

Calif. Fracking Litigation May Bring Economic Harm

Law360, New York (December 04, 2012) -- On Oct. 16, 2012, four environmental activist groups filed a lawsuit against the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR), challenging the DOGGR's handling of the oil and gas permitting process in California. In particular, this lawsuit alleges that the DOGGR is violating the California Environmental Quality Act (CEQA) by approving permits for oil and gas wells without evaluating the environmental impacts from the use of hydraulic fracturing or "fracking" within the state.

Fracking involves the high-pressure injection of a mix of fluids and other substances into an oil or gas reservoir. By injecting the mix at high pressure into the bottom of a well, the underground reservoir rock is fractured. After the fluid is withdrawn, the other substances, called "proppants," keep the newly formed cracks open in the reservoir rock and allow for additional oil or natural gas to flow back to the well.

Fracking has become a hot topic issue recently, beginning with the release of a 2010 documentary that showed a man lighting his faucet water on fire supposedly based on groundwater contamination from nearby natural gas drilling. Since then, local governments and activist groups have made increasingly vocal calls for more regulations banning or limiting the use of fracking.

The upcoming release of a big-budget movie about this issue starring Matt Damon is sure to draw only more attention to this issue. However, when it comes to California, the challenges to the use of fracking are often based more on politics and public opinion than on the actual facts concerning how fracking is conducted in this state.

The Use of Fracking in California Should Not Be Attacked Based on the Very Different Practices Applied in Other States

Although fracking has received considerable media attention recently, state regulators have repeatedly emphasized how the use of fracking in California is "radically different" from how it is conducted in the rest of the country.[1] In other parts of the country, fracking is generally used with the horizontal drilling for natural gas from shallow shale gas deposits, which are often inside uncapped rock formations.

In contrast, fracking in California is principally used to enhance the recovery of oil, not natural gas, from existing wells. It is also principally conducted in deep, vertically drilled oil wells, where a layer of less permeable rock, which is known as "cap rock," prevents the uncontrolled migration of oil, gas or fracking chemicals.[2]

The fracking process in California is also generally performed for shorter duration and using much less water to loosen crude in depleted oil wells.[3] Most importantly, fracking has been conducted in California for over 30 years, and there has been no evidence during this time that fracking has contributed to any cases of groundwater contamination in this state.[4]

In short, plaintiffs will face an uphill battle in showing that the DOGGR is violating CEQA by failing to consider whether the use of fracking may result in a significant environmental impact. The drilling of oil and gas wells in California is already subject to extensive regulations.

Plaintiffs will need to overcome the reasonable conclusion that the existing laws and regulations for the operation of oil and gas wells will adequately protect against any environmental impacts that may result from the use of fracking.[5]

Plaintiffs' Challenge to the DOGGR's Pattern and Practice of Permitting Oil and Gas Wells Is Procedurally Improper

In this recent litigation, plaintiffs are not challenging a specific project, as would typically be required for CEQA challenges to agency actions. Instead, plaintiffs are alleging that the DOGGR has a "pattern and practice" of violating CEQA. By attacking the DOGGR's alleged pattern and practice, plaintiffs hope to be excused from bringing individual challenges to the specific approvals, where the DOGGR has supposedly failed to consider the impacts of fracking.

Although a handful of cases have allowed claims for declaratory relief that challenge the pattern and practice of an agency,[6] this challenge must be directed against "a generalized agency policy"[7] or an "on-going policy or manner of making decisions." [8]

Plaintiffs will have difficulty showing the existence of a "generalized agency policy" when their complaint relies upon projects that have been approved in a number of different ways by the DOGGR.[9] The variety of responses by the agency shows that a significant amount of discretion was exercised by the agency in reviewing the permits submitted for oil and gas development.

Review of "discretionary, specific agency decisions" may only be had through a petition for administrative mandamus.[10] If the agency is exercising its discretion in reviewing individual projects, then a court will likely find that plaintiffs should be required to challenge those projects individually through the administrative mandamus process.

By going through the administrative mandamus process, the challengers would be required to raise this issue before the administrative agency and exhaust their right to a review of the agency decision in that forum. By requiring the exhaustion of this issue before the agency, there would be an opportunity to create a record concerning whether fracking would have a significant impact for that particular well.

Although cases that challenge a generalized agency decision are generally not limited to the administrative record,[11] this particular case is not well-suited to that type of review. This lawsuit challenges whether the use of fracking can cause a significant effect on the surrounding environment. This issue should be decided based on the particular facts surrounding its potential use and should not be decided in the theoretical manner suggested by plaintiffs here.

Administrative Burdens on the Use Of Fracking, Such as Unnecessary CEQA Review, Could Cause Significant Economic Harm

This new litigation against the DOGGR has the potential to cause significant economic repercussions if the plaintiffs are successful in obtaining the relief sought by their complaint. Plaintiffs are arguing that the DOGGR must issue an environmental impact report (EIR) before it approves any permit for an oil or gas well that may involve the use of fracking.

If the DOGGR is required to produce a full EIR for every well that may involve the use of fracking, as requested in the complaint, then significant delays and expenses will be incurred by the agency and the operator.[12] Certainly, this is a goal of the plaintiffs and an improper use of CEQA.

Fracking is generally used in California in order to enhance additional production from an existing well. If significant environmental review is required before fracking is allowed to be conducted at a particular well, then an oil operator may decide that the incremental benefit from fracking at that well does not justify the administrative and litigation costs that plaintiffs would like to impose by this lawsuit. This would be an unfortunate result.

Through the use of fracking, there is the potential to tap into the largest oil shale formation in the continental United States, the Monterey Shale, which may contain 64 percent of the technically recoverable shale oil deposits remaining in the continental United States.[13]

A state-wide shift away from fracking could result in the aggregate loss of significant oil production within the state. The reduced oil production could have serious effects on the state's revenues, which are already subject to considerable volatility, as well as on the nation's interests in moving towards energy independence.

--By Jeffrey D. Dintzer and Matthew C. Wickersham, Gibson Dunn & Crutcher LLP

Jeffrey Dintzer is a partner, and Matthew Wickersham is an associate in the firm's Los Angeles office.

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[1] Michael J. Mishak, Oil extraction method widely used in California with little oversight (Los Angeles Times, March 14, 2012), available at <http://articles.latimes.com/2012/mar/14/local/la-me-oil-fracking-20120315> (last accessed Nov. 16, 2012) ("State regulators said fracking here is 'radically different' from drilling in the Rocky Mountain West, Mid-Atlantic region and Northeast, where operators inject millions of gallons of chemical-laced water and sand to break apart rock and release natural gas.").

[2] DOGGR, Hydraulic Fracturing in California, available at http://www.conservation.ca.gov/dog/general_information/Pages/HydraulicFracturing.aspx (last accessed Nov. 15, 2012).

[3] Michael J. Mishak, Oil extraction method widely used in California with little oversight (Los Angeles Times, March 14, 2012).

[4] DOGGR, Hydraulic Fracturing in California ("In California, hydraulic fracturing has been used as a production stimulation method for more than 30 years with no reported damage to the environment.").

[5] Id. ("California's requirements for the protection of underground resources and well construction standards provide a first line of protection from potential damage caused by hydraulic fracturing.").

[6] East Bay Mun. Utility Dist. v. Department of Forestry & Fire Protection, 43 Cal. App. 4th 1113 (1996); Californians for Native Salmon etc. Assn. v. Department of Forestry 221 Cal. App. 3d 1419 (1990).

[7] Californians for Native Salmon, 221 Cal. App. 3d at 1429.

[8] East Bay Mun. Utility, 43 Cal. App. 4th at 1123.

[9] The complaint identifies 18 oil and gas projects, where the DOGGR found that the projects were exempted from further environmental review as a categorical exemption for “minor alterations to land” or an “existing facility.” The complaint also identifies 20 oil and gas projects, where the DOGGR approved the project after issuing a negative declaration or mitigated negative declaration, which requires a finding that the project will not have a significant impact on the environment.

[10] *Californians for Native Salmon*, 221 Cal. App. 3d at 1429.

[11] See, e.g., *East Bay Mun. Utility*, 43 Cal. App. 4th at 1123 (holding that it was “appropriate that the trial court took evidence beyond that contained in the [permits] themselves on how [the agency] analyzed impacts to the Mokelumne River Watershed, including how the agency’s practices and policies as of the time of trial had changed from those it had earlier employed”).

[12] See also Eric Adair, *Environmental Groups File CEQA Action to Enjoin California Regulators from Permitting Fracking* (Oct. 16, 2012), available at <http://www.hinsongravelle.com/environmental-groups-file-ceqa-action-to-enjoin-california-regulators-from-permitting-fracking> (last accessed Nov. 16, 2012).

[13] U.S. Department of Energy, U.S. Energy Information Administration, *Review of Emerging Resources: U.S. Shale Gas and Shale Oil Plays* (July 2011), available at <ftp://ftp.eia.doe.gov/natgas/usshaleplays.pdf> (last accessed Nov. 16, 2012) at p. 4 (“The largest shale oil formation is the Monterey/Santos play in southern California, which is estimated to hold 15.4 billion barrels or 64 percent of the total shale oil resources shown in Table 1”).

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