EPA REGULATIONS AS THEY RELATE TO HORIZONTAL DRILLING AND FRACKING

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Mike also represents clients in federal and state courts and before administrative agencies on a broad range of environmental permitting, compliance and enforcement defense issues. He has significant experience litigating matters under the Clean Water Act (CWA), Oil Pollution Act (OPA), Clean Air Act, Resource Conservation and Recovery Act (RCRA), and related state statutes. Mike has also litigated numerous cases relating to EPA regulations promulgated under the Clean Air Act, RCRA and other environmental statutes in the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the District of Columbia.

Prior to commencing the practice of law in 1990, Mike was a nuclear engineer with the General Electric Company/Knolls Atomic Power Laboratory, where his responsibilities included plant operations and environmental compliance for a land-based naval nuclear submarine prototype.

AWARDS AND HONORS

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I. INTRODUCTION

Although not new to oil and gas operations, hydraulic fracturing or "fracking" has recently received greater attention by the media and by national non-governmental organizations ("NGOs"). As such, there have been increased calls for more stringent federal regulation, particularly with respect to potential effects of hydraulic fracturing activities on groundwater, surface waters and air emissions, including increased regulation of oil and gas operations on public lands. Moreover, while several States have taken actions to address chemical disclosure requirements, there have also been efforts to have the U.S. Environmental Protection Agency ("EPA") impose national requirements with respect to chemicals use. Thus, owners and operators of oil and gas wells using hydraulic fracturing must be aware of the potential for increased federal regulation in this area. Several of the more significant recent and upcoming federal regulatory actions are described further below.

II. FEDERAL REGULATION OF INJECTION FLUIDS

A. Safe Drinking Water Act ("SDWA")

1. Underground Injection Control Program

Under the SDWA, 42 U.S.C. § 300h-3, EPA regulates the construction, operation, permitting and closure of injection wells that place fluids underground for storage or disposal under the Underground Injection Control ("UIC") Program. Under this program, EPA (or a state or Indian tribe that has received primary authorization to implement the UIC Program) must issue a permit for each new injection well. Often, flowback from hydraulic fracturing operations is disposed via injection to a subsurface well. Flowback is the water-based solution that flows back to the surface during and after hydraulic fracturing activities. Under the UIC Program, these types of wells are known as "Class II" wells -- a designation covering wells that inject fluids associated with oil and natural gas production. 40 C.F.R. § 144.6. [1] By EPA's estimation, over 172,000 Class II wells exist in the United States, with about 20 percent of the total number of Class II wells being disposal wells. *See* EPA, *Classes of Wells*, http://water.epa.gov/type/groundwater/uic/wells.cfm (last updated Aug. 2, 2012); EPA, *Class II Wells - Oil and Gas Related Injection Wells (Class II)*, http://water.epa.gov/type/groundwater/uic/class2/ (last updated May 9, 2012).

Operators of Class II injection wells must comply with casing, cementing, operating, reporting, and injection pressure requirements, and must prepare, maintain, and comply with an EPA-approved plug and abandonment plan. 40 C.F.R. § 144.28. However, there is no requirement for fluids to be treated to be disposed of in a Class II well.

The SDWA creates the opportunity for state regulation to achieve primacy over the federal UIC Program; a state may devise its own program and request primacy from EPA, which may be granted in the event EPA finds the program to be "effective." [2] 42 U.S.C. § 300h-4. At the very least, a state's program must include permitting, inspection, record-keeping, monitoring, and reporting mechanisms that demonstrate its effectiveness. *See* EPA, *Class II Wells -- Oil and Gas Related Injection Wells (Class II)*, http://water.epa.gov/type/groundwater/uic/class2/.

Although the SDWA regulates injection wells used to dispose of fluids from hydraulic fracturing operations, in most cases it does not regulate the injection methods used during hydraulic fracturing operations themselves. *See* 42 U.S.C. § 300h(d). The Energy Policy Act of 2005 amended Section 300h(d) of the SDWA with respect to its regulation of hydraulic fracturing activities. *See* Pub. L. No. 109-58, § 322. Through this amendment, Congress exempted from the UIC Program regulation of "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities." *Id.* § 300h(d)(1)(B)(ii). Thus, while fracking flowback is regulated upon disposal in injection wells, if flowback is treated and reused for fracking purposes, it is not subject to UIC regulation. Currently, there are no federal standards for recycling flowback, meaning operators must only treat flowback to a level rendering it reusable for future fracking operations.

2. "Diesel Fuels" and EPA Guidance

The Energy Policy Act's 2005 exemption of fluids used in fracking operations from the UIC Program has been a cause of some debate. The exemption applies to all fluids "other than diesel fuels." In May 2012, in an effort to clarify the meaning of the term "diesel fuels" in the context of the Energy Policy Act, EPA issued draft permitting guidance on the issue. *See* EPA, *Draft Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels* (May 2012),

[1] The UIC Program ensures proper construction, plugging, unplugging, or abandonment of such wells in order to minimize the risk of contamination of groundwater supplies by contaminants from the well.

[2] Typically, a state's program must meet the minimum federal requirements outlined by the SDWA to take primacy over the federal standards, but in the case of oil and gas operations, a program can still take primacy without meeting federal requirements in the event it is declared "effective."

available at http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/hydraulic-fracturing.cfm.

The draft guidance recommended fracking operation permit writers, when determining whether an operation injects "diesel fuels," consider whether any portion of the injected fluid is referred to as "diesel fuel" in either its primary name or a common synonym. *Id.* at 1. It further suggested permit writers take into account whether the fluid contains one of the following six listed Chemical Abstract Service Registry Numbers: 68334-30-5, 68476-30-2, 68476-31-3, 68476-34-6. 8008-20-6, and 68410-00-4. *Id.*

Despite this clarification, the draft guidance noted EPA expected permitting decisions would continue to be made on a case-by-case basis, "considering the facts and circumstances of the specific injection activity and applicable statutes, regulations and case law" as the guidance underwent its notice and comment period, which recently closed on August 23, 2012. In comments, some industry groups raised concerns whether EPA's definition of "diesel fuels" is overly broad. On the other hand, non-governmental organizations continue to call for a general ban on use of diesel fuel, and have argued "diesel fuels" should be read to include not only petroleum distillate fuels, but all constituent chemicals that compose diesel fuel, whether used in diesel form or as separate components in fracking fluid, particularly BTEX-containing compounds.

B. Clean Water Act ("CWA")

A potential, though less popular, alternative disposal method for flowback is through direct or indirect discharge to surface waters. Discharges to surface waters generally require an operator to obtain and comply with a National Pollutant Discharge Elimination System ("NPDES") permit, which is typically administered by authorized states. 33 U.S.C. § 1342. There are two different levels of control provided by NPDES permits: (1) a technology-based limit, based upon the ability of dischargers in the same industrial category to treat wastewater; and (2) a water-quality based limit, in the event the technology-based limit is insufficient to protect the body of water in question. EPA, Water Permitting 101, *available at* http://www.epa.gov/npdes/pubs/101pape.pdf. NPDES permits may be individual or general permits.

With respect to technology-based standards under the NPDES, EPA has issued effluent guidelines for oil and gas extraction activities. *See* 40 C.F.R. Part 435. These guidelines generally prohibit the direct discharge of wastewater into navigable waters "from any source associated with production, field exploration, drilling, well completion, or well treatment (*i.e.*, produced water, drilling muds, drill cuttings, and produced sand)." 40 C.F.R. § 435.32. Although there are certain exceptions to this prohibition (e.g., certain oil and gas wells west of the 98th parallel) and some wells may be subject to different restrictions but not prohibited, flowback from hydraulic fracturing activities used in shale gas extraction would generally fall under this prohibition.

Because of the general prohibition on direct discharges, water not reused or injected may be required to be transported to a treatment plant to be treated prior to discharge into surface waters. For a publicly owned treatment works ("POTW") to accept such new waste for treatment and disposal, the POTW must notify the NPDES permitting authority of any "new introduction of pollutants" or "substantial change in the volume or character of pollutants" being introduced to the POTW. 40 C.F.R. §122.42(b). A POTW that accepts fracking waste is subject to those notification requirements unless it has previously identified and received authorization to accept and discharge all fracking wastes processed by the facility in its NPDES permit. States may have their own restrictions on the ability to discharge to a POTW, and EPA has found that POTWs may not be properly equipped to treat wastewater from hydraulic fracturing activities. *See generally* EPA, *Natural Gas Extraction - Hydraulic Fracturing,* http://www.epa.gov/hydraulicfracture/ (last updated Sept. 26, 2012). While there is no comprehensive set of national standards at this time, in 2011, EPA announced plans to release standards for wastewater discharges produced by natural gas extraction activities by 2013 for coalbed methane and 2014 for shale gas. *Id.* These standards would establish requirements fracking wastewater must meet before being sent to a treatment facility. EPA, *EPA Announces Schedule to Develop Natural Gas Wastewater Standards* (Oct. 20, 2011), http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/91e7fadb4b114c4a8525792f00542001.

C. Federally Managed Lands

In May 2012, the Bureau of Land Management ("BLM") released proposed regulations with respect to hydraulic fracturing operations on federal lands. 77 Fed. Reg. 27,691 (May 11, 2012). Under the draft regulations, operators of fracked wells on federal lands would be required to report information regarding handling of recovered fluids, an estimate of the amount of flowback recovered by the hydraulic fracturing operation, and a description of proposed disposal methods for flowback.[3] These regulations would also

[3] Hydraulic fracturing activities are currently regulated under Onshore Oil and Gas Order No. 7, at 58 Fed. Reg. 47,354 (Sept. 8, 1993).

require storage of any flowback in lined pits. BLM requested specific comments on the addition of further requirements for the handling of flowback, and expressed an intent "to avoid duplication of existing state requirements and ... engage states in cooperative efforts to avoid duplication." *Id.* at 27,697-27,698. The notice and comment period on these proposed regulations closed on September 10, 2012.

III. FEDERAL REGULATION OF AIR EMISSIONS

A. New Source Performance Standards

On April 17, 2012, U.S. EPA Administrator Lisa Jackson signed final New Source Performance Standards ("NSPS") and National Emission Standards for Hazardous Air Pollutants ("NESHAP") for the regulation of volatile organic compounds ("VOCs") and certain other pollutants emitted through hydraulic fracturing and by certain equipment used by the oil and gas industries in upstream and midstream operations (the "Rule"). Although signed in April, the Rule was not published in the Federal Register until August 16, 2012 due to EPA reportedly weighing industry requests for clarification of certain provisions of the Rule. 77 Fed. Reg. 49,490 (Aug. 16, 2012). The Rule is slated to become effective on October 15, 2012, but certain provisions will be phased in over several years.

The Rule stems from a lawsuit filed against EPA in January 2009 by WildEarth Guardians and the San Juan Citizens Alliance. The plaintiffs alleged that EPA had not satisfied its obligation to review NSPS and major sources air toxic standards for the oil and gas industry within the time periods mandated by the Clean Air Act ("CAA"). *WildEarth Guardians v. Jackson*, No. 1:09-cv-00089-CKK (D.C.C) (filed Jan. 14, 2009, consent decree entered Feb. 5, 2010). In February 2010, the parties entered into a consent decree (Consent Decree) that required EPA to review these standards and produce a proposed rule by July 28, 2011 and then promulgate final rules by February 28, 2012. Due in part to EPA's need to review the 156,000 comments filed in response to the proposed rules, the consent decree was amended to require EPA to promulgate the Rule by April 17, 2012.

Promulgation of this Rule has held the attention of industry, environmentalists, and the average citizen because it is the first federal regulation of air emissions from natural gas wells that are hydraulically fractured, as well as the first federal regulation of certain equipment used in the upstream and midstream oil and gas industries. Over the past several years, the use of hydraulic fracturing techniques to extract natural gas from unconventional formations has significantly increased. In addition to industry and environmentalists, local, state and federal regulatory bodies have been evaluating the impacts of hydraulic fracturing on the environment and the economy. This Rule marks what may be the beginning of a path of heightened federal scrutiny and regulation of the growing use of hydraulic fracturing in the natural gas industry.

1. Overview of the Rule

Under CAA § 111, 42 U.S.C. § 7411, EPA is authorized to set technology-based standards for new or modified stationary sources that cause, or significantly contribute to, air pollution that may endanger public health or welfare (the NSPS). Under CAA § 112, EPA regulates emissions from major sources of hazardous air pollutants (the NESHAP). *Id.* § 7412. The technology-based standards under Section 112(d) are referred to as Maximum Achievable Control Technology or MACT standards. *Id.* § 7412(d). After setting these standards, EPA must review, and if necessary, revise the NSPS and NESHAP every eight years. *Id.* §§ 7411(b)(1)(B), 7412(d)(6). EPA must also undergo a review under Section 112(f) to determine if there remains any "residual risk" after implementation of the technology-based standards under Section 112(d). *Id.* § 7412(f). Prior to the promulgation of the new final Rule, the oil and gas industry NSPS was last updated in 1985 and the NESHAP was last updated in 1999. The lack of a periodic review within the time provided in the statute led to the filing of the January 2009 litigation, the February 2010 consent decree, and now to the published final Rule.

In order to comply with the Consent Decree, and its underlying statutory obligations, EPA specifically re-reviewed four CAA regulatory schemes applicable to the oil and gas industry: (i) NSPS for VOCs; (ii) NSPS for sulfur dioxide (SO_2); (iii) an air toxics standard for major sources of oil and natural gas production; and (iv) an air toxics standard for major sources of natural gas transmission and storage. As a result of this review, EPA revised the existing NSPS and NESHAP standards and also promulgated new standards.

For the NESHAP, EPA revised 40 C.F.R. Subparts HH and HHH (applicable to the oil and natural gas production sector and the natural gas transmission and storage sector, respectively). 77 Fed. Reg. at 49,501-49,502. The NESHAP revisions only affect glycol dehydrators, storage vessels, valves, startup, shutdown and malfunction, and certain reporting, monitoring, recordkeeping and testing requirements. *Id.* In addition, EPA made a few "minor technical revisions" to the NESHAP. *Id.* The NESHAP rules are effective October 15, 2012, but the compliance dates range from October 15, 2012 through October 15, 2015. *Id.* at 49,503.

With regard to the NSPS, the Rule revised the existing NSPS regulating VOC emissions from equipment leaks and SO_2 emissions from sweetening units at onshore gas processing plants. EPA also promulgated new NSPS for certain upstream and midstream equipment. These standards are set forth in a new NSPS category titled "Standards of Performance for Crude Oil and Natural Gas Production, Transmission and Distribution (Subpart OOOO)." The standards regulate SO_2 from onshore natural gas processing plants as well as VOC emissions from gas wells, centrifugal compressors, reciprocating compressors, pneumatic controllers, storage vessels, and leaking components at onshore natural gas processing plants. 77 Fed. Reg. at 49,492. The NSPS standards only apply to facilities that commenced construction, reconstruction or modification after August 23, 2011 (the date the Rule was proposed), but are phased in from October 15, 2012 through Dec. 31, 2014.

2. Green Completion Requirements

Perhaps the most controversial aspect of the Rule is the requirement that reduced emission completion ("REC"), or "green completion," must be utilized at hydraulically fractured natural gas wells in order to control emissions during flowback. In hydraulic fracturing, flowback occurs after fluids are injected into wells at a high pressure to fracture geologic formations so that oil or natural gas travels to production wells. During the period in which the fracturing fluids flow back to the surface, methane and VOCs can be emitted to the atmosphere in the form of excess natural gas. But when RECs are employed, this excess gas is separated from the flowback water and placed into a gas collection system. After being collected, the gas is generally re-injected into wells, treated, or used as a fuel source. EPA claims that using RECs would result in a 95-percent reduction in the VOCs emitted from hydraulically fractured wells.

Although some companies have been employing RECs for years, and some state and local regulators already require RECs in certain instances (e.g., Colorado, Wyoming, Fort Worth, Texas and Southlake Texas), EPA estimates that only roughly half of the fractured wells in the United States presently employ RECs. *See* 77 Fed. Reg. at 49,517; EPA Fact Sheet, *Overview of Final Amendments to Air Regulations for the Oil and Natural Gas Industry*, *available at* http://www.epa.gov/airquality/oilandgas/pdfs/20120417fs.pdf. Public comments on the proposed rule expressed concerns that requiring all hydraulically fractured natural gas wells employ RECs by October 15, 2012 would be impossible without halting completion operations. EPA acknowledges in the preamble to the Rule that there will be a shortage of labor and supply in the REC market through at least 2014. 77 Fed. Reg. at 49,517-49,518. Thus, in what EPA considers to be a compromise with industry, the final version of the Rule does not require use of RECs until January 1, 2015 and has developed a REC phase-in plan. *Id*. at 49,517-49,519.

Effective October 15, 2012, Subpart OOOO requires a 95 percent reduction in VOC emissions from hydraulically fractured wells. 77 Fed. Reg. at 49,543 (to be codified at 40 C.F.R. §§ 60.5370-60.5375) Affected operators have the option of effectuating this reduction by either employing RECs or by combusting flowback emissions. To encourage early adoption of RECs, Subpart OOOO provides that any facility that employs RECs after fracturing, in accordance with the requirements of 40 C.F.R. § 60.5375, will not be considered a modified facility under this NSPS. 77 Fed. Reg. at 49,543 (to be codified at 40 C.F.R. §§ 60.536, 60.5365). Until an operator does employ RECs, as of October 15, 2012, any affected facility constructed or modified after August 23, 2011 must combust completion emissions until they employ RECs. *Id.* at 49,517-49,519. In addition, whether operators employ RECs immediately or wait until the deadline, they have an ongoing "general duty to safely maximize resource recovery and minimize releases to the atmosphere during flowback and subsequent recovery." *Id.* at 49,544 (to be codified at 40 C.F.R. § 60.5375(a)(4)). Wildcat wells, delineation wells and low-pressure wells are not required to conduct green completions. However, these wells must combust flowback emissions "where practicable" by October 15, 2012. *Id*. at 49,543-49,544 (to be codified at 40 C.F.R. § 60.5375(f)); *see also id*. at 49,564-49,566 (to be codified as 40 C.F.R. § 60.5430) (defining "wildcat well", "low-pressure gas well" and "delineation well").

In its preamble to the final Rule, EPA explains that it moved away from requiring specific REC equipment and instead sets forth REC performance standards in the Rule. As a consequence, the final Rule generally requires a system that, with "no direct release to the atmosphere," will (a) "[f]or the duration of flowback, route the recovered liquids into one or more storage vessels or re-inject the recovered liquids into the well or another well, and route the recovered gas into a gas flow line or collection system, re-inject the recovered gas into the well or another well, use the recovered gas as an on-site fuel source, or use the recovered gas for another useful purpose that a purchased fuel or raw material would serve," and (b) route all salable quality gas to the gas flow line as soon as practicable. 77 Fed. Reg. at 49,543-49,544 (to be codified at 40 C.F.R. § 60.5375). If this is not feasible, operators "must capture and direct flowback emissions to a completion combustion device, except in

conditions that may result in a fire hazard or explosion, or where high heat emissions from a completion combustion device may negatively impact tundra, permafrost or waterways." *Id.* at 49,544 (to be codified at 40 C.F.R. § 60.5375(f)(2)).

3. Anticipated Environmental & Economic Impacts of the Rule

EPA estimates that the combined annual emission reductions resulting from full implementation of the Rule will amount to 190,000 tons of VOCs, 12,000 - 20,000 tons of hazardous air pollutants; and 1.0 million short tons of methane. 77 Fed. Reg. at 49,534; Overview of Final Amendments to Air Regulations for the Oil and Natural Gas Industry Fact Sheet. At the same time, EPA estimates that industry will need to spend a net total of $170 million annually to comply with just the NSPS. 77 Fed. Reg. at 49,534 However, after factoring in estimated engineering compliance savings and revenues gained from green completion, EPA estimates that industry will gain $11 million through implementation of the Rule. *Id.* at 49,534-49,537.

4. Regulation of Methane Emissions On the Horizon

Although the Rule does not expressly regulate methane emissions, EPA considers reduced methane emissions to be a "co-benefit" of the Rule. In the preamble to the Rule, EPA states that, although it is not taking final action with respect to methane, EPA "[i]ntend[s] to continue to evaluate the appropriateness of regulating methane with an eye toward taking additional steps if appropriate." 77 Fed. Reg. at 49,513. EPA follows this statement with a discussion of the Greenhouse Gas Reporting Program ("GHGRP"), finalized in November 2010 at 40 C.F.R. Part 98, that requires annual reports by covered petroleum and natural gas facilities, beginning for reporting year 2011. EPA intends to use the reported GHGRP data, including data relating to methane emissions, to help "evaluate whether it is appropriate to directly regulate methane from the oil and gas sources covered by this [R]ule." *Id.* at 49,513.

5. "Liquids Rich" Hydraulic Fracturing Wells are Not Subject to the Rule

In what has been identified as a regulatory gap by EPA, the Rule's NSPS standards do not apply to hybrid wells that produce both oil and gas. Hybrid wells are not subject to the Rule because the Rule defines "gas well or natural gas well" as "an onshore well drilled principally for production of natural gas."[4] 77 Fed. Reg. at 49,565 (to be codified at 40 C.F.R. § 60.5430). Thus, with the exception of new or modified storage tanks and pneumatic controls, hybrid oil wells, including for example, those in the Bakken Shale play in North Dakota and Montana and the Eagleford Shale play in Texas, are not subject to the NSPS.

This is not to say, however, that EPA will leave this regulatory gap unfilled. In an August 15, 2012 Federal Register notice, EPA issued a federal implementation plan ("FIP") imposing VOC emission controls for oil and gas production on the Fort Berthold Indian Reservation ("FBIR") in the Bakken Shale. 77 Fed. Reg. at 48,878. In the preamble to this FIP, EPA specifically states that it is filling the regulatory gap caused by NSPS not applying to the FBIR by imposing VOC control requirements and emissions reductions, monitoring, recordkeeping and reporting for all well completions, recompletions, and production and storage operations at the FBIR. EPA stated that the FBIR FIP was necessary "to level the playing field, and provide the public on the FBIR the same air quality protections as the public outside the FBIR." *Id.* at 48,879.

In light of EPA's move to regulate VOCs within the FBIR, it is reasonable to expect that EPA will take aim at hydraulic fracturing operations at other plays with unique geological formations that permit hybrid drilling. This is especially true as long as the price of oil stays at or above the price of natural gas and incentivizes industry to emphasize hybrid drilling.

6. Administrative Petitions and Judicial Review

On the same day EPA promulgated the final Rule, the American Petroleum Institute ("API") petitioned EPA for reconsideration of the Rules and an administrative stay of the Rules. API sought immediate revisions in response to its concerns over the oil storage tank provisions and what API interprets to be a restriction on venting of gas from wells. Judicial petitions for review of the Rule may be filed in the United States Court of Appeals for the District of Columbia Circuit through October 15, 2012. 40 C.F.R. § 7607(b).

B. Aggregation of Emissions Units for Purposes of Defining "Major" Sources

Under Title V of the CAA, every "major source" of air pollution must obtain an operating permit. 42 U.S.C. § 7661a(a). Major sources are those that have the potential to emit one hundred tons per year of any pollutant. A major source can consist of either a single facility or an aggregation of multiple facilities, which is then considered, for purposes of the statute, to

[4] The Rule includes indicators of natural gas wells such as location within specific geological formations that are "generally accepted as gas producing," including tight reservoirs, high permeability gas, shale gas, or coal seam plays. 77 Fed. Reg. at 49,516.

be a single source. Major sources are subject to more burdensome regulation, including more stringent pollution controls. Although to the discussion below generally refers to Title V requirements, aggregation of sources for determining what constitutes a "major" source is also implicated under EPA's New Source Review ("NSR") pre-construction permit program, which utilizes similar definitions for what constitutes an emissions "source."[5]

Aggregation of multiple facilities into a single source is of particular importance to the oil and gas industry. Often resource extraction takes place in the form of centralized facilities servicing multiple, widespread production wells. While neither the plant nor the specific wells may individually produce enough air pollutants to be considered a major source, if viewed collectively, these facilities may exceed the major source threshold.

Under EPA regulations, multiple pollutant-emitting activities are to be aggregated into a single source when they are (1) under common control; (2) located on one or more contiguous or adjacent properties; and (3) belong to the same major industry classification. 40 C.F.R. § 71.2.[6] A recent decision from the United States Court of Appeals for the Sixth Circuit, which focuses on the second criterion of the test, could significantly alter EPA's approach to aggregation decisions.

The facilities at issue in *Summit Petroleum Corp v. EPA*, --- F.3d ----, 2012 WL 3181429 (6th Cir. Aug. 7, 2012), are in many ways typical of industry operations. Summit operates a natural gas sweetening plant and about 100 sour gas production wells located within an area of approximately 43 square miles. The wells are up to eight miles away from the plant, and do not share common boundaries. All parties in the litigation agreed that the plant itself did not emit enough pollution to be considered a major source, but if it were aggregated with the wells, the collective facilities would be considered a major source. It was also undisputed that both the plant and the wells were under "common control" and all belonged to the same industry classification. Thus, the dispute focused solely on whether the plant and wells, scattered across a large area of land, most of which Summit did not own, could be considered contiguous or "adjacent."

EPA's interpretation of "contiguous or adjacent" has changed over time. Based on a decision of the U.S. Court of Appeals for the D.C. Circuit, *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), EPA decided against including "functional relationship" as a separate factor, in addition to the three factors above. 45 Fed. Reg. 52,676, 52,694 (Aug. 7, 1980). Notwithstanding, soon after issuing the 1980 rules rejecting "functional relationship" as an independent factor for aggregation, EPA began using functional relationship as a factor for determining whether facilities met the "contiguous or adjacent" prong for stationary sources. EPA thereafter applied the functional relationship test inconsistently over the decades following the 1980 rules, and used it for each of the three factors in different determinations. As oil and gas operations began to draw the attention of environmental groups, the idea of applying "functional relationship" in an expansive way to aggregate oil and gas operations was raised in several permitting actions. In response, in 2007, EPA issued an interpretation applicable to the oil and gas sector. Mem. from William L. Wehrum, Acting Assistant Adm'r, to Reg'l Adm'rs I-X (Jan. 12, 2007), *available at* http://www.epa.gov/region7/air/nsr/nsrmemos/oilgas.pdf (last visited Sept. 13, 2012) (the "Wehrum Memorandum"). Because most oil and gas operations potentially subject to air permitting meet the other two prongs for a stationary source, , the Wehrum Memorandum focused on interpreting the "contiguous or adjacent" criterion. For this industry, EPA recognized that focusing on whether multiple activities were operationally or functionally related would potentially lead to results that would not adhere to the common sense notion of a plant as required by the D.C. Circuit in its *Alabama Power* decision; for example, multiple separate pumping stations along a pipeline. *Id*. at 3. Instead, the Wehrum Memorandum stressed that physical proximity was most important in evaluating "adjacency" and making source determinations. *Id*.[7]

Two years later, under the new administration, EPA issued a new interpretation, that revoked the Wehrum Memorandum and reportedly allowed EPA to rely again on functional relationship for aggregation decisions. Mem. from Gina McCarthy, Assistant Adm'r, to Reg'l Admr's I-X (Sept. 22, 2009),

[5] Under EPA's Prevention of Significant Deterioration ("PSD") program, major stationary sources located in attainment areas are required to obtain a PSD permit prior to construction or major modification. 42 U.S.C. § 7475; 40 C.F.R. § 51.166. A "major stationary source" is a stationary source which emits, or has the potential to emit (a) 100 tons per year or more of any NSR regulated pollutant in listed industrial source categories or (b) 250 tons per year or more of any NSR regulated pollutant for all other sources. 40 C.F.R. § 52.21(b)(1). Major stationary sources in nonattainment areas are also subject to NSR pre-construction permit requirements, and have a threshold of 100 tons per year or less. 40 C.F.R. § 51.165.

[6] *See also* 40 C.F.R. §§ 52.21(b)(6), 51.165(a)(ii) (definition of "[b]uilding, structure, facility, or installation" under PSD program).

[7] The "contiguous" factor has not generated the same level of controversy, as it has been interpreted consistent with its common meaning of physically abutting.

available at http://www.epa.gov/region7/air/nsr/nsrmemos/oilgaswithdrawal.pdf (last visited Sept. 13, 2012) (the "McCarthy Memorandum"). Relying on a broad view of functional relationship, EPA applied this guidance to the Summit permitting decision. EPA concluded that Summit's production wells and plant worked together as a single unit, and together produced a single product. Given this functional relationship, the agency aggregated the plant and wells into a single, major source, subject to regulation under Title V.

Summit challenged EPA's decision, and on review the Court in *Summit* flatly rejected this approach to aggregation. Instead, it found that "adjacency" is an unambiguous term that can be evaluated without resorting to additional factors. EPA's interpretation "that activities can be adjacent so long as they are functionally related, irrespective of the distance that separates them, undermines the plain meaning of the text, which demands, by definition, that would-be aggregated facilities have physical proximity." *Summit*, 2012 WL 3181429, at *10. In other words, adjacency relates solely to geographic location, not contextual relationship or the purpose for which two activities exist. *Id.* at *8.

Thus, the Court scrapped EPA's primary reliance on functional interrelationship for purposes of aggregation. In essence, the Sixth Circuit directed EPA to return to the Wehrum Memorandum's focus on proximity as the chief determiner of adjacency, without regard to how dependent the facilities are on each other.

Although the *Summit* decision is the only court decision on the issue and is only binding in the Sixth Circuit (Michigan, Ohio, Kentucky, and Tennessee), it may prompt other Circuits to question EPA's use of the functional relationship test for aggregation. Also, the decision may lend support to state efforts to promote geographic proximity as the most important factor in determining adjacency. For example, in 2011 Pennsylvania's Department of Environmental Protection introduced a new distance threshold to its aggregation decisions - sources located within a quarter mile are presumptively aggregated, while those farther away are evaluated on a case-by-case basis. PA DEP, "Interim Guidance for Performing Single Stationary Source Determinations for the Oil and Gas Industries," Doc. No. 270-0810-006 (Dec. 25, 2010), published at 40 Pa.B. 7429. The Pennsylvania Environmental Hearing Board has also cited the *Summit* case as persuasive. *Group Against Smog Pollution v. Pennsylvania*, EHB Docket No. 2011-065-R (Aug. 14, 2012).

The issue of how properly to aggregate facilities, however, is not yet settled. EPA is expected to seek rehearing *en banc* of the *Summit* decision, and it is too early to tell whether any other Circuits will follow suit. Environmental groups also continue to fight approaches that lead to fewer operations being classified as major sources subject to Title V. Clean Air Council, for example, an environmental NGO based in Pennsylvania, is challenging Pennsylvania's quarter-mile proximity threshold. EPA has also said that it disagrees with Pennsylvania's approach. NGOs may also challenge individual permits and a State Implementation Plan for failing to adequately protect against violations of the National Ambient Air Quality Standards, premised on the argument that failing to aggregate sources leads to such violations.

IV. FEDERAL DISCLOSURE REQUIREMENTS

Citizen groups opened a new front in their fight to obtain greater disclosure of the chemicals used in hydraulic fracturing when they petitioned EPA to initiate a rulemaking under the Toxic Substances Control Act ("TSCA"). *See generally* Earthjustice, *100+ Groups From 23 States File Petition For Drilling and Fracking Chemical Testing, Info* (Aug. 4, 2011), http://earthjustice.org/news/press/2011/100-groups-from-23-states-file-petition-for-drilling-and-fracking-chemical-testing-info. Disclosure of those chemicals and fluids used in hydraulic fracturing activities has been a contentious issue and challenge for regulators in recent years. *See, e.g.*, Kate Galbraith, *Seeking Disclosure on Fracking* (May 30, 2012), http://www.nytimes.com/2012/05/31/business/energy-environment/seeking-disclosure-on-fracking.html.

On August 4, 2011, Earthjustice submitted a TSCA Section 21 petition (the "Petition") on behalf of dozens of groups (the "Earthjustice Coalition") requesting that EPA "promulgate rules protecting public health and the environment from the serious risks posed by chemical substances and mixtures used in oil and gas exploration or production;" the Earthjustice Coalition collectively referred to those chemical substances and mixtures as "E&P Chemicals." Letter from Deborah Goldberg and Megan Klein, Earthjustice, to Lisa P. Jackson, EPA Admin., at 1 (Aug. 4, 2011), *available at* http://earthjustice.org/sites/default/files/fracking_petition.pdf (hereinafter "Petition"). On November 23, 2011, EPA partly granted the Petition with respect to the requests related to Sections 8(a) and (d) of TSCA and those chemicals and mixtures used for hydraulic fracturing activities *only* (as opposed to chemicals used for other oil and gas exploration and production activities). *See* Letter from Stephen A. Owens, EPA Assistant Administrator, to Deborah Goldberg, Earthjustice, at 1 (Nov. 23, 2011), *available at* http://www.epa.gov/oppt/chemtest/pubs/EPA_Letter_to_Earthjustice_on_TSCA_Petition.pdf (hereinafter "EPA Partial Grant"). EPA indicated that it would

convene a stakeholder process to develop an overall regulatory approach to hydraulic fracturing under TSCA and that the Agency would publish an Advanced Notice of Proposed Rulemaking ("ANPR") identifying key issues for further discussion and analysis. *See id.*

TSCA, which was passed in 1976, 15 U.S.C. § 2601 (referring to Pub. L. 94–469, title I, § 2, Oct. 11, 1976, 90 Stat. 2003), gives EPA the authority to regulate chemical substances and mixtures that "may present an unreasonable risk of injury to health or the environment." *Id.* § 2601(a)(2). Under TSCA, EPA can issue regulations requiring information or imposing restrictions on a chemical's use based on the information it receives from regulated entities. 40 C.F.R. § 707.20. Section 4 of TSCA grants EPA the authority to require testing of chemical substances and mixtures by manufacturers, importers, and processors where risks or exposures of concern are found to exist. 15 U.S.C. § 2603. EPA may also, under Section 8 of TSCA, require reporting and record-keeping by persons who manufacture, import, process, or distribute chemical substances in commerce, including records of significant adverse reactions to health and the environment or copies of health and safety studies. *Id.* §§ 2607(c), (d). Section 21 of TSCA allows "[a]ny person" to petition EPA to "initiate a proceeding for the issuance, amendment, or repeal of any rule under" Sections 4, 6, or 8 of the statute. *Id.* § 2620(a). EPA must grant or deny each such petition within 90 days, and, if the petition is granted, "promptly" commence an appropriate TSCA proceeding. *Id.* § 2620(b)(3). EPA's denial of a Section 21 petition must be published in the Federal Register, and that denial can be challenged by the petitioning party in federal court. *Id.* § 2620(b)(3), (4)(A).

The Earthjustice Coalition, through its Petition, requested that EPA require manufacturers and processors of E&P Chemicals to: (1) develop test data pursuant to TSCA Section 4; and (2) maintain records and submit reports on E&P Chemicals and any data on environmental or health effects and exposures pursuant to TSCA Section 8(a). Petition, *supra*, at 18-20. The Earthjustice Coalition also requested that EPA require manufacturers, processors and distributors to: (1) submit copies of all information related to significant adverse reactions to health or the environment pursuant to Section 8(c); and (2) provide health and safety studies related to E&P Chemicals pursuant to Section 8(d). *Id.* at 18-21. The Earthjustice Coalition based these requests on the grounds that the public lacked adequate information about the health and environmental effects of E&P Chemicals. *Id.* at 1-3. The Earthjustice Coalition also asserted that current efforts to assess potential risks posed by hydraulic fracturing, including EPA's study of the potential impacts on drinking water and the voluntary online chemical registry, are insufficient, and so TSCA regulation is necessary to fill gaps in federal and state regulations. *Id.* at 5-6, 12. The Petition identified various reports, which it alleged demonstrated that E&P Chemicals present an unreasonable risk of harm. *Id.* at 10-17.

EPA issued a first written response to the Earthjustice Coalition on November 2, 2011, denying the portion of the Petition that EPA promulgate a testing rule using its TSCA Section 4 authority. *See* Letter from Stephen A. Owens, EPA Assistant Admin., to Deborah Goldberg, Earthjustice, at 1 (Nov. 2, 2011), *available at* http://www.epa.gov/oppt/chemtest/pubs/SO.Earthjustice.Response.11.2.pdf (hereinafter "EPA Partial Denial"). EPA concluded that the Petition "does not set forth sufficient facts to support the assertion that it is 'necessary to issue' the requested TSCA section 4 rule, as required by TSCA section 21(b)(I)." *Id.* at 1. In particular, the Petition "did not set forth facts sufficient to support the required findings under TSCA section 4(a)(1)(A) or 4(a)(1)(B)." *See id; see also* 15 U.S.C. § 2603.

On November 23, however, EPA partially granted the Earthjustice Coalition's TSCA Section 8(a) and (d) requests, deciding that "there is value in initiating a proposed rulemaking process using TSCA authorities to obtain data on chemical substances and mixtures used in hydraulic fracturing." EPA Partial Grant at 1. EPA's first step would be to "convene a stakeholder process to develop an overall approach that would minimize reporting burdens and costs, take advantage of existing information, and avoid duplication of efforts;" this "dialogue will also focus on how the information reported could be best aggregated and disclosed to maximize transparency and public understanding." *Id.* EPA indicated it intended to publish an ANPR and stated that its "expectation is that the TSCA proposal would focus on providing aggregate pictures of the chemical substances and mixtures used in hydraulic fracturing" and "would not duplicate, but instead complement, the well-by-well disclosure programs of states." *Id.* at 2. EPA denied the Petition with respect to other chemicals used in the E&P sector and expressed its belief that "the development of our natural gas resources can continue to evolve responsibly, building off the important work that has already been done by states, the industry and others to disclose crucial information to the American public." *Id.*

Section 8 of TSCA emphasizes disclosure. *See, e.g.*, 15 U.S.C. § 2607(e) ("Any person who manufactures, processes, or distributes in commerce a chemical substance or mixture and who obtains information which reasonably supports the conclusion

that such substance or mixture presents a substantial risk of injury to health or the environment shall immediately inform the Administrator of such information unless such person has actual knowledge that the Administrator has been adequately informed of such information."). TSCA Section 8(a) gives EPA the authority to require "each person (other than a small manufacturer or processor) who manufactures or processes or proposes to manufacture or process a chemical substance" to maintain such records and submit such reports as EPA "may reasonably require."[8] 15 U.S.C. §§ 2602(2)(A); 2607(a)(1). TSCA rules can apply to mixtures to the extent EPA "determines the maintenance of records or submission of reports, or both, is necessary for the effective enforcement of [TSCA]." *Id.* § 2607(a)(1). The types of information that can be required include: chemical or mixture identity; categories of use; quantity manufactured or processed; by-product description; health and environmental effects information; number of individuals exposed; and disposal method(s).[9] *Id.* § 2607(a)(2).

EPA is also required, "[t]o the extent feasible," to not require "any reporting which is unnecessary or duplicative." *Id.* § 2607(a)(2). Regulations enacted under Section 8(a) may be "tailored to meet unique information needs" – for example, through chemical-specific rules. EPA Office of Pollution Prevention and Toxics, *EPA Authorities Under TSCA*, at 23 (July 11, 2005), *available at* http://www.epa.gov/oppt/npptac/pubs/tscaauthorities71105.pdf (hereinafter "EPA Authorities Under TSCA"). Alternatively, EPA may gather information through "standardized" reporting rules that are not applicable to a particular chemical or subset of chemicals. *Id.* Section 8(a) rules have been used, for example, to obtain use and exposure information necessary to make decisions on whether to take action under Section 4 (testing) or 6 (regulation on use) of TSCA or to "obtain information on proposed categories of use of a chemical substance or mixture." *Id.* at 24.

Section 8(d) of TSCA provides EPA with the authority to promulgate regulations to "require any person who manufactures, processes, or distributes in commerce or who proposes to manufacture, process, or distribute in commerce any chemical substance or mixture" to submit lists and copies of health and safety studies regarding the chemical substance or mixture that are conducted or initiated by, known to, or reasonably ascertainable by the submitter. 15 U.S.C. § 2607(d). The Section 8(d) requirements may apply to entire categories of chemicals. 15 U.S.C. §§ 2607(a)(2); 2625(c). EPA generally requires that companies search files where the required information is ordinarily maintained, 40 C.F.R. § 716.25, and Section 8(d) reporting obligations generally terminate within 2 years. *Id.* § 716.65.

Regulated parties can claim confidential business information protection ("CBI") similar to that provided under the Freedom of Information Act, except that CBI may be disclosed (a) to EPA employees and contractors; (b) to others, if EPA determines the disclosure is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment; or (c) where such disclosure is relevant in any proceeding under TSCA. 15 U.S.C. § 2613(a)(1). Also, under TSCA Section 14(b), "health and safety information in a health and safety study submitted to EPA under TSCA is generally subject to public disclosure." EPA Authorities Under TSCA, *supra*, at 33; *see also* 15 U.S.C. § 2613(b); 40 C.F.R. § 716.55. EPA, however, generally may not disclose processes used in the manufacturing or processing of a chemical substance or mixture or, in the case of a mixture, the release of data disclosing the portion of the mixture comprised by any of the chemical substances in the mixture. 40 C.F.R. § 716.55(a). EPA also must typically notify the party that submitted the CBI prior to the anticipated disclosure of such CBI. *See, e.g., id.* § 704.7.[10]

[8] A "chemical substance" means "any organic or inorganic substance of a particular molecular identity, including—(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature, and (ii) any element or uncombined radical." 15 U.S.C. 2602(2)(A). "Manufacture" includes imports. *Id.* § 2602(7). "Process" means "the preparation of a chemical substance or mixture, after its manufacture, for distribution in commerce—(A) in the same form or physical state as, or in a different form or physical state from, that in which it was received by the person so preparing such substance or mixture, or (B) as part of an article containing the chemical substance or mixture." *Id.* § 2602(10).

[9] A "mixture" "means any combination of two or more chemical substances if the combination does not occur in nature and is not, in whole or in part, the result of a chemical reaction; except that such term does include any combination which occurs, in whole or in part, as a result of a chemical reaction if none of the chemical substances comprising the combination is a new chemical substance and if the combination could have been manufactured for commercial purposes without a chemical reaction at the time the chemical substances comprising the combination were combined." *Id.* § 2602(8).

[10] The Obama Administration has already taken significant steps to declassify information previously designated as CBI under TSCA. *See generally* EPA, Increasing Transparency in TSCA, http://www.epa.gov/oppt/existingchemicals/pubs/transparency.html (last accessed Sept. 4, 2012) ("As part of EPA's ongoing effort to increase the public's access to chemical information, the Agency has been reviewing past claims to treat the identity of chemicals as CBI in health and safety

As explained above, TSCA Sections 8(a) and (d) potentially impose obligations on manufacturers and processors of the chemicals used in hydraulic fracturing rather than the drilling companies directly (except in those instances in which a company is both a hydraulic fracturing fluid maker and driller). The American Petroleum Institute ("API") has argued that EPA's authority over hydraulic fracturing chemicals under TSCA Section 8(a) is limited to the extent hydraulic fracturing fluids are considered "mixtures."[11] Notwithstanding, EPA likely would argue it has the authority to require some disclosure under TSCA, and that chemical substances within the mixture remain subject to regulation. EPA has been considering the potential use of TSCA to regulate certain hydraulic fracturing activities at least as far back as 2011. *See* Letter from U.S. Environmental Protection to Senator Benjamin Cardin (Mar. 8, 2011) at 4-5. In response to a March 1, 2011, letter from Maryland Senator Ben Cardin, EPA provided a summary of major regulations that it was implementing in the area of natural gas drilling. *Id.* at 1. Although EPA acknowledged that it did not have any existing or proposed TSCA regulations specific to drilling, the agency stated that "there are several statutory and regulatory authorities that relate to the regulation and testing of chemicals that may be relevant to natural gas drilling activities and which EPA is reviewing with respect to hydraulic fracturing." *Id.* at 4.

In its response to Senator Cardin, EPA also argued that regulations applicable to all chemicals, including those used in "natural gas drilling activities," obligate manufacturers to provide notice to EPA at least 90 days before commencing production or importation of a new chemical. *Id.* at 4 (citing 15 U.S.C. § 2604; 40 C.F.R. part 720). EPA further asserted that that notification would allow EPA the opportunity "to evaluate the chemical substance and its potential impact on human health or the environment." *Id.* at 4. EPA then declared that it could impose conditions, "up to and including a ban on manufacture," on any qualifying new chemical prior to its entry into interstate commerce. *Id.*

For those chemicals already a part of commerce, EPA informed Senator Cardin that it could "issue significant new use rules, which require notice to the Agency before engaging in new uses of designated chemical substances and give the Agency the opportunity to restrict such uses." *Id.* (citing 15 U.S.C. § 2604; 40 C.F.R. part 721). EPA also affirmed that, under the authority granted to it by Section 8 of TSCA, EPA can require reporting by manufacturers and processors of chemical substances or mixtures to provide information related to them, including copies of health and safety studies. *Id.* at 5 (citing 15 U.S.C. § 2607; 40 C.F.R. part 704). Even more, EPA stated in its response to the Senator that TSCA Section 4 gave it the authority to require the testing of chemicals from manufacturers and processors, including "chemicals used in natural gas drilling." *Id.* at 4 (citing 15 U.S.C. § 2603; 40 C.F.R. part 790). That said, EPA's denial of the Petition in November suggests that EPA is reluctant, at least for the time being, to invoke its authority under TSCA Section 4 in the hydraulic fracturing sector.

Of course, EPA must finalize its rulemaking process before it imposes any requirements under TSCA that address hydraulic fracturing. In doing so, EPA must consider the adequacy of existing regulation. *See* 15 U.S.C. § 2607(a)(2) ("To the extent feasible, the Administrator shall not require under paragraph (1), any reporting which is unnecessary or duplicative."). EPA has affirmed it will initiate a stakeholder process that includes the states, industry, and public interest groups. *See* EPA Partial Grant at 1-2. Some of those stakeholders have already expressed their resistance or outright opposition to the Earthjustice Coalition's TSCA requests. API and the American Chemistry Council ("ACC") had already sent letters to EPA in advance of its partial grant of the Petition on November 23, 2011.[12] API announced its support for "an effective and reasonable chemicals management program under TSCA" while noting that chemicals used for hydraulic fracturing "are likely to be poor candidates for priority review, assessment, or risk mitigation action under TSCA in most cases."[13] The ACC went further, arguing that "EPA should deny the Petition in all its aspects." In contrast, the non-profit OMB Watch published a July 2012 report decrying that "manufacturers of fracking fluid chemicals are not required to submit reports to the EPA

studies submitted to EPA. The Agency reported on November 28, 2011, that since 2009, 577 formerly confidential chemical identities had been made public and more than 1,000 health and safety studies had been made accessible to the public that were previously unavailable or only available in limited circumstances.").

[11] Letter from Erik Milito, Group Director, Upstream and Industry Operations, API, to Wendy Cleland-Hamnett, Dir., Office of Pollution Prevention and Toxics, EPA, at 24 (Oct. 13, 2011) (hereinafter "API Comments") ("Although section 8(a) reporting requirements may be imposed on chemical substances as the 'Administrator [of EPA] may reasonably require,' the Administrator of EPA may impose section 8(a) reporting requirements on mixtures 'only to the extent that the Administrator determines ... is necessary for the effective enforcement of this Act.'").

[12] *See* API Comments, *supra*, at 1; Comments of the American Chemistry Council on TSCA Section 21 Petition Concerning Oil and Gas Exploration and Production Chemicals at 16 (Oct. 20, 2011) (hereinafter "ACC Comments").

[13] *See* API Comments at 30; ACC Comments at 16.

disclosing the chemical identities, categories, and quantities of those chemicals or their environmental and health effects" under TSCA. OMB Watch, The Right to Know, The Responsibility to Protect: State Actions Are Inadequate to Ensure Effective Disclosure of the Chemicals Used in Natural Gas Fracking at 19 (July 2012). OMB Watch argued that EPA could use TSCA to compel greater disclosure of the chemicals and mixtures used in hydraulic fracturing. *Id.* at 52.

Meanwhile, Congressional legislators, led by Senator James Inhofe, have been attempting to curtail EPA's authority over hydraulic fracturing under TSCA. S. 2248, 112th Cong. § 4 (2012). Senator Inhofe's proposed legislation would codify that each state "shall have the *sole authority* to promulgate or enforce any regulation, guidance, or permit requirement regarding the underground injection of fluids or propping agents pursuant to the hydraulic fracturing process, or any component of that process, relating to oil, gas, or geothermal production activities on or under any land within the boundaries of the State." *Id.* (emphasis added).[14]

EPA's draft rule responding to the Petition has remained at the Office of Management and Budget ("OMB") since December 2011, and, at the time of writing, OMB's website does not show an actual or anticipated publication date.[15] As a result, while the timing is unclear, manufactures and processors of chemicals, mixtures, and fluids used in hydraulic fracturing could very likely become subject to EPA's authority under TSCA at some point in the future.

[14] The bill's use of the phrase "any land" is apparently an attempt to grant states the authority to regulate hydraulic fracturing activities on *federal lands* within their geographic boundaries. *See* S. 2248, 112th Cong. § 4 (2012) (referring to "activities on or under *any land within the boundaries* of the State") (emphasis added).

[15] *See* Office of Information and Regulatory Affairs, Office of Management and Budget, Executive Office of the President, Pending EO 12866 Regulatory Review, http://www.reginfo.gov/public/do/eoDetails?rrid=121358 (last accessed Sept. 4, 2012) (referring to RIN: 2070-ZA17 -- "Chemical Substances and Mixtures Used in Oil and Gas Exploration or Production; TSCA Section 21 Petition; Agency Response").