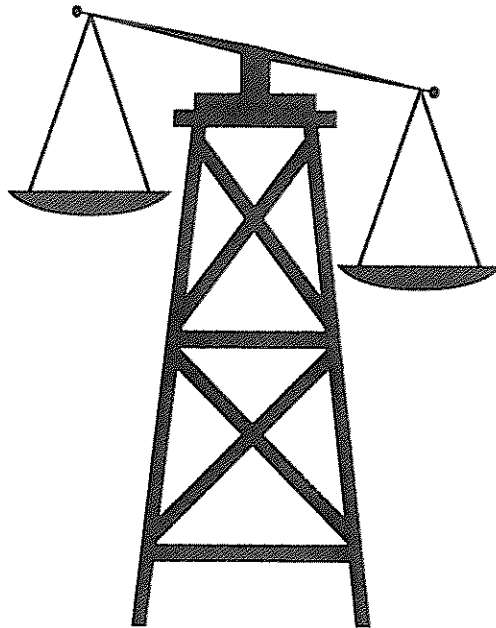


TEXAS A&M LAW REVIEW

2014 SURVEY ON
OIL & GAS



TEXAS A&M UNIVERSITY
SCHOOL OF LAW

CALIFORNIA



By: Edward S. Renwick

I. INTRODUCTION

According to the 2012 Preliminary Report of California Oil and Gas Production Statistics, which was released in April 2013, there were 3,586 notices of intention to drill filed with the Division in the year 2012.¹ This contrasts with 4,033 notices of intention to drill in the year 2011.² 3,081 wells were actually drilled in 2012 as opposed to 2,294 wells actually drilled in 2011.³ 2,195 of the wells actually drilled in 2012 were completed to production whereas 2,342 wells drilled in 2011 were completed to production.⁴ In 2012 footage drilled was 9,058,565 whereas in 2011 footage drilled was 5,641,077.⁵ Total oil production in California for 2012 was 197.5 million barrels, and in 2011 it was 196.8 million barrels.⁶ Natural gas production in 2012 was 222.4 billion cubic feet, and in 2011 it was 244.4 billion cubic feet.⁷ Thus activity in the California upstream oil and gas sector reached a plateau in 2012 and remained roughly equal to or perhaps even slightly below the activity in 2011.⁸

1. Div. of Oil, Gas, and Geothermal Res., Dep't of Conservation, 2012 Preliminary Report of California Oil and Gas Production Statistics (2012), ftp://ftp.consrv.ca.gov/pub/oil/annual_reports/2012/PR03_PreAnnual_2012.pdf.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

II. CASE LAW

During the period September 1, 2012, through August 31, 2013, there have been no significant upstream or midstream oil and gas appellate cases reported in California. There has, however, been considerable trial court activity.

In August 2012 the Center for Biological Diversity gave formal notice of intent to the Bureau of Land Management (BLM) to sue under the Federal Endangered Species Act contending that issuing oil and gas leases in California's Monterey Shale Formation play and the probable ensuing hydraulic fracturing threatens habitat for endangered species, including California Condors and the San Joaquin Kit Fox.⁹ Thereafter the Center filed a law suit against the BLM, styled *Center for Biological Diversity v. Bureau of Land Management*.¹⁰ The complaint alleges that the BLM violated federal law in issuing the leases.¹¹ It claims that the environmental studies did not adequately consider the development impact of hydraulic fracturing techniques and therefore violated the National Environmental Policy Act.¹² In early 2013 the court ruled that the leases in question (which were issued in Monterey and Fresno Counties) did violate the National Environmental Policy Act because they relied on old studies that predated the use of horizontal drilling and hydraulic fracturing in shale formations.¹³

On October 16, 2012, the Center for Biological Diversity, Earthworks, Environmental Working Group, and the Sierra Club filed a similar lawsuit in Alameda County Superior Court against the California Department of Conservation and its Division of Oil, Gas and Geothermal Resources.¹⁴ The complaint alleges that the Division was violating the California Environmental Quality Act by approving and issuing permits for new oil and gas wells. The plaintiffs sought a declaratory judgment that the Division of Oil, Gas and Geothermal Resources violated the California Environmental Policy Act by issuing permits without a sufficient analysis of the environmental impacts of hydraulic fracturing.¹⁵

9. *60-Day Notice of Intent to Sue BLM for Failing to Reinitiate Endangered Species Act Consultation Regarding its Oil & Gas Leasing Activities in California*, BIOLOGICAL DIVERSITY (Aug. 29, 2012), http://www.biologicaldiversity.org/campaigns/california_fracking/pdfs/BLM_Fracking_ESA_Notice_8_29_12.pdf.

10. *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 937 F. Supp. 2d 1140 (N.D. Cal. Mar. 31, 2013).

11. *Id.* at 1144.

12. *Id.*

13. *Id.* at 1161.

14. *Ctr. for Biological Diversity v. Cal. Dep't of Conservation*, No. RG13664534 (Alameda Cnty. Super. Ct., Cal. Oct. 16, 2012), *dismissed*.

15. *Id.* Because of the enactment of SB 4, which creates a detailed scheme for regulating hydraulic fracturing, the court has dismissed this case as moot. *Id.*

On January 24, 2013, the Center for Biological Diversity filed another lawsuit in Alameda County Superior Court.¹⁶ Its theory is that the Division of Oil, Gas and Geothermal Resources is failing to regulate and supervise hydraulic fracturing under California's underground injection control program.¹⁷

On July 10, 2013, the Center for Biological Diversity filed yet another lawsuit, this time against San Benito County alleging that when the San Benito County Planning Commission unanimously approved a project to drill up to fifteen test wells over a two year period, and when the County Board of Supervisors subsequently approved the project, they failed to sufficiently analyze the project's environmental impacts under the California Environmental Quality Act.¹⁸

In addition to environmental groups challenging oil and gas operations in California, royalty litigation has finally come to California. Until recently royalty litigation that is common in other oil and gas producing states had been rare in California. However, that may be changing. On March 22, 2013, The Melissa D. Duflock Revocable Trust filed a class action against Chevron Corporation, Chevron U.S.A. Inc., and Chevron San Ardo Energy Company in the Superior Court of California for the County of San Luis Obispo.¹⁹

The complaint alleges that Chevron has failed to pay the full royalties owed to Plaintiff and other owners of leases in California.²⁰ Plaintiff filed the action on behalf of itself and a larger class of similarly situated parties defined as "all present and former owners of royalty interests which burden oil and gas leases and wells in California now or formerly held by" Chevron.²¹ Based on this definition of the class, Plaintiff believes there to be many hundreds of potential class members.²²

Defendants removed the case to the United States District Court, Central District of California on March 3, 2013.²³ Plaintiff filed a motion to remand on June 3, 2013.²⁴ On August 14, 2013, the Court

16. Ella Foley Gannon, *Calif.'s Road To Fracking Regulation Will Be Bumpy*, BINGHAM (Mar. 6, 2013), <http://www.bingham.com/Publications/Files/2013/03/Calif-s-Road-to-Fracking-Regulation-Will-be-Bumpy>.

17. *Id.*; see CAL. CODE REGS., tit 14, §§ 1724–1724.10 (2013).

18. *Ctr. For Biological Diversity v. San Benito Cnty.*, No. M123956, (Monterey Cnty. Super. Ct., Cal. July 10, 2013); see also *Lawsuit Targets San Benito County's Approval of 15 Oil Wells in Endangered Condor Habitat*, INDYBAY (July 13, 2013), https://www.indybay.org/newsitems/2013/07/13/18739742.php?show_comments=1.

19. *Melissa D. Duflock Revocable Trust v. Chevron Corp.*, No. #CV130147 (San Luis Obispo Cnty. Super. Ct., Cal. Mar. 23, 2013), *removed*, 2013 WL 4236397 (C.D. Cal. Aug. 14, 2013).

20. *Id.*

21. *Id.*

22. *Id.*

23. *Melissa D. Duflock Revocable Trust*, 2013 WL 4236397.

24. *Id.*

granted the motion to remand.²⁵ Accordingly the case is now back before the San Luis Obispo County Superior Court.

III. LEGISLATIVE ACTION

So far as the upstream oil and gas industry is concerned most of the significant legislative activity at the state capitol this year revolved around hydraulic fracturing. Numerous bills were introduced, some seeking a moratorium on hydraulic fracturing. In the end the one bill to survive and be signed into law was Senate Bill No. 4 by Senator Pavely.²⁶ As passed it does not contain a moratorium.

In summary SB 4 provides as follows. It requires the Secretary of the Natural Resources Agency to conduct and complete prior to January 1, 2015, an independent scientific study on well stimulation treatments including acid well stimulation and hydraulic fracturing.²⁷ It requires an owner or operator of a well to record and include all data on acid treatments and well stimulation treatments.²⁸ It requires the Division of Oil, Gas and Geothermal Resources in consultation with the Department of Toxic Substances Control, the State Air Resources Board, the State Water Resources Control Board, the Department of Resources Recycling and Recovery, and any local air districts and regional water quality control boards where well stimulation may occur to adopt rules and regulations specific to well stimulation.²⁹ The rules and regulations are to be adopted by January 1, 2015, and must include rules governing the construction of wells and well casing and full disclosure of the composition and disposition of well stimulation fluids.³⁰

The bill requires operators to obtain a permit prior to performing well stimulation treatment and provides that the permit expires one year after issuance.³¹ A copy of the permit must be provided to tenants and property owners thirty days prior to commencing treatment, and the operator must notify the Division of Oil, Gas, and Geothermal Resources seventy-two hours prior to commencing treatment.³² Suppliers claiming trade secret protection for the chemical composition of their treatment fluids must disclose that information in connec-

25. *Id.* (docket information available at <http://dockets.justia.com/docket/california/cacdce/2:2013cv03177/561230>).

26. S. 4, 2013-2014 Reg. Sess. (Ca. 2013). Amends sections 3213, 3215, 3236.5 and 3401 of, and adds Article 3 (commencing with section 3150) to chapter 1 of Division 3 of, the Public Resources Code, and adds section 10783 to the Water Code. *Id.* Approved by the Governor September 20, 2013, and filed with the Secretary of State September 20, 2013. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

tion with their well treatment permit application, but those with access to that information are prohibited from disclosing it.³³

The bill also requires the State Water Resources Control Board to protect groundwater by developing before July 1, 2015, a groundwater monitoring criteria on how to conduct appropriate monitoring on wells subject to well stimulation treatments.³⁴

The bill imposes criminal penalties for certain violations and also provides for civil penalties for certain violations.³⁵

The bill is unclear as to what extent the acid treatment of waste water disposal wells is covered by the law. In order to keep production wells, particularly those with a high water cut, in operation waste water disposal wells must often be acid treated on very short notice. If such wells are subject to SB 4, the permitting and advance notice provisions of the law do not appear to take into account the reality of oil field operations.

Now that California has enacted a law that regulates hydraulic fracturing but does not prohibit it, anecdotal evidence suggests the efforts of those who wish to ban the practice may be shifting to local governments. For instance, the Author is aware of efforts in San Benito County and in the City of Los Angeles to do so.

The Legislature also enacted, and Governor Brown signed into law, a surface owner notification law.³⁶ AB 1966 amends section 848 of the Civil Code to provide that where there are separate surface owners and mineral owners, the mineral owner cannot come on the property without first giving notice.³⁷ For non-disturbance activity five days' notice is required upon first entry.³⁸ For surface disturbance activity thirty days' notice is required upon first entry.³⁹ The law went into effect on January 1, 2013.⁴⁰

IV. REGULATORY ACTION

Regulatory activity in California has been focused on hydraulic fracturing. Even before the adoption of SB 4, the Governor had instructed the Division of Oil, Gas and Geothermal Resources to study hydraulic fracturing regulation. In December 2012 the division staff released a discussion draft of such regulations.⁴¹ This discussion draft

33. *Id.*

34. *Id.*

35. *Id.*

36. A.D. 1966, 2013-2014 Reg. Sess. (Cal. 2013) (approved by the Governor September 25, 2012, and filed with the Secretary of State September 25, 2012).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Pre-Rulemaking Discussion Draft*, CAL. DEP'T CONSERVATION (Dec. 18, 2012), http://www.conservation.ca.gov/dog/general_information/Documents/121712DiscussionDraftofHFRegs.pdf.

does not initiate a rulemaking process.⁴² Instead it is a starting point for discussion by interested parties in preparation for a more formal process, which now will be dictated by the requirements of SB 4.⁴³

42. *See id.*

43. *Id.*