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Recent Statutory and Regulatory Developments Related to Hydraulic Fracturing in New York, Pennsylvania, West Virginia and Ohio

The use of hydraulic fracturing, sometimes called "fracking," has made it economically possible to produce hydrocarbons, mainly gas, from the central Appalachian region of the eastern United States. Shale gas development from the Marcellus Shale is focused in four states: New York, Pennsylvania, West Virginia and Ohio. These states are now facing environmental and surface-use issues which may be unfamiliar to developers from outside the region. Each of these states is reacting differently to the shale gas boom, with new statutes and regulations having been recently passed or still under consideration. These new laws and regulations will play a significant role in how—or if—this enormous natural gas asset is developed.

New York

On August 5, 2010, the New York State Senate voted in favor of Senate Bill S 8129A, which provides for a moratorium on issuing drilling permits in the Marcellus Shale formation until May 15, 2011. The New York State Assembly is slated to vote on their version of the bill within a month and both houses are considering bills that would dramatically increase regulation of hydraulic fracturing ("fracking"):

Bill Number	Provision
A. 8748A (N.Y. 2010) S. 7592A (N.Y. 2010)	Prohibits fracking within five miles (Assembly version) or ten miles (Senate version) of the New York City watershed or supply infrastructure, or any other water system that has received a filtration avoidance determination from the EPA.
A. 10641 (N.Y. 2010)	Prohibits fracking on land operated by the office of parks and recreation and within one (1) mile thereof.
A. 10292 (N.Y. 2010)	Proposes to require that any fracking operator provide a bond or other financial security of at least \$250,000.00, also requiring operators applying for a new permit to submit a drilling use plan and environmental impact statement.
A. 6953 (N.Y. 2010)	Prohibits toxic chemicals in fracking fluid and requires disclosure of fracking fluid chemicals and constituents.

In addition, in June, 2010, Rep. Robert Sweeney sponsored legislation which would comprehensively change fracking regulations in New York.¹ Included in the bill are:

- a directive to state agencies to draft new regulations relating to the discharge of pollutants from facilities that treat wastewater from fracking facilities;
- clearance giving local governments more discretion in regulating fracking activities;

¹ A. 11347, 233rd Sess. (N.Y. 2010).

- further regulations of the plugging/abandonment and environmental reclamation of former fracking operations;
- requirements that operators disclose fracking fluid chemicals and imposition of strict financial liability on operators for any environmental damage caused by fracking; and
- new location restrictions on fracking, including setback restrictions; new fees on fracking; new air quality monitoring requirements; and new environmental assessment requirements.

The New York Department of Environmental Conservation (*NYDEC*) has been drafting new fracking regulations requiring a Supplemental Generic Environmental Impact Statement (the *SGEIS*). The draft *SGEIS* supplements the existing Generic Environmental Impact Statement (*GEIS*) and analyzes the range of potential impacts of shale gas development using horizontal drilling and high-volume hydraulic fracturing. The draft *SGEIS* outlines safety measures, protection standards and mitigation strategies that operators would have to follow to obtain permits. The form of *SGEIS* was released for public comment last year. Observers consider the *SGEIS* regulations to be potentially the strictest in the country, and many of the provisions overlap with the proposed legislation described above.

Pennsylvania

On June 23, 2010, several Pennsylvania State Senators introduced a bill calling for the creation of an Emergency Drinking Water Support Fund.² The legislation would impose a \$10 surcharge for every well permit.³ That surcharge would accumulate in a fund, which would be used for “the testing of well water and purchasing of clean water for residents and businesses that have reason to believe their well water is contaminated from either an accidental spill of fracking water or chemicals, seepage of chemicals and fracking water or seepage of natural gas dislodged by the fracking process.”⁴ New legislation has been proposed to require more extensive environmental studies before Pennsylvania issues a drilling permit.⁵ That same bill proposes to implement a fracking buffer zone, whereby fracking may not take place “within 3,000 feet of a reservoir that serves as a water source for a community water system,” and would require each fracking operator to report the chemicals used in their fracking fluid.⁶

Like New York, pending bills in Pennsylvania aim at comprehensively overhauling fracking operations.⁷ One proposed bill, among other things, would increase fracking permit requirements, increase well location restrictions, increase casing requirements, and impose fracking fluid reporting requirements.⁸

On January 28, 2010, Governor Ed Rendell proposed amendments to existing drilling regulation. The governor proposed amendments to drilling regulations that would specifically address hydraulic fracturing. The proposed rules would heighten protection of water supplies, strengthen requirements for construction of well casings, and impose a stricter obligation on operators to replace any water supplies they contaminate. The governor also proposed hiring more inspectors to enforce the new rules. Additionally, earlier this month, Governor Rendell agreed with legislative leaders to introduce a new tax on drilling production by October 1, 2010.

² S. 1416, 194th Sess. (Pa. 2010).

³ *Id.*

⁴ *Id.*

⁵ H. 2630, 194th Sess. (Pa. 2010).

⁶ *Id.*

⁷ H. 2213, 194th Sess. (Pa. 2010).

⁸ *Id.*

The State Environmental Quality Board has also instituted new rules for fracking wastewater discharge.⁹ The new regulations mandated that any new drilling operations reduce their total dissolved solids to 500 milligrams per liter if they chose to discharge the wastewater into streams or surface water.¹⁰ Older drilling operations, however, were grandfathered in, and are not subject to the new regulations.¹¹

West Virginia

In May 2009, the West Virginia Department of Environmental Protection (*DEP*) announced proposed changes to regulation of fracking that were sent to the West Virginia legislature for consideration in 2010. These rule changes were aimed at providing additional protection of water resources during the fracking process, increased reporting requirements for fracking, and establishing water quality standards with respect to dissolved solids in water discharged during drilling operations.

Bill Number (passed)	Provision
S.B. 273, 79th Leg., 2nd Sess. (W. Va. 2010) (This bill has been effective since passage on March 13, 2010.)	Requires, with some exceptions, the use of protective synthetic liners in pits and impoundments used for holding wastewater generated due to fracturing.
S.B. 382, 79th Leg., 2nd Sess. (W. Va. 2010) (This bill has been effective since June 8, 2010.)	This bill requires the well operator to file with the secretary and state Geological and Economic Survey, detailed reports on well operations and collection of any core samples.
Bill Number (pending)	Provision
H.B. 4513, 79th Leg., 2nd Sess.	The bill requires the well operators withdrawing more than 210,000 gallons of water during any month from water resources of the state to submit information to the Office of Oil and Gas, including, <i>prior to drilling, fracturing or stimulating gas wells</i> , identifying surface, ground, or purchased water sources, anticipated volume and time periods of water withdrawals, additives used in the water and anticipated methods for water withdrawal.
S.B. 682, 79th Leg., 2nd Sess.	Requires land owners to be notified before drilling companies could apply for work permits and is under consideration by the current West Virginia legislature.
H.B. 4001, 79th Leg., 2nd Sess.	Sets acceptable limits of dissolved solids in water discharged during drilling operations to be no more than 500 mg/l.

⁹ Press Release, Pa. Dep't. of Env'tl. Prot., Governor Rendell Praises Regulatory Panel Vote Protecting Pennsylvania's Streams, Rivers from Drilling Wastewater; IRRRC Also Votes to Enhance Erosion and Sediment Control, Stormwater Regulations, (June 17, 2010).

¹⁰ *Id.*

¹¹ *Id.*

Ohio

Prior to 2010, Ohio did not directly regulate hydraulic fracturing. In 2010, the General Assembly of Ohio passed legislation which extended present enhanced recovery regulations to fracking.¹² Included in the new laws are the following provisions and requirements:

- Defines “well stimulation” or “stimulation of a well” as “the process of enhancing well productivity, including fracturing operations.”
- Imposes additional reporting requirements. For example, within sixty days after the completion of the drilling operations, a driller needs to file all electric logs and well completion records. Among other details, the record needs to provide information about “the type and volume of fluid used to stimulate the reservoir of the well, the reservoir breakdown pressure, the method used for the containment of fluids recovered from the fracturing of the well, the methods used for the containment of fluids when pulled from the wellbore from swabbing the well, the average pumping rate of the well, and the name of the person that performed the well stimulation.” In addition, the driller needs to include a copy of the log from the stimulation of the well, a copy of the invoice for each of the procedures and methods used on the well, and a copy of the pumping pressure and rate graphs.
- Requires that pits or steel tanks to be used for “brine and other waste substances resulting from, obtained from, or produced in connection with drilling,” be constructed and maintained to prevent the escape of brine and other waste substances, as authorized by the Chief of the Department of Marine Resources. The statute also imposes restrictions on the location of drilling with respect to distance of the site of drilling from an occupied dwelling or urban area.

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¹² OHIO REV. STAT. ANN §§ 1509.10 *et seq.* (2010).