KAUFMAN DOLOWICH VOLUCK

ATTORNEYS AT LAW

2015 Casualty Loss Reserve Seminar

FRACKING

AN EMERGING RESOURCE AND SOURCE OF NEW RISK

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Presenter Information

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Presenter Information

Marc S. Voses is a partner in the New York Office of Kaufman Dolowich & Voluck. Marc focuses his practice on domestic and international insurers and reinsurers in coverage and liability issues. He has handled complex coverage issues related to commercial general liability, data and privacy, environmental, professional and management liability policies. In addition, he has handled as disputes involving bad faith and extracontractual claims.

Introduction

- The new generation of environmental claims
- Why focus on hydraulic fracturing (fracking)?
  - EPA report published in 2015
  - Media/political attention
  - Lawsuits and allegations
  - Public scrutiny
- While the risks are “new” – the coverage issues are familiar

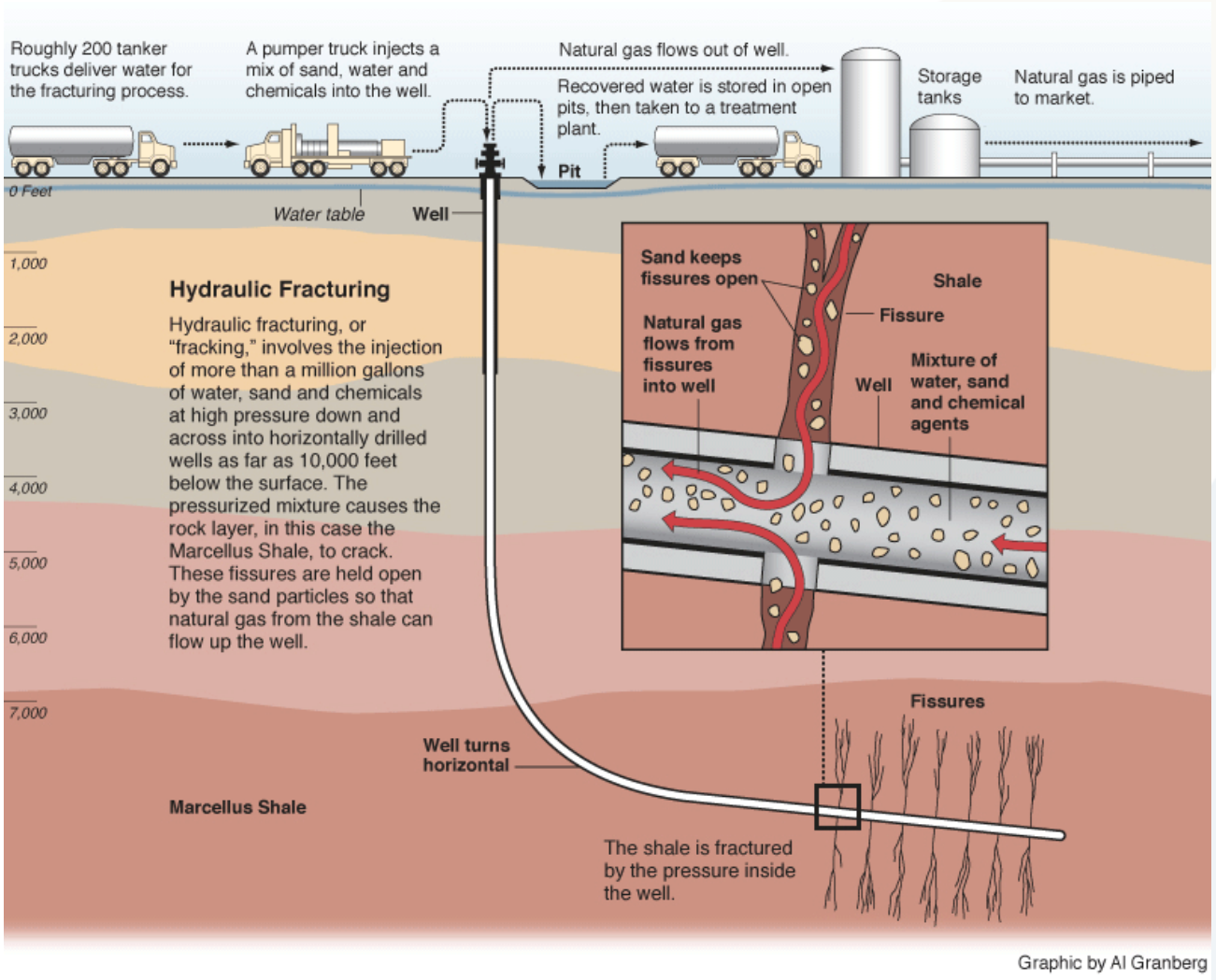
Overview of Hydraulic Fracturing

History and Process

- Unconventional?
  - Injecting pressurized liquids to fracture rock and recover hydrocarbons dates back to the 1940s.
  - Over the past 6 decades, has helped deliver over 600 trillion cubic feet of natural gas from more than 1.1 million separate and successful applications.
  - Almost 9 out of every 10 onshore wells require fracture stimulation

Overview of Hydraulic Fracturing

History and Process



Overview of Hydraulic Fracturing

History and Process

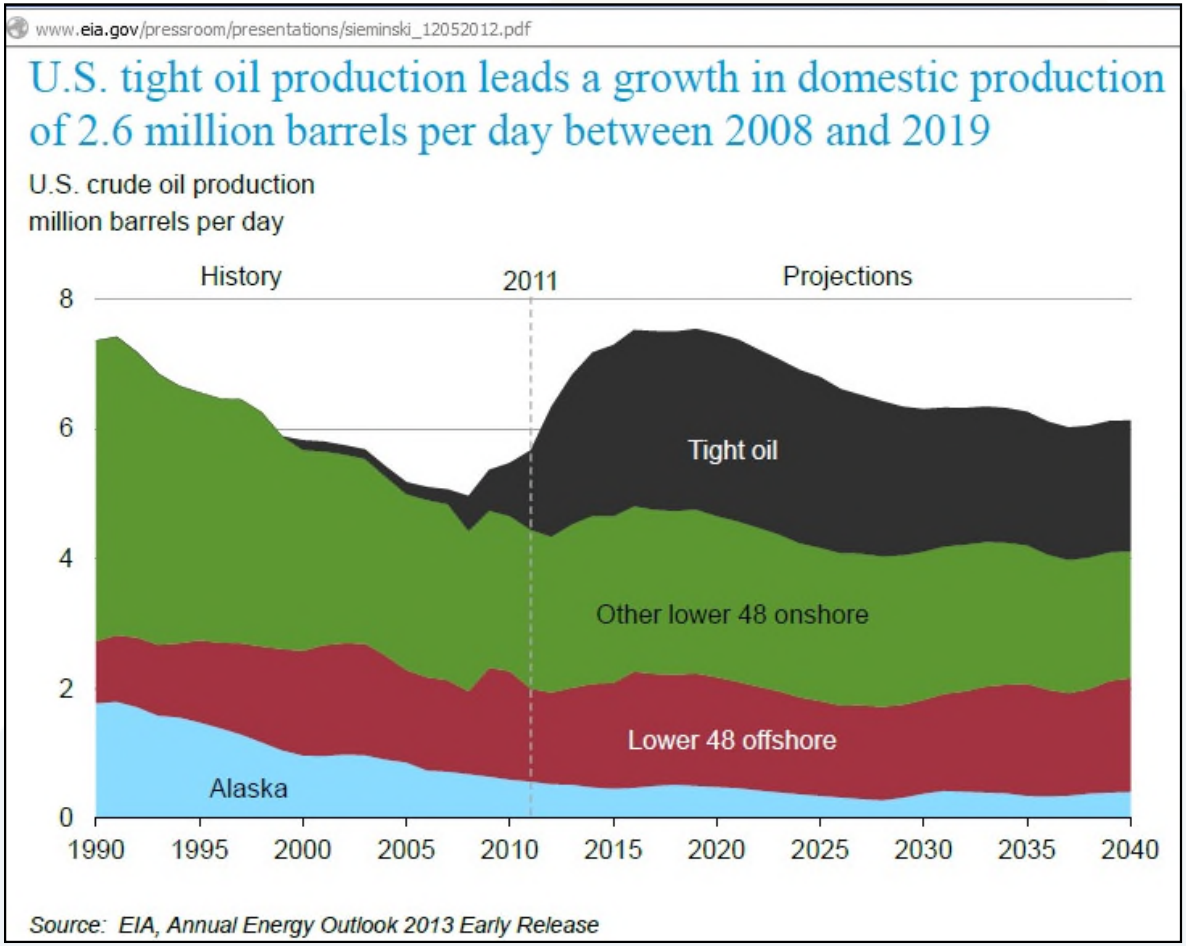
- Chemicals used in fracking cocktail include:
  - Benzene, toluene, and zylene
  - Methanol
  - Biocides
  - Ethylene glycol
  - Hydrochloric acid
  - Diesel fuel
  - Potassium chloride
  - Naphthalene
  - Tergitol NP-4
  - And about 750 other substances

Overview of Hydraulic Fracturing

History and Process

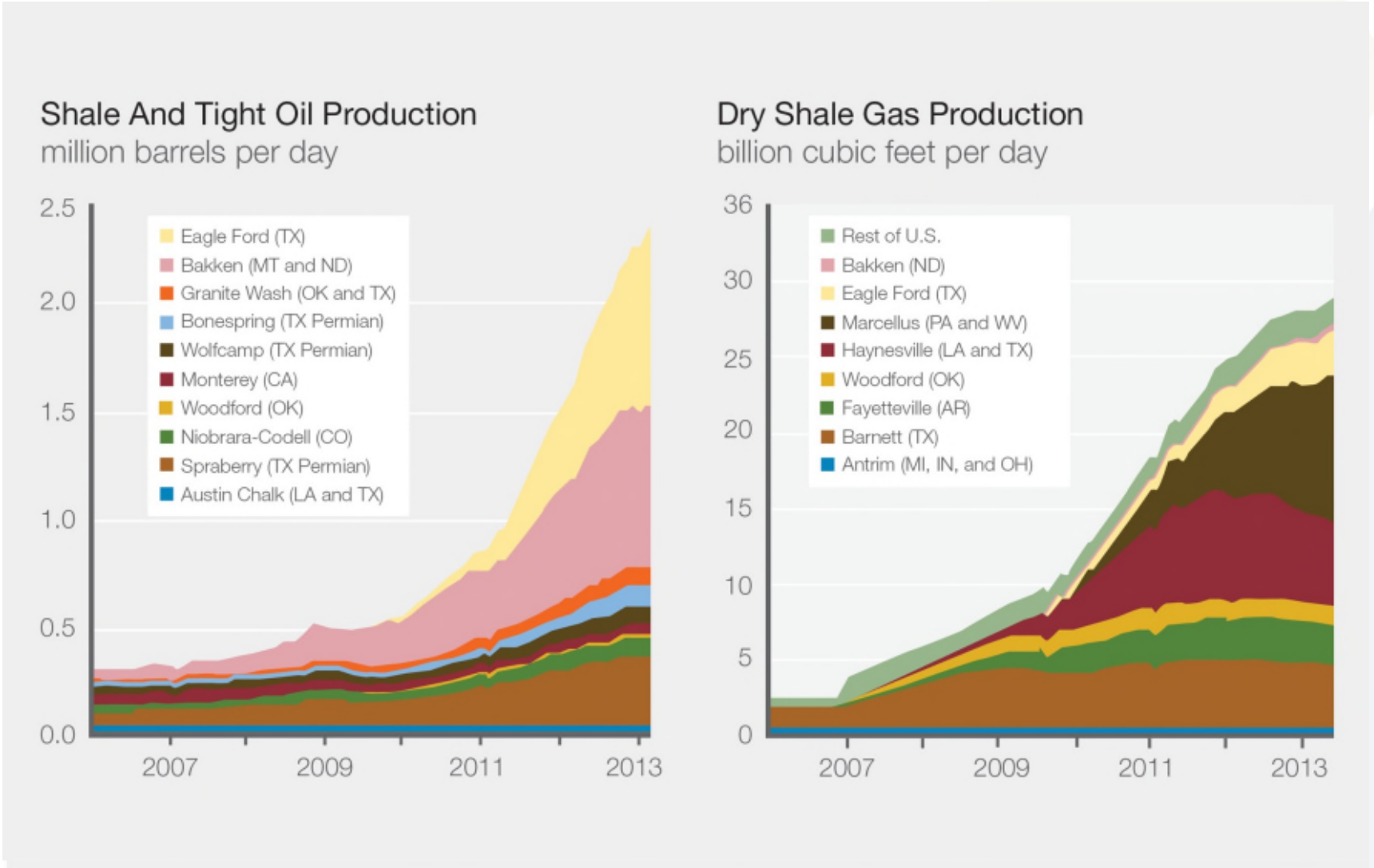
Not Just for Natural Gas

- Tight light oil production is set to be the single largest driver of U.S. oil production
- Growing by about 1 million barrels per day
- Contributing to overall U.S. supply growth to more than 7 million barrels per day

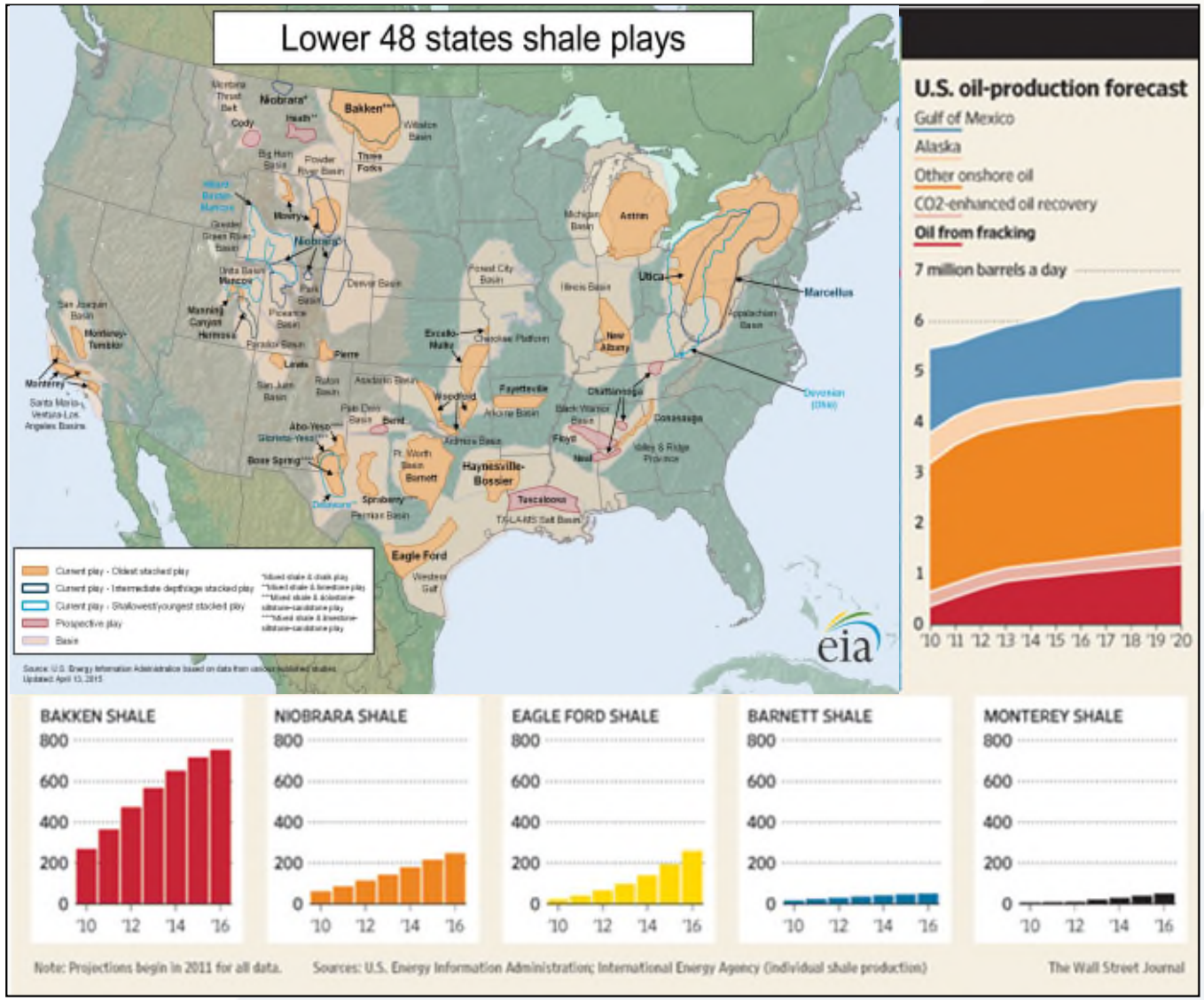


Overview of Hydraulic Fracturing

History and Process



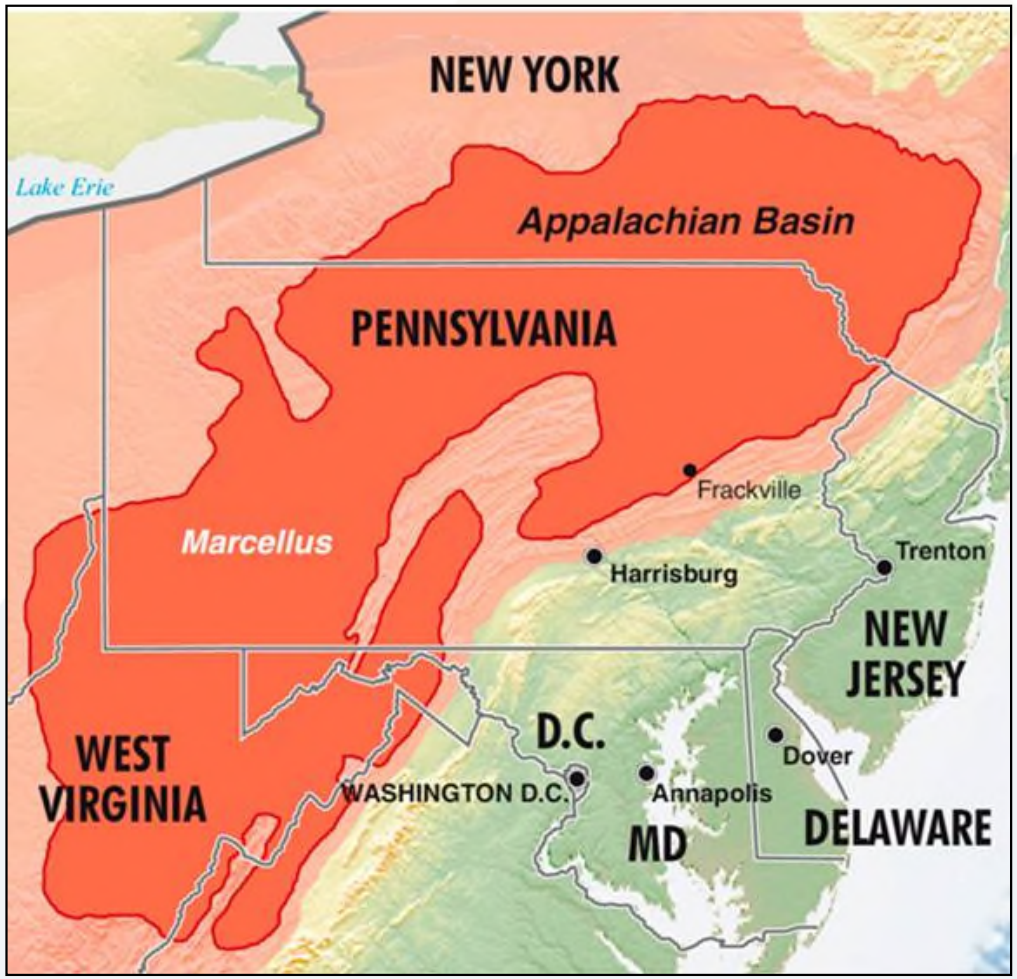
US Shale Gas and Shale Oil



A Few of the Major Plays

Marcellus Shale

- Over 15 cubic feet of natural gas per day in 2015.
- Roughly 40% of total U.S. shale gas production , and 18% of total U.S. natural gas production.



A Few of the Major Plays

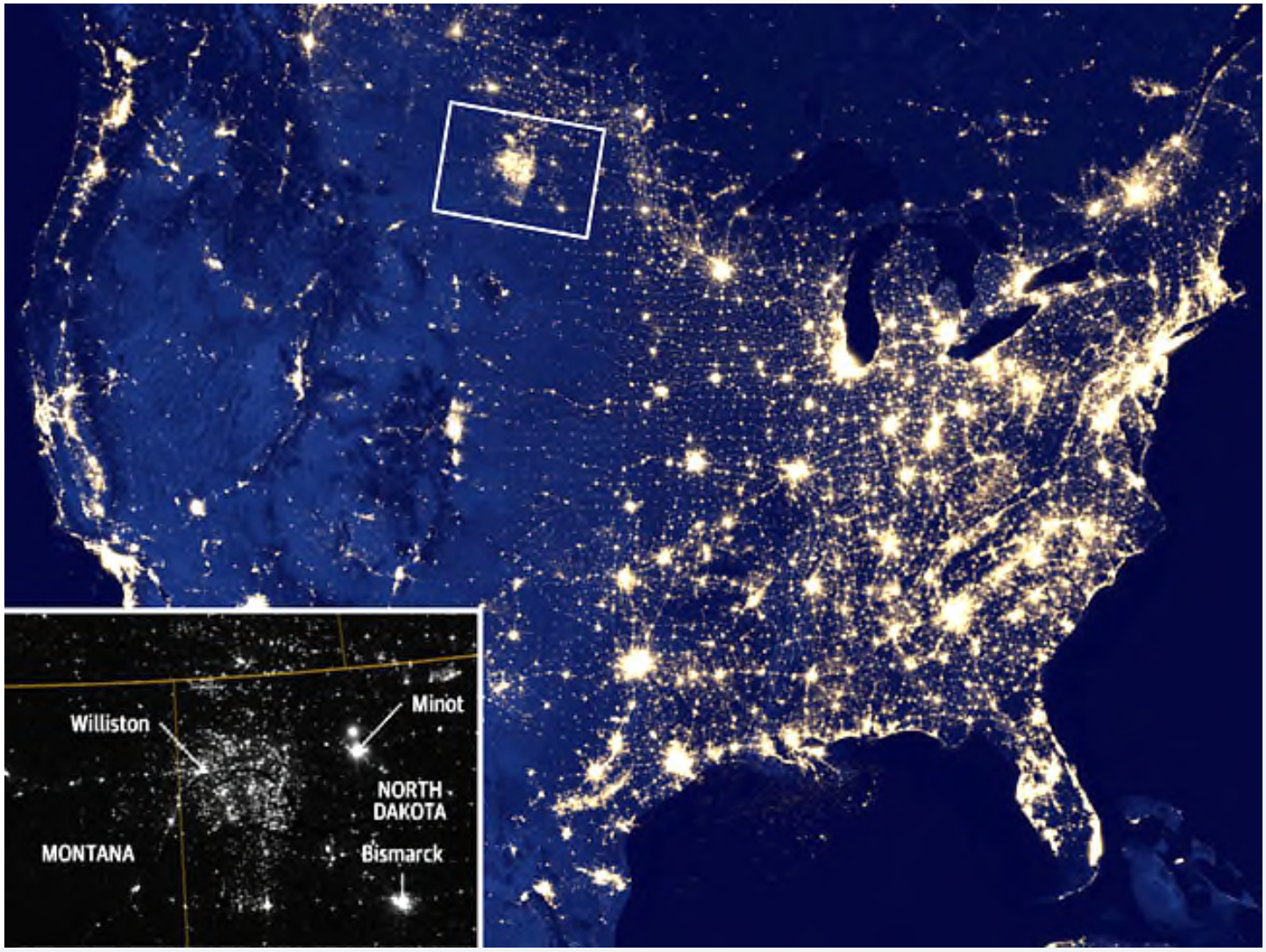
Texas: Eagle Ford, Permian Basin (Sprayberry/Wolfcamp)

- Over 3.5 million barrels of oil per day in 2015, with a slight reduction in the Eagle Ford Region in 2015.
- Will pass Kuwait, Mexico and Iraq to become 8th largest oil producer in the world.
- Local bans on fracking have been instituted by municipalities, but the state of Texas signed a bill into law in 2015 that prohibits local bans on fracking.

A Few of the Major Plays

Bakken

- Over 1.1 million barrels of oil per day in 2015
- Over 1.3 billion cubic feet of natural gas per day in 5
- Roughly 10% of U.S. oil production



Untapped Major Plays

New York's Ban on Fracking (Marcellus Shale)

- Official ban imposed by Gov. Cuomo in June 2015.
- State relied upon "exhaustive research and examination of the science and facts", stating that fracking "poses significant adverse impacts to land, air, water, natural resources and potential significant public health impacts that cannot be adequately mitigated."
- Individuals have filed suit against the state DEP, demanding the right to frack on their property.
- A drilling company that uses a waterless fracking method (gelled propane) has filed for an application to drill, despite the ban.

Limited Plays

Maryland's Limitations on Fracking

- 2015 bill holding drilling companies strictly liable to residents for damage to resident's property, and requiring drilling companies to disclose chemicals used for drilling.
- Three year moratorium on the drilling practice as a panel reviews the public health and environmental impacts.

Substantial limitations imposed in England and Germany in 2015

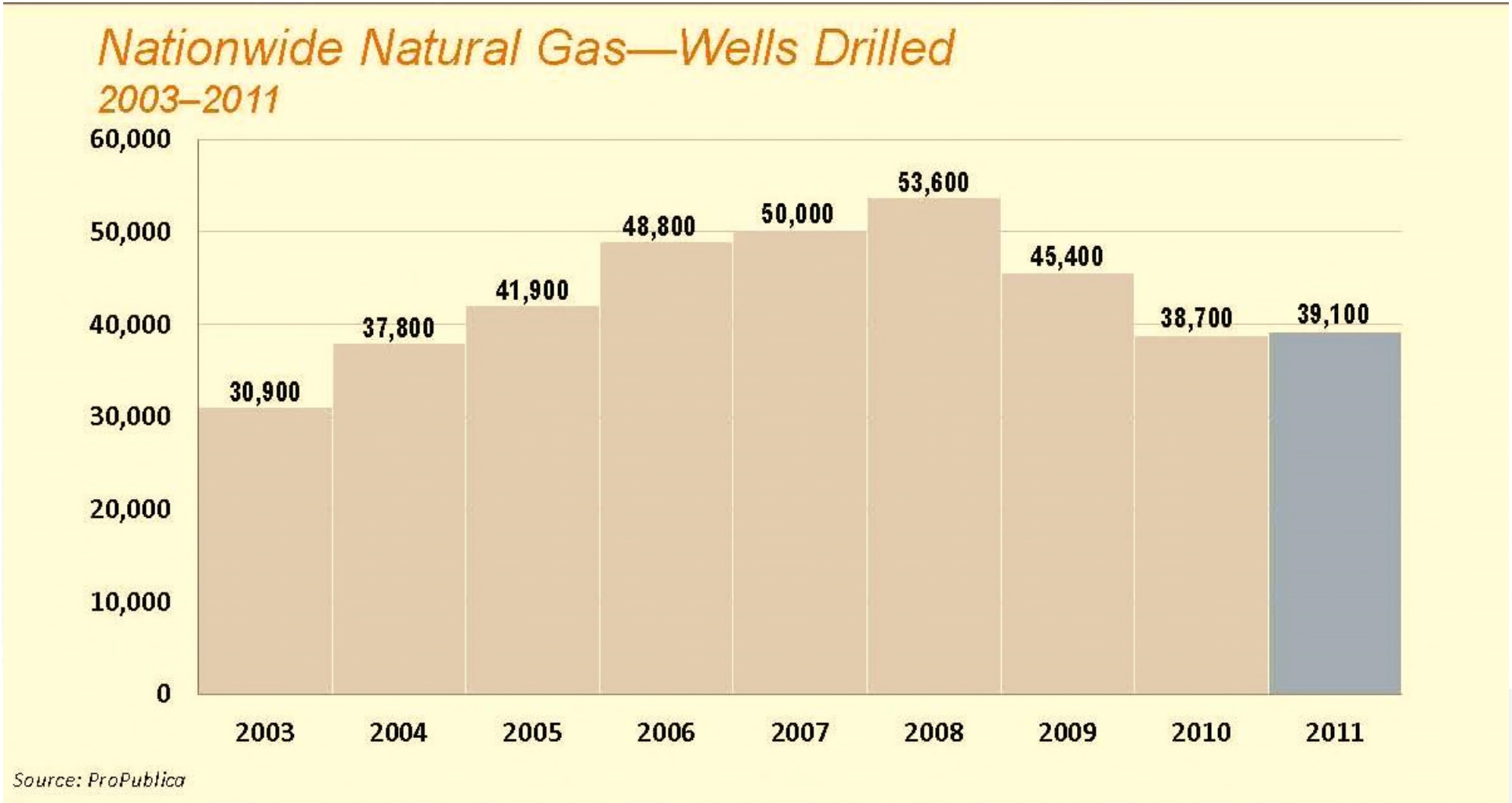
- Not outright bans, but regulatory limitations based upon noise, traffic, and esthetic downsides to fracking.

Producing Wells - 2012

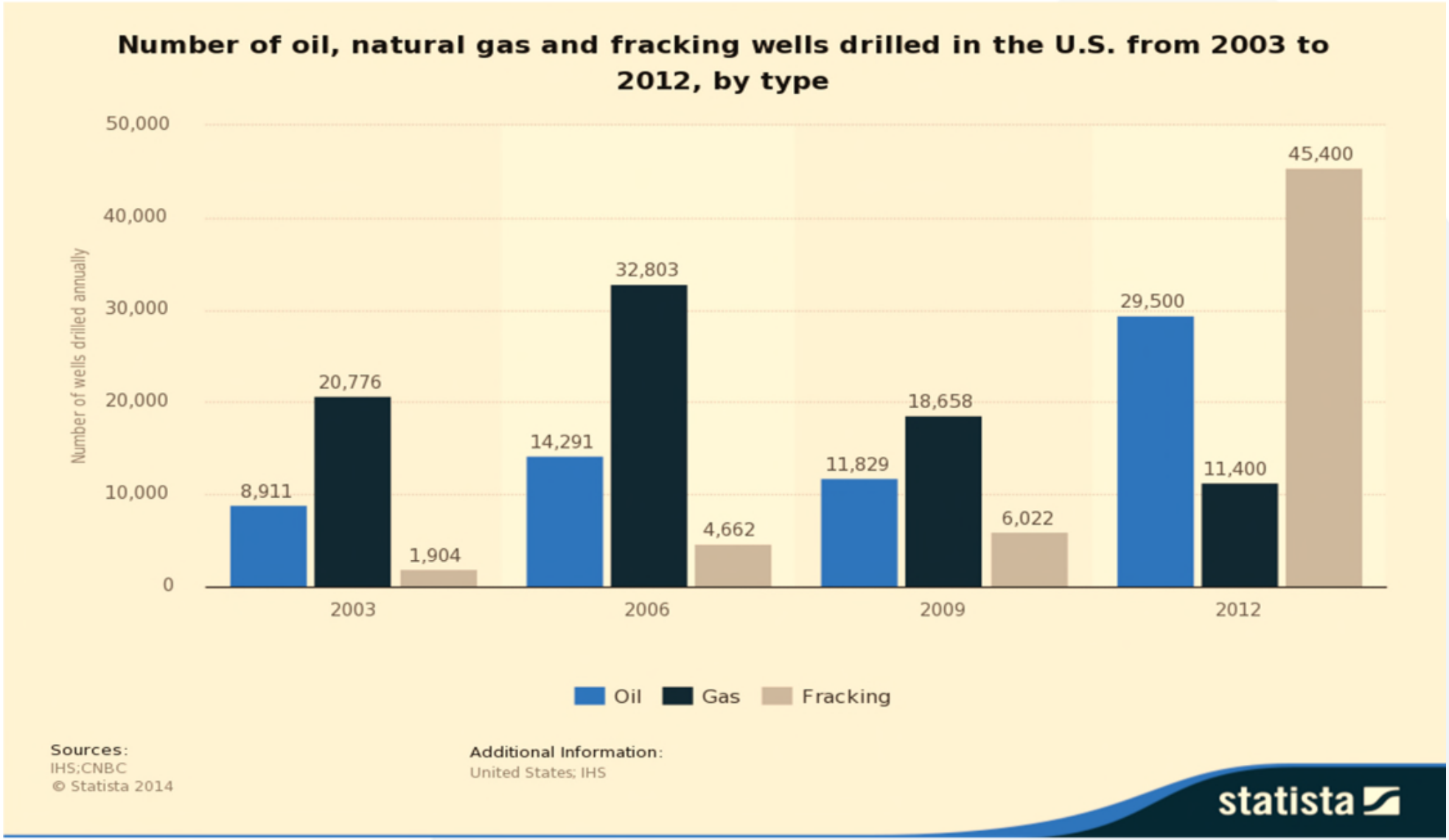
South Central		Rocky Mountain		Marcellus Shale	
TX	96,617	CO	32,000	KY	17,936
OK	40,000	MT	6,240	NY	7,176
AR	8,538	NM	28,206	OH	35,104
KS	24,697	WY	22,171	PA	55,136
LA	19,792			VA	7,843
				WV	50,700
TOTAL	189,644		88,617		173,895

Total in U.S. – 482,822

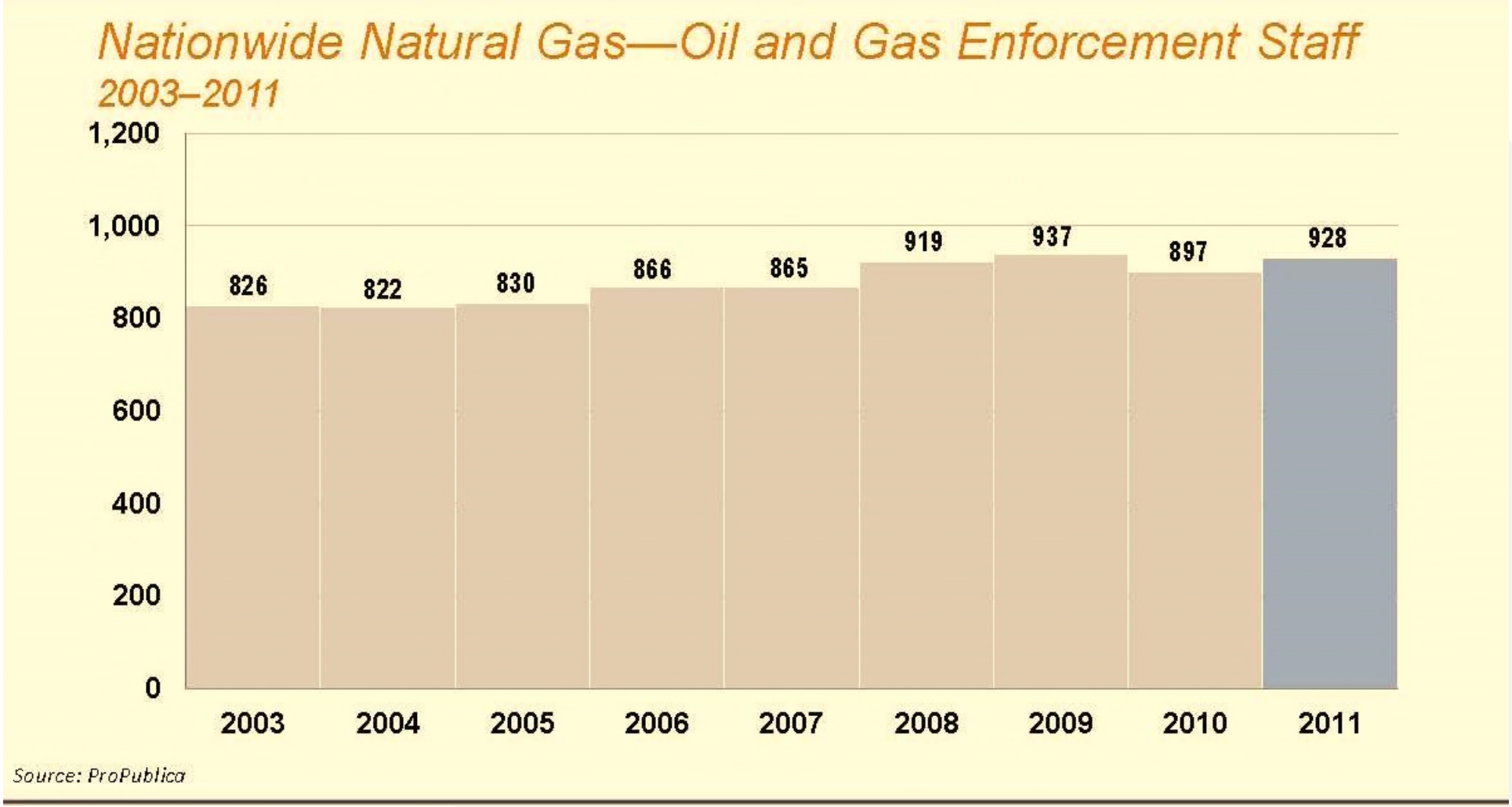
Production Wells



Production Wells cont'd



Regulatory Oversight



Short Term U.S. Outlook

Shale Oil & Gas Production will Continue to Rapidly Increase

- 30% average increase in dry shale gas production in the past 5 years
- In 2008, shale production was only 13% of overall US production but is approaching 50%.
- Fracking in California, the largest known deposit of oil shale and where two-thirds of the US' oil shale is expected to exist, is just beginning.
  - Unique risks/aspects of Monterrey Shale
  - Regulatory environment
- Drilling activities are expected to return to dry plays including Haynesville, Fayetteville and Barnett
  - Further development in Haynesville has been slow in 2015
- Bulk of U.S. natural gas production growth is projected to come from Appalachia and Eagle Ford
  - Output from these shale basins estimated at 79% of total U.S. natural gas production growth through 2035

Short Term U.S. Outlook

Dependence on Foreign Sources Will Continue to Decrease

- EIA estimates the U.S. will be the largest producer of natural gas and petroleum (including crude oil, natural gas liquids) in 2014, surpassing Russia and Saudi Arabia
- Navigant projects U.S. will be net exporter of natural gas by 2019
- Recent BP report projects U.S. energy production will outpace consumption by 2035

EPA Report of 2015

- June 2015: no link between fracking and widespread pollution of drinking water.
  - While contamination is possible, and has happened in isolated incidents, it is not a systemic problem.
  - As of June 23, 2015, there are 28 pending groundwater contamination lawsuits (AR, NY, OK, PA, TX, WV)
- EPA provided guidance to the oil and gas industry
  - EPA identified four chemicals that are “more likely than others to reach drinking water and create a toxicological hazard.”
  - EPA cautioned companies to be mindful of regional water consumption restrictions.

Federal Regulation

- March 2015, effective late June 2015: regulations for fracking on land owned by the government (9-10% of total production)
  - Disclosure of all chemicals used in the fracking process within 30 days of the completion of fracking operations.
  - Government inspection of concrete barriers lining fracking wells.
  - Limitations on storing chemicals around well sites.
  - Detailed submission of well geology required.

Drivers/Key Market Factors

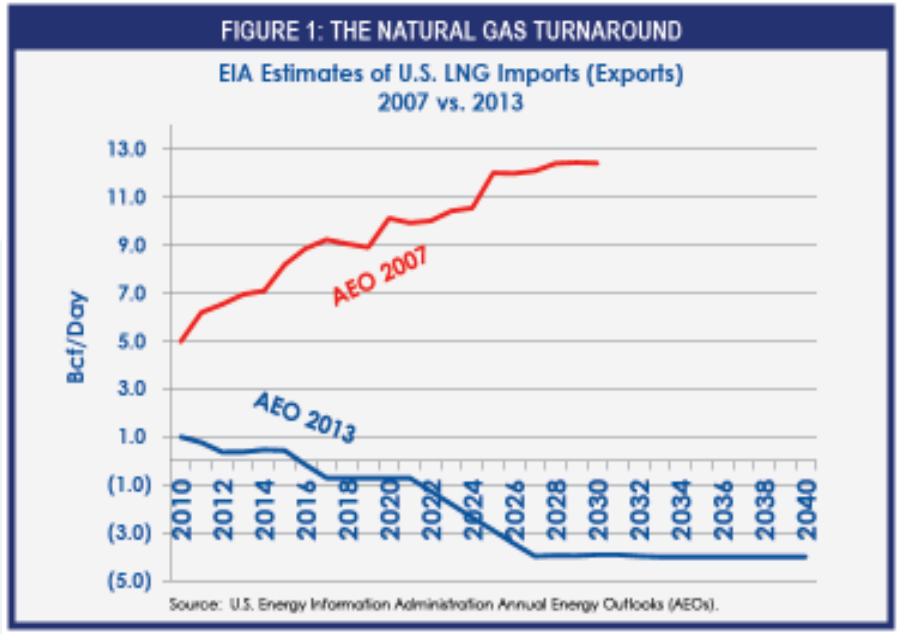
Growth/Expanded Use of Natural Gas

- Projected to overtake oil as most used fuel by 2027
- Significant growth in the next decade:
  - Coal-fired plants expirations and conversions
  - Increased demand for industrial use
  - Increasing adoption for vehicles, primarily bus and truck fleets

Drivers/Key Market Factors

LNG

- Increasing number of applications to export LNG
- Navigant estimate the U.S. will become a net LNG exporter in 2017
- North American LNG exports expected to come on line in 2015/2016
- Significant reduction in LNG *import* facilities
- LNG originally planned to be imported here has been redirected, causing international price instability
- Implications in Europe and elsewhere
- China a major factor in LNG exports
- LNG facilities contain unique construction risks



Drivers/Key Market Factors

Transportation Issues

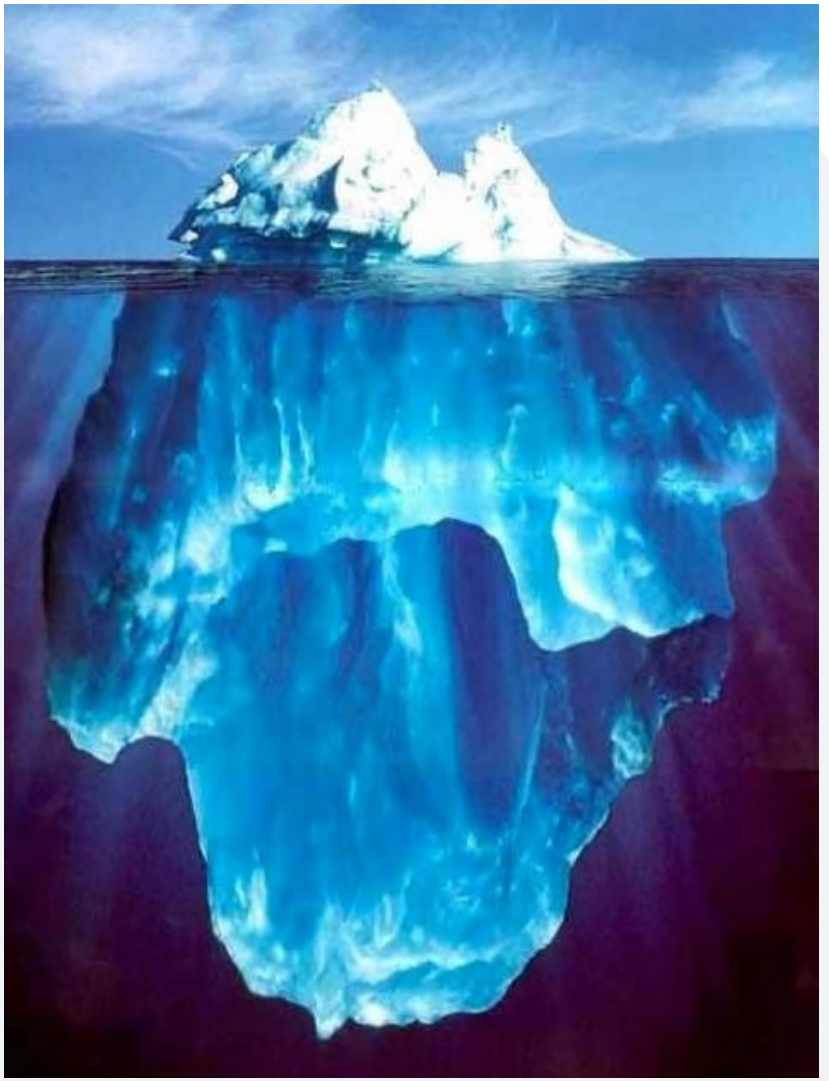
- Need for pipeline infrastructure in Northwest and elsewhere
- 116,837 miles of pipelines either planned or under construction worldwide. About 42,000 miles in North America
- Rail emerging as primary transporter of crude in Bakken
- Rail also emerging in Western Canada
- The pipeline vs. rail conundrum

What Are the Risks?

… it's bigger and more complicated than you think

Focus Areas

- Water
- Fracking Fluids
- Well Construction
- Surface Water and Soil/Land
- Seismic Disturbances, Health & Safety, Emissions
- Regulations



The Four Risk Groups

- Water
  - Unique to fracking are the risks associated with the transport, storage and use of significant amounts of water. Each fracking project may use 2-4 million gallons of water.
  - Risks:
    - Limited water supply – impact on other groundwater users
    - Change in water table – impact on shallow aquifers
    - Storage of fracking cocktail at the drilling location (usually housed in “frack tanks” or purpose built ponds) – presents both short- and long-term risks—e.g., storm event causing overflow and gradual seepage.

The Four Risk Groups –Cont'd

- Casing
  - Breach of vertical casing may cause release (which can be gradual or sudden in nature) impacting shallow aquifers.
    - And there are numerous casings: conductor casing → surface casing → intermediate casing….
  - Operators should take measures before, during and after operations by monitoring nearby groundwater wells for exposure to fracking fluid and methane before, during and after drilling.

The Four Risk Groups – Cont'd

- Blowout
  - This includes the loss of well during drilling operations, as well as loss of flowback water from production site.
  - The risk concerns impact to surrounding areas: farms, homesteads, waterways….
  - If drilling site is located near an urban area, it may impact more directly the local community and business.

The Four Risk Groups – Cont'd

- Fracking Fluid ("Cocktail")
  - Made up of:
    - 99% water highly concentrated in saline;
    - .5% sand (including silica sand), which acts as a proppant to crack shale and release natural gas. Up to 4 mil pounds of sand can be used in drilling operations.
      - Exposure to silica sand can occur during any part of the operation when sand dust laden with silica becomes airborne.
    - .5% other chemicals, which companies are not legally obligated to disclose pursuant to the Halliburton Loophole in 2005 Energy Bill.
    - Significant amount of fracking fluid is never recovered.

Seismic Activity

- UK – O&G Company acknowledged seismic activity resulting from fracking activity
- USGC
  - 600%+ increase in seismic disturbances in active fracking states from 1980s through 2012
  - Increase more pronounced since 2009
  - Beltway states had 21 seismic events per year from 1970-2000
    - 29 in 2001-2008
    - 50 in 2009
    - 87 in 2010
    - 134 in 2011
    - 99 in 2009–2013
    - 659 in 2014.

Seismic Activity

- USGS – 5.2 magnitude earthquake believed to come from fracking on June 29th, 2014
  - 5.6 magnitude earthquake in 2011
- There have been over 20 earthquakes in northern Texas since 2013
  - Exxon has contested claims that the earthquakes were caused by its fracking
- Alberta, Canada – 4.4 magnitude in June 2015, and 3 earthquakes over 4.0 magnitude in 2015. Fracking has been referenced as a cause for the earthquakes.

Seismic Activity

Oklahoma

- Aug. 20 2014: OK hit with 20 earthquakes in 1 day
  - Largest one registering at 4.3
  - 1978-2008: OK only averaged 2 per year
- 2014: 359 earthquakes over a 2.5 magnitude, up from 14 in 2013.
- February 2015: injection wells shut down in north-central Oklahoma as a result of several earthquakes.
- August 2015: Oklahoma regulators informed energy companies to sharply reduce wastewater disposal in an area northeast of Oklahoma City.

Insurance Potentially Implicated

- Casualty- General Liability and Umbrella Insurance
- Environmental/Pollution Liability Insurance (EIL or PPL or ESL)
- Operator's Extra Expense ("Control of Well") Insurance
- Errors & Omissions Insurance (e.g., Architects & Engineers Coverage)
- D&O Insurance
- Business Interruption Insurance
- Homeowner's Insurance
- Agricultural Insurance
- Workers' Compensation Insurance
- Products Liability Insurance
- From an operator's perspective, policies mainly at play are GL, Environmental & OEE

Risk Allocation: Parties Implicated

- Various parties involved in fracking operations:
  - Site owner-operator
  - Non-operating owners
  - Contractor(s) building the infrastructure (roads, pads, ponds)
  - Drilling contractors (supplies, rig and crew)
  - Wireline operators
  - Equipment suppliers
  - Fracking operators (provide the chemicals, blend the cocktail)
  - Transporters
  - Storage facilities
  - Recycling facilities

Risk Allocation…Cont'd

- The operating agreement between the site owner-operator and the non-operating owner usually allocates the risk between those parties in accordance with their ownership interest.
- Among the contractors, however, industry norm is to have "knock for knock" contractual arrangement.
  - Under a "knock for knock" contract, each contractor is responsible for their own workers and equipment, and indemnifies the other parties, regardless of fault.

Property Suits – Likely Causes of Action

- Plaintiffs – Home, Property & Business Owners
  - Trespass
  - Negligence/Gross Negligence/Strict Liability
  - Nuisance
  - Fraud/Misrepresentation
  - Air and Noise Pollution
  - Strict Liability
  - Breach of Contract
  - Indemnity
  - Medical Monitoring

Property Suits – Alleged Damages

- Typical damages alleged:
  - Air and Noise Pollution
  - Well Contamination
  - Seismic Activity / Sinkholes
  - Diminution of Property Value
  - Loss of Business Income
  - Costs of Remediation/Monitoring

Bodily Injury Suits: The New Toxic Tort

- Causes of Action
  - Negligence
  - Employer Liability
  - Strict Liability
- Damages Sought
  - Typical Bodily Injury Damages
  - Medical Monitoring
  - Punitive Damages

Bodily Injury Suits: The New Toxic Tort

- Employer Liability
  - Employee exposure to contaminants
    - Failure to provide safe workplace
    - Failure to provide appropriate protective equipment
    - Failure to maintain safe levels of exposure
    - Failure to warn
  - Silica Exposure?
    - NIOSH study
    - Latency issues

Third-Party Liability Claims

- Do not know what, if any, liability scheme (i.e., CERCLA?)
- Property damage claims – remediation
  - Fracking fluid
  - Hydrocarbons
- Property damage claims – seismic activity
- Bodily injury claims

Third-Party Liability Claims

- "Year" may be important – fracking since 1940's
- General Liability Policies
  - Property damage liability or bodily injury liability
  - Liability incurred because of PD or BI sustained during policy period "caused by an occurrence"
- "Occurrence"
  - An accident which results during the policy period in bodily injury or property damage
  - Occurrence based general liability policy is "triggered" when the harm is sustained, not when the claim is asserted

"OCCURRENCE"…A New Breed

- Some policies issued through the surplus lines market or by captives servicing the energy industry define the term "occurrence" as an event occurring or commencing during the term of the policy
  - Example: "The word "occurrence" means an event or a continuous or repeated exposure to conditions which commence during the term of this policy and cause personal injury or bodily injury or loss or damage to Property that is neither expected nor intended by the Insured…."
  - This new breed of occurrence language may have ramifications because, arguably, an insured may have to establish that its claim arose from an "occurrence," which occurred or commenced during the relevant policy period

Third-Party Liability Claims

- Insurer's duty to defend policyholder under GL policies
  - If allegations fall within coverage, ultimate liability is irrelevant
    - Insurer must defend until liability is determined – even if allegations are meritless
    - But, there must be a potential for coverage under the policy terms
    - Some jurisdictions allow the duty to defend to be assessed using evidence extrinsic to the allegations of the underlying complaint
- Motion practice on duty to defend may tee-up coverage issues at the outset of coverage litigation

Property & Bodily Injury Suits - Defenses

- Negligence & Intentional Tort Actions
  - Your single biggest focus should be on causation
- Reasons Causation is The Focus
  - Novelty of science = scarcity of medical literature/studies
  - Lack of pre-fracking samples or other environmental testing
  - Non-disclosure of chemicals used by O&G companies
  - Identification of attributable defendants
  - But future legislation may short-cut these issues

Property & Bodily Injury Suits - Defenses

- Put Plaintiffs to their Proofs on Causation
  - Have Plaintiff identify the specific contaminant(s)
    - Is the contaminant naturally occurring?
    - Is it actually used in our insured's operations?
    - Is it used in activities of other nearby operations?
      - i.e., Other O&G wells (active or abandoned)
      - Underground mines
      - Well operation/maintenance
    - Was it used in prior or historical nearby activities?

Property & Bodily Injury Suits - Defenses

- Use of Experts
  - Assess the location of the well(s) to Plaintiff's location
    - Is there an exposure pathway?
  - Can we rebut using insured's testing and safety protocols?
  - Report on mechanical integrity of well and sub-surface conditions

Property & Bodily Injury Suits - Defenses

- General & Specific Causation Issues
  - Can Plaintiff tie their exposure to the particular contaminant(s) to the disease/illness claimed?
  - Dose-Response issues?
    - What is the concentration, timing and duration of exposure?
  - Is there a medical diagnosis of the disease/illness claimed?

Lone Pine strategy: *Strudley v. Antero Resources Corp. et al.* (Case No. 2011-cv-2218)

- Lone Pine Strategy (Colorado – *Strudley*)
  - Lone Pine order required plaintiffs to make a *prima facie* showing of exposure, injury, and specific causation by way of medical experts, contamination reports and other details regarding each individual's specific and durational exposure to hazardous substances from defendants' operations
  - Plaintiffs submitted medical records, air/water samples, expert testimony from a physician who concluded (without examination) that "sufficient environmental exposure and health information exists to merit further substantive discovery"
  - Lower court found plaintiffs' proofs insufficient and dismissed the case
  - Appellate court reversed on procedural grounds—questioning the trial court's authority to dismiss without discovery under the circumstances.
  - April 2015: Colorado Supreme Court affirmed the appellate decision

Likely Insurer Defenses

- "Expected" or "Intended" Harm
  - General liability policies do not afford coverage for liabilities arising out of property damage or bodily injuries that were expected or intended by the policyholder
  - Fracking claims present issues concerning whether the relevant harm was expected or intended and, as such, not arising from a covered "occurrence"
  - Evidence of expected or intended harm may include internal documents considering the potential risks of the fracking technique, knowledge of the risks discussed in journals and trade publications, and/or discussions of harm in regulatory or legislative settings

Likely Insurer Defenses

- The governing principles differ by state. For example, coverage may be precluded if the policyholder knew that:
  - The damages would flow directly and immediately from its intentional act
  - The harm was "more likely than not to occur"
  - Bodily injury or property damage was "reasonably anticipated"
  - Injury was "practically certain," and/or
  - The harm at issue was "substantially probable"
- The law on whether the insured's prior knowledge is assessed based on a subjective or objective standard (or a hybrid-approach) varies from state to state and may hinge on variations on policy language

Likely Insurer Defenses

- Pollution Exclusions
  - General liability policies began including a form of pollution exclusion in the 1970s commonly known as the “qualified” pollution exclusion
  - In the mid-1980s, general liability policies began including a form of pollution exclusion commonly known as the “absolute” pollution exclusion
  - More recent pollution exclusions contain “time element” clauses
  - Variations in pollution exclusions are more prevalent since the 1980s and each variation can have significant ramifications on coverage

Likely Insurer Defenses

- "Qualified" Pollution Exclusions
  - General liability policies issued between the early 1970s and the mid-1980s commonly contain the so-called "qualified pollution exclusion"
  - This exclusion bars coverage for "pollution"-related bodily injury or property damage unless the discharge/release is "sudden and accidental"
  - Some courts interpreted this early exclusion as barring coverage only for "pollution"-related bodily injury or property damage that was expected or intended
  - Other courts gave "sudden" independent meaning from "accidental" and gave the clause independent meaning from the "expected or intended" clause

Likely Insurer Defenses

- "Absolute" or "Total" Pollution Exclusions
  - Began to appear in the mid-1980s in response to courts limiting the scope of the "qualified" exclusion
  - The "absolute" pollution exclusion bars coverage for injury/damage caused by discharges of pollutants, including costs associated with a governmental directive that the insured test for, monitor or remediate pollutants
  - There have been disputes concerning the applicability of the "absolute" exclusion as well
  - The disputes often center on whether the material responsible for the damage or injury is a "pollutant". For example, natural gas may not be considered a "pollutant" in some states

Likely Insurer Defenses

- "Time Element" Pollution Exclusion Clauses
  - More recent pollution exclusions contain "time element" clauses
  - Afford coverage for bodily injury or property damage arising from accidental, short-duration releases of pollutants if certain conditions (including prompt reporting) are met
  - Fracking related accidents, e.g., well-blow outs, could trigger limited time element coverage for pollution incidents

Likely Insurer Defenses

- *Warren Drilling Co. v. ACE Am. Ins. Co.*, 2:12-cv-425 (S.D. Ohio).
- Energy pollutions liability extension (EPLE) endorsement:
  - Reinstates coverage under CGL policy with pollution exclusion for certain pollution incidents where the discharge was:
    - Was unexpected and unintended
    - Commenced abruptly and instantaneously
    - Commenced at or from a site owned or occupied by the insured or at which the insured was performing operations
    - Was known by the insured within 30 days after the commencement of the discharge
    - Was reported to the insurer within 60 days after the commencement of the discharge

Likely Insurer Defenses

Application of New Pollution Exclusion

- *Star Insurance Company v. Bear Productions, Inc.,* No. CIV-12-149-RAW (E.D. Okla. Oct. 16, 2013)
- Class action lawsuit against an insured company engaged in the transport and disposal of "produced fluid waste" (PFW) from fracking operations, alleging personal and property damage caused by the insured's pollution and contamination of the environment.
- Primary and umbrella insurers moved for summary judgment based on policies' pollution exclusion, barring coverage for "'[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants' .... 'Pollutants' mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed."

Likely Insurer Defenses

Exception to the pollution exclusion in *Bear Productions*:

- This insurance applies to “bodily injury”, “property damage”, and “environmental damage” only if:
  1. The “bodily injury”, “property damage”, or “environmental damage” are caused by a “pollution incident”
     a. on or from a “designated well site”5 in the “coverage territory”, and
     b. that begins and ends within 72 hours of the incident; and
     c. that is accidental; and
     d. that is reported within 90 days of the incident
  2. The “bodily injury”, “property damage”, or “environmental damage” first occurs during the policy period[.]
- Court granted the insurers’ summary judgment and held coverage barred by pollutions exclusion. Also held that exception did not apply to save coverage because (1) the alleged pollution began in 2003, before the inception of the policy, (ii) lasted well beyond 72 hours (2003 – 2009), and (iii) was not accidental.

Likely Insurer Defenses

- Oil Industries Limitation Endorsement
  - There is no standard-form Oil Industries Limitation Endorsement, so wording differs significantly by policy
  - Sometimes found in umbrella policies, rarely in primary policies
  - Frequently, the endorsement makes clear that property damage to certain oil industry-specific equipment is not covered by liability insurance
  - Some forms of this endorsement are broader to exclude coverage for third-party property damage claims

Likely Insurer Defenses

- Saline Substances Contamination Exclusion
  - This exclusion's applicability to fracking-related harm is the fracking liquid of "cocktail" that is injected into a "fracked" well to help release the oil or natural gas from the disjointed shale bed
  - Applies to property damage, not bodily injury
  - Interplay with pollution exclusion

First-Party Property Claims

- Protects a policyholder's place of operations and inventory
- Provides coverage for lost or damaged property
  - "All Risk" policies: cover losses to real property caused by any peril not expressly excluded
  - "Named Peril" policies: cover only those perils expressly listed, such as fire and explosion
- As fracking operations move into the Northeast, wells are being drilled in close proximity to businesses

First-Party Property Claims

- Property Damage
  - Well blow-outs
  - Seismic activities beneath insured property: collapse, cracking, shifting, sink holes
- Utility Service Interruption
  - Provides coverage for losses that the policyholder incurs due to the interruption of utility services that result from physical damage to the property that supplies the utility
  - For example, if hydraulic fracturing activities results in your business losing access to its water services, and your business then incurs losses because of interruption of service, you may have an insurable loss – i.e., a farm's inability to water its crops or provide water to its livestock

First-Party Property Claims

- Business Interruption
  - Provides coverage for lost income due to suspension of business operations, often as a result from direct physical loss to insured property
  - Generally, business interruption coverage requires property damage
    - Business Interruption coverage may turn on whether the policy requires property damage to insured property, like the insured's offices or factories
    - The majority of Time Element coverages, like Contingent Business Interruption (CBI) and Civil Authority coverage, do not require property damage to the insured's property

First-Party Property Claims

- Civil Authority Coverage
- Covers losses due to an order of a civil authority
  - Closure of specified state and local governments
- A typical policy provides:
  - "When a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises . . . ." (ISO CP 00 30 06 07, at p. 2)

First-Party Property Claims

- Energy companies with land leases in New York may possess Civil Authority claims as a result of drilling ban.

First-Party Property Claims

- Potential application of “Business Pursuits” exclusion
  - Most homeowners insurance policies exclude coverage for liability relating to "business pursuits,“ barring coverage for any damage or liability “arising out of or in connection with the business pursuits of any insured.” Said “business” need not be owned or operated by the insured.
  - Although the law is not uniform, most jurisdictions generally define a business pursuit as a (i) continual or recurrent activity (ii) carried out for financial gain.

First-Party Property Claims

Business Pursuits Exclusion – Cont'd

- In most states, courts give a broad interpretation to "business pursuits," drawing in almost any activity that results in financial gain.
- Few states have adopted a narrower interpretation of "business pursuits," limiting it to activities that are considered a "primary occupation" and not including those where profit is not the insured's primary motive (PA).
- GA, MS and NC: exclusion only applies to insured's principal business.

Environmental Liability Coverage

- Companies engaged in fracking operations may face coverage issues under GL policies
  - Oil industries limitation endorsement
  - Saline substances contamination exclusion
- EIL/PPL are claims made policies
  - Property damage, remediation costs
  - Injury to “air” may constitute property damage
  - Retrofitting smokestacks may constitute remediation – may apply to re-casing wells

NRG Energy, Inc. v. Illinois Un. Ins. Co., Civ. 10-516-JJb-SCR (Mid. Dist. LA Jan. 30, 2012) (Premises Pollution Liability Insurance Policy)

OIL Insurance Limited

- Pooled insurance program comprised of members that are medium to large sized public and private energy companies with at least $1 billion in physical property assets and an investment grade rating or equivalent
  - The purpose of the company is to insure certain risks inherent in energy operations, including losses and costs arising from physical damage to property, control of wild wells and certain pollution liability
  - Provides first-party insurance (excluding business interruption loss) and third-party property insurance

D&O Coverage

- Does a governmental subpoena constitute a “claim” within the meaning of a D&O policy
- D&O policies provide coverage for “claims” against the directors and officers, as well as the company itself (when the company indemnifies the directors and officers and for claims directly against the company)
- “Claims” may include “formal or informal administrative or regulatory proceedings”

D&O Coverage

- *MBIA Inc. v. Federal Insurance Co.*, 652 F.3d 152 (2d Cir. 2011)
  - "Securities Claim" provided coverage for the costs incurred responding to New York Attorney General's subpoena and investigation

Best Practices

- **Cleanup**
  - Flowback
  - Fracking water
  - Temporary roadways
- **Corporate Citizenship**
  - Are you dealing with a large company?
  - LLP/LLC that is dissolved at the end of operations?
  - Small frackers that are struggling to turn a profit may cut corners
  - Is job safety a big concern?

Best Practices

- **Containment**
  - Storage of hazardous or toxic liquids
  - Storage of flammable or explosive substances
  - Naturally-occurring radioactive materials (NORM)
  - Heavy metals
  - Toxic minerals
  - Air emissions
  - Noise
    - Flaring
    - Trucking traffic
- **Casings**

Questions?

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