Subcommittee on Energy and Mineral Resources
Doug Lamborn, Chairman
Hearing Memo

July 13, 2015

To: All Natural Resource Committee Members

From: Subcommittee on Energy and Minerals Staff (x5-9297)

Subject: Oversight hearing on "*The Future of Hydraulic Fracturing on Federally Managed Land"*

The Subcommittee will hold an oversight hearing on "*The Future of Hydraulic Fracturing on Federally Managed Land"* on **Wednesday, July 15, 2015 at 10:00 A.M. in Room 1324 Longworth House Office Building.** This hearing will focus on the Bureau of Land Management's (BLM) final hydraulic fracturing rule, notably how it duplicates state efforts, causes unnecessary delays and burdens to operators, and is premised on questionable authority.

Policy Overview

- Four states, Colorado, North Dakota, Utah, and Wyoming, energy trade associations, and two tribes, the Southern Utes and the Ute Tribe of Uintah and Ouray County, have filed lawsuits challenging the BLM's final rule on hydraulic fracturing. Last month, a federal judge issued a stay delaying the effective date of the rule.

- The rule's variance provision does not permit states to enforce more stringent state hydraulic fracturing regulations on federal lands; rather, it permits the BLM the opportunity to adopt and interpret state rules on federal land. As such, states with federal lands must choose to accept duplicative regulations that will further hamper the permitting process, or abandon their own regulations and adopt the BLM's.

- Despite the BLM's insistence that this rule provides a uniform set of regulations throughout the country, operators are reporting that BLM field offices are receiving inconsistent interpretations of the final rule, leading to conflicting messages from various state offices.

- The BLM vastly underestimated the costs of implementation, and the associated delays with the final rule. For instance, North Dakota predicts this rule will add six months or more to the process for an operator to produce on federal land, with a cumulative decrease on revenue to the state of at least $300 million per year.

Witnesses Invited

Mr. Tom Fitzsimmons
Commissioner
Wyoming Oil and Gas Conservation Commission
Cody, WY

Mr. Lloyd Hetrick
Operations Engineering Advisor
Newfield Exploration Co.
The Woodlands, TX

Honorable Neil Kornze
Director
Bureau of Land Management
U.S. Department of the Interior
Washington, DC

Honorable James M. "Mike" Olguin
Council Member
Southern Ute Indian Tribe
Ignacio, CO

Ms. Hannah Wiseman
Attorneys' Title Professor
Florida State University College of Law
Tallahassee, FL

Hearing Focus

This hearing addresses the Bureau of Land Management's ("BLM") final rule on hydraulic fracturing (or "fracing"). Since the BLM first issued an advanced notice of proposed rulemaking, the rule has received sustained criticism from industry, states, and tribes. These entities and groups argue that the rule is premised on questionable statutory grounds, duplicates existing regulations, and would be overly burdensome. There is apparently merit to these claims, as a federal judge recently found that the rule imposed a credible threat of harm on the aforementioned stakeholders, and issued a stay for the effective date. This hearing will examine some of the more egregious issues raised by the stakeholders, and demonstrate that the BLM's final rule would unnecessarily venture into state authority.

Background

Over the past five years, America has vaulted to the forefront of production of oil and gas, due to the technological combination of hydraulic fracturing ("fracing") and horizontal drilling. This technology has enabled the United States to tap into its vast reserves of shale oil and gas, which in 2014 drove the United States to produce the most crude oil annually since 1986.[1] Fracing has been employed in the oil and gas industry since 1947, and is a "well stimulation technique" in which an "artificial fracture" is created and then "fluid [and propping agents] [are] pumped into the production casing, through the perforations (or open hole), and into the targeted formation at pressures high enough to cause the rock within the targeted formation to fracture."[2] Fracing *only* refers to the well stimulation process, and *does not* include well completion, construction, or other associated activities.[3]

The majority of increased production has occurred on state and private lands, which in turn has prompted states to adopt new regulatory regimes to ensure that producers carry out hydraulic fracturing activities safely. It is under these state regulatory authorities that fracing on federal land has been successfully operating.

Citing public concern about whether fracing can contaminate underground water sources, whether there is adequate management of well, and whether chemicals used for fracing should be disclosed, the BLM undertook a rulemaking process to address fracing on federal lands.[4] The final rule was announced on March 20, 2015, and was to become effective on June 24, 2015.[5] However, the rule's effective date has since been postponed due to the issuance of a stay by a Wyoming federal judge.[6]

A recent report by the U.S. Environmental Protection Agency ("EPA") highlighted the fact that fracing has had no "widespread, systemic impacts on drinking water resources in the United States."[7] Furthermore, the rule has been recognized as an overreach of the BLM's statutory powers, and heavily duplicative of the practices of states that have been effective in addressing hydraulic fracturing on both state and federal lands.[8]

During the previous Congress, on multiple occasions the U.S. House of Representatives acted on and passed legislation that would explicitly grant primacy to the states or tribes that have established fracing regulatory regimes.[9] These legislative solutions recognized that states have successfully overseen the hydraulic fracturing processes, and uniquely understand the geographical challenges found within their boundaries. The legislation also further reiterated the congressional intent to remove hydraulic fracturing from the realm of federal regulation with the passage of the Energy Policy Act 2005 ("EPAct 2005").

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[1] In 2014, the U.S. produced 3.17 billion barrels of oil, the most since the 3.17 billion barrels produced in 1986. U.S. Energy Information Administration, Petroleum & Other Liquids: U.S. Field Production of Crude Oil, http://www.eia.gov/dnav/pet/hist/LeafHandler.ashx?n=pet&s=mcrfpus1&f=a.

[2] AMERICAN PETROLEUM INSTITUTE, HYDRAULIC FRACTURING OPERATIONS---WELL CONSTRUCTION AND INTEGRITY GUIDELINES 15 (2009), *available at* http://www.api.org/~/media/files/policy/exploration/api_hf1.pdf.

[3] *See id.*

[4] 77 Fed. Reg. 27691 (2012).

[5] 80 Fed. Reg. 16128 (2015).

[6] Order Postponing Effective Date of Agency Action, Wyoming v. Jewell, No. 15-043 (D.Wyo. June 24, 2015).

[7] U.S. Environmental Protection Agency, Assessment of the Potential Impacts on Hydraulic Fracturing for Oil and Gas on Drinking Water Resources, at ES-6 (2015).

[8] *See* Press Release, Independent Petroleum Association of America, America's Independent Oil, Natural Gas Producers File Lawsuit Against Interior Department Over Final Hydraulic Fracturing Rule, (March 20, 2015), *available at* http://www.ipaa.org/press-releases/americas-independent-oil-natural-gas-producers-file-lawsuit-against-interior-department-over-final-hydraulic-fracturing-rule/.

[9] *See e.g.* H.R. 2728, Protecting States' Rights to Promote American Energy Security Act, 113th Congress (2013).

The Final Rule is Premised on a Lack of Statutory Authority or Justification

The BLM justifies its authority of the law under the statutory provisions of the Mineral Leasing Act ("MLA") and the Federal Land Policy and Management Act ("FLPMA").[10] Chiefly, the BLM argues that "[e]ach lease is expressly subject to existing and future regulations" and that the BLM "has authority to condition or to deny APDs," and by extension, the BLM may extend that authority to proposals for hydraulic fracturing operations.[11] This reasoning is flawed, as the BLM's chief justification for this rule is the protection of groundwater – a duty that belongs to the states and the EPA pursuant to the Safe Drinking Water Act.

Both the MLA and FLPMA are silent as to the protection of groundwater, and the use of hydraulic fracturing. In fact, the Congress – despite the repeated attempts of the House in the 113th – has acted only once on hydraulic fracturing. The EPAct 2005 explicitly removed hydraulic fracturing from the purview of federal regulatory schemes, and intended the regulation of hydraulic fracturing to remain with the states.[12]

Even if the BLM did have express statutory authority, the need for this rule is highly suspect. As mentioned previously, the BLM argues that "public concern about whether fracturing can lead to or cause the contamination of underground water sources" prompted the necessity of the final rule.[13] However, the final rule references neither the numerous statements by Department of the Interior officials concerning the lack of evidence linking hydraulic fracturing to widespread groundwater contamination, nor a single instance of the process of hydraulic fracturing contaminating groundwater.

Thus, the BLM's final rule is questionable at its foundation, and is contrary to the EPA's study. Without express Congressional authority to act, the BLM promulgated a rule that treads on state authority, and ignores Congressional intent.

The Final Rule Duplicates and Hinders State Regulatory Efforts

In defending the rule, the BLM relies on the argument that roughly half of the states that have producing wells on federally managed lands do not have hydraulic fracturing regulations.[14] Furthermore, the BLM asserts that over 90 percent of wells being drilled on federal land are hydraulically fractured.[15] Thus, the BLM concludes, this rule is needed to provide a baseline for those states without fracing regulations, and a failsafe for those states with regulations.

However, the BLM's conclusion relies on a false narrative. First, the BLM, within the rule itself, acknowledges that at least 99.3 percent of the total well completions on federal and Indian lands nationwide

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[10] *See* 80 Fed. Reg. 16186.
[11] 80 Fed. Reg. 16186.
[12] Energy Policy Act of 2005, Pub. L. No. 109-58, § 322, 42 U.S.C. § 300h(d) (2005).
[13] 80 Fed. Reg. 16,128.
[14] *Subcommittee Hearing on Effect of the President's FY 2016 Budget and Legislative Proposals for the Bureau of Land Management and the U.S. Forest Service's Energy and Minerals Programs on Private Sector Job Creation, Domestic Energy and Minerals Production and Deficit Reduction before the Subcommittee on Energy and Mineral Resources of the H. Comm. on Natural Resources*, 114th Con., March 24, 2015 (statement of Dir. Neil Kornze, U.S. Bureau of Land Management) ("The Bureau has oversight responsibility for federal oil and gas leases in 32 different States, yet only about half of those States have put rules in place to address modern hydraulic fracturing practices").
[15] 80 Fed. Reg. 16131.

occur in states that have existing hydraulic fracturing regulations.[16] Indeed, Director Kornze, in his April testimony before the Senate Energy and Natural Resources Committee, stated that the fracing rule codifies many of the regulations states are "already implementing."[17] These facts and statements demonstrate that states and Tribes have proactively led the way in regulating hydraulic fracturing – the BLM now seeks to upend those regulations that have been effective in ensuring the safe production of oil and natural gas from federal lands.

The BLM attempted to mitigate state and tribal concerns by inserting a "variance" provision into the final rule. That provision permits a BLM state director to issue a variance for a state or tribal regulation if the director determines "that the proposed alternative meets or exceeds the objectives for which the variance is being requested."[18] The BLM state director has the final say on whether a variance will be issued, and such determination cannot be appealed.[19]

While the variance provision was intended to respond to tribal and state complaints, the BLM acknowledged in the final rule, "[a] state or tribal variance is not a delegation of full or partial regulatory primacy."[20] The practical application of obtaining a variance provides no benefit to the state – rather, the BLM's provision grants the BLM a variance from its own rule. If the BLM finds that a state provision "meets or exceeds the objectives for which the variance is requested," then the BLM will merely enforce the state rule on federal land. In other words, the BLM will interpret whether operators are complying with a state rule on federal land. In essence, the variance provision only increases duplication, and does not prevent the BLM from questioning State's policy choices. Even if a state sought a variance, guidance has not been provided to state offices to direct how such a decision would be made, and as such, not a single variance has been granted to date.

The BLM's rule is highly duplicative, and permits the BLM to make unilateral decisions concerning state regulations without appeal. For states with federal lands, this rule presents a major challenge, and may force the states to adopt the BLM's less rigorous regulation, or to encourage operators to avoid federal land entirely.

The Final Rule Will Force Unnecessary Costs and Unknown Delays to the Permitting Process

The BLM's final rule predicts the rule will impact 2,800 to 3,800 hydraulic fracturing operations per year, at a cost of $11,400 per operation.[21] This impact, the BLM asserts, will also accompany a 12 hour delay in processing time for the BLM. Both the cost per operation and the potential delays caused by the final rule have been heavily criticized by states, tribes and industry.

The cost of the rule per operation has been greatly underestimated. Both the Independent Petroleum Association of America and the Western Energy Alliance posit the rule only assumed *de minimis* values to the expense and time necessary to prepare and review applications for permission to conduct hydraulic fracturing.

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[16] *See* 80 Fed. Reg. 16187.
[17] *Subcommittee Hearing on the Bureau of Land Management's Final Hydraulic Fracturing Rule: Hearing before the Subcommittee on Public Lands, Forests, and Mining of the S. Comm. On Energy and Natural Resources*, 114th Con., April 30, 2015 (statement of Dir. Neil Kornze, U.S. Bureau of Land Management).
[18] 80 Fed. Reg. 16221.
[19] 80 Fed. Reg. 16221.
[20] 80 Fed. Reg. 16176.
[21] 80 Fed. Reg. 16195.

A study commissioned by the Western Energy Alliance predicted the proposed rule would impose costs of *at least $345 million annually*, at an estimated cost of $96,913 per well.[22]

An egregious example of the BLM undervaluing potential costs is their estimate concerning the requirement for operators to store recovered fluids in closed tanks, rather than open pits. A commenter on the final rule explicated this new regulatory imposition could cost potentially $20 million more per year for a single operator,[23] whereas the BLM estimated a maximum cost to all operators of $16.4 million.[24] This is an extreme variance, and demonstrates the BLM likely underestimated the costs for compliance.

Additionally, the BLM failed to assess all associated delays with compliance of the new rule. For instance, the rule imposes a new requirement that operators apply for a permit to frac.[25] Operators are able to submit this request as part of their APD, or as a standalone document. If operators choose the latter option, the permit to frac will implicate further National Environmental Policy Act ("NEPA") analysis. Nowhere in the final rule is this additional NEPA process addressed, even though this alone could add significant delays to the permitting process.

Many conclude the BLM failed to consider all of the potential costs and delays that will affect operators. These aforementioned examples highlight some of the major flaws within the BLM's rule, and they highlight the lack of foresight the BLM showed while drafting the final rule.

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[22] July 22, 2013 Memorandum from John Dunham to Kathleen Sgamma, Business Impact of Revised Completion Regulations, at 1, *available at* http://www.westernenergyalliance.org/wp-content/uploads/2013/07/Final-Economic-Analysis-of-the-BLM-Fracing-Rule-Revision.pdf.

[23] *See* IPAA and WEA Memorandum in Support of Motion for Preliminary Injunction, Wyoming v. Jewell, No. 15-041, at 44 (D.Wyo. May 15, 2015).

[24] 80 Fed. Reg. 16206.

[25] *See* 80 Fed. Reg. 16219.