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Rules Governing Fracturing Conducted on Federal Lands Become Effective June 24

BY TOM MOUNTEER

With the U.S. on track to become the world's largest oil and gas producer, the federal government has overhauled its 30-year-old rules governing hydraulic fracturing operations on public lands.

On March 20, the Department of Interior's Bureau of Land Management ("BLM") issued final rules governing fracturing on federal public lands. BLM first proposed the rules at the end of 2012, withdrew them in January 2013, and then, in May 2013, issued the proposed rules it has now finalized. The rules will become effective on June 24, 2015, 90 days after their publication in the May 26 edition of the Federal Register (80 Fed. Reg. 16,128).

The new rules will apply to about 90,000 of the 100,000 oil and gas wells drilled on 35 million acres of federal public and tribal lands that use hydraulic fracturing. About 11 percent of all hydraulic fracturing occurs on federal land. The balance occurs on private and state-owned land. States have jurisdiction on private and state-owned land where the vast majority of fracking is done.

Given the predominance of public lands in the Western U.S., the rules will have their most significant impact in that region. BLM estimates that new rules would add about $5,500 to the cost of fracturing at each well.

Substantive Requirements

The substantive requirements of the new federal rules follow the pattern of rules in states that regulate fracturing closely or industry best practices. The rules allow states and tribes to request variances from provisions for which they have equal or more stringent rules in place.

Submission of Geologic Information. The new rules require producers to augment the information they submit with their Application for a Permit to Drill ("APD") on federal land with additional information on the geology, depth, and location of pre-existing wells to allow the BLM to better evaluate the APD and manage site characteristics.

Wellbore Integrity. The new rules impose a number of requirements to assure well integrity and the strength of the cement casing between the wellbore and the water zone through which the wellbore passes. Those requirements include design and implementation of best practices to monitor cementing operations during well construction, correcting indications of inadequate cementing and proving the corrections worked, performing mechanical integrity tests before commencing fracturing operations, and monitoring annulus pressure during fracturing. Government inspectors are authorized to inspect

and validate the safety and integrity of the barriers at wells of their choosing—not so-called "type wells" selected by producers.

Public Disclosure of Fracking Chemicals. Producers will have to disclose the chemicals used in fracturing through the FracFocus website within 30 days of completing fracking operations, with an exemption for those chemicals that qualify for trade secret protection. Rules in 20 states already required disclosure with FracFocus, and another four states were considering doing so.

Wastewater Handling and Disposal. With limited exceptions, producers have to store produced water in covered tanks instead of lined pits to prevent risk to air, water, and wildlife, and take steps to reduce the risk of cross-well contamination by chemicals and fluids used in the fracturing process.

Opposition from Environmentalists and Industry

Like so many environmental rules, the new fracturing rules drew opposition from both the environmental community as well as industry.

While groups like Earthworks liked the effective ban on using unlined pits to store produced wastewater, the Natural Resource Defense Council wished the rules put more public lands altogether off limits to fracturing. The League of Conservation Voters disagrees with relying on chemical disclosure via the industry-sponsored FracFocus website.

The day before BLM issued the rules, Sen. Jim Inhofe (R-OK), chairman of the Senate Environment and Public Works Committee, introduced a bill to leave regulation of fracturing exclusively in the hands of state governments. In states that already regulate fracking, rules follow a similar pattern to the new federal rules. The Administration hopes the new federal rules will serve as model for states that do not yet have rules.

Within hours of BLM's issuing the rules, the Independent Petroleum Association of America and Western Energy Alliance filed a lawsuit in Wyoming challenging the rules. The Petroleum Association said the rules address "unsubstantiated concerns," on the belief that state regulations are sufficiently protective.

Opponents of the new rules fault their duplication of existing state rules. Several states—Colorado, Montana, Utah, and Wyoming for example—already require public disclosure of fracking chemicals. Within a few days of the issuance of the new rules, the State of Wyoming filed a challenge as well. Wyoming claimed BLM exceeded its statutory authority in issuing the rules.

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Over the past few years, there has been a convergence by which reputable, investment grade fracturers abide by practices similar to those incorporated in the new federal rules. The current brouhaha may have as much to do with beliefs about the proper role for the federal government in regulating fracturing operations than with outright disagreement with the substantive requirements of the new rules. As noted, 20 states already require public disclosure of fracking chemicals via the FracFocus website. BLM's limiting the new rules to federal lands necessarily deprives opponents of some grounds for opposing them. The new rules should address some of the clamor for greater oversight of this practice, even if the rules directly govern only 11 percent of all U.S. fracturing.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Washington, D.C. lawyer:

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