

# The Future of Fracking Regulation by the Bureau of Land Management

Grace Krasnerman\*

## I. INTRODUCTION

Hydraulic fracturing (“fracking”) accounts for approximately 51% of oil production and 67% of natural gas production in the United States.<sup>1</sup> The Energy Policy Act of 2005 (“EPAAct”) generally excluded fracking from federal regulation under specified programs such as the Safe Drinking Water Act. Recently, however, the Bureau of Land Management (“BLM”) issued new fracking regulations to maintain public health and environmental welfare for fracking on public and tribal lands. Several Western states—the primary sites for fracking under BLM’s jurisdiction—filed suit against the Department of the Interior (“DOI”), asserting that BLM lacked the authority to regulate fracking. In *Wyoming v. U.S. Department of the Interior*, Judge Scott Skavdahl of the District Court of Wyoming enjoined BLM from implementing the new regulations and affirmed the states’ contention that it was wholly in their authority to regulate fracking.<sup>2</sup> DOI is currently appealing this decision in the Tenth Circuit, and the pending decision holds enormous implications for the federal government’s ability to regulate the growing fracking industry under existing legislation.

## II. THE LITIGATION

On March 26, 2015, reacting to the increase in domestic fracking operations and the potential risks it poses to human health and the environment, BLM issued a final rule regarding hydraulic fracturing on federal and Indian lands. BLM issued the rule pursuant to its authority—under an array of statutes—to manage

\*J.D. Candidate, Columbia Law School, Class of 2018.

1. Jack Perrin & Troy Cook, *Hydraulically Fractured Wells Provide Two-Thirds of U.S. Natural Gas Production*, U.S. ENERGY INFO. ADMIN., May 5, 2016, <http://www.eia.gov/todayinenergy/detail.php?id=26112> [https://perma.cc/5KJN-CJT5].

2. *Wyoming v. U.S. Dep’t of the Interior*, No. 2:15-CV-041-SWS, 2016 WL 3509415, at \*12 (D. Wyo. June 21, 2016).

oil and gas resources on these lands. BLM's goals were "[t]o ensure that wells are properly constructed to protect water supplies, to 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 to provide public disclosure of the chemicals used."<sup>3</sup> The rule applies to BLM-licensed fracking activity on federal and Indian lands, and requires fracking operators to follow widely accepted industry standards. Most fracking in the United States occurs on private and state-owned land, but the majority of drilling operations on federal and Indian lands have used fracking techniques in recent years.<sup>4</sup>

Judge Skavdahl first issued a preliminary injunction against the rule in 2015, subsequently vacating the BLM regulations in June 2016. DOI and intervening environmental groups appealed to the Tenth Circuit Court of Appeals. Briefing was completed on October 7, 2016, but oral argument was postponed from January 2017 to March 2017. The primary questions at issue are whether BLM has the requisite authority to regulate fracking on public lands, and if there is a rational justification for the proposed protocols.

Proponents of the BLM rule argue that revisions are necessary to adapt to the surge in domestic oil and natural gas production, the majority of which stems from fracking. Due to palpable public concern about fracking and its potential to contaminate water, BLM updated the rule in order to strengthen safety protocols. Opponents of the rule argue that not only has Congress not delegated the authority to regulate fracking to DOI, but that BLM also failed to provide rational justification for instituting these new rules, which the states consider a superfluous addition to the existing regulatory framework. Fracking operators are particularly concerned with the rule's potential economic consequences. Critics of nationally uniform standards argue that it is economically inefficient and a problem of federal overreach.

3. Final Rule: Hydraulic Fracturing on Federal and Indian Lands, 80 Fed. Reg. 16,128 (Mar. 26, 2015) (to be codified at 43 C.F.R. pt. 3160).

4. *Id.* at 16,195. In 2013, 90% of the 2800 new wells on federal and Indian lands were hydraulically fracked.

### III. WHETHER BLM HAS THE AUTHORITY TO REGULATE FRACKING

Courts must administer a two-prong test when reviewing an agency's interpretation of a statute it implements, derived from *Chevron v. Natural Resources Defense Council*. To determine whether an administrative agency has the authority to regulate a particular activity pursuant to a federal statute, the

question [is] whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>5</sup>

The states argue that Congress has spoken directly to the issue at hand with the passage of EPAct, which limited the definition of "underground injection" as applied to Part C of the Safe Drinking Water Act ("SDWA"). The amended definition excluded non-diesel hydraulic fracturing from the list of oil production processes that the EPA could regulate within its underground injection control ("UIC") programs.<sup>6</sup> In *Wyoming*, the states assert that this exemption removed fracking from all federal regulation. However, the UIC provision of the SDWA only affects the *holes* drilled to inject contaminants deep underground and the wells used to force oil and gas to the surface, but does not cover drilling or production. In addition, EPAct only precludes EPA (as well as states and tribes) from using the SDWA to regulate fracking, but it does not preclude other federal agencies (like BLM) or other regulatory programs (such as those administering land and resource management statutes).

However, the states successfully argued before the district court that the EPAct exemption *broadly* removes fracking from the federal regulatory sphere. The government asserts in its appeal that Congress did not intend to repeal BLM's authority under other statutes. In fact, BLM has regulated oil and gas operations on federal and Indian lands to protect both surface and

5. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

6. 42 U.S.C. § 300h(d)(1)(B)(ii) (2012).

underground water for nearly a century.<sup>7</sup> The updated rule actually does not regulate underground injection, but requires fracking operators on federal and Indian lands to: submit information to BLM and obtain a permit before fracking; follow modern design standards that specifically reduce the risk of water contamination; properly manage recovered fluids; and disclose fracturing chemicals.<sup>8</sup> Regardless, the district court construed EPA's SDWA exemption as broadly limiting authority for all federal agencies, and viewed BLM's rule as an attempt to regulate fracking "in a manner that the EPA would have done under the SDWA absent the 2005 EPA Act. . . . [H]owever, regulation of an activity must be by Congressional authority, not administrative fiat."<sup>9</sup>

Another issue currently being briefed within the Tenth Circuit is whether the District Court of Wyoming followed the *Chevron* dictate that courts should defer to "an agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority."<sup>10</sup> BLM argues that it made a reasonable interpretation of the relevant statutes when it updated its fracking regulations in order to better protect public health and welfare from increased use of hydraulic fracturing, and thus increased risk of water contamination. According to BLM, numerous statutes, such as the Mineral Leasing Act ("MLA"),<sup>11</sup> the Federal Land Policy and Management Act ("FLPMA"),<sup>12</sup> and a host of other statutes<sup>13</sup> authorize BLM to regulate oil and gas drilling activities on public lands by granting DOI broad authority to protect federal lands from injury caused by the activities of lessees of those lands. The MLA and FLPMA make the federal government the trustee of federal and Indian land for all present and future generations, and therefore, the government has authority to examine potential environmental effects of extraction when granting mining leases. DOI argues that these statutes give BLM the implicit authority to

7. See Operating Regulations To Govern The Production of Oil And Gas—Act of February 25, 1920, 41 Stat. 437.

8. 80 Fed. Reg. at 16,129–30, 16,217–22.

9. *Wyoming*, 2016 WL 3509415, at \*11.

10. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (citing *Chevron*, 467 U.S. 837).

11. 30 U.S.C. §§ 181–287 (2012).

12. 43 U.S.C. §§ 1701–1787 (2012).

13. See 1920 Right-of-Way Leasing Act, 30 U.S.C. §§ 301–306; the Mineral Leasing Act for Acquired Lands, *id.* § 351–360; the Federal Oil and Gas Royalty Management Act of 1982, *id.* §§ 1701–1759; the Indian Mineral Leasing Act of 1928, 25 U.S.C. §§ 396–396g; and the Indian Mineral Development Act of 1982, *id.* § 2101–2108.

issue any necessary regulations that would protect above- and underground water from contamination.

However, the district court was unconvinced by the respondents' proffered statutory sources of authorization and asserted that FLPMA was only a "land use planning statute,"<sup>14</sup> and dismissed the other acts invoked by DOI. Instead, the court focused on EPCA's SDWA exemption, ruling that it removed all federal authority from every aspect of fracking and precluded BLM from exercising separate statutory authority under the MLA, FLPMA, and other statutes germane to oil and gas resource management.

#### IV. THE POTENTIAL CONSEQUENCES OF THE TENTH CIRCUIT APPEAL

If the Tenth Circuit overturns the district court's holding that BLM lacks authority to regulate fracking, then the federal government would be able to supplement existing state law with stronger regulations where fracking on federal and tribal land is concerned. Several states and tribes do not adequately regulate fracking on their own; the BLM rule would fill that gap by enforcing what are considered to be the industry's best practices. Without sufficient regulation, fracking may pose risks to environmental and human health. Fracking is already lightly regulated due to its exemption from the SDWA. Further, because shallow wells are cheaper and easier to operate, companies prefer to drill to shallow depths, posing a greater risk for groundwater contamination because of the wells' close proximity to water aquifers.<sup>15</sup> In addition to shallow drilling, other fracking practices put groundwater at risk: Stanford University scientists published a study in March 2016 that demonstrated how fracking operations near the town of Pavillion, Wyoming contaminated drinking water resources through unsafe practices such as dumping fluids containing diesel fuel, maintaining high chemical concentrations in unlined pits, and having insufficient cement barriers to protect groundwater. In 2008, Pavillion residents complained of a foul taste and odor in the drinking water, to which EPA responded three years later with an inconclusive report, eventually transferring the investigation to Wyoming. In early 2016, Wyoming announced it had no plans to take further action due to a finding that there

14. *Wyoming*, 2016 WL 3509415, at \*8.

15. Robert B. Jackson et al., *The Depths of Hydraulic Fracturing and Accompanying Water Use Across the United States*, 49 ENVTL. SCI. & TECH. 8969-76 (2015).

was no widespread, systematic impact of fracking on drinking water.<sup>16</sup> However, on December 13, 2016, EPA issued a new conclusion that fracking “can impact drinking water resources under some circumstances.”<sup>17</sup>

EPA’s recent finding of scientific evidence linking fracking to water contamination demonstrates that data gaps and uncertainties limited the agency’s ability to thoroughly assess the severity or frequency of contamination. The lack of uniform national standards results in a wide range of state practices: Colorado’s and Wyoming’s distinctively lenient regulations stand in stark contrast to New York’s and Vermont’s bans on fracking.

## V. CONCLUSION

*Wyoming v. DOI* is currently in the Tenth Circuit, and its outcome will determine whether the states will secure exclusive authority to regulate hydraulic fracturing or if federal agencies can also implement regulations where authority is available outside the SDWA. This decision will ultimately impact both the industry and the environment, as there is a clear delineation between the industry supporters of sole state authority, and the environmental groups’ support for DOI’s implementation of national fracking regulations.

However, the apparent policy inclinations of the incoming Trump administration may further affect any possible regulation of fracking (or lack thereof). Despite EPA’s December 2016 report linking fracking to water contamination, President-elect Donald Trump’s promise to further deregulate fracking threatens the possibility of further national regulation.<sup>18</sup> Trump’s appointee as EPA Administrator, Scott Pruitt, has ties to the oil and gas industry and has continuously fought fossil fuel regulation.<sup>19</sup> Even if BLM’s rule is upheld in court, the new administration poses a risk to its implementation.

16. Dominic C. Digiulio & Robert B. Jackson, *Impact to Underground Sources of Drinking Water and Domestic Wells from Production Well Stimulation and Completion Practices in the Pavillion, Wyoming, Field*, 50 ENVTL. SCI. & TECH. 4524 (2016).

17. U.S. ENVTL. PROT. AGENCY, HYDRAULIC FRACTURING FOR OIL AND GAS: IMPACTS FROM THE HYDRAULIC FRACTURING WATER CYCLE ON DRINKING WATER RESOURCES IN THE UNITED STATES, EPA/600/R-16/236F (2016).

18. Coral Davenport, *Reversing Course, E.P.A. Says Fracking Can Contaminate Drinking Water*, N.Y. TIMES, Dec. 13, 2016, [https://www.nytimes.com/2016/12/13/us/reversing-course-epa-says-fracking-can-contaminate-drinking-water.html?\\_r=0](https://www.nytimes.com/2016/12/13/us/reversing-course-epa-says-fracking-can-contaminate-drinking-water.html?_r=0) [<https://perma.cc/7MUX-QJH7>].

19. *Id.*