

LEGAL UPDATES

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Illinois' New Fracking Act: What It Means for Industry

On June 17, 2013, Gov. Pat Quinn signed into law the Illinois Hydraulic Fracturing Regulatory Act, establishing a highly regulated permitting program for high volume horizontal hydraulic fracturing activities that will be overseen by the Illinois Department of Natural Resources (IDNR).

Although the act paves the way for drilling in the New Albany Shale reserve in Illinois, it may be several months before IDNR finalizes regulations implementing the act and begins issuing permits. Outside of Illinois, the new law is likely to be studied closely by other states seeking to address concerns regarding hydraulic fracturing while continuing to support development of unconventional oil and gas production.

The act's provisions are designed to provide additional environmental protections, increase transparency and promote public participation, all while encouraging safe development of the resources. The new requirements include the following:

Public review: All permit applications are subject to a public review and comment process. Anyone who might be adversely affected by a permit may request a public-contested case hearing pursuant to the Illinois Administrative Procedure Act. Final decisions are subject to review under Illinois' Administrative Review Law. Additionally, IDNR will issue a report every three years that analyzes the number and location of high volume horizontal hydraulic fracturing permit holders, current technological advancements and best practices, confirmed environmental and public health impacts, revenues generated and the regulatory costs incurred by the state.

Chemical disclosure: Operators must disclose all base fluids, additives and chemicals used at a well site. To protect chemical information otherwise required to be reported from public disclosure, operators must request trade

secret protection from IDNR. Any party denied a request to review chemical information because of a trade secret protection may seek disclosure of the information under the Public Access Counselor or injunctive or declaratory relief provisions of the Freedom of Information Act. Finally, IDNR may disclose protected information to health professionals when medically necessary and to other state agencies in order to protect public health or the environment in the event of a release of fracking fluid, additive or flowback.

Monitoring water quality and usage: In order to obtain a permit, operators must assess the quality of waters in the area surrounding the well site to determine baseline conditions prior to drilling and must develop a water quality sampling plan. Operators are required to sample all water sources within 1,500 feet of the well site before drilling and, again, within six, 18 and 30 months of completing hydraulic fracturing operations at the well site. Operators also must develop a water management plan and report the volume and rate of water withdrawals from surface and groundwater sources.

Well construction standards: Operators must conform to current industry standards, established by the American Petroleum Institute, governing the preparation, construction, drilling and maintenance of wells. The best practices provisions include criteria governing casing and cementing of wells and performance of pressure testing to verify the integrity of the well, blowback preventer and related equipment.

Site operation: The new law requires fracking fluid, additives, flowback and produced water to be stored in above ground storage tanks, except flowback may be temporarily stored, as necessary, in reserve pits. Fracking fluids and flowback must be either reused or disposed of at a wastewater treatment facility or Class II injection well. Prior to removal from the well site for disposal, flowback must be tested for organic and inorganic chemicals, heavy metals and naturally occurring radioactive material. In addition, operators must implement specific measures to control emissions associated with venting hydrocarbon fluids and natural gas. Flaring is only permitted if an operator demonstrates that implementing required control measures is technically infeasible or economically unreasonable. Finally, operators must plug the well and restore the well site pursuant to the Illinois Oil and Gas Act.

Seismic protection: If an induced earthquake occurs and it can be traced to underground disposal wells, IDNR will adopt rules pursuant to the act to monitor seismic impacts and control Class II injection wells. IDNR will employ a traffic light control system that allows for low levels of seismicity while imposing additional monitoring and mitigation requirements during more intense seismic events.

Well setbacks: All wells must be set back from residences, churches, schools and hospitals (500 feet), as well as groundwater wells (500 feet), surface waters (300 feet), nature preserves

(750 feet), and surface water or groundwater sources used for public water supply (1,500 feet).
Presumption of liability: The act creates a rebuttable presumption of liability on the part of hydraulic fracturing operations for pollution or diminution of surface and groundwater sources within 1,500 feet of the well site if the pollution or diminution occurred during operation of the well site or up to 30 months after completion of operations at a well site. This presumption can be rebutted through affirmative proof that the pollution or diminution was not caused by the fracturing operation.

Enforcement and penalties: The act establishes different classes of criminal violations and penalties not to exceed \$10,000 per day of violation for misdemeanors and \$25,000 per day of violation for felonies. Additionally, the act provides for injunctive relief and civil penalties not to exceed \$100,000 for a violation and \$20,000 for each day a violation continues. The act also contains a citizen lawsuit provision, creating an additional mechanism for investigating alleged violations and enforcing regulatory obligations. Finally, the act reinforces the authority of the Illinois Environmental Protection Agency to enforce surface water and groundwater regulations contained in the Illinois Environmental Protection Act.

What This Means to You

Although the long-awaited fracking act takes effect immediately, IDNR must promulgate rules that will govern the permit application process (including the registration and application forms) before the applicant-specific permitting process can begin. Once rules have been established, the first group of permit applicants will be able to submit their applications.

Applicants should prepare thorough applications and expect to defend their applications at virtually every step of the public comment and hearing process. With intense scrutiny likely from opponents of the act, successfully obtaining a permit will depend on an applicant's ability to thoroughly marshal the necessary technical and legal justification for the project.

Contact Information

If you have questions concerning this or other environmental issues, please contact your Husch Blackwell attorney.

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