

2014 Should Be Pivotal For Fracking Regulation

Law360, New York (February 10, 2014, 5:58 PM ET) -- The United States is in the middle of an energy boom, due largely to hydraulic fracturing, also known as fracking. In fact, fracking techniques helped increase U.S. oil and natural gas production so much in 2013 that our trade deficit has dropped to its lowest level since 2009.[1] Projections for the future are even brighter, with the U.S. Energy Information Administration projecting that by 2018, the U.S. will export more natural gas than it imports.[2]

This energy boom has opened the doors to increased scrutiny from public officials, regulators and the public at large. Guidance at the federal level, however, has been minimal and generalized, but an upcoming draft report from the Environmental Protection Agency, coupled with an increase in fracking legislation at the state and local level is set to ensure that this will be an important year, helping to set the stage for our ultimate federal fracking policy.

The U.S. Environmental Protection Agency has not yet regulated fracking in the continental U.S. The EPA recently published a rule requiring oil and gas companies to disclose the chemicals used in fracking off the California coast. The agency nonetheless began a large study in 2010, to determine the possible impacts of fracking on drinking water resources.[3] A final report was originally due out in 2014, but the EPA has pushed the timetable back, opting instead to release a draft report this year and a final one in 2016.[4]

The EPA's findings are highly anticipated, with some predicting they may be used to pave the way for stringent federal regulation of hydraulic fracturing. U.S. Chamber of Commerce President Thomas Donohue warns that such regulations "could short-circuit America's absolute explosion in energy opportunity that is creating millions of jobs." [5] Donohue's statement seems justified, given the current administration's stated intent, reflected in President Obama's recent comments in his State of the Union address to strengthen "protection of our air, our water and our communities."

The delay of the EPA report comes at a crucial time, as state and local regulators seem to be taking this lack of guidance from the federal government as a license to issue legislation piecemeal, in some cases even banning the practice outright.

In Florida, where oil drilling has long occurred in the panhandle and southwest parts of the state, a Florida legislative subcommittee recently passed the Fracturing Chemical Usage Disclosure Act, a measure that would require oil and gas companies to provide the state with the chemicals the use during the fracking process.[6]

And in September 2013, California Gov. Jerry Brown signed the first fracking law, SB 4, which paved the way for rules requiring companies, among other things, to disclose chemicals they use in the fracking

process, to provide notice to neighbors before operations begin and to conduct certain testing on water wells.[7] This legislation has also fueled efforts by various groups to ban the practice in that state altogether[8] — despite estimates that the Monterey Shale, which extends the length of California, contains over 15 billion barrels of technically recoverable oil,[9] a figure that, if tapped, is likely to bring increased wealth to the state and thousands of jobs.

But although state-by-state regulation may be a workable solution, the ever-increasing local regulations and bans are muddying a field already suffering from lack of clarity.

For example, in mid-January of this year, the North Carolina Mining and Energy Commission approved a rule that would let companies keep confidential the makeup of the chemical mixture used in the fracking process. Although that rule is currently still under final consideration, its adoption would send a message to companies that North Carolina welcomes the fracking industry. This rule, however, may be undermined by the many local bans and moratoriums that have been passed in North Carolina in the past few years.[10]

Other states facing a varying patchwork of regulation at the local level include shale-rich New York and Colorado.

In New York state, where fracking remains at a standstill due to a state-wide moratorium pending the results from that state's environmental agency's review, many New York towns have nonetheless banded together to limit or ban drilling operations completely.[11] On Jan. 6, 2014, Kirkland, N.Y., banned fracking within the town limits.[12] Four days later, Erie County instituted a similar ban on county-owned lands.[13]

Similarly, many cities in Colorado, such as Boulder City, Colorado Springs and Loveland, have passed measures to ban fracking, creating a patchwork of regulation similar to that in place in New York. To add to that complexity, the group "Protect Our Colorado" is trying to get a Colorado statewide ban on fracking on the ballot; such a move would threaten the industry in a state that sits on large shale formations.[14]

The result of these piecemeal local bans may lead to a de facto ban throughout the larger areas of the states where those towns are located. For example, in New York, even if the state-wide moratorium is lifted, such a patchwork of regulation may deter companies from investing in the small areas that remain available for fracking in fears that similar bans, already in place in neighboring towns, could require the companies to pull out. The same can be said for Colorado.

Local bans are also popping up in traditionally fracking-friendly areas like Texas and Ohio. For example, the city of Dallas, which sits on the edge of the Barnett Shale, passed restrictions in December 2013, which ban fracking within 1,500 feet of a "home, school, church" and other areas, effectively banning the practice within the city.[15] And in Ohio, which sits on top of the Marcellus Shale, over two dozen bans or moratoriums have been passed in recent years.[16]

More such examples abound, but what is clear is that until some guidance is provided, particularly at the federal level, the trend to regulate and ban fracking at the state and local level is likely to continue its increasing pace this year.

Fueling the race to regulate or ban the practice altogether at the local level is private litigation, which continues to flourish. Most litigation contains allegation that nearby fracking has contaminated a water

supply, but proving these claims in the absence of conclusive scientific studies has been difficult, with some recent studies finding that such contamination is unlikely.[17] And if the EPA's draft report this year were to suggest that drinking water is impacted adversely by fracking practices, it would likely help to give such cases a much needed boost and could help spur new litigation.

The issuance of the draft EPA report — a first look at the EPA's fracking hand — coupled with the continuing increase in state and local regulation will make 2014 a year to watch in the fracking regulatory arena.

—By Claudia M. Barrett, Gibson Dunn & Crutcher LLP

Claudia Barrett is a senior associate in Gibson Dunn's Washington, D.C., office. Barrett practices in the firm's litigation department and is a member of its environmental litigation and mass tort practice group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Gilbert, Daniel and Lefebvre, Ben, "U.S. Oil Boom Changes Trade Trends," The Wall Street Journal Online, Jan. 7, 2014, <http://online.wsj.com/news/articles/SB10001424052702304617404579306650123601942>.

[2] Id.

[3] Environmental Protection Agency, "EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources," <http://www2.epa.gov/hfstudy>.

[4] Associated Press, "EPA Official: Fracking Study Won't Be Done Until 2016," TribLive.com, June 19, 2013, <http://triblive.com/news/adminpage/4223323-74/conference-epa-research#axzz2riCNaba4>.

[5] Reuters, "EPA Fracking Study Could Hurt Energy Boom – U.S. Business Leader," Reuters.com, Dec. 3, 2013, <http://www.reuters.com/article/2013/12/03/usa-fracking-idUSL2N0JI1CE20131203>.

[6] Florida House of Representatives, "CS/HB71 – Fracturing Chemical Usage Disclosure Act," <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=51190>.

[7] State of California, "SB-4 Oil and Gas: Well Stimulation," California Legislative Information, http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB4.

[8] Rogers, Paul, "Top Climate Scientists Call for Fracking Ban in Letter to Gov. Jerry Brown," San Jose Mercury News Online, Nov. 12, 2013, http://www.mercurynews.com/science-environment/ci_24509392/top-climate-scientists-call-fracking-ban-letter-gov.

[9] United States Government Accountability Office, "Report to Congressional Requesters, Oil and Gas, Information on Shale Resources, Development and Environmental and Public Health Risks," Sept. 5, 2012, <http://www.gao.gov/assets/650/647791.pdf>.

[10] Food & Water Watch, "Local Actions Against Fracking, Passed Measures,"

<https://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/>.

[11] FracTracker Alliance, "Current High Volume Horizontal Fracturing Drilling Bans and Moratoria in New York," FracTracker.org, <http://www.fractracker.org/map/ny-moratoria/>.

[12] Vanno, Philip, "Town of Kirkland Bans Hydrofracking," Utica Observer Dispatch Online, Jan. 7, 2014, <http://www.uticaod.com/article/20140107/NEWS/140109610#ixzz2po3yKWTG>.

[13] Erie County, Local Law Intro, No. 4-2013, "Banning of Hydraulic Fracturing on Land Owned by Erie County."

[14] "Summary Maps: Natural Gas in the Lower 48 States and North America," U.S. Energy Information Administration, http://www.eia.gov/pub/oil_gas/natural_gas/analysis_publications/maps/maps.htm.

[15] Baker, Meagan, "Dallas City Council Passes De Facto Fracking Ban, Refuses to Tell Residents," Energy In Depth, Dec. 11, 2013, <http://energyindepth.org/texas/dallas-city-council-passes-de-facto-fracking-ban-refuses-to-tell-residents/>.

[16] Food & Water Watch, "Local Actions Against Fracking, Passed Measures," <https://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/>.

[17] Murphy, Michael, "Lone Pine Orders Are Still Useful In Fracking Litigation," Law360, Aug. 7, 2013, <http://www.law360.com/articles/462731/lone-pine-orders-are-still-useful-in-fracking-litigation>.