

Concerns Remain Under BLM's New Fracking Rules

Law360, New York (May 28, 2013, 1:49 PM ET) -- The Bureau of Land Management has issued a revised proposed rule for regulating hydraulic fracturing. On May 16, 2013, the BLM issued a supplemental notice of proposed rule-making revising its original regulatory proposal from a year ago.

The proposed rule applies only to hydraulic fracturing conducted on federal and Indian lands. As revised, the proposed rule expressly does not apply to other “well stimulation” operations, including secondary recovery through flooding and tertiary recovery through steam injection.

The revisions focus on three main topics:

- Creating a mechanism to reduce overlap between the BLM’s regulations and state and tribal regulations that are equally or more protective
- Addressing disclosure of chemicals used in hydraulic fracturing, both by enabling use of an existing database and by providing more detailed guidance on how trade secrets claims will be handled
- Addressing well integrity through cement evaluation tools in order to protect usable groundwater from contamination

Current Regulation of Hydraulic Fracturing

Hydraulic fracturing involves the injection of fluid under high pressure to create or enlarge fractures in rocks, such as shale, that contain reservoirs of oil and gas. The fluid used in hydraulic fracturing usually is accompanied by another material such as sand, which is carried into the newly fractured rock and helps to keep the fractures open.

In addition to water and sand (which the BLM states typically makes up 98 to 99 percent of the materials pumped into a well during a fracturing operation), chemical additives frequently are used for purposes that include limiting growth of bacteria and preventing corrosion of the well casing. The exact formulation of the chemicals varies depending on the rock formation and the operator.

Recently, new horizontal drilling and fracturing technology has allowed increased access to shale oil and gas resources, including in areas of the country where large-scale oil and gas extraction had not previously occurred. In addition, there has been increasing public concern about whether hydraulic fracturing can cause contamination of underground water sources, whether the chemicals used in fracturing should be publicly disclosed and whether there would be adequate management of well integrity and fluids that could flow back to the surface during and after fracturing operations.

These factors led the BLM to reconsider its existing regulations, which were established 30 years ago and were last revised in 1988. The existing regulations are found at 43 C.F.R. Part 3160.

The BLM reports that approximately 90 percent of wells drilled on federal and Indian lands use hydraulic fracturing. The BLM-managed mineral estates include 700 million subsurface acres of onshore federal estate and 56 million subsurface acres of Indian mineral estate. BLM regulations do not affect drilling on private or state lands.

Proposed New Regulations As Revised

Both the BLM's originally proposed rule and the revised proposed rule require BLM approval of all new hydraulic fracturing activities on federal and Indian lands and address three substantive topics: disclosure to the public of chemicals used in hydraulic fracturing on public and Indian lands; confirmation that wells used in fracturing operations meet appropriate construction standards; and a requirement that well operators put in place appropriate plans for managing "flowback" water that returns to the surface.

The revisions also would allow well operators, in some circumstances, to seek a variance to follow state or tribal regulations in lieu of federal regulations.

Chemical Disclosure Requirements

The original and revised proposed rule would require the disclosure to the BLM of chemicals used in the fracturing process after the fracturing process is complete. The BLM is now proposing additional protection for trade secrets in its revised proposed rule, allowing operators to submit an affidavit that undisclosed information about chemicals in hydraulic fracturing fluid should be exempt from disclosure. The BLM would retain its authority to demand specific chemical details of any materials for which a trade secret exemption is sought under the new proposal.

The revised proposed rule would require use of a specific website, FracFocus.org, for public disclosures. In addition, the BLM no longer proposes to require operators to provide an estimate of the chemical composition of flowback fluids, in response to concerns that this would effectively result in operators having to reveal the chemical composition of their fluids prior to operations.

Well Integrity and Reporting Requirements

The original proposed rule would have required operators to submit information in the form of a "cement bond log" to help the BLM ensure that water resources are protected. The revised proposed rule would allow more flexibility in testing protocols and would instead require operators to submit "cement evaluation logs" to verify that operators have properly cemented well casings and isolated water aquifers from the potential for contamination.

Additionally, operators would be required to submit an estimate of the total fluids to be used in fracturing operations, the maximum injection pressure, the volume of fluid to be recovered during flowback and the estimated fracture direction, length and height, including the projected fracture propagation on a map.

Water Management Plans for Flowback Fluids

Both the original and revised proposed rule would require well operators to provide a management plan demonstrating how surface water and groundwater would be protected from contamination by recovered fluids. The BLM is seeking comment on the costs and benefits of its proposed requirement that flowback fluids must be stored in closed tanks but has not otherwise substantially changed this requirement.

Variances

The revised proposed rule eases some of the regulatory burden that would have been created by the original proposal by providing the BLM with discretion to grant parties a variance in certain cases when state or tribal regulations meet or exceed federal standards.

Comments

The BLM is seeking public comment on all aspects of the revised proposed rule. Public comments are due within 30 days of the supplemental notice of proposed rule-making's publication in the Federal Register and may be submitted by using: the federal eRulemaking portal at www.regulations.gov; U.S. mail; or hand delivery to the BLM.

Remaining Concerns With the Revised Proposed Rule

While the BLM addressed several trade secret and technical concerns related to the originally proposed rule, it appears likely that environmental groups, the industry and other interests will call for further changes. One remaining issue that both environmental groups and industry have raised is how the proposed regulations fit into the BLM's regulation of public lands under other existing laws, such as the National Environmental Policy Act.

For example, in their comments on the previous rule, environmental groups expressed concern that the BLM may not be able to adequately assess the environmental impacts of a proposed hydraulic fracturing operation without knowing the full chemical composition of hydraulic fracturing fluids.

While the BLM responded to this concern in its comments on the proposed revised rule, the increased protections of confidential business information under the proposed rule may raise further concerns by environmental interests.

The requirement that the BLM approve hydraulic fracturing and refracturing operations at existing, approved wells also may burden the agency and industry by generating a substantial amount of litigation. Environmental groups are likely to challenge the BLM's hydraulic fracturing approvals in court, raising arguments under NEPA and other laws similar to claims that are currently being litigated in the *Center for Biological Diversity v. BLM* and *Center for Biological Diversity v. Jewell* cases in the U.S. District Court for the Northern District of California.

In those cases, environmental groups have argued that the BLM must complete a comprehensive environmental review of fracking before granting individual leases for oil and gas development on federal lands.

Conclusion

While the BLM's revised proposed rule addresses several concerns that arose out of its original proposal, significant issues remain. Interested parties that could be affected by the regulations should review the proposal closely and submit comments by the close of the comment period.

--By Barbara J. Schussman, Tyler G. Welti, Donald Baur and Nidhi J. Thakar, Perkins Coie LLP

Barbara Schussman is a partner in the firm's San Francisco office. Donald Baur is a partner, and Tyler Welti and Nidhi Thakar are associates in the Washington, D.C., office.

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