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### California

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# CALIFORNIA



By: Edward S. Renwick<sup>1</sup>

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## I. INTRODUCTION

Understanding the regulation of California upstream oil and gas operations required understanding a bit of history, geography, and demographics. First the history: Prior to 1911, California politics were dominated by the Southern Pacific Railroad Company. In that year a group of reformers elected Hiram Johnson as Governor.<sup>2</sup> A flood of reform legislation followed that among other things, was designed to prevent the concentrations of power that the Southern Pacific Railroad Company had enjoyed. Local governments followed suit.<sup>3</sup> The result is a regulatory system in which statewide regulatory agencies must share power with various local agencies.

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2. *California, INITIATIVE & REFERENDUM INST. U. S. CAL.*, <http://www.iandrinstitute.org/California.htm> (last visited Dec. 22, 2011).

3. *Id.*

The upstream oil and gas business, like all businesses, is impacted by all manner of regulatory agencies. The statewide agencies that uniquely regulate the upstream oil and gas industry are:

1. The California Division of Oil and Gas and Geothermal Resources (generally referred to as “DOGGR”), which issues well permits and regulates oil field practices; and<sup>4</sup>
2. The California State Lands Commission, which controls state lands and has proprietary control over oil and gas operations on state lands.<sup>5</sup>

And the local agencies that uniquely regulate the upstream oil and gas industry include:

1. The city councils of charter cities that have plenary and exclusive power over matters of local concern as opposed to matters of statewide concerns—for instance, charter cities have the power to ban oil and gas production within their boundaries;<sup>6</sup>
2. County planning commissions and, where applicable, city planning commissions that regulate land use;<sup>7</sup>
3. Local building departments which issue permits such as grading and building permits;<sup>8</sup>
4. Local air quality management districts and county air pollution control districts that issue air quality permits;<sup>9</sup> and
5. County energy agencies or commissions (in some counties) that among other things, review DOGGR well permits.<sup>10</sup>

Next, geography and demographics: California is really two states. One state is a coastal plain bounded on the west by the Pacific Ocean and on the east by a range of mountains. The coastal plain is highly urban, heavily populated, and politically liberal. In less than a lifetime, particularly in the southern one half of the state, the coastal plain has changed from being a sparsely populated land of farms, cat-

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4. *Oil, Gas & Geothermal*, CAL. DEP’T OF CONSERVATION, <http://www.conserva-tion.ca.gov/dog/Pages/aboutUs.aspx> (last visited Dec. 22, 2011).

5. *Land Management Division*, CAL. ST. LANDS COMMISSION, [http://www.slc.ca.gov/Division\\_Pages/LMD/Documents/LMD\\_Brochure.pdf](http://www.slc.ca.gov/Division_Pages/LMD/Documents/LMD_Brochure.pdf) (last visited Dec. 22, 2011).

6. *Regs. on Drilling, Operation, Maint., Abandonment of Oil, Gas, & Geothermal Wells*, 59 Op. Att’y Gen. 461 (1976), available at <ftp://ftp.consrv.ca.gov/pub/oil/publications/prc03.pdf>.

7. See CAL. CONST. art. XI, § 7 (West, Westlaw through 2011 Legis. Sess.); see also *DeVita v. Cnty. of Napa*, 889 P.2d 1019, 1031 (Cal. 1995) (stating that “[l]and use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7.”).

8. See CAL. CONST. art. XI, § 7; see also *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 194 P.2d 148, 152 (Cal. Dist. Ct. App. 1948) (indicating that “[l]egislation requiring issuance of permit by municipality as condition precedent to erection of structure on private property or to use that may be made of property, if reasonable, is valid exercise of police power.”).

9. *California Stationary Sources Permitting*, CAL. EPA (Apr. 20, 2010), <http://www.arb.ca.gov/permits/stationary-sources-overview.htm>.

10. See CAL. CONST. art. XI, § 7.

tle ranches, orange groves, and oil fields to an often densely populated land of housing projects, cities, and factories. The other California is a central valley bounded on the west by a range of coastal mountains and on the east by another mountain range. The northern part of the central valley comprises the Sacramento basin and the southern portion the San Joaquin Basin. Although changing, the central valley is still largely rural—a land of agriculture and oil and gas production. It tends to be politically conservative.

What generalizations can be drawn from this combination of history, geography and demographics, and the shared authority of statewide agencies and powerful local agencies? The majority of California voters live in the coastal plain. They, generally speaking, are not favorably inclined toward the oil and gas industry. As a result, the statewide agencies, with the exception of the DOGGR, tend not to be favorably inclined toward the oil and gas industry. The ranks of the DOGGR are filled with people who have come out of the oil and gas industry and thus, tend to be favorably inclined toward the industry.

The predilections and biases of local agencies depend on their location. In the coastal plain these agencies are answerable, either directly or indirectly, to a local electorate that tends to be anti-oil. As a result local agencies in the coastal plain tend to be anti-oil. In the central valley, these local agencies are answerable to an electorate that tends to be politically conservative and pro-oil. As a result, local agencies in the central valley tend to be pro-oil.

## II. CASE LAW

In the last twelve months, there have been no significant oil and gas cases reported in California. At first blush that may seem strange given the fact that California is the third largest oil and gas producer among the lower forty-eight states. Even when Alaska is considered that does not change. Alaska and California are in a virtual tie for third place. The explanation for this absence of appellate decisions may be explained by two facts. First, most California oil and gas fields were discovered many years ago and most title disputes have long since been decided. Second, California leases tend to be quite detailed and thus, rely on implied covenants to a much lesser degree than leases in other states. The absence of appellate oil and gas cases may change in the years ahead. High prices, the ability of California refineries to handle heavy crude, conflicts between oil and gas production and urbanization, the excitement over shale plays, and renewed interest in projects that squeeze more oil out of old oil fields may result in more oil and gas cases reaching the appellate courts in coming years. The Author is aware of several upstream oil and gas cases now in the trial courts that present title issues that may eventually find their way into the appellate courts.

### III. LEGISLATIVE ACTION

While any legislation affecting business will affect the upstream oil and gas business, there is only one piece of legislation in the twelve-month period that uniquely affects the upstream oil and gas business. AB 591 would amend Sections 3210, 3213, and 3215 of as well as adding Section 3017 to the California Public Resources Code.<sup>11</sup> In brief, it would require the DOGGR to compile a list of chemicals or components used in the process of hydraulic fracturing and to map every well where hydraulic fracturing has taken place.<sup>12</sup> The bill is still under consideration.

### IV. REGULATORY ACTION

#### A. State Level

First, California Division of Oil, Gas, and Geothermal Resources issued regulations required by AB 1960, the Minimum Facility Maintenance Requirements Act, which was passed in 2008.<sup>13</sup> The regulations provide for minimum facility maintenance standards and require regular inspections by DOGGR personnel and impose fees to reimburse the DOGGR for those inspections.<sup>14</sup> Interestingly enough, the law was prompted by a single oil and gas producer in Santa Barbara County generally considered by the oil and gas industry, the legislature, and the DOGGR to engage in poor oil field maintenance practices.

Second, California's old oil fields make a good deal of water. This water is normally disposed of in waste water disposal wells that inject the water into depleted oil formations. The DOGGR has responsibility for issuing the permits to inject. At the present, the head of the California Resources, of which the DOGGR is a division, is holding these permits. The oil industry is unclear as to when and if the processing of such permits in the normal course of business will resume.

#### B. Local Level

The following is a non-exhaustive listing of location regulations and ordinances that uniquely impact the upstream oil and gas industry.

1. Severance tax ordinances were presented as referenda on the Spring 2011 ballots of the City of Los Angeles and the City of Beverly Hills,<sup>15</sup> however, they were rejected by the voters.<sup>16</sup>

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11. Assemb. B. 591, 2011–2012 Reg. Sess. (Cal. 2011).

12. *Id.*

13. Assemb. B. 1960, 2008–2009 Reg. Sess. (Cal. 2008).

14. *Id.*

15. *Los Angeles County, California Ballot Measures*, BALLOTPEdia (Dec. 18, 2011, 8:06 AM), [http://ballotpedia.org/wiki/index.php/Los\\_Angeles\\_County,\\_California\\_ballot\\_measures](http://ballotpedia.org/wiki/index.php/Los_Angeles_County,_California_ballot_measures).

2. Santa Barbara County is in the process of updating the county ordinance dealing with “high risk operators.” The proposal provides that any oil and gas operator that has two spills of over fifteen barrels of oil field waste or oil outside of containment in a year’s time must be categorized as a “high risk operator” and be subject to additional regulations, inspections, and bonding requirements.<sup>17</sup>
3. The San Joaquin Valley Unified Air Pollution Control District issued draft regulations modifying the regulations covering steam enhanced crude oil production.<sup>18</sup>

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16. *Id.*

17. See SANTA BARBARA COUNTY, CAL. CODE OF ORDINANCES ch. 25, § 25-43 (2011).

18. Revisions to the California State Implementation Plan, San Joaquin Valley Unified Air Pollution Control District, 40 C.F.R. § 52 (2011), available at <http://www.federalregister.gov/articles/2011/11/16/2011-29466/revisions-to-the-california-state-implementation-plan-san-joaquin-valley-unified-air-pollution>.