

Illinois Passes Comprehensive Hydraulic Fracturing Legislation

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In anticipation of an expected surge in energy development in the largely untapped New Albany Shale, an approximately 60,000-square mile shale formation located partially in Southeastern Illinois within the Illinois Basin, Illinois lawmakers passed Senate Bill 1715, known as the Hydraulic Fracturing Regulatory Act (the Act).¹ The Act expands the Illinois Department of Natural Resources' (DNR's) regulatory authority to encompass horizontal hydraulic fracturing operations. Illinois' law goes beyond what most states have enacted, requiring baseline groundwater testing before drilling, the use of tanks rather than pits for wastewater storage, and chemical disclosures both prior to drilling and subsequent to the performance of fracturing activities, all of which could have significant cost impacts for those operating in the state. Additionally, it addresses seismic activity at disposal wells, authorizes citizen suits, and imposes a tax on production.

Operators will have to comply with the Act in addition to the current law governing oil and gas production, the Illinois Oil and Gas Act, which supplies the requirements for, among other things, oil and gas permitting, drilling, operating, and plugging and abandonment of wells in the state.² Where the two laws conflict, however, the provisions of the Act will prevail.³ The bill was sent to Governor Pat Quinn on June 6, 2013, and he signed the Act into law on June 17, 2013. The rules go into effect immediately.

The Act's stringent guidelines apply to all high volume hydraulic fracturing operations that use more than 80,000 gallons of hydraulic fracturing fluid per stage on wells that are drilled at least 100 feet horizontally.⁴ Illinois DNR will retain primary regulatory authority over the hydraulic fracturing operations, including the review and issuance of permits; however, the Act delegates some enforcement authority to the Illinois Environmental Protection Agency (EPA).⁵

Strict Rules For Ground and Surface Water Protection

The Act, dubbed the "strongest in the nation" by its supporters, includes particularly strict restrictions for preserving groundwater and surface water quality. It requires oil and gas companies to perform baseline groundwater testing and extensive compliance monitoring during all stages of operations,⁶ and creates a rebuttable presumption that all hydraulic fracturing operators are liable for contamination of water sources within 1,500 feet of a well site.⁷ In addition, operators in Illinois must maintain sealed tanks for wastewater storage onsite rather than open pits,⁸ test flowback fluids for a variety of constituents,⁹ and remove wastewater from well sites within a set timeframe.¹⁰ Operators must also prepare and submit to Illinois DNR a

report on the transportation and disposal of the fluid, showing that the wastewater was not discharged into surface waters.¹¹ Thus, akin to the Resource Conservation and Recovery Act's "cradle-to-grave" hazardous waste management requirements, the Act establishes controls on the management of hydraulic fracturing wastewater from its point of generation, through its storage, transportation and disposal.

Public Notice and Comment Periods for Every Permit Application

Under the new law, any proposed fracking operation is subject to public comment periods and a public hearing, with feedback taken into account by the state when deciding whether to approve an application. Within five calendar days after the DNR's receipt of an application, the DNR must post notice of its receipt and a copy of the application on its website with notice also to the Illinois EPA, Illinois State Water Survey, and Illinois State Geological Survey.¹² Upon notice of DNR's receipt of the application, the applicant must provide the following public notices: (1) within five calendar days, notice to all real property owners of record within 1,500 feet of the proposed well site and to each municipality and county in which the well site is to be located; and (2) within three calendar days, notice by publication once per week for two consecutive weeks in a newspaper of general circulation published in each county where the well site is proposed to be located.¹³ The applicant must certify and provide documentation to the DNR that the public notice requirements were fulfilled.¹⁴

The public comment period begins seven calendar days after the DNR's receipt of the permit application and lasts for thirty calendar days.¹⁵ Where a public hearing is conducted, the DNR may provide for an additional public comment period of fifteen days beginning on the day after the public hearing.¹⁶ The DNR may request that the applicant respond to any substantive public comments obtained during the public comment period.¹⁷ These provisions requiring detailed public notices and providing the public with the opportunity to request a hearing on every well permit application could be a significant barrier to development in Illinois that introduces significant delays in the application process.

Chemical Disclosure Required Before and After Fracturing

Notably, the Act requires companies to disclose the chemicals used in their fracturing activities not only after drilling operations, but also before they commence. Under the Act, operators must obtain special permits issued by the Illinois DNR before commencing drilling. The permit application requires the operator to disclose, among other information, the location, depth, source of water withdrawal and the chemicals the operator expects to use in performing fracturing operations.¹⁸ Upon completion of drilling, companies must disclose the total volume of water used and each hydraulic fracturing chemical added to the fluid, as well as chemical concentrations.¹⁹ Moreover, the Act makes no mention of FracFocus, the industry-supported website most states use for chemical disclosure. Instead, Illinois DNR intends to create and maintain a comprehensive website and searchable database dedicated to providing information

to the public related to hydraulic fracturing operations in the state, including, for each well it authorizes, the identity of its operators, its waste disposal, its chemical disclosure information, and any complaints or violations under the Act.²⁰ While the Act allows companies to claim trade secret protection for qualified formulas to shield the chemicals they use,²¹ the public may challenge the trade secret claim through the state's freedom of information law.²² Regardless, companies must provide unredacted disclosure reports to Illinois DNR.²³

Setback, Construction, Cementing, Well Integrity, and Liability Provisions

The Act also includes a number of provisions aimed at protecting the public and natural resources located near hydraulic fracturing operations. Initially, all well permit applicants must submit safety plans, containment plans, well completion reports and proof of at least \$5 million in liability insurance coverage for injuries, damages, or losses related to pollution or contamination from drilling or operation of the well.²⁴ In addition, the Act imposes location and density stipulations that specify setback distances from residences, places of worship, drinking water sources, surface waters, and nature preserves.²⁵

The Act establishes technical requirements for the design, construction and drilling of horizontal wells, including well integrity testing before, during and upon completion of drilling operations.²⁶ In addition to conforming to current industry standards published by the American Petroleum Institute, the cement slurry, among other things, must be prepared to minimize its free water content and also isolate and protect fresh groundwater and any abnormally pressured zones, lost circulation zones, and any potential flow zones including hydrocarbon and fluid-bearing zones.²⁷ The provisions relating to construction and cementing provide numerous other specific requirements regarding pump rates, integrity tests, casing depth, intermediate casing, production casing, pressure tests, and notification and recordkeeping obligations.

Seismic “Traffic Light” System Could Limit Wastewater Disposal at UIC Class II Wells

Another distinction of the Act is its provision establishing a regulatory program to address seismicity resulting from the underground injection of wastewater produced by oil and gas wells. The Act's so-called “traffic light” protocol would allow activity that leads to small earthquakes but would shut down injection wells when public safety is perceived to be at risk.²⁸ When earthquakes raise concern for public health and safety, extra monitoring would be required along with efforts to reduce the threat, which could lead to state officials ordering disposal operations to be scaled back or even stopped.²⁹ The Act orders the State Geological Survey to assist Illinois DNR in developing the “traffic light” system and establishing unacceptable seismic activity levels once the Act becomes law.³⁰ Ohio's Department of Natural Resources implemented earthquake-related regulations in 2012 for disposal wells after a series of seismic events was tied to a certain well in Youngstown used for the disposal of brine, including flowback water produced by hydraulic fracturing operations. The Act is the first legislation to cite the traffic light system.

Authorizes Citizen Suits and Production Taxes

Also included in the Act are several provisions addressing investigative and enforcement authority, including a provision allowing citizen suits to compel compliance.³¹ Violations of the Act or other Illinois regulations may result in criminal or civil sanctions, including, but not limited to, fines that may be increased with each violation or prosecution by the Illinois Attorney General.³²

The Act's economic provisions and promise for new jobs, however, cannot be overlooked and perhaps are the driving force behind the overwhelming support the Act received in the Illinois House (108–9) and Senate (52–3–4), and by Governor Quinn. The Act allows the State of Illinois to levy a tax on each well based on the average production level for that well. The tax rate varies from three to five percent of the value of the oil or gas produced.³³ Other provisions reduce the tax rate by up to a quarter percent if at least fifty percent of the operators of the well site are Illinois construction workers paid at or above the state minimum wage.³⁴ In addition to increased state revenue, the exploration and production in the New Albany Shale would create potentially thousands of jobs in southern Illinois, further boosting the state economy.

For further information, please contact Vinson & Elkins lawyers [Larry Nettles](#) or [Jennifer Cornejo](#) or one of the members of V&E's Shale and Fracking practice group: [John B. Connally](#), [Casey Hopkins](#), [Jim Prince](#), [Bob Schick](#), [Sue Snyder](#), or [Jim Thompson](#). Visit our website to learn more about V&E's Environmental practice.

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¹ S.B. 1715, 98th Gen. Assem., Reg. Sess. (Ill. 2013) (hereinafter S.B. 1715).

² 62 Ill. Adm. Code Part 240.

³ S.B. 1715 § 20.

⁴ *Id.* §§ 5, 20.

⁵ *Id.* § 87.

⁶ *Id.* §§ 80(b)–(c).

⁷ *Id.* § 85.

⁸ *Id.* § 75(c)(1).

⁹ *Id.* § 75(c)(7).

¹⁰ *Id.* § 75(c)(5).

¹¹ *Id.* § 75(c)(14).

¹² *Id.* §§ 40(a)–(b).

¹³ *Id.* § 40.

¹⁴ *Id.* § 40.

¹⁵ *Id.* § 45(a).

¹⁶ *Id.* § 45(b).

¹⁷ *Id.* § 45(d).

¹⁸ *Id.* § 35(b).

¹⁹ *Id.* § 75(f).

²⁰ *Id.* § 110.

²¹ *Id.* § 77(h).

²² *Id.* § 77(j).

²³ *Id.* § 77(f).

²⁴ *Id.* § 35(b).

²⁵ *Id.* § 25.

²⁶ *Id.* § 70.

²⁷ *Id.* § 70(d)(4).

²⁸ *Id.* § 97(c).

²⁹ *Id.* § 97(d).

³⁰ *Id.* § 97(b).

³¹ *Id.* § 102(h).

³² *Id.* §§ 100–01.

³³ *Id.* § 2–15.

³⁴ *Id.* § 2–17.