Docket No. EPA-HQ-OPPT-2011-1019

COMMENTS

of

THE WASHINGTON LEGAL FOUNDATION

to the

ENVIRONMENTAL PROTECTION AGENCY

Concerning

ADVANCE NOTICE OF PROPOSED RULEMAKING REGARDING HYDRAULIC FRACTURING CHEMICALS AND MIXTURES

IN RESPONSE TO THE PUBLIC NOTICE PUBLISHED
AT *79 FED. REG. 28664* (May 19, 2014)

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Document Control Office (7407M)
Office of Pollution Prevention and Toxics
Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460-0001

Re: Advance Notice of Proposed Rulemaking
Regarding Hydraulic Fracturing Chemicals and Mixtures
Docket No. EPA-HQ-OPPT-2011-1019
79 Fed. Reg. 28664 (May 19, 2014)

Dear Sir or Madam:

The Washington Legal Foundation (WLF) appreciates this opportunity to submit these comments to the Environmental Protection Agency (EPA) in connection with the stakeholder process convened by EPA "to develop an approach to obtain information on chemical substances and mixtures used in hydraulic fracturing" (a process referred to herein as "fracking"). WLF urges EPA, in developing that approach, to keep in mind several important factors: (1) fracking is not a new process; the oil and gas industry has successfully employed fracking techniques for more than 70 years as a means of unlocking oil and natural gas reserves found in shale and other tight-rock formations; (2) recent improvements in fracking technology, when combined with modern horizontal drilling techniques, have led to a renaissance in American oil and natural gas production that has major positive implications for employment and national security; (3) the safety record of companies employing fracking techniques is unparalleled; (4) burdensome and duplicative regulation of fracking has the potential to undermine that major success story.

In light of these considerations, WLF urges EPA to proceed with caution. WLF shares

EPA's desire that the oil and gas industry, when engaged in fracking, should employ chemicals whose use poses a low risk of environmental damage. But as EPA itself has acknowledged, there is no evidence that chemicals used in the fracking process have ever adversely affected drinking water supplies. EPA and others have undertaken ongoing studies of the long-term effects of fracking. At least until those studies are completed, it makes little sense for EPA to impose significant new federal regulatory requirements that are likely to duplicate the substantial state-government reporting requirements that are already in place. FracFocus, an online hydraulic fracturing chemical registry that permits companies to voluntarily disclose information about chemicals being used at individual wells, has done an excellent job of informing the public about the fracking process. WLF urges EPA to build upon that voluntary system rather than adopt an entirely separate command-and-control information-gathering bureaucracy that has the potential to undermine the national renaissance in oil and gas production in which fracking has played so great a part.

I. Interests of the Washington Legal Foundation

The Washington Legal Foundation is a public interest law firm and policy center based in Washington, D.C., with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law. To that end, WLF regularly appears before federal and state 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., Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014) (challenging EPA's Clean Air Act "tailoring rule"); *United*

States v. King, 660 F.3d 1071 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 2740 (2012) (urging reasonable enforcement policies for Underground Injection Control programs); *Wallach v. Town of Dryden*, ___ N.E.3d ___, 2014 WL 2921399 (N.Y., June 30, 2014) (urging preemption of fracking bans imposed by municipal governments).

WLF also regularly publishes articles addressing the need to adopt reasonable limits on the scope of government regulation of oil and gas development. *See, e.g.*, Eric Waekerlin and Joe Green, *Hydraulic Fracturing & TSCA: EPA's Surprising Move and Its Sweeping Implications*, WLF LEGAL BACKGROUNDER (Feb. 24, 2012) (available at www.wlf.org/upload/legalstudies/legalbackgrounder/2-17-12Waeckerlin_LegalBackgrounder.pdf).

II. EPA's Rulemaking Proceedings Under the TSCA

Congress adopted the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2600 *et seq.*, in 1976 to ensure that "adequate data . . . be developed with respect to the effect of chemical substances and mixtures on health and the environment." 15 U.S.C. § 2601(b)(1). At the same time, Congress made clear that the Executive Branch should avoid adopting regulations that would interfere with technological innovation and economic development:

> [A]uthority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation while fulfilling the primary purpose of this Act to assure that such innovation and commerce in such chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment.

15 U.S.C. § 2601(b)(3). Congress added, "It is the intent of Congress that [EPA] shall carry out this Act in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to

take under this Act." 15 U.S.C. § 2601(c).

Section 8(a) of the TSCA, 15 U.S.C. § 2607(a)(1), authorizes EPA to require "manufacturers or processors" of chemical substances to "maintain such records" and submit to EPA "such reports, as [EPA] may reasonably require." The statute explicitly prohibits EPA from requiring reports that are "unnecessary or duplicative." 15 U.S.C. § 2607(a)(2). Section 8(d) of the TSCA, 15 U.S.C. § 2607(d), authorizes EPA to promulgate rules requiring chemical manufacturers, processors, or distributors to provide EPA with information about existing safety studies with respect to their chemicals.

In response to a 2011 Citizen Petition filed by Earthjustice and other environmental groups, EPA on November 23, 2011 stated that it would issue rules under TSCA §§ 8(a) and 8(d) covering chemicals used in fracking operations. On May, 19, 2014, EPA issued this "advance notice of proposed rulemaking," requesting stakeholders to submit comments "on the information that should be reported and disclosed for hydraulic fracturing chemical substances and mixtures and the mechanism for obtaining this information." 79 Fed. Reg. at 28664. EPA emphasized that it has not committed itself to issuing *any* regulation that would impose additional reporting obligations on manufacturers or processors of chemicals used for fracking. It stated: "This [information-seeking] mechanism could be regulatory (under TSCA section 8(a) and/or 8(d)), voluntary, or a combination of both." *Id.*

III. Additional Regulation at the Federal Level Is Largely Unnecessary and Duplicative Because Most Oil and Gas-Producing States Already Require Disclosure of Chemicals Used in Local Fracking Operations

As noted above, the TSCA prohibits EPA from imposing record-keeping and reporting

requirements under TSCA § 8(a) to the extent that they are "unnecessary or duplicative." 15 U.S.C. § 2607(a)(2). In light of the extensive reporting requirements already imposed on the oil and gas industry at the state level, WLF submits that additional mandatory record-keeping and reporting requirements at the federal level are unwarranted because they are neither necessary nor non-duplicative.

Indeed, EPA has acknowledged the existence of state chemical-disclosure requirements, and has not suggested that those requirements are ineffective in ensuring public awareness of the chemicals that are being used in fracking operations. In particular, Colorado, Wyoming, and North Dakota all have adopted extensive well-by-well disclosure requirements. They have determined that use of FracFocus should be the primary means of disclosure. If EPA determines that exercise of its TSCA § 8(a) authority is warranted, WLF urges EPA to follow the lead of those States and likewise rely on FracFocus as the mechanism for obtaining any information.

FracFocus is an online fracking chemical registry; it allows companies to submit information about chemicals being used at individual wells. The program, which is a joint effort of the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission, is widely acknowledged as having been a significant success in increasing transparency and public access to chemical information. It currently provides information on fracking fluid used in more than 56,000 wells. *See* http://www.fracfocus.org.

EPA reliance on FracFocus would not only avoid unnecessary duplication; it would also ensure protection of trade secret information. FracFocus supplies information to the public in a manner that adequately discloses the identity of chemicals being utilized yet still protects

valuable trade secrets. The more detailed reported requirements urged by Earthjustice and others would unnecessarily risk disclosure (and therefore loss) of those trade secrets. Such destruction would be unfair to manufacturers and would expose EPA to significant monetary liability under the Fifth Amendment's Takings Clause. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

In granting Earthjustice's request to move forward under § 8(a), EPA stated, "Our expectation is that the TSCA proposal would focus on providing aggregate pictures of the chemical substances and mixtures used in hydraulic fracturing. This would not duplicate, but instead complement, the well-by-well disclosure programs of states." Nov. 23, 2011 Letter to Earthjustice from Stephen A. Owens, Assistant Administrator of EPA. But the letter fails to explain why FracFocus, with information from more than 56,000 wells, does not adequately provide "aggregate pictures of the chemical substances and mixtures used in hydraulic fracturing"; it clearly does. There is little reason to suppose that wells not included in FracFocus use a different set of chemicals from those reported on FracFocus. Were EPA to take steps to encourage broader reporting on FracFocus, there would be no differences whatsoever.

IV. Additional Regulation Is Particularly Unwarranted in Light of the Major Role that Fracking Has Played in the Renaissance of Oil and Gas Production

In determining whether to impose additional federal regulation of fracking, EPA should keep in mind the major role that fracking has played in the recent renaissance in American oil and gas production. Additional regulation potentially could interfere with that trend, which has had significant positive implications for employment, domestic employment, and national security.

Fracking has unlocked vast reserves of shale and other tight-rock formations to produce an unprecedented expansion in U.S. oil and gas production (and known reserves) in the past four years. Thanks to fracking, the U.S. has reclaimed its title as the world's leading oil producer, producing more than eight million barrels per day and surpassing production by both Saudi Arabia and Russia. America is well on its way to eliminating its over-dependence on foreign oil, with imports now accounting for less than 40% of overall consumption (down from 60% in the last decade). Since its inception in the 1940s, fracking has accounted for the production of more than 600 trillion cubic feet of natural gas and seven billion barrels of oil. The U.S. continues to be the #1 producer of natural gas in the world, and in light of the fracking-enhanced ability to recover natural gas, President Obama has estimated that current levels of production can last for 100 years. Fracking has created tens of thousands of new jobs and has freed government leaders from the need to craft an appease-oil-exporting-countries foreign policy.

In light of the tremendous benefits that the U.S. has derived from fracking, EPA should act with extreme caution before imposing new regulations on an activity that is already subject to significant government oversight. The experiences of two neighboring States—Pennsylvania and New York—provide a cautionary tale regarding the dangers of excess regulation. Oil reserves located in both States are prime candidates for development through use of fracking technology. Pennsylvania has imposed rigorous but not overly harsh regulations; the result has been an oil boom and significant economic gains in previously depressed areas of the State, with no evidence of any environmental damage. In contrast, bureaucratic red tape in New York has prevented fracking from going forward, despite the conclusions of environmental experts in the

State that fracking could proceed without undue risks of environmental harm. As a result, economically depressed counties in western New York have missed out on the boom experienced by their nearby Pennsylvania neighbors. Adopting federal regulations that create similar barriers to the economic expansion that has been brought about through fracking technology would run directly counter to Congress's intent, stated expressly in 15 U.S.C. § 2601(b)(3), that EPA's "authority over chemical substances and mixtures should be exercised in such a manner as not to impede unduly or create unnecessary economic barriers to technological innovation."

Additional regulation might be warranted if there were evidence that state regulation had proven insufficient and that fracking had created serious environmental problems. But there is no such evidence. Indeed, EPA officials agree with the consensus of scientists who have looked at the issue: there is no evidence that chemicals used in fracking have *ever* led to contamination of groundwater. Unquestionably, regulators must ensure that the oil and gas industry complies with standard safety procedures when constructing wells that must pass near or through aquifers on their way to reaching oil and gas reserves located deeper in the ground. But industry has adopted numerous measures—such as cementing into place surface casing at the uppermost portions of wells—to prevent leakage. If those measures are followed, there is no evidence to suggest that the specific chemical mix used in connection with fracking (a mix whose composition is 99.5% water and sand and only .5% other chemicals) is relevant to degree of risk that groundwater might be contaminated. It bears repeating that Congress adopted the TSCA not to eliminate all possibility of environmental harm but rather to provide assurances that chemical

substances do not present an "unreasonable risk" of injury to health and the environment. 15 U.S.C. § 2601(b)(3). In the absence of any evidence that an "unreasonable risk" of injury exists unless an additional layer of disclosure regulations is adopted, mandatory TSCA regulations are unwarranted.

Finally, EPA needs to bear in mind the motivation of those who push for additional federal regulation of fracking. Earthjustice has been quite frank about its ultimate goal: it seeks to end all fracking, and it views federal regulation under §§ 8(a) and (d) of the TSCA as a first step toward increased federal regulation—and eventual prohibition—of fracking. Earthjustice's anti-fracking campaign cannot plausibly be viewed as simply an effort to increase public awareness of chemicals used in fracking, given the ready availability of such information on FracFocus.

V. Any EPA Regulation Under TSCA §§ 8(a) and (d) Ought to Be Directed at Service Providers Who Mix Chemicals at Well Sites

TSCA § 8(a) authorizes EPA to impose record-keeping and reporting requirements on one who "manufactures" or "processes" a chemical substance. TSCA § 8(d) extends EPA's regulatory authority to anyone who "manufactures, processes, or distributes" a chemical substance. The advance notice of proposed rulemaking asks commenters to address the following question: to whom should EPA address any regulations that it issues?

As explained above, WLF recommends that EPA not adopt any mandatory regulations but instead encourage voluntary participation in FracFocus. Whatever form of regulation EPA decides to adopt, WLF urges EPA to direct its regulation solely to service providers who mix

chemicals at well sites. Such entities will have the most direct knowledge of precisely what chemicals are used at each well. More importantly, unless EPA limits regulatory requirements to a single layer of the manufacturing and distribution chain, there is simply too great a risk that "duplicative" record-keeping and reporting requirements will be imposed—a result explicitly prohibited by 15 U.S.C. § 2607(a)(2).

CONCLUSION

WLF respectfully urges EPA not to adopt mandatory regulations under §§ 8(a) and (d) of the TSCA. At a maximum, EPA should encourage further voluntary use of FracFocus.

Sincerely,

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Chief Counsel

/s/ Cory L. Andrews
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