January 28, 2011

Santa Barbara County
Board of Supervisors
105 East Anapamu Street, Suite 407
Santa Barbara, California 93101

RE: Ordinance Amending Chapter 25, Petroleum Code, to Address Regulation of "High Risk" Petroleum Operations & Operators

Dear Chair Gray & Members of the Board:

The following comments on a proposed ordinance to amend the County's Petroleum Code are submitted by the Environmental Defense Center (EDC). EDC is a non-profit public interest law firm that represents community organizations in environmental matters affecting California's south central coast.

We appreciate the Board's interest in increasing the effectiveness and utility of the High Risk Operations Ordinance adopted on December 9, 2008. EDC conditionally supports the proposed amendments to Chapter 25, with one proviso (described below).

Background

The High Risk Operations Ordinance was made necessary after incidents at several facilities under common ownership/operation caused the release of more than 150,000 gallons of oil into Santa Barbara County's creek systems and environment in late 2007 and early 2008. The majority of these incidents were caused by aged and failing infrastructure, poor corporate and on-site management, and inefficient and/or insufficient regulatory oversight.

The High Risk Operations Ordinance was adopted in December 2008 by a 4-0 vote (Mr. Firestone recused himself). As noted by County staff in a Board Letter dated October 7, 2008, regarding onshore oil operations generally:

> Through our inspection process it has become evident that some facilities pose a higher risk to life limb and property. In an effort to minimize these potential safety issues, the Planning and Development Department is proposing the Board adopt the [High Risk Operations Ordinance].

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> The [High Risk Operations Ordinance is] designed to encourage onshore Petroleum Operators to properly maintain their facilities by utilizing good workmanship and management practices to minimize code violations and oil spills to the maximum extent feasible.

We are not aware of any operation or operator that has been deemed "High Risk" under the High Risk Operations Ordinance since its adoption more than two years ago. This speaks, in part, to the utility of the High Risk Operations Ordinance as a deterrant to bad actors.

Remediation Requirements of High Risk Operations

Staff has proposed changes to Chapter 25, Section 25-43 that would clarify responsibilities for the preparation and implementation of remediation plans. These changes are welcome. However, one proposed change would reduce the High Risk Operations Ordinance's effectiveness as a deterrant.

Subsection 25-43(f)/(h)

Subsection 25-43(f) of the High Risk Operations Ordinance currently provides: "Any shut-down order issued under this section shall be cancelled *when the goals and guidelines of the remediation plan are achieved for that facility*." (Emphasis added.)

Section 25-43 was subjected to scrutiny by the courts when Greka sued the County after the High Risk Operations Ordinace was adopted in 2008. In April 2009, the U.S. District Court for the Central District of California dismissed Greka's lawsuit and held that the High Risk Operations Ordinance was constitutional:

> If the Administrator shut down facilities owned or operated by a High Risk Operator, including facilities that are not High Risk Operations, the shut down could serve a legitimate government purpose. . . . Because a 'set of circumstances exists under which the Ordinance would be valid,' Plaintiff's claims fail as a matter of law.

Greka Oil & Gas, Inc. v. County of Santa Barbara, et al. (2009) at p. 5 (attached hereto).

Subsection 25-43(f) serves a critical piece of that legitimate government purpose, but the purpose would be defeated by the proposed 2011 amendments to the High Risk Operations Ordinance.

The proposed amendments would renumber Subsection 25-43(f) to Subsection 25-43(h) and revise it to say: "Any shut-down order issued under this section shall be cancelled *when the cause of the shut down order has been remediated*." This particular change will *not* enhance staff's ability to carry out the original intent of the High Risk

Operations Ordinance, because it would limit the County's authority to comprehensively address endemic and facility-wide deficiencies.

"Goals and guidelines of the remediation plan" might include a number of objectives that are related to the cause of a shut-down but that are not the direct "cause of the shut-down order." For example, the High Risk Operations Ordinance augments the County's ability to inspect at-risk facilities for failing infrastructure and inadequate management. It is possible that a remediation plan would proactively address noted deficiencies *before* they lead to an incident which would require a *second* shut-down of the facility. Cancelling an initial shut-down order prematurely would obviate the authority otherwise provided to the County under the High Risk Operations Ordinance.

There is no reason to change Subsection 25-43(f). It would not increase the effectiveness of the High Risk Operations Ordinance, and it has already survived a legal challenge. Subsection 25-43(f) should be left "as is" in order to maximize the County's ability to protect human health and the environment.

Conclusion

We appreciate the intent behind the proposed amendments, and we appreciate the time that staff has put into tackling the issue of onshore oil pollution. We look forward to continuing a conversation about how to best improve the High Risk Operations Ordinance.

Please feel free to contact me with any questions or concerns. Thank you for considering our recommendations.

Respectfully submitted,

Nathan G. Alley
Staff Attorney

Attachment: *Greka Oil & Gas, Inc. v. County of Santa Barbara, et al.* (2009).

ATTACHMENT 1

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 09–0457 PA (AJWx)	Date	April 20, 2009
Title	Greka Oil & Gas, Inc. v. County of Santa Barbara, et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Paul Songco	Not Reported	N/A
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None	None

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion to Dismiss ("Motion") filed by defendants County of Santa Barbara ("County"), The Board of Supervisors of the County of Santa Barbara, and Michael Zimmer (collectively "Defendants") against plaintiff Greka Oil & Gas, Inc. ("Plaintiff"). (Docket No. 11.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing scheduled for April 20, 2009 is vacated, and the matter taken off calendar.

I. Background

Plaintiff alleges that it owns several facilities for the production, processing, and storage of petroleum within the County of Santa Barbara, and thus is subject to the County's Petroleum Code ("Petroleum Code"). The Petroleum Code was amended through County Ordinance 4701 ("Ordinance"), which took effect on January 8, 2009. Plaintiff alleges that the Ordinance is unconstitutional, and therefore brings claims for facial violation of its substantive due process rights under 42 U.S.C. § 1983, and injunctive relief to prevent the Ordinance from being enforced.[1/]

The purpose of the Petroleum Code is to "protect the health, safety, public welfare, physical environment and natural resources of the county by the reasonable regulation of onshore petroleum facilities and operations[.]" Santa Barbara Municipal Code Ch. 25, § 25–2.[2/] In fulfilling this purpose,

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[1/] Plaintiff also brought a claim for declaratory relief as to the retroactive application of the Ordinance, however the parties stipulated to dismiss this claim, and it is no longer before the Court. (See Docket No. 14.)

[2/] Defendants attach the Santa Barbara County Petroleum Code as Exhibit 1 of the declaration of Michael Zimmer. Defendants request that the Court take judicial notice of the Petroleum Code. (See Docket No. 12.) Federal Rule of Evidence 201 permits judicial notice of adjudicative facts

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the Petroleum Code regulates facilities for the production, processing, and storage of petroleum, and permits the "Petroleum Administrator" ("Administrator") to designate facilities as "High Risk Operations" if they fail to comply with the health and safety regulations specified in the Petroleum Code, or if they have three or more unauthorized releases of a regulated material within a twelve month period. See id. § 25–4 (definition of "High Risk Operation"). The purpose of the Ordinance, which added section 25-43 to the Petroleum Code, is to "remediate the high risk operation and bring the facility and the operator within normal, safe operating standards and protect the public safety, health and environment." Id. § 25–43(a). To accomplish this, the Ordinance not only prescribes procedures for implementing a remediation plan for specific High Risk Operations, Id. §§ 25–43(b)–(d), but it also provides that the Administrator can seek to remedy management practices used by an operator or owner that might endanger multiple facilities:

> (e) Should any additional facility owned or operated by the owner or operator of the high risk operation facility meet the definition of a high risk operation within the period in which one facility is so declared or if more than one facility initially meets the definition thereof, the petroleum administrator shall have authority to declare the owner or operator to be a high risk operator and order a remediation plan which may include other petroleum facilities located in the county and under the control of the high risk operator. Any petroleum facilities included in such multi-facility remediation plan shall be designated high risk operations. An order requiring a remediation plan for any other petroleum facilities located in the county and under the control of the high risk operator shall be ordered only in cases where it is determined that the operator is operating more than one facility in such a manner that indicates common risk factors, management practices or failures, safety procedures, operational or logistical errors, training deficiencies or other operator caused problems are likely to exist at multiple facilities and such multi-facility remediation plan shall be ordered to include any facilities which the petroleum administrator determines may be impacted by such common problems. Any high risk operator, so designated, or the owner of any facility designated for such county-wide remediation plan may appeal this order in the same manner as outlined in paragraph (c). Any facility in such multi-facility remediation plan shall be removed from the remediation plan when the goals and guidelines of the remediation plan are achieved for

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that are not subject to reasonable dispute, are generally known, and are capable of accurate and ready determination. F.R.E. 201(a)–(b). The Court finds that the Petroleum Code meets this standard, and takes judicial notice of it.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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> that facility.
>
> (f) At the sole discretion of the petroleum administrator, at any time during which a facility or operator is subject to this section, the petroleum administrator may require a bond be posted to cover the cost of remediating the causative problems of the high risk operation.
>
> (h) Failure of the owner or operator of a high risk operation to post a bond required under this section or to reasonably achieve the goals and guidelines of an approved remediation plan under this section may be cause for a shutdown of the high risk operation(s) or any other petroleum operations located in the county that are co-owned or co-operated by the high risk operator, at the discretion of the petroleum administrator. A shut-down order under this subsection may be appealed by the high risk operator or any owner affected, to the director of planning and development. Any decision of the planning and development director after appeal may be appealed to the board of appeals pursuant to sections 25-16, 25-17 and 25-18. Any shut-down order issued under this section shall be cancelled when the goals and guidelines of the remediation plan are achieved for that facility.

Id. § 25–43 (Ord. No. 4701 § 1) (emphasis added). Plaintiff's complaint ("Complaint") involves only the portion of the Ordinance underlined above. Plaintiff contends that the underlined language means that facilities that it operates may be shut down through no fault of Plaintiff. Rather, if some of the facilities that Plaintiff operates are owned by an entity ("Owner") that also owns facilities that are not operated by Plaintiff, and those other facilities are designated High Risk Operations, the Administrator may designate Owner a High Risk Operator and shut down not only the High Risk Operations, but also Owner's facilities that are operated by Plaintiff. Plaintiff would then be unable to earn income from operating the closed facilities. Because such a scenario is possible, Plaintiff alleges that the Ordinance facially violates its substantive due process rights.

II. Motion to Dismiss Standard

Generally, plaintiffs in federal court are required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e). The purpose of Rule 8(a)(2) is to "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, __, 127 S. Ct. 1955, 1964, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 103, 2 L. Ed. 2d 80 (1957)).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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Case No. CV 09–0457 PA (AJWx) Date April 20, 2009

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The Ninth Circuit is particularly hostile to motions to dismiss under Rule 12(b)(6). See, e.g., Gilligan v. Jamco Dev. Corp. , 108 F.3d 246, 248–49 (9th Cir. 1997) ("The Rule 8 standard contains a powerful presumption against rejecting pleadings for failure to state a claim.") (internal quotation omitted).

III. Analysis

"Substantive due process protects individuals from arbitrary deprivation of their liberty by government." Brittain v. Hansen, 451 F.3d 982, 991–92 (9th Cir. 2006); see also Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th Cir. 1998) ("To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property."). "The touchstone of due process is protection of the individual against arbitrary actions of the government," undertaken "in the exercise of power without any reasonable justification in the service of a legitimate governmental objective[.]" County of Sacramento v. Lewis, 523 U.S. 833, 845–46, 118 S. Ct. 1708, 1716, 140 L. Ed. 2d 1043 (1998) (citing Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935 (1974); Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 664, 88 L. Ed. 2d 662 (1986)).

A plaintiff asserting a substantive due process claim must meet an "extremely high" burden. Matsuda v. City & County of Honolulu, 512 F.3d 1148, 1156 (9th Cir. 2008). To prove that the Ordinance violates its substantive due process rights, Plaintiff must "demonstrate first that [its] contracts [to operate oil facilities] were the type of property the Due Process Clause protects and, second, that the [Ordinance] deprived [it] of [its] rights under the contracts in a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" Id. (quoting Nunez, 147 F.3d at 871). In evaluating substantive due process claims, the Ninth Circuit has determined that state action which "'neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights' will violate substantive due process only if the action is 'not rationally related to a legitimate governmental purpose.'" Matsuda, 512 F.3d at 1156 (quoting Richardson v. City & County of Honolulu, 124 F.3d 1150, 1162 (9th Cir. 1997)).

The Court does not reach the issues of whether Plaintiff's contractual rights to operate oil facilities constitute a constitutionally protected property interest,[3/] or if Plaintiff's characterization of the

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[3/] Plaintiff cites a state law case holding that the right to continue extracting oil from existing wells was a fundamental right in the context of determining the standard of review in an administrative mandamus action. The Termo Co. v. Luther, 169 Cal. App. 4th 394, 406–07, 86 Cal. Rptr. 3d 687 (2008) ("In the context before us, the right to continue to operate existing oil wells and to extract oil is a fundamental right") (emphasis added); see also id. at 406–07. However, "'[e]ven though every contract may confer some legal rights under state law, that fact alone need not place all contracts within federal due process protection. 'Although the underlying substantive interest is created by 'an

SEND
JS-6

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Ordinance is accurate. Even if Plaintiff has a constitutionally protected property interest, and even if its characterization is accurate, Plaintiff's claims fail as a matter of law.

Plaintiff confuses the standard for a facial substantive due process challenge with that of an as-applied substantive due process challenge. If the Administrator enforced the Ordinance in a way that created the scenario about which Plaintiff is concerned — in which Plaintiff is harmed through no fault of its own — Plaintiff would have standing to assert an as-applied challenge.[4/] See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992) (to have standing, a plaintiff must have "suffered an injury in fact — an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical[.]") Here, Plaintiff has not brought an as-applied challenge. Nor could it, as the Ordinance has not yet been applied to shut down a facility that Plaintiff operates. Rather, Plaintiff brings a facial challenge. (Compl. ¶ 21 ("Greka accordingly seeks a determination that, insofar as the Ordinance allows the shutdown of Non-Offending Facilities, the Ordinance is unconstitutional on its face[.]").)

Plaintiff's suit concerns potential collateral harm to faultless parties when a compliant facility is shut down. The possibility of such a scenario arising is insufficient to support a facial substantive due process challenge. The fact that the Ordinance "might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid[.]" United States v. Salerno, 481 U.S. 739, 745, 107 S. Ct. 2095, 2100, 95 L. Ed. 2d 697 (1987). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [legislative act] would be valid." Id. Here, the Ordinance could be constitutionally applied in many circumstances. If the Administrator shut down facilities owned or operated by a High Risk Operator, including facilities that are not High Risk Operations,[5/] the shut down could serve a legitimate government purpose. The Administrator can only shut down these facilities after the High Risk Operator has failed to post a bond or comply with a

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independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause.'" San Bernardino Physicians' Servs. Med. Group, Inc. v. San Bernardino County, 825 F.2d 1404, 1407–08 (9th Cir. 1987) (quoting Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9, 98 S. Ct. 1554, 1560, 56 L. Ed. 2d 30 (1978) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 602, 92 S. Ct. 2694, 2700, 33 L. Ed. 2d 570 (1972))).

[4/] The Court takes no position on whether such a challenge could succeed.

[5/] The Court takes no position on whether the Ordinance actually provides the Administrator with authority to do so.

SEND
JS-6

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CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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remediation plan. Thus, the Administrator can use the threat of shut down, or actual shut down, to provide a strongly coercive incentive for High Risk Operators to remedy their violatory practices. If those violatory practices endanger public health, safety, and welfare, there is a clearly legitimate government interest[6/] in providing enforcement mechanisms strong enough to stop those practices.[7/] Because a "set of circumstances exists under which the [Ordinance] would be valid[,]" Plaintiff's claims fail as a matter of law. Salerno, 481 U.S. at 745, 107 S. Ct. at 2100.

Conclusion

For the foregoing reasons, Defendants' Motion is granted. Plaintiff's case is dismissed with prejudice. Bautista v. Los Angeles County, 216 F.3d 837, 842 (9th Cir. 2000) ("Dismissal with prejudice is proper under Rule 12(b)(6) only if it 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") (quoting Conley, 355 U.S. at 45, 78 S. Ct. at 102, 2 L. Ed. 2d 80).

IT IS SO ORDERED.

_____ : _____

Initials of Preparer _____

6/ Not only does this serve a legitimate government purpose, but it also advances that purpose. Thus, Plaintiff's argument that "[s]ubstantive due process may also be violated when the regulation, while related to a legitimate public purpose, fails to substantially advance that legitimate purpose" does not help it. (Pl.'s Opp. 7) (emphasis in original).) Moreover, Plaintiff makes this argument based on language in a Supreme Court case addressing a Fifth Amendment taking, which merely states that the "substantially advances" formula "has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental purpose may be so arbitrary or irrational that it funs afoul of the Due Process Clause." Lingle v. Chevron USA, Inc., 544 U.S. 528, 542, 125 S. Ct. 2704, 2083, 161 L. Ed. 2d 876 (2005) (emphasis added). This language in no way suggests that the "substantially advances" formula supplants the "not rationally related to a legitimate governmental purpose" test. Matsuda, 512 F.3d at 1156.

7/ Even if enforcing the Ordinance somehow always inflicts harm on innocent parties, this alone would not eviscerate the public interest in stopping the violatory practices, and certainly does not "rise to the conscience-shocking level." Sacramento, 523 U.S. at 849, 118 S. Ct. at 1718.