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ENERGY LAW REPORT



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Hydraulic Fracturing Developments

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

With most state legislative sessions in recess and federal legislative action unlikely until after the November 2016 election, it was no surprise that there were only a handful of new developments in the fracking world during the final quarter of 2015. New regulatory requirements were promulgated by the federal Environmental Protection Agency (“EPA”), the Texas Railroad Commission, and the Pennsylvania Department of Environmental Protection. This column also includes updates on new rules issues by the Department of Interior (“DOI”), the Federal Bureau of Land Management (“BLM”) new standards for crude-to-rail transportation, local bans in Oklahoma, and enforcement procedures in Pennsylvania. Finally, at the end of last year the President signed a budget resolution ending the decades old ban on U.S. crude oil exports.

FEDERAL REGULATORY DEVELOPMENTS

BLM Fails to Accelerate Fracking Case

On December 29, 2015, a Wyoming federal judge denied the DOI’s request to bifurcate the case¹ involving challenges to BLM’s recent Fracking Rules. DOI sought bifurcation to settle the question of whether the department has legal authority over fracking, arguing that jurisdiction is a purely legal matter that requires no examination of the administrative record. Judge Scott Skavdahl denied the request, indicating that he is not prepared to deem the record irrelevant to the jurisdictional question and noted that the BLM has unnecessarily delayed for nine months the process of making the record complete. The ruling eliminates DOI’s ability to force a speedy decision and appeal period on the question of its authority, and forces DOI to succumb to the slower pace of a complex, consolidated case.

EPA’s Science Advisory Board to Review Fracking Study

The EPA’s recent fracking study is set to undergo scrutiny by a Science

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¹ *Wyo. v. Dep’t of Interior, D. Wyo.*, No. 2:15-CV-00043 (D. Wyo. September 30, 2015).

Advisory Board research advisory panel in the face of criticism over the study's core conclusion that fracking has not caused systematic injury to water supplies. The panel provided its draft report on January 7, 2016, with a teleconference scheduled for early February. Thus far, the panel has focused on the overuse of generalities by the EPA and a lack of citation to appropriate data points. The panel members shared their concerns with the public in late October, stating that the study left out critical issues such as the potential off-site spills of fracking fluid and leaks from improperly closed wells, and the probability of such incidents occurring. The panel members also recommended that the study be expanded to specify best management practices, and suggested what additional research may be needed to resolve remaining uncertainty. The full Advisory Board is expected to discuss the panel's review in May.

Increased Disclosure under New EPA Rule

In connection with its effort to reduce methane emissions from the oil and natural gas sectors, on October 22, 2015, the EPA promulgated a new rule requiring regulated industry to gather and disclose additional greenhouse gas emissions information. The rule, which requires affected facilities to begin reporting 2016 data by March 31, 2017, forces operators to collect and report information on boosting systems, completions and workover of oil wells using fracking and blowdowns of natural gas transmission pipelines.

Challenges to New Crude-by-Rail Transportation Standards Delayed Due to FAST Act

The Department of Transportation ("DOT") Pipeline and Hazardous Materials Safety Administration ("PHMSA") recently released its final version of updated safety standards for crude-by-rail transportation. A number of environmental groups, have appealed denial of their claim,² and have now urged the D.C. Circuit to not delay its review of the groups' petitions.³ The DOT recently requested a stay of the appeal proceedings in light of the enactment of the Fixing America's Surface Transportation Act ("FAST Act") in early December 2015. According to both parties, the FAST Act moots a number of issues raised by both sides. Environmental groups, however, argue that the remaining issues relating to retrofit tank thickness and speed limits should continue on track toward a decision by the Courts. DOT, on the other hand, maintains that it needs a 60-day abeyance to more fully understand the implications of the FAST Act on the new standards. The PHMSA, which published a number of editorial clarifications on the new standards, issued its

² PHMSA's response to the petitions is <http://federalregister.gov/a/2015-28774>.

³ *Am. Petroleum Inst. v. United States, D.C. Cir.*, No. 15-1131 (D.C. Cir., June 29, 2015).

final rule, which took effect on December 23, 2015.

TransCanada Corp. to Challenge President Obama's Rejection of the Keystone Pipeline

In early November 2015, the Obama Administration denied TransCanada Corporation's application to construct the Keystone XL oil pipeline, after a seven year review process.⁴ President Obama stated that approving the pipeline would not have contributed to the country's economy or security interests, and would only serve to weaken the U.S.'s role as a global leader in taking action against climate change.⁵ TransCanada has challenged the administration's decision in the U.S. District Court for the Southern District of Texas,⁶ arguing that the President exceeded his power under the Constitution, and has indicated its intent to bring separate claims under the North American Free Trade Agreement to recover billions in damages.⁷

Budget Deal Ends Ban on Crude Oil Exports

In late December, President Obama signed a 2016 budget deal that ended a decades-old ban on the export of domestic oil. The \$1.15 trillion compromise between Republicans and Democrats eliminates the oil ban that dates back to 1975 in exchange for multi-year extensions of the federal energy investment tax credit and renewable electricity production tax credit programs. It is too early to tell who will benefit from the repeal of the oil export ban, particularly in light of recent declines in oil prices. In addition, while domestic oil producers and international producers exporting to Central and South America could benefit from the deal, it will be some time before the necessary infrastructure upgrades and increased oil prices are in place to take advantage of the new exportation opportunities.⁸

STATE BANS AND RESTRICTIONS ON FRACKING OPERATIONS

Colorado

On December 9, 2015, Colorado's supreme court heard arguments on an

⁴ David Marino and Rebecca Penty, *TransCanada Sues Over Keystone Pipeline Denial*, Bloomberg BNA: Daily Environment Report (January 6, 2016).

⁵ *Id.*

⁶ *TransCanada Keystone Pipeline LP, et al. v. Kerry, et al.*, U.S. Dist. Court, Southern Dist. of Texas, No. 4:16-CV-00036.

⁷ David Marino and Rebecca Penty, *TransCanada Sues Over Keystone Pipeline Denial*, Bloomberg BNA: Daily Environment Report (January 6, 2016).

⁸ Keith Goldberg, *Budget Deal Stuffs Stockings for Green Energy Cos.*, LAW 360 (December 16, 2015).

appeal from lower court decisions to overturn local bans on fracking in Longmont and Fort Collins.⁹ Industry lawyers argued that local bans and moratoriums on fracking impede the state's interest in facilitating oil and gas development. Lawyers for the municipalities contend that the state's interest is in the development of oil and gas, and not fracking, and that industry operators have alternative methods at their disposal to extract natural resources.¹⁰ The court has yet to hand down its decision.

Florida

H.B. 191 passed the State of Florida's House Agricultural and Natural Resources Appropriations subcommittee in December of 2015. The bill, which would place a temporary moratorium on fracking and set a June 2017 deadline for the Florida Department of Environmental Protection to establish rules and permitting procedures, is expected to be a major source of debate in Florida's upcoming 2016 legislative session. In addition to concerns about fracking's potential impact on the environment, a number of municipalities have voiced their opposition to the bill's preemption of local government ordinances that govern fracking operations.

Kansas

In an order issued by the Kansas Corporation Commission on October 29, 2015, limits on wastewater disposal in and around areas of increased seismic activity in south central Kansas were extended for an additional 180 days. The limits, which initially took effect in March of 2015, were implemented to curb increases in seismic activity in the region. According to the commission, the number of earthquakes in Kansas increased from a total of four in 2013 to 127 in 2014.¹¹ Since the imposition of the restrictions, the region has seen a reduction in the number of earthquakes. Data indicates that there were 133 earthquakes within the 180 days leading up to the placement of the limits, and only 85 earthquakes during the 180 days following the imposition of the limits.¹² Scientists are unable, however, to tie those reductions to the wastewater disposal limits at this time. The commission's order will remain in effect until March 13, 2016.

⁹ *City of Longmont, et al. v. Colorado Oil and Gas Ass'n, Colo.*, No. 2015SC667, and *City of Fort Collins v. Colorado Oil and Gas Ass'n, Colo.*, No. 2015SC668.

¹⁰ Tripp Baltz, *Local Fracking Bans Said to Impede Colorado's Interest*, Bloomberg BNA: Daily Environment Report (December 9, 2015).

¹¹ Christopher Brown, *Kansas Commission Extends Limits on Wastewater Injection*, BLOOMBERG BNA: DAILY ENVIRONMENT REPORT (November 3, 2015).

¹² *Id.*

North Dakota

Effective December 31, 2015, North Dakota farmers are no longer allowed to sell irrigation water to oil producers for fracking operations. The state's decision ends a policy implemented in 2010, titled the Industrial Water Use in Lieu of Irrigation Policy, which permitted oil producers to secure their water needs from local farms. The state cited dangerous traffic conditions resulting from higher trucking volume as the reason for ending the policy. State officials say that oil operators can still meet their water needs by using the state's improved piping and infrastructure to access state waters.

Oklahoma

In November 2015, four Oklahoma oil and gas companies were put on notice of actions by environmental groups alleging that injuries and damage from recent seismic activity was caused by wastewater well injection in the central Oklahoma and southern Kansas region. The environmental groups ground their claims in the Resource Conservation and Recovery Act ("RCRA"), which allows citizen lawsuits over hazardous waste. Oklahoma has experienced a recent spike in seismic activity in the region, with the number of earthquakes multiplying five-fold between 2013 and 2014.¹³ The question of whether or not seismic activity can be tied to fracking operations has received increased attention over the last 12 months.

Additionally, earthquakes in the Edmond, Oklahoma, area during the final days of 2015 caused the state's Corporation Commission to implement a plan to reduce wastewater disposal operations in and around the Arbuckle formation. These reductions are in addition to volume cuts ordered in August of 2015, which effectively reduced disposal by 38 percent in the northern part of Oklahoma County and southern Logan County. In a related development, fourteen residents of Edmond filed a lawsuit against a group of oil companies in connection with seismic activity registered at the end of 2015.¹⁴ The plaintiffs allege that the oil operators acted negligently because they should have been aware that the use of disposal wells would increase the risk of seismic activity.

Pennsylvania

After four years of rulemaking, the Pennsylvania Department of Environmental Protection ("PADEP") sent its final oil and gas rules to the state's

¹³ Paul Stinson, *Groups to Sue Oklahoma Energy Companies Over Quakes*, Bloomberg BNA: Daily Environment Report (November 3, 2015).

¹⁴ *G. Terry Felts, et al. v. Devon Energy Production Company, L.P., et al., Dist. Ct. of Oklahoma County*, No. CJ-2016-137 (filed January 11, 2016).

Environmental Quality Control Board (“EQB”) for review in early January of 2016. The new rules, which would, for the first time, establish different requirements for convention oil and gas operations and unconventional operations, including fracking, referred to as Chapter 78 and 78a regulations, respectively, received over 28,000 comments from the public, according to a state-issued fact sheet. The regulations would largely ban the use of in-ground impoundments, or pits, for storing drill cuttings and waste fluids. The rules also include a number of new fracking requirements that relate to: storage tank vandalism; permits to dispose of drill cuttings; secondary containment for storage vessels, trucks, and drill rigs; construction rules for gathering lines and horizontal drilling under streams; temporary transport lines for freshwater and wastewater; water management plans for water withdrawal for fracking; use of waste fluids for dust suppression and de-icing; and monthly reporting of gas, condensate, and waste. The EQB is expected to review the rules in early February.

The Pennsylvania Supreme Court recently remanded a case¹⁵ between a natural gas company and the PADEP in connection with the assessment of enforcement penalties. The natural gas company argued that the PADEP incorrectly interpreted the Clean Streams Act¹⁶ when it imposed ongoing penalties for each day contaminants from an impoundment leak remained in the ground. Resolution of the remanded case will likely impact how the PADEP quantifies penalties in the future.

Pennsylvania’s commonwealth appellate court is allowing a gas company’s permit-program challenge to move forward. The case,¹⁷ which was first filed in June, alleges that the PADEP, when making permitting decisions, relied on provisions of Act 13 that were rejected under a prior Pennsylvania Supreme Court decision. The 2013 decision, *Robinson Twp. v. Commonwealth of Pennsylvania*,¹⁸ rejected the requirement that the PADEP consider a gas well’s impact on public land, parks, waters, and other environmentally sensitive areas when deciding to approve or reject a permitting application.

A Butler County Court of Common Pleas has upheld a township’s zoning board decision approving an ordinance that allows natural gas drilling in the

¹⁵ *EQT Production Co. v. Pa. Dep’t Env’tl. Prot.*, Pa. Supreme Court, No. 15 MAP 2015, judgment entered 12/29/15.

¹⁶ 35 P.S. §§ 691.1 et seq.

¹⁷ *Pennsylvania Independent Oil & Gas Ass’n v. Commonwealth of Pennsylvania*, Penn. Commonwealth Court, No. 321MD2015 (decided December 29, 2015).

¹⁸ 623 Pa. 564 (2013).

municipality.¹⁹ Challengers of the ordinance argued that the regulation, which would allow drilling and fracking operations throughout the township, harms the environment and community.²⁰ The judge, however, pointed to the 121-paragraph explanatory document issued by the zoning board in support of its decision to illustrate that the board properly weighed information provided by all parties at the zoning hearings.²¹ The environmental groups advised that they plan to appeal the decision.

Texas

The Texas Railroad Commission released its proposed rules on unconventional fracture-treated fields in early December 2015, which will amend Texas Administrative Code Sections 3.5, 3.31, 3.38, 3.40, 3.45, 3.51, 3.52, and 3.86. The rules, which were originally drafted for vertical wells, were adjusted for horizontal wells and will address filing applications; deepening, reentering, and plugging back wells; spacing issues; well densities; assignment of acreage to pooled development and proration units; oil allowables; oil potential test forms; oil well allowable production; and horizontal drain hole wells.²²

The City of Denton, Texas, is working toward incentivizing drilling operators to consolidate their wells. The city council engaged a consultant to assist the city with preparing a fee schedule that would offer discounted rates for per-well inspections and per-site permits when multiple wells are grouped together. The proposed fee schedule and related analysis, which were discussed during a December 1, 2015, city council work session, can be found in the Legislation Page of the city's Web site.

OTHER DEVELOPMENTS

Canada Blames Fracking for Earthquake

A recent earthquake in Canada spurred the British Columbia Oil and Gas Commission to blame fracking as the cause of the seismic activity. The commission specifically pointed to an injection well located within one kilometer of the epicenter owned by Progress Energy Canada, a subsidiary of the Malaysian government oil and gas company Petronas, as the source of the

¹⁹ *Delaware Riverkeeper Network, et al v. Middlesex Township Zoning Board, et al.*, No. 15-00429 in the Court of Common Pleas of Butler County.

²⁰ Dan Packer, *Pa. Judge Allows Town's Gas Drilling Ordinance to Stand*, Law 360 (November 25, 2015).

²¹ *Id.*

²² Nushin Huq, *Texas Proposals on Fracking Draw Industry Support*, Bloomberg BNA: Daily Environment Report (December 8, 2015).

quake. In rendering its determination, the commission identified the following four factors explaining the phenomenon: (i) absence of seismic events prior to fracturing operations; (ii) the proximity of the epicenter and injection well; (iii) fracking operations were ongoing when the quake hit; and (iv) seismic movement appeared to be strongest near the well. The commission advised, however, that the seismic activity did not necessitate more stringent drilling restrictions at this time.

Proposed Strategy for Wastewater Controls at Wells

Resources for the Future, a natural-resources-based think tank, released a discussion paper on December 17, 2015, advising regulators to focus their efforts on correcting the sources of pit and tank leaks and overflows, rather than viewing tanks as the outright answer to the problem. The recent fracking rules issued by the BLM effectively prohibit pits for wastewater storage. Resources for the Future, like some oil and gas industry groups, advocates that operators have the option and the flexibility to choose between pits and tanks, based on the circumstances.

2015 Fracking Disclosure Report Card

According to a recently released fracking disclosure report card, only a few oil and gas companies took it upon themselves to increase disclosures of the risks of fracking operations to investors in 2015. According to the creators of the scorecard, the balance of the industry continues to fail at providing adequate information about how they manage toxic chemicals, water, and other issues related to fracking.²³

²³ The complete scorecard results can be found at <http://disclosingthefacts.org/2015>.