

## Calif.'s Road To Fracking Regulation Will Be Bumpy

--By Ella Foley Gannon, Camarin E.B. Madigan, and Devin M. McDonell, Bingham McCutchen LLP

*Law360, New York (March 06, 2013, 11:34 AM ET)* -- On Jan. 24, 2013, the Center for Biological Diversity (CBD) took an additional step in its efforts to challenge the practice of hydraulic fracturing in California when it filed a complaint in California's Alameda County Superior Court, claiming that California's underground injection control (UIC) program[1] requires the California Division of Oil, Gas and Geothermal Resources (DOGGR) to regulate hydraulic fracturing.

There is no question that fracking will play an increasing role in California's future — the issue is whether and how it is regulated. The CBD's suit, seeking declaratory and injunctive relief, is the latest mile marker on the road to fracking regulation in California.

### Three Routes to Regulation

Fracking regulation is currently moving forward through agencies (e.g. the DOGGR) through the courts and the legislature. The DOGGR initiated the process of passing its own regulations when it published its Dec. 18, 2012 discussion draft [2] designed specifically to regulate fracking activities.

Although a more formal rule-making is expected, the discussion draft is an initial step toward developing a new regime to regulate fracking operations. The DOGGR's overture to regulate fracking has not mollified the CBD, and their recent litigation evidences the CBD's unwillingness to rely on the rule-making process to arrive at a fracking regulation scheme.

Instead, the CBD remains committed to using the courts to establish that the DOGGR must regulate hydraulic fracking under existing California law. Finally, the California legislature has repeatedly attempted — and failed — to pass legislation regulating fracking, and these attempts are likely to continue.

### ***DOGGR's Approach to Fracking***

The DOGGR is the state agency with primary regulatory authority over oil and gas operations in California, and operators must obtain a permit from the DOGGR prior to drilling oil or gas wells. The DOGGR's UIC program regulates "injection operations" at oil and natural gas production wells, including waterflood, steamflood, cyclic steam, water disposal, gas storage and other enhanced oil recovery projects.[3]

The California Department of Conservation, under which the DOGGR operates, has stated that these regulations do not apply to alternative enhanced oil recovery (EOR) methods, such as fracking, and that regulation of alternative EOR methods “would require additional regulations and/or statutes.”[4] This exemption removes fracking from a fairly robust set of requirements applicable to other injection operations.

For example, fracking is exempt from the requirement that well operators submit an application that provides detailed information about regulated injection activities, including an engineering study and an injection plan.[5] In addition to permitting, the UIC program requires inspection, enforcement, testing, plugging and abandonment oversight, data management and public outreach.[6] Currently, none of these regulations apply to fracking.

The DOGGR’s discussion draft proposes the adoption of new fracking regulations outside of the UIC program. Were the discussion draft to be adopted as written, fracking would be subject to notice, testing, monitoring and reporting requirements.[7]

The discussion draft would also require operators to provide the DOGGR and the appropriate regional water quality control board with at least 10-days’ notice prior to commencing fracking activities and describes the type of information that may be required in the notice. The DOGGR would then be required to post a public notice of the proposed activities on its website within seven days of receiving the notice.

The discussion draft also prescribes prefracking testing and evaluation activities and monitoring requirements during and after fracking operations, as well as requirements for the storage and handling of fluids associated with fracking. Finally, the discussion draft would also codify the DOGGR’s exemption for “well stimulation, including hydraulic fracturing” from California’s UIC program.

### ***CBD’s Challenges to DOGGR Inaction***

In its Jan. 24, 2013 complaint, the CBD argues that under the UIC program, the DOGGR is obligated to monitor and supervise all forms of underground injection, including fracking. The CBD further alleges that the Public Resource Code’s mandate that the DOGGR supervise drilling operations “so as to prevent, as far as possible, damage to life, health, property, and natural resources,” requires the DOGGR to regulate fracking.

The CBD seeks a declaration that the DOGGR’s failure to regulate fracking activities under the UIC program and its alleged failure to prevent impairment of public resources violates state law. The CBD also seeks an injunction prohibiting the DOGGR from issuing new permits for well operations, which include fracking activities until it complies with the law.

While the complaint mentions the discussion draft, the CBD does not specifically challenge it, noting that it would be premature to do so. However, the CBD’s position on the discussion draft was made clear in a statement issued in immediate response to the discussion draft, which stated that the DOGGR’s draft rules “would keep California’s fracking shrouded in secrecy and do little to contain the many threats posed by fracking.”[8]

The CBD's Jan. 24, 2013, complaint was its second challenge in six months to the DOGGR's lack of regulation and oversight of hydraulic fracking. The first complaint,[9] filed on Oct. 16, 2012, by the CBD and other environmental plaintiffs, challenged the DOGGR's issuance of oil and gas drilling permits without completing environmental impact reports for each new hydraulic fracking project.

Unlike the typical California Environmental Quality Act case that challenges the approval of a single project, the complaint seeks declaratory and injunctive relief regarding the DOGGR's entire permitting process.

The plaintiffs claim that the DOGGR's current practice of approving drilling permits that allow for hydraulic fracking under categorical exemptions or by issuing negative declarations or mitigated negative declarations is contrary to the requirements of the CEQA because of the potentially significant environmental effects associated with hydraulic fracturing.[10] This CEQA case is still pending.

The CBD has also taken its battle against hydraulic fracking in California to federal court. On Dec. 8, 2011, the CBD and Sierra Club challenged the Bureau of Land Management's issuance of four leases of parcels of federal lands in Monterey and Fresno counties for oil and gas development. The main contention in this case is that the BLM failed to comply with the National Environmental Policy Act before issuing the leases because it did not prepare an environmental impact statement, relying instead on an environmental assessment and a finding of no significant impact.

Plaintiffs claimed that this decision was arbitrary and capricious, given what they alleged to be known significant impacts associated with oil development generally and hydraulic fracking in particular. The U.S. District Court for the Northern District of California held a hearing on cross-motions for summary judgment in this case on Jan. 15, 2013.

On Aug. 29, 2012, the CBD also provided the BLM with a 60-days' notice of intent to sue regarding alleged violations of the Endangered Species Act in connection with leasing of federal land in California for oil and gas leases. In this notice, the CBD claimed that new information regarding the impacts of hydraulic fracturing on listed species requires the BLM to reinitiate consultation with the U.S. Fish and Wildlife Service and to consult with the National Marine Fisheries Services.

The CBD alleged that the BLM was required to halt all ongoing leasing and drilling activities until it completed a reinitiated consultation. In a somewhat unusual move, the BLM responded to the CBD notice on Oct. 26, 2012, documenting its compliance with the ESA in connection with its oil and gas leasing program and concluding that reinitiating consultation was not required. To date, the CBD has not filed an ESA action, but it could do so at any time.

### ***Failed Legislative Attempts to Regulate Fracking***

In August 2012, the California Senate Appropriations Committee failed to allow two bills, AB 591[11] and AB 972,[12] out of committee in time to be addressed by the full senate. AB 591 sought to impose notice requirements, similar to those seen in the discussion draft, upon fracking activities. AB 972 sought a moratorium on the DOGGR's ability to approve drilling of wells, which used hydraulic fracking until regulations had been adopted.

Most recently, in December 2012, Sen. Fran Pavley, D-Calif., introduced SB 4,[13] which would require well operators to record all fracking activities and various agencies, including the DOGGR, to adopt regulations specific to fracking similar to those proposed in the discussion draft. SB 4 has been referred to the Senate Committee on Natural Resources and Water and the Committee on Public Safety.

## The Road Ahead

For the foreseeable future, fracking regulation will continue to move forward on the three parallel paths discussed above. The DOGGR's discussion draft is likely to lead to a formal — and lengthy — rule-making proceeding, in which stakeholders will have an opportunity to mold and shape California's approach to fracking regulation.

Simultaneously, environmental groups, in addition to participating in the DOGGR's rule-making, will continue to challenge the DOGGR's failure to regulate fracking under existing law. And finally, the legislature, and particularly Pavley, remains committed to passing legislation requiring some form of fracking regulation. Unfortunately, none of these processes are likely to provide industry with clear rules regarding fracking activities in the next year.

*Ella Foley Gannon and Camarin Madigan are partners, and Devin McDonell is an associate in the firm's San Francisco office.*

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[1] Cal. Code Regs. §§ 1724.6-1724.10.

[2] Available at [http://www.conservation.ca.gov/dog/general\\_information/Documents/121712NarrativeforHFregs.pdf](http://www.conservation.ca.gov/dog/general_information/Documents/121712NarrativeforHFregs.pdf).

[3] See California Department of Conservation UIC Application Guidance (available at [http://www.conservation.ca.gov/dog/general\\_information/Pages/UICApplicationGuidance.aspx](http://www.conservation.ca.gov/dog/general_information/Pages/UICApplicationGuidance.aspx)).

[4] California Department of Conservation Fact Sheet: Hydraulic Fracturing (available at [http://static.ewg.org/reports/2012/fracking/ca\\_fracking/DOGGR\\_2010\\_fact\\_sheet\\_1.pdf](http://static.ewg.org/reports/2012/fracking/ca_fracking/DOGGR_2010_fact_sheet_1.pdf)).

[5] Id.

[6] Id.

[7] For a detailed discussion of the discussion draft, see "Beginning of Calif.'s Road to Finalized Fracking Rules," available at [http://www.law360.com/m/environmental/articles/407536?nl\\_pk=724af09c-431b-49ce-9de8-c1daaac2436d&utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=environmental](http://www.law360.com/m/environmental/articles/407536?nl_pk=724af09c-431b-49ce-9de8-c1daaac2436d&utm_source=newsletter&utm_medium=email&utm_campaign=environmental).

[8] Press Release, Center for Biological Diversity, Five Fatal Flaws in California's New Fracking Regulations (Dec. 18, 2012) (available at [http://www.biologicaldiversity.org/news/press\\_releases/2012/fracking-12-18-2012.html](http://www.biologicaldiversity.org/news/press_releases/2012/fracking-12-18-2012.html)).

[9] See *Center for Biological Diversity et al. v. California Dept. of Cons.*, No. RG-12-652054 (Sup. Court of Cal., Alameda County, Oct. 16, 2012).

[10] See *id.* at 11-13.

[11] See AB 591, 2011-12 Reg. Sess., (Cal. 2011) (last amended in Senate May 9, 2012) (available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0551-0600/ab\\_591\\_bill\\_20120509\\_amended\\_sen\\_v93.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0551-0600/ab_591_bill_20120509_amended_sen_v93.pdf)).

[12] See AB 972, 2011-12 Reg. Sess. (Cal. 2011) (last amended in Senate June 28, 2012) (available at [http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab\\_0951-1000/ab\\_972\\_bill\\_20120628\\_amended\\_sen\\_v93.pdf](http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0951-1000/ab_972_bill_20120628_amended_sen_v93.pdf)).

[13] See SB 4, 2013-14 Reg. Sess., (Cal. 2012) (available at [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0001-0050/sb\\_4\\_bill\\_20121203\\_introduced.pdf](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0001-0050/sb_4_bill_20121203_introduced.pdf)).

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