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EPA Plans Regulation of Hydrofracking Wastewater, States Move Forward with Hydrofracking Regulation

While the widespread use of hydraulic fracturing (hydrofracking, fracking) in shale gas plays is revolutionizing the natural gas extraction industry, concerns over potential environmental impacts to neighboring communities continue. The federal government, which to date has left the regulation of hydrofracking largely to the states and municipalities, recently announced a significant rulemaking that would regulate the discharge of fracking wastewater to treatment plants. The regulation of fracking wastewater is an active issue at both federal and state levels.

FEDERAL STUDY AND REGULATION OF FRACKING WASTEWATER

The Environmental Protection Agency (EPA) announced on October 20, 2011, that it will propose Clean Water Act pretreatment standards for hydrofracking wastewater sent to publicly owned wastewater treatment plants. The proposed rule is expected in 2014. In a hearing of the Senate Energy and Natural Resources Committee's Subcommittee on Water and Power, EPA official Cynthia C. Dougherty stated that while "natural gas holds promise for an increased role in our energy future, the EPA believes it is imperative that we access this resource in a way that protects drinking water sources and surface waters."

EPA's proposed wastewater discharge rule will likely track the results of a study of hydrofracking's impacts to water quality, which is underway. In 2010, the U.S. House of Representatives' Appropriation Conference Committee directed EPA to conduct a study of hydrofracking and its impacts on the environment. In October 2011, EPA released its Final Study Plan for the hydrofracking study, which aims to answer the questions:

- Can hydraulic fracturing impact drinking water resources?
- If so, what conditions are associated with these potential impacts?

The EPA plans to release a preliminary report on the study in 2012 and a final report in 2014.

For both its rulemaking and study, EPA will likely seek data and information from stakeholders throughout the industry.

CONGRESSIONAL HEARINGS

The proposed study and regulations have generated both support and opposition, and have resulted in numerous congressional hearings. On November 14, 2011, the Senate Energy and Natural Resources Committee held a field hearing on the Marcellus Shale development in Charleston, West Virginia. On November 16, 2011, the House Committee on Transportation and Infrastructure's Subcommittee on Water Resources and Environment held a hearing on federal regulation of hydrofracking. Mike Krancer, secretary of the Pennsylvania Department of Environmental Protection (DEP), spoke out in strong opposition to federal regulation, saying that regulation should be left to the unique needs and requirements of the individual states and that federal regulation would be "unwise, duplicative and unnecessary." On November 17, 2011, the House Committee on Science, Space, and Technology's Subcommittee on Energy and Environment held a hearing to question the utility of EPA's study. Several members questioned whether the study was a sound use of EPA resources.

STATE LEVEL DEVELOPMENTS

Most of the state level developments concerning the water quality implications of hydrofracking have focused on the disclosure of the chemicals used. In July, Governor Rick Perry signed House Bill 3328, making Texas the first state to pass legislation requiring the disclosure of hydrofracking chemicals. The new law directs the Railroad Commission of Texas to develop rules requiring that well operators disclose the chemicals and total volume of water used in hydrofracking and to post the information on a publicly available website. The commission held a public hearing on the draft rule in October, and the final rule is due by July 1, 2012. Several other states have already promulgated rules requiring the disclosure of hydrofracking chemicals, including Louisiana, Wyoming, and Arkansas.

In Pennsylvania, the center of the Marcellus Shale boom, state regulation of hydrofracking wastewater continues to evolve. In April, responding to public concern and a lengthy article in the *New York Times*, the state DEP asked fracking companies to voluntarily stop sending hydrofracking wastewater to municipal water treatment plants. By July, DEP reported to EPA that the request had been successful, and industry members had voluntarily complied.

In November, both houses of the Pennsylvania General Assembly passed bills that regulate hydrofracking and particularly its potential impact on drinking water supplies. House Bill 1950 adds a number of water supply protections and provides that "a well operator who affects a public or private water supply by pollution or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity or quality for the purposes served by the supply." Senate Bill 1100 contains a similar requirement and provides that the Pennsylvania DEP may deny a well permit where the application does not "include a reuse plan for fluids that will be used to hydraulically fracture that well." These bills are not yet law, and they must first be reconciled and signed by the governor of Pennsylvania. We will have to stay tuned for possible regulation of hydrofracking wastewater in other shale gas hotbeds like New York, Texas, and Louisiana.

As state regulation of hydrofracking wastewater develops, the federal government has indicated that it will be playing a more visible role, including providing input and funding. The

federal Department of Energy's Shale Gas Subcommittee recently released its second Ninety-Day Report, dated November 18, 2011, which makes a number of recommendations for regulation. In particular, the subcommittee recommends that the federal government provide grants to support review of state hydrofracking wastewater programs by the State Review of Oil and Natural Gas Environmental Regulations (STRONGER) or the Ground Water Protection Council (GWPC).

FOR MORE INFORMATION

Robinson & Cole LLP's Environmental and Utilities Practice Group is advising a number of clients on a host of the regulatory and risk issues presented by the rapidly evolving practice of hydraulic fracturing, also known as fracking or hydrofracking. For questions, please contact one of the following attorneys:

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