

Client Update

Bureau of Land Management Issues Final Rule for Fracking on Federal and Tribal Lands

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On March 20, 2015, the Bureau of Land Management at the U.S. Department of the Interior (“BLM”) issued a final rule governing drilling and hydraulic fracturing (“fracking”) on federal and tribal lands (the “Rule”). Updating 25-year-old regulations that did not address fracking in detail, BLM established requirements for fracking requests, well integrity, disclosure of chemicals and storage of recovered fluids. While the requirements only apply to public lands, some states may use them in formulating their own fracking regulations.

BACKGROUND

While fracking has been used for decades to extract oil and gas, recent technological advances have made the process more economically viable, which has resulted in its rapid adoption. Concerns have been raised about fracking’s potential impacts to the environment, including potential impacts to water supplies. In response to these concerns, BLM and the U.S. Environmental Protection Agency (“EPA”) have been assessing the environmental impacts of fracking.

THE RULE

The Rule takes effect on June 24, 2015 (the “effective date”). Generally, the Rule applies to all fracking wells on federal and tribal lands, though with some important exceptions. The Rule supplements BLM’s existing oil and gas regulations and adds requirements for fracking operations. The new requirements include the following:

Requests for Approval of Fracking

The Rule requires fracking operators to submit a request for approval of fracking operations (“Fracking Request”) to BLM. Prior to the Rule, regulations only required a Notice of Intent (“NOI”) for non-routine fracking operations. The Fracking Request is a new requirement that must be submitted with either an

NOI or the standard BLM Application for Permit to Drill (“APD”). Fracking Requests must include information on the geology of the wellbore, the location of faults and fractures, the direction and length of fractures, the depths of usable water and estimates of the volume of fluid to be used, among others. In some cases, it is not necessary to submit a Fracking Request if an APD was approved prior to the effective date.

Well Integrity

In order to protect water zones, existing regulations require oil and gas operators to cement well casings using cement of a certain quality and depth. Under the Rule, fracking operators submitting Fracking Requests will generally have to include cement reports that meet new standards. Fracking operators must demonstrate that the cement is adequately bonded and of a certain depth. In certain instances, the Rule requires operators to submit cement evaluation logs to demonstrate compliance. Fracking operators must now also test the surface pressure of any casing or fracturing string prior to conducting fracking operations.

Disclosure of Chemicals

Within 30 days of completing the last stage of fracking, operators must disclose the type and amount of chemicals used in the fracking process for each well. Operators must also submit a report to BLM concerning the handling and disposal of recovered fluids.

The disclosure of chemicals used in fracking operations is predominately a state issue. Prior to 2005, the federal Safe Drinking Water Act required the disclosure of chemical content for underground injections. In the 2005 Energy Policy Act, however, Congress exempted fracking operators from such regulation.

Under the Rule, operators may disclose chemicals through a report submitted to BLM or through FracFocus, a publicly accessible online registry managed by a joint venture between the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission. FracFocus was started in 2011 to inform the public of the chemical content of the fracking fluids injected into oil and gas wells. As of March 1, 2015, 20 states adopted FracFocus as a disclosure reporting regime.

Under the Rule, certain chemical information may be exempt from disclosure to the public as trade secrets. An operator seeking an exemption will have to submit an affidavit and, if requested by BLM, the chemical information for evaluation. If BLM determines that the information is not exempt from disclosure, it will

notify the operator and owner prior to releasing such information to allow them to seek a court order preventing release of the information. A recent EPA analysis of FracFocus found that 11% of the ingredients used in fracking were undisclosed as business secrets and that 70% of wells examined used at least one chemical that was unidentified.

Storage of Recovered Fluids

Under the Rule, fluids recovered in the fracking process must be stored prior to disposal in rigid above-ground tanks (“frac tanks”), and not, with very limited exceptions, in lined pits as is currently a common industry practice. Operators seeking an exception from this requirement must demonstrate that a frac tank is infeasible for environmental, public health or safety reasons.

IMPACT

Costs to the Industry

BLM estimates that the Rule will result in compliance costs of \$11,400 per fracking operation. This reflects an increase of approximately 0.13% to 0.21% of the cost of drilling a well. Approximately one-half of the increased costs reflect the transition to frac tanks and 38% reflect increased evaluations of cement adequacy and depth. Some oil and gas industry representatives argue that BLM significantly underestimated these costs.

Reactions and Perspectives

Wyoming has already filed a petition in federal court seeking to set aside and vacate the Rule. Wyoming argues that (i) BLM exceeded its authority because Congress gave EPA the exclusive authority to regulate underground injections and (ii) the Rule attempts to regulate underground injections for fracking, a category that Congress exempted from the regulation of underground injections in the 2005 Energy Policy Act. North Dakota has filed a motion to join Wyoming’s suit, making a similar argument. The Independent Petroleum Association of America and the Western Energy Alliance jointly filed a similar petition.

The oil and gas industry generally supports disclosure through FracFocus. However, they argue that the Rule duplicates existing state regulations and will slow development of federal lands. Others argue that the Rule does not require sufficient disclosure of potential environmental and health risks and oppose the mechanism of disclosure through FracFocus.

The true impact of the Rule remains to be seen. The Rule only applies to federal and tribal lands, from which only 11% of the country's natural gas production is sourced. Under the Rule, states and tribes, with BLM approval, can issue a variance for specific regulations that meet or exceed the Rule. Ultimately, state laws will determine the regulatory consequences for the vast majority of fracking wells. States seeking to revise or formulate new fracking regulations may look to the Rule for guidance. This may have broader implications as regulators and the public scrutinize health and safety issues associated with fracking.

We will continue to monitor developments regarding fracking on federal and tribal lands, including challenges to the Rule.

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Please do not hesitate to contact us with any questions.