 California's Division of Oil, Gas & Geothermal Resources (DOGGR) has released its proposed regulations governing hydraulic fracturing pursuant to Senate Bill 4, controversial legislation signed into law this September. DOGGR's November 15 public notice begins its formal rulemaking process and marks the start of a 60-day public comment period for the new rules. DOGGR also filed its Notice of Preparation for a statewide Environmental Impact Report required to be conducted pursuant to SB 4.

The new regulations were released on the heels of a letter signed by group of twenty climate scientists sent to California Governor Jerry Brown calling for a moratorium on the controversial practice. As the vast majority of fracking in California is in pursuit of oil—including in the Monterey Shale—the letter highlights the incongruity between California's apparent green lighting of fracking with the passage of SB 4, and the State's ambitious climate and clean energy goals as memorialized in legislation such as AB 32, SB 375, and programs including the Low Carbon Fuels Standard and 33% Renewable Portfolio Standard (RPS) which the Governor himself recently touted as a floor, not a ceiling.

In September, Governor Brown signed California's first fracking bill, SB 4, which will require oil and gas companies to apply for a permit to conduct fracking, publicly disclose the fracking chemicals they use, notify neighbors before drilling, and monitor ground water and air quality, among other requirements. Rick presented a summary and analysis of the bill, here.

Earlier this year, Berkeley Law's Center for Law, Energy & the Environment, through our Wheeler Institute for Water Law & Policy, produced a comprehensive report on hydraulic fracturing and water resources in California, intended to identify water quality issues that require more regulation and additional scientific study, and inform the policymaking process. Co-authored with my colleague Michael Kiparsky, our report provided recommendations for better oversight and regulation of hydraulic fracturing in the State.

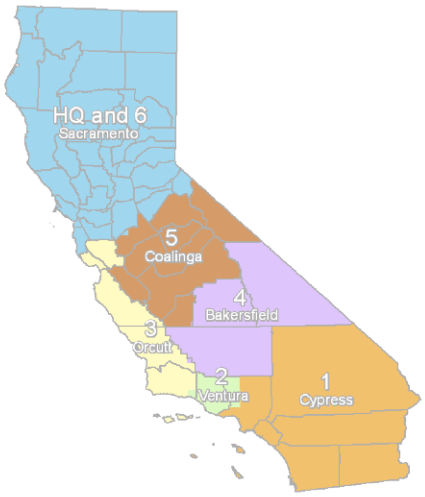
SB 4 and DOGGR's new regulations incorporate many of the report's recommendations, such as:

- Requiring 30 days advance notice to all property owners and residents in the vicinity of planned fracking sites;
- Conducting groundwater testing and monitoring before and after every fracking event;
- Mandatory reporting on the volume of water used and disposition of fracking wastewater;
- Requiring full disclosure of all chemicals used in fracking, with reporting to a publicly accessible, searchable website;
- Requiring seismic testing and mapping of all fault zones prior to any fracturing event;
- Greater coordination among agencies to ensure information sharing and accountability; and
- Requiring an independent, peer-reviewed scientific study that evaluates the risks of fracking.

These measures are an important step in the right direction. Indeed, prior to SB 4, state regulators at DOGGR came under fire for failing to comprehensively track and monitor—let alone adequately regulate—fracking in California.

But as written, SB 4 itself creates confusion and has upset many environmentalists who supported prior, stronger versions of the bill. Confusion stems primarily from the bill's late amendments addressing environmental review under the California Environmental Quality Act (CEQA), and the alleged mandate for DOGGR to approve all fracking permits even before the agency conducts a statewide environmental impact report.

CEQA Logic Games



DOGGR districts

The new law orders the State, by July 15, 2015, to conduct an environmental impact report (EIR) pursuant to CEQA, analyzing the effects of hydraulic fracturing statewide. On Friday, DOGGR issued a Notice of Preparation under CEQA for this statewide EIR. The Notice contains very few details but does indicate that "due its geographic extent, and the diversity of environmental and anthropogenic attributes associated with it, the EIR will evaluate the potential impacts of the Proposed Project [fracking, defined broadly] according to DOGGR's six administrative Districts."

While this statewide EIR, alone, should not change the applicability of CEQA review for individual fracking events between now and July 2015, SB 4 also contains language stating that DOGGR "shall allow" fracking in this interim period if minimum requirements are met. This led the Western States Petroleum Association (WSPA) and DOGGR to now argue that SB 4 releases oil and gas companies from any CEQA review until the statewide EIR is complete and the new regulations are in place. In December, DOGGR is expected to release emergency regulations to govern this "streamlined interim procedure" in which, in DOGGR's own words, "owners or operators may proceed with well stimulation treatments without a permit if they comply with specified provisions of the Act."

One outcome at stake is a lawsuit filed in 2012 by a group of environmental groups, represented by Earthjustice, challenging DOGGR's alleged "pattern and practice" of approving fracking permits without adequate environmental review under CEQA, instead finding fracking projects to fall within categorical exclusions for "minor alterations to land," or issuing negative declarations finding that such projects will not have a significant effect on the environment.

The Western States Petroleum Association now argues that the lawsuit is moot, citing SB 4's "shall allow" language. DOGGR filed a very short brief concurring with WSPA, stating that SB 4 "provides that until the new regulations are in place, ministerial well permits shall be issued based on written certification from an owner or operator demonstrating compliance with specified portions of S.B. 4."

The larger question is, what level of CEQA review is DOGGR is required to undertake for individual fracking projects between now and July 2015? DOGGR's statements appear to indicate that the agency believes that no CEQA review is required in 2014 at all, assuming the basic requirements of SB 4 and the agency's forthcoming emergency regulations are met. But even after the new regulations are in place and the statewide EIR is complete, that does not necessarily mean that project-level CEQA review should cease. A statewide EIR will address a much less individualized set of environmental issues than a project-specific EIR. And a statewide EIR will not provide the public notice, comment, and judicial review benefits that project-specific CEQA review does. SB 4 contains no express statement that fracking and acidization projects shall be exempt from CEQA. In addition, Governor Brown's signing statement accompanying SB 4 states that DOGGR should "group permits together" according to shared characteristics; CEQA review may be appropriate for such groups of permits if they share common characteristics such as location, geological conditions, natural resources, planned inputs, and more. An existing example is the Baldwin Hills Community Standards District and corresponding EIR.

State Senator Fran Pavley, lead sponsor of the bill, has stated that the controversial "shall allow" language "is not intended to exempt existing laws, regulations and orders that may require additional review or mitigation." She appropriately pointed to other wording in SB 4 stating that "this article does not relieve the division or any other agency from complying with any other provision of existing laws, regulations, and orders."

In other words, nothing in SB 4 states that CEQA no longer applies to fracking or acidization projects, which still require agency approval. Quite to the contrary: "all existing laws, regulations and orders that may require additional review or mitigation" apply. Thus, by one reading, it is still incumbent on DOGGR to determine on a project-by-project basis the appropriate level of CEQA review required, including whether a categorical exemption or negative declaration may be appropriate. As such, there is also a viable argument that the Earthjustice lawsuit is not moot, and the question of appropriate CEQA review for individual fracking projects would still benefit from judicial review.

Thoughtful clarifying amendments in the next legislative session on this issue may serve the interest of both the environmental and regulated communities.

Dueling Timelines

Another source of confusion and criticism is the apparent mismatch between when the statewide EIR must be completed and certified (July 15, 2015), and the deadline for DOGGR to adopt its rules and regulations governing fracking wells, disclosure, and operations (January 1, 2015). This places DOGGR's rules and regulations ahead of the statewide EIR. Therefore, the new rules and regulations may be issued before fully assessing and accounting for the suite of potential significant environmental effects posed by fracking. Indeed, a better solution would be to have the final rules issued after this EIR is complete, or at least re-evaluate and/or revise the rules in light of the statewide EIR. In the interim, perhaps a moratorium on larger projects, as New York has done, is preferable. At minimum, the State needs a system in place to analyze potential environmental impacts on a case-by-case basis before the final regulations are implemented.

In addition, DOGGR may need to prepare a separate EIR under CEQA for the development of its new regulations, just as CARB had to comply with CEQA in issuing the AB 32 Scoping Plan and Low Carbon Fuel Standard. This may lead to two parallel CEQA processes: one assessing the environmental impacts of DOGGR's new regulations, and the other a statewide EIR for well stimulation and hydraulic fracturing generally, as directed by SB 4. To-date, DOGGR has only issued a Notice of Preparation for the latter, and has not indicated whether it plans to conduct a second EIR for its regulatory program.

Assessing GHG Emissions, Compliance with Low Carbon Fuel Standard

A statewide EIR on the impacts of fracking and well stimulation treatments should also assess GHG emissions, including the potential for fugitive methane leakage from fracking and the carbon intensity of oil production. State Appellate Courts have confirmed that GHG impacts should be evaluated through CEQA. (*See, e.g., CBE v. City of Richmond* (2010) 184 Cal.App.4th 70).

Further, oil produced in California and ultimately used as a fuel in this State will be subject to the Low Carbon Fuel Standard (LCFS) implemented by the Air Resources Board, which places a cap on the average carbon intensity of transportation fuels in California's market. The LCFS recently withstood industry challenge, resulting in a favorable Ninth Circuit ruling. Because the LCFS takes a lifecycle approach to calculating carbon intensity, methane leakage, production techniques, land use changes, and the carbon footprint of the fuel itself will all be relevant to compliance with the program. California oil has historically been carbon intensive to produce. This may incentivize California oil producers to make operations more efficient, or risk losing the in-state market.

Not in My Orchard

With the passage of SB 4, we may also see an increase in local bans on fracking at the city and county level in California. This month, three Colorado cities approved bans on the practice. More than 100 municipalities have enacted similar legislation. A number of California cities have already enacted bans, although some are largely symbolic—in areas that are not expected to see any fracking activity. But with rising tensions between oil and agricultural interests in the State, both of which need ample water and land to conduct operations, we may see an increase in city or county-level bans.

While the legality of local bans will depend on the precise language used, cities and counties have longstanding zoning and land use powers which they can and do exercise to limit projects within jurisdictional boundaries. For example, San Bernardino County has an existing ban on the development of commercial-scale solar power facilities. Local bans on fracking have been upheld by courts in New York and in Pennsylvania. SB 4 itself does not contain language concerning preemption of other local laws. Rather, the "savings clause" cited above indicates that all other applicable laws still apply, including local laws. Therefore, the door is open for more local bans or restrictions on hydraulic fracturing in California.