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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

Rodrigo ROMO, on behalf of himself and his two minor children, Plaintiff, **v.** **Edmund G. BROWN, in his official capacity as Governor of California; Division of Oil, Gas & Geothermal Resources; Steve BOHLEN, in his official capacity as California Oil and Gas Supervisor,** Defendants.	Case No. 34-2015-00181715 **NOTICE OF DEMURRER TO COMPLAINT; DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES** October 27, 2015, 2:00 p.m. Department 53 The Honorable David I. Brown Trial Date: None Set Action Filed: July 14, 2015

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TABLE OF AUTHORITIES

TO PLAINTIFF THROUGH HIS COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on October 27, 2015 at 2:00 p.m. or as soon thereafter as the matter may be heard, in Department 53, located at 800 9th Street, Third Floor, Sacramento, CA 95814, all defendants will demur to the complaint in this action, pursuant to Code of Civil Procedure sections 430.10, subdivision (e).

Pursuant to Local Rule 1.06 (A), the Court will make a tentative ruling on the merits of this matter by 2:00 p.m. on the court day before the hearing. The complete text of the tentative rulings for the department may be downloaded from the Court's website. A party without online access may call the dedicated phone number for the department as referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the Court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

DEMURRER

Defendants will and hereby do demur to the complaint on the ground that it fails to state facts sufficient to state a cause of action.

WHEREFORE, defendants pray as follows:

1. That the Court sustain the demurrer without leave to amend;
2. That the Court dismiss the complaint without leave to amend;
3. For such other and further relief as the Court deems just and proper.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The complaint alleges that defendants have violated the law by not adopting regulations requiring minimum setbacks between the use of well stimulation treatments on existing oil and gas wells, and schools. Yet no statute mandates such regulations, and in the absence of such a mandate, an executive agency has broad discretion to decide what particular regulations are appropriate for a given subject matter.

There is no legal basis for relief, and the Court should sustain the demurrer without leave to amend.

II. BACKGROUND

A. Well Stimulation Generally

The complaint alleges the following facts, which this demurrer accepts as true.

The action concerns "well stimulation treatments"[1] (WSTs) employed by private energy companies to increase oil and gas production. The oil and gas industry has used WSTs in California since 1947. (Compl. ¶ 58.) Such techniques can improve energy production, but can also pose certain environmental risks. (Compl. ¶¶ 59-61.)

Plaintiff Rodrigo Romo is a parent of two children who currently attend public schools within 1.5 miles of a well at which WST has been performed. (Compl. ¶ 8.) People of color, including the plaintiff and his children, claim to be disparately burdened by the operation of wells, including both "conventional oil extraction," and use of WSTs. (Compl. ¶ 8.)

Air quality concerns exist in the relevant geographic areas independently of WSTs: "The majority of school children attending schools near well stimulations are already exposed to the worst air pollution in the country." (Compl. ¶ 2.) The counties affected by well stimulation are already among the most polluted in the state. (Compl. ¶ 70.) In particular, the communities in which the plaintiff's children attend school are already among the 20% most polluted in the state. (Compl. ¶ 72.) The San Joaquin Valley air basin (the site of both schools that plaintiff's children

[1] Specific examples of well stimulation treatment include hydraulic fracturing, matrix acidization, and acid fracturing. (Compl. P. 1, fn. 2.)

attend) has failed to comply with federal clean air standards since 1997. (Compl. ¶ 16.) As a result, the school children affected by well stimulation already contend with preexisting health conditions and exposure to numerous sources of pollution. (Compl. ¶ 71.)

Los Angeles County, in which well stimulation occurs, is the most ozone polluted county in the country. (Compl. ¶ 75.) Other counties at issue in the action are among the most polluted in the country. (Compl. ¶ 75.)

Approximately 5.4 million people in California live within one mile of a new and/or active oil or gas well. (Compl. ¶ 94.) (According to the 2014 consensus, there are 38.8 million people in California. (http://quickfacts.census.gov/qfd/states/06000.html))

Defendant Division of Oil, Gas, and Geothermal Resources (DOGGR) has general oversight over oil, gas, and geothermal wells in California. (Compl. ¶¶ 15, 25.) DOGGR supervises the drilling, operation, maintenance, and plugging and abandonment of onshore and offshore oil, gas, and geothermal wells to encourage wise development of energy resources while protecting public health and the environment. (Pub. Res. Code, § 3106.) Defendant Steven Bohlen is the state Oil and Gas Supervisor. (Compl. ¶ 16.) His responsibilities are described as being similar to DOGGR's. (Compl. ¶ 16.) Defendant Brown is the Governor of California; he signed a recent law imposing special permitting requirements on WST, Senate Bill 4 ("SB 4") (Pavley, Ch. 313, Stats. Of 2013), and generally oversees DOGGR. (Compl. ¶ 14.)

While the complaint alleges that SB 4 and its implementing regulations should do more to regulate WST, it does not allege that SB 4 or its regulations makes any health effect worse than without SB 4 or the regulations. (See, e.g. Compl. ¶ 115.) Instead, the complaint alleges liability based on the failure of the SB 4 regulations to mandate setbacks from schools or "geographical limitations" on WST. (Compl. ¶ 115.)

B. The Well Stimulation Treatment Regulations.

In 2013, Governor Brown signed into law Senate Bill 4 (Pavley, Ch. 313, Stats. Of 2013), which required DOGGR to promulgate regulations governing WST. The final WST regulations took effect on July 1, 2015.

For the first time in California, the WST regulations imposed separate permit requirements for any WST. (See RJN Ex. 1, § 1783.) This is in addition to the permit requirements for construction and operation of wells generally. The permit application must include detailed information about the operator, the well, and the planned WST activities. (Run Ex. 1, §§ 1783.1, 1784.) Among other information, it must include a Spill Contingency Plan, water management plan, and information about the fluids to be used. (*Ibid.*) Additionally, the application must contain documentation from either the State Water Board or the Regional Water Board that the well in question is covered by a regional groundwater monitoring program. (*Ibid.*)

The regulations also include mandatory procedures for notifying people who live in the vicinity of a well that will undergo WST. (*Id.* § 1783.2.) Nearby property owners may request water quality testing for drinking or irrigation water located near stimulated wells, including before and after the WST. (§ 1783.3.)

The regulations also include requirements for pressure testing, cement evaluation, monitoring during WST operations, monitoring and evaluation of seismic risks, storage and handling of WST fluids and wastes, and post-WST monitoring. (§§ 1784.1-1787.) They require additional post-WST public disclosures, and the filing of a post-WST report. (§§ 1788, 1789.)

Congress has endorsed the use of WSTs, and has exempted them from various environmental laws. (Compl. ¶ 63.) Neither Senate Bill 4 nor DOGGR's WST regulations regulate the proximity between school and stimulated wells. (Compl. ¶ 89.)

III. LEGAL STANDARD

A general demurrer may be used to test the sufficiency of a cause of action in a complaint. (See *Ivory v. Superior Court* (1938) 12 Cal.2d 455; Code Civ. Proc. §§ 430.10-430.80.) The Court "gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded ... the court does not, however, assume the truth of contentions, deductions or conclusions of law." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.) Allegations that are contrary to law or that are contradicted by a fact of which judicial notice may be taken "will be treated as a nullity." (*Gentry v. eBay* (2002) 99 Cal.App.4th 816,

824; *Embarcadero Municipal Improvement District v. County of Santa Barbara* (2001) 88 Cal.App.4th 781, 786.)

IV. ARGUMENT

The complaint alleges that many of the health effects in question are caused by factors other than WSTs. (See, e.g., Compl. ¶¶ 83 ["Proximity to oil and gas production increases a population's exposure to air pollutant emissions, as well as dust, chemicals, noise and light."], 1, 85, 91.) Furthermore, the complaint does not allege that any of the defendants has ever performed WST, or has done anything to increase the risk of WST performed by private well operators.

Rather, the complaint alleges that the WST regulations do not go far enough, because people living near stimulated wells are exposed to environmental elements that other Californians are not exposed to. (See, e.g., Complaint ¶ 3 ["Governor Brown, Supervisor Bohlen and DOGGR approved inadequate well stimulation regulations that allow dangerous industrial activities to continue to discriminatorily injure students of color, including Latino schoolchildren"].) Plaintiff implicitly argues that even if the existing regulations reduce the harm, they do not reduce it enough.

Thus, the complaint relies on a central assumption that the government has an obligation to regulate private activities in such a way that it equalizes outcomes. Under that assumption, the government violates the law if it does not keep all persons in the state equally free of harm, and must take all regulatory steps necessary to ensure that all communities have identical air quality. That thesis has no basis in the law, and the Court should sustain the demurrer without leave to amend.

A. The decision not to adopt regulations specifying setbacks between WSTs and schools is not a violation of the law, because an agency has a legal duty to promulgate regulations on a specific subject only when a statute specifically mandates such regulations.

The complaint posits that defendants have a duty to regulate WSTs more aggressively and extensively than defendants already do. The key basis of liability alleged is "Defendants' approval of SB 4 regulations without setbacks or geographical limitations on well stimulation." (Compl. ¶ 115.) The complaint alleges that the approval violated Government Code section 11135. (*Ibid.*)

The law, however, is to the contrary. An agency's duty to promulgate regulations springs from the agency's governing statute. (*Tailfeather v. Board of Supervisors of Los Angeles County* (1996) 48 Cal.App.4th 1223.) *Tailfeather* concerned precisely the situation presented in this case: regulations designed to protect public health, but which did not protect certain groups as effectively as the plaintiffs desired. There, as here, the plaintiffs argued that the government had a legal duty to enact regulations beyond those already on the books.

The *Tailfeather* plaintiffs were a group of indigent residents who sought to compel the City of Los Angeles to adopt formal written standards governing waiting times for receipt of medical care. (*Id.* at p. 1227.) The plaintiffs in *Tailfeather* based their argument on language in the underlying statute, which stated that "The board of supervisors of each county, or the agency authorized by county charter, shall adopt standards of aid and care for the indigent and dependent poor of the county or city and county." (Welfare and Institutions Code section 17001; see *Tailfeather*, 48 Cal.App.4th at p. 1233.) The statute included a statement of legislative intent that services be "provided promptly and humanely." (Welfare and Institutions Code § 10000; see *Tailfeather*, 48 Cal.App.4th at p. 1231, fn. 7.)

The Court of Appeal held that the statutory language did impose a general requirement for provision of medical care. (*Id.* at p. 1234.) That requirement included a duty to adopt standards of eligibility for aid and care for the indigent and dependent poor. (*Id.* at p. 1237.) The statutory

requirement, however, conferred upon the local government a great deal of discretion in setting standards for eligibility and levels of aid. (*Id.* at p. 1237.)

Accordingly, the Court declined to mandate the adoption of specific standards for waiting periods, because the statute did not explicitly require them:

> Unless the governing statutes specifically call for formal regulation in a particular area, the decision of when or whether to undertake the promulgation of formal regulations is a discretionary one. (See *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal. 3d 392, 413 [128 Cal. Rptr. 183, 546 P.2d 687].) Federal courts facing similar issues, where a petitioner seeks to compel rulemaking under the Administrative Procedures Act (5 U.S.C. § 552 et seq.), have concluded that "the decision to institute rulemaking is one that is largely committed to the discretion of the agency, and ... the scope of review of such a determination must, of necessity, be very narrow." (See *WWHT, Inc. v. F.C.C.* (D.C. Cir. 1981) 656 F.2d 807, 809 [211 App.D.C. 218].) It is said that an agency decision not to institute rulemaking should be overturned "only in the rarest and most compelling circumstances." (citations omitted)

(*Id.* at p. 1244.)

Here, DOGGR's decision not to adopt rules prohibiting WST on wells that are located within a specific distance of schools is a policy judgment entrusted to the discretion of the agency, which the Court should not disturb or penalize.

Other cases echo this principle:

> It is the prerogative of the Legislature to prescribe the powers and authority of an executive agency created to deal with a specific public problem such as public health. The manner in which this authority is exercised is a matter of administrative discretion. The wisdom or effectiveness of the exercise of either legislative or administrative discretion is judged essentially by the political process.
>
> In short, the judicial branch of government is not the overseer of the other two. A citizen's mere dissatisfaction with the performance of either the legislative or executive branches, or disagreement with their policies does not constitute a justiciable controversy.

(*Zetterberg v. California State Department of Public Health* (1975) 43 Cal.App.3d 657, 662.)

Plaintiff's argument is even weaker than the parallel argument in *Tailfeather*. Whereas in *Tailfeather*, the plaintiffs relied on language in the governing statute, here, plaintiff seems to concede that the regulations satisfy the requirements of SB 4. In fact, the complaint alleges that the governing statute seeks to increase the use of WST in California. (Compl. ¶ 65 ["California's SB 4, like the Energy Policy Act, outlines the State's commitment to promoting, streamlining, and encouraging the expansion of well stimulation treatments."].)

The Legislature did direct DOGGR to adopt specific regulations, but none of the Legislature's direction concerns setbacks between stimulated wells and schools:

> 30. Further in SB4, the legislature directs DOGGR:
>
> " .. .in consultation with the Department of Toxic Substances Control, the State Air Resources Board, the State Water Resources Control Board, the Department of Resources Recycling and Recovery, and any local air districts and regional water quality control boards in areas where well stimulation treatments, including acid well stimulation treatments and hydraulic fracturing treatments may occur, shall adopt rules and regulations specific to well stimulation treatments. The rules and regulations shall include, but are not limited to, revisions, as needed, to the rules and regulations governing construction of wells and well casings to ensure integrity of wells, well casings, and the geologic and hydrologic isolation of the oil and gas formation during and following well stimulation treatments, and full disclosure of the composition and disposition of well stimulation fluids, including, but not limited to, hydraulic fracturing fluids, acid well stimulation fluids, and flowback fluids."

(Compl. ¶ 30.) DOGGR adopted all of the regulations that the statute mandated.

Ultimately, the conclusion here must be the same as it was in *Tailfeather*: in the absence of a governing statute specifically directing the agency to adopt regulations on a particular matter, the Court should not create its own mandate.

B. The oil and gas industry's use of WSTs is not a violation of Government Code section 11135, because that provision applies only to government programs, not to private activities.

While plaintiff does not claim that any oil and gas statute requires DOGGR to adopt regulations limiting the locations where WST is allowed, plaintiff does allege that the SB 4 implementing regulations violate Government Code section 11135(a). Section 11135 is a general provision prohibiting government programs from engaging in unfair discrimination:

> No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state. Notwithstanding Section 11000, this section applies to the California State University.

(Gov. Code § 11135(a).)

As explained in the previous section, an agency cannot be compelled to enact regulations absent a statutory mandate for the specific regulations in question. Even if the law were

otherwise, however, plaintiff has not properly alleged "disparate impact" discrimination under California law.

1. Oil and gas extraction by private companies is not a government program subject to section 11135.

Section 11135 applies only to a "program or activity that is conducted, operated, or administered by the state or by any state agency," or a program that the state funds. The vast majority of the allegations in the complaint concern the harmful effects of oil and gas production generally, and WST specifically. Those harms are alleged to result from the actions of *private* entities who operate oil and gas wells. The complaint does not allege that the State funds the operation of the wells. Accordingly, neither operation of the wells in general nor the performance of WST by private companies is a program or activity subject to section 11135.

The WST permitting program established pursuant to SB 4 is, of course, a state program. Were the Court to invalidate that permitting program, however, as plaintiff requests, that would simply mean that the non-governmental WST activity could proceed without agency oversight, and without being subject to section 11135. Moreover, assuming arguendo that WST disproportionately harms people of color, the logical conclusion is that by regulating WST, the defendants disproportionately *benefit* people of color. Accordingly, there is no basis for invalidating the regulations under section 11135.

2. If plaintiff's understanding of section 11135 were correct, then section 11135 would be impossible to satisfy.

As explained in the preceding sections, the plain language of section 11135 and the case law contradicts plaintiff's position that section 11135 requires the government to ensure that private activities affect minority populations in exactly the same way they affect other populations. Besides being inconsistent with the law, however, plaintiff's position would lead to absurd results, because under plaintiff's theory, section 11135 would be impossible to satisfy.

Whatever the policy advantages or disadvantages of regulations governing the proximity between oil and gas wells receiving WST, and schools, such regulations would not eliminate the alleged disparate impacts to minority communities. Minority communities would still (according

to the complaint) be overrepresented in the vicinity of oil and gas wells generally, which increases health risks.

The complaint alleges that minority populations are more vulnerable to pollution than other communities. (See, e.g., Compl. ¶ 2.) Thus, even if WST could be performed only on wells located father away from minority populations, according to the complaint, minority populations would still suffer more severe consequences. Under plaintiff's analysis, section 11135 would still not be satisfied.

If, as plaintiff contends, the law requires complete equalization of outcomes for minority populations, then this action cannot achieve compliance with the law. (And compliance would not be possible.) If, as defendants contend, section 11135 allows government activities that reduce harm and protect the public, even imperfectly, then the SB 4 regulations, which do precisely that, do not violate section 11135.

V. CONCLUSION

The Court should sustain the demurrer without leave to amend.

Dated: September 16, 2015

Respectfully Submitted,

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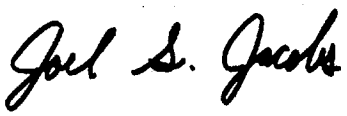

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DECLARATION OF SERVICE BY E-MAIL

Case Name: ***RODRIGO ROMO v. EDMUND G. BROWN et al.***

Case No.: **34-2015-00181715**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On September 16, 2015, I served the attached **NOTICE OF DEMURRER TO COMPLAINT; DEMURRER; MEMORANDUM OF POINTS AND AUTHORITIES** by transmitting a true copy via electronic mail, addressed as follows:

Madeline Stano, Esq.
Sofia Parino, Esq.
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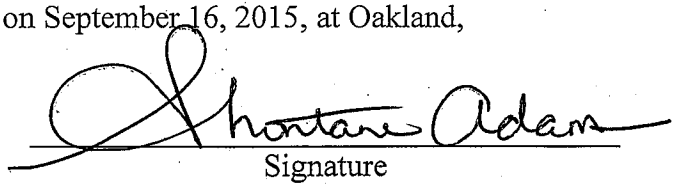
I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 16, 2015, at Oakland, California.

SHONTANE ADAMS
Declarant



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