

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 361

(Senators Raskin and Zirkin)

Judicial Proceedings

Environment and Transportation

Civil Actions - Hydraulic Fracturing Liability Act

This bill makes information about chemicals used in hydraulic fracturing discoverable as evidence and voids specified contractual waiver provisions pertaining to hydraulic fracturing activities. The bill also increases the amount of comprehensive general and environmental pollution liability insurance coverage that permit holders must maintain and increases the duration of coverage of environmental pollution liability insurance. Finally, the bill requires permit holders to submit information to the Maryland Department of the Environment (MDE) and the appropriate local health department (LHD) about the composition of the injection fluid used for hydraulic fracturing. MDE and LHDs must generally keep that information confidential, except under specified circumstances.

Fiscal Summary

State Effect: General/special fund revenues associated with general economic activity may decrease to the extent that the bill results in less development of natural gas resources than would occur in the absence of the bill, as discussed below. Any such impact occurs in FY 2018 at the earliest. MDE can likely implement the bill with existing resources, as discussed below.

Local Effect: Local severance tax revenues and other revenues associated with general economic activity may decrease for Allegany and Garrett counties to the extent that the bill's requirements result in less development of gas resources than would occur in the absence of the bill, as discussed below. Any such impact occurs in FY 2018 at the earliest. LHDs can likely implement the bill with existing resources, as discussed below.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Legal Actions

The bill voids any contractual waiver of a right to sue a permittee or liability for damages caused by the hydraulic fracturing activities of a permittee. Any information about the chemicals used in hydraulic fracturing activities are discoverable in a legal action against a permittee, subject to specified provisions, and admissible as evidence. Further, a plaintiff may recover any economic or noneconomic damages that were proximately caused by the hydraulic fracturing activities of the permittee. Punitive damages may be awarded if a permittee's act or omission constitutes gross negligence or reckless, willful, or wanton misconduct.

Increase in Required Insurance Coverage

The bill increases, from \$300,000 to \$1.0 million per person and from \$500,000 to \$5.0 million per occurrence, the required comprehensive general liability coverage for damages caused by the sudden accidental occurrences of a permittee. The bill also increases, from \$1.0 million to \$10.0 million, the environmental pollution liability insurance coverage for bodily injury and property damage to persons and natural resource damages, including the costs of cleanup and remediation, caused by a release of pollutants. The bill increases, from five years to six years, the duration for which environmental pollution liability insurance must be maintained from the time that MDE determines that the gas or oil well has been properly sealed and plugged and the site reclaimed.

Required Information about the Composition of Injection Fluid

A holder of a permit to drill for the hydraulic fracturing of a well for the exploration or production of natural gas must submit documentation that states the composition of the injection fluid used for hydraulic fracturing of the well to MDE and the appropriate LHD. In general, the specific concentration, but not the identity, of any chemical constituents that are part of the composition of the injection fluid, is confidential.

However, MDE or an LHD must, on request, provide the contents of the documentation to (1) a health care professional for medical purposes; (2) a party to a civil or criminal action for litigation purposes; (3) a federal, State, or local agency; or (4) a public health professional, a toxicologist, or an epidemiologist employed in the field of public health for public health purposes. An entity that has received the documentation must keep the information confidential except for limited, specified instances for medical care, as necessary to litigate the civil or criminal action, or as reasonably necessary to protect public health and safety.

Definitions

The bill defines a “hydraulic fracturing activity” to include (1) well drilling; (2) the exploration or production of natural gas; and (3) the storage, treatment, or transport of any natural gas produced by hydraulic fracturing, chemical component used in hydraulic fracturing, or waste from hydraulic fracturing, including produced waters. The bill also broadly defines “natural gas” as any hydrocarbon or nonhydrocarbon gas that is produced from a natural reservoir, including carbon dioxide, casinghead gas, helium, hydrogen, hydrogen sulfide, and nitrogen.

Current Law/Background:

Current Oil and Gas Regulations

A person must obtain a permit from MDE before drilling a well for the exploration, production, or underground storage of gas or oil in Maryland. An applicant that wants to extract gas from the Marcellus Shale may also be required to apply for a number of other State environmental permits.

Environmental laws such as the federal Clean Air Act and the federal Clean Water Act include provisions that are generally referred to as “permit shields,” which generally provide the permit holder with certain protections from enforcement and liability as long as the permit holder remains in compliance with State and federal laws and all provisions and conditions within the permit.

MDE regulates gas exploration and production and has broad authority to impose conditions on permits to protect the State’s natural resources and to provide for public safety. Further, MDE may deny a permit based on a substantial threat to public safety or a risk of significant adverse environmental impact. However, current MDE oil and gas regulations were written prior to the use of high-volume hydraulic fracturing and, as of March 2016, have not been revised since 1993. These regulations apply to all gas wells in Maryland, are not specific to the practice of hydraulic fracturing and, in some cases, are incompatible with modern industry practices.

Presumptive Impact Areas

Chapter 703 of 2012 established a presumptive impact area applicable to areas around a deep shale gas deposit well for which MDE has issued a gas exploration or production permit. In a presumptive impact area, it is presumed that contamination of a “water supply” was caused by the activities of gas exploration or production.

Aside from the various permit requirements and conditions, the general comprehensive and environmental pollution insurance coverage requirements, and the presumption of liability for damage to water supplies within presumptive impact areas, liability for economic or noneconomic damages resulting from oil or gas development are controlled by the general application of tort law and any liability agreements established by contract.

Marcellus Shale Safe Drilling Initiative

Governor Martin O'Malley established the Marcellus Shale Safe Drilling Initiative by executive order in June 2011 to ensure that, if drilling for natural gas from the Marcellus Shale proceeds in Maryland, it is done in a way that protects public health, safety, natural resources, and the environment. The executive order directed MDE and the Department of Natural Resources (DNR) to assemble and consult with an advisory commission. Specifically, the executive order tasked MDE and DNR, in consultation with the advisory commission, with conducting a three-part study and reporting recommendations.

Part I of the study, a report on findings and recommendations regarding sources of revenue and standards of liability for damages caused by gas exploration and production, was released in December 2011. Part II of the study, a report on best practices, was completed in August 2013 and reflected changes made after consideration of more than 4,000 public comments. While the report contained many recommendations, the centerpiece was the use of a Comprehensive Gas Development Plan (CDP), which a drilling applicant would be required to submit as a prerequisite to an individual well permit. A CDP would address, before any well is drilled, the broad and cumulative issues associated with the completion of numerous wells and the effects that the well construction and resource extraction and transportation would have on a large scale.

The third and final report was released on November 25, 2014, and contained information from a risk assessment, a public health study, and an economic impact study commissioned by the departments. The report incorporated findings from the risk assessment, including several impacts that were characterized as high, moderate, or low risks. Ultimately, the departments concluded that the risks to public health and the environment can be adequately managed under a stringent regulatory regime that relies on the best practices identified in their report.

MDE developed regulations to implement many of the best practices identified during the initiative, which were published in the *Maryland Register* on January 9, 2015. However, Chapters 480 and 481 of 2015 required MDE to adopt additional regulations related to hydraulic fracturing by October 1, 2016, and prohibited the regulations from taking effect until October 1, 2017. The Acts also prohibited MDE from issuing a permit to drill a well using hydraulic fracturing until October 1, 2017. Subsequently, the regulations published on January 9, 2015, were withdrawn as an operation of law because they were not acted

upon within one year. MDE advises that it is currently in the process of developing regulations governing the hydraulic fracturing of gas wells.

State/Local Revenues: To the extent that the bill's liability insurance and/or disclosure requirements establishes a substantial disincentive to engage in the extraction of natural gas resources in the State, the bill directly affects severance tax revenues in Allegany County, and to a greater extent, Garrett County; other sources of State and local revenue from general economic activity may also be indirectly impacted.

As noted above, Chapters 480 and 481 of 2015 prohibit MDE from issuing a permit to drill a well using hydraulic fracturing until October 1, 2017. Thus, any impact occurs beginning in fiscal 2018 at the earliest and depends on the extent to which hydraulic fracturing occurs in the absence of the bill. MDE reports that there are no applications pending for permits to drill a well using hydraulic fracturing.

State/Local Expenditures: MDE advises that it can likely implement the bill with existing resources, but that the collection and release of information related to injection fluid increases its workload. The magnitude of any such increase in workload depends on the volume and timing of requests for information and is thus somewhat unpredictable; however, MDE anticipates that the additional workload can be handled with existing staff.

The Maryland Association of County Health Officers (MACHO), which represents LHDs, similarly advises that the bill has an impact on LHDs, but that the magnitude of any fiscal or operational impact depends on the volume of requests for information and the volume and format of storage of the documentation. To the extent that the bill's intent is for documentation to be stored electronically, storage costs are minimal. However, MACHO advises that storing the documentation in paper form may be more costly in the long term.

Any fiscal or operational impact on MDE and LHDs occurs beginning in fiscal 2018 at the earliest and depends on the extent to which hydraulic fracturing occurs in the absence of the bill.

In the event that future hydraulic fracturing activities occur, State and local expenditures associated with the remediation of any damages caused by oil and gas exploration and development may decrease due to the bill's liability and insurance provisions.

Small Business Effect: The bill may have a meaningful adverse impact on small businesses engaged in providing services related to hydraulic fracturing to the extent the bill prevents, or reduces the level of, future natural gas exploration or production through hydraulic fracturing. The bill may have a meaningful beneficial impact on small businesses in Western Maryland reliant upon tourism to the extent that the development of natural gas resources would impact the levels of tourism in the area; however, any such impact is

unclear. The bill may also have a meaningful beneficial impact on any small business with property that is located adjacent to any future hydraulic fracturing activities that may occur to the extent that the bill provides greater legal and financial protections than would otherwise be available.

Additional Information

Prior Introductions: SB 458 of 2015, a similar bill, passed the Senate with amendments and received a hearing in the House Environment and Transportation Committee, but no further action was taken.

Cross File: None.

Information Source(s): Maryland Department of the Environment, Department of Natural Resources, Maryland Insurance Administration, Judiciary (Administrative Office of the Courts), Maryland Association of County Health Officers, Garrett County, Department of Legislative Services

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