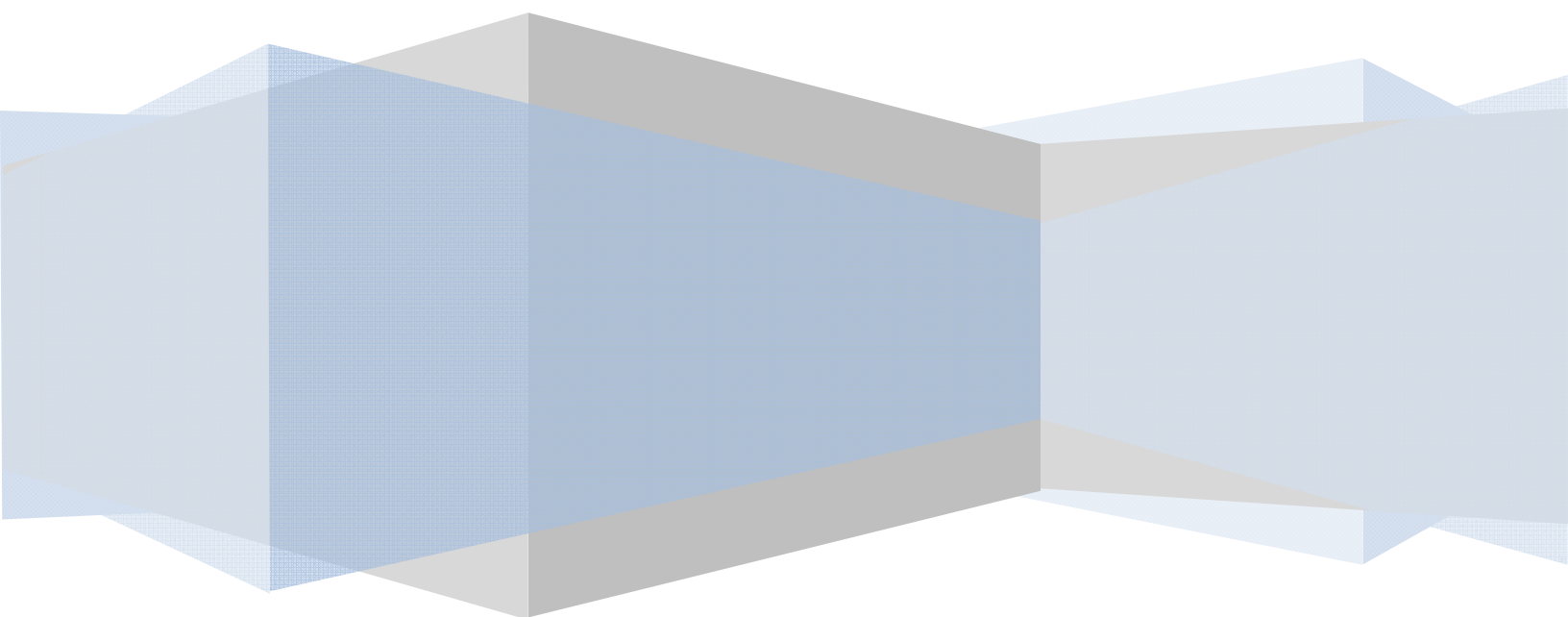


The Fracks of Life

(The More Things Change, The More They Stay the Same)

William R. Keffer and J. Randall Miller



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The development and full-fledged implementation of new and improved technology in the oil-and-gas industry have ushered in a renaissance in exploration and production in the U.S. The combination and use of 3-D seismic testing, horizontal drilling, and hydraulic fracturing have opened up vast new frontiers of reserves that, until now, had been uneconomic or unknown. The sharp increase in shale-gas and shale-oil discoveries and development is literally changing the geo-political balance regarding relative energy positions and has made plausible the idea of energy independence.

But, of course, with every technological and economic advancement, there is typically a trail of ramifications that is created and must be addressed. Whether those ramifications become problematic or are properly managed depends on industry's response, both in scope and timing. Having practiced for over thirty years dealing with environmental impacts related to the oil-and-gas industry as in-house counsel for a major oil company, as outside counsel for several other major and independent oil companies, and as counsel for small and large landowners affected by these impacts, we have compiled an extensive depth and breadth of experience regarding practices that can minimize a company's exposure to claims arising from oil-and-gas operations. Hydraulic fracturing or "fracking", as it is commonly referred to now, is an advancement of substantial economic benefit, and yet has already developed a reputation as an industrial bogeyman, whose downside is far too risky, and therefore unacceptable. Whether companies subscribe to any of the alleged concerns is beside the point; the more important point is to realize that society's perception of this issue will become the reality, and litigation will likely follow.

Towards that end, we would offer the following "lessons learned" and practical advice to those companies seeking to be a part of the current revolution in exploration and production, so that they might minimize the claims and allegations that will undoubtedly become part of their experience.

1. Cover Your Base. There is simply no substitute for baseline data. Ideally, before drilling and fracking a well, you should survey and identify every available, actively-used water well within a certain radius of the well to be drilled (e.g., at least twice the farthest calculated distance that the frack will/can travel from the input point) and design and conduct a sampling exercise, in order to collect a sufficient amount of relevant data regarding water quality in the area. This data set will be your first and best line of defense against later claims of alleged frack-related groundwater contamination. The appropriate radius and list of parameters to test for will vary from location to location, so those decisions should be made with the advice and active participation of lawyers and experts who have had extensive experience in handling groundwater-pollution involving frack fluids or other oilfield-related operations.

2. Know Your Field of Play. Before drilling and fracking your well, find out the history of the field in which you are planning to drill. Usually, there will have been some amount of prior exploration, drilling, and production, as well as possible ongoing production. There might be wells that were plugged and abandoned decades ago with everything ranging from telephone poles to oilfield debris - in other words, not very well. There might be wells that have been "temporarily" abandoned for years, whose downhole condition is unknown. There might be producing wells that were drilled and completed at a time in history when steel was in short supply, so that perhaps those wells were "short-cased" and are not properly protected through the base of the deepest usable "fresh"-water zone. While you cannot always guard against, or even know about, every potential problem in a mature field, you can perform a certain level of due diligence that can inform and equip you with the ability to take precautionary steps that you might not otherwise have considered. For example, you can confer with field-administrative officials and both past and current landowners and lessees around the well site and area, and obtain a relatively inexpensive historical aerial photograph of an area, with at least a two-mile perimeter around the well site. Factors such as surface and subsurface location conditions, state oil-and-gas well regulations, historical wellbore spacing, and current industry practice in the field can help determine the distance from your well site that should be examined. As a general rule, exceeding - rather than merely meeting - administrative requirements for drill-site due diligence is a cost-effective practice that can enhance your credibility as a concerned, prudent operator. Being aware of secondary consequences that might result from your fracking is another way to be armed with information that might protect you against claims for which landowners would seek to hold you primarily liable.

3. Communicate with Your Neighbors. This is perhaps the simplest, and yet most often overlooked and underestimated, preventive step that can be taken. In all of our years of experience dealing with oilfield-pollution claims, we can always go back into the company files and find that point in time, early in the history of the complaint, when a company representative chose poor, abusive, or no communication with a landowner, instead of proper, courteous, and respectful communication; and that's where what could have been resolved as a relatively nominal complaint took an expensive turn for the worse and later became a very expensive lawsuit. Since landowners are people, too, it is always a safe assumption that they would like to be treated exactly as you would like to be treated. It is an unfortunate reality that, as an oil-and-gas company, you usually start off with three strikes against you, upon showing up on a landowner's doorstep: 1) you're an uninvited guest; 2) you're going to impact the way the landowner has been using and living on his property; and 3) you're likely to do something on his property that can be described as "contamination." On top of all that, most of the time, that landowner has absolutely no financial interest in the oil and gas to be produced. Instead, he has to tolerate your presence for the financial benefit of everyone but him. As a result, every communication - and every incentive to have communication - with that landowner should always be designed and carried out with those realities foremost in mind.

4. Find Out What the Locals Are Drinking. In addition to sampling any area water wells to determine a baseline for quality, do a little reconnaissance to find out the source of drinking water in the area. Is everyone in the immediate area of your planned operation on private well water? Do they use their own filtration systems? For what particular water-quality

problem? Are they on a rural-water system? How far from your landowner is the nearest municipal or rural water system, and are taps available? Where does the rural-water system get its water? From other water wells in the area? Likewise, if there's a town or community nearby, where does the community system get its water? Collecting this information ahead of time can paint a picture regarding area water sources that could help you design a more precise strategy regarding the collection of baseline data.

5. Get the Dirt...on How It's Being Used. Take the time to learn what the current and historical use of the land has been. Has it been used to grow crops? If so, what kind and for how long? Has it been used for cattle grazing? Is there any kind of specialized use? For example, does the landowner take particular pride in his range-management practices? Is his property used for hunting, fishing, wildlife observation, or wildflower tours? Knowing ahead of time how the landowner is using his property can, not only provide helpful insight that could affect the placement of the well and the size and location of related operations, but it can also provide critical information that can assist in identifying certain parameters to look for, when sampling area water wells.

6. Don't Be a Stranger. Frequently, at the outset of a new project, there will be a great deal of confidentiality and privacy for perfectly legitimate reasons. However, to everyone else in the community, including the landowner, it just looks like plain, ol' secrecy, and secrecy means you know something they don't know, which will almost always immediately be interpreted as something detrimental to them, even if it's beneficial for you. As a result, don't allow yourself to be cast in the role of foreigner or stranger. Instead, determine what kind of assistance you will need, in conjunction with the local work that needs to be done, and see if you can include any local talent on your team. When your landowner and other locals can see a familiar face involved with your activities, the level of stress and concern can be reduced substantially.

7. Find Out If Your Landowner Thinks He Looks Good in a Suit. Although easy to determine, companies almost never research a landowner's litigation history at the local courthouse. Nothing predicts future behavior better than past behavior. If a landowner has made a habit of suing others, you can rest assured that there will come a time when he feels justified in suing you. This is another simple box to check under the heading of "due diligence" but is almost always passed over as an unnecessary expense, if even considered at all.

8. All Politics Is Local. Make it a point to learn about the elected officials that represent the area where you are planning to drill and frack. Municipal and county officials are typically the most important folks to know. But it can often be enlightening to find out who the state legislators and congressional representatives are, too. You never know when one of them, or one of their family members, might live or own property in the immediate area. Also, that state or county might have enacted statutes or ordinances relating to oil-and-gas development and fracking, in particular. Find out whether the elected officials in your area have taken public positions on these issues, so you will know ahead of time what you're dealing with.

9. Share the Wealth. Once you know that you plan to be in the community for the long term, broaden your perspective to understand what all that means. You have decided that it will be profitable to continue operating in that community, so remember to share some of that profit by investing it in the community. But this suggestion has at least two parts to it. First, you have

to remember that you are making money off of the resources that happen to be located in that community, so that there is a well-founded reason to invest some of that money in things that are important to that community: the volunteer fire department; the local school; the community's infrastructure - roads, water, utilities, etc. Second, and just as important, these decisions need to be made from an informed perspective. Tone-deaf, haphazard donations, just to check a box, can be more damaging than making no donation at all.

10. Knowledge Is Power. A truism that has been borne out in every pollution case we have ever handled is that "information is good." If it's bad news (e.g., there is contamination present, a risk has been increased, etc.), then it's news that you would rather know now and have found about yourself, than to have operated in ignorance and have the bad news dumped on you later by hostile forces. If it's good - or innocuous - news, then all the better. "Head-in-the-sand" policies might be temporary avoidance measures, but they are ultimately recipes for disaster.

In this fast-paced, head-spinning, technologically-advanced era in which we live, amazingly effective production tools in the oilfield, like hydraulic fracturing, make the future of oil-and-gas production in the U.S. exciting and seemingly unbounded. Yet, even with such positive developments, there are still responsibilities to tend to. Common courtesy and common sense are never out of date and can be the difference between peaceful coexistence and hostile, expensive, protracted litigation. These ten tips cannot guarantee immunity from unpleasant and perhaps unfounded attacks; but they will go a long way towards minimizing your exposure and defusing those who otherwise are always looking for their next target.

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