

## REGULATORS FOCUS ON "FRACKING"

Hydraulic fracturing, or "fracking," is a process used to maximize the extraction of underground natural resources including natural gas, oil, and geothermal energy. Water mixed with sand and chemicals is pumped into geologic formations at high pressure to open or enlarge fractures and allow natural gas or other resources to flow more freely. After the process is complete, the fracturing fluids, termed flowback, return to the surface and are stored for disposal or recycling.

The use of hydraulic fracturing and the attendant environmental concerns are not new. In 1997, in response to a challenge to EPA's determination that hydraulic fracturing was not subject to the Underground Injection Control (UIC) program brought by the Legal Environmental Assistance Foundation (LEAF), the Eleventh Circuit Court of Appeals held that hydraulic fracturing of coalbed methane wells was subject to regulation under Alabama's UIC program. After this ruling, EPA began a study of the risk associated with this type of fracturing and in 2004 released a report, Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs (EPA 816-R-04-003). According to the study, hydraulic fracturing of coalbed methane wells posed little to no direct threat to underground sources of drinking water. Thereafter, Congress chose not to subject fracturing to federal regulation under the Clean Water Act as part of the 2005 Energy Act. Because Congress and the EPA have declined to institute federal oversight, regulation of hydraulic fracturing has largely been left to the states.

Over the past few years, the use of hydraulic fracturing has been on the rise, due in part to advances in available technology that have made the practice more profitable. The increased popularity of hydraulic fracturing to recover natural gas from coalbeds and shale gas formations has led EPA to further investigate the relationship between hydraulic fracturing and drinking water. EPA plans to complete the design for a \$1.9 million study this month and expects the initial results of the study to be available in late 2012. States are cautiously awaiting the results of the study, and one state – New York – has contemplated a ban on fracturing within the state pending the study's conclusion. Legislators have also introduced a bill, the Fracturing Responsibility and Awareness of Chemicals Act of 2009 (H.R. 2766, S. 1215), which would amend the Safe Drinking Water Act to subject hydraulic fracturing operations to restrictions on underground injection of fluids near drinking water sources and require companies to disclose the chemicals used in hydraulic fracturing operations.

Proponents of hydraulic fracturing urge that the process is safe because the fracturing occurs far below the water table and generally the wells are lined with concrete and steel, thereby posing little risk to drinking water. They also note that natural gas is a cleaner burning fuel than coal, emitting about half as much carbon dioxide, and argue that increased production of natural gas through fracking could help reduce greenhouse gas emissions. However, others fear that the rise of large-scale hydraulic fracturing will result in contamination of drinking water. These critics seek increased regulation of the process to ensure safety.

Alabama has proponents and critics of the process as well. Hydraulic fracturing of coalbed wells in Alabama has been a common practice for many years. According to a 2008 report by Jack C. Pashin of the Geological Survey of Alabama, shale formations are present in the Black Warrior Basin and Appalachian Thrust Belt in Alabama. Earlier this year, plans by Energen Corp. to hydraulically pressurize a well in West Alabama were met with concerns by environmental groups. However, state oil and gas officials maintain that current regulations adequately protect the environment. Regulations promulgated by the State Oil and Gas Board of Alabama contain provisions that specifically address hydraulic fracturing. A copy of the regulations is available on the Oil and Gas Board's website at [www.gsa.state.al.us](http://www.gsa.state.al.us).

## EPA Announces New Region 4 Administrator

On September 1, EPA announced the selection of Gwen Keyes Fleming as the new Regional Administrator for Region 4, which includes Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. As the Regional Administrator, Fleming will manage Region 4 activities, including local environmental protection efforts, under the direction of EPA Administrator, Lisa P. Jackson.

## Federal Judge Refuses to Relinquish Jurisdiction

A federal judge in New Jersey refused to relinquish jurisdiction or refrain from hearing a case involving alleged violations of the Resource Conservation and Recovery Act, 42 U.S.C. § 6901. See *Interfaith Community Organization, Inc. v. PPG Industries, Inc.*, No. 09-0480 (GEB), 2010 WL 2758718 (D.N.J. July 12, 2010). Defendant PPG Industries Inc. argued that the court should apply the doctrine of abstention, which allows a federal court to “decline to exercise jurisdiction so that a state court or agency will have the opportunity to decide the matters at issue,” based on a consent judgment reached in state court that requires PPG to remediate the site at issue in the federal case. The Court held that abstention was not warranted under the *Colorado River* doctrine, *Burford v. Sun Oil Co.*, or the primary jurisdiction doctrine.

## ADEM to Hold Hearings on Proposed Revisions to Division 3

On October 6, 2010 ADEM will hold a hearing on proposed revisions to Division 3 of the ADEM Administrative Code. ADEM proposes to modify its Prevention of Significant Deterioration (PSD) regulations, codified at Rule 335-3-14-.03, to comply with recent EPA amendments known as the Tailoring Rule. The proposed revision will include additional thresholds of 100,000 tons per year of greenhouse gas emissions for major sources and 75,000 tons per year of greenhouse gas emissions as a significance threshold. Additional information is available at [www.adem.state.al.us/PubHearings/PubHearings.htm](http://www.adem.state.al.us/PubHearings/PubHearings.htm).

## D.C. Circuit Rejects Constitutional Challenge to Unilateral Administrative Orders

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit held that unilateral administrative orders issued by EPA under CERCLA do not violate due process. In *General Electric Company v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010), the court rejected the plaintiff's contention that the orders violate the Due Process Clause because the orders are issued without a hearing before a neutral decision maker, and held that due process was satisfied because the recipient of the order may refuse to comply and force EPA to sue in federal court. The court also rejected plaintiff's claims that damage resulting from issuance of the order, such as decrease in stock price, violated due process. According to the court, these damages did not warrant due process protection because they were caused by market reactions to the order, rather than issuance of the order.

## Newly Released Standards Prevent Statute of Limitations Defense

In *State ex rel. Northern Pacific Center Inc. v. BNSF Railway Co.*, No. 08-CV-6385, 2010 WL 2777157 (D. Minn. July 14, 2010), a Minnesota federal district court held that a former property owner that remediated soil to the satisfaction of the state environmental agency in 2001 could be liable for claims filed by the current property owner in 2008 for costs incurred to remediate the soil to a higher standard despite the six-year statute of limitations. The court held that the construction of the permanent response action, necessary to trigger the running of the statute of limitations, did not occur until after the state environmental agency raised the soil remediation standards in 2003. Plaintiff's claims filed in 2008 were, therefore, timely.

## Litigation Ongoing in the Wake of the Gulf Oil Spill

The Judicial Panel on Multidistrict Litigation consolidated numerous claims related to the *Deepwater Horizon* oil spill in the Eastern District of Louisiana with U.S. District Judge Carl Barbier presiding. Additionally, the United States Department of Justice indicated this month that it may file a civil complaint for damages related to the spill.

## Grants Awarded in Alabama to Fund Recycling

In August, ADEM awarded over \$1.7 million in funds for the purchase of collection trucks, containers, bins, and other equipment to encourage recycling in Alabama. The funds resulted from a fee on solid wastes disposed in landfills in the state imposed by the Solid Wastes & Recyclable Materials and Management Act.

### [EPA Concludes First Case Under Mining and Mineral Processing Initiative](#)

In August, EPA announced that CF Industries, Inc. will spend approximately \$12 million to address RCRA violations at its phosphoric acid and ammoniated fertilizer manufacturing facility. This announcement marked the conclusion of EPA's first case under the National Enforcement Initiative for Mining and Mineral Processing. EPA continues investigations of other phosphoric acid facilities as part of the enforcement initiative.

### [EPA Announces Draft Plan for Protection of U.S. Waters](#)

EPA recently announced the release of its draft strategy for protection and restoration of U.S. waters titled "Coming Together for Clean Water: EPA's Strategy for Achieving Clean Water." EPA solicited comments on the plan and intends to issue the final document later this year.



## ATTORNEY PROFILES

**Richard E. Davis** is a partner with Starnes Davis Florie LLP. Richard's practice is primarily devoted to environmental litigation and regulatory compliance. He represents clients in federal and state courts in Alabama as well as in matters involving federal and state regulatory agencies. Richard's practice includes CERCLA, Clean Air, Clean Water, and RCRA litigation; natural resource and property damage claims; and land and water use issues. He also defends personal injury actions based on chemical exposure. Richard is a Fellow in the Litigation Counsel of America Trial Lawyer Honorary, was listed in the 2008 - 2010 editions of *Alabama Super Lawyers*<sup>®</sup> magazine for Environmental Litigation, was selected by his peers for inclusion in the 2011 edition of *Best Lawyers in America*<sup>®</sup>, and is Chair of the Alabama State Bar Environmental Law Section for the 2010 – 2011 term.

**J. Scott Dickens** is a partner with Starnes Davis Florie LLP. Scott's practice is primarily devoted to environmental and construction litigation. He has represented clients in all State and Federal Courts in Alabama, in arbitration proceedings before the American Arbitration Association and Alabama Building Commission, and in the United States Court of Federal Claims. Scott's practice includes CERCLA and RCRA litigation; architect and engineer liability claims, particularly relating to environmental issues; and construction related matters. He also frequently speaks at environmental and construction seminars. Scott is a 1996 graduate of Cumberland School of Law where he was a member of the *Cumberland Law Review*.

**Amber M. Whillock** is an associate with Starnes Davis Florie LLP. Amber's practice is primarily devoted to environmental litigation and regulatory compliance. While attending Cumberland School of Law, Amber was the Executive Editor of the *Cumberland Law Review*, a Thomley Scholarship Recipient, a George M. Stewart Banking Award Recipient and the recipient of numerous Scholar of Merit Awards. Amber was also active in the Phi Alpha Delta Law Fraternity and served as a Judge Abraham Caruthers Legal Research and Writing Teaching Assistant. Amber is currently an associate member of the Environmental Law Institute, and a member of the Birmingham and American Bar Associations.

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