

Client Alert

April 2015

Clean Water Act Prosecution Reflects Expanding Federal Enforcement Focus on Hydraulic Fracturing

On April 22, 2015, oil and gas exploration company Trans Energy, Inc., was sentenced to two years of probation and a criminal fine for discharges in connection with Marcellus Shale natural gas activities. The company constructed impoundments in streams to use the impounded water in hydraulic fracturing. The government alleged that the impoundments caused the discharge of rock, sand, soil and other pollutants into waters of the United States. Trans Energy agreed in a plea agreement with the United States to pay a \$600,000 fine and serve two years of probation. The case was investigated by agents from the US EPA's Criminal Investigations Division. The prosecution was brought by the Department of Justice in the US District Court for the Northern District of West Virginia on the basis of unpermitted and negligent discharges into waters of the US in violation of the Clean Water Act.

Ensuring that energy extraction activities comply with federal environmental laws is one of six national EPA enforcement initiatives. Together with other federal, state and local partners, EPA is focusing on incidences of noncompliance from natural gas extraction and production activities that may cause or contribute to significant harm to public health and/or the environment.

The Clean Water Act prohibits the negligent or knowing discharge of any pollutant from a point source into the waters of the United States. Trans Energy admitted that it was negligent when creating the impoundments and causing the discharges because it failed to provide adequate training to employees about Clean Water Act requirements and failed to adequately investigate the ecological characteristics of the stream channel, despite knowing that construction of dams in stream channels is regulated.

This investigation and criminal prosecution are examples of the EPA's relying on Clean Water Act authority to oversee activities by an industry that is otherwise primarily regulated by the states. In light of case law developments and the ongoing rulemaking to change the CWA definition of waters of the US, the case highlights the importance of robust environmental compliance plans, including the need to adequately train employees on compliance with federal, state and local environmental laws.

A broad array of federal environmental statutes may be implicated by energy extraction activities. In addition to the Clean Water Act, EPA's initiative focuses on the Clean Air Act, the Safe Drinking Water Act, CERCLA and RCRA. The Fish and Wildlife Service is also a partner in the initiative, relying in particular on its authority under the Endangered Species Act as well as other wildlife laws such as the Migratory Bird Treaty Act. As a national initiative, federal resource agencies are actively inspecting and investigating activities in all oil and gas plays throughout the country.

How Hunton & Williams LLP Can Help

Hunton & Williams LLP has one of the leading environmental law practices in the country. Among its attorneys is Todd S. Mikolop, who recently joined the firm from the Environmental Crimes Section of the US Department of Justice, where he led the national Energy Extraction Initiative, which is focused on the investigation and enforcement of federal environmental crimes related to the oil and gas industry. Todd worked with federal agents, regulators and scientists on numerous cases across the United States.

Hunton & Williams regularly counsels and represents oil and gas industry clients. Our attorneys have experience with virtually every aspect of the Clean Water Act, including the NPDES and 404 permit programs, and with the Endangered Species Act and other wildlife laws. We routinely represent regulated businesses in legislative, regulatory, litigation and enforcement matters arising under the environmental laws that undergird DOJ's Energy Extraction Initiative. If you have questions about the developments discussed in this client alert, or other environmental issues, please contact us.

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