



Industry and States Legally Challenge Federal Hydraulic Fracturing Regulations

States and industry organizations are seeking to invalidate a recent hydraulic fracturing rule promulgated by the U.S. Bureau of Land Management (the Rule).¹ The Rule will go into effect on June 24, 2015, and litigation has been filed by states and industry organizations to halt implementation of the Rule. Industry organizations brought suit to request a review of the Rule on March 20, 2015, and filed a request for a preliminary injunction to enjoin the Rule's application on May 15, 2015. Colorado and Wyoming filed a separate suit on May 29, 2015, to request a preliminary injunction alleging irreparable harm if the Rule is implemented.² In addition, several non-governmental organizations (NGOs) filed an unopposed motion to seek to intervene as respondents in the litigation, claiming that they have a right to defend the Rule and to prevent the Rule from being further diminished. This *Alert* summarizes the parties' litigation positions with respect to the Rule and impending dates, concluding with oral arguments currently scheduled for June 23, 2015.

U.S. Bureau of Land Management Rule Titled "Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands"

The Bureau of Land Management (BLM) published the Rule entitled "Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands" on March 26, 2015. The Rule provides revisions for current federal oil and gas regulations that pertain to hydraulic fracturing on federal and Indian lands. The Rule addresses drilling operations on over 750 million acres of lands contained within several western states. BLM reports that it received more than 1.35 million public comments on its initial

¹ 80 Fed. Reg. 16,128 – 16,222 (March 26, 2015).

² The state of North Dakota is expected to file a similar preliminary injunction motion in the coming days.

proposed rule.³ Several industry organizations and states have asserted in the litigation that the Rule will severely curtail and impede oil and gas development on federal and Indian lands.

The Rule includes requirements for: (i) operators to procure BLM approval for hydraulic fracturing operations; (ii) industry best practices for constructing and monitoring wells; (iii) storage of recovered fluids in above ground tanks; and (iv) disclosure and public availability of chemicals used in hydraulic fracturing operations. The Rule also creates opportunities for the BLM to coordinate standards with states and Indian tribes to attempt to decrease administrative costs.

States claim that the Rule infringes on State sovereign authority to regulate oil and gas production within each state's boundaries and exceeds the authority of BLM. Industry organizations argue that the Rule is duplicative, complicated, and costly. The environmental NGOs assert that while the Rule is not stringent enough, it must be preserved in order to protect the benefits that it does provide to the environment.

Industry Organizations' Claims

In its memorandum in support of a motion for preliminary injunction, industry organizations claim that application of the Rule will cause them irreparable harm and that the Rule lacks a scientific basis. The industry further argues that hydraulic fracturing—a procedure used by oil and gas producers to allow for collection of oil and gas by injecting water, sand, and specific chemicals into rock formations—has allowed for increased production from domestic wells over the past decade. Citing a publication by the U.S. Department of Energy, the industry organizations argue that hydraulic fracturing has facilitated the production of more than 600 trillion cubic feet of natural gas and seven billion barrels of oil.⁴

According to the industry, BLM has arbitrarily issued an unjustifiable rule that is arbitrary and capricious under the Administrative Procedure Act because it contains impossible certification requirements for industry compliance, impossible or inapplicable storage requirements for recovered fluids, and an undefined mechanical integrity test for hydraulic fracturing equipment. The industry organizations also claim that BLM has offered no empirical evidence or scientific basis for the Rule's requirement that operators isolate all usable water in order to protect it from contamination. Further, the industry organizations claim that the Rule will lead to a reduction in operations on federal and Indian lands because the costs of implementing the Rule are more than BLM estimates. The industry organizations also believe the prohibitive costs of the Rule could motivate the industry to pursue alternative options for production on adjacent fee and state lands.

The United States' response to the motion for preliminary injunction argues the industry organizations are unlikely to succeed on the merits in their request for a preliminary injunction.⁵ The United States posits that the industry organizations ignored the applicable provisions and explanations of the Rule and that they failed to demonstrate a likelihood of imminent, irreparable harm. The United States further claims that BLM has the responsibility to administer public lands and resources for a sustained yield, and that BLM has the discretion to implement protective standards for federal and Indian lands. According to the United States, the Rule is necessary to address the technological advances in horizontal drilling and hydraulic fracturing in an effort to prevent undue degradation of the environment.

³ 80 Fed. Reg. at 16,131.

⁴ Memorandum in Support of Motion for Preliminary Injunction, *Independent Petroleum Association of America, et al., v. U.S. Department of the Interior Secretary, et al.*, 2:15-cv-00041-SWS, *3 (D. Wyo. 2015).

⁵ Respondents Brief in Opposition to Petitioners' Motion for Preliminary Injunction, *Independent Petroleum Association of America, et al., v. U.S. Department of the Interior Secretary, et al.*, 2:15-cv-00041-SWS (D. Wyo. 2015).

The industry organization's motion for preliminary injunction was filed on May 15, 2015, and the United States' response was submitted on June 1, 2015. The Industry organization's reply to the response is due Monday, June 8, 2015, and oral arguments are scheduled for the morning of June 23, 2015.

States' Claims

Colorado and Wyoming claim that BLM has exceeded its jurisdiction and that both states—along with other states that regulate hydraulic fracturing—will suffer a loss of their exclusive sovereign authority over hydraulic fracturing.⁶ The states allege that the Rule is duplicative and burdensome because Colorado and Wyoming both have comprehensive regulations for all phases of oil and gas production, including hydraulic fracturing. The states say that by making the process for drilling more complicated, the Rule will prevent economic development within their borders.

Moreover, the states assert that the statutes cited by BLM for its authority to promulgate the Rule do not actually authorize the BLM to regulate hydraulic fracturing.⁷ In contrast, the states cite the Safe Drinking Water Act and the 2005 Energy Policy Act for their sovereign authority to regulate hydraulic fracturing.⁸

Utah's Governor Gary R. Herbert said last month that Utah endeavors to join Colorado and Wyoming in their suit. The State of North Dakota has already intervened in the litigation.

The states' preliminary injunction motion was filed on May 29, 2015. The response from the United States is due Monday, June 8, 2015, and oral arguments are scheduled for the morning of June 23, 2015.

NGOs' Claims

Several environmental NGOs including the Sierra Club, Earthworks, The Wilderness Society, Conservation Colorado Education Fund, Western Resource Advocates, and Southern Utah Wilderness Alliance (collectively, the Citizen Groups) have sought intervention as respondents in the states' suit.⁹ The Citizen Groups seek to defend the Rule and preserve its goals of environmental protection.

The Citizen Groups claim that they are an interested party because they use public lands and advocate for their protection. The Citizen Groups state that the Rule will provide transparency for hydraulic fracturing operations and help the groups protect their interests. The Citizen Groups also argue that BLM will not be able to adequately represent the groups' interests because the agency balances both mineral extraction and environmental protection. The Citizen Groups cite numerous examples of how the BLM has already compromised the groups' interests during the promulgation of the Rule.¹⁰ The Citizen Groups also assert that if they are not allowed to intervene, then the BLM will only have to address the states' arguments, which seek to weaken and eliminate the Rule.¹¹

The Citizen Groups' motion to intervene was unopposed, and it is expected that the court will grant the motion. The Citizen Groups filed an opposition to the industry organizations' motion for preliminary

⁶ Memorandum in Support of Wyoming and Colorado's Motion for Preliminary Injunction, *State of Wyoming, et al., v. U.S. Department of the Interior Secretary, et al.*, 2:15-cv-00043-SWS, *2 (D. Wyo. 2015).

⁷ *Id.* at 6.

⁸ *Id.*

⁹ Memorandum in Support of Citizen Groups' Unopposed Motion to Intervene as Respondents, *State of Wyoming, et al., v. U.S. Department of the Interior Secretary, et al.*, 2:15-cv-00043-SWS, *2 (D. Wyo. 2015).

¹⁰ *Id.* at 7-8.

¹¹ *Id.* at 9.

injunction on June 4, 2015, claiming that the industry organizations cannot prove that they will be harmed by the Rule.

Conclusion

The June 24, 2015, effective date of the Rule is quickly approaching, and oral argument on whether to enjoin the Rule's application will occur June 23, 2015. The district court judge for the district of Wyoming is expected to either rule from the bench or issue a short order that afternoon.

The Rule is complex and the foregoing should not be taken as legal advice. Greenberg Traurig attorneys are available to discuss the Rule with you in more detail and answer any specific questions.

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