



Debate Over Federal vs. State Regulation Of Fracing Heats Up

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While the New York State Department of Environmental Conservation's ("NYSDEC") review of high-volume hydrofracing continues at its Rip Van Winkle-like pace, federal regulatory forays continue. A spirited debate is ongoing on the proper role of the federal and state governments in fracing regulation, but the reality of Congressional legislative deadlock means the federal Environmental Protection Agency ("EPA") will continue as a primary source of new industry regulation.

On August 5, 2013, the EPA updated its April 2012 oil and natural gas standards for volatile organic compound emissions from storage tanks because the Agency admitted it had underestimated the number of tanks that would be needed.

Specifically, the EPA stated:

"Storage tanks that emit 6 or more tons of volatile organic compounds (VOCs) a year must reduce emissions by 95 percent. Today's rule establishes two emission control deadlines:

- tanks that come online after April 12, 2013 are likely to have higher emissions and must control VOC emissions within 60 days or by April 15, 2014, whichever is later; and
- tanks that came online before April 12, 2013 are likely to have lower emissions and must control VOC emissions by April 15, 2015.

The updated standards also establish an alternative emissions limit that would allow owners/operators to remove controls from tanks if they can demonstrate that the tanks emit less than 4 tons per year of VOC emissions without controls. In addition, the rule streamlines compliance and monitoring requirements for tanks that have already installed controls."

The EPA had issued its comprehensive Final Air Rules for the Oil and Natural Gas Industry on April 17, 2012. The 2013 amendments were the result of petitions filed by both industry and environmental groups seeking revisions to the April 2012 regulations. The Agency rejected

most of the petitions, and environmental groups may still seek judicial intervention in support of more restrictive regulations.

Meanwhile, the proper balance between federal and state regulation continues to be debated in Washington, with Democrats urging a shared role, and Republicans calling for federal restraint. In a speech on August 8, 2013, Ron Wyden (D-OR), Chair of the Senate Energy and Natural Resources Committee, called for a divided regime with states having authority over issues likely to be unique to individual areas, such as activities below ground, with the federal government in charge of more generic areas such as disclosure and reporting requirements. For its part, the House Natural Resources Committee's Energy and Mineral Resources Subcommittee is holding hearings on the Protecting States' Rights to Promote American Energy Security Act (H.R. 2728), designed to constrain EPA authority. The measure was reported to the full House on July 31, 2013. At a late July hearing, Secretary of the Interior Jewell suggested there should be minimum federal standards, particularly in the areas of well casing. Others have argued that the diversity of land features and water systems throughout the country would make a single set of standards unworkable. However, Secretary Jewell maintains that baseline standards apply regardless of the hydrology or land features.

With the Obama Administration's unveiling of fracing regulations for public lands, and recent comments from senior administration officials, the argument over responsibility for fracing regulation is likely to continue to be at the forefront in Washington. 

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