Texas Wesleyan Law Review

Volume 19 | Issue 2 Article 11

3-1-2013

# Indiana Oil and Gas Update

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# INDIANA OIL AND GAS UPDATE


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TABLE OF CONTENTS

I. INTRODUCTION ..... 329
II. THE "EMERGENCY" HYDRAULIC FRACTURING REPORTING REGULATIONS FOR OIL AND GAS WELLS .. 330
III. THE AMENDMENT OF INDIANA'S OIL AND GAS ACT ... 331
IV. EMERGENCY COAL BED METHANE REGULATIONS ..... 332
V. EMERGENCY COAL SEAM PROTECTION REGULATIONS . 333

## I. INTRODUCTION

Although Indiana is not necessarily in the forefront of major new oil and gas exploration, it enjoys robust oil and gas operations in its New Albany Shale and elsewhere. Between 250 and 300 wells are typically completed in Indiana each year.[1] Indiana's lawmakers have responded to public concern regarding the safety of hydraulic fracturing to increase gas production. In 2012, the Indiana Legislature required the Department of Natural Resources to address the public's need for additional information and transparency concerning the hydraulic fracturing process for oil and gas wells. Prior to that, in 2011, Indiana lawmakers enacted a comprehensive amendment to the state's Oil and Gas Act, which was followed by several "emergency" regulations from the Department of Natural Resources to implement the amendment.[2] Included in those emergency regulations were pro-

1. *New Rules Expand Hydraulic Fracturing Reports*, IND. DEP'T OF NATURAL RES., http://www.in.gov/activecalendar/EventList.aspx?fromdate=6/1/2012&todate=6/30/2012&display=Month&type=public&eventidn=56709&view=EventDetails&information_id=113877 (last visited Feb. 4, 2013).

2. *See generally* IND. CODE § 14-37 (2006), *amended by* 2010 Ind. Acts 872; *see, e.g.*, 20110727 Ind. Reg. 312110432ERA (July 22, 2011) [hereinafter Emergency Coal



DOI: https://doi.org/10.37419/TWLR.V19.I2.9

visions relating to coal bed methane wells and coal seam protection, which were designed to preserve the state's coal resources in the face of consistent oil, gas, and methane production.[3]

## II. THE "EMERGENCY" HYDRAULIC FRACTURING REPORTING REGULATIONS FOR OIL AND GAS WELLS

On February 21, 2012, the Indiana Legislature passed House Bill 1107, which required the Indiana Department of Natural Resources (the "Department" or "DNR") to develop reporting and disclosure requirements for hydraulic fracturing treatments for oil and gas wells.[4] The DNR adopted "emergency" or "temporary" regulations that expand the reporting requirement for hydraulic fracturing information to all well types, including oil and gas wells.[5] Previous reporting requirements applied only to coal bed methane wells. In Indiana, coal bed methane wells are hydraulically fractured in 70% of completions.[6] By contrast, only 20% to 25% of new wells are completed with hydraulic fracturing.[7]

The regulations took effect on July 1, 2012,[8] and require operators to disclose the following information immediately upon well completion or re-completion:

1. Volume and source of base fluids used (usually water);
2. Type and amount of proppant used;
3. Identification of each additive or additive product used including:
   a. Trade name of each additive,
   b. Description of the purpose of each additive, and
   c. A copy of the Material Safety Data Sheet ("MSDS") for each additive, if not already submitted;
4. Maximum volume of each additive expressed as:
   a. Percent by mass of the total fracturing fluid,
   b. Percent by volume of the total fracturing fluid, and
   c. Maximum surface treating pressure and injection treating pressure; and

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Bed Methane Wells Rule]; 20110810 Ind. Reg. 312110444ERA (Aug. 2, 2011) [hereinafter Emergency Coal Seam Protection Rule].

3. *See* Emergency Coal Bed Methane Wells Rule, *supra* note 2; Emergency Coal Seam Protection Rule, *supra* note 2.

4. H.B. 1107, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012).

5. *See* 20120627 Ind. Reg. 312120292ERA (June 27, 2012) [hereinafter Emergency Fracking Rule].

6. *Hydraulic Fracturing and Other Trends in Oil and Gas Production*, IND. DEP'T OF NATURAL RES., http://www.in.gov/dnr/dnroil/files/og-Hydraulic_Fracturing_Data_for_Oil_and_Gas_Wells.pdf (last visited Sept. 28, 2012).

7. Press Release, Ind. Dep't of Natural Res., New Rules Expand Hydraulic Fracturing Reports (June 18, 2012), *available at* http://www.in.gov/activecalendar/EventList.aspx?fromdate=6/1/2012&todate=6/30/2012&display=Mont&type=public&eventidn=56709&view=EventDetails&information_id=113877.

8. *See* Emergency Fracking Rule, *supra* note 5, § 5.

5. Any other information reasonably required by the form prescribed by the Division of Oil and Gas (the "Division").[9]

The regulations require the Division to make available on its website copies of all MSDSs submitted pursuant to the new requirements.[10] MSDSs provide data only on chemicals deemed hazardous under OSHA.[11] As a result, it has been argued that they offer a relatively low level of disclosure.

Importantly, the regulations themselves do not include any trade secret protections or disclosure requirements for flowback (fluids which return to the surface following injection into wells). Likewise, the new rules do not require that any disclosure be made or notice be given prior to fracturing an oil or gas well. By contrast, disclosures must be made regarding treatment of coal bed methane in permit applications prior to drilling.[12] The reason for the inconsistency may largely owe to the fact that coal bed methane wells are hydraulically fractured much more frequently than oil and gas wells in Indiana.

The new rules indicate that Indiana's legislators perceived a need for greater transparency and reporting of the chemicals used in hydraulic fracturing, even though a small portion of the state's oil and gas wells experience such fracturing.

## III. The Amendment of Indiana's Oil and Gas Act

The Indiana Legislature passed a comprehensive amendment in 2011 to the state's Oil and Gas Act. Senate Enrolled Act 71, effective July 1, 2011, amended the Oil and Gas Act, and some of the more significant provisions involve the following:

1. lifting of the moratorium on coal bed methane wells, discussed in more detail *infra*,
2. requiring coal bed methane permit applicants to disclose the fluids and products to be used to stimulate wells,
3. imposing coal seam protection rules applicable to coal bed methane, oil, and gas wells, and
4. expanding the definition of "waste" for all well types to mean "locating, spacing, drilling, equipping, operating, or producing" a well in a manner that "unreasonably reduces or tends to unreasonably reduce the quantity of commercially mineable coal resources."[13]

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9. *Id.* § 3(b).
10. *Id.* § 4.
11. Employers are required to use MSDSs to warn employees of hazardous chemicals in the workplace under OSHA. *See* 29 C.F.R. § 1910.1200(a)(1) (2012). Parties must include the common or chemical names of certain hazardous substances on MSDSs, assuming that the names do not qualify for trade secret protection. *See id.* § 1910.1200(h)(i)(1)(i).
12. *See* Emergency Coal Bed Methane Wells Rule, *supra* note 2, § 3.
13. S.B. 71, 117th Gen. Assemb., 1st Reg. Sess. (Ind. 2011).

The Enrolled Act was further fleshed out through the DNR's adoption of additional emergency rules relating to coal bed methane and coal seam protection.

## IV. EMERGENCY COAL BED METHANE REGULATIONS

In 2010, the Indiana Legislature imposed a moratorium on the coal bed methane wells.[14] The moratorium prohibited the issuance of permits for the extraction of coal bed methane, except under limited conditions.[15] The legislature lifted the moratorium in 2011 through the passage of Senate Bill 71 and imposed additional rules for coal bed methane wells. The DNR adopted emergency regulations effective August 1, 2011, which implement and expand the new rules for coal bed methane wells.[16]

Included in the emergency regulations were extensive, additional requirements for permit applications for coal bed methane wells. Unlike oil and gas well applicants, coal bed methane well applicants must disclose "detailed plans" for proposed well stimulation and hydraulic fracturing operations.[17] Regarding stimulation, applications must identify each additive product and the proposed concentrations, the purpose of each additive, a copy of the MSDS for each, and the coal seam to be stimulated.[18] Applicants must also demonstrate that other coal seams will not be adversely affected.[19] A plan for flushing and recovery of fluids used to stimulate the well is also part of the application.[20] The regulations also provide that if an operator substantially changes an approved well stimulation plan, a revised plan must be submitted and approved by the Division.[21]

Similar information is required with respect to proposed hydraulic fracturing of coal bed methane wells. Presumably to determine potential risks to underground sources of drinking water, applicants must identify known water wells within a 500-foot radius of the proposed well, plus other known well types, test holes, and borings within that same radius which penetrate the coal seam to be hydraulically fractured.[22]

In addition to the hydraulic fracturing information required before drilling, operators must submit additional information immediately after completion or re-completion of coal bed methane wells.[23] If the Division determines that the operator's hydraulic fracturing opera-

14. *See generally* IND. CODE § 14-37-4-1 (2006), *amended by* 2010 Ind. Acts 872.
15. *See id.*
16. *See* Emergency Coal Bed Methane Wells Rule, *supra* note 2.
17. *Id.* § 3(c).
18. *Id.* § 3(c)(1).
19. *Id.* § 3(c)(viii).
20. *Id.* § 3(c)(1)(D).
21. *Id.* § 9(e).
22. *Id.* § 3(c)(2).
23. *Compare id.* § 9(f), *with* Emergency Fracking Rule, *supra* note 5, § 3(b).

tions "have the potential to result in an adverse impact upon groundwater sources of drinking water," the regulations empower the Division to require operators to "monitor groundwater and take other measures necessary to survey the potential extent of an adverse impact and to protect groundwater users."[24]

The emergency rules further require applicants to identify the surface owner of the property where the well will be located, the owners of the coal seam to be penetrated, and any lessee of the coal seam.[25] Also included are provisions to notify potentially affected persons when a coal bed methane application is deemed substantially complete, in order to allow comments and objections to the issuance of permits.[26] Within fifteen days of the date the application is deemed substantially complete, the Division is required to notify "interested persons," the surface owner, the coal owner, the lessee, or others with an interest in the coal resources who have filed an affidavit with the Division under IC 14-37-7-8.[27] Thereafter, notified parties have thirty-three days from the date of the Division's notification to file comments and objections.[28]

## V. Emergency Coal Seam Protection Regulations

Following the legislature's lead for conservation of coal resources found in Enrolled Act 71, the DNR adopted new regulations to protect "commercially minable coal resources" effective August 14, 2011.[29] The regulations apply to "all wells for oil and gas purposes," including "noncommercial gas wells and noncommercial coal bed methane wells."[30]

The emergency rule attempts to balance the correlative rights of coal interest owners vis-à-vis owners of oil and gas interests. In so doing, the rule defines "waste of the volume of coal" to mean producing gas in a manner that unreasonably reduces or tends to unreasonably reduce the quantity of commercially minable coal resources ultimately recovered.[31] It establishes the following as "commercially minable coal resources" regardless of the depth or thickness of the coal seam: (i) a coal seam associated with a permitted underground

24. Emergency Coal Bed Methane Wells Rule, *supra* note 2, § 9(h).
25. *Id.* § 3(d)(1).
26. *Id.* § 5.
27. *Id.* § 5(e).
28. *Id.* § 5(g)(2). The emergency regulations impose additional rules not discussed here that operators and practitioners should consult. Included here is simply a summary of key provisions this author deems relevant.
29. *See* Emergency Coal Seam Protection Rule, *supra* note 2.
30. *Id.* § 1(a).
31. *Id.* § 5(b). Pursuant to section 4(a) of the rule, coal may also be commercially minable if sufficient data exists to believe the coal is commercially minable under accepted underground methods, the coal is of sufficient quality and quantity to be "commercially saleable," and the seam is at least thirty-six inches and located not more than 800 feet below the surface. *Id.* § 4(a).

mine; (ii) a coal seam associated with an inactive underground mine temporarily closed but anticipated to resume operation; and (iii) a coal seam identified as commercially minable by its owner provided that the owner submits an engineer's or geologist's map with details concerning the coal seam and an affidavit from the engineer or geologist that the coal can be practically mined and is of sufficient quantity and quality to be "commercially saleable."[32] The map and affidavit will be kept confidential by the Division, but not the name of the owner who submitted them.[33] The Division is empowered to modify the location of a proposed well where necessary to protect commercially minable coal, the health and safety of miners, or to protect against improper drilling and spacing in violation of IC 14-37.[34]

Significantly, the regulations do not preclude placement of wells within commercially minable coal resources, so long as operators take certain precautions. Operators must set a production string of casing properly centralized and cemented to ensure adequate cement is placed behind the casing.[35] Section 6(a) requires that cement be placed in an area between fifty feet below and 100 feet above the commercially minable seam.[36] If the Division finds evidence of failure to adequately protect the coal seam, it is empowered to require remedial action from the operator or owner.[37]

32. *Id.* § 3(a), (c).
33. *Id.* § 3(d).
34. *Id.* § 5(c).
35. *Id.* § 6(b).
36. *Id.*
37. *Id.* § 6(h).