

## Shale To The Chief

*Law360, New York (February 27, 2012, 1:41 PM ET)* -- In his January 2012 State of the Union address, President Barack Obama endorsed scientifically sound development of shale gas resources.

Speaking in Philadelphia in February, U.S. Environmental Protection Agency Administrator Lisa Jackson announced that the agency plans to allocate \$14 million of its 2013 budget to further study how shale drilling, and particularly the technology of hydraulic fracturing of shale basins (fracking), may impact water quality, air quality and ecosystems.

Jackson reported that the EPA also plans to fund grants for additional research into the environmental issues surrounding fracking. As the media hype continues to swirl around shale development, and particularly whether it will be a magnet for future litigation, there are lessons to be taken from other products and industries that have faced similar governmental investigations into science and technology.

These lessons teach that government research is a powerful tool, often used against industry. But there are also ways in which industry can play a meaningful leadership role in shaping the scientific dataset and thus public understanding of the science.

First, experience shows that government-sponsored research has the power to make even a persuasive track record of safety no longer look or feel like adequate proof of safety — particularly in the context of litigation.

The EPA's "Final Plan to Study the Potential Impacts of Hydraulic Fracturing on Drinking Water Resources," announced in November 2011, describes the agency's intent to gather and analyze data going to fracking's impact on both the availability and the quality of potable water. The EPA's stated goal is to release "interim" data later this year, followed by "final" results and proposed rulemaking in 2014.

Purportedly, the EPA will ask and answer the kind of causation questions that are critical to pending and future health-related litigation. To the extent the EPA's conclusions in any way support plaintiffs' lawyers' claims, they will fuel the litigation fires.

Moreover, they will have a uniquely powerful impact on the opinions of future judges and juries — purely because they carry the imprimatur of the government agency charged with protecting environmental safety.

Whatever negative public sentiment may exist toward "big government" generally and agencies like the EPA specifically, prospective jurors want to believe that those charged by our government with protecting public health and safety have the training, know-how and desire to do their jobs well.

Second, announcements of federally sponsored research findings are, by definition, one-sided media events with tremendous influence over the public discourse. The EPA knows this and clearly does not intend to sit quietly over the next two years waiting for its final plan results. It is going to speak to the issues in a way that has repeated influence over national and even international opinions — particularly given the United States' leadership role in shale development.

Only a month after announcing its final plan in November 2011, the EPA preempted its own schedule by releasing in draft a report purporting to link shale drilling to alleged contamination of drinking water in Pavillion, Wyo.

Similarly, on Jan. 12, 2012, the EPA announced that it was going to test approximately 60 residential wells in Dimock, Penn., and declared that immediate action was needed to protect public health.

Both of these decisions triggered some strongly negative reactions, including from the governor of Wyoming and the secretary of the Pennsylvania Department of Environmental Protection. Still, there is no denying that the feds repeatedly made scientific news and that the press coverage of the EPA's reports far exceeded the coverage of the scientifically based critiques.

Third, the plaintiffs' bar has become increasingly sophisticated in how it uses its own experts to shape the scientific views of governmental decision-makers. Experts who regularly support plaintiffs in litigation also consult on government agency research or provide influential testimony to government panels.

These same experts may also independently publish and speak on the relevant issues in the scientific and popular press. Rarely are they required to disclose their litigation conflicts of interest as would be expected if they worked with industry.

Evidence can already be found that plaintiffs will use the same strategy here — and that it will impact how the scientific and lay community discusses fracking's potential benefits and risks.

Despite these challenges, it is important to note that companies reduce their litigation risk and even win cases not just by proving that their operations are actually safe, but also by proving that they acted reasonably to investigate and make decisions relevant to safety.

Evidence that a company cooperated with government's scientific investigations, met government's science-based standards and even agreed with some of government's conclusions is powerful proof of reasonable conduct regarding safety concerns.

Evidence that looks like a company or industry tried to work the oversight system through means that were not objective and scientific can be devastating. Thus, companies looking down the road at potential litigation can help themselves greatly if they take care in the tone they set with the relevant agencies and leave the door open to wrap themselves in the protective blanket of science-based government oversight.

Similarly, to the extent companies find ways to develop and publish independent data, which can stand as an affirmative response to critics, they are well-served. Of course, such science may be attacked as biased or motivated by commercial self-interest.

But industry should be able to argue credibly that its true motivation is a sustainable — which means a scientifically defensible — path forward. It should want to ensure that the science is conducted carefully and responsibly and proves credible over time, so that its investments in shale development can actually mature and bear fruit.

Industry's true best interest and the best interest of the public, one can argue, is for those engaged in shale operations to be the most authoritative scientific voice in the conversation.

It is likely that there will be something for everyone in the data that emerges over the next several years. Even purported answers will be subject to ongoing scrutiny and attack from various constituents. It is also likely that as the EPA releases its scheduled findings, the playing field will forever change.

There are meaningful opportunities, now and in the immediate future, for industry to play its own significant role as a thought leader in developing the published scientific database.

--By Hope S. Freiwald, Dechert LLP

*Hope Freiwald is a partner in Dechert's Philadelphia office.*

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