



E23 Cutting-Edge Legal Issues and Considerations Surfacing From the Scientific Process Involving Hydraulic Fracturing (Fracking)

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After attending this presentation, attendees will gain an understanding about the legal issues, controversies, and considerations involving fracking.

This presentation will impact the forensic science community by providing statutory and case law evaluations on the legal issues regarding fracking. The case law in this area is still developing, and the legal issues are cutting-edge issues demonstrating the tension between the interests of the parties — the landowners, the environment, and the natural gas industry.

One of the biggest shale deposits in the United States, the Marcellus Shale, which is located under much of Ohio, West Virginia, Pennsylvania, New York, and small regions of Maryland, Kentucky, and Tennessee, is worth approximately \$500 billion. Fracking is the process of extracting natural gas from gas shale deposits located approximately a mile below the surface and this process has resulted in massive new supplies of oil and clean-burning natural gas that have increased our country's energy security and have improved our ability to generate electricity, heat homes, and power our vehicles for generations to come. Fracking has contributed to boosting many local economies through royalty payments to landowners, tax revenues, and job creation. As a result of this massive production potential, many legal issues, controversies, and concerns are surfacing around how environmental laws are created and how they should be enforced. There are heated jurisdictional controversies regarding the application of federal versus state jurisdiction and whether the state or federal government should have the final word as to the outcomes pertaining to specific environmental issues related to the oil and gas industry. An overlap of laws in this area is created by the federal government, the state government, and the municipalities at a local level of government.

Several states such as Colorado, Texas, Pennsylvania, Louisiana, and Wyoming allow and regulate fracking in each of their own ways. Other states like New York, as of this writing, have not approved fracking, and yet some New York state courts have taken preemptive measures to limit or prevent fracking. The perspectives of each of these states and other states will be examined.

Currently, the most common litigation involves title issues surrounding the ownership rights of minerals extracted from real property. Many of the more cutting-edge legal issues are related to the Halliburton Loophole, in that there have been efforts to introduce legislation to remove the oil and gas industry exemptions from the federal Clean Air Act and the Clean Water Act. Such legislation specifically seeks to remove exemptions related to storm water run-off at drill sites and emissions generated by the oil and gas industry.

A recurring issue is determining whether fracking activities contribute to or are responsible for contaminating drinking water; however, studies appear to be confirming that fracking happens so far from groundwater, with so much rock in between, that it is unlikely that fracking is resulting in the pollution of groundwater. Of more concern are the issues surrounding waste water disposal. Currently, Pennsylvania is pushing drillers to recycle waste water, a process which is also stimulating the economy and creating new jobs. In addition, structural concerns exist regarding older wells being retrofitted to comply with new regulations.

Another legal issue in this area is the sealing or unsealing of court records regarding details of settlement. After landowners sue the natural gas companies for damages for alleged contaminated waters, the parties, especially the corporations involved, are requesting the trial courts seal the terms of the settlement so that the public is not aware of the precise amount of settlement. The media outlets are filing petitions to intervene to unseal the court records. In this age of transparency of government records and the constitutional presumption of openness in judicial proceedings, the right of privacy or "secrecy" involving the settlement amount must be analyzed and weighed against the public's right to know the precise settlement terms. The timeliness of the intervention is another legal concern.

In conclusion, this presentation will provide the legal issues and concerns regarding hydraulic fracturing which has become a major jurisdictional issue and involves other developing issues attracting a significant amount of attention in the near future for, with, and by our judiciary.

Fracking, Legal Issues, Scientific Process