

On July 25, 2017 the Bureau of Land Management published in the Federal Register a proposed rule that would rescind the Obama Administration's 2015 Rule titled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands." This proposal has been anticipated since the Interior Department announced in March earlier this year that the Department intended to review and rescind the 2015 Rule.

As background, the BLM began preparing the rule in 2010 to address growing public concern about the environmental consequences of hydraulic fracturing and the widespread use of hydraulic fracturing. The purpose of the 2015 rule was to "ensure that wells are properly constructed to protect water supplies, make certain that the fluids that flow back to the surface as a result of hydraulic fracturing operations are managed in an environmentally responsible way, and provide public disclosure of the chemicals used in hydraulic fracturing fluids." The specific requirements that the 2015 final rule placed upon well operators are listed in the Federal Register at 82 FR 34665-66 [here](#).

The 2015 rule never went into effect, however, as several states and industry and oil quickly challenged the rule in the U.S. District Court of Wyoming. The District Court [stayed](#) the 2015 final rule prior to the effective date, [preliminarily enjoined](#) the rule, and later [ordered the Interior to set aside the rule](#), concluding that the BLM lacked the authority to regulate hydraulic fracturing. The Interior Department and environmental groups then appealed the decision to the 10th Circuit. In March of 2017, the Court of Appeals required the Department to report whether it had changed its position on the appeal since the new administration had begun. The Interior Department announced that it was preparing to rescind the rule and the Court of Appeals soon postponed oral argument on the 2015 Rule. In addition, President Trump [issued Executive Order 17383](#) "Promoting Energy Independence and Economic Growth" which directed the Secretary of the Interior to review the 2015 final rule in March of 2017.

On July 27, the [10th Circuit heard oral arguments](#) on whether the federal government had the authority to issue the 2015 rule and whether the case should continue to be postponed while the Department of Interior continues the rule-making process to rescind the rule. The 10th Circuit could decide to put the case on hold pending the Department's rule making process, issue a decision on BLM authority to issue the 2015 rule, or could dismiss the case and vacate the district court's ruling that the BLM did not have authority to issue the 2015 rule.

The rescission of the 2015 Rule proposed last week would return the affected sections of the code to the language that existed immediately before the 2015 final rule was effected.

The BLM's arguments for rescinding the 2015 final rule are that: (1) the compliance costs to industry are burdensome, (2) the regulations are generally not necessary due to state regulations and the ability of tribes to regulate, (3) it is not necessary to require operators to disclose the chemical content of hydraulic fracturing fluids as many companies are now making those disclosures voluntarily or under state law, (4) pre-existing regulations will continue to require prior approval for "nonroutine fracturing jobs" (however without the 2015 rule, this term is not defined), and (5) resource and environmental damage from hydraulic fracturing is rare and best handled therefore through state and tribal regulations.

The draft [Environmental Assessment](#) for the proposal to rescind the 2015 rule references the economic analysis in the Regulatory Impact Analysis for the 2015 rule to analyze the compliance costs of that rule: although the compliance costs of the 2015 rule were estimated to be approximately \$32 million per year, or possibly up to \$45 million per year, this would only amount to 0.13 to 0.21 percent of the cost to drill a well. (See page 28 of the Environmental Assessment).

The Bureau of Land Management has posted a [Regulatory Impact Analysis](#) and a draft [Environmental Assessment](#) on the rescission of the rule and is seeking comments on these documents. The alternatives analyzed in the Environmental Assessment are only "no action" and rescinding the 2015 rule. The draft Environmental Assessment supports a finding of no significant impact, meaning that the Department would not need to conduct a more thorough analysis of the impacts, alternatives, and mitigation strategies of the rescission through an Environmental Impact Statement. The Environmental Assessment concludes that rescinding the 2015 rule will not affect the number of hydraulic fracturing operations on Federal and Indian land. The EA analysis of the "no action" alternative concludes that:

"The 2015 final rule could provide the BLM with additional assurance that hydraulic fracturing operations are conducted in safe and an environmentally responsible manner by: (i) Establishing procedures and performance standards that could help the BLM verify whether wells proposed for hydraulic fracturing are capable of withstanding the anticipated fracturing pressures, (ii) Requiring operators to monitor and report the cementing operations of a well to help ensure proper isolation of usable water zones and undertake specific mitigation actions when there are signs of an inadequate cement job, and (iii) Requiring operators to store recovered fluids in tanks to reduce the threat of leaks or spills on the surface. The rule could also assist in informing the public of the chemical ingredients contained in hydraulic fracturing fluids." (page 28 of Environmental Assessment).

The EA analysis of the rescission of the 2015 rule raises concerns about the impact of fracturing on drinking water and on the environment generally; however, it concludes that

the estimated reduction in compliance costs of 0.1 to 0.2 percent of the cost of drilling a well justifies any potential lessening of the assurances that hydraulic fracturing is conducting in an environmentally sound manner. (page 32 of Environmental Assessment). The assessment emphasizes the availability of state and tribal regulations, existing BLM regulations, and industry best practices as helping to mitigate the risks of hydraulic fracturing.

The deadline to submit public comment to the Bureau of Land Management is September 25, 2017. The BLM requests comments on the specific regulatory changes that would be made by this proposed rule, information about state and tribal capacity to regulate hydraulic fracturing, and what other approaches could be taken under the existing Federal authorities, including what information could be collected during the application for a permit to drill (“APD”) process to minimize hydraulic fracturing risks in state and tribal lands with limited regulations. After the comment period closes, the Department of Interior will prepare a final Environmental Assessment and issue a final rule on whether it will rescind the 2015 rule. Comments can be submitted [here](#).

Alexandria Sadler helped draft this blog post.