From: **Craig Matthiessen/DC/USEPA/US**
Sent: 7/2/2012 7:44:26 AM

To: Elizabeth Bosecker/DC/USEPA/US@EPA; denning.george; Gregory Wilson/DC/USEPA/US@EPA; swackhammer.j-troy; belke.jim; franklin.kathy; dehaven.leigh; beasley.lynn; howard.markw; Nick Nichols/DC/USEPA/US@EPA; gioffre.patricia; Sara Goehl/DC/USEPA/US@EPA; jacob.sicy; eby.terry; Vanessa Principe/DC/USEPA/US@EPA; Gilberto Irizarry/DC/USEPA/US@EPA; Dana Tulis/DC/USEPA/US@EPA; Larry Stanton/DC/USEPA/US@EPA
CC: Kim Jennings/DC/USEPA/US@EPA
Subject: FYI - EPA Eyes New Air, Water Enforcement Powers To Inspect Fracking Sites

From Inside EPA:

EPA Eyes New Air, Water Enforcement Powers To Inspect Fracking Sites

Posted: June 29, 2012

Story Updated

EPA is exploring use of new statutory authorities for conducting multimedia inspections of hydraulic fracturing operations, including powers seldom before used at drilling sites under the Clean Air Act's so-called "general duty" provision and the agency's Clean Water Act (CWA) regulations aimed at preventing oil spills at certain facilities.

The new approach highlights officials' vows to use all existing authorities to oversee the booming fracking sector but have, in some cases, been hampered by legal limitations and uncertain science.

Legal observers offered mixed views of the agency's new approaches, with one informed source saying the "general duty" authority appears to be a "legitimate inspection tool," though the source says use of the spill provisions may be difficult to apply to fracking operations. An industry source calls the use of the air law provision a "reach."

Indications that EPA is using the authorities for possibly the first time stem from a May 1 letter that EPA Region III sent to Texas-based drilling company Range Resources concerning inspections at several of its Marcellus Shale sites. The letter seeks a host of information under both the air act's general duty clause, contained in section 112(r)(1), and the agency's spill prevention, control and countermeasures (SPCC) rules under section 311(j) of the CWA.

A Region III spokeswoman says, "Yes, EPA Region III has used [Clean Air Act] section 112(r) authority for past inspections of shale gas drill sites, and yes, we intend to use it in the future."

The region conducted a sweep of multimedia inspections of oil and gas sites in the Marcellus Shale region of Pennsylvania earlier this year, citing broad authority under the air and water laws, according to an agency source.

In the letter to Range, EPA asks the company to submit a range of information, including storage capacity for oil related products, whether the nearest surface waterbody is a navigable waterway or a "tributary of or physically connected to a navigable waterway," the company's SPCC plan for each operation, storage tank integrity tests, and other spill prevention data under the CWA.

"A facility is subject to the SPCC regulations if, due to its location, it could reasonably be expected to discharge oil into or upon the navigable waters of the United States and has a total above-ground

storage capacity exceeding 1,320 gallons or a total underground storage capacity of greater than 42,000 gallons," the letter says

The agency is citing section 112(r)(1) of the air law, known as the "general duty clause," which imposes responsibility on owners and operators at facilities that house hazardous substances to take steps to prevent accidental releases and to minimize the consequences of such a release, in at least one natural gas site inspection that Region III conducted earlier this year in the northeast Marcellus Shale region.

The section 112(r) provision creates the "purpose and general duty" for EPA to prevent the accidental release and to minimize the consequences of any such release of "extremely hazardous substances." Under the section, some 13,000 facilities that produce, handle, process, distribute or store certain chemicals must submit risk management plans to the agency.

"Many industries have developed standards and generally recognized safe practices to manage the risks associated with extremely hazardous substances . . ." Adherence to such industry best practices "(as well as any government regulations) can serve as a benchmark to determine compliance with the General Duty Clause," the letter says.

While EPA only inspected one set of wellsites in January, the letter says, the agency is citing the CWA section 311(j) along with the water law's inspections monitoring and entry provisions under section 308, and Clean Air Act "general duty" provision to obtain additional information on other operations in the region.

Under the clause, the agency requests the process hazard analysis for each operation, equipment data, documentation of administrative controls to ensure tanks are not overfilled, "the actual inventory of chemicals present" during the January inspection, total quantity of each chemical and other data.

Though EPA has used its multimedia inspections as a compliance tool for decades, such inspections are "new to oil and gas," the industry lawyer says.

Multimedia Inspections

Sources say EPA has rarely applied its section 112(r) authority to oil and gas wellsites -- which are not "facilities" in the brick-and-mortar sense, although it has widely used the provision with success to conduct multimedia inspections at refineries. However, the provision is most often used to show a liability basis when there's been an accident.

One informed source says the general duty authority appears to be a "legitimate inspection tool" as applied to fracking operations, given that the controversial extraction practice "clearly has the potential for air releases." The provision, which the source adds is sufficiently broad to allow EPA to use it for inspections even though an accidental release has not occurred, "could be fertile ground to make sure [industry] is minimizing the release," though the source cautions that EPA will not likely be able to cite the authority once operations are permitted because potential releases would already be well-documented because of the permitting requirements.

The informed source adds that applying the SPCC rules to fracking operations may be difficult, given that those regulations govern "accidental releases" and many of the water releases during fracking, such as injection and flowback, are intentional. "The question is whether it would be [considered] accidental," that source says.

While EPA uses its comprehensive multimedia inspections across a variety of sectors to determine if facilities are in compliance with environmental laws, it has struggled to find solid legal authority to do

so with fracking, which has historically been governed by state regulations. Several statutory exemptions in environmental laws, including the Safe Drinking Water Act (SDWA) and the air act, further complicate the issue, leaving the agency on shaky legal ground.

For example, Fred Hauchman, director of the Office of Science Policy within the agency's Office of Research & Development, told the National Association of Counties in March that the agency is doing "a pretty comprehensive look at all the statutes" to determine where "holes" may allow for additional oversight or regulation.

The agency has already had to withdraw one enforcement action -- a SDWA emergency order it issued to Range Resources for its Parker County, TX operations, saying the company may have "caused or contributed" to methane contamination of residential water wells. The agency dropped the order earlier this year after the company pressed a constitutional challenge in the U.S. Court of Appeals for the 5th Circuit.

Similarly, the agency is facing broad criticisms, and evidentiary hurdles, in its bid to use authority in the Superfund law to inspect alleged groundwater contamination near fracking activities, in Pavillion, WY and Dimock Township, PA. The evidentiary hurdle stems in part from the law's exemption for petroleum and related substances, including natural gas, forcing EPA to prove that hazardous substances, many of which are naturally occurring, stem from fracking.

The agency is also facing political hurdles. House Republicans recently questioned Administrator Lisa Jackson and White House energy adviser Heather Zichal over the agency's use of "broad authority" under section 104(e) of the Superfund law to conduct groundwater investigations where fracking has occurred.

In the June 19 letter, top GOP members of the House Energy and Commerce Committee ask whether the administration's working group on fracking, which Zichal leads, supports use of the Superfund authority. "Does the Working Group believe this investigative approach and the use of [Superfund law] authority credibly support development of domestic natural gas resources while respecting the States' role?" the letter says.

But Zichal told *Inside EPA* recently that the working group would leave fracking enforcement issues entirely up to the discretion of EPA and would decline to examine the agency's enforcement actions, though she said the White House would limit the burdens EPA rules and policies place on the industry.

CWA Authority

EPA has also used its CWA authority under section 404 to require industry to obtain "dredge-and-fill" permits where well construction occurs near waters of the U.S. -- given EPA a broader venue for oversight, since the Army Corps of Engineers must consult with the agency on such permits.

For example, a second industry attorney says, "I think 404 lets the Agency go out in the oil and gas patch right now with relatively little question as to their ability to enforce the law -- and the consequences for 404 violations can be serious (including criminal liability)." In addition, the 404 authority is "agnostic to land ownership" which "arguably gives the Agency a broader range of enforcement/permitting options."

Earlier this year, Region III quietly issued a slew of compliance orders to West Virginia drilling companies in the state, requiring them to seek section 404 permits from the Corps and to undertake mitigation activities for what the agency characterizes as unlawful discharge of dredge-and-fill material into jurisdictional waters.

Meanwhile, the industry attorney says that EPA officials have increasingly cited environmental justice concerns -- a high priority of this administration -- at natural gas sites. But this is sparking industry worries that EPA could cite equity issues as a "broad scope under which to act" at fracking sites, particularly given that, unlike many industrial facilities which may be situated in low-income, minority neighborhoods, oil and gas operations must be located where there are accessible underground reserves, often in rural communities.

EPA June 26 released its proposal for elevating the role of environmental justice in air, water and waste and other permits, in accordance with its broader Plan EJ 2014 push to consider equity through its decisionmaking. -- *Bridget DiCosmo* (bdicosmo@ipwnews.com This e-mail address is being protected from spambots. You need JavaScript enabled to view it)