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BLM Issues Final Rule on Hydraulic Fracturing on Federal and Tribal Lands

By Sara K. Orr and Benjamin M. Lawless*

This article explains the U.S. Bureau of Land Management's final regulations updating its existing rules regulating oil and gas drilling and hydraulic fracturing activities on federal and tribal lands.

Recently, the U.S. Bureau of Land Management ("BLM") released its final regulations updating its existing rules regulating oil and gas drilling and hydraulic fracturing activities on federal and tribal lands ("Final Rule"). The Final Rule was issued after an almost-three year rulemaking process during which the federal government received over 1.5 million public comments on two prior proposed rules. The Final Rule requires public disclosure of chemicals used in the hydraulic fracturing process, above-ground storage for wastewater, and enhanced well construction and testing, among other requirements.

The Final Rule applies only to well sites on federal and tribal lands, primarily in the Western U.S., and does not apply to operations on private lands. BLM estimates that the Final Rule will impact 2,814 hydraulic fracturing operations per year on federal and tribal lands in the near-term, and cost industry $26 million per year (an increase from the Revised Proposed Rule's cost estimate of $12 to $20 million per year). Operators must comply with the Final Rule once it becomes effective on June 24, 2015. Oil and gas operators are in the process of evaluating the Final Rule's estimated costs and efficiencies, as well as its potential environmental impacts, and litigation challenges to the Final Rule have already been filed by industry groups.

MAJOR CHANGES IN THE FINAL RULE

As expected, the Final Rule is designed to require upstream oil and gas drillers to

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1 Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands (issued Mar. 20, 2015) (to be codified at 43 C.F.R. pt. 3160) (hereinafter "Final Rule"). BLM initially issued its proposed rule in May 2012 ("Proposed Rule") and then issued a revised proposed rule for public comment in May 2013 ("Revised Proposed Rule").


3 See Final Rule at 317-321.

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engage in industry best practices and sets a minimum baseline for state and tribal regulators to follow in their future rulemakings. The 395-page Final Rule retains much of the substance of the 2013 Revised Proposed Rule, including allowing industry to use the “FracFocus” Web site to disclose the components of hydraulic fracturing fluids, and the concept of granting “variances” to states and tribes to regulate hydraulic fracturing operations as long as the state or tribal regulations meet or exceed BLM’s minimum requirements. However, the Final Rule contains a number of important changes and additions:

• **Storage Tank Requirement.** The Final Rule requires that operators use above-ground tanks to store recovered flowback fluids in lieu of lined pits, as would have been permitted by the Revised Proposed Rule. The Final Rule forbids the use of lined pits in all but a few, limited circumstances and instead requires that operators must manage recovered fluid in “rigid enclosed, covered or netted and screened above-ground tanks.” Department of Interior officials stated that this new requirement would cost approximately $5,500 per operation. Operators may apply for an exemption to use a lined pit only if the use of a tank is “infeasible for environmental, public health or safety reasons” and the pit would meet other specified requirements, including that it be of sufficient distance from water sources, usable groundwater, public places and unstable areas.

• **Public Disclosure.** The Final Rule expands on the types of information required to be publicly disclosed by operators within 30 days of a fracturing operation, as well as how the information is made publicly available. Under the Final Rule, if the operator submits the required disclosure information to BLM, it will be subsequently posted on the FracFocus Web site, a Web platform currently used by industry to disclose the contents of fracturing fluids. Operators may also submit the required information directly to the FracFocus Web site. The Final Rule requires that the operator provide information about each additive in the hydraulic fracturing fluid used in the operations, including information on proppants (such as sand) as well as chemical additives. The Final Rule also expands the disclosure requirements with respect to the volume of recovered water to include all recovered water, including water produced immediately after hydraulic fracturing but prior to the production of oil and gas.

5 To be codified at 43 C.F.R. Sec. 3162.3-3(h).
7 To be codified at 43 C.F.R. Sec. 3162.3-3(h)(1)(i)–(vii).
8 To be codified at 43 C.F.R. Sec. 3162.3-3(i).
9 www.fracfocus.org.
10 To be codified at 43 C.F.R. Sec. 3162.3-3(i)(6).
not require owners to submit information related to claimed trade secrets in connection with the disclosure of hydraulic fracturing fluid components. The Final Rule requires operators to submit to BLM specified information, including chemicals used, within 30 days after completion of the hydraulic fracturing process. Submitted information is presumed to be publicly available.\textsuperscript{11} For information the owner or operator claims to be exempt from public disclosure as a trade secret, an affidavit must be submitted to BLM. The affidavit must:

- identify the owner of the withheld information;
- identify the federal statute or regulation prohibiting the public disclosure of the information were it in BLM’s possession;
- include an affirmation that the operator has access to the withheld information, the information is not publicly available, and the information is not required to be publicly disclosed under any other applicable law;
- identify the competitors that would benefit from the information; and
- affirm that the trade secret information is not readily apparent through reverse engineering.

- \textit{Replacement of the “Type Well” Concept.} Under the 2013 Revised Proposed Rule, operators would have been allowed to submit to BLM a single cement evaluation log for a group of geologically similar wells using a model well or “type well.” In the Final Rule, operators are required to use and demonstrate the specified best practices for all wells, not just a model or “type” well. In place of the type well concept, the Final Rule allows operators to submit an Application for Permit to Drill ("APD") or Notices of Intent ("NOIs") for a group of similar wells with a single plan containing information for a group of wells with substantially similar geological characteristics, called a “master hydraulic fracturing plan.”\textsuperscript{12} However, operators must still receive an approved APD from BLM for each individual well before drilling may commence.

The Final Rule also allows the use of an expanded set of cement evaluation tools to protect usable water, updates the definition of “usable water” to include those waters generally containing up to 10,000 ppm of total dissolved solids, defers to state or tribal categorizations of groundwater to determine the usable water zones and formations that must be protected, and revises record retention requirements to ensure records of the use of chemicals in the hydraulic fracturing operation are retained for the full life of the well.

\textbf{NEXT STEPS}

As expected, litigation challenging the Final Rule was filed in the U.S. District Court.

\textsuperscript{11} To be codified at 43 C.F.R. Sec. 3162.3-3(j).

\textsuperscript{12} To be codified at 43 C.F.R 3160.0-5.
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Court for the District of Wyoming the same day the rule was released. In addition, bills were recently introduced in the U.S. Congress to declare that states have an exclusive right to regulate hydraulic fracturing.

Companies with operations on federal or tribal lands should carefully review the requirements of the Final Rule to consider the impact these regulations could have on their operations. Additionally, companies should monitor any potential regulatory changes that the BLM may be required to undertake in response to litigation.