

December 2, 2011

*Practice Group(s):**Energy, Infrastructure  
and Resources**Oil & Gas*

## EPA to Require Chemical Disclosure under TSCA by Hydraulic Fracturing Fluid Manufacturers

*By Cliff L. Rothenstein and Tad J. Macfarlan*

On the day before Thanksgiving, the U.S. Environmental Protection Agency (“EPA”) quietly issued a letter bound to have significant impacts on the oil and gas industry, announcing its intent to develop and issue regulations under the Toxic Substances Control Act (“TSCA”) governing the disclosure and evaluation of chemicals used in hydraulic fracturing operations.

By letter dated November 23, 2011, EPA partially granted an Earthjustice petition seeking regulation of hydraulic fracturing fluids under TSCA, 15 U.S.C. §§ 2601-2697. This decision came on the heels of a November 2, 2011 rejection of another portion of the same petition. The combined response means that EPA plans to propose rules that would require (1) manufacturers and processors of hydraulic fracturing fluids to maintain records and submit reports to EPA on chemical composition, along with related environmental, health, and exposure information, and (2) manufacturers, processors, and distributors of hydraulic fracturing fluids to submit to EPA all existing health and safety studies related to hydraulic fracturing chemicals. However, EPA will not require the development of test data on hydraulic fracturing fluid chemicals, nor will it regulate the broader universe of chemical substances and mixtures used in oil and gas exploration and production (“E&P chemicals”). Given the stakes involved for both environmental and industry groups, legal challenges to EPA’s decisions can reasonably be anticipated.

### Current Regulation of Chemical Disclosure

Most states require some degree of chemical disclosure under their programs regulating the natural gas industry, which vary widely in both form and content. As public debate continues to intensify over the use of hydraulic fracturing processes to gain access to the ample reserves of natural gas in the Marcellus Shale, many companies have moved to the very public disclosure of hydraulic fracturing fluid contents via the online datasite “FracFocus,”: while more states are considering stricter rules on chemical disclosure by natural gas operators. *See* Tex. Nat. Res. Code Ann. § 91.851 and proposed 16 TAC § 3.29; New York’s proposed 6 NYCRR § 560.3(c), § 750-3.11(e)(1)(ii), § 750-3.12(b), and § 750-3.13(e). Because trade secret protections under state regulatory regimes are often more extensive than under TSCA, application of TSCA’s reporting requirements to hydraulic fracturing fluid producers may threaten to expose otherwise confidential, proprietary information.

However, limited disclosure of hydraulic fracturing chemicals is already required under current federal law through the development of material safety data sheets under the Occupational Safety and Health Act. EPA is also currently conducting a comprehensive study on the potential impacts of hydraulic fracturing on drinking water supplies. The final study plan indicates that significant attention will be paid to hydraulic fracturing fluid composition, storage, injection processes, flowback, and disposal. Finally, EPA has recently proposed Clean Air Act standards that would require reductions of air emissions at new or modified wells drilled to extract natural gas using hydraulic

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fracturing, and also announced that it is developing Clean Water Act effluent guidelines to control wastewater produced from hydraulic fracturing operations.

### The Earthjustice Petition

On August 15, 2011, Earthjustice submitted a petition to EPA pursuant to TSCA § 21, arguing that existing regulations provided the public with too little information on the perceived threat posed by hydraulic fracturing fluids. The petition requested four specific regulatory actions:

- Adopt a rule pursuant to TSCA § 4 to require manufacturers and processors of E&P chemicals to develop test data sufficient to evaluate the toxicity and potential for health and environmental impacts of all substances and mixtures that they manufacture and process.
- Adopt a rule pursuant to TSCA § 8(a) requiring manufacturers and processors of E&P chemicals to maintain records and submit reports to EPA disclosing the identities, categories, and quantities of E&P chemicals, descriptions and byproducts of E&P chemicals, all existing data on potential or demonstrated environmental health effects of E&P chemicals, and the number of individuals potentially exposed to E&P chemicals.
- Request, pursuant to TSCA § 8(c) and its implementing regulations, submission of copies of any information related to significant adverse reactions to human health or the environment alleged to have been caused by E&P chemicals manufactured, processed, or distributed by the nine primary manufacturers, processors, and distributors of E&P chemicals (identified by name) in the United States.
- Adopt a rule pursuant to TSCA § 8(d) to require submittal of all existing, not previously reported health and safety studies related to the health and/or environmental effects of E&P chemicals.

With regard to its § 4 request, Earthjustice claimed that its petition had developed a sufficient factual record to support each of two statutorily prescribed findings, either of which would force EPA to develop a rule requiring testing of the chemical substance or mixture in question: (1) the substance or mixture *may present an unreasonable risk of injury to health or the environment*, and (2) the substance or mixture is or will be *produced in substantial quantities*, and there is or may be *significant or substantial human exposure* to the substance or mixture. In either case, in order to have the authority to develop testing rules, EPA must also find that (1) there are insufficient data and experience to be able to reasonably determine the effects of the substance or mixture on health or the environment and (2) testing of the substance or mixture is necessary to develop such data.

With regard to its § 8(d) request, Earthjustice asserted that submission of health and safety studies was necessary to ensure that the chemical substances and mixtures do not present an unreasonable risk of injury to health or the environment – this coincides with the demonstration that Earthjustice would need to make in court to successfully challenge an EPA decision to deny a § 8 petition. Presumably, Earthjustice considered its other two § 8 requests to be supported by this same rationale.

### EPA's Denial of the Petition with Regard to Testing

EPA tersely denied the § 4 request on November 2, 2011, stating that Earthjustice had failed to set forth sufficient facts to support the required findings set forth above for issuance of a test rule covering all E&P chemicals. Thus, EPA does not plan to require manufacturers and processors to conduct their own original testing. The response letter, however, suggested that “TSCA may be a valuable authority to provide a national picture of the chemical substances and mixtures used in

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hydraulic fracturing,” and therefore EPA would consider and conduct additional analyses on the § 8(a) and § 8(d) requests.<sup>1</sup>

### EPA’s Grant of the Petition with Regard to Recordkeeping and Reporting

As foreshadowed in its November 2 letter, EPA partially granted the § 8(a) and § 8(d) requests on November 23, 2011, but only with regard to hydraulic fracturing fluids (not the entire universe of E&P chemicals). EPA will issue an advance notice of proposed rulemaking with the expectation that any forthcoming rules “would focus on providing aggregate pictures of the chemical substances and mixtures used in hydraulic fracturing.”

The § 8(a) rule will likely require the maintenance of records and reporting with respect to the following information:

- The common or trade name, the chemical identity, and the molecular structure of each chemical substance or mixture.
- The categories or proposed categories of use of each such substance or mixture.
- The total amount of each such substance and mixture manufactured or processed, reasonable estimates of the total amount to be manufactured or processed, the amount manufactured or processed for each of its categories of use, and reasonable estimates of the amount to be manufactured or processed for each of its categories of use or proposed categories of use.
- A description of the byproducts resulting from the manufacture, processing, use, or disposal of each such substance or mixture.
- All existing data concerning the environmental and health effects of such substance or mixture.
- The number of individuals exposed, and reasonable estimates of the number who will be exposed, to such substance or mixture in their places of employment and the duration of such exposure.
- The manner or method of its disposal, and in any subsequent report on such substance or mixture, any change in such manner or method.

Meanwhile, the § 8(d) rule would require the submission of any existing “health and safety study,” broadly defined in EPA’s regulations. “Not only is information which arises as a result of a formal, disciplined study included, but other information relating to the effects of a chemical substance or mixture on health or the environment is also included. Any data that bear on the effects of a chemical substance on health or the environment would be included. Chemical identity is part of, or underlying data to, a health and safety study.”

Significantly, EPA declared that its effort “would not duplicate, but instead complement, the well-by-well disclosure programs of states.” Furthermore, EPA expressed its desire to minimize reporting burdens and costs, take advantage of existing information, and avoid duplication of efforts.

Companies potentially subject to the anticipated TSCA reporting requirements, and other stakeholders in the oil and gas industry, will want to engage with EPA and others in the Administration and Congress to ensure that any proposed rule considers existing state requirements and minimizes burdens. EPA has indicated that it intends to convene a stakeholders group to seek involvement by various interests; and industry representatives (E&P chemical producers as well as service companies)

<sup>1</sup> EPA apparently did not act on Earthjustice’s § 8(c) request to require the nine named primary manufacturers, processors, and distributors of E&P chemicals to report allegations of significant adverse reactions to human health or the environment – nor has EPA given an indication that it will do so in the future.

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will want to assure they have a seat at that table. Given the ever-growing body of state regulations and industry practices related to hydraulic fracturing fluid chemical disclosure, many may question whether EPA needs to move under TSCA at this time – days and dollars lost in the development of and compliance with duplicative regulations are not well spent.

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### Authors:

**Cliff L. Rothenstein**

cliff.rothenstein@klgates.com

+1.202.778.9381

**Tad J. Macfarlan**

Tad.macfarlan@klgates.com

+1.717.231.4513

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