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ENVIRONMENTAL GROUPS FILE CEQA ACTION TO ENJOIN CALIFORNIA REGULATORS FROM PERMITTING FRACKING

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On October 16, 2012, four environmental groups filed a state court action alleging that California's Division of Oil, Gas & Geothermal Resources (DOGGR) has failed to comply with the California Environmental Quality Act (CEQA) in the permitting process for oil and gas operations, including hydraulic fracturing, or "fracking," in the state. A copy of the complaint may be found on our website.

The plaintiffs — Center for Biological Diversity (CBD), Earthworks, Environmental Working Group (EWG), and the Sierra Club — who are represented by Earthjustice, filed their complaint (case number RG12652054) in Alameda County Superior Court. DOGGR is the only named defendant. The complaint pleads two closely related causes of action. The first, for declaratory relief, seeks a declaration from the court that DOGGR has followed an illegal pattern and practice of failing to comply with CEQA in issuing oil and gas drilling permits. The second, for injunctive relief, seeks to enjoin DOGGR from issuing any further oil and gas drilling permits until such time as it complies with CEQA "by considering, evaluating, and mitigating the environmental and public health impacts associated with hydraulic fracturing." Thus, unlike the typical CEQA challenge, there is no particular project that is the subject of the litigation. Rather than challenging a single project, the action contends that the entire permitting process is not compliant with CEQA and must be remedied globally. The complaint contends that "it is impracticable and a waste of judicial resources for Plaintiffs to challenge oil and gas permits one at a time rather than with a single lawsuit," noting that DOGGR issues dozens of permits annually.

The central legal theory of the complaint turns on plaintiffs' interpretation of CEQA. In brief summary, the complaint explains that CEQA requires that state agencies complete an environmental impact report (EIR) for discretionary projects that may have a significant impact on the environment, and to mitigate or avoid those impacts when feasible. Plaintiffs contend that



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DOGGR unlawfully avoids the complex and lengthy EIR process on a well-by-well basis by relying on categorical exemptions available under CEQA, or by adopting negative declarations that particular projects — in this case the drilling of a well — will not have a significant impact on the environment. According to plaintiffs, since 2011 DOGGR has approved at least 18 oil and gas projects under CEQA by relying on categorical exemptions for "minor alterations to land" or "existing facilities," and another 20 or more projects based on negative declarations or mitigated negative declarations. The complaint goes into great depth on the claimed environmental impacts of fracking in an attempt to bolster plaintiffs' claim that the combination of fracking and horizontal drilling in the Monterey Shale, with its estimated 15 billion barrels of oil, and elsewhere in the state, will have a significant environmental impact.

Plaintiffs do not specify precisely what would be required to ensure full CEQA compliance by DOGGR. The declaratory relief action merely seeks a declaration that DOGGR's current method of complying with CEQA is inadequate. The claim for injunctive relief, however, suggests the full scope of the relief plaintiffs seek. They ask the court to "enjoin DOGGR from issuing oil and gas permits to the extent that they allow for hydraulic fracturing unless and until DOGGR has complied with CEQA by the preparation of environmental documentation that considers, evaluates, and mitigates the impacts from such activities." Thus, it is possible, even probable, that plaintiffs will ultimately contend that each individual frack job will require its own EIR, and that categorical exemptions and negative declarations will not suffice. With more than 600 frack jobs performed in California in 2011, preparation of a full EIR every time a well is fracked would undoubtedly impose significant delays and administrative burdens far beyond those currently in place for oil and gas permitting in the state.

Notably, the case was filed in the immediate aftermath of a one-year study of fracking in Baldwin Hills and just prior to the anticipated delivery of a draft set of fracking regulations now being prepared by DOGGR. The filing of the action confirms that environmental groups are neither satisfied by the conclusions reached in the Baldwin Hills study nor placated by the promise of tighter regulation of fracking in California. We may now be seeing the next significant wave of fracking-related activity in the state, as stakeholders seek to advance their positions by taking their claims to court. Another suit is expected shortly, as one of the plaintiffs in the present case, CBD, may file an



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Endangered Species Act suit as soon as the end of October challenging the Bureau of Land Management's sale of oil and gas leases on federal lands in California.

We will continue to monitor the progress of this case and provide updates as warranted.

For more information regarding California fracking issues, please contact:

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