

BLM Moves to Rescind Federal Fracking Regulations

In a proposed rule published yesterday in the Federal Register, the Department of the Interior's Bureau of Land Management (BLM) seeks to rescind Obama-era regulations governing hydraulic fracturing on public lands. The regulations—which were promulgated in March 2015 and later stayed before they ever took effect—would impose stringent well casing integrity requirements and increased standards for storage and disposal of waste fluids. The regulations would also require operators to submit detailed geological information to the BLM and publicly disclose chemicals used in the fracking process via the website www.fracfocus.org.

Although the regulations would apply only to operations on federal and Native American tribal lands (which represent around 10% of fracking operations in the U.S.), they have been met with widespread disapproval. Critics argue that the regulations are either redundant or conflict with existing laws, and many have voiced concerns that the regulations may be used as a de facto standard for state legislatures developing their own fracking rules. The federal reporting requirements in particular have come under intense scrutiny due to the potential for disclosure of trade secret information related to proprietary fracking fluids.

Two industry groups (the Independent Petroleum Association of America and the Western Energy Alliance), four states (Wyoming, Colorado, North Dakota and Utah), and the Ute Indian Tribe have filed suit in Wyoming federal court challenging the regulations, and in June 2016, a Wyoming district judge ruled in their favor, finding that Congress had not delegated authority to the BLM to regulate hydraulic fracturing. The Obama administration appealed that ruling to the U.S. Court of Appeals for the Tenth Circuit, which initially scheduled oral argument for March 2017. Following the recent presidential election, however, the Tenth Circuit issued an order asking the BLM if it wished to proceed with oral argument given a potential shift in federal policy, stating that “the court is concerned that the briefing filed by the federal appellants in these cases may no longer reflect the position of the federal appellants.” In response, the BLM asked the court to stay the litigation to provide the new administration an opportunity to review the matter. Oral argument has been rescheduled for this Thursday.

The BLM's proposed rule confirms that the government's position has changed drastically. The proposed rule states that implementation of the 2015 regulations “would result in compliance

costs to the industry of approximately \$32 million per year (and potentially up to \$45 million per year),” which costs the BLM has determined are “not justified.” The proposed rule goes on to acknowledge that all 32 states with federal oil and gas leases currently have laws or regulations governing hydraulic fracturing, and that “the appropriate framework for mitigating [environmental] impacts exists through state regulations, through tribal exercise of sovereignty, and through BLM’s own pre-existing regulations and authorities.” Regarding disclosure of the chemical content of hydraulic fracturing fluids, the proposed rule recognizes that such disclosure “is more prevalent than it was in 2015 and there is no need for a Federal chemical disclosure requirements, since companies are already making those disclosures on most of the operations, either to comply with state law or voluntarily.” Notably, although not mentioned in the proposed rule, a number of states have enacted legislation designed to protect the secrecy of proprietary information that operators are required to submit to state regulatory bodies.

In sum, the proposed rule concludes that the 2015 regulations are “unnecessarily duplicative of state and some tribal regulations and impose burdensome reporting requirements and other unjustified costs on the oil and gas industry.” Public comment on the proposed rule will be accepted for 60 days after publication, following which the BLM will make any necessary changes before publishing a final rule. A new legal battle between the Trump-led BLM and proponents of the 2015 regulations may be on the horizon.