

Court Strikes Down BLM Hydraulic Fracturing Rule

US District Court rejects US Bureau of Land Management's rule regarding hydraulic fracturing operations on federal and Tribal lands.

On June 21, 2016, the US District Court for the District of Wyoming (District Court) ruled that the US Department of the Interior's Bureau of Land Management (BLM) has no authority to regulate hydraulic fracturing activities on public and Tribal lands. The Court's decision sets aside BLM's rule (released in March 2015; see our previous [Client Alert](#)).¹ Appeals of the district court ruling are expected.

Background

On March 26, 2015, BLM issued its final regulations updating the US Department of the Interior's existing rules regulating oil and gas drilling and hydraulic fracturing activities on public and Tribal lands (Final Rule). The Final Rule was issued after three years of agency rulemaking, including review of over 1.5 million public comments and two iterations of the proposed rule. Litigation challenging the regulations was filed in the US District Court for the District of Wyoming the same day the rule was released. The Final Rule never took effect, as the District Court first postponed its original effective date (June 24, 2015) and then preliminarily enjoined BLM from enforcing the rule pending the Court's decision.

Court's Decision

The States of Wyoming, Colorado, North Dakota, Utah and the Ute Indian Tribe, along with industry groups, challenged the rule upon its issuance. Petitioners argued that BLM had no authority to regulate hydraulic fracturing. Various environmental groups intervened on behalf of the government, supporting BLM's argument that it has broad authority under a number of statutes, including the Mineral Leasing Act (MLA) and the Federal Land Policy and Management Act (FLPMA), to regulate oil and gas activities on federal and Tribal lands.

The Court ruled that BLM lacked Congressional authority to promulgate the hydraulic fracturing regulations. In so holding, the Court found that Congress had not directed the BLM to enact regulations governing hydraulic fracturing, and examined other federal laws wherein Congress expressly removed federal agency authority over hydraulic fracturing activities. The Court found that Congress had explicitly removed hydraulic fracturing activities from federal regulation in its 2005 Energy Policy Act, which included an amendment to the Safe Drinking Water Act to "expressly and unambiguously" revise the definition of "underground injection" to exclude "the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas or geothermal production activities."²

The Court held that "it makes no sense" to interpret the more general authority granted by MLA and FLPMA as providing the BLM authority to regulate hydraulic fracturing when Congress has directly

spoken to the topic at hand in the Energy Policy Act of 2005.³ Accordingly, the Court found that Congress never delegated authority over hydraulic fracturing to BLM, and therefore the rule was “in excess of its statutory authority and contrary to law.” The Court decided no other substantive issues or technical arguments.

Conclusion

BLM and intervenor environmental groups will likely appeal the District Court’s ruling to the Tenth US Circuit Court of Appeals, which is also considering a challenge by BLM and environmentalists over whether the District Court appropriately enjoined the rule during litigation. That litigation may be dismissed or potentially consolidated with future appeals of the District Court’s decision.

Companies with operations on public or Tribal lands should carefully monitor subsequent appeals of the District Court’s decision with a particular eye toward the applicability and effectiveness of the Final Rule on appeal. In addition to seeking an appeal of the District Court’s ruling, BLM and intervenors may seek a stay of the District Court’s ruling pending appeal from the Tenth Circuit, which could allow for the Final Rule to take effect in the interim. In addition, BLM may undertake additional regulatory changes in response to the District Court’s ruling.

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Endnotes

- ¹ Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands (issued Mar. 20, 2015)(to be codified at 43 C.F.R. pt. 3160) (hereinafter, Final Rule). BLM initially issued its proposed rule in May 2012 and then issued a revised proposed rule for public comment in May 2013.
- ² Opinion at p. 21 citing 2005 EP Act Sec. 322 (codified at 42 U.S.C. Sec. 300h(d)(1)(B)(ii)).
- ³ Opinion at p. 22.