



ARNOLD & PORTER LLP

Hydraulic Fracturing Legal Update

October 31, 2013 Issue 2013-2

Arnold & Porter LLP is pleased to provide this summary of legislative and regulatory developments over the past several months concerning hydraulic fracturing. The update accompanies a [regulatory chart](#) that the firm has posted online and will update; the chart lists proposed and final laws, regulations, and guidance documents by jurisdiction and contains links to many of these documents. Arnold & Porter also maintains a hydraulic fracturing [litigation chart](#), where the cases are organized by topic with links to many of the decisions and pleadings. To be added to the free subscription list for this update service, or to send us additional laws, regulations, judicial decisions, or other documents for posting, please e-mail [Margaret Barry](#).

This month's update focuses on legislative and regulatory developments. The next update will focus on judicial decisions.

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](#).

HYDRAULIC FRACTURING - LEGISLATIVE & REGULATORY DEVELOPMENTS

Federal

On September 23, 2013, EPA published a [final rule](#) amending the new source performance standards (NSPS) for the oil and gas sector. The amendments phase in deadlines for complying with the August 2012 NSPS's requirements to reduce emissions of volatile organic compounds from storage tanks used by the crude oil and natural gas production industry. The original compliance date was October 15, 2013. EPA made these changes in response to petitions for reconsideration and indicated that it is continuing to evaluate other aspects of the petitions.

On September 12, 2013, the Occupational Safety and Health Administration (OSHA) published a [proposed rule](#) to reduce the permissible exposure limit (PEL) for crystalline silica dust, a material used as proppant in hydraulic fracturing. The proposed regulations would reduce the PEL to an across-the-board 8-hour time-weighted average of 50 micrograms of respirable crystalline silica per cubic meter of air. Current PELs range from 50 to 250 micrograms per cubic meter of air, depending on the form of crystalline silica and whether the applicable workplace is shipyards, construction, or general industry. The proposal also addresses requirements for exposure assessment, preferred methods for controlling exposure, respiratory protection, medical surveillance, hazard communication, and recordkeeping. The proposed rule follows on the heels of a [Hazard Alert](#) issued by OSHA and the National Institute for Occupational Safety and Health that focuses on worker exposures to airborne silica in the course of hydraulic fracturing operations.

On August 5, 2013, the Bureau of Land Management (BLM) published a [notice of intent](#) to prepare an environmental impact statement (EIS) and initiated a public scoping process regarding oil and gas leasing and development on public lands in the Hollister Field Office in California. The notice indicated BLM might also amend the Hollister Resource Management Plan (RMP). In its [announcement](#) of this undertaking, BLM indicated that the planning process was a "cooperative effort" with the State of California and that it was "in response to a series of legal challenges." (The legal challenges to which BLM refers include a challenge to a BLM sale of oil and gas leases in which a federal court [held](#) that BLM had unreasonably refused to consider drilling projections that included fracking operations.) In its [notice of intent](#), BLM indicated that the EIS will analyze various current or reasonably foreseeable well completion and stimulation practices, including hydraulic fracturing and the use of horizontal drilling. BLM also announced that it would undertake a "separate peer-reviewed, interdisciplinary assessment of the current state of industry practices for well completion and stimulation in California." BLM indicated that this planning process might also be used to consider amending

RMPs for other field offices in California.

Alaska

On August 7, 2013, the Alaska Oil and Gas Conservation Commission issued a [new version](#) of proposed regulations governing hydraulic fracturing of oil and gas wells. These regulations replace [proposed regulations](#) originally published in December 2012. The newly proposed regulations would require notification of neighbors and pre- and post-drilling sampling of water sources within one-half mile of the well bore. The proposed regulations also require disclosure of the concentrations of chemical additives in fracking fluid.

California

California Governor Jerry Brown signed [S.B. 4](#) into law on September 4, 2013. The new law requires regulations for well stimulation treatments, including hydraulic fracturing and acid well stimulation, by January 2015, as well as a scientific study to evaluate “the hazards and risks and potential hazards and risks that well stimulation treatments pose to natural resources and public, occupational, and environmental health and safety.” The regulations must provide for construction of wells and well casings to ensure integrity of wells, well casings, and the geologic and hydrologic isolation of the oil and gas formation. The law also requires that an independent entity provide copies of approved permits and information on available water sampling and testing to tenants and owners within a 1,500-foot radius of the wellhead or within 500 feet from the horizontal projection of all subsurface portions of the designated well to the surface. The new law also requires public disclosure of the composition and disposition of well stimulation fluids within 60 days after the well stimulation treatment ends.

Colorado

The Colorado Oil and Gas Conservation Commission [announced](#) that as of July 1, 2013 it would begin active enforcement of Rule 205.A, which requires that chemical disclosures be completed within 60 days after completion of a hydraulic fracturing treatment, or no later than 120 days after commencement of a hydraulic fracturing treatment.

Kansas

On September 26, 2013, the Kansas Department of Health and Environment published [regulations](#) governing the land-spreading of drilling waste. The regulations became effective on October 11, 2013. The regulations provide that approval of the Kansas Corporation Commission (KCC) is required prior to any land-spreading. The regulations set forth the information that must be provided in land-spreading applications as well as the criteria that must be met in order for the KCC to approve applications. The regulations require, among other things, that the water table must be at least 10 feet below the surface, that there cannot be any documented groundwater contamination, that at least three years must have passed since previous land-spreading, and that the drilling mud must be water-based.

On August 15, 2013, the KCC held a hearing on [proposed regulations](#) that would require that chemicals used in hydraulic fracturing fluid be disclosed in conjunction with the submission of completion reports. The regulations would permit submission of the information via FracFocus as an alternative compliance mechanism.

Maryland

In August 2013, the Maryland Department of the Environment and Maryland Department of Natural Resources published a draft set of [recommended best practices](#) for natural gas exploration and production. This draft report was issued to fulfill requirements of [Executive Order 01.01.2011.11](#) issued in June 2011. In the meantime, a de facto moratorium on drilling remains in place.

North Carolina

In 2012, [S.L. 2012-143](#) directed the North Carolina Mining and Energy Commission (MEC) to study North Carolina and other states' laws on compulsory pooling and to report its findings and recommendations to the Joint Legislative Commission on Energy Policy established by the law. Compulsory pooling occurs when landowners are forced to include their property in a drilling unit or pool so that enough tracts of land are joined together to satisfy spacing requirements for well drilling permits. In September 2013, the Compulsory Pooling

Study Group, comprising four MEC commissioners, published its [final report](#). The report recommends allowing compulsory pooling where 90 percent of the owners of the surface acreage of a drilling unit have voluntarily leased or consented to developing their oil or gas rights. The report's recommendations also include the establishment of protections for landowners subject to pooling orders.

On July 29, 2013, Governor Pat McCrory signed legislation ([S.L. 2013-765](#)) that continues the moratorium on issuance of permits for oil and gas development involving hydraulic fracturing and horizontal drilling. The law directs the MEC to develop a comprehensive environmental permit for hydraulic fracturing. The moratorium will continue until regulations are promulgated and the General Assembly takes further legislative action to authorize issuance of permits. Progress on the development of regulations can be followed at MEC's [website](#).

Ohio

On September 29, 2013, provisions of an Ohio law ([H.B. 59](#)) concerning the acceptance by solid waste facilities of drilling waste materials contaminated with radioactive material went into effect. To assist solid waste landfills and transfer facilities with compliance, the Ohio Environmental Protection Agency (Ohio EPA) published a [guidance document](#) describing the representative analytical results that such facilities must obtain and the logs they must keep with respect to technologically enhanced naturally occurring radioactive material (TENORM). Ohio EPA also issued a [fact sheet](#) regarding the preliminary stakeholder outreach that will be part of its effort to develop solid waste facility regulations for the receipt, acceptance, processing, handling, management, and disposal of material that contains or is contaminated with TENORM.

On September 11, 2013, the Ohio State Energy Response Commission sent a [letter](#) to oil and gas well owners and operators informing them that they could not use a state-created alternative reporting mechanism to comply with the federal Emergency Planning and Community Right-to-Know Act.

Pennsylvania

The Pennsylvania Department of Environmental Protection [announced](#) on August 27, 2013 that the Environmental Quality Board had approved [proposed regulations](#) regarding surface activities related to oil and gas well development. The regulations address protection of public resources such as parks, historic sites, and critical communities for species of concern; orphan and abandoned well identification; containment practices; and protection of water resources. The draft regulations, which were issued pursuant to [Act 13](#) of 2012, must be reviewed by the Attorney General's Office and the Office of General Counsel, after which the public comment period will officially open.

Effective August 10, 2013, the Pennsylvania Department of Environmental Protection amended its [technical guidance for air quality permit exemptions](#) to require that unconventional wells meet certain criteria in order to be exempt from air permitting requirements. The criteria include performance of a leak detection and repair program, installation of volatile organic compound (VOC) emission controls on storage vessels/storage tanks and other equipment to achieve emissions reduction of 95% or greater; 12-month limits on VOC and hazardous air pollutant emissions from the entire well site that are equal to or more restrictive than federal standards, restrictions on flaring activities, and de minimis NOx emissions limits.

Texas

On September 1, 2013, [H.B. 2767](#) became effective. The law is intended to encourage recycling of certain drilling wastes. It requires the Texas Railroad Commission (TRC) to promulgate regulations for the treatment and beneficial use of oil and gas waste. It also specifies that ownership of fluid oil and gas waste transfers to recyclers and then to any person to whom the waste is transferred for disposal or beneficial use; the law also limits the tort liability of recyclers.

On August 12, 2013, the TRC released a [draft rule](#) for informal comment that proposes changes to requirements for disposal wells, including requiring a top of cement above the underground source of water and requiring TRC inspections of the operations and compliance history of commercial disposal wells prior to approvals of transfers.

West Virginia

The West Virginia Department of Environmental Protection issued the final version of [Natural Gas Production Facility Class II General Permit G70-A](#) on October 18, 2013. The G70-A permit allows installation and

operation of specified equipment and air pollution control devices at oil and natural gas production facilities to control emissions of regulated air pollutants. Equipment that may be covered by the permit includes oil and natural gas wells, storage vessels, natural gas-driven pneumatic controllers, in-line heaters, natural gas production units, natural gas heater treaters, low pressure towers, tank truck loading facilities, glycol dehydration units, and natural gas-fired compressor engines.

Wyoming

On August 28, 2013, the Wyoming Oil and Gas Conservation Commission (WOGCC) filed an amended notice of intent to adopt rules and regulations establishing a baseline water sampling and monitoring program that would set requirements for pre-drilling testing and subsequent sampling of water sources within a half-mile of planned drilling sites. The proposed amendments are to [Chapter 1](#) and [Chapter 3](#) of the WOGCC Rules and Regulations; a proposed [Appendix K](#) prescribes sampling and analysis procedures for the proposed monitoring program. A vote on the proposed regulations is anticipated on November 12, 2013.

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

Matthew J. Douglas
Partner

Denver

tel: +1 303.863.2315

Matthew.Douglas@aporter.com

Michael D. Daneker
Partner

Washington, DC

tel: +1 202.942.5177

Michael.Daneker@aporter.com

Jonathan Martel
Partner

Washington, DC

tel: +1 202.942.5470

Jonathan.Martel@aporter.com

arnoldporter.com

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](#).

© 2013 Arnold & Porter LLP. This Advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific fact situation.

NOTICE: If you no longer wish to receive marketing materials from Arnold & Porter LLP, please let us know by emailing opt-out@aporter.com or by contacting Marketing, Arnold & Porter LLP, 555 Twelfth Street, NW, Washington, DC 20004.

[Click here to unsubscribe.](#)