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EPA Moves Toward National List Of Fracking Chemicals

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Law360, New York (June 23, 2014, 11:31 AM ET) -- The U.S. Environmental Protection Agency is moving in the most tentative of ways to solicit information about chemical substances used in hydraulic fracturing. In May, the EPA signaled possible willingness to flex its muscles using the Toxic Substances Control Act that many feared had irreparably atrophied — the agency issued an advance notice of proposed rulemaking[1] and initiated a "stakeholder" process soliciting input on various means of collecting information about the composition and potential health and environmental effects of fracking chemicals.

Fracking remains at the forefront of debates over U.S. energy policy and concerns about chemicals used in the process have been central to the controversy. In the fracking process, a mixture of mostly water, a proppant (often sand used to keep fractures open) and a small concentration of other chemicals is injected deep into the ground to force open cracks within shale formations. These fractures allow oil or natural gas to be more easily extracted. The chemical additives serve several functions, including: (1) reducing friction within the well, (2) eliminating bacterial growth and (3) preventing well pipe corrosion. Potential environmental and health impacts of these additives and the perceived lack of transparency are often cited as reasons to require disclosure of the identities of these chemical substances.

History of EPA's Consideration of Fracking and TSCA Disclosure Requirements

The EPA's toe-dipping voyage into regulating fracking under TSCA began in August 2011, when environmental groups submitted a TSCA Section 21 petition, requesting the agency initiate rulemakings for fracking chemicals under the act.[2] The petition asserted that TSCA regulations were necessary to fill perceived "gaps" in federal and state regulation.

Specifically, the petition requested that the EPA adopt a TSCA Section 8 rule to require chemical manufacturers and processors to report detailed information on all chemical substances used in oil and gas exploration and production generally, including records of allegations of significant adverse reactions to fracking chemicals in accordance with TSCA Section 8(c).[3]

The petitioners also requested that the EPA promulgate a TSCA Section 4 Testing Rule to require chemical substance manufacturers and processors to conduct toxicity tests for the chemical substances and mixtures used in all oil and gas exploration and production.

The EPA denied the petitioners' request to issue a Section 4 Testing Rule, but granted the Sections 8(a) and 8(d) portions of the request.[4] Ultimately, the EPA limited the scope of rulemaking to chemical substances and mixtures used in hydraulic fracturing, rather than all exploration and production chemicals. The EPA did not directly address the environmental groups' Section 8(c) request.

After spending more than two years developing the ANPRM, the EPA published it in the Federal Register on May 19, opening a three-month comment period. On June 12, the EPA announced

an extension of the comment deadline to Sept. 18, 2014.

Issues Raised by 2014 ANPRM

Perhaps reflecting the EPA's efforts to avoid the appearance of impeding economic growth at a time when U.S. energy production is on the rise, the ANPRM makes clear that the agency has not settled on a specific path forward to address identification and disclosure of fracking chemicals. The options under consideration range from using the EPA's authority under TSCA Sections 8(a) and 8(d) to require reporting, to voluntary disclosure and incentive programs or to some combination of both.

The EPA seeks public input in eight areas. The areas reflect challenges the EPA is confronting in adapting TSCA to the fracking context at a time when many states have already instituted their own programs regulating the process. The following issues are among those with which the EPA will contend in developing a federal approach.

Balancing Disclosure with Protection of Confidential Business Information

In the first area where the EPA seeks input, “Overall Approach To Reporting and Disclosure of Chemical Substances and Mixtures Used in Hydraulic Fracturing,” the agency expresses interest both in what information should be reported to it and in what information should be disclosed to the public. The ANPRM suggests that the EPA is very interested in how information that constitutes trade secrets or confidential business information could be reported and then aggregated in a “national list” and disclosed, while still protecting the commercial interests of the disclosing companies.

One concept that seems likely to be suggested as a model for the “national list” is a “systems approach” suggested by a Secretary of Energy Advisory Board ("SEAB") task force convened by Secretary of Energy Ernest Moniz to evaluate the effectiveness of FracFocus. (FracFocus is a public hydraulic fracturing chemical registry; a number of states permit or require operators to use FracFocus for chemical disclosure.)[5]

In findings released in March, the SEAB task force praised FracFocus for quickly improving disclosure practices and providing uniformity, but was critical of the prevalent use of trade secret protections to shield chemical identity information from disclosure. To protect proprietary information and prevent reverse engineering, the task force’s report suggested use of the systems approach for disclosure, with specific chemical identities and Chemical Abstracts Service Registry numbers reported separately from the trade names of specific additives and products that contain the chemicals.[6]

Tailoring Fracking Regulations to Fit Within the TSCA Framework

Several lines of questions in the ANPRM reflect potential challenges of conforming fracking regulations to the existing TSCA regulatory regime. For example, in the section identifying issues related to “Who should report and disclose information,” the EPA identifies types of companies that might be subject to fracking reporting and disclosure requirements: well operators, chemical manufacturers, chemical suppliers who engage in processing chemicals, service providers who mix chemicals on site and service providers who inject the fracking fluids.

The EPA’s authority under Section 8(a) applies only to “manufacturers” and “processors” of chemical substances and mixtures, while its Section 8(d) authority applies to manufacturers,

processors and “distributors.” Although the EPA has interpreted the term “processor” very expansively, it is not clear whether a mere supplier of substances or mixtures used in fracking operations could be required to report under Section 8(a), or whether some entities, such as suppliers and on-site service providers, would instead have to be encouraged to report Section 8(a) information voluntarily, but could still be required to submit Section 8(d) health and safety studies pursuant to a regulation. The EPA’s questions imply that it might struggle to implement TSCA to regulate an industry that is different in many ways from those typically subject to TSCA reporting requirements.

The EPA's questions regarding “Scope of Reporting or Disclosure” also highlight the complexities of adapting fracking regulations to fit the TSCA mold. For example, TSCA regulations are not necessarily framed with the intention of gathering chemical, physical and toxicological information on chemical substances and mixtures that may be formed on site during use.

Similarly, the “Reporting Threshold and Frequency of Reporting or Disclosure” section of the ANPRM requests comments regarding the size of companies that should be required or encouraged to report, and requests comments on what size thresholds might be appropriate in light of TSCA Section 8(a)’s exemption for “small manufacturers and processors.” The EPA expresses interest in comments concerning how different reporting thresholds and timeframes would affect the usefulness of the information provided and the costs of reporting. The ease with which TSCA can be applied to the types of businesses in the fracking industry appears to be an open question.

Establishing a Potentially Lighter Regulatory Footprint

The EPA is considering options for disclosure that would be voluntary or incentive-based, or that would rely on nongovernmental mechanisms for obtaining disclosures. For instance, the EPA poses questions about “Use of Third-Parties,” including about use of third-party certification in addition to or in place of a regulatory or voluntary reporting requirement. Almost certainly, the EPA will be receiving comments on the performance standards and certification process established by the Center for Sustainable Shale Development in 2013.[7] CCSD is a collaboration of energy companies, environmental organizations and other stakeholders in the Appalachian region. The performance standards are practices to apply to unconventional oil and gas development in the Appalachian region to protect air and water resources. These standards have been criticized for not being stringent enough.[8]

In questions regarding “Health and Safety Studies,” the EPA asks whether Section 8(d) mandatory reporting of health and safety studies is appropriate or whether voluntary mechanisms should be used instead. Thus, the EPA questions whether there is “an approach that more effectively encourages further health and safety studies” — implying that the agency is concerned that a Section 8(d) rule might discourage fracking companies from assessing potential impacts of the chemical substances and mixtures they are using.

In “Safer Chemicals and Transparency,” the ANPRM suggests that incentive and recognition programs could be used to promote safe and sustainable fracking practices, perhaps in conjunction with regulatory mandates. The ANPRM mentions existing programs such as the Green Chemistry program,[9] Sustainable Futures program[10] andDesign for the Environment,[11] which involve collaborations between industry and government, as possible models for encouraging use of safer chemicals in fracking.

Coordinating with Other Federal, State and Nongovernmental Disclosure Programs

The EPA takes care throughout the ANPRM to articulate its interest in minimizing potential duplication and overlap in reporting and disclosure obligations. In posing questions about how best to achieve "Data Collection Efficiency," the ANPRM states that "the EPA believes that any TSCA reporting requirements should complement existing reporting programs and data sources, such as state databases and websites like FracFocus to avoid duplication." The ANPRM does not elaborate on what the EPA means by "complement," but it hints that the agency may want to establish a sort of cooperative federalism to gather information on fracking chemicals.

The EPA's expressed concern about efficiency appears to be an acknowledgment of the role that TSCA Section 9 can play. Section 9 requires that the administrator consult and coordinate with the heads of other appropriate federal entities to achieve maximum enforcement of TSCA while imposing the least burden of duplicative requirements. The administrator also is directed to coordinate actions taken under TSCA with actions taken under other federal laws administered by the EPA. TSCA Section 9, however, does not constrain the EPA from moving beyond what states have been doing.

In the ANPRM, the EPA specifically refers to the Bureau of Land Management's ongoing rulemaking, which would require public disclosure of chemicals used in fracking at approximately 3,400 (and counting) wells on federal and Indian lands.[12] The BLM's proposed reporting and disclosure requirements are narrower in scope than TSCA requirements likely would be. For instance, the EPA is more likely to impose obligations for reporting estimates of potential human exposures and environmental releases as well as related health and safety data. In addition, BLM would require reporting only after completion of fracking activities. Operators who drill on federal and Indian lands presumably would be subject to both BLM and EPA disclosure regulations, provided they are considered manufacturers or processors subject to TSCA.

The EPA is also considering how to avoid duplication of state reporting and disclosure requirements. All states with major oil and gas operations already mandate some form of fracking chemical reporting, often involving public disclosure and often using FracFocus.[13] As with the proposed BLM rule, the information required to be disclosed is likely narrower in scope than what would be required under TSCA, and most states require disclosure only after completion of the fracking operation.

Conclusion

The expansive scope of questions in the ANPRM makes predicting the ultimate regulatory outcome difficult. The EPA obviously is cognizant of state efforts to regulate disclosure of chemicals used in fracking and expresses a desire to avoid trampling on these existing programs at a time when concerns regarding federal preemption, and the respective roles of the EPA and states in chemical regulation, have taken on great significance in the debate about TSCA reauthorization. Nonetheless, TSCA reporting requirements would inevitably extend more federal control over fracking activities and might establish a credible basis to achieve uniformity in reporting standards while emphasizing data gathering on potential effects on human health and the environment from exposures to the chemical substances used in fracking fluids.[14]

[1] Hydraulic Fracturing Chemicals and Mixtures; Advance Notice of Proposed Rulemaking, 79 Fed. Reg. 28664 (May 19, 2014), available at http://www.gpo.gov/fdsys/pkg/FR-2014-05-

19/pdf/2014-11501.pdf.

[2] Letter from Deborah Goldberg, Earthjustice, to Wendy Cleland-Hamnett, Director, EPA Office of Pollution Prevention and Toxics, regarding Citizen Petition Under Toxic Substances Control Act Regarding the Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production (Aug. 4, 2011), available at http://www.epa.gov/oppt/chemtest/pubs/Section_21_Petition_on_Oil_Gas_Drilling_and_Fracking_Chemicals8.4.2011.pdf. TSCA Section 21 authorizes members of the public to petition EPA to initiate rulemaking proceedings and requires that such petitions "set forth the facts which it is claimed establish that it is necessary to issue, amend, or repeal a rule." 15 U.S.C. § 2620(a), (b)(1).

[3] See 15 U.S.C. § 2607(a), (c), (d). Under Section 8(a), the EPA has authority to require reporting of basic information concerning chemical substances and mixtures, including: (1) the common or trade name, specific chemical identity, and molecular structure of the chemical substance or mixture; (2) the total quantity manufactured or processed for particular uses; (3) a description of the byproducts resulting from the chemical substance's manufacture, processing, and use; (4) any existing data on health and environmental effects; (5) estimates concerning human exposure; and (6) methods of disposal. See 15 U.S.C. § 2607(a)(2). See 15 U.S.C. § 2607(d). Under Section 8(d), the EPA can require manufacturers, processors and distributors to submit lists and copies of all existing health and safety studies.

[4] Letter from EPA Assistant Administrator Steven A. Owens to Deborah Goldberg, Earthjustice, regarding TSCA Section 21 Petition Concerning Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production (Nov. 2, 2011), available at http://www.epa.gov/oppt/chemtest/pubs/SO.Earthjustice.Response.11.2.pdf; Letter from EPA Assistant Administrator Steven A. Owens to Deborah Goldberg, Earthjustice, regarding TSCA Section 21 Petition Concerning Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production (Nov. 2, 2011), available at http://www.epa.gov/oppt/chemtest/pubs/SO.Earthjustice.Response.11.2.pdf; Letter from EPA Assistant Administrator Steven A. Owens to Deborah Goldberg, Earthjustice, regarding TSCA Section 21 Petition Concerning Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production (Nov. 23, 2011), available at http://www.epa.gov/oppt/chemtest/pubs/EPA_Letter_to_Earthjustice_on_TSCA_Petition.pdf.

[5] About Us, FRACFOCUS, http://fracfocus.org/welcome (last visited June 17, 2014).

[6] SEC'Y OF ENERGY ADVISORY BD., TASK FORCE REPORT ON FRACFOCUS 2.0 (Feb. 24, 2014), available at http://1.usa.gov/1fJOVNz.

[7] Ctr. for Sustainable Shale Dev., Performance Standards (Aug. 19, 2013), available at https://www.sustainableshale.org/wp-content/uploads/2014/01/Performance-Standards-v.-1.1.pdf.

[8] See, e.g., Letter from Civil Soc'y Inst. et al. to Fred Krupp, Envtl. Def. Fund (undated), available at http://www.earthworksaction.org/files/publications/LETTER-JointEnviroFrackingToEDF.pdf.

[9] Green Chemistry, EPA, available at http://www2.epa.gov/green-chemistry (last visited June 17, 2014).

[10] Sustainable Futures, EPA, available at http://www.epa.gov/oppt/sf/ (last visited June 17, 2014).

[11] Design for the Environment, EPA, available at http://www.epa.gov/dfe/ (last visited June 17, 2014).

[12] The most recent activity in the BLM rulemaking was a supplemental notice of proposed rulemaking issued in May 2013. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31636 (May 24, 2013), available at http://www.gpo.gov/fdsys/pkg/FR-2013-05-24/pdf/2013-12154.pdf. The supplemental notice was published a year after BLM's proposed rule. See Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27691 (May 11, 2012), available at http://www.gpo.gov/fdsys/pkg/FR-2012-05-11/pdf/2012-11304.pdf.

[13] See, e.g., 2 COLO. CODE REGS. § 404-1:205A; 16 TEX. ADMIN. CODE § 3.29.

[14] This article is adapted from a longer analysis published at http://www.arnoldporter.com/resources/documents/ADV514ANationalListOfFrackingChemicals.pdf. Arnold & Porter tracks litigation related to hydraulic fracturing at http://www.arnoldporter.com/resources/documents/HydraulicFracturingCaseChart.pdf and hydraulic fracturing legislation and regulation at http://www.arnoldporter.com/resources/documents/Hydraulic%20Fracturing%20Chart.pdf.

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