

University of Colorado Law School

Colorado Law Scholarly Commons

Shale Plays in the Intermountain West: Legal
and Policy Issues (November 12)

2010

11-12-2010

SLIDES: Evolving Policy on Shale Plays

John Martin

Follow this and additional works at: <https://scholar.law.colorado.edu/shale-plays-in-intermountain-west>



Part of the Climate Commons, Energy and Utilities Law Commons, Energy Policy Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Policy Commons, Hydraulic Engineering Commons, Natural Resource Economics Commons, Natural Resources and Conservation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, Oil, Gas, and Energy Commons, Oil, Gas, and Mineral Law Commons, Science and Technology Law Commons, State and Local Government Law Commons, Sustainability Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

Martin, John, "SLIDES: Evolving Policy on Shale Plays" (2010). *Shale Plays in the Intermountain West: Legal and Policy Issues (November 12)*.

<https://scholar.law.colorado.edu/shale-plays-in-intermountain-west/8>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



Evolving Policy on Shale Plays

John Martin

Crowell & Moring LLP

Regulatory Context

- » The public's perception of hydraulic fracturing

Public Perception

» Water contamination

Hydraulic Fracturing/Allegations of Contamination

Public Perception

» Water scarcity

*"Whiskey is for drinking; water is for fighting over."
– attributed to Mark Twain*

Public Perception

» Spills/contamination

Public Perception

- » Fracking and earthquake activity

Hydraulic Fracturing Policy

2003 Memorandum Agreement

- 3 Largest oil service companies agreed to eliminate diesel fuel from fracturing coalbed methane seams

» 2004 EPA Study

- Injection of fracturing fluids into coalbed methane wells posed little or no threat to underground sources of drinking water
- Identified diesel fuel as a constituent of concern

Safe Drinking Water Act

- » Amended by Energy Policy Act of 2005
 - Exempts hydraulic fracturing from SDWA regulation
 - Can the EPA regulate the use of diesel fuel to fracture formations?
 - Current EPA Position
 - Regulation under UIC Program for Class II wells?
 - Diesel as the primary constituent?
 - Diesel as an additive?

Clean Water Act and State Regulation

- » CWA covers the discharge of water produced by hydrofracturing regulations
- » Regulated by the National Pollutant Discharge Elimination System

Jurisdictional Limits of Clean Water Act

» Water Volume vs. Water Quality?

- CWA precludes regulation of water rights/use of water
- Stream damage associated with water volume as opposed to water quality?
- Volume of contaminants?

Jurisdictional Limits of Clean Water Act

- “Navigable Waters” of the United States
- CWA jurisdiction over intermittent or ephemeral streams?

Ongoing EPA Study on Hydraulic Fracturing

- » Congress asked EPA to study:
 - “[T]he relationship between hydraulic fracturing and drinking water, using a credible approach that relies on the best available science, as well as independent sources of information.”
 - Will be a multi-year study
 - EPA is gathering information from operators and from service companies

Effluent Limit Guidelines

- » New category of effluent guidelines for discharge of hydraulic fracturing fluids?
- » Environmental organizations and landowners associations very interested in promulgation of new Effluent Limit Guideline for hydraulic fracturing

The Wyoming Disclosure Rules

- » States have authority to regulate fracturing
- » 2010 Wyoming disclosure rules – most far reaching disclosure requirements
- » Confidentiality issues

Safe Drinking Water Act

- » § 1421(d) – Definition of “underground injection”
 - (1)(A) - means the subsurface emplacement of fluids by well injection; and
 - (1)(B) **excludes** –
 - (i) the underground injection of natural gas for purposes of storage; and
 - (ii) the **underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.**

How did we get here?

- » Federal regulation of fracturing
 - The Safe Drinking Water Act
 - Underground Injection Control Program
 - The 2004 EPA Study & 2003 Memorandum Agreement
 - Energy Policy Act of 2005 (Hydraulic Fracturing Exemption)
 - Clean Water Act
 - State Regulation