CalGEM regarding is alleged practice and procedure. The claims in the Kern County case are against Kern County and concern the Kern 2021 SREIR.

The case in Kern County is progressing. On 10/4/21, the trial court in Kern County ordered that the 2021 Kern SREIR was suspended and that the County must cease review and approval of applications for oil and gas permits until the court determines that the 2021 ordinance complies with CEQA. The claims in this case against CalGEM can proceed in parallel with the claims against Kern County in the Kern case. The resolution of the claims in this case regarding CalGEM's responsibilities as "responsible agency" will determine the degree to which CalGEM can rely on Kern as "lead agency," but the Kern Case will determine the adequacy of Kern's actions as "lead agency."

CONCLUSION

The motions to strike of CalGEM and the Industry Groups to the complaint are DENIED. CalGEM and the Industry Groups must file answers to the complaint within 30 days of service of this order.

The Court orders counsel to obtain a copy of this order from the eCourt portal.

Dated: 12/22/2021

Evelio Grillo / Judge