

Unconventional Oil and Gas Production: California Announces Draft and Interim Emergency Rules Regulating “Well Stimulation Treatments”

Since 2010, more than 20 states have adopted new laws or regulations specific to hydraulic fracturing, a technology that, along with horizontal drilling, has given exploration and production (E&P) companies the ability to more economically tap into the United States’ vast “unconventional” hydrocarbon formations.

This update addresses the draft regulations and interim emergency regulations recently published by California’s Division of Oil, Gas and Geothermal Resources (the “DOGGR”) to implement California Senate Bill 4, legislation designed to bring additional regulation and oversight to oil and gas operations involving “well stimulation treatments,” such as hydraulic fracturing. For a detailed analysis of the text of Senate Bill 4 and California’s shale potential, see our Legal Update: “California Moves to Further Regulate Unconventional Oil and Gas Production: A Review of Senate Bill 4 and Its Potential Impact on Shale Development in the Golden State.”¹

Formal Rulemaking Process and Public Comment Period

Less than two months after Governor Brown signed Senate Bill 4 into law on September 20, 2013, the DOGGR has announced an aggressive implementation plan for the new law. On November 15, 2013, the DOGGR published draft regulations for public comment. Then, on

December 11, 2013, the DOGGR published emergency regulations for the interim period. The emergency interim regulations will take effect starting on January 1, 2014, and will run until final rules are adopted.

The DOGGR’s November 15 notice began the formal rulemaking process and marked the beginning of a 60-day public comment period. Comments may be submitted by email to DOGGRRegulations@conservation.ca.gov, by facsimile to 916-324-0948, or by mail to Department of Conservation, 801 K Street, MS 24-02, Sacramento, CA 95814, ATTN: Well Stimulation Regulations. The written comment period closes at 5:00 p.m. on January 14, 2014. The DOGGR also plans to hold five public hearings in different parts of the state.

Senate Bill 4 requires the adoption of finalized rules by January 1, 2015, and the DOGGR anticipates that the rulemaking process will take one year to complete.

Proposed Regulations Faithful to and Expand upon Senate Bill 4

While the proposed regulations generally track the requirements of Senate Bill 4, they do expand the regulatory requirements in a few notable areas. The proposed regulations add a new article, “Article 4. Well Stimulation Treatments,” to Subchapter 2 of Chapter 4 of Division 2, Title 14, California Code of

Regulations. The proposed regulations also add a new Sections 1751 to Article 1, a new Section 1761 to Article 2 in the same subchapter of Chapter 4.

The unique notice requirements in Senate Bill 4 are extended in the proposed regulations. Senate Bill 4 requires the operator to provide notice to the DOGGR at least 72 hours prior to the actual start of a well stimulation treatment. The proposed regulations expand on this requirement by requiring that the operator provide the DOGGR with notice confirming that the treatment is proceeding three hours in advance of the treatment.

Senate Bill 4 requires the operator to provide a copy of the approved well stimulation treatment permit to specified tenants and property owners at least 30 days prior to commencing the treatment. The proposed regulations clarify that a “tenant” is “a person or entity possessing the right to occupy a legally recognized parcel, or portion thereof, by way of a valid written agreement.” The proposed regulations also require that the operator hire an independent third party to deliver this notice. In turn, the third party must then provide the DOGGR with information about to whom and how the notice was provided. These details surrounding this process were not included in Senate Bill 4.

The proposed regulations governing the application for a permit to perform a well stimulation treatment are consistent with Senate Bill 4. They do, however, require disclosure of a few additional items, such as an evaluation of the cement job and a radius analysis.

The proposed regulations governing public chemical disclosure are also generally consistent with the requirements in Senate Bill 4, with one notable exception: namely the requirement in §1789 that the operator disclose whether an earthquake of magnitude 2.0 or greater has occurred in the area of the well stimulation treatment radius analysis since the treatment was performed. If adopted, this would make

California’s disclosure rules unique among the approximately 20 states that have adopted disclosure regulations to date.

The proposed regulations require a few things that Senate Bill 4 did not. These include: specific, largely technical requirements for the evaluation of the cement job and pressure testing prior to the well stimulation treatment; monitoring during treatment operations; monitoring after treatment operations; when a treatment must be terminated; when a well must be shut-in; and the storage and handling of well stimulation fluids.

Application of the Proposed Regulations and the Definition of “Well Stimulation Treatment”

As one might expect, the proposed regulations provide a more narrow, specific and technical definition of “well stimulation treatment” than Senate Bill 4. The proposed regulations replace “any” with “a” in the following sentence: “any treatment of a well designed to enhance oil and gas production or recovery by increasing the permeability of the formation.” The definition in the proposed regulations also adds another qualifying sentence that is not included in Senate Bill 4, that a “[w]ell stimulation is a short term and non-continual process for the purposes of opening and stimulating channels for the flow of hydrocarbons.” In addition to the activities expressly exempted in Senate Bill 4, the definition in the proposed regulations adds that “the removal of scale or precipitate from the perforations, casing, or tubing; or a treatment that does not penetrate into the formation more than 36 inches from the wellbore” do not constitute well stimulation treatments. The proposed regulations impose a temporal limit as well, providing that a well stimulation treatment “commences when well stimulation fluid is pumped into the well, and ends when the well stimulation treatment equipment is disconnected from the well.”

Moreover, the proposed regulations distinguish between well stimulation treatments and “underground injection projects” (defined as “sustained or continual injection into one or more wells over an extended period in order to add fluid to a zone for the purpose of enhanced oil recovery, disposal, or storage”). The proposed regulations also state that Article 4 does not apply to acid stimulations treatments that use an acid concentration of 7 percent or less, a distinction not made in Senate Bill 4.

All together, these provisions bring an essential clarity to the regulations that will make their implementation and enforcement consistent with intent of Senate Bill 4.

Comparison to DOGGR’s Pre-Rulemaking Discussion Draft Regulations Published Earlier in 2013

The proposed regulations significantly expand the requirements that the DOGGR originally outlined in its pre-rulemaking regulations that were published earlier in 2013 but were never adopted. For example, the proposed regulations have a broader application than the DOGGR’s pre-rulemaking regulations as the new proposed regulations apply to “well stimulation treatments” while the pre-rulemaking regulations, if they had been adopted, would have only applied to hydraulic fracturing treatments, a narrower subset of that category. Following Senate Bill 4, the proposed regulations also include significantly more regulatory requirements than the pre-rulemaking requirements, such as the notice that must be provided to landowners and tenants.

While the proposed regulations incorporate many of the regulatory concepts included in the pre-rulemaking regulations, the two sets of regulations look very different. As expected, the proposed regulations incorporate a lot of Senate Bill 4’s text. The proposed regulations do, however, incorporate some of the language used

in the pre-rulemaking regulations in key areas, including the requirements for casing, cementing, radius analysis, pressure testing, zonal isolation, storage and handling of fluids well monitoring, and well testing.

Overall, the DOGGR’s proposed regulations closely follow Senate Bill 4 although they do incorporate some of the language and many of the concepts used in the DOGGR’s pre-rulemaking regulations.

Interim Regulations Intended to Take Effect January 1, 2014

Following the publication of the notice of rulemaking for these regulations contemplated by Senate Bill 4, the DOGGR published a notice of proposed emergency rulemaking on December 11, 2013, accompanied by the text of proposed interim regulations (the “Interim Regulations”). The comment period for the proposed Interim Regulations was short, ending just five days after its proposal. Moreover, the DOGGR is not required to respond to comments.

The DOGGR notice says that the Interim Regulations are required because of its finding that emergency regulations are “necessary for the immediate preservation of the public peace, health and safety, or general welfare.” The finding of an emergency is based on an express grant of authority in Cal. Pub. Res. Code Section 3161(b)(6) that refers to emergency authority during the period prior to the adoption of regulations, as well as the practical issues of implementing the other provisions of Senate Bill 4 that will be in effect commencing 2014.

Senate Bill 4 does not impose a moratorium on well stimulation during this interim period, but instead requires issuance of a permit by the DOGGR based on certification by the applicant of certain matters. This self-certification and permit process requires a set of definitions and standards that are established by the Interim Regulations.

In addition, the Interim Regulations provide detailed guidance concerning the notices to the DOGGR and notices to neighbors, as well as interim model groundwater monitoring criteria.

In summary, the Interim Regulations are expected to take effect on January 1, 2014, and are intended by the DOGGR to implement the “interim grace period from SB 4’s permitting requirement” during 2014. The stated goal is to provide certainty and clarity for industry in order to permit hydraulic fracturing and other well stimulation to take place based on the self-certification process while Senate Bill 4 is more fully implemented.

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Endnote

¹ Available at <http://www.mayerbrown.com/California-Moves-to-Further-Regulate-Unconventional-Oil-and-Gas-Production-A-Review-of-Senate-Bill-4-and-Its-Potential-Impact-on-Shale-Development-in-the-Golden-State-11-04-2013/>.

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