

Future Of Fracking In Calif. Is Still Hazy

Law360, New York (September 26, 2013, 4:49 PM ET) -- On Friday, Sept. 20, 2013, California Gov. Jerry Brown signed into law Senate Bill 4, a bill regulating hydraulic fracturing operations and other “well stimulation treatments” within the state. Among other things, the law requires well operators to obtain fracking permits from the California Division of Oil, Gas and Geothermal Resources (DOGGR), notify nearby property owners and tenants of planned operations and disclose the chemical makeup of fracking fluid to the DOGGR.

Legislation to Shape Fracking Landscape in California

Fracking is the practice of creating fissures in underground rock formations using pressurized fluid and sand to release oil and gas reserves. Although fracking has been commonplace in California for decades, recent technological developments have increased both its efficiency and its prevalence, pushing the issue of fracking onto the national stage.

Efforts to answer public calls for increased regulation have been underway in three areas: state legislation, agency rulemaking and citizen-suit litigation. With the governor’s signature on SB 4, the future of fracking in California comes into much sharper relief.

Content of the New Law

The DOGGR is charged with supervising the drilling and operation of oil and gas wells so as to protect human health and the environment. Under prior law, fracking operators were required to file with the DOGGR a written notice of intention to commence drilling and were prohibited from drilling absent the DOGGR’s approval. The new law adds substantially to this existing regulatory structure.

New Regulations

The new law directs the DOGGR to work with a number of state agencies to develop regulations by Jan. 1, 2015, that address “well stimulation treatment,” a term defined to include any activity that enhances oil and gas production by increasing the permeability of a geologic formation.

The regulations will be informed by a “comprehensive independent scientific study” to be conducted by the secretary of the California Natural Resources Agency by Jan. 1, 2015, on the hazards and risks that fracking and other well stimulation treatments pose to human health and the environment.

These new regulations will require fracking operators to do the following:

- Ensure the integrity of wells and well casings such that geologic and hydrologic formations are isolated during fracking operations
- Disclose the composition and disposition of fracking fluids
- Develop and submit a water management plan
- Provide baseline groundwater contaminant levels and monitor groundwater following fracking operations at the request of nearby property owners.

The regulations will also set threshold values for acid matrix-stimulation treatments, an alternative well stimulation method.

Until the regulations are finalized, fracking activities will be allowed in California as long as the well owner or operator certifies compliance with the disclosure and notification requirements and submits to the DOGGR a complete well history.

During the preregulation period, the DOGGR will conduct a statewide environmental impact report pursuant to the California Environmental Quality Act, which must be completed by July 1, 2015.

Fracking Permits

DOGGR permits will be required before operators may engage in any fracking operations. The permit must specify the well ID number and location; the time period during which treatment will occur; a water management plan; information about the chemicals used in the fracking operation; estimates of the length and height of induced fractures; and other information. Permits will expire after one year and will be available for public viewing on the DOGGR's website.

Operators must provide nearby property owners and tenants with copies of the permit at least 30 days in advance of the start of operations. Any of those individuals will have the right to request water quality sampling at the operator's expense. The operator must also provide the DOGGR 72-hours' notice before beginning operations.

Trade Secrets

Fracking fluid suppliers are allowed to claim trade secret protection over the fluids but must still provide the protected information to the DOGGR. They must also substantiate the claim for protection to the DOGGR's satisfaction.

That certain fluids are being claimed as protected trade secrets must be disclosed publicly and if the DOGGR receives a request to release the protected information, the DOGGR must give the supplier at least 60-days' notice to file a court action to prohibit the release of the information. The bill allows the DOGGR to disclose protected information to a government officer or to a health professional under certain circumstances.

Information that does not qualify for trade secret protection includes the identities of chemical constituents of additives; the concentration of additives in fracking fluid; pollution monitoring data; health and safety data associated with fracking fluid; and the chemical composition of flowback fluid.

Impact of the New Law

The new law attempts to strike a balance between environmental and health concerns on the one hand

and the opportunity for economic development on the other. On the economic side of the equation lies the Monterey shale formation, a resource estimated to hold 15 billion barrels of oil.

With Brown's signature on SB 4, California has foregone the "moratorium" route that certain states and local governments have pursued, opting instead for a policy of fracking with heightened standards of protection, extensive agency oversight and full disclosure of relevant information.

Alongside his signature to SB 4, Brown added a signing statement reading, "I am also directing the Department of Conservation when implementing the bill to develop an efficient permitting program for well stimulation activities that groups permits together based on factors such as known geologic conditions and environmental impacts, while providing for more particularized review in other situations where necessary."

The signing statement suggests that the state intends for the fracking permitting process to be simpler and more manageable than the language of the bill may otherwise imply. Brown is also reported to have stated that "the bill needs some clarifying amendments, and I will work with the author in making those changes next year."

The governor's office has not elaborated on the likely nature of those amendments. Thus, while the basic framework for fracking in California is now enshrined in California law, the governor's statements, together with the blanks that remain in the unwritten DOGGR regulations and in the results of the independent scientific study, leave the future of fracking in California still somewhat hazy.

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