

C O M M E N T

# Comment on *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination*

by Peter D. Robertson

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I think Professor Merrill and Dean Schizer have made a very thoughtful proposal which has genuine merit and deserves equally thoughtful consideration by states across the country. I have a series of what are essentially random reactions, thoughts, and suggestions, but they all flow from a fundamental position that their suggestions are an excellent model for states to consider as they adopt new or update old regulatory and liability regimes. My observations, of course, spring from my varied experiences in the environmental arena. I worked at the U.S. Environmental Protection Agency (EPA) for six years and I support its mission as strongly now as I did then. I also worked at a trade association for the independent natural gas producers—the companies that produce the majority of the natural gas in our country today. I am the yellowest of yellow dog Democrats, and I desperately want renewable energy resources to succeed and become a much bigger part of our energy equation. But I also believe that won't happen for some time, and that we are going to have to continue to burn fossil fuels for the foreseeable future; if I'm right about that, I want us to burn the cleanest of those fuels—natural gas—to the greatest degree possible. And I want us to get that gas out of the ground in the most sustainable way possible.

The authors' remarks make clear to me that they believe that the shale revolution of the last decade is, essentially, a good thing, and that any efforts to create regulatory and liability schemes should strive to do so in a way that does not kill this engine of economic opportunity. I certainly agree with that, and think generally that their proposals are well-suited to ensure the continuing vibrancy of the natural gas industry.

The authors also note that so far, there is little evidence that fracking contaminates groundwater, and especially that fracking activity itself—as compared to surface spills of fracking fluids or mishandling of fracking wastewaters—is a likely source of groundwater contamination. They also note that the public must believe that shale drilling is safe, or the shale revolution could be vulnerable to regulatory overkill. This is of particular importance to me, because I

believe we're dangerously close to a point now where entire communities believe that it both isn't safe and can't be made safe. My sense when I worked at America's Natural Gas Alliance (ANGA)—and it hasn't abated any since that time—is that our national debate about fracking has been dangerously close to a fact-free debate. And we're seeing the consequences of that today. Municipalities around the country are seeking to ban fracking and natural gas development within their borders. Some states are putting years-long moratoria on fracking. The great state of Vermont has essentially banned fracking—a particularly courageous act when one considers that Vermont produces no natural gas. I think these fear-based, rather than fact-based, reactions argue strongly that any effort to encourage the adoption by states of the kind of structure that the authors suggest should be accompanied by—or perhaps preceded by—an effort to educate the public about the true risks of fracking, as well as the benefits of natural gas. States, the natural gas industry, power providers, and other stakeholders all have to be involved in that effort. I'm afraid that without it, the public won't be convinced that anything short of a fracking ban will keep their groundwater safe.

The authors also note that regulatory responses to potential fracking risks should be dynamic so that we can best address real risks, rather than perceived risks, as we learn more through experience about what those real risks are. The sad truth of regulatory efforts, in my experience, is that is that they are not typically dynamic, at either the federal or state level. It is understandable—states typically lack the resources to update regulations frequently enough to keep current with changing industries. The rapid growth in shale resources is an example—some states with shale resources that did not previously have a history of oil and gas activity did not have sufficient regulation in place to deal with the shale boom. They have had to play catch up. Nor will many states have the resources to update their regulations to keep pace with advances in technology. One way to bridge the gap, at least temporarily, is by relying on voluntary industry best practices to help fill the gaps. Such programs can typically be adopted more quickly than

regulations can, which means results can come sooner. But I also recognize the public's skepticism about using such efforts as compared to legally binding laws and regulations. And, of course, such programs can't be used to develop the liability regimes necessary to the authors' proposals. It is certainly not a perfect solution and I know how suspicious some will be at using voluntary programs to supplement regulatory ones, unless and until they have a better understanding of the genuine risks of fracking and how industry best practices can ameliorate those risks.

I think the authors' suggestion that the regulatory locus should be at the state level is key to ensuring that we can move forward on adopting such programs. Any effort to make EPA the lead regulator of fracking and shale gas development is doomed to fail. It would require statutory changes that simply aren't possible with the current state of politics surrounding federal environmental regulation. And those politics are not going to change in the foreseeable future. In addition, the argument that states are better situated to regulate the industry is well taken, in my view. To cite the rationale that is most typically given in support of that argument, differences in geology among states with shale resources suggest that a uniform federal regulation is not the best way to proceed.

I think the authors are right again when they observe that the shale revolution could be at risk from regulatory overkill. The industry's moves away from dry gas to liquids, from gas to oil, and the reduction in rig counts and other industry trends all show that the industry is particularly sensitive to cost issues. With gas substantially below \$3 per million BTUs, that sensitivity to costs—including regulatory costs—will continue. Excessive regulation will almost certainly dampen gas development, and/or push gas production away from areas with more burdensome regulations and into areas that have less protective environmental regimes, another outcome we want to avoid.

I especially endorse the authors' suggestion that disclosure should play an important, albeit secondary role, in this proposed structure. Disclosure can go a long way to help address the skepticism that so many feel about the industry—it is an important part of the education component that I feel is so necessary. I take some of my lessons on disclosure from the success we had during the Clinton Administration in expanding the federal Toxic Release Inventory (TRI) program. TRI educates individuals and communities, and allows them to work successfully—sometimes with industry, and sometimes against it—to achieve reductions in toxic pollutants. Given that one important voluntary reporting tool already exists for the natural gas industry—FracFocus<sup>1</sup>—and many states

have or are adopting their own disclosure programs, there is every reason to ensure these programs become universal.

I similarly endorse the authors' preference for *ex ante* regulation where the risks are not novel or heterogeneous. It is an axiom of environmental policy that pollution prevention is cheaper, and usually easier, than remediation.

I will close with an observation about the politics that I think will surround any effort to adopt such regulatory and liability regimes. To put it mildly, it will not be easy. The industry as a whole will certainly fight it, especially proposals that impose strict liability. I think it is likely that some environmental groups will suggest it doesn't go far enough. The industry will say that sufficient programs are already in place and that additional regulation would risk crippling it. I think many of them also genuinely believe that no additional regulation is necessary because the risk simply does not justify it.

When I first started working for ANGA, it was in the early days of efforts to require disclosure of the contents of fracking fluid. As I observed and was involved in internal discussions among industry participants, it became clear to me that my thinking about disclosure was very different than theirs. I saw disclosure requirements as ultimately helpful to the industry, probably even necessary to its survival. I also saw disclosure requirements as inevitable; they were the headlight of a train that was bearing down on the industry. I hoped that they would get aboard that train and try to shape them. But at that early time, many of them dismissed the need for disclosure, saying, "It is impossible for a properly constructed well to contaminate groundwater. The amount of toxic constituents in fracking fluids is incredibly small as compared to the total volume of fluid injected. We have to disclose the contents to medical staff if there is any human exposure. There really is not anything for the public to worry about, so why should we have to take on the burden of additional disclosure?" They thought that a properly educated public would understand that there was no risk, and therefore disclosure wasn't necessary. To be fair, the industry ultimately did get on board with disclosure. I strongly suspect that the same attitude will prevail with any additional effort to regulate their operations. It suggests that we have a lot of hard work ahead of us to create an atmosphere where regulatory bodies, the industry, and the public can come together to create thoughtful and successful regulatory and liability regimes, which will help ensure that we have a robust oil and gas industry for the foreseeable future.

1. See FRACFOCUS CHEMICAL DISCLOSURE REGISTRY, <http://fracfocus.org> (last visited June 12, 2013).