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Bureau of Land Management Issues Proposed Rule Establishing Disclosure and Integrity Requirements for Hydraulic Fracturing on Federal and American Indian Lands

Introduction

On May 11, 2012, the Bureau of Land Management (BLM) issued a Proposed Rule[1] that would require the public disclosure of chemicals used in hydraulic fracturing operations, set requirements for well-bore integrity and establish flowback water standards for for all hydraulic fracturing operations on federal public lands and American Indian lands held in trust by the United States (Tribal lands). If adopted as proposed, BLM's rule would impact fracturing operations on 700 million subsurface acres of public land and 56 million acres of Tribal lands.[2] According to BLM estimates, approximately 90 percent of the 3,400 wells drilled annually on public and Tribal lands are hydraulically fractured.[3] BLM has opened a 60-day comment period on the Proposed Rule (comments are due on or before July 10, 2012). However, for comments concerning the Proposed Rule's information collection requirements, BLM recommends that comments be submitted by June 11, 2012 to ensure that the Office of Management and Budget (OMB) may consider them before rendering its decision on the Proposed Rule.[4]

"BLM estimates that the anticipated benefits of the Proposed Rule range from US$12 million to US$50 million per year and the estimated costs range from US$37 million to US$44 million per year."

Contents of the Rule

The Proposed Rule would expand the scope of BLM's current regulation of oil and gas production on public and Tribal lands to address issues associated with hydraulic fracturing operations. The Obama Administration has recently issued a suite of new and proposed rules[5] (and related guidance[6]) directed at hydraulic fracturing operations, of which the Proposed Rule is a part. The existing BLM rules regulating natural gas production on public and Tribal lands were established in 1982 and last revised in 1988, many years before hydraulic fracturing technology was in wide use.

The Proposed Rule would revise existing federal oil and natural gas regulations[7] to reflect current industry practices and techniques, such as hydraulic fracturing, and would add new sections[8] requiring the disclosure of chemicals used in well stimulation operations and mandate mechanical integrity tests prior to stimulation

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activities. Crucially, the Proposed Rule would not impose substantive restrictions on hydraulic fracturing operations (*e.g.*, banning the use of certain chemicals). Rather, the Proposed Rule would adopt procedural requirements that generally reflect requirements currently in place at the state level. The Proposed Rule also attempts to integrate disclosure with state regulators through a central chemical disclosure registry, FracFocus.org. The Proposed Rule would update the language in BLM's existing regulations to improve readability and clarity and reflect industry practices that were not widespread when the current regulations were promulgated. Specifically, the Proposed Rule would remove the two somewhat ambiguous terms that have dictated the extent of regulation on federal lands — "nonroutine fracturing jobs" and "routine fracturing jobs" — and add definitions for "annulus," "bradenhead," "proppant," "stimulation fluid," "usable water" and "well stimulation."[9] As a practical matter, most of the Proposed Rule's requirements can be divided between pre-approval requirements and post-completion reporting requirements.

Pre-Approval of Well Stimulation Operations

For all well stimulation activities that take place after the effective date of the rule, operators would be required to submit a Sundry Notice and Report on Wells (Form 3160-5) to BLM for approval[10] and complete a Mechanical Integrity Test[11] prior to commencing stimulation activity.

Sundry Notice Information Requirements: At least 30 days before the operator wishes to begin well stimulation operations, the operator must submit a Notice of Intent of Sundry containing the following information:

- *Geological Information*: The geological names, a geological description and the depth of the top and bottom of the formation into which well stimulation fluids would be injected.[12]
- *Cement Bond Logs*: The proposed measured depths of all occurrences of usable water and logs evidencing that all occurrences of usable water have been isolated and protected from contamination.[13]
- *Perforation Depth, Water Source, Pump Pressures and Transportation Routes*: The proposed measured depth of the perforations in the casing and uncased hold intervals, information about the water source to be used in the operation, disclosure of the proppants to be used and the anticipated pressures to be used in the operation.[14]
- *Certificate of Compliance*: Operators would certify, in writing, that they are in compliance with all applicable federal, tribal, state and local laws, rules, and regulations pertaining to the proposed stimulation fluids and that operators have complied with all notice and permit requirements.[15]
- *Proposed Well Stimulation Engineering Design*: Detailed description of the well stimulation engineering design for BLM approval, including total volume of fluid used, anticipated surface treating pressure range, maximum injection treating pressure and estimated fracture length and height.[16]
- *Flowback Fluid Handling*: Operators would submit information on the estimated volume of fluid to be recovered, proposed method of handling flowback fluids (including pit requirements, chemical composition of the fluid, etc.) and the proposed disposal method.[17]

Mechanical Integrity Test: The Proposed Rule would also require operators to perform a successful mechanical integrity test prior to the commencement of well stimulation operations.[18] The mechanical integrity test would need to emulate the pressure conditions anticipated in the proposed stimulation process.[19] This section

would also establish engineering criteria for using a fracturing string during well stimulation[20] and would mandate that the well-bore maintain the desired pressure for 30 minutes with no more than 10 percent pressure loss.[21]

Post-Completion Reporting Requirements

Within 30 days after completion of well stimulation operations, the Proposed Rule would require operators to submit a Subsequent Report Sundry Notice (also using Form 3160-5) to BLM containing, in pertinent part, the following information:

- *Chemical disclosure*: Operators would be required to disclose all chemical additives used in the fracturing operation by trade name and purpose and include a report that disclosed the complete chemical makeup of all materials used in the actual stimulation fluid.[22] The information would be required in a format that would not link additives to the chemical composition of the materials in order to minimize the risk of disclosure of formulas. The disclosure requirement is modeled after the approach adopted by Colorado in 2011.[23]
- *Depth, Pressure & Transportation*: Disclosure of the actual measured depth of the perforations or open-hole interval, source of the water used, proppants used, estimated pump pressures, information on concerning water supply (*e.g.* rivers, creeks, springs, lakes, ponds and wells) and the transportation method for all water used in well stimulation activities.[24]
- *Fracture Information*: The calculated, estimated or actual length and height of the fracture.[25]
- *Certificate of Compliance*: The operator would submit a signed certificate of compliance certifying that the treatment fluid used complied with all applicable permitting and notice requirements and all applicable federal, tribal, state and local laws, rules and regulations[26] and that well-bore integrity was maintained throughout the operation.[27]
- *Fluid Handling*: Operators would provide information describing the handling of fluids used in the stimulation activities, flow-back fluids, and produced water during and after fracturing operations.[28]
- *Deviation*: Operators would submit documentation and an explanation if the actual operators deviated more than slightly from the approved plan.[29]

Trade Secret Exemption: The Proposed Rule contains a trade secret exemption that would allow operators to exempt confidential information from the disclosure requirements.[30] In order to exercise the exemption, operators would need to identify the confidential information, identify the federal statute or regulation that protects the information, and explain in detail why the information should be protected from public disclosure. In addition, operators would be required to inform BLM whether the information was otherwise publicly available (*e.g.*, previously disclosed under state law).[31]

Storage Requirements: The Proposed Rule would require operators to store recovered fluids in tanks or lined pits. In an effort to grant flexibility, operators would be allowed to choose between lined pits or tanks based on the anticipated cost and burden.[32]

Impact on Industry

BLM estimates that the anticipated benefits of the Proposed Rule range from US$12 million to US$50 million per year and the estimated costs range from US$37 million to US$44 million per year. There is considerable debate over both the anticipated cost of the Proposed Rule and the extent to which it overlaps

with existing state regulations. Currently, at least 11 states have some form of chemical disclosure requirement in place.[33] There is a great deal of variability among the state regulations, including the amount of disclosure required, trade secret protections, whether disclosure is public and the timing of the disclosure. Some state regulations, like those of Wyoming, are generally considered to be more stringent than the Proposed Rule's requirements. Industry and state officials voiced concern that the rule would create more paperwork and impose unnecessary burdens, while offering little to no benefit. The Proposed Rule was reworked by Office of Management and Budget prior to publication to reduce overlap with state regulations.[34]

Some Tribal leaders have contended that the Proposed Rule would make natural gas development on Tribal lands significantly more cumbersome than on state or private property, placing tribes at a competitive disadvantage.[35] Indeed, where reservations are "checkerboarded," oil and gas operators would be able, in some cases, to move just a few feet away onto privately held or state lands where none of the new regulations would apply, potentially depriving tribes of critical sources of revenue.

Lastly, the Proposed Rule's chemical disclosure requirements will likely be the subject of much debate among environmental groups, industry, and state regulators. The original draft of the rule required disclosure of the chemicals used 30 days before a well could be started. After further consideration and input, the disclosure requirements were moved to after the completion of fracturing operations. This concession is anticipated to receive a great deal of pushback. Already, environmental groups and a number of members of Congress question why disclosure should not happen before chemicals are used. Looming over the debate is an ongoing EPA study on groundwater contamination from fracturing operations, the results of which are anticipated to be released in 2014. The Proposed Rule, when taken in conjunction with other recent action by the Obama Administration, appears to be part of an effort to extend some amount of federal control over hydraulic fracturing activities, particularly on federal lands. Given the pendency of various ongoing studies and pressure from stakeholders, we would expect this trend to continue, particularly if President Obama is re-elected in November 2012.

Endnotes

1 Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Land, 77 Fed. Reg. 27,691 (proposed May 11, 2012) (to be codified at 43 C.F.R. pt. 3160).

2 77 Fed. Reg. at 27,691-2.

3 77 Fed. Reg. at 27,693.

4 *See* 77 Fed. Reg. at 27,691.

5 *See, e.g.*, Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, U.S. Environmental Protection Agency (Apr. 17, 2012) (expected publication in the Federal Register in May 2012), http://www.epa.gov/airquality/oilandgas/pdfs/20120417finalrule.pdf. *See also* "EPA Issues First Air Regulations for Hydraulically-Fractured Gas Wells & Associated O&G Development Equipment," Latham & Watkins Client Alert No. 1329 (April 26, 2012).

6 "Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels – Draft: Underground Injection Control Program Guidance #84" (Issued May 4, 2012).

7 77 Fed. Reg. at 27,694 (existing regulation at 43 C.F.R. §§ 3160.0 – 3162.3-2).

8 77 Fed. Reg. at 27,694 (to be codified at 43 C.F.R. § 3162.3-3(a)-(j)).

9 77 Fed. Reg. at 27,694.

[10] 77 Fed. Reg. at 27,695 (to be codified at 43 C.F.R. § 3162.3-3(b)). A Sundry Notice is also required if BLM's previous approval is more than five years old or new information about the relevant geology, the stimulation operation or technology, or the anticipated impacts on resources becomes available.

[11] 77 Fed. Reg. at 27,697 (to be codified at 43 C.F.R. § 3162.3-3(d)).

[12] 77 Fed. Reg. at 27,6975 (to be codified at 43 C.F.R. § 3162.3-3(c)(1)).

[13] 77 Fed. Reg. at 27,6976 (to be codified at 43 C.F.R. § 3162.3-3(c)(2)).

[14] 77 Fed. Reg. at 27,6976 (to be codified at 43 C.F.R. § 3162.3-3(c)(3)).

[15] 77 Fed. Reg. at 27,6976 (to be codified at 43 C.F.R. § 3162.3-3(c)(4)).

[16] 77 Fed. Reg. at 27,6976 (to be codified at 43 C.F.R. § 3162.3-3(c)(5)).

[17] 77 Fed. Reg. at 27,6976 (to be codified at 43 C.F.R. 3162.3-3(c)(6)).

[18] 77 Fed. Reg. at 27,697 (to be codified at 43 C.F.R. § 3162.3-3(d)).

[19] 77 Fed. Reg. at 27,697 (to be codified at 43 C.F.R. § 3162.3-3(d)(1)).

[20] 77 Fed. Reg. at 27,697 (to be codified at 43 C.F.R. § 3162.3-3(d)(2)).

[21] 77 Fed. Reg. at 27,697 (to be codified at 43 C.F.R. § 3162.3-3(d)(3)).

[22] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(4)-(5)).

[23] 77 Fed. Reg. at 27,698 (Colorado Oil and Gas Conservation Commission Rule 204A.b2.ix-xii).

[24] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(1)-(3)).

[25] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(6)).

[26] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(8)).

[27] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(9)).

[28] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(10)).

[29] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(11)).

[30] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(1)-(2)).

[31] 77 Fed. Reg. at 27,698 (to be codified at 43 C.F.R. § 3162.3-3(g)(3)).

[32] 77 Fed. Reg. at 27,697-8 (to be codified at 43 C.F.R. § 3162.3-3(f)).

[33] *See* "Hydraulic Fracturing: Chemical Disclosure Requirements," Congressional Research Service, April 4, 2012.

[34] "New Proposal on Fracking Gives Ground to Industry," New York Times, May 4, 2012.

[35] *See Bureau of Land Management's Hydraulic Fracturing Rule's Impacts on Indian Tribal Energy Development Before the Subcomm. on Indian and Alaska Native Affairs*, 158th Cong. (April 19, 2012),

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