

TSCA, FIFRA, AND PERHAPS EPCRA LIKELY TO PLAY FEATURED ROLES IN THE PIECEMEAL DEVELOPMENT OF FEDERAL FRACKING REGULATION

Katherine Ghilain and Shailesh Sahay

Hydraulic fracturing, or "fracking," has emerged as a central issue in American energy, economic, and environmental policy. Technological advances, infrastructure development, and increasing demand have prompted a boom in natural gas production in shale formations across the United States. Fracking involves the injection of fluid at high pressure to force open cracks within shale formations and release the natural gas trapped inside. The fluid is a mixture of water, a proppant (often sand) used to keep fractures open, and chemical substances used to help facilitate the process. These chemicals typically include substances designed to reduce friction, eliminate bacterial growth, and prevent well pipe corrosion. States in which fracking is already occurring have created a patchwork of laws and regulations, but federal regulatory involvement is still a work in progress.

According to a September 2012 Government Accountability Office (GAO) report, parts of the following eight federal environmental and public health laws apply to unconventional oil and gas development:

- Safe Drinking Water Act (SDWA);
- Clean Water Act (CWA);
- Clean Air Act (CAA);
- Resource Conservation and Recovery Act (RCRA);
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);
- Emergency Planning and Community Right-to-Know Act (EPCRA);
- Toxic Substances Control Act (TSCA); and
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

U.S. Government Accountability Office, GAO-12-874, *Unconventional Oil and Gas Development: Key Environmental and Public Health Requirements* (Sept. 2012) at 17, available at <http://www.gao.gov/assets/650/647782.pdf>.

The oil and gas industry has enjoyed long-standing exemptions or limitations in coverage related to the first six of these statutes, *id.*, which places limitations on federal authority absent new legislation. As a result, the U.S. Environmental Protection Agency (EPA) is in the process of evaluating its existing statutory authority to regulate fracking and may end up taking a piecemeal approach, adding further complexity to the already complicated legal landscape.

In November of 2011, EPA announced that it plans to propose rules under TSCA to collect and subsequently disclose information on the composition and potential health and environmental effects of chemical substances used in the fracking process—an effort prompted by a petition filed by Earthjustice and more than 100 other environmental groups. Letter from Stephen A. Owens, Assistant Administrator, Environmental Protection Agency, to Deborah Goldberg, Earthjustice (Nov. 23, 2011), available at http://www.epa.gov/oppt/chemtest/pubs/EPA_Letter_to_Earthjustice_on_TSCA_Petition.pdf. EPA is still weighing a 2010 petition from the Natural Resources Defense Council asking the agency to reconsider the exemption of exploration and production wastes from hazardous waste regulation under subtitle C of RCRA. According to the GAO report, narrowing this exemption would require congressional approval. More recently, EPA has made apparent it also is considering its authority to oversee certain aspects of fracking operations under FIFRA, as biocides used in fracking fluid may be characterized as pesticides, and FIFRA contains no exemptions for extraction operations. Bridget DiCosmo, *EPA Eyes Novel Use of FIFRA to Address Fracking, Prompting New Concern*, Inside EPA (Oct. 22, 2012). Finally, an October 24, 2012, petition by another group of environmental organizations has

asked EPA to add the oil and gas extraction industry to the list of industry sectors already regulated under EPCRA section 313(b)(1)(B), that would require the industry to report chemical releases from drilling and other phases of production and processing to the Toxics Release Inventory (TRI). Letter from Eric Schaeffer, Executive Director, Environmental Integrity Project, and Adam Kron, Attorney, Environmental Integrity Project, to Hon. Lisa Jackson, Administrator, U.S. Environmental Protection Agency (Oct. 24, 2012), *available at* http://www.environmentalintegrity.org/news_reports/documents/2012_10_24TRIPetitionFINALSigned.pdf. This request follows an earlier decision by the Department of Interior (DOI), through the Bureau of Land Management (BLM), to propose revisions to existing regulations that would require public disclosure of chemicals used in fracking operations on federal and Indian lands. 77 Fed. Reg. 27,691 (May 11, 2012). The BLM has authority to regulate fracking on federal and Indian lands pursuant to the Federal Land Policy and Management Act, the Mineral Leasing Act, the Mineral Leasing Act for Acquired Lands, and the Indian Mineral Leasing Act. *See* 43 C.F.R. § 3160.0-3. Current BLM regulations applicable to fracking are found at 43 C.F.R. § 3162.3-2.

In addition to considering regulation under these environmental laws, EPA has already taken several steps to regulate fracking. Earlier this year, EPA issued a final rule under the CAA to require fracking operators to reduce air emissions at new or modified natural gas wells. 77 Fed. Reg. 49,490 (Aug. 16, 2012). The agency also initiated a rulemaking to develop CWA effluent guidelines to control the discharge of wastewater produced by fracking operations. 76 Fed. Reg. 66,286 (Oct. 26, 2011). EPA has also issued draft guidance to clarify permitting requirements for using diesel fuels during fracking operations under the SDWA. 77 Fed. Reg. 27,451 (May 10, 2012).

The extent to which EPA will seek to regulate fracking under these and the other applicable environmental laws remains to be seen and may be determined in part by the agency's multi-year study of fracking's potential impacts on drinking water. Stakeholders will need to

monitor EPA's activities closely and engage with the agency to ensure that any proposed rules take into consideration existing state requirements and other federal requirements.

Katherine Ghilain and *Shailesh Sahay* are members of the Environmental Practice Group in the New York and Washington, D.C., offices of Arnold & Porter LLP.