

Federal oversight of fracking in dispute

Jonathan D. Silver, Pittsburgh Post-Gazette, 4-3-11

U.S. Sen. Bob Casey drew jeers from drillers and cheers from environmentalists last month when he launched his latest push to bring hydraulic fracturing under federal oversight.

Depending on one's perspective, allowing the U.S. Environmental Protection Agency to regulate the controversial technique would either disrupt the natural gas industry and erect a new regulatory hurdle or provide baseline standards and reassure people who fear that the process can ruin underground supplies of drinking water.

"The bill is designed to make sure that we don't have problems. I think it's a very important precaution," Mr. Casey, D-Pa., said during a recent interview.

Developed more than 60 years ago by oil and gas company Halliburton and used today in all Marcellus Shale wells, hydraulic fracturing is a technique that injects a mixture of water, sand and chemicals into the ground under high pressure to crack rock and allow trapped natural gas to flow.

Some of the mixture remains underground. And some of the chemicals, although added in relatively small quantities, are harmful.

That toxicity is what scares environmentalists, who wonder exactly what substances drillers are shooting into the earth, whether the fluid can foul drinking water, and if the process is being adequately regulated.

"So far, states have not stepped up to the plate to fill those shoes," said Jessica Goad, policy fellow at The Wilderness Society.

Mr. Casey's FRAC Act -- Fracturing Responsibility and Awareness of Chemicals -- has two components.

One would put hydraulic fracturing, or "fracking," under the auspices of the EPA and remove a 2005 congressional exemption -- dubbed the "Halliburton loophole" -- that prevents the agency from regulating it.

The other would force drillers to reveal publicly all chemicals used in fracking, except for proprietary formulas.

While Pennsylvania does require disclosure of chemicals, it does not have any preapproval process for fracking. Drillers must comply with various regulations governing such activities as casing wells and disposing of wastewater, and then file a "well completion" report.

States could exceed a federal guideline, Mr. Casey said, "But I think there should be kind of a floor or a minimum."

Mr. Casey opposes the current "patchwork" regulatory framework in which the 30-odd states that are home to natural gas drilling have rules of varying stringency.

And while Mr. Casey applauded drilling companies that voluntarily reveal information about their fracking fluid, he said such disclosure falls short because it is not mandatory and not always accessible to the public online.

Drilling advocates maintain that fracking is safe and has not been conclusively linked to groundwater contamination, which is what Mr. Casey wants the EPA to prevent. Drillers note that Marcellus Shale wells are more than a mile below the surface, far from any aquifers.

Whether fracking and water contamination are linked is the subject of a study by the EPA following a widely criticized 2004 agency report that determined "little or no threat."

The gas industry and environmentalists squabble over every aspect of regulating fracking, from who should oversee it, to whether Congress ever meant for it to be federally regulated -- to even whether it is fair to link a loophole to Halliburton and its onetime chief executive officer, former Vice President Dick Cheney.

When Mr. Casey introduced the FRAC Act for its second go-around after it failed the first time, environmentalists hailed it as a way to give the EPA muscle once again to regulate fracking.

"We do believe that it would restore a power that the EPA had before but did not necessarily use or use to the best of its ability," said Lauren Pagel, policy director for Earthworks, a nonprofit environmental group.

Drillers, however, insist that the EPA never had the means to regulate fracking.

It is more than an academic distinction. Environmentalists want Congress to restore what they consider a vital regulatory tool to the EPA, while drillers say they are aghast that Congress might confer a level of oversight that the agency never had.

At the center of the debate is the 1974 federal Safe Drinking Water Act and its rules governing the placement of fluids underground, or "underground injection."

The provisions say the EPA -- or states the EPA approves to act in its stead -- must prohibit underground injection without a permit or a rule.

But there has been loud debate over the meaning of words and whether Congress considered fracking to be the type of underground injection subject to federal supervision.

Environmentalists believe the answer is yes; but they acknowledge for more than two decades the EPA never did anything.

"EPA has lots of power that it never has exercised -- often because of the influence of a wealthy and powerful industry," said Deborah Goldberg, managing attorney for Earthjustice, an environmental law firm.

Oil and gas trade groups, on the other hand, believe that there was never any desire by Congress to give EPA control of fracking.

"You're basically creating from whole cloth a regulatory regimen that would have to be defined for fracturing," said Lee O. Fuller, executive director of the trade group Energy in Depth and vice president of government relations for the Independent Petroleum Association of America.

That could amount to a massive disruption of the drilling industry because of the time it would take to craft regulations and permitting processes, said Travis Windle, spokesman for the Marcellus Shale Coalition.

"It would be a potential shutdown of oil and gas production on shore in the United States," Mr. Windle said. "The EPA doesn't write permits on the back of napkins."

Mr. Casey brushes off such doom-and-gloom scenarios.

"I realize they've got to make an argument and set forth their reason why they think it'll slow things down or have that kind of adverse impact, but I think that's really overblown," he said.

A landmark 1995 Alabama case -- Legal Environmental Assistance Foundation Inc. v. EPA -- in which residents claimed that fracking had contaminated their water, went up to a federal appeals court.

An EPA filing in the case described the agency's "long-standing interpretation" that fracking was not regulated under the law "because the wells at which the hydraulic fracturing is performed are principally focused on production, rather than disposal or other emplacement of fluids below ground."

In 1997, the 11th Circuit rejected the EPA's narrow interpretation in favor of a broad one, ruling that the agency did indeed have jurisdiction over fracking.

The appellate decision led to another round of litigation between LEAF and the EPA and the agency's 2004 fracking study.

It also prompted Congress in 2005 to amend the law, reinterpret its intent, and exempt fracking from EPA oversight, except in cases of diesel fuel being mixed with fracking fluid.

"EPA didn't think the act regulated [fracking]. One court in Alabama, however, in 1997 decided it did. That created confusion. Congress then wanted to clarify that it didn't and wouldn't in the future," said Benjamin Grumbles, the EPA's former assistant administrator for water.

The state Department of Environmental Protection requires companies to file reports after a Marcellus well has been completed that reveal the chemicals used and something called the Chemical Abstracts Service number, which provides detailed data about hazardous components.

The reports are available at regional DEP offices but are not put online. Some companies, such as Range Resources, post the information to the Web.

If a company tells DEP that chemical data is considered proprietary, the state notifies the company when a request comes in from the public to view the information, DEP spokeswoman Jamie Legenos said.

"We would basically say, 'Can we release this?' " Ms. Legenos said. If the answer is no, the public could then submit a request under the state's Right to Know Law.

In a state-by-state analysis of disclosure requirements by The Wilderness Society, Pennsylvania fared well.

Only one state, Wyoming, was credited with having full public disclosure; 29 had no full disclosure; and three were somewhere in between including Pennsylvania, which rated a "No, but better than most."

Both Ms. Goad of The Wilderness Society and Mr. Casey's office, however, contend that there are still fracking chemicals in the state that go undisclosed because drillers must reveal only those compounds listed on Material Safety Data Sheets -- data about products kept on hand for workers and emergency personnel.

"MSDSs ... are fraught with gaps in information about the formulation of the products," according to a paper by TEDX, The Endocrine Disruption Exchange, a nonprofit run by former World Wildlife Fund scientist Theo Colborn, the 1997 winner of then-Chatham College's Rachel Carson Leadership Award. "Some MSDSs report little to no information about the chemical composition of a product."

The FRAC Act faces an uphill battle. Mr. Casey noted opposition from Republicans and some Democrats.

Matt Pitzarella, spokesman for Range Resources, said there are numerous groups that promulgate baseline standards, suggested best practices and scholarly reviews.

"If I waved a magic wand and all of sudden the EPA was the primary regulator for this industry, the first people they'd call would be the state regulators and ask them, 'How do we do this?' " Mr. Pitzarella said.

Even environmentalists do not form a united front in support of the FRAC Act.

John Hanger, DEP's former secretary and the founding president of Citizens for Pennsylvania's Future, does not think a solution should come from Washington and flatly stated the FRAC Act would not pass.

"Really, Pennsylvania needs to focus on its own regulations and not rely on Washington or the federal government to make sure that we develop this gas in a way that protects the environment," Mr. Hanger said.

"I need to point out that the federal government has full authority over the Gulf of Mexico and the BP drilling operations and obviously that regulatory process was full of problems. I think it's much better that we all here in Pennsylvania make this work for everyone as much as possible."