Award Winning

The Override

Every Landman Wants One!

Volume VII, Issue VI | January, 2013

Los Angeles Association of Professional Landmen

Presidents Message

Rae Connet, Esq.
PetroLand Services

As we shake off the holiday slow down and jump back into our usual fast paced race there remains much to look forward to in the year ahead. Fracing continues to be the most significant political issue impacting drilling and leasing operations throughout the State. DOGGR has issued its proposed new regulations for comments and the South Coast AQMD is also weighing in. The challenge for landmen is to keep abreast of what's happening so that we are able to intelligently respond to questions from prospective lessors, land use agency staffers and the public at large with whom we deal on a daily basis. Fortunately, LAAPL has a terrific Legislative Affairs Committee to keep us informed. Please be sure to read the updates provided by Mike Flores and Olman Valverde of Luna & Glushon.

Things in the LA Basin continue much the way they have. The operators of the mature fields of Los Angeles are continuing their in-field development. Drilling permits are being issued and wells are being drilled, despite rumors to the contrary.

On a more personal side, our Treasurer, Sarah Downs, and our Membership Chair, Jason Downs, are expecting the birth of their first child any day now. So please send them both your good wishes for a safe delivery and healthy baby.

Our meeting this month is our joint meeting with the LA Geological Society in Long Beach. This is always a great meeting, as we step out of our contract and negotiating perspective and step into the world of the geologists. I hope to see you all there.

-L. Rae Connet

Inside This Issue:

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Meeting Luncheon Speaker

Hydraulic Fracturing and Groundwater: A Perspective from an LA Water District

The guest speaker for the Los Angeles Association of Professional Landmen and the Los Angeles Basin Geological Society annual joint luncheon is **Ted Johnson**, Chief Hydro-geologist, Water Replenishment District of Southern California

Ted oversees projects related to managed aquifer recharge and water quality protection for the Central Basin and West Coast Basin of southern Los Angeles County. Lately he has been researching the hydraulic fracturing process to assess potential risks to groundwater in the WRD service area. Ted has over 26 years of Southern Califonia groundwater experience and received his B.S. and HM.S. degrees from California

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Opinionated Corner

Joe Munsey, RPL
Newsletter Chair
Southern California Gas Company

Welcome back from the holidays. Trusting all enjoyed your version of the holidays; Christmas, Chanukah or Three Kings Days. Happy New Year! May all prospects produce hydrocarbons in paying quantities.

There appears an article in the October 29th, 2012 issue of the *National Review* in which the author, Bradley C. S. Watson, discusses the progressive law schools and the crises of constitutionalism. The article begins with the mention of one of the potentates of the United States Supreme Court, the Honorable Justice Ruth Bader Ginsburg, mixing it up with the boys of the Egyptian Arab Spring. Our Supremette was mourning the fact she labored under an old constitution. Such a yoke of burden she must carry and toil under. The Egyptian Arab Spring gang was informed if she was invited to be part of the "good ole boys club" in writing the new Egyptian Constitution she would not look to the U. S. Constitution as guidance. I am sure these Reformation enlightened pyramid builders thought to themselves, i.) girls are not allowed to participate in the process, ii) our constitution leans too close to Judeo/ Christian principles for their comfort, and iii.) Sharia law would be central to their constitution – meaning, church and state are one, not separate. Nice try your Honor – wrong part of the world to be discussing western societal reformation ideas. Whatever liberalism principals Egyptian President Morsi was taught and caught at the University of Southern California are now but fleeting moments of mischief he indulged himself in while doing his graduate studies here in the United States.

In the event you heard this reported in the nightly news at the time, or similar educationally related razzle dazzle reporting in the past, ever consider what era the time machine would need to drop you off at when progressive jurisprudence began to see the light of day here in America? If you are thinking around the Summer of Love era, well, you are wrong, get back on the time machine before the warlocks attack and set the dial for early 20th century. Mr. Watson explains – it goes back to the 1920's and 1930's when national elite schools invented progressive jurisprudence that would in due course produce a Supreme Court Justice who has come to hold this view, along with a host of many jurists who sway to its beat.

There you have it; we have nearly 90 years of progressive jurisprudence being taught and its beginnings started way before most of us were born. "Houston, we have a problem." That being how to change the direction of higher education where a student who lacks the faith of the biblical character Daniel, much less a prayer's chance in hell, to walk into the lion's den and not be consumed. As reported by Mr. Watson, it certainly plagues the elite institutions; I would venture to say many would agree the lower food chain colleges and universities come with well heeled progressives ready to assuage pliable minds wandering aimlessly.

In hindsight, it appears the Summer of Love was a portend of things to come; many fine state liberal arts colleges/ universities were just beginning to show what the Berkerlyian "free speech movement" was all about and it did not come with the real freedom to express ideas unless it was "their" ideas.

There is a possible solution on the horizon – think "disruption." Because print space is at an all time premium – and as the Japanese put it, a man who takes up a lot of space is taking up too much space -- we will expound on the disruption theme in the next issue.

Plan to attend our annual joint meeting with the Los Angeles Basin Geological Society on Thursday, January 24th at The Grand on Willow Street Convention in Long Beach. A hot topic getting rave reviews these days will be discussed – "fracing," or as the general public has come to know the term – "fracking."

Lawyers' Joke of the Month

Jack Quirk, Esq.
Bright and Brown

Bird Warning:

After finding about 200 dead crows last year, there was concern that they may have died from Avian flu. To everyone's relief, after examining the remains, a bird pathologist definitely confirmed the problem was definitely NOT Avian flu. However, he also determined that 98% of the crows had been killed by impact with trucks, and only 2% were killed by car impact.

The State then hired an ornithological behaviorist to explain the disproportionate percentages for truck versus car kill. The ornithological behaviorist determined the cause in short order.

When crows eat road kill, they always set-up a look-out crow in a nearby tree to warn of impending danger. His conclusion was that the lookout crow could say "Cah," but he could not say "Truck."

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State University Fullerton. He is a California Professional Geologist and Certified Hydrogeologist, and is on the Board of Directors of the Groundwater Resources Association of California.

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Golf Chair
Open

Our Honorable Guests

Our November guest of honor who attended:

Nathan Francis, Land Manager,
Rio Tinto

Treasurer's Report

As of 4/1/2009, the LAAPL account showed a balance of	**$ 12,185.53**
Deposits	**$ 2,185.00**
Total Checks, Withdrawals, Transfers	**$ 747.85**
Balance as of 4/30/2009	**$ 13,622.68**
Merrill Lynch Money Account shows a total	**$11,096.90**

New Members and Transfers

Jason Downs, RPL
Downchez Energy, Inc.
Membership Chair

Welcome! As a Los Angeles Association of Professional Landmen member, you serve to further the education and broaden the scope of the petroleum landman and to promote effective communication between its members, government, community and industry on energy-related issues.

New Members

Cecelia Richardson Land Tech Occidental Petroleum 301 E. Ocean Blvd, Suite 300 Long Beach, CA 90802 (562) 495-9302	**Jennifer Cox** Landman Plains Exploration and Production Co. 1200 Discovery Drive Suite 500 Bakersfield, CA 93309 (661) 395-5276

Transfers

Clifford E. Clement Independent 1978 Regulus Ct., Livermore, CA 94550 Office: (925) 362-0627 cesooner3@comcast.net	To **Clifford E. Clement** Director, Land and Real Estate Macpherson Oil Company 2716 Ocean Park Blvd., #3080 Santa Monica, CA 90405 Office: 310-452-3880 Cell: 925-518-1780 cliff_clement@macphersonoil.com
Jennifer Parkes Land Tech Venoco Inc. 6267 Carpenteria Ave., Suite 100 Cartenteria, CA 93013 Office: 805-745-2180 Cell: 805-689-1194 jennifer.parkes@venocoinc.com	To **Jennifer Ott** Landman Venoco Inc. 370 17th Ave Suite 3700 Denver CO 80202 Office: 303-600-2903 Cell: 805-689-1194 jennifer.ott@venocoinc.com

New Member Requests	**Welcome Back [Reinstatement]**
None to Report	None to Report

Reminder for Dues

Early Bird Reminder for LAAPL Annual Dues

Sarah Downs, RPL
Downchez Energy, Inc.
LAAPL Treasurer

Sarah Downs, Chapter Treasurer will be calling for dues late Spring; which will be due by June 2013 for the 2013 – 2014 year. Cost; a mere $40.00.

Get Ready...Set.....Go!

(Nominations for LAAPL 2013 - 2014 Officers)

It is that time of the year to start considering a run for a LAAPL Chapter Officer for the 2013 – 2014 term. The following offices are open:

President[1]
Vice President
Treasurer
Secretary
LAAPL Local Director
LAAPL Local Director

[1]Per Section 7(3) the Vice President shall succeed to the office of the President after serving his or her term as Vice President and shall hold the office of President for the next twelve (12) months.

LAAPL and LABGS Hold Annual Joint Luncheon

The Los Angeles Association of Professional Landmen and the Los Angeles Basin Geological Society will hold its joint luncheon in January. Please note the date of the luncheon is the fourth Thursday of January and the location is at the Grand at Willow Street Conference Center.

When: Thursday, Jan 24th

~~Time~~: 11:30am

Cost: $20 with reservations
$25 without reservations

Meeting Place: The Grand at Willow Street Conference Center
4101 East Willow Street

Long Beach, CA
Contact: Graham Wilson
562-326-5278
Gwilson@shpi.net
Online at www.labgs.org.

Luncheon Speaker Topic

Fracturing and Groundwater: A Perspective from an LA Water District

Ted Johnson, Chief Hydrogeologist, Water Replenishment District of Southern California

Over the past few years, media reports and movies such as "Gasland" have featured stories about perceived impacts to the environment from the practice of hydraulic fracturing to enhance oil and gas recovery. This procedure, also known as "fracking," has been going on for decades in the United States for conventional oil and gas well stimulation practices, but has seen broader application in recent years as hydrocarbon production has focused on unconventional methods in lower permeability geologic formations (shale) that were formerly thought too tight for economic hydrocarbon recovery.

One of the primary concerns about fracking is that fluids used contain chemicals that may migrate upward from the target reservoirs into overlying underground sources of drinking water (USDWs). Migration pathways can include natural or induced fractures, abandoned wells, or migration via poor cement seals in active oil and gas wells. California has a strong history of oil and gas production, as well as groundwater extraction for potable purposes, and so there is a natural concern whether fracking could be a risk to California's groundwater supply.

The talk will present an overview of the hydraulic fracturing practice, potential risks to groundwater, and potential monitoring and management techniques to minimize these risks. It will focus on the Central Basin and West Coast Basin in southwestern Los Angeles County, which are two of the most utilized urban groundwater basins in the State. There are also at least 30 oil fields in the CBWCB that have produced over 5.5 billion barrels of oil have with a remaining reserves estimated at 380 million barrels. As fracking technology improves and becomes more prevalent in the State, appropriate regulations and monitoring will be needed to ensure protection of the groundwater resource.

Announcement

Day Carter & Murphy LLP Announces the Election of a New Partner to the Firm

Day Carter & Murphy LLP is pleased to announce that **Joshua L. Baker** has been elected as partner, effective January 1, 2013; he has been with Day Carter & Murphy LLP since its inception in 2006.

Josh's practice focuses primarily on oil and gas, energy, and real estate transactional matters; he regularly assists his oil and gas clients with title due diligence for acquisitions and financing.

He completed his undergraduate studies at the University of California, Santa Barbara, in 2002, graduating Cum Laude; completing his graduate studies at the University of the Pacific, McGeorge School of Law receiving his Jurist Doctorate. He was a member of the McGeorge Law Review and was a recipient of the Order of the Coif.

Josh recently co-authored the recent California section of AAPL's "Oil and Gas Law: Comparison of Laws on Leasing, Exploration and Production." He is a member of Young Professionals in Energy, CIPA, BAPL, and LAAPL.

Throughout the years, Josh has demonstrated the highest levels of commitment to legal excellence and superior client service. It is a privilege to welcome Josh into his new role within the firm.

Guest Article

Sempra International to Construct Natural Gas Pipeline Network in Northwest Mexico

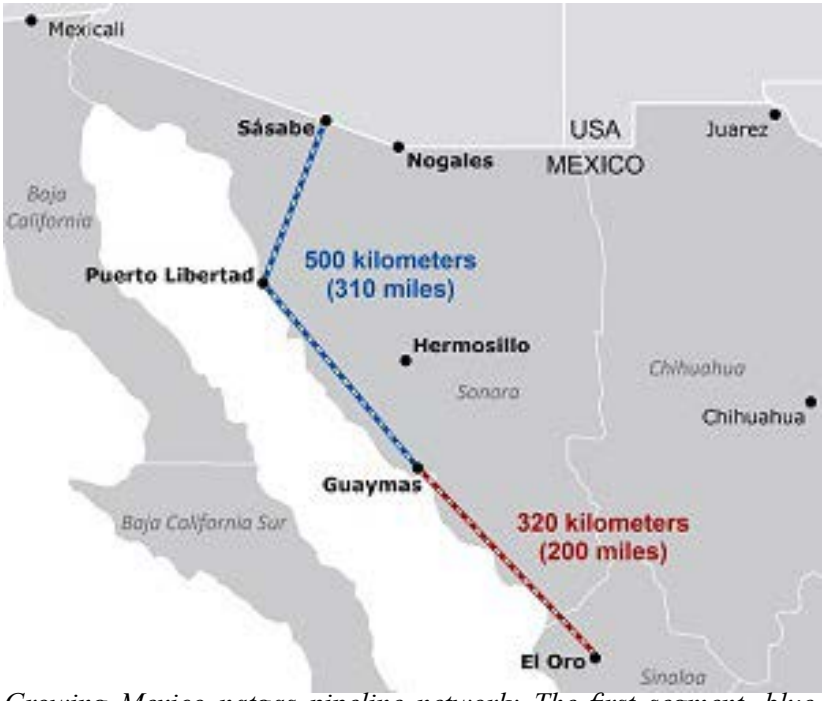
Reprinted from GasLines©
With Permission of Southern California Gas Company
October 22, 2012

Sempra International announced that its Mexican business unit Sempra Mexico has been awarded two contracts by Comisión Federal de Electricidad (CFE), Mexico's state-owned electric utility, to construct, own and operate an approximately 500-mile (820-kilometers), $1 billion pipeline network connecting the Northwestern states of Sonora and Sinaloa.

After a competitive and transparent international public bidding process, Sempra Mexico's offers were selected to develop the new pipeline network, which will be comprised of two segments that will interconnect to the U.S. interstate pipeline system in Arizona and will provide natural gas to new and existing CFE power plants that currently use fuel oil. The capacity for each segment is fully contracted by CFE under two 25-year firm capacity contracts denominated in U.S. dollars.

Growing Our International Business

"We are pleased to have been awarded these projects, which will strengthen the gas transportation system in northern Mexico," said George Liparidis, president and CEO of Sempra International. "These projects represent an extension of our core business in Mexico and an important part of our plan to grow our international business."



Growing Mexico natgas pipeline network: The first segment, blue, a 36-inch, 310-mile (500-kilometer) pipeline will run from Sásabe, south of Tucson, Ariz., to Guaymas, Sonora, and will have the capacity of 770 million cubic feet (Mcf) of natural gas per day. The second segment, red, from Guaymas to El Oro, Sinaloa, is a 30-inch, 200-mile (320-kilometer) pipeline with a capacity of 510 Mcf of natural gas per day.

The first segment, a 36-inch, 310-mile (500-kilometer) pipeline will run from Sásabe, south of Tucson, Ariz., to Guaymas, Sonora, and will have the capacity of 770 million cubic feet (Mcf) of natural gas per day. The new pipeline is expected to begin operations late 2014.

The second segment from Guaymas to El Oro, Sinaloa, is a 30-inch, 200-mile (320-kilometer) pipeline with a capacity of 510 Mcf of natural gas per day. The pipeline is planned to begin operations in the third quarter of 2016.

Creating New Jobs

"This new pipeline network will provide reliable access to clean natural gas to CFE's plants in Sonora and Sinaloa," said Carlos Ruiz, president and CEO of Sempra Mexico. "We have a long and successful history of safe, efficient and reliable operations in Mexico and we appreciate the confidence that CFE has placed in us. We look forward to creating new jobs in these communities and improving the local economy for years to come."

Sempra Mexico also owns and operates more than 430 miles (700 kilometers) of natural and liquefied petroleum gas pipelines in all six northern Mexican states.

Announcement

Macpherson Oil Company Announces Addition to Its Management Team

Jason Downs, RPL
Downchez Energy, Inc.
Membership Chair

After an 11 year absence from the Los Angeles Basin, **Cliff Clement** recently returned to Los Angeles and accepted the position of Director, Land and Real Estate for Macpherson Oil Company in Santa Monica, California. Prior to working the past ten years in Northern California for Third Planet Windpower and Calpine Corporation, Cliff previously worked for PXP (Stocker Resources) and Atlantic Oil Company in the LA Basin. Macpherson Oil Company, based in Santa Monica, is a privately held California independent energy company producing in excess of 10,000 bopd, in addition to 44 mws of clean renewable energy from its Mount Poso Cogen. Feel free to contact Cliff with any questions about Macpherson's on-going land efforts. Cliff's new contact information is:

Clifford E. Clement
Director, Land and Real Estate
Macpherson Oil Company
2716 Ocean Park Blvd, Suite 3080
Santa Monica, CA 90405-5208
Email: cliff_clement@macphersonoil.com
Office: 310-452-3880
Cell: 925-518-1780
www.macphersonoil.com

Announcement

LAAPL Board to Appoint Nominations Committee

The LAAPL's Board of Directors will be appointing its Nominations Committee to seek out qualified candidates for officers. The officers will serve from July 1st, 2013 – June 30th, 2014. For all qualified members interested in submitting their names as candidates are encouraged to contact the committee members:

Per Section 7 (7a) of the By-laws, the membership will be provided with a list of nominees for officers for Vice President, Secretary, Treasurer and two (2) Directors at the March meeting. Further nominations from the floor will also be accepted at the March meeting. Members whose names are placed in nomination must give prior consent to be nominated and by mail or email up to May 1, 2013. The election will take place at the last regular meeting of the Association this fiscal year, which is scheduled for May 16, 2013.

Guest Article

Compton Unified School District v. Hassan

(2012) 2012 WL 5448402 (Unpublished)

Kevin A. Day, Esq.
AlvaradoSmith, PC

One of the most detail-oriented portions early on in an eminent domain case is identifying the various "interests" that may or may not still be affecting the title of the property being acquired. There are often easements, liens or recorded documents that purport to attach to the property, yet upon further investigation, most turn out to have been extinguished years ago with the parties failing to record reconveyances or the like. However, some title issues usually remain, and finding the necessary parties is challenging in light of the passage of time. As a result, public entities must usually resort to the default process, and serve these defendants through publication following a sufficient initial showing to the court. One question often arises – how conclusive are these defaults if an heir or relative suddenly returns? This recent (November 8, 2012) case, while unpublished, provides a glimpse into the Second District's thought process.

In 2003, the District filed its complaint in eminent domain, seeking to acquire fee simple title to a condominium complex with 168 units spread over 8 parcels. The complex was in a serious state of disrepair, with none of the units considered habitable, and most already demolished by the city. In examining the title, the District determined that numerous fraudulent "homeowner's association" mechanics liens were filed against the property, and began filing motions to extinguish the liens. Twenty-three liens were filed by a gentleman in prison at the time, so the District caused him to be served with the eminent domain complaint and a motion to extinguish the liens. He failed to respond, and the District obtained a default judgment, with the liens being extinguished by the court.

In 2004, the District determined that Mr. Hassan was also purportedly a lien holder, and began efforts to locate him. When those efforts proved unsuccessful, the District obtained an order to serve him by publication in the Los Angeles Times. Following the expiration of the necessary waiting period, Mr. Hassan's default was taken by the District. For reasons that were not apparent at the time, it was very lucky that the District located the incarcerated lien holder discussed above, and continued to serve documents on his criminal counsel despite the lack of a response. It turned out that Mr. Hassan was a relative of the prisoner, resided in France, and allowed the prisoner to open fake bank accounts for fraudulent purposes (hence his prison service address).

Following a valuation trial, and the use of the awarded amount to pay penalties, prior taxes and assessments, approximately $25,000 remained on deposit. The District received a default judgment in favor of Hassan in that amount, and obtained its Final Order of Condemnation in 2008. However, the District was not clear of Mr. Hassan. In 2010, he reappeared and filed a motion to withdraw the remaining deposit, or in the alternative to recover either $250,000 (the value of the units his liens were attached to) or $3.75 million (the value of the "other" units he claims his liens were attached to).

Following a hearing in the trial court, Mr. Hassan was allowed to withdraw the $25,000 on deposit, but his remaining claims were denied. He appealed the default judgment taken against him, primarily claiming that the District could not extinguish his liens in an eminent domain action by way of a default. The appellate court noted that in an eminent domain action, a proceeding in rem, the lack of actual notice (or a claim for the same) is not a ground to set aside a default. This is a valuable point for an eminent domain practioner as any analysis of the public entity's search efforts will be examined to see if extrinsic fraud or mistake prevented the defendant from responding – not a review of the search efforts themselves. In this case, the court noted that the District properly demonstrated to the trial court that it had undertaken reasonable and diligent efforts to search for Mr. Hassan in securing the order to serve by publication, and properly followed the statutory guidelines for publication. Inherent in that process was the trial court's review of the necessary declaration laying out the search parameters to obtain the various orders. Essentially, it behooves the public entity to include as much detail as possible about the steps taken prior to seeking the order to serve via publication, particularly when the challenge (if any) will likely arise long after the case is concluded. Here, the appellate court also noted that in an eminent domain case, the prejudice to the public entity caused by the delay when a long defaulted defendant "returns" is greater because funds have already been set aside, established in amount, or possibly disbursed. These principles, coupled with the nature of why Mr. Hassan was so hard to find because of his fraudulent scheme which landed his relative in prison, caused the appellate court to uphold the finding of service on Mr. Hassan.

The next issue addressed was the finality

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of a default judgment in an eminent domain case. Mr. Hassan contended that he was entitled to prove that the extinguished interests were actually valid and not properly eliminated by the trial court. The appellate court held that a default judgment encompasses the remedies set forth in the operative complaint. Here, the District sought to acquire fee simple title to the property following the payment of the determined amount of just compensation. The resulting judgment is therefore res judicata as to all of the issues and claims pled in the complaint. Thus, Mr. Hassan was deemed to have acceded to the City's position in the complaint. In the end, Mr. Hassan was entitled to withdraw the portion of the funds remaining on deposit, but his effort to revive his dubious liens was blocked. While the facts in this case were the product of unscrupulous persons, it demonstrates the need to do the "little things" right in an eminent domain case. It is easy to focus on the large dollar claims, or constitutional challenges that may be filed, however as the District demonstrated here, properly following the steps to default a previously "unfindable" person prevented a large monetary claim more than two years after the case originally concluded. Mr. Day can be reached at kday@alvaradosmith.com.

2012 Eminent Domain Year in Review & 2013 Forecast

By Bradford B. Kuhn, Esq., &
Rick E. Rayl, Esq.
Law Firm of Nossaman LLP

As we look back on 2012, it was unquestionably a busy year. Federal funds continued to make their way to local projects and shovels continued to break ground for infrastructure projects. The potential use of eminent domain to acquire underwater mortgages made headlines across the country, although the plan remains purely theoretical, having not been attempted in any jurisdiction. And, many in California were left scratching their heads trying to figure out just how to deal with the dissolution of redevelopment agencies.

As we look forward to 2013, we expect another exciting year. As has become our custom, what follows is an eminent domain recap of 2012, along with our thoughts on what the Right-of-Way profession can expect in 2013. With so many published decisions in 2012, we have not included any unpublished decisions in our review.

However, there were several interesting unpublished decisions and other stories this year. To keep up to date, we invite you to follow our blog, the California Eminent Domain Report, which covers issues in far more detail than we have time for in our year-end summary.

The Role of the Judge in Eminent Domain Trials

In County of Glenn v. Foley (Case No. C068750), the Court held it was improper for the trial court to grant the agency's in limine motion to exclude all of the owner's appraiser's opinions because the appraiser's comparable sales required material adjustments. The Court explained that an appraiser's quantitative adjustments to comparable sales do not amount to valuing a property other than the one in question (something that is not allowed under Evidence Code section 822). Instead, such adjustments are a natural and necessary tool to prove the fair market value of the subject property since no two properties are going to be exactly alike. Similarly, the Court held that even if comparable sales have different characteristics than the subject property (such as improvements, personal property, or orchards), these sales are admissible so long as they shed light on the value of the subject property.

In City of Corona v. Liston Brick Company of Corona (2012) 208 Cal.App.4th 536, the condemning agency sought to acquire an easement over a portion of a larger parcel. In valuing the part taken, the owner sought to rely on (1) another public agency's appraisal of the entire larger parcel, (2) the resulting purchase and sale agreement between the owner and that agency for the portion of the property not being acquired by the condemning agency, and (3) the option price offered by the other agency for the entire parcel in the event the condemning agency did not complete its acquisition. The Court held that all three types of evidence were inadmissible under Evidence Code section 822: the appraisal because it valued a different property than the one being condemned; the purchase and sale agreement because it was a sale to a public agency which could have acquired the property through eminent domain; and the option price for the larger parcel because the option was never exercised. The Liston Brick Company and Foley decisions, read together, provide some good lessons on the admissibility limits imposed by section 822.

In City of Livermore . Baca (2012) 205 Cal.App.4th 1460, a property owner sought to recover severance damages caused by he agency's partial acquisition, including damages caused by changes in curb appeal, impacts to drainage, and temporary impacts to circulation and access. The trial court refused to admit any of the evidence, finding it speculative and non-compensable. The Court of Appeal disagreed, allowing evidence of temporary severance damages to be presented to the jury since they interfered with the owner's actual, intended use of the property. More generally, the Court suggested that as long as an expert can identify specific damages arising from a taking or public project, such damages generally are not inadmissibly speculative, and thus can be presented to the jury.

Business Goodwill

In People ex rel. Department of Transportation v. Dry Canyon Enterprises (2012) 211 Cal.App.4th 486, the Court of Appeal held that before a jury can determine the amount of a business' goodwill loss, in addition to demonstrating that the loss (i) is caused by the taking, (ii) cannot be prevented by relocation or other reasonable mitigation efforts, and (iii) will not be covered through another form of compensation, the business must also prove to the judge that it had goodwill before the taking. While this requirement already exists as implicit in the very concept of

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"loss of business goodwill" (one cannot lose someone one never had in the first place), the opinion also (1) arguably limits significantly a business goodwill appraiser's ability to utilize the cost to create approach to valuation, and (2) serves as a warning to appraisers using untested or non-traditional valuation methodologies.

Right to Take/Procedural Missteps

In Council of San Benito County Governments v. Hollister Inn (2012) 209 Cal.App.4th 473, the government's acquisition resulted in the taking of a hotel's key access point, leaving it with only an admittedly inferior secondary access point. The owner challenged the agency's right to take on the grounds that the agency did not analyze whether it should condemn substitute access in an effort to mitigate damage to the hotel. The Court held that where the condemning agency acquires only a portion of property, Code of Civil Procedure section 1240.350 allows the agency to condemn alternative access for the remainder parcel only if the taking results in the remainder becoming landlocked. In other words, if the taking leaves the remainder with any access, however inferior it might be, section 1240.350 does not provide the agency with any right to condemn substitute access. As a result, the Court overruled the owner's right to take challenge.

In California Department of Transportation v. Menigoz (2012) 203 Cal.App.4th 1505, Caltrans accepted the property owner's final demand of compensation five days before trial, and the parties entered into a stipulated judgment that did not mention litigation expenses. The owner then filed a motion to recover its attorneys' fees. The Court held that if the matter settles at any time before the jury is empanelled, the agency has no liability for litigation expenses, regardless of how unreasonable its pre-settlement conduct may have been. On the other hand, once trial commences, the agency could face liability for litigation expenses – even if the parties reach a settlement before the trial ends.

Regulatory Takings/Inverse Condemnation

In West Washington Properties v. California Department of Transportation (2012) 210 Cal.App.4th 1136, the Court rejected an inverse condemnation claim arising from Caltrans' requiring the removal of an 8,000 square foot "wallscape" advertising space on a property owner's building, explaining that general regulations restricting the use of property – such as Caltrans' enforcement of the Outdoor Advertising Act – constitute an exercise of the police power for an authorized purpose and do not constitute takings. The Court also held that Caltrans was not estopped from demanding the removal of the wallscape due to its failure to enforce its regulations for a number of years, explaining that government inaction cannot form a proper basis to estop the government from enforcing a law intended to benefit the public.

In Pacific Bell Telephone Company v. Southern California Edison Company (2012) 208 Cal.App.4th 1400, one private utility company sued another private utility company for inverse condemnation arising from damage to the company's telephone cable. At issue was whether a private utility company could be held liable for inverse condemnation and, if so, whether it was a strict liability standard or a reasonableness standard. The Court held that a privately owned utility company could be liable in inverse condemnation, and that the same strict liability standard applicable to public agencies also applied to the utility company.

Other Valuation-Related Litigation

In Duea v. County of San Diego (2012) 204 Cal.App.4th 691, a redevelopment agency threatened to acquire an owner's property under eminent domain. Prior to the filing of a condemnation action, the owner sold the property to the private developer working with the redevelopment agency on the redevelopment project. When the owner then sought to transfer his Proposition 13 base year value to a replacement property (a beneficial tax treatment available to condemnees and owners who sell under threat of eminent domain), the County Assessor denied his request because the sale was to a private developer – not a public entity. The Court upheld the County assessor's decision on a number of procedural issues. In doing so, the Court implied that if a property owner faces condemnation by anyone other than apublic entity, the owner loses the ability to transfer the Proposition 13 base year value to a replacement property if the owner sells before the condemnation action is filed.

In Western States Petroleum Association v. State Board of Equalization (2012) 202 Cal.App.4th 1092, the State Board of Equalization adopted a new rule for petroleum refineries, directing county tax assessors to start treating their land, improvements, and all fixtures and equipment as a single appraisal unit. This meant that in a traditional real estate market, all the depreciation of the fixtures and equipment would be wiped out by increasing property tax values (and refineries' property taxes would increase). Petroleum refineries filed suit challenging the rule, and the Court of Appeal agreed with the refineries, holding that the Board of Equalization could not adopt new valuation formulas in an attempt to manipulate the restrictions on the taxation of property under Propositions 13 and 8.

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Recently, however, the California Supreme Court agreed to hear the case, so the Court of Appeal opinion is superseded by the grant of review. Stay tuned.

United States Supreme Court Interested in Takings

After passing on a number of Fifth Amendment issues in recent history, the U.S. Supreme Court finally issued a takings decision in 2012, and is scheduled to issue two more in 2013.

In Arkansas Game and Fish Commission v. United States (2012) 133 S.Ct. 511, the Court held that there was no categorical exclusion by which the government could avoid paying just compensation under the Fifth Amendment for the temporary flooding of private property. The Court explained that relevant factors in determining whether a temporary flooding rises to the level of a compensable taking include: (i) the degree to which the invasion is intended or is a foreseeable result of authorized government action; (ii) the character of the land at issue and the owner's reasonable investment-backed expectations regarding the land's use; and (iii) the severity of the interference.

In 2013, be on the lookout for the Court's decision in Koontz v. St. Johns River Water Management Dist. (2012) 133 S.Ct. 420, in which the Court will decide whether the essential nexus and rough proportionality tests required to be satisfied for government land-use exactions also apply to government demands for property owners to dedicate money, services, labor, or any other type of personal property to a public use. Oral argument is scheduled for January 15, 2013.

Finally, while no oral argument date has yet to be set, it's also worth following Horne v. U.S. Department of Agriculture (2012) 133 S.Ct. 638, in which the Court will decide whether a federal government program requiring raisin "handlers" to turn over a percentage of their raisin crops violates the takings clause.

Status of Redevelopment Dissolution

One of the major themes of 2012 was the fallout from the Supreme Court's December 2011 decision allowing the dissolution of California's redevelopment agencies. In 2012, the Legislature enacted some "clean up" legislation – AB 1484 – which corrected some of the obvious deficiencies of AB XI 26, but created other problems and uncertainties. More significantly, successor agencies, developers, and bond holders all fought back, filing more than a dozen lawsuits challenging the new law.

Eminent Domain and Underwater Mortgages

One other longstanding news story from 2012 involved the efforts by Mortgage Resolution Partners, a company formed to convince government agencies to condemn underwater mortgages in an effort to stabilize housing markets in areas particularly hard hit by the decline in property values. While generating tremendous media attention and at least an initial analysis by a number of local governments, we're not aware of the plan being implemented in any jurisdiction.

Themes for 2013

In 2013, we expect to see a lot of attention on the continuing redevelopment-dissolution saga. The lawsuits described above (and, in all likelihood, others like them) will make their way through the system, and the outcome will determine both how the dissolution process moves forward and who ends up with the redevelopment funds the state was so keen to capture when it initiated the dissolution. In addition, as successor agencies obtain a "Finding of Completion" under AB 1484, they will embark on the Long Range Management Plans that will eventually effect the disposal of the former redevelopment assets. In other words, we'll likely see a flurry of property sales within former redevelopment areas as we move into the second half of 2013.

We will likely see additional efforts from the "condemn underwater mortgages" proponents, but the plan appears to have some fundamental flaws that we expect will prevent it from being implemented with any meaningful success.

We expect the two takings decisions from the U.S. Supreme Court to make headlines; it is not often that we anticipate more than one takings decision in a single year.

Here in California, it's likely that the 2012 trend of increasing numbers of published eminent domain decisions will continue. More projects are moving forward, which means more eminent domain, which means more appellate rulings. Regulatory takings decisions will likely to make more news in 2013, and we may finally have a clearer picture of whether a few recent decisions really do portend a pendulum swing in favor of property owners in this area so traditionally stacked in favor of the government.

Finally, we will likely see additional decisions exploring the role of judge and jury in eminent domain, where the tension between the jury's role to determine compensation and the Court's role to determine all other issues – including issues of fact – continues to confound litigants and judges. Mr. Kuhn can be reached at bkuhn@nossaman.com and Mr. Rayl can be reached at rrayl@nossaman.com.

Case Law Update

Indemnity and Express Negligence Provisions In Master Service Agreements

H. Martin Gibson · John J. Harris · Austin V. Henley
SNR Denton US LLP1

The recent Texas Court of Appeals decision in Tutle & Tutle Trucking, Inc. v EOG Resources, Inc., 10-11-00062-CV; 2012 Tex. App. LEXIS Tex. App. 9543 (Tex. App. Waco November 15, 2012), illustrates the importance of carefully drafting indemnity clauses in Master Service Agreements. EOG had a Master Services Agreement with Tutle & Tutle Trucking. Frac Source was a contractor of EOG's and had a separate MSA with EOG. Tutle's employee, Henderson, was injured, apparently in Texas, while assisting Frac Source in unloading sand from a Frac Source truck. Henderson sued Frac Source and Tutle for negligence, but never made a claim directly against EOG, claiming that Frac Source had modified or removed a safety device from its equipment, rendering such equipment unreasonably dangerous. Frac Source then made demand on EOG to defend and indemnify it under the EOG/Frac Source MSA. EOG, in turn, demanded indemnity from Tutle under the EOG/Tutle MSA.

Paragraph 6 of the EOG/Tutle MSA set out the parties' indemnity obligations. Paragraph 6A of the EOG/Tutle MSA contained an indemnification (in all capital letters) under which Tutle agreed to indemnify EOG, its related companies, partners, etc., but did not include Tutle's contractors or subcontractors, against claims asserted by Tutle's employees "arising in connection [with the MSA]." However, since (a) Henderson (Tutle's employee) had not sued EOG, and (b) the claim for which EOG sought indemnity from Tutle was a contractual claim which had been made by EOG's contractor (Frac Source), Paragraph 6 A of the EOG/Tutle did not cover the indemnity claimed by EOG.

Nevertheless, the EOG/Tutle indemnity provisions also included Paragraph 6E (in lower case letters) which the parties called the "pass through" provision and provided as follows::

> 6E. The terms and provisions of this Paragraph 6 [the indemnification paragraph] shall have no application to claims or causes of action asserted against Company [EOG] or Contractor [Tutle] by reason of any agreement of indemnity with a person or entity not a party to this Agreement in those instances where such contractual indemnities are not related to or ancillary to the performance of the work contemplated under the Agreement or a indemnities uncommon to the industry. The terms and provisions of this Paragraph 6 shall expressly apply to claims or causes of action asserted against Company or Contractor by reason of any agreement of indemnity with a person or entity not a party to this Contract where such contractual indemnities are related to or ancillary to the performance of the work contemplated under the Agreement and or Company's project and are indemnities not uncommon in the industry.

EOG relied upon this "pass through" provision in arguing that Tutle owed EOG a duty to defend and indemnify it against Frac Source's contractual indemnification claim. Tutle defended by asserting that it owed no contractual duty, as a matter of law, to indemnify Frac Source under the MSA because it had not agreed to indemnify EOG for claims asserted by EOG's contractors, and the indemnity provisions did not satisfy Texas law's "fair-notice" requirements consisting of the express negligence test and conspicuousness.

The trial court found for EOG holding that Tutle had a contractual duty under Paragraph 6E to defend and indemnify EOG and Frac Source in the suit by Tutle's employee. Implicit in such finding is the fact that Tutle owed EOG indemnity for contractual claims made by Frac Source based on negligence claims by Henderson.

Texas courts have created two conditions to enforcement of indemnifications against one's own negligence. The first requires that a party's intent to be released from all liability caused by its own future negligence must be expressed in unambiguous terms in the contract. The second is that something must appear on the face of the contract to attract the attention of the person looking at it; this is the reason is why you typically see these provisions in all caps, in contrasting colors, larger type, etc.

In a 2-1 decision, the Waco Court of Appeals held that the Texas Business and Commerce Code's definition of "conspicuous" includes language in which both the heading and text are in larger or contrasting type, but "it does not require both the

Case of the Month continued on page 15

heading and the text to be in larger or contrasting type." It concluded that "the numbering for the 'pass through' provision is capitalized and is different from other provisions in the [MSA]. And, perhaps more importantly, the location of paragraph 6E, being numerically linked to paragraphs 6A …, is such that a reasonable person ought to have noticed it." The dissent, however, asserted that "one probably cannot bury another company's agreement to indemnify for an act of negligence much deeper than that."

With respect to the express negligence issue, EOG argued that because EOG was seeking indemnity for Frac Source's negligence, not its own negligence, the express-negligence doctrine should not apply. Without specifically deciding the issue put to it by EOG, the court assumed Tutle's position, that any extraordinary sharing of risk should be subject to the doctrine, and concluded that the language was not vague and ambiguous and met the express negligence test.

The dissent raised the issue, not answered by the majority, of whether the doctrine applies because it is an indemnity of a contractual indemnity, which, at the pass through level, is only a contract claim not a negligence claim. It is this issue that has caused attorneys drafting agreements to attempt to add "contractual" to indemnity clauses. However, simply inserting "contractual or" every place that you have a mention of negligence has the potential to obviate many of the contractual undertakings in the contract in which the indemnity clause appears -- an unintentional result. A preferable solution would be to include contractors and their subcontractors in the group of indemnified parties.

We also note that the Texas anti-indemnity law in the Texas Civil Practice & Remedies Code voids any contract relating to a well or mine if it indemnifies a person against loss caused by the negligence of the indemnitee unless the parties agree in writing that any mutual indemnity obligation will be supported by liability insurance coverage limited to the amount each party has agreed to obtain for the benefit of the other. The insurance issue was not addressed in Tutle v EOG.

Although the Tutle v EOG interpreted specific provisions and requirements of Texas indemity statutes, which differ in many respects from California indemnity statutes, set forth in California Civil Code §§ 2772, et seq., the court's holding highlights the necessity to pay careful attention to the scope of indemnity provisions in oil and gas agreements, not just service agreements. Furthermore, in situations where an agreement provides that Texas law governs the interpretation of the contract, these Texas statutes and the application of those statutes by Texas courts, as in Tutle, will be directly applicable, potentially even where the contract is performed in California.

The biggest lesson in the case is that you should carefully scrutinize the definitions of "Company Group," and "Contractor Group," which are entitled to receive the benefit of the indemnify obligations and ensure that contractors and subcontractors of every tier and their employees, agents, etc. are included in those definitions. Another lesson is that you should expressly state that the indemnification includes an indemnification against one's own negligence, and state it clearly. If the agreement is governed by Texas law, all parts of the indemnification clause must be set out in larger type, in bold, or all caps. Additionally, too often the indemnity provisions are regarded as boiler plate and simply inserted from one document into the next. Even in printed standard form agreements, these provisions are negotiable. Close attention should be paid to your drafting of each clause each time.

[1] *Martin Gibson is a partner and Austin Henley is an associate at SNR Denton's Dallas office. John Harris is a partner at SNR Denton's Los Angeles office.*

EDUCATIONAL CORNER

Sarah Duffy, Nomadic Land Services
Education Chair

Need continuous education credit? The American Association of Professional Landmen (AAPL) is committed to providing education seminars and events that support our membership base. Listed below are continuous education courses available for the upcoming months. You can also earn credits by attending our luncheons based upon speaker and subject matter. Please visit www.landman.org to browse all of the upcoming nationwide event.

January 2013

Principles of Land Practices
When: January 10-11, 2013 **Where:** Houston, TX

RL/RPL Continuing Education Credits	**14.0**
CPL Recertification Credits	**14.0**
CPL/ESA Ethics Credits	**1.0**

Field Landman Seminar
When: January 17, 2013 **Where:** Casper, WY

RL/RPL Continuing Education Credits	**2.0**
CPL Recertification Credits	**2.0**
CPL/ESA Ethics Credits	**0.0**

Landman 411 Series - Property
When: January 23, 2013 **Where:** Fort Worth, TX

RL/RPL Continuing Education Credits	**2.0**
CPL Recertification Credits	**2.0**
CPL/ESA Ethics Credits	**0.0**

Field Landman Seminar
When: January 31, 2013 **Where:** Mars, PA

RL/RPL Continuing Education Credits	**2.0**
CPL Recertification Credits	**2.0**
CPL/ESA Ethics Credits	**0.0**

JOA Workshop – A Comprehensive Review of Operating Agreements and Well Trades
When: January 15-16, 2013 **Where:** Lafayette, LA

RL/RPL Continuing Education Credits	**14.0**
CPL Recertification Credits	**14.0**
CPL/ESA Ethics Credits	**0.0**

Oil and Gas Land Review, CPL/RPL Exam
When: January 23-26, 2013 **Where:** Tulsa, OK

RL/RPL Continuing Education Credits	**18.0**
CPL Recertification Credits	**18.0**
CPL/ESA Ethics Credits	**1.0**

WI/NRI Workshop
When: January 25, 2013 **Where:** Tyler, TX

RL/RPL Continuing Education Credits	**6.0**
CPL Recertification Credits	**6.0**
CPL/ESA Ethics Credits	**0.0**

February 2013

Fundamentals of Land Practices & Optional RPL Exam
When: February 1-2, 2013 **Where:** Denver, CO

RL/RPL Continuing Education Credits	**7.0**
CPL Recertification Credits	**7.0**
CPL/ESA Ethics Credits	**1.0**

IRWA Winter Seminar
When: February 12, 2013 **Where:** Santa Ana, CA

RL/RPL Continuing Education Credits	**4.0**
CPL Recertification Credits	**4.0**
CPL/ESA Ethics Credits	**0.0**

WI/NRI Workshop
When: February 15, 2013 **Where:** Coraopolis, PA

RL/RPL Continuing Education Credits	**6.0**
CPL Recertification Credits	**6.0**
CPL/ESA Ethics Credits	**0.0**

Landman 411 Series: Contracts
When: February 20, 2013 **Where:** Fort Worth, TX

RL/RPL Continuing Education Credits	**2.0**
CPL Recertification Credits	**2.0**
CPL/ESA Ethics Credits	**0.0**

Field Landman Seminar
When: February 21, 2013 **Where:** Greeley, CO

RL/RPL Continuing Education Credits	**2.0**
CPL Recertification Credits	**2.0**
CPL/ESA Ethics Credits	**0.0**

Intro to Field Land Practices
When: February 12, 2013 **Where:** Evansville, IN

RL/RPL Continuing Education Credits	**13.0**
CPL Recertification Credits	**13.0**
CPL/ESA Ethics Credits	**2.0**

WI/NRI Workshop
When: February 16, 2013 **Where:** Canton, OH

RL/RPL Continuing Education Credits	**6.0**
CPL Recertification Credits	**6.0**
CPL/ESA Ethics Credits	**0.0**

Intro to Field Land Practices
When: February 26-27, 2013 **Where:** Canton, OH

RL/RPL Continuing Education Credits	**13.0**
CPL Recertification Credits	**13.0**
CPL/ESA Ethics Credits	**2.0**

Oil and Gas Land Review, CPL/RPL Exam
When: Feb 26 - Mar 1, 2013 **Where:** Midland, TX

RL/RPL Continuing Education Credits	**18.0**
CPL Recertification Credits	**18.0**
CPL/ESA Ethics Credits	**1.0**

March 2013

Basics of Geographic Information System
When: March 2, 2013 **Where:** Morgantown, WV

RL/RPL Continuing Education Credits	**0.0**
CPL Recertification Credits	**0.0**
CPL/ESA Ethics Credits	**0.0**

Fundamental of Land Practices & Optional RPL Exam
When: March 5-6, 2013 **Where:** Russellville, AR

RL/RPL Continuing Education Credits	**7.0**
CPL Recertification Credits	**7.0**
CPL/ESA Ethics Credits	**1.0**

Pooling Seminar
When: March 8, 2013 **Where:** Pittsburgh, PA

RL/RPL Continuing Education Credits	**5.0**
CPL Recertification Credits	**5.0**
CPL/ESA Ethics Credits	**0.0**

Field Landman Seminar
When: March 7, 2013 **Where:** Corpus Christi, TX

RL/RPL Continuing Education Credits	**2.0**
CPL Recertification Credits	**2.0**
CPL/ESA Ethics Credits	**0.0**

Landman 411 Series: Encumbrances
When: March 11, 2013 **Where:** Fort Worth, TX

RL/RPL Continuing Education Credits	**3.0**
CPL Recertification Credits	**3.0**
CPL/ESA Ethics Credits	**0.0**

Oil and Gas Land Review, CPL/RPL Exam
When: March 13-16, 2013 **Where:** Bakersfield, CA

RL/RPL Continuing Education Credits	**18.0**
CPL Recertification Credits	**18.0**
CPL/ESA Ethics Credits	**1.0**

2013 Mining & Land Resources Institute
When: March 14-15, 2013 **Where:** Reno, NV

RL/RPL Continuing Education Credits	**14.0**
CPL Recertification Credits	**14.0**
CPL/ESA Ethics Credits	**1.0**

Fundamentals of Land Practices & Optional RPL Exam
When: March 25-26, 2013 **Where:** Wichita, KS

RL/RPL Continuing Education Credits	**7.0**
CPL Recertification Credits	**7.0**
CPL/ESA Ethics Credits	**1.0**

JOA Workshop
When: March 20-21, 2013 **Where:** Midland, TX

RL/RPL Continuing Education Credits	**14.0**
CPL Recertification Credits	**14.0**
CPL/ESA Ethics Credits	**1.0**

APPL Home Study Program

AAPL's Home Study program allows members to earn continuing education credits at their own convenience and schedule. The courses cover the issues most relevant to today's Landman and cost between $30 and $75 to complete. To receive continuing education credits via a home study course:

- Download or print out the course (PDF format)
- Answer all questions completely
- Submit the answers as instructed along with the appropriate fee

If you have questions or would like more information, please contact AAPL's Director of Education Christopher Halaszynski at (817) 231-4557 or chalaszynski@landman.org.

General Credit Courses

#100 Environmental Awareness for Today's Land Professional
Credits approved: 10 CPL/ESA/RPL
$75.00

#101 Due Diligence for Oil and Gas Properties
Credits approved: 10 CPL/RPL
$75.00

#102 The Outer Continental Shelf
Credits approved: 5 CPL/RPL
$37.50

#104 Of Teapot Dome, Wind River and Fort Chaffee: Federal Oil and Gas Resources
Credits approved: 5 CPL/RPL
$37.50

#105 Historic Origins of the U.S. Mining Laws and Proposals for Change
Credits approved: 4 CPL/RPL
$30.00

#106 Going Overseas: A Guide to Negotiating Energy Transactions with a Sovereign
Credits approved: 4 CPL/RPL
$30.00

#108 Water Quality Issues: Safe Drinking Water Act (SDWA)/Clean Water Act (CWA)/Oil Pollution Act (OPA)
Credits approved: 4 CPL/ESA/RPL
$30.00

#109 Common Law Environmental Issues and Liability for Unplugged Wells
Credits approved: 4 CPL/ESA/RPL
$30.00

Ethics Credit Courses

Two ethics courses are available. Each course contains two essay questions. You may complete one or both of the questions per course depending on your ethics credits needs. Each question answered is worth one ethics continuing education credit.

#103 Ethics Home Study (van Loon) – 1 or 2 questions
Credits approved: 2 CPL/RPL & 2 Ethics
$15.00 per question

#107 Ethics Home Study (Sinex) – 1 or 2 questions
Credits approved: 2 CPL/RPL & 2 Ethics
$15.00 per question

LAAPL LEGISLATIVE AFFAIRS UPDATE

By Olman J. Valverde, Esq., & Mike Flores, Co-Chairs, Legislative Affairs Committee
Law Offices of Luna & Glushon

DOGGR RELEASES FRACTURING DRAFT REGULATIONS

On December 18, 2012, DOGGR released a "Pre-Rulemaking Discussion Draft" which would add a new article, Article 4, to Chapter 4 of Title 14 of the California Code of Regulations, as it pertains to DOGGR's oversight of hydraulic fracturing in California. The DOGGR website, (http://www.conservation.ca.gov/dog), has the following three links that provide a full explanation of the announcement, **1**) **Text of the "discussion draft" of regulations, 2) Narrative/background about the development of the "discussion draft" regulations, and 3) Frequently asked questions.**

Background

In July this year, the California Department of Conservation concluded their Hydraulic Fracking Seminars that were given at seven locations throughout the state. These seminars were part of a four step process to establish fracturing regulations by DOGGR, 1) the informational gathering seminars that concluded in July, 2) the release of the "discussion draft regulations", 3) the invitation for public comment to the "discussion draft regulations" and 4) the creation and release of the final regulations.

Summary of Discussion Draft Regulations

The new sections would provide as follows:

• Section 1780. **Definitions** would create several new fracking-related definitions.

• Section 1781. **Well Simulation Not an Injection Project**, would clarify that well stimulation activities such as fracking are not underground injection or disposal projects, and thus not subject to statutory schemes governing those activities.

• Section 1782. **General Hydraulic Fracturing Requirements** would impose various general requirements on operators related to well casing, protection of water zones, prevention of vertical migration of fluids or gases, wellbore integrity, and related matters.

• Section 1783. **Required Data Prior to Hydraulic Fracturing** would require operators to provide to DOGGR and to the applicable regional water quality control board information detailing the proposed fracking operations before fracking begins. Operators would be required to complete a “Form DOGGR HF1″ at least ten days before fracking begins, and notify DOGGR again at least 24 hours before actually commencing work. DOGGR would be required to post information about the proposed fracking within seven days of receipt of Form DOGGR HF1.

• Section 1784. **Evaluation Prior to Hydraulic Fracture** would require operators to perform a series of evaluations before commencing fracking operations. These evaluations would include pressure testing of cemented casing strings and tubing strings, proper rigging of surface equipment, adequacy of well cementing, and a fracture radius analysis to ensure that no fracking fluids or hydrocarbons will migrate into protected water zones.

• Section 1785. **Monitoring During Hydraulic Fracturing Operations**, would establish monitoring requirements during fracking operations. In the event that any irregularities occur, fracking operations must be terminated and DOGGR must be notified.

• Section 1786. **Storage and Handling of Hydraulic Fracturing Fluids** would create requirements for the proper and safe storage and handling of fracking fluids, including fluids stored at well sites and fracking flowback. Among these are a prohibition against storing non-freshwater fracking-related fluids in unlined sumps or pits, and clean up and remediation requirements in the event of an unauthorized release, with associated reporting requirements.

• Section 1787. **Well Monitoring After Hydraulic Fracturing**, would obligate operators to continue to monitor wells after fracking has been completed to identify any potential problems that could endanger any underground source of protected water. The monitoring data must be maintained for at least five years and made available to DOGGR on request.

• Section 1788. **Required Public Disclosures** would require that operators post specified data about fracking operations on www.FracFocus.org. In addition to basic information identifying the relevant well(s), operators would be required to disclose "[a] complete list of the names, CAS numbers, and maximum concentration, in percent by mass, of each chemical added to the [fracking] fluid." Operators would also need to disclose trade names, suppliers, and a brief description of the intended purpose of each chemical in the fluid. Also subject to disclosure would the volume of carrier fluid, the disposition of carrier fluid, any radiological components or tracers injected in the well, and the estimated volume of flowback fluid.

• Section 1788.1 **Claims of Trade Secret Protection**, would create an exemption to Section 1788′s disclosure requirements to protect against disclosure of trade secrets. Trade secret protection would be afforded to information that meets the definition created by California Civil Code Section 3426.1(d) or Penal Code Section 499c(a)(9). Operators seeking trade secret protection would be required to execute a declaration under penalty of perjury confirming the confidential nature of the information and demonstrating that disclosure would harm the competitive position of the party asserting the protection.

• Section 1788.2 **Use of Trade Secret Information**, would govern the use of trade secret information in the event that the information is necessary to investigate or respond to a spill or release of fracking fluid, as well as in the event that a medical professional needs access to such information to treat a patient who may have been exposed to a hazardous chemical.

Noticeably absent from the draft regulations is any significant treatment of induced seismicity. Section 1784 would require analysis of faults, but that analysis is primarily focused on protection of water rather than prevention of induced seismicity. In the FAQs, DOGGR explains that "reports of induced seismicity associated with [fracking] are actually related to long-duration, high- volume injection of waste fluids in disposal wells. [Fracking] is a short-duration production well stimulation treatment." California already has injection control rules in place that address waste fluid disposal well pressures. DOGGR concludes that "induced seismicity has not been an issue in California."

Industry Response

DOGGR chief Tim Kustic, said in a news conference Tuesday that DOGGR reviewed other states' fracking rules, and that as far as he could tell, the pre-frack testing he proposed would be unique in the country.

Industry representatives said cost remains a primary concern with any new regulations, even as they declined to estimate how much oil producers' costs would rise under Tuesday's proposal.

Les Clark, executive vice president of Bakersfield's Independent Oil Producers Agency, said well testing is "expensive to do," but that he expects upcoming discussions with state regulators to result in a set of "common sense" rules.

The oil and gas industry has previously opposed such prenotification, saying it would needlessly worry neighbors who have no power to appeal a company's decision to frack. While details remain to be worked out, "we don't have a problem" with the proposal's prenotification requirements, said Rock Zierman, chief executive of the California Independent Petroleum Association.

Critical Response

The DOGGR announcement had a strong reaction from several environmentalists and politicians, in a written statement, Sen. Fran Pavley (D-Agoura Hills) criticized the prenotification proposal as inadequate. She did not elaborate but did add that "public disclosure and public input are key to this process."

Still more contentious was the idea of exempting "trade secrets" from the list of frack fluid ingredients that the draft rules say should be published online at fracfocus.org or some other public website. DOGGR proposes to allow oil companies to identify certain ingredients by only the chemical family or a similarly vague description. But environmentalists said the industry should have to state exactly what it wants to inject underground, no exceptions. "There should be some way to disclose what those (chemicals) are," said George Torgun, staff attorney at Earthjustice, a San Francisco nonprofit.

In a statement from Kristin Lynch, Pacific Region Director of Food & Water Watch
“With proposed regulations, which took nearly a year to draft, today the California Division of Oil, Gas and Geothermal Resources (DOGGR) proves that it has no intention to move beyond the lawless Wild West when it comes to fracking in our state, leaving us at the mercy of the oil and gas industry.

“DOGGR’s draft regulations will do nothing to protect Californians from the dangers fracking poses to our air, water and climate. It does not address the federal environmental and health legislative exemptions the oil and gas industry currently enjoys, including the key exemption to the Safe Drinking Water Act. Nor does it provide meaningful chemical disclosure requirements and it would have the industry police itself by evaluating and monitoring its fracking operations for safety. The ‘regulations’ proposed are akin to having state speeding regulations where automobile drivers are expected contact law enforcement on their own volition if they break the posted speed limit at any given time.”

In a written statement, the Center for Biological Diversity said the draft regulations “do little to protect the state's environment, wildlife, climate and public health.
“California faces huge environmental risks unless state officials halt this dangerous fracking boom,” Kassie Siegal, an attorney for the center said.

It is interesting to note that there are two bills in front of the current session of the California Legislature, AB 7 by Assemblyman Bill Wieckowski (D-Fremont) and SB 4 by Senator Fran Pavley (D-Agoura), related to hydraulic fracturing. These bills, which are a remake of bills put forth by both legislators in the previous session, ask for stronger oversight of fracturing than the new "discussion draft regulations" proposed by DOGGR.

Another point of interest, DOGGR's draft rules do not address other controversial aspects of fracking, such as impacts on air quality and related seismic activity. In the "Frequently asked questions" section on the DOGGR website, their repos we to seismic activity concerns was, "since 1947 in the United States, more than one million oil and gas wells have been hydraulically fractured with no recorded incidences of triggered earthquakes...." This basically stating it is a non-issue.

Next Steps

In the "frequently asked questions" link listed on DOGGR's website, here are two key questions and answers that address the next steps:
Will the public have an opportunity to comment on these regulations?

Prior to commencing the formal rulemaking process, the Division is circulating the proposed regulations to solicit stakeholder input on an informal basis. To this end, the Division will hold stakeholder workshops at times and places to be announced. Written comments about these draft proposed regulations can be submitted at any time to comments@conservation.ca.gov. In addition, once the formal rulemaking process begins, there will be a minimum 45-day public comment period that will include at least one public comment hearing.

When will the regulations go into effect?

The Division hopes to commence the formal rulemaking process in February 2013. The duration of the rulemaking process depends on the extent of public participation and the number of revisions the Division makes to the regulations during the process. The Division estimates that this rulemaking process will take eight to ten months to complete.