

State Bar, Environmental Law Section Presents Update on Fracking Regulations

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The California State Bar, Environmental Law Section hosts an annual conference which welcomes attorneys and students from across the state to learn and discuss cutting edge environmental law issues. This year's Environmental Law Conference at Yosemite featured an insightful panel on hydraulic fracturing regulation. The panel, held on Sunday, October 19, was titled "Recent Developments in the Regulation of Fracking at the Federal, State, and Local Level." The four panelists each shared their experience and differing viewpoints in relation to their law practice.

Kassie Siegel, Senior Counsel at the Center for Biological Diversity, focused on hydraulic fracturing regulation at the federal level. She noted the lack of meaningful federal regulations and pointed out that fracking is exempt from several federal laws including the Clean Water Act, Toxic Substances Control Act, and the Resource Conservation and Recovery Act. Thus, fracking is not highly regulated by federal agencies and currently depends more on state and local oversight.

Eric Adair, a partner at Hinson Gravelle & Adair, spoke next and provided a realistic view of California's consumption and regulation of natural gas. Adair previously worked in Texaco's legal department, and has over 20 years of experience in this field of law. He began the presentation by stating, "California uses a lot of oil and gas." While noting that production of oil and gas does have environmental risks, he emphasized that every energy industry, including renewable development, carries risks if not conducted properly. The central issue for Adair is thus, "what is the increased risk of fracking" in comparison with other industries?

Adair noted that oil and gas regulations in California have existed since at least 1919, but Senate Bill 4 ("SB 4") is the first set of regulations specific to fracking. He then gave a brief overview of the past and upcoming regulatory action by the Department of Conservation ("DOC") under SB 4, including the Second Revision of the Proposed Final Regulations for well stimulation. Most notably, he detailed the regulatory requirements of SB 4: independent scientific study, disclosure of well stimulation fluids, trade secret information, neighbor notification, and so on. Although it does not encompass every impact of fracking, the regulatory scheme under SB 4 will provide a good indication of whether there is a substantial increased risk to human safety or environmental impact from fracking, says Adair. Additionally, the Division of Oil, Gas and Geothermal Resources ("DOGGR") will complete preparation of a statewide Environmental Impact Report ("EIR") by July 1, 2015. A representative from DOGGR was in attendance and forecasted that the Draft EIR will be public by the end of this year, 2014.

Adair also briefly touched on local regulation of fracking. State law preempts local regulation of fracking, and he mentioned the issue of regulatory takings that has come up in regards to fracking prohibitions. Local fracking prohibitions may be challenged on the grounds of an unconstitutional taking of private property if the mineral owner is unable to access his property: the natural gas or oil under the surface.

Lorelei Oviatt, the Director of the Kern County Planning and Community Development Department in Bakersfield, California presented next on the panel. She noted that fracking has been going on for more than 60 years in Kern County, in the absence of regulations prior to SB 4. She explained the actions that Kern County has taken in regards to efficient regulation: the county is implementing a streamlined permitting scheme and is emphasizing full disclosure to the public. Oviatt recognized that there are risks associated with fracking, echoing the statements of Adair, but she stated that Kern County “wants to have a reasonable risk.” Using cost-benefit analysis terminology, she explained the risk must be disclosed and reasonable in relation to the benefit gained from the extraction of natural gas. Kern County has already completed many EIRs. Addressing health concerns, Oviatt stated that in completing approximately 15 EIRs per year for multiple years in a row, Kern County has not found any water contamination as a result of fracking. She ended her presentation by asking, “so what should we do [in regards to fracking]?” Her response: “regulate it and make strict environmental standards.”

The panel ended with a presentation by Heather Minner, an attorney with Shute Mihaly & Weinberger, focused on regulation of fracking on the local level in California. She discussed recent local prohibitions on fracking, including failed and challenged attempts to prohibit fracking and successful prohibitions, such as in the County of Santa Cruz. There is currently no fracking in Santa Cruz, however. Minner detailed upcoming ballot measures in Santa Barbara County, Measure P, and Santa Benito County, Measure J, both which would prohibit land uses “that support high-intensity operations.” High-intensity operations include hydraulic fracturing. Minner noted that Santa Barbara’s Measure P authorizes the Board of Supervisors to grant exemptions, and thus allowing fracking, if necessary in order to avoid a taking. As Minner admitted, both of these ballot measures could be challenged if passed, likely under an unconstitutional taking or a state law preemption cause of action.