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FILED

DEC 1986

U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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YOLANO-DONNELLY TENANT
ASSOCIATION, et al.,

Plaintiffs,

vs.

SAMUEL R. PIERCE, JR., etc.,
et al.,

Defendants.

CIVIL NO. S-86-846 MLS

MEMORANDUM AND ORDER

This case involves a challenge to a final regulation promulgated by the United States Department of Housing and Urban Development ("HUD"), 51 Federal Register 11198, (April 1, 1986), as amended by a notice published at 51 Federal Register 26876, which restricts certain types of public housing assistance to United States citizens and certain groups of eligible aliens. On September 18, 1986 the court heard defendants' motion to dismiss for failure to state a claim and plaintiffs' motion for a preliminary injunction. This order memorializes the oral rulings made at that hearing.

1 I. MOTION TO DISMISS

2 Defendants move to dismiss plaintiffs' complaint on
3 the grounds that it fails to state claims upon which relief may
4 be granted. Fed. R. Civ. Proc. 12(b)(6).

5 A. Standard

6 The standard for considering such a motion is well
7 settled. A complaint should not be dismissed for failure to
8 state a claim unless it appears beyond doubt that the plaintiffs
9 can prove no set of facts which would entitle them to relief.
10 Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Ninth Circuit
11 has interpreted this as meaning that dismissal is warranted only
12 if it appears to a certainty that plaintiffs would be entitled
13 to no relief under any state of facts that could be proved. NL
14 Industries, Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).
15 The court must accept all of plaintiffs' material allegations as
16 true and construe them in a light most favorable to plaintiffs.
17 "[T]he office of a motion to dismiss is merely to assess the
18 legal feasibility of the complaint, not to assay the weight of
19 the evidence which might be offered in support thereof."
20 Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir. 1980).

21 B. Analysis

22 Applying these principles, the court concludes that it
23 must deny defendants' motion except with respect to the third
24 claim for relief. However, dismissal of the third claim is with
25 30 days' leave to amend.

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1 1. Third Claim: Retroactive
2 Application of Statute

3 The third claim alleges that the challenged regulation
4 violates fifth amendment procedural rights, specifically
5 existing beneficiaries' right to be free from retroactive
6 application of legislation. In this court's view, the
7 regulation operates prospectively only. The regulation
8 establishes eligibility criteria for continued or future housing
9 assistance. The regulation does not attempt to reclaim any
10 benefits already conferred.

11 Accordingly, the third claim must be dismissed.

12 2. First and Second Claims:
13 Statutory Construction and
14 Fifth Amendment Claims

15 Plaintiffs' first claim alleges that HUD's regulation
16 exceeds the scope of the statute it implements and therefore was
17 promulgated in excess of the agency's authority. Plaintiffs'
18 second claim alleges that the regulation violates plaintiffs'
19 right to substantive due process and equal protection under the
20 fifth amendment.

21 With respect to the fifth amendment claim, the court
22 concludes that depending upon the proof of the facts, or
23 depending upon a further examination of the construction of the
24 law with respect to those claims, plaintiffs may be able to
25 establish a substantive due process and/or equal protection
26 violation under their theory that the regulation allegedly
denies the right of a family to cohabit. Such a claim is

1 supported by the reasoning in Halet v. Wend Investment Co., 672
2 F.2d 1305 (9th Cir. 1982), Hawaii Boating Ass'n v. Water
3 Transportation Facilities Div., 651 F.2d 661 (9th Cir. 1981) and
4 the original Supreme Court decision addressing the family
5 cohabitation issue, Moore v. City of East Cleveland, 431 U.S.
6 494 (1977).

7 Under Halet the court must determine whether the
8 challenged regulation infringes a fundamental right. 672 F.2d
9 at 1311. If it finds a fundamental right has been infringed, it
10 must next determine whether the proposed regulation works a
11 "genuinely significant deprivation" of this right. Id. If
12 those two tests are met, then the court must determine whether
13 the regulation can survive strict scrutiny. Id.

14 To determine whether a "genuinely significant
15 deprivation" of a fundamental right has occurred, the court must
16 look at the "importance of the nature of the benefit denied."
17 Hawaii Boating Ass'n, 651 F.2d at 665. The penalty must involve
18 a denial of the basic necessities of life or a fundamental
19 political right. Id. Deprivations which are "merely
20 uncomfortable" do not constitute significant deprivations. Id.

21 In this case, the right to live with one's family is a
22 fundamental right. Halet, 672 F.2d at 1311. Housing, like
23 welfare assistance and medical aid, is a basic necessity. See
24 id. at 665. Depriving an individual of his shelter is a
25 significant penalty to impose for exercising one's right to live
26 with one's family.

1 Under this reasoning, plaintiffs' second claim states
2 a claim upon which relief may be granted.

3 Plaintiffs' first claim raises an issue of statutory
4 construction. Because the court must defer to an agency's
5 interpretation of a statute unless that interpretation is
6 "demonstrably irrational or clearly contrary to the plain and
7 sensible meaning of the statute," Olivares v. I.N.S., 685 F.2d
8 1174, 1177 (9th Cir. 1982), plaintiffs' first claim is very
9 weak. However, the court also has a duty to interpret federal
10 statutes in a way which avoids serious doubts as to their
11 constitutionality. United States v. Grace, 461 U.S. 171, 175-76
12 (1983), Thompson v. Washington, 497 F.2d 626, 633 (D.C. Cir.
13 1973) (citing Richmond Screw Anchor Co. v. United States, 275
14 U.S. 331, 346 (1928)).

15 Because of the constitutional questions raised by the
16 regulation, the court refuses to dismiss the statutory
17 construction claim at this early point in the proceedings.

18 3. Fourth Claim: Violation of
19 Notice and "Opportunity to
20 Comment" Requirements

21 The fourth claim alleges a violation of plaintiffs'
22 right to notice and opportunity to comment on the proposed
23 regulation. Plaintiffs contend that the 1986 regulation is an
24 amended or modified rule subject to the notice and comment
25 requirements in 24 C.F.R. Part 10.

26 Of particular significance to the court is the length
of time between the initial publication of the regulation in the

1 Federal Register in 1982 and the ultimate version re-published
2 in 1986. Furthermore, the court has been advised that there are
3 ten or twelve, or perhaps more, changes in the new regulation
4 from the one published in 1982.

5 Brock v. Cathedral Bluffs, 796 F.2d 533 (D.C. Cir.
6 1986), cited by defendants' counsel during oral argument, does
7 not answer the questions presented in this case. As the court
8 understands the scenario here, the 1982 publication in the
9 Federal Register stated that this was a final rule, that it
10 would take effect upon the expiration of the first period of 30
11 calendar days of continuous session of Congress, subject to
12 waiver, and that further notice of the effective date of the
13 final rule would be published in the Federal Register. That
14 arguably suggests to the public that the 1982 regulation is the
15 final rule that was adopted based upon all of the hearings
16 conducted and comments submitted. It further suggests that the
17 agency had arrived at its final ruling, published it, but for
18 whatever reason -- perhaps because it had been asked to do so,
19 maybe because it was assessing the political climate to see if
20 the law might be changed -- it made the determination that it
21 would postpone the effective date until further notice.

22 Then, when the new regulation which is under attack
23 here was published, in 1986, there were ten or twelve changes.
24 There is nothing to lead the court to believe that these changes
25 were the result of the public notice and comments that were made
26 in 1982. They might well represent an entire revision of

1 thinking on the part of the agency, which, if established as a
2 fact, would call for compliance with 24 C.F.R. Part 10 regarding
3 notice and opportunity to comment.

4 Section 10.3 of these regulations covers general
5 rule making procedures for the issuance, amendment or repeal of
6 the HUD rules. Section 10.8 describes those procedures. If
7 plaintiffs establish violation of Section 10.8 the rule could
8 not be adopted at this time without going back and starting over
9 again. The court finds that these issues are raised adequately
10 by the pleadings and that a set of facts may well be proven
11 which would support plaintiffs' fourth claim.

12 4. Fifth and Sixth Claims:
13 Violations of the Adminis-
14 trative Procedure Act

15 The fifth and sixth claims may be considered together.
16 These concern alleged violations of the Administrative Procedure
17 Act. 5 U.S.C. §§ 551 et seq. The court is not satisfied that
18 defendants have adequately addressed these claims in their
19 motion to dismiss or in their opposition to plaintiffs' motion
20 for preliminary injunction. Plaintiffs, too, have addressed
21 those claims only briefly. Under the circumstances, the court
22 has no alternative but to deny the motion to dismiss and defer
23 any kind of analysis on these two claims.

24 5. Seventh Claim: National
25 Environmental Policy Act

26 The court denies the defendants' motion to dismiss the
claim for relief based upon the National Environmental

1 Policy Act ("NEPA"). 42 U.S.C. §§ 4321 et seq. NEPA requires
2 that federal agencies prepare environmental impact statements
3 ("EIS's") for major federal actions having a significant effect
4 on the human environment. 42 U.S.C. § 4332. This includes new
5 regulations. See 40 C.F.R. § 1509.18(a).

6 An agency determines whether to prepare an EIS by
7 examining whether the proposed action:

- 8 1. Requires an EIS; or
- 9 2. Requires neither an EIS nor an "environmental
10 assessment" (i.e., the action is subject to a
11 "categorical exclusion").

12 40 C.F.R. § 1501.4(a). A categorical exclusion is a category of
13 action which a federal agency has determined has no effect on
14 the physical environment. 40 C.F.R. § 1508.4. Categorical
15 exclusions are established by adopting regulations. Id.

16 If an action is not categorically excluded under the
17 agency's regulations, then the agency must prepare an
18 "environmental assessment" ("EA"). 40 C.F.R. § 1501.4(i). An
19 EA is a sort of mini-EIS; it is a brief document which provides
20 sufficient evidence and analysis to enable the agency to
21 determine whether to prepare an EIS or to make a finding of no
22 significant impact ("FONSI"). 40 C.F.R. § 1508.9(a)(1). A
23 FONSI, in turn, is a document which briefly presents the reasons
24 why an action which is not categorically excluded will not have
25 a significant effect on the human environment and why an EIS is
26 therefore not required. 40 C.F.R. 1508.13. As a document, a

1 FONSI must include either a copy of the environmental assessment
2 or a summary of it. Id.

3 Plaintiffs argue that the FONSI prepared for the 1982
4 regulation did not contain either an EA or even refer to an EA.
5 Plaintiffs have also submitted a declaration which indicates
6 that displacement of the class of people plaintiffs undertake to
7 represent can create significant effects on the physical
8 environment. For these reasons, the court concludes that
9 plaintiffs have stated a claim upon which relief may be granted.

10 6. Eighth Claim: Regulatory
11 Flexibility Act

12 Plaintiffs' final claim is that the actions HUD took
13 to fulfill its obligations under the Regulatory Flexibility Act,
14 5 U.S.C. § 601 et seq., were unsupported by fact and constitute
15 an abuse of discretion. Defendants argue that HUD's compliance
16 with the Act is not subject to judicial review.

17 The statutory background and the issues in general are
18 well summarized in Small Refiners Lead Phase Down Task Force v.
19 U.S.E.P.A., 705 F.2d 506, 537-39 (D.C. Cir. 1983); see also
20 Mid-Tex Electric Co-op., Inc. v. FERC, 773 F.2d 327, 340-43
21 (D.C. Cir. 1985), Thompson v. Clark, 741 F.2d 401, 404-08 (D.C.
22 Cir. 1984) (the Regulatory Flexibility Act may be considered as
23 part of the overall judgment whether a rule is reasonable under
24 the APA). After carefully considering these authorities, the
25 court finds that plaintiffs may be able to prove facts which
26 would establish a violation of the Regulatory Flexibility Act.

1 II. MOTION FOR A PRELIMINARY INJUNCTION

2 Plaintiffs seek a preliminary injunction enjoining
3 defendants and their officers, agents and employees from
4 implementing or enforcing the regulations during the pendency of
5 this litigation.

6 A. Preliminary Injunction Standard

7 There are two tests for determining the propriety of a
8 preliminary injunction. The moving parties must show either:

- 9 1. A combination of probable success on the merits
10 and the possibility of irreparable injury; or
11 2. Serious questions raised on the merits with
12 the balance of hardship tipping sharply in
13 favor of the moving party.

14 Hartikka v. United States, 754 F.2d 1516, 1518 (9th Cir. 1985);
15 Wm. Inglis and Sons Baking v. ITT Continental Baking Co., 526
16 F.2d 86, 88 (9th Cir. 1975).

17 These two formulations represent two points on a
18 sliding scale in which the required degree of irreparable harm
19 increases as the probability of success decreases. Oakland
20 Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376
21 (9th Cir. 1985). At any point on the continuum, however,
22 plaintiff must demonstrate the existence of a serious threat of
23 irreparable injury. Id.

24 B. Analysis

25 Based upon the allegations of the complaint and the
26 facts before the court, the court concludes that it must grant

1 the plaintiffs' motion for a preliminary injunction. It finds
2 that plaintiffs have raised serious questions on the merits of
3 this case with respect to at least three of their claims: (1)
4 The second claim based on the fifth amendment right to cohabit
5 with one's family, (2) the fourth claim based on the
6 requirements of 24 C.F.R. Part 10 for notice and an opportunity
7 to comment on amendments to and modifications of existing
8 regulations, and (3) the seventh claim based on NEPA's
9 requirement that an agency prepare an environmental assessment
10 before making a finding that its acts will have no significant
11 effect on the environment.

12 Turning to the second part of the test, the court
13 finds that the balance of hardship tips sharply in the
14 plaintiffs' favor. The hardships caused by losing/being denied
15 housing assistance or being forced to separate from a family
16 member is considerably greater than any hardship the government
17 might suffer from having to delay implementation of a regulation
18 which has already been delayed for nearly four years.

19 This being the case, plaintiffs have satisfied the
20 requirements for a preliminary injunction. After the September
21 19 hearing this injunction applied only to the named plaintiffs.
22 However, after a subsequent hearing held on November 14, 1986,
23 the court granted plaintiffs' motion for certification of this
24 action as a class action on behalf of the class defined as
25 follows:

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FILED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

1986

DEC 12 1986
U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

BY ~~YOLANDE~~ DONNELLY TENANT ASSOCIATION, et al.)
)
 5 Plaintiffs,)
 6 vs.)
 7 SAMUEL R. PIERCE, JR., in his official)
 capacity as Secretary of the U.S.)
 8 Department of Housing and Urban)
 Development, et al.)
 9 Defendants.)
 10 _____)

NO. CIV S-86-846-
MLS
ORDER CERTIFYING
NATIONWIDE CLASS
AND EXTENDING
PRELIMINARY
INJUNCTION

11 On November 14, 1986, plaintiffs' Motion for Class
 12 Certification came before the Honorable Milton L. Schwartz,
 13 Judge of the United States District Court for the Eastern
 14 District of California. David Pallack, of San Fernando Valley
 15 Neighborhood Legal Services, Inc., and Stephen Rosenbaum, of
 16 California Rural Legal Assistance, appeared for plaintiffs, and
 17 Jeffrey S. Paulsen, Trial Attorney, Department of Justice,
 18 appeared for defendants. The Court, having considered the
 19 briefs, having heard oral argument, and having fully considered
 20 the matter, makes the following ruling.

21 The Court grants plaintiffs' Motion for Class
 22 Certification under Federal Rule of Civil Procedure 23(a) and
 23 23(b)(2). The Court finds that the class is so numerous that
 24 joinder is impracticable, that there are questions of law common
 25 to the class, that the claims of the representative parties are
 26 typical of the claims of the class, and that the representatives
 27 will fairly and adequately protect the interests of the class.
 28 The Court also finds that defendants have acted and refused to

1 act on grounds generally applicable to the class, thereby making
2 final injunctive and declaratory relief with respect to the
3 whole class appropriate.

4 The Court finds that the class should be certified as a
5 nationwide class, given the nationwide nature of the violations
6 claimed. The Court finds that certification of a nationwide
7 class will not improperly interfere with the litigation of
8 similar issues in the case of The City of New York, et al v.
9 Samuel R. Pierce, Jr., et al, No. 86-CIV 6068 (LLS), currently
10 filed in the United States District Court for the Southern
11 District of New York, because that case is presently in a
12 dormant state, and because the parties to that case have
13 stipulated to a stay of those proceedings pending this Court's
14 resolution of the Motion for Class ~~certification~~ ^{Certification.} *ms*

15 The scope of the class is:

16 "All United States citizens and 'eligible
17 aliens' as defined in 42 U.S.C. §1436a
18 nationwide who would be eligible, either
19 presently or prospectively, for subsidized
20 housing under the United States Housing Act
21 of 1937, §235 or §236 of the National Housing
22 Act, or §101 of the Housing and Urban Develop-
23 ment Act of 1965, but for the presence in
24 the family of an adult who is an ineligible
25 alien."

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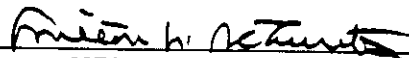
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The Court finds support in its ruling from, inter alia,
Califano v. Yamasaki, 442 U.S. 692 (1979) and Federal Rule of
Civil Procedure 23(c)(1).

The Court also extends the preliminary injunction
previously granted on September 18, 1986, to the entire class.
HUD and its agents are enjoined from enforcing the April 1, 1986
regulation (51 Fed. Reg. 11198) as to all members of the class.
This injunction shall remain in effect during the pendency of
this case, unless modified by the Court prior to judgment.

IT IS SO ORDERED.

DATED: DECEMBER 18, 1986.


MILTON L. SCHWARTZ
United States District Judge