Docket ID No. EPA-HQ-OA-2017-0190

COMMENTS

of

WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

EVALUATION OF EXISTING REGULATIONS

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED AT 82 FED. REG. 17,793 (April 13, 2017)

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Submitted Electronically (http://www.regulations.gov)
U.S. Environmental Protection Agency
Regulatory Reform Task Force
Docket ID No. EPA-HQ-OA-2017-0190
1200 Pennsylvania Ave., NW
Washington, DC 20460

Re: Comments Concerning Regulations Appropriate for Repeal, Replacement, or Modification Pursuant to Executive Order 13777; Docket ID No. EPA-HQ-OA-2017-0190

Dear Sir or Madam:

Pursuant to the public notice published at 82 Fed. Reg. 17,793 (Apr. 13, 2017), Washington Legal Foundation (WLF) appreciates the opportunity to submit these comments to the Environmental Protection Agency's (EPA) Regulatory Reform Task Force on ways to reduce the regulatory burdens the agency places on the American people.

These comments identify three regulatory burdens that merit the Regulatory Reform Task Force's attention. First, WLF urges EPA to replace or modify its August 2, 2016 Rule on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector. Second, WLF requests that the agency withdraw its December 2016 study, "Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States," pending a reevaluation of the scientific studies available on the subject. Third, EPA should perform a thorough reconsideration of the models it utilizes to determine the risk of inhalation exposure to asbestos, beginning with the 1986 model used for Superfund determinations. WLF acknowledges that the second and third items are not "regulations." However, the hydraulic fracturing study and asbestos risk modeling, if retained, both meet the criteria of agency actions that merit reconsideration under Executive Order 1377 § 3(d): they will lead to inefficient use of EPA resources, are outdated and ineffective, and will inhibit job growth.

I. Interests of WLF

Washington Legal Foundation is a nonprofit public-interest law firm and policy center based in Washington, DC, with supporters throughout the United States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears before state and federal courts and administrative agencies to urge adoption of environmental policies that strike a proper balance between environmental safety and economic well-being. *See, e.g., Am. Mun. Power, Inc. v. EPA*, No. 16-1168 (S. Ct., pending) (challenging EPA's Clean Air Act Boiler MACT Rule); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA's Clean Air Act "tailoring rule"); *Mingo Logan Coal Co. v. EPA*, 134 S. Ct. 1540 (2014) (challenging EPA's unilateral revocation of a discharge permit under § 404 of the Clean Water Act); *Am. Farm Bureau Found. v. EPA*, 792 F. 3d 281 (3rd Cir. 2015) (challenging EPA's TMDL for the Chesapeake Bay watershed); Comments, *In re: Source Determination for Certain Emission Units in the Oil & Natural Gas Sector* (Oct. 26, 2015); Comments, *In re: EPA Report on Hydraulic Fracturing* (Aug 28, 2015).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently produces and distributes articles on a wide array of legal issues related to EPA regulation. *See, e.g.*, Samuel B. Boxerman & Ben Tannen, *EPA Seeks Stakeholder Comments On Reforming Existing Regulations*, WLF COUNSEL'S ADVISORY (Apr. 21, 2017); Mark Latham, Victor E. Schwartz, & Christopher E. Appel, *Is EPA Ignoring Clean Air Act Mandate to Analyze Impact of Regulations on Jobs?*, WLF LEGAL BACKGROUNDER (June 6, 2014); Richard Alonso & Sandra Y. Snyder, *Source "Aggregation": Federal Appeals Court Reverses 30 Years of Faulty EPA Precedent,* WLF LEGAL BACKGROUNDER (Nov. 16, 2012).

I. Rule on Source Determination for Certain Emission Units in the Oil and Natural Gas Sector

Washington Legal Foundation urges EPA to replace or modify its August 2, 2016 rule for determining sources under the Clean Air Act (CAA) for certain emissions units in the oil and natural gas sector.[1]

[1] *See* 40 CFR Parts 51, 52, 70, and 71.

EPA's current definition of "adjacent" in regulating source emissions complicates the agency's ability to differentiate minor from major sources when permitting under the CAA. WLF is concerned that the rule, by design, makes it much more likely that oil and gas operations will run afoul of federal air permitting requirements. The rule permits aggregation of air emissions from oil and gas equipment separated by many miles and that may not even be located at the same facility.

By aggregating emissions from such disparate sources, the rule substantially increases the likelihood that the newly constituted "source" will exceed federal permitting thresholds. This regulatory fiction imposes additional monitoring and reporting requirements, and thus greater financial costs, on the oil and gas sector. Those increased costs have had a negative effect on the American economy in the form of higher energy prices. Among other things, such higher energy prices adversely impact American families, especially lower-income, middle-income, and fixed-income families.

II. EPA Study of Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States

In December 2016, EPA's Office of Research and Development released a study seven years in the making: "Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States."[2] The study's June 2015 draft elicited an avalanche of criticism from the environmental activist community for its conclusion that "hydraulic fracturing activities have not led to widespread, systemic impacts to drinking water resources."[3] WLF commented on the draft study, praising EPA for following the evidence where it led, but also criticizing the agency for its failure to offer specific conclusions and recommendations that naturally flowed from those findings.[4]

The final report bowed to environmental activists' criticisms, altering the above-quoted language to provide a more favorable conclusion: "Overall, we conclude activities in the hydraulic fracturing water cycle can impact drinking water resources under some circumstances."[5] A careful reading of the report, however, reveals that the agency failed

[2] https://cfpub.epa.gov/ncea/hfstudy/recordisplay.cfm?deid=332990.

[3] Draft, *Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States*, June 2015, at 547, *available at* https://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/F7A9DB9ABBAC015785257E540052DD54/$File/HF_Main.pdf.

[4] Comment, In Re: EPA Report on Hydraulic Fracturing, Washington Legal Foundation, Aug. 28, 2015, *available at*, http://www.wlf.org/litigating/case_detail.asp?id=830.

[5] *Supra* note 2 at 565.

to find *any* evidence of an actual threat in its case study locations. The reason for that, the report claims, is that investigators experienced difficulties in accessing reliable data, especially from the oil and gas industry, which was reluctant to cooperate.

But an account published in the *Houston Chronicle* took issue with EPA's assertion that industry was uncooperative. A director for an oil and gas industry trade association told the reporter that "Oklahoma driller Chesapeake Energy 'stepped forward' to make drilling sites available to the scientists .. but 'for some reason EPA decided it wasn't good enough.'"[6] The story related that other companies had similar experiences when they approached EPA scientists.

The final EPA report also ignored at least three studies that rejected a link between groundwater contamination and hydraulic fracturing, including one EPA itself initiated.

EPA announced in 2011 that hydraulic fracturing was likely causing groundwater problems in Pavillion, Wyoming. The agency initiated a study, for which it drilled two test wells at the site. After the agency's draft study on the groundwater was roundly criticized by state environmental regulators and even other federal agencies, EPA declined to release a final report and abandoned the investigation. It handed the investigation over to Wyoming officials, effectively coercing the state to do the work of the federal government.

Results from the Wyoming Department of Environmental Quality's (DEQ) two-year study indicate that hydraulic fracturing has not led to widespread, systemic impacts on drinking water resources.[7] Ironically, the state DEQ did identify what was causing the reportedly foul smell in the EPA test wells: EPA's faulty drilling of the wells clogged the drain screens, and the standing water became contaminated with bacteria.[8] Though an agency spokesperson said that the agency was reviewing the report at the time of its

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[6] James Osborne, *How the EPA Spent Five Years Studying Fracking, Only to Report There Isn't Enough Data*, HOUSTON CHRON., Dec. 16, 2016, *available at* http://www.houstonchronicle.com/business/article/How-the-EPA-spent-five-years-studying-fracking-10801437.php.

[7] Wyoming Department of Environmental Quality, Pavillion Groundwater Report Fact Sheet, Nov. 7, 2016, *available at* http://deq.wyoming.gov/media/attachments/Water%20Quality/Pavillion%20Investigation/Investigation%20Final%20Report/03_Fact-Sheet-for-the-Pavillion-Wyoming-Area-Domestic-Water-Wells-Final-%20Report.pdf.

[8] Jazz Shaw, *'Close the Books' on the Fracking Contaminates Ground Water Myth*, HOT AIR, Nov. 12, 2016, *available at* http://hotair.com/archives/2016/11/12/close-the-books-on-the-fracking-contaminates-ground-water-myth/.

release,[9] the final EPA Hydraulic Fracturing for Oil and Gas report makes no reference to it.

Also absent from EPA's report is a three-year-long investigation of hydraulic fracturing's effects on drinking water in the Marcellus Shale by the University of Cincinnati, completed in June 2015.[10] The study rejected a link between fracking and groundwater pollution.

The EPA report further failed to mention an extensive study on the impact of fracking fluids on water sources performed by a team of researchers at Duke University.[11] The extensive study was headed by Avner Vengosh, Professor of Geochemistry and Water Quality, and was published on October 14, 2016 in the peer-reviewed journal *Science of the Total Environment*.

The Duke study tested fracturing wastewater from unconventional oil and gas wells in six basins nationwide, touching seven different states. Professor Vengosh and his team at Duke found that the chemicals used in fracking fluids only account for between four and eight percent of the wastewater being generated over the active lifetime of hydraulically-fractured wells in the United States. This means that at least 92 percent of the wastewater is made up of naturally occurring brines.

EPA apparently views Professor Vengosh as a highly regarded, credible source. The final hydraulic fracturing report cited 17 of Vengosh's studies or articles. It is unclear why EPA chose to ignore his most recent scholarly work.

WLF urges EPA to formally withdraw the study pending a reevaluation by the agency's Science Advisory Board of the scientific studies available that address hydraulic fracturing and groundwater contamination. Because the vast majority of oil and gas regulation occurs at the state level, EPA's conclusions on the safety of hydraulic fracturing should not influence public opinion on, or oversight of, this essential extraction technique. The agency's view, however, does carry considerable weight, and EPA's failure to take into consideration all available studies and come to definitive conclusions

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[9] Mead Gruver, *Wyoming Study: Fracking Likely Not Behind Well Water Problem*, Associated Press, Nov. 10, 2016, *available at* https://apnews.com/0466ca821e2f42e59a80d1b5641f696e/wyoming-study-fracking-likely-not-behind-well-water-problem.

[10] Elizabeth Claire Botner, *Elevated Methane Levels from Biogenic Coalbed Gas in Ohio Drinking Water Wells Near Shale Gas Extraction*, July 19, 2015, *available at* http://www.artsci.uc.edu/content/dam/artsci/departments/geology/Docs/Generaldocs/Botner%20ETD.pdf.

[11] Andrew J. Kondash, Elizabeth Albright, Avner Vengosh, *Quantity of Flowback and Produced Waters from Unconventional Oil and Gas Exploration*, SCIENCE OF THE TOTAL ENV'T, Sept. 9, 2016, *available at* http://sites.nicholas.duke.edu/avnervengosh/files/2011/08/Quantity-and-source-of-unconventional-wastewater.pdf.

based on that science can impact domestic energy development, investment, and job creation in this vital industry sector.

III. Risk-Quantification Method for Inhalation Exposure to Asbestos

Since 1986, EPA has utilized a method for quantifying asbestos-exposure risk that considers every type of naturally-occurring mineral to be equally hazardous.[12] EPA uses that method when judging asbestos risks, for instance, in Superfund site designation and cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). EPA has adhered to this risk-assessment policy despite the emergence of scientific evidence that some types of asbestos are more likely to cause asbestos-related diseases than others.

EPA's asbestos-risk assessment model requires EPA to consider all actual and potential asbestos exposures to be equally hazardous, leading to the inefficient allocation of resources. Such inefficiency spreads limited resources across all possible exposure risks, diverting attention and funds away from those Americans who are most vulnerable to harm. The agency's policy also has fueled nearly four decades of tort and products-liability litigation by bestowing credibility on novel theories of causation that have vastly expanded the pool of asbestos "victims." This "elephantine mass of asbestos cases" as US Supreme Court Justice David Souter called it in 1999,[13] has bankrupted over 100 businesses and has turned a select cadre of plaintiffs' lawyers into millionaires. The expansion of frivolous suits has also had the tragic impact of reducing the amount of compensation available for those individuals who have valid claims.

Nine years ago, the EPA office responsible for devising and carrying out cleanup plans under CERLA raised questions about the agency's monolithic asbestos-risk model. In 2008, the Office of Solid Waste and Emergency Response (OSWER, now known as the Office of Land and Emergency Management) asked the Asbestos Committee of EPA's Science Advisory Board (SAB) to consider a new approach to assessing the potency of asbestos that considered different mineral types and fiber sizes as posing different levels of risk.

The SAB committee accepted public comments and held a public meeting in July 2008. At that meeting, the active involvement of attorneys representing plaintiffs in asbestos lawsuits and plaintiffs'-bar-funded advocacy groups reflects the influence of the

[12] US EPA, Airborne Asbestos Health Assessment Update. Prepared by the Environmental Criteria and Assessment Office, 600/8-84-003F (1986).

[13] *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999).

1986 risk model on litigation.[14] Comments from asbestos plaintiffs' lawyers and organizations advancing their interests also dominated the public comment docket.[15]

A comment filed by Richard Wilson of Harvard University and Robert P. Nolan of the City University of New York persuasively argued that EPA's 1986 model was dangerously flawed and required revision.[16] The professors noted that even in 1986 "there was already … more than sufficient evidence to show that the various types of asbestos had a range of potencies for causing asbestos-related diseases," and that "There is anecdotal evidence that this was well understood by EPA officials at the time."[17] They explained that the most recent studies demonstrated that chrysotile asbestos, which was then and remains today the most frequently used type of asbestos in industrial applications, "is less potent in causing lung cancer than amphibole asbestos" by at least a factor of five.[18] It added that "chrysotile is *much* less potent in causing pleural mesothelioma than the amphibole asbestos," by "at least a factor of 50."[19]

Professors Wilson and Nolan also criticized the 1986 risk model's influence on asbestos liability litigation: "[T]he report has also been used incorrectly for assigning medical causation in many situations, including assigning fault and awarding billions of dollars in damages. The result has been described by some as 'random redistribution of wealth.'"[20]

The SAB Asbestos Committee's November 14, 2008 Report consisted of a two-page cover letter and a collection of comments by committee members.[21] Though the

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[14] List of Registered Public Speakers, Meeting, OSWER Interim Method to Assess Asbestos-Related Carcinogenic Risk, July 21, 2008, *available at* https://yosemite.epa.gov/sab%5CSABPRODUCT.NSF/8027D3B44BC1CF9185257489003D3F9E/$File/Asbestos+Registered+Public+Commenters-final.pdf.

[15] List of comments available at https://yosemite.epa.gov/sab%5CSABPRODUCT.NSF/PeopleSearch/CDFC688FB693B6EC8525741E0047E19B?OpenDocument.

[16] Comment of Richard Wilson and Robert P. Nolan, July 7, 2008, *available at* https://yosemite.epa.gov/sab%5CSABPRODUCT.NSF/026B5E4FF33745598525748A005634FD/$File/Asbestos+Public+Comments_RNolan_RWilson_EPA_2-007_FINAL+Combined.pdf.

[17] *Id.* at 2.

[18] *Id.* at 4.

[19] *Ibid* (emphasis in original).

[20] *Id.* at 2.

[21] SAB Asbestos Committee, SAB Consultation on EPA's Proposed Approach for Estimation of Bin-Specific Cancer Potency Factors for Inhalation Exposure to Asbestos, Nov. 28, 2008, *available at*

letter specifically stated that "group consensus was not sought," it explained that the "general view of the Committee was there is insufficient evidence to support the need for the Agency's effort in developing risk assessment method(s) to account for potential difference in risk based on mineral type and size."[22] A number of committee members did, however, express agreement with OSWER that exposure hazard risks differ based on asbestos types and fiber sizes.

EPA Administrator Stephen L. Johnson cited the SAB Asbestos Committee's Report in his decision to table OSWER's proposed reform to asbestos risk assessment.[23] He also declined the suggestion of several committee members that a broader review of how EPA assesses asbestos risk be undertaken, asserting that "The Agency will continue its investigations of the amphibole asbestos found in Libby, Montana, and other efforts to improve its ability to assess and manage asbestos risks."[24]

EPA did not, in fact, pursue a more accurate, science-based risk assessment in the standards it set for the cleanup of the Libby Superfund site. In its draft *Toxicological Review of Libby Amphibole Asbestos*,[25] EPA proposed a reference concentration level[26] for a lung condition known as localized pleural thickening which, according to one federal health agency, was essentially the same as the background amphibole asbestos level in some areas of the country.[27] A coalition of business groups similarly criticized the proposed reference concentration level, arguing that the level was "unrealistic because it is virtually impossible to assess compliance with it," and they expressed concern that the standard "will almost certainly be (mis)used as a *de facto* limit for exposure to ambient amphibole asbestos and nonasbestiform amphiboles alike."[28]

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https://yosemite.epa.gov/sab/SABPRODUCT.NSF/0/77CFF6439C00ABF3852575010077801F/$File/EPA-SAB-09-004-unsigned.pdf.

[22] *Id*. at 1-2.

[23] https://yosemite.epa.gov/sab/SABPRODUCT.NSF/0/77CFF6439C00ABF3852575010077801F/$File/EPA-SAB-09-004+Response+12-29-2008.pdf.

[24] *Ibid*.

[25] https://cfpub.epa.gov/ncea/iris_drafts/recordisplay.cfm?deid=235092.

[26] The reference concentration level estimates the level at which a person can continuously inhale a substance throughout a 70-year lifetime without deleterious effects.

[27] Memo to EPA from NCEH/ATSDR, Centers for Disease Control and Prevention, reprinted in EPA's Response to Selected Major Interagency Comments on the Interagency Science Consultation Draft IRIS Toxicological Review of Libby Amphibole Asbestos, Aug. 25, 2011, at A-1, *available at* http://ofmpub.epa.gov/eims/eimscomm.getfile?p_download_id=502986.

[28] American Chemistry Council, *et al*., Letter to Danielle DeVoney, US EPA, Apr. 24, 2012, *available at* https://www.uschamber.com/letter/coalition-letter-expressing-concerns-epa%E2%80%99s-draft-iris-assessment-la-asbestos.

Despite such criticism of EPA's unworkable and potentially economically ruinous exposure level for one particular health condition, the agency's final risk summary document retained the standard proposed in the original draft.[29]

EPA should perform a thorough reconsideration of the models it utilizes to determine the risk of inhalation exposure to asbestos, beginning with the 1986 model that its own Office of Solid Waste and Emergency Response has found to be flawed. The scientific evidence continues to mount that different types and sizes of asbestos pose different risks of cancer, mesothelioma, and other asbestos-related diseases.[30] Such a reconsideration could help EPA better allocate its limited resources, and could discourage continued use of unscientific causation theories in asbestos litigation, reducing frivolous claims and focusing compensation on truly injured parties.

Conclusion

WLF appreciates the opportunity to provide EPA's Regulatory Reform Task Force with these recommendations. We trust that they will be given serious consideration as the agency strives to reduce regulatory burdens.

Respectfully submitted,

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[29] US EPA, IRIS Toxicological Review of Libby Amphibole Asbestos (Final Report), Dec. 8, 2014, Summary at 3, *available at* https://cfpub.epa.gov/ncea/iris_drafts/recordisplay.cfm?deid=292394.

[30] *See*, *e.g.*, Jennifer S. Pierce, Peter S. Ruestow & Brent L. Finley, *An Updated Evaluation of Reported No-Observed Adverse Effect Levels for Chrysotile Asbestos for Lung Cancer and Mesothelioma*, CRITICAL REV. IN TOXICOLOGY, Mar. 31, 2016, *available at* http://www.tandfonline.com/doi/full/10.3109/10408444.2016.1150960.