

Emerging State Fracking Regulations

Law360, New York (August 06, 2012) -- The use of hydraulic fracturing, or “fracking,” to extract oil and gas from rock formations has grown dramatically across the United States in recent years. The practice has received extensive coverage in the environmental trade press as new legal developments arise almost daily.

Technological advancements in the field of horizontal drilling have made it feasible and economical to use hydraulic fracturing to extract natural gas and oil from shale formations. Fluids are injected deep underground to splinter targeted rock formations and create avenues large enough for oil or gas deposits to escape the rock for capture.

The injection fluids consist of three major elements: (1) water, (2) some type of proppant (often sand) and (3) a mix of proprietary chemicals used as lubricants.

As the use of hydraulic fracturing has grown, certain groups have voiced concerns about the potential impacts of the process and a vocal opposition has emerged. Some of the dangers cited by fracking opponents include:

- Contamination of underground drinking water;
- Pollution from the stowage and removal of the injection fluid;
- Abnormal seismic activity, including earthquakes;
- Air pollution; and
- Contributions to global warming.

One particular concern is that companies are hesitant to divulge the chemicals used in their injection fluids for fear of revealing trade secrets. Some argue that knowledge of the fluids’ components is necessary to fully understand the potential health impacts of hydraulic fracturing and to accurately monitor groundwater for pollution.

Currently, there is little direct federal regulation of hydraulic fracturing. The U.S. Environmental Protection Agency (EPA) is prevented from regulating much of the hydraulic fracturing process. The Energy Policy Act of 2005 exempted “underground injection” from the scope of the Safe Drinking Water Act.[1] The disposal of fluids into surface waters of the United States is regulated by the National Pollutant Discharge Elimination System program, as authorized by the Clean Water Act.

The EPA also has recently issued regulations addressing the emissions from fracking operations.[2] Otherwise, the EPA has not adopted any rules governing other aspects of fracking.[3] Industry has resisted additional federal regulations, arguing that states and localities have regulated fracking for decades, and these existing protections are adequate.

In the face of increasing pressure brought by citizen and environmental groups, states and local communities have started taking the lead by issuing their own laws and regulations on the subject. As a result, a patchwork of laws and regulations is being created nationwide with little coordination.

For example:

North Carolina

North Carolina recently passed a law (Session Law 2012-143; SB 820) creating a new Mining and Energy Commission that is tasked with developing regulations and environmental safeguards for oil and gas fracking in the state.[4]

Before this law was passed, fracking was banned in North Carolina.[5]

The new law authorizes the issuance of fracking permits beginning as early as 2014, provided the commission adopts appropriate environmental standards for fracking and the legislature votes to allow permit issuance by that time.[6]

California

California, where fracking has been widely used for years to extract oil from the Monterey-Temblor shale, has never had any rules or reporting requirements associated with the practice.

However, earlier this year, a California legislator proposed a bill (AB 972) to place a moratorium on fracking in California by banning fracking permits until the state's Department of Oil, Gas and Geothermal Resources (DOGGR) implements public safety rules regarding the practice. The Senate Environmental Quality Committee approved the bill in July 2012, and now it moves to the Senate Appropriations Committee.[7]

Regardless of whether the moratorium bill passes, however, California is likely to see increased regulation as Gov. Jerry Brown has made public his plan to develop fracking regulations in California, and the DOGGR has already asked for well operators to voluntarily report their fracking data to a state database so regulators can start evaluating in-state fracking operations.

In addition, the California Department of Conservation has hosted a series of workshops to solicit the public's input as it explores potential fracking regulations.[8] Hundreds of people have attended the workshops to express their concerns about the impact of fracking on California's drinking water, air quality, community health and limited water supply.

The department plans to release those draft regulations later this summer.

Illinois

Illinois lies above a rock formation called the New Albany Shale that likely contains trillions of cubic feet of natural gas.[9] Drilling companies have begun leasing land in anticipation of operations there, and while many are excited about economic benefits from a strong hydraulic fracturing industry in Illinois, others fear the environmental risks that would arise.

In February 2012, Illinois State Sen. Michael Frerichs, D-52, introduced SB 3280 to impose restrictions on hydraulic fracturing.[10] An amended version of the bill passed the state Senate on April 26, 2012, receiving unanimous support (54–0). The Senate-approved bill would require operators to test hydraulic fracturing equipment before conducting operations and to store injection fluid in vessels that would prevent it from seeping into the water supply.

The bill would force operators to reveal the chemical ingredients used in the fracturing process, but it would also allow the state Department of Natural Resources to create a process for companies not to disclose information that would divulge trade secrets. Certain landowners and state agencies would enjoy the right to challenge the withholding of trade secrets, and another provision would give medical professionals the ability to access trade secrets if necessary.

Finally, the Senate-passed bill would give the Department of Natural Resources the authority to “adopt any other rules necessary to regulate hydraulic fracturing and corollary issues related to hydraulic fracturing.”

State House Speaker Michael Madigan, D-22, has been negotiating with representatives of the oil and gas industry on potential hydraulic fracturing legislation. Industry representatives fear a statewide moratorium on hydraulic fracturing[11], but they also oppose a Madigan proposal to impose a 12 percent severance tax on the industry, which may eliminate current jobs and threaten the prospects for future hydraulic fracturing operations.[12]

Industry officials were scheduled to meet with Madigan’s office in July to present their proposal for hydraulic fracturing legislation.[13] Though the Illinois legislature stands adjourned, a special legislative session to address pension reform and hydraulic fracturing remains possible.[14]

Other States

Even states that do not contain natural gas reserves are getting into the mix.

For example, Vermont, which has no natural gas deposits, banned fracking earlier this year in a symbolic move designed to serve as an example to other states.[15]

And New Jersey, which contains far less natural gas reserves as neighboring New York and Pennsylvania[16], has nonetheless temporarily outlawed hydraulic fracturing across the state.[17]

Most recently, the New Jersey state legislature proposed legislation (A575) for the governor's approval that would ban companies in the state from processing hydraulic fracturing wastewater and other byproducts.[18] Though a New Jersey environmental agency has asserted that the state currently accepts little hydraulic fracturing waste from other states, some groups fear that Pennsylvania, a state experiencing a large amount of hydraulic fracturing of its Marcellus Shale rock formation, will export significant amounts of waste into New Jersey.[19]

On June 21, 2012, the New Jersey General Assembly passed bill A575 by a vote of 56 to 19, with four abstentions. The New Jersey Senate followed just four days later, passing it by a vote of 30 to 5.[20] Governor Chris Christie has not yet indicated whether he plans to sign A575 into law.[21]

Bill A575 would prohibit "wastewater, wastewater solids, sludge, drill cuttings or other byproducts resulting from hydraulic fracturing for the purpose of natural gas exploration or production in any state" from being "treated, discharged, disposed of or stored in" the state of New Jersey.[22]

Though some opponents have criticized A575 for possibly violating the U.S. Supreme Court's dormant commerce clause jurisprudence by banning the receipt of waste from other states, others have pointed to a New Jersey Office of Legislative Services analysis that the bill is constitutional because its prohibitions affect waste materials from all states, including New Jersey.[23]

Conclusion

These states represent only a few examples, but they are representative of developments occurring in many states and communities impacted by fracking. Natural gas represents a key component to our nation's energy future, providing the promise of a domestically available, cheaper and cleaner fuel source.

Although industry has typically rejected federal regulation of drilling operations, the state-by-state approach that is currently taking place, which is sometimes divorced from scientific considerations, threatens to produce widely disparate regulations and may even result in cutting off access to certain areas.

Although it goes against conventional wisdom, with shale deposits lying under much of the continental United States, it may be in industry's long-term best interest to consider supporting a national regulatory framework that will best provide a consistent regulatory scheme and ensure that deposits are tapped in a responsible manner while at the same time ensuring access to our nation's natural gas resources.

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- [1] Safe Drinking Water Act § 1421(d)(1); see also water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_hydroreg.cfm
- [2] EPA Issues Final Air Rules for the Oil and Natural Gas Industry, U.S. EPA, epa.gov/airquality/oilandgas/actions.html (last updated Apr. 20, 2012).
- [3] A proposed Bureau of Land Management (“BLM”) rule would force certain chemical disclosures for operations on BLM-administered land, and no less than fifteen states have adopted their own disclosure rules. See Brandon J. Murrill and Adam Vann, Cong. Research Serv., Hydraulic Fracturing: Chemical Disclosure Requirements 1 (2012). at 2.
- [4] Clean Energy and Economic Security Act, 2012 N.C. Sess. Laws 143, www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2011-2012/SL2012-143.pdf.
- [5] Oil and Gas Conservation Act, N.C. GEN. STAT. § 113-393(d) (1945) (prohibiting horizontal drilling).
- [6] Clean Energy and Economic Security Act, 2012 N.C. Sess. Laws 143 § 2(m), www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2011-2012/SL2012-143.pdf.
- [7] AB 972 Assembly Bill – Vote Information, LEGINFO, www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0951-1000/ab_972_vote_20120702_000001_sen_comm.html (last visited July 25, 2012).
- [8] Damon Nagami, Concerned Californians Rally As Fracking Workshops Draw To A Close, NRDC SWITCHBOARD (July 25, 2012), switchboard.nrdc.org/blogs/dnagami/concerned_californians_rally_a.html.
- [9] David M. Dolendi, Fracking’s Last Frontier: Regulation and Taxation, Law 360 (June 14, 2012, 1:06 PM), www.law360.com/environmental/articles/348617?nl_pk=87bdacd4-6c2e-439f-9fdf-caf91b3ff23e&utm_source=newsletter&utm_medium=email&utm_campaign=environmental; Fracking Comes to Illinois: How to Create Jobs and Protect the Environment, Chicago Tribune, May 25, 2012, articles.chicagotribune.com/2012-05-25/news/ct-edit-fracking2-20120525_1_fracking-natural-gas-southern-illinois.
- [10] Bill Status of SB 3280, Illinois General Assembly, www.ilga.gov/legislation/billstatus.asp?DocNum=3280&GAID=11&GA=97&DocTypeID=SB&LegID=64455&SessionID=84 (last visited July 16, 2012).
- [11] Tom Kacich, Jakobsson Fracking Moratorium Bill Clears Committee, The News-Gazette, (May 31, 2012, 4:53 PM), www.news-gazette.com/news/environment/2012-05-31/jakobsson-fracking-moratorium-bill-clears-committee.html.
- [12] Jon Musgrave, Taxes, Not Environment, Sticking Point in Fracking Bill, DailyRegister/Daily Journal, (June 7, 2012, 1:50 PM), www.dailyregister.com/news/x465788649/Taxes-not-environment-sticking-point-in-fracking-bill.

[13] Musgrave, supra note 23.

[14] Kevin McDermott and Brianna Ehley, Illinois Pension Reform Stalls; 'Slots at Tracks' Passes, www.stltoday.com, (June 1, 2012, 12:05 AM), www.stltoday.com/news/local/illinois/fcf4e1f4-5fb5-5f5b-a4be-17ee57999ff8.html; Knight, supra note 6.

[15] www.huffingtonpost.com/2012/05/17/vermont-fracking-ban-first_n_1522098.html

[16] Mireya Navarro, New Jersey Senate Bans Treatment of Fracking Waste, N.Y. Times Blog, (June 25, 2012, 6:31 PM), green.blogs.nytimes.com/2012/06/25/new-jersey-senate-bans-treatment-of-fracking-waste/.

[17] In 2011, Governor Chris Christie conditionally vetoed a bill that would have permanently prohibited hydraulic fracturing in New Jersey, replacing the ban with a twelve month moratorium instead. Scott Fallon, NJ Senate Oks Ban on Disposal of Fracking Waste, *The Record*, (June 26, 2012, 6:40 AM), www.northjersey.com/news/state/062512_NJ_Senate_to_vote_on_fracking_byproduct_ban.html.

[18] Assemb. 575, 215th Leg., (N.J. 2012), www.njleg.state.nj.us/2012/Bills/A1000/575_R1.PDF.

[19] Mireya Navarro, New Jersey Senate Bans Treatment of Fracking Waste, N.Y. Times Blog, (June 25, 2012, 6:31 PM), green.blogs.nytimes.com/2012/06/25/new-jersey-senate-bans-treatment-of-fracking-waste/.

[20] Bills 2012-2013, New Jersey State Legislature, www.njleg.state.nj.us/bills/BillView.asp (follow "Bills 2012-2013" hyperlink; then follow "Bill Number" hyperlink; then search for "A575"; then follow "A575" hyperlink).

[21] Associated Press, NJ Gov: No Decision on Banning Fracking Waste, *BloombergBusinessWeek*, (June 27, 2012), www.businessweek.com/printer/articles/39096?type=ap.

[22] Assemb. 575 §§ 1, 3.

[23] See Fallon, supra note 31; see also Stephen Miller, Fracking Wastewater, Earthquakes, and the Stream of Interstate Commerce, *Land Use Prof Blog*, (Jan. 20, 2012), lawprofessors.typepad.com/land_use/2012/01/fracking-wastewater-earthquakes-and-the-stream-of-interstate-commerce-.html (discussing potential Dormant Commerce Clause issue).

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