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2014 Fracking Year In Review: California Edition

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2014 was another active year concerning hydraulic fracturing in California, with key developments in the regulatory, legislative and litigation areas of practice. We provide a high-level summary of the year's developments below, focused on just a few of the key areas of interest.

Update on Drafting of Regulations Pursuant to SB 4

California's passage of SB 4 in September 2013 put into place some of the toughest regulations on fracking in the country. SB 4 put into place a number of regulatory procedures and processes in order to help the state impose a comprehensive regulatory system with regard to fracking. The regulatory actions directed by SB 4 included implementation of an independent, science-based study of hydraulic fracturing, the development of a comprehensive environmental impact report, mandatory public disclosure of the content of all chemicals used, well integrity testing before and after fracturing, regular testing of nearby drinking water sources, prior notification of surrounding land owners and development of groundwater management plans.

In addition, SB 4 required that the Division of Oil, Gas & Geothermal Resources develop a permitting scheme to regulate the use of well-stimulation practices like fracking. The bill required DOGGR to define a range of unconventional drilling practices and to adopt rules and regulations specific to those practices that operators will need to abide by in order to receive a permit to drill. SB 4 required that these regulations be submitted and implemented by Jan. 1, 2015. However, in June of this year, the California Legislature approved a trailer bill that would delay implementation of the new regulations by six months, setting a new enactment deadline of July 1, 2015. The trailer bill required that the regulations still be finalized by Jan. 1, 2015, but that they would not become effective until July 1, 2015. In the meantime, DOGGR has issued multiple versions of its proposed regulations and accepted public comments on them. Specifically, DOGGR issued initial proposed regulations in November 2013. It then followed-up with revised regulations in June 2014 and held a 45-day public comment period, as well as holding five comment hearings at cities throughout the state in July. DOGGR most recently issued its second revised set of regulations in October, and allowed for a 15-day public comment period.

DOGGR is also tasked with developing a comprehensive EIR pursuant to the California Environmental

Quality Act, analyzing the effects of fracking statewide. It issued its notice of preparation and held public comments in November and December of 2013. Its current deadline for submission of the EIR is July 1, 2015.

Similar to DOGGR, the State Water Quality Control Board has also been working throughout 2014 to develop regulations pursuant to SB 4. SB 4 requires that operators put together a groundwater monitoring plan that specifies how they will test water quality if they drill in an area with useable water. These groundwater monitoring plans must be approved by water regulators with the SWQCB.
The SWQCB is currently developing the precise criteria on which it will be evaluating these groundwater monitoring plans. It has until July 1, 2015, to create the official criteria. There are currently temporary groundwater monitoring plan criteria in place, but it is expected that the permanent criteria due in July 2015 will be more stringent.

Recent Legislative Efforts Regarding Fracking

Even with the passage of SB 4 in 2013, the California Legislature continues to propose and pass additional laws relating to fracking. As described above, the Legislature passed a trailer bill to SB 4 in June 2014, which pushed back certain deadlines for the implementation of the regulations mandated under SB 4, and made some minor revisions to requirements relating to the level of environmental review required by DOGGR in issuing permits.

In May, a proposed bill, SB 1132, to impose a moratorium on hydraulic fracturing was defeated by a vote of 18-16 in the California Senate. Opponents argued it did not make sense to pass it when the state had just recently passed SB 4, which already significantly regulates hydraulic fracturing.

Finally, SB 1281 was passed and approved by Gov. Jerry Brown in September 2014. It requires oil and gas facility owners or operators to report to DOGGR the volume, source and use of all freshwater, recycled water and treated water, and would require that DOGGR make that information publicly available. The bill would also require reporting of wastewater disposal methods and volumes.

Fracking Bans by California Cities

Despite the presence of comprehensive statewide regulations enacted by the California Legislature with SB 4, it has been an active year for local lawmakers seeking to ban fracking and other well-stimulation techniques conducted by oil and gas operators in California. These regulations are usually based on concerns about the possible environmental consequences of high-volume fracking, even though the laws usually extend far more broadly to ban all well-stimulation activity.

Numerous California cities have attempted to ban fracking and other well-stimulation activity in the past year, though only one — Beverly Hills — has successfully enacted a prohibition. On May 6, 2014, Beverly Hills became the first California municipality to pass an ordinance prohibiting the use of any well-stimulation treatments by oil and gas operators within the city. Prohibitions on well stimulation have not fared as well in other cities.

On Feb. 28, 2014, Los Angeles approved a motion directing the city attorney to prepare an ordinance to ban all activities associated with oil and gas well stimulation, along with the use of waste disposal injection wells. The city attorney has yet to prepare such an ordinance, and the Los Angeles Department of City Planning even issued a report to the city council in early November urging the council to abandon its proposed ban on well-stimulation activities in favor of updated land use and zoning regulations for oil

and gas operations.

About one month after Los Angeles officially proposed to ban well stimulation, Carson took the next step by passing an emergency moratorium on all new well drilling. The hasty ban was enacted in an attempt to keep Occidental Petroleum Corp. from using fracking techniques on its wells, even though Occidental had agreed not to use fracking techniques in Carson. The temporary moratorium on all new oil drilling was allowed to expire after 45 days and is no longer in effect.

At roughly the same time, Compton decided to enter the regulatory fray by adopting a moratorium on all well-stimulation activities. Even more brazenly, Compton applied its moratorium to any well drilled from any location that extends below the city, not only to wells drilled from above the city's surface. The Western States Petroleum Association brought suit against Compton, the city council and mayor in late July, claiming the ordinance exceeds the city's constitutional authority by regulating drilling operations beyond its borders that are already comprehensively regulated by the state. On Sept. 23, Compton withdrew its moratorium.

Fracking Bans by California Counties

California's municipalities are not the only local governing bodies attempting to regulate well-stimulation activities. On Nov. 4, voters in two California counties — Mendocino and San Benito — approved bans on all well-stimulation techniques used by the oil and gas industry, even though neither county is home to existing fracking operations. The Mendocino County measure not only prohibits well stimulation, but also the issuance of permits for engaging in well stimulation, such as those issued by DOGGR. Additionally, the measure establishes a "Community Bill of Rights" for citizens and ecosystems, creates strict liability for damages in the county caused by well stimulation inside or outside the county, and declares any conflicting law null and void.

The substance of the San Benito measure is more familiar. The measure prohibits any well-stimulation activity that increases permeability of the well, not simply fracking. While proponents could not identify any fracking occurring in the county, there are over 20 active wells in the county that would be prospectively implicated by the measure's prohibition on well stimulation generally. San Benito is also facing a claim for $1.2 billion by Citadel Exploration Inc. for lost oil extraction revenue as a result of this measure.

Environmental Groups Have Continued to File Litigation Challenging Fracking Activities

In addition to these actions by California and local governments, 2014 has also been an active year for efforts by environmental groups challenging the practice of hydraulic fracturing.

On Jan. 13, 2014, a judge in the Superior Court of California, County of Alameda, dismissed a complaint filed by several environmental activist groups — the Center for Biological Diversity, Earthworks, Environmental Working Group and Sierra Club — against DOGGR (Case No. RG-12-652054, Alameda County Superior Court). In the CBD litigation, these activist groups argued that the state agency violated CEQA by issuing approvals for new oil and gas wells that may involve the use of hydraulic fracturing, without conducting the level of environmental review that the plaintiffs believed to be required under CEQA. Rather than challenge the drilling of specific wells, the plaintiffs challenged DOGGR's overall pattern and practice in approving new oil and gas wells where hydraulic fracturing may occur. These activist groups sought injunctive and declaratory relief preventing the use of hydraulic fracturing in California without additional environmental review.

Several petroleum industry trade associations intervened in the action and subsequently filed a motion to dismiss the case as moot based on the enactment of SB 4 and its role in regulating hydraulic fracturing in California. (Gibson Dunn was involved in the representation of these trade associations.) On Jan. 13, 2014, the Superior Court held that plaintiffs' prospective challenge was rendered moot by the recent passage of SB 4 by the California Legislature. In passing SB 4, the Legislature directed DOGGR to adopt comprehensive regulations governing the practice of well stimulation, including hydraulic fracturing, and provided direction to DOGGR regarding review of well-stimulation activities under CEQA. As part of SB 4, the Legislature also determined that, by July 2015, DOGGR must complete an EIR analyzing the effects of hydraulic fracturing in the state. Prior to completion of the EIR, the Legislature has directed DOGGR to allow hydraulic fracturing to occur, subject to the operator's certification of compliance with specified requirements, without the need for CEQA review in the interim. Because of these changes in the law, the court held that plaintiffs' claims were moot to the extent that they were challenging DOGGR's policy or practice prior to the adoption of the permanent regulations. The court also held that plaintiffs' claims were not ripe to the extent that they were challenging DOGGR's policy or practice after adoption of the permanent regulations.

More recently, on Dec. 3, 2014, the Environmental Defense Center filed a lawsuit against the Bureau of Safety and Environmental Enforcement, saying it failed to provide for public or environmental review prior to approving 51 oil drilling permits that allow for fracking in the Santa Barbara Channel. In addition, on Dec. 4, 2014, the Center for Biological Diversity filed a notice of intent to sue the U.S. Department of the Interior, saying it violated three federal laws by allowing fracking in California's Santa Barbara Channel without evaluating its polluting effects on coastal communities or marine wildlife. The Center for Biological Diversity's notice seeks to compel the Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement to suspend all hydraulic fracturing off California's coast and conduct a full analysis of fracking pollution's threats to wildlife, public health and the environment

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DISCLOSURE: Gibson Dunn & Crutcher LLP became co-counsel of record for the trade associations in April 2013, in connection with the litigation described in this article. Jeffrey Dintzer, Matt Wickersham and John O'Hara participated in that representation.
