The new year brought with it several noteworthy developments in the fracking world. These include: a new lawsuit in connection with legal action against the Department of Interior ("DOI") Federal Bureau of Land Management ("BLM") in connection with its proposed rules for oil and gas exploration; new methane emission rules proposed by BLM for Federal and Indian lands; and a report by the Science Advisory Board ("SAB") recommending that the U.S. Environmental Protection Agency’s ("EPA") assessment of groundwater contamination risk associated with hydraulic fracturing operations. Several states were also active with new oil and gas regulations implemented in California, Colorado, Wyoming and Nebraska. Several states were also active with new oil and gas regulations implemented in California, Colorado, Wyoming and Nebraska.

Federal Regulatory Developments

BLM Fracking Rule

As reported in our March 2016 fracking law update in the Energy Law Report (reflecting our January 2016 Client Alert available here) court has before it a challenge to the validity of BLM’s final rule for fracking on federal and tribal lands ("Final Rule") brought by seven groups and the Ute Indian Tribe ("Ute Tribe"). The Ute Tribe contends that, by applying standards for federal lands to tribal lands, the BLM violated its fiduciary duty as a trustee for the tribe by reducing the value of tribal mineral leases. BLM, on the other hand, contends that promulgating the rule after consultation with the Ute Tribe and taking into consideration all relevant factors. The government has urged the Ute Tribe’s action to block the Final Rule.

The states of Wyoming, Colorado and Utah argue that BLM’s reliance on the Federal Land Policy and Management Act and the Mine Act among other laws, is misplaced, as federal land management and leasing laws are to preempt various uses of the surface do not act as environmental laws to protect underground water supplies. The states point to the Safe Drinking Water Act ("SDWA") as that protects underground water supplies, and contend that the use of SDWA to regulate fracking was mostly preempted by the Energy Policy Act of 2005. The states also contend that applying the Final Rule across all federal and Indian lands creates a uniform standard that does not account for environmental and geographic circumstances that impact wells differently across the country. Accordingly, the states claim they are ir account for such variables and should be charged with regulating the industry.

The Independent Petroleum Association of America and the Western Energy Alliance also requested clarity and justifications for the regulations in the rule are unclear or impractical making the rule arbitrary and capricious.

On March 21, federal attorneys asked the U.S. Court of Appeals for the Tenth Circuit to overturn the preliminary injunction currently held by the federal appellants, backed by environmental groups, argue that BLM has overreached its authority and that the plaintiffs’ claims of irreparable harm justifying the injunction are without merit. The plaintiffs have until April 1, 2016 to respond.

EPA Fracking Study

The Science Advisory Board ("SAB"), on February 16, 2016 issued a report ("SAB Report") raising concerns over EPA’s draft assessment of hydraulic fracturing (issued June 4, 2015) ("Draft Study"). The SAB Report found no evidence that fracking has led to a water impact on drinking water resources in the United States. Although the Draft Study did find specific instances of contamination of drinking water resources, BLM concluded that such cases are limited compared to the total number of hydraulic fracturing operations. The SAB Report reviews the Draft Study in part in response to critical comments submitted over the study’s core conclusions reflected in the Draft Study and sets for the number of information requests related to: (i) the probability and risk of well spills and releases of water produced from fracking operations, (ii) the toxicity with regard to fracking chemicals, (iv) the public health impacts and safety considerations of hydraulic fracturing impacts, and (v) radioactive materials that can emerge from a well.

The SAB Report recommends that the Draft Study be revised to include illustrations, clarify ambiguities, and be more precise in its major findings, so that the general public can better access and understand EPA’s findings. Toward that end, the SAB held a 90-minute telecon in order to provide context, although we encourage readers to refer to previous installments for a more in-depth analysis.

Keystone XL Pipeline

As for the injunction, the federal appellants, backed by environmental groups, argue that BLM has overreached its authority and that the plaintiffs’ claims of irreparable harm justifying the injunction are without merit. The plaintiffs have until April 1, 2016 to respond.
On January 6, 2016, TransCanada Corp filed suit in the Southern District of Texas alleging that President Barack Obama’s decision permit for the Keystone Pipeline (as reported in the March 2016 Energy Law Report) was politically motivated and not based on sub of the project. TransCanada further argued in its complaint that Congress, not the President, holds the power to regulate international commerce. The United States filed a motion to dismiss on April 1, 2016, contending that the President’s determination was appropriate considerations of national security and foreign relations.

Natural Gas Storage Task Force

In response to the recent major natural gas leak at Aliso Canyon in California, the Energy Department and the Pipeline and Hazardous Administration have announced the formation of a natural gas storage safety task force. The task force will hold workshops with government leaders to develop best practices to increase safety at storage facilities and refine emergency response policies and procedures, which will also include experts from EPA, the Department of Health and Human Services, DOI, the Federal Energy Regulatory National Oceanic and Atmospheric Administration, will summarize and make public its findings later this year.

GAO Report on EPA Oversight of Injection Wells

A report released by the Government Accountability Office (“GAO”) criticized EPA’s oversight of fracking fluid injection wells. According to the report, EPA failed to adequately collect data, complete inspections, or conduct sufficient oversight activities for the Class II underground injection wells. GAO recommended that EPA require reporting of data from well specific inspections, issue guidance on remediating injection wells, and improve exemption databases. EPA advised that it will complete most recommendations, but it is not planning to require v inspections.

Pacific Offshore Fracking Review

Under a legal settlement filed in January 2016 in federal court by the Center for Biological Diversity, the Environmental Defense Center, BSEE, agreed to prepare a programmatic environmental assessment (“PEA”) of fracking, acid well stimulation, and other drilling activities in federal waters off the coast of California. President Obama on May 11, 2016, announced a new regulatory framework for offshore energy development in the Pacific Ocean to reduce waste and methane emissions from the oil and gas industry. The Waste Prevention Rule, which would phase in over seven years, was politically motivated and not based on sub...
BLM’s recent decision to open one million acres of public land for oil and gas exploration is the subject of a lawsuit filed by an environmental group. The plaintiff alleges that BLM failed to comply with the National Environmental Protection Act when it issued an inadequate Environmental Impact Statement (“EIS”) that does not contemplate the effects of fracking. The environmental group notes that the EIS doesn’t mention fracking, which plaintiff contends would result in significantly more harm to air quality, water quality, wildlife and human health than conventional drilling. According to the complaint, BLM failed to consult with tribal authorities, failed to consult with the responsible state agency, and failed to consult with the responsible federal agency.

State Regulatory Developments

California

In early February 2016, California’s Office of Administrative Law approved emergency gas storage regulations developed by the California Conservation Division of Oil, Gas, and Geothermal Resources. In response to the recent Aliso Canyon, southern California gas leak emergency rules call for each storage facility to have a comprehensive risk management plan, daily inspections of wellheads, ongoing integrity, continuous measurement of annular gas pressure or flow within wells, and regular testing of all safety valves. According to the regulations, the new regulations will remain in effect for six months, but may be extended as permanent regulations are developed.

Colorado

On January 25, the Colorado Oil and Gas Conservation Commission approved new rules that address how and when local governments can regulate oil and gas activity. The new rules have received criticism, however, from both environmental groups and industry leaders. Industry groups noted their dissatisfaction with the low threshold for project size triggering compliance with the requirements, the lack of a grandfathering provision for existing facilities, and the requirement that operators file notice with local government of a project near urban areas before making a decision on the location of the facility with the surface owner. Environmentalists and community advocates have expressed frustration at the decision that, among other things, removes local government control over oil and gas development and overturns bans on fracking.

Louisiana

In March, a Louisiana appeals court upheld a state issued fracking permit, holding that state oil and gas law preempted a local ordinance that would prohibit the drilling. In 2014, the state Office of Conservation issued a drilling permit for a location designated under a local ordinance. The local authority sued the commission, arguing that the permit violated the ordinance by approving an unpermitted panel point to state law related to oil and gas projects to support its finding that the legislature expressly provided its intent to pre-empt local control.

Nebraska

On March 30th, Nebraska Governor Pete Ricketts signed Legislative Bill 1082, which imposes additional disclosure regulations on oil and gas; wastewater disposal wells. The bill requires injection well operators to conduct annual sampling and analysis of injected wastewater, results of such testing to the state Oil and Gas Conservation Commission. The new legislation also mandates periodic evaluation of injection well operators to cover the costs of shutting down its wells, certification and monitoring of vehicles used to transport wastewater, and for the public notices and hold public hearings when a well permit application is filed.

Oklahoma

In response to increased seismic activity, the Oklahoma Corporation Commission (“OCC”) has mandated a 40% reduction in wastewater disposal. The plan will implement a four-prong strategy that will address leakage (i) at new wells using innovative permitting and requirements to govern unconventional gas production that subject conventional operators to unjustified and inappropriate standards and expenses. PIPP is seeking an order voiding the new rules for oil and gas drilling contaminated the families’ well water. It is unclear how this decision, which is a rare victory for plaintiffs in such lawsuits, will impact the future of similar cases against fracking operators, but some commentators predict that plaintiffs will be more emboldened to file similar lawsuits.

Pennsylvania

The Pennsylvania Independent Petroleum Producers Association (“PIPP”) has filed suit in state court challenging the validity of new regulations that will govern surface operations at oil and gas wells. PIPP argues in its complaint that the new regulations will result in increased leakage of methane, a potent greenhouse gas, and that they are not justified or appropriate. The state has also proposed new regulations that would require increased testing and reporting of methane leaks.

In March 2016, a Pennsylvania federal jury awarded $4.2 million to plaintiffs alleging that Cabot Oil & Gas acted negligently in drilling created a private nuisance and harmed two Pennsylvania families in their use and enjoyment of their property. The claim alleged that gas drilling contaminated the families’ well water. It is unclear how this decision, which is a rare victory for plaintiffs in such lawsuits, will impact the future of similar cases against fracking operators, but some commentators predict that plaintiffs will be more emboldened to file similar lawsuits.

On January 19, 2016, Pennsylvania Governor Tom Wolf announced that the state would embark on a mission to implement new regulations to address methane leaks in the oil and gas industry. Governor Wolf cited the state’s position as the country’s second largest natural gas producer and the need for new rules to address environmental and public health impacts. The plan will implement an additional strategy that will address leakage in new wells using innovative permitting and monitoring requirements. The new rule will draw upon current federal and state standards, as well as best practices already utilized by industry leaders.
Wyoming

New rules governing bonding requirements and applications for permits went into effect on February 1. Under the regulations, new bl $100,000, while individual bonds are $10 per foot of vertical well bores. The cost of applications for permits to drill were raised from $ permits will be effective for two years rather than just one. On February 9th, the Wyoming Oil and Gas Conservation Commission ap by its rules governing flaring and venting of natural gas at drill sites. The rule mandates new monthly reporting on venting and flaring, including how the gas is metered, and that a compositional analysis of the gas be submitted biannually. Environmentalists claim, however, that inadequate, arguing that the commission should have banned venting with only limited exceptions.

Other Developments

Offshore Well-Control Rule

On April 14th, BSEE issued final rules governing spill prevention and other best practice requirement for off shore oil and gas rigs. The responsive to oil and gas industry leader comment, urging that the rules allow greater flexibility on methods and time frames for simple requirements, especially in respect of inspection/replacement of blow-out prevention technology. The new rules implement a number blowout preventers, including a requirement for single sets of shear rams, and outside audits of equipment and real-time offshore well as set standards related to well design, well casing, well cementing, and subsea containment systems. The rules, which were origir 2015, received criticism from the industry as being impractical and too costly.

Crude Oil Train Safety Rule

The federal government, environmental groups, and various railroad industry leaders once at odds over the Pipeline and Hazardous Administration’s (“PHMSA”) May 2015 final rule governing new tank car standards for high-hazard flammable trains are now in agre contentions are no longer timely. In March, the parties filed a joint brief in the D.C. Circuit advising that the recently enacted Fixing Transportation (“FAST”) Act addressed most of the issues between the adversaries, with the exception of the PHMSA rule’s requirement be fitted with electronically controlled pneumatic, or ECP, brakes. The railroads have requested an abeyance of their claims, with the special brake rule in the future, while the government has sought a full dismissal of all claims for a lack of ripeness. The FAST Act requires transportation secretary to issue a new regulatory impact analysis and determination on the ECP brakes requirement by December 2 railroads to defer their brake arguments until a later date.

Study on Injection Well Induced Earthquakes

The U.S. Geological Survey (“USGS”) recently released its short-term forecast for seismic activity that, for the first time, includes disc Earthquakes. The study, which comes after a significant hike in the incidence of earthquakes in the U.S., reports that the states facing human-induced earthquakes are, in order, Oklahoma, Kansas, Texas, Colorado, New Mexico and Arkansas, with the largest populations in Oklahoma and Texas. The USGS concluded that wells with higher rates of injection are more likely to be associated with induced seis

Lawsuit Seeks Fracking-Induced Quake Monitoring

A recent lawsuit filed by Sierra Club seeks a court order requiring substantial reductions of underground injections of fracking waste of operators in Oklahoma. The complaint contends that the reductions are necessary to help stem a recent spike in seismic activity in the findings of an independent earthquake monitoring and prediction center. Sierra Club filed the lawsuit after the region experienced earthquake in mid-February, the third-strongest recorded in the state. The environmental group’s action follows lawsuits filed in Janus City of Edmond, who alleges that operators should have known that well activity would increase the likelihood of earthquakes. Such claims are more common in the region.

Attorneys for Sierra Club have indicated that they intend to sue another operator, and one of the state’s largest energy companies, later date in order to comply with certain notice requirements. The lawsuit would follow an agreement between Sandridge and the state Commission from earlier this year, where Sandridge agreed to remove seven wells from disposal operations and reduce total saltwater 40%, or an estimated 191,000 barrels daily, in an effort to avoid litigation over the company’s failure to comply with a prior commission.

Coast Guard Abandons Policy to Regulate Barge Transport of Wastewater

The Coast Guard officially rescinded its 2013 policy proposal to regulate the transport of fracking wastewater by barge. According to the policy, which called for chemical analysis, radiation surveys, and other protections, was intended to protect workers and the public fro


10 Motion to Dismiss for Failure to State a Claim, TransCanada Keystone Pipeline LP et al. v. Kerry, et al., No. 4:16-cv-00036 (S.D. Tex.


12 U.S. GAO Report to Congressional Requesters, Drinking Water: EPA Needs to Collect Information and Consistently Conduct Act


16 Summit Petroleum Corp. v. EPA, 690 F.3d 733 (6th Cir. 2012).

17 FACT SHEET: Administration Takes Steps Forward on Climate Action Plan by Announcing Actions to Cut Methane Emissions (Ja


20 State Announces Comprehensive Natural Gas Storage and Inspection Mandates (February 5, 2016), available at http://www.conserva

21 Tripp Baltz, New Colorado Rules Require Drillers to Notify Communities, Bloomberg BNA (January 26, 2016).

22 We note that there is no further update to the appeal of municipal fracking bans before the Colorado Supreme Court. See Eric Rot


24 Media Advisory - Regional Earthquake Response Plan for Central Oklahoma and Expansion of the Area of Interest (Mar. 7, 2016),

25 Media Advisory - Regional Earthquake Response Plan for Western Oklahoma (Feb. 16, 2016), available at http://www.occeweb.co


29 Pennsylvania Dept. of Environmental Protection, Oil and Gas Surface Regulations, Final Rulemaking (Feb. 3, 2016), Chapter 78 a http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PublicPartCenterPortalFiles/Environmental%20Quality

30 Environmental Quality Board, Minutes, Environmental Quality Board Meeting, Feb. 3, 2016, available at http://www.state.pa.us/porta


34 Ari Natter, Oil Firms Urge White House to Weaken Well-Control Rule, Bloomberg BNA: Daily Environment Report (March 25, 2011


39 Paul Stinson, Oklahoma Company Agrees to Disposal Well Cuts, Bloomberg BNA (January 28, 2016).