



DON'T BELIEVE THE HYPE: FEDERAL AGENCIES ARE "ALL OVER" HYDRAULIC FRACTURING

by Sam Boxerman, Joel Visser, and Jim Wedeking

The shale oil and gas revolution is a “game changer” for the United States. Advances in hydraulic fracturing, combined with horizontal drilling, have opened vast reservoirs of natural gas and crude oil in shale formations across the U.S. Dramatic increases in domestic oil and gas production are driving economic growth, creating jobs, and dramatically reducing U.S. dependence on foreign sources of oil and gas.¹

Experience shows shale oil and gas development is being and can be done safely, as two Environmental Protection Agency (EPA) Administrators have acknowledged in testimony before Congress.² This is not surprising, as states have been overseeing oil and gas production successfully for decades and have adjusted their own rules to address advances in shale development. Nevertheless, activists have mounted a relentless campaign, claiming hydraulic fracturing will damage the environment because it is “unregulated,”³ and seeking significant new federal laws and regulations.

Yet, there already is no shortage of federal regulation of hydraulic fracturing. In fact, according to Administrator McCarthy, “EPA has been all over [fracking] for quite a while,”⁴ with more regulation in development. Other agencies are likewise increasing federal oversight. New or proposed federal regulations run the gamut from controlling air emissions to seeking to restrict worker exposure to the sand used in hydraulic fracturing fluid. The question should not be whether there is enough federal regulation, but whether the ever-growing federal regulation will handcuff future development.

EPA REGULATION

What makes hydraulic fracturing unusual is that Congress has generally barred EPA from directly regulating the hydraulic fracturing process itself (i.e. the injection of water, sand, and fracturing fluids to stimulate oil and gas recovery). Although EPA regulates underground injections of fluids through the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*, it may not regulate “the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.” *Id.* § 300(h)(d). In response, states have continued to take the lead in regulating this central aspect of hydraulic fracturing.

Diesel Guidance. EPA has, however, relied on this statutory language to propose an expansive underground injection control (“UIC”) guidance. See EPA, Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels – Draft: Underground Injection Control Program Guidance # 84 (May 2012) (“Guidance”).⁵ In addition to interpreting the statutory term “diesel fuels,” EPA proposes underground injection control rules for well construction and operation, mechanical integrity, chemical

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disclosure, monitoring, reporting, financial responsibility, and well plugging and abandonment.⁶ If finalized, the Guidance would operate in states where EPA is the UIC permitting authority and would encourage states with their own EPA-approved UIC permitting programs to follow the guidance.

Industry groups have raised concerns about EPA's draft, noting the UIC program was never intended to regulate temporary injections of fluids to stimulate hydrocarbon production and that the proposed definition of "diesel fuels" was both too broad and too vague.⁷ Several states with active shale development sought to opt out of the Guidance, arguing that it failed to account for regional geological differences and imposed unnecessary administrative burdens on state agencies to enforce duplicative standards already required by states.⁸ Currently, the Guidance remains under review at the Office of Management and Budget.⁹

Air, Water, Waste and Chemical Regulations. EPA has also moved to expand air, water, waste, and chemical regulation of shale development. Federal and state Clean Air Act requirements already apply to oil and gas operations. However, last year the agency promulgated revisions to the Clean Air Act's New Source Performance Standards ("NSPS") for the oil and gas sector, 40 C.F.R., Part OOOO.¹⁰ The revisions require natural gas developers to flare methane emitted during the post-hydraulic fracturing well-completion process. Beginning in 2015, shale gas developers must install reduced emission completions devices—known as "green completions"—to capture methane that would have been otherwise incinerated.

The Clean Water Act similarly already governs shale development. Oil and gas sites, like any other industrial facility, may not discharge pollutants to rivers or streams without a permit. 33 U.S.C. § 1311.¹¹ Existing effluent limitation guidelines already prohibit pollutant discharges from onshore oil and gas operations, including wastes related to well completion or well treatment. 40 C.F.R. § 435.32. Despite these existing regulations, EPA announced that it would propose revisions to the effluent limitation guidelines specific to shale gas development in 2014. 76 Fed. Reg. 27,742 (Oct. 26, 2011).

EPA is also considering new chemical regulations for hydraulic fracturing. Prompted by an environmental group petition, EPA is developing an advance notice of proposed rulemaking ("ANPRM") that could lead to national reporting requirements for well operators under Sections 8(a) and 8(e) of the Toxic Substances Control Act ("TSCA").¹² This could mean a program requiring companies to submit to the federal government data on chemicals used in hydraulic fracturing fluid and the potential health or environmental effects of those chemicals. EPA is projecting that it will publish the ANPRM in August 2014.

While it has not yet acted, EPA is also considering regulations related to waste management, the treatment of some hydraulic fracturing fluid chemicals as pesticides, and chemical disclosure. For example, EPA is considering new technical guidance for states and tribal governments on the design, operation, maintenance, and closure of oil and gas waste storage tanks and storage pits under the Resource Conservation and Recovery Act ("RCRA").¹³ The agency also is examining the possibility of inspecting well sites to ensure that all chemicals used as biocides are registered under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") and may propose new national training and certification requirements for well service employees that handle biocides.¹⁴ EPA has also received a petition for a rulemaking that would subject upstream oil and gas operations to reporting requirements under the Emergency Planning and Community Right to Know Act.¹⁵

Hence, far from leaving hydraulic fracturing "unregulated," EPA has finalized, proposed, or is contemplating new regulations for hydraulic fracturing on several different fronts: air, water, waste, chemicals, and pesticides.

OTHER AGENCIES' REGULATION OF HYDRAULIC FRACTURING

Nor is EPA the only federal agency setting standards for hydraulic fracturing. For example:

BLM Proposed Regulations. The U.S. Bureau of Land Management (“BLM”) has authority over the approximately 21% of all proven U.S. oil reserves and 23% of gas reserves that are found on federal and tribal lands.¹⁶ The boom in development has not reached federal lands, however, where production lags well behind, hindered by a long and costly permitting process.¹⁷ In May 2012, however, BLM proposed new federal regulations for hydraulic fracturing on federal and tribal lands, proposing, among others, well construction, chemical disclosure, and wastewater management requirements. 77 Fed. Reg. 27,691 (May 11, 2012). After receiving over 177,000 comments, BLM issued a revised proposal, 78 Fed. Reg. 31,636 (May 24, 2013), which addressed certain of industry’s concerns to some degree, such as by proposing a more modest disclosure requirement.¹⁸ Environmental groups were dissatisfied with BLM’s proposal, and are seeking further revisions to include technology standards and limits for fugitive methane emissions.¹⁹ Environmental groups have also signaled that they may sue BLM under the National Environmental Policy Act (“NEPA”), arguing that BLM must prepare an Environmental Impact Statement (“EIS”) before issuing a final rule.²⁰

BLM’s involvement in hydraulic fracturing regulation is not limited to individual well permits. Whenever BLM creates resource management plans or leases federal lands for oil and gas development, it must comply with NEPA.²¹ However, in response to one court ruling,²² BLM announced plans to conduct an EIS for all BLM-administered lands in the Hollister Field Office in central California. 78 Fed. Reg. 47,408 (Aug. 5, 2013). Unless BLM moves forward on an appropriately expeditious schedule, the EIS could further delay drilling on federal lands, adding to BLM’s already arduous permitting process that took, on average, 229 days to complete during FY 2012.²³ BLM’s increased regulatory oversight and scrutiny over development will exacerbate existing delays and make shale development on federal lands even less attractive.

FWS Regulation. The U.S. Fish & Wildlife Service (“FWS”), which administers the Endangered Species Act (“ESA”), could impact hydraulic fracturing on state- and private-owned land as well. FWS is considering listing decisions for the Lesser prairie chicken and the Gunnison sage grouse. Both species are present near shale plays in Colorado, Texas, New Mexico, and Wyoming, and an ESA listing could appreciably hamper shale development on lands deemed to be critical habitat. In response, states have sought to implement their own conservation measures to preserve habitat without a listing.²⁴

OSHA Regulation. The Occupational Safety and Health Administration (“OSHA”) recently proposed a new rulemaking aimed at reducing exposure to crystalline silica, used as a proppant in hydraulic fracturing fluids. 78 Fed. Reg. 56,283 (Sept. 12, 2013). OSHA asserts that airborne exposure to silica puts workers at increased risk of developing silicosis and other illnesses and has proposed a 50% reduction in existing permissible exposure limits. The comment period on the proposed rule is still open, but initial analyses suggest that if finalized, the proposed standard could impact hydraulic fracturing significantly.²⁵

IMPLICATIONS

Expanding federal regulation could have significant, direct impact on shale oil and gas development. A layer of duplicative federal regulations governing well permitting and development would raise costs and further delay the already slow process for permitting wells on federal lands. One economic analysis has estimated that even as adjusted, the proposed BLM rule substantially underestimates the significant costs that would be created for drilling on federal and tribal lands, threatening jobs and economic growth.²⁶ Moreover,

additional EPA regulation of air, water, waste, and chemicals will impose ever increasing compliance costs that will make energy development increasingly challenging in today's competitive marketplace.

¹ U.S. Energy Information Administration, What is shale gas and why is it important? (Dec. 5, 2012); PriceWaterhouseCoopers, Shale gas: A renaissance in U.S. manufacturing? (Feb. 2012).

² Former EPA Administrator Lisa Jackson testified she was not aware of any "proven case where the fracking process itself has affected water." *Pain at the Pump: Policies that Suppress Domestic Production of Oil and Gas: Hearing Before the H. Comm. On Oversight & Gov't Reform*, 112th Cong. (May 24, 2011). That sentiment was affirmed by current EPA Administrator Gina McCarthy. *Questions for the Record, Gina McCarthy Confirmation Hearing: Hearing Before the S. Comm. On Env. & Pub. Works*, 113 Cong. (Apr. 29, 2013).

³ E.g., Public Citizen, Hydraulic Fracturing: Unsafe, Unregulated, available at, <http://www.citizen.org/Page.aspx?pid=4704>.

⁴ Mike Soraghan, *New EPA chief says agency is 'all over' fracking*, E&E ENERGYWIRE (Sept. 23, 2013).

⁵ EPA had posted a notice on its website that federal permits were required when diesel fuels were used in hydraulic fracturing, but agreed to a more formal process in response to an industry lawsuit. See Notice of Settlement Agreement, *Independent Petroleum Assoc. of Amer. v. EPA*, Case No. 10-1233 (D.C. Cir. Feb. 23, 2012).

⁶ Guidance at 14-32.

⁷ See, e.g., Comments of the American Petroleum Institute, Docket No. EPA-HQ-OW-2011-1013-2463 (Aug. 23, 2012) at 20-26.

⁸ See, e.g., Comments of the Industrial Comm'n of North Dakota, Docket No. EPA-HQ-OW-2011-1013-1217 (June 24, 2012) at 2-3.

⁹ See EO 12866 Regulatory Review, Office of Information and Regulatory Affairs, <http://www.reginfo.gov/public/do/eoPackageMain>.

¹⁰ 77 Fed. Reg. 49,490 (Aug. 16, 2012).

¹¹ Oil and gas operations are generally exempt from federal construction stormwater permitting requirements. 33 U.S.C. § 1342(l)(2); 40 C.F.R. § 122.26(a)(2)(ii).

¹² 78 Fed. Reg. 41,770 (July 11, 2013).

¹³ 42 U.S.C. § 6901, *et seq.* EPA is also considering a petition to regulate oil and gas development wastes as RCRA hazardous waste. NRDC. Petition for Rulemaking, available at http://docs.nrdc.org/energy/files/ene_10091301a.pdf.

¹⁴ Bridget DiCosmo, *EPA sees no FIFRA oversight for fracking beyond registration role*, INSIDE EPA (Mar. 21, 2013).

¹⁵ Environmental Integrity Project, Petition for Rulemaking, available at http://www.environmentalintegrity.org/news_reports/documents/2012_10_24TRIPetitionFINALIGNED.pdf.

¹⁶ Congressional Research Service, U.S. Crude Oil and Natural Gas Production in Federal and Non-Federal Areas (Mar. 7, 2013) at 2, 3.

¹⁷ *Id.* at 2, 4 (oil and gas production on federal lands declined from 2007 to 2012 as a percentage of all production).

¹⁸ BLM proposes to use "fracfocus.org", a website 10 states now use for disclosure of fracturing fluid information that is managed by the Ground Water Protection Council and Interstate Oil and Gas Compact Commission.

¹⁹ Comments of Center for Biological Diversity and Waterkeeper Alliance, BLM-2013-0002-5618 (Aug. 23, 2013).

²⁰ Comments of Sierra Club, *et al.*, BLM-2013-0002-5619 (Aug. 23, 2013).

²¹ The same NEPA requirements apply to the U.S. Forest Service and other agencies that manage federal lands eligible for oil and gas development.

²² A court found BLM had not adequately assessed the potential environmental impacts of hydraulic fracturing before leasing certain federal lands in California for oil development. *Center for Biological Diversity v. BLM*, Case No. 13-cv-01749, (N.D. Cal Mar. 31, 2013).

²³ GAO-13-572, Oil and Gas Development: BLM Needs Better Data to Track Permit Processing Times and Prioritize Inspections at 27 (Aug. 2013).

²⁴ See, Wyoming Public Serv. Comm'n, Sage Grouse Core Area Protection, available at, <http://psc.state.wy.us/pscdocs/SAGEGROUSE.html>. Links to state plans to preserve Lesser prairie chicken habitat in Colorado, Kansas, New Mexico, Oklahoma, and Texas are available at www.lesserprairiechicken.com.

²⁵ Miguel Garrido, OSHA Silica Rule Would Raise Fracking Costs: BGOV Insight, Bloomberg Government (Oct. 23, 2013).

²⁶ John Dunham & Associates, Business Impact of Revised Completion Regulations (July 22, 2013) (estimating an annual cost of over \$345 million), submitted with Comments on BLM Hydraulic Fracturing Rulemaking Proposal by the Independent Petroleum Association of America and Western Energy Alliance (August 22, 2013).