

JUNE 2016

VOL. 16-6

PRATT'S

ENERGY LAW

REPORT



EDITOR'S NOTE: A BANNER YEAR FOR ENERGY M&A

Victoria Prussen Spears

**ENERGY MERGERS AND ACQUISITIONS:
A YEAR IN REVIEW - PART I**

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*Power Companies and Generation Assets
Renewables*

Master Limited Partnerships and YieldCos

Liquefied Natural Gas

Project Finance

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ISBN: 978-1-6328-0836-3 (print)

ISBN: 978-1-6328-0837-0 (ebook)

ISSN: 2374-3395 (print)

ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S ENERGY LAW REPORT [page number]

(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT'S ENERGY LAW REPORT 4 (LexisNexis A.S. Pratt)

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An A.S. Pratt® Publication

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Hydraulic Fracturing Developments

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

The new year brought with it several noteworthy developments in the fracking world. These include:

- a new lawsuit in connection with the Keystone Pipeline;
- legal action against the Department of Interior (“DOI”) Federal Bureau of Land Management (“BLM”) in connection with its proposed opening of public lands 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 that was critical of the U.S. Environmental Protection Agency’s (“EPA”) assessment of groundwater contamination risk associated with hydraulic fracking operations.

Several states were also active with new oil and gas regulations implemented in California, Colorado, Wyoming, and Nebraska, while a nuisance lawsuit in Pennsylvania against a fracking operator resulted in a jury award. In many instances, we carry forward text from prior Hydraulic Fracturing Developments columns in order to provide context, although we encourage readers to refer to previous columns for a more in-depth analysis.

FEDERAL REGULATORY DEVELOPMENTS

BLM Fracking Rule

As reported in the March 2016 Hydraulic Fracturing Developments column, a Wyoming federal court has before it a challenge to the validity of BLM’s final rule for fracking on federal and tribal lands (“Final Rule”)¹ brought by several

* Eric Rothenberg (erothenberg@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. Brian Kenyon (bkenyon@omm.com) and Jesse Glickstein (jglickstein@omm.com) are associates in the Project Development and Real Estate Practice resident in the Los Angeles and Tokyo offices, respectively. Sylvia Sermons is a case manager at the firm.

¹ 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.

states, industry groups and the Ute Indian² Tribe (“Ute Tribe”). The Ute Tribe contends that, by applying standards for federal lands to tribal lands, the DOI Secretary violated her fiduciary duty as a trustee for the tribe by reducing the value of tribal mineral leases.³ BLM, on the other hand, contends that the Final Rule was properly promulgated after consultation with the Ute Tribe and taking into consideration all relevant factors. The government has urged the court to dismiss the Ute Tribe’s action to block the Final Rule.⁴

The states of Wyoming, Colorado, and Utah argue that BLM’s reliance on the Federal Land Policy and Management Act and the Mineral Leasing Act, among other laws, is misplaced, as federal land management and leasing laws are intended to apportion various uses of the surface and mineral rights and do not act as environmental laws to protect underground water supplies. The states point to the Safe Drinking Water Act (“SDWA”) as the only federal law 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 consider the varying environmental and geographic circumstances that impact wells differently across the country. Accordingly, the states claim they are in the best position to 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 rule, claiming that provisions 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 holding up the application of BLM’s fracking rules, promulgated in 2015, pending resolution of consolidated lawsuits challenging the validity of the regulations.⁵ The appeal of the injunction is moving forward while the merits of the fracking rules themselves are contested in the U.S. District Court for the District of Wyoming by state, tribe and industry plaintiffs. As for the injunction, the federal appellants, backed by environmental groups, argue that BLM has the authority

² Eric Rothenberg, *et al.*, “Hydraulic Fracturing Developments,” ENERGY LAW REPORT (Vol. 16-3, March 2016), at page 102.

³ *Id.*

⁴ Response to Ute Tribe’s Merits Brief re Motion for Permanent Injunction, *Wyo. v. Dep’t of Interior*, No. 2:15-CV-00043 (D. Wyo. Apr. 4, 2016).

⁵ Opening Brief for the Federal Appellants, *Wyoming v. Jewell*, No. 15-8134, (10th Cir., Mar. 21, 2016).

to regulate fracking and that the plaintiffs' claims of irreparable harm justifying the injunction are without merit. The plaintiffs have until April 25 to respond to the federal appellants' brief on the injunction, while the federal government responded in the underlying district court case in early April.

EPA Fracking Study

The Science Advisory Board ("SAB"), on February 16, 2016 issued a report ("SAB Report")⁶ raising concerns over EPA's draft assessment on drinking water impact from hydraulic fracking (issued June 4, 2015) ("Draft Study").⁷ The Draft Study found no evidence that fracking has led to a "widespread, systemic impact on drinking water resources in the United States." Although the Draft Study did find specific instances of contamination of drinking water wells (and other impacts on drinking water resources), EPA concluded that such cases are limited compared to the total number of fracking wells. EPA requested that the Science Advisory Board ("SAB") review the Draft Study, partly in response to critical comments submitted over the study's core conclusion that fracking has not caused systematic injury to water supplies. The SAB Report raises concerns with the observations, data and level of uncertainty around conclusions reflected in the Draft Study and sets for the number of information requests related to:

- the probability and risk of well failure scenarios;
- spills and releases of water produced from fracking operations;
- the toxicology with regard to fracking chemicals;
- descriptions of best management practices and details on state regulations; and
- radioactive materials that can emerge from a well.⁸

The SAB Report recommends that EPA revise the major statements of findings in the Executive Summary "to be more precise, and to clearly link these statements to evidence provided in the body of the [Draft Study]."

⁶ [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/444FC752302EB12585257F5B005D49CD/\\$File/2-16-16+Draft+SAB+HF+rpt.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/444FC752302EB12585257F5B005D49CD/$File/2-16-16+Draft+SAB+HF+rpt.pdf).

⁷ *Assessment of the Potential Impacts of Hydraulic Fracturing for Oil and Gas on Drinking Water Resources (External Review Draft)*, U.S. Environmental Protection Agency, Washington, D.C. (EPA/600/R-15/047, 2015), available at https://www.epa.gov/sites/production/files/2015-07/documents/hf_es_erd_jun2015.pdf.

⁸ U.S. Environmental Protection Agency Science Advisory Board, *Science Advisory Board (SAB) Draft Report (2/16/16) to Assist Panel Deliberations*, available at [https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/444FC752302EB12585257F5B005D49CD/\\$File/2-16-16+Draft+SAB+HF+rpt.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/LookupWebProjectsCurrentBOARD/444FC752302EB12585257F5B005D49CD/$File/2-16-16+Draft+SAB+HF+rpt.pdf).

The SAB Report also urged EPA to recognize and analyze “local-level hydraulic fracturing impacts,” which can be severe when such impacts occur, including available EPA and state findings on impacts to water resulting from fracking operations in Pennsylvania, Wyoming, and Texas, where citizens perceive fracking operations to have a significant impact on water resources.

The SAB Report further recommends that the Draft Study be revised to include illustrations, clarify ambiguities, and “be more precise in the presentation of major findings,” so that the general public can better access and understand EPA’s findings. Toward that end, the SAB held a teleconference on March 7, 2016 to solicit public input.

Keystone XL Pipeline

On January 6, 2016, TransCanada Corp filed suit⁹ in the Southern District of Texas alleging that President Barack Obama’s decision not to approve a permit for the Keystone Pipeline (as reported in the March 2016 Hydraulic Fracturing Developments column)¹⁰ was politically motivated and not based on substantive consideration of the project. TransCanada further argued in its complaint that Congress, not the President, holds the power to regulate international and interstate commerce. The United States filed a motion to dismiss on April 1, 2016, contending that the President’s determination was appropriately founded on considerations of national security and foreign relations.¹¹

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 Materials Safety Administration have announced the formation of a natural gas storage safety task force.¹² The task force will hold workshops with industry and government leaders to develop best practices to increase safety at storage facilities and refine emergency response policies and procedures. The task force, which will also include experts from EPA, the Department of Health and Human Services, DOI, the Federal Energy Regulatory Commission, and the

⁹ *TransCanada Keystone Pipeline LP et al. v. Kerry, et al.*, No. 4:16-cv-00036 (S.D. Tex., Jan. 6, 2016).

¹⁰ Eric Rothenberg, *et al.*, “Hydraulic Fracturing Developments,” ENERGY LAW REPORT (Vol. 16-3, March 2016), at page 104.

¹¹ 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., Apr. 1, 2016).

¹² Department of Energy, *Working Together to Address Natural Gas Storage Safety* (Apr. 1, 2016), available at <http://energy.gov/articles/working-together-address-natural-gas-storage-safety>.

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 March 28 report, EPA failed to adequately collect data, complete inspections, or conduct sufficient oversight activities for the Class II underground injection wells. As a result of its conclusions, GAO recommended that EPA require reporting of data from well-specific inspections, issue guidance on enforcement failure to report, and improve exemption databases. EPA advised that it will complete most recommendations, but it is not planning to require well-specific data on inspections.¹³

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 (“EDC”) and DOI’s Bureau of Ocean Energy Management and Bureau of Safety and Environmental Enforcement (“BSEE”), in connection with a pending lawsuit brought by EDC, BSEE agreed to prepare a programmatic environmental assessment (“PEA”) of fracking, acid well stimulation, and other drilling techniques on the Pacific Outer Continental Shelf (“OCS”).¹⁴ The complaints accuse DOI of rubber-stamping permits for offshore drilling off the California coast without considering environmental effects. As part of the settlement, BSEE also agreed not to approve any applications for permits to drill or applications for permits to modify that involve fracking or acid well stimulation on the Pacific OCS until completion of the PEA.

The draft PEA,¹⁵ which was published in the Federal Register on February 22, 2016 and concludes that offshore fracking will not significantly impact the environment, is now under fire by the EDC and Surfrider Foundation,¹⁶ as well

¹³ U.S. GAO Report to Congressional Requesters, *Drinking Water: EPA Needs to Collect Information and Consistently Conduct Activities to Protect Underground Sources of Drinking Water* (February 2016), at pages 31-35, available at <http://www.gao.gov/assets/680/675439.pdf>.

¹⁴ Settlement Agreement, *Center for Biological Diversity v. Bureau of Ocean Energy Mgmt.*, No. 2:15-cv-01189 (C.D. Cal. Jan. 29, 2016), available at https://www.biologicaldiversity.org/campaigns/offshore_fracking/pdfs/Offshore_Fracking_Settlement_Agreement_1_29_16.pdf.

¹⁵ http://www.rd.usda.gov/files/WEP_TelecomProgPEAv1794.pdf.

¹⁶ http://www.environmentaldefensecenter.org/wp-content/uploads/2016/03/EDC-Surfrider-Comments-BOEM-BSEE-OCS-WST-PDEA-2016_03_23.pdf.

as certain members of Congress.¹⁷ The environmental groups allege that the PEA does not offer scientific evidence that fracking will not impact the local environment, and fails to adequately describe the chemicals, or their toxicity, used in offshore fracking. The final version of the PEA was anticipated to be issued on May 28, 2016.

White House Review of Oil and Gas Infrastructure Proposal

A proposed rule by EPA¹⁸ to clarify what will be considered a “source” subject to regulatory obligations for new and modified oil and natural gas wells is set to undergo review by the White House Office of Management and Budget this month.¹⁹ EPA suggests two approaches. Under the first option, which EPA and industry leaders prefer, “adjacent” sources will be considered a single source when two or more surface sites share the same two digit Standard Industrial Classification (“SIC”) code, are under common control, and are contiguous, or are located within a short distance of one another, with EPA proposing a distance of a quarter-mile or less. EPA states that it prefers this option because it is similar to regulations under the National Emission Standards for Hazardous Air Pollutants (“NESHAPs”) rules and will streamline the permitting process. Further, EPA states this will avoid facilities being “daisy-chained” whereby “each individual unit is located within the specified ‘contiguous or adjacent’ distance from the next unit, but where the last unit is separated from the first unit by a much larger distance.”

Under the second option, a source would be defined to include all interrelated equipment that is under common control, is in the same two-digit SIC code, and is on contiguous or adjacent property. Sources will be considered “adjacent” if (1) separated by a distance of a quarter-mile or more and there is an exclusive functional interrelatedness (e.g. connected by a pipeline or there are exclusive deliveries of products from one group of equipment to the other via trucks or trains); or (2) the pollutant-emitting activities are separated by a distance of less than a quarter-mile. Some commentators have noted that EPA does not explain in the Source Determination Rule how this proposal differs from the standard of “functional interrelatedness” in determining adjacency under the Title V of the Clean Air Act struck down by the U.S. Court of

¹⁷ [http://capps.house.gov/sites/capps.house.gov/files/documents/BOEM_BSEE_EA_letter - Final_Signed.pdf](http://capps.house.gov/sites/capps.house.gov/files/documents/BOEM_BSEE_EA_letter_Final_Signed.pdf).

¹⁸ 80 F.R. 56579, available at <https://www.federalregister.gov/articles/2015/09/18/2015-21026/source-determination-for-certain-emission-units-in-the-oil-and-natural-gas-sector>.

¹⁹ John Kennedy, *White House to Review EPA Oil, Gas Infrastructure Proposal*, LAW 360 (April 7, 2016).

Appeals for the Sixth Circuit.²⁰

The proposed rule may significantly impact the industry if equipment and infrastructure once considered separate and independent, and permitted as minor sources, are deemed adjacent and grouped under one permit as a major source of pollution subject to increased regulation. The proposal is part of EPA's broader mission of complying with the Obama administration's Climate Action Plan, which calls for the U.S. and Canada to reduce methane emissions from the oil and gas sector by 40–45 percent from 2012 levels by 2025.²¹

BLM Rule to Reduce Methane Emissions from Oil and Gas Operations on Indian/Federal Lands

BLM proposed a new rule²² in February 2016 (“Waste Prevention Rule”) intended to reduce waste and methane emissions from oil and gas operations, and limit oil and gas flaring, venting, and leaking on federal and Indian lands. The Waste Prevention Rule, which would phase in over several years if approved, would require operators to adopt current technologies to limit flaring to 1,800 cubic feet per month per well, inspect equipment for leaks, and replace equipment that vents methane into the air. The Waste Prevention Rule would reduce waste in the operation of pneumatic controllers and pumps, downhole well maintenance and liquids unloading, and calls for more efficient well drilling and completions. The Waste Prevention Rule would also permit BLM to increase onshore oil and gas royalties above the current 12.5%, but no such increase is proposed at this time. BLM estimated that the new method of applying royalties to unavoidable gas flaring could generate additional royalties of \$9 million to \$16 million a year. BLM estimates that the Waste Prevention Rule will reduce venting, flaring and leaking methane emissions and volatile organic compounds by 50 percent after a three-year phase-in of the regulations.

Suit Filed on BLM Plan to Open New Public Lands for Oil and Gas Production

BLM's recent decision to open one million acres of public land for oil and

²⁰ *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012).

²¹ FACT SHEET: Administration Takes Steps Forward on Climate Action Plan by Announcing Actions to Cut Methane Emissions (Jan. 14, 2015), *available at* <https://www.whitehouse.gov/the-press-office/2015/01/14/fact-sheet-administration-takes-steps-forward-climate-action-plan-anno-1>.

²² 81 F.R. 6616, *available at* http://www.blm.gov/style/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.15043.File.dat/VF%20Proposed%20Rule%20Waste%20Prevention.pdf.

gas exploration is the subject of a lawsuit²³ filed by an environmental group. The complaint 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, according to the plaintiff, would result in significantly more harm to air quality, water quality, wildlife and human health than conventional drilling. According to the plaintiff, the area in question has approximately 42 federally listed threatened and endangered animal species within its borders.

STATE REGULATORY DEVELOPMENTS

California

In early February 2016, California’s Office of Administrative Law approved emergency gas storage regulations developed by the California Department of Conservation’s Division of Oil, Gas, and Geothermal Resources in response to the recent Aliso Canyon, southern California gas leak noted above. The emergency rules call for each storage facility to have a comprehensive risk management plan, daily inspections of wellheads, ongoing verification of facility integrity, continuous measurement of annular gas pressure or flow within wells, and regular testing of all safety valves. According to the agency, the regulations will remain in effect for six months, but may be extended as permanent regulations are developed.²⁴

Colorado

On January 25, the Colorado Oil and Gas Conservation Commission approved new rules that address how and when local governments must be consulted when energy development is proposed in urban areas, including new mitigation measures and best management practices intended to reduce the impacts of oil and gas activity.²⁵ The new rules have received criticism, however, from both environmental groups and industry leaders. Industry representatives noted their dissatisfaction with the low threshold for project size triggering compliance with the requirements, the lack of a grandfathering provision for existing surface agreements, and the requirement that operators file notice with

²³ *Los Padres Forestwatch, et al. v. U.S. Bureau of Land Mgmt, et al.*, No. 2:15-cv-04378 (C.D. Cal. Jun. 10, 2015).

²⁴ State Announces Comprehensive Natural Gas Storage and Inspection Mandates (February 5, 2016), *available at* <http://www.conservation.ca.gov/index/Documents/2016-03%20Emergency%20regulations%20for%20natural%20gas%20storage%20wells%20go%20into%20effect.pdf>.

²⁵ Tripp Baltz, *New Colorado Rules Require Drillers to Notify Communities*, Bloomberg BNA (January 26, 2016).

local government of a project near urban areas before reaching a final decision on the location of the facility with the surface owner. Environmentalists and community advocates have expressed frustration over the new rules, stating that the rules allow additional neighborhood drilling with minor conditions of approval. Some groups say they will support proposed ballot measures to increase community controls. The November general election will have a ballot with as many as twelve anti-drilling proposals, including increases in local government control over oil and gas development and outright bans on fracking.²⁶

Louisiana

In March, a Louisiana appeals court upheld a state issued fracking permit, holding that state oil and gas laws preempt a local government's zoning ordinance that would prohibit the drilling.²⁷ In 2014, the state Office of Conservation issued a drilling permit for a location designated for residential use under a local ordinance. The local authority sued the commission, arguing that the permit violated the ordinance by approving an unpermitted use. The appellate panel pointed to state law related to oil and gas projects to support its finding that the legislature expressly provided its intent to preempt that area of law.

Nebraska

On March 30, Nebraska Governor Pete Ricketts signed Legislative Bill 1082,²⁸ which imposes additional disclosure regulations on operators of fracking and wastewater disposal wells. The bill requires injection well operators to conduct annual sampling and analysis of injected wastewater, and to report the results of such testing to the state Oil and Gas Conservation Commission. The new legislation also mandates periodic evaluation of the ability of each well operator to cover the costs of shutting down its wells, certification and monitoring of vehicles used to transport wastewater, and for the commission to issue public notices and hold public hearings when a well permit application is filed.

Oklahoma

In response to increased seismic activity, the Oklahoma Corporation

²⁶ We note that there is no further update to the appeal of municipal fracking bans before the Colorado Supreme Court. See Eric Rothenberg, *et al.*, "Hydraulic Fracturing Developments," ENERGY LAW REPORT (Vol. 16-3, March 2016), at page 105.

²⁷ *St. Tammany Parish Government v. James H. Welsh*, 2015CA1152 (La. App. 1 Cir. 3/9/16).

²⁸ <http://nebraskalegislature.gov/FloorDocs/Current/PDF/Intro/LB1082.pdf>.

Commission (“OCC”) has mandated a 40 percent reduction in wastewater disposal volumes in the central portion of the state by May 28.²⁹ This is the second time the commission has issued a call for cuts in wastewater injection—the first being issued in February for the western portion of the state.³⁰

In a move to bolster the OCC’s authority to respond to seismic emergencies, the Oklahoma legislature approved legislation that expressly provides for the OCC to respond to environmental or public health emergencies without the need for public notice and hearing.³¹ The legislative change is intended to thwart recent challenges made by oil and gas operators questioning the OCC’s authority to regulate injection wells to combat recent seismic activity.³²

Pennsylvania

The Pennsylvanian Independent Petroleum Producers Association (“PIPP”) has filed suit³³ in state court challenging the validity of rules drafted by the state Department of Environmental Protection that will govern surface operations at oil and gas wells.³⁴ PIPP argues in its complaint that the new rules should be void as to conventional drillers, as they will result in final-form regulations intended to govern unconventional gas production that subjects PIPP and similar conventional operators to unjustified and inappropriate standards and expenses. PIPP is seeking an order voiding the new rules for conventional drillers. The rules were approved by the Pennsylvania Environmental Quality Board on February 3, 2016.³⁵

In March 2016, a Pennsylvania federal jury awarded \$4.2 million to plaintiffs

²⁹ Media Advisory—Regional Earthquake Response Plan for Central Oklahoma and Expansion of the Area of Interest (Mar. 7, 2016), *available at* <http://www.occeweb.com/News/2016/03-07-16ADVISORY-AOI,%20VOLUME%20REDUCTION.pdf>.

³⁰ Media Advisory—Regional Earthquake Response Plan for Western Oklahoma (Feb. 16, 2016), *available at* <http://www.occeweb.com/News/2016/02-16-16WesternRegionalPlan.pdf>.

³¹ Oklahoma House Bill 3158, pg. 5-6, amending 17 O.S. 2011, Section 52, *available at* <https://legiscan.com/OK/text/HB3158/2016>.

³² Paul Stinson, *Oklahoma Passes Bill to Clarify Seismicity Response*, Bloomberg BNA (April 11, 2016).

³³ *Pennsylvania Independent Petroleum Producers Association v. Commonwealth of Pennsylvania et al.*, No. 219 MD 2016 (Pa. Commw. Mar. 24, 2016).

³⁴ Pennsylvania Dept. of Environmental Protection, Oil and Gas Surface Regulations, Final Rulemaking (Feb. 3, 2016), Chapter 78 and 78a, *available at* <http://files.dep.state.pa.us/PublicParticipation/Public%20Participation%20Center/PubPartCenterPortalFiles/Environmental%20Quality%20Board/2016/February%203/Final%20Annex%20A.pdf>.

³⁵ Environmental Quality Board, Minutes, Environmental Quality Board Meeting, Feb. 3, 2016, *available at* http://www.portal.state.pa.us/portal/server.pt/document/1621967/february_3_2016_eqb_minutes.pdf.

alleging that Cabot Oil & Gas acted negligently in drilling fracking wells, which created a private nuisance and harmed two Pennsylvania families in their use and enjoyment of their property.³⁶ The claims alleged that Cabot's natural gas drilling contaminated the families' well water. It is unclear how this decision,³⁷ which is a rare victory for plaintiffs in such lawsuits, will impact future decisions in similar cases against fracking operators, but some commentators predict that plaintiffs will be more emboldened to file such nuisance actions. Cabot has appealed the decision.

On January 19, 2016, Pennsylvania Governor Tom Wolf announced³⁸ that the state would embark on a mission to implement new regulations to reduce methane leaks in the oil and gas industry. Governor Wolf cited the state's position as the country's second largest natural gas producer as the motivation for the new regulations. The plan will implement a four-prong strategy that will address leakage:

1. at new wells using innovative permitting that will require modern technology, better record keeping and quarterly monitoring inspections;
2. at new compressor stations and processing facilities by updating best-available technology obligations and requiring more stringent leak detection and repair requirements;
3. at existing wells with new regulatory standards; and
4. at transmission and distribution pipelines by requiring better detection and repair protocols and implementation of best management practices.

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 blanket bonds will be \$100,000, while individual bonds are \$10 per foot of vertical well bores. The cost of applications for permits to drill were raised from \$50 to \$500, but permits will be effective for two years rather than just one. On February 9th,

³⁶ Jury Verdict, *Ely v. Cabot Oil & Gas Corp.*, No. 09-cv-02284 (M.D. Pa, Mar. 10, 2016).

³⁷ *Fiorentino v. Cabot Oil & Gas Corporation*, No. 3:09-cv-02284 (M.D. Pa, Nov. 19, 2009).

³⁸ Governor Wolf Announces New Methane Rules to Improve Air Quality, Reduce Industry Loss (Jan. 19, 2016), available at <https://www.governor.pa.gov/governor-wolf-announces-new-methane-rules-to-improve-air-quality-reduce-industry-loss/>.

the Wyoming Oil and Gas Conservation Commission approved amendments to its rules governing flaring and venting of natural gas at drill sites. The rule mandates new monthly reporting on venting and flaring, including a description of how the gas is metered, and that a compositional analysis of the gas be submitted biannually. Environmentalists claim, however, that the new rules are inadequate, arguing that the commission should have banned venting with only limited exceptions.

OTHER DEVELOPMENTS

Offshore Well-Control Rule

On April 14, BSEE issued final rules governing spill prevention and other best practice requirement for off shore oil and gas rigs.³⁹ The rules as issued are responsive to oil and gas industry leader comment, urging that the rules allow greater flexibility on methods and time frames for implementing the new requirements, especially in respect of inspection/replacement of blow-out prevention technology. The new rules implement a number of new features on blowout preventers, including a requirement for double sets of shear rams, and outside audits of equipment and real-time onshore well monitoring, as well as set standards related to well design, well casing, well cementing, and subsea containment systems.⁴⁰ The rules, which were originally proposed in April 2015,⁴¹ 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 Materials Safety Administration's ("PHMSA") May 2015 final rule governing new tank car standards for high-hazard flammable trains⁴² are now in agreement that such contentions are no longer timely. In March, the parties filed a joint brief in the D.C. Circuit⁴³ advising that the recently enacted Fixing America's Surface Transportation ("FAST") Act addressed most of the issues between the adversaries, with the exception of the PHMSA rule's requirement for certain

³⁹ <http://www.bsee.gov/Regulations-and-Guidance/final-well-control-rule/>.

⁴⁰ Ari Natter, *Oil Firms Urge White House to Weaken Well-Control Rule*, Bloomberg BNA: Daily Environment Report (March 25, 2016).

⁴¹ BSEE, *Proposed Well Control Rule Fact Sheet*, available at <http://www.bsee.gov/Regulations-and-Guidance/final-well-control-rule/>.

⁴² 80 F.R. 26643, available at <https://www.federalregister.gov/articles/2015/05/08/2015-10670/hazardous-materials-enhanced-tank-car-standards-and-operational-controls-for-high-hazard-flammable>.

⁴³ *Association of American Railroads v. DOT, et al.*, No. 15-1415 (D.C. Cir. Nov. 12, 2015).

trains to be fitted with electronically controlled pneumatic, or ECP, brakes. The railroads have requested an abeyance of their claims, with the right to contest 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 the U.S. transportation secretary to issue a new regulatory impact analysis and determination on the ECP brakes requirement by December 2017, which is why the railroads seek 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 discussion of “Induced Earthquakes.”⁴⁴ The study, which comes after a significant hike in the incidence of earthquakes in the U.S., reports that the states facing the highest risk from human-induced earthquakes are, in order, Oklahoma, Kansas, Texas, Colorado, New Mexico, and Arkansas, with the largest populations at risk located in Oklahoma and Texas. The USGS concluded that wells with higher rates of injection are more likely to be associated with induced seismic activity.

Lawsuit Seeks Fracking-Induced Quake Monitoring

A recent lawsuit⁴⁵ filed by Sierra Club seeks a court order requiring substantial reductions of underground injections of fracking waste liquids from a handful of operators in Oklahoma. The complaint contends that the reductions are necessary to help stem a recent spike in seismic activity in the area, based on the findings of an independent earthquake monitoring and prediction center. Sierra Club filed the lawsuit after the region experienced a 5.1 magnitude earthquake in mid-February, the third-strongest recorded in the state. The environmental group’s action follows lawsuits filed in January by residents of the City of Edmund, who allege that operators should have known that well activity would increase the likelihood of earthquakes. Such claims are becoming 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, Sandridge Energy, at a later date in order to comply with certain notice requirements. The lawsuit would follow an agreement between Sandridge and the state’s Corporation Commission from earlier this year, where Sandridge agreed to remove seven wells from disposal operations and reduce total saltwater disposal volume by 40 percent, or an estimated 191,000 barrels daily, in an effort to avoid litigation

⁴⁴ <http://pubs.usgs.gov/of/2016/1035/ofr20161035.pdf>.

⁴⁵ *Sierra Club v. Chesapeake Operating, LLC*, No. 16-cv-00134 (W.D. Okla. Feb. 16, 2016).

over the company's failure to comply with a prior commission order.⁴⁶

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.⁴⁷ According to the Coast Guard, the policy, which called for chemical analysis, radiation surveys, and other protections, was intended to protect workers and the public from radioactive isotopes in transported wastewater. The Coast Guard based its decision to forgo development of the policy due to the lack of industry interest in this form of transport, noting that more than 70,000 comments were submitted in connection with the proposal, and only 21 of them supported finalization of the proposal.

⁴⁶ Paul Stinson, *Oklahoma Company Agrees to Disposal Well Cuts*, Bloomberg BNA (January 28, 2016).

⁴⁷ 81 F.R. 8976, *available at* <https://www.federalregister.gov/articles/2016/02/23/2016-03674/carriage-of-conditionally-permitted-shale-gas-extraction-waste-water-in-bulk>.