Former Bush EPA Official Says Fracking Exemption Went Too Far; Congress Should Revisit

Abraham Lustgarten, ProPublica, 3-9-11

When Benjamin Grumbles was assistant administrator for water at the Environmental Protection Agency in the George W. Bush administration, he oversaw the release of a 2004 EPA report that determined that hydraulic fracturing was safe for drinking water. Then he watched as Congress used those findings to bolster the case for passing a law that prohibited the EPA from regulating fracking under the Safe Drinking Water Act.

In two interviews with ProPublica -- the first on June 29, 2009, soon after he left the EPA, and the second on March 5, 2011 -- Grumbles ponders the criticism leveled at the 2004 study and suggests that it's now time for Congress and the EPA to take another look at hydraulic fracturing. Our questions, and his answers, have been combined and edited for length to the version you see here. Grumbles is currently on the board of the Clean Water America Alliance, a group focusing on water sustainability issues. He has also served as head of Arizona's Department of Environmental Quality.

Q: In the 2004 EPA study, which examined hydraulic fracturing in coalbed methane gas wells, a commission of experts concluded that the process "poses little or no threat" to underground sources of drinking water. That study has since been criticized. Where do you stand?

I saw that there were accusations, by Congressman (Henry) Waxman and Congresswoman (Diana) DeGette, that somehow politics were involved in that commission, or that it was too heavily slanted towards an industry perspective and that there were not enough environmental groups on that commission. There was also an employee in Denver who claimed whistle-blower status and felt that there was a greater risk to groundwater than was being acknowledged. Honestly, I never felt that the claims had much merit.

The career employees reviewing the report were quite comfortable with the integrity and product of that commissioned report. So, they recommended to me that hydraulic fracturing was not the type of threat that should be as high a priority as other types of threats to drinking water supplies. They took great offense to some of the other accusations that were made that the commission was biased in some way.

Q: You've said the study was never intended to be a "clean bill of health." Can you explain?

When we got the report, it was a snapshot in time. It was a thorough review describing the issues. Whether it's hydraulic fracturing or any other type of practice that can have an impact on the environment, one single report shouldn't be the basis for a perpetual, never-ending policy decision.

It wasn't meant to be a bill of health saying 'well, this practice is fine. Exempt it in all respects from any regulation.' I'm sure that wasn't the intent of the panel of experts, and EPA never viewed it that way. That's one reason why we were urging Congress to say 'look, if you are going to issue an exemption, ensure that it is not perpetual.'

Q: You're referring to the exemption passed by Congress as part of the 2005 Energy Policy Act, which prohibited the regulation of fracturing under the Safe Drinking Water Act. What did you think about the idea of an exemption?

The career staff and I felt that when Congress provides a permanent exemption in an environmental statute, they need to be very careful about that and they need to have some built-in review process or safeguards so that if there is a risk presented, either the states or the EPA can then revisit it.

Q: Why, then, did you relinquish authority to both regulate the process and to revisit the issue?

I was disappointed, and I think others at EPA were disappointed, that the language [of the exemption] did not include the type of safety net language that I suggested.

It is not for one office and one agency to announce a position of the executive branch. And our view was, we had concerns about the scope of the language, we provided technical assistance and information, and ultimately Congress decided not to include the language that we had suggested. I was disappointed by that, but there is always tomorrow, and there is always the opportunity for additional facts to get Congress to revisit the exemption.

Q: So, were you overruled?

No, I felt that the commission's report [the 2004 EPA study] was an important piece that indicated that this was not presenting a significant threat to groundwater. I did feel as a matter of policy that the exemption was broader than it should have been at the time.

We certainly did not ask Congress to exempt hydraulic fracturing. We opposed the language, and we did provide information to executive committees.

Q: How did politics influence the EPA's oversight of this issue?

What came across clearly to the EPA was that the [Bush] administration did not want us to take a formal position of opposition to the exemption. It wasn't so much a pressure. It was just very clear, here is the situation: EPA officials or career staff are not to take a position of opposition or support for the legislation.

I'm not saying that there was political pressure in some sense of being told not to say certain things. This is the case in all high-profile legislative and congressional issues over my six years at EPA.

When it comes to working with Congress, the EPA is one important voice in where the executive branch is coming from, but it is not the only voice. So, as is always the case with any administration, there was coordination of the process with the Department of Energy, Office of Management and Budget, the White House. I know the office of the vice president [Dick Cheney] was involved, but I honestly did not see much involvement at all.

Q: How did you get the message that the EPA shouldn't take a formal position on the exemption?

They would say, 'continue to monitor this issue, work with congressional offices, explore the language, but don't take a formal position either for or against the language that was being developed in Chairman Barton's committee.' [Joe Barton, House Energy and Commerce Committee]

Q: Were you or the EPA ever instructed on what, specifically, to conclude in your research?

I never received any political pressure to do anything, or to take any particular view other than to not have an

official position of opposition to the legislation that Chairman Barton and others were working on in the House and the Senate.

Q: The EPA's 2004 report did find that diesel fluid in fracturing presented a risk to groundwater. How was this addressed?

The former administrator [of water] Tracy Mehan recognized that under current law the agency was not regulating or prohibiting diesel fluids from being used in the hydraulic fracturing process, so he signed, on behalf of the EPA, an MOU [memo of understanding] with major companies that have a major stake in this, voluntarily getting them to commit not to use diesel fluids for the hydraulic fracturing process.

Based on current law and what tools we had, I felt this was a positive step. And it was a sincere step forward for us to make sure that we were engaged with the industry and engaged in the sense that they knew we were watching this and knew that it could be a problem if they used this sort of a process.

Q: And now we learn from some members of Congress that diesel use continued despite those efforts ...

It's disappointing, and the agency needs to follow up and ensure that the industry is providing accurate and timely information.

I think if the information is true that industry withheld information or misled regulators or the policy makers, then that is serious, and they need to provide all the relevant information they have.

Q: What does the situation say about the role of binding regulations vs. informal agreements?

A memo of understanding was the best way we had available at the time. Obviously, I think the right step is for Congress to look at the exemption carefully and require the industry to provide timely, accurate information so that Congress and the agency can revisit whether the exemption makes sense or not, or consider an exemption that is not as broad and has additional safeguards.

It's important to ensure that both sides of this story are told. It's not only 'what does the practice entail and what kind of fluids are being used,' but also to understand what role does it play in the nation's energy policy? The reality is there are energy companies and communities that are very supportive of hydraulic fracturing and the potential for natural gas in the country.

But from an environmental regulator standpoint, you have to make sure that all the facts are out on the table.

Q: What did the EPA want the legislative exemption language to say?

I didn't feel strongly that an exemption was necessary -- that any legislative language was needed. But if language was going to move through, it should have included some broader recapture provision that allowed for regulation under the Safe Drinking Water Act if a problem developed -- that the exemption would not be applicable. That's easier said than written.

Oftentimes in environmental laws, when it comes to permitting certain activities, there will be a period of time when that activity may be permitted, but that direction is for a limited time and that, then, forces a revisiting of the issue. And that allows science to drive the results and to revisit whether an exemption is appropriate.

I don't know how the congressional committee ultimately debated that, but they arrived at a broad exemption where the only restriction on it was if diesel fluids were used in the process. I would have been more supportive of language that was more restrictive.

Q: How did the exemption change the EPA's oversight of hydraulic fracturing?

Once Congress enacted that exemption it signaled to the agency, 'well, we can do some review and monitoring of the situation, but we need to focus on some other priorities.'

Q: And what do you think of what has happened since that exemption was passed in 2005?

I'm not surprised at the discussions that have come up. Since then, there has been increasing data -- this being one of the big topics of the day when it comes to water and energy -- and there have been an increasing number of instances where communities and citizens have expressed concern. I think it is important to keep having that conversation as to whether an exemption makes sense, and also what additional science is needed to justify the continuation of the exemption.

Q: If the law had been written with the sort of safety net you wanted, would the recent news about water contamination have been enough to force the government to revisit the exemption issue?

Probably. From what I have seen and read about the past few years, while there is growing promise within the energy sector for natural gas and the hydraulic fracturing process, there is also a growing list of concerns. They weren't known to us at the time, within the agency and within Congress.

I'm not in a position to second-guess or revisit a law that is based on the data that we had at the time. We did not see this as a high-priority environmental risk. But we did know that this was a relatively new process and we had concerns that a particular exemption needs to be revisited when more is learned.

Clearly Congress should focus on this and ask whether it should continue in place as is, given the increasing amount of information and concern over the practice. I support EPA's effort to revisit the issue, to gather all of the facts and to do an even more comprehensive assessment.

Q: Should energy companies continue to be allowed to keep the names of the chemicals they use for fracturing secret?

I think this is one where it is important for the EPA and the Congress to ensure that the public has the relevant information as to what is happening in the hydraulic fracturing process.

I think communities' right to know is a valuable tool. There has always been a balance with confidential business information. But since we didn't have the legal authority under the Safe Drinking Water Act, we had to rely on powers of persuasion and other tools to get the industry to commit to providing us information and also refrain from using diesel fuel.

Q: The conclusions of the 2004 EPA report don't appear to reflect the severity of the concerns voiced in earlier drafts and even deeper in the pages of the same final version. Did political pressures influence the editing process?

If there were changes that were made, it is news to me. I really never saw any evidence of that. What I saw was the final report, and that EPA staff felt that the report was a solid product and there was integrity to the process.

The most important thing was that at the time EPA felt that the report was a valid work, and that it was indicating that there was not a risk to groundwater.

But that by itself doesn't justify a statutory exemption, particularly an exemption that isn't revisited.

Q: The 2004 EPA fracturing study was designed to be the first part of a three-phase process. But the first phase concluded that fracturing "does not justify additional study." Why?

I don't recall how it was resolved. There was never a sense that the chapter had ended. There was interest in our part in doing additional phases. Based on the conversations I remember having, further study and gathering information in the field would have been appropriate.

Q: Broadly speaking, what is the political environment that the EPA operates within?

Well, environmental laws can at times collide with energy policies and complicate energy policies. When the environmental statutes -- the Clean Water Act, Clean Air Act, NEPA [National Environmental Policy Act] -- are being discussed, other agencies have strong views and perspectives and want to support energy production and facilitate energy supply.

The environmental laws and programs don't always trump ... If the mood of the nation is to increase energy independence and energy supply, some of the environmental provisions can be viewed as constraints or barriers to that process. We've got to keep working on ways to get the two, environment and energy, to be on the same side.