



## Texas A&M Journal of Property Law

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Volume 7  
Number 3 *Oil & Gas Survey*

Article 4

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5-15-2021

### California

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#### Recommended Citation

Joshua L. Baker & Ryan Mahoney, *California*, 7 Tex. A&M J. Prop. L. 357 (2021).  
Available at: <https://doi.org/10.37419/JPL.V7.I3.4>

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## CALIFORNIA

*Joshua L. Baker and Ryan Mahoney\**

### I. INTRODUCTION

Oil and gas output in California has declined as the industry faces increasing regulatory and market headwinds.<sup>1</sup> However, California remains a major oil and gas producing jurisdiction at the present. California is the seventh-largest producer of crude oil in the United States and contains the fifth-largest crude oil reserves.<sup>2</sup>

California has a long history of oil and gas exploration and production, refinement and marketing, and as a result, well-

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DOI: <https://doi.org/10.37419/JPL.V7.I3.4>

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1. See Julie Cart, *Battle Lines are Drawn over Oil Drilling in California*, U.S. Energy News (December 6, 2019), <https://energynews.us/2019/12/06/us/battle-lines-are-drawn-over-oil-drilling-in-california/>.

2. See *California State Profile and Energy Analysis*, U.S. Energy Administration Information (January 16, 2020) <https://www.eia.gov/state/analysis.php?sid=CA> [<https://perma.cc/SDD9-FACR>].

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established common law principles and statutory and regulatory laws are in place that govern all facets of the industry. The following update summarizes key changes in California oil and gas law for the survey period from January 1, 2020, to October 15, 2020.

## II. LEGISLATIVE ACTIVITY

Although previous legislative sessions had seen the introduction of many bills seeking to regulate and otherwise deemphasize oil and gas production in California, the COVID-19 pandemic contributed to a less-productive legislative session in 2020 with respect to oil and gas regulation. Despite this, the tone of introduced bills mirrored previous years, in that the proposed laws sought to further constrain oil and gas production in California. The only major oil and gas regulatory bill of the 2020 legislative session is summarized below.

### A. *Assembly Bill No. 3214*<sup>3</sup>

Assembly Bill No. 3214 (“AB 3214”) effects several changes to California oil and gas regulation by amending a provision of the California Government Code in order to increase the existing criminal penalties associated with oil spills in waters of the State of California.<sup>4</sup> AB 3214 increases the minimum financial penalty from \$5,000 to \$10,000 and the maximum financial penalty from \$500,000 to \$1,000,000 for those convicted of several offenses, which include knowingly failing to follow the directions of the administrator<sup>5</sup> in connection with an oil spill, knowingly failing to notify the Coast Guard of the disability of a vessel which is causing a discharge of oil, knowingly engaging or causing the discharge or spill of oil, or knowingly failing to cleanup, abate or remove spilled oil as required

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3. A.B. 3214, 2020 Leg., 2019-2020 Sess. (Cal. 2020). Approved by the Governor on September 24, 2020, and chaptered by the Secretary of State as Chapter 119 on September 24, 2020.

4. “Waters of the state” is defined in the related statutory framework to mean any surface water, including saline waters, marine waters and freshwaters, within the boundaries of the State, but does not include groundwater. (California Government Code § 8670.3(ak).)

5. “Administrator” is defined as the administrator for oil spill response appointed by the Governor pursuant to California Government Code § 8670.4, which provides, among other things, that there shall be an administrator for oil spill response appointed by the Governor who shall be a chief deputy director of the California Department of Fish and Game. (California Government Code §§ 8670.3(a), 8670.4.)

under California law.<sup>6</sup> Additionally, AB 3214 adds the option for the court to impose a fine of up to \$1,000 per gallon spilled in excess of 1,000 gallons in connection with any of the aforementioned offenses.<sup>7</sup>

The legislative history of AB 3214 indicates that the bill was enacted in response to perceived insufficiency of the financial penalties associated with the 2015 oil spill near Refugio State Beach in Santa Barbara.<sup>8</sup> While the prosecution team litigating that matter asked for \$1 billion in penalties, the Court imposed a substantially smaller penalty of \$3,000,000.<sup>9</sup>

### III. EXECUTIVE ACTIVITY

On September 23, 2020, California Governor Gavin Newsom issued Executive Order N-79-20 (the “Order”). The Order broadly announces a myriad of goals relating to carbon emissions, the use of electric vehicles, the reduction of oil and gas production, and other climate related issues. The Order elucidates several important points with respect to California’s future treatment of oil and gas development, generally indicating California’s intention to move away from oil and gas extraction.

First, the Order states that “it shall be a goal of the State that 100 percent of in-state sales of new passenger cars and trucks will be zero-emission by 2035.”<sup>10</sup> The Order sets a similar goal for medium- and heavy duty trucks, drayage trucks, off-road vehicles and equipment with target dates between 2035 and 2045.<sup>11</sup>

Second, in a more direct blow to the upstream oil and gas industry in California, the Order states that “as [California] transitions away from fossil fuels,” the State will work “to end the issuance of new hydraulic fracturing permits by 2024.”<sup>12</sup>

Third, the Order requires the State’s oil and gas regulatory agency, the Department of Conservation’s Geologic Energy Management Division (“CalGEM”), to “strictly enforce bonding requirements and

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6. California Government Code § 8670.64(b)(1) (as amended by AB 3214).

7. *Id.* at § 8670.64(b)(2) (as amended by AB 3214).

8. California State Assembly, Floor Analysis of AB 3214, at 1-2 (Aug. 29, 2020).

9. *Id.* at 2.

10. Cal. Exec. Order N-79-20 (September 23, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-text.pdf> [<https://perma.cc/MA7M-E8X8>].

11. *Id.*

12. *Id.*

other regulations to ensure oil extraction operators are responsible for the proper closure and remediation of their sites.”<sup>13</sup>

And finally, the Order states that CalGEM will “[p]ropose a significantly strengthened, stringent, science-based health and safety draft rule that protects communities and workers from the impacts of oil extraction activities by December 21, 2020.”<sup>14</sup>

#### IV. CASE LAW DEVELOPMENTS

California’s Appellate Courts issued the below opinions affecting oil and gas law in the state during the survey period.

In *Association of Irrigated Residents v. California Department of Conservation*<sup>15</sup> (“*Association*”), various environmental groups challenged the California Department of Conservation’s Division of Oil, Gas and Geothermal Resources’ (“DOGGR’s”)<sup>16</sup> approval of 213 permits to drill new oil wells in California’s South Belridge Oil Field. The groups filed a petition for a writ of mandate in the Superior Court for the County of Kern alleging that DOGGR failed to comply with the California Environmental Quality Act (“CEQA”)<sup>17</sup> by issuing the permits because no CEQA exemption applied to the issuance and no environmental review was conducted.<sup>18</sup> The Superior Court rejected the petition, holding that the permit approvals were “ministerial,” and therefore exempt from CEQA.<sup>19</sup> The groups appealed the ruling of the Superior Court, arguing that the issuance of the permits was in fact discretionary and thus should trigger CEQA review.<sup>20</sup>

The California Court of Appeals for the Fifth District upheld the ruling of the Superior Court.<sup>21</sup> The Appellate Court agreed that the act was ministerial in nature.<sup>22</sup> Under California law, when the issuance of a “permit is governed by fixed standards or objective criteria set forth in a statute, regulation or other law such that there is no room for the agency to exercise any discretion or judgment to shape

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13. *Id.*

14. *Id.*

15. 2020 Cal. App. Unpub. LEXIS 2222 (Ct. App. 2020) (unpublished).

16. The Division of Oil, Gas and Geothermal Resources (DOGGR) was renamed the California Geologic Energy Management Division (CalGEM) by A.B. 1057, 2019 Leg., 2018-2019 Sess. (Cal. 2019). This opinion continues to use the DOGGR acronym.

17. California Public Resources Code § 21000 *et seq.*

18. *Association*, 2020 Cal. App. Unpub. LEXIS 2222 at \*2.

19. *Id.*

20. *Id.* at \*11.

21. *Id.* at \*3.

22. *Id.* at \*35.

the project in a manner responsive to environmental concerns, the agency's decision would be ministerial."<sup>23</sup> The Appellate Court reviewed the governing statutes, and conceded that while "some statutory provisions and regulations reflect that, under other circumstances, DOGGR would ordinarily exercise discretion in making well drilling permit decisions ...," nevertheless, "... that was not the case here."<sup>24</sup> Rather, "DOGGR did not exercise discretionary judgment or deliberation, but merely determined in a mechanical fashion whether there was conformity [with the relevant law]."<sup>25</sup>

The case is unpublished and therefore not binding outside of this specific litigation.

In *King & Gardiner Farms, LLC v. County of Kern*<sup>26</sup>, the California Court of Appeals for the Fifth District considered an appeal in a long-running challenge to Kern County's oil and gas permitting ordinance. This particular appeal alleged CEQA deficiencies in the county's Environmental Impact Report (EIR) for the ordinance relating to water supply issues, conversion of agricultural land and noise impacts. The Court found CEQA deficiencies related to all three areas.<sup>27</sup>

With respect to water supply issues, after reviewing the EIR and the relevant legal standards, the Appellate Court found that "the level of detail provided in the EIR about mitigation for the significant water supply impacts fails to enable the public and decision makers to understand and consider meaningfully the issues relating to water supply impacts and mitigating those impacts."<sup>28</sup>

The Court also found deficiencies in the EIR's consideration of agricultural impacts related to the County's oil and gas permitting scheme. *King & Gardiner Farms* had argued that the EIR failed to address the "most promising" method of mitigated oil and gas impacts on agriculture, clustering oil infrastructure sited on farmland. The Court agreed that clustering as proposed by *King & Gardiner* "presented a type of mitigation that would lessen, but not eliminate, a significant environmental impact" of oil and gas operations.<sup>29</sup> The

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23. *Id.* at \*31-32 (citing *Sierra Club v. County of Sonoma*, 11 Cal. App. 5<sup>th</sup> 11, 22-23 (Ct. App. 2017); *Friends of Juana Briones House v. City of Palo Alto*, 190 Cal. App. 4<sup>th</sup> 286, 300 (Ct. App. 2010); *Sierra Club v. Napa County Bd. of Supervisors*, 205 Cal. App. 4<sup>th</sup> 162, 180 (Ct. App. 2012).

24. *Id.* at \*65.

25. *Id.*

26. 45 Cal. App. 5<sup>th</sup> 814 (Ct. App. Feb. 25 2020).

27. *Id.* at 829-30.

28. *Id.* at 870.

29. *Id.* at 882.

Court then found deficiencies related to the EIR's consideration of the proposed mitigation.<sup>30</sup>

Finally, the Court found deficiencies related to the EIR's treatment of noise impacts. The Court held that the EIR's "reliance on a single ... metric for determining the significance of the project's noise impacts and the absence of an analysis ... for concluding the magnitude of the increase in ambient noise ... does not comply with CEQA."<sup>31</sup>

The Court therefore set aside the ordinance, but permits issued prior to invalidation remain effective. The County is currently in the process of re-drafting the oil and gas permitting ordinance.

#### V. REGULATORY ACTIVITY

Regulatory activity affecting the California oil and gas industry during the survey period continued to focus on a variety of issues. In particular, CalGEM continues work related to the rulemaking process for the adoption of new public health regulations for communities located near oil and gas operations.<sup>32</sup>

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30. *Id.*

31. *Id.* at 894.

32. *See Public Health Rulemaking*, CALIFORNIA DEPARTMENT OF CONSERVATION, <https://www.conservation.ca.gov/calgem/Pages/Public-Health.aspx> [https://perma.cc/4S9B-TKNF].