

Client Alert

June 2012

NC General Assembly Authorizes Hydraulic Fracturing

On June 21, 2012, the North Carolina General Assembly passed the Clean Energy and Economic Security Act (Senate Bill 820), opening the door to hydraulic fracturing in North Carolina. The Act does not authorize hydraulic fracturing immediately but instead removes existing statutory hurdles and establishes a framework under which fracturing will be permitted in the future. Specifically, it creates the N.C. Mining and Energy Commission and directs it, along with other agencies, to establish a regulatory program for the management of oil and gas exploration and development in North Carolina and for the use of horizontal drilling and hydraulic fracturing to achieve development of oil and gas resources. Although portions of the act become effective immediately, it is impossible to predict when legalized hydraulic fracturing will begin in North Carolina; the Mining and Energy Commission is directed to complete rulemaking by October 1, 2014, but no permits for exploration or for hydraulic fracturing operations can be issued until the General Assembly takes further action to authorize the issuance of such permits.

Following ratification, the bill was presented to Governor Beverly Perdue, who has 10 days to sign or veto the bill. Opponents of the bill have urged the governor to veto it, and the Southern Environmental Law Center and a collection of environmental advocacy groups ran a full-page advertisement in the *Raleigh News & Observer* urging Governor Perdue to veto the bill. If the governor vetoes the bill, it will be returned to the Senate and House for an override vote. The General Assembly has already overridden eight vetoes in the 2011–2012 session.

The legislation was preceded by studies conducted by the Departments of Environment and Natural Resources, Commerce and Justice, and by the Rural Advancement Foundation, which concluded that oil and gas exploration and development using hydraulic fracturing and horizontal drilling could be performed safely provided appropriate regulatory controls were in place. There was also a series of hearings for the purpose of collecting public comments and concerns. Hydraulic fracturing, or hydrofracking, the term popular among opponents, is a technology that allows the recovery of oil and gas encased in subsurface shale deposits common in the Triassic Basin geologic area in central North Carolina, primarily the Deep River Basin, as well as in the smaller Dan River Basin. Claims of groundwater contamination and other environmental concerns related to the use of the technology in Pennsylvania and other states have generated vocal opposition to the legislation.

Prior to the passage of the Act, injection of hydraulic fracturing fluids was prohibited by a general law governing underground injection of wastes. The Act explicitly provides that injection of hydraulic fracturing fluid for the exploration or development of natural gas resources is not subject to this prohibition. The Act also exempts horizontal drilling in connection with hydraulic fracturing from a pre-existing ban on wells that are not drilled vertically.

The Act consists of several parts:

1. Legislative findings acknowledging the recommendations of the final report of the studies and authorizing the use of hydraulic fracturing and horizontal drilling once a regulatory program has been established.

2. Reconstitution of the Mining Commission as the Mining and Energy Commission.
3. Directing the establishment of a regulatory program by the Mining and Energy Commission, the Environmental Management Commission and the Commission for Public Health. The bulk of the program will be developed by the Mining and Energy Commission, including regulations regarding permits, required disclosures and reporting, safety measures, management of wastes, construction standards, siting standards, and limits of water use.
4. Creation of exceptions from prohibitions on horizontal drilling and hydraulic fracturing, with a prohibition on the issuance of permits pending further authorization by the General Assembly.
5. Landowner and public protections, including notifications to landowners for activities involving exploration or development of mineral resources, creation of a presumption of liability for water contamination, compensation, reclamation and remediation requirements, required indemnifications, mandatory terms and disclosures in leases to protect landowners, and registration of representatives of oil and gas operators and developers who acquire, manage, or negotiate terms for interests in land for oil and gas interests.
6. Creation of a Joint Legislative Commission on Energy Policy to exercise legislative oversight for the programs, policies and actions established under the authority of the Act.

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