

When Will They Ever Learn? CBD Files Another Questionable Lawsuit Against DOGGR

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On August 3, 2016, the Center for Biological Diversity (“CBD”) filed suit against the California Division of Oil, Gas, and Geothermal Resources (“DOGGR”) and the State Water Resources Control Board (“Water Board”), challenging the regulators’ decision to approve an aquifer exemption for the Arroyo Grande oil field. Its latest lawsuit against DOGGR, filed in the Superior Court for the City and County of San Luis Obispo, CBD alleges that DOGGR and the Water Board failed to conduct environmental review, in violation of the California Environmental Quality Act (“CEQA”). In order to appreciate the claims in the case, some background is necessary.

The Safe Drinking Water Act and Aquifer Exemptions

The federal Safe Drinking Water Act (“SDWA”), 42 U.S.C. §§ 300g *et seq.*, prohibits injection of fluids that may harm human health into an underground source of drinking water. An “exempt aquifer” is an aquifer for which protection under the SDWA has been waived because the aquifer does not currently serve as a source of drinking water and could not serve as a source of drinking water in the future due to existing mineral production, depth of the aquifer, or existing contamination. 40 C.F.R § 146.4. In short, an aquifer is exempt from the SDWA when it could not feasibly serve as a source of drinking water.

The U.S. Environmental Protection Agency (“U.S. EPA”) established aquifer exemptions after determining that mineral, oil, and geothermal energy production would be limited without them. Over 90% of the approximately 5,000 aquifer exemptions are exemptions for Class II wells, which are wells that inject fluids brought to the surface while producing oil and gas. DOGGR has state primary authority to regulate underground injection and aquifer exemptions, and DOGGR must consult with the Water Board and the Regional Water Boards in reviewing an aquifer exemption application. The U.S. EPA must grant final approval for an aquifer exemption.

The Arroyo Grande Aquifer Exemption

The Arroyo Grande aquifer exemption was originally granted in 1983, and the current application is merely an expansion of the existing exempt status. DOGGR and the Water Board concurred that the proposed expansion qualifies as an exempt aquifer under federal law because the Arroyo Grande aquifer does not and could not serve as a source of drinking water. The aquifer contains hydrocarbons, and has been a hydrocarbon-producing zone since at least 1977. On February 8, 2016, DOGGR submitted a proposal to the U.S. EPA requesting approval of the aquifer exemption expansion. The purpose of the exemption is to allow operators to inject water produced during oil and gas extraction (“produced water”) back into the formation that the water was pulled from, as has been the practice for decades in this region.

CBD Lawsuit

Having the necessary background, it is important to note that CBD filed the current lawsuit under CEQA, a state statute that requires environmental review of discretionary approvals by state or local agencies. The lawsuit alleges that the aquifer exemption process should be considered a discretionary project approval, and therefore, DOGGR should have conducted an initial study and environmental review as required by CEQA. Based on

DOGGR's analysis of the aquifer, however, the Arroyo Grande aquifer qualifies as an exempt aquifer under the SDWA, a federal statute. In our opinion, if a federal statute compels a determination, CBD cannot attempt to change that outcome based on state law theories, such as a CEQA environmental review challenge. Further, DOGGR has committed to installing additional environmental safeguards including groundwater monitoring wells and the creation of buffer zone to prevent potential groundwater migration.

Injection into underground aquifers is not a new concept – this practice has occurred in California for decades as a disposal mechanism for produced water. According to the most recent publication from state regulators, there has been no evidence of groundwater contamination from underground wastewater injection. The real target of CBD's lawsuit is oil and gas production generally. Based on this and past lawsuits, it appears that CBD's real agenda is to put a halt to all oil and gas production within California.