NATIONAL ASSOCIATION OF Manufacturers

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Vice President
Energy and Resources Policy

September 10, 2012

U.S. Department of the Interior
Director (630), Bureau of Land Management
Mail Stop 2134 LM
1849 C St., NW
Washington, DC 20240
Attention: 1004-AE26

Re: RIN 1004-AE26. *Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands,* proposed rule published in the Federal Register on May 11, 2012 (77 Fed. Reg. 27691).

The National Association of Manufacturers (NAM), the largest industrial trade association in the United States, representing over 12,000 small, medium and large manufacturers in all 50 states, submits the following comments on the Bureau of Land Management's (BLM) proposed rule, *Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands*, 77 Fed. Reg. 27,691 (May 11, 2012) (the "Proposed Rule"). For the reasons stated herein, the NAM believes the BLM should withdraw the Proposed Rule in favor of allowing states to continue their respective regulatory programs.

I. Introduction: Manufacturers Support Greater Access to Unconventional Oil and Gas Resources

There are abundant oil and natural gas resources in the United States. The NAM supports policies that promote the leasing, exploration and development of the nation's oil and natural gas resources in an environmentally sound manner. The emergence of hydraulic fracturing technologies has made the extraction of shale gas and shale oil more technically feasible and more cost-effective. The development of these resources is providing increasingly important sources of energy for American manufacturers and consumers. These new sources of gas and oil will have a significant positive impact on this country's ability to meet its feedstock and energy needs.

Equally important, shale oil and gas development through hydraulic fracturing has unlocked tremendous benefits for manufacturers and the millions of Americans who work in U.S. manufacturing. Hydraulic fracturing is helping to drive demand for more chemical, metal, and industrial products manufactured in the United States. A recent PwC/NAM analysis found that new shale gas development could reduce natural gas expenses for manufacturers by as much as $11.6 billion annually through 2025.[1] PwC further estimated that the benefits of

[1] PwC, Shale Gas: A Renaissance In US Manufacturing? (Dec. 2011), *available at* http://www.nam.org/~/media/01A2FACA40ED41F3A20FA08FBD6522C0/Shale_Gas_A_renaissance_in_Manufacturing.pdf (last visited June 28, 2012).

affordable gas and the demand for more manufacturing products could lead to the creation of approximately one million new jobs by 2025. This makes unconventional oil and gas development extraordinarily important to American manufacturers who are subject to an increasingly competitive global marketplace.

II. Comments on BLM's Proposed Rule

States have long been the primary regulators of hydraulic fracturing. The NAM believes states should continue to be the main regulators of this industry, and is concerned that duplicative regulation could harm any potential gains resulting from increased exploration of shale oil and gas. The BLM's proposed rule, which seeks to make radical changes to the procedures oil and gas drillers must follow before exploring on Federal and Indian lands, not only duplicates state regulations but also lacks any real evidence that would justify the agency's undertaking of such a broad, burdensome new federal regulatory effort.

The BLM's proposed rule is, for the most part, a solution in search of a problem. It is at best premature, at worst completely unnecessary. It duplicates existing state regulations, its costs significantly outweigh its benefits, and it will almost certainly result in delays to drilling activities. And in promulgating this rule, BLM either failed to adequately comply with or bypassed entirely a host of statutory requirements designed to safeguard against the deficiencies present in these comments.

For these reasons, which are described in greater detail below, NAM strongly urges BLM to withdraw the Proposed Rule.

A. The Proposed Rule Duplicates Existing State and Federal Regulations

In the Executive Summary for the Proposed Rule, BLM lays out its three primary goals for this regulation:

> *"BLM proposes to modernize its management of well stimulation activities, including hydraulic fracturing, to ensure that fracturing operations conducted on the public mineral estate (including split estate where the Federal Government owns the subsurface mineral estate) follow certain best practices, including: (1) The public disclosure of chemicals used in hydraulic fracturing operations on Federal lands; (2) confirmation that wells used in fracturing operations meet appropriate construction standards; and (3) a requirement that operators put in place appropriate plans for managing flowback waters from fracturing operations."*

In oil and gas producing states, hydraulic fracturing regulations addressing the three focus areas of the Proposed Rule—well construction, water protection, and chemical disclosure—are already in place. The Proposed Rule duplicates these effective regulations already on the books.

Moreover, BLM appears not to have done proper research as to the scope or applicability of these state regulations. At a hearing before the House Oversight and Government Reform Committee on May 31, 2012, Acting BLM Director Mike Pool had the following exchange with Acting Chairman James Lankford:

BLM Director Pool: The issue here is that the state regulations don't obtain [sic] to federal lands.

Rep. Lankford: With public lands, you are saying that state rules would not apply.

BLM Director Pool: That is correct.

That is *not* correct. Oil and natural gas companies operating on Federal or Indian lands must obtain a state permit and comply with all state regulations—including those that apply to hydraulic fracturing.

Where there is a perceived deficiency in any one state's regulatory mechanisms, the BLM should work with the state to fill in the gaps rather than imposing a one-size-fits-all federal rule on states where no deficiencies exist. In fact, there are existing programs in place to ensure that state regulation is sufficient. The State Review of Oil & Natural Gas Environmental Regulations (STRONGER) program reviews states' oil and gas regulatory programs and recommends improvements. The Interstate Oil and Gas Compact Commission (IOGCC) also support the states with model regulations. There is no legitimate reason why the continued operation of these programs will not be sufficient to ensure effective state regulation that meets BLM's goals.

States are the appropriate regulatory authorities for hydraulic fracturing operations because they are able to tailor their regulations to state-specific factors, whereas a federal one-size-fits-all approach is often ill-suited to address local issues. State regulators, not BLM staff, have the technical expertise to appropriately evaluate stimulation activity within a given state, and states are better staffed and have state-specific knowledge which makes regulation at the state level more efficient. The Proposed Rule ignores state expertise in addressing state-specific issues, and it ignores significant regional differences in geology, hydrology, and processes. The BLM is not equipped to provide the level of service that is necessary to enforce this rule, and it must recognize its shortcomings both in terms of staff resources and site-specific expertise. Given limited federal budgets and difficulties the BLM has retaining qualified petroleum engineers and other technical staff, the BLM should consider ways to delegate more to the states rather than proposing an entire new regulatory regime for which it does not have the budget, the staff, or the technical expertise.

The BLM also already requires operators to submit detailed information in compliance with a series of Onshore Oil and Gas Orders.[2] These orders are binding on operating rights owners and operators of Federal and Indian oil and gas leases, and cover a wide range of topics, such as drilling, site security, measurement of oil and gas, and disposal of produced waters. The Proposed Rule appears to have been drafted without consideration of the information that is already submitted to the federal government via Onshore Oil and Gas Orders; the NAM does not understand why information needs to be submitted multiple times for the same well. The BLM needs to conduct an internal review of existing requirements and then re-examine the proposed rule and eliminate redundant requirements.

B. BLM Has Provided No Justification for the Proposed Rule

The BLM states that the Proposed Rule is necessary because its current regulations applicable to stimulation activities have not been revised in many years, and because of vague "public concern" relating to well stimulation. However, the BLM fails to explain whether any of

[2] 43 C.F.R. § 3164.1; *available at* http://www.blm.gov/mt/st/en/prog/energy/oil_and_gas/operations/orders.html.

these concerns are warranted due to actual instances of stimulation activities affecting health or the environment, or why it has expanded the regulations so dramatically.

The Environmental Protection Agency (EPA) has testified before Congress that there have been no documented cases of hydraulic fracturing fluid impacting drinking water. *Pain at the Pump: Policies that Suppress Domestic Production of Oil and Gas: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. (May 24, 2011) (statement of the EPA Administrator Lisa Jackson). Hydraulic fracturing has been successfully used at over a million wells for 60 years. Given this long history of safe use, the BLM should first document why federal regulation is warranted before proceeding with such regulation. While the BLM asserts there are unspecified "public concerns," it offers no empirical data or documented case studies. Before the BLM takes steps to regulate hydraulic fracturing, it should present a documented rationale based on peer reviewed, sound science. Insisting on regulating an activity that is already subject to comprehensive state law oversight without any factual or scientific bases to do so is arbitrary and capricious.

The EPA is actively studying the health and environmental impacts of well stimulation and has yet to find one verifiable instance where stimulation activities caused aquifer contamination, human health impacts, environmental degradation, or any other health or environmental impact that would warrant such a dramatic expansion of BLM authority. According to the EPA, the study is not scheduled for release for peer review until 2014.

Manufacturers recognize that wells must be constructed to insure that stimulation activities do not affect aquifers, which is why significant effort and money goes into the design and construction of every well. Any well standards or stimulation reporting requirements developed by the BLM must be based on sound science and proven engineering practices, and should not be driven by knee-jerk reactions to claims that stimulation activities are damaging human health or causing environmental degradation.

As stated by the Administrator of the Office of Information and Regulatory Affairs, "[r]egulation must be justified; the arguments on its behalf must be based on careful evidence, not on dogmas, intuitions, hopes, or fiat."[3] At a minimum, the BLM has a public service responsibility to acknowledge that well stimulation, including hydraulic fracturing, is a safe activity when undertaken responsibly pursuant to existing state and federal regulation. More importantly, the BLM should not even be considering action until EPA's study has been completed and is peer reviewed. The Proposed Rule is premature and will continue to be premature until EPA's study and analysis is completed and peer reviewed. Until there is evidence that the significant expansion of federal authority embodied in the Proposed Rule is warranted, the Proposed Rule will be withdrawn or significantly pared.

C. The Proposed Rule's Costs Outweigh its Benefits

The BLM performed a cost-benefit analysis for the Proposed Rule, and under virtually every scenario modeled, the rule's benefits outweigh its costs. It also vastly underestimated overall costs by orders of magnitude. An economic analysis performed by John Dunham Associates for the Western Energy Alliance finds that the Proposed Rule would cost $1.615 billion for new and existing wells in the 13 western states that contain the preponderance of the

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[3] Remarks of Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, March 15, 2011, available at http://www.whitehouse.gov/sites/default/files/omb/inforeg/speeches/economic-growth-public-protection-03152011.pdf.

nation's Federal and Indian lands.[4] An estimated 5,058 wells waiting to be permitted or drilled would be impacted by the Proposed Rule. The study found that Wyoming would see the biggest cost impact from the Proposed Rule, with an average $771.7 million in costs, followed by New Mexico with $169 million, Utah with $155.2 million and Colorado with $142.7 million.

The BLM also appears to understate personnel required to comply with the Proposed Rule. In the Proposed Rule, the BLM estimates that in order to meet additional operational and administrative needs, operators will be required to add 15-18 employees across the industry for each of the next three years after rule implementation. 77 Fed. Reg. 27703. The BLM states no basis for the estimate, or the scope of the estimate. The NAM urges the BLM to clarify how it reached this estimate.

D. The Proposed Rule Will Lead to Drilling Delays

Dual regulations by state and federal entities cause unnecessary delay, expense, and confusion as operators must comply with two distinct regulatory schemes. Delays in permitting often means that key assets and resources are sidelined and idled for periods of time. In some cases delays in permitting may mean the difference between getting a well drilled and having to wait for another season to complete the well. Delays also translate into fewer jobs, as the lack of drilling activity has a ripple effect downstream. The NAM strongly opposes any delays that result from duplicative regulations and unnecessary layers of bureaucracy.

The Proposed Rule's assumption that operators will experience no delays in the approval process for individual well permits if the proposed rule is adopted is unrealistic based upon documented trends with regards to the length of time needed for the BLM to approve each project. In addition, the Proposed Rule will require a number of additional approvals/permits at various stages in the drilling process, which translate to additional delays and expenses. For example, in proposed section 3162.3-3(b), the BLM would be required to approve all well stimulation activity for new wells and for those wells more than five years old. The BLM then indicates that these requirements are consistent with the following states: Montana, Colorado and Wyoming. In other words, it duplicates the efforts of these states and perhaps others. As drilling entities are forced to comply with two sets of rules that may be different but similar, these differences will create tension between the states and BLM and force companies to hire additional compliance personnel to meet the demand for more information. This will result in a slowdown of drilling. As drilling activities slow down it will only increase drilling costs as drill rigs and personnel sit idle waiting for federal approval. All this will make federal lands less attractive to energy companies as they consider the additional cost of drilling on federal lands versus state and private lands.

Compounding this problem is the open-ended permitting process the Proposed Rule would create. The Proposed Rule explicitly authorizes BLM staff to request "additional information" as needed. There is no requirement that the request even be reasonable. Under the Proposed Rule, the authorized BLM officer may seek a limitless stream of additional information as part of the stimulation application or may impose specific (and unique) mitigation requirements related to recovered fluids, with no process in place for operators to appeal a decision, request or requirement. Different BLM offices throughout the country may well ask for different information or require different "best practices." The NAM is very concerned that the discretion authorized in this proposed rule will allow different offices to require entirely different

[4] Those states are: Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

tests or paperwork for approval and that no two offices will be the same. Add these open-ended permitting requirements to state permitting requirements operators must obtain, and the burden becomes overwhelming.

E. The Proposed Rule Clumsily Addresses *FracFocus*, Trade Secrets and Confidential Business Information

The *FracFocus* website is currently being used by hundreds of oil and gas drilling companies across the United States. These companies voluntarily place a wide range of information on this website, including ingredients in stimulation fluids or fracking fluid. A number of states of establish laws that require disclosure of these fluids on *FracFocus* (Colorado, Montana & North Dakota, for instance). The Proposed Rule refers to *FracFocus* several times but does not indicate that the BLM will use this website. Establishing an entirely new and separate reporting scheme is unnecessary and would be a waste of time and resources; the BLM needs to express its intention to use *FracFocus*.

Assuming the BLM eventually adopts *FracFocus* as the chemical disclosure platform for this rule, the BLM must tailor the rule accordingly so it is consistent with the existing *FracFocus* platform in order to avoid unnecessary expense, delay, confusion and duplication of efforts. As currently structured, the proposed rule will require operators to submit their information to the BLM rather than loading the information on the website themselves. There is no need to utilize the BLM's scarce resources in this way; the BLM simply does not have the staff to perform this requirement in a timely manner.

With respect to trade secrets and confidential business information (CBI), the BLM must recognize that service companies and vendors often hold the rights to fluid trade secrets, even though it is apparently the operator who the BLM envisions will be required to make the claim for protection. If the BLM chooses to issue a final rule, it must recognize that in many cases operators do not have access to proprietary and trade-secret information and should incorporate protections for service companies and vendors.

The NAM is concerned that CBI will not be adequately protected under the Proposed Rule as written. The proposed disclosure process is flawed and could subject CBI to disclosure. The Proposed Rule appears to require companies to submit trade secrets and CBI to the BLM along with a request that the information be protected from disclosure; the BLM will then make a determination as to whether it agrees to protect the submitted information. The process lacks adequate safeguards and companies are at the mercy of BLM staff. The Proposed Rule's submittal requirements are incompatible with *FracFocus* because that system is not set up to handle trade secrets or CBI. The BLM appears to be asking for additional information that at this point is not critical to the effort, and NAM encourages the agency to drop those additional requirements.

F. The Proposed Rule Extends Beyond Hydraulic Fracturing

The BLM has stated its intent is to focus on regulating hydraulic fracturing. However, BLM applicability criteria for the Proposed Rule are broader than hydraulic fracturing, encompassing a new category of "well stimulation" activities. The BLM must ensure and specifically state that such activities as enhanced oil recovery and maintenance operations are *not* included. Although the BLM explicitly states in the preamble that enhanced recovery operations are clearly not included, nowhere in the Proposed Rule is that clearly stated. To the extent the BLM moves forward with this regulation, it should include in the final rule specific

language that applicability does not include well maintenance or enhanced oil recovery activities.

G. The Proposed Rule Violates a Wide Range of Statutes and Executive Orders

i. Executive Order 13563

That the BLM would rush to issue the Proposed Rule without adequate justification is disturbing; that it did so against the backdrop of the President's Executive Order 13563 on regulations is somewhat shocking. The Proposed Rule violates both the spirit and the letter of EO 13563, issued less than fifteen months prior to release of the Proposed Rule.[5]

EO 13563 explicitly requires regulations to be based upon the best available science; here, the science can charitably be called "incomplete." EO 13563 allows agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; here, the BLM has made no such reasoned determination because the facts will not support it. EO 13563 requires agencies to select the regulatory approach that maximizes net benefits; here, there are no net benefits, only net costs. And finally, EO 13563 requires agencies to avoid redundant, inconsistent or overlapping regulatory requirements. The Proposed Rule will very clearly result in redundant, overlapping regulatory requirements, imposing additional costs, causing delays and ultimately limiting access to our vast domestic oil and gas resources.

ii. Executive Order 13132

Executive Order 13132 requires agencies to complete an impact assessment for any regulation that has significant federalism implications.[6] The BLM claims that the Proposed Rule would not have significant federalism effects and therefore did not undertake such an assessment. This is the wrong conclusion. The Proposed Rule has potential federalism ramifications and until those ramifications are studied and discussed publicly, the NAM believes moving forward would be precipitous.

The Proposed Rule creates federalism concerns due to its treatment of water rights. Water is essential to oil and gas extraction and is used throughout the process of drilling, completion and production. Because oil and gas operations require water, operators generally secure access to water or water rights prior to drilling to ensure that water is reliably and economically available throughout their operations. The Proposed Rule appears to allow BLM staff to direct operators to use, or not use, water from various sources without explaining from where the federal government's authority comes to impose water access limitations or requirements.

In the West a water right is a recognized property right, *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 53 (Colo. 1999), and water rights are routinely purchased and sold like other property rights. To obtain water for a given operation, an operator may enter into a contract to purchase water from a source; may purchase or lease an existing water right; may divert unappropriated water; or may utilize recycled water produced in association with oil and gas operations. For the BLM to now suggest in the Proposed Rule that it

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[5] Executive Order 13563, *Improving Regulation and Regulatory Review*, January 18, 2011.

[6] Executive Order 13132, *Federalism*, August 4, 1999.

has the authority to dictate to operators—especially operators in the Western United States—which sources they may or may not use is entirely inappropriate and completely inconsistent with settled water law. *See e.g. Cal. Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935) (confirming that states, not Congress or federal agencies, maintain jurisdiction over appropriation of water in the state). This could be viewed as an effort by the federal government to wrest control of water rights from the states, which are guaranteed by the Tenth Amendment.

The NAM requests that the BLM withdraw the Proposed Rule and conduct a proper analysis of its federalism impacts, as required by Executive Order 13132. This analysis is critical so that the public will have an opportunity to review and comment on this portion of the Proposed Rule.

iii. NEPA

The BLM prepared an environmental assessment (EA) under the National Environmental Policy Act (NEPA) for the Proposed Rule. This EA is deficient for several reasons. First, BLM failed to notify the public that it was preparing a NEPA analysis and failed to circulate the draft EA, effectively precluding the public from providing any meaningful input before the EA was finalized. This is the exact *opposite* of what NEPA was enacted to do. BLM should have provided proper notice and should have circulated the draft EA.

Second, the BLM failed to analyze adequately the socioeconomic impacts of the Proposed Rule. Given the gross disparity between the BLM's economic impact analysis and the analysis performed by John Dunham Associates for the Western Energy Alliance—a difference of orders of magnitude—the EA's socioeconomic impacts analysis falls woefully short of NEPA's "hard look" standard.

Third, by considering only a no action alternative and two almost identical alternatives, The BLM, in essence, analyzed only one "true" alternative and failed to consider additional, reasonable alternatives. Had the BLM provided the public with notice of its intent to conduct a NEPA analysis, the public could have proposed, and the BLM could have analyzed, additional, reasonable alternatives.

Finally, the NAM asks that the BLM clarify whether a separate NEPA analysis is required for approval of stimulation plans. The Proposed Rule establishes an application process that will require BLM approval of various plan and well elements before an operator may stimulate a well. The BLM has stated that it expects that approval of certain elements, such as the cement bond log, will be considered federal actions triggering NEPA. In addition to the delays inherent in the NEPA process, the NAM is concerned that each approval may be subject to challenge in federal court; this will result in even greater delays and added costs. The BLM must explain its intent and clarify that its approval of a stimulation proposal will not be subject to NEPA.

iv. Statutes Applicable to Economically Significant Regulations

The BLM claims that the Proposed Rule will not have a significant economic impact, and avoids conducting analyses under several statutes and executive orders. These include: the Paperwork Reduction Act, the Small Business Regulatory Enforcement Fairness Act, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, the Small Business Regulatory Enforcement Fairness Act, and Executive Order 12866. The NAM disagrees with the BLM's decision to avoid each of these statutes and orders. The scope of the Proposed Rule is substantially broad, and the study by John Dunham Associates indicates that costs could be as high as $1.615 billion—well beyond the $100 million threshold that triggers the applicability of

these statutes. These statutes and orders were enacted to promote transparency and protect the public from overly costly and burdensome regulations. By ignoring them, the BLM has deprived the public of an open, transparent regulatory process as required by the Administrative Procedure Act. Invoking these statutes could have also safeguarded against many of the problems NAM has identified with the rule, such as an upside-down cost-benefit ratio.

III. Conclusion

The NAM strongly recommends the BLM withdraw the Proposed Rule and allow the states to regulate hydraulic fracturing without a duplicate layer of federal regulation. The Proposed Rule is impractical, duplicative, costly and overly burdensome, and will undoubtedly result in delays for large numbers of drilling activities. Should the BLM choose to move forward with the rule, it must at a minimum make the changes set forth in these comments with respect to enhanced oil recovery and maintenance operations, trade secrets and CBI, use of *FracFocus*, the role of NEPA in getting permits, and duplication of federal and state laws. Ultimately, though, the reasons not to impose the Proposed Rule outweigh the reasons for it, and the NAM encourages BLM to withdraw the Proposed Rule.

Sincerely,

Ross Eisenberg
Vice President, Energy & Resources Policy