



4310-84P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Part 3160

[LLWO300000 L13100000 PP0000 17X]

RIN 1004-AE52

Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule

AGENCY: Bureau of Land Management, Interior.

ACTION: Proposed rule.

SUMMARY: On March 26, 2015, the Bureau of Land Management (BLM) published in the *Federal Register* a final rule entitled, “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands” (2015 final rule). The BLM is now proposing to rescind the 2015 final rule because we believe it is unnecessarily duplicative of state and some tribal regulations and imposes burdensome reporting requirements and other unjustified costs on the oil and gas industry. This proposed rule would return the affected sections of the Code of Federal Regulations (CFR) to the language that existed immediately before the published effective date of the 2015 final rule.

DATES: The BLM must receive your comments on this proposed rule or on the supporting Regulatory Impact Analysis or Environmental Assessment on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: *Mail:* U.S. Department of the Interior, Director (630), Bureau of Land Management, Mail Stop 2134LM, 1849 C St., N.W., Washington, D.C. 20240, Attention: 1004-AE52.

Personal or messenger delivery: U.S. Department of the Interior, Bureau of Land Management, 20 M Street, S.E., Room 2134 LM, Washington, D.C. 20003, Attention: Regulatory Affairs.

Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions at this website.

FOR FURTHER INFORMATION CONTACT: Steven Wells, Division Chief, Fluid Minerals Division, 202-912-7143, for information regarding the substance of this proposed rule or information about the BLM’s Fluid Minerals program. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service (FRS) at 1-800-877-8339, 24 hours a day, 7 days a week, to leave a message or question with the above individuals. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION:

- I. Executive Summary
- II. Public Comment Procedures
- III. Background
- IV. Discussion of Proposed Rule
- V. Procedural Matters

I. Executive Summary

The process known as “hydraulic fracturing” has been used by the oil and gas industry since the 1950s to stimulate production from oil and gas wells. In recent years,

public awareness of the use of hydraulic fracturing practices has grown. New horizontal drilling technology has allowed increased access to oil and gas resources in tight shale formations across the country, sometimes in areas that have not previously experienced significant oil and gas development. As hydraulic fracturing has become more common, public concern has increased about whether hydraulic fracturing contributes to or causes the contamination of underground water sources, whether the chemicals used in hydraulic fracturing should be disclosed to the public, and whether there is adequate management of well integrity and the “flowback” fluids that return to the surface during and after hydraulic fracturing operations.

In light of the public concern for and widespread use of hydraulic fracturing practices, in November 2010, the BLM prepared a rule that was intended to regulate the use of hydraulic fracturing in developing Federal and Indian oil and gas resources. Since that time, the BLM has published two proposed rules (77 FR 27691 and 78 FR 31636), held numerous meetings with the public and state officials, and conducted many tribal consultations and meetings. The final rule entitled, “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” was published in the *Federal Register* on March 26, 2015 (80 FR 16128). The 2015 final rule was intended to: ensure that wells are properly constructed to protect water supplies, 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 provide public disclosure of the chemicals used in hydraulic fracturing fluids.

On March 28, 2017, President Trump issued Executive Order 13783, entitled, “Promoting Energy Independence and Economic Growth” (82 FR 16093, Mar. 31, 2017),

which directed the Secretary of the Interior to review four specific rules, including the 2015 final rule, for consistency with the order’s objective “to promote clean and safe development of our Nation’s vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth and prevent job creation” and, as appropriate, take action to lawfully suspend, revise, or rescind those rules that are inconsistent with the policy set forth in Executive Order 13783. To implement Executive Order 13783, Secretary of the Interior Ryan K. Zinke issued Secretarial Order No. 3349 entitled, “American Energy Independence” on March 29, 2017, which, among other things, directed the BLM to proceed expeditiously in proposing to rescind the 2015 final rule. Upon further review of the 2015 final rule, as directed by Executive Order 13783, and Secretarial Order No. 3349, the BLM believes that the 2015 final rule unnecessarily burdens industry with compliance costs and information requirements that are duplicative of regulatory programs of many states and some tribes. As a result, we are proposing to rescind, in its entirety, the 2015 final rule.

II. Public Comment Procedures

If you wish to comment on the proposed rule or the supporting analyses (namely, the Environmental Assessment (EA) or the Regulatory Impact Analysis (RIA) prepared for this proposed rule), you may submit your comments by any of the methods described in the “ADDRESSES” section.

Please make your comments on the proposed rule as specific as possible, confine them to issues pertinent to the proposed rule, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph of the proposed rule that you are addressing. The BLM is not obligated to

consider or include in the Administrative Record for the final rule comments that we receive after the close of the comment period (see “DATES”) or comments delivered to an address other than those listed above (see “ADDRESSES”).

Comments, including names and street addresses of respondents, will be available for public review at the address listed under “ADDRESSES: Personal or messenger delivery” during regular hours (7:45 a.m. to 4:15 p.m.), Monday through Friday, except holidays.

Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment--including your personal identifying information--may be made publicly available at any time. While you can ask us in your comment to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

III. Background

Well stimulation techniques, such as hydraulic fracturing, are commonly used by oil and natural gas producers to increase the volume of oil and natural gas that can be extracted from oil and gas formations. Hydraulic fracturing techniques are particularly effective in enhancing oil and gas production from shale gas or oil formations. Hydraulic fracturing involves the injection of fluid under high pressure to create or enlarge fractures in the reservoir rocks. The fluid that is used in hydraulic fracturing is usually accompanied by proppants, such as particles of sand, which are carried into the newly fractured rock and help keep the fractures open once the fracturing operation is completed. The proppant-filled fractures become conduits for fluid migration from the reservoir rock to the wellbore and the fluid is subsequently brought to the surface. In

addition to the water and sand (which together typically make up about 99 percent of the materials pumped into a well during a fracturing operation), chemical additives are also frequently used. These chemicals can serve many functions in hydraulic fracturing, including limiting the growth of bacteria and preventing corrosion of the well casing. The exact formulation of the chemicals used varies depending on the rock formations, the well, and the requirements of the operator.

In 2013, the BLM estimated that about 90 percent of the approximately 2,800 new wells on Federal and Indian lands were stimulated using hydraulic fracturing techniques. Over the past 15 years, there have been significant technological advances in horizontal drilling, which is now frequently combined with hydraulic fracturing. This combination, together with the discovery that these techniques can release significant quantities of oil and gas from large shale deposits, has led to production from geologic formations in parts of the country that previously did not produce significant amounts of oil or gas.

On May 11, 2012, the BLM published in the *Federal Register* the initial proposed rule entitled, “Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands” (77 FR 27691). The BLM received over 177,000 comments on the initial proposed rule from individuals, Federal and state governments and agencies, interest groups, and industry representatives.

After reviewing the comments on the proposed rule, the BLM published a supplemental notice of proposed rulemaking entitled, “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands,” on May 24, 2013 (78 FR 31636). The BLM received over 1.35 million comments on the supplemental proposed rule.

On March 26, 2015, the BLM published the final rule entitled, “Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands” in the *Federal Register* (80 FR 16128, codified as amendments to 43 CFR 3160.0-3, 3160.0-5, 3162.3-2, 3162.3-3, and 3162.5-2 (2015)). Although the 2015 final rule never went into effect, it nevertheless amended certain provisions in part 3160 of the 2015 edition of Title 43 of the Code of Federal Regulations (CFR), including the list of statutory authorities, the definitions section, and a provision requiring operators to isolate and protect certain waters. In addition, the 2015 final rule amended other provisions in part 3160 of the 2015 edition of Title 43 of the CFR, which, had they gone into effect, would have required an operator to:

- Obtain the BLM’s approval before conducting hydraulic fracturing operations by submitting an application with information and a plan for the fracturing (43 CFR 3162.3-3(d)(4)).
- Include a hydraulic fracturing application in applications for permits to drill (APDs), or in a subsequent “sundry notice” (43 CFR 3162.3-3(c)).
- Include information about the proposed source of water in each hydraulic fracturing application so that the BLM can complete analyses required by the National Environment Policy Act (NEPA) (43 CFR 3162.3-3(d)(3)).
- Include available information about the location of nearby wells to help prevent “frack hits” (i.e., unplanned surges of pressurized fluids into other wells that can damage the wells and equipment and cause surface spills) (43 CFR 3162.3-3(d)(4)(iii)(C)).

- Verify that the well casing is surrounded by adequate cement, and test the well to make sure it can withstand the pressures of hydraulic fracturing (43 CFR 3162.3-3(e)(1) and (2) and (f)).
- Isolate and protect usable water, while redefining “usable water” to expressly defer to classifications of groundwater by states and tribes, and the Environmental Protection Agency, 43 CFR 3160.0-7; and require demonstrations of only 200 feet of adequate cementing between the fractured formation and the bottom of the closest usable water aquifer, or cementing to the surface (43 CFR 3162.3-3(e)(2)(i) and (ii)).
- Monitor and record the annulus pressure during hydraulic fracturing operations, and report significant increases of pressure (43 CFR 3162.3-3(g)).
- File post-fracturing reports containing information about how the hydraulic fracturing operation actually occurred (43 CFR 3162.3-3(i)).
- Submit lists of the chemicals used (non-trade-secrets) to the BLM by sundry notice (Form 3160-5), to FracFocus (a public website operated by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission), or to another BLM-designated database (43 CFR 3162.3-3(i)(1)).
- Withhold trade secret chemical identities only if the operator or the owner of the trade secret submits an affidavit verifying that the information qualifies for trade secret protection (43 CFR 3162.3-3(j)).

- Obtain and provide withheld information to the BLM, if the BLM requests the withheld information (43 CFR 3162.3-3(j)(3)).
- Store recovered fluids in above-ground rigid tanks of no more than 500-barrel capacity, with few exceptions, until the operator has an approved plan for permanent disposal of produced water (as required by Onshore Oil and Gas Order No. 7) (43 CFR 3162.3-3(h)).

The 2015 final rule would have also authorized two types of variances:

- Individual operation variances to account for local conditions or new or different technology (43 CFR 3162.3-3(k)(1)).
- State or tribal variances to account for regional conditions or to align the BLM requirements with state or tribal regulations (43 CFR 3162.3-3(k)(2)).

Per the 2015 final rule, the standard for approval of either type of variance is that the variance would meet or exceed the purposes of a specific provision in the rule (43 CFR 3162.3-3(k)(3)).

Two industry associations filed suit opposing the 2015 final rule in the U.S. District Court for the District of Wyoming in March 2015. Four states and a tribe also challenged the rule in the same court.¹ The Court consolidated the cases. Six environmental groups intervened in the case in support of the rule.

¹ A separate tribe filed a separate challenge to the rule in the U.S. District Court for the District of Colorado. That case has been settled.

The District Court stayed the 2015 final rule prior to its effective date. Subsequently, the District Court preliminarily enjoined the 2015 final rule. On June 21, 2016, the District Court issued an order setting aside the rule. The Court concluded that Congress revoked the BLM's authority over hydraulic fracturing operations by enacting the Safe Drinking Water Act of 1974 and the Energy Policy Act of 2005. *Wyoming v. Jewell*, No. 15-cv-41 (D. Wyo. June 21, 2016).

The District Court did not address a number of additional arguments that Petitioners raised against the 2015 final rule. Those unaddressed arguments focused primarily on allegations that the rule was not supported by sufficient facts or was otherwise arbitrary and capricious. The District Court also did not expressly address the argument of a Tribal petitioner that the BLM is precluded from regulating oil and gas operations on Indian lands.

The Department of the Interior ("the Department") and environmental group intervenors appealed the District Court's decision. *Wyoming v. Zinke*, No. 16-8068 (10th Cir.). The appeal concerns only the statutory authority issues that the District Court decided. Briefing was completed in October 2016. Before oral argument, however, the Court of Appeals in a March 2017 order required the BLM to report whether it had changed its position in the appeal following the Presidential Inauguration.

Following the March 2017 order from the Court of Appeals, the Department accelerated its review of the 2015 final rule. As previously noted, pursuant to Executive Order 13783, the Department commenced a review of existing energy-related regulations, which included the 2015 final rule, to determine whether changes would be appropriate to

support domestic energy production. Based upon this review, the Department identified the 2015 final rule as being duplicative and burdensome and, therefore, appropriate for rescission. On March 15, 2017, the Department informed the Court of Appeals that it was preparing a notice of proposed rulemaking to rescind the rule, which it intended to publish in the *Federal Register*. Shortly thereafter, the Court of Appeals postponed oral argument, and required further briefing on several issues regarding the effect of the present rulemaking effort on the appeal.

If the Court of Appeals were to reverse the District Court's order on statutory authority, the case would be remanded to the District Court to decide the remaining issues, primarily whether the BLM complied with the Administrative Procedure Act in the rulemaking that resulted in the 2015 final rule.

In sum, the 2015 final rule has never gone into effect, and was set aside by the District Court on June 21, 2016. The 2015 final rule would not go into effect unless and until the courts decide that the rule was properly promulgated.

In the Regulatory Impact Analysis (RIA) for the 2015 final rule, the BLM estimated that the requirements of the 2015 final rule would result in compliance costs to the industry of approximately \$32 million per year (and potentially up to \$45 million per year). The BLM had concluded that many of the requirements were consistent with industry practice and similar to the requirements found in existing state regulations, and therefore would not pose a significant new compliance burden to the industry. However, comments received by many oil and gas companies and trade associations representing members of the oil and gas industry suggested that the BLM's proposed and final rules

were unnecessary and would cause substantial harm to the industry. The BLM recognizes that the 2015 final rule would pose a financial burden to industry if implemented.

As noted earlier, since January 2017, the President has issued Executive Orders that necessitate the review of the BLM's 2015 final rule. Section 7(b) of Executive Order 13783 directs the Secretary of the Interior to review four specific rules, including the 2015 final rule, for consistency with the policy set forth in section 1 of [the] Order and, if appropriate, to publish for notice and comment proposed rules to suspend, revise, or rescind those rules.

Section 1 of Executive Order 13783 states that it is in the national interest to promote clean and safe development of United States energy resources, while avoiding "regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." Section 1 describes the prudent development of these natural resources as "essential to ensuring the Nation's geopolitical security." Section 1 finds it in the national interest to ensure that electricity is affordable, reliable, safe, secure, and clean, and that coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources, can be used to produce it.

Accordingly, Section 1 of Executive Order 13783 declares it the policy of the United States that: (1) executive departments and agencies immediately review regulations that potentially burden the development or use of domestically produced energy resources and, as appropriate, suspend, revise, or rescind those that unduly burden domestic energy resources development "beyond the degree necessary to protect the

public interest or otherwise comply with the law”; and (2) to the extent permitted by law, agencies should promote clean air and clean water, while respecting the proper roles of the Congress and the States concerning these matters; and (3) necessary and appropriate environmental regulations comply with the law, reflect greater benefit than cost, when permissible, achieve environmental improvements, and are developed through transparent processes using the best available peer-reviewed science and economics.

As directed by the aforementioned Executive Order, and by Secretarial Order No. 3349, the BLM conducted a review of the 2015 final rule. As a result of this review, the BLM believes that the compliance costs associated with the 2015 final rule are not justified and it now proposes to rescind the rule.

In the RIA for the 2015 final rule, while noting that many of the requirements of the 2015 final rule were consistent with industry practice and that some were duplicative of state requirements or were generally addressed by existing BLM requirements, the BLM asserted that the rule would provide additional assurance that operators are conducting hydraulic fracturing operations in an environmentally sound and safe manner, and increase the public’s awareness and understanding of these operations.

It follows that the rescission of the 2015 final rule could potentially reduce those assurances or potentially reduce public awareness and understanding about hydraulic fracturing operations on Federal and Indian lands. However, considering state regulatory programs, the sovereignty of tribes to regulate operations on their lands, and the pre-existing authorities in other Federal regulations, the proposed rescission of the 2015 final rule would not leave hydraulic fracturing operations entirely unregulated.

The BLM’s review of the 2015 final rule included a review of state laws and regulations which indicated that most states are either currently regulating or are in the process of regulating hydraulic fracturing. When the 2015 final rule was issued, 20 of the 32 states with currently existing Federal oil and gas leases had regulations addressing hydraulic fracturing. In the time since the promulgation of the 2015 final rule, an additional 12 states have introduced laws or regulations addressing hydraulic fracturing. As a result, all 32 states with Federal oil and gas leases currently have laws or regulations that address hydraulic fracturing operations.² In addition, some tribes with oil and gas resources have also taken steps to regulate oil and gas operations, including hydraulic fracturing, on their lands.

The BLM also now believes that disclosures of the chemical content of hydraulic fracturing fluids to state regulatory agencies and/or databases such as FracFocus is more prevalent than it was in 2015 and that there is no need for a Federal chemical disclosure requirement, since companies are already making those disclosures on most of the operations, either to comply with state law or voluntarily. There are 23 states that currently use FracFocus for chemical disclosures. These include six states where the

² The reference to 32 states with existing Federal oil and gas leases includes the following 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. The State of Oregon regulates hydraulic fracturing operations by way of its regulations addressing “Water Injection and Water Flooding of Oil and Gas Properties” (Oregon Administrative Rules [Or. Admin. R.] sec. 632-010-0194). The State of Arizona may regulate hydraulic fracturing operations by way of its regulations addressing “Artificial Stimulation of Oil and Gas Wells” (Arizona Administrative Code [A.A.C.] sec. R12-7-117). The State of Indiana issued “emergency rules” in 2011 and 2012 that incorporated new legislation addressing hydraulic fracturing (Pub. L. 140-2011 and Pub. L. 16-2012) into Indiana’s oil and gas regulations at 312 Indiana Administrative Code (IAC) Article 16. For further information about the state regulatory programs, see § 2.12 of the RIA and Appendix 1 of the EA prepared for this proposed rulemaking action.

BLM has major oil and gas operations, including Colorado, Montana, North Dakota, Oklahoma, Texas, and Utah.

In addition to state and tribal regulation of hydraulic fracturing, the BLM has several pre-existing authorities that it will continue to rely on if the 2015 final rule is rescinded, some of which are set out at 43 CFR subpart 3162 and in Onshore Oil and Gas Orders 1, 2, and 7. These authorities reduce the risks associated with hydraulic fracturing by providing specific requirements for well permitting; construction, casing, and cementing; and disposal of produced water.³ By reverting to 43 CFR subpart 3162 as it existed prior to the 2015 final rule, the BLM would continue to require prior approval for “nonroutine fracturing jobs;” however, “nonroutine fracturing jobs” would not be defined in 43 CFR subpart 3162 since the term was not defined before the 2015 final rule. The BLM also possesses discretionary authority allowing it to impose site-specific protective measures reducing the risks associated with hydraulic fracturing.

The BLM’s review of the 2015 final rule also included a review of incident reports from Federal and Indian wells since December 2014. This review indicated that resource damage is unlikely to increase by rescinding the 2015 final rule because of the rarity of adverse environmental impacts that occurred from hydraulic fracturing operations before the 2015 final rule, and after its promulgation while the 2015 final rule was not in effect. The BLM now believes that the appropriate framework for mitigating these impacts exists through state regulations, through tribal exercise of sovereignty, and

³ Additional discussion regarding Onshore Oil and Gas Orders 1, 2, and 7, and 43 CFR subpart 3162, is provided in §2.11 of the RIA and the EA prepared for this proposed rulemaking action.

through BLM's own pre-existing regulations and authorities (pre-2015 final rule 43 CFR subpart 3162 and Onshore Orders 1, 2, and 7).

The BLM is seeking comments on the specific regulatory changes that would be made by this proposed rule and is interested particularly in information that would improve BLM's understanding of state and tribal regulatory capacity in this area. Further, the BLM is seeking specific comments on approaches that could be used under existing Federal authorities, including what additional information could be collected during the APD process or through sundry notices, to further minimize the risks from hydraulic fracturing operations, particularly in states or on tribal lands where the corresponding regulations or enforcement mechanisms may be less comprehensive.

IV. Discussion of Proposed Rule

As previously discussed in this preamble, the BLM proposes to revise 43 CFR part 3160 to rescind the 2015 final rule. Although the 2015 final rule never went into effect, this proposed rule would restore the regulations in part 3160 of the CFR to exactly as they were before the 2015 final rule, except for any changes to those regulations that were made by other rules published between March 26, 2015 (the date of publication of the 2015 final rule) and now. This proposed rule would not result in any change from current requirements because the 2015 final rule never went into effect. The following section-by-section analysis reviews the specific changes that would be required to return to the pre-2015 final rule regulations.

Section 3160.0-3 Authority.

The BLM proposes to amend § 3160.0-3 by removing the reference to the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C. 1701). The 2015 final

rule added this reference as an administrative matter. This proposed rule would return this section to the language it contained before the 2015 final rule and would not have any substantive impact.

Section 3160.0-5 Definitions.

The BLM proposes to amend this section by removing several terms that were added by the 2015 final rule and by restoring the definition of “fresh water” that the 2015 final rule had removed. The proposed rule would remove the definitions of “annulus,” “bradenhead,” “Cement Evaluation Log (CEL),” “confining zone,” “hydraulic fracturing,” “hydraulic fracturing fluid,” “isolating or to isolate,” “master hydraulic fracturing plan,” “proppant,” and “usable water.” The 2015 final rule used those terms in the operating regulations. If those operating regulations are rescinded, as proposed, these terms would no longer be necessary in this definitions section. The BLM is proposing to restore the previous definition of “fresh water” to the regulations.

Section 3162.3-2 Subsequent well operations.

This proposed rule would amend § 3162.3-2 by making non-substantive changes to paragraph (a), which include replacing the word “must” with the word “shall”, replacing the word “combine” with the word “commingling”, replacing the word “convert” with the word “conversion”, and removing the language from the first sentence of paragraph (a) that the 2015 final rule only added to more fully describe Form 3160-5.

The proposed rule would also make non-substantive changes to paragraph (b) of § 3162.3-2, which include replacing “using a Sundry Notice and Report on Well (Form 3160-5)” with “on Form 3160-5”.

The proposed rule would also restore “perform nonroutine fracturing jobs” to the list of activities that require the authorized officer’s prior approval in § 3162.3-2. The 2015 final rule removed those words from the list because it amended § 3162.3-3 to require all hydraulic fracturing operations to be approved by the authorized officer. This proposed rule would remove that requirement from § 3163.3-3, which is discussed below.

Section 3162.3-3 Other lease operations.

The BLM proposes to revise this section by removing language that was added by the 2015 final rule and returning this rule to the exact language it contained previously. The 2015 final rule made substantial changes to this section and revised the title to read as “Subsequent well operations; Hydraulic fracturing.”

Paragraph (a) of this section in the 2015 final rule, as reflected in the 2015 edition of the CFR, includes an implementation schedule that the BLM would have followed to phase in the requirements of the rule, had the rule gone into effect. Paragraph (b) of this section contains the performance standard referencing § 3162.5-2(d). Paragraph (c) of this section would have required prior approval of hydraulic fracturing operations. Paragraph (d) of this section lists the information that an operator would have been required to include in a request for approval of hydraulic fracturing. Paragraph (e) of this section specifies how an operator would have had to monitor and verify cementing operations prior to hydraulic fracturing. Paragraph (f) of this section would have required mechanical integrity testing of the wellbore prior to hydraulic fracturing. Paragraph (g) of this section would have required monitoring and recording of annulus pressure during hydraulic fracturing. Paragraph (h) of this section specifies the requirements that would have applied for managing recovered fluids until approval of a permanent water disposal

plan. Paragraph (i) of this section specifies information that an operator would have been required to provide to the authorized officer after completion of hydraulic fracturing operations. Paragraph (j) of this section specifies how an operator could have withheld information from the BLM and the public about the chemicals used in a hydraulic fracturing operation. Paragraph (k) of this section describes how the BLM would have approved variances from the requirements of the 2015 final rule.

For the reasons discussed earlier in this preamble, the BLM believes this section of the 2015 final rule is unnecessarily duplicative and would impose costs that would not be clearly exceeded by its benefits and, therefore, proposes to remove these 2015 final rule provisions and to restore the previous language of the section.

Section 3162.5-2 Control of wells.

The BLM proposes to amend paragraph (d) of this section by restoring the term “fresh water-bearing” and the phrase “containing 5,000 ppm or less of dissolved solids.” The proposed rule would also restore other non-substantive provisions that appeared in the previous version of the regulations.

IV. Procedural Matters

Regulatory Planning and Review (E.O. 12866, E.O. 13563, E.O. 13771)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs within the Office of Management and Budget will review all significant rules. The Office of Information and Regulatory Affairs has determined that this proposed rule is significant because it would raise similarly novel legal or policy issues.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Executive Order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Executive Order 13771 (82 FR 9339, Feb. 3, 2017) requires Federal agencies to take proactive measures to reduce the costs associated with complying with Federal regulations. Consistent with Executive Order 13771, we have estimated the cost savings for this proposed rule to be \$14 – \$34 million per year from the 2015 final rule. Therefore, this proposed rule is expected to be a deregulatory action under Executive Order 13771.

After reviewing the requirements of this proposed rule, we have determined that it will not have an annual effect on the economy of \$100 million or more or 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.

Regulatory Flexibility Act

This proposed rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) The RFA generally requires that Federal agencies prepare a regulatory flexibility analysis for rules subject to the notice and comment rulemaking requirements under the Administrative Procedure Act (5 U.S.C. 500 *et seq.*), if the rule would have a significant economic impact, either detrimental or beneficial, on a substantial number of small entities (*See* 5 U.S.C. 601 – 612). Congress enacted the RFA to ensure that government regulations do not unnecessarily or disproportionately burden small entities. Small entities include small businesses, small governmental jurisdictions, and small not-for-profit enterprises.

The BLM reviewed the Small Business Administration (SBA) size standards for small businesses and the number of entities fitting those size standards as reported by the U.S. Census Bureau in the Economic Census. The BLM concluded that the vast majority of entities operating in the relevant sectors are small businesses as defined by the SBA. As such, the proposed rule would likely affect a substantial number of small entities.

Although the proposed rule would likely affect a substantial number of small entities, the BLM does not believe that these effects would be economically significant. The proposed rule is a deregulatory action that would remove all of the requirements placed on operators by the 2015 final rule. Operators would not have to undertake the compliance activities, either operational or administrative, that are outlined in the 2015 final rule, except to the extent the activities are required by state or tribal law, or by other pre-existing BLM regulations.

The BLM conducted an economic analysis which estimates that the average reduction in compliance costs would 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. For more detailed information, see section 5.3 of the Regulatory Impact Analysis (RIA) prepared for this proposed rule. The current draft RIA has been posted in the docket for the proposed rule on the *Federal eRulemaking Portal*: <http://www.regulations.gov>.

Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule will not have an annual effect on the economy of \$100 million or more.

This rule will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This rule will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

This rule is a deregulatory action that would remove all of the requirements placed on operators by the 2015 final rule. Operators would not have to undertake the compliance activities, either operational or administrative, that would have been required solely by the 2015 final rule. The screening analysis conducted by the BLM estimates the average reduction in compliance costs would be a small fraction of a percent of the profit margin for companies, which is not large enough to: have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises; cause a major

increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or have an annual effect on the economy of \$100 million or more.

Unfunded Mandates Reform Act

This rule will not impose an unfunded mandate on State, local, or tribal governments, or the private sector of more than \$100 million per year. The rule will not have a significant or unique effect on State, local, or tribal governments or the private sector. The proposed rule is a deregulatory action, which contains no requirements that would apply to State, local, or tribal governments or to the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (UMRA) (2 U.S.C. 1531 *et seq.*) is not required for the rule. This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments, because it contains no requirements that apply to such governments, nor does it impose obligations upon them.

Takings (E.O. 12630)

This rule will not affect a taking of private property or otherwise have taking implications under Executive Order 12630. A takings implication assessment is not required. This rule is a deregulatory action that would remove all of the requirements placed on operators solely by the 2015 final rule and therefore would impact some operational and administrative requirements on Federal and Indian lands. All such operations are subject to lease terms which expressly require that subsequent lease activities be conducted in compliance with subsequently adopted Federal laws and regulations. This rule conforms to the terms of those leases and applicable statutes and,

as such, the rule is not a government action capable of interfering with constitutionally protected property rights. Therefore, the BLM has determined that the proposed rule would not cause a taking of private property or require further discussion of takings implications under Executive Order 12630.

Federalism (E.O. 13132)

Under the criteria in section 1 of Executive Order 13132, this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement. A federalism impact statement is not required.

The proposed rule will not have a substantial direct effect on the states, on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the levels of government. It would not apply to states or local governments or state or local governmental entities. The rule would affect the relationship between operators, lessees, and the BLM, but it does not directly impact the states. Therefore, in accordance with Executive Order 13132, the BLM has determined that this proposed rule does not have sufficient federalism implications to warrant preparation of a Federalism Assessment.

Civil Justice Reform (E.O. 12988)

This rule complies with the requirements of Executive Order 12988. More specifically, this rule meets the criteria of section 3(a), which requires agencies to review all regulations to eliminate errors and ambiguity and to write all regulations to minimize litigation. This rule also meets the criteria of section 3(b)(2), which requires agencies to write all regulations in clear language with clear legal standards.

Consultation with Indian Tribes (E.O. 13175 and Departmental Policy)

The Department strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and we have found that this proposed rule includes policies that could have tribal implications.

If the proposed rule is implemented, oil and gas operations on tribal and allotted lands would not be subject to the procedures or standards in the 2015 final rule. The BLM believes that rescinding the 2015 final rule will assist in preventing Indian lands from being viewed by oil and gas operators as less attractive than non-Indian lands due to unnecessary and burdensome compliance costs, thereby preventing economic harm to Indian tribes and allottees that could have resulted from implementation of the 2015 final rule. However, other resources on those lands might have benefited from the risk reduction intended by the 2015 final rule.

Although the states with significant Federal oil and gas resources have regulatory programs addressing hydraulic fracturing operations, the oil and gas producing Indian tribes have not as uniformly promulgated regulatory programs to address hydraulic fracturing.

In light of this, the BLM is seeking comments regarding the effects of the proposed rescission of the 2015 final rule on tribes, individual allottees, and Indian resources. As discussed below, the BLM will be consulting with interested tribes on those topics, but also requests comments providing information about existing or

proposed tribal regulation of hydraulic fracturing operations, the economic and environmental impacts of the proposed rescission of the 2015 final rule as it would apply to Indian lands, and whether all or any parts of the 2015 final rule should continue to apply on Indian lands.

The BLM is engaging potentially interested tribes to consult on a government-to-government basis and discuss the proposed rule. Initial tribal outreach letters for the proposed rule invite tribes to provide written comments and/or discuss, either during in-person meeting(s) or by other means, the proposed rule. The responses to the aforementioned initial tribal outreach letters will help to identify what future actions the BLM will take as part of its tribal consultation efforts for the proposed rule.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) (44 U.S.C. 3501–3521) provides that an agency may not conduct or sponsor, and a person is not required to respond to, a “collection of information,” unless it displays a currently valid control number (44 U.S.C. 3512). Collections of information include requests and requirements that an individual, partnership, or corporation obtain information, and report it to a Federal agency (44 U.S.C. 3502(3); 5 CFR 1320.3(c) and (k)). If this proposed rule is promulgated and the 2015 final rule is rescinded, there will be no need to continue the information collection activities that the OMB has pre-approved under control number 1004-0203. Accordingly, if the 2015 final rule is rescinded, the BLM will request that the OMB discontinue that control number.

National Environmental Policy Act

The BLM has prepared an environmental assessment (EA) to determine whether this rule would have a significant impact on the quality of the human environment under the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). If the final EA supports the issuance of a Finding of No Significant Impact (FONSI) for the rule, the preparation of an environmental impact statement pursuant to the NEPA would not be required.

The current draft of the EA and a draft FONSI have been placed in the file for the BLM's Administrative Record for the proposed rule at the BLM 20 M Street address specified in the "ADDRESSES" section. The current draft EA and draft FONSI have also been posted in the docket for the proposed rule on the *Federal eRulemaking Portal*: <http://www.regulations.gov>. The BLM invites the public to review these documents and suggests that anyone wishing to submit comments on the draft EA and FONSI should do so in accordance with the instructions contained in the "Public Comment Procedures" section above.

Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required. Section 4(b) of Executive Order 13211 defines a "significant energy action" as "any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of rulemaking, and notices of rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant

adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of [OIRA] as a significant energy action.”

Since the proposal is a deregulatory action and would reduce compliance costs, it is likely to have a positive effect, if any, on the supply, distribution, or use of energy, and not a significant adverse effect. As such, we do not consider the proposed rule to be a “significant energy action” as defined in Executive Order 13211.

Clarity of this Regulation

We are required by Executive Orders 12866 (section 1(b)(12)), 12988 (section 3(b)(1)(B)), and 13563 (section 1(a)), and by the Presidential Memorandum of June 1, 1988, to write all rules in plain language. This means that each rule must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use common, everyday words and clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the “ADDRESSES” section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Author

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Dated: July 21, 2017

Katharine S. MacGregor

Acting Assistant Secretary

Land and Minerals Management

List of Subjects in 43 CFR Part 3160

Administrative practice and procedure, Government contracts, Indians-lands, Mineral royalties, Oil and gas exploration, Penalties, Public lands-mineral resources, Reporting and recordkeeping requirements.

For the reasons stated in the preamble, and under the authorities stated below, the Bureau of Land Management proposes to amend 43 CFR part 3160 as follows:

PART 3160 – ONSHORE OIL AND GAS OPERATIONS

1. The authority citation for part 3160 continues to read as follows:

Authority: 25 U.S.C. 396d and 2107; 30 U.S.C. 189, 306, 359, and 1751; 43 U.S.C. 1732(b), 1733, and 1740; and Sec. 107, Pub. L. 114-74, 129 Stat. 599, unless otherwise noted.

Subpart 3160 – Onshore Oil and Gas Operations: General

2. Revise § 3160.0-3 to read as follows:

§ 3160.0-3 Authority.

The Mineral Leasing Act, as amended and supplemented (30 U.S.C. 181 *et seq.*), the Act of May 21, 1930 (30 U.S.C. 301-306), the Mineral Leasing Act for Acquired Lands, as amended (30 U.S.C. 351-359), the Act of March 3, 1909, as amended (25 U.S.C. 396), the Act of May 11, 1938, as amended (25 U.S.C. 396a-396q), the Act of February 28, 1891, as amended (25 U.S.C. 397), the Act of May 29, 1924 (25 U.S.C. 398), the Act of March 3, 1927 (25 U.S.C. 398a-398e), the Act of June 30, 1919, as amended (25 U.S.C. 399), R.S. § 441 (43 U.S.C. 1457), the Attorney General’s Opinion of April 2, 1941 (40 Op. Atty. Gen. 41), the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 471 *et seq.*), the National Environmental Policy Act of 1969, as amended (40 U.S.C. 4321 *et seq.*), the Act of December 12, 1980 (94 Stat. 2964), the Combined Hydrocarbon Leasing Act of 1981 (95 Stat. 1070), the Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. 1701), the Indian Mineral Development Act of 1982 (25 U.S.C. 2102), and Order Number 3087, dated December 3, 1982, as amended on February 7, 1983 (48 FR 8983) under which the Secretary consolidated and transferred the onshore minerals management functions of the Department, except

mineral revenue functions and the responsibility for leasing of restricted Indian lands, to the Bureau of Land Management.

3. Amend § 3160.0-5 by removing the definitions of “annulus,” “bradenhead,” “Cement Evaluation Log (CEL),” “confining zone,” “hydraulic fracturing,” “hydraulic fracturing fluid,” “isolating or to isolate,” “master hydraulic fracturing plan,” “proppant,” and “usable water,” and by adding the definition of “fresh water” in alphabetical order to read as follows:

§ 3160.0-5 Definitions.

* * * * *

Fresh water means water containing not more than 1,000 ppm of total dissolved solids, provided that such water does not contain objectionable levels of any constituent that is toxic to animal, plant or aquatic life, unless otherwise specified in applicable notices or orders.

* * * * *

Subpart 3162 – Requirements for Operating Rights Owners and Operators

4. Amend § 3162.3-2 by revising the first sentence of paragraph (a) and revising paragraph (b) to read as follows:

§ 3162.3-2 Subsequent well operations.

(a) A proposal for further well operations shall be submitted by the operator on Form 3160-5 for approval by the authorized officer prior to commencing operations to redrill,

deepen, perform casing repairs, plug-back, alter casing, perform nonroutine fracturing jobs, recompleting in a different interval, perform water shut off, commingling production between intervals and/or conversion to injection. * * *

(b) Unless additional surface disturbance is involved and if the operations conform to the standard of prudent operating practice, prior approval is not required for routine fracturing or acidizing jobs, or recompletion in the same interval; however, a subsequent report on these operations must be filed on Form 3160-5.

* * * * *

5. Revise § 3162.3-3 to read as follows:

§ 3162.3-3 Other lease operations.

Prior to commencing any operation on the leasehold which will result in additional surface disturbance, other than those authorized under § 3162.3-1 or § 3162.3-2, the operator shall submit a proposal on Form 3160-5 to the authorized officer for approval. The proposal shall include a surface use plan of operations.

6. Amend § 3162.5-2 by revising the heading and first sentence of paragraph (d) to read as follows:

§ 3162.5-2 Control of wells.

* * * * *

(d) *Protection of fresh water and other minerals.* The operator shall isolate freshwater-bearing and other usable water containing 5,000 ppm or less of dissolved solids and other mineral-bearing formations and protect them from contamination. * * *

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