

Publications

Oil and Gas Alert: Ohio Oil and Gas Regulation Legislation Revisions to Revised Code 1509

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On June 11, 2012, Governor Kasich signed into law Substitute SB 315 (SB 315), modifying the Ohio regulatory structure for oil and gas operations contained in Revised Code 1509. SB 315 originated from a governor's request calling for significant revisions in the regulatory program for oil and gas, and in response, the president of the Ohio Senate, Senator Tom Neihaus, and Committee Chairman Senator Jones, actively engaged in revising the proposal to make it consistent with the existing R.C. 1509 regulatory system. SB 315, as significantly revised, was passed by the Ohio Senate on May 15, 2012. On May 24, 2012, the Ohio Senate concurred with revisions to SB 315 by the Ohio House, sending the bill on May 30, 2012, to the governor for his signature. With the governor's signature, SB 315 will become effective September 11, 2012.

A wide-ranging energy bill, SB 315 includes midstream regulatory proposals. However, the more detailed provisions in the Bill are the update to the 1509 oil and gas regulatory program. The purpose of this Alert is to briefly describe the new provisions in SB 315 that update R.C. 1509 and the Ohio oil and gas regulatory process.

As introduced, SB 315 contained several proposals that would have compromised the preemption authority contained in R.C. 1509.02, where the Division of Oil and Gas ("Division") is granted "sole and exclusive" regulatory authority over "all aspects" of oil and gas development in Ohio. In the legislative process, those proposals were eliminated.

As introduced, SB 315 contained chemical disclosure provisions that would have significantly constrained the development of the Utica Shale in Ohio. One service company even suggested that if the proposal was adopted as introduced, it would not use any of the completion techniques it had developed for shale resource plays in the last seven years. The ideas for the Bill may have come from a surprising source – the Environmental Defense Counsel took credit for outlining the as-introduced disclosure provisions. Fortunately, the president of the Senate wanted SB 315 to take a balanced approach to chemical disclosure.

As passed, SB 315 requires operators to disclose, with the initial filing of the completion report, all chemicals they use in drilling the well until the surface casing is set. R.C. 1509.10(A)(9)(a). In addition to the current disclosure requirements for hydraulic fracturing, operators will need to disclose the chemicals to the Division or on the Frac Focus website. R.C. 1509.10(F). However, there are now clear provisions to allow operators and service companies to protect their trade secrets. R.C. 1509.10(I). Following initial completion, operators will now need to disclose any chemicals used to refracture or newly complete a well. Operators will also be required to keep records of all chemicals placed in a well for two years. R.C. 1509.10(J)(1)-(2). However, inaccurate or incomplete disclosure will be treated as substantial compliance if reasonable efforts were made to obtain that information. R.C. 1509.10(K)(1) and chemicals that appear in incidental or trace amounts do not need to be disclosed. R.C. 1509.10(K)(2).

A key new concept in SB 315 is the definition of "horizontal well," defined as a well producing from the Utica, Point Pleasant or Marcellus formations. R.C. 1509.01 (GG). These horizontal wells will be subject to several heightened regulatory requirements such as 1) higher insurance requirements (\$5 million) (R.C. 1509.07 (2)); 2) required testing of water wells (out to 1,500 feet from the wellhead (R.C. 1509.06(C))); and 3) well pad pre-construction site visits with the Division inspectors (R.C. 1509.04(H)). Also required with the permit application for a horizontal well is a road use and maintenance agreement or an affidavit that the operator attempted, in good faith, to enter into such an agreement but was unable to reach agreement with the local officials. R.C. 1509.04(11)(G).

Perhaps the most ominous late addition to SB 315 were provisions to allow each day of both civil (R.C. 1509.33(I)) and criminal penalties (R.C. 1509.99(F)) to be treated as separate violations. R.C. 1509.33(I). All the discussion centered on imposing that requirement with limitations requiring the violation to be intentional or purposeful before daily violations could be imposed. However, the provisions, as passed, do not contain the limitations and can apply to even minor inadvertent violations. Many industry representatives believe this failure to add appropriate limitations on daily violations will need to be addressed in subsequent legislation.

In contrast, when the Division sought to add failure to file reports to its list of material and substantial violations in SB 315, it established a procedure to grant extensions, plus a notice and 30-day cure procedure before reporting violations become actionable. R.C. 1509.94(2). The legislation also clarifies the decades-old concept that granting a permit is not an order that can be appealed. R.C. 1509.03(B)(1). In addition, the Division can now enter cooperative agreements and seek "advice and consultation" from other state regulatory agencies, but the Division does not give up any of its R.C. 1509 authority in the process. R.C. 1509.02.

Producers will now need to report, to the best of their knowledge, on the anticipated source of water to be used for well operations as a part of the permit application with a focus on whether the water will come from the Lake Erie or Ohio River watershed. R.C. 1509.06(A)(8)(a). Also, the Division can now establish site specific terms and conditions for wells located in a hundred-year flood plain and in the five-year time of travel for a public drinking water supply. R.C. 1509.06(H)(2). For UIC-Class II injection wells, owners and brine haulers will need to electronically make quarterly reports of the information they are required to collect on each load of produced water. R.C. 1509.22(D)(1)(c).

If you have any questions about SB 315 and how it affects oil and gas regulation in Ohio, please contact Jon Airey – (614) 464-6346, wjairey@vorys.com; John Keller – (614) 464-6389, jkkeller@vorys.com; Gregory Russell – (614) 464-5468, gdrussell@vorys.com; or Zachary Simpson – (614) 464-5404, zmsimpson@vorys.com.