

The “Halliburton Loophole”: Exemption of Hydraulic Fracturing Fluids from Regulation Under the Federal Safe Drinking Water Act

President Richard M. Nixon established the federal Environmental Protection Agency (EPA) in December 1970, in part to address at the federal level, heightened public awareness and concern over pollution and contamination of the environment (more detailed information on the creation of the EPA can be viewed at <http://www.epa.gov/history/>). In subsequent years, the EPA was charged with the responsibility of regulating many toxic or potentially toxic substances introduced into the environment. One of the most visible and important laws the EPA enforces is the federal “Safe Drinking Water Act” of 1974. Under this law, the EPA has wide authority to regulate any activities that may affect public drinking water sources as defined in the law.

Since hydraulic fracturing typically introduces a mixture of potentially toxic chemicals into the ground, concerns have arisen as to whether those chemicals can affect drinking water supplies and therefore should be regulated by the EPA under the Safe Drinking Water Act. But due to another federal law enacted in 2005, the EPA does not currently have the authority to regulate the underground injection of chemicals during the hydraulic fracturing process.

This prohibition is a result of provisions within the 2005 National Energy Act, which was enacted by Congress and signed into law by President George W. Bush. The prohibition has been called the “Halliburton Loophole” by critics, because it is believed to have come from recommendations made in 2001 by a Special Energy Policy Task Force headed by then United States Vice President Richard B. Cheney, who had served as Chief Executive Officer of the Halliburton Corporation, a leading energy company in Texas that initially developed the modern hydraulic fracturing process.

History

The Safe Drinking Water Act was enacted by Congress in 1974, to protect public health by ensuring the safety of drinking water. It requires the EPA to promulgate regulations to ensure the safety of public drinking water produced by public water systems. The law was amended with updates during the Reagan Administration in 1986 and again under President Bill Clinton in 1996.

It should be noted that the law does not apply to small private drinking water wells that have fewer than 15 service connections, or serve fewer than 25 persons, or provide water

less than 60 days per year. It also does not apply to bottled water, which is regulated by the Food and Drug Administration.

Detailed information on the federal Safe Drinking Water Act can be found on the EPA's website at <http://water.epa.gov/lawsregs/rulesregs/sdwa/>

The 1974 law authorized the EPA to regulate underground injection wells that might affect the public water supply, and this was done under the Underground Injection Control Program (UICP). Following a federal court case where Alabama landowners claimed that a hydraulic fracturing operation had contaminated a drinking water well, in 1997 the 11th United States Circuit Court of Appeals issued a ruling directing the EPA to regulate hydraulic fracturing injections under those provisions of the Safe Drinking Water Act.

As a result of this court decision, in 2000 the EPA undertook a study of hydraulic fracturing, to determine the potential risk to public water supplies from the process. The EPA's report was published in 2004 and determined that hydraulic fracturing posed little risk to public water supplies and recommended no further study.

This report was controversial, and resulted in at least one "whistleblower" claim by an EPA employee who alleged the study was biased, and the EPA Inspector General initiated a review of the study.

Also during this period, in January 2001, President George W. Bush appointed an Energy Policy Task Force (formally titled the National Energy Policy Development Group), headed by Vice President Richard B. Cheney, to formulate a new national energy policy that could be proposed to Congress. The task force recommended in May 2001 that the new energy policy law exempt hydraulic fracturing from enforcement under the Safe Water Drinking Act. The entire report can be viewed at <http://wtrg.com/EnergyReport/National-Energy-Policy.pdf>

This recommendation was also subject to criticism because the Bush Administration took extensive efforts to keep details of many of the meetings of the task force secret, and prior to his election as Vice President, Mr. Cheney had served as Chief Executive Officer for the Halliburton Corporation in Texas, a leading energy company that not only had developed the modern hydraulic fracturing process in the 1940s, but was strongly advocating its use in the Marcellus Shale gas play. The *Washington Post* undertook an investigative series on the task force, which furthered the controversy, for example, the article "Papers Detail Industry's Role in Cheney's Energy Report" by Michael Abramowitz and Steven Mufson published on July 18, 2007 can be viewed at http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701987_pf.html

The Bush Administration's proposed energy policy to Congress did include the exemption provision, and in the final Energy Policy Act of 2005 (Public Law 109-58), Congress did exempt hydraulic fracturing from regulation under the UICP. See the text of the entire law at <http://www.gpo.gov/fdsys/pkg/PLAW-109publ58/pdf/PLAW-109publ58.pdf>

Several senators and members of congress subsequently introduced legislation to repeal the exemption. For example, Pennsylvania Senator Robert Casey introduced the "Frac Act" which he discusses in a press release at <http://casey.senate.gov/about/blog/index.cfm?tag=Fracking> but as of early March 2012, none have been enacted into law.

Current Status

In the 2010 Appropriations Act, Congress directed the EPA to undertake another study of risk posed to public drinking water by hydraulic fracturing. A first draft of the report is expected by the end of 2012, and the final report will be delivered in 2014.

Detailed information on the current EPA study on the effects of hydraulic fracturing on drinking water can be found on this page of the EPA's website:

<http://www.epa.gov/hfstudy/index.html>

Pennsylvania State Laws

On February 14, 2012 Pennsylvania's state government enacted a controversial and comprehensive law that amended the state Oil and Gas Act to regulate the Marcellus Shale development. See the entire bill at

<http://s3.documentcloud.org/documents/289726/stateimpact-pa-impact-fee-draft.pdf>

Part of the law was intended to protect groundwater that serves as a source for drinking water and the new law includes provisions expanding the distance between gas wells and water sources, including:

- Increasing well-setback distance from 100 feet to 300 feet for streams, rivers, ponds and other water bodies, and from 200 feet to 500 feet from buildings and private water wells and to 1,000 feet for public drinking water systems.
- Expanding an unconventional operator's "presumed liability" for impairing water quality from 1,000 feet to 2,500 feet from a gas well, and extends the duration from 6 months to 12 months;
- Requires that brine flowback water be handled in accordance with the Clean Streams Act; and

- Improving the quality of gas well casings.

Section 3215 “Well Location Restrictions;” Section 3217 “Protection of Fresh Groundwater and Casing Requirements” and 3218 “Protection of Water Supplies” within the legislation includes many of these provisions.

Section 3222 of the law also expands reporting requirements on completed wells. In particular, the law requires reporting composition of fracking fluids and other chemicals used to DEP, but the company may request “trade secrets” protection for the information. Section 3222.1 provides that the chemicals must be disclosed though the amount of disclosure depends on determination of proprietary composition and a study on the implementation of the disclosure website.

Section 3304 of the law also prohibits municipal governments from enacting ordinances prescribing regulations more stringent than those contained in the act

It should also be noted that Pennsylvania remains one of the few states that do not prescribe construction standards for private residential drinking water wells.

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