

LEGAL UPDATES

PUBLISHED: JUNE 23, 2016

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Federal Judge Strikes Down BLM Fracking Rules

On June 21, 2016, a federal district judge in Wyoming struck down U.S. Bureau of Land Management (BLM) regulations governing hydraulic fracturing, or fracking, on federal and Indian lands. In his decision, U.S. District Judge Scott Skavdahl found that the BLM lacked congressional authority to promulgate the rules.

Background of the Court Challenge

The BLM rules, issued in March 2015 but stayed by Skavdahl later that year, focused on three aspects of oil and gas development on public lands: wellbore construction, chemical disclosure and wastewater management. The rules included a requirement that oil and gas producers disclose chemicals used in fracking operations, as well as requirements related to storage of recovered wastewater, concrete barriers between wells and water zones, and detailed disclosure of existing well locations. Arguing that the rules exceeded the BLM's authority and were unnecessarily redundant of applicable state laws, industry groups, the Ute Indian tribe and the states of Colorado, North Dakota, Wyoming and Utah filed lawsuits challenging the rules.

The BLM, a bureau of the U.S. Department of the Interior, argued that the fracking rules fell within its broad "regulatory sphere" provided by federal statutes related to mineral leases and royalties on federal lands. The court disagreed, finding that those statutes did not grant the broad authority to regulate hydraulic fracturing claimed by the federal government. To the contrary, the court unequivocally concluded that "hydraulic fracturing is not subject to federal regulation unless it involves the use of diesel fuels," referencing the Energy Policy Act of 2005 (the 2005 EP Act) passed by Congress during the George W. Bush administration.

Prior to 2005, the Safe Drinking Water Act (SDWA) authorized the Environmental Protection Agency (EPA) to regulate fracking. The court found that the 2005 EP Act “expressly and unambiguously” amended the SDWA to exclude hydraulic fracturing operations from the definition of “underground injection” subject to regulation by EPA under the SDWA, except for fracking operations involving diesel.

Given Congress’ clear intent to exclude hydraulic fracturing from federal regulation, Skavdahl described BLM’s rules as “an end-run around the 2005 EP Act; however, regulation of an activity must be by Congressional authority, not administrative fiat. The Court finds the intent of Congress is clear, so that is the end of the matter.”

What This Means to You

Although the federal government is expected to appeal the decision, the immediate impact of the court’s decision is that oil and gas producers will not be required to spend time and resources to comply with the BLM rules. The court’s decision reaffirms the long-standing principle that the states, rather than the federal government, are in the best position to regulate oil and natural gas production, including hydraulic fracturing.

The decision also underscores the limitations of executive power in the face of congressional inaction on regulatory issues relating to the oil and gas industry. As Skavdahl noted, “Congress’ inability or unwillingness to pass a law desired by the executive branch does not default authority to the executive branch to act independently, regardless of whether hydraulic fracturing is good or bad for the environment or the Citizens of the United States.”

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For additional information on state energy regulation, contact an environmental attorney focused on the hydrocarbon industry and member of Husch Blackwell’s Energy & Natural Resources team.