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ILLINOIS'S HYDRAULIC FRACTURING REGULATORY ACT: A SUCCESSFUL COMPROMISE

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I. INTRODUCTION

This article briefly discusses the history of legislative action and negotiations that led up to the negotiation and promulgation of the Illinois Hydraulic Fracturing Regulatory Act (the Act) in June 2013. It also summarizes and discusses numerous provisions in the Act that were of particular interest to environmental groups engaged in negotiating the Act, as well as the Act's implementing regulations finalized in November 2014. Finally, it provides a brief discussion of the status of fracking activity in Illinois right now and a forecast for the near future. I note that the views expressed in this article are those of its author and do not necessarily represent the organizational views of the Environmental Law & Policy Center or any other environmental organization mentioned herein.

A. The History of the Hydraulic Fracturing Regulatory Act

In the spring 2011 legislative session, environmental groups began working on a bill regulating fracking. A limited bill (including provisions on chemical disclosure, pits, and well integrity) passed the Senate, but not the House. In the spring 2012 legislative session, House Speaker Michael Madigan became interested in fracking and made clear he wanted a more comprehensive bill that also provides revenue for the state. He worked with environmental groups, the Illinois Attorney General's office, and legislative staff to draft a comprehensive bill. That bill¹ was severely watered down at the last minute, and even with that watering down, garnered no industry support. The speaker and

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1. See Bill Status, S.D. 3280, 97th Gen. Assemb. (Ill. 2012) www.ilga.gov/legislation/BillStatus.asp?DocNum=3280&GAID=11&DocTypeID=SB&LegId=64455&SessionID=84&GA=97 (last visited Jan. 27, 2016) (amending Illinois Oil and Gas Act).

environmental groups were not willing to support it and called for a moratorium instead. However, that moratorium was never called for vote due to lack of support.

The following summer, the summer of 2012, Rep. John Bradley (D-Marion) made clear that he wanted to oversee multi-party negotiations to come up with a comprehensive bill, and he and other legislative leaders invited environmental groups, industry, and state agencies to the table. Knowing that a moratorium would be a very hard fight, the environmental groups took Bradley up on his invitation, lest a regulatory bill get drafted with no environmental input. Negotiations began in October 2012 and the bill² was signed into law as Public Act 98-0022 on June 17, 2013.³

B. Summary of the Act's Provisions

The Illinois Hydraulic Fracturing Regulatory Act contains many highly protective standards to ensure fracking is only done in a strictly regulated manner. For example, it contains some of the strongest protections against water pollution in the country. The Act prohibits open-air ponds for wastewater storage, instead requiring closed tanks for wastewater storage except temporarily in unforeseeable circumstances.⁴ It includes strong waste fluid management provisions, mandating that wastewater be reused in fracking or injected deep underground,⁵ and be tested for dangerous chemicals,⁶ and that wells be shut down if fracking fluid migrates toward the surface.⁷ The Act contains comprehensive water monitoring requirements that ensure that water pollution is quickly and easily identified. Specifically, the Act requires both baseline and periodic post-fracking testing of surface water and groundwater sources near fracking wells.⁸

The Act further protects against water pollution by creating a presumption of liability for water pollution. Under that presumption, the onus is on fracking companies to prove that contamination of water sources near well sites was not caused by fracking, instead of requiring citizens or the Illinois Environmental Protection Agency (Illinois EPA) to prove that

2. Amendment to S.B. 1715, 98th Gen. Assemb. (Ill. 2013), www.ilga.gov/legislation/98/SB/PDF/09800SB1715ham001.pdf (last visited Jan. 27, 2015).

3. Bill Status, S.B. 1715, 98th Gen. Assemb. (Ill. 2013), www.ilga.gov/legislation/BillStatus.asp?DocNum=1715&GAID=12&DocTypeID=SB&LegId=72606&SessionID=85&GA=98 (last visited Jan. 27, 2016).

4. Hydraulic Fracturing Regulatory Act, 225 Ill. Comp. Stat. 732 / 1-75(c)(2) (2016).

5. 225 Ill. Comp. Stat. 732 / 1-75(c)(8).

6. 225 Ill. Comp. Stat. 732 / 1-75(c)(7).

7. 225 Ill. Comp. Stat. 732 / 1-75(d).

8. 225 Ill. Comp. Stat. 732 / 1-80.

fracking caused the contamination.⁹ The Act also calls for “setbacks” from water sources—i.e., mandated minimum distances between a well and different types of water sources—that are among the strongest in the nation, including the largest setback of any state from public water supply intakes.¹⁰ In addition, the Act protects against water contamination by requiring many best engineering practices for well construction, casements, and maintenance.¹¹

The Act also includes numerous provisions aimed at creating transparency for the public about what the impacts of fracking truly are: specifically, what’s going in the ground and how that is affecting the environment and public health. For example, the Act includes the strongest chemical disclosure provisions in the nation. Those provisions include comprehensive disclosure chemical requirements for both before and after fracking (including creation of master lists of the base fluids, additives, and chemicals that may be used in fracking, which are to be posted on Illinois Department of Natural Resources (DNR) website).¹² The Act also provides for much more constrained use of trade secret protection than most other states. It allows companies to request trade secret protection of any of the chemical information otherwise required to be disclosed.¹³ However, it includes provisions aimed at ensuring that only qualified trade secrets are protected, that the public can challenge trade secret designations, and, critically, that health needs trump companies’ right to protect chemical information.¹⁴

Other provisions of the Act that were designed to enhance transparency include a mandate that fracking permit applicants submit a water management plan describing the source of water to be used for fracking, the location where that water will be withdrawn, the anticipated volume and rate of each water withdrawal, and the months when withdrawals will take place.¹⁵ After fracking, companies must report to the DNR the total water used in fracking and the locations from which the water was withdrawn.¹⁶ In addition, within two years after the first fracking permit is issued and each three years thereafter, DNR must compile comprehensive reports describing the impacts of fracking, updates on available pollution controls, and recommendations for further legislative action.¹⁷

9. 225 Ill. Comp. Stat. 732 / 1-85.

10. 225 Ill. Comp. Stat. 732 / 1-25.

11. *See, e.g.*, 225 Ill. Comp. Stat. 732 / 1-70 (providing requirements for preparation, drilling, and construction of wells).

12. 225 Ill. Comp. Stat. 732 / 1-35(b)(8), 1-75(f)(9), 1-77.

13. 225 Ill. Comp. Stat. 732 / 1-77(f)–(h).

14. 225 Ill. Comp. Stat. 732 / 1-77(h), (j), and (l).

15. 225 Ill. Comp. Stat. 732 / 1-35(b)(10).

16. 225 Ill. Comp. Stat. 732 / 1-75(f)(5)–(6).

17. 225 Ill. Comp. Stat. 732 / 1-97.

Another key focus of the Act is broad opportunities for public participation. First, the Act requires ample public notice and opportunity for comment. Notice of the permit application is to be published twice in a local newspaper and sent directly to owners of property near the proposed well site.¹⁸ Each application is to be made available for public comment for 30 days.¹⁹ Anyone who may be adversely affected by the permit may request a public hearing.²⁰ Public hearings are to be “contested case” hearings, allowing for parties to present evidence and cross-examine witnesses.²¹ If a hearing is held on the permit, DNR may extend the comment period for an additional 15 days following the hearing.²² Final permit decisions are subject to judicial review.²³

Beyond taking part in permitting, citizens can also play a role in enforcing the Act. The Act provides that, in addition to the Attorney General and the State’s Attorney of the county in which fracking is taking place, any adversely affected person may sue fracking companies for violations of the Act, and/or the Illinois DNR for failure to perform its duties under the Act.²⁴

The Act contains numerous other provisions aimed at minimizing other types of pollution and adverse impacts from fracking. For example, the Act includes several important provisions to protect air quality. For both oil and gas wells, and during both well completions (the initial fracking of the well) as well as production, the Act requires fracking permit holders to capture natural gas and put that gas to beneficial use unless the permittees demonstrate that it would be technically infeasible or economically unreasonable to do so.²⁵ If they make that demonstration, they must flare the gas, destroying most of the harmful air pollution in the process.²⁶ The Act also includes provisions designed to limit water use, which is a major environmental concern of fracking. Specifically, it requires permit applicants to describe methods they will use to minimize both water withdrawals and adverse impact to aquatic life from those withdrawals.²⁷ The Act also protects against earthquakes by authorizing DNR to adopt rules if an earthquake occurs that is traced to deep underground wells where fracking wastewater is injected.²⁸ Finally, the Act grants DNR broad authority to administer and enforce the Act, including authority to inspect

18. 225 Ill. Comp. Stat. 732 / 1-40.

19. 225 Ill. Comp. Stat. 732 / 1-45(a).

20. 225 Ill. Comp. Stat. 732 / 1-50(a).

21. 225 Ill. Comp. Stat. 732 / 1-50(c).

22. 225 Ill. Comp. Stat. 732 / 1-45(b).

23. 225 Ill. Comp. Stat. 732 / 1-53(d).

24. 225 Ill. Comp. Stat. 732 / 1-102.

25. 225 Ill. Comp. Stat. 732 / 1-75(e)(2), (4).

26. 225 Ill. Comp. Stat. 732 / 1-75(e)(3), (5).

27. 225 Ill. Comp. Stat. 732 / 1-35(b)(10).

28. 225 Ill. Comp. Stat. 732 / 1-96.

fracking sites, collect data, require testing or sampling, examine records and logs, hold hearings, adopt rules, and take other actions as may be necessary to enforce the Act.²⁹

II. THE IMPLEMENTING REGULATIONS

Development of the implementing regulations for the Act was a task of historic proportions for the Department of Natural Resources in light of the very high public interest, and controversy, surrounding fracking. DNR published its draft implementing regulations for the Act in November 2013.³⁰ It then held five public hearings, including one in Chicago and others downstate, in November and December 2013, and set a deadline of January 3, 2014, for written public comments on the draft regulations.³¹ DNR received an unprecedented number of comments which it was obligated to review and take into account in finalizing the rules.³² As required by Illinois administrative procedure, DNR submitted a revised version of the rules to the Illinois legislature's Joint Committee on Administrative Rules (JCAR) on August 29, 2014.³³ Environmental organizations including, among others, the Environmental Law & Policy Center, the Natural Resources Defense Council, Faith in Place and Sierra Club—all of which had taken part in negotiations of the Act—submitted further comments to JCAR on the revised rules, but were denied access to negotiations on the final rules. After considerable further revision to the rules, the final implementing regulations were published in November 2014.³⁴

From the perspective of environmental groups the final regulations were a mixed bag. The draft regulations published in November 2013 were very weak in terms of environmental protection: where the Act had left details to be filled in by DNR,

29. 225 Ill. Comp. Stat. 732 / 1-15(e).

30. The draft rules are available at www.dnr.illinois.gov/OilandGas/Documents/ProposedHydraulicFracturing62-245.pdf (last visited Jan. 27, 2016).

31. *High Volume Horizontal Hydraulic Fracturing Administrative Rules*, Ill. Dep't of Nat. Resources, www.dnr.illinois.gov/OilandGas/Pages/PublicHearingTranscriptsAndComments.aspx (last visited Jan. 27, 2016) (mentioning the dates for the public hearings with links to the transcripts).

32. *See id.* (providing the comments received from the public); *see generally*, *Response to Public Comments*, Ill. Dep't of Nat. Resources, www.dnr.illinois.gov/OilandGas/Documents/IDNR%20Response%20Document.pdf (last visited Jan. 27, 2016) (including public comments in the Introduction).

33. *See High Volume Horizontal Hydraulic Fracturing Administrative Rules*, *supra* note 31. The revised rules are available at www.dnr.illinois.gov/OilandGas/Documents/final%20Rules%2062-245.pdf (last visited Jan. 27, 2016).

34. The final implementing regulations were codified at Ill. Admin. Code tit. 62, § 245 (2014), www.dnr.illinois.gov/adrules/documents/62-245.pdf (last visited Jan. 27, 2016).

the agency had largely made decisions that did not prioritize the environment and public health over industry, and DNR even drafted rule provisions that were, in our interpretation, directly contrary to the letter and spirit of the Act and thus impermissible. The revised regulations submitted to JCAR were much more protective of the environment and public health. As is set out in more detail below, the final regulations retained some highly protective provisions contained in the revised rules, but weakened, or altogether got rid of, many such provisions and further weakened certain requirements that had been included in the draft rules.

Some of the most environmentally and public health-protective provisions in the final regulations include regulations concerning disclosure of fracking chemicals, certain requirements to limit water pollution, and public participation. For example, the regulations clarified the procedure by which health professionals treating people injured or ill due to exposure to fracking chemicals could obtain information about those chemicals. Whereas the draft rules proposed to give DNR discretion over when to share chemical information with health professionals, the final rules remove that discretion and provide for a 24-hour hotline for health professionals to access trade-secret protected chemical information in case of emergency.³⁵ The final rules also remove a circular definition of “affected patient” that the draft rules contained that likely would have severely limited the circumstances under which disclosure would take place.³⁶

With regard to water pollution, the Act requires wastewater to be stored in closed tanks, allowing use of open pits *only* for one week if unexpectedly huge volumes of wastewater come up the well.³⁷ The draft rules would have allowed wastewater to sit in open pits potentially far longer than a week.³⁸ The final rules

35. See draft rules at Ill. Admin. Code tit. 62, § 245.730 (stating that information concerning fracking chemicals “may be disclosed by IDNR”); Ill. Admin. Code tit. 62, § 245.730 (providing that information concerning fracking chemicals “will be provided” to a health professional).

36. See draft rules at Ill. Admin. Code tit. 62, §§ 245.110, 245.730 (2014) (providing that only a health professional treating a patient that had already been diagnosed as being affected by fracking chemicals could obtain protected information about those chemicals); Ill. Admin. Code tit. 62, §§ 245.110, 245.730. The problem with the provision in the draft rules is it would be difficult, if not impossible, for a health professional to diagnose a patient as made ill by a fracking chemical without knowing what that chemical was first. Thus, there would be very few, if any, “affected patients” for whom a health provider could seek the relevant trade-secret protected fracking chemical information.

37. 225 Ill. Comp. Stat. 732 / 1-75(c)(2).

38. See draft rules at Ill. Admin. Code tit. 62, § 245.850(c) (providing that fracking fluid placed into a pit must be recycled or moved into a storage tank “within 7 days after completion of high volume horizontal hydraulic fracturing operations”).

mandate that wastewater be removed from pits within seven days of being placed there.³⁹ The presumption of liability for water pollution that was hard fought in the law also was retained in the final rules. As noted above, the Act creates a presumption that water pollution found within 1,500 feet of a fracking well was caused by that fracking unless the fracking company can prove otherwise.⁴⁰ The draft rules would have limited that presumption to a small set of chemicals,⁴¹ rather than the list of over 100 chemicals specified in the law.⁴² The final rule restored the presumption to the much-broader set of chemicals set out in the law.⁴³ Finally, the final rules correct a limitation in the draft regulations that would have limited the Act's coverage. The Act provides that it applies to all fracking wells, regardless of when they began operating or what base fluid they use.⁴⁴ The draft rules would have exempted existing wells and possibly excluded wells that are fracked using nitrogen or other gases as a "base fluid," instead of water.⁴⁵ The final rules remove the exemption for existing wells and set out a formula for determining when wells fracked using gas are covered by the Act and its regulations.⁴⁶

With regard to public participation, the final rules helped lessen the burden on the public to get to, and take part in, hearings on fracking permits, and minimized a loophole that might have allowed fracking companies to shield information about fracking wells from public review. As noted above, the Act provides for public hearings on permit applications as part of DNR's process for determining whether an applicant has complied with application requirements.⁴⁷ The draft rules would have improperly placed a "burden of proof" on hearing petitioners and allowed hearings to take place wherever DNR wanted them.⁴⁸ The final rules remove the burden of proof and require hearings to take place within 30 miles from the county in which the fracking well is proposed.⁴⁹ The Act also requires that any "significant deviation" to a permit undergo public review,⁵⁰ in part to avoid situations of bait and switch (relatively empty permit applications followed by

39. 62 Ill. Admin. Code tit. 62, § 245.850(c).

40. 225 Ill. Comp. Stat. 732 / 1-85.

41. See draft rules at § 245.620(4) (limiting presumption to chemicals monitored for by third party contracted by the fracking permit holder).

42. 225 Ill. Comp. Stat. 732 / 1-5 (defining "pollution or diminution").

43. Ill. Admin. Code tit. 62, § 245.620.

44. 225 Ill. Comp. Stat. 732 / 1-20.

45. See draft rules at § 245.100(a) (providing that the rules apply to "wells . . . [that] are planned, have occurred since June 17, 2013, or are occurring" and that use greater than 80,000 gallons per stage, or more than 300,000 gallons in total, in that fracking).

46. See Ill. Admin. Code tit. 62, § 245.110 (defining "base fluid").

47. 225 Ill. Comp. Stat. 732 / 1-50.

48. Draft rules at §§ 245.270(b)(2), (i).

49. Ill. Admin. Code tit. 62, § 245.270.

50. 225 Ill. Comp. Stat. 732 / 1-55(c).

meaty modifications). DNR's draft rules would have severely narrowed the types of permit modifications requiring public review.⁵¹ The final rules expand what changes qualify as significant modifications,⁵² and provide that DNR's 60-day clock for reviewing permit applications does not begin until DNR determines the application is complete.⁵³

Along with these strongly protective provisions, however, the final regulations omitted or weakened protective provisions that had been contained in either the draft or the revised rules. For example, the Act requires permit applicants to include a "detailed description" of the formation to be fractured.⁵⁴ The draft rules required a thorough description of the "confining zone"—i.e., geological features that would confine fracturing fluids, oil, and gas to the fracked area—as known "after reasonable inquiry."⁵⁵ The final rules remove "after reasonable inquiry" and provide that, if any of the features of the confining zone are unknown, the applicant "shall so state"⁵⁶—thereby making the applicant's duty less than crystal clear.

The final rules also erected certain barriers to participation in public hearings not provided for in the statute. The Act provides for public hearings whenever a person who may be adversely affected by the proposed well so requests via "a short and plain statement," as long as that request is not frivolous.⁵⁷ The draft rules directed hearing petitioners to identify the sections of the law and regulations that they are concerned about, but only if those sections are known to them.⁵⁸ The final rules remove "if known,"⁵⁹ possibly discouraging participation by unrepresented persons if they interpret the final rules to require them to review or identify statutory sections in order to request a hearing.

Provisions limiting water use and air pollution also were either weakened or left less clear in the final rules. The Act requires permit applicants to provide a water use management plan stating how much water they anticipate using, when and from where they will get that water, and how they will minimize water use "as much as feasible."⁶⁰ DNR's revised rules directed permit applicants to submit more information to clarify how much water was being used in comparison with other users, and included requirements that withdrawals be halted when water

51. Draft rules at §§ 245.330(c), (d).

52. Ill. Admin. Code tit. 62, §§ 245.330(c), (d).

53. *Id.* at §§ 245.230(b), (e).

54. 225 Ill. Comp. Stat. 732 / 1-35(b)(6)(A).

55. Draft rules at § 245.210(a)(6)(A).

56. Ill. Admin. Code tit. 62, § 245.210(a)(6)(A).

57. 225 Ill. Comp. Stat. 732 / 1-50(a), (b).

58. Draft rules at § 245.270(a)(3)(E).

59. Ill. Admin. Code tit. 62, § 245.270(a)(3)(D).

60. 225 Ill. Comp. Stat. 732 / 1-35(b)(10).

runs low.⁶¹ The final rules omit those provisions.⁶² As for air pollution, the Act requires applicants to capture gas produced from wells unless they show that it is technically infeasible or economically unreasonable to do so.⁶³ The revised rules included specifications regarding what was needed to make that showing.⁶⁴ The final rules omit many of those specifications.⁶⁵

III. CONCLUSION

As of this writing in January 2016, only two companies have registered to apply for fracking permits in Illinois,⁶⁶ which is a mandatory prerequisite to filing a fracking permit application. No fracking permit applications have yet been filed. The federal Energy Information Administration (EIA) projected on January 12, 2016, that oil production will fall in 2016 and that oil prices will remain around \$40/barrel this year.⁶⁷ EIA also forecasts that growth in natural gas will slow to “0.7% in 2016, as low natural gas prices and declining rig activity begin to affect production.”⁶⁸ It therefore seems unlikely at this time that companies will apply for permits to frack in Illinois in the coming year.

The Illinois Hydraulic Fracturing Regulatory Act and its implementing regulations represent a complicated, delicate compromise among environmental organizations, state agencies, and industry groups. The Act's provisions have been called “the nation's strictest regulations for natural gas drilling.”⁶⁹ Fortunately for environmental advocates and the concerned public, the strength of the protections of the Act and its regulations has yet to be tested. If and when it is tested, environmental advocates and the public will surely take advantage of the Act's public participation provisions to make sure fracking companies act in full compliance with the Act and its implementing rules.

61. See revised rules at Ill. Admin. Code tit. 62, § 245.210(a)(10) (listing requirements for the Water Source Management Plan).

62. *Id.*

63. 225 Ill. Comp. Stat. 732 / 1-75(e).

64. See revised rules at Ill. Admin. Code tit. 62, § 245.845(d) (providing, *inter alia*, that permit applicants demonstrate that capturing gas would result in a serious business injury such as a taking).

65. *Id.*

66. *Approved Registrations*, Ill. Dep't of Nat. Resources, www.dnr.illinois.gov/OilandGas/Pages/ApprovedRegistrations.aspx (last visited Jan. 27, 2016).

67. *Short-Term Energy Outlook and Summer Fuels Outlook*, U.S. Energy Info. Admin. (Apr. 12, 2016), www.eia.gov/forecasts/steo/ (last visited May. 2, 2016).

68. *Short-Term Energy Outlook and Summer Fuels Outlook*, U.S. Energy Info. Admin. (Apr. 12, 2016), www.eia.gov/forecasts/steo/archives/jan16.pdf (last visited June 7, 2016).

69. David L. Callies & Chynna Stone, *Regulation of Hydraulic Fracturing*, 1 J. OF INT'L & COMP. L. 1, 26 (2014).

