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REPORT



EDITOR'S NOTE: THE BUZZ ON ELECTRIC VEHICLE CHARGING

Victoria Prussen Spears

WHY YOUR LOCAL ELECTRIC VEHICLE CHARGING STATION DOESN'T (AND SHOULDN'T) LOOK LIKE YOUR LOCAL GAS STATION

A. Christopher Young, Marc D. Machlin, and Erica Hall Dressler

WIND ENERGY: USFWS ISSUES DRAFT REVISIONS TO EAGLE INCIDENTAL TAKE RULE

Andrew C. Bell

FEDERAL COURT UPHOLDS FERC'S APPROACH ON LNG ENVIRONMENTAL PERMITTING AND SHIFTS FOCUS TO CHALLENGES TO DOE'S ENVIRONMENTAL REVIEW

David L. Wochner, John L. Longstreth, Sandra E. Safro, Michael L. O'Neill, and Gillian R. Giannetti

OCC ISSUES HANDBOOK ON OIL AND GAS EXPLORATION AND PRODUCTION

LENDING Donald E. Malecki, Sean W. Moran, James D. Newell, Mark Pfeiffer, Hank Pool, and William H. Schorling

EPA'S PLAN TO MAKE SWEEPING NEW CHANGE TO REGULATION OF METHANE EMISSIONS FROM EXISTING OIL AND GAS SOURCES AND POTENTIAL NEXT

STEPS Paul D. Tanaka, Michael Saretsky, and Michael J. Mahoney

HYDRAULIC FRACTURING DEVELOPMENTS

Eric Rothenberg, John D. Renneisen, Kelly McTigue, Brian Kenyon, Jesse Glickstein, and Sylvia Sermons

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VOLUME 16

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Editor's Note: The Buzz on Electric Vehicle Charging Victoria Prussen Spears	295
Why Your Local Electric Vehicle Charging Station Doesn't (And Shouldn't) Look Like Your Local Gas Station A. Christopher Young, Marc D. Machlin, and Erica Hall Dressler	297
Wind Energy: USFWS Issues Draft Revisions to Eagle Incidental Take Rule Andrew C. Bell	305
Federal Court Upholds FERC's Approach on LNG Environmental Permitting and Shifts Focus to Challenges to DOE's Environmental Review David L. Wochner, John L. Longstreth, Sandra E. Safro, Michael L. O'Neill, and Gillian R. Giannetti	314
OCC Issues Handbook on Oil and Gas Exploration and Production Lending Donald E. Malecki, Sean W. Moran, James D. Newell, Mark Pfeiffer, Hank Pool, and William H. Schorling	319
EPA's Plan to Make Sweeping New Change to Regulation of Methane Emissions from Existing Oil and Gas Sources and Potential Next Steps Paul D. Tanaka, Michael Saretsky, and Michael J. Mahoney	323
Hydraulic Fracturing Developments Eric Rothenberg, John D. Renneisen, Kelly McTigue, Brian Kenyon, Jesse Glickstein, and Sylvia Sermons	327

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Editorial Office
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Hydraulic Fracturing Developments

*By Eric Rothenberg, John D. Renneisen, Kelly McTigue, Brian Kenyon, Jesse Glickstein, and Sylvia Sermons**

Noteworthy developments in the hydraulic fracturing industry during the second quarter of 2016 include the following:

- New rules from the U.S. Environmental Protection Agency (“EPA”) covering waste disposal at municipal treatment facilities, methane emissions and drilling reporting requirements;
- A new lawsuit to compel the EPA to review and update its fracking waste disposal regulations and state waste management plan guidelines;
- A decision striking down the Department of Interior (“DOI”) Federal Bureau of Land Management (“BLM”) rules for fracking on public lands; and
- Increases in the civil penalties that may be issued by the BLM and DOI’s Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement (“BSEE”) for violations of onshore and offshore drilling regulations, respectively.

New state-level developments include court decisions in Colorado and West Virginia holding that local fracking restrictions are preempted by state law; and Pennsylvania has signed its new hydraulic fracturing regulations into law.

Throughout this article, we reference our prior Hydraulic Fracturing Developments columns in order to provide context. For a more in-depth analysis, we encourage readers to refer to previous columns.

FEDERAL REGULATORY DEVELOPMENTS

BLM Fracking Rule

A federal judge has ruled in favor of states and industry groups challenging BLM’s final fracking rule issued in March 2015 (“Final Rule”) that would have

* Eric Rothenberg (erothernberg@omm.com), a partner in O’Melveny & Myers LLP’s New York office and a member of the Board of Editors of *Pratt’s Energy Law Report* and its Hydraulic Fracturing Developments columnist, and Washington, D.C., counsel John D. Renneisen (jrenneisen@omm.com) are both members of the firm’s Environmental Practice. Kelly McTigue (kmctigue@omm.com) is a partner in the firm’s Los Angeles office and a member of the Project Development and Real Estate Practice. Brian Kenyon (bkenyon@omm.com) and Jesse Glickstein (jglickstein@omm.com) are associates in the firm’s Project Development and Real Estate Practice resident in the Los Angeles and Tokyo offices, respectively. Sylvia Sermons is a case manager in the Los Angeles Litigation Department.

regulated hydraulic fracturing on federal and Native American lands.¹ The court held that BLM lacked congressional authority to promulgate the Final Rule, which would have imposed stringent well-casing and wastewater storage requirements, as well as required drillers to disclose what chemicals are used in fracking operations.² BLM filed an appeal three days after the district court handed down its decision to set aside the Final Rule.³

Following the district court's decision to overturn the Final Rule, a federal appellate court vacated a preliminary injunction issued on September 30, 2015, that prevented BLM from enforcing the Final Rule while the rule was under review by the courts.⁴ Elimination of the injunction means that, should the appeals court remand the case on the Final Rule back to the district court, BLM would be free to enforce the Final Rule during the pendency of the litigation.⁵

BLM and BSEE Penalties

Under a new BLM rule effective as of July 28, 2013, civil penalties for violations of onshore oil and gas regulations will more than double.⁶ The agency announced that the hike in penalties is in response to inflation, as the penalties have not been adjusted since they were initially imposed in 1987.

Along with BLM's increase in penalties, BSEE announced that it would also raise civil penalties for offshore drilling violations.⁷ Penalties for offshore drilling violations will only be increasing by five percent since these penalties were recently adjusted in 2011.

The increased BLM and BSEE fines are maximum penalties, and both agencies have the discretion to impose lesser punishment for onshore and offshore drilling violations.

¹ *Wyoming et al. v. Jewell et al.*, No. 15-8134 (D. Wyo. July 13, 2016).

² Department of Interior Bureau of Land Management, Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 43 CFR 3160 (Mar. 26, 2015), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2015-03-26/pdf/2015-06658.pdf>. BLM published a minor correction to the Final Rule on March 30, 2015, addressing two references to the date September 22, 2015, which should have read December 26, 2014.

³ *Wyoming et al. v. Jewell et al.*, No. 15-8134 (D. Wyo. July 13, 2016).

⁴ *Wyoming v. Dept. of Interior*, No. 15-8126, (10th Cir., July 13, 2016).

⁵ For more information on the Final Rule and related litigation, *see* Eric Rothenberg, et al., "Hydraulic Fracturing Developments," PRATT'S ENERGY LAW REPORT (Vol. 16-6, June 2016), at page 233.

⁶ 81 F.R. 41860 (June 28, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-06-28/pdf/2016-15129.pdf>.

⁷ 81 F.R. 41801 (June 28, 2016), *available at* <https://www.gpo.gov/fdsys/pkg/FR-2016-06-28/pdf/2016-15157.pdf>.

Lawsuit over EPA Drilling Waste Regulations

Environmental groups filed a lawsuit against the EPA requesting that a judge force the agency to review and update its Resource Conservation Recovery Act (“RCRA”) rules for oil and gas drilling waste disposal, something the agency has not done since 1988.⁸ According to the complaint, the EPA is required to review and, if necessary, revise the RCRA regulations every three years.⁹ The complaint also claims that the EPA failed to update its guidelines for state waste management plans, rules that have not been updated by the agency since 1981. According to the plaintiffs, the current drilling waste regulations and state waste management guidelines are not sufficient to keep up with the recent growth in hydraulic fracturing operations across the country. The complaint identifies pits and impoundments, injection wells and “road-spreading” where waste materials are applied to road surfaces for deicing and dust suppression, as concerning waste disposal practices that should be addressed in the EPA’s revised regulations.

EPA Ban on Fracking Wastewater to Municipal Facilities

The EPA has published its final rule prohibiting hydraulic fracturing operators from discharging fracking wastewater into municipal sewage treatment plants.¹⁰ According to the agency, certain fracking wastewater constituents cannot be treated effectively by municipal facilities, and the large quantities of effluent may hinder treatment processes, result in excess bio-solids and cause harm to the public. The agency maintains that the final rule mirrors current industry practice, and does not anticipate that compliance will result in additional cost to operators.

EPA Methane Emission Rules

On June 3, 2016, the EPA issued three final rules that will curb emissions of methane, smog-forming volatile organic compounds (“VOCs”) and toxic air pollutants like benzene from new, reconstructed and modified oil and gas sources. The first rule finalizes amendments to the current new source performance standards (“NSPS”) and establishes new standards pursuant to the President’s Climate Action Plan: *Strategy to Reduce Methane Emission* and the Clean Air Act. Amendments to the current standards will improve implemen-

⁸ *Environmental Integrity Project, et al. v. Gina McCarthy*, No. 1:16-cv-00842 (D.D.C., filed May 4, 2016).

⁹ Complaint available at <http://big.assets.huffingtonpost.com/drillingwastesuit.pdf>.

¹⁰ 81 F.R. 41845 (June 28, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-28/pdf/2016-14901.pdf>.

tation of the current NSPS.¹¹ The second rule clarifies EPA's air-permitting rules as they apply to the oil and natural gas industry.¹² The third rule limits harmful emissions while streamlining the permitting process for the oil and natural gas production industry in Indian country.¹³ All three rules will be effective as of August 2, 2016.

New Drilling Reporting Rules

According to the Office of Information and Regulatory Affairs' regulatory agenda, the EPA intends to issue new rules in January 2017, which would require oil and gas drilling operators to disclose pollution data to the agency's Toxics Release Inventory database.¹⁴ Currently, the oil and gas industry qualifies under an exemption to the disclosure rules.

SEC Resource Extraction Disclosure Rule

After significant litigation, the SEC has issued its final rule on resource extraction disclosures.¹⁵ The rule requires operators to share project-level disclosures of payments of \$100,000 or more during a fiscal year made to governments as part of their attempts to develop oil, gas and minerals, including but not limited to, production entitlements, taxes, royalties, fees and infrastructure improvements. Exemptions to the rule include delayed disclosures for resource exploration payments, and disclosures made by companies acquiring another company when such disclosures are made on behalf of the acquired company. Disclosing parties need to comply with the new requirements for fiscal years ending on or before September 30, 2018. The rule comes after extensive litigation initiated by the American Petroleum Institute and Oxfam America Inc., attacking the constitutionality of the rules, and claiming that the rule goes beyond the agency's rulemaking authority and infringes on the disclosing party's First Amendment rights.¹⁶

¹¹ 81 F.R. 35824 (June 3, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-03/pdf/2016-11971.pdf>.

¹² 81 F.R. 35622 (June 3, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-03/pdf/2016-11968.pdf>.

¹³ 81 F.R. 35944 (June 3, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-03/pdf/2016-11969.pdf>.

¹⁴ David Schultz, *EPA Schedules New Drilling Industry Reporting Rules*, Bloomberg BNA: Daily Environment Report (May 19, 2016).

¹⁵ Securities and Exchange Commission, 17 CFR Parts 240 and 249, Release No. 34-78167; File No. S7-25-15: *Disclosure of Payments by Resource Extraction Issuers* (June 27, 2016), available at <https://www.sec.gov/rules/final/2016/34-78167.pdf>.

¹⁶ *American Petroleum Institute et al., v. SEC*, Memorandum Opinion, No. 1:12-cv-01668-JDB, (D.D.C. July 2, 2013), available at <http://www.api.org/-/media/files/news/2013/13-july/>

STATE REGULATORY DEVELOPMENTS

Colorado

The Colorado Supreme Court has ruled that local bans on hydraulic fracturing in Longmont and Fort Collins are preempted by state law.¹⁷ The court's holding, which affirmed lower court decisions, comes in a case where industry groups questioned the constitutionality of Longmont's fracking ban and Fort Collins' five-year moratorium. The Colorado Supreme Court held that the local bans were preempted by the Colorado Oil and Gas Conservation Act, which makes the state the exclusive authority to regulate the development of oil and gas resources.¹⁸

In the wake of the Colorado Supreme Court's decision to nullify the hydraulic fracturing restrictions in the two municipalities, supporters of local control over fracking are taking to state ballots to secure local government control over oil and gas activities in their regions.¹⁹ The ballot measures include eliminating state preemption over local rules on oil and gas drilling, increasing the required separation distance between wells and occupied structures, and a measure that would require the more stringent restrictions of state and local regulations to be imposed should there be any regulatory overlap.²⁰

Pennsylvania

Pennsylvania's new rules on hydraulic fracturing were signed into law on June 23, 2016.²¹ The new regulations, known as Chapter 78a and which were implemented under Act 52, took five years to complete. Act 52 also postpones the implementation of similar revisions to regulations governing conventional oil and gas drilling, known as Chapter 78, in response to industry complaints

api%20vs%20security%20exchange%20and%20oxfam.pdf; *Oxfam America, Inc. v. SEC*, Memorandum and Order, No. 1:14-cv-13648-DJC (D. Mass. Sept. 2, 2015), available at https://www.oxfamamerica.org/static/media/files/CASPER_DECISION.pdf.

¹⁷ *City of Longmont v. Colo. Oil and Gas Ass'n*, No. 15-SC-667, 2016 CO 29 (May 2, 2016); *City of Fort Collins v. Colo. Oil and Gas Ass'n*, No. 15-SC-668, 2016 CO 28 (May 2, 2016).

¹⁸ *Longmont* Opinion available at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2015/15SC667.pdf; *Fort Collins* opinion available at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2015/15SC668.pdf.

¹⁹ Full text of four proposed ballot measures is available at <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html>.

²⁰ Full text of four proposed ballot measures is available at <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html>.

²¹ P.L. 379 No. 52 (June 23, 2016), available at <http://www.legis.state.pa.us/cfdocs/legis/li/uconsCheck.cfm?yr=2016&sessInd=0&act=52>.

that the needs of traditional oil and gas drilling were not fully addressed during the rulemaking process.

The state's Department of Environmental Protection (the "DEP") recently withdrew what would have been a nearly \$9 million fine against Range Resources Corp. The penalty was imposed in connection with a leaking natural gas well that was ineffectively capped, which allegedly led to the polluted groundwater at a nearby stream.²² Range Resources Corp. filed an appeal of the matter, which is before the Pennsylvania Environmental Hearing Board, claiming that the DEP improperly held Range Resources Corp. responsible for the leak under two separate statutes, the Clean Streams Law and the 2012 Oil and Gas Act. Since the penalty was withdrawn by the DEP, Range Resources Corp. has the right to challenge any future penalties imposed by the agency in connection with the leak.

West Virginia

A federal judge in West Virginia ruled that counties lack legal authority to prohibit the disposal of fracking wastewater in a case involving Fayette County's issuance of an ordinance banning storage of fracking wastewater.²³ The court held that the ordinance was preempted by the West Virginia Oil and Gas Act, which allocates full responsibility for all oil and gas production to the state's Department of Environmental Protection.²⁴

OTHER DEVELOPMENTS

Suit Alleging Earthquakes caused by Fracking

As previously reported, the Sierra Club filed a RCRA citizen's suit alleging that Chesapeake Operating, LLC, and other Oklahoma drilling companies' disposal of liquid wastes from oil and gas extraction activities into wells drilled deep into the ground has contributed to the dramatically increased seismic activity within the state since 2009.²⁵ The environmental group argues that the earthquakes induced by these waste management activities present an imminent and substantial endangerment to health and the environment in violation of

²² *Range Resources-Appalachia LLC v. Pennsylvania*, No. 2015-099, before the Pennsylvania Environmental Hearing Board.

²³ *EQT Production Co. v. Wender, et al.*, Memorandum Opinion and Order, No. 2:16-cv-00290 (S.D. W. Va. June 10, 2016).

²⁴ Opinion available at <http://naturalgasnow.org/wp-content/uploads/2016/06/WVcase.pdf>.

²⁵ Complaint available at <https://www.sierraclub.org/sites/www.sierraclub.org/files/blog/20160212%20v3%20RCRA%20Complaint%20FINAL.pdf>.

RCRA Section 7002(a)(1)(B).²⁶ The defendant operators recently filed motions to dismiss asserting that the case, under RCRA, should be dismissed to allow the Oklahoma Corporate Commission to exercise its authority over drilling practices.²⁷ On May 25, the Sierra Club filed a brief in response to the defendants' motions to dismiss pending before the court. The petitioner's reply brief argues that the defendants' position ignores federal law, and that the facts of the case qualify as the sort of imminent and substantial endangerment to health or the environment that RCRA was intended to address.²⁸

Seismic Activity Linked to Wastewater Wells

Shemin Ge, a geological science professor at the University of Colorado Boulder, claimed that approximately 10 percent of oil and gas wastewater injection wells in 34 states are associated with earthquakes.²⁹ Ge shared her findings during her presentation of the 2016 Birdsall-Dreiss Distinguished Lecture at the National Ground Water Association summit in Denver. According to Ge's studies, seismic activity is linked to injection of high volumes of waste fluids at high pressures. Of the 188,570 injection wells across 34 states studied by Ge and her team, 18,757 were deemed "associated" with earthquakes.

Health Risk to Water Wells

A recent report issued by the federal Agency for Toxic Substances and Disease Registry has found that chemicals and methane levels in private drinking water wells in Dimock, Pennsylvania, are concentrated enough to pose a health hazard.³⁰ The data reviewed by the agency dated back to a 2012 study by the EPA of water wells located in close proximity to natural gas drilling activities.³¹ The report advised local residents to regularly test their drinking water.

²⁶ *Sierra Club v. Chesapeake Operating LLC et al.*, No.5:16-cv-00134-F (W.D. Okla., filed Feb. 16, 2016); 42 B.S.C. § 6972(a)(1)(B).

²⁷ Motions to Dismiss Plaintiff's First Amended Complaint, by Chesapeake Operating LLC, Devon Energy Prod. Co., and New Dominion LLC, No. 5:16-cv-00134-F, April 25, 2016, Docket Nos. 59-64, and Motion to Dismiss First Amended Complaint by Sandridge Exploration and Production LLC, 5:16-cv-00134-F, May 5, 2016, Docket Nos. 76, 77.

²⁸ Replies in Support of Motions to Dismiss First Amended Complaint by Chesapeake Operating LLC, Devon Energy Prod. Co., and New Dominion LLC, 5:16-cv-00134-F, June 16, 2016, Docket Nos. 89-91.

²⁹ Tripp Baltz, *Quakes Linked to 10 Percent of Oil and Gas Wastewater Wells*, Bloomberg BNA: Daily Environment Report (April 27, 2016).

³⁰ Report available at http://www.atsdr.cdc.gov/hac/pha/DimockGroundwaterSite/Dimock_Groundwater_Site_HC_05-24-2016_508.pdf.

³¹ "ATSDR releases public health report about contaminants in Dimock private wells," May 24, 2016, available at <http://www.atsdr.cdc.gov/news/displaynews.asp?PRid=2617>.

Faulty Wells Are the Problem, Not Fracking

A new report issued by the National Academies of Science finds that failing wellbores, and not high volume horizontal fracking, was the main source of methane contamination in wells in the Denver-Julesburg basin region of northeast Colorado.³² Researchers studied data collected from 1988 to 2014 by the Colorado Oil and Gas Conservation Committee to identify methane contamination levels in 924 wells in the region. Sources of the contaminants were identified as inadequate surface casing and leaks in production casing and wellhead seals in older, vertical wells, rather than failures connected to horizontal fracking operations.

Duke University Study

A new study released by Duke University's Nicholas School of the Environment reports that widespread water and soil contamination in the Bakken region of western North Dakota is the result of brine spills from fracking operations.³³ Researchers reported finding high concentrations of ammonium, selenium, lead and salts in the wastewater that are believed to be directly connected to the increased fracking operations in the area over the past decade. Radium contamination was also found in soils downstream from spill sites.

Germany

On July 8, 2016, the upper house of the German Parliament, known as the Bundesrat, passed a bill that will essentially ban all fracking for oil and gas in the country.³⁴ The bill, which will be sent to the president for execution, is expected to go into effect later this year. The bill will not affect existing projects, and test drilling will be permitted conditioned on the operator obtaining the consent of the respective state government. The bill also intensifies water protections for conventional fracking. The lower house of the German Parliament is required to reconsider the ban in 2021.

New Brunswick

In early June 2016, the Canadian province of New Brunswick decided to

³² Owen Sherwood et al., "Groundwater methane in relation to oil and gas development and shallow coal seams in the Denver-Julesburg Basin of Colorado," June 7, 2016, *available at* <http://www.pnas.org/content/early/2016/07/05/1523267113.full>.

³³ Nancy Lauer et al., "Brine Spills Associated with Unconventional Oil Development in North Dakota," *Environ. Sci. Technol.*, 2016, 50 (10), pp. 5389–5397 (April 27, 2016), *available at* <http://pubs.acs.org/doi/abs/10.1021/acs.est.5b06349>.

³⁴ Jabeen Bhatti, *German Parliament Votes to Ban Fracking*, Bloomberg BNA: Daily Environment Report (July 8, 2016).

extend its moratorium on hydraulic fracturing in the region.³⁵ The decision was based on findings by the Commission on Hydraulic Fracturing that the province's five conditions to allow fracking would not be satisfied in the near future. Those five conditions are:

- 1) a social license is in place;
- 2) clear and credible information is available about the impacts of hydraulic fracturing on public health, the environment and water, allowing the government to develop a country-leading regulatory regime with sufficient enforcement capabilities;
- 3) a plan is in place to mitigate the impacts on public infrastructure and to address issues such as waste water disposal;
- 4) a process is in place to respect the duty of the provincial government to consult with First Nations; and
- 5) a mechanism is in place to ensure that benefits are maximized for New Brunswickers, including the development of a proper royalty structure. The moratorium is extended indefinitely until such time as the five conditions can be met.

United Kingdom

A local government in the United Kingdom has agreed to allow methane gas extraction via hydraulic fracturing for the first time since 2012.³⁶ Neighboring countries of Scotland, Germany and France continue to withstand industry encouragement and economic pressures to allow such resource development in their own countries.

³⁵ Gov't of New Brunswick, Canada News Release "Moratorium on hydraulic fracturing to continue indefinitely," 27 May 2016, *available at* http://www2.gnb.ca/content/gnb/en/news/news_release.2016.05.0462.html.

³⁶ Alex Scott, "U.K. Fractures over Fracking," *Chemical & Engineering News*, Vol. 94, Issue 23, p. 13 (June 6, 2016).

