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News & Insights from the Marcellus and Utica Shales



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USEPA Issues New Air Regulations for Oil and Gas Industry

On April 17, 2012, the United States Environmental Protection Agency ("USEPA") finalized its long-anticipated updated New Source Performance Standards ("NSPS") and National Emissions Standards for Hazardous Air Pollutants ("NESHAP") for the oil and gas sector, which include first-time federal air standards for hydraulically fractured natural gas wells. This suite of regulations, issued under the federal Clean Air Act, was finalized pursuant to a Consent Decree entered by the D.C. District Court in conjunction with a lawsuit filed against USEPA in January 2009 by WildEarth Guardians and the San Juan Citizens Alliance. The rules will be published in the *Federal Register* in the coming weeks, and will take effect 60 days following publication.

Perhaps most significantly, the new rule package ultimately requires owners and operators of natural gas wells that are hydraulically fractured to reduce emissions of volatile organic compounds ("VOCs") during well completion operations through the use of reduced emissions completions ("RECs" or "green completions"). For purposes of the new regulations, "reduced emission completion" is defined as "well completion following fracturing or refracturing where gas flowback that is otherwise vented is captured, cleaned, and routed to the flow line or collection system, re-injected to the well or

In The News



Pa. Supreme Court Endorses Subjective Test in **Jedlicka**

by Kevin M. Eddy
Pittsburgh

On March 26, 2012, in *T.W. Phillips v. Jedlicka*, the Pennsylvania Supreme Court affirmed the test for determining whether an oil and gas lease has produced in paying quantities depends on the operator's good faith judgment and endorsed the subjective test over the objective test. The Supreme Court confirmed that Pennsylvania courts must consider and analyze the operator's subjective good-faith judgment in maintaining operation of the well to determine whether a well is producing "in paying quantities."

The lawsuit stems from a 1928 lease of oil and gas rights in a 163-acre tract in Indiana County, Pennsylvania. The term of the lease was for "two years, and as long thereafter as oil or gas is produced in paying quantities." Over the years, the parcel was subdivided and Ann Jedlicka eventually owned 70 acres. Her parcel contained a well that was drilled in 1929. In 2004, T.W. Phillips assigned the leasehold to co-defendant PC Exploration, Inc., who drilled four more wells on Ms. Jedlicka's property and planned to drill four more.

Read the full article on our [website](#).

another well, used as an on-site fuel source, or used for other useful purpose that a purchased fuel or raw material would serve, with no direct release to the atmosphere." Green completions are not required for new exploratory wells or delineation wells, or for hydraulically fractured "low pressure" gas wells, which instead must capture and direct flowback emissions to a completion combustion device.

In response to comments from the industry, USEPA has established a two-phased approach to implementing this requirement to allow sufficient time for the order and manufacture of the necessary REC equipment. During the initial phase, which lasts until January 1, 2015, owners and operators can elect to reduce VOC emissions by flaring using a completion combustion device that burns off the gas that would otherwise escape as an alternative to RECs, unless state or local requirements prohibit such combustion or combustion would be a safety hazard. Owners and operators who pursue this option remain subject to "a general duty to safely maximize resource recovery and minimize releases to the atmosphere during flowback and subsequent recovery." The second (and final) phase begins on January 1, 2015, at which point owners and operators must achieve VOC emissions reductions through RECs. To encourage the use of green completions earlier than required, the new rules provide that refractured and recompleted natural gas wells will not be considered "modified"-and therefore will not be considered affected facilities-if well owners and operators use RECs rather than flaring to reduce emissions following such refracturing, as long as the advance notification, recordkeeping and annual reporting requirements for new wells are met. In justifying this exemption in the Preamble to the final rule, USEPA reasons that the increase in emissions from natural gas wells that have implemented these controls will be *de minimis*.

Read the full article on our [website](#).



Update on Pa. Municipality Act 13 Lawsuit

by [Michael G. Connelly](#)
Pittsburgh

As reported in our March update, seven Pennsylvania municipalities filed suit in the Commonwealth Court on March 29, 2012, challenging the provision of Act 13 providing that state law preempts the local regulation of natural gas drilling by municipalities and townships. After an initial hearing on the lawsuit on April 11, 2012, Commonwealth Court Judge Keith Quigley [ordered a 120-day stay](#) of the enforcement of the provision regarding local regulation of natural gas drilling. The Court held that, to the extent that Chapter 33 of Act 13 may be interpreted to immediately preempt pre-existing local ordinances, a preliminary injunction was issued to prevent enactment of that provision of Act 13 pending further order of Court.

Read the full article on our [website](#).



Morgantown, W.Va. Works Around Fracking Ban Overturn

As mentioned in previous newsletters, Spilman led the charge in August 2011 to overturn a fracking ban enacted by the city council of Morgantown, W.Va. With the ban successfully overturned, the city turned to a zoning approach to regulate extractive industry land use, despite the state's passage of The Natural Gas Horizontal Well Control Act this past December.

Click [here](#) to read more.

Featured Shale Team Member

J.C. "Max" Wilkinson (Charleston, W.Va.)

Max has 15 years of experience primarily in energy sector enforcement, litigation and permitting. He served as Corporate Counsel for ICG, LLC and was counsel to the Virginia Department of Mines, Minerals and Energy's Division of Mined Land Reclamation



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while serving as an Assistant Attorney General. Max has extensive experience in energy industry environmental issues from both a private sector and regulatory perspective. Click [here](#) to read his full professional biography.

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