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 ALAMEDA COUNTY
 SEP - 4 2013
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ALAMEDA

Center for Biological Diversity,
 Plaintiff,

vs.

California Department of Conservation,
 Division of Oil, Gas, and Geothermal
 Resources, Does 1 through X,
 Defendant.

Case No. RG13-664534

ORDER DENYING PLAINTIFF'S
 MOTION FOR SUMMARY
 JUDGMENT

Plaintiff's Motion for Summary Judgment, or in the alternative, for Summary Adjudication, came regularly before the court on August 8, 2013 with Judge Frank Roesch presiding.

Plaintiff was represented by Vera Pardee, Esq. and by Hollin Kretzmann, Esq. Defendant was represented by Joel Jacob, Esq. and by Bryant Cannon, Esq. The matter was argued and submitted.

The court has carefully considered all the papers and pleadings submitted by the parties and has considered the argument of counsel (and the unsolicited Plaintiff's Notice of Supplemental Citation) and, good cause appearing therefore, rules as follows:

Preliminary Matters

1) Plaintiff's Request for Judicial Notice is ruled upon as follows: Requests for Judicial Notice numbered 1,2,4,8,10,11,13,14,15,16,17,and 19 are GRANTED. Requests for Judicial Notice numbered 3,5,6,7,9,12,18,and 20 are DENIED.

2) Defendant's Request for Judicial Notice is ruled upon as follows: Request for Judicial Notice numbered Exhibit 1 and 2 are GRANTED and Requests for Judicial Notice numbered Exhibit 3,4,5,6 and 7 are DENIED.

3)Plaintiff's Evidentiary Objections and Motion to Strike are ruled upon as follows:
Bopp Declaration paragraph 4 - objection overruled; Stettner declaration paragraph 6 - objection overruled; Kustic Declaration paragraph 4 - objection overruled; Kustic Declaration paragraph 5 - objection overruled; Kustic Declaration paragraph 6 - objection overruled; Kustic Declaration paragraph 9 - objection overruled; Kustic Declaration paragraph 10 - objection overruled; Kustic Declaration paragraph 11 - objection overruled; Kustic Declaration paragraph 12 - objection overruled; Kustic Declaration paragraph 13 - objection overruled; Kustic Declaration paragraph 14 - objection overruled; Kustic Declaration paragraph 16 - objection overruled; Kustic Declaration paragraph 17 - objection overruled; Hilbert Declaration paragraph 8 - objection overruled; Hilbert Declaration paragraph 9 - objection overruled; Hilbert Declaration paragraph 11 - objection overruled; Hilbert Declaration paragraph 12 - objection overruled; Hilbert Declaration

paragraph 13 - objection overruled; Hilbert Declaration paragraph 15 - objection overruled; Hilbert Declaration References - objection sustained.

4)Defendant's Evidentiary Objections and Motion to Strike are ruled upon as follows:

Pardee Declaration paragraph 4 and Exhibit C – objection sustained; Pardee Declaration paragraph 5 and Exhibit D – objection sustained; Pardee Declaration paragraph 6 and Exhibit E – objection overruled; Pardee Declaration paragraph 7 and Exhibit F – objection sustained; Pardee Declaration paragraph 8 and Exhibit G – objection sustained; Pardee Declaration paragraph 9 and Exhibit H – objection sustained; Pardee Declaration paragraph 11 and Exhibit J – objection sustained; Pardee Declaration paragraph 15 and Exhibit N – objection sustained; Pardee Declaration paragraph 21 and Exhibit T – objection sustained; Pardee Declaration paragraph 24 and Exhibit V – objection sustained; Pardee Declaration Exhibit V Tables – objection sustained; Pardee Declaration paragraph 26 – objection sustained; Pardee Declaration paragraph 26(a) – objection sustained; Pardee Declaration paragraph 26(b) – objection sustained; Pardee Declaration paragraph 26(c) – objection sustained; Pardee Declaration paragraph 26(d) – objection sustained; Pardee Declaration paragraph 26(e) – objection sustained; Pardee Declaration paragraph 26(f) – objection sustained; Pardee Declaration paragraph 26(g) – objection sustained.

Summary Judgment Motion

Plaintiff's complaint contains three causes of action. The first cause of action seeks a judicial declaration that defendant is required, by virtue of the regulation itself and by

virtue of the regulation's enabling statute, to apply the provisions of California Code of Regulations §§1724.6 – 10 to hydraulic fracturing oil and gas wells.

The second cause of action seeks a judicial declaration that defendant has failed to comply with the statutory mandate found in Pub Res Code §3000 et seq in general and specifically Pub Res Code §3106(a) in its regulation of hydraulic fracturing wells.

The “third cause of action” is identical to the second cause of action except that it seeks injunctive relief instead of declaratory relief. It is not a cause of action as it is not a separate theory of liability, rather, it is an alternative remedy sought by plaintiff on the same theoretical basis as the second cause of action.

A summary judgment motion must be granted if there is no triable issue of fact and if the moving party is entitled to judgment as a matter of law CCP§ 437c(c).

Here, there is no triable issue of fact but the moving party is not entitled to judgment as a matter of law as to the entire action or as to any cause of action.

The first cause of action asserts that the plain and unambiguous language in California Code of Regulations §§1724.6 to 1724.10 (the UIC Regulations) applies to hydraulic fracturing wells in California. Plaintiff asserts that the regulatory scheme found there applies to “any subsurface injection...project,” and seeks a Judicial Declaration that the UIC Regulations, therefore, apply to hydraulic fracturing wells notwithstanding the defendant's assertion that the term “subsurface injection project” in the UIC Regulations does not refer to hydraulic fracturing wells.

It is not disputed that since the UIC Regulations were enacted by the defendant agency in the early 1980s (Bopp Declaration paragraphs 3 and 4) the defendant agency has

defined hydraulic fracturing wells as something other than a “subsurface injection project” and has never applied the UIC Regulations to a hydraulic fracturing project.

The defendant agency’s interpretation of its own regulation is afforded considerable deference (see *Yamaha Corp. V. State Board of Equalization*, (1998) 19 Cal 4th 1) and is entirely consistent with the technical definition of “injection project” (see Hilbert Declaration paragraph 9,11,12,13 and 15).

The application by the defendant agency of its definition of “injection project” to the UIC Regulations is rational, is not arbitrary or capricious and is not clearly erroneous. Such application has been a longstanding and consistent administrative interpretation of its own regulation and interested parties have acquiesced in the interpretation for an extended period of time. Such interpretation is afforded great weight; it should not be overturned unless clearly erroneous.

The second cause of action (and the third as well) asserts, that the defendant’s application of its interpretation of the UIC Regulations with regard to hydraulic fracturing wells constitutes a breach of Public Resources Code §3300 et seq, in general, and Pub Res Code §3106(a) in particular.

Pub Res Code §3106(a) states as follows:

The supervisor shall so supervise the drilling, operation, maintenance, and abandonment of wells and the operation, maintenance and removal or abandonment of tanks and facilities attendant to oil and gas operation, including pipelines not subject to regulation pursuant to Chapter 5.5 (commencing with Section 51010) of Part 1 of Division 1 of Title 5 of the Government Code that are within an oil and gas field, so as to prevent, as far as possible, damage to life, health, property, and natural resources; damage to underground oil & gas deposits from infiltrating water and other causes; loss of oil, gas, or

reservoir energy, and damage to underground and surface waters suitable for irrigation or domestic purposes by infiltration of, or addition of, detrimental substances.

This mandate is general; it does not require any specific regulation related to hydraulic fracturing wells and does not mandate the inclusion of hydraulic fracturing wells into the definition of “injection projects”.

Plaintiff’s burden then, in this summary judgment motion, is to initially demonstrate that defendant, in its supervision of the “drilling, operation, maintenance...” etc. of hydraulic fracturing wells, has failed to “prevent, as far as possible, damages to life, health...” etc.

Plaintiff fails to meet this burden.

Plaintiff does not demonstrate, or even assert, that Defendant does nothing to supervise the drilling of hydraulic fracturing wells. Rather, plaintiff argues that the defendant’s refusal to apply the UIC Regulations to such wells demonstrates a failure by defendants to comply with the statute and an act in direct conflict with Pub Res Code §3106(c).¹

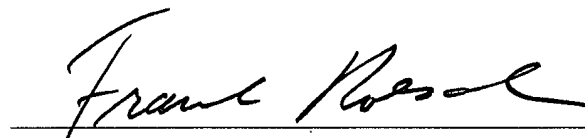
Plaintiff’s argument, however, does not stand scrutiny. Not only is the UIC Regulations a set of regulations that is not applicable to hydraulic fracturing wells because of the technical and long-used definition of “injection project”, but the undisputed evidence

¹. Defendant has misunderstood plaintiff’s argument to be that defendant has failed to promulgate a set of regulations relating to hydraulic fracturing wells. The plaintiff clarifies its argument in the Reply (“the rules applicable to fracking do exist; the Center really seeks a declaration that they must be enforced”.)

is that the specific application of the UIC Regulations is not compatible with hydraulic fracturing wells. (Kustic Declaration paragraphs 8, 9, 11, 12 and 13.)

For the above stated reasons, the motion is denied.

Dated: *Sept 4, 2013*

A handwritten signature in cursive script, reading "Frank Roesch", written over a horizontal line.

Frank Roesch
Judge of the Superior Court

Case No. RG13-664534

On the date shown below, I served the - the attached document
 - I declare under penalty of perjury that the foregoing is true and correct.

By first class 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 1221 Oak Street, Oakland CA 94612

By Facsimile Transmission: I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was addressed as shown on the foregoing document or on the attached, and that the service of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland CA 94612

Leah Wilson, Clerk/Administrator

Date: 9/5/13


Superior Court Clerk

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