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In This Issue

Loopholes in California's New Fracking Legislation Could Allow Drilling to Continue Unabated

by Sofia Plagakis

On Sept. 11, California lawmakers passed a controversial bill aimed at providing oversight of hydraulic fracturing for natural gas and oil (a drilling process known as fracking). While the new law includes some of the key elements of an effective chemical disclosure policy, last-minute, industry-friendly amendments forced into the bill undermine its ability to protect the health and safety of California residents.

Background

California's Monterey Shale is said to be the largest shale oil play in the country. Located in the Central Valley and Central Coast near Los Angeles, the play lies below most of the sources of drinking water for the area. It is estimated to contain 15 billion barrels of oil that have, until the advent of new technology, been too difficult and expensive to extract.

State Sen. Fran Pavley (D-Agoura Hills) sponsored Senate Bill 4, which would require oil companies to get permits for fracking, notify neighbors near drilling sites, disclose the chemicals used, and monitor air and groundwater quality. The new law would also require the state's Department of Natural Resources to work with air and water pollution control boards across the state to stringently regulate hydraulic fracturing. In addition, the law requires the state agency to conduct a statewide scientific study of the risks of fracking.

The new law will also put in place the first-ever rules in the state for fracking and "acidizing," a practice commonly used along with fracking in which acids (such as hydrofluoric acid) are injected into the well to actually dissolve the surrounding rock.

Loopholes in New Law

Several large national environmental groups, such as the Natural Resources Defense Council (NRDC), Environmental Working Group, and Clean Water Action, supported the legislation as initially proposed. However, in August, a coalition of over 100 local environmental and community groups opposed the bill, describing it as too weak. The coalition called on Governor Jerry Brown (D) to establish an immediate moratorium on all fracking.

The larger environmental groups sought to strengthen the bill and protect it from industry-friendly changes as it moved through the legislature. But last-minute amendments proposed by industry interests and supported by Brown created loopholes that exempt fracking operations from key oversight requirements. In May, Brown called fracking a "fabulous economic opportunity." Now, even the larger environmental groups have come out firmly against the law.

The most significant industry-friendly amendment allows the state's Division of Oil, Gas, and Geothermal Resources (DOGGR) to waive requirements for environmental impact analyses of proposed drilling operations. The legislation allows the agency to establish threshold values for the volume of acid being used. Any operation using acid that falls below the agency's threshold can be carried out without a permit, and possibly without disclosing the chemicals used or without notifying people living nearby. It is unclear where the agency would set that threshold.

Normally an assessment of the possible impacts of drilling would be mandatory before a regulatory agency would even consider approving a permit to drill. The new provision could allow the agency to skip this critical step and approve drilling permits without fully understanding the potential impacts of the activity. This provision could exempt certain oil and gas operations from the California Environmental Quality Act (CEQA).

The new law also allows fracking to continue unabated while agencies draft regulations and investigate environmental impacts. The law mandates the state agency to conduct a scientific peer-reviewed statewide environmental impact report on the risks of fracking, but the report is not due until January 2015. Hundreds, possibly thousands of wells may be drilled before the study is completed.

Environmentalists believe it is irresponsible to allow fracking while environmental problems potentially associated with the drilling technique are still uncertain.

"Californians deserve to have their health and drinking water sources protected from oil and gas development. Last-minute amendments, added due to oil industry pressure, threaten to weaken the environmental review required by CEQA," said Miriam Gordon, California Director of Clean Water Action, in a joint press release from four environmental organizations. Allowing fracking to continue before environmental impact analyses and approvals are granted and before regulations are completed means that the oil and gas industry will be able to significantly expand their operations in the state without any oversight for the next two years.

California's Break from the ALEC Disclosure Model

However, the new California legislation includes many provisions for addressing disclosure of the chemicals used in the fracking process. In the last few years, a number of states, including Texas, Ohio, and Pennsylvania, have passed legislation to require that companies disclose the chemicals used in fracking fluids. While the specific provisions vary by state, many have followed a model supported by the American Legislative Exchange Council (ALEC). ALEC is an influential conservative policy shop that drafts industry-friendly model legislation and pushes it out to state lawmakers. The ALEC model includes requirements for drillers to disclose the toxic chemicals they are injecting into the ground – but only after fracking is completed and with tanker-sized loopholes that allow the companies to keep many chemicals secret.

In March, Illinois became one of the first states to break away from the ALEC model and passed the strongest fracking disclosure bill in the country. The legislation included provisions for baseline water testing and chemical reporting, restricted allowable trade secrets, and required online disclosure by the state. Although California's new legislation does not duplicate the Illinois law, it does include a number of strong provisions.

Chemical Reporting and Baseline Water Testing

California's new law requires companies to report the chemicals they plan to use in fracking and the acid stimulation process *as part of the permit application process and prior to drilling*. The state will then post the approved permit on a publicly accessible website within five business days of issuing the permit and provide nearby landowners with a copy.

Landowners will have a chance to have their water wells tested before and after fracking or acidization occurs. To ensure the accuracy and completeness of the information reported, an independent third-party contractor approved by the state will conduct the water baseline sampling and testing; however, the drilling company will pay for it. However, baseline water testing will only be conducted upon request by nearby landowners. This is weaker than the Illinois approach, which requires well operators to conduct testing and monitoring on all fracking operations. Also, the Illinois law requires water monitoring for 30 months after fracking is completed, while the California law is vague on timeframes.

The California law requires well operators to report information on the chemicals actually used after the well is completed. The reported information must include specifics such as unique chemical identification numbers, maximum concentrations (instead of actual concentrations), and total volume of water or the type and total volume of base fluid used (and if water, whether the water is suitable for irrigation or domestic purposes).

Trade Secrets

Although the California law allows companies to withhold chemical information as "trade secrets," it provides stringent limits on the use of these claims. The law requires companies to substantiate any trade secrets claims with an explanation of why the information is confidential. The state reviews each trade secrets claim.

The law requires the state agency to collect all chemical data, including trade secrets information, on the fracking chemicals. In cases where trade secrets claims are made, the supplier must still provide a list of the chemical constituents, including chemical abstract identification numbers. This is a sharp contrast to other state laws, which do not require the state to even gather trade secrets information.

In addition, the new law provides the state agency with a framework for handling the trade secrets data and sharing it with health professionals in cases of emergencies. Lawmakers in both California and Illinois have included such provisions in their legislation after medical professionals in other states, such as Colorado and Pennsylvania, have voiced problems with gag rules that prevent them from sharing chemical information with their patients and other health professionals.

Online Disclosure

The legislation also calls for a state website to publicly list the chemicals used in fracking. Online disclosure helps citizens evaluate the potential risks and rewards of allowing fracking in their communities. The website will include the approved permit application (posted within five business days of approval), information about the chemicals used in the fracking fluid, and water quality data within 60 days of drilling a well. The law also specifies that the data be organized in a format, such as a spreadsheet, that allows the public to easily search and aggregate the information. However, the website is not required until January 2016. Until then, the law authorizes the state to use an alternative website for chemical reporting, recommending FracFocus.org. Disclosures reported to and posted on FracFocus are highly problematic, as the Center for Effective Government has reported on numerous occasions.

Conclusion

Although the California law represents a welcome departure from the ALEC model of fracking disclosure legislation, the loopholes regarding waivers of an environmental impact analysis leave the legislation ineffective in protecting public health and the environment for the next two years. Environmental groups and communities are calling on Brown and state lawmakers to fix these provisions and to impose a moratorium until the state can fully assess the threats of fracking and acidization to California's air, water, and communities.

Justice Department Raises the Standards for the Freedom of Information Act, One Step at a Time

by Gavin Baker

Oversight of how federal agencies implement the Freedom of Information Act (FOIA) is critical to ensuring the public has robust access to government records. The Justice Department's Office of Information Policy (OIP) recently issued its annual assessment of how well agencies are processing FOIA requests and announced plans to substantially improve its assessment measures next year. The more robust assessment tool will better hold agencies accountable for providing information to the public.

Under the Freedom of Information Act, anyone may request information from a federal agency on critical topics like food safety, compliance with environmental standards, and special interest influence in government decision making. The act is the cornerstone of government transparency. Agencies are required by law to promptly provide the information requested, unless it is specifically exempted, such as classified national security information.

The Justice Department's 2013 Assessment

In August, the unit with the Department of Justice (DOJ) responsible for FOIA oversight released its assessment of agency progress in processing FOIA requests in 2013. The assessment rates agencies' performance on specific implementation milestones as green, yellow, or red – meaning the agency met, partially met, or did not meet the milestones, respectively.

The first assessment was published in 2011 for a limited set of agencies; it expanded to all agencies in 2012. The milestones have evolved from year to year but have always addressed five broad elements of FOIA processing:

1. Applying the "presumption of openness," the principle that transparency should be the default and secrecy a rare exception;
2. Establishing effective systems within an agency for responding to FOIA requests;
3. Making information available proactively, in advance of formal requests;
4. Utilizing technology to increase efficiency; and
5. Reducing the backlog of overdue requests and improving the timeliness of responses.

Most of the milestones address questions about the way the agency manages requests, such as whether the agency had appropriate staffing levels for responding to FOIA requests. Other milestones focus on whether the agency met deadlines for processing requests and how frequently the agency denied requests.

Results of the 2013 Assessment

In general, agencies met the 15 milestones in the 2013 assessment tool. The average milestone was met by 80 out of 99 agencies. The two milestones with the highest score, which were both met by 98/99 agencies, showed that agency staff have sufficient technological support to process requests and that agencies were adding new information to their websites in the past year. The milestone with the lowest score, which was met by only 61 agencies, had to do with reducing the number of backlogged requests: 38 agencies (38 percent) failed to reduce their backlogs.

A comparison to last year's scores shows modest progress. Generally, government-wide performance in achieving the FOIA milestones did not change considerably from 2012, though individual agencies had minor changes in performance that generally offset each other. However, two milestones had sizable changes compared to last year. First, 13 more agencies reported utilizing advanced technology to improve FOIA processing. The increased adoption of advanced technology is a welcome development that could make FOIA processing more efficient and faster.

On the other hand, 19 fewer agencies reported making any discretionary disclosures. Sometimes, agencies have the option to release requested documents when the information technically falls within a disclosure exemption. This is particularly the case with the exemption that protects a government interest – for instance, inter-agency memos or internal rules. When agencies opt to release records that could have been withheld under such exemptions, it is called a discretionary disclosure.

The reason for the drop in discretionary disclosures is not immediately clear. However, it may be the unexpected result of a recent U.S. Supreme Court ruling that limited how broadly the internal rules exemption could be applied. The internal rules exemption, among the highest-used exemptions just a few years ago, has been almost entirely eliminated in the aftermath of the ruling. It may be that agencies previously released some information when the exemption was still widely used and counted the release as "discretionary," while such records are now considered mandatory disclosures. However, if this is not the cause, then the lower number of agencies making discretionary disclosures could raise concerns about agencies overzealously withholding information from the public when they could choose to disclose.

More Detailed Assessment for 2014

The 2013 assessment included several improvements from past years. For instance, there were summary scores for each milestone, making it immediately clear how many agencies earned each score. For the first time, the assessment data was released in an open, machine-readable format, which will facilitate external research and analysis of the data. And, on Sept. 19, new reporting guidelines were released describing bigger improvements planned for next year's assessment.

Most significantly, the 2014 assessment will assign an overall score for each agency. For the first time, each agency will have an at-a-glance indicator of the overall state of its FOIA implementation. Having a single score should be a useful oversight tool and may cultivate a more competitive environment on FOIA performance. If agency leaders are loathe to be ranked among the worst performers, they may encourage reforms or allocate additional resources to ensure they are not at the bottom of the list.

In an expanded questionnaire, agencies will now have to report whether or not they adjudicate requests for expedited processing within the law's 10-day deadline. Other new questions ask about the process an agency uses to make discretionary releases of requested records, its handling of referrals and consultations with other agencies, its procedures for proactive disclosure of information, its personnel practices, its utilization of dispute resolution services, and its timeliness in communicating with requesters.

In addition, the new questionnaire asks for more detailed responses from agencies. For several issues, if agencies fail to achieve the milestone, the guidelines ask agencies to provide plans for how they will improve their performance. Asking for such plans should bring an increased measure of accountability by reinforcing that repeated poor performance cannot continue indefinitely.

Toward Better Oversight of FOIA Implementation

OIP deserves credit for continuing to develop its assessment into an increasingly more useful exercise and thus driving improvements in implementation. As the assessment is further developed, OIP should look for ways to address more elusive concerns about agency activities under FOIA, such as the possible excessive use of some exemptions to withhold public information.

Looking forward, Congress should clarify its expectations for OIP and its role in FOIA oversight. For its assessments to carry weight, OIP needs to have the appropriate authority and independence to exercise robust oversight. Strengthening oversight will bolster the FOIA system and help ensure that FOIA delivers the transparency that the American people deserve.

Levin Bill Would Shutter Corporate Tax Loopholes

by Jessica Schieder

Last week, Sen. Carl Levin (D-MI) introduced the Stop Tax Haven Abuse Act, which would restrict the use of offshore tax havens by corporations. At a time when corporate profits are high by historic standards, the bill could raise money for vital government programs and reduce the deficit. The legislation is a slimmed down version of the Cut Unjustified Tax (CUT) Loopholes Act of 2013 (S. 268), introduced earlier this year.

The new bill would generate as much as $220 billion in revenue from the closure of tax loopholes and forecasted reductions in tax abuses over the next decade. A press release said the bill could "provide part of the foundation for a balanced deficit-reduction package to end sequestration."

The Stop Tax Haven Abuse Act requires increased transparency on the part of corporations in reporting profits and closes some of the legal loopholes they currently use to avoid paying taxes.

Currently, Sens. Mark Begich (D-AK) and Jeanne Shaheen (D-NH) are cosponsoring the bill along with Sen. Sheldon Whitehouse (D-RI).

The High Cost of Tax Avoidance

A combination of tax avoidance and evasion through the use of tax havens allows multinational corporations and wealthy individuals to avoid an estimated $100 billion in taxes each year, according to the Congressional Research Service (CRS). Some estimate the lost revenue could exceed $160 billion.

U.S. multinational corporations are estimated to collectively keep as much as $1.9 trillion offshore. Profits kept abroad are not taxable as long as they remain abroad indefinitely due to the current state of U.S. law. This exception to normal taxation is referred to as a "deferral." The deferral loophole is only one of many that allow corporations to pay far less than the top U.S. corporate tax rate of 35 percent. Some companies – like General Electric, Verizon Communications, and Boeing– paid a tax rate less than zero between 2008 and 2010.

(For corporations, as well as individuals, there is a tenuous line between legal tax avoidance and tax evasion. CRS states that the legality of some financial activities designed to minimize taxes paid is "not entirely clear.")

Forgone revenue means fewer dollars for infrastructure, education, scientific research, and health care.

If the $220 billion in estimated revenue over ten years was divided equally each year, it could ensure the federal Highway Trust Fund stays solvent, put the U.S. on track to repair the 11 percent of bridges that are structurally deficient by 2028, allow over 2.5 million young students to enroll in Head Start each year, or pay for 17 percent of the nation's worker health and safety research budget.

Increased tax revenues would ease some pressure on state budgets, as well. Preventing tax haven abuse by corporations and wealthy individuals would have generated around $26 billion in revenue for states in 2011. According to a U.S. Public Interest Research Group (US PIRG) report, this could have covered the education costs of more than 3.7 million children in K-12 grades in 2011.

Discouraging Tax Haven Abuse

The Stop Tax Haven Abuse Act requires more corporate transparency in reporting overseas profits, and it limits opportunities for individuals and corporations to strategically avoid U.S. taxes.

A major tax avoidance strategy this legislation attempts to restrict is the transfer of intellectual property to offshore subsidiaries. Companies make these transfers so they don't have to pay taxes on the profits they incur from owning copyrights and patents.

The bill also targets corporations that use subsidiaries in foreign countries as "shell corporations" where they park money to avoid taxation. The legislation requires corporations to disclose information about the beneficial ownership of their subsidiaries, including country-by-country employment, revenues, and tax payments, so tax officials can determine what role the subsidiaries actually play in the overall corporation.

A summary of the bill's main provisions posted on Levin's website asserts that it will:

- Crack down on the use of intellectual property transfers as tax-avoidance tools by taxing excess income earned from transferring intellectual property to offshore subsidiaries;
- Give the Treasury Department important new weapons to fight against foreign governments and financial institutions that aid tax avoidance, including the ability to prohibit U.S. banks from doing business with foreign banks in jurisdictions that impede U.S. tax enforcement;
- Require SEC-registered corporations to disclose employment, revenues, and tax payments on a country-by-country basis;
- Eliminate the tax incentive for companies to move jobs and operations offshore by limiting their ability to claim immediate tax deductions for expenses related to those offshore operations while deferring the U.S. tax on the income those operations generate;
- Repeal what are known as the "check-the-box" and "CFC look-through" rules, which allow multinationals to avoid U.S. taxes they would otherwise owe by making offshore subsidiaries disappear for tax purposes, turning taxable passive income into tax-deferred active income;
- Prevent multinationals from using short-term loans from their offshore subsidiaries to essentially repatriate income while avoiding taxes that should apply to repatriated money.

Small Businesses Support Closing Loopholes

The use of tax havens allows multinational corporations and wealthy individuals to keep income abroad, minimizing the federal and state taxes owed. Small and medium-sized businesses frequently do not have these options, however, which means that smaller firms are often paying *higher* taxes than the multinationals, creating an immensely unfair playing field. According to a report by US PIRG, the 100 largest publicly traded companies account for approximately $1.2 trillion in offshore profits, or more than 63 percent of all U.S. business profits held offshore.[1] 82 percent of the 100 largest publicly traded companies operate in tax havens or low-tax jurisdictions.

Since American small businesses often make their profits in the U.S., they support closing corporate loopholes that allow tax avoidance.

When polled, more than three-quarters of American small business owners support closing tax loopholes by requiring a more detailed profit-reporting system, according to a survey by the Main Street Alliance and the American Sustainable Business Council. About 64 percent of small business owners wanted to end deferral, the loophole that allows corporations to indefinitely avoid paying U.S. taxes by keeping profits abroad.

American small business owners think corporations should be required to pay their fair share of taxes before spending on education, infrastructure, or the military is reduced.

Whitehouse praised language in the Levin bill that eliminates unfair advantages in the tax code for multinational businesses, saying, "This bill would force corporations that are dodging their responsibilities to pay their fair share of taxes, and create an even playing field for American companies that already play by the rules."

The Public Wants Higher Corporate Taxes

Increasing tax revenue by reducing tax haven abuse has wide public support. Four out of five small employers support revenue-positive tax reform that closes tax loopholes that favor large corporations.

Closing corporate loopholes has historically enjoyed Republican, as well as Democratic, support. Sen. John McCain (R-AZ) joined Whitehouse and Levin earlier this year in introducing an amendment to the budget resolution in support of closing corporate loopholes. Other bills, including the Bipartisan Tax Fairness and Simplification Acts of 2010 and 2011, have enjoyed bipartisan support for the closure of tax loopholes and the elimination of tax breaks for special interests, as well.

The introduction of the Stop Tax Haven Abuse Act presents an opportunity for a bipartisan collaboration in raising revenue to pay for public investments the country needs.

Notes:

[1] 63 percent represents the 100 largest publicly traded companies divided by the number 3,000, which represents the Russell 3000 companies, who collectively held $1.9 trillion offshore in May 2013.

Energy Department Conditionally Approves Controversial Maryland Export Terminal

by Katie Weatherford

On Sept. 11, the U.S. Department of Energy (DOE) announced that it has conditionally approved a Dominion Resources Inc. permit application to convert its existing liquefied natural gas (LNG) import facility, located on the Chesapeake Bay, to an export terminal. The project must still receive final approval from several agencies, but if approved, the permit would allow the company to export up to 0.77 billion cubic feet of liquefied natural gas per day for 20 years to non-free trade countries like India and Japan. It could also increase the risk of catastrophic tanker accidents, air pollution, and water contamination.

Environmental groups are appalled by the initial approval. They have warned that exporting LNG will lead to more hydraulic fracturing (or fracking) operations in the United States to satisfy increased demand overseas.

What's at Stake

Dominion Resources Inc. purchased the Cove Point import facility in 2002 for $217 million. After Dominion purchased the site, it received federal approval to expand its storage capacity from 7.8

billion cubic feet (Bcf) to 14.6 Bcf and the plant's daily send-out capacity from 1.0 Bcf to 1.8 Bcf. One Bcf is enough natural gas to provide energy for approximately 3.4 million homes per day.

In 2011, Dominion applied for and received approval to export liquefied natural gas to countries that operate under free trade agreements with the United States. The permit authorizes Dominion to export up to 1 Bcf of liquefied natural gas per day for up to 25 years. On Sept. 11, the Energy Department approved a second permit filed by Dominion seeking to export 0.77 Bcf per day for up to 20 years to non-free trade countries, which is conditional upon the Federal Energy Regulatory Commission's (FERC) completion of an environmental review and approval of the project.

If Dominion receives all the necessary approvals for its project to convert the existing facility into an export terminal, the company plans to begin construction of the $3.8 billion project in 2014. Once completed, the terminal would be bi-directional, meaning that Dominion could import and export liquefied natural gas from the facility. Operations are projected to begin by 2017.

According to Maryland's State Data Center, almost 20,500 people live in the same zip code as the Cove Point facility. The facility is located on the Chesapeake Bay in Lusby, MD. Risks to the area include increased traffic on the bay from massive LNG tankers that would carry the liquefied gas from the facility to importing nations. In addition to the risk of tanker accidents, "[t]he facility would also dump billions of gallons of dirty ballast water into the Bay, threatening marine life," according to a letter from environmental advocates and area businesses. The construction would require clearing hundreds of acres of forest along the Patuxent River, threatening habitats, damaging the tourism industry, and disrupting the state's "water enthusiasts and fishing industries." The Patuxent is a major wildlife and recreation resource in Maryland.

These threats exist because, in addition to converting its Cove Point facility to export LNG, Ecowatch reported that Dominion would need to construct a compressor station in the Elklick Diabase Flatwoods Conservation site and set up a huge construction site on the Patuxent River waterfront. According to Sierra Club, "the facility would become the state's biggest trigger of heat-trapping pollution, exceeding the combined emissions of the state's entire fleet of seven coal-fired power plants."

Approved Without Assessing the Environmental Impacts

Before Dominion can export liquefied natural gas, it must get a permit to export the fuel and construct an export terminal from the Energy Department, FERC, and state and local permitting agencies. FERC is responsible for ensuring that an environmental impact statement is completed in accordance with the National Environmental Policy Act. The DOE is the lead federal agency for deciding whether an LNG project will move forward since it has the authority to approve or deny the import and/or export permit.

Although FERC is responsible for preparing an environmental impact statement for the project, the agency said it would only prepare an environmental assessment (a less detailed review of environmental impacts). The Energy Department issued the conditional approval on Sept. 11 without waiting for FERC to complete its environmental assessment and approve the project to build new facilities at the site.

Shortly after the Energy Department announced the conditional approval, the Sierra Club released a statement opposing the decision. In the statement, the group promised to "hold DOE to its commitment to fully review environmental issues before deciding whether to issue final authorization."

Public interest and environmental groups have warned that expanding LNG exports will threaten public health and safety because it will lead to an increase in fracking operations in the United States. Moreover, exporting natural gas is not expected to reduce greenhouse gas emissions domestically or abroad. To prepare liquefied natural gas for export, it must first be sent to a liquefaction facility where it is cooled and converted into a liquid. It is then sent through a pipeline into huge tankers that transport the liquefied gas overseas where it is sent through another pipeline into a facility that converts it back into gas. These many steps take a considerable amount of energy to conduct and pose a potential risk of leakage at every stage.

According to Chesapeake Climate, "If Dominion redirected the money it's investing in Cove Point toward wind power, it could increase the East Coast's installed wind capacity by 50 percent and create more than 7,500 jobs."

In addition to these issues, previous major accidents involving liquefied natural gas show why concerns about the safety of LNG operations are justified. One example happened right in Cove Point in October 1979, when a leak led to an explosion in an electrical substation at a receiving terminal, killing one operator and injuring another. Another incident occurred in Cleveland, OH, in 1944, when a gas leak and explosion from liquefied natural gas-related activities killed 128 people. And in 2004, an accident at a steam boiler used in the liquefaction process caused a huge explosion at the Algerian port of Skikda, killing approximately 30 people and injuring 70 more.

Before the DOE and FERC approve export permits, they should stringently review and assess the risks to public health and safety so that these concerns – not corporate profits – remain the top priority.

State and Local Concerns Should Be Addressed

In addition to gaining final approval from the DOE and FERC, Maryland's Public Service Commission will need to decide whether to allow Dominion to build the infrastructure it needs to convert the Cove Point import facility to an export facility. The Center for Effective Government has joined with several environmental groups and businesses opposed to the project on a recent letter sent to Maryland Governor Martin O'Malley (D) urging him to "declare your public opposition to the project and do everything in your power as Governor to stop it." The letter also warned that the project would lead to higher energy prices, set back the state's greenhouse gas reduction efforts, strain the state's transportation infrastructure, and pollute the Chesapeake Bay.

According to the letter, construction at the facility would require “support from a massive infrastructure system of compressor stations and hundreds, if not thousands, of miles of intrusive pipelines spread all across Maryland and the surrounding region.” Residents in Myersville, MD, for instance, are already fighting a compressor station that would be built one mile from the town's elementary school. Meanwhile, residents of Baltimore County are fighting a pipeline project that would threaten 70 streams and 24 watersheds.

Some environmental groups may have a say in the construction permitting decision under an early 1970s agreement between the groups and the facility's original owner. The agreement gave environmental groups opposed to the construction of the import facility power to approve or deny any major changes to the terminal or adjacent areas. Dominion acquired the facility in 2002, and in 2005 renewed the agreement. The 2005 agreement said that the Sierra Club and the Maryland Conservation Council would not oppose the expansion of import operations if Dominion would protect the areas surrounding the facility.

When Dominion proposed the project to export liquefied natural gas, Sierra Club sent a letter to the company rejecting the proposal. Dominion challenged the agreement in court, and in January received a decision in its favor. The court found that converting the facility to an export terminal and adding the liquefaction plant does not constitute a "major change" under the agreement. Sierra Club plans to appeal the court decision, and if successful, may be able to block the project. Meanwhile, the controversy has already spurred substantial public opposition.

International Considerations: Fast-Track Authority for TPP Agreement

Dominion's permit, if approved, would allow it to import from and export LNG to nations with free-trade agreements with the U.S., as well as nations that do not currently have such agreements with the United States, such as Japan. Japan is the largest importer of LNG in the world, and after a tsunami destroyed the Fukushima nuclear facility in March 2011, Japan's reliance on LNG imports has increased. Exporting LNG to Japan could be quite profitable for a U.S. company because the price of natural gas in overseas markets is much higher than in the U.S., where the shale gas boom has led to record low prices.

This past July, Japan entered the Trans-Pacific Partnership (TPP) negotiations and will become a favored trading partner with the U.S. if the agreement is finalized.

If Maryland approves the Cove Point project, it could not impose any new standards on liquefied natural gas without exposing the state to potential litigation under the investor-state dispute resolution provisions in existing free trade agreements, as well as those expected to be in the TPP agreement. Under these provisions, a private importer in a country with favored nation status could sue the state of Maryland and the U.S. government for imposing any environmental law or regulation that hurts the overseas company's bottom line. The fact that the Cove Point facility has been conditionally approved for exports and would be the only export terminal on the East Coast could subject state and local authorities to enormous pressure.

Conclusion

Exporting large quantities of liquid natural gas carries significant health and safety risks to the public and to the environment, such as air and water contamination and catastrophic accidents.

States and local communities near the export facilities must deal with the outcomes, should these risks be realized. The residents of these communities should be able to determine if the risks are worth the rewards to them. This is why local permitting authority exists, and it is the way democracy is supposed to work.

Elected officials at all levels of government need to review the evidence, assess threats, and listen to their constituents. Congressional fast-track authority for trade agreements – particularly agreements that give deep-pocketed corporations new legal rights – should be rejected as fundamentally anti-democratic.

Growing Use of Third Parties to Certify Health and Safety Compliance Raises Troubling Questions

by Katie Greenhaw, 9/24/2013

In May, the U.S. Environmental Protection Agency (EPA) proposed two rules to protect the public from the risks of formaldehyde exposure. The first rule sets emissions standards for formaldehyde in composite wood products; the second establishes requirements for third-party certifications of products subject to those emissions limits. The use of third-party programs to assess regulatory compliance is growing as agencies try to stretch scarce resources, raising troubling questions about enforcement of important standards and safeguards.

EPA's proposed framework provides a timely illustration of the issues agencies must grapple with when they develop third-party certification programs. Most importantly, agencies must ensure that companies are following regulatory requirements and complying with crucial public health and safety standards.

Third-Party Certification

Congress enacted the Formaldehyde Standards for Composite-Wood Products Act (FSA) in 2010 to address concerns about the public's exposure to formaldehyde emissions from manufactured products and building materials. The FSA expanded existing California standards and set national limits on the amount of formaldehyde that may be emitted from composite wood products, including hardwood plywood and particleboard. It also directed EPA to promulgate regulations by January 2013 to ensure compliance with the emissions limits, including regulatory provisions that address third-party testing and certification.

EPA's third-party certification framework is modeled on, but not identical to, California's program for verifying compliance with emissions limits. Under the proposed national framework, EPA would approve Accreditation Bodies (AB) to accredit qualified Third-Party Certifiers (TPC). Those TPCs would then be responsible for ensuring that composite wood panel producers are meeting EPA's standards. California's program directly approves TPCs, eliminating the need for ABs. EPA contends that using internationally recognized ABs will enhance the program by establishing a globally uniform process.

Congress directed EPA to establish a third-party certification program to ensure that products meet national formaldehyde emission standards. As is often the case with federal legislation, Congress left important implementation details to the agency. EPA's proposal outlines the roles and responsibilities of EPA, TPCs, and ABs, and also sets out criteria for program participation. While there are some general requirements for TPCs and ABs, the agency will address more specific implementation requirements in a later rulemaking.

EPA based its framework on existing third-party programs and proposes to use voluntary consensus standards as the general requirements for certification. EPA proposed the program framework before issuing the rest of the implementation regulations required by Congress to give stakeholders a chance to comment and understand how to participate in the program. Regulated composite wood products producers, potential TPCs, and other interested parties have until Sept. 25 to comment on the proposed framework.

Using Third Parties to Assess Compliance

Agencies sometimes use private third parties to conduct oversight of regulated entities and verify that they are in compliance with regulatory requirements. In a variety of programs, agencies have approved third parties to perform inspections, conduct testing, and identify violations. Third parties may be used to check compliance with voluntary standards as well as mandatory regulations. When agencies rely on third parties to certify that entities are complying with mandatory health and safety standards, the stakes are high.

When agency budgets are tight, the use of third parties may be viewed as a more cost-effective regulatory approach. But in order to be effective, third-party assessments must be reliable and accurate. Reliability is especially important when assessing compliance with mandatory standards that impact public health and safety. Third parties must be competent and unbiased in assessing compliance. Because third parties may be paid by the regulated producers or facilities, monitoring their objectivity and independence is crucial.

In 2012, the Administrative Conference of the United States (ACUS), an independent body that provides recommendations for improvement of federal agency procedures, issued a recommendation addressing some of the issues that arise when agencies develop third-party programs. ACUS based its recommendation on a comprehensive report prepared by consultant Lesley McAllister that surveyed eight significant third-party programs.

McAllister concluded that such programs may allow agencies to leverage private resources and conduct assessment activities on a larger scale than the agency could do directly. Based on the report, ACUS found that "third-party programs may be particularly effective when regulated products or processes are international in scope." On the other hand, both the report and recommendation recognized that these programs have the potential to undermine regulatory goals and impose high costs.

Because of the risks and benefits associated with these programs, they must be carefully designed and operated to ensure they are effectively evaluating compliance and achieving the agency's regulatory goals. The increasing use of third-party programs by regulatory agencies underscores the importance of proper design and oversight for these programs.

Recent Third-Party Programs

Over the last five years, Congress enacted three different laws requiring the use of third parties to conduct testing and certification activities. In addition to the third-party program for formaldehyde emissions from composite wood products, Congress has required third-party testing and certification for food and product safety programs.

The Consumer Product Safety Improvement Act (CPSIA) of 2008 required children's products to be tested by an approved third-party laboratory to certify compliance with product safety rules. Third-party laboratories may test and certify products once accredited by the Consumer Product Safety Commission (CPSC) or a CPSC-designated AB. There are over 400 CPSC-accepted laboratories around the world. Both imported products and products manufactured domestically must be third-party tested and certified.

In 2011, Congress required the Food and Drug Administration (FDA) to establish a third-party program for imported foods. The Food Safety Modernization Act (FSMA) directed FDA to set up a program for accrediting third-party auditors to inspect and certify foreign food facilities and the food they produce. The FDA recently proposed procedures for accreditation and for monitoring and conducting oversight of participating ABs and auditors. The agency will then propose standards specifying what qualifications a certification body must have to qualify for accreditation. Similar to EPA, FDA says the third-party audit and certification program "is central to a global system."

All of these programs are designed to operate on an international scale by facilitating inspections and certifications of products and facilities outside the U.S. For EPA and CPSC, this means ensuring compliance with applicable standards for products manufactured domestically and abroad. EPA plans to rely on ABs that operate internationally to accredit and oversee certain TPCs.

Considerations for EPA Going Forward

As EPA reviews comments and works to finalize the details of its third-party certification framework, it should consider how to maximize the effectiveness of the program in guaranteeing that producers are meeting formaldehyde emissions standards. McAllister, author of the 2012 ACUS report, has identified several general metrics for assessing the success of third-party programs, including reliability, compliance rates, and the agency's capacity to run the program. While some of these metrics cannot be measured at this stage, the agency has the opportunity to help ensure the effectiveness of this program through its current rulemaking process.

EPA's proposal includes recordkeeping and reporting requirements that would help ensure reliability and accountability. The rule would allow EPA to inspect TPCs and ABs and revoke accreditation if necessary. EPA would also document and make publicly available certain information about TPCs, ABs, and panel producers.

EPA can improve the transparency of this program by implementing additional mechanisms currently under consideration. Specifically, EPA should require electronic reporting and make more information available on a publicly viewable database, including product information and inspection results. These actions will streamline the reporting process, improve reporting accuracy, increase accountability, and help instill public confidence in the program.

Once EPA has finalized the formaldehyde rules and operationalized the third-party program, the agency should conduct thorough oversight and confirm that the program is ensuring compliance with emissions standards. This oversight is particularly critical for programs where Congress has required the use of third parties to aid in the enforcement of public protections.

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