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Calif.'s Fracking Rules On Deck For Environmental Fight

By Erin Coe

Law360, San Diego (December 21, 2012, 9:57 PM ET) -- California's new draft regulations for hydraulic fracturing are likely to face challenges from environmental groups over how much notice energy companies need to give the public before using the oil and gas extraction process and how much they have to disclose about the chemicals they use, experts said Friday.

The state Department of Conservation on Tuesday released proposed rules that would require energy companies to reveal the location of the wells where fracking is done as well as disclose the chemicals they use as part of the process, but the proposals also include short timeframes for disclosure and an exemption for trade secrets that could draw fire from environmental advocates, experts said.

Although the draft is aimed at launching discussions among stakeholders and does not initiate the formal rulemaking process, if the current proposals were adopted, conservation groups would be more likely than the energy industry to attack them, according to experts.

"The draft regulations would not have a significant negative impact on the energy industry, and I don't feel that the regulations are too onerous," said Kevin Poloncarz, a Paul Hastings LLP partner. "But if they were adopted in this form, they would likely face a challenge from the environmental community."

Under the draft rules, energy companies would be required to do their own testing and certify a well is appropriate for fracking, in which a mix of fluids is injected at high pressure deep into oil and gas reservoirs to fracture the rock. They would have to submit notification to the DOC's Division of Oil, Gas and Geothermal Resources 10 days before conducting fracking operations and provide the public with three days of notice, but groups were likely to argue that the three-day window was too short for the public to react before fracking operations begin, according to Poloncarz.

"I imagine that a lot of folks are going to claim that is not enough time to provide interested stakeholders, such as landowners and individuals in the environmental community, to evaluate whether the proposed operation meets the standards and whether it is truly going to be protective of groundwater," he said.

Environmental groups may try to argue for more robust requirements that force energy companies to go beyond providing an affirmative response that their operations meet the DOC's standards and make them spell out whether the use of the fracking procedure on a particular well has any potential environmental impacts, Poloncarz said.

The draft rules also allow companies to withhold what chemicals they use in the fracking process if they are considered trade secrets, and conservationists are expected to contend that the provision could encourage companies to use trade secret protection quite broadly to avoid having to reveal key information on what substances are being injected into the ground, according to experts.

"What environmentalists strongly believe with some basis is that a trade-secret exemption can swallow the rule," said Jon Welner, a Jeffer Mangels Butler & Mitchell LLP partner. "If companies are required to disclose what chemicals they use except what they consider a secret, based on experiences from other states, many chemicals will be considered secret."

The fact that the proposed rules are designed to be a discussion draft shows that the DOC wants to ease into the controversial debate over fracking, according to Welner. While these draft rules mainly focus on disclosure issues, the DOC and other state agencies are still going to need to address a host of other environmental concerns, including air and water pollution issues, and more regulations are likely on the horizon, he said.

"The DOC is putting its toe into the water and taking an important first step, but we have a long way to go in regard to regulations on different aspects of hydraulic fracturing," he said. "All of this is going to be unfolding over the next few years."

The draft regulations on the subject of disclosure may prompt the DOC to also take a closer look at whether regulations on well integrity, which ensure that energy companies' activities in a well do not result in leaks into the groundwater, need to be expanded, according to Welner.

In addition, concerns that fracking contributes to the release of methane and other potential greenhouse gases into the air could lead to coordinated action by the DOC and the California Air Resources Board, while concerns over the reinjection of wastewater into wells could spur discussions between the DOC and the State Water Resources Control Board, he said.

"Some of the other issues around fracking are more significant environmentally than disclosure of chemicals used in fracking," Welner said. "But the issue of chemicals used in fracking is going to remain front and center primarily because it's alarming to the public."

A pending environmental suit that seeks to block any new approvals of natural gas projects that use fracking in California until state energy regulators step up their scrutiny of such wells could also influence the direction of fracking discussions at the DOC and other state agencies, according to experts.

The Sierra Club and other environmental groups sued in state court in October, claiming the DOGGR improperly exempted developments that use fracking from review under the California Environmental Quality Act or conducted only a superficial analysis.

This case raises the question of whether an environmental impact report should be required before a well permit can be issued, and a finding in favor of the plaintiffs could risk slowing oil production in the state to a halt, according to Welner.

"If the plaintiffs do prevail and energy companies have to do a lot more environmental review for each well, it would have a very significant impact in terms of the additional cost and time required in order to obtain a well permit," he said.

--Additional reporting by Megan Stride. Editing by Elizabeth Bowen.

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