



ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

Arnold & Porter LLP is pleased to provide this monthly summary of statutes, regulations, judicial decisions and case filings on hydraulic fracturing around the United States. It accompanies a litigation [chart](#) that the firm has posted on-line and continually updates, where the cases are organized by topic and where links are found to many of the decisions and pleadings. To sign up to continue to receive this free update service, or to send us additional cases or complaints for posting, please e-mail [Cullen Howe](#).

Arnold & Porter attorneys have a long history of counseling energy companies on regulatory compliance and defending their interests in enforcement proceedings and litigation. Information about the firm's experience with hydraulic fracturing is available [here](#).

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STATUTES, REGULATIONS, AND ORDERS

Federal Developments

GAO Releases Reports Addressing Regulatory Challenges Concerning Hydraulic Fracturing

On October 9, 2012, the Government Accountability Office (GAO) released two reports concluding that state and federal regulators face significant challenges in drafting environmental and public health regulations to address hydraulic fracturing and other forms of unconventional fossil fuel development because of the lack of data on the risks. [One report](#), which focused on the development of oil and natural gas in shale formations, concluded that the risks cannot be quantified at present because there are too many uncertainties given the recent production boom. The [other report](#) examined the status of major federal environmental laws and regulations in unconventional oil and gas development, as well as state laws in Colorado, North Dakota, Ohio, Pennsylvania, Texas and Wyoming. It concluded that federal and state agencies have reported several challenges in regulating oil and gas development from unconventional reservoirs. In both reports, GAO stopped short of making recommendations.

State and Local Developments

Colorado

On October 1, 2012, the Colorado Oil and Gas Conservation Commission voted to launch a three-month rulemaking on setback and groundwater monitoring standards for oil and gas wells. Setback regulations dictate requirements that oil and gas companies must meet when they are a given distance from occupied buildings. More stringent requirements apply in situations involving high-occupancy buildings like hospitals or schools. The rulemaking will focus on impacts such as noise, odor, and well-pad lighting, as well as proposed new requirements for baseline groundwater monitoring.

New York

On September 20, 2012, the Commissioner of the state Department of Environmental Conservation [announced](#) that the state's rules concerning hydraulic fracturing will be delayed for an indeterminate length of time so a public health review can be conducted by the state Department of Health. The state released draft rules concerning hydraulic fracturing in September 2011 and closed the public comment period in January 2012 after receiving approximately 80,000 comments.

Ohio

On October 1, 2012, Yellow Springs, Ohio adopted a "Community Bill of Rights" that bans shale gas drilling, hydraulic fracturing, and injection wells within its borders. The Village Council voted 3-2 in favor of the law. Under state law, the Ohio Department of Natural Resources has permitting authority over all forms of oil and gas drilling.

On September 18, 2012, the Ohio Environmental Protection Agency's Division of Materials and Waste Management (DMWM) issued an [advisory](#) to solid waste landfills in the state concerning how they should handle wastes associated with hydraulic fracturing. The advisory addresses three kinds of wastes: drill cuttings, drilling muds, and frac sands. The advisory also addresses how the agency and the state Department of Natural Resources regulate flowback/brine disposal. The advisory states that landfill operators interested in accepting these waste streams are required to obtain prior authorization from DMWM.

Pennsylvania

On October 6, 2012, the Pennsylvania Department of Environmental Protection issued [technical guidance](#) that will help regulators determine when to issue separate permits for individual sources of emissions and when to aggregate separate sources and treat them as a single source for permitting purposes. The guidance states that properties are contiguous or adjacent if they are within a quarter mile of each other. Sources located on contiguous or adjacent properties should be aggregated as a single source for permitting purposes as long as the facilities are within the same industrial grouping and under common control. If emissions from the aggregated sources meet or exceed major source emissions thresholds, they are subject to permitting requirements under the Clean Air Act's new source review, prevention of significant deterioration, and Title V programs. According to the guidance, when emission sources are on properties located more than a quarter mile apart, they may be considered contiguous or adjacent, but the decision to do so will be made on a fact-specific, case-by-case basis.

DECISIONS AND SETTLEMENTS

Jeffrey v. Ryan (N.Y. Sup. Ct. Binghamton Co. Oct. 2, 2012): A New York state court struck down a local law banning hydraulic fracturing in the City of Binghamton, ruling that the law constituted a moratorium that was not properly enacted by the city. The court held that the city did not meet three requirements when it enacted the moratorium in 2011: that the moratorium was in response to a dire necessity, that it was reasonably calculated to alleviate or prevent a crisis, and that the city was taking reasonable steps to rectify the problem. In particular, the court pointed out that there was no dire need for the moratorium given that the state Department of Environmental Conservation has yet to publish new regulations concerning the practice in New York.

State of New York v. United States Army Corps of Engineers (E.D.N.Y. Sept. 24, 2012): New York and other related parties commenced a lawsuit seeking to enjoin the Delaware River Basin Commission from issuing proposed regulations governing natural gas development in the Basin until the U.S. Army Corps of Engineers prepares a draft environmental impact statement pursuant to the National Environmental Policy Act. The district court granted defendants' motion to dismiss, holding that the lawsuit was premature given that until the Commission's regulations are final, the plaintiffs could not establish a likelihood of injury. The court further held that the claims are not ripe because they would be moot if the Commission fails to issue final rules and leaves the current moratorium that has been in effect since 2009 in place.

Impact Energy Resources v. Salazar (10th Cir. Sept. 5, 2012): In late 2008, the Bureau of Land Management opened lands in Utah for oil and gas leases, and awarded several leases to the highest bidders, including plaintiff energy companies. In February 2009, the newly appointed Secretary of the Interior announced that the lands in question would not be leased. The plaintiff companies subsequently brought suit in state court. The district court dismissed the lawsuit as time barred under the Mineral Leasing Act, which requires actions contesting a decision to be commenced within 90 days after the final decision of the Secretary. On appeal, the 10th Circuit affirmed on identical grounds, holding that the action should have been brought within 90 days of the February 2009 announcement by the Secretary.

Evenson v. Antero Resources Corp. (Denver Co. Dist. Ct. Aug. 17, 2012): Several families residing in Garfield County, Colorado filed a lawsuit alleging that drilling and exploration activities of defendant company exposed their properties to hazardous gases, chemicals, and industrial wastes. The complaint included causes of action for negligence and medical monitoring, among others. The court granted defendant's motion to dismiss, holding that it lacked jurisdiction over plaintiffs' claims. In particular, the court held that it could not enjoin the issuance of a drilling permit given that state law provided statutory mechanisms for seeking judicial review of such permits. In addition, the court held that the claims were not ripe because they were dependant on defendant seeking and being granted permits, which had not yet occurred.

NOTICES AND CASE FILINGS

Env. Working Group v. NYS Dept. of Env. Conservation (N.Y. Sup. Ct. Albany Co., filed Sept. 17, 2012): A Washington D.C.-based environmental group filed a lawsuit against New York seeking documents concerning

the oil and gas industry's efforts to influence the state's regulation of hydraulic fracturing. The lawsuit seeks correspondence and communications since Jan. 1, 2011, between 25 oil and natural-gas companies or their representatives and the governor, his top aides and department officials. In March 2012, the group filed a request under the state's Freedom of Information Law. However, the lawsuit alleges that the governor provided only a very limited number of records.

To speak with an Arnold & Porter attorney about these issues, contact:

Lawrence E. Culleen

Partner

Washington, DC

tel: +1 202.942.5477

Lawrence.Culleen@aporter.com

Michael D. Daneker

Partner

Washington, DC

tel: +1 202.942.5177

Michael.Daneker@aporter.com

Matthew J. Douglas

Partner

Denver

tel: +1 303.863.2315

Matthew.Douglas@aporter.com

arnoldporter.com

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