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BLM Fracking Rule Bows to Industry, Ignores Public Concerns

On May 16, the U.S. Department of the Interior's Bureau of Land Management (BLM) released a revised proposed rule for hydraulic fracturing on federal public lands (commonly referred to as fracking). The new proposed rule not only ignores concerns about the public health and environmental risks of the natural gas drilling method, it also disregards recommendations by lawmakers and the U.S. Department of Energy's Shale Gas Production Subcommittee, which called for transparency and full public chemical disclosure. The proposed rule suggests the agency has placed industry concerns ahead of public health and safety. It also contradicts the new data standards the Obama administration issued just last week by executive order.

Background

In his 2012 State of the Union address, President Obama pledged to require "all companies that drill for gas on public lands to disclose the chemicals they use" and to "develop this resource without putting the health and safety of our citizens at risk." The Department of the Interior estimates that 90

percent of the 3,400 wells drilled each year on public and Indian lands use fracking, a process that pumps large amounts of water, sand, and toxic chemicals into gas wells at very high pressure to cause fissures in shale rock that contains methane gas.

In May 2012, BLM released a proposed rule, and over 170,000 comments came in, a large number from environmental and public interest organizations and lawmakers asking the agency to *strengthen* public health and environmental provisions in the proposed rule.

In December 2012, BLM announced that it was withdrawing the proposed rule and would issue a new proposal with changes based on comments received. Unfortunately, the new proposal ignores the recommendations submitted to the agency last September by public health and environmental organizations and lawmakers, and instead addresses issues raised by the oil and gas industry. Further, the agency disregarded recommendations made by the Shale Gas Production Subcommittee. In 2011, President Obama asked the U.S. Department of Energy to form this expert panel to identify any immediate steps to "improve the safety and environmental performance" of fracking.

Disclosure of Toxic Chemicals Required Only *After* Fracking Has Begun

The public has voiced concerns about the lack of reporting and water testing requirements prior to drilling. These components are seen as essential to protecting water resources and the health of those living in the area and drinking the water. But the proposed rule would not require drillers to disclose the chemicals they are using until 30 days *after* drilling.

The agency acknowledged the comments requesting pre-disclosure of chemicals, but simply noted that the "proposed rule was not revised based on these comments." Instead, BLM explained that it agreed with oil and gas industry comments, which opposed pre-disclosure of chemical constituents, primarily because of trade secrets concerns and that chemicals used may change. The agency explained that it believes that disclosure after fracking would provide adequate assurances in protecting public health and safety and protect federal and Indian resources.

This language represents a direct capitulation to the oil and gas industry. An earlier draft of the rule, leaked in February 2012, required companies to disclose the chemicals used in fracking fluid before beginning operations. It prompted vigorous complaints from the gas industry, and it seems industry interests won.

Without such pre-drilling disclosure, public health officials cannot track changes in water and air quality and guard against toxics seeping into groundwater and/or threatening public health. The lack of such information also prevents lawmakers, communities, and public inspectors from holding companies accountable if contamination occurs.

Trade Secrets Free Pass

The proposed rule would neither require drilling companies to disclose trade secrets information to the BLM, nor require drillers to submit a detailed explanation of why the information is confidential. The proposal specifically instructs companies **not** to disclose information considered to be confidential.

Public interest and environmental organizations contend that this amounts to giving drilling companies a free pass to decide what chemical information they want kept secret, with no oversight or review.

The proposed rule does require drillers to submit an affidavit, similar to the one required by Colorado's chemical disclosure rule. However, it only requires drillers to provide generalized affirmations, with no specific factual justification. There is also no process in place for evaluating and challenging trade secrets claims that give undue advantages to industry. Some states like Wyoming provide a record of their trade secrets decisions online; BLM should have required this.

Additionally disappointing, under the BLM proposed rule, health professionals, such as emergency medical technicians, nurses, and doctors, would not have easy access to the chemical information claimed as trade secrets. Several states, such as Montana, Pennsylvania, and Colorado, have established rules to allow health professionals fast access to chemical data in case of emergency. Fast access in the case of accidents and emergencies is another reason a government agency should collect all chemical disclosure data – including information considered to be trade secrets.

BLM claims that the Federal Trade Secrets Act prevents the agency from disclosing trade secrets information to health officials. But, in comments submitted to the agency last September, public interest organizations provided a detailed legal explanation about how the act does not constrain the agency's ability to require public disclosure of trade secrets information to health professionals.

No Federal Oversight of Data

The chemical disclosure requirements of BLM's proposal represent major concessions to the oil and gas industry, with little explanation to public health and environmental organizations of the reasons. The agency decided to allow drilling companies to report the chemicals used in fracking to an industry-funded website, called FracFocus.org, undermining public safeguards for complete public disclosure.

On numerous occasions, public interest and environmental organizations have argued that this site is not subject to federal laws or oversight. FracFocus is managed by the Ground Water Protection Council (GWPC) and the Interstate Oil and Gas Compact Commission (IOGCC), nonprofit intergovernmental organizations comprised of state agencies that promote oil and gas development. Moreover, the site has received funding from industry associations, including the American Petroleum Institute, a major trade association representing the interests of private oil, gas, and drilling companies.

Although BLM publicly noted that there are concerns that FracFocus is not updated in a timely manner, needs a dedicated funding source independent from the oil and gas industry, and is not subject to federal laws or oversight, the agency simply stated that that it did "not revise the rule in response to these comments."

Instead of explaining how its decision to proceed with FracFocus.org would be best for the public, BLM explained that this approach would be more "cost-effective" and beneficial to the agency and the oil and gas industry. It is remarkable that a government agency would simply dismiss concerns about the

reliability and accessibility of data that it is requiring companies to report with no explanation beyond that it would take a great deal of work for the federal government to implement properly.

The agency also failed to address the concern that the data will not be accessible through Freedom of Information Act (FOIA) requests. The Interstate Oil and Gas Compact Commission has already declared that it is not subject to federal or state open records laws, despite the fact that it is collecting government-mandated data. BLM could have included a simple acknowledgement that it would hold copies of all submitted data and these records would be available under FOIA, but FOIA is not mentioned anywhere in the proposed rule.

Violates Open Data Order

The proposed rule will also violate the executive order President Obama signed just last week requiring new government information to be made available to the public in open, machine-readable formats. Concurrently, the administration issued an accompanying Open Data Policy designed to make previously unavailable government data accessible to entrepreneurs, researchers, and the public.

BLM's approach to data collection and distribution appears to violate the new executive order and the Open Data Policy guidelines. Instead of establishing a modern example of government information collection and sharing, BLM's proposed rule would put government required data on a third-party, industry-funded website and collect and distribute the information in formats that are not machine-readable. The FracFocus.org website only allows users to download PDF files of reports, which are not machine-readable. The oil and gas industry has publicly opposed making chemical data easier to download or evaluate for fear that the public "might misinterpret it or use it for political purposes." (subscription required)

Lawmakers Object to the Proposed Rule

Rep. Ed Markey (D-MA) claimed that the changes in the new BLM proposal "make regulations weaker, not stronger." Last September, Markey and several other House Democrats from across the country submitted comments on the BLM's first proposed fracking rule. They recommended the agency require companies to disclose the chemicals and volume before fracking a well, instead of only after the fact.

In addition, the lawmakers called the BLM proposed rule a "direct contraction with the President's goal of transparency and public participation." The lawmakers noted that the proposal fails to comply with President Obama's 2009 Open Government Directive, which instructed all agencies to "publish information online in an open format that can be retrieved, downloaded, indexed and searched by commonly used web search applications."

In its 90-day report, President Obama's Shale Gas Production Subcommittee recommended that chemical data on fracking fluid be "posted on a publicly available website that includes tools for searching and aggregating data by chemical, well, by company, and by geography." In fact, in its final report, the Subcommittee praised BLM for having stated its intention during an Oct. 31, 2011, public hearing to follow the Subcommittee's recommendation.

Conclusion

"We are interested in good public disclosure," stated David Hayes, Deputy Director of the Department of the Interior, during a press teleconference last week. But the proposed final rule ignores the concerns and recommendations of lawmakers, public interest groups, and the public. It is a capitulation to industry interests.

Once the new proposed rule is officially published in the *Federal Register*, the American people will have another 30 days to voice their indignation at this failure to respond to the public's demand to know about the possible toxins being released in their communities. BLM's mission is "to sustain the health, diversity, and productivity of America's public lands for the use and enjoyment of present and future generations." This rule fails to do that.

New Executive Order Will Improve Data Transparency

On May 9, President Obama signed Executive Order 13642, "Making Open and Machine Readable the New Default for Government Information." The new policy reaffirms the administration's commitment to transparency and lays a framework for agencies to improve public access to, and use of, government data.

The order was accompanied by an Office of Management and Budget (OMB) memo detailing the new policy and its implementation, as well as a set of tools and resources to assist agencies in implementing the policy.

Making public data more accessible provides the public with information about product safety, environmental conditions, government spending, and other issues that directly affect their lives. The president's policy contains a number of thoughtful and far-reaching reforms to modernize government information practices and reduce the bureaucratic inertia that too often leaves valuable public information locked away. However, the administration continues to leave decisions about releasing specific information up to individual agencies, rather than establishing and enforcing government-wide standards.

History

The new policy builds off previous data and web policy reforms instituted by the Obama administration. In May 2009, the administration launched Data.gov, a government-wide catalog of open datasets. In December 2009, the Open Government Directive required each agency to publish three previously unavailable datasets and develop a plan to publish additional data.

An April 2011 executive order on improving customer service led to an OMB memo that July on reforming government websites. In turn, the administration included a commitment in its September 2011 National Action Plan for the Open Government Partnership to update the policy governing federal websites, which evolved into the Digital Government Strategy, released in May 2012. The

strategy committed OMB to issue an open data policy, a commitment fulfilled by the new executive order and memo.

Key Features of the New Policy

Dataset Inventories: The policy requires that in the next six months, agencies prepare and make public an inventory of agency datasets. The inventory will indicate whether the data can be made public and whether it is currently available. In addition, the policy requires agencies to consult with the public to determine priorities for expanding and improving available data. The inventory will solve the chicken-and-egg problem that leaves the public unable to provide input on which agency datasets should be released first because the public doesn't know what datasets agencies possess. Our March recommendations to the administration specifically called for disclosure of dataset inventories.

Plan for Openness from the Beginning: The policy requires agencies to plan from the earliest stages of data collection for public use and reuse of data. For instance, the policy states that "information should be collected electronically by default." This approach applies to creating particular information as well as IT systems as a whole. This reform addresses technical barriers to transparency, which can lead agencies to argue that providing public access could be cost-prohibitive due to the expense of creating "workarounds" for current legacy systems. Our March recommendations called for agencies to "create IT systems that have efficient information access built in to their design." In addition, the reforms will facilitate public use of data once released, such as by providing better metadata and utilizing open formats.

Integrate Openness into Agency Activities: The policy integrates the new requirements into existing agency activities, such as strategic planning and performance reporting. The policy also addresses potential challenges – for instance, by noting that thoughtful planning for openness may cost more upfront but should be considered a capital investment because it will result in long-term savings to the agency. This will help to ensure that the new policy is effectively put into place and does not get siloed or sidelined by agencies.

Support for Implementation: To support robust implementation, Project Open Data provides a bevy of resources to agencies, including checklists, specific guidelines, and ready-to-use software. The CIO Council also will create a working group to assist and encourage agencies in implementing the new policy. This will ensure that agencies with limited resources or technical know-how will have backup in applying the new policy.

Next Steps for Greater Openness

Perhaps the greatest limitation in the new policy is that it still grants agencies discretion to choose what data to release. This approach emphasizing agency flexibility has repeatedly been used by the Obama administration, despite repeated calls from transparency advocates for new standards of information that every agency must disclose. Without standards, agencies have often avoided posting datasets that shed light on key agency operations, such as data on lobbyist visits to agency offices. The lack of specific and measureable actions by all agencies has also contributed to charges of weak enforcement and oversight for open government policies. Inconsistent agency performance on various

open government issues was one of the top complaints about the Obama administration's first-term efforts on open government.

Although the administration committed in September 2011 to update the "management, look and feel, and structure of Federal Government websites," the new policy does not address websites or interfaces for accessing data. While some agencies have done a good job of creating user-friendly websites and intuitive tools for analyzing information, the administration needs a plan to scale those innovations across the executive branch.

Former EPA Official Sheds Light on Problems with White House Review of Rules and Standards

Recent reflections of a former executive agency official illustrate the troubling role the White House Office of Information and Regulatory Affairs (OIRA) plays in reviewing all agency rules before they can be issued. In a new article, Lisa Heinzerling shares her perspective on OIRA review during her tenure at the U.S. Environmental Protection Agency (EPA). Notably, Heinzerling gives a first-hand account of how the White House interacts with agencies regarding rules, contradicting the story being told by former OIRA Administrator Cass Sunstein and challenging the unrecognizably rosy picture of rule reviews he spins. Indeed, Heinzerling identifies a number of problems with OIRA, including significant delays and a lack of transparency, that resonate with health and safety advocates.

OIRA: The "Black Box" for Agency Rules

Many agencies are required by presidential Executive Order 12866 to submit rules to the Office of Information and Regulatory Affairs (OIRA), a regulatory review agency housed within the White House Office of Management and Budget (OMB), for review before they may be published. OIRA reviews the agency's analyses, including any cost-benefit analyses and impact analysis the agency has conducted, to determine if OIRA believes the rule should be proposed and/or adopted as written. An executive order requires that OIRA's review of "major rules" be completed within 90 days unless the agency agrees to a one-time extension of an additional 30 days. OIRA is also required to provide the public with the current status of all rules under review.

If OIRA sends a rule back to an agency for further analysis, the office is required to explain in writing why more analysis is needed. If OIRA makes changes to the proposed rule during the review process, the agency is supposed to identify those changes in a clear and understandable manner and make this information available to the public.

For years, former agency staffers and public interest groups have argued that OIRA review causes significant delays that routinely last beyond the 90-day and 120-day time limits, that OIRA review often weakens rules and standards opposed by business, and that OIRA often sends proposals back to an agency (or kills the proposal altogether) without any explanation to the public. Some rules currently under review at OIRA have been there for years, despite statutory or court-ordered deadlines, and not even the agencies know what is causing the delay. In fact, OIRA is often called a "black box" of the federal rulemaking process.

Despite the significant delays and lack of transparency at OIRA, former Administrator Cass Sunstein claimed in a recent article, "The Office of Information and Regulatory Affairs: Myths and Realities," that OIRA is nothing more than an "information aggregator" and that cost-benefit analysis plays a limited role in OIRA reviews. In March, we wrote that Sunstein's claims differ significantly from what some agency staff and public interest advocates believe happens behind closed doors at OIRA.

Now we have an insider's written account to bolster those assertions. Heinzerling writes that "Sunstein's account does not jibe with my own perceptions of OIRA's power relative to EPA or to other executive branch actors." She observes that Sunstein's attempt to downplay OIRA's interference with agency rulemaking is rebutted by his own description of the power he held as the OIRA administrator. For example, in Sunstein's new book, *Simpler: The Future of Government*, he writes that he had authority to say no to members of the Obama administration, to ensure that some rules "never saw the light of day," and to use cost-benefit analysis as a "rule of decision," rather than as an analytical tool to guide agency decision making. Heinzerling's experience suggests the latter description is more accurate. According to Heinzerling, OIRA plays a "central and often decisive role in determining which rules move and which don't" and is not a neutral broker.

OIRA's Lengthy Delays and Opaque Process

According to Heinzerling, the deadlines for review established under executive order are essentially meaningless and "perhaps survive as benchmarks, but nothing more."

One example of OIRA delay is the Occupational Safety and Health Administration's (OSHA) proposed rule to protect workers from exposure to silica dust, which has been stuck at OIRA for years, as we noted in a blog post in February. Another example is EPA's proposed rule to limit formaldehyde in pressed-wood products. Congress mandated that the rule to regulate the use of formaldehyde be *finalized* by January 2013, but the EPA's proposed rule has been sitting at OIRA since May 2012.

According to Heinzerling, "OIRA extends review indefinitely at the 'request' of agency heads – but these requests . . . often are instigated by OIRA itself." OIRA controls the request by calling "an official at the agency and ask[ing] the agency to ask for such an extension," which "the agency is not to decline . . . ." In other instances, OIRA prevents the clock from running by blocking an agency from sending the rule to OIRA at all or claiming that OIRA did not "receive" the rule until weeks or months after the agency has electronically submitted the rule to OIRA.

Disappointingly, these delays have increased during the Obama administration. According to a new Congressional Research Service (CRS) report, the length of time it takes OIRA to review rules increased dramatically in 2012, far exceeding any review times over the past 15 years. Currently, OIRA has 126 rules under review (according to the Regulatory Dashboard), and nearly 70 have been held well beyond the 120-day limit.

Heinzerling describes OIRA's review process as "utterly opaque," and this has been the case for decades. In a 2003 report, the Government Accountability Office (GAO) found that OIRA often made substantial changes to rules under review, but its review process was not well documented or clear. These same concerns remain true today.

As Heinzerling notes, OIRA regularly violates the transparency provisions of Executive Order 12866, which requires OIRA to document communications with outside parties, provide the public with the current status of rules under review, and encourage agencies to disclose changes OIRA made to a rule during the review process. In direct contradiction of the executive order, Heinzerling describes an incident in which a staff person at OIRA told her not to disclose a memo that explained why an EPA rule was reviewed by White House officials more senior than the OIRA administrator. Likewise, Heinzerling explains how OIRA often fails to provide a written explanation to agencies as to why a rule has failed OIRA review and is being sent back to the agency. And although OIRA posts the status of rules on its Regulatory Review Dashboard, this information often contains errors or is not updated for days or weeks after the status of a rule has changed.

Conclusion

As the Obama administration seeks consent from the Senate on Howard Shelanski's nomination as the next OIRA administrator, there may be an opportunity to change OIRA's practices and track record. The Senate should ask Shelanski how he plans to address OIRA's notoriously lengthy delays and opaque review process so that the public has the information necessary to actively participate in the rulemaking process. Public interest groups are cautiously hopeful that Shelanski will use his tenure to free rules that will better protect public health, worker safety, and the environment from the prison of OIRA delay and deferral.

Federal Spending Needs More Transparency: The DATA Act and Reform

The House Oversight and Government Reform Committee unveiled its discussion draft of the Digital Accountability and Transparency Act of 2013 on May 10. This legislation, more commonly known as the DATA Act, is intended to bring unprecedented public transparency to federal spending by requiring more spending data to be published online, in a standardized format, and in a searchable, downloadable database.

In April 2012, the House unanimously passed the DATA Act, but it stalled in the Senate, even though it was introduced with bipartisan support in that chamber. Rep. Darrell Issa (R-CA), chairman of the House Oversight and Government Reform Committee, wrote in January that in "this Congress I believe we will make the DATA Act law."

Why We Need Reform

A number of laws and policies over the last several decades have sought to help the public gain a better sense of where their taxpayer dollars are going. Some of the most important data sources were created in the 1970s and early 1980s, notably the Federal Procurement Data System (FPDS), the Federal Assistance Awards Data System (FAADS), the Catalog of Federal Domestic Assistance (CFDA), and the Consolidated Federal Funds Report (CFFR).

FPDS tracks government contract actions. FAADS follows grants and other types of non-contract government spending assistance to outside entities. The CFDA aggregates federal spending and non-spending assistance. The Consolidated Federal Funds Report combined what's in the other two datasets with spending information on salaries, retirement, disabilities, and more, so it was the most complete.

In 2006, the Federal Funding Accountability and Transparency Act (FFATA) became law. It required that the information in FPDS and FAADS be searchable on one website by 2008. The Center for Effective Government (then known as OMB Watch) – working with a contractor – had earlier released an online database that did this called FedSpending.org. As the 2008 deadline loomed for the Office of Management of Budget (OMB) to produce its own website, OMB turned to the Center for Effective Government and licensed our website and software.

Thus, USAspending.gov was born.

But all was not well and still is not.

Unfortunately, the Consolidated Federal Funds Report was discontinued in 2012 (the 2010 report, released in 2011, is the final one available), and USAspending.gov does not include many of the types of spending information the report contained. And where there was overlap, the spending data in CFFR was shown to be far more accurate than the data currently included on USAspending.gov. Thus, the *accuracy* of publicly available, searchable budget information may have actually been reduced in recent years.

By way of example, the National Priorities Project blogged that USAspending.gov claims that zero dollars were spent on Medicare in 2007, 2011, and 2012 despite representing some 14 percent of the federal budget. A more comprehensive assessment by the Sunlight Foundation found that there is substantial misreporting of obligations on the site.

In 2010, Congress' investigative arm, the Government Accountability Office (GAO), stated, "In a random sample of 100 awards, GAO identified numerous inconsistencies between USAspending.gov data and records provided by awarding agencies," among other issues. Sub-recipient reporting falls far short of what FFATA requires, and there are many other problems, as well, as the Project On Government Oversight recently pointed out.

What the DATA Act Would Do

These issues have not gone unnoticed by Congress. Enter the DATA Act.

The version of the DATA Act that will be reintroduced in this Congress is similar to the Senate version from last fall, which is unfortunately less ambitious than last year's House-passed bill. The Data Transparency Coalition compared the two versions in a blog post; the House Oversight and Government Reform Committee has a one-page summary of the differences, as well.

The current version of the DATA Act would:

- Include information about budget authority, obligations, and outlays on the agency, agency component, appropriations account, program, and object class levels (e.g. the nature of the obligation, such as personnel compensation, contracts, acquisition of capital assets, or grants), as well as any transferring of funds and unobligated funding;

- Combine transaction-level obligation information (e.g. contracts signed, grants awarded, loans made) with outlays (the checks that are actually cut);

- Assign universal unique identifiers to contract and grant awards;

- Establish government-wide data standards;

- Work to reduce improper payments;

- Extend the Recovery Accountability and Transparency Board's life and have it review a data stream from USAspending.gov for completeness, timeliness, quality, and accuracy and submit a report every two years, as well examine data for indicators of fraud;

- Create a pilot program with select major contractors and grant recipients to examine the feasibility of widespread recipient reporting of federal funds received, similar to what occurred under the Recovery Act; and

- Transfer responsibility for running USAspending.gov from OMB to the Treasury Department.

What the DATA Act Wouldn't Do

While the DATA Act would create sweeping changes to the current system of federal spending reporting, it still won't fix some problems we feel are important.

- Transaction-level information for certain types of spending would still not be available for things like Medicare. For instance, individual Medicare payments to doctors would not be included.

- Even though they represent roughly $1 trillion in impacts to the government's bottom line each year, tax expenditures (i.e., exemptions and subsidies) are another area of "spending" that wouldn't be part of USAspending.gov.

- As we wrote last year:

> Currently, there is no easily accessible, public linkage between an appropriation and a federal program because there is no set definition of what a "program" is. Instead, one must laboriously comb through appropriations bills, legislative report language, the president's budget, agency reports, and USAspending.gov and manually piece the chain

together, making it almost impossible to see how and why any given dollar of federal funds was spent. To fix this problem, Congress must change the way it writes appropriations bills and create a more robust way to identify programs across the federal government. Unfortunately, the DATA Act does nothing to change how appropriations bills are written.

- Contractor and grantee performance information would not be included in USAspending.gov.

- The actual contracts and supporting documents, such as statements of work, will also not be available.

Challenges

Even within the scope of what the current DATA Act discussion draft intends to do, there will be great challenges. The different types of information – description, obligations, outlays, etc. – on federal spending in various forms are stored and collected in various places, even for the same transaction. Agencies – and offices and subdivisions within agencies – collect and format information in widely different formats. Many still use paper-based records to track spending and also utilize archaic computing technologies, making it difficult to link them up.

The problem is more than an information technology challenge; what is required is a different way of conceptualizing data. This will require some degree of subject-matter expertise to make sense of the data coming from the various parts of the federal government, which have wildly different missions.

While no means a final solution to the lack of transparency surrounding federal spending, the DATA Act will advance the ball significantly.

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