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AND OPPORTUNITIES**

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Hydraulic Fracturing Developments

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

This quarterly update includes: potential legal action against the Department of Interior (“DOI”) Federal Bureau of Land Management (“BLM”) in connection with its proposed cancellation of a number of oil and gas leases in Colorado, as well as a successful challenge to BLM’s proposal to open areas of California to fracking operations. In the states, we note unsuccessful attempts to include anti-fracking measures on ballots in Colorado and Ohio, new Maryland fracking regulations submitted to the legislature for review, and renewed challenges to Pennsylvania’s fracking regulations. 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 more in-depth analyses.

FEDERAL REGULATORY DEVELOPMENTS

BLM

Lawsuits are likely to be filed in connection with BLM’s issuance of a Final Environmental Impact Statement (“EIS”)¹ on August 5, 2016, that will result in the cancellation of 25 undeveloped oil and gas leases issued between 1995 and 2012 in the White River National Forest, Colorado. Industry groups claim that the decision to retroactively cancel leases violates private property rights. Conversely, environmental groups claim that BLM has not gone far enough and that all 65 leases reviewed in the EIS should be cancelled. Under the EIS, BLM will allow 27 leases (some of which are developed) to operate with only minor modifications, while 13 undeveloped leases will be subject to new stipulations, including restrictions on surface facilities and new roads. BLM issued the EIS in response to a 2007 decision by the Interior Board of Land Appeals that, as the result of a challenge to three leases in Pitkin County, BLM must either do its own environmental analysis or formally adopt the White River National

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¹ http://www.blm.gov/co/st/en/fo/crvfo/existing_leases_on.html.

Forest’s 1993 Oil and Gas EIS for leasing on the White River National Forest.²

On September 6, 2016, a federal court in California overturned³ a proposed plan by BLM to allow drilling on more than one million acres of land in California, approximately 25 percent of which would involve fracking. The court found that BLM violated the National Environmental Policy Act (“NEPA”)⁴ by failing to take a “hard look” and adequately assess the environmental consequences of fracking (“aside from . . . isolated and passing references to fracking . . . the 1,073-page [management plan] makes no mention of fracking at all, let alone meaningful discussion to inform decision-makers and the public of the attendant environmental concerns unique to fracking”). The court, however, rejected the claim that BLM was required to consider alternatives that decreased the overall amount of oil and gas activity on federal lands, addressing only the overall environmental impact.

In the ongoing *Murray Energy Corp. v. EPA* litigation challenging greenhouse gas reduction initiatives including the Clean Power Plan,⁵ the judge, on October 17, 2016, ordered EPA to undertake an evaluation of the Plan’s economic impact, including job loss in connection with the current or anticipated closure of over 400 coal-fired power-generating units. The court determined that EPA had abused its discretion by failing to perform the noted analysis as required under Section 321(a) of the Clean Air Act.

STATE REGULATORY DEVELOPMENTS

Colorado

Environmental groups have indicated that they will forbear from introducing ballot measures to ban or restrict fracking development in the state, instead redirecting their efforts to block a separate ballot initiative that would make Colorado’s Constitution much more difficult to amend (“Amendment 71”). The groups had previously supported Initiative 75, which would have given local governments expanded authority to regulate or ban fracking; and Initiative 78, which would have increased statewide setback distances between wells and occupied buildings from 500 feet to 2,500 feet.⁶ Recently, however, Colorado

² http://www.blm.gov/co/st/en/fo/crvfo/existing_leases_on.html.

³ Civil Minutes, *Los Padres ForestWatch et al. v. BLM*, No. 2:15-cv-04378-MWF-JEM (C.D. Cal., Sept. 6, 2016), available at http://www.biologicaldiversity.org/programs/public_lands/energy/dirty_energy_development/oil_and_gas/pdfs/28_Order_on_XMSJs_9-6-16.pdf.

⁴ 42 U.S.C. § 4321 et seq.

⁵ Memorandum Opinion, *Murray Energy Corp. et al. v. McCarthy*, No. 5:14-cv-00039-JPB (N.D. W. Va. Mar. 24, 2014).

⁶ <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html>.

Secretary of State Wayne Williams determined that the groups failed to secure the necessary number of signatures to put the initiatives on the ballot.⁷ According to the environmental groups, economic and practical reasons are behind their decision to redirect their efforts to the proposed Amendment 71, which would require signatures from two percent of registered voters in each of the state's 35 senate districts in order to put an initiative on the ballot, along with requiring 55 percent of voters, rather than a simple majority, in order to pass.⁸

Maryland

The Maryland Department of the Environment (“MDEP”), as mandated by state regulations, released proposed regulations⁹ (“Proposed Regulations”) on September 26, 2016, to a legislative review committee prior to publishing the Proposed Regulations for a 30-day public comment period (the process was expected to be completed by the end of 2016). The Proposed Regulations would establish requirements for construction, integrity and pressure testing, and water monitoring for fracking wells, and prohibit any well pad within specified distances of public and private drinking water wells and public water supplies or anywhere within the watersheds of Broadford Lake, Piney Reservoir, and Savage Reservoir. The Proposed Regulations also would require disclosure of chemical information regarding fracking fluids (with limited protections for trade secrets). Commentators also expect at least one bill to be introduced during the next General Assembly session (commencing in January 2017) seeking to ban fracking permanently in the state and another that would adopt a strict liability standard for operators should fracking be allowed to proceed. Maryland had instituted a moratorium on fracking.¹⁰

Ohio

The Ohio Supreme Court affirmed the Ohio Secretary of State's decision that proposed county charters for Athens, Megis, and Proter counties, which would

⁷ Kelsey Ray, *Both of Colorado's anti-fracking initiatives fail to make the ballot*, THE COLORADO INDEPENDENT, Aug. 29, 2016, <http://www.coloradoindependent.com/160924/colorado-fracking-measures-fail>.

⁸ Corey Hutchins and Kelsey Ray, *Amendment 71, aka “Raise the Bar,” explained*, THE COLORADO INDEPENDENT, Oct. 19, 2016, <http://www.coloradoindependent.com/161485/colorado-raise-the-bar-amendment-71>.

⁹ <http://www.mde.state.md.us/programs/land/mining/marcellus/pages/index.aspx>.

¹⁰ http://news.bna.com/deln/DELNWB/split_display.adp?fedfid=97976077&vname=dennotallissues&split=0.

have allowed communities to regulate fracking, are unconstitutional.¹¹ As a result, the November ballot in Ohio did not include any measures to limit or prohibit hydraulic fracturing in the state.

Pennsylvania

The state's new oil and gas regulations have come under fire, as a coalition of natural gas developers filed a complaint on October 13, 2016, arguing that a number of provisions are costly, unclear, and unlawful.¹² As previously reported, the rules are the state's first regulations intended to specifically address hydraulic fracturing.¹³ The lawsuit alleges that sections of the Chapter 78a regulations impose unreasonable and excessive costs, including requirements that well operators identify and plug abandoned wells before drilling; obtain Solid Waste Management Act permits for certain activities on well sites; upgrade, close, or re-permit freshwater impoundments within 12 or 36 months, respectively; and prepare monthly reports on waste generation.¹⁴ The complaint also alleges that the regulations require site restoration plans that duplicate or are in conflict with existing requirements under the Clean Streams Law programs, and create ambiguity over spill cleanup requirements by introducing additional deadlines and reporting obligations beyond existing procedures in Act 2. The complaint is currently being reviewed by the state's Department of Environmental Protection.

On September 28, 2016, the Pennsylvania Supreme Court struck down as unconstitutional four provisions of the state's 2012 Oil and Gas Act ("Act 13").¹⁵ The decision addresses four remaining issues following the court's December 19, 2013, decision striking down Act 13's restriction on local regulations of oil and gas operations. Commentators expect that the decision will have limited impact because the four invalidated provisions were not typically enforced; however, the decision may suggest that the panel is skeptical about hydraulic fracturing.

OTHER DEVELOPMENTS

Methane

On August 2, 2016, a group of states, state agencies, and various industry

¹¹ *State ex rel. Coover v. Husted*, 2016-Ohio-5794 (Sept. 13, 2016).

¹² Complaint, *Marcellus Shale Coalition v. DEP of the Commonwealth of Pa.*, No. 573-MD-2016 (Pa. Cmwlth. Oct. 13, 2016).

¹³ Eric Rothenberg, et al., *Hydraulic Fracturing Developments*, PRATT'S ENERGY LAW REPORT, Vol. 16-8, Sept. 2016, at 331–32.

¹⁴ Complaint, *Marcellus Shale Coalition v. DEP of the Commonwealth of Pa.*, No. 573-MD-2016 (Pa. Cmwlth. Oct. 13, 2016).

¹⁵ *Robinson Twp. v. Commonwealth*, 2016 Pa. LEXIS 2190 (Sept. 28, 2016).

groups filed several lawsuits in the U.S. Court of Appeals for the District of Columbia¹⁶ challenging EPA's authority in regard to the recently issued final rule aimed at curbing methane emissions from new oil and gas wells (as previously reported).¹⁷ As noted in our previous Columns, the new regulation requires more frequent well inspections and the development of leak monitoring plans, in addition to other requirements.

In a related development, a proposed rule¹⁸ ("Proposed Rule") by the California Air Resources Board aimed at decreasing methane emissions from oil and gas facilities by 40 to 45 percent by 2025 will likely move forward for a final vote in the first half of 2017. The Proposed Rule would cover new and existing facilities, both on land and offshore, including natural-gas storage facilities. If adopted, the rules would be phased in between January 1, 2018, and January 1, 2020. The Proposed Rule would require producers to institute leak detection and repair measures to curb fugitive methane emissions, install vapor-collection systems, and collect vented gas from compressors. Operators will be required to proactively search for leaks and to phase out pneumatic devices that continuously bleed natural gas into the atmosphere.

A recent study¹⁹ by the National Oceanic and Atmospheric Administration ("NOAA") found that methane emissions from oil and gas operations represent approximately 20 to 25 percent of global methane emissions and are higher than previously estimated. The study also confirmed earlier findings by NOAA that fossil fuel development is not directly responsible for the increase in global methane emissions between 2007 and 2013.

Seismic Activity

EPA ordered that 17 produced water disposal wells located in the Osage Nation Reservation in Oklahoma be shut down in early September following the occurrence of a 5.6 magnitude earthquake in Pawnee, Oklahoma (the

¹⁶ *Indep. Petroleum Ass'n of Am. v. EPA*, D.C. Cir., No. 16-1262 (filed Aug. 2, 2016); *Interstate Nat. Gas Ass'n v. EPA*, D.C. Cir., No. 16-1263 (filed Aug. 2, 2016); *West Virginia v. EPA*, D.C. Cir., No. 16-1264 (filed Aug. 2, 2016); *W. Energy All. v. EPA*, D.C. Cir., No. 16-1266 (filed Aug. 2, 2016); *GPA Midstream Ass'n v. EPA*, D.C. Cir., No. 16-1267 (filed Aug. 2, 2016); *Texas Oil and Gas Ass'n v. EPA*, D.C. Cir., No. 16-1269 (filed Aug. 2, 2016); *Am. Petroleum Inst. v. EPA*, D.C. Cir., No. 16-1270 (filed Aug. 2, 2016).

¹⁷ Eric Rothenberg, et al., *Hydraulic Fracturing Developments*, PRATT'S ENERGY LAW REPORT, Vol. 16-8, Sept. 2016, at 329-30.

¹⁸ <https://www.arb.ca.gov/regact/2016/oilandgas2016/oilandgas2016.htm>.

¹⁹ Media Release, NOAA, Study finds fossil fuel methane emissions greater than previously estimated (Oct. 5, 2016), <http://www.noaa.gov/media-release/study-finds-fossil-fuel-methane-emissions-greater-than-previously-estimated>.

strongest earthquake in Oklahoma since 2011). EPA's order followed action by the Oklahoma Corporation Commission ("OCC"), which ordered 37 produced water wells shut down following the earthquake. In addition, environmental groups filed a lawsuit against oil and gas companies, alleging that recent seismic activity is caused by wastewater well injection activities (in addition to separate lawsuits brought by landowners alleging negligence). The companies claim that the environmental groups lack standing and that OCC has sole authority to regulate injection wells, which it has already done with recent actions to address seismic activity. The claim remains pending in federal court.

Crude by Rail

On August 15, 2016, the Department of Transportation Pipeline and Hazardous Materials Safety Administration ("PHMSA") published a final rule ("Final Rule"), implementing new requirements for crude transport by rail. The rules were first proposed in 2015, setting stringent requirements for rail shipments of hazardous materials, including crude oil, ethanol, and other flammable materials, and a phase-out of DOT-111 tank cars, the type of rail tankers that have been involved in major spill events in conjunction with derailments. In December 2015, the Fixing America's Surface Transportation Act²⁰ was passed, setting forth certain mandates and minimum requirements to update the PHMSA regulations. The Final Rule (effective as of August 15, 2016)²¹ implements these statutory requirements, including a revised phase-out schedule for DOT-111 under which such tank cars will be phased out between January 1, 2018, and May 1, 2025 (depending on the material being carried and whether such tank car is jacketed). New tank cars will need to be equipped with a thermal protection blanket that is at least 0.5 inches thick, and older tank cars will be retrofitted with minimum top-fittings protection, in addition to the thermal protection blanket.

On July 13, 2016, PHMSA, in coordination with the Federal Railroad Administration, published a notice of proposed rulemaking²² to improve oil spill response readiness and mitigation. The proposed rule would update and clarify the comprehensive oil spill response plan requirements for certain trains, incorporate into the hazardous materials regulations a test method for initial boiling point for flammable liquids, and require railroads to share information

²⁰ <https://www.gpo.gov/fdsys/pkg/PLAW-114publ94/html/PLAW-114publ94.htm>.

²¹ <https://www.federalregister.gov/documents/2016/08/15/2016-19406/hazardous-materials-fast-act-requirements-for-flammable-liquids-and-rail-tank-cars>.

²² http://www.phmsa.dot.gov/staticfiles/PHMSA/DownloadableFiles/Files/HM_251B_OSRP_NPRM_advanced_copy.pdf.

with state and tribal emergency response commissions with the goal of improving community preparedness for potential accidents. Some commentators predict that the requirements will impose substantial costs and burdens on railroad companies, which will increase the price of transportation by rail.²³

Canada

Prime Minister Justin Trudeau previously announced that a form of carbon taxation will be implemented by 2018, and, in a speech to the House of Commons on October 3, 2016, he further announced that provinces will have the choice of implementing a direct tax on carbon or adopting a cap-and-trade system. If a province fails to take either action by 2018, the federal government will impose a price on carbon emissions that will start at C\$10 (US\$7.47) per metric ton in 2018, rising by C\$10 each year, eventually reaching C\$50(US\$37.36) per metric ton by 2022.²⁴ Currently, approximately 85 percent of Canadians live in an area with a price on carbon emissions, including British Columbia and Alberta, which have a carbon tax (Alberta's will be effective on January 1, 2017), and Quebec and Ontario, which have cap-and-trade systems (Ontario's will be effective on January 1, 2017), although the rules for each system may need to be strengthened based on the new federal program. It is noteworthy that Alberta's carbon tax resulted from an unlikely partnership between Suncor Energy (in addition to other companies in the oil sands industry) and Greenpeace.

Mexico

The Mexican government announced in 2015 that it planned to develop fracking operations in the country after a constitutional law change in 2013 allowed for development of related regulations. A private auction was planned to be held in 2015 to develop fracking operations shortly after the bidding period opened for an auction of shallow-water offshore oil exploration blocks in the Gulf of Mexico. However, the auction was postponed due to a fall in gas prices. In September 2016, Mexico's Energy Secretary reportedly stated that auctions may proceed within the year and that environmental regulations should be ready by March 2017.²⁵

²³ Janoe, J. Scott, *DOT Oil Train Rule Proposes Costly Requirements*, LAW360, July 22, 2016, http://www.law360.com/environmental/articles/819716?nl_pk=e552f7ea-93f1-42ae-9bac-16c47deb1007&utm_source=newsletter&utm_medium=email&utm_campaign=environmental.

²⁴ Note that the conversion rate is as of October 24, 2016.

²⁵ *Fracking expected to begin next year*, MEXICO NEWS DAILY, Sept. 24, 2016, <http://mexiconewsdaily.com/news/fracking-expected-to-begin-next-year/>.

United Kingdom

Prime Minister Theresa May has modified a recent proposal for the Shale Wealth Fund to include an option to distribute fund proceeds to local residents residing near wells.²⁶ The original proposals only contemplated compensation being given to community trusts and local authorities. Communities could receive as much as 10 percent of tax revenue derived from shale exploration, which could be spent on local infrastructure and skills training. The new fund could deliver up to £10 million (US\$12.2 million) per eligible community.²⁷

²⁶ Press Release, GOV.UK, PM rewrites plan to put money from infrastructure in the hands of local people (Aug. 7, 2016), <https://www.gov.uk/government/news/pm-rewrites-plan-to-put-money-from-infrastructure-in-the-hands-of-local-people>.

²⁷ Press Release, GOV.UK, PM rewrites plan to put money from infrastructure in the hands of local people (Aug. 7, 2016), <https://www.gov.uk/government/news/pm-rewrites-plan-to-put-money-from-infrastructure-in-the-hands-of-local-people>.

