

Oil & Gas Law Report

Blog series:

**Regulatory and
Environmental Matters**



A relationship of a
different stripe.

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Porter Wright Resources

Porter Wright's Oil & Gas practice group includes more than 40 attorneys with extensive experience in all aspects of doing business in the Marcellus and Utica shale plays. These attorneys include:



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ODNR's Preemption of Oil and Gas Regulation Upheld

February 14, 2013 | [Jeff Fort](#)

As we discussed in an [earlier post about regulatory structures](#), the question of who is authorized to regulate oil and gas operations in Ohio pits local governments against the state government. The state won the first round earlier this week — and it may have landed a knock-out punch.



In *State ex rel. Morrison v. Beck Energy Corp.*, 2013-Ohio-356 (Ninth Dist.) Beck obtained a permit from the Ohio Department of Natural Resources (ODNR) to drill an oil and gas well on property located within the city of Munroe Falls, Summit County, Ohio. When Beck began drilling, the city issued a stop work order and filed a lawsuit. The city claimed that Beck's activities were illegal because Beck did not comply with city ordinances that required Beck to obtain a city drilling permit (and pay the associated application fee), a zoning certificate, rights-of-way construction permits, post a performance bond and attend a public hearing. The trial court agreed with the city and issued an injunction. Beck appealed.

The appellate court framed the issue on appeal as, "whether the City of Munroe Falls can enforce its ordinances governing oil and gas drilling and related zoning and rights-of-way issues despite the state's comprehensive statutory scheme for drilling set forth in R.C. Chapter 1509." The court added that this was a case of first impression; i.e., the first time the court had considered this question.

The court pointed out, "In 2004, the General Assembly enacted H.B. 278, which expanded the regulatory scheme and amended R.C.1509.02 to give the Division of Mineral Resources Management of the Ohio Department of Natural Resources the 'sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells.'"

The court also observed that in 2010 ODNR's authority was expanded to include "production operations," and was expanded further in 2011 to include "well stimulation," "completing," "construction" of site and "permitting related to those activities."

Nevertheless, the city argued that Article XVIII, Section 3 of the Ohio Constitution gives municipalities "home-rule" authority to regulate gas drilling operations because the authority given to the state by the statute only pertains to "permitting, location and spacing of" oil and gas wells under R.C. 1509.02.

To decide whether the ordinances were an appropriate use of the city's home-rule authority, the court went through a three-

step analysis established by the Ohio Supreme Court. After disposing of the first two steps, the court determined that the third step — whether the ordinances conflicted with a state statute — was most critical. The court said: “... the issue to be resolved in this appeal boils down to whether the ordinances Munroe Falls attempts to enforce are in conflict with R.C. 1509.02. In the event of a direct conflict, the state regulation prevails.”

The city argued that because none of its ordinances infringed on the states control over “permitting, location and spacing” of oil and gas wells, the ordinances did not conflict with the statute and were enforceable.

The court agreed that the city’s ordinances regarding excavations and rights-of-way do not conflict with R.C. 1509.02 and found those ordinances to be enforceable as long as the city did not enforce those ordinances “in a way that discriminates against, unfairly impedes or obstructs oil and gas activities and operations.”

However, with respect to the other ordinances, the court did not agree with the city, finding instead that the authority

granted to the state by statute is broader than the city’s interpretation and in conflict with the remaining city ordinances. The court held, “We are compelled to follow the established law in our application of the constitutional home-rule analysis to Munroe Falls’ drilling ordinances. Because the drilling ordinances are in direct conflict with the state statutes, the city cannot enforce the ordinances as presently written.”

With that, the court reversed the judgment of the Summit County Court of Common Pleas, but instructed that Beck would need to apply for the excavation and rights-of-way permits.

You can bet that, given this guidance, creative city council members who are opposed to oil and gas production will stretch the court’s reasoning as far as possible. We expect to see more litigation testing the limits of home rule authority.

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Who Should Regulate Oil and Gas Operations, National, State or Local Government?

September 14, 2012 | [Rebecca Mott](#) and [Jeff McNealey](#)

Laws and regulations are adopted at all levels of government. The scope of coverage and the need for uniformity normally dictate the jurisdictional level of regulation. But, when the objectives of federal, state, and local governments conflict, legal battles erupt under the rally cries of “federalism,” “states rights,” “home rule,” “preemption,” and “constitutional rights.”

Some issues, such as interstate pipelines and air quality, are clearly better regulated at a federal level, while others are more suited to the state or local level. For example, uniform federal Clean Air Act regulations prevent states from creating “pollution havens” to attract business.

Similar concerns exist between state and local regulation. The state, as a whole, may want to encourage development of some kind, but communities and local

authorities may have a different perspective. Such is the case for oil and gas production, fracking and brine disposal.

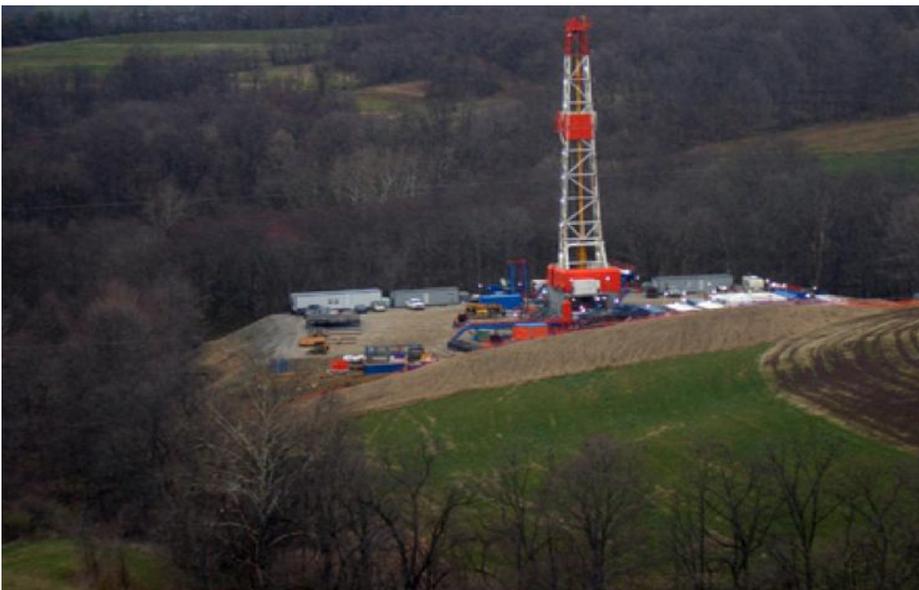
Pennsylvania Wrestles with Preemption

In the spring of 2012, the Pennsylvania legislature passed a law known as Act 13, which prohibits local government from regulating oil and gas activities in contravention of state law. On July 26, 2012, pursuant to a challenge from Robinson Township, a Pennsylvania Commonwealth Court (analogous to Ohio’s Common Pleas Courts) overturned key provisions of Act 13. In *Robinson Township v. Commonwealth*, the court declared unconstitutional: (1) the provision of Act 13 that preempts local municipalities from enacting zoning ordinances that are more restrictive than the provisions of Act 13; and (2) the provision of Act 13 that authorizes the Department of

Environmental Protection (“DEP”) to waive setback requirements for oil and gas wells from the waters of the Commonwealth. Both sides appealed the decision to the Pennsylvania Supreme Court, which is expected to issue a much anticipated ruling in the near future.

Ohio State Law Also Preempts Oil and Gas Operations

Through ORC §1509.02, Ohio law vests Ohio Department of Natural Resources (“ODNR”), Division of Oil and Gas



Resources Management with “sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state”

Although windmills are far more attractive, and clearly far less mobile, than oil and gas drilling rigs, the rigs are a far more popular target here in Ohio. Local communities, some small and some larger, fueled by concerns over fracking, have attempted to block various oil and gas operations within their respective jurisdictions. While undoubtedly politically responsive to their constituents, community leaders should be forewarned that Ohio laws, i.e. ORC § 1509.02, preclude effective challenges to oil and gas operations in this manner.

Ohio has adopted a comprehensive statewide regulation of oil and gas operations, including fracking, which laws were most recently comprehensively updated in June, 2012. Absent specific state legislative authority to counties and townships for control over certain local matters such as local impact cost recovery, these political entities have no authority to regulate oil and gas operations other than as a part of the statewide comprehensive system. For municipalities, Ohio's Constitution provides for “home rule” provisions which may seemingly give some authority for municipalities to regulate oil and gas operations by zoning or similar local regulations. There is a similar legislative process which could also extend “limited” home rule for townships undertaking the process to qualify.

However, pursuant to the controlling case of *Am. Financial Servs. Assn. et al. v. Cleveland*, 112 Ohio St. 3d 170, 2006-Ohio-6043, the Ohio Supreme Court has routinely held that the home rule provisions of the Ohio Constitution do not apply in the face of comprehensive statewide legislation, as in the case of those impacting the oil and gas industry. The legal precepts underlying the *American Financial* decision have also been extended to regulation of electric transmission lines, hazardous waste facilities and solid waste facilities. It is clearly the state policy of Ohio to encourage extraction of Ohio's mineral resources in an expeditious, efficient, and environmentally compliant manner. The current Ohio program under the oversight of the Ohio Department of Natural Resources accomplishes this. For its part, the Division of Oil and Gas Resources Management encourages public participation. As a result of its initiative, Section 1509.61 was added to its governing statute. This provision requires that local governments notify affected land owners and provide a hearing before entering into an oil and gas lease covering property it owns.

Accordingly, while local jurisdiction in Ohio may want to charge these “modern windmills,” their “intellectual and financial capital” would be far more wisely and effectively expended through active participation with qualified experts in the ODNR permitting processes to assure that each permits addresses any particular local situations needing specific attention beyond the general purview of state law.

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Is There a Right To Appeal an Oil and Gas Drilling Permit in Ohio? [UPDATE: No]

February 1, 2013 | Andrew Trafford

Ohio Supreme Court Rules Drilling Permits Are Not Appealable to the Oil and Gas Commission

The Ohio Supreme Court this week ruled in the case *Chesapeake Exploration, LLC v. Oil and Gas Commission*, Slip Opinion No. 2013-Ohio-224, agreeing with Chesapeake and holding that there is no right to appeal a drilling permit in Ohio. In doing so, the court decided that R.C. 1509.06(F) does exclude drilling permits as appealable orders. This means that once a drilling permit is issued by the Chief, it cannot be appealed to the Oil and Gas Commission. You can [read the whole opinion](#) (it's short).



To learn more about this topic, read our original post:

Is There a Right To Appeal an Oil and Gas Drilling Permit in Ohio?

November 2, 2012 | Andrew Trafford and Jeff Fort

Surface owners, neighbors and others indirectly affected by the issuance of an oil and gas well drilling permit might be surprised to learn that they do not have a clear right to challenge the terms

contained in that permit. But, recent cases in Ohio and West Virginia have forced courts to more clearly define who can appeal the issuance of an oil and gas well drilling permit.

In most States, when an operator wants to drill a new well, it has to obtain a drilling permit from the State agency charged with regulating those activities. Those permits affect other parties, namely landowners, neighbors, and other oil companies. In both Ohio and West Virginia, landowners are asking courts to recognize a right of appeal to challenge the issuance of an oil and gas well drilling permit. The laws in both States will inevitably be litigated and that process has begun.

Who Has The Right To Appeal The Issuance Of A Drilling Permit Under Ohio Law?

The Ohio statute that governs drilling permits is not entirely clear about this, though recent changes to these laws and a case pending before the Ohio Supreme Court both address the issue.

The issue is this: the section of the Ohio Revised Code (Chapter 1509), which governs oil and gas regulation in the State, grants a right to appeal decisions of the

State's oil and gas regulatory agency. Later in the same Code section are specific rules for issuing drilling permits (R.C. 1509.06), which includes language suggesting that drilling permits are not appealable.

Take a look: here the Ohio Revised Code provides a general right to appeal a permit issuance:

Any person adversely affected by *an order by the chief* of the division of oil and gas resources management may appeal to the oil and gas commission for an order vacating or modifying the order.

R.C. 1509.36 (emphasis added). The statute goes on to permit any party to the hearing before the Commission to appeal to the Court of Common Pleas. R.C. 1509.37.

There is another general right to appeal, by way of the Administrative Procedure Act, in a different part of R.C. 1509:

"Any order issuing, denying, or modifying a permit or notices required to be made by the chief pursuant to this chapter shall be made in compliance with [The Administrative Procedure Act]...Every order issuing, denying, or modifying a permit under this chapter and described as such shall be considered an adjudication for purposes of [The Administrative Procedure Act]. (R.C. 1509.03(B)(1))"

Left alone, these sections provide a general right to appeal. But take a look at R.C. 1509.06, which outlines the procedure for obtaining drilling permits, and it states:

"...the issuance of a [drilling] permit shall not be considered an order of the chief."

(R.C. 1509.06(F))

Because the right to appeal only exists for "orders of the chief", this language creates a potential carve-out for drilling permits rendering them un-appealable.

A recently filed case in the Supreme Court of Ohio seeks to clarify this potential ambiguity.

In *Chesapeake Exploration LLC v. Oil and Gas Commission et al*, Case No. 12-207 (2012), Chesapeake is the lessee of an oil and gas lease for land owned by Summitcrest. When Chesapeake was issued a drilling permit in February 2012, Summitcrest appealed to the Ohio Oil and Gas Commission to vacate the permit arguing that the lease is invalid. The Division of Oil and Gas Resources Management and Chesapeake both moved to dismiss the appeal on the grounds that the Commission did not have jurisdiction, which is the issue currently before the Supreme Court of Ohio. Chesapeake argues that the language in R.C. 1509.06(F) removes drilling permits from the appellate jurisdiction of the Oil and Gas Commission. The Oil and Gas Commission argues that R.C. 1509.06(F) is insufficient, by itself, to remove their power to hear an appeal in the face of two general grants of jurisdiction in R.C. 1509.36 and R.C. 1509.03(B), cited above.

The Supreme Court of Ohio has asked for further briefing on the issue, and will issue a decision in the future.

Interestingly, in the middle of all the events in the Chesapeake case, above, Senate Bill 315 went into effect and expressly exempted drilling permit issuances from being subject to the Administrative Procedure Act (amendment to R.C. 1509.03(B)(1)). This takes away one leg of

the Commission's argument that they have the power to hear permit appeals. The other leg, R.C. 1509.36 was unchanged by S.B. 315.

Does this create more confusion, or will the Supreme Court's ruling in the Chesapeake case settle the issue? Until the Supreme Court of Ohio issues its opinion, it is unclear who has the right to appeal drilling permits, if those rights exist at all.

Ask The Neighbors: West Virginia Supreme Court Will Hear A Similar Case

A very similar issue is in front of the West Virginia Supreme Court in the case *Martin v. Hamblet*, Case No. 11-1157 (2012). Matthew Hamblet is a fractional owner of a large surface estate in West Virginia and [claims](#) that previous wells drilled on his land by EQT Production Company, an operator, caused "substantial damage" in his words. This included heavily eroded and rutted access roads, silted streams, and felled timber left in inaccessible hillside locations. EQT applied for, and received, a permit for a new well. EQT [contends](#) that they have followed the statutory procedure for obtaining a permit and will comply with all safety and environmental regulations.

In this case the issue is framed differently: the West Virginia statute does not allow for appeals from surface owners (or is at least more clear about it than the Ohio statutes), but Mr. Hamblet argues that appeal rights have been recognized by a previous West Virginia Supreme Court ruling. Moreover, Mr. Hamblet argues that denying his right to appeal violates his constitutional right to due process.

UPDATE: The WVSC issued its opinion on Nov. 21, 2012, denying Mr. Hamblet a right to appeal the well drilling permit. The court said that the West Virginia Code "is clear and unambiguous with regard to who may object to the well proposed to be drilled. Notably absent from the statute is any mention of the surface owner of the subject property." Read the full opinion [here](#).

Waiting for Clarification

So, this issue is being viewed through multiple lenses. Landowners are wanting their day in court and are seeing constitutional problems. The State regulatory agency and its judicial counterpart, the Oil and Gas Commission, are seeing threats to their jurisdiction. The operators are seeing regulations that are designed to fast-track production and wondering whether the Oil and Gas Commission is the appropriate forum for issues like title disputes. Once the Supreme Court of Ohio rules on Chesapeake, we will know much more about the right to appeal drilling permits.

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The Basics of Ohio Prevailing Wage Law

January 24, 2013 | Leigh Anne Benedic

Many employers who infrequently deal with Ohio prevailing wage requirements often ask us how to determine whether Ohio's prevailing wage will apply to their project. The most practical consideration is to determine whether prevailing wages apply to your project before bidding for work or seeking bids for subcontractors. Oftentimes companies who aren't thinking about prevailing wages on the front end can have it unexpectedly derail their project budget and/or cause disputes with its subcontractors over the appropriate wages to be paid.

Consistent with this, we thought it helpful to list a few things for employers to think about when they are considering this question.

1. "Public Improvement"

Determine whether your project meets the definition of "public improvement" under Ohio Revised Code Chapter 4115. This includes "all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works" constructed by a public authority or pursuant to a contract with a public authority, such as the state of Ohio, a county, or other political subdivision.

Note that recent interpretations by the Ohio Attorney General have construed this definition broadly. For example, Ohio [Attorney General Opinion 2012-029](#) found that an oil and gas company's agreement with an Ohio county to maintain the roads was a "public improvement" that required the county to comply with Ohio's prevailing wage requirements, which in



turn required the oil and gas company to pay prevailing wages to the workers who maintained the road. [Read more in this recent post](#). Local governments have required prevailing wages in line with this Attorney General Opinion, such as [Jefferson County's recent decision to require prevailing wages](#) on county and township road improvements associated with construction of an oil pipeline.

For housing projects, a public funding source can also trigger Ohio prevailing wages. Ohio Revised Code § 176.05 states that a "public improvement" includes any "construction, rehabilitation, remodeling or improvement of residential housing ... that is financed in whole or in part from state

moneys” or other funding sources from counties, cities, including bonds. There are a few exceptions to this particular requirement for housing projects, including thresholds for the number of housing units and whether the developer or sponsor of the project is a for-profit or nonprofit entity.

2. Ohio Cost Thresholds

Even if the definition of “public improvement” is met, the project still must be above Ohio’s cost thresholds. These thresholds are set biennially and depend on the type of construction. [The Ohio Department of Commerce explains these thresholds in detail.](#)

For 2013, the new construction threshold is \$200,000, and will increase to \$250,000 on Sept. 29, 2013. Projects involving reconstruction, enlargement, repair, remodeling, renovation, or painting have a threshold of \$60,000, to be adjusted to \$75,000 on Sept. 29, 2013.

For the 2012-13 biennium starting Jan. 2, 2012, construction projects involving roads, streets, alleys, sewers, ditches, and other works connected to road or bridge construction are subject to lower thresholds of \$82,137 for new construction and \$24,609 for reconstruction, enlargement, repair, remodeling, renovation or painting.

3. Contractual Obligations

Consider also whether your funding sources or contracts contain express language requiring Ohio prevailing wages to be paid. The absence of that language does not guarantee that Ohio prevailing wages do not apply, but it can be a trigger to perform your own analysis to confirm that it is the type of project covered by Ohio prevailing wages.

4. Federal Prevailing Wages

If federal funding is involved such that federal prevailing wage requirements apply, those obligations will supersede and replace any Ohio prevailing wage requirements. Note that many funding sources from state and local governments sometimes originate from the federal government, and have federal prevailing wage requirements attached. However, the types of projects in which federal and Ohio prevailing wage are required frequently differ, so even if one set of requirements does not apply, the other may.

5. Exceptions May Apply

Finally, there are several exceptions to Ohio’s prevailing wage requirements found throughout the Ohio Revised Code. Any time the above steps lead to a conclusion that Ohio prevailing wages apply, make sure that these exceptions are examined in detail to ensure the right conclusion was made.

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Ohio Attorney General Issues Guidance on Road Use Maintenance Agreements (RUMA's)

November 30, 2012 | [Chris Baronzzi](#) and [Jeff Fort](#)

In response to questions posed by the Richland County Prosecuting Attorney, the Ohio Attorney General recently provided guidance to public authorities about entering into Road Use Maintenance Agreements ("RUMA's") with oil and gas operators. This is a distillation of the 20-page Attorney General Opinion No. 2012-029, which addressed three primary questions.

I. May a county enter into an agreement with a private oil and gas drilling company to have the company improve and repair the county roads it uses at no cost to the county?

Answer: Yes. After analyzing various Ohio statutes relevant to a public authority's obligation to improve and repair roads, the Attorney General concluded, "[a] county may, in accordance with R.C. 9.334, R.C. 153.693, R.C. 1509.06, R.C. 5555.022, R.C. 5557.06, or R.C. 5727.75, enter into an agreement with a private company that conducts oil and gas drilling operations . . . to have the company improve and repair the county roads it uses at no cost to the county." (2012 Op. Att'y Gen. No. 2012-029, Syllabus ¶11)

The opinion points out that R.C. 1509.06(A)(11) specifically requires a company applying for an oil and gas well permit to (1) identify what roads it will use to access the well site, and (2) provide a copy of its agreement with the appropriate governmental authority "concerning maintenance and safe use of the roads ..." or provide "an affidavit

attesting that the applicant attempted in good faith to enter into such an agreement, but was unable to do so."

II. Next, when a county enters into a RUMA with a private company, must the private company comply with:

- A. R.C. 307.86-.92: Competitive Bidding for Purchases of Goods or Services**
- B. R.C. 153.44: Review of Contract by Prosecuting Attorney**
- C. R.C. 153.69: Professional Design Services**
- D. R.C. 4115.03-.16: Payment of Prevailing Wage Rates**

Before responding to these questions, the Attorney General observed that it is not within his authority to advise private companies about their legal obligations. The Attorney General only advises public officials and entities. So, with regard to the county's obligations, the Attorney General advised:

A. R.C. 307.86-.92: Competitive Bidding for Purchases of Goods or Services.

Answer: No. Since the work is being done at no cost to the county, R.C. 307.86 and the related statutes that require public contracts to be submitted to a competitive bidding process do not apply.

B. R.C. 153.44: Review of Contract by Prosecuting Attorney.

Answer: Not unless required by the county prosecutor. R.C. 153.44 provides that all public improvement contracts “that exceed [1,000] dollars in amount shall be submitted by the board of county commissioners to the prosecuting attorney of the county” for review. But in the case of a RUMA, since the county is not paying for the improvement and repairs, “the county is not required to comply with R.C. 153.44.” (2012 Op. Att’y Gen. No. 2012-029, Syllabus ¶12)

The Opinion concludes, however, that a prosecuting attorney, as counsel for county officials, “may nonetheless require a board of county commissioners or county engineer to submit to him for review a [RUMA].” (2012 Op. Att’y Gen. No. 2012-029, Syllabus ¶13)

C. R.C. 153.69: Professional Design Services.

Answer: No. R.C. 153.69 authorizes a public authority to contract for professional design services, such as engineering and architectural services, and imposes various requirements for those contracts. While a public authority “must follow R.C. 153.69 when planning to enter into a contract for professional design services”, a RUMA “is not a ‘professional design services contract,’ as that term is used in R.C. 153.69, since the company also will make the improvements and repairs to the county roads set forth in the plans and designs.” (2012 Op. Att’y Gen. No. 2012-029, Syllabus ¶12 and p.14)

D. R.C. 4115.03-.16: Payment of Prevailing Wage Rates.

Answer: Yes. Ohio’s prevailing wage laws require a public authority to ensure prevailing wages are paid for work done

on a public improvement project. Since work under a RUMA is considered a “public improvement,” as defined in R.C. 4115.03(C), a governmental agency that enters into a RUMA is required to comply with R.C. 4115.03-.16 when the total project cost to the company will be more than the amount prescribed in R.C. 4115.03(B)(4). (2012 Op. Att’y Gen. No. 2012-029, Syllabus ¶14)

III. May a County be held liable for civil damages if an oil and gas company does not pay prevailing wage rates for work performed under the authority of a RUMA?

Answer: Unknown. As discussed above, the Attorney General determined that prevailing wage laws are implicated by RUMA’s but the Attorney General refused to address whether a private company must comply with prevailing wage laws in connection with a RUMA.

The Attorney General observed that the question of whether a public authority could be held liable for failing to require an oil and gas drilling company to pay prevailing wages for work done under a RUMA has never before been addressed by Ohio courts and is “a question of fact that cannot be determined by means of an Attorney General opinion.” (2012 Op. Att’y Gen. No. 2012-029, Syllabus ¶15).

While the Attorney General sidestepped this question, it is apparent to the authors of this blog that a RUMA should require oil and gas drillers to pay prevailing wages and a public authority that ignores this requirement, especially in light of this Attorney General opinion, is inviting litigation and may very well be held liable for damages.

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Fracking (Fracing) Fluid Not Allowed on Ohio Roads

September 24, 2012 | [Chris Baronzzi](#)

A common misunderstanding of Ohio oil and gas law is that it allows oil and gas operators to spread drilling fluid on Ohio roads.

The Ohio Revised Code authorizes local governments to spread “brine” produced from oil and gas wells on roads. Ohio law does not allow drilling fluid (aka “frac” or “frack” fluid) to be spread on roads under any circumstances and does not even allow brine to be spread without authorization from a local government.

Brine ≠ Frack Fluid

The distinction between brine and drilling fluid in the oil and gas industry is critical, even if those terms are sometimes used interchangeably by the public.

The Ohio Revised Code defines brine as “all saline geological formation water resulting from, obtained from, or produced in connection with exploration, drilling, well stimulation, or production of oil or gas, or plugging of a well.” ORC §1509.01 (U).

In layman's terms, brine is a naturally occurring liquid that flows from deep in the earth when an oil and gas well is drilled. It is essentially very salty water that may also contain some dissolved minerals and other elements. Brine is not the carefully engineered drilling fluid that oil and gas companies use to drill and hydraulically fracture oil and gas wells.

Local Government May Spread Brine, Not Drilling Fluid, on Roads

Ohio law authorizes a board of county commissioners, a board of township trustees, or the legislative authority of a municipal corporation to “permit the surface application of brine to roads, streets, highways, and other similar land surfaces it owns or has the right to control for control of dust or ice,” subject to various reporting requirements and other guidelines established by the Ohio Department of Natural Resources. ORC §1509.226

Ohio law is very clear that drilling fluid can not be spread on roads. ORC

§1509.226(B)(10) states,

“only brine produced from a well shall be allowed to be spread on a road. Fluids from the drilling of a well, flowback from the stimulation of a well, and other fluids used to treat a well shall not be spread on a road.”



Everything in Moderation

Even though brine is not the same as drilling fluid, there are still environmental concerns if it is not handled responsibly. You certainly would not want to dump a truckload of brine on a corn field. But, even plows that spread rock salt on the roads in winter have the potential to be destructive if they are used excessively.

Fortunately, the ODNR imposes regulations and limits on how, and how much, brine can be spread on roads. Everything from the speed of the spreader truck to the diameter of the nozzle that sprays the brine is regulated by the ODNR. Further, the statute requires the local government to provide annual informational reports to the

Chief of the ODNR so that the Chief can monitor any brine spreading. The Chief has discretion to determine what information must be provided. Through this requirement, the Chief could require brine to be tested for radiation, if necessary.

The bottom line is that spreading brine serves a purpose on Ohio roads and it is carefully controlled. Admittedly, it would be better if asphalt roads never became icy or if country lanes never got dusty but until road construction technology improves, brine spreading offers an alternative to the other options for controlling ice and dust: rock salt and oil.

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Management of Oil Field Wastes

March 29, 2013 | [Jeff Fort](#)

The disposal of wastes associated with oil and gas production continues to draw the attention of regulators and concerned citizens. In a series of articles we will examine the waste issue from the characterization of these wastes (discussed below) and their ultimate disposal in underground injection wells.

A Brief History of Waste Management and RCRA

By the 1960s it was becoming clear that the country had a waste management problem. The only modern environmental law on the books at the time was the Clean Air Act. So the Solid Waste Disposal Act of 1965 was enacted as an amendment to the air law. This initial foray into comprehensive waste regulation proved inadequate in many respects. The treatment, storage and disposal of waste — even defining what a waste is — is complicated, especially when recycling is considered.

The modern regulation of solid and hazardous waste can be traced to 1976 with the enactment of the Resource Conservation and Recovery Act (RCRA). Generally, when looking at the world through the lens of RCRA, all material is either a product or a solid waste. A subcategory of solid waste is hazardous waste that is regulated under Subtitle C of RCRA.

A solid waste is “hazardous” if it has been specifically listed as hazardous by the EPA or if it has certain hazardous characteristics, e.g., flammability. Subtitle C of RCRA prescribes a “cradle-to-grave”



management system for hazardous waste. Nonhazardous solid wastes are addressed in Subtitle D of RCRA. *(Note: Under federal law, all hazardous wastes are solid wastes, but not all solid wastes are hazardous wastes.)*

The key point to understand is that if a solid waste is a hazardous waste, a considerably more complicated and comprehensive regulatory system applies. For purposes of this discussion, it is this key regulatory difference that is critical to understanding how oil field wastes are regulated.

Defining Exempt vs. Non-Exempt

As RCRA was getting off the ground, EPA recognized that certain solid wastes were relatively benign but generated in large quantities. If properly managed, these “special” wastes pose little threat to human health or the environment. So, in 1978, EPA proposed to exempt oil and gas exploration and production (E&P) waste from the Subtitle C, 43 Federal Register 58946, and in 1980, the exemption was included in amendments to RCRA known

as the Solid Waste Disposal Act Amendments.

In the Solid Waste Disposal Act Amendments of 1980, Congress amended RCRA to add section 3001 (b)(2)(A), which exempted drilling fluids, produced waters and certain other wastes associated with exploration, development and production of crude oil, natural gas and geothermal energy from regulation as hazardous wastes. The law also required EPA to study the exemption and report to Congress. In 1988, the EPA concluded that E&P wastes need not be regulated under Subtitle C. The exemption is codified in EPA regulations at 40 CFR § 261.4 (b)(5). EPA also published a [list of exempt and non-exempt E&P-related wastes](#), which is reproduced below. Consequently, most oil and gas E&P-related waste is regulated as a solid waste under Subtitle D, not hazardous waste under Subtitle C.

In a 1988 report to Congress, the EPA identified criteria for determining what wastes are included in the exemption and, therefore, exempt from Subtitle C. For a waste to be exempt:

[I]t must be associated with operations to locate or remove oil or gas from the ground or to remove impurities from such substances and it must be intrinsic to and uniquely associated with oil and gas exploration, development or production operations (commonly referred to simply as exploration and production or E&P); the waste must not be generated by transportation or manufacturing operations.

See, 58 FR 15284, 3/22/93. The EPA further explained that only waste from “primary field operations” is exempt. Primary field operations are activities at or near the

wellhead or gas plant and including only those operations necessary to locate and recover oil and gas from the ground and to remove impurities. As a practical matter, any waste generated downhole is probably exempt E&P waste from primary field operations.

With regard to nonexempt transportation-related waste, the EPA explained:

Transportation of oil and gas can be for short or long distances. For crude oil, “transportation” is defined in the Report to Congress and the subsequent Regulatory Determination as beginning after transfer of legal custody of the oil from the producer to a carrier (i.e., pipeline or trucking concern) for transport to a refinery or, in the absence of custody transfer, after the initial separation of the oil and water at the primary field site. For natural gas, “transportation” is defined as beginning after dehydration and purification at a gas plant, but prior to transport to market.

58 FR 15284, 3/22/93.

Exemption for Crude Oil Reclamation Operations

Next, the EPA was asked to clarify the scope of the exemption for crude oil reclamation operations. The EPA explained that the inclusion of “liquid and solid wastes” from crude oil reclamation on the list of non-exempt wastes was intended to refer only to those non-E&P wastes generated by reclaimers (e.g., waste solvents from cleaning reclaimers’ equipment) and was not intended to refer to wastes remaining from the treatment of exempt wastes originally generated by the

exploration, development or production of crude oil or natural gas. The EPA explained:

The Agency has consistently taken the position that wastes derived from the treatment of an exempt waste, including any recovery of product from an exempt waste, generally remain exempt from the requirements of RCRA Subtitle C. Treatment of, or product recovery from, E&P exempt wastes prior to disposal does not negate the exemption.

* * *

For example, waste residuals (e.g., BS&W) from the on-site or off-site process of recovering crude oil from tank bottoms obtained from crude oil storage facilities at primary field operations (i.e., operations at or near the wellhead) are exempt from RCRA Subtitle C because the crude oil storage tank bottoms at primary field operations are exempt. In effect, reclaimers are conducting a specialized form of waste treatment in which valuable product is recovered and removed from waste uniquely associated with E&P operations.

58 FR 15284, 3/22/93.

However, to the extent that reclaimer wastes are derived from non-exempt



oilfield wastes or do not meet the “uniquely associated with E&P operations” standard, they are not exempt. For example, waste solvents generated from the cleaning of tank trucks would not be exempt.

To summarize:

Generally, crude oil reclaimer wastes that are derived from exempt oilfield wastes (e.g., produced water, BS&W) are not subject to the Subtitle C waste management requirements of RCRA. Such wastes, however, remain subject to any applicable state solid waste management requirements. Moreover, this exemption from RCRA Subtitle C requirements may not apply if the crude oil reclaimer wastes are combined with other wastes that are subject to RCRA Subtitle C requirements.

58 FR 15284, 3/22/93.

Exemption for Service Companies

Likewise, service company wastes may or may not be covered by the exemption. Empty drums, drum rinsate, vacuum truck rinsate, sandblast media, painting wastes, spent solvents, spilled chemicals and waste acids are all nonexempt wastes because they are not uniquely associated with “primary field operations.”

It doesn't matter which company generates the waste. The property owner, a lessee, a contractor — all are potential “generators” and therefore liable if the wastes are hazardous. However, if the service company generates a waste uniquely associated with the exploration, development or production of crude oil or natural gas at primary field operations, those wastes are exempt from regulation under Subtitle C.

Lessons Learned

Though the current upswing in oil and gas exploration activity in Ohio is relatively new, the characterization of its wastes, and the concordant management standards, are not. EPA and Congress have considered the issues, determined a policy and successfully implemented it for the last 25 years.

The following is excerpted from the EPA publication "Exemption of Oil and Gas Exploration and Production Wastes from Federal Hazardous Waste Regulations."

Exempt E&P Wastes

- Produced water
- Drilling fluids
- Drill cuttings
- Rigwash
- Drilling fluids and cuttings from offshore operations disposed of onshore
- Geothermal production fluids
- Hydrogen sulfide abatement wastes from geothermal energy production
- Well completion, treatment, and stimulation fluids
- Basic sediment, water, and other tank bottoms from storage facilities that hold product and exempt waste
- Accumulated materials such as hydrocarbons, solids, sands, and emulsion from production separators, fluid treating vessels, and production impoundments
- Pit sludges and contaminated bottoms from storage or disposal of exempt wastes
- Gas plant dehydration wastes, including glycol-based compounds, glycol filters, and filter media, backwash, and molecular sieves
- Workover wastes
- Cooling tower blowdown

- Gas plant sweetening wastes for sulfur removal, including amines, amine filters, amine filter media, backwash, precipitated amine sludge, iron sponge, and hydrogen sulfide scrubber liquid and sludge
- Spent filters, filter media, and backwash (assuming the filter itself is not hazardous and the residue in it is from an exempt waste stream)
- Pipe scale, hydrocarbon solids, hydrates, and other deposits removed from piping and equipment prior to transportation
- Produced sand
- Packing fluids
- Hydrocarbon-bearing soil
- Pigging wastes from gathering lines
- Wastes from subsurface gas storage and retrieval, except for the non-exempt wastes listed on page 11 (of the EPA publication)
- Constituents removed from produced water before it is injected or otherwise disposed of
- Liquid hydrocarbons removed from the production stream but not from oil refining
- Gases from the production stream, such as hydrogen sulfide and carbon dioxide, and volatilized hydrocarbons
- Materials ejected from a producing well during blowdown
- Waste crude oil from primary field operations
- Light organics volatilized from exempt wastes in reserve pits, impoundments, or production equipment

Non-Exempt Wastes

- Unused fracturing fluids or acids
- Gas plant cooling tower cleaning wastes
- Painting wastes
- Waste solvents
- Oil and gas service company wastes such as empty drums, drum rinsate, and

blast media, painting wastes, spent solvents, spilled chemicals, and waste acids

- Vacuum truck and drum rinsate from trucks and drums transporting or containing non-exempt waste
- Refinery wastes
- Liquid and solid wastes generated by crude oil and tank bottom reclaimers¹
- Used equipment lubricating oils
- Waste compressor oil, filters, and blowdown
- Used hydraulic fluids

- Waste in transportation pipeline related pits
- Caustic or acid cleaners
- Boiler cleaning wastes
- Boiler refractory bricks
- Boiler scrubber fluids, sludges, and ash
- Incinerator ash
- Laboratory wastes
- Sanitary wastes
- Pesticide wastes
- Radioactive tracer wastes
- Drums, insulation, and miscellaneous solids

¹ Although non-E&P wastes generated from crude oil and tank bottom reclamation operations (e.g., waste equipment cleaning solvent) are non-exempt, residuals derived from exempt wastes (e.g., produced water separated from tank bottoms) are exempt. For a further discussion, see the Federal Register notice, Clarification of the Regulatory Determination for Waste from the Exploration, Development, and Production of Crude Oil, Natural Gas and Geothermal Energy, March 22, 1993, Federal Register Volume 58, Pages 15284 to 15287.

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Exploring the Disposal of Fracking Waste Water — UIC Class II Wells in Ohio

April 13, 2013 | Jeff Fort

As discussed in an [earlier post about the management of oil field wastes](#), most exploration and production waste is not regulated as a hazardous waste. Instead, it is regulated as a solid waste. Even so, as discussed in a recent article by Stephen Ellis:

“One of the biggest problems in the oil and gas industry today is water management. Solving the technical and economic challenges around managing the millions of gallons of water used to properly fracture tight oil and gas wells has been called the holy grail of the industry by Southwestern Energy CEO Steve Mueller. He estimates that water transportation (primarily trucking) costs around \$1.5 million (25%) of the \$6 million that an average Marcellus well costs.”

See: Stephen Ellis, “[Oilfield Water Management: The Oil And Gas Industry’s Holy Grail](#),” Seeking Alpha, March 31, 2013.

Water Used in Operations

Water is used in the drilling of the well. It is also used in the stimulation — i.e., fracking — of the well. According to the Ohio Department of Natural Resources (ODNR), most of the water used in fracturing remains thousands of feet underground in the formation. However, about 15-20 percent returns to the surface through a steel-cased well bore and is temporarily stored in steel tanks or lined pits. The wastewater that returns to the surface after



hydraulic fracturing is called [flowback](#). Later, as the well is producing hydrocarbons, it also produces water named, appropriately enough, “produced water.”

All water that flows out of a well needs to be treated, recycled or disposed of properly. Perhaps the most common and least expensive way to deal with this wastewater is to pump it back underground through a specialized well commonly referred to as either an “injection well” or “disposal well.” There are only a handful of disposal wells in Pennsylvania but there are almost 200 in Ohio.

The abundance of disposal wells in Ohio makes it a popular destination for flowback and produced water disposal from surrounding states.

Regulatory Response

The history of how disposal wells came to replace evaporation pits for the safe disposal of certain kinds of drilling fluids is described in a [2011 ODNR-DOGRM presentation](#) to the Ohio Geological Society. Injection wells are now heavily regulated to ensure the safety of people and the environment.

To address the possibility of groundwater contamination by injection wells, the regulation of multiple types of injection wells, including those for the disposal of flowback and produced wastewater, is authorized in the Safe Drinking Water Act, 42 U.S.C. § 300f, and its implementing regulations, 40 CFR Parts 144, 145 and 146. Under the Safe Drinking Water Act, Ohio received delegation from USEPA to implement and enforce its the regulatory program for injection wells in 1983. Section 1509.22 of the Ohio Revised Code also regulates the storage and disposal of brine, and in 2010 and 2012, the Ohio General Assembly further tightened the standards applicable to these wastewater streams in response to the shale play.

Permits are required to drill a disposal well. (R.C. 1509.221.) Any person who transports brine has to register with the state and get an ID number. Well owners can only use the services of registered persons for wastewater management and those persons are required to file annual reports. (R.C. 1509.223.) Transporters are also required to have insurance in specified amounts and a surety bond. (R.C. 1509.225.) The ODNR regulations are found at OAC 1509:9-3 et seq.

Liquids Eligible for Disposal

The liquids that can be injected into a Class II well include liquids associated with drilling and stimulation activities such as:

- Pits water, or fluids from drilling and cementing operations
- Mixture of drilling mud, freshwater and formation brines
- Flowback or frack water, which is a mixture of chemicals, brine and brackish water associated with horizontal drilling
- Produced water; i.e., natural formation brine, which is a byproduct of oil and gas production. Brine contains mainly sodium, chloride, calcium, barium, iron, strontium, magnesium, and potassium. Chloride is the predominant constituent with concentrations as high as 200,000 ppm (mg/L).

Approximately 98 percent of oilfield fluids in Ohio are disposed of through injection in disposal wells. The remaining 2 percent is spread legally for dust and ice control. In 2011, more than half of the liquids disposed of in Ohio's disposal wells came from out of state. (Read more in the ODNR-DOGRM presentation referenced above.)

Since the Underground Injection Control (UIC) program's inception in 1983, more than 202 million barrels of oilfield fluids have been successfully disposed of, with no reports of ground water contamination incidents. In addition, before the Youngstown event, discussed below, no seismic event had been previously linked to operations at any of the state's Class II wells. See: "[Preliminary Report on the Northstar I Class II Injection Well and The Seismic Events in the Youngstown, Ohio, Area](#)," ODNR, March 2012.

Permitting Class II Wells

Ohio's stringent regulations are reflected in the Class II well permitting process. Depending on the projected disposal

volume, ODNR establishes a preliminary area of review around the proposed well site of either 1/4 mile or 1/2 mile, followed by a “pre-site field review.”

A “pre-site field review” involves an inspection by ODNR of the area around the location of a proposed Class II well. The review is intended to identify all water wells, dwellings and surface bodies of water within the area of review. If these types of features are identified in close proximity to the proposed injection well, ODNR has the regulatory discretion to impose additional requirements on the applicant. Likewise, ODNR has the discretion to order seismic testing and monitoring if it believes those are necessary or warranted based on its review of the area.

After an injection well application is reviewed and deemed complete, ODNR also sends instructions for public notice to the well operator. Notice of the proposed permit is then published in the local newspaper by the operator. If there are relevant objections relating to public health or safety, or good conservation practices, ODNR may require a public hearing.

Injection Pressure

The surface injection pressure is initially set by a formula prescribed in OAC 1501:9-3-07 (D) taking into account the specific gravity of the injectate. Thereafter, the well operator reports the specific gravity of the injectate to ODNR on a quarterly basis. If necessary, ODNR can adjust the permitted pressure to ensure that the water is being safely assimilated into the geologic formation.

Mechanical integrity of the well is determined before injection. Thereafter, the regulations require continuous

monitoring or monthly mini-tests. Production casing need be at least 300 feet above the injection zone and tubing and packer are required.

On the surface, the injection well facility must be within a dike area with a 30 mil liner or a concrete dike. The truck unloading pad must be concrete with a drain, vault and sump.

ODNR conducts unannounced inspections on each well every 11 to 12 weeks. The inspections include a check of injection and annulus pressures to insure integrity. There is also an overall inspection of the facility and pipelines for leaks.

Earthquakes?

In the first quarter of 2011, a series of small-magnitude earthquakes occurred in the Youngstown area. After a thorough investigation, ODNR concluded that they had been induced by a nearby injection well — the result of a confluence of extremely rare circumstances. In fact, all evidence indicates that properly located Class II injection wells will not cause earthquakes. See: “[Preliminary Report on the Northstar I Class II Injection Well and The Seismic Events in the Youngstown, Ohio, Area](#),” ODNR, March 2012.

As a result of the Youngstown incident, Ohio adopted new procedures to ensure the set of circumstances that led to seismic activity is not repeated. This comprehensive list of new standards prohibits the drilling of any new wells in the Precambrian basement rock formation and requires thorough reviews and analysis of geologic data as well as ongoing evaluation, monitoring and testing. Read the [complete list of standards](#) adopted in March 2012.

Conclusion

Brine and other liquid wastes are an unavoidable by-product of oil and gas production. To the extent they cannot be recycled, underground injection — with appropriate safeguards — is currently one of the most reliable and safe disposal methods available.

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Gas Plant and Gas Wells Are Not Collectively a “Major Source” Due to Being “Functionally Related,” Absent Physical “Adjacency”

August 13, 2012 | [Robert Brubaker](#)

On Aug. 7, 2012, the U.S. Court of Appeals for the Sixth Circuit in Cincinnati vacated a USEPA determination that a natural gas sweetening plant and gas wells supplying it constituted a single “major source” for Title V permitting purposes. The decision focuses solely on the meaning of “adjacent” in the three-part “major source” definition, which requires:

- Common control
- Contiguous or adjacent property
- SIC code commonality

The case involved approximately 100 sour gas production wells spread over a 43 square mile area on separate parcels located 500 feet to eight miles from a natural gas processing plant. All of the output of the wells is pipelined to the plant. Neither the wells alone nor the plant alone have enough emissions to be classified as a Title V “major source.” However, the combined emissions of both the wells and the plant together exceed the “major source” threshold (100 tons per year of actual or potential emissions of a regulated air pollutant, such as nitrogen oxides, sulfur dioxide, or carbon monoxide). There was no dispute that the wells and the plant had common

ownership and control, that they belonged to the same two-digit SIC code major industrial grouping, and that they were not on “contiguous” property. The only disagreement was whether the term “adjacent” in the Title V definition of a “major source” refers to physical proximity, or to functional relationship.

The court’s two-judge majority relied upon the dictionary definition, etymology, and case law meanings of “adjacent” to conclude that “adjacency is purely physical and geographical,” and not an ambiguous term. The court rejected EPA’s

argument that activities can be adjacent so long as they are “functionally related,” irrespective of the distance that separates them.

An interesting aspect of the decision is the court’s refusal to grant deference to the agency’s interpretation of its own regulation. The court wrote:

“Having determined that the word ‘adjacent’ is unambiguous, we apply no deference in our review of EPA’s interpretation of it.”

The court also rejected EPA’s argument that its interpretation of “adjacent” was so



longstanding — dating back to 1980 — that it was entitled to deference for that reason alone. To this argument the court responded: “An agency may not insulate itself from correction merely because it has not been corrected soon enough, for longstanding error is still an error.”

The victory in the Sixth Circuit is an important milestone in the long, but as yet unfinished, ordeal of the prevailing petitioner, Summit Petroleum Corp., to establish that its gas wells and production plant are not subject to Title V permitting requirements. Summit Petroleum filed its request for a Title V “major” vs. “minor” source determination in January 2005. EPA made its final determination that Summit’s gas wells and sweetening plant on Indian territory in Michigan constituted a single “major source” subject to Title V permitting requirements in October 2010. The court noted that during that five-year interval, “[t]he parties engaged in at least twenty-five conference calls and exchanged a ‘small mountain of paper.’”

Almost seven years after the applicability determination request was made, the Sixth Circuit has remanded the matter to EPA “for a reassessment of Summit’s Title V source determination request in light of the proper, plain-meaning application of the requirement that Summit’s activities be aggregated only if they are located on physically contiguous or adjacent properties.”

In a dissenting opinion, Judge Karen Nelson Moore expressed her view that on remand, “EPA is free to reach the same conclusion that Summit’s operations should be aggregated as a major source for Title V permitting purposes, so long as it bases that conclusion on the considerations that the majority today deems appropriate.” On remand, Summit Petroleum will learn whether EPA interprets physical adjacency to mean something more than 500 feet of separation or something less than eight miles.

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EPA's Clean Air Act New Source Performance Standards for the Oil and Gas Sector Finally Appear in the Federal Register

August 29, 2012 | [Eric Gallon](#)

On April 17, 2012, the United States Environmental Protection Agency (EPA) issued [final revised New Source Performance Standards \(NSPS\) and National Emission Standards for Hazardous Air Pollutants \(NESHAPs\) for the oil and natural gas industry](#). Four months later, EPA [published those rules in the Federal Register](#).

EPA's website provides summaries of the new rules' requirements for [natural gas well sites](#), [natural gas gathering and boosting stations](#), [gas processing plants](#), [natural gas transmission compressor stations](#), and the [oil industry](#). In short, the rules:

- Require owners and operators of fractured and refractured gas wells to use "reduced emissions completions" (also called RECs or "green completions") or "completion combustion devices" (e.g., flaring), so that [gas and liquid hydrocarbons produced when the well is prepared for production are either captured for use or sale or burned](#)
- Require storage vessels with volatile organic compound ("VOC") emissions of at least 6 tons per year to reduce those emissions by at least 95%
- Set "natural gas bleed rate limit[s] ... for individual, continuous bleed, natural gas-driven pneumatic controllers"

- Require "wet seal centrifugal compressors located between the wellhead and the point at which the gas enters the transmission and storage segment" to reduce their VOC emissions by at least 95%
- Require "reciprocating compressors located between the wellhead and the point where natural gas enters the natural gas transmission and storage segment" to take certain measures to reduce VOC emissions
- Require leak detection and repair procedures for smaller leaks at oil and natural gas processing plants
- Impose NESHAPs on small glycol dehydration units.

The new rules are set to go into effect on October 15, 2012. The Oil and Gas Journal reports that the American Petroleum Institute has already petitioned EPA to reconsider and stay the rules.

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