

## *EPA Issues Hydraulic Fracturing Chemical Disclosure Advance Notice of Proposed Rulemaking*

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On May 9, 2014, the Environmental Protection Agency (“EPA”) issued a pre-publication of its Advance Notice of Proposed Rulemaking (“ANPR”) on chemical disclosure for fracturing fluids, with the final version published on May 19, 2014. Pursuant to its authority under sections 8(a) and (d) of the Toxic Substances Control Act (“TSCA”), the EPA is requesting comment on the design and scope of potential regulatory or voluntary regimes for disclosure of chemical substances and mixtures used in hydraulic fracturing (or “fracing”). As discussed in more depth below, the EPA’s openness to making at least part of the program voluntary and questions on technological and economic feasibility are interesting facets of the ANPR. Comments are due on August 18th.<sup>1</sup> Those engaged in the business of hydraulic fracturing or wastewater management associated with fracturing fluids should monitor and participate in this proceeding.

### **The EPA’s Path to the ANPR**

The federal government, thus far, has been deliberate with regard to regulation of hydraulic fracturing. Various factors may have contributed to this caution including the fact that the Resource Conservation and Recovery Act (“RCRA”) exempts oil and gas wastes from regulation as a hazardous waste under Subtitle C. Additionally, while a core element of the Safe Drinking Water Act (“SDWA”) Underground Injection Control (“UIC”) program establishes requirements for proper well siting, construction and operation to protect drinking water resources, the Energy Policy Act of 2005 (“EPA 2005”), excluded fracing fluids from regulation under the program – except when diesel fuels are involved.<sup>2</sup>

Despite the federal government’s cautious approach to regulation, it has not stayed out of the fracing arena altogether. In rules similar to those under evaluation in the ANPR, the Bureau of Land Management (“BLM”) proposed regulations in 2013 (replacing its 2012 proposal), which were modeled after Colorado’s chemical disclosure regulations, for companies fracing on federal and tribal lands.<sup>3</sup> The BLM proposal could require operators to file disclosures post-fracing on: (i) volume of water used; (ii) product name, CASR #, vendor, and description of each chemical ingredient; and (iii) maximum chemical ingredient concentration of each additive in the fracturing fluid. There would be a process by which operators could seek trade secret protection, and the disclosures themselves would occur on FracFocus.<sup>4</sup>

The upcoming United States EPA ANPR is being issued in response to a petition filed by Earthjustice and 114 other groups in 2011. The petitioners initially sought to require testing of chemicals used in oil and gas exploration and production (“E&P”) under Section 4 of TSCA and disclosure of chemicals utilized in E&P and information on health and safety studies for such chemicals under Section 8 of TSCA. The EPA denied the request for a Section 4 test rule, but agreed to publish the forthcoming ANPR to identify issues related to chemicals utilized in fracking.<sup>5</sup> A pre-publication copy of the ANPR was shared by the EPA on May 9th.

## The ANPR’s Proposals and Questions

As expected, the ANPR seeks information that will clarify the chemicals utilized in fracking and maximize the data available for risk characterization of such chemicals. The ANPR relies on EPA’s authority under TSCA to require chemical manufacturers, processors, and distributors to comply with record and reporting requirements for chemical substances. It also cites the EPA’s authority under the Pollution Prevention Act (“PPA”) as support for the action.<sup>6</sup> Specifically, the ANPR states:

“The agency is particularly concerned about the potential for disproportionate impacts from hydraulic fracturing in environmental justice communities, and would like to have a better understanding of the chemicals and mixtures that are used during that process, and subsequently disposed of, in and around these communities.”<sup>7</sup>

Towards this end, the ANPR asks for comments on the design and scope of potential regulatory or voluntary regimes for disclosing information on chemical substances and mixtures used in fracking. It includes a request for information on the roles that various parties play in the fracking process; the frequency, duration, concentration, and volumes of chemicals used in fracking; general management practices of exploration and production companies and service companies; and best management practices generally associated with generation, collection, and reporting of disclosure information associated with fracking activities. The EPA also requests comment on the extent to which parties should be required or incentivized to disclose health and safety studies for chemical substances used in fracking.<sup>8</sup> Overall, the questions are directed at collecting information on issues as varied as the scope of what should be reported, frequency of reporting, potential for combining voluntary and mandatory requirements for reporting, potential for utilizing incentives and third party certification processes, and whether different stakeholders should have different reporting obligations and EPA should apply limits to reporting obligations for small manufacturers or processors.<sup>9</sup>

Additionally, there is a focused line of inquiry within the ANPR regarding data collection efficiencies and how to minimize duplicative reporting or disclosure requirements for entities also reporting to the BLM, state agencies, or others. The EPA asks “How much overlap is acceptable?” and whether the agency should develop a new information collection repository or utilize an existing one such as FracFocus.<sup>10</sup> FracFocus is managed by the Ground Water Protection Council and Interstate Oil and Gas Compact Commission, and its national hydraulic fracturing chemical registry is used by many states and operators to manage disclosure of chemical additives.<sup>11</sup> The EPA is specifically requesting discussions on alternatives, rationales, benefits, and technological and economic feasibility for disclosure, with supporting information and any applicable direct experiences. Altogether, there is a significant information gathering effort underway in the ANPR and an attempt to take the pulse of interested stakeholders (whether industry, environmental groups like those who prompted the ANPR, or states).

## How Could the ANPR Impact State Programs

Many states currently regulate disclosure of chemicals utilized in fracking. In fact, chemical disclosure rules represent one of the most prevalent forms of regulation applicable to hydraulic fracturing.<sup>12</sup> Several states include both trade secret protection and health/emergency exceptions for those trade secret protections.<sup>13</sup> The level of state regulation on chemical disclosures for fracking fluid raises questions whether EPA rules are needed and whether they will be duplicative of what is already in place.

When the BLM opened up its draft chemical disclosure rulemaking for comments, 1,348,451 comments were filed. Several comments demonstrate the tensions at play between environmental groups (desiring that rules be more stringent), states (including a number that characterized the proposed rules as duplicative of their own and unnecessary),<sup>14</sup> and industry<sup>15</sup> (wanting to ensure appropriate protection of trade secrets and minimize the burden on industry) when it comes to fracking regulations.

In recognition that the ANPR might overlap with state programs or cause undue burdens, James Jones, EPA assistant administrator for chemical safety and pollution prevention, stated that “EPA looks forward to hearing from the public and stakeholders..., and we will continue working with our federal, state, local and tribal partners to ensure that we complement but not duplicate existing reporting requirements.”<sup>16</sup> As the ANPR acknowledges, “TSCA section 8(a) also notes that, to the extent feasible, the EPA Administrator must not require reporting under TSCA section 8(a)(1) that is unnecessary or duplicative.”<sup>17</sup> And, while the EPA states it will coordinate with the BLM “to ensure both EPA’s and BLM’s efforts provide useful information for assessment and disclosure purposes, while not overly burdening reporting entities,”<sup>18</sup> EPA may well have a hard time establishing the necessity for its program in light of the increasing number of state disclosure programs. Commenters concerned with duplication or unduly burdensome regulation should highlight those issues and how chemical disclosure is already addressed.

Lastly, when it comes to a requirement to disclosure health and safety studies under Section 8(e), recent case law suggests that such an obligation may well be more onerous than appears at first blush. TSCA § 8(e) provides:

Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information *unless such person has actual knowledge that the Administrator has been adequately informed of such information.* (emphasis added)

In a November 12, 2013, opinion by the Chief Administrative Law Judge (ALJ) for the EPA, a manufacturer was assessed a \$2.5 million dollar penalty for failing to submit an epidemiological study to the EPA under Section 8(e) of TSCA despite the fact that: (1) the conclusions and many of the findings in the study were known to EPA through the existence of other studies; and (2) the study was conducted more than five years before the violation was cited past the applicable statute of limitations period. The ALJ concluded that regardless of the fact that the study’s conclusions corroborated prior studies, the “new” study was conducted at a different plant and included slightly different considerations (e.g short term workers, smokers in the employee pool, and an assessment of urine) and thus created new information. Further, the ALJ concluded that that the failure to submit the study was a continuing violation and thus the TSCA statute of limitations was not applicable. Assuming the

decision is not challenged, this case may well create continual reporting obligations for any company that monitors workplace exposures and tracks employee health records. To the extent such data are compiled, analyzed for patterns or trends, and document or assess adverse health effects, the decision makes it plausible that the findings could be reportable pursuant to TSCA § 8(e) even if the findings are consistent with “known effects” of exposures to a chemical. Thus, commenters concerned with unduly burdensome regulations may wish to consider and address the ramifications of a Section 8(e) obligations on the oil and gas industry.

## What Is Coming Next

Interested stakeholders should file comments informing the EPA of any suggestions or concerns associated with the ANPR. For example, the EPA expressed interest in practical considerations, feasibility, duplication of efforts, and voluntary programs. Several questions were specifically listed in the ANPR, as noted above. Interested parties have through August 18th to comment on the ANPR published on May 19th, unless an extension is granted.

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- <sup>1</sup> *Notice Hydraulic Fracturing Chemicals and Mixtures, Advance Notice of Proposed Rulemaking*, EPA 79 FR 28664 (issued May 19, 2014) (“ANPR”), available at, <https://www.federalregister.gov/articles/2014/05/19/2014-11501/hydraulic-fracturing-chemicals-and-mixtures>. Comments should be filed in EPA Docket No. EPA-HQ-OPPT-2011-1019. *Natural Gas Extraction - Hydraulic Fracturing*, EPA (last updated May 19, 2014), available at, <http://www2.epa.gov/hydraulicfracturing>. This article discusses some of the key aspects of the ANPR; however, readers should review the ANPR for full details.
- <sup>2</sup> UIC Class II permitting guidance exists when diesel fuels are used in the fracking process <http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/hydraulic-fracturing.cfm>.
- <sup>3</sup> BLM regulates hydraulic fracturing under 43 C.F.R. § 3160.
- <sup>4</sup> See 43 C.F.R. 3162.3-2 Revisions.
- <sup>5</sup> See e.g. ANPR at p. 4.
- <sup>6</sup> ANPR, at pp. 7-9 (describing the EPA’s authority under the TSCA and stating that “the PPA directs EPA to develop improved methods of coordinating, streamlining and assuring public access to data collected under Federal environmental statutes; facilitate the adoption of source reduction techniques by businesses; and establish an annual awards program to recognize a company or companies that operate outstanding or innovative source reduction programs.”).
- <sup>7</sup> *Hydraulic Fracturing Chemicals and Mixtures*, EPA (last updated May 12, 2014), available at <http://yosemite.epa.gov/opei/rulegate.nsf/byRIN/2070-AJ93?opendocument#2>.
- <sup>8</sup> ANPR, at pp. 18-20.
- <sup>9</sup> ANPR, at pp. 9-17 (including lists of particular questions raised by the EPA).
- <sup>10</sup> ANPR, at p. 18.
- <sup>11</sup> See e.g. FracFocus.org (including registration of over 60,000 well sites).
- <sup>12</sup> See e.g. Louisiana La. Admin. Code Title 43: Part XIX, Section 118, Mississippi at Mississippi Rule 26, Montana at Mont. Admin. Rule 36.22.1015-1016, New Mexico at New Mex. Code Rule § 19.15.16.19(B), North Dakota at North Dakota Admin. Code § 43-02-03-27.1, Ohio at Ohio Rev. Code § 1509.10, Oklahoma at OAC 165:10-3-10(b), Oregon at Oil and Gas Rule 632-010-0017, and Utah at Utah Ann. Code § 649-3-39.
- <sup>13</sup> See e.g. Montana, at Mont. Admin. Rule 36.22.1015-1016, Nebraska at Nebraska Proposed Oil and Gas Code Rule 3.043 and 3.044, Pennsylvania at 58 Pa.C.S. § 3222-3222.1, and Texas at 16 TAC § 3.29.
- <sup>14</sup> See e.g. Laura Hancock, *Wyoming delegation: Exempt state from fracking rules*, Wyoming Star Tribune (Aug. 20, 2013), available at [http://trib.com/business/energy/wyoming-delegation-exempt-state-from-fracking-rules/article\\_f2636973-f4a2-5738-aa1f-1432706b2b6f.html](http://trib.com/business/energy/wyoming-delegation-exempt-state-from-fracking-rules/article_f2636973-f4a2-5738-aa1f-1432706b2b6f.html); see also, Pete Kasperowicz, *House votes to block federal fracking rules*, The Hill (Nov. 20, 2013), available at, <http://thehill.com/blogs/floor-action/votes/190977-house-votes-to-block-federal-fracking-rules> (regarding potential legislation to exclude states with existing rules).
- <sup>15</sup> See e.g. Julia Bell, *Oil, Gas Producers: BLM Hydraulic Fracturing Rule Unnecessary; Undermines State Authority*, IPAA (Aug. 22, 2013), available at <http://www.ipaa.org/press-releases/oil-gas-producers-blm-hydraulic-fracturing-rule-unnecessary-undermines-state-authority/>.
- <sup>16</sup> *EPA Seeking Public Comment on Enhancing Transparency for Chemicals and Mixtures Used in Hydraulic Fracturing*, EPA (May 9, 2014), available at, <http://yosemite.epa.gov/opa/admpress.nsf/bd4379a92ceeeac8525735900400c27!ea058b80944b150d85257cd30050c710!OpenDocument>.

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<sup>17</sup> ANPR, at p. 7.

<sup>18</sup> ANPR, at p. 5.