

OCTOBER 2014

VOL. 14-2

PRATT'S

ENERGY LAW REPORT



FROM THE EDITORS: ENERGY REFORM

Steven A. Meyerowitz and Victoria Prussen
Spears

**ENERGY REFORM LEGISLATION IN MEXICO
GIVES THE PRIVATE SECTOR UNPRECEDENTED
OPPORTUNITIES IN THE MEXICAN ELECTRICAL
POWER INDUSTRY**

Eric Save, Michael S. Hindus, and
John B. McNeece III

**THE TEXAS RAILROAD COMMISSION'S
PROPOSED RULE AMENDMENTS GOVERNING
INJECTION WELLS**

Barclay Nicholson and Jim Hartle

**A LOOK BEHIND THE CURTAIN: D.C.
CIRCUIT ORDERS OBAMA ADMINISTRATION
TO PROVIDE CHINESE COMPANY WITH
EXPLANATION FOR CFIUS CHALLENGE TO
WIND FARM INVESTMENT**

Scott M. Flicker and Dana M. Stepnowsky

**WHAT THE FRACK IS HAPPENING IN ILLINOIS?
THE CONCERNS WITH FRACKING AND THE
POTENTIAL LEGAL CLAIMS ON THE HORIZON**

Thomas G. Cronin

**THE *SUMMIT* SOURCE AGGREGATION DECISION
NOW APPLIES NATIONWIDE - BUT FOR HOW
LONG?**

Bob Greenslade

**UPDATE ON SECTION 1603 LITIGATION IN THE
U.S. COURT OF FEDERAL CLAIMS**

Timothy L. Jacobs, David S. Lowman, Jr.,
Laura Ellen Jones, and Hilary B. Lefko

**UNITED STATES EXPANDS SANCTIONS ON
RUSSIA, INTRODUCES LIMITED SECTORAL
SANCTIONS AGAINST RUSSIAN COMPANIES**

Alan V. Kartashkin, Carl Micarelli, and Robert T.
Dura

IN THE COURTS

Steven A. Meyerowitz

LEGISLATIVE AND REGULATORY UPDATE

Steven A. Meyerowitz

INDUSTRY NEWS

Victoria Prussen Spears

What the Frack Is Happening in Illinois? The Concerns with Fracking and the Potential Legal Claims on the Horizon

*By Thomas G. Cronin**

When the moratorium on fracking is eventually lifted in Illinois, the longstanding debate regarding environmental issues will once more ramp up, including concerns involving water contamination, air pollution, noise pollution, and increased seismic activity. The author of this article discusses the concerns over fracking and the variety of potential causes of action that fracking may incite.

INTRODUCTION

More than a year has passed since Illinois enacted a law allowing hydraulic fracturing, or “fracking,” in the state. Due to the volume of comments and concerns with the proposed regulations, however, the practice has been put on hold while the Illinois Department of Natural Resources (“IDNR”) sorts through and finalizes the methods and rules by which the industry must abide.

When the moratorium on fracking is eventually lifted, the longstanding debate regarding environmental issues will once more ramp up, including concerns involving water contamination, air pollution, noise pollution, and increased seismic activity. However, the battles over such concerns and claims of loss or injury will ultimately be fought in the courtroom, and there seems to be a variety of potential causes of action that fracking may incite.

BACKGROUND

Hydraulic fracturing has been around since the late 1940s, although its use has increased significantly as of late. The process involves the injection of a mixture of water, sand, and chemicals at high pressure down and eventually across horizontally drilled wells. The pressurized liquid breaks apart—or fractures—the subsurface rock, which in turn releases trapped oil and gas that is eventually pumped back to the surface. The sand particles from the liquid help maximize the retrieval by holding open the cracks so that all of the gas can escape. There are also hundreds of different chemicals included in the mixture that help optimize the liquid’s flow.

A significant amount of materials and effort goes into fracking just one well. For example, more than one million gallons of fluid are typically injected into a well, and the workforce required for sustaining a drill can involve dozens—if not hundreds—of trucks and vehicles carrying materials to and from the site.

* Thomas G. Cronin is a partner in Gordon & Rees LLP’s Chicago office, focusing his practice on product liability, construction and construction defect, design professionals, commercial and residential real estate transactions and litigation, environmental and toxic tort and personal injury. He may be contacted at tcronin@gordonrees.com.

CONCERNS WITH FRACKING

Even though fracking is at a standstill in Illinois, issues from areas throughout the country provide a road map of potential problems that Illinois communities—prevalently in the southern portion of the state—could experience.

Water contamination seems to garner the majority of attention and concern from fracking opponents, mostly due to the assortment of chemicals that comprise the fluids injected into the earth. While many of the chemicals used are nontoxic, some are potentially hazardous enough in high concentrations to have an adverse impact on personal health and the environment; other studies have discovered that some of the chemicals can contribute to hormonal diseases, cancer, and infertility.¹

Just recently, research from Stanford University revealed that fracking operations at two sites in Wyoming drilled at shallower depths than previously thought—in some instances, even through subsurface sources of drinking water.² While the Stanford research did not contain any findings that the drinking water had been contaminated, the drilling's proximity to a water source simply magnifies health and contamination concerns.

Air pollution is also a potential concern with fracking. In one recent case, a Dallas jury found the concern to be a real. Specifically, in *Parr v. Aruba Petroleum, Inc.*, a jury found in favor of a north Texas family, awarding them \$2.95 million for health issues they alleged to have experienced as a result of air contamination from a nearby fracking well. An environmental medical specialist involved in the case ran tests on Lisa Parr and discovered more than 20 toxic chemicals in her blood; samples from the air also revealed other toxic chemicals commonly found in petroleum products.³

Similar to the *Parr* suit, a recent study conducted in southwest Pennsylvania found that there was a rise in particulate matter at night inside the homes within close proximity of fracking wells.⁴ The finding suggests that these rises occur for periods of several hours during the night, when the atmosphere is more stable, which prevents the particulates from dispersing.

Aside from the potential issues with air and water, there is an abundance of research and data that correlates fracking to seismic activity, and Oklahoma has become the poster state for such problems. While the state historically averaged two earthquakes of 3.0 magnitude or greater per year, Oklahoma has experienced nearly 300 such earthquakes thus far in 2014 alone.⁵ One resident has even filed a lawsuit,

¹ Schlanger, Zoe. "There's Still a Lot We Don't Know About Fracking Chemicals." *Newsweek* (Aug. 13, 2014).

² Banerjee, Neela. "Oil Companies Fracking into Drinking Water Sources, New Research Shows." *Los Angeles Times* (Aug. 12, 2014).

³ Deam, Jenny. "Jury Awards Texas Family Nearly \$3 Million in Fracking Case." *Los Angeles Times* (Apr. 24, 2014).

⁴ McMahon, Jeff. "Air Pollution Spikes in Homes Near Fracking Wells." *Forbes* (June 26, 2014).

⁵ Gallucci, Maria. "Oklahoma Earthquake Tied to Fracking Wastewater Draws First Lawsuit, Joins

alleging that a 2011 quake that caused bricks from a chimney to fall on her was the result of a nearby fracking operation.⁶

While some states, such as Ohio and Arkansas, have taken action in strictly regulating fracking in certain areas, Illinois maintains its holding pattern—on regulations and seismic data—while the IDNR sorts through the fracking bill. However, given the statistical data and research from states such as Oklahoma, an increase in seismic activity should probably be expected, rather than feared, in southern Illinois.

LITIGATION POSSIBILITIES

Because the issues related to fracking encompass air, water, and land, there are a variety of potential legal claims that come into play. There have been minimal claims to date given fracking's infancy and the ongoing research related to its effects. Claims seem to be picking up across the country, however, and given the media attention and results like the recent verdict in Dallas, more claims are certain to follow, regardless of whether there is sufficient legal precedent. Illinois will be no different.

Exposure claims due to air pollution and water contamination are certainly possible, especially in light of the Aruba Petroleum verdict and gaining research and data supporting a link. These complaints will obviously require a pattern or frequency of physical injuries and ailments, which can take years to manifest. Such claims will obviously be stronger in instances where there is a cluster of similarly affected plaintiffs, but the proof required will be no different and no less difficult. Rather, they will be incredibly fact-intensive.

Where exposure claims will inherently take some time to develop, property damage or personal injury claims from earthquakes are much more evident. Reliable research and data has essentially achieved a status where the link between quakes and fracking cannot be denied, however, plaintiffs will still have to utilize local research evidencing a rise in tremors. The first wave of claims will likely be difficult to prove given fracking's new presence in Illinois and the lack of local data and research. However, the fact that claims are being made across the country, such as the recent lawsuit in Oklahoma, should be indicative of the legal climate that Illinois may soon face.

Considering the equipment, manpower, and coordination of multiple contractors for any fracking operation, drilling sites will also give rise to construction and premises injury claims. Regardless of what potential fracking claims are premised upon, plaintiffs and defendants will undoubtedly have to rely upon expert research and testimony in arguing their positions, which will require a hefty investment to prosecute or defend.

CONCLUSION

The Illinois Department of Natural Resources is expected to release its fracking

Growing Legal Effort in Arkansas, Texas." *International Business Times* (Aug. 8, 2014).

⁶ Gallucci, Maria. "Oklahoma Earthquake Tied to Fracking Wastewater Draws First Lawsuit, Joins Growing Legal Effort in Arkansas, Texas." *International Business Times* (Aug. 8, 2014).

regulations in the coming months, and once the rules and limits are set, operations in southern Illinois will begin. Once that occurs, litigation will not be far behind.