



Obama Administration Issues New Rules Regulating Fracturing Activities on Public and Tribal Lands

The U.S. Department of the Interior (“DOI”) released final rules regulating hydraulic fracturing activities on federal and tribal lands on March 20, 2015.¹ The new rules were codified in the Federal Register at 43 C.F.R. Part 3160 on March 26, 2015.² Unless the courts or Congress intervene, the new rules will become effective on June 24, 2015.³ The new rules serve to significantly expand federal regulations governing hydraulic fracturing by providing additional testing and reporting requirements as well as heightened standards applicable to the management of recovered fluids. These rules do not apply to drilling on private lands.

The new rules are DOI’s attempt to take a path that goes between the demands of environmental advocates for strict new regulation on hydraulic fracturing on federal lands and the equally strong voice of the oil and gas industry asking for the regulation of these activities to be left to the states. Some estimate the new rules will add only about \$5,500 to the cost of drilling a new well, while others believe a better estimate is more than \$97,000.⁴ In addition to these costs, the new rules are sure to generate ongoing disputes and controversies. Some environmental advocates wanted the rules to be more stringent.⁵ Meanwhile, some industry groups and one state are already challenging

the rules in court, alleging that they go too far.⁶ The key substantive requirements of the rules are summarized below, followed by a more detailed discussion of their impacts and the reaction to them.

Overview of the New Rules

Master Hydraulic Fracturing Plan. As a result of the new rules, an operator must submit a master hydraulic fracturing plan (“MHFP”) with its drilling permit application or with its Sundry Notice and Report on Wells as a notice of intent.⁷ An operator must also submit a new MHFP if the operator becomes aware of any significant new information regarding the geology of the area, the stimulation operation, or the impacts of the hydraulic fracturing operation.⁸ The MHFP must include fairly detailed information about the hydraulic fracturing project including information on the wellbore geology, the location of faults and fractures in close proximity to the wellbore, possible encounters with usable water (generally defined as water containing less than 10,000 parts per million of total dissolved solids), specific estimates related to the proposed hydraulic fracturing process such as the estimated direction and length of fractures, and a plan for handling fluids recovered.⁹

Drilling Activities. During well construction, the new regulations focus on protecting usable water.¹⁰ To accomplish this, operators must design and implement a casing program that follows best practices in the industry and perform a mechanical integrity test to confirm well integrity.¹¹ During the hydraulic fracturing operation, an operator must monitor annulus pressure at the bradenhead and ensure pressure does not exceed certain thresholds.¹² If test results during well construction or during the hydraulic fracturing operation show reason for concern, an operator must take corrective action.¹³ The new regulations generally require that all fluids recovered during hydraulic fracturing operations be stored in rigid enclosed, covered, or netted and screened above-ground tanks that do not have a capacity exceeding 500 barrels.¹⁴ Thus, operators will no longer be able to use open pits for storage of wastewater unless subject to a limited exception.

Post-Drilling Requirements. At the end of the hydraulic fracturing project, an operator must generally provide certain reports and certifications within 30 days of completing the last stage of the fracturing operation.¹⁵ The final federal regulations require disclosure of fluids used in the fracking process.¹⁶ Specifically, an operator must provide a description of the fluids and additives used in the frac fluid, including the trade name, supplier, purpose, ingredients, Chemical Abstract Service Number, maximum ingredient concentration in additive (percent by mass), and maximum ingredient concentration in hydraulic fracturing fluid (percent by mass).¹⁷ The regulations require disclosures to occur through the use of FracFocus, a website managed by the Ground Water Protection Council and Interstate Oil and Gas Compact Commission.¹⁸ Operators can seek an exemption for the requirements for information that qualifies as a “trade secret.”¹⁹ Depending on the application of the trade secret exemption, the actual impact the disclosure requirements will have on operators will vary.

Industry Impact

Certain aspects of these rules resemble rules already in place in many states. For example, 20 states (including states that are friendly to the oil and gas industry such as Texas, Oklahoma, and Louisiana) already require operators to make certain disclosures to FracFocus regarding the composition of the frac fluid used in hydraulic fracturing projects.²⁰

However, the federal rules differ from the disclosure requirements in most states in that both names and maximum concentrations must be disclosed.²¹ These rules seem to go further than state regulation in certain other areas too. For example, the new regulations provide fairly stringent rules about how fluids recovered during hydraulic fracturing operations must be stored.²² This is in contrast to some states, such as Pennsylvania, which provide a wider array of acceptable options for storing fluids recovered from hydraulic fracturing operations.²³ While the government has projected these new rules will result in additional costs of approximately \$5,500 per well, the industry believes the new costs will be more than \$97,000 per well.²⁴

The Path Forward

The path forward in wake of these new rules is unclear, as the regulations have received praise by some and criticism from others. The Bureau of Land Management has stated that this rule may serve as a model for states desiring to craft legislation for regulating drilling activities on private land.²⁵ U.S. Representative Tom Reed of New York has suggested that the state of New York look to these new regulations and attempt to draft state legislation that provides a way forward for developing the Marcellus Shale in New York.²⁶

However, despite receiving praise from some public officials and environmental groups, others from these groups and those in the oil and gas industry have voiced strong opposition to the new rules. Certain congressional members have already introduced legislation that would leave fracking regulations completely in the hands of the states.²⁷ Further, some industry groups and states, such as Wyoming and North Dakota, have already begun questioning the legality of these regulations.²⁸ Two industry groups have filed a petition for review in federal court in Wyoming alleging that the DOI enacted these regulations without sufficient evidence to support the need for them.²⁹ Further, the groups allege the regulations constitute arbitrary and unnecessary burdens that duplicate state law or improperly curtail the jurisdiction of state governments and are not properly tailored to achieve a legitimate government purpose.³⁰ On March 26, 2015, Wyoming became the first state to challenge the DOI's authority to enact the rules by alleging the rules exceed the DOI's authority and usurp existing state regulations.³¹

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Jeffrey A. Schlegel

Houston
+1.832.239.3728
jaschlegel@jonesday.com

Omar Samji

Houston
+1.832.239.3639
osamji@jonesday.com

Charles T. Wehland

Chicago
+1.312.269.4388
ctwehland@jonesday.com

Allan T. Kirk

Houston
+1.832.239.3838
akirk@jonesday.com

Jennifer M. Hayes

Pittsburgh
+1.412.394.7992
jhayes@jonesday.com

Endnotes

- 1 See Press Release, "Interior Department Releases Final Rule to Support Safe, Responsible Hydraulic Fracturing Activities on Public and Tribal Lands," The U.S. Department of the Interior, March 20, 2015.
- 2 See the [published rules](#).
- 3 See U.S. Code of Federal Regulations, 43 C.F.R. § 3162.3-3(a).
- 4 See Mark Drajem, James Polson, and Andrew M Harris, "Oil Industry Meets First Federal Fracking Rules with a Lawsuit," *Bloomberg Business*, March 20, 2015.
- 5 Coral Davenport, "New Federal Rules are Set for Fracking," *The New York Times*, March 20, 2015.
- 6 See Keith Goldberg, "Wyoming Launches Bid to Block Federal Fracking Rule," *Law360*, March 26, 2015.
- 7 § 3162.3-3(c)(3).
- 8 § 3162.3-3(c)(4).
- 9 See §§ 3160.0-5 and 3162.3-3(d).
- 10 See § 3162.3-3(e) – (g).
- 11 See § 3162.3-3(e) – (g).
- 12 See § 3162.3-3(g).
- 13 See *id.*
- 14 § 3162.3-3(h).
- 15 § 3162.3-3(i).
- 16 *Id.*
- 17 *Id.*
- 18 See *id.* and "About Us," *FracFocus*.
- 19 § 3162.3-3(j).
- 20 See Bureau of Land Management, "Final Agency Draft," *Department of the Interior*, March 20, 2015.
- 21 See, e.g., § 3162.3-3(j) that requires operators to submit the maximum ingredient concentration in additive compared to the Texas Administrative Code, Title 16, § 3.29 that allows the submission of actual or maximum concentration of each chemical ingredient.
- 22 See § 43 C.F.R. 3162.3-3(h).
- 23 See 25 Pa. Code 78.56 and 57.
- 24 See Mark Drajem, James Polson, and Andrew M. Harris, "Oil Industry Meets First Federal Fracking Rules with a Lawsuit," *Bloomberg Business*, March 20, 2015.
- 25 See *id.*
- 26 See Brian Tumulty, "Reed says federal fracking rules could be used in N.Y.," *Star Gazette*, March 23, 2015.
- 27 See Keith Goldberg, "Wyoming Launches Bid to Block Federal Fracking Rule," *Law360*, March 26, 2015.
- 28 See *id.* and Nick Smith, "State may challenge federal fracking rules," *The Bismarck Tribune*, March 26, 2015.
- 29 *Independent Petroleum Association of America et al v. Jewell et al.*, Docket No. 2:15-cv-00041 (D. Wyo. Mar 20, 2015), Court Docket.
- 30 *Id.*
- 31 See *State of Wyoming v. U.S. Department of the Interior Secretary et al.*, case number 2:15-cv-00043, in the U.S. District Court for the District of Wyoming.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.