MythBusters – Federal Exemptions

Across the U.S., each state has regulatory authority over oil and gas operations. Colorado has some of the most comprehensive and stringent oil and gas regulations in the country: Every aspect of oil and gas activity is regulated from site selection, permitting, down-hole activities, hydraulic fracturing and disclosure, and final site reclamation.

States are the most appropriate place to regulate oil and gas activity because state regulators understand the unique geological characteristics of the basins in their states. Even so, the federal government does have a regulatory role. Many myths and misconceptions assert the industry is exempt from federal regulations, but this is simply untrue. [1]For more information, click on the highlighted links.

Myth #1 – Oil and Gas Industry is exempt from The Safe Drinking Water Act (SDWA)

Fact: The Safe Drinking Water Act regulates the disposal of oil and natural gas produced waters under its Underground Injection Control Well program – specifically as Class II wells. It was never intended to regulate well construction activities, including hydraulic fracturing, and no federal regulations for hydraulic fracturing exist under the SDWA.

Myth #2 – Oil and Gas is not subject to the Clean Air Act (CAA)

Fact: In 1990, Congress directed EPA to take steps to control emissions from area sources representing 90 percent of hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas. As part of this program, Congress provided that emissions from oil and natural gas production wells could be aggregated together and regulated as an "area source," which address the most significant threats to human health from air toxins emitted by all facilities, including oil and natural gas exploration and production facilities.

Myth #3 - Oil and Gas is excluded from Clean Water Act (CWA)

Fact: Oil and natural gas exploration and production operations are subject to regulation under the Clean Water Act. Any discharges of wastewaters, such as produced waters from well sites to navigable waters or their tributaries, are fully subject to the National Pollutant Discharge Elimination System (NPDES) permit requirements. In addition, stormwater runoff from a well site that contains pollutants is subject to the same permitting requirements that are imposed on stormwater discharges from various industrial facilities.

Myth #4 – Regulators have never considered oil and gas waste to be covered under the Resource Conservation and Recovery Act (RCRA)

Fact: Subtitle C of the Resource Conservation and Recovery Act establishes regulations to manage hazardous wastes. These regulations are designed to address low volume, high toxicity wastes. In 1980, Congress required EPA to evaluate whether the Subtitle C program was appropriate for oil and natural gas production drilling fluid and produced water wastes, where EPA concluded: Subtitle C was not appropriate to manage these wastes; State regulatory programs

1 The following summaries come and used with the permission of the Independent Petroleum Association of America (IPAA) and Baker Botts LLP.

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effectively managed them; and, any gaps in these regulatory programs could be effectively addressed by regulation under RCRA programs for non-hazardous waste (Subtitle D) and by working with the states on their regulatory programs.

To address gaps in the state programs, EPA initiated a peer review process that eventually became STRONGER, State Review of Oil and Natural Gas Environmental Regulations, "a non-profit, multi-stakeholder organization whose purpose is to assist states in documenting the environmental regulations associated with the exploration, development, and production of crude oil and natural gas."

Myth #5 – All Oil and Gas activity is omitted from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or Superfund

Fact: Congress addresses the clean-up petroleum contamination effectively through programs such as the Clean Water Act's provisions, the Oil Spills Program. The Oil Pollution Act of 1990 (OPA) is the primary law for managing crude oil related releases. To address any leaking underground storage tanks (USTs) containing petroleum, Congress added provisions to RCRA in 1984. Also, EPA interprets the "petroleum exclusion" to exclude crude oil and fractions of crude oil that are indigenous in those petroleum substances. However, substances that are added to petroleum or that increase in concentration as a result of contamination of the petroleum during use are not considered part of the petroleum, and are regulated under CERCLA. Lastly, CERCLA provides for "federally-permitted releases" which covers releases of hazardous substances to the environment that have been authorized through federal permits issued under the Clean Water Act, the Clean Air Act, or state law authorization.

Myth #6 – All Oil and Gas activities are exempt from National Environmental Policy Act (NEPA)

Fact: Congress established under Section 390 of the Energy Policy Act a rebuttable presumption, or an assumption of fact accepted by the court until disproved, that activities related to oil and natural gas development on federal land or pursuant to leases of federal interests in oil and natural gas reservoirs should be subject to a categorical exclusion, under NEPA. In these certain cases the responsible federal agency would not be required to prepare an EIS or an EA when the rebuttable presumption applies.

Myth #7 – Oil and Gas is exempt from the Toxic Release Inventory of the Emergency Planning and Community Right-to-Know Act

Fact: Toxic Release Inventory (TRI) was created by section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) of 1986. It requires most industries to report significant toxic substances to the EPA, which then aggregates and disseminates the information to the public. However, when Congress enacted the TRI program, it applied to manufacturing operations only. It did not cover, nor intend to cover, oil and natural gas production. In the mid-1990's EPA evaluated expanding which industry categories were subject to reporting under TRI. EPA concluded that the oil and natural gas production industry should not be added to TRI reporting.

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