



Wyoming Outdoor Council

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U.S. Department of the Interior—Attn: 1004—AE26
Director (630), Bureau of Land Management

Mail Stop 2134 LM
1849 C St., NW
Washington, DC 20240

Re: Comments on BLM's Proposed Regulations for Oil and Gas Hydraulic Fracturing on Federal and Indian Lands

Dear Principal Deputy Director Kornze:

The Wyoming Outdoor Council would like to submit these comments on BLM's proposed regulations for regulating hydraulic fracturing on Federal and Indian lands. 78 Fed. Reg. 31636 (May 24, 2013). The Wyoming Outdoor Council is Wyoming's oldest statewide environmental advocacy organization and has worked to protect Wyoming's environment, public lands, and people for the last forty-six years.

Wyoming has been among the national leaders in energy development, and particularly so in oil and gas extraction using horizontal drilling with hydraulic fracturing. Discussions of energy development regulations can be guaranteed to examine closely impacts upon economic interests. But while economic and energy security is important, even more considerable thought is owed to risks posed by hydraulic fracturing to the health and welfare of the American people and the environment upon which that health and welfare relies.

Wyoming especially, has an immeasurably important stake in the BLM's hydraulic fracturing rule. The case of Pavillion, Wyoming, no matter to whom one assigns the blame, was a first-hand lesson in what inadequate precaution and regulation of hydraulic fracturing can mean for Wyoming, its communities, and its citizens. This lesson resonates with areas experiencing oil and gas development nationwide. The development of a BLM hydraulic fracturing rule demonstrates that the Department of the Interior is far from

ignorant of the human and environmental risks that have potential to be associated with hydraulic fracturing. However, it is vital that the content of the rule reflect that understanding in the form of a robust, proactive policy that safeguards human health and the environment, allowing oil and gas extraction to operate but to do so around those public health priorities. We do not need or want a well-intended hydraulic fracturing rule made ineffective by loopholes. This would create a worse reality, where the American people see supposed policy protections for human health and the environment, but which actually force these basic human rights to exist around the needs of industry. This type of policy would be worse for American citizens and it would be unacceptable.

Just as in our initial comments to the BLM submitted July 10, 2012, we believe some aspects of the BLM's proposed rule will contribute to safer hydraulic fracturing practices and the Wyoming Outdoor Council emphasizes its support of and appreciation for those pieces. However, several other components of the proposed rule risk undermining the rule's primary intent as it is stated in the rule itself- "to mitigate environmental and health impacts of hydraulic fracturing." The following eleven concerns must be ameliorated if the proposed rule is to truly protect the communities and environments among which hydraulic fracturing operations develop.

A. Transparency: Complete, Reliable, and Accessible Data

- a. The trade secret exemption of hydraulic fracturing fluids under the Trade Secret Act is troublesome from a public lands, public health, and public information standpoint. We understand that the BLM rule must acknowledge the Act as long as it remains law. However, the BLM rule should not further contribute to insufficient public information by omitting a requirement for operators to submit trade secret information even to regulators.

The BLM should at least take the necessary steps to individually validate each exemption claim under the Trade Secret Act or other federal law before allowing chemical information to be excluded from the public record. The current proposal under 43 CFR 3162.3-3(j) to allow operators to refrain from disclosure of items they themselves deem to qualify as trade secrets poses an unnecessary risk to public health and the environment. The added provision that the BLM may request information on a case-by-case basis does not go far enough and wrongly leaves the burden of proof with the BLM and more importantly, with the public to ensure unprotected information is not withheld as a Trade Secret. We must remember these private operators are profiting from development of *publicly owned* lands and resources. Protection of present and future public health is to take the highest priority – as it should - above policy streamlining and above economic concerns of private industry.

To ensure adequate transparency in this rule, we request that proposed section 3162.3-3(j)(i) be modified to ensure that claims of exemption from fracking fluid disclosure are legitimate. Following section (j)(v) the following sentence should be inserted. "In addition to this affidavit, the operator will provide independent verification attesting that the claimed exemption is valid under existing law and

the other provisions in sections (i)-(v).” Independent verification could be provided through organizations such as industry trade groups, which would provide assurance to industry that there would not be disclosure of any information that was revealed to them. It is crucial that operators cannot simply unilaterally claim they are entitled to an exemption from fracking fluid constituent disclosure. There is a need to provide for independent, and regular – not just circumstantial - verification of the validity of that request.

- b. Additionally, the Wyoming Outdoor Council continues to believe that the disclosure of chemicals in accordance with the proposed rule needs to be through a government-run, neutral website – not through FracFocus.org, which is a privately (non-profit with industry ties) operated website. The public deserves a reliable, unbiased, accessible forum from which to obtain information about chemicals being used near their water supplies. Despite the best intentions of those who operate FracFocus.org and despite the anticipated changes to the site, the public deserves to get information from an independent source of information, not an industry-based clearinghouse.

For these reasons, we ask that the proposed hydraulic fracturing regulations be modified as follows. Proposed section 3162.3-3(i) should be modified to eliminate FracFocus as the means for disclosing the constituents of fracking fluids. A government hosted website should provide access to disclosed fracking fluid constituent data. Or, possibly, the government could, at a minimum, provide an interface to the FracFocus website that ensures open data rules are complied with and ensures that data which is submitted is machine-readable. While the BLM expresses confidence that FracFocus will be modified in ways that eliminate some of the significant concerns that have been raised regarding this portal, this is nevertheless an *assumption*, which should not be allowed to determine the parameters of a regulation. Certainty should be the guide to the regulatory provisions regarding this website. As far as we know, modifications to FracFocus remain speculative at this time. Speculative revisions should not guide these regulatory changes, instead a government hosted website should be put in place.

Alternatively, BLM should consider other non-profit, genuinely public interest organizations that could host these data; organizations that do not have connections to industry as FracFocus does. There are many highly competent, web-based organizations with tremendous database skills and capabilities. For example, the Environmental Working Group or SkyTruth may be able to provide these capabilities. If identifying an alternative organization to FracFocus is not possible, the BLM should overcome its reluctance and independently manage the disclosure of fracking fluid constituents to maintain the public trust. Public trust is a critical piece to this policy and it is foregone by the reliance upon FracFocus in the current proposal.

The BLM recognized repeatedly in the proposed rule that it has a mandatory obligation to prevent unnecessary or undue degradation of the public lands. In

addition, these obligations are created under the definition of “multiple use” in the Federal Land Policy and Management Act (FLPMA) to ensure environmental protection, and the management of public lands in a way that protects their environmental resources. The BLM cites these legal mandates as a basis for supporting adoption of these fracking rules, and to insist upon independent administration of fracking regulations despite State rules that may be in place because the States may not be operating under similar legal obligations. This reality is also true relative to disclosure of fracking fluid constituents. The BLM should recognize that it therefore has an *independent* duty to ensure disclosure, and for managing disclosure, that cannot be delegated to an independent and largely publically unaccountable organization like FracFocus.

B. Proactive not Reactive Disclosure Policies

As the Wyoming Outdoor Council highlighted in our July 2012 comments, the proposed rule should require the chemical components of fracturing fluid that are reported to the BLM to be disclosed to the public and BLM *before* fracturing operations take place, not afterward. The current requirement for post-fracturing chemical disclosure is not good enough. *See* 43 C.F.R. § 3162.3-3(i) (proposed) (allowing disclosure of fracking fluid constituents to occur 30 days after the hydraulic fracturing operation is completed).

In order to effectively and efficiently address potential groundwater contamination, the public and health officials need to know what chemicals are going into the ground before it is possible that water supplies have already experienced contamination. The protection of public lands for present and future generations demands that the BLM is prepared to supply information from the outset and not wait for data to be collected and potentially debated after the fact.

While we appreciate concerns including that the constituents actually used in a fracking operation might change or to some extent be unknown prior to fracking, we do not believe this should be a bar to pre-fracking disclosure of fracking fluid constituents. One option is to use the same concept as the BLM’s provisions for “type wells.” BLM is proposing to allow whole groups of wells to be collectively submitted for approval pursuant to a Notice of Intent Sundry Notice. 43 C.F.R. § 3162.3-3(d) (proposed). Allowing a group of wells to be submitted collectively for approval should also allow the BLM to require disclosure of fracking fluid constituents prior to drilling. Inherent in allowing “type wells” to be submitted collectively for approval is some level of uncertainty—each well will likely differ somewhat. Given this inherent uncertainty in the overall well approval process, there is no good reason to withhold information on fracking fluid constituents prior to fracking based on claims that the exact make-up of fracking fluid constituents may not be known. BLM is proposing that many types of information must be presented in the Notice of Intent Sundry Notice, including information related to geological structures, useable water depths, depths of perforations, a plan that includes estimates of the volumes of fluids that will be used, anticipated pressures, information about fracturing direction, length and height, and information about how flowback waters will be managed. All of these issues have uncertainties too, perhaps just as great as fracking fluid constituent information, yet this uncertainty has

(rightfully) not dissuaded the BLM from requiring it as a component of the Notice of Intent Sundry Notice, *prior to fracking*. The same should be true relative to fracking fluid constituent disclosure—disclosure can easily and usefully be made prior to fracking and BLM should require this.

C. Baseline and Post-Drilling Water Testing

The Wyoming Outdoor Council, in its July 2012 comments asked the BLM to consider a baseline testing policy. The BLM explained in the revised proposed rule that it would not require baseline and post-fracturing water testing. We would like to remind the BLM of its unique obligation under federal law, unlike the states, specifically to protect the environment and public lands from undue damage. A policy of baseline and post-fracturing water testing is necessary for the BLM to effectively protect public water resources from undue damage. Given that states do not possess the same obligation to the environment and public lands that the BLM possesses, it would be unwise of the BLM to rely solely upon state development and implementation of effective baseline and post-fracturing water testing policies. Ultimately, any unmet responsibilities in the realm of protection of public lands and the environment from undue damage as a result of fracking will belong to the BLM.

Baseline testing is a crucial element of understanding what the impacts of hydraulic fracturing are or may be. As recognized by the State of Wyoming—which is working to adopt a State requirement for baseline testing in the very near future—a major component of the controversy over the EPA’s preliminary conclusions that fracking caused water contamination at the Pavillion, Wyoming sites is a consequence of having no baseline testing data. Without knowing exactly what groundwater conditions were prior to fracking in the Pavillion area, mitigation of groundwater contamination is unnecessarily challenging, drawn out, and in some cases inconclusive. This critical information gap creates a time delay for industry and government, and a lack of security for the public. It could have been overcome if baseline testing were required before oil and gas development occurred. Additionally, ground and surface water sources do not often exist within one political boundary. Relying solely upon the states to provide baseline testing is unhelpful when development and potential contamination occurs in an adjacent state that has no or less useful and effective baseline testing standards. Therefore, the BLM should move to require baseline testing as a component of this hydraulic fracturing rule. Given the commonsense nature of this measure, it is likely a relatively easy accomplishment and the BLM should not retreat from putting in place baseline testing requirements.

BLM already proposes to require the disclosure of a number of items of information as a component of a Notice of Intent Sundry Notice, prior to the commencement of fracking. 43 C.F.R. §§ 3162.3-3(d)(1)-(6) (proposed). Disclosure would include the access routes and transportation methods for water, the volume of recovered flowback waters, the methods of handling flowback waters, and the proposed disposal methods for flowback water. It would be relatively simple to add a requirement to these provisions that chemical testing be done of the groundwater in the proposed drilling area to ensure a baseline of information was in place. A requirement for a specified number of up-gradient and down-gradient wells and the distance for sampling from the proposed well—

perhaps at least a mile—should also be specified. If this were done, BLM could fully meet its obligation to manage the public lands in a multiple use manner, ensure there was no unnecessary or undue degradation of the public lands, and ensure that the public lands are protected, as required by FLPMA.

D. Type Wells: Unnecessary Risk of Loophole

In the Wyoming Outdoor Council's past comments to the BLM regarding the initial proposed hydraulic fracturing rule, we highlighted the importance of transparent and thorough evaluations of the fracturing process itself as well as the evaluation of the integrity of the fracturing wells. We also emphasized the importance of the BLM acknowledging the well established high risk of hydraulic fracturing to water sources. That being said, section 3162.3-3(d) of the revised proposed rule requires the BLM's reconsideration.

While the use of type wells to evaluate well integrity may streamline the evaluation process, saving industry time and money, it poses an unnecessary risk to human health and the environment. At a minimum, the current proposed rule too hastily assumes that the risk of groundwater contamination is sufficiently mitigated by generalizing wells into groups based on vague, unspecified similarities.

First, as the BLM knows, the risk of groundwater contamination is not something to be taken lightly – it can create health and environmental problems and it is expensive, if not impossible, to clean-up. Managing via such generalizations as type wells suggests a “good enough” approach. This is not appropriate for protecting groundwater resources given the clear severity of risk posed by hydraulic fracturing operations to groundwater sources.¹

Secondly, the BLM offers no clear standards or procedures for determining type wells. This provides too much room for interpretation and is a clear opportunity for an industry loophole. At a minimum, a clearer, more specific set of standards and procedures need to be provided to guide the determination of what constitutes a type well for a given set of wells. Under the current definition of a type well there is too much ambiguity as to what such a well will be. These wells are a “model” in fields where geologic characteristics are “substantially similar.” 43 C.F.R. § 3160.0-5 (proposed). Operations in these fields are “likely” to be “successfully replicated using the same design.” *Id.* These standards need to be made substantially more clear and specific if the type well provision is to be maintained in the regulations. Specific geologic characteristics that must be “substantially similar” should be defined and the degree of similarity should be specified. Successful replication of operations should be mandated as a condition of recognizing a type well. It

¹ Just one example of the real risks to groundwater resources related to well-integrity and hydraulic fracturing: Vaidyanathan, Gayathri. “When 2 wells meet, spills can often follow.” Energy and Environment Publishing, LLC., 5 Aug. 2013. Web. <<http://www.eenews.net/stories/1059985587>>.

should not simply suffice that operations should be “likely” to be replicated, as currently provided for.

Finally, the degree of ambiguity in the current proposal creates too much uncertainty in the regulations and makes the rule subject to ineffective implementation, if not abuse. The purpose of allowing type wells is to allow many fewer Notice of Intent Sundry Notices to be filed. In fact, BLM anticipates only 415 Notice of Intent Sundry Notices will need to be filed per year under its proposal. 78 Fed.Reg. at 31673. This workload is not nearly so great that shortcuts in approving fracking operations need to be provided for.

E. Management of Flowback Waters

Our July 2012 comments also referenced the management of flowback, or recovered fluids, in the proposed rule. The potential for hydraulic fracturing operations to contaminate groundwater are significant, a risk that is arguably increased with the storage and disposal of flowback after a fracturing operation takes place. We again would like to thank the BLM for including this issue in the proposed rule, but to emphasize the need for reconsideration of proposed section 3162.3-3. In particular, some additional steps are needed to ensure the protection of groundwater supplies, wildlife, and the environment.

- a. First, in our previous comments, we noted what we believed to be a BLM oversight when analogous sections 3162.3-3(c)(6)(ii) and 3162.3-3(g)(10)(ii) did not show agreement concerning the requirement to disclose chemicals found in flowback. In the revised proposed rule, the BLM has eliminated the requirement to disclose flowback constituents entirely. This is a mistake. The BLM seems to believe that the constituents of flowback fluids will be unknown or uncertain. For example, it might be unknown what constituents may be introduced into the flowback fluids from underground formations. Or the chemical reactions that might occur, creating new constituents, might be hard to predict or be unknown. While this may be true, certainly some degree of understanding of the composition of flowback waters can and will be known. The companies know what chemicals were pumped into the ground, they have experience in recovering fluids and should have some understanding of their composition. Section 3162.3-3(d)(5)(i) of the proposed rules should be modified to require information regarding the composition of flowback fluids. Accommodation can easily be made for uncertainty. For example, the provision might read, “The estimated volume of fluid to be recovered . . . and an assessment of the most likely components and composition of these fluids.”
- b. Second, open storage pits, even lined ones pose a greater risk for leakage, harm to wildlife, and deteriorated air quality.

As the Wyoming Outdoor Council has emphasized in the past, Section 3162.3-3(h) serves a very important purpose – to protect groundwater supplies from fluids containing hydrocarbons. While we appreciate and support the provision’s intent, there is still need for this section to be improved. This can be done in one of two ways. First, the BLM could strengthen the protective measures of this rule

further by requiring that only closed-loop, storage tank-only systems may be used for the recovery, treatment, and disposal of flowback fluids. Such a revision is perfectly reasonable (see explanation below) and would provide the most protection for human health and the environment. Second, though not preferred above storage tanks for reasons explained below, any open pits should be *double lined*. Under the Resource Conservation and Recovery Act (RCRA), it is standard practice to use *double*-lined pits to handle toxic chemicals. The BLM should, at a minimum, modify the rule to reflect this requirement.

The BLM invites comment on whether tanks should be required for the storage of flowback fluids, and if pits are allowed whether leak detection systems should be required and double-lined pits mandated. 78 Fed. Reg. 31656. To elaborate on our comments, we believe that tanks should be required for the storage of flowback waters because pits have too many environmental shortcomings. In particular, they increase air pollution. In some areas, such as the ozone nonattainment area in Sublette County Wyoming, the Uinta Basin in Utah, and increasingly in northwest Colorado, air pollution is a significant issue, and allowing evaporation of large quantities of these air pollutants (volatile organic compounds) from open pits should not be permitted. In addition, BLM points out its Instruction Memorandum (IM) 2013-033 may help reduce the impacts of open pits to wildlife. However, at best, these provisions only *reduce* impacts to wildlife, they do not eliminate them. That stands in contrast to storage tanks where impacts to wildlife can be completely eliminated. At this point, the use of storage tanks (and other recovery systems) has become standard operating practice for industry, so the cost of their use is not prohibitive. For these reasons, the use of storage tanks for the collection of flowback waters should be mandated in the rule.

Also, in response to the BLM's request for comment on this specific issue, if double-lined pits are allowed in the final rule, then leak detection equipment should be mandated. Again, the use of double-lined pits is standard practice under the Resource Conservation and Recovery Act for managing hazardous wastes. Certainly any pit leaks should be mitigated as much as possible with the early warning provided by leak detection systems. The potential hazardous nature of flowback waters makes these provisions well advised, and we would say mandated by BLM's obligation to prevent unnecessary or undue degradation of the public lands.

F. Exemption of Groundwater Supplies is not Justified

- a. Under the proposed definition of "useable water," zones where hydrocarbon production is authorized and zones designated as exempt under the Safe Drinking Water Act are not deemed to be useable water. 43 C.F.R. § 3160.0-5 (proposed). Moreover, waters that are not underground sources of drinking water, do not supply agricultural or industrial uses, or zones designated as exempt by the State or tribes, and which contain more than 10,000 ppm of dissolved solids, would also apparently not be deemed useable. *Id.* These exemptions should be rethought.

Writing off groundwater supplies as unusable for the sake of exempting them from regulations protecting the environment is inappropriate and irresponsible management. As groundwater supplies continue to become increasingly scarce with changing climate and increased demand, we must strive to protect each and every groundwater supply that could conceivably be used by future generations. Mexico-City, Mexico is a prime example of water scarcity forcing communities to find ways of extracting and using water sources once thought to be unusable. Also, in Wyoming, Encana's approval from the Oil and Gas Conservation Commission to inject wastewater into the Madison Formation is a current example of controversy surrounding what constitutes a potential usable drinking water supply. There is surmounting scientific evidence that the approved injection location could pollute water that could be used in the future, yet injections will likely go forth. The BLM should not create this same risk on a national scale by opening a resource as vital as drinking water to interpretation by industry, which has great incentive to exploit it.

The BLM should be extremely conservative in defining waters that are not required to be isolated from hydraulic fracturing operations or which do not have to be protected. *See* 43 C.F.R. §§ 3162.3-3(e)(2), 3162.5-2(d) (proposed) (requiring that a cement evaluation log must protect useable water and requiring that useable waters be isolated from hydraulic fracturing operations). As indicated, waters that are useable are under a constant state of change—as we demand increasingly more water for increasingly more uses and users, some of which were unforeseen, we must ensure the maximum protection of water supplies, even if they are not currently useable. For that reason, we request that the exemptions in sections (4)(A)-(4)(C) of the proposed definition of useable water be eliminated and that instead only the definition of useable waters in sections (1)-(4) be retained (along with the requirement that the waters can contain up to 10,000 ppm dissolved solids).

- b. Furthermore, as indicated both sections 3162.3-3(e)(2) and 3162.5-2(d) of the proposed rules require protections for useable water. Yet as far as we can determine, there is no specific requirement to certify that protection of useable waters has been achieved. The certification that would be required applies to assurance that wellbore integrity was maintained, that the requirements in paragraphs (e), (f), (g), and (h) were complied with, and that the hydraulic fracturing operation complied with applicable laws and regulations. 43 C.F.R. §§ 3162.3-3(i)(7)(i)-(iii) (proposed). While these provisions probably do encompass the requirement to protect useable waters and to isolate them, this is ambiguous. That ambiguity should be corrected and a specific requirement to certify that useable waters have been protected should be inserted into proposed section 3162.3-3(i)(7).

G. Processes Similar to Hydraulic Fracturing

The BLM has done well to clarify in the revised proposed rule that the rule would apply specifically to hydraulic fracturing operations. However, in doing so, the BLM has also

excluded practices such as acidizing, which have many similarities to hydraulic fracturing, in particular in their ability to cause environmental, particularly groundwater damage. The proposed rule should be changed to include these other extraction practices that are similar to hydraulic fracturing.

H. The BLM Should Insert a Preamble into these Regulations Expressing its Intent

In numerous instances in the proposed regulations and in the commentary in the Federal Register, the BLM states that the reasons for pursuing one regulatory provision or another are to ensure it complies with the statutory mandates for environmental protection that it operates under. *See, e.g.*, 78 Fed. Reg. at 31671. These are stated to be ensuring compliance with the prohibition on allowing unnecessary or undue degradation of the public lands. 43 U.S.C. § 1732(b). And meeting BLM's multiple use obligations, perhaps especially the requirement to ensure "harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment . . ." *Id.* § 1702(c). And last, BLM must ensure that the policy of the United States expressed in FLPMA is met, namely to ensure the "public lands be managed in a manner that will protect" numerous resources and where appropriate will "preserve and protect certain public lands in their natural condition . . ." *Id.* § 1701(a)(8).

Given these overarching principles, which are guiding this rulemaking, BLM should insert, as a preamble to the hydraulic fracturing rules, a statement of these guiding principles. There is certainly precedent for this. BLM's land use planning rules contain a Purpose statement and a statement of Objectives. 43 C.F.R. §§ 1601.01-1 and 1601.0-2. The objectives of land use planning include maximizing resource values for the public. *Id.* BLM's lease, permit, and easement regulations also contain a statement of Purpose. *Id.* subpart 2920.

Therefore, the BLM should adopt a statement of purpose or objectives for these hydraulic fracturing regulations. This could help set the tone and establish guidance for interpreting and understanding the entire regulatory hydraulic fracturing package. For example, as BLM notes in the Federal Register notice, adopting state regulatory provisions in lieu of the BLM's regulations may not be appropriate where the state does not operate under similar statutory mandates for environmental protection as BLM does. A statement of purpose or objectives would help clarify this and establish a basis for this position.² Consequently, we would propose that BLM adopt the following preamble language for this rule:

The purpose and objectives for these regulations are to ensure compliance with Federal statutory requirements related to multiple use management and protection of the environment, as well as to allow efficient and economic extraction of oil and gas resources. Proposed hydraulic

² A statement of purpose or objectives would help clarify what is required to "meet [] the standards prescribed by the BLM" when information based on State or tribal laws or regulations is submitted as part of a Sundry Notice. 43 C.F.R. § 3162.3-3(d) (proposed).

fracturing operations on the public lands and tribal lands must ensure compliance with these requirements prior to approval. Any variances from these regulations must comply with Federal statutory requirements related to multiple use management and protection of the environment.

If needed a statement of Authority specifically stating these statutory requirements could also be inserted.

I. Variances

Under BLM's proposed regulations, BLM could grant variances to the provisions of these hydraulic fracturing regulations. Any exercise of this power must be carefully limited or the entire purpose of these regulations could be defeated. BLM also states that this power could be a means to defer to State or tribal laws and regulations. 78 Fed. Reg. at 31661. In determining whether to grant a variance, and especially whether to accept application of State or tribal law in lieu of these Federal regulations, the BLM should specifically ensure that the requirements of Federal law related to environmental protection are adhered to, as discussed in paragraph H above.

To ensure application of this regulation is carefully limited we propose the following changes to the proposed variance regulations. First the current language stating BLM can grant a variance "if the BLM determines that the proposed alternative meets or exceeds the objectives of the regulation" should be changed to "**only** if the BLM determines that the proposed alternative meets or exceeds the objectives of the regulation." 43 C.F.R. § 3162.3-3(k)(2) (proposed). Furthermore, the language stating that a variance can be granted if the request "meets or exceeds the objectives of the regulation for which the variance is being requested" is vague and ambiguous. If BLM were to insert a Purpose and Objectives statement into these regulations, as we have requested above, this ambiguity could be at least partially corrected. Additionally, BLM should make clear what is necessary to "consider[] all relevant factors." What are those factors? This should be clarified and language should be inserted into the regulation specifically stating what relevant factors must be considered.

J. Compliance with EPA Guidance Should be Specifically Mandated

In its discussion of why BLM will not prohibit the use of diesel fuel in fracturing fluids, BLM says that since EPA is developing guidance for the use of diesel fluids pursuant to its authority under the Safe Drinking Water Act, this will suffice. 78 Fed. Reg. at 31645-646. We would nevertheless ask the BLM to insert into its fracking regulations a specific statement that compliance with the rules and regulations of other agencies will be required prior to granting approval to frack. While operators will be required to certify that they have complied with all applicable Federal rules and regulations, 43 C.F.R. § 3162.3-3(i)(7)(ii) (proposed), we believe there should be a specific statement inserted into the regulations requiring compliance with the guidance, rules, and regulations of the EPA. If this is not done it will be easy to overlook these important provisions. BLM is often not extremely aware of EPA's activities. Therefore, we would propose that the

following paragraph (vi) be inserted into the current list of five factors that must be included in a hydraulic fracturing plan that is specified at 43 C.F.R. §§ 3162.3-3(d)(4)(i)-(v): “A statement of plans to comply with the guidance, rules, or regulations of other Federal or State agencies that relate to hydraulic fracturing.”

K. Bonding

A critical concern related to hydraulic fracturing will be whether operators have in place sufficient bonding protection to ensure that there is financial support to deal with any needed remediation or other reclamation efforts that come about as a result of fracking operations. Yet we believe BLM is silent on this issue, not only in the proposed rules but also in the commentary in the Federal Register. This should be corrected and assurance should be made that sufficient bonding will be in place to cover financial needs that could result from fracking operations.

Pursuant to the memorandum issued by the Office of the Solicitor on July 19, 2004, the BLM has authority to require separate bonds in an amount sufficient to cover specific lease and regulatory obligations, and is not constrained just to modifying statewide or nationwide bond levels. Moreover, pursuant to IM 2006-206, BLM is to have an action plan that will review operations on Federal oil and gas leases, which is to include steps to increase bond amounts where necessary.

The BLM should consider this guidance and put in place a provision in the fracking regulations that ensures there is sufficient bonding to cover any financial needs for the remediation or reclamation of impacts that could result from hydraulic fracturing. We would suggest this language be inserted into the regulations: “Upon receiving an Application for Permit to Drill or Notice of Intent Sundry Notice proposing hydraulic fracturing activities on a lease, the BLM will conduct a review of existing bonding on the lease and will determine if modifications in the bonding level are required. Any modifications to the bonding level shall be established and put in place prior to the commencement of hydraulic fracturing operations. Bonding levels shall be sufficient to ensure that potential environmental impacts resulting from hydraulic fracturing operations can be remediated.”

CONCLUSION

The Wyoming Outdoor Council and its members would again like to express that we are appreciative and supportive of the efforts by the BLM to implement a federal hydraulic fracturing rule. We firmly believe that the rule can be strong and effective, particularly if the eleven issues highlighted in this letter are given proper consideration. These issues include: (1) Chemical transparency, (2) pre-fracking disclosure, (3) baseline and post-drilling testing, (4) caution with type wells, (5) careful flowback management, (6) caution about groundwater exemptions, (7) inclusion of processes similar to fracking, (8) inserting an “intent” preamble, (9) limiting variances for state and tribal laws, (10) assuring compliance with EPA diesel guidance, and (11) ensuring appropriate bonding.

These issues are all key components to the BLM producing a federal fracking rule that is effective and adequately protective of public health and the environment.

Thank you for the opportunity to comment and we look forward to the remainder of this rulemaking process and the implementation of a federal hydraulic fracturing rule.

Sincerely,



Amber Wilson
Environmental Quality Coordinator
Wyoming Outdoor Council



Bruce Pendery
Chief Legal Council
Wyoming Outdoor Council