Multiple Documents

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2	Exhibit Exhibit 1
3	Proposed Order Proposed Order

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA, State Bar No. 196029
Supervising Deputy Attorney General
GEORGE TORGUN, State Bar No. 222085
SHANNON CLARK, State Bar No. 316409
Deputy Attorneys General
1515 Clay Street, 20th Floor
P.O. Box 70550
Oakland, CA 94612-0550
Telephone: (510) 879-1973
Fax: (510) 622-2270
E-mail: Shannon.Clark@doj.ca.gov

Attorneys for Plaintiff State of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL,

Plaintiff,

v.

DAVID BERNHARDT, Secretary of the Interior; JOSEPH R. BALASH, Assistant Secretary for Land and Minerals Management, United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Case No. 4:18-cv-00521-HSG

Case No. 4:18-cv-00524-HSG (related)

STATE PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: December 5, 2019
Time: 2:00 P.M.
Judge: Hon. Haywood S. Gilliam, Jr.

Courtroom 2, 4th Floor
1301 Clay Street, Oakland, CA 94612

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, on December 5, 2019, at 2:00 P.M., or as soon thereafter as it may be heard, Plaintiff State of California, by and through Xavier Becerra, Attorney General, by and through the undersigned counsel, will, and hereby do, move for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Civil Local Rule 7. This motion will be made before the Honorable Haywood S. Gilliam, Jr., United States District Judge, Oakland Courthouse, 1301 Clay Street, Oakland, CA 94612.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Plaintiff hereby moves for summary judgment on the ground that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. In support of this motion, Plaintiff submits the accompanying Memorandum of Points and Authorities and a Proposed Order.

Dated: June 3, 2019

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
GEORGE TORGUN

/s/ Shannon Clark
SHANNON CLARK

Attorneys for Plaintiff State of California

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MEMORANDUM OF POINTS AND AUTHORITIES

The State of California challenges a final action by the United States Department of the Interior's Bureau of Land Management ("BLM") to repeal a commonsense rule promulgated in response to widespread increases in hydraulic fracturing operations across the U.S. and documented concerns about these operations' impact on human health and the environment. Following a nearly five-year long rulemaking process in which BLM solicited over 1.5 million comments, the Hydraulic Fracturing on Federal and Indian Lands rule ("Fracking Rule" or "Rule") was issued in March of 2015. 80 Fed. Reg. 16,128 (Mar. 26, 2015) (AR 24014).[1] The Fracking Rule supplemented an antiquated regulatory scheme which had remained unchanged for over 25 years and was no longer adequate to manage the increasing use and complexity of hydraulic fracturing operations coupled with horizontal drilling technology. *Id.* Among other requirements, the Rule ensured the integrity of well construction to prevent contamination of drinking water supplies, set storage requirements for hydraulic fracturing fluids to prevent the leakage of dangerous chemicals and hazardous air emissions, and provided for public disclosure of chemicals injected during fracturing operations. *Id.*

These achievements were short-lived, however. Following a short nine-month rulemaking process in which BLM contradicted its own prior findings regarding the importance of the Rule, the agency abruptly issued a repeal of the Fracking Rule ("Final Repeal" or "Repeal"). *See* 82 Fed. Reg. 61,924 ("Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule") (Dec. 29, 2017) (AR 195). In its haste and determination to rescind the rule, BLM ignored foundational requirements of good rulemaking in the Administrative Procedure Act ("APA") and violated the important public disclosure and "hard look" requirements of the National Environmental Policy Act ("NEPA").

To begin, BLM failed to provide a "reasoned analysis" for the Repeal. The few justifications that BLM provides for its decision to repeal the Fracking Rule are all based on unsupported assertions that directly contradict the agency's prior findings in the record. BLM does not acknowledge or explain these inconsistencies. Similarly fatal to BLM's action is its

[1] The administrative record in this matter is cited as "AR [page number], excluding leading zeros.

failure to consider alternatives that would address any alleged deficiencies with the Rule, rather than a wholesale repeal of its requirements.

Additionally, BLM's Repeal only considered the agency's perceived faults with the Rule, but not its substantial benefits. The record shows that BLM ignored benefits of the Fracking Rule that the agency had previously found to be important and necessary protections for the environment and public health. In the Regulatory Impact Analysis conducted for the Repeal, BLM fails to explain how the benefits of the Fracking Rule are outweighed by the cost savings of the Repeal, which the agency admitted were minimal.

Further, many of the purported problems with the Fracking Rule that BLM now argues form the basis for the Repeal, were addressed and dismissed by the agency during the promulgation of the Rule. Despite this abrupt change in position, BLM offers no new explanations, data, or other information to justify its decision to ignore its prior findings. This lack of a reasoned explanation, along with BLM's other failures to provide good reasons for the Repeal, render the agency action arbitrary and capricious and in violation of the APA.

BLM's evaluation of potential significant impacts associated with the Repeal also violates NEPA. Notwithstanding evidence that there are substantial questions as to whether the Repeal would cause significant impacts to the environment, and despite the agency's prior findings that failing to implement the rule would result in environmental risks, BLM finds that the Repeal would cause no significant impacts. This unsubstantiated finding reflects BLM's cursory analysis and failure to take a "hard look" at the potential impacts of the Repeal, violating both NEPA and the APA.

As a result of these failings, the Repeal is unlawful and should be vacated by this Court.

STATUTORY BACKGROUND

I. FEDERAL LAND MANAGEMENT STATUTES

BLM is tasked with the regulation and administration of oil and gas operations, including hydraulic fracturing activities, on federal and Indian lands pursuant to several federal land management statutes. The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1701 *et seq*., directs BLM to "manage the public lands under principles of multiple use and

sustained yield." *Id.* § 1732. FLPMA further requires that BLM undertake its management of public lands "in a manner that will protect the quality of … ecological, environmental, air and atmospheric, [and] water resources … values," *Id.* § 1701(a)(8), and that BLM "take any action necessary to prevent unnecessary or undue degradation of the lands." *Id.* § 1732(b).

The Mineral Leasing Act of 1920 ("MLA"), 30 U.S.C. § 181 *et seq*., similarly directs BLM to "prescribe necessary and proper rules and regulations" to ensure that operations on federal leases are conducted with "reasonable diligence, skill and care," to protect "the interests of the United States," and to safeguard "the public welfare" in federal mineral leases. *Id*. §§ 187, 189. Pursuant to the Indian Mineral Leasing Act of 1983, 25 U.S.C. §§ 396-396g, and the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-08, oil and gas operations and mineral leases on tribal lands are governed by the rules and regulations promulgated by BLM and subject to BLM's approval. 25 U.S.C. §§ 396d, 2102.

II. NATIONAL ENVIRONMENTAL POLICY ACT

The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*., is the "basic national charter for the protection of the environment." 40 C.F.R. § 1500.1. The fundamental purposes of the statute are to ensure that "environmental information is available to public officials and citizens before decisions are made and before actions are taken," and that "public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. § 1500.1(b)-(c). NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before taking action. *See* 42 U.S.C. § 4332; *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988).

To meet these objectives, federal agencies must prepare a detailed EIS for any "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Prior to completing an EIS, an agency may first prepare an environmental assessment to determine whether the effects of an action may be significant. 40 C.F.R. § 1508.9. If an agency decides not to prepare an EIS, it must supply a "convincing statement of reasons" to explain why a project's impacts are not significant. *Nat'l Parks & Conservation Ass'n v. Babbitt*,

241 F.3d 722, 730 (9th Cir. 2001). However, an EIS must be prepared if "substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998). "To trigger this requirement a plaintiff need not show that significant effects will in fact occur." *Id.*

To determine whether a proposed project may significantly affect the environment, NEPA requires that both the context and the intensity of an action be considered. 40 C.F.R. § 1508.27. In evaluating the context, "[s]ignificance varies with the setting of the proposed action" and includes an examination of "the affected region, the affected interests, and the locality." *Id.* § 1508.27(a). Intensity "refers to the severity of impact," and NEPA's implementing regulations list ten factors to be considered in evaluating intensity, including "[u]nique characteristics of the geographic area such as proximity to ... ecologically critical areas," "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial," "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," and "[t]he degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration." *Id.* § 1508.27(b). The presence of just "one of these factors may be sufficient to require the preparation of an EIS in appropriate circumstances." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005).

FACTUAL AND PROCEDURAL BACKGROUND

I. MANAGEMENT OF HYDRAULIC FRACTURING OPERATIONS PRIOR TO THE FRACKING RULE

The Department of Interior, and through its delegation, BLM, are responsible for administering oil and gas operations on federal and Indian lands. 30 U.S.C. §§ 181, 187; 43 U.S.C. §§ 1701, 1731; 25 U.S.C. §§ 396, 2102. Collectively, BLM oversees hundreds of millions of acres of mineral estate on federal and tribal lands. 80 Fed. Reg. at 16,129 (AR 24015). At the time of the final Fracking Rule's promulgation, there were approximately 47,000 active oil and gas leases on public lands. *Id.*

Hydraulic fracturing is the process of injecting water and other materials at very high pressures into a well in order to create or enlarge fractures in reservoir rock, thereby creating access to oil or gas within the rock. 80 Fed. Reg. at 16,131 (AR 24017). Chemical additives are frequently added to the injection fluid, the exact makeup of which varies depending on the operator of the well, and the material forming the rock reservoir. *Id.* Many of these additives are known to be hazardous to human health, and impacts from exposure can include cancer, immune system effects, changes in body weight or blood chemistry, cardiotoxicity, neurotoxicity, liver and kidney toxicity, and reproductive and developmental toxicity. AR 21165-21166. Prior to the promulgation of the Fracking Rule, BLM's only existing regulations specific to hydraulic fracking operations, located at 43 C.F.R. § 3162.3-2, had last been revised in 1988. *Id.* These provisions were limited in scope, and required that operators performing "non-routine" fracturing operations seek approval from the BLM. 43 C.F.R. § 3162.3-2. The remaining existing requirements for oil and gas operations, found at 43 C.F.R. § 3162.3-1 and Onshore Oil and Gas Orders 1, 2, and 7, were not specific to hydraulic fracturing operations and had largely remained unchanged for at least 25 years. 80 Fed. Reg. at 16,129 (AR 24015).

Since the promulgation of these authorities, hydraulic fracturing activities increased dramatically throughout the country. 80 Fed. Reg. at 16,131 (AR 24017). BLM estimates that about 90 percent of new wells in 2013 on federal and Indian lands utilized hydraulic fracturing techniques. *Id.* This increase, coinciding with technological advances in horizontal drilling, has expanded oil and gas explorations to shale deposits across the country that had not previously produced large amounts of oil or gas. *Id.*

Public concern over risks associated with hydraulic fracturing, including groundwater contamination and increased seismic activity, grew in response to the rise in fracturing activities. *Id.* Beginning in November 2010, BLM began to address these concerns by holding forums to solicit comments from the public and industry on issues regarding hydraulic fracturing. *Id.* Additionally, the Secretary of Energy convened a Shale Gas Production Subcommittee to evaluate hydraulic fracturing concerns. *Id.* On November 18, 2011, after meeting with representatives from industry, regulatory bodies and environmental groups, the subcommittee

issued its final report which made recommendations for implementing hydraulic fracturing best practices. AR 32185. In particular, the report recommended adopting policies that accelerate the disclosure of fracturing fluid composition, implementing stricter standards for well development and construction, and conducting pressure testing of cemented casing in fracturing wells. *Id.*

II. THE FRACKING RULE

In response to four public forums and the subcommittee's report, on May 11, 2012, the BLM published its proposed rule titled, "Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands." *See* 77 Fed. Reg. 27,691 (AR 28257) ("Proposed Rule"). Following an extended comment period on the Proposed Rule, BLM issued a supplemental notice of proposed rulemaking for the Fracking Rule on May 24, 2013 to solicit additional input. *See* 78 Fed. Reg. 31,636 (AR 26338) ("Supplemental Proposed Rule"). During the comment periods for both the Proposed Rule and the Supplemental Proposed Rule, BLM received over 1.5 million comments. 80 Fed. Reg. at 16,131 (AR 24017). Finally, more than four years after BLM held the initial public forum and following multiple comment periods, the BLM published the final Fracking Rule on March 26, 2015. *Id.* at 16,128 (AR 24013).

According to BLM, the Fracking Rule "serves as a much-needed complement to existing regulations designed to ensure the environmentally responsible development of oil and gas resources on Federal and Indian lands, which were finalized nearly thirty years ago, in light of the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology." 80 Fed. Reg. at 16,128 (AR 24014). The Fracking Rule "is more protective than the previous proposed rules and current regulations," "strengthens oversight and provides the public with more information than is currently available, while recognizing state and tribal authorities and not imposing undue delays, costs, and procedures on operators." *Id.* In enacting the Fracking Rule, BLM aimed to "ensure that wells are properly constructed to protect water supplies, to 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 to provide public disclosure of the chemicals used in hydraulic fracturing fluids." *Id.* In particular, the Rule sought to reduce and identify potential "frack hits," or the unplanned surge of pressurized fluid during a

hydraulic fracturing operation into another well, which often results in surface spills. *Id.* at 16,148 (AR 24034).

The requirements established by the Fracking Rule reflect these goals. The Fracking Rule required that operators of hydraulic fracturing operations submit detailed information to BLM about their proposed operation, implement a casing and cementing program that met performance standards to protect usable groundwater, and monitor, test, and remediate, if necessary, well cementing to ensure that it meets performance standards. 80 Fed. Reg. at 16,129 (AR 24015). Additionally, the Rule required that operators monitor pressure during hydraulic fracturing operations, set standards for the storing of injection liquids in secure above-ground storage tanks, and mandated the disclosure of chemicals used in injection fluids to BLM and the public, with limited exceptions. *Id.* at 16,130 (AR 24015). The Rule further eliminated the distinction between "routine" and "non-routine" fracturing operations from the existing BLM regulations, and instead required prior approval for nearly all hydraulic fracturing operations, regardless of whether they were "routine." *Id.* at 16,146 (AR 24032).

The Fracking Rule's requirements supplemented existing federal, tribal and state regulations so as to "establish a consistent standard across Federal and Indian lands and fulfill BLM's stewardship and trust responsibilities." *See* 80 Fed. Reg. at 16,129, 16,178 (AR 24015, 24064). At the time the Fracking Rule was issued, many state regulations fell short of the requirements imposed by the Fracking Rule. For example, at least six of the nine states where the majority of fracking on federal land occurs did not require the use of tanks instead of pits for containing injection waste fluids, as the Fracking Rule does. *See* 80 Fed. Reg. at 16,162-63 (AR 24047-24048); AR 24325-24329. Additionally, most of the nine states' regulations on monitoring and verifying the integrity of cement casing fell short of the Fracking Rule's requirements. AR 24291. The Fracking Rule contemplated concurrent state regulation of wells on federal lands and in no way prevented states from enacting stricter requirements. 80 Fed. Reg. at 16,178 (AR 24064). States or tribes could also apply for a variance from the requirements of the Fracking Rule. *Id.* at 16,175 (AR 24061). Further, BLM estimated that compliance with the Fracking Rule was expected to cost about $11,400 per well, or approximately 0.13 to 0.21 percent

of the cost of drilling a well (an estimate that BLM has since lowered in its Final Repeal), but noted that such costs may be overstated to the extent that the Fracking Rule's provisions are already required by state regulations or are consistent with the voluntary, existing practices of operators. *Id.* at 16,130 (AR 24016). BLM found that the Fracking Rule would not "adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities." AR 24372.

III. TENTH CIRCUIT LITIGATION OVER THE FRACKING RULE

Shortly after the Fracking Rule was finalized, two industry groups, the States of Wyoming, Colorado, North Dakota, and Utah, and the Ute Indian Tribe (collectively, "Petitioners") filed or intervened in lawsuits challenging the Rule in Federal District Court in Wyoming. *See Indep. Petroleum Ass'n. of America, et al. v. Jewell*, *et al.*, Case No. 2:15-CV-041-SWS (D. Wyo. petition filed Mar. 20, 2015) (AR 78935); *State of Wyoming, et al. v. U.S. Dep't of the Interior, et al.*, Case No. 2:15-CV-043-SWS (D. Wyo. petition filed Mar. 26, 2015) (AR 83502). Citizen Groups subsequently moved to intervene in support of BLM on June 2, 2015. AR 79634. Petitioners argued that BLM lacked the statutory authority to regulate fracking on federal and Indian lands, and the District Court agreed in a merits decision issued on June 21, 2016, and set aside the Fracking Rule. *State of Wyoming v. U.S. Dep't of the Interior*, No. 2:15-CV-043-SWS, 2:15-CV-041-SWS, 2016 WL 3509415 (D. Wyo. June 21, 2016); AR 22234. BLM and the Citizen Group Respondents appealed to the Tenth Circuit Court of Appeals. *See* AR 83212, 86287.

While these appeals were pending, and following President Donald Trump's inauguration in January 2017, the Tenth Circuit requested that BLM provide a statement to the court confirming whether their positions on the issues presented on appeal remained the same in light of the change in administration. AR 110031-110032. On March 15, 2017, BLM responded to the court, stating that BLM had begun reviewing the Fracking Rule "for consistency with the policies and priorities of the new Administration," and that this "initial review revealed that the [Fracking Rule] does not reflect those policies and priorities." AR 110034. BLM stated that it had "begun

the process to prepare a notice of proposed rulemaking … to rescind the [Fracking Rule]." AR 110034-110035.

On September 21, 2017, based on BLM's decision to rescind the Rule, the Tenth Circuit Court of Appeals dismissed the appeals of the District Court's decision as prudentially unripe and vacated the District Court's June 21, 2016 judgment invalidating the Fracking Rule. *Wyoming v. Zinke*, 871 F.3d 1133 (10th Cir. 2017) (AR 110635-110638; AR 110603-110630).[2]

IV. EXECUTIVE ORDER 13783 AND SECRETARIAL ORDER 3349

On March 28, 2017, President Trump issued Executive Order 13783, titled, "Promoting Energy Independence and Economic Growth." 82 Fed. Reg. at 16,093 (AR 19392). The order establishes that "it is the policy of the United States that … agencies immediately review existing regulations that potentially burden the development or use of domestically produced energy resources." *Id.* Section 7, "Review of Regulations Related to United States Oil and Gas Development," orders the Secretary of the Interior to review the Fracturing Rule for consistency with this policy and "if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding [the Fracking Rule]." *Id.* at 16,096 (AR 19395).

The very next day, Secretary of the Interior Ryan Zinke issued Secretarial Order 3349, titled, "American Energy Independence," in order to implement Executive Order 13783. AR 19419. The order states that "as previously announced by the Department, BLM shall proceed expeditiously with proposing to rescind the [Fracking Rule]." AR 19422.

V. THE FRACKING RULE REPEAL

Less than four months later, on July 25, 2017, BLM proposed to repeal Fracking Rule in its entirety ("Proposed Repeal"). 82 Fed. Reg. 34,464 (AR 16483). The eight-page Proposed Repeal stated that it reviewed the Fracking Rule at the direction of Executive Order 13783 and Secretarial Order 3349 and as a result, the agency now "believes that compliance costs associated with the [Fracking Rule] are not justified." *Id.* at 34,466-67 (AR 16485-16486). BLM also

[2] Throughout this litigation, BLM never contended that it lacked the statutory authority to regulate hydraulic fracturing. *See* AR 110119 (BLM explaining that it "had authority to promulgate the Hydraulic Fracturing Rule," and "Congress has never revoked that authority").

referenced concerns from oil and gas companies and trade associations that the Fracking Rule "would cause substantial harm to the industry." *Id.* at 34,466 (AR 16485). The Proposed Repeal concluded that despite originally finding that the Fracking Rule "would not pose a significant burden to industry," it now "recognizes that [the Rule] would pose a financial burden to industry if implemented." *Id.* BLM presented no new information regarding costs or the burdens to industry in making these findings. *Id.*

On December 29, 2017, less than ten months after the agency first announced it would rescind the Fracking Rule, BLM published the Final Repeal, which went into effect the same day. 82 Fed. Reg. 61,924 (AR 195). The Repeal eliminated the provisions added by the Fracking Rule in their entirety and returned the language of BLM regulations to nearly what it was prior to the Fracking Rule's implementation. *Id.* In addition to removing these new requirements, the Repeal went even further, eliminating the pre-existing requirement that operators request approval prior to "non-routine fracturing operations." *Id.* at 61,926 (AR 205); *see also* 43 C.F.R. § 3162.3-2. Of the more than 100,000 public comments received on the Proposed Repeal, less than 1 percent supported the Repeal. AR 3562.

BLM gave several reasons for the Repeal. Initially, BLM stated that at the direction of Executive Order 13783 and Secretarial Order 3348, it was taking action to "rescind those rules that are inconsistent" with the Orders' policy to avoid "regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." 82 Fed. Reg. at 61,925 (AR 200). Pursuant to these Orders, the agency reviewed the Fracking Rule and concluded that "the compliance costs associated with the 2015 rule are not justified." *Id.* BLM argued that existing BLM regulations, combined with state and tribal rules on hydraulic fracturing, are adequate to ensure environmentally responsible exploration of oil and gas resources. *Id.* at 61,925-26 (AR 202-203). While BLM admitted that the Fracking Rule did "provide additional assurance that operators are conducting hydraulic fracturing operations in an environmentally sound and safe manner," and that the Repeal could "reduce these assurances," it dismissed these benefits. *Id.* BLM argued that since the Fracking Rule was promulgated, "an additional 12 states have introduced laws or regulations addressing hydraulic fracturing." *Id.*

BLM stated that chemical disclosure of fracturing fluids is more common, and that many operators were making such disclosures voluntarily. *Id.* at 61,925-26 (AR 203). Due to these changes, combined with existing regulations, BLM found the Repeal "relieved operators of duplicative, unnecessary, costly and unproductive regulatory burdens." *Id.* at 61,925 (AR 200).

Alongside the Repeal, BLM issued a "Regulatory Impact Analysis for the Final Rule to Rescind the 2015 Hydraulic Fracturing Rule" ("RIA"), which "relied heavily on the previous analysis from 2015." AR 421, 60759.[3] The RIA estimated that the Repeal would "reduce compliance costs by up to about $9,690 per well," which "represents about 0.1 - 0.2% of the costs of drilling a well." RIA at 53 (AR 476). On a yearly basis, the RIA estimated that compliance costs would range from about $15 - $34 million per year from 2018 to 2027." *Id.* In the RIA, BLM acknowledged that these estimates are lower than the estimated compliance costs for the Fracking Rule. *Id.* The RIA also notes that "the average reduction in compliance costs would be just a small fraction of a percent of the profit margin for small companies, which is not large enough impact to be considered significant." *Id.* at 63 (AR 486). In addition, the RIA finds that the Repeal will forgo benefits including "reductions in the risks to surface and groundwater resources," and "increased public awareness … of hydraulic fracturing operations." *Id.* at 55 (AR 478). The RIA contains an "Evaluation of Cost Savings and Forgone Benefits" ("Cost Benefit Analysis"). *Id.* at 56 (AR 479). Despite the RIA's findings that the saved compliance costs would be minimal, and its acknowledgement that the Repeal would remove the Fracking Rule's expected benefits, BLM still concludes, without further explanation, that the "cost savings would exceed the forgone benefits." *Id.* at 55-56 (AR 478-479).

Also in December 2017, BLM published an "Environmental Assessment, Rescinding the 2015 Hydraulic Fracturing on Federal and Indian Lands Rule" ("EA") and a "Finding of No Significant Impact" ("FONSI"). AR 140, 188. The EA briefly summarizes a few impacts caused

[3] As stated in the Court's Order at ECF No. 87, the Parties have stipulated that any documents that Federal Defendants purport to be deliberative documents, and that are cited in the Parties' merit briefs, will be attached to the brief. Per this stipulation, all such purportedly deliberative documents that State Plaintiff cites are attached here as Exhibit 1. The deliberative materials are ordered numerically by AR number.

by the Repeal, including impacts to ground water, surface water and greenhouse gases, all of which it finds to be insignificant. EA at 30-33 (AR 171-174). The EA offers several arguments to support this conclusion. First, the EA contends that state, tribal and BLM regulations will "reduce the risks associated with hydraulic fracturing." *Id.* at 33 (AR 174). The EA includes a "State-by-state Comparison of Hydraulic Fracturing Laws and Regulations" that provides a brief comparison highlighting state regulations that are "generally consistent" with the Fracking Rule. *Id.* at 43-46 (AR 184-187). The comparison reflects that state regulations are still less protective than the Fracking Rule in many areas, including cement casing requirements, baseline water testing, storage tank requirements, and records retention. *Id.* Second, the EA provides a summary of American Petroleum Institute ("API") guidance documents, which are not mandatory. *Id.* at 33-35 (AR 174-176). The EA also notes that BLM has no data on the amount of operators that comply with this guidance. *Id.* at 35 (AR 176). Finally, the EA concludes that "the reduction in compliance costs that are anticipated as a result of rescinding the [Fracking Rule] appear to be an appropriate tradeoff for any potential lessening of assurances [that operators will conduct hydraulic fracturing in a responsible manner]." *Id.* at 36-37 (AR 177-178).

STANDING

Plaintiffs have standing to bring this action. In order to demonstrate standing, plaintiffs must show that they have suffered "an injury in fact" that is "fairly traceable to the challenged conduct of the defendant," and is "likely to be redressed by a favorable judicial decision." *Lujan v. Defenders of Wildlife*, 506 U.S. 555, 560 (1992). In the NEPA context, "[t]he procedural injury implicit in agency failure to prepare an EIS"—namely, "the creation of a risk that serious environmental impacts will be overlooked"—"is itself a sufficient 'injury in fact' to support standing." *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975); *see also Comm. to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 448-49 (10th Cir. 1996) ("[A]n injury of alleged increased environmental risks due to an agency's uninformed decisionmaking may be the foundation for injury in fact under Article III.") (citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1499-1501 (9th Cir. 1992); *City of Davis*, 521 F.2d at 671). Here, California has a strong interest in preventing the adverse environmental and public health impacts from the use of hydraulic

fracturing on federal and Indian lands within the State. Hydraulic fracturing composes one fifth of all oil and gas production in the state. *See* AR 77476, 77559; AR 23418, 23427, 23365-23366. Thus, the Repeal will adversely impact California by increasing the risks of harmful environmental and public health impacts from conducting hydraulic fracturing on federal and Indian lands, including increased air pollution, impacts to surface and groundwater resources, and induced seismicity from the disposal of wastewater in disposal wells from hydraulic fracturing operations. *See* AR 5056-5057. As a result, California has standing to bring this suit.

STANDARD OF REVIEW

Summary judgment is appropriate when the record shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

The Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., governs the procedural requirements for agency decision-making, including the agency rulemaking process. Judicial review of administrative decisions is governed by section 706 of the APA, 5 U.S.C. § 706. Agency actions are subject to judicial reversal where they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or "without observance of procedure required by law." *Id*. § 706(2)(A), (C), (D).

To satisfy the "arbitrary and capricious" standard of review, an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") (internal quotation marks omitted). An agency action is arbitrary and capricious where the agency (i) has relied on factors which Congress has not intended it to consider; (ii) entirely failed to consider an important aspect of the problem; (iii) offered an explanation for its decision that runs counter to the evidence before the agency; or (iv) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* An agency's decision not to prepare an environmental

impact statement ("EIS") under NEPA is also reviewed under an "arbitrary and capricious" standard. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 763 (2004).

When an agency reverses course by repealing a fully-promulgated regulation, it "is obligated to supply a reasoned analysis for the change." *State Farm*, 463 U.S. at 42. Further, the agency must show that "the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("*Fox*"). When an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Id.; see California v. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106, 1123 (N.D. Cal. 2017) ("*California I*") ("New presidential administrations are entitled to change policy positions, but to meet the requirements of the APA they must give reasoned explanations for those changes and address [the] prior factual findings underpinning a prior regulatory regime.") (internal quotations and citations omitted); *see also California v. U.S. Dep't of the Interior*, No. C 17-5948 SBA, 2019 WL 2223804, at *7-9 (N.D. Cal. 2019). Further, any "unexplained inconsistency" between a rule and its repeal is "a reason for holding an interpretation to be an arbitrary and capricious change." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) ("*Nat'l Cable*"). Finally, an agency cannot repeal a validly promulgated rule without first considering alternatives in lieu of a complete repeal, such as by addressing any alleged deficiencies individually. *Yakima Valley Cablevision, Inc. v. F.C.C.*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal.").

ARGUMENT

I. BLM FAILED TO PROVIDE A REASONED ANALYSIS FOR THE FINAL REPEAL OF THE FRACKING RULE

BLM's rationale for repealing the Fracking Rule fails to meet the standards for taking such action set forth by the U.S. Supreme Court. *See State Farm*, 463 U.S. at 42, 48; *Nat'l Cable*, 545 U.S. at 981; *Fox*, 556 U.S. at 515. First, BLM claims that state and tribal regulations, combined with pre-existing federal requirements, are sufficient to protect the public and the environment

from the risks associated with hydraulic fracturing. Yet the record and BLM's own review of state regulations demonstrate that these requirements fall short of the protections that the Fracking Rule provided. Additionally, BLM asserts that repealing the Fracking Rule complies with Executive Order 13783 because the rule "unduly burdens energy resources development." However, this explanation is contradicted by BLM's own findings that the Fracking Rule will impose insignificant compliance costs on oil and gas operators and will have a minimal, if any, impact on energy development. Finally, despite acknowledging the environmental protections that the Fracking Rule provides the public, BLM failed to consider reasonable alternatives to repealing the entirety of the Rule's requirements.

A. BLM Failed to Explain How State and Tribal Regulations, Along With Preexisting Federal Rules, Will Ensure the Environmentally Responsible Development of Federal Oil and Gas Resources

BLM attempts to justify the Repeal by making the unsupported assertion that state and tribal regulatory programs, as well as pre-existing BLM regulations, are sufficient to protect public health and the environment from harms associated with hydraulic fracturing. It concludes that, as a result of these authorities, the Fracking Rule's requirements are "duplicative, unnecessary, costly and unproductive regulatory burdens." 82 Fed. Reg. at 61,925 (AR 200). These conclusory assertions, however, are expressly contradicted by both the record and BLM's own findings, which demonstrate that existing regulations are not as comprehensive as the Fracking Rule. *See California v. U.S. Dep't of the Interior,* 2019 WL 2223804 at *11 (finding that agency's "conclusory assertions" to justify rule repeal, unsupported by facts or analysis, violated APA). BLM's rationale is all-the-more confounding given that the agency acknowledged in the Fracking Rule that it was "not allowed to delegate its responsibilities to the states." 80 Fed. Reg. at 16,178 (AR 24064).

When promulgating the Fracking Rule, BLM acknowledged that its existing regulations and Onshore Orders were "in need of revision as extraction technology has advanced," and that the Fracking Rule "provided further assurance of wellbore integrity, … public disclosure of chemicals used in hydraulic fracturing, and … safe management of recovered fluids." 80 Fed. Reg. at 16,137 (AR 24023). BLM even acknowledged that the Repeal could reduce "such

assurances." 82 Fed. Reg. at 61,925 (AR 202). Despite these contradictory findings, BLM does not explain how the agency's existing regulations and Onshore Orders now provide sufficient protection from the risks the Fracking Rule was designed to address.

BLM's claim that state and tribal regulations will address the risks caused by hydraulic fracturing similarly falls flat. The agency argues that "since the promulgation of the [Fracking Rule] an additional 12 states have introduced laws or regulations addressing hydraulic fracturing." 82 Fed. Reg. at 61,925 (AR 203). However, the evidence in the record shows that state requirements differ significantly from the Fracking Rule, especially with regard to mechanical integrity testing, pressure monitoring during hydraulic fracturing operations, and post-fracturing disclosure requirements. *See* AR 15737-15742, 15712. Further, BLM's own review of state regulations reflects this disparity, demonstrating that the Fracking Rule remains more stringent and protective than most state rules. *See* EA at 41-46 (AR 182-187). For example, the agency's review shows that a majority of states, including most of the major states with hydraulic fracturing activities, do not meet the Fracking Rule's cement casing requirements, nor the minimum requirements for storage tanks or records retention. *Id.* at 43-44 (AR 184-185).

Moreover, even those state regulations that BLM represents as "generally consistent" with Fracking Rule provisions still fall short in important ways. *See* EA at 44 (AR 185). BLM finds, for example, that nearly all the states it reviewed require chemical disclosure of hydraulic fracturing fluids to FracFocus,[4] and concludes that because use of FracFocus is "more prevalent than in 2015, there is no continuing need for a federal chemical disclosure requirement." *See* 82 Fed. Reg. at 61,926 (AR 203); EA at 41-46 (AR 182-187). As noted by commenters, however, the Fracking Rule mandated the disclosure of much more information than just the chemicals used in injection fluids, such as information regarding the sources and locations of water used in the fluid. *See* 80 Fed. Reg. at 16,166-67 (AR 24052-24053).

[4] FracFocus is a website managed by the Ground Water Protection Council, a non-profit organization of state water quality regulatory agencies, and by the Interstate Oil and Gas Compact Commission, a multi-state government agency charged with balancing oil and gas development with environmental protection. 80 Fed. Reg. at 16,130 (AR 24016).

The U.S. Environmental Protection Agency ("EPA") similarly questioned BLM's rationale during its interagency review of the Repeal Rule and RIA. In response to BLM's statement that repealing the Fracking Rule would "relieve operators of duplicative, unnecessary, and unproductive regulatory burdens," EPA noted:

> This statement does not appear to be supported by the facts that BLM has provided (e.g., table 2.12 in the RIA). Table 2.12 shows that several states do not have a specified requirement in areas outlined in the 2015 rule.

AR 1041; *see* AR 1044 (EPA commenting that "Please clarify as this statement implies that all of these states have requirements that were in 2015 final rule which is not consistent with Table 2.12 in the RIA."); AR 1068 (EPA commenting that "State regulations vary widely; it is difficult to say that the rule is broadly duplicative."); AR 1110 (EPA commenting that "Table 2.12 shows several instances where states did not have specific regulations aligning with existing BLM rules. It is difficult to state that all 32 states have applicable regulations."); AR 1156 (EPA commenting that "This statement does not seem to be consis[te]nt with Table 2.12. Within that table there appears to be several states that do not appear to have aspects that are described within BLM's rule."); AR 1160 (same); *see also* AR 65854 (U.S. Army Corps of Engineers' commenting that "there are many provisions within this rule that strengthen consideration of how states and federal land management agencies and agencies with substantial critical infrastructure (e.g. dams, levees etc) is accomplished to ensure that fracturing is accomplished in a responsible manner").

Further, even for those states with certain fracturing regulations, those regulations do not necessarily apply to tribal lands. Indeed, BLM admits that many tribes do not have regulations for hydraulic fracturing at all. 82 Fed. Reg. at 61,939 (AR 261). BLM's analysis does not address these shortcomings in state and tribal rules, nor how the water quality and public disclosure concerns BLM discussed when it promulgated the Fracking Rule will be addressed without consistent enforcement of the Fracking Rule's provisions across federal and tribal lands.[5]

[5] As the record shows, BLM's review of state regulations that formed a primary rationale for the Repeal did not begin until after BLM had publicly announced that it would rescind the Rule. For example, BLM did not begin requesting information from states on their fracturing regulations or conducting research on state regulations until after the decision to repeal the Rule had been made. *See, e.g.*, AR 75505-75507, 75053-75054, 74781-74785 (BLM emails requesting information from states on hydraulic fracturing operations and conversations on status of review process from

Ultimately, BLM has failed to provide a reasoned explanation to support its claim that the Fracking Rule is "duplicative, unnecessary, costly and unproductive regulatory burdens" due to state, tribal, and pre-existing regulatory requirements, which is expressly contradicted by the record. This decision-making process fails to show a "rational connection between the facts found and the choice made," in violation of the APA. *State Farm*, 463 U.S. at 43; *California v. U.S. Dep't of the Interior*, 2019 WL 2223804, at *8-12.

B. Executive Order 13783 Cannot Justify Repealing the Fracking Rule

The Final Repeal is also not justified by Executive Order 13783. Executive Order 13783 requires agencies to "suspend, revise or rescind" regulations that "unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." 82 Fed. Reg. at 16,093 (AR 19392). Citing the Executive Order, BLM states it conducted a review of its regulations and found that the "compliance costs associated with the [Fracking Rule] are not justified." 82 Fed. Reg. at 61,925 (AR 201). Yet BLM provides no evidence to support these assertions.[6]

To the contrary, BLM admits that the Repeal "will not have a significant economic effect on a substantial number of small entities." 82 Fed. Reg. at 61,947 (AR 296). BLM also acknowledges that the "average reduction in compliance costs will be a small fraction of a percent of the profit margin for small companies, which is not a large enough impact to be considered significant." *Id*. at 61,947 (AR 297). The compliance costs that BLM references as being so

March 21 – 27, 2017, following the March 15, 2017 Repeal announcement). Other emails from BLM employees directly reference that they are reviewing state regulations following the decision to repeal. *See, e.g*., AR 75053 (March 22, 2017 email stating, "We are working on rescinding the HF rule and coming up with a new proposal quickly. I was checking on state regulations. I didn't see any change in MT regs on Fracking since 2012."); AR 74611 (March 28, 2017 email "checking on the state regulations"); 74833 (March 24, 2017 email stating, "I am still updating the State comparison status as of current date.").

[6] As with its other primary rationale for the Repeal, Executive Order 13783 was not even issued until March 28, 2017 – two weeks after BLM had already announced it was repealing the Fracking Rule. *See* AR 19392. Despite Executive Order 13783's direction for BLM to review the Fracking Rule "for consistency with the policy set forth in section 1 of this order and, if appropriate, … publish for notice and comment proposed rules suspending, revising, or rescinding those rules" (AR 19395), Secretarial Order 3349, issued the following day, reaffirmed that "[a]s previously announced by the Department, BLM shall proceed expeditiously with proposing to rescind" the Fracking Rule. AR 19417.

burdensome to energy development directly contradict BLM's own prior finding that the costs of the Fracking Rule would be minimal. *See* RIA at AR 476; 80 Fed. Reg. at 16,195 (AR 24081) (The Rule "will not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs … or state, local or tribal governments or communities."). *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1067 (N.D. Cal. 2018) ("*California II*") (finding that BLM failed to provide an adequate explanation because it failed to "point to any fact that justifies its assertion that the Waste Prevention Rule encumbers energy production. Its concern remains unfounded."); *California v. U.S. Dep't of the Interior,* 2019 WL 2223804 at *11-12 (agency's failure to provide data or analysis to support assertion that rule constituted a "burden" on the development of domestic energy sources under Executive Order 13783 was arbitrary and capricious).

In fact, the maximum yearly compliance costs BLM states that operators will save from the Repeal are *lower* than the maximum compliance costs estimated during promulgation of the Fracking Rule.[7] Despite the fact that BLM's new cost estimates are less than earlier estimates the agency found to be minor, BLM does not explain how it now finds such costs more burdensome to energy development. BLM's failure to reconcile this inconsistency prevents it from offering the reasoned explanation required by the APA. *See State Farm*, 463 U.S. at 43 (an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.").

Moreover, by its own terms, Executive Order 13783 does not "impair or otherwise affect" the statutory mandates imposed upon BLM by Congress. 82 Fed. Reg. at 16,096 (AR 19395); *see In re Aiken County*, 725 F.3d 255, 260 (D.C. Cir. 2013) ("[T]he President and federal agencies may not ignore statutory mandates or prohibitions merely because of a policy disagreement with Congress."). FLPMA gives BLM the responsibility of managing oil and gas resources "in a manner that will protect the quality of … ecological, environmental, air and atmospheric, [and] water resources … values." 43 U.S.C. § 1701(a)(8). In finalizing the

[7] BLM estimates that the Repeal will reduce compliance costs up to $34 million per year. RIA at 4 (AR 427). In contrast, BLM previously found that compliance costs for implementing the Fracking Rule might reach $45 million per year. AR 24376.

Fracking Rule, BLM acknowledged specifically that the protections the rule implemented were "in accordance with BLM's stewardship responsibilities under the FLPMA." 80 Fed. Reg. at 16,130 (AR 24016). Moreover, BLM emphasized that the agency was "not allowed to delegate its responsibilities to the states." *Id.* at 16,178 (AR 24064). BLM's use of Executive Order 13783 to justify eliminating rules it promulgated pursuant to statutory responsibility does not meet the reasoned explanation required under the APA and results in arbitrary agency action.

C. BLM Did Not Consider Alternatives to Repealing the Entire Fracking Rule

"[A]n agency must examine significant policy alternatives in order to come to 'reasoned' regulatory decisions." *Action for Children's Television v. FCC*, 821 F.2d 741, 748 (D.C. Cir. 1987); *see also Pub. Citizen*, 733 F.2d at 103 (agency action was "arbitrary and capricious because the agency failed to pursue available alternatives that might have corrected the deficiencies in the program"). Multiple courts in this District have found that an agency's failure to consider alternatives before rescinding or removing the entirety of a regulation was in violation of the APA. In *California v. U.S. Dep't of the Interior*, the Office of Natural Resources Revenue rescinded the entirety of regulations updating the way that the agency calculated royalties from oil and gas leases, without considering alternatives that would more narrowly address the concerns with the regulation that the agency identified. 2019 WL 2223804 at *2, *10-11. The court found that the agency's action was a violation of the APA, stating that "an agency must consider alternatives in lieu of a complete repeal, such as by addressing deficiencies individually." *Id.* at *10. Additionally in *California v. Bureau of Land Management*, BLM completely suspended regulations designed to reduce waste from venting and flaring at oil and gas operations, arguing that the regulations were burdensome to small oil and gas operators. *California II*, 286 F. Supp. 3d at 1066-67. The court held that BLM's failure to consider a more "tailored" suspension of requirements as to small operators, and instead applying the suspension to all operators, "regardless of size," was arbitrary and capricious. *Id.* Similarly, BLM's decision to broadly rescind the Fracking Rule without first considering alternatives designed to address the specific concerns the agency identified fails to provide the "reasoned analysis" required by the APA.

Here, BLM failed to consider alternatives that would have mitigated the alleged failings of the Fracking Rule – namely the purportedly duplicative and costly measures – without removing the provisions that provided important environmental protections. For example, in its review of state regulations, BLM identified several provisions of the Fracking Rule, such as cement casing requirements, measures to prevent frack hits, and storage tank requirements that remain widely unregulated by states. EA at 43-44 (AR 184-185). Instead of a complete repeal, BLM could have considered an alternative that would have kept these less duplicative requirements and better addressed the environmental risks the Fracking Rule sought to prevent. BLM's failure to consider this reasonable alternative violates the APA. *See Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) (noting that "[t]he failure of an agency to consider obvious alternatives has led uniformly to reversal"); *Pub. Citizen*, 733 F.2d at 103 ("At the very least, [the agency] was required to explain why those alternatives would *not* correct the … problems it had identified."); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 93, 103 (D.C. Cir. 1984) ("[i]t is well established that an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives.").

II. BLM FAILED TO CONSIDER THE FULL BENEFITS OF THE FRACKING RULE OR EXPLAIN HOW THE COST SAVINGS OF THE REPEAL EXCEEDS THESE BENEFITS

An agency rescinding a regulation must offer a "reasoned analysis" and "a rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 42, 52. Such "reasoned analysis" cannot solely consider the regulation's flaws, with no consideration of its benefits. *California I*, 277 F. Supp. 3d at 1123 ("Defendants' failure to consider the benefits of compliance … rendered their action arbitrary and capricious and in violation of the APA."). In 2015, BLM stated that one of the important benefits of the Fracking Rule was that it created "a consistent, predictable, regulatory framework" that will "establish a consistent baseline" and "promote the development of more stringent standards by state and tribal governments." 80 Fed. Reg. at 16,128, 16,130 (AR 24014, 24016). BLM added that the Rule would "complement existing rules" by "providing further assurances" that hydraulic fracturing was conducted in an environmentally responsible and safe manner. *Id.* at 16,137 (AR 24023).

In the Repeal, BLM almost immediately dismisses any benefit to these "additional assurances,"[8] and in doing so, fails to fully consider the important benefits of a federal requirement. 82 Fed. Reg. at 61,925 (AR 202). For example, the agency does not address that without a consistent federal baseline, states may weaken or repeal their hydraulic fracturing regulations in the future. Nor does BLM acknowledge the role the Fracking Rule may have in encouraging states to develop more stringent rules for hydraulic fracturing operations on their lands. *Id.* at 16,128 (AR 24014). The agency also fails to consider that unlike BLM, states do not need to comply with the stewardship standards and trust responsibilities applicable to public lands. *Id.* at 16,133 (AR 24019). Additionally, as discussed above, the BLM does not address that the Fracking Rule remains much more protective than most state regulations. *See* EA at 43-46 (AR 184-187) (showing how most states still do not match the Fracking Rule's requirements regarding storage tanks, cement casing or water testing).

Moreover, BLM provides no explanation for its finding that the benefits of Repeal will exceed the marginal cost savings from eliminating the Rule's provisions. When promulgating the Fracking Rule, BLM found that the Rule would "not adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities." AR 24372. Further, BLM found that the costs of compliance for the Fracking Rule were minimal and represented only a minor percentage of operator's costs per well. AR 24362. In addition, in issuing the Repeal, BLM acknowledges that the expected compliance cost savings from Repeal are even less than the costs originally estimated for implementation of the Fracking Rule. *See* RIA at 54 (AR 477) ("We estimate that this final rule would reduce per-well compliance costs by an average of about $9,690 …. In contrast … we estimated that the [Fracking Rule] would have increased per-well compliance costs by about $11,400."). However, despite these findings, BLM inexplicably concludes that benefits of Repeal will exceed the costs (in terms of foregone environmental and public health protections). *Id.* at 56 (AR 479). This failure to explain how the BLM reached its

[8] According the RIA, "Any incremental benefit that the [Fracking Rule] provided in addition to existing federal, state and tribal regulations and industry standards has heretofore been undemonstrated and is likely to be marginal." RIA at 5 (AR 428).

conclusion, as well as the agency's sole consideration of the Rule's purported flaws, while dismissing its benefits, contravenes the "reasoned analysis" requirement of the APA.

III. BLM'S PROFFERED EXPLANATION RUNS COUNTER TO THE RECORD BEFORE THE AGENCY

"The absence of a reasoned explanation for disregarding previous factual findings violates the APA." *Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 969 (9th Cir. 2015). Moreover, when an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," it must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox*, 556 U.S. at 515; *see id*. at 537 (Kennedy, J., concurring) ("An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."). During the promulgation of the Fracking Rule, BLM considered and addressed many of the concerns that the agency now argues warrant the Repeal. BLM provides no explanation for this sudden change in position. Absent "[n]ew facts or evidence coming to light, considerations that [the agency] left out in its previous analysis, or some other concrete basis supported in the record," the Repeal does not satisfy the APA. *California II*, 286 F. Supp. 3d at 1068.

Throughout the multiple comment periods during the promulgation of the Fracking Rule, operators of hydraulic fracturing operations and other entities that would be subject to the Rule raised various objections and concerns. *See* 80 Fed. Reg. at 16,140-216 (AR 24026-24102). Despite already addressing these issues in promulgating the Fracking Rule, BLM now uses many of these same arguments to support the Repeal. For example, BLM argues that the Fracking Rule is duplicative of state and existing BLM regulations. 82 Fed. Reg. at 61,925 (AR 200). However, BLM responded to comments on the Fracking Rule offering this same critique, stating, the agency "recognizes that many states have made efforts to update their hydraulic fracturing regulations in recent years, but those regulations continue to be inconsistent across states." 80 Fed. Reg. at 16,178 (AR 24064). BLM further noted that "state rules may not apply to Indian lands," and that the Fracking Rule will "establish a consistent standard across Federal and Indian lands and fulfill BLM's stewardship and trust responsibilities." *Id.* BLM also disagreed with

comments that said the existing BLM regulations were sufficient to meet the agency's stewardship responsibilities, responding that the Fracking Rule "addresses specific hydraulic fracturing operational aspects … that existing rules do not address." *Id.* at 16,180 (AR 24066). Ultimately, after considering and addressing these concerns, BLM found that the Fracking Rule offered important, necessary and additional protections that applied consistently across tribal lands and finalized the rule. *Id*. BLM has offered no new analysis or information that explains how existing BLM regulations, or state and tribal provisions, will provide the comprehensive protections of the Fracking Rule.

Similarly, BLM now claims that the Fracking Rule imposes "unnecessary burdensome and unjustified administrative requirements and compliance costs." 82 Fed. Reg. at 61,924 (AR 196). Many commenters on the Fracking Rule also claimed that the Rule's costs were overly burdensome and unnecessary. *See* 80 Fed. Reg. at 16,147, 16,160, 16,162-63, 16,180, 16,185-86 (AR 24033, 24046, 24048-24049, 24066, 24071-24072) (discussing that the requirements for prior approval and mechanical integrity tests were "unnecessary and costly" that the rule would negatively affect jobs, revenue and effective government). BLM responded that it "evaluated these [cost] concerns as a part of its economic analysis and found the overall impacts to be nominal in relation to current overall costs of drilling operations." *Id.* at 16,180 (AR 24066). BLM elaborated that "those additional costs would be easily outweighed by revenues that operators might expect from a geologically attractive area." *Id.* at 16,186 (AR 24072).

BLM does not dispute the cost estimates of the Fracking Rule, noting that compliance cost savings on Repeal would be lower than initially estimated. RIA at 53 (AR 476). BLM also admits that "[m]arket forces provide a much stronger impact on employment that the BLM rule as witnessed by the recent industry cycle of volatile prices and corresponding rig activity." AR 75992, 71408. Despite no new factual findings, BLM fails to explain why these concerns, previously addressed, now form the basis for its reversal of position. Because BLM has failed to provide a "reasoned explanation … for disregarding facts and circumstances that underlay or were engendered by the prior policy" it has violated the APA. *Fox*, 556 U.S. at 516.

IV. BLM FAILED TO TAKE A "HARD LOOK" AT THE ENVIRONMENTAL CONSEQUENCES OF REPEALING THE FRACKING RULE

NEPA requires federal agencies to take a "hard look" at the environmental consequences of a proposed activity before taking action. *See* 42 U.S.C. § 4332; *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005). To do so, a federal agency must prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3. As the Ninth Circuit has found, "the bar for whether 'significant effects' may occur is a low standard." *League of Wilderness Defs. v. Connaughton*, 752 F.3d 755, 760 (9th Cir. 2014). An EIS is required if "substantial questions are raised as to whether a project may cause significant environmental impacts." *Friends of the Wild Swan v. Weber*, 767 F.3d 936, 946 (9th Cir. 2014). In reviewing an agency decision not to prepare an EIS pursuant to NEPA, the inquiry is "whether the responsible agency has reasonably concluded that the project will have no significant adverse environmental consequences." *Save the Yaak Comm.*, 840 F.2d at 717 (internal quotation marks omitted).

Here, there are substantial questions as to whether the Repeal may have significant environmental impacts. In the EA developed for the Fracking Rule, BLM noted that failing to implement the Rule would result in many impacts, including an increased risk of "frack hits," the potential contamination of groundwater and surface water resources, and less information provided to BLM and the public regarding the types of chemicals used in fracking injections. AR 23879-23886. However, in its EA for the Final Repeal, BLM fails to meaningfully discuss any of these impacts. Instead, the EA contains a brief summary of several impacts that the Final Repeal will cause, such as surface and groundwater impacts, which it quickly concludes to be insignificant. EA at 30-31 (AR 171-172). For example, BLM references a 2015 EPA report[9] on the impacts of hydraulic fracturing, which BLM acknowledges "confirms that there are risks to drinking water from hydraulic fracturing operations." *Id.* at 32 (AR 173). BLM further states that the report "indicates a need to assure well-bore integrity and care in conducting fracturing operations with little vertical separation of the fractured stratum and drinking water sources." *Id.*

[9] EPA, Hydraulic Fracturing for Oil and Gas: Impacts from the Hydraulic Fracturing Water Cycle on Drinking Water Resources in the United States (Dec. 2016) (AR 76121).

Despite these findings indicating substantial questions as to whether the Repeal would impose significant impacts, BLM quickly dismisses such findings by arguing that such risks are "rare" and that the "report does not indicate that BLM regulation is necessary in addition to state or tribal regulation." *Id.* This cursory rejection of potential impacts does not establish that the Repeal could not have significant impacts on water sources, and also impedes the "hard look" required of BLM under NEPA.

Moreover, as the comment letter from Plaintiff discusses, recent science conducted in California demonstrates the potential for significant environmental impacts from the use of hydraulic fracturing in California. AR 5056. These impacts include significant and unavoidable impacts to aesthetics, air quality, biological resources (terrestrial environment), cultural resources, geology, soils and mineral resources, greenhouse gas emissions, land use and planning, risk of upset/public and worker safety, and transportation and traffic. *Id*. For example, the California analysis finds that, in Kern County, air emissions resulting from hydraulic fracturing operations "would occur at levels that could violate an air quality standard or contribute substantially to an existing or projected air quality violation." *Id*. The California Council on Science and Technology also released a study in July 2015 which identified several potential direct and indirect impacts from hydraulic fracturing, including the release of volatile organic compounds ("VOCs") from retention ponds and tanks used to store well stimulation fluids, and induced seismicity from the disposal of wastewater in disposal wells. *Id*. As EPA noted in its comments on the induced seismicity issue, "While most induced seismicity has been linked to wastewater injection, in the last few years there has been more induced seismicity that is potentially linked to hydraulic fracturing." AR 1081; *see also* AR 1129. The large number of comments opposing the Repeal (AR 3562) also reflects the degree to which the impacts from hydraulic fracturing "are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4); *see California v. U.S. Dep't of Transp*., 260 F. Supp. 2d 969, 973-74 (N.D. Cal. 2003) (agency violated NEPA by failing to evaluate "the degree to which the effects on the quality of the human environment are likely to be controversial," especially given "the volume of comments from and the serious concerns raised by federal and state agencies specifically charged with protecting the environment support a

finding that an EIS was required"); *Nat. Res. Def. Council, Inc. v. Dep't of Energy*, 2007 WL 1302498 (N.D. Cal. May 2, 2007) (finding that controversy factor required preparation of EIS); *Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 979-80 (D. Haw. 2008) (finding that a "substantial national controversy" regarding the Navy's use of sonar "further supports the need for an EIS").

BLM attempts to "soft-pedal" these potentially significant impacts by stating that such impacts will be reduced by existing BLM regulations, as well as state and tribal rules on hydraulic fracturing. EA at 25-33 (AR 166-174); *see* AR 59617 ("I have lightly edited the EA, as attached. The most substantive suggested edit is on p.20, in which I attempt to soft-pedal the climate change issue"). As discussed above, these arguments are directly undermined by the review of state regulations outlined in the EA itself, which demonstrates that state regulations are significantly less protective than the Fracking Rule. EA at 41-46 (AR 182-187). Moreover, as in other parts of the Repeal, the EA fails to discuss how these less comprehensive and inconsistent regulations will provide the same protections as the Fracking Rule. BLM also argues that environmental risks posed by hydraulic fracturing will be adequately addressed by recommendations in API guidance documents. *Id.* at 33-35 (AR 174-176). Yet BLM does not address how these unenforceable documents will offer the same protection as mandatory provisions of the Fracking Rule, and even admits it has no statistics on the industry's compliance with these guidance documents. *Id.* at 52 (AR 193).

BLM also attempts to justify the impacts it acknowledges the Repeal would create by stating that such impacts were an "appropriate tradeoff" for purported reductions in compliance costs. EA at 36 (AR 176-177). However, the EA does not purport to include a cost-benefit analysis as authorized by 40 C.F.R. § 1502.23.[10] Moreover, cost reductions cannot prevent an agency from preparing an EIS under NEPA when the appropriate significance standards have been met. *See* 40 C.F.R. § 1508.27(a); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373

[10] As this section provides: "If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences." 40 C.F.R. § 1502.23.

F. Supp. 2d 1069, 1086 (E.D. Cal. 2004) ("Neither the net long term benefits of the program, nor the risk associated with not implementing the project, relieve [an agency] of its duty to conduct an EIS when the project will have significant environmental impacts."). BLM's attempt to wave away significant impacts by simply comparing them to the Final Repeal's purported benefits is improper and undermines its FONSI determination. Moreover, BLM's reliance on purported economic impacts contradicts the agency's own prior assertion that the compliance costs imposed by the Fracking Rule are minimal. *See* 80 Fed. Reg. at 16,180, 16,186 (AR 24066, 24072). This flawed analysis cannot reasonably support BLM's conclusion that the impacts of the Repeal are insignificant.

In sum, BLM's attempts to ignore, undermine, and obfuscate the potentially significant impacts caused by the Repeal fail to provide the "hard look" required by NEPA.

CONCLUSION

For the reasons given above, the State of California respectfully requests that this Court grant its motion for summary judgment, declare that the Repeal is unlawful, and vacate the Repeal.

Dated: June 3, 2019

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
DAVID A. ZONANA
Supervising Deputy Attorney General

/s/ Shannon Clark
SHANNON CLARK
GEORGE TORGUN
Deputy Attorneys General
Attorneys for Plaintiff State of California

Exhibit 1

From: "Dutta, Subijoy" <sdutta@blm.gov> on behalf of Dutta, Subijoy
To: "Abernathy; Justin"
Cc: "McNeer; Richard"; "Senio; Ian"; Charles Yudson; "Ford; Michael"; "Hawbecker; Karen"
Subject: Re: Draft of the rule
Date: Thursday, October 26, 2017 2:18:09 PM

Justin,
I just looked at the nonroutine comments in the preamble and have one input on that as comment below. (p. 45 of the preamble). I have a national operations call in 45 minutes and will check on nonroutine sundries.

The commenter is mistaken. The plain meaning of "fracturing" in 43 CFR. § 3162.3-2 (2014), and as understood in the industry, includes "hydraulic fracturing." See, e.g., Williams & Myers Manual of Oil and Gas Terms, p. 420 (10th ed. 1997) (quoting American Gas Ass'n, Glossary for the Gas Industry (3d ed. 1981)). The BLM has always interpreted that regulation to include hydraulic fracturing. The commenter does not offer any other rational interpretation. The BLM has exercised approval authority over non-routine hydraulic fracturing[DSN1],[2] but the implementation of the non-routine fracturing provisions have been left to the sound discretion of the authorized officer.

[DSN1]The BLM requires submission of documents and information pertaining to Horizontal Drilling, bottom hole pressure, directional designs etc. under Onshore Order#1, Section III Application for Permit to Drill (APD). The APD requirements covers all of the information pertaining to hydraulic fracturing operations. The nonroutine fracturing sundry provision is rare and left out to the discretion of the AO. I am checking to see if we can locate any such sundries .

Subijoy

Subijoy Dutta, P.E.
Lead Petroleum Engineer
Fluid Minerals Division
20 M. Street SE, Washington, DC 20003
Ph: 202-912-7152; Cell: 202-802-0379
www.blm.gov; email: sdutta@blm.gov

On Thu, Oct 26, 2017 at 1:21 PM, Abernathy, Justin <jabernathy@blm.gov> wrote:

> Thank you for the substantial of amount time and work that you've put in to this recently! And thank you for putting your edits on top of Ian's edits, that will definitely help me expedite my efforts to incorporate all of the edits and comments.
>
> On Thu, Oct 26, 2017 at 1:14 PM, McNeer, Richard <richard.mcneer@sol.doi.gov> wrote:
>
> > Justin:
> >
> > Here are my edits on top of Ian's. I made some edits on my own, and other in agreement with other commenters.
> >
> > Richard

On Thu, Oct 26, 2017 at 1:07 PM, Abernathy, Justin <jabernathy@blm.gov> wrote:
Thank you.

On Thu, Oct 26, 2017 at 11:46 AM, Senio, Ian <isenio@blm.gov> wrote:
Hi Justin,

Please find attached suggested edits and comments on the final rule draft.

Please note that we'll need to complete the discussion in the procedural matters part of the preamble
having to do with tribal consultation (on about page 87) and the discussion of EO 13211, Effects on Energy Supply (on about page 91).

Please let me know if you have questions or would like to discuss.

Thank you

--Ian

On Thu, Oct 26, 2017 at 11:33 AM, Abernathy, Justin <jabernathy@blm.gov> wrote:
OK to both, thanks.

On Thu, Oct 26, 2017 at 11:25 AM, Senio, Ian <isenio@blm.gov> wrote:
I should be done with the rule (preamble and reg text) by about noon.

If you like, I can also take a look at the EA.

On Thu, Oct 26, 2017 at 10:42 AM, McNeer, Richard <richard.mcneer@sol.doi.gov> wrote:
Justin and Ian:

I have lightly edited the EA, as attached. The most substantive suggested edit is on p.20, in which I attempt to soft-pedal the climate change issue.

Richard

On Thu, Oct 26, 2017 at 8:23 AM, Abernathy, Justin <jabernathy@blm.gov> wrote:
Ian/Richard:

For your review, I have attached initial drafts of the final HF rescission rule preamble, EA and RIA.

I am going to check with Tim momentarily regarding any specific expectations as far as a time for completing the initial reviews and moving these documents along. If there is enough time, I would like to do some more work on the RIA. It still reads in some spots as if it's for the proposed rule (I am assuming we should change those reference to "final" rule). In light of this, I recommend that you review the RIA last. I will let you know of any specific information on expectations for timing that I receive feedback on.

If you have any questions or need anything else, please let me know.

Thanks for your help with this,

JA

On Thu, Oct 26, 2017 at 6:20 AM, Senio, Ian <isenio@blm.gov> wrote:

> Thanks very much for the update.
>
> I'll look for a draft at around 8:00.
>
> --Ian
>
> On Thu, Oct 26, 2017 at 6:18 AM, Abernathy, Justin <jabernathy@blm.gov> wrote:
>
> > Ian,
> >
> > Good morning. I am still working to add content to the preamble. I think I should be able to send you (and Richard) the preamble, EA and RIA to review in about 2 hours (by about 8 AM). We have put these documents together in a relatively short amount of time and so they are pretty "rough" initial drafts.
> >
> > I had originally indicated to Tim that you and Richard would be able review these documents beginning late Wed night or first thing this morning, but I am going to shoot him an e-mail and let him know that this is going to be delayed from what I had previously anticipated because I am delayed in finishing the documents. I was not provide a specific time for completing the initial reviews of the document (by you and Richard) today, but I will let you know if receive any specific information on a desired completion time from Tim (or via Tim).
> >
> > Thanks for your flexibility with this.
> >
> > JA
> >
> > On Thu, Oct 26, 2017 at 6:01 AM, Senio, Ian <isenio@blm.gov> wrote:
> >
> > > Good morning Justin,
> > >
> > > Just wondering when I might see the most recent draft of the final fracking rule. Charles had indicated that I might have a draft by this morning.
> > >
> > > Thank you
> > >
> > > --Ian

--
Justin Abernathy, J.D.
Senior Policy Analyst
Energy, Minerals and Realty Management (WO-300)

Bureau of Land Management
U.S. Department of the Interior
20 M Street Southeast
Washington, D.C. 20003
Phone (desk): 202-912-7213
Phone (cell): 202-309-2794
Email: jabernathy@blm.gov

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Justin Abernathy, J.D.
Senior Policy Analyst
Energy, Minerals and Realty Management (WO-300)
Bureau of Land Management
U.S. Department of the Interior
20 M Street Southeast
Washington, D.C. 20003
Phone (desk): 202-912-7213
Phone (cell): 202-309-2794
Email: jabernathy@blm.gov

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Justin Abernathy, J.D.
Senior Policy Analyst
Energy, Minerals and Realty Management (WO-300)
Bureau of Land Management
U.S. Department of the Interior
20 M Street Southeast
Washington, D.C. 20003
Phone (desk): 202-912-7213
Phone (cell): 202-309-2794
Email: jabernathy@blm.gov

From:	"Tichenor, James" <jtichenor@blm.gov> on behalf of Tichenor, James
To:	Mike Ford
Cc:	Justin Abernathy
Subject:	HF RIA docs
Date:	Wednesday, October 11, 2017 10:40:17 AM
Attachments:	Draft RIA Rescind HF Rule 5.9.17 (1) (4).docx HF RIA SOL Surname 3.11.2015.plus DH edits.3.12.2015 Clean.docx SUSB Data Example for BLM HF Rule.xlsx HF Rescind Proposed Rule 3.30.17.xlsx us_6digitnaics_r_2012.xlsx

Hi Mike,

I've attached some of the relevant HF rescind rule docs for the RIA. Per our discussion, it relied heavily on the previous analysis from 2015, so I've attached that as well. (That's the last version that I have in Word. Not sure if it's entirely relevant to you now, but just so you have it for reference purposes). Also as mentioned, the excel file is a little mess, and I might have to refresh my memory and I might have to help walk you through that, it you think the comments warrant revisiting things.

--
James Tichenor
Economist
Energy, Minerals, and Realty Management Directorate WO-300
Bureau of Land Management
jtichenor@blm.gov
202-573-0536

From: "McNeer, Richard" <richard.mcneer@sol.doi.gov> on behalf of McNeer, Richard
To: "Rodgers; Kerry"; "Lawyer; Mark"
Cc: Justin Abernathy; James Tichenor; "Yudson; Charles"; "Hawbecker; Karen"; Jack Haugrud
Subject: Re: USACE Comments on Proposed Rule to Rescind the 2015 Hydraulic Fracturing Rule and Update from EPA
Date: Friday, June 30, 2017 1:53:02 PM

Kerry and Mark:

Thanks for the USACE comments. I will review them.

[redacted]

The NPR proposes a simple deregulatory action based on the policy assessment that the states are and should be taking the lead in regulating HF operations on Federal lands. EPA's policy managers may agree or disagree with the premise and goals of the NPR, but it is a simple decision that should not require much time, and should be a priority.

Thanks again for all your efforts in support of this initiative.

Richard

On Fri, Jun 30, 2017 at 1:33 PM, Rodgers, Kerry <kerry_rodgers@ios.doi.gov> wrote:

> Good afternoon,
>
> Attached and pasted below are the U.S. Army Corps of Engineers comments on the Proposed Rule to Rescind the 2015 Hydraulic Fracturing Rule.
>
> In order to allow for policy review, EPA is unable to provide comments by COB today as requested. Stu has asked that EPA submit comments by noon on Wednesday, July 5. Please let me and Mark know if the BLM has concerns about this timing.
>
> Thanks.
>
> —
>
> "General Comments: This rule has been not been implemented since it was published in the Federal Register because of litigation. However, there are many provisions within this rule that strengthen consideration of how states and federal land management agencies and agencies with substantial critical infrastructure (e.g. dams, levees etc) is accomplished to ensure that fracturing is accomplished in a responsible manner and. USACE believes that establishing, maintaining, and monitoring well integrity when hydraulic fracturing takes place in the vicinity of embankment dams and levees is desirable as a loss of control of high pressure fluids has the potential to negatively impact the integrity of these structures. Further the rule enhances public disclosure of the chemicals used in hydraulic fracturing which is in our view is a positive outgrowth and which may be lost with the rescission of the rule. Lastly, provisions in the rule do enhance consistent regulation of the hydraulic fracturing process and likely would have supported consistent regulation of these activities by all states/tribes and the Federal government. The rescission therefore will remove those anticipated benefits of the rule (anticipated because the rule was never implemented due to litigation."
>
> —
>
> Kerry
>
> Kerry E. Rodgers

Management Analyst, Policy and Regulatory Affairs
Executive Secretariat and Regulatory Affairs
Office of the Secretary
U.S. Department of the Interior
Phone: (202) 513-0705
E-mail: kerry_rodgers@ios.doi.gov

From: McGinnis, Shelley
To: Beverly Winston
Subject: BPs on V&F and HF
Date: Wednesday, April 26, 2017 2:01:17 PM
Attachments: V&F_Memo_2017_0317_final (1).docx
HF_Memo_2017_0316_final_j.docx

--

ShelleyMcGinnis, Ph.D.
ResourceAdvisor
Bureauof Land Management
Energy,Minerals, and Realty Management
1849 CStreet NW, Room 5625
Washington,DC 20240
Office:202-208-6551
Cell: 202-578-3010
Email: smcginnis@blm.gov

INFORMATION/BRIEFING MEMORANDUM
FOR THE ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT

DATE: March 30, 2017

FROM: Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management

SUBJECT: Venting & Flaring Rule

BACKGROUND

The "Venting & Flaring Rule" is formally the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). These regulations are codified at new 43 CFR subparts 3178 and 3179. The recent rulemaking also includes provisions to make regulatory and statutory authority consistent with respect to royalty rates that may be levied on competitively offered oil and gas leases on Federal lands. This rule implements recommendations from several oversight reviews, including reviews by the Office of the Inspector General of the Department of the Interior (OIG) and the Government Accountability Office (GAO).[1] The OIG and GAO reports recommended that the Bureau of Land Management (BLM) update its regulations to require operators to augment their waste prevention efforts, afford the BLM greater flexibility in setting royalty rates, and clarify BLM policies regarding royalty-free, on-site use of oil and gas.

DISCUSSION

Date of finalization:
The final rule was published in the Federal Register on November 18, 2016, and took effect on January 17, 2017.

Is it subject to the White House Directive to delay the effective date?
No. The rule was in effect on January 17, 2017, prior to the President's January 20 Order.

Who, if anyone, has weighed in on the rule?
The BLM received 330,000 public comments on the rule, including approximately 1,000 unique comments. Commenters included: State governments (including Wyoming, North Dakota, and New Mexico), local governments, tribal governments, members and representatives of the oil and gas production industry, and environmental/conservation groups. In general, industry groups and the commenting states were opposed to the rule; environmental/conservation groups supported the rule; and local governments and tribal governments were split (tribal governments expressed a desire to minimize waste, but also did not want to hinder production).

[1] GAO, Oil and Gas Royalties: The Federal System for Collecting Oil and Gas Revenues Needs Comprehensive Reassessment, GAO-08-691, September 2008, 6; GAO, Federal Oil and Gas Leases: Opportunities Exist to Capture Vented and Flared Natural Gas, Which Would Increase Royalty Payments and Reduce Greenhouse Gases, GAO-11-34, (Oct. 2010), 2.

Industry groups and the states of Wyoming, Montana, and North Dakota have challenged the rule in court. Several environmental groups, as well as the states of New Mexico and California, have intervened in support of the rule.

Legislation has been filed in both houses of Congress disapproving the rule pursuant to the Congressional Review Act (CRA). Under the CRA, if both houses of Congress pass a joint resolution disapproving a rule, and the President signs the resolution, the rule will cease to have effect and the agency will be precluded from issuing "a new rule that is substantially the same," unless authorized by new legislation. The House passed its resolution, H.J. Res. 36. The Senate's resolution, S.J. Res. 11, is pending before the Committee on Energy and Natural Resources. The White House expressed support for H.J. Res. 36.

The potential job impact of the rule:
The Regulatory Impact Analysis (RIA) concluded that the rule is not expected to impact employment in any material way. It found that the anticipated additional gas production volumes represent only a small fraction of the U.S. natural gas production volumes. Additionally, the RIA noted that annualized compliance costs represent only a small fraction of the annual net incomes of the affected companies, and that economic exemptions in the rule would reduce costs for the most impacted companies. Finally, the RIA predicted that companies would require new labor to comply with the rule.

In the litigation, North Dakota has asserted that it will lose "more than 1,000 jobs" as a result of the rule. An economist hired by industry petitioners asserted that the rule could result in the loss of as many as 3,850 jobs. Economists hired by the environmental groups offered a rebuttal to these claims, concluding that the rule will likely have a neutral or positive effect on employment.

NEXT STEPS

What options do we have at our discretion/potential paths forward:

- *Potential Congressional Review Act (CRA) nullification.* If the rule is repealed pursuant to the CRA, then the BLM will revert to applying the venting, flaring, and royalty-free use regulations in NTL-4A. If the BLM were to decide later to replace or revise NTL-4A through a subsequent rulemaking, the BLM would need to consider at that time what implications the CRA's "substantially the same" limitation might have on the rulemaking. The scope of that limitation has not been judicially interpreted.

- *APA rulemaking process*. If the rule is not nullified under the CRA, the BLM could commence a new rulemaking to revise and/or rescind some or all of the rule pursuant to the Administrative Procedure Act.

- *Implementation flexibility*. The rule provides the BLM with some latitude in how its provisions are enforced or implemented. For example, the rule considers gas flared in excess of an operator's capture target to be avoidably lost, and therefore royalty bearing. Repeated noncompliance with the rule's capture requirements could subject an operator to enforcement actions ranging from civil monetary penalties to shutting in a lease. The BLM has discretion as to whether and how civil penalties should be levied, and could let the royalty provision associated with excess flaring serve as the primary compliance

mechanism. Additionally, there are multiple provisions in the rule that allow for exemptions based on economic considerations. How those economic considerations are applied is left to BLM policy direction.

- *Litigation*. With regard to the pending litigation, the Solicitor's Office will need to prepare a separate options paper. However, a settlement offer to revisit through additional rulemaking the portions of the rule that overlap current Environmental Protection Agency (EPA) provisions, or that have been flagged as too burdensome, is outlined below:
    - 43 CFR 3162 (Requirements for Operating Rights Owners and Operators) – Waste minimization plan could be dropped, the information required for the plan could be scaled back, or the plan could be limited to operators coordinating with midstream gas processors.
    - 43 CFR 3178 (Royalty Free Use of Lease Production) – Royalty free use is good as written. There is very little controversy associated with this portion of the rule, except for some clarification of terms which were included in final.
    - 43 CFR 3179.1-.12 (Waste Prevention and Resource Conservation) – Flaring limits/Avoidable/unavoidable, etc. – Suggest scaling back CT/FA limits from the ultimate 98%/750 Mcf requirement in the rule.
        - For example, North Dakota capture target adjusts to "90% by October 1, 2020, with potential for 95% capture are attainable and should be adopted as gas capture goals by the Commission."
        - Both Wyoming and Utah have flaring prohibitions above 1800 Mcf per well per month unless Commission approval.
        - With inclusion of ONRR data since publication of the rule, a very accurate method has been developed to determine exact impacts of various selected values of CT and FA, so it is possible to fine tune which parameters are selected to meet objectives.
    - 43 CFR 3179.101-.105 (flaring and venting gas during drilling and production operations) – Are generally okay; 3179.101 (well drilling) could be dropped (EPA overlap); may relax royalty flaring limits which rule tightened.
        - Limits to royalty free flaring were reduced to 20 MMcf from 50 MMcf in rule.
    - 43 CFR 3179.201-.204 (flared or vented from equipment and during well maintenance operations) – Much overlap with EPA; Suggest dropping 3179.201 (pneumatic controllers), 3179.202 (pneumatic pumps), 3179.203 (storage vessels); Potentially drop 3179.204 (liquids unloading), this is mostly a reporting standard and could be relaxed or dropped, not a lot of good data to quantify which might be a good reason to keep parts of it.
    - 43 CFR 3179-301-.305 (leak detection and repair) – LDAR program overlaps with EPA (drop in its entirety).
    - 43 CFR 3179.401(state or tribal variances) – Clarify terms to convey that the variance provision does not require a point by point equivalence to allow a variance to be granted. Potentially modify language regarding who enforces portions of the rule subject to the variance.

INFORMATION/BRIEFING MEMORANDUM
FOR THE ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT

DATE: March 30, 2017

FROM: Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management

SUBJECT: Hydraulic Fracturing Rule

BACKGROUND

The BLM final rule on hydraulic fracturing serves as a complement to update existing regulations designed to ensure the environmentally responsible development of oil and gas resources and protection of other downhole zones on federal and Indian lands. The BLM initiated the rule in response to the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology. This technology has opened large portions of federal and Indian lands to oil and gas development. The hydraulic fracturing rule addresses various safety concerns which should improve the confidence level of the public as industry explores and opens larger and newer areas of federal and Indian lands to oil and gas development. The rule has garnered tremendous public interest and was immediately challenged in court.

DISCUSSION

Dates/Timeline of the rule development and finalization:
On November 18, 2011, the National Gas Subcommittee of the Secretary of Energy's Advisory Board recommended that the BLM undertake a rulemaking to ensure well integrity, water protection, and adequate public disclosure related to hydraulic fracturing on federal and Indian lands. Following the recommendation the BLM developed and published a draft Hydraulic Fracturing rule on May 11, 2012. The BLM received 177,000 comments in response and published a supplemental rule addressing the comments on May 24, 2013. The BLM received 1.35 million comments in response, addressed these comments and published the final rule in the Federal Register on March 26, 2015 followed by a correction notice on March 30th. The final rule has not gone into effect because the Wyoming district court first preliminarily enjoined the effectiveness of the rule and then set aside the rule in a final order. That court's decision is currently on appeal to the Tenth Circuit. Options in that litigation were briefed on Friday, March 10, 2017.

Is it subject to the White House Directive to delay the effective date:
No. This rule has never taken effect. Because of the district court's order setting aside the rule, the rule is not scheduled to go into effect. The district court's order is on appeal to the Tenth Circuit.

Who, if anyone, has weighed in on the rule:
BLM held several regional public forums, tribal consultations, and received a total of 1.35 million public comments in the rulemaking proceeding. Industry and state commenters were mostly

opposed to the rule. Indian tribes were divided. Some supported a ban (the Pawnee Nation is now pursuing a ban), while others felt it hurt business opportunities. Similarly Congressional members were divided. Environmental groups supported the rule and wanted it to be stricter, or to ban hydraulic fracturing.

Two industry associations, Independent Petroleum Association of America and Western Energy Alliance, filed suit in the U.S. District Court for the District of Wyoming on March 20, 2015. Four states (Colorado, North Dakota, Utah, and Wyoming) and the Ute Tribe of the Uintah and Ouray Reservation also challenged the rule, and the cases were consolidated.[1] Environmental groups (Sierra Club, Earthworks, Western Resource Advocates, Wilderness Society, Conservation Colorado Education Fund, and Southern Utah Wilderness Alliance) intervened as defendants in the case.

In the court of appeals, the industry associations, the states, and the tribe support the district court's decision. The environmental groups oppose the court's decision. There have been several *amici curiae* in the litigation, including the states of Alaska, Kansas, Montana, and Texas, county government associations, and the U.S. Chamber of Commerce opposed to the rule. Former Interior officials Lynn Scarlett, David Hayes, James Caswell, and Michael Dombeck filed an *amicus* brief in the court of appeals supporting the Department's statutory authority.

There are bills in the House and Senate that would place sole regulatory authority over hydraulic fracturing operations on federal lands in the hands of state agencies. Rep. Gohmert and five co-sponsors introduced H.R. 928. Senator Inhofe and eight co-sponsors introduced S.334.

The potential job impact of the rule:
BLM's Regulatory Impact Analysis (RIA) concluded that the rule would not change the employment decisions of firms in the oil and gas industry. It based that conclusion on the finding that the rule would impose average additional costs per fracking operation of less than $12,000, which is less than 0.25% of the average cost of drilling and fracking a well. Market forces provide a much stronger impact on employment than the BLM rule as witnessed by the recent industry cycle of volatile prices and corresponding rig activity. North Dakota has a backlog of over 800 wells that have been drilled, but not finished, which are waiting for favorable market prices rather than the courts to clear the BLM rule.

In district court, the industry groups did not argue that the rule would cause loss of jobs, but did challenge the RIA's finding of the average cost of the rule. Colorado, Utah, and Wyoming made a general argument that the rule would reduce employment. The tribe did not present arguments concerning employment. North Dakota argued that additional delays in permitting would result in loss of jobs.

In its court of appeals brief, the tribe argued that there would be a negative impact on jobs on the tribe's lands. The other appellees did not address employment in their appellate briefing.

[1] A separate tribe – the Southern Ute Indian Tribe – filed a separate challenge to the rule in the District of Colorado. That case has been settled.

NEXT STEPS

What options do we have at our discretion/potential paths forward:

The BLM has formulated a team, including representation from the Solicitor's Office, and met the week of March 20. The team is currently drafting the proposed rule, preamble, EA and RIA for initial submission and review required before being submitted to BLM leadership.

From: Subijoy Dutta
To: James Tichenor
Cc: Jeffrey Prude; James Annable; Justin Abernathy; Ross Klein
Subject: RE: Major State - regs
Date: Tuesday, March 28, 2017 5:22:36 PM

James,
I have been checking on the state regulations. I am almost done updating the piece and will send that out soon.
I heard back from Texas RRC today and they still allow pits and sent me an email to that effect. Their engineer mentioned to me that no change in their regulation on that
Utah also allows pits. BLM UTSO engineer and UT state person confirmed that. They also use master fracking pits now. This will be in the updated piece.

Subijoy

From: Tichenor, James [mailto:jtichenor@blm.gov]
Sent: Monday, March 27, 2017 6:20 PM
To: Subijoy Dutta
Cc: Jeffrey Prude; James Annable; Justin Abernathy; Ross Klein
Subject: Re: Major State - regs

Thanks Subijoy,

That makes sense about OK, thanks for truthing it.. Looks like 165:10-7-16(a)-(e) relates to pits receiving <50k bbls and (f) is for >50k bbls. Will make that change to mine.

For Texas, I remember back in 2015, TX has something allowing to apply for pits, but I think we talked to the TRC and they said they'd never approved it.

For ND, I think the tank rule is very recent (Oct 16). Is it possible that the change hasn't tracked yet to Allen? I'm pasting it below. (highlighted only bc it pasted funny). As I read it, seems like pits may on really be approved if they have freshwater, but maybe there are other regs in the code that speak more specifically...

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I will be checking with WY, MT, and UT as well.

Please let me know if any of you have any questions.

Subijoy

Subijoy Dutta, P.E.
Lead Petroleum Engineer
Fluid Minerals Division
20 M. Street SE, Washington, DC 20003
Ph: 202-912-7152; Cell: 202-802-0379;
www.blm.gov; email: sdutta@blm.gov

From: Tichenor, James [mailto:jtichenor@blm.gov]
Sent: Monday, March 27, 2017 2:06 PM
To: Subijoy Dutta; Jeffrey Prude; James Annable
Cc: Justin Abernathy
Subject: Major State - regs

2.12 Summary of State Regulations

The BLM reviewed existing state regulations for consistency and potential overlap with the 2015 final rule requirements that would be rescinded by this proposed rule. We conducted a detailed examination of existing state regulations in California, Colorado, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming. From FY 2010 to FY 2016, the number of well completions on Federal and Indian lands in those states accounted for XX% of the total well completions on Federal and Indian lands nationwide. Table 2.12 shows a summary of the findings.

California: In July 2015, the California Division of Oil, Gas, and Geothermal Resources finalized its hydraulic fracturing rules.[1] However, these rules were in effect as emergency measures at the time the BLM published the 2015 final rule. In addition, the California Code of Regulations[2] places requirements on oil and gas operations. California also lists "Field Rules" on its website that identify well construction information and requirements on an individual field basis.

Colorado: The Colorado Oil and Gas Conservation Commission has a number of rules that regulate hydraulic fracturing in addition to its requirements on all oil and gas operations.[3] The relevant requirements related to the BLM's 2015 final rule that would be rescinded by this proposed rule are unchanged since 2015.

Montana: The Montana Board of Oil and Gas Conservation has regulated hydraulic fracturing since August 2011 in addition to its requirements on all oil and gas operations.[4] The rules have not changed since the BLM's 2015 final rule.

New Mexico: The New Mexico Oil Conservation Division has regulated hydraulic fracturing through specific regulations (since 2012) and with its general oil and gas rules.[5] The rules have not changed since the BLM's 2015 final rule.

North Dakota: The North Dakota Department of Mineral Resources has hydraulic fracturing regulations and general oil and gas regulations.[6] The hydraulic fracturing rules were established in 2012 and amended in 2014. The recovered fluid management requirements were updated in October 2016.

Oklahoma: The Oklahoma Corporation Commission Oil and Gas Division regulates oil and gas operations, including hydraulic fracturing, with regulations in Title 165, Chapter 10 of the Oklahoma Register.[7]

Texas: The Texas Railroad Commission regulates oil and gas operations, including hydraulic fracturing, see Texas Administrative Code, Title 16, Part 1, Chapter 3.[8]

Utah: The Utah Oil and Gas Conservation regulates oil and gas operations, including hydraulic fracturing, see Office of Administrative Rules R649.[9]

Wyoming: The Wyoming Oil and Gas Conservation Commission regulates oil and gas operations, including hydraulic fracturing, see General Agency, Board or Commission Rules, "Chapter 3: Operational Rules, Drilling Rules."[10]

Table 2.12: Summary of State Regulations Covering Requirements that the BLM Proposes to Rescind

State	Percent of well completions on Federal and Indian lands from FY14-16	Monitor Cementing Operations	CEL to Demonstrate Remediation Action was Successful	Cement Evaluation Logs to Verify Isolation of the Production Zone	MIT/ Pressure Test on the Casing Proposed for Fracturing	Monitoring of Pressures During HF Operations	Management of Recovered HF Fluids	Chemical Disclosure of HF Fluids
California	4%	Yes. Section 1724(a)(6)	Requires operator to recement. May require CEL. Section 1722.4	Yes. Section 1784.2	Yes. Section 1784.1	Yes. Section 1785	Must be "stored in containers." Pits not allowed. Section 1786(a)(4)	Yes to FracFocus. Section 1788(b)
Colorado	10%	Not specified but state has extensive requirements for casing and	Not specified but state has extensive requirements for casing and	Yes. Rule 317O	Yes. Rule 317J	Yes. Rule 341	Lined pits generally allowed.[11] Rule 904. Tanks in surface water	Yes. Rule 205A The state uses FracFocus*

		cementing. Rule 317	cementing. Rule 317				supply areas. Rule 317B.d(2)	
Montana	1%	Not specified but state has casing and cementing requirements. 36.22.1001	Not specified but state has casing and cementing requirements. 36.22.1001	Not specified but state has casing and cementing requirements. 36.22.1001	Yes. 36.22.1106(2)	Yes. 36.22.1106(5)	Pits may store fluids up to 10 days after completion operations cease. 36.22.1005	Yes to FracFocus. 36.22.1015
New Mexico	29%	Not specified but state has casing and cementing requirements. 19.15.16.10	CEL not specified but operator must remedy. 19.15.16.11	Not specified but state has casing and cementing requirements. 19.15.16.10	Yes. 19.15.16.10(G) and (I)	Not specified but state has extensive requirements concerning offset wells, horizontal well spacing, well and lease equipment. 19.15.16.14, .15, .18	Closed-loop tanks system required unless approved to use lined pits or below-grade tank. 19.15.17.8	Yes. 19.15.16.19(B) The state uses FracFocus*
State	**Percent of well completions on Federal and Indian lands from FY14-16**	**Monitor Cementing Operations**	**CEL to Demonstrate Remediation Action was Successful**	**Cement Evaluation Logs to Verify Isolation of the Production Zone**	**MIT/ Pressure Test on the Casing Proposed for Fracturing**	**Monitoring of Pressures During HF Operations**	**Management of Recovered HF Fluids**	**Chemical Disclosure of HF Fluids**
North Dakota	7%	Not specified but state has extensive requirements for casing and cementing. 43-02-03-22	Not specified but director must approve remediation plan and may require additional pressure test. 43-02-03-22	Yes, if fracturing through the intermediate casing string. 43-02-03-27.1(2)(c)	Yes, if fracturing through the intermediate casing string. 43-02-03-27.1(2)(d)	Yes. 43-02-03-27.1(1)(b) and (2)(a) and (3)	Requires rigid, closed tanks. 43-02-03-19.3	Yes to FracFocus. 43-02-03-27.1(1)(g)
Oklahoma	1%	Yes. 165:10-3-4(i)(1)	Not specified depends on circumstances. 165:10-3-4(c)(7)(h) and 4(d)(5)	No	Yes, operator must test all casing strings. 165:10-3-4(g)	No	Requires tanks. 165:10-3-13	Yes to FracFocus. 165:10-3-10(c)
Texas	1%	Not specified but state has extensive requirements for casing and cementing. 3.13	Not specified but state has extensive requirements for casing and cementing. 3.13	Yes. 3.13(a)(7)(D)(iv)	Yes. 3.13(a)(7)(A) and (B)	Yes. 3.13(a)(7)(C)	Requires tanks unless pit is approved. Section 3.8(d)(2)	Yes to FracFocus. 3.29(a)(8)
Utah	17%	Not specified	Not specified but operator must correct R649-3-39	Not specified for hydraulic fracturing completions, only for class II disposal wells. R649-3-39	Yes, operator must test all casing strings. R649-3-39	Not specified for hydraulic fracturing completions, only for class II disposal wells. R649-3-39	Unclear, appears to require "workmanlike storage" for hyrdraulic fluids but also allow completion pits. R649-3-39	Yes to FracFocus. R649-3-39
Wyoming	29%	Not specified but state has extensive requirements for casing and cementing. Section 22	May require. Section 22(a)(i)	May require. Section 22(a)(i)	May require. Section 45(a)	Yes. Section 45(h)(vi)	Requires tanks or lined pits. Section 45(j)	Yes. Section 45(h)(i) and (ii)

* State does not require use of FracFocus in its regulation, but the FracFocus indicates that the State uses it for reporting. Source: FracFocus website "About Us," accessed on March 26, 2017, available at https://fracfocus.org/welcome.

As a result of our review, the major changes to these state regulations from the time when the BLM finalized the 2015 final rule are:

- North Dakota requiring closed rigid tanks for flowback, not lined pits; and
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James Tichenor
Economist
Energy, Minerals, and Realty Management Directorate wo-300
Bureau of Land Management
jtichenor@blm.gov
202-573-0536

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From: Tichenor, James
To: Subijoy Dutta
Cc: Jeffrey Prude; James Annable; Justin Abernathy; Ross Klein
Subject: Re: Major State - regs
Date: Monday, March 27, 2017 6:20:59 PM

Thanks Subijoy,

That makes sense about OK, thanks for truthing it.. Looks like 165:10-7-16(a)-(e) relates to pits receiving <50k bbls and (f) is for >50k bbls. Will make that change to mine.

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Subijoy Dutta, P.E.

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Fluid Minerals Division

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Colorado	10%	Not specified but state has extensive requirements for casing and cementing. Rule 317	Not specified but state has extensive requirements for casing and cementing. Rule 317	Yes. Rule 317O	Yes. Rule 317J	Yes. Rule 341	Lined pits generally allowed.[11] Rule 904. Tanks in surface water supply areas. Rule 317B.d(2)	Yes. Rule 205A. The state uses FracFocus*
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State	**Percent of well completions on Federal and Indian lands from FY14-16**	**Monitor Cementing Operations**	**CEL to Demonstrate Remediation Action was Successful**	**Cement Evaluation Logs to Verify Isolation of the Production Zone**	**MIT/ Pressure Test on the Casing Proposed for Fracturing**	**Monitoring of Pressures During HF Operations**	**Management of Recovered HF Fluids**	**Chemical Disclosure of HF Fluids**
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Oklahoma	1%	Yes. 165:10-3-4(i)(1)	Not specified depends on circumstances. 165:10-3-4(c)(7)(h) and 4(d)(5)	No	Yes, operator must test all casing strings. 165:10-3-4(g)	No	Requires tanks. 165:10-3-13	Yes to FracFocus. 165:10-3-10(c)
Texas	1%	Not specified but state has	Not specified but state has	Yes.	Yes.	Yes.	Requires tanks unless pit is	Yes to FracFocus.

		extensive requirements for casing and cementing. 3.13	extensive requirements for casing and cementing. 3.13	3.13(a)(7)(D)(iv)	3.13(a)(7)(A) and (B)	3.13(a)(7)(C)	approved. Section 3.8(d)(2)	3.29(a)(8)
Utah	17%	Not specified	Not specified but operator must correct R649-3-39	Not specified for hydraulic fracturing completions, only for class II disposal wells. R649-3-39	Yes, operator must test all casing strings. R649-3-39	Not specified for hydraulic fracturing completions, only for class II disposal wells. R649-3-39	Unclear, appears to require "workmanlike storage" for hydraulic fluids but also allow completion pits. R649-3-39	Yes to FracFocus. R649-3-39
Wyoming	29%	Not specified but state has extensive requirements for casing and cementing. Section 22	May require. Section 22(a)(i)	May require. Section 22(a)(i)	May require. Section 45(a)	Yes. Section 45(h)(vi)	Requires tanks or lined pits. Section 45(j)	Yes. Section 45(h)(i) and (ii)

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James Tichenor
Economist

Energy, Minerals, and Realty Management Directorate wo-300

Bureau of Land Management

jtichenor@blm.gov

202-573-0536

--

James Tichenor
Economist
Energy, Minerals, and Realty Management Directorate WO-300
Bureau of Land Management
jtichenor@blm.gov
202-573-0536

From: Subijoy Dutta
To: Prude, Jeffrey
Subject: Re: Draft Notice of Proposed Rule - State Comparison Status - Brief update
Date: Sunday, March 26, 2017 11:30:06 AM

Jeff,
That will be part of the preamble that Richard will likely be crafting. You can mention when that piece is put together.

Subijoy

Sent from my mobile device
Subijoy Dutta, P.E.
Lead Petroleum Engineer
Fluid Minerals Division
20 M. Street SE, Washington, DC 20003
Ph: 202-912-7152; Cell: 202-802-0379;
www.blm.gov; email: sdutta@blm.gov

On Mar 25, 2017, at 1:01 PM, Prude, Jeffrey <jprude@blm.gov> wrote:

> I was thinking for the part of the write-up that says we're not leaving fracking unregulated - there are still lots of rules that have to be followed even in those sates that don'r have fracking rules.
>
> Thx.
>
> Regards,
>
> Jeff Prude
> Bureau of Land Management
> Bakersfield Field Office Oil and Gas Program Lead
> 3801 Pegasus Dr.
> Bakersfield, CA 93308
> (661) 391-6140
>
> "If you want to go fast, go alone.
> If you want to go far, go together." -African proverb
>
> On Fri, Mar 24, 2017 at 10:45 PM, Subijoy Dutta <sdutta@blm.gov> wrote:
>> This was there before the 2015 rule. Nothing changed after the rule. This is a state status comparison report. What we stated before in 2015 rule, no change of status on those two states. One had last change in 2005 the other in 2013.
>>
>> Sent from my iPhone
>>
>> On Mar 24, 2017, at 6:46 PM, Prude, Jeffrey <jprude@blm.gov> wrote:

Hi Subijoy

The other two states without any specific HF operations do have general regs that protect fresh/usable water, the environment, health and safety, etc., don't they? So we can still mention that?

Thx. Have a good weekend.

Regards,

Jeff Prude
Bureau of Land Management
Bakersfield Field Office Oil and Gas Program Lead
3801 Pegasus Dr.
Bakersfield, CA 93308
(661) 391-6140

"If you want to go fast, go alone.
If you want to go far, go together." -African proverb

On Fri, Mar 24, 2017 at 6:30 PM, Subijoy Dutta <sdutta@blm.gov> wrote:

> I am still updating the State comparison status as of current date. But want to send the draft summary below. This may help the strike team in moving aggressively forward. Attached Virginia, and Kentucky regulations for the team, especially James and Ross.

BLM currently has oil and gas leases in 32 states: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

29 States out of the 32 states, as listed below, currently have some regulations in place addressing hydraulic fracturing (HF) operations. Virginia and Kentucky have introduced their hydraulic fracturing regulations in late 2016.

- Seventeen states had regulations covering hydraulic fracturing operations prior to the BLM's 2015 rule. They are Alaska, Arkansas, Colorado, Illinois, Kansas, Michigan,

Montana, Nevada, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Texas, Utah, and Wyoming.

- Twelve other states have updated or in the process of finalizing their oil and gas regulations addressing hydraulic fracturing operations after March 2015. These states are Alabama, California, Idaho, Kentucky, Louisiana, Maryland (moving towards banning hydraulic fracturing), Mississippi, Nebraska, South Dakota, Tennessee, Virginia, and West Virginia.

- Out of the remaining 3 states (Arizona, Indiana, and Oregon), only Indiana updated their oil and gas regulation in September 2015 to protect underground sources of drinking water (USDW) by limiting the maximum wellhead injection pressure, which is a limitation in the hydraulic fracturing completion requiring very high injection pressure. Arizona or Oregon did not have any change.

Subijoy

From: Subijoy Dutta [mailto:sdutta@blm.gov]
Sent: Friday, March 24, 2017 4:24 PM
To: Justin Abernathy; Richard McNeer; James Tichenor; Charles Yudson; Adrienne Brumley; Jeffrey Prude; Ross Klein; James Annable
Subject: RE: Draft Notice of Proposed Rule - FracFocus States

Hello Team,

I talked to GWPC/FracFocus and they just sent a Map to me showing their latest list of States using FracFocus as in the attached Word document.

There are 23 states currently using FracFocus.

Please email/call me if questions.

Subijoy

Subijoy Dutta, P.E.

Lead Petroleum Engineer

Fluid Minerals Division

20 M. Street SE, Washington, DC 20003

Ph: 202-912-7152; Cell: 202-802-0379;

www.blm.gov; email: sdutta@blm.gov

From: Abernathy, Justin [mailto:jabernathy@blm.gov]
Sent: Thursday, March 23, 2017 2:56 PM
To: Richard McNeer; James Tichenor; Justin Abernathy; Charles Yudson; Adrienne Brumley; Jeffrey Prude; Ross Klein; James Annable; Subijoy Dutta
Subject: Draft Notice of Proposed Rule - Rescinding HF Rule (As of Thu 3/23 @ 3 PM)

--

Justin Abernathy, J.D.

Senior Policy Analyst

Energy, Minerals and Realty Management (WO-300)

Bureau of Land Management

U.S. Department of the Interior

Phone : 970-570-0035

Email: jabernathy@blm.gov

From: Subijoy Dutta
To: Gerald Dickinson
Cc: Travis Kern
Subject: RE: MT State regulation on HF - any change from December 2015
Date: Wednesday, March 22, 2017 3:47:41 PM

Thanks, lot, Jerry.
Can you provide your Cell and MT desk phone number. My BLM cell went kaput.

Subijoy

From: Dickinson, Gerald [mailto:gdickins@blm.gov]
Sent: Wednesday, March 22, 2017 3:27 PM
To: Subijoy Dutta
Cc: Travis Kern
Subject: Re: MT State regulation on HF - any change from December 2015

Subijoy - I didn't find anything different than you did. Made a couple of phone calls also and my contacts weren't aware that either Montana or North Dakota had made any revisions to what you already have too.

If you need anything else, let me know.

Jerry Dickinson

On Wed, Mar 22, 2017 at 1:12 PM, Subijoy Dutta <sdutta@blm.gov> wrote:
Jerry,
We are working on rescinding the HF rule and coming up with a new proposal quickly.
I was checking on some of the state regulations. I didn't see any change in MT regs on Fracking since 2012.
Attached what I found on their website today, indicating no change.
Can you please confirm.
I also need to know about ND. Attached their OIl and Gas regulation excerpt as well.

Please let me know soon.

Subijoy
PS: I am in all day meeting on this from yesterday, and we are getting the regs and related docs prepared.

Subijoy Dutta, P.E.
Lead Petroleum Engineer
Fluid Minerals Division
20 M. Street SE, Washington, DC 20003
Ph: 202-912-7152; Cell: 202-802-0379;
www.blm.gov; email: sdutta@blm.gov

--
Gerald F (Jerry) Dickinson
Petroleum Engineer
DOI/BLM Montana/Dakotas State Office
406-896-5110 (o)
307-320-8327 (c)

From: Prude, Jeffrey
To: Winkler, Bill@DOC
Cc: Hodge, John; Bartling, Bill@DOC; Leroy Mohorich
Subject: Re: TIME SENSITIVE: BLM Question on California State HF Regulations
Date: Tuesday, March 21, 2017 4:41:25 PM

Hi Bill

Thanks. I will pass this on to the Team.

Regards,

Jeff Prude
Bureau of Land Management
Bakersfield Field Office Oil and Gas Program Lead
3801 Pegasus Dr.
Bakersfield, CA 93308
(661) 391-6140

"If you want to go fast, go alone.
If you want to go far, go together." -African proverb

On Tue, Mar 21, 2017 at 1:13 PM, Winkler, Bill@DOC <Bill.Winkler@conservation.ca.gov> wrote:

> John,
>
> I just talked with Emily Reader with the Well Stimulation Unit in Sacramento. She confirmed that there have not been any changes in our hydraulic fracturing rules since 2015.
>
> Let me know if you have any other questions.
>
> Bill Winkler
>
> Supervising Oil and Gas Engineer
>
> Inland District, Bakersfield
>
> Division of Oil, Gas and Geothermal Resources
>
> Bill.Winkler@conservation.ca.gov
>
> (661) 322-4031 Office
>
> **From:** Hodge, John [mailto:jhodge@blm.gov]

Sent: Tuesday, March 21, 2017 12:53 PM
To: Bartling, Bill@DOC <Bill.Bartling@conservation.ca.gov>; Winkler, Bill@DOC <Bill.Winkler@conservation.ca.gov>
Cc: Jeffrey Prude <jprude@blm.gov>; Leroy Mohorich <lmohoric@blm.gov>
Subject: TIME SENSITIVE: BLM Question on California State HF Regulations

Hi Bill and Bill,

Quick question from our Washington Office and they need a quick turnaround. Have there been any changes in the CA regulations regarding hydraulic fracturing since 2015? I think the only change may be that they went from interim/emergency rules to final.

What the WO is looking for is whether states have kept their existing laws intact or increased their regulations. I will me in a meeting for the next few hours so if you need to call please use my cell and I can step-out. Any help is greatly appreciated.

(I also left Bill W. a voice message)

Thanks,

John

--

John Hodge

Asst. Field Manager - Minerals Division

3801 Pegasus Dr.

Bakersfield, CA 93308

Office: (661) 391-6020

Fax: (661) 391-6041

Cell: (661) 301-1659

From: "Hartman, Robert" <bhartman@blm.gov> on behalf of Hartman, Robert
To: "Annable; James"
Subject: Re: State HF Regulations
Date: Tuesday, March 21, 2017 5:16:04 PM

Jim,

I know of no west slope specific HF policy. During the time of our frac hit they used the Offset policy from the DJ. I talked to the local COGCC engineer in Rifle and he indicated the policy has now grown statewide and they use it in the Piceance.

http://cogcc.state.co.us/documents/reg/Policies/InterimStatewideHorizontalOffsetPolicy.pdf

Bob Hartman

Work 970 244 3041 GJFO
Cell 970 589 6735

On Tue, Mar 21, 2017 at 1:39 PM, Annable, James <jannable@blm.gov> wrote:

> Bob
>
> I know there is a horizontal fracturing policy for wells in the DJ Basin. Are there specific HF regulations that apply to western slope wells or is the State using the DJ Basin regulations for all of the State.
>
> Thanks
> Jim
>
> --
> Jim Annable
> Petroleum Engineer, Royal Gorge Field Office
> 3028 East Main Street, Canon City, CO 81212
> Office: 719-269-8566
> Cell: 719-429-1307

From: Stewart, Shannon
To: mike nedd; Kathleen Benedetto
Subject: Fwd: Memos for Onshore Orders, HF and V&F
Date: Thursday, March 16, 2017 5:27:04 PM
Attachments: Onshore Orders Memo 2017 0316 final.docx
Attachment 1 - API Letter.pdf
HF Memo 2017 0316 final.docx
V&F Memo 2017 0316 final (1).docx

Hi Mike and Kathy

Attached are the three memos that 300 developed on Onshore Orders 3, 4 and 5; Hydraulic Fracturing; and Venting and Flaring. Shelley said these have been reviewed by SOL Richard McNeer. We will need to send these up to ASLM first thing Friday to hit our 48 hour in advance deadline. Let me know if you want any changes made.

Shannon

--

Shannon Stewart
Acting Chief of Staff
Bureau of Land Management
202-570-0149 (cell)
202-208-4586 (office)
scstewar@blm.gov

INFORMATION/BRIEFING MEMORANDUM
FOR THE ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT

DATE: March 16, 2017

FROM: Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management

SUBJECT: Onshore Orders

BACKGROUND

"Onshore Orders" is shorthand for the three concurrent rulemakings that replaced the BLM's site security, oil measurement, and gas measurement regulations contained in Onshore Oil and Gas Orders Nos. 3, 4, and 5, which had been in place since 1989. The recent rulemakings resulted in new site security, oil measurement, and gas measurement regulations for Onshore Federal and Indian oil and gas production and are codified in the Code of Federal Regulations at 43 C.F.R. part 3170. These rulemakings were prompted by external and internal oversight reviews finding many of the BLM's production measurement and accountability policies to be outdated and inconsistently applied.[1]

DISCUSSION

Date of finalization:
All three of the final rules were published in the Federal Register on November 17, 2016, and became effective on January 17, 2017.

Are the rules subject to the White House Directive to delay the effective date:
No, they were in effect on January 17, 2017, before the White House issued the January 20, 2017 Directive.

Who, if anyone, has weighed in on the rule:
After the rules were proposed in 2015, the BLM received slightly more than 100 public comments on each rule. The low number of comments was largely because, leading up to issuance of the proposed rules, the BLM worked with industry in identifying improvements. Almost all of the comments on the rules came from industry. Industry expressed support for sound site security and measurement regulations and also expressed support for the codification of those regulations in the Code of Federal Regulations. However, industry objected to a number of particular requirements in the proposed rules and provided many technical comments for improving the rules. The States of North Dakota and New Mexico also submitted comments that expressed opposition to the proposed rules, but were less detailed than those submitted by industry. Much of the state government opposition was generated by a drafting error that would have applied BLM's

[1] *E.g.,* Report to Congressional Requesters, Oil and Gas Management, Interior's Oil and Gas Production Verification Efforts Do Not Provide Reasonable Assurance of Accurate Measurement of Production Volumes GAO-10-313 (2010).

operating regulations (including APD requirements) to operations on state and private tracts in a federally approved unit or CA. That error was corrected in the final rule. The BLM made substantial changes to the proposed rules in based on the comments it received.

The BLM presented the final rules to API in October 2016. The rules were well received and the API members expressed appreciation for the BLM's willingness to modify the proposed rules in response to comments. The BLM has since conducted further outreach to make the regulated community aware of the new regulations and has not received complaints at these outreach sessions. However, on February 21, 2017, API sent a letter (Attachment 1) to the BLM requesting that the BLM delay implementation of the entirety of all three rules until the BLM has systems in place to implement all portions of the rules.

Legislation has been filed in the House of Representatives to nullify all three of the rules under the Congressional Review Act (CRA). The CRA disapproval resolution for the site security rule (OO3) was sponsored by Rep. Pearce of New Mexico with nine co-sponsors.[2] The CRA disapproval resolution for the oil measurement rule (OO4) was sponsored by Rep. Westerman of Arkansas with three co-sponsors.[3] The CRA disapproval resolution for the gas measurement rule (OO5) was sponsored by Rep. Kramer of North Dakota with two co-sponsors.[4] No CRA disapproval resolutions for any of the three rules have been filed in the Senate.

In recent conversations with the BLM, industry has identified three areas where BLM could make improvements to the rules: 1) immediate assessments; 2) lengthen the time (Phase-in period) for the implementation of the Facility Measurement Point (FMP) requirements; and 3) gas sampling procedures.

While BLM could change its approach to immediate assessments, the BLM promulgated the rules, in part, to respond to the Office of Inspector General's recommendation in 2009 that the BLM "[e]nhance the deterrent for operator noncompliance by increasing the dollar amount of monetary assessments, seeking congressional action for increasing civil penalties, and expanding the infractions for which immediate assessments may be issued." (Recommendation 9, OIG Report No. CR-EV-BLM-0001-2009, *BUREAU OF LAND MANAGEMENT'S OIL AND GAS INSPECTION AND ENFORCEMENT PROGRAM,* December 2010)

The rules have not been challenged in court.

The potential job impact of the rule:
The BLM concluded that none of the three rules will have a significant impact on employment. These rules largely codify existing industry practices, and include a number of provisions that reduce, delay, or remove altogether compliance requirements for leases that are older and/or that have lower levels of production. A number of new exemptions, increased allowances for commingling and allocation and off-lease measurement agreements, higher production thresholds for leases to be covered under existing exemptions, and the outright removal of some requirements

[2] H.R.J. Res. 56, 115th Cong. (2017).
[3] H.R.J. Res. 82, 115th Cong. (2017).
[4] H.R.J. Res. 68, 115th Cong. (2017).

all contributed to a significant reduction in cost between the proposed and final versions of the rules.

The BLM's economic analysis concluded that the combined impact of the three rules would be to increase costs by less than $13,000 per entity (Operator) per year for the first three years after the rules become effective and by about $7,500 per entity (Operator) per year after that. The cost estimates for each individual rule are as follows:

- Site Security Rule: $31.2 million one-time cost plus $11.7 million increase in annual operating costs. The average compliance cost per entity (Operator) for this rule is under $6,000 per year for the first three years after the rule becomes effective, and just over $3,000 per year after that.
- Oil Measurement Rule: $3.3 million one-time cost plus $4.6 million increase in annual operating costs. The average compliance cost per entity (Operator) for this rule is just over $1,500 per year for the first three years after the rule becomes effective, and just over $1,200 per year after that.
- Gas Measurement Rule: $23.3 million one-time cost plus $12.1 million increase in annual operating costs. The average compliance cost per entity (Operator) for this rule is just over $5,300 per year for the first three years after the rules becomes effective, and just under $3,300 per year after that.

NEXT STEPS

What options do we have at our discretion/potential paths forward:

At this time, BLM is engaged in the initial phases of implementing the three rules. Industry has said the requirements contained in the rules are necessary for implementing standards the industry has employed for many years. If BLM decides to revise any or all of the rules, it could undertake measures to address immediate assessments, a phase-in period for the implementation of the Federal Measurement Point (FMP) requirements, and gas sampling procedures. Any revisions of the rules would need to be done through a rulemaking. In addition, the BLM will consider how to best respond to API's February 21, 2017 letter. Finally, if all of the CRA bills are passed by both the House and Senate and signed by the President, the BLM will revert to applying the site security, oil measurement, and gas measurement rules in Onshore Orders Nos. 3, 4, and 5. Because the three rules were drafted to operate interdependently, the BLM will likely need to engage in further rulemaking if only one or two of the CRA bills is passed (as the surviving regulations would likely run into functional problems without their sister regulations in place).

ATTACHMENT

1. API Letter dated February 21, 2017

Richard Ranger
Senior Policy Advisor
Upstream
1220 L Street, NW
Washington, DC 20005-4070
USA
Telephone 202-682-8057
Fax 202-682-8426
Email rangerr@api.org
www.api.org

February 21, 2017

Ms Kristin Bail, Acting Director
Bureau of Land Management
U.S. Department of the Interior
1849 C St., NW, Room 2134 LM
Washington, DC 20240

Attention: Request for Postponed Effective Date for Requirements in 43 CFR 3175

Dear Acting Director:

API is a national trade association representing over 625 member companies involved in all aspects of the oil and natural gas industry. API's members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API member companies are leaders of a technology-driven industry that supplies most of America's energy, supports more than 9.8 million jobs and 8% of the U.S. economy, and since 2000 has invested nearly $2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

On January 17, 2017, the rules replacing the Bureau of Land Management (BLM) Onshore Orders 3, 4, & 5 (43 CFR 3173, 3174, & 3175) became effective. On January 19, a letter (attached to this letter as an addendum) was distributed through the BLM state offices informing operators that, "Due to unanticipated delays and complexities with developing the updated version of the Automated Fluid Minerals Support System (AFMSS), the BLM will not be able to accept applications for FMPs by January 17, 2017." The BLM therefore postponed the requirement to submit applications for Facility Measurement Points (FMPs) for both existing measurement facilities (pre-January 17, 2017; see 43 CFR 3173.12(e)) and new measurement facilities (January 17, 2017 and beyond; see 43 CFR 3173.12(d)), by the extent of the final delay period. This directly delays the date when operators will receive approved FMPs for both affected oil and gas measurement facilities.

In the January 19 postponement letter, BLM also delayed the implementation of portions of 43 CFR 3174 for existing oil measurement facilities, explaining that a delay was necessary because 43 CFR 3174.2(f) states, "measuring procedures and equipment used to measure oil for royalty purposes, that is in use on January 17, 2017, must comply with the requirements of this subpart on or before the date the operator is required to apply for an FMP number under 3173.12(e) of this part."

The BLM has not postponed the requirements of 43 CFR 3175. In justifying the decision not to delay these requirements, the postponement letter states, "The delay does not affect the implementation of the measurement requirements in 43 CFR 3175. Unlike 43 CFR 3174, where implementation timeframes are

based on the FMP application deadline, the implementation timeframes in 3175 are based on the flow category of the meter (very low, low, high, or very high)."

The postponement should be extended to the entirety of all three rules (43 CFR, 3173, 3174, and 3175) because the requirements within each rule are predicated on the now-postponed FMP requirements. Although cited within the January 19 postponement letter, 43 CFR 3175 is specifically excluded based on an interpretation of the definition for the very low, low, high, and very high flow categories within 43 CFR 3175 (§ 3175.10). However, these flow categories are also based around FMPs. For example, the definition for the high-volume category is as follows: "High-volume facility measurement point or high-volume FMP means any FMP that measures more than 200 Mcf/day, but less than or equal to 1,000 Mcf/day over the averaging period." This category applies to a high-volume *FMP*, not a high-volume meter. The definition for an FMP from 43 CFR 3173 (§ 3170.3) further states, "Facility measurement point (FMP) means a BLM-approved point where oil or gas produced from a Federal or Indian lease, unit PA, or CA is measured and the measurement affects the calculation of the volume or quality of production on which royalty is owed." Because an FMP is a "BLM-approved point" and the flow categories within 43 CFR 3175 are based on FMPs, it is impractical to move forward with the requirements with 43 CFR 3175 during the present period when BLM is unable to process applications for FMPs.

Another factor that should be considered in the implementation of these rules is that the liquid and gas measurement equipment and accounting software used at FMPs must be approved by the BLM Production Measurement Team. This team has not been formed and as of the date of this letter there is no approved equipment list for operators to rely upon to ensure compliance. While the rules postpone the requirement to obtain approval for FMP equipment and software for two years, this situation still imposes a compliance obligation on operators before they can obtain the approvals from BLM that are described in the rules.

In conclusion, we respectfully request that the entirety of 43 CFR 3173, 3174, and 3175 be postponed until the BLM has systems in place to implement all portions of the rules.

Should you have any questions, please contact Richard Ranger at 202.682.8057, or via e-mail at rangerr@api.org.

Very truly yours,

Richard Ranger
Senior Policy Advisor
Upstream and Industry Operations
American Petroleum Institute

Cc: Larry Claypool, Acting Associate Director for Minerals and Realty Management

United States Department of the Interior

BUREAU OF LAND MANAGEMENT

[Field Office and address]

http://www.blm.gov

[DATE]

In Reply, Refer To:
3160 (310) P

Company Name
Address 1
Address 2
City, State, Zip

Attn: Name of company contact

Dear Name of company contact,

On November 17, 2016, the Federal Register published final rules relating to requirements for site security and production handling (43 CFR 3173), measurement of oil (43 CFR 3174), and measurement of gas (43 CFR 3175), all with an effective date of January 17, 2017. The 43 CFR 3173 requirements require operators to submit electronic applications to the BLM for approval of Facility Measurement Points (FMPs) and site facility diagrams within specific timeframes.

For permanent measurement facilities installed before January 17, 2017, these timeframes, which range from one to three years from the effective date of the rule, are based on the average production rate of oil and gas on that lease, Communitization Agreement (CA), or Participating Area (PA) unit over the previous 12 months (see 43 CFR 3173.12(c)). For permanent measurement facilities installed after January 17, 2017, the operator must submit an electronic application for an FMP number before any production can leave the permanent measurement facility (see 43 CFR 3173.12(d)).

Due to unanticipated delays and complexities with developing the updated version of the Automated Fluid Minerals Support System (AFMSS), the BLM will not be able to accept electronic applications for FMPs by January 17, 2017. In addition, this affects the filing of new and amended site facility diagrams in instances requiring FMP numbers. The BLM is working to complete the new system and anticipates that this functionality will be available to operators by May 2017.

As a result, the BLM is taking the following interim steps to help operators:

1. For permanent measurement facilities in place before January 17, 2017, the BLM will extend the timeframes in 43 CFR 3173.12(e) by the number of days between January 17, 2017, and the date the BLM fully implements the electronic FMP functionality. The date that the electronic

FMP functionality is available to operators is called the "*new effective date.*" For example, if the *new effective date* is May 17, 2017 (a delay of 120 days), the BLM will extend the time frames listed in 43 CFR 3173.12(e) by 120 days.

2. For permanent measurement facilities installed between January 17, 2017, and the *new effective date*, the operator has 60 days from the *new effective date* to apply for an FMP. During this period, the operator may use the measurement facility for Oil and Gas Operation Reports (OGOR) just as they would for an existing FMP during the phase-in period. For example, if an operator installs a new permanent measurement facility on February 1, 2017, and the *new effective date* is May 17, 2017, the operator would have until July 16, 2017, to apply for an FMP. During the period of February 1, 2017, and until the BLM assigns an FMP number, the operator would use the lease, unit PA or CA number for OGOR reporting. Operators must submit the site facility diagrams 30 days after assignment of the FMP.

3. For permanent measurement facilities covered under 3173.11(d)(2), *i.e.*, those that are in service on or before January 17, 2017, and are modified or experience a change in operator after January 17, 2017, the operator has 60 days from the *new effective date* to apply for an FMP. For example, if an operator modifies an existing permanent measurement facility on February 1, 2017, and the *new effective date* is May 17, 2017, the operator would have until July 16, 2017, to apply for an FMP. Operators must submit the site facility diagrams 30 days after assignment of the FMP.

4. For permanent measurement facilities installed after the *new effective date*, the operator must apply for an FMP before any production leaves the permanent measurement facility.

5. The BLM will provide operators with a 30-day notice of the *new effective date* and post to the web.

6. In addition, this delay affects the implementation of the requirements in 43 CFR 3174 for permanent oil measurement facilities in place before January 17, 2017. Under 3174.2(f), "measuring procedures and equipment used to measure oil for royalty purposes, that is in use on January 17, 2017, must comply with the requirements of this subpart on or before the date the operator is required to apply for an FMP number under 3173.12(c) of this part." Therefore, the BLM will apply the extension referenced in paragraph 1 above to the implementation timeframes for oil measurement procedures and equipment in 43 CFR 3174.2(f). The delay does not affect the implementation of the measurement requirements in 43 CFR 3174 for permanent oil measurement facilities installed on or after January 17, 2017.

7. The delay does not affect the implementation of the measurement requirements in 43 CFR 3175. Unlike 43 CFR 3174, where implementation timeframes are based on the FMP application deadline, the implementation timeframes in 3175 are based on the flow category of the meter (very low, low, high, or very high).

Please contact [Name] at [Phone] or [email@blm.gov] if you have any questions or need to make corrections.

Sincerely,

INFORMATION/BRIEFING MEMORANDUM
FOR THE ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT

DATE: March 16, 2017

FROM: Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management

SUBJECT: Hydraulic Fracturing Rule

BACKGROUND

The BLM final rule on hydraulic fracturing serves as a complement to update existing regulations designed to ensure the environmentally responsible development of oil and gas resources and protection of other downhole zones on federal and Indian lands. The BLM initiated the rule in response to the increasing use and complexity of hydraulic fracturing coupled with advanced horizontal drilling technology. This technology has opened large portions of federal and Indian lands to oil and gas development. The hydraulic fracturing rule addresses various safety concerns which should improve the confidence level of the public as industry explores and opens larger and newer areas of federal and Indian lands to oil and gas development. The rule has garnered tremendous public interest and was immediately challenged in court.

DISCUSSION

Dates/Timeline of the rule development and finalization:
On November 18, 2011, the National Gas Subcommittee of the Secretary of Energy's Advisory Board recommended that the BLM undertake a rulemaking to ensure well integrity, water protection, and adequate public disclosure related to hydraulic fracturing on federal and Indian lands. Following the recommendation the BLM developed and published a draft Hydraulic Fracturing rule on May 11, 2012. The BLM received 177,000 comments in response and published a supplemental rule addressing the comments on May 24, 2013. The BLM received 1.35 million comments in response, addressed these comments and published the final rule in the Federal Register on March 26, 2015 followed by a correction notice on March 30th. The final rule has not gone into effect because the Wyoming district court first preliminarily enjoined the effectiveness of the rule and then set aside the rule in a final order. That court's decision is currently on appeal to the Tenth Circuit. Options in that litigation were briefed on Friday, March 10, 2017.

Is it subject to the White House Directive to delay the effective date:
No. This rule has never taken effect. Because of the district court's order setting aside the rule, the rule is not scheduled to go into effect. The district court's order is on appeal to the Tenth Circuit.

Who, if anyone, has weighed in on the rule:
BLM held several regional public forums, tribal consultations, and received a total of 1.35 million public comments in the rulemaking proceeding. Industry and state commenters were mostly

opposed to the rule. Indian tribes were divided. Some supported a ban (the Pawnee Nation is now pursuing a ban), while others felt it hurt business opportunities. Similarly Congressional members were divided. Environmental groups supported the rule and wanted it to be stricter, or to ban hydraulic fracturing.

Two industry associations, Independent Petroleum Association of America and Western Energy Alliance, filed suit in the U.S. District Court for the District of Wyoming on March 20, 2015. Four states (Colorado, North Dakota, Utah, and Wyoming) and the Ute Tribe of the Uintah and Ouray Reservation also challenged the rule, and the cases were consolidated.[1] Environmental groups (Sierra Club, Earthworks, Western Resource Advocates, Wilderness Society, Conservation Colorado Education Fund, and Southern Utah Wilderness Alliance) intervened as defendants in the case.

In the court of appeals, the industry associations, the states, and the tribe support the district court's decision. The environmental groups oppose the court's decision. There have been several *amici curiae* in the litigation, including the states of Alaska, Kansas, Montana, and Texas, county government associations, and the U.S. Chamber of Commerce opposed to the rule. Former Interior officials Lynn Scarlett, David Hayes, James Caswell, and Michael Dombeck filed an *amicus* brief in the court of appeals supporting the Department's statutory authority.

There are bills in the House and Senate that would place sole regulatory authority over hydraulic fracturing operations on federal lands in the hands of state agencies. Rep. Gohmert and five co-sponsors introduced H.R. 928. Senator Inhofe and eight co-sponsors introduced S.334.

The potential job impact of the rule:
BLM's Regulatory Impact Analysis (RIA) concluded that the rule would not change the employment decisions of firms in the oil and gas industry. It based that conclusion on the finding that the rule would impose average additional costs per fracking operation of less than $12,000, which is less than 0.25% of the average cost of drilling and fracking a well. Market forces provide a much stronger impact on employment than the BLM rule as witnessed by the recent industry cycle of volatile prices and corresponding rig activity. North Dakota has a backlog of over 800 wells that have been drilled, but not finished, which are waiting for favorable market prices rather than the courts to clear the BLM rule.

In district court, the industry groups did not argue that the rule would cause loss of jobs, but did challenge the RIA's finding of the average cost of the rule. Colorado, Utah, and Wyoming made a general argument that the rule would reduce employment. The tribe did not present arguments concerning employment. North Dakota argued that additional delays in permitting would result in loss of jobs.

In its court of appeals brief, the tribe argued that there would be a negative impact on jobs on the tribe's lands. The other appellees did not address employment in their appellate briefing.

[1] A separate tribe – the Southern Ute Indian Tribe – filed a separate challenge to the rule in the District of Colorado. That case has been settled.

NEXT STEPS

What options do we have at our discretion/potential paths forward:

The BLM is coordinating with the Solicitor's Office to assemble a team of subject matter experts who will meet in Washington D.C. during the week of March 20, 2017 to focus on rescinding the hydraulic fracturing rule. The goal is to complete a draft by March 24, 2107.

INFORMATION/BRIEFING MEMORANDUM
FOR THE ASSISTANT SECRETARY – LAND AND MINERALS MANAGEMENT

DATE: March 16, 2017

FROM: Tim Spisak, Acting Assistant Director, Energy, Minerals and Realty Management

SUBJECT: Venting & Flaring Rule

BACKGROUND

"Venting & Flaring Rule" is shorthand for the *Waste Prevention, Production Subject to Royalties, and Resource Conservation* rulemaking that replaced the requirements related to venting, flaring, and royalty-free use of gas contained in the 1979 Notice to Lessees and Operators of Onshore Federal and Indian Oil and Gas Leases, Royalty or Compensation for Oil and Gas Lost (NTL-4A). These regulations are codified at new 43 CFR subparts 3178 and 3179. The recent rulemaking also includes provisions to make regulatory and statutory authority consistent with respect to royalty rates that may be levied on competitively offered oil and gas leases on Federal lands. This rule implements recommendations from several oversight reviews, including reviews by the Office of the Inspector General of the Department of the Interior (OIG) and the Government Accountability Office (GAO).[1] The OIG and GAO reports recommended that the BLM update its regulations to require operators to augment their waste prevention efforts, afford the BLM greater flexibility in setting royalty rates, and clarify BLM policies regarding royalty-free, on-site use of oil and gas.

DISCUSSION

Date of finalization:
The final rule was published in the Federal Register on November 18, 2016, and took effect on January 17, 2017.

Is it subject to the White House Directive to delay the effective date:
No, it was in effect on January 17, 2017, before the President's Order.

Who, if anyone, has weighed in on the rule:
The BLM received 330,000 public comments on the rule, including approximately 1,000 unique comments. Commenters included: state governments (including Wyoming, North Dakota, and New Mexico), local governments, tribal governments, members and representatives of the oil and gas production industry, and environmental/conservation groups. In general, industry groups and the commenting states were opposed to the rule, environmental/conservation groups supported the rule, and local governments and tribal governments were split (tribal governments expressed a desire to minimize waste, but also did not want to hinder production).

[1] GAO, Oil and Gas Royalties: The Federal System for Collecting Oil and Gas Revenues Needs Comprehensive Reassessment, GAO-08-691, September 2008, 6; GAO, Federal Oil and Gas Leases: Opportunities Exist to Capture Vented and Flared Natural Gas, Which Would Increase Royalty Payments and Reduce Greenhouse Gases, GAO-11-34, (Oct. 2010), 2.

Industry groups and the states of Wyoming, Montana, and North Dakota have challenged the rule in court. Several environmental groups, as well as the states of New Mexico and California, have intervened in support of the rule.

Legislation has been filed in both houses of Congress disapproving the rule pursuant to the Congressional Review Act (CRA). Under the CRA, if both houses of Congress pass a joint resolution disapproving a rule, and the President signs the resolution, the rule will cease to have effect and the agency will be precluded from issuing "a new rule that is substantially the same," unless authorized by new legislation. The House passed its resolution, H.J. Res. 36. The Senate's resolution, S.J. Res. 11, is pending before the Committee on Energy and Natural Resources. The White House expressed support for H.J. Res. 36.

The potential job impact of the rule:
The Regulatory Impact Analysis (RIA) concluded that the rule is not expected to impact employment in any material way. It found that the anticipated additional gas production volumes represent only a small fraction of the U.S. natural gas production volumes. Additionally, the RIA noted that annualized compliance costs represent only a small fraction of the annual net incomes of the affected companies, and that economic exemptions in the rule would reduce costs for the most impacted companies. Finally, the RIA predicted that companies would require new labor to comply with the rule.

In the litigation, North Dakota has asserted that it will lose "more than 1,000 jobs" as a result of the rule. An economist hired by industry petitioners asserted that the rule could result in the loss of as many as 3,850 jobs. Economists hired by the environmental groups offered a rebuttal to these claims, concluding that the rule will likely have a neutral or positive effect on employment.

NEXT STEPS

What options do we have at our discretion/potential paths forward:

- *Potential Congressional Review Act (CRA) nullification.* If the rule is repealed pursuant to the CRA, then the BLM will revert to applying the venting, flaring, and royalty-free use regulations in NTL-4A. If the BLM were to decide later to replace or revise NTL-4A through a subsequent rulemaking, the BLM would need to consider at that time what implications the CRA's "substantially the same" limitation might have on the rulemaking. The scope of that limitation has not been judicially interpreted.
- *APA rulemaking process*. If the rule is not nullified under the CRA, the BLM could commence a new rulemaking to revise and/or rescind some or all of the rule pursuant to the Administrative Procedure Act.
- *Implementation flexibility*. The rule provides the BLM with some latitude in how its provisions are enforced or implemented. For example, the rule considers gas flared in excess of an operator's capture target to be avoidably lost, and therefore royalty bearing. Repeated noncompliance with the rule's capture requirements could subject an operator to enforcement actions ranging from civil monetary penalties to shutting in a lease. The BLM has discretion as to whether and how civil penalties should be levied, and could let

the royalty provision associated with excess flaring serve as the primary compliance mechanism. Additionally, there are multiple provisions in the rule that allow for exemptions based on economic considerations. How those economic considerations are applied is left to BLM policy direction.

- *Litigation*. With regard to the pending litigation, the Solicitor's Office will need to prepare a separate options paper. However, a settlement offer to revisit through additional rulemaking the portions of the rule that overlap current EPA provisions or that have been flagged as too burdensome is outlined below:
    - 43 CFR 3162 – Waste minimization plan could be dropped, the information required for the plan could be scaled back, or the plan could be limited to operators coordinating with midstream gas processors
    - 43 CFR 3178 – Royalty free use is good as written.
        - Very little controversy associated with this portion of the rule except for some clarification of terms which were included in final.
    - 43 CFR 3179.1-.12 – Flaring limits/Avoidable/unavoidable, etc.; Suggest scaling back CT/FA limits from the ultimate 98%/750 Mcf requirement in the rule
        - For example North Dakota capture target adjusts to "90% by October 1, 2020 with potential for 95% capture are attainable and should be adopted as gas capture goals by the Commission"
        - Both Wyoming and Utah have flaring prohibitions above 1800 Mcf per well per month unless Commission approval.
        - With inclusion of ONRR data since publication of the rule, a very accurate method has been developed to determine exact impacts of various selected values of CT and FA, so it is possible to fine tune which parameters are selected to meet objectives.
    - 43 CFR 3179.101-.105 – Are generally okay; 3179.101 could be dropped (EPA overlap); may relax royalty flaring limits which rule tightened
        - Limits to royalty free flaring were reduced to 20 MMcf from 50 MMcf in rule.
    - 43 CFR 3179.201-.204 – Much overlap with EPA; Suggest dropping 3179.201 (pneumatic controllers), 3179.202 (pneumatic pumps), 3179.203 (storage vessels); Potentially drop 3179.204 (Liquids unloading), this is mostly a reporting standard and could be relaxed or dropped, not a lot of good data to quantify which might be a good reason to keep parts of it.
    - 43 CFR 3179-301-.305 – LDAR program overlaps with EPA (drop in its entirety).
    - 43 CFR 3179.401 – Variance process – clarify terms to convey that the variance provision does not require a point by point equivalence to allow a variance to be granted. Potentially modify language regarding who enforces portions of the rule subject to the variance.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, by and through XAVIER BECERRA, ATTORNEY GENERAL, Plaintiff, **v.** **DAVID BERNHARDT, Secretary of the Interior; JOSEPH BALASH, Assistant Secretary for Land and Minerals Management, United States Department of the Interior; UNITED STATES BUREAU OF LAND MANAGEMENT; UNITED STATES DEPARTMENT OF THE INTERIOR,** Defendants.	Case No. 4:18-cv-00521-HSG Case No. 4:18-cv-00524-HSG (related) **[PROPOSED] ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The Court has read and considered the memoranda of points and authorities and other documents in support of and in opposition to Plaintiff's Motion for Summary Judgment and has heard and considered the arguments of counsel at the hearing on this matter held on December 5, 2019.

NOW THEREFORE, good cause appearing, the Court hereby GRANTS Plaintiff's Motion for Summary Judgment.

Specifically, the Court FINDS and DECLARES that the Bureau of Land Management violated the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*., and the National Environmental Policy Act, 42 U.S.C. § 4321 *et. seq.*, when it issued Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61,924 (Dec. 29, 2017) ("Repeal"), without providing a reasonable explanation for its action and without providing an adequate analysis of the environmental impacts of the action.

Therefore, the Court hereby DECLARES the Repeal unlawful and VACATES the Repeal.

IT IS SO ORDERED.

Dated: _____

_____
Hon. Haywood S. Gilliam, Jr.

General Information

Court	United States District Court for the Northern District of California; United States District Court for the Northern District of California
Federal Nature of Suit	Other Statutes - Administrative Procedure Act/Review or Appeal of Agency Decision[899]
Docket Number	4:18-cv-00521