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Hydraulic Fracturing Developments

*By Eric Rothenberg, John D. Renneisen, Brian Kenyon, Jesse Glickstein, Scott A. Snyder and Sylvia Sermons**

This quarterly update includes Trump administration actions affecting oil/gas operations; Environmental Protection Agency (“EPA”) chemical rule-making updates; and litigation regarding the migration of fracking waste. In the states, we note challenges faced in Colorado for the fracking industry after two explosions in successive months; the first fracking permit in Illinois; and North Dakota’s efforts to intervene to challenge the EPA’s consent decree establishing a timeline for its review of oil and gas waste disposal rules. In many instances, we carry forward text from our prior information updates in order to provide context, although we encourage readers to refer to previous installments for a more in-depth analysis.

FEDERAL DEVELOPMENTS

BLM Fracking Rule

On July 25, 2017, the Bureau of Land Management (“BLM”) published a proposed rule that would rescind an Obama administration 2015 rule relating to fracking on federal and tribal lands.¹ Environmental groups have criticized the BLM for failing to provide a sufficient rationale for rescinding the 2015 rule. The BLM, on the other hand, asserts in its notice of proposed rulemaking that the rule was promulgated on the basis of insufficient analysis.

Notably, the 2015 rule has never gone into effect. In 2016, the federal district court judge vacated the rule, finding that BLM does not have authority to regulate fracking, and a subsequent appeal by the BLM has not yet been resolved.² Thus, the BLM’s proposed rule would not result in any change from

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¹ Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 34,464 (July 25, 2017).

² *State of Wyoming et al. v. Ryan Zinke et al.*, No. 16:8068 (10th Circuit).

currently applicable requirements, but would prevent the rule from going into effect if the Court of Appeals reversed the decision below.³

EPA Rules on Chemical Reporting for Fracking Fluids

The Trump administration has sought to slow or defer the implementation of recent amendments to the Toxic Substances Control Act, some of which will impact chemicals used in fracking. The EPA has halted rulemaking involving the regulation of chemicals used for fracking, rules assessing the use of polychlorinated biphenyls, and a rule that would have imposed reporting requirements upon natural gas processing facilities. The last of these was a final Toxics Release Inventory rule for which public comments were collected. Some have questioned whether the suspension of this rulemaking complies with the requirements of the Administrative Procedure Act (“APA”).

Methane Rules

As we previously reported, in March 2017, President Donald Trump issued a sweeping administrative order directing, *inter alia*, that the Administrator of the EPA and the Secretary of the Interior review rules and regulations affecting the oil and gas sector. As part of its ongoing review of environmental regulations put in place by the Obama administration, in June, the EPA issued a 90-day administrative stay of parts of the 2016 new source performance standards for emissions from new, reconstructed, and modified oil and gas equipment, including new requirements to find and repair leaks, capture gas from the completion of fracking wells, and limit emissions from certain other equipment used by oil and gas companies.⁴

In July 2017, a divided panel of the D.C. Circuit ruled that the EPA does not have the authority to stay regulations while it reconsiders them, holding that “such orders [delaying the rule’s effective date] are tantamount to amending or revoking a rule.” (Petition for en banc rehearing was rejected August 10, 2017). In June 2017, the EPA had formally proposed to stay the rules for two years.⁵ The EPA earlier withdrew a request by the Obama administration that oil and natural gas companies provide information on methane emissions from field operations in preparation for potential emissions regulations for existing facilities.

In June 2017, the BLM published an interim final rule postponing, pending judicial review, compliance deadlines for certain sections of its November 18,

³ For additional discussion of the litigation surrounding the 2015 rule and the BLM’s efforts to repeal it, please refer to Eric Rothenberg et al., *Hydraulic Fracturing Developments*, PRATT’S ENERGY LAW REPORT, Vol. 17-7, July/August 2017, at 270–271.

⁴ 82 Fed. Reg. 25,730 (June 5, 2017).

⁵ 82 Fed. Reg. 27,645 (June 16, 2017).

2016, rule to reduce methane emissions from flaring, venting, and leaks from oil and gas operations on federal and tribal lands.⁶ The BLM notes that such action is permitted by Section 705 of the APA, 5 U.S.C. 705, which provides that, “[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.”⁷

Migration of Fracking Waste

The U.S. Court of Appeals for the Eighth Circuit has reversed a lower court’s grant of summary judgment to defendants facing trespass and unjust enrichment claims by adjoining property owners claiming injury from migration of fracking wastes (the court also excluded expert testimony on alleged groundwater contamination).⁸ The Eighth Circuit determined that the exclusion of plaintiffs’ expert testimony was improper given its relevance and sufficient reliability, and further that, even without such testimony, plaintiffs had raised a genuine issue of material fact as to whether the fracking waste could have migrated onto their property.

STATE DEVELOPMENTS

Colorado

The fracking industry faces challenges in connection with “setback” requirements under local law. Consideration of more stringent setback requirements was spurred by residential explosions in April and May 2017, tied to Anadarko Petroleum Corp. Subsequently, the Colorado Senate blocked newly proposed fracking setback legislation. A referendum seeking to impose even stricter setback requirements similarly failed. Also under consideration are new rules regarding the placement of pipelines or homes near wells, or the imposition of additional mapping and inspection requirements.

The Sierra Club and other environmental groups filed a lawsuit challenging the Colorado Oil and Gas Conservation Commission’s approval of a plan to drill 24 new oil and gas wells near an elementary school in Weld County, Colorado.⁹ The complaint alleges that the approved well facilities are located less than the required 500 feet from occupied buildings, and that the approval of wells so close to a school with a predominantly Hispanic and African-

⁶ 82 Fed. Reg. 27,430 (June 15, 2017).

⁷ For additional discussion of the EPA and BLM methane rules, please refer to Eric Rothenberg et al., *Hydraulic Fracturing Developments*, PRATT’S ENERGY LAW REPORT, Vol. 16-8, September 2016, at 329, and Vol. 17-7, July/August 2017, at 270.

⁸ *Dale Stroud et al. v. Southwestern Energy Co. et al.*, 858 F.3d 481 (8th Cir. 2017).

⁹ *Weld Air and Water v. Colo. Oil and Gas Conservation Comm’n*, Case No. 17-CV-31315 (Colo. Dist. Ct.).

American student body constitutes an “environmental injustice” violating constitutional guarantees of equal protection.

Illinois

On August 31, 2017, the Illinois Department of Natural Resources granted Woolsey Companies Inc. the state's first permit for hydraulic fracturing. The permit covers all aspects of the fracking well's development and operation. Environmental groups, including Food and Water Watch, believe the approval runs contrary to the prevailing public opinion among Illinois residents and continue to seek a ban on all fracking in Illinois

Montana

The state Senate has forwarded a bill (S.B. 299) to the governor that would require drillers to disclose the chemicals they use in hydraulic fracturing. The bill directs the Montana Board of Oil and Gas to promulgate rules mandating that operators disclose such information, with the ability to apply to the Board for exemptions for trade secrets. Rules issued under the bill would not, however, require drillers to disclose fracking chemicals prior to drilling. The Board previously denied a petition by environmental groups that the Board require chemical disclosures to be made prior to the commencement of drilling operations, which decision the petitioners have challenged.¹⁰ The parties have agreed to delay the timeline of the lawsuit while the bill remains pending.

New York

The State Supreme Court Appellate Division dismissed a landowner's case seeking clarification as to whether the state's ban on high-volume fracking applied to non-commercial properties.¹¹ The court held that the petitioner lacked standings, as he had not applied for a drilling permit and had no concrete plans to proceed with actual drilling operations.

North Dakota

North Dakota is arguing that the state's interest in its oil and gas waste management program gives it a right to intervene in a pending challenge to a consent decree entered into by the EPA and environmental groups that establishes a timeline for the EPA to review certain oil and gas drilling waste

¹⁰ *Montana Environmental Information Ctr., et al. v. Montana Board of Oil and Gas Conservation*, Case No. DV-17-50 (Big Sky Lewis and Clark County Dist. Ct. (Mont.), filed Jan. 17, 2017).

¹¹ *Morabito v. Martens*, 149 A.D. 3d 1316 (N.Y. App. Div. 2017).

rules.¹² The EPA has countered that the state is unable to show an injury-in-fact as a result of the consent decree, which governs only the timing of the EPA's decision about a potential rulemaking, and not the substance thereof. The state objects to this reasoning, arguing that it has been prejudiced for being unable to file a motion to dismiss, which would have prompted responsive briefing, and that it has at least an equal stake in the case as environmental groups.

OTHER DEVELOPMENTS

Keystone XL Pipeline

As discussed in previous installments of this column, TransCanada Corporation's Keystone XL oil pipeline project (the "XL Pipeline") has faced challenges and controversy since the project's initial proposal in 2008. In March 2017, President Trump overturned the 2015 decision by the Obama Administration to halt the XL Pipeline, but the XL Pipeline continues to face various hurdles.

The XL Pipeline still requires approval from the Nebraska Public Service Commission ("NPSC") because most of the preferred route for the pipeline is across privately owned Nebraska lands. The NPSC must determine whether the XL Pipeline is in the public interest (in September 2015, TransCanada ceased fighting a lawsuit filed by landowners challenging the company's right to use an alternate method for approval other than through the NPSC).¹³ The NPSC held a four-day hearing in early August 2017 to hear testimony from both proponents and opponents of the XL Pipeline. A decision from the NPSC is expected by late November 2017; however, regardless of the outcome, the NPSC's ruling will likely be appealed to the Nebraska Supreme Court. In addition, TransCanada will need to acquire the privately owned land, which will likely require the use of eminent domain, which actions, according to most commentators, will result in additional litigation.

A lawsuit brought by environmental groups against the U.S. Department of State, the U.S. Fish and Wildlife Service, and the Secretary of the Interior under the National Environmental Policy Act, challenging the cross-border permit granted for the XL Pipeline, was ongoing as of September 8, 2017. The government and TransCanada filed motions to dismiss, arguing that the permit was issued in accordance with an exercise of presidential authority over foreign affairs and national security duly delegated by the president to the State

¹² *Environmental Integrity Proj., et al. v. Scott Pruitt*, Case No. 17-5010 (D.C. Cir.), filed January 25, 2017.

¹³ *Steskal, et al. v. TransCanada Keystone Pipeline LP*, Case No. CI 15-6 (Holt Cty. (Neb.) Dist. Ct., filed on Jan. 16, 2015).

Department, and is not subject to review under the APA. The environmental groups responded by arguing that President Trump waived his permitting authority over the project, and, as such, the permit is not a delegated presidential action, but, instead, an agency action subject to judicial review.

In early September 2017, TransCanada filed a letter with Canada's National Energy Board ("NEB"), requesting that it suspend its assessment of the XL Pipeline for 30 days while the company considers whether to move forward after the NEB released new, stricter environmental assessment conditions, including evaluation of the project's effect on greenhouse gas emissions and climate change.

Delaware River Basin

The Delaware River Basin Commission has announced that it will consider a resolution to resume drafting regulations on natural gas development activities in the watershed, thereby ending a moratorium on hydraulic fracturing in the river basin that has been in effect since December 2010.¹⁴

If the resolution passes, the commission would prepare draft regulations for public comment in the last quarter of 2018.

Hurricane Harvey Impact

At the end of August, Harvey, a Category 4 hurricane, passed through the Gulf of Mexico and Southeast Texas, closing an estimated 10 percent of the U.S. fracking industry. Prolonged flooding and high winds damaged tanks and other infrastructure, and made roads and rails impassable. Potential chemical contamination impacts are under investigation. The Natural Resources Defense Council and other civic groups have called for greater resilience planning in the oil and gas industry

¹⁴ Resolution for the Minutes, adopted Sept. 13, 2017, *available at* http://www.nj.gov/drbc/library/documents/ResforMinutes091317_natgas-initiate-rulemkg.pdf.