



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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DECISIONS AND SETTLEMENTS

Teel v. Chesapeake Appalachia LLC (N.D. W. Va. Oct. 25, 2012): Landowners in West Virginia filed a lawsuit against a gas drilling company for trespass, negligence, and related claims alleging that the company's dumping of large volumes of drill cuttings, mud, and chemical additives into a waste pit on their property damaged it and harmed them. The company moved for partial summary judgment on the trespass claim. The court granted the motion, holding that the plaintiffs could not maintain a trespass claim given that the creation of the pits was contemplated by state law and was thus necessary and reasonable.

Hiser v. XTO Energy, Inc. (E.D. Ark. Aug. 14, 2012): A plaintiff alleged that her home was damaged by vibrations resulting from nearby drilling activity and brought claims for negligence, nuisance, and trespass. The case was originally filed in state court and then removed to federal court. The defendant company moved for summary judgment. The district court denied the motion, holding that expert testimony was not required to determine proximate cause and that this was an issue of fact to be determined by a jury.

Hagy v. Equitable Production Co. (S.D. W. Va., May 17, 2012 and June 29, 2012): A family filed suit in West Virginia state court. The case was removed to federal court in December 2010. Plaintiffs alleged that their property and water well, which were both within 1,000 feet from defendant company's gas wells, became contaminated as a result of defendant's wells. The complaint alleged causes of action for negligence, negligence per se, nuisance, strict liability, trespass, and medical monitoring. Subsequently, defendants moved for summary judgment. In a [May 2012 decision](#), the district court held that the plaintiffs had entered into a settlement agreement that waived all causes of action against the drilling company. In a [June 2012 decision](#), the court held that the claims against the remaining defendant, which supplied certain drilling equipment, should be dismissed given that plaintiffs failed to provide any evidence that would demonstrate negligence on the part

of the company.

NOTICES AND CASE FILINGS

Center for Biological Diversity v. Cal. Dept. of Conservation (Cal. Super. Ct., filed Oct. 16, 2012): Four environmental groups filed a lawsuit in California state court seeking to force the California Department of Conservation (CDC) to conduct environmental analyses for oil and gas fields before hydraulic fracturing occurs. The plaintiffs alleged that the California Division of Oil, Gas, and Geothermal Resources (CDOGGR), a division of CDC, has been violated the California Environmental Quality Act (CEQA) by issuing permits for oil and gas drilling without analyzing the risks posed by fracturing. CDOGGR is preparing to issue regulations that specifically govern fracturing sometime later in the year.

American Petroleum Institute v. EPA (D.C. Cir., filed Oct. 15, 2012): Nine separate petitions were filed by environmental groups, industry associations, and the state of Texas challenging EPA's air pollution standards for hydraulic fracturing operations. EPA's final rule was released in [April 2012](#) and published in [August 2012](#). The final new performance standards are expected to reduce emissions of volatile organic compounds, methane, and air toxics. However, the rule does not directly regulate methane. The petitions filed by environmental groups challenge the rule's omission with respect to methane.

STATUTES, REGULATIONS AND ORDERS

Federal Developments

EPA Publishes Notice Concerning Impacts of Hydraulic Fracturing on Drinking Water

On November 9, 2012, EPA published a [notice](#) seeking public input concerning a pending study on the impacts of hydraulic fracturing on drinking water. The study, which was undertaken at the request of Congress, includes an analysis of water used in all stages of the hydraulic fracturing process. EPA will accept data and literature from the public until April 30, 2013.

Groups Ask EPA to Require TRI Reporting for Chemicals Used in Oil and Gas Extraction Activities

On October 24, 2012, 17 environmental groups [petitioned](#) EPA to require Toxic Release Inventory (TRI) reporting for oil and gas extraction activities. In their petition, the groups cited air emission data from EPA in support of their request that EPA add the oil and gas extraction industry to the list of industries that must report releases of toxic chemicals under the Emergency Planning and Community Right-to-Know Act. According to the petition, EPA has estimated that these operations release approximately 130,000 tons of hazardous air pollutants per year, approximately 30% of the total released by all industries that report their emissions pursuant to the TRI.

EPA Releases Data on Groundwater Pollution at Site in Wyoming

On October 10, 2012, EPA [released](#) new monitoring data on groundwater contamination in a natural gas field in Wyoming which the agency had previously linked to hydraulic fracturing. The agency concluded that the groundwater contamination was “likely associated with gas production practices, including hydraulic fracturing.” EPA is taking public comment on the data until January 15, 2013. In September 2012, the Wyoming Department of Environmental Quality released a [memorandum](#) finding no exceedences of EPA's ambient air quality standards near the town of Pavillion, which is close to the gas field.

USGS Releases Oil and Gas Assessment of Utica Shale

On October 4, 2012, the U.S. Geological Survey released its [oil and gas assessment](#) of the Utica Shale, which covers parts of Maryland, New York, Ohio, Pennsylvania, Virginia and West Virginia. According to the assessment, the continuous oil, gas and natural gas liquid accumulations of the Utica Shale contain approximately 38 trillion cubic feet of undiscovered, recoverable natural gas. The survey also found that the amount of undiscovered oil ranges from 590 million barrels to 1.39 billion barrels. The Utica Shale lies beneath the Marcellus Shale, and both are part of the Appalachian Basin.

State Developments

California

On October 5, 2012, The South Coast Air Quality Management District (SCAQMD) announced [plans](#) to initiate a rulemaking that may include requirements for reporting of chemicals used in hydraulic fracturing. The announcement also called for a review of existing SCAQMD rules to determine if they are sufficiently protective and an evaluation of currently available technologies to control emissions from hydraulic fracturing.

Colorado

On November 6, 2012, citizens of the City of Longmont approved a [ban](#) on the use of hydraulic fracturing to extract oil, gas, and other hydrocarbons within city limits. In addition to banning hydraulic fracturing, the measure prohibits disposal of solid or liquid wastes created in connection with hydraulic fracturing, including flowback and produced wastewater and brine.

Texas

On September 28, 2012, the Texas Railroad Commission issued a [proposed rule](#) that would allow the recycling of hydraulic fracturing fluids and reuse of water produced in oil and gas drilling. Under the proposed rule, companies could recycle water and hydraulic fracturing flowback fluid onsite without a permit. These fluids are normally kept in storage tanks or containment pits until disposal.

Utah

On October 24, 2012, the Utah Division of Oil, Gas, and Mining enacted a [rule](#) that, among other things, requires all oil and gas producers to report the amount and type of chemicals used in hydraulic fracturing operations to a national registry within 60 days of the work being performed. Specifically, the rule requires the public disclosure of chemicals used by individual wells; defines proper methods for production of oil and gas emphasizing well bore integrity, casing design, pressures, drilling, completions, and protection of groundwater; and addresses the proper methods for the protection of surface water flowback.

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