

Client Alert

May 2012

Federal Regulatory Developments in Hydraulic Fracturing

Three recent rulemaking initiatives affecting the oil and gas industry evidence the federal government's continuing efforts to carve out a larger role for itself in the regulation of hydraulic fracturing, or "fracking." This alert provides an overview of the three initiatives.

The first rulemaking of note is a U.S. Environmental Protection Agency ("EPA") final rule under the Clean Air Act establishing new source performance standards ("NSPS") for the first time and revised national emissions standards for hazardous air pollutants ("NESHAPs") that will apply to upstream and midstream sectors of the oil and gas industries. The NSPS will regulate emissions of volatile organic compounds and sulfur dioxide at exploration, production, processing and transportation facilities. With respect to fracking operations, the highlight of the NSPS is a requirement that fracking well operators employ reduced emission completion ("REC") technology (a.k.a., "green completion" technology) to control emissions during flowback. This requirement will apply to new sources operating after January 1, 2015.

As to wells for which well completion operations begin before that date, the rule will require the capture of flowback emissions for routing to a "completion combustion device," in most cases a flare. As incentive to employ REC technology before the 2015 deadline, EPA included in the NSPS an exemption for refractured wells that employ REC from the Air Act definition of "modification." The exemption will allow operators avoid certain state permitting obligations applying to modified sources. The final NSPS also will require that operators give EPA two days' advance notice before commencing well completion operations and provides that, in the alternative, compliance with an applicable state law requiring advance notice of commencement of well completion will satisfy the NSPS's notice requirement.

A second recently proposed rulemaking comes from the Department of the Interior's Bureau of Land Management ("BLM"). On May 4, it released a proposal to regulate hydraulic fracturing activities on public and Indian land. The rule would place a number of obligations on operators performing "well stimulation" activities, specifically hydraulic fracturing to stimulate production from oil and gas wells. The new requirements would include obtaining BLM approval of proposed fracking activities, performance of mechanical integrity tests before fracking is conducted at a well, conditions on handling of flowback during production and on disposal methods for flowback and other recovered fluids, and extensive reporting of the results of fracking activity within 30 days of completion of a well. In addition, the proposed rule would require disclosure of information on each fracking fluid by additive trade name and purpose, the Chemical Abstracts Service Registry Number ("CASRNs") and the percent mass of each ingredient contained in the fluid. In an apparent concession to oil and gas producers, BLM would require this disclosure only after use of fluids, and not before. BLM will receive comments on the proposed rule for a period of 60 days through July 10, 2012. (See 77 Fed. Reg. 27691 (May 11, 2012)).

Finally, EPA recently issued a draft guidance document seeking to clarify Safe Drinking Water Act underground injection control ("UIC") permitting requirements applicable to fracking operations. See ["Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels – Draft: Underground Injection Control Program Guidance #84."](#) In the Energy Policy Act of 2005, Congress exempted the injection of hydraulic fracking fluids and propping agents from the UIC program but excluded diesel fuel from the exemption. The draft guidance defines "diesel fuel" with reference to six CASRNs based on an expansive analysis by EPA of industry, regulatory and other usage of the phrase.

The draft guidance recommends that UIC permit writers “consider whether any portion of the [proposed] injectate has any of the ... [six] CASRNs, or is referred to by its primary name” or a common synonym. The CASRNs and their primary names are:

- 68334-30-5: Fuels, diesel
- 68476-34-6: Fuels, diesel, no. 2
- 68476-30-2: Fuel oil, no. 2
- 68476-31-3: Fuel oil, no. 4
- 8008-20-6: Kerosene
- 68410-00-4: Distillates (petroleum), crude oil

Other provisions of the guidance address the following issues:

Usage Information: EPA is requesting information concerning the primary uses of diesel fuels in fracking, the volumes of diesel-containing fracking fluids and propping agents, and the frequency with which such fluids and agents are used.

Duration of Permits: The guidance proposes two alternatives for the duration and termination of UIC permits. In one, a permit writer may issue a short duration permit that would be effective only through completion of diesel fuel fracking activity in a well. Under the second option, a permit writer may assign a well to “temporarily abandon” status upon completion of diesel fuel fracking activity, leaving the permit in place for an operator that might conduct future fracking of a well using diesel fuel.

Area of Review: An operator seeking a UIC permit must identify an “area of review” in which fluids injected during fracking operations have the potential to migrate to a potential drinking water source. The guidance notes that operators subject to the UIC program must define an appropriate area of review, assess it for conduits of potential fluid movement and, if necessary, perform corrective action such as plugging of improperly abandoned or orphaned wells with conduits for contaminants to a drinking water source. The guidance provides for alternative means of identifying an area of review, including a site-specific determination and use of a minimum one-quarter-mile fixed radius around a well.

Information Submitted with Permit Application: The guidance addresses not only concerns about contamination from diesel fluid injection and migration but also concerns about induced seismic activity (i.e., earthquakes) arising from underground injection activities.

Monitoring: The guidance addresses monitoring for mechanical integrity of wells and associated equipment before, during and after fracking injection using diesel fuel. EPA is also requesting comment on the types of water quality monitoring that should be required as part of a UIC permit.

EPA is requesting comments on the draft guidance for a period of 60 days through July 9, 2012. (See 77 Fed. Reg. 27451 (May 10, 2012)).

At the very least, the rather broad description of diesel offered by EPA, together with increased obligations on certain fracking operations, will give the federal government a regulatory foothold where state oversight already is in place. Additionally, it should be noted that the disclosure of chemical additives proposed by BLM, combined with recent studies concerning potential air emissions from certain fracking operations, could lead to increased interest in the fracking industry from the plaintiff tort bar.

Fracking operations already are subject to state and local government approvals and oversight that provide for effective management, public involvement and sharing of information that also protects confidential business information. For the most part, exploration and production companies are opposed to any additional federal oversight. Nevertheless, these three recent rulemaking activities from the EPA and BLM are just the most recent examples of federal agencies becoming more active in the regulation of fracking. The continued expansion of fracking operations and perceived concerns with fracking likely will compel ongoing government oversight and regulation. Oil and natural gas companies should remain vigilant as increased attention, and even more regulatory initiatives, at both the federal and state levels can be expected in the future.

Hunton & Williams lawyers are engaged in the legislative, regulatory, litigation and public education arenas on behalf of members of the oil and gas industries. For more information about this alert, please contact Joe Stanko or Dan Jordanger in the firm's administrative law group or Miles Haberer, David Landin or Lori Jarvis of the firm's national business torts and product liability team.

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