

SIDLEY UPDATE

## Shale and Hydraulic Fracturing

### Federal

**OSHA issued final silica rule.** On March 25, the Occupational Safety and Health Administration (OSHA) published its [final rule](#) establishing a new Permissible Exposure Limit (PEL) for occupational exposure to respirable crystalline silica that will apply across the industry, including to oil and gas development using hydraulic fracturing. Issued after a multiyear rulemaking process, the new standard sets a substantially lower PEL of 50 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) and an action level of 25  $\mu\text{g}/\text{m}^3$ , the same levels as OSHA proposed three years ago. OSHA has, however, provided more time to comply than had been proposed, extending the compliance deadline to two years for most industries (by June 23, 2018) and five years for hydraulic fracturing operations in the oil and gas industry (by June 23, 2021).

**Government, NGOs file opening briefs in hydraulic fracturing appeal.** Appellants, the United States and several non-governmental organizations (NGOs) filed opening briefs in their interlocutory appeal to the Tenth Circuit of a September 2015 preliminary injunction blocking the U.S. Bureau of Land Management (BLM) rule governing hydraulic fracturing on federal and tribal lands. Appellants argued that the lower court based the injunction on an incorrect reading of federal law, asserting that the Mineral Leasing Act, Federal Land Policy and Management Act, and other public lands statutes broadly authorize BLM to regulate the development of publicly held resources using hydraulic fracturing. They also disputed the ruling below that the Energy Policy Act of 2005, which exempts hydraulic fracturing from regulation under the Safe Drinking Water Act, precludes regulation by BLM on public land. The briefs of four states and the Ute Indian tribe in support of the preliminary injunction are due in late April.

**NGOs criticize federal agencies' draft study finding hydraulic fracturing can be done offshore without significant environmental impacts.** In comments, the Center for Biological Diversity and Environmental Defense Center criticized a draft programmatic environmental assessment by the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE) of hydraulic fracturing on the Pacific Outer Continental Shelf. The groups had sued the Interior Department, claiming it had approved permits allowing offshore hydraulic fracturing without performing the review required by the National Environmental Policy Act. BOEM and BSEE resolved the suit by agreeing to halt new approvals for hydraulic fracturing and conduct an environmental review. The agencies' draft assessment finds that using hydraulic fracturing at 22 rigs off the coast of Southern California would present no significant impact. The groups' comments asserted that hydraulic fracturing would use chemicals that could not be adequately studied and would extend the lives of oil platforms that would otherwise shut down. The agencies expect to issue a final assessment in May.

## States

**Industry trade association challenges Pennsylvania regulations.** On March 24, the Pennsylvania Independent Petroleum Producers Association filed a petition for review challenging new oil and gas drilling [regulations](#) issued by the Pennsylvania Department of Environmental Protection (DEP). The Pennsylvania Environmental Quality Board approved the rules last month. The petition alleges that DEP did not follow state law because the agency did not properly separate rules governing conventional oil and gas wells from unconventional wells. DEP had sought to justify its approach in its [executive summary](#) in support of its final rulemaking, noting that the final rule divided the rules into separate chapters of the Pennsylvania code. The petitioners also argued that by effectively commingling the requirements into one overall rulemaking, DEP has imposed on petitioner's members new mandates that are not necessary or appropriate for conventional operators.

**Colorado bill would establish earthquake liability for drillers.** The Colorado House approved [H.B. 1310](#) on a close 33-31 party-line vote. The bill would hold oil and gas drillers strictly liable for earthquakes caused by hydraulic fracturing that result in property damage or personal injury. In such a suit, the plaintiff would need only establish a prima facie showing that an earthquake occurred, that the plaintiff suffered damages and that oil and gas operations were located "within the area" that experienced the earthquake. A plaintiff would have five years after discovering the damages or injuries to file suit. The bill now proceeds to the Colorado Senate, controlled by Republicans. All 31 Republicans in the Colorado House voted against H.B. 1310.

**Selling water to oil and gas company could lead to prison.** Two Colorado men, Norman Armstead and nephew Donald Armstead, face charges of grand theft, forgery and conspiracy for purchasing water designated for agricultural use and then selling it to a company for hydraulic fracturing. According to police, the pair bought \$101,200 worth of water from the City of Boulder purportedly on behalf of ditch companies and sold it for more than \$900,000 to an oilfield service company. The City of Boulder prohibits the resale or subleasing of water for industrial purposes.

## Studies

**EIA drilling report predicts a decrease in oil production in 2016 and 2017.** The Energy Information Administration (EIA) [reported](#) that nearly half of the oil produced in the continental United States comes from wells drilled in early 2014, leading it to predict a 7.4 percent decrease in production this year, the equivalent of 700,000 barrels per day. Hydraulically fractured wells that draw from shale formations tend to see a steep decline in initial production, with many dropping by 70 percent after the first year. The EIA states that this requires developers to constantly drill and complete new wells in order to maintain production levels. According to the EIA's *Drilling Productivity Report*, the February 2016 rig count was approximately one-quarter of what it was in the fall of 2014, declining from nearly 1,600 rigs operating to 413. EIA predicted that U.S. oil production will decrease from 9.4 million barrels per day (bpd) in 2015 to 8.7 million bpd in 2016 and 8.2 million bpd in 2017.

**NGO issues report on Oil- and gas-related spills in Colorado.** The environmental group Center for Western Priorities released a [report](#) documenting 615 spills of oil or other fluids at Colorado well sites in 2015 and claiming that 90 of these impacted groundwater. According to the report, nearly half of the incidents involved produced water. The report asserts that oil spills accounted for 110 incidents, although more than half of those were less than five barrels. The report is based on documents obtained from the Colorado Oil & Gas Conservation Commission. These documents also show that the number of spills decreased in 2015, down from 777 in 2014. Colorado has 51,000 active oil and gas wells.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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