Ohio Legislative Service Commission

Bill Analysis

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S.B. 212

129th General Assembly
(As Introduced)

Sens. Skindell, Grendell, Tavares, Brown

BILL SUMMARY

- Requires oil or gas well owners to submit a list of all chemicals to be used in well stimulation to the Environmental Protection Agency (EPA) and the applicable board of health.

- Requires oil or gas well owners who begin drilling to submit documentation to the Chief of the Division of Oil and Gas Resources Management describing where and how brine and other waste substances produced from oil and gas production will be disposed of.

- Requires drilling permit holders to pay a 5% overriding royalty to the Director of Environmental Protection, and requires money from the royalty to be credited to the Clean Water Restoration Fund created by the bill.

- Requires the Fund to be used to remediate and repair any water well or ground water adversely affected by hydraulic fracturing.

- Authorizes the Director of Environmental Protection and the applicable health commissioner to enter lands at any time to sample and analyze fluids used in well stimulation.

- Requires the Oil and Gas Leasing Commission to adopt a rule requiring lessees of formations in state land to conduct baseline testing of surface and ground water for quantity and quality in the leased area before beginning to drill and before conducting well stimulation.

- Requires the Commission to adopt a rule requiring such lessees to recycle, capture, or treat all water used in drilling and operating a well and to document the quantity of water used and periodically submit reports identifying all chemicals used in well stimulation fluid.

CONTENT AND OPERATION

Submission of information

Well stimulation

The bill requires the owner of an oil or gas well to submit a complete list of all chemicals to be used in stimulating the well to the Environmental Protection Agency (EPA) and board of health of the health district where the well is or is to be located ten days before beginning to drill the well.[1] Well stimulation is the process of enhancing well productivity, including hydraulic fracturing operations.[2] Under the bill, the Chief of the Division of Oil and Gas Resources Management in the Department of Natural Resources is to prescribe either a form or another manner of submission. The bill does not specify for what purpose the EPA and a board of health are to receive the list of chemicals.

Current law requires that any person drilling for oil or gas in Ohio submit a well completion record to the Division either: (1) within 60 days after completion of drilling, or (2) after determining that the well is dry or lost. The well completion record must include, in part, specified information regarding products, fluids, and substances used to stimulate the well and chemicals added to them.[3] However, there is an exception to that requirement for trade secrets. An owner of a well may designate a product, fluid, substance, or chemical trade secret and withhold disclosure of its identity, amount, concentration, or purpose.[4] It is not clear how the bill's requirement for disclosure of *all* chemicals would interact with the protection afforded under current law for trade secrets. (see **COMMENT** 1.)

Waste disposal

The bill requires a well owner who begins drilling to submit documentation to the Chief of the Division of Oil and Gas Resources Management identifying where and how brine or other waste substances resulting, obtained, or produced from oil and gas production at the well site will be disposed of. The bill requires the Chief to establish appropriate procedures for implementation of the requirement.[5] Under continuing law,

[1] R.C. 1509.191.

[2] R.C. 1509.01(Z), not in the bill.

[3] R.C. 1509.10(A), not in the bill.

[4] R.C. 1509.10(I)(1), not in the bill.

[5] R.C. 1509.227.

the Chief is required to adopt rules and issue orders regarding storage and disposal of brine and other waste substances.[6]

Royalty; Clean Water Restoration Fund

The bill requires a person issued a permit to drill, reopen, convert, or plug back a well and who uses well stimulation in a well to pay a 5% overriding royalty to the Director of Environmental Protection. The Director must deposit money from the royalty in the state treasury to the credit of the Clean Water Restoration Fund, which the bill creates. The Director must adopt rules in accordance with the Administrative Procedure Act establishing necessary procedures and requirements for implementing payment of the royalty.[7] The bill requires the Director to use money in the Fund to remediate and repair any water well or ground well water adversely affected by hydraulic fracturing.[8]

Well sampling

The bill authorizes the Director of Environmental Protection and the applicable health commissioner to enter public and private lands at any time to sample and analyze fluids used in well stimulation.[9] (See **COMMENT** 2.)

Requirements governing leasing of formations in state land

The bill requires the existing Oil and Gas Leasing Commission to adopt rules in accordance with the Administrative Procedure Act establishing two additional requirements governing persons who lease formations in state land for oil nor natural gas exploration, development, and production. First, the rules must establish a requirement that, prior to drilling a well and prior to conducting well stimulation under such a lease, the person who entered into such a lease conduct baseline testing of surface and ground water for quantity and quality in the leased area.

Second, the rules must also establish a requirement that a person who entered into such a lease recycle, capture, or treat all water used by the person when drilling and operating a well under the lease. The rules must require the person to document the quantity of water used and to submit periodic reports identifying all chemicals used in well stimulation fluid during the term of the lease. It is not clear how the bill's

[6] R.C. 1509.22(C), not in the bill.

[7] R.C. 1509.192.

[8] R.C. 6111.70.

[9] R.C. 1509.031.

requirement for disclosure of *all* chemicals used in well stimulation would interact with the protection afforded under current law for trade secrets as discussed above.[10]

COMMENT

(1) The bill requires oil and gas well owners to submit a list of all chemicals to be used in well stimulation to the EPA and the applicable board of health regardless of whether such chemicals are protected trade secrets.[11] However, the Fifth Amendment to the U.S. Constitution and Section 19, Article I of the Ohio Constitution prohibit the government from appropriating private property for public use without providing just compensation to the owner. The U.S. Supreme Court has held that requiring disclosure of intangible property rights protected by state law can amount to a taking under the Fifth Amendment to the U.S. Constitution (*Ruckelshaus v. Monsanto, Co.* 467 U.S. 986, 1003–04 (1984)). Ohio provides protection to trade secrets under current law.[12] Thus, if the bill is enacted and disclosure of all chemicals used in well stimulation is required, including protected trade secrets, that provision could be subject to constitutional challenge.

(2) The bill authorizes the Director of Environmental Protection and the applicable health commissioner to enter public and private lands at any time to sample and analyze fluids used in well stimulation. The Fourth Amendment of the U.S. Constitution and Section 14, Article I of the Ohio Constitution protect against unreasonable searches and seizures. Generally, warrantless searches are unreasonable and are therefore invalid (*Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978)). This general rule applies to commercial premises as well as homes (*Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978)).

In addition, an owner or operator of a business has a reasonable expectation of privacy in commercial property (*New York v. Burger*, 482 U.S. 691, 699 (1987)). However, the U.S. Supreme Court has carved out an exception to the warrant requirement for "pervasively regulated businesses" and industries closely regulated "long subject to close supervision and inspection" (*United States v. Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp. v. United States* 397 U.S. 72, 77 (1970)). These types of businesses have such a history of government oversight that the reasonable expectation of privacy is diminished in this context (*New York v. Burger*, 482 U.S. 691, 702 (1987)).

[10] R.C. 1509.74.

[11] R.C. 1509.10(I)(1).

[12] R.C. 1333.61 to 1331.69, not in the bill.

Nonetheless, a warrantless administrative search must still be reasonable as determined by three criteria. Pertinent to this discussion is the third criterion, which stipulates that the administrative scheme must provide a constitutionally adequate substitute for a warrant (*New York v. Burger*, 482 U.S. 691, 702–703 (1987)). Under that third criterion, the U.S. Supreme Court has held that statutes authorizing warrantless administrative searches must perform two basic functions of a warrant (*New York v. Burger*, 482 U.S. 691, 703 (1987)). These functions are to: (1) advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and (2) limit the discretion of inspecting officers (*New York v. Burger*, 482 U.S. 691, 703 (1987)).

Statutes that contain no restraint on the inspecting officer's discretion have been held unconstitutional. For example, the Ohio Supreme Court found a statute that authorized warrantless administrative searches of liquor premises unconstitutional because the applicable statute contained no limit on the hours of administrative search (*State v. VFW Post 3562*, 37 Ohio St.3d 310, 525 (1988)). Thus, if the bill is enacted and the Director of Environmental Protection and applicable health commissioner are permitted to enter public and private lands to conduct sampling at any time, that provision could be subject to constitutional challenge.

HISTORY

ACTION	DATE
Introduced	09-06-11

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