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Governor Signs Senate Bill 4, Imposing New Requirements on Hydraulic Fracturing

Earlier this year, we issued an alert regarding the passage of California Senate Bill 4 that would require significant information to be disclosed by companies that engage in hydraulic fracturing (HF). After a series of amendments and fierce lobbying by environmental groups and the petroleum industry, the bill was approved by both houses and signed into law by Governor Jerry Brown on September 20, 2013. The law will have important consequences on the oil and gas industry, including new permitting, notice, and disclosure requirements. It also poses additional obstacles to protecting trade secrets.

Scientific Study and Regulation of Well Stimulation Treatments

A key feature of the new law is an independent scientific study under the auspices of the Natural Resources Agency, to be conducted and completed by January 1, 2015. The study will evaluate all aspects and effects of well stimulation treatments (a term added by the amendments that includes both HF and acid well stimulation treatments), including human health, environmental and ecologic impacts; seismic impacts; and ultimate reuse, recycling and disposition of materials involved in the operations. Progress reports on the study from the secretary of the Natural Resources Agency will be required every four months beginning on or before April 1, 2014, until the study is completed, including a peer review of the study by independent scientific experts.

Also before January 1, 2015, the Natural Resources Agency, in collaboration with the Department of Toxic Substances Control, State Air Resources Board, State Water Resources Control Board, Department of Resources Recycling and Recovery, local air districts, and regional water quality control boards, are to adopt rules and regulations specific to well stimulation treatments. The various agencies and boards are also instructed to determine and specify how authority, responsibility, and notification and reporting requirements will be divided among each public entity, and to delineate this division of authority in interagency formal agreements, to be completed on or before January 1, 2015.

Permitting Requirements

As we reported initially, the regulations will require a well owner or operator that intends to engage in well stimulation treatments to apply for a permit from the state oil and gas supervisor or a district deputy. The permit application will require such information as the well identification and location; the time period during which HF is planned to occur; an estimate of the amount of water to be used and its source; the planned location of the HF treatment on the well bore; the estimated length, height, and direction of the induced fractures; and a complete list of the names, Chemical Abstract Service numbers, and estimated concentrations of every chemical constituent of the HF fluids to be used. The amendments now additionally require a water management plan and a groundwater monitoring plan.

Upon approval, the permit will be posted on a public website within five business days. The operator will also be required to provide a copy of the permit at least 30 days prior to commencing an HF treatment to every surface property owner within a 1,500-foot radius of the wellhead, and within 500 feet from the horizontal projection of all subsurface portions of the designated well to the surface. Moreover, the law requires the operator to contract with an independent entity or person to provide the notice to property owners. Then, the

operator must also provide notice to the Division of Oil, Gas, and Geothermal Energy at least 72 hours prior to the actual start of the HF treatment to facilitate divisional "spot checks," which are also mandated by the bill. Once the HF has ended, the operator will be required within 60 days to post a notice on a public website of the HF fluid composition and disposition.

Water Quality Sampling and Testing

Once notice has been provided to property owners as described above, the property owners so notified will be allowed to request water quality sampling and testing from a designated qualified contractor on any water wells or surface water suitable for drinking or irrigation purposes. The well owner or operator who wants to engage in well stimulation (not the property owner) is required to pay for the sampling and testing. Results of the testing will then be provided to the division, regional water board, and property owner. The sampling and testing by the designated third-party contractor will be subject to audit and review by the State Water Resources Control Board or the regional water control board, as applicable.

Trade Secret Protection

One key area of concern will continue to be problematic: protection of trade secrets. We reported earlier that SB 4 provided some degree of trade secret protection, but nevertheless required disclosure, even when trade secret protection is invoked. The enacted legislation still requires disclosure, and trade secret protection of well stimulation treatment fluids has been even further weakened by the express exclusion from protection as a trade secret the identities of the chemical constituents of additives, the concentrations of the additives, and the chemical compositions of flowback fluids.

The amendments further require that suppliers provide information to the division to help assess a trade secret claim, including the extent to which the trade secret is known by the supplier's employees and others involved in the supplier's business and outside the supplier's business, the measures taken by the supplier to guard the secrecy of the trade secret information, the value of the trade secret information to the supplier and its competitors, the amount of money or effort the supplier expended to develop the trade secret information, and the ease or difficulty with which the trade secret information could be acquired or duplicated by others.

If the division then determines that the information is not entitled to trade secret protection, the supplier has only 60 days to get a declaratory judgment or preliminary injunction before the information is released to the public. The enacted legislation also retains a similar provision that releases the trade secret information within 60 days of a request for release of the information by the public unless declaratory judgment or a preliminary injunction is obtained. Given the dissatisfaction environmentalist groups have already expressed with the trade secret protections of the enacted legislation, it can be expected that they will attempt to take full advantage of this provision that allows them to force disclosure, or at a minimum, the expense and hassle of litigation. It will be especially important for companies to implement procedures to ensure that the certified mail notices from the division of impending disclosure are received and handled promptly and appropriately.

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