



December 24, 2013

*Via Electronic Mail*

Office of Administrative Law Reference Attorney  
300 Capitol Mall, Suite 1250  
Sacramento, California 95814  
[staff@oal.ca.gov](mailto:staff@oal.ca.gov)

Re: OAL File Number [2013-1219-01E](#) (Well Stimulation Treatment) Emergency Regulations

Dear Sir or Madam:

On behalf of the Center for Biological Diversity, Earthworks, Environmental Working Group, and Sierra Club and their members, we write to urge the Office of Administrative Law (OAL) to reject the Interim Well Stimulation Treatment Regulations proposed by the Department of Conservation, Division of Oil, Gas, and Geothermal Resources (DOGGR), published in the California Register and on OAL's website on December 19, 2013. The Interim Regulations put public health and safety at risk, and are inadequate to protect California's air, water, and climate. Furthermore, DOGGR's interim regulations do not comply with California law. The OAL should reject these interim regulations, and deny further reconsideration until DOGGR revises the regulations to comport with existing state law.

The proposed regulations are designed to implement Senate Bill 4, which takes effect January 1, 2014. The Interim Well Stimulation Treatment Regulations suffer from a fundamental legal flaw: they are based upon an erroneous legal interpretation of SB 4. The Well Stimulation Treatment Regulations proceed on the assumption that well stimulation or fracking can take place without formal permitting procedures and instead can proceed with only "check-the-box" oversight by the California Department of Conservation to determine whether the applicant has submitted an Interim Well Stimulation Treatment Notice with some of the information that an applicant must provide to meet the disclosure requirements of SB 4.

The interpretation of SB 4 incorporated into these proposed regulations would provide the Department of Conservation with virtually no oversight over fracking while final fracking regulations are being developed. This is a chilling proposition: DOGGR mindlessly—and ministerially—rubber stamps whatever fracking proposal industry can dream up. So, if industry wants to dump a carcinogen in a drinking-water source, or frack in an urban area, or inject 500 wells an acre, or continue fracking after fracking triggers an earthquake that levels a city—no problem. All the Department of Conservation bureaucrat can do is check the box and approve the project. This means that the Department of Conservation would have no ability whatsoever

to zone particular areas off-limits, set density standards on the amount of fracking in a particular area, say no to any chemical or any amount of any chemical, or put a stop to fracking on a temporary basis in the event of a documented environmental crisis. This check-the-box approach to oversight is about collecting basic information, not making sure that environmental problems don't arise, or if they do, they can be stopped in their tracks. The law provides no such thing.

Section 3161(b) doesn't say "allow fracking everywhere, every time, every proposal." Instead, it provides that the Department of Conservation must allow some fracking when and if the conditions are right. § 3161 (b) ("The division **shall allow**, until regulations governing this article are finalized and implemented, and upon written notification by an operator, all of the activities defined in Section 3157, **provided** all of the following conditions **are met**") (emphasis added). The rest of subsection (b) provides several itemized conditions that must be met before interim fracking is allowed.

Section 3161 (b) lays out a plan for whether—and under what conditions—fracking can take place while new fracking regulations are being finalized and implemented on or before January 2015. Section 3161 (b) imposes some duties on the Department of Conservation, and some duties on the "owner or operator." The Department of Conservation must determine whether the listed conditions are met, not the owner or operator. Section 3161 (b) is unequivocal that unless "**all**" the conditions "**are met**"—**not will be met, or could be met in the future**—the interim fracking authorization specified in § 3161 (b) is not triggered. The role of the owner or operators is limited to § 3161 (b)(1) and (b)(2). It is DOGGR—not the applicant (and certainly not the applicant's submission of an Interim Well Stimulation Notice)—that must assure compliance with every other provision of § 3161(b).

Section § 3161(b)(4)(A) requires that the fracking EIR be "certified" (finalized) by DOGGR before interim fracking takes place. If DOGGR wants to fast track authorization of interim fracking, it need only get going on the mandatory pre-conditions clearly laid out in § 3161(b), including finishing the EIR. Should DOGGR complete the EIR before final fracking regulations are completed "on or before January 1, 2015," then § 3161(b) would allow interim fracking with DOGGR providing oversight. This process would allow the state legislature to intervene in the event that the EIR depicts horrific environmental consequences from fracking that should be averted.

An additional § 3161(b) precondition is that DOGGR ensure that "all activities pursuant to this section fully conform . . . [to] all other applicable provisions of law," which would include the California Environmental Quality Act ("CEQA"). § 3161(b)(5). While the legislature granted emergency regulatory authority in § 3161(b)(6), it did not authorize an end run on CEQA—in fact, time and again SB 4 emphasizes the need for CEQA compliance. § 3161(b)(6).

Some of the mandatory preconditions that DOGGR must assess before any interim fracking occurs pertain to dates after the completion of the fracking EIR or after the final fracking regulations are in place. Not a single timing condition states a date for a task that

prevents a mandatory condition from being completed at an earlier date. Every single one of the timing conditions sets a floor, not a ceiling. DOGGR must complete the listed actions before a date certain, but DOGGR has it totally in its power to complete those listed actions at an earlier date. This is the only reading of § 3161 that gives full meaning to every term, and doesn't just pick and choose which provisions to treat as law and which provisions to essentially say: "the state legislature just didn't mean what it said."

Section 3161 (b) imposes two requirements on the applicant. First, the applicant needs to provide the listed information in its interim permit application. That's laid out in § 3161 (b)(1). These proposed interim regulations address only that element of § 3161. But the second requirement imposed on the applicant by § 3161 is laid out in § 3161 (b)(2): the applicant is required to provide a "**complete**" well history. If the applicant doesn't provide a "complete" well history, the applicant hasn't met this standard. Section § 3161 (b)(2) gives the applicant until March 1, 2015 to provide the complete well history. But, a plain reading of this provision—like a plain reading of the other timing provisions that pertain to DOGGR—is that no interim fracking can take place until the applicant provides the complete well history. If they blow right by that mandatory precondition or fail to meet the completeness standard, the statute plainly says no interim fracking can take place.

Section 3161 must be read with § 3160; they are intertwined. The permitting process is laid out in § 3160. In addition to specifying the information industry must provide before DOGGR issues any fracking permits, § 3160 also provides that DOGGR has discretion to say no to fracking or condition its use. The key language is in § 3160 subsection (d)(3)(A), which expressly provides that the supervisor or district deputy reviews a "well stimulation treatment permit application" and the government officer "**may**"—not "**shall**"—approve the permit if the application is complete.

Elsewhere in § 3160, just a few lines prior to language that DOGGR "may"—not "**shall**"—approve the permit—the language of SB 4 expressly addresses CEQA and says if the fracking activities have been "fully described, analyzed, evaluated, and mitigated, no additional review or mitigation shall be required." § 3160 (d)(2)(B) ("Division 13 (commencing with Section 21000).") This language explicitly contemplates full CEQA review before a fracking permit is issued, thus undermining industry's argument that CEQA compliance can be ignored while a statewide EIR is being developed. This "no additional review or mitigation shall be required" provision is not a substantive standard, it's a timing condition. Before DOGGR "fully describes, analyzes, evaluates, and mitigates" a fracking proposal that industry submits, DOGGR holds all the cards. Once DOGGR does a full, complete, and appropriate CEQA review and imposes whatever mitigation is appropriate through that process, it's not allowed to have a "do over" or impose further conditions. It puts a premium on DOGGR doing CEQA right, it doesn't wipe out CEQA. By its own terms it instructs DOGGR to apply CEQA, and to do it right the first time.

Because the proposed interim regulations are fundamentally inconsistent with the express provision of SB 4, they should be withdrawn and no interim well stimulation should be permitted until all of the mandatory statutory preconditions clearly set forth in § 3161 are met.

Sincerely,

A handwritten signature in black ink that reads "William Rostov". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

William Rostov

Counsel for Center for Biological Diversity, Earthworks,  
Environmental Working Group and Sierra Club

Cc: *via electronic mail* to:

Department of Conservation

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ATTN: SB 4 Interim Well Stimulation Treatment Regulations

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