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California's Draft Hydraulic Fracturing Regulations Offer Substantial Trade Secret Protection for Operators

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California's Monterey shale, underlying a substantial portion of California, from Los Angeles to San Francisco, is estimated to hold 400 billion barrels of oil, or as much as 64% of the total shale oil reserves in the continental U.S. 15 billion barrels of oil in the Monterey shale are believed to be recoverable using today's technology.¹ Hydraulic fracturing is a process by which a high-pressure mix of water, sand and small amounts of chemicals is injected into a well bore to unlock oil and natural gas from shale rock layers deep below the earth's surface. Hydraulic fracturing techniques have been in use for more than 30 years, but have been widely expanded in recent years with developments in technology.² Increased public attention to hydraulic fracturing has led to a recent regulatory initiative in California that will impact such operations.

On December 18, 2012, California's Department of Conservation, Division of Oil, Gas, and Geothermal Resources ("DOGGR") released a pre-rulemaking discussion draft of regulations for hydraulic fracturing. The draft regulations will provide the starting point for the industry, environmental community, and lawmakers when a formal rulemaking process begins. DOGGR anticipates the rulemaking process to begin in early 2013 and to be completed by the end of the year.³

Of concern to many operators and service providers is the ability to maintain trade secret protection over their hydraulic fracturing fluid formulas. In the absence of legal protection, information disclosed to a public agency, such as DOGGR, can potentially be obtained by third parties through a request under California's Public Records Act. The proposed regulations also require disclosure of certain information to the public after the operation concludes. However, California's draft hydraulic fracturing regulations include ample trade secret protections for operators and the manufacturers of hydraulic fracturing fluid.

California's Proposed Hydraulic Fracturing Regulations:

Currently, California does not have any laws specifically regulating hydraulic fracturing. If adopted, the draft regulations would impose testing, monitoring and reporting requirements before and after fracturing operations.

The draft regulations would require an operator to submit a notice of intent to commence drilling to DOGGR at least 10 days prior to commencing hydraulic fracturing operations, including the location and anticipated depth of the well, the volume and pressures of injected fluid, a cement evaluation, a fracture radius analysis, and a project design. Within seven days of receipt of a notice of intent to commence operations, DOGGR will post information about the project on its public website.⁴ The draft regulations would also require an operator to pressure-test the equipment prior to commencing

¹ <http://money.cnn.com/2013/01/14/news/economy/california-oil-boom/index.html>

² http://www.conservation.ca.gov/dog/general_information/Pages/HydraulicFracturing.aspx

³ <http://www.conservation.ca.gov/dog/Pages/Index.aspx>

⁴ DOGGR Pre-Rulemaking Discussion Draft Regulations ("Draft Regs.") § 1783. Available at http://www.conservation.ca.gov/dog/general_information/Documents/121712DiscussionDraftofHFRregs.pdf

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operations to ensure sufficient integrity in cement casings, and conduct a fracture radius analysis to ensure that byproducts will not migrate into protected water.⁵

During hydraulic fracturing, the draft regulations require an operator to continuously monitor the operation for significant pressure changes, and to cease operations, conduct diagnostic testing, and report to DOGGR if such changes occur.⁶ The draft regulations also impose guidelines for the storage and handling of hydraulic fracturing fluid, and make the operator responsible for remediation in the event of a spill.⁷

After a hydraulic fracturing operation concludes, operators would be required to monitor the well, daily for the first 30 days and monthly for five years, for any potential problems that could endanger an underground water source.⁸ Within 60 days after an operation concludes, an operator would be required to publicly disclose information about the operation, including the location of the well and geographic scope of the operation, the composition of fracturing fluid – so long as it is not claimed as a trade secret – and the estimated volume of fluid that was used and recovered.⁹

Trade Secret Protection:

The California Public Records Act provides that public records are open to inspection by members of the public unless exempted by law.¹⁰ In addition, the Public Records Act broadly defines “public records” to include almost every piece of written information other than purely personal information unrelated to the “conduct of the public’s business.”¹¹ Thus, without statutory or other protection, the Public Records Act can lead to disclosure to the public at large – including competitors – of trade secrets submitted to regulatory agencies. Even confidential information that falls within an exemption to the Public Records Act may be disclosed at an agency’s discretion.¹² Any proposed legislation mandating the disclosure of proprietary information to regulating agencies is cause for concern, lest it become publicly available in response to a request for information.

The draft regulations directly address the inherent tension between an operator’s right to protect its competitive advantage by maintaining a proprietary interest in its hydraulic fracturing fluid formula, and the public’s right to information under the Public Records Act.

The draft regulations specifically provide that information required to be disclosed to DOGGR prior to commencing hydraulic fracturing operations would “be presumed to be public records for the purposes of the California Public Records Act.”¹³ But the draft regulations do not require an operator to make any disclosures regarding the composition of hydraulic fracturing fluid prior to drilling.

The required disclosures following completion of fracturing operations would contain information relating to the nature of fracturing fluids that were used, including the composition of hydraulic fracturing fluid by chemical and percentage. The disclosed information would be publically available on a “Chemical Disclosure Registry” created for that purpose.¹⁴ However, the regulations specifically

⁵ Draft Regs. § 1784.

⁶ Draft Regs. § 1785.

⁷ Draft Regs. § 1786.

⁸ Draft Regs. § 1787.

⁹ Draft Regs. § 1788.

¹⁰ Cal. Govt. Code §§ 6253(a) and (b), 6254.

¹¹ *San Gabriel Tribune v. Sup. Ct.* (1983) 143 Cal.App.3d 762, 774.

¹² See *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656.

¹³ Draft Regs. § 1783.

¹⁴ Draft Regs. § 1788.

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exempt “trade secrets” from the disclosure requirement.¹⁵ In lieu of disclosing information to the Registry that constitutes trade secrets, under the draft regulations an operator may identify a chemical family rather than a specific chemical.¹⁶ An operator is also required to provide contact information for the person or entity that possesses the information withheld as a trade secret.¹⁷

A public agency may request information withheld as trade secrets when necessary to investigate spills. Additionally a health professional may also request trade secret information when necessary to administer medical treatment.¹⁸ But the draft regulations would allow an operator to request that trade secrets information remain confidential in such circumstances.¹⁹

Although California's draft regulations would require disclosure of the general types of fracturing fluids used, they would preserve the ability of operators to maintain the precise formulas as trade secrets. This scope of protection is consistent with the national trend. Currently, the regulations in every state that requires disclosure of the chemical composition of hydraulic fracturing fluid contain a trade secret exemption.²⁰ Draft regulations released in Alaska in late December, however, would require full public disclosure of each fluid additive type by chemical name, CAS registry number, and concentration.²¹ If adopted, Alaska's regulations will directly impact the ability of an operator who conducts fracturing operations in both Alaska and other states to maintain trade secret protection over their fluid formulas.²²

California's Administrative Rulemaking Process:

The procedures DOGGR must follow when promulgating new regulations are outlined in California's Administrative Procedures Act²³. The draft regulations discussed in this alert are merely a pre-rulemaking discussion draft, and DOGGR has not yet published specific proposed language for its hydraulic fracturing regulations. A release of pre-rulemaking discussion drafts affords stakeholders a greater opportunity to shape the regulations than is available during the formal rulemaking process. Once DOGGR initiates the formal rulemaking process, it will accept written comments from the public for 45 days.²⁴ DOGGR may also schedule a public hearing on the proposed regulations, or if it does not, any interested party may request one.²⁵ A final regulation adopted by DOGGR is subject to review by California's Office of Administrative Law, which will determine within 30 days whether the regulation becomes law or is returned to DOGGR without approval.²⁶ If approved, the regulation is filed with California's Secretary of State and adopted as law.²⁷ DOGGR anticipates the formal rulemaking process to conclude by the end of this year.

¹⁵ Draft Regs. §§ 1788, 1788.1, 1788.2.

¹⁶ Draft Regs. § 1788.1.

¹⁷ Draft Regs. § 1788.1.

¹⁸ Draft Regs. § 1788.2.

¹⁹ Draft Regs. § 1788.2.

²⁰ http://www.rff.org/centers/energy_economics_and_policy/Pages/Shale_Maps.aspx

²¹ AOGCC draft regulations at 20 AAC 25.283(12)(h). Available at <http://doa.alaska.gov/ogc/hear/HydraulicFrac.pdf>

²² The AOGCC, who issued Alaska's draft regulations, has indicated that the comment process concludes April 1, 2013, and that a public hearing will be held in Alaska on April 4, 2013. <http://doa.alaska.gov/ogc/hear/HydraulicFrac2.pdf>

²³ Cal. Govt. Code §§ 11340, et seq.

²⁴ Cal. Govt. Code §§ 11346.4(a), 11347.3(a)(6).

²⁵ Cal. Govt. Code §§ 11346.5(a)(1), 11346.8.

²⁶ Cal. Govt. Code §§ 11349.1, 11349.3(a).

²⁷ Cal. Govt. Code §§ 11343, 11344.

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