



Environmental, Safety & Health Review – United States

Fall 2011

Inside

Recent Ohio Legislative and Regulatory Initiatives in Shale Gas Development.....	2
Kendra S. Sherman	
Failure of BLM to Base Decision on Administrative Record Results in Vacation of Right-of-Way Denial.....	4
Ronda Sandquist, Kristi J. Livedalen and Rodney R. Patula	
New IRS Code Tax Benefits for Solid Waste Disposal Facilities.....	5
Catherine Corrigan Tompkins	
Nanomaterials: Reward Versus TSCA Risk.....	7
Whitney Todd	

Recent Ohio Legislative and Regulatory Initiatives in Shale Gas Development

Kendra S. Sherman
Principal, Columbus
+1.614.365.2726

The exploration of Marcellus and Utica Shale, and its potential for the creation of thousands of jobs in Ohio, is driving several significant legislative and regulatory initiatives aimed at the myriad of issues associated with developing this important resource. As the pace of exploration and development picks up, staying ahead of the game on legal and regulatory developments is critical for all potential shale gas players.

Authority of Ohio Department of Natural Resources and Ohio Environmental Protection Agency

The Ohio Department of Natural Resources (ODNR) has primary regulatory authority over oil and gas drilling activity in Ohio, including regulations for well construction, siting, design and operation. ODNR also regulates disposal of brine and drilling fluids from oil and gas drilling/production, and regulates Class II underground injection wells used for disposal of waste fluids from oil and gas drilling/production operations and transporters hauling these fluids in Ohio. The Ohio Environmental Protection Agency (Ohio EPA), on the other hand, has water, solid waste and air regulations that are applicable to oil and gas drilling activities. Ohio EPA's requirements reduce impacts to wetlands, streams, rivers or other state waters from the construction of a drill site, require air permits for equipment at the drill site, and govern the proper management and disposal of waste from drilling activities.

At times the regulatory authority of ODNR and Ohio EPA appears to overlap and intersect on shale gas issues. In an effort to clarify these issues, ODNR released the attached table which summarizes each agency's regulatory authority:

Regulatory Issue	ODNR	Ohio EPA
Drilling in the shale deposits	<p>Issues permits for drilling oil/gas wells in Ohio.</p> <p>Sets requirements for proper location, design and construction of wells.</p> <p>Inspects and oversees drilling activity.</p> <p>Requires controls and procedures to prevent discharges and releases.</p> <p>Requires that wells no longer used for production are properly plugged.</p> <p>Requires registration for facility owners with the capacity to withdraw water at a quantity greater than 100,000 gallons per day.</p>	<p>Requires drillers obtain authorization for construction activity where there is an impact to a wetland, stream, river or other water of the State.</p> <p>Requires drillers to obtain an air permit to install and operate for units or activities that have emissions of air pollutants.</p>
Pumping water to the drill site from a public water supply system		Requires proper containment devices at the point of connection to protect the public water system.

Regulatory Issue	ODNR	Ohio EPA
Wastewater and drill cutting management at drill sites	<p>Sets design requirements for on-site pits/lagoons used to store drill cuttings and brine/flowback water.</p> <p>Requires proper closure of on-site pits/lagoons after drilling is completed.</p> <p>Sets standards for managing drill cuttings and sediments left on-site.</p>	Requires proper management of solid wastes shipped off-site for disposal.
Brine/flowback water disposal	<p>Regulates the disposal of brine and oversees operation of Class II wells used to inject oil/gas-related waste fluids.</p> <p>Reviews specifications and issues permits for Class II wells.</p> <p>Sets design/construction requirements for Class II underground injection wells.</p> <p>Responds to questions/concerns from citizens regarding safety of drinking water from private wells from oil/natural gas drilling.</p>	
Brine/flowback water hauling	Registers transporters hauling brine and oil/gas drilling related wastewater in Ohio.	

For items within Ohio EPA’s regulatory purview, Ohio EPA has been very active. For example, on May 16, 2011, Ohio EPA sent a letter to ODNR advising that it will no longer approve permit applications for the disposal of brine wastewater at publicly owned wastewater treatment works. In June 2011, Ohio EPA released a guidance document on the recommendations for water well sampling before oil and gas drilling. This guidance provides an overview for well owners who wish to collect samples prior to oil and gas drilling activities and includes information on certified laboratories, sampling costs and following proper procedures and sampling methods. On October 31, 2011 Ohio EPA announced that it was seeking public comments on a draft general permit that controls air emission standards for shale gas drilling. The new standards do not affect actual drilling and fracking activities, but instead regulate emissions from generators, dehydration systems and other “peripheral” activities that go on in the drilling process. Ohio EPA’s draft general permit is applicable to several emissions sources found at most shale gas production sites including internal combustion engines, turbine-powered generators, dehydration systems, storage tanks, flares and unpaved roadways. The permit contains emissions limits, operating restrictions, and monitoring, testing and reporting requirements. Public comments on the draft general permit were accepted through November 28, 2011.

Ohio Legislative Developments

In addition to the regulatory steps taken by Ohio EPA, during the past two months, several pieces of legislation related to shale gas drilling have been introduced or advanced in the Ohio Legislature, including:

S.B. 212 (Sponsored by Senator Michael J. Skindell [D-Lakewood]). Establishes requirements governing well stimulation, brine disposal and water that is used in the drilling and operation of oil and gas wells on state land, including a requirement that oil and gas permittees pay a 5-percent overriding royalty for each well stimulated. *Status: Referred to Agriculture, Environment & Natural Resources Committee on September 20, 2011.*

H.B. 351 (Sponsored by Representative Nikki J. Antonio [D-Lakewood]). Establishes requirements governing well stimulation, brine disposal and water used in the drilling and operation of oil and gas wells, including a requirement that oil and gas permittees pay a 7-percent overriding royalty for each well stimulated. *Status: Referred to Agriculture & Natural Resources Committee on November 9, 2011.*

S.B. 213 (Sponsored by Senator Michael J. Skindell [D-Lakewood]). Establishes a moratorium on horizontal stimulation of oil and gas wells until US EPA publishes a report containing the results of a study of the relationship of hydraulic fracturing to drinking water resources and the Chief of the Division of Oil and Gas Resources Management issues a report analyzing how Ohio's rules address issues raised in the US EPA report. *Status: Referred to Agriculture, Environment & Natural Resources Committee on September 20, 2011.*

H.B. 345 (Sponsored by Representative Denise Driehaus [D-Cincinnati]). Companion legislation to S.B. 213 which establishes a moratorium on horizontal stimulation of oil and gas wells until US EPA publishes a report containing the results of a study of the relationship of hydraulic fracturing to drinking water resources and the Chief of the Division of Oil and Gas Resources Management issues a report analyzing how Ohio's rules address issues raised in the US EPA report. *Status: Referred to Agriculture & Natural Resources Committee on November 9, 2011.*

S.B. 78 (Sponsored by Senator Michael J. Skindell [D-Lakewood]). Bans the taking or removal of oil or natural gas from and under the bed of Lake Erie. *Status: Referred to Agriculture, Environment & Natural Resources Committee on February 23, 2011.*

H.B. 304 (sponsored by Representative Nickie Antonio [D-Lakewood]). Companion legislation to S.B. 78 which bans the taking or removal of oil or natural gas from and under the bed of Lake Erie. *Status: Referred to Agriculture & Natural Resources Committee on September 13, 2011.*

On June 30, 2011, Governor Kasich signed H.B. 133 that created the Oil and Gas Leasing Board and established

procedures by which the Board may enter into leases for oil and gas production on land owned or under the control of a State agency. This law became effective on September 30, 2011.

In an effort to keep up with the rapid pace of shale gas development in Ohio, new regulatory and legislative initiatives in Ohio will continue to be introduced and implemented quickly. Shale well operators, developers and all others impacted by Ohio's shale plays should follow these initiatives to plan and prepare for their impact on shale gas activities. Federal legislative and regulatory developments on shale gas issues should also be monitored closely as well. Stay tuned for more updates from Squire Sanders on these issues.

Failure of BLM to Base Decision on Administrative Record Results in Vacation of Right-of-Way Denial

Ronda Sandquist
Partner, Phoenix
+1.303.623.1317

Kristi J. Livedalen
Of counsel, Phoenix
+1.303.623.3052

Rodney R. Patula
Partner, San Francisco
+1.415.954.0214

On September 28, 2011 the Interior Board of Land Appeals of the US Department of Interior (Board of Appeals) took the unusual step of setting aside a decision of the Bureau of Land Management (BLM) denying three right-of-way (ROW) applications filed by CAM-Colorado, LLC and CAM Mining LLC (hereinafter CAM), both subsidiaries of Rhino Energy of Lexington, Kentucky. The Board of Appeals set aside the decision, on the grounds that the BLM failed to support their decision based upon a properly compiled administrative record.

CAM is developing a new underground coal mine project, known as Red Cliff, located in Northwestern Colorado, which would produce more than 8 million tons of clean coal per year to be transported by rail. The draft Environmental Impact Statement expressly acknowledged that the purpose and need for this project is to provide better access to CAM's existing coal leases in the area immediately adjacent to Red Cliff, as well as potential federal coal leases within the Red Cliff area. Access requires ROWs on BLM lands for surface facilities and linear features essential for the processing and transport of the coal.

CAM, at BLM's instruction, filed its first ROW application in 2005 seeking land use authorization for a water pipeline, coal load-out facility, railroad line and associated access roads. Almost a year later, CAM filed an application to lease 11,735 acres of federal coal. In 2009, CAM filed two other ROW applications, which included additional overland access. In 2010, after more than five years of statutory reviews by BLM and third-party contractors (at CAM's expense), BLM abruptly asked CAM to withdraw its ROW applications. CAM declined and, in April 2011, the BLM denied CAM's ROW applications with BLM asserting for the first time there was no need for the ROWs unless and until CAM had been awarded new federal coal leases (the Decision).

In May 2011, Squire Sanders, on CAM's behalf, filed an appeal of the Decision with the Board of Appeals. Two weeks later, the BLM transmitted to the Board of Appeals a 60,000-page administrative record, but refused to provide the same record to CAM – even after CAM sought and obtained a Board order requiring the BLM to produce the record to CAM.

After months of litigating Freedom of Information Act and administrative procedure issues, the BLM moved in August for the Board's permission to withdraw some documents from the record and to add other documents. CAM responded with an unprecedented cross-motion to vacate the Decision, reinstate the ROW applications and remand the case to the BLM. After extensive briefing and parallel FOIA proceedings, including preparation by Squire Sanders of a draft complaint for mandamus to be filed in federal court, on September 28, the

Board of Appeals issued its order granting CAM's cross-motion in all respects.

The Board directed that the BLM “[o]n remand, ...should consider the matters raised in this appeal [that is, the merits of the appeal]. Should BLM again reject the ROW applications, it should clearly set forth its rationale for doing so in its decision and provide appellants the right of appeal. If an appeal is filed, BLM **shall properly compile** the administrative record, forward it to the Board, and make a copy available for appellants.” (Emphasis in original).

This unusual Decision by the Board of Appeals is a significant success for CAM and ensures that the BLM will need to properly consider the merits of the ROW applications on remand. The grant also is important precedent for other applications before the BLM and can be relied upon to challenge a BLM decision where the basis of the agency action is uncertain in any material respect or is not adequately supported by the administrative record compiled by the agency.

New IRS Code Tax Benefits for Solid Waste Disposal Facilities

Catherine Corrigan Tompkins

Partner, Cleveland
+1.216.479.8470

In August 2011, the Internal Revenue Service (IRS) issued final regulations governing solid waste disposal facilities. These long awaited regulations clarify IRS rules relating to financing solid waste disposal facilities and are intended to implement a policy to encourage recycling of solid waste. As a result, a company embarking on a capital project to construct a new facility or expand an existing one might benefit from the use of tax-exempt financing and should consider whether all or a portion of the project would qualify as a “solid waste disposal facility” under these regulations.

Benefits of Tax-Exempt Financing

Tax-exempt bonds are issued by a governmental entity and, when issued for the benefit of a private company, the bond proceeds are loaned to the company to be repaid over the term of the bonds. There can be significant economic benefits to financing eligible costs through tax-exempt financing in that tax-exempt borrowing is typically available at lower interest rates and for a longer term than conventional borrowing. In addition, real property tax exemptions or other benefits may apply depending on the jurisdiction of the facility.

The Internal Revenue Code (Code) permits tax-exempt financing of certain private facilities that qualify as “exempt facilities” including solid waste disposal facilities. Companies in industries, such as mining, metals, steel, refining, chemicals, paper, landfills and electric utilities, have utilized tax-exempt solid waste financing for qualifying portions of capital projects that have a recycling component. Some of the qualifying projects include all or portions of: tailings ponds; cokers that process vacuum residuals; bag houses, precipitators or scrubbers; paper machines; landfills; and related and ancillary functions and support facilities.

What Is a Solid Waste Disposal Facility?

For purposes of the Code, a solid waste disposal facility is a facility that (1) processes solid waste in a qualified solid waste disposal process; (2) performs a preliminary function (i.e., a function to collect, separate, sort, store, treat, process, disassemble or handle solid waste that is preliminary to and directly related to a qualified solid waste disposal process); or (3) is functionally related and subordinate to either of the above.

What Is Solid Waste?

The final Code regulations define solid waste as garbage, refuse, and other solid material derived from any agricultural, commercial, consumer, governmental, or industrial operation or activity if it is both (1) used or residual material, and (2) reasonably expected to be introduced into a qualified solid waste disposal process within a reasonable time after such

generation, purchase or acquisition. Significantly, these final regulations eliminate the “no value” test or restriction that any property that had a market value could not constitute solid waste – a rule that created considerable uncertainty regarding the financing of solid waste facilities. Excluded from the new definition of solid waste: virgin material (except under certain circumstances), solids within liquids and liquid waste, precious metals (except under certain circumstances), hazardous material that must be disposed of in a regulated facility and radioactive material subject to regulation under the Nuclear Regulatory Act.

What is a Solid Waste Disposal Process?

A qualified solid waste disposal process may employ any biological, engineering, industrial, or technological method for disposing or recycling the waste. The regulations provide for three eligible types of solid waste disposal processes including (1) a final disposal process (such as taking solid waste to a landfill), (2) an energy conversion process (such as burning waste to capture heat/steam) and (3) a recycling process (such as recycling old tires into road bed material or converting waste paper into other products).

What About Mixed-Use Facilities?

If a facility is used for both a qualified solid waste disposal function and other functions, then the costs of the facility are allocated among the qualified and non-qualified functions. In addition, there is a special rule for mixed input processes. If the annual percentage of solid waste used in a process is at least 65 percent of the materials used, then no allocation is required and all of the costs of the property used for such process or function are treated as allocable to a qualified solid waste disposal process.

Thus, if you are considering a project that might qualify as a solid waste disposal facility under the new Code regulations, it may be beneficial to evaluate the applicability of the tax benefits that are available and Squire Sanders lawyers can assist in that analysis.

Nanomaterials: Reward Versus TSCA Risk

Whitney Todd

Associate, Cleveland

+1.216.479.8410

With the rapid advancement of nanotechnology and introduction of nanomaterials – tiny materials manufactured at the molecular and even atomic level – into commerce, the lure of entering the nanotechnology field is certainly appealing. However, the risk may well outweigh the reward as US EPA seeks to determine the extent to which nanomaterials may be subject to Toxic Substances Control Act (TSCA)¹ requirements.

US EPA previously stated it would deem a nanoscale version of a substance listed on the TSCA Inventory to be an “existing” chemical substance², therefore, not required to meet TSCA’s premanufacturing notification requirements for “new” – i.e., not on the TSCA Inventory – chemical substances. However, US EPA has since reviewed that approach, expressing concern that nanomaterials may have different features from their non-nanoscale counterparts. Accordingly, US EPA is now pursuing a burdensome comprehensive regulatory scheme under TSCA to “ensure that nanomaterials are manufactured and used in a manner that protects against unreasonable risks to human health and the environment.”³ This regulatory approach includes (1) premanufacturing notifications (PMNs) for “new” chemical substances, (2) a broad Significant New Use Rule (SNUR) under TSCA §5(a)(2), (3) an information gathering rule under TSCA §8(a) to establish reporting requirements for nanomaterials already on the market, and (4) a rule, under TSCA §4(a), to require manufacturers and processors to test certain nanomaterials that are already in commerce.

US EPA anticipates proposing the broad SNUR and the information gathering and testing rules shortly. But since 2005,

US EPA has already received and reviewed more than 100 new chemical notices under TSCA for nanomaterials and has thus permitted limited manufacture of “new” chemical nanomaterials through administrative orders or specific SNURs under TSCA. These orders can and have led to regulations applicable to all manufacturers of certain nanomaterials. Moreover, recent legislative proposals to overhaul TSCA include provisions specifically aimed at identifying nanomaterials as “new” chemicals. Accordingly, it is clear that the risk of TSCA regulation of nanomaterials is indeed very real.

¹ 15 U.S.C. §§ 2601 to 2697.

² See US EPA, “TSCA Inventory Status of Nanoscale Substances – General Approach.” (Jan. 23, 2008).

³ US EPA, “Control of Nanoscale Materials under the Toxic Substances Control Act” (last modified Apr. 29, 2011).

Squire Sanders Environmental, Safety & Health Practice

Karen A. Winters

Chair, Environmental, Safety & Health Practice Group
Columbus, +1.614.365.2750

Rob Elvin

European Head of the Environmental, Safety & Health Practice Group
Manchester, +44.161.830.5257

Jessica E. DeMonte

Editor, *Environmental, Safety & Health Review – United States*
Columbus, +1.614.365.2809 or Chicago, +1.312.781.1123

Environmental, Safety & Health

In today's global economy, environmental issues know no boundaries – forcing companies across the globe to pay close attention to ongoing compliance issues and be prepared when a crisis or regulatory action surfaces. Whether it is the need for counsel pertaining to a compliance matter, an industrial accident, a proposed regulation or allegations of environmental violations, Squire Sanders is ready to assist companies in a range of industries including aerospace, automotive, biotechnology, mining, iron and steel, pulp and paper, chemical and waste management in navigating the maze of complex regulations that affect multinational business operations. We offer the full range of services to corporations with business operations and investment interests in the European Union, Russia, Asia, the Middle East and the Americas.

- Compliance audits
- Dispute resolution/litigation
- Emissions credit trading
- Environmental impact assessments
- International trading issues in environmental law
- Market access
- Permitting and licensing
- Rapid emergency response counseling
- Regulatory counseling
- Transactional support

BEIJING · BERLIN · BIRMINGHAM · BRATISLAVA · BRUSSELS · BUDAPEST · CINCINNATI · CLEVELAND · COLUMBUS · FRANKFURT · HONG KONG · HOUSTON
KYIV · LEEDS · LONDON · LOS ANGELES · MADRID · MANCHESTER · MIAMI · MOSCOW · NEW YORK · NORTHERN VIRGINIA · PALO ALTO · PARIS · PERTH
PHOENIX · PRAGUE · RIO DE JANEIRO · SAN FRANCISCO · SANTO DOMINGO · SHANGHAI · TAMPA · TOKYO · WARSAW · WASHINGTON DC · WEST PALM BEACH
INDEPENDENT NETWORK FIRMS: BEIRUT · BOGOTÁ · BUCHAREST · BUENOS AIRES · CARACAS · LA PAZ · LIMA · PANAMÁ · RIYADH · SANTIAGO