

Client Alert

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California Draft Regulations on Hydraulic Fracturing

On Tuesday, December 19, California's Department of Conservation released a "discussion draft" of proposed regulations for hydraulic fracturing, now often referred to as "fracking." HF, the practice of injecting high-pressure chemical solutions into oil- and gas-producing geologic zones to fracture the rock formations and release the oil and gas into a well, has been used in California for decades with little attention or problems. But recently, environmental groups have raised high-profile public concerns about air and water pollution, prompting closer attention from lawmakers.

The proposed regulations, which are available at http://www.conservation.ca.gov/dog/general_information/Documents/121712DiscussionDraftofHFRegs.pdf, are intended to protect groundwater, public health and safety, and the environment by imposing various testing and disclosure requirements on operators before, during, and after HF operations:

- Before HF occurs, operators would have to perform pressure tests of the well and equipment and evaluate nearby wells that might be affected. The regulations further require modeling and fracture radius analysis, with all wells and geological formations within twice the anticipated fracture radius subject to assessment.
- Within 10 days before HF begins, operators would be required to report the results of the testing and other information about well location, depth, and other details to the Department of Conservation. This information would be made available to the public as a public record on a designated website within seven days (i.e., at least three days before HF operations commence).
- During HF operations, operators would be required to constantly monitor pressures, slurry and fluid rates, and proppant concentrations. Various changes in monitored values (delineated in the regulations) would require cessation of operations, further testing, and reporting to the Department.
- After HF ends, operators would be required to continue monitoring specified pressures, conditions, and production rates daily for the first 30 days and then monthly for five years thereafter. Monitoring data would be reported annually and maintained for five years.
- The proposed regulations would subject HF fluids to current laws and regulations governing notification, response, and cleanup of spills in the oil field environment, and would impose further reporting requirements in the event of a release or spill. Additionally, the fluids could not be stored at any time in unlined sumps or pits.
- Operators would also be required to post public information about the operation, including the well location and depth, a list of chemicals used, the total volume of fluid used, and the disposition of the fluid, within 60 days of cessation of HF operations. This information would be posted on FracFocus.org or another chemical registry website.
- Operators would be able to invoke trade secret protections for HF fluids, but would be required to demonstrate that the trade secret provides a significant economic advantage that would be

compromised by disclosure, that disclosure has not already occurred elsewhere, and that the fluid cannot be reverse engineered. Trade secret protection would shield the chemical composition from public disclosure, but disclosure to appropriate government agencies and medical personnel could still be required in emergency situations and cases of exposure. Compelled disclosure would be made subject to confidentiality agreements.

The addition of further notice and testing requirements to what is already a highly regulated industry could result in impeded production, but the inclusion of trade secret protection in the proposed regulations is significant, although operators will need to be aware of the criteria that must be met to maintain trade secret status. It is also noteworthy that the regulations propose the use of FracFocus.org, which is a voluntary oil production industry initiative, as the official chemical disclosure registry.

A spokesman for the Western States Petroleum Association expressed appreciation for “the effort that the Department of Conservation is making” on the regulations, saying, “[w]e are encouraged that they continue to recognize the important role that hydraulic fracturing can play in the state’s economy.” The initial reaction to the proposed regulations from environmental organizations, on the other hand, seems to be generally negative, as the regulations do not address concerns related to air quality or surface water. Environmental groups also objected to trade secret protection and the use of FracFocus.org, which they argue leave a “loophole” that “would keep California’s HF shrouded in secrecy.”

The discussion draft released on Tuesday does not initiate the formal rulemaking process, which is expected to start next year. Rather, the agency said, these proposed regulations are “meant to be a launchpad for discussion by industry players, environmental organizations and other stakeholders.” In the meantime, HF legislation and regulations are being considered nationwide. Ohio and Pennsylvania enacted significant regulations and disclosure requirements earlier this year, and many state legislatures considered HF-related legislation in this most recent legislative session. California narrowly defeated legislation that would have imposed greater monitoring and notice requirements than the proposed regulations, and the sponsoring legislators have indicated that they intend to continue their efforts to limit HF.

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