

## Swanson, Cory

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**From:** Spohn, Katie <Katie.Spohn@nebraska.gov>  
**Sent:** Thursday, June 27, 2013 11:42 AM  
**To:** kendra.jones@arkansasag.gov; charles.moulton@arkansasag.gov; Swanson, Cory; clayton.eubanks@oag.ok.gov; melissa.houston@oag.ok.gov; patrick.wyrick@oag.ok.gov; Brasher, Andrew (ABrasher@ago.state.al.us); rtambling@ago.state.al.us; Brad Phelps (bradford.phelps@arkansasag.gov); Carol Isaacs (isaacsc@michigan.gov); Mattioli, Mark; Turner, Kevin; tom.bates@oag.ok.gov; manningp@michigan.gov; Johnson, Blake; Elbert Lin (elbert.lin@wvago.gov)  
**Cc:** Bolen, Holley; Cookson, David  
**Subject:** RE: Federalism in Environmental Policy Teleconference Thursday, June 27, 2013 at 11:00 EDT  
**Attachments:** FEP Planning Committee Call Minutes.doc  
**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Thanks to everyone who was able to join the call. Minutes are attached. Of immediate attention are the following items:

1. Joinder of a White Paper regarding EPA's lack of authority to promulgate regulations for NSPS for new sources. This paper will be circulated by early next week for joinder by all interested states.
2. Effluent Limitation Guideline for Power Plants: Comments on Rule are due August 6, 2013. Oklahoma will be circulating a draft comment letter in the near future.
3. EPA FOIA: Oklahoma will be filing suit for denial of the fee waiver and welcomes joinder.
4. BLM Fracking Rule: OK will circulate comment letter for joinder in the near future.

Next Call will be August 8, 2013 at 11 am EDT.

Katie Spohn

Deputy Attorney General  
Nebraska Attorney General's Office  
(402) 471-2834  
Email: [katie.spohn@nebraska.gov](mailto:katie.spohn@nebraska.gov)

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**From:** Spohn, Katie  
**Sent:** Thursday, June 27, 2013 9:52 AM  
**To:** 'kendra.jones@arkansasag.gov'; 'charles.moulton@arkansasag.gov'; 'coswanson@mt.gov'; 'clayton.eubanks@oag.ok.gov'; 'melissa.houston@oag.ok.gov'; 'patrick.wyrick@oag.ok.gov'; Brasher, Andrew (ABrasher@ago.state.al.us); 'rtambling@ago.state.al.us'; 'Brad Phelps (bradford.phelps@arkansasag.gov)'; 'Carol Isaacs (isaacsc@michigan.gov)'; 'mmattioli@mt.gov'; 'Turner, Kevin'; 'tom.bates@oag.ok.gov'; 'manningp@michigan.gov'; Johnson, Blake; Elbert Lin (elbert.lin@wvago.gov)  
**Cc:** Bolen, Holley; Cookson, David  
**Subject:** RE: Federalism in Environmental Policy Teleconference Thursday, June 27, 2013 at 11:00 EDT

## FEP Planning Committee – June 27, 2013 Conference Call

Attendance: Alabama, Arkansas, Michigan, Montana, Nebraska, Oklahoma, and West Virginia

### 1. Greenhouse Gas Standards for Existing and/or Modified Units

- A. 2010 Settlement Agreement with States and Environmental Groups required GHG NSPS for both new and existing sources
- B. April 15 and 17, 2013 Notices of Intent to Sue
  - I. 21-State coalition of AGs drafted response and request to be involved in settlement discussions
- C. Presidential Memorandum and Climate Action Plan – June 25, 2013
  - I. **NE, OK, and MI White Paper commenting on EPA's lack of authority to be used in Washington DC will be circulated for joinder early next week.**
- D. EPA Re-Proposal of New Source NSPS
  - I. September 30, 2013: will be circulating a comment letter for AG's and state environmental agencies to consider upon re-proposal.

### 2. CSAPR

- A. SCOTUS granted cert June 24, 2013
  - I. **Party States should be receiving an update from NE and TX in the very near future**
  - II. **Amicus effort: Likely to be lead by WV**

### 3. Effluent Limitation Guideline for Power Plants (\* potential comment opportunity)

- A. EPA released ELG on April 19, 2013
  - I. **Comments due August 6, 2013 (EPA-HQ-RCRA-2013-0209): Oklahoma will put something together for circulation**

### 4. PM 2.5 (\*potential amicus opportunity)

- A. WildEarth Guardians sued EPA on May 15, 2013 over Utah and Idaho SIPs to force implementation of the new 2012 standard under Subpart 4 as well (i.e. *NRDC v. EPA* applies to all particulate standards, not just the 1997 version at issue in that case) (D. Co.): **Nebraska will observe and inform the states if an amicus opportunity arises. We do not want unfriendly legal precedent established without an opportunity to share our views on the issue.**

### 5. Other Items to Be Addressed

#### A. EPA FOIA Request Update:

On May 31, 2013, Oklahoma received another denial of the fee waiver appeal when EPA concluded that the waiver was moot because there was no proper FOIA request before the agency. **OK will be filing suit in the W.D. of Oklahoma in the near future. OK will cover the costs of**

litigation and welcomes all states to participate who were parties to the original FOIA request. Paul Seby will be helping OK with their efforts.

**B. Center for Cooperative Federalism**

Clayton is working on the application for a 501 (c)(3) organization

**C. BLM-Fracking Rule: Clean Water Act Issue**

Oklahoma is drafting a comment letter for circulation

**D. EPA Authority over Non-Tribal Minor Sources on Reservation**

Michigan is having issues with EPA asserting authority over non-tribal (minor) air emission sources located on reservation and inquired as to whether other states were experiencing similar issues. Oklahoma is litigating the issue right now with EPA.

6. **Next Call: August 8, 2013 at 11:00 EDT, 10:00 CDT, 9:00 MDT.**

**Swanson, Cory**

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**From:** Swanson, Cory  
**Sent:** Thursday, July 11, 2013 12:01 PM  
**To:** Baker, Tim  
**Subject:** BLM hydraulic fracking rule

Tim,

I am following up on a conversation we had last month regarding the BLM hydraulic fracking rule. As I recall, you told me the DEQ was submitting a comment to the BLM along the lines that the state should be the primary regulator. I was hoping we could get a copy of the rule. There is a fair amount of interest in the office as we watch this play out.

Thanks and we should probably catch up one of these days on a couple of other issues.

**Cory J. Swanson**  
**Deputy Attorney General**  
**Montana Department of Justice**  
**Ph: 406-444-5774**

## Swanson, Cory

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**From:** Baker, Tim  
**Sent:** Thursday, July 11, 2013 12:29 PM  
**To:** Swanson, Cory  
**Subject:** RE: BLM hydraulic fracking rule  
**Attachments:** 042213\_SJewell Sec Interior\_Fracturing.pdf

Hi Cory – don't think DEQ is commenting (but will check) – I know the BOGC will be commenting and of course, the Governor has already commented, at least once and offered similar comments to Sec Jewell at the recent WGA meeting. I've attached Governor's letter. Tim

**From:** Swanson, Cory  
**Sent:** Thursday, July 11, 2013 12:01 PM  
**To:** Baker, Tim  
**Subject:** BLM hydraulic fracking rule

Tim,

I am following up on a conversation we had last month regarding the BLM hydraulic fracking rule. As I recall, you told me the DEQ was submitting a comment to the BLM along the lines that the state should be the primary regulator. I was hoping we could get a copy of the rule. There is a fair amount of interest in the office as we watch this play out.

Thanks and we should probably catch up one of these days on a couple of other issues.

**Cory J. Swanson**  
**Deputy Attorney General**  
**Montana Department of Justice**  
**Ph: 406-444-5774**

## Swanson, Cory

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**From:** Barnes, John  
**Sent:** Thursday, August 29, 2013 3:44 PM  
**To:** Fox, Tim; Darkenwald, Scott; Bennion, Jon; Swanson, Cory; Mattioli, Mark; VanDyke, Lawrence; Burton, Anastasia  
**Subject:** Montana joins 3 other states in protesting fracking rules

[http://missoulian.com/news/state-and-regional/montana-joins-other-states-in-protesting-fracking-rules/article\\_db26e650-10e0-11e3-8e1c-001a4bcf887a.html](http://missoulian.com/news/state-and-regional/montana-joins-other-states-in-protesting-fracking-rules/article_db26e650-10e0-11e3-8e1c-001a4bcf887a.html)

OFFICE OF THE GOVERNOR  
STATE OF MONTANA

STEVIE BULLOCK  
GOVERNOR



JOHN WALSH  
LI. GOVERNOR

April 22, 2013

The Honorable Sally Jewell, Secretary  
U.S. Department of Interior  
1849 C. Street NW  
Washington, D.C. 20240

Re: Proposed Rules on Hydraulic Fracturing

Dear Secretary Jewell:

I am writing to express my concern about the impending adoption of hydraulic fracturing rules by the Bureau of Land Management. Hydraulic fracturing and the associated technology of horizontal drilling are of critical importance to the ongoing success of oil shale development in Montana and the surrounding states. Montana is committed to the strict regulation of this activity and was an early adopter of hydraulic fracturing rules, including chemical disclosure requirements covering even non-hazardous fluid components. Based on Montana's history with our rules, I believe they adequately address issues of concern to our state and provide a consistent and predictable regulatory approach.

I am concerned that the proposed BLM rules impose a redundant regulatory process that will adversely affect permit timeliness, increase confusion and potential non-compliance in the regulated community, and cause operators to choose well locations that avoid federal property rather than best recover the resource. Discouraging investment in the development of federal minerals hurts Montana's economy by stifling economic development and reducing shared federal mineral royalty revenues. I am also concerned that the proposed rules may impinge on the state's regulation of water rights and water use through federal permitting and mitigation requirements that are at odds with our long-established water ownership and use doctrines.

Montana has had good success regulating hydraulic fracturing and associated technologies. Our state has had over 800 modern high-volume hydraulic fracture treatments performed in oil shale, with a remarkable absence of negative impacts on our groundwater. Hydraulic fracturing is a customized technique that requires knowledge of the specific and unique geologic setting in which it is conducted. State regulators use that specific knowledge to effectively regulate these activities, and BLM should take advantage of that existing state expertise. The BLM should explore ways to utilize our expertise and share existing state regulations through Memoranda of Understanding, direct adoption of existing state regulations, or a similar approach which

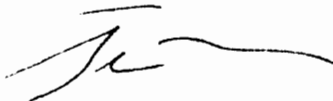
Ms. Sally Jewell, Sec.  
April 22, 2013  
Page 2

recognizes hydraulic fracturing as a technique in which all parties are interested in a safe and successful operation.

Montana's oil and gas regulators have had a productive and cooperative relationship with BLM in Montana with regard to well spacing, well locations, public hearings and other conservation-oriented activities. The relationship recognizes each party's interests and jurisdiction, and has avoided the need for BLM to adopt duplicative rules.

I believe a similar relationship could provide another opportunity to avoid an unnecessary layer of regulation, and suggest that BLM work closely with the State of Montana to achieve a satisfactory alternative to the proposed regulations that encourages responsible development, and protects our resources, environment and way of life.

Sincerely,

A handwritten signature in black ink, appearing to read 'Steve Bullock', with a long horizontal flourish extending to the right.

STEVE BULLOCK  
Governor

SB:sj



## Swanson, Cory

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**From:** Swanson, Cory  
**Sent:** Wednesday, July 17, 2013 3:02 PM  
**To:** Fox, Tim  
**Subject:** BLM issues follow up

There are two BLM issues in the hopper right now.

1. RMP's are the management plans in Eastern Montana. The comment period for the Draft EIS has closed. Tim Baker was checking to confirm that DNRC, DEQ and FWP made a comment on those. The Governor's office did not comment upon it. Baker said they are trying to use his newly-formed sage grouse advisory committee to form a state sage grouse habitat plan, in order to stave off the BLM's plan. The problem with that is timing. The BLM Final EIS is likely to be out by December, and the State plan is expected around March 2014. So we may be playing catch up and we face a likely litigation situation here - either the state and local governments, or the oil, gas and coal industries, or all of the above. Certainly agricultural and recreation folks will be interested in suing.

2. The BLM proposed rule on hydraulic fracturing is out for comment now, and comments are due by August 23. I spoke to Tim Baker about this, as well. He said the Oil and Gas Board is going to submit comments, and maybe DEQ, not sure. I believe our office does not have a role in submitting substantive or technical / scientific comments on the rule, but if there is a process or legal comment to submit, we should do so. I intend to confirm what agency is submitting comments and get a copy of them. Below is an article about this draft regulation:

BLM Revises Draft Regulations Governing Hydraulic Fracturing on Public and Tribal Lands: Comments Due August 23 By Dustin Till

July 15, 2013

The Bureau of Land Management is seeking comments on its revised proposal to regulate hydraulic fracturing (fracking) on federal and tribal lands.[1] The comment period runs through August 23, 2013. Like BLM's initial proposal, which was published in May 2012, the revised proposal has thus far received a lukewarm reception from both oil and gas interests and environmental advocates.[2]

BLM's current regulations governing hydraulic fracturing and acidizing[3] on federal lands were finalized in 1982, and last revised in 1988.[4] Those provisions address both "routine" and "non-routine" hydraulic fracturing, although the regulations do not define those terms. The current regulations do not require operators to disclose the chemicals used in fracturing operations, or require the use of best practices.

BLM's initial proposal generated over 177,000 public comments.[5] BLM subsequently withdrew that proposal and published its revised proposal in May 2013. The initial and revised proposals both address three primary subjects: 1) the disclosure of chemicals used in hydraulic fracturing; 2) well construction and integrity testing; and 3) flowback water management.

The revised proposal somewhat streamlines disclosure requirements and provides additional protections for trade secrets. It also provides operators with greater flexibility in the methods used for well integrity testing. And as written, the revised proposal would allow operators to store flowback waters in either lined open pits, or in closed tanks. BLM expressly solicited comments on the costs and benefits of requiring only storage in closed tanks – a requirement that would conflict with most state-level regulations and impose significant cost increases on oil and gas operations.

Industry groups generally agree that the revised proposal is an improvement, but nonetheless contend that BLM has failed to justify the regulations from an economic or scientific point of view. The oil and gas industry is also concerned that BLM's rules duplicate, or conflict with, state-level regulations. At least nine states require operators to disclose the chemical composition of the fluids used in hydraulic fracturing, and regulate other aspects of fracturing operations. Illinois is the latest state to adopt standards for hydraulic fracturing, and at least two other states, California and Alaska, are in the process of developing their own regulations. See California Issues Draft Hydraulic Fracturing Regulations, Marten Law Environmental News (Jan. 22, 2013).

Environmentalists are also displeased, arguing that the revised rules protect industry rather than the environment. BLM's initial proposal generated over 177,000 public comments, and the revised proposal will undoubtedly generate similar controversy and comment.

Hydraulic fracturing on public lands is also garnering increased Congressional attention. Competing legislative proposals have sought to expand, or decrease, the federal government's oversight of hydraulic fracturing. In 2005, Congress exempted hydraulic fracturing from regulation under the Safe Drinking Water Act's underground injection control program.<sup>[6]</sup> The Fracturing Responsibility and Awareness of Chemicals Act (H.R. 1921), which was reintroduced in May 2013, would remove that exemption and require operators to disclose chemical constituents, but not the chemical composition, of hydraulic fracturing fluids. In contrast, the Fracturing Regulations are Effective in State Hands proposal (S. 2248, H.R. 4322) introduced in 2012, would clarify that states have exclusive jurisdiction to regulate hydraulic fracturing on federal lands within their boundaries. Congress is also weighing legislation intended to speed up leasing procedures for oil and gas development on federal lands. See Federal Lands Jobs and Energy Security Act (H.R. 1965).

## I. Hydraulic Fracturing

Hydraulic fracturing is a well stimulation technique that increases the volumes of oil and natural gas that can be extracted from wells – particularly in shale and tight formations. Hydraulic fracturing involves the injection of fluid under high pressure to create or enlarge fractures in the reservoir rocks. The fluid used in fracturing usually contains proppants, such as particles of sand, that help keep fractures open. While water and sand generally make up 98 to 99 percent of the materials injected during fracturing operations, chemical additives are also commonly used for a variety of purposes, including limiting the growth of bacteria and preventing the corrosion of the well casing. The composition of chemical additives varies depending on the type of rock formation being fractured and the operator's specific requirements.

## II. Oil & Gas Development on Federal Lands

### A. Oil and Gas Resources on Federal Lands

Between 2008 and 2012, domestic oil production rose over 20% - from 5 million barrels per day (bpd) to 6.5 million bpd. Marketed natural gas production similarly rose from approximately 19,000 billion cubic feet (bcf) in 2007 to over 25,000 bcf in 2012.

While the majority of the new shale plays, such as Marcellus, Bakken, and Eagle Ford, are located primarily on private lands, significant oil and gas production occurs on Federal lands. BLM oversees approximately 700 million subsurface acres of federal mineral estate, and 56 million acres of Indian mineral estate. Currently, there are approximately 113 million acres of onshore federal lands open and accessible for oil and gas development. Inventories show that 279 million acres of Federal land have oil and gas potential. There are approximately 5.3 billion barrels of proved oil reserves on federal acreage onshore, and oil production on federal acreage increased from 5 million bpd in 2008 to 6.2 million bpd in 2012. At the same time, onshore natural gas production on federal lands has declined slightly from 3,051 bcf in 2008 to 2,921 bcf in 2012. While total oil and gas production on Federal lands declined in 2012, that decline was primarily attributable to declines in offshore production.

### B. Federal Oil and Gas Leasing

BLM may lease lands “known or believed to contain oil or gas deposits.”[7] Oil and gas activities on Federal lands involve five general steps:

- Land use planning: Resource management plans (RMPs) developed under the Federal Land Policy and Management Act (FLPMA) identify lands available for oil and gas leasing.[8] RMPs categorize lands as either: 1) open with standard stipulations; 2) open with special terms and conditions; 3) open but no surface occupancy allowed; or 4) closed to leasing.

- Parcels nominations and lease sales: Oil and gas leasing is generally governed by the Federal Onshore Oil and Gas Leasing Reform Act of 1987[9], which amended the Mineral Leasing Act[10] by establishing new bidding and leasing procedures. Parcels in areas identified as open for leasing in an RMP may be nominated for leasing by sending a written expression of interest to the relevant BLM office. With certain exceptions, all lands offered for oil and gas leasing are leased via competitive bidding at live auctions.[11] Lands that remain unsold after the competitive lease sale are available for two years to noncompetitive leasing.[12] •Well permitting and development: Before lessees (or operators hired by lessees) may begin drilling activities, BLM must approve an Application for Permit to Drill (APD).[13] No drilling or surface disturbance may occur prior to approval of the APD.[14] An APD includes, among other things, a drilling plan, a surface use plan of operations, evidence of bond coverage, and operator certification.[15] •Operations and production: BLM performs periodic inspections (at least once every three years) during construction and operation to ensure that conditions of the APD are being implemented. Baseline conditions are identified during an initial inspection, prior to any surface disturbing activities are commenced.

- Plugging and reclamation: The ultimate objective of reclamation is ecosystem restoration, including restoration of the natural vegetation community, hydrology, and wildlife habitats. In most cases, this means a condition equal to or closely approximating that which existed before the land was disturbed. Reclamation must achieve short-term stability, the visual, hydrological and productivity objectives of the surface management agency, and include the steps necessary to ensure that long-term objectives will be reached through natural processes.

### III. BLM’s Revised Proposal

#### A. The Scope of Covered Activities

BLM’s revised hydraulic fracturing rules require operators to obtain BLM approval before beginning fracturing or refracturing operations via a Notice of Intent Sundry. Operators may submit the Notice of Intent Sundry either as part of their APD or separately before fracturing (or refracturing) activities begin.

BLM’s initial proposal broadly defined “well stimulation” as “those activities conducted in an individual well bore designed to increase the flow of hydrocarbons from the rock formation to the well bore by modifying the permeability of the reservoir rock. Examples of well stimulation operations are acidizing and hydraulic fracturing.” The initial definition expressly included acidization and could arguably have applied to other activities such as thermal stimulation (i.e., steam injection) and maintenance fracturing.

The revised proposal deletes the definition of “well stimulation” and inserts a new definition for “hydraulic fracturing,” which excludes acidization, enhanced secondary recovery, and tertiary recovery:

Hydraulic fracturing means those operations conducted in an individual wellbore designed to increase the flow of hydrocarbons from the rock formation to the wellbore through modifying the permeability of reservoir rock by fracturing it. Hydraulic fracturing does not include enhanced secondary recovery such as water flooding, tertiary recovery, recovery through steam injection, or other types of well stimulation operations such as acidizing.

In another significant change, the revised proposal allows operators to submit their Notice of Intent Sundry for multiple wells that share substantially similar geologic characteristics.

#### B. Chemical Disclosure

One of the more controversial aspects of BLM's proposal is the requirement that operators publically disclose the composition of chemicals used during fracturing operations. BLM's initial proposal would have required operators to submit reports before and after fracturing operations, and would have required operators to disclose, among other things, the trade name, chemical composition, and purpose of all chemical additives. Operators objected to BLM's initial proposal, criticizing the lack of protection for propriety chemical compositions and the cumbersome process for claiming trade secrets.

The revised proposal scales down the disclosure requirements – operators are only required to disclose the chemical composition of fracturing fluids after the operation is complete. The revised rule also provides greater protection for trade secrets, and allows operators to submit an affidavit asserting that certain information about their fracturing fluids are exempt from disclosure. Furthermore, the revised proposal somewhat eases reporting procedures by allowing operators to make their disclosures via the FracFocus website – a portal that is currently used by numerous states with similar reporting requirements.

### C. Well Construction & Integrity Testing

Both the initial and revised proposals imposed requirements for well construction and integrity testing. Well-established drilling and well development techniques protect groundwater aquifers during drilling operations. After a wellbore is drilled through an aquifer, a steel pipe casing is immediately installed and cemented into place. The casing isolates the materials inside the wellbore from groundwater. These techniques are aimed at isolating the internal conduit of the well from the surface and subsurface environments, including groundwater, and isolating and containing the well's produced fluid to a production conduit within the well.

Both the initial and revised proposals focus significant attention to integrity testing. Under the initial proposal, operations would have been required to submit cement bond logs (CBLs). CBLs are a tool used to gauge whether water-bearing formations are isolated from the casing string. A CBL reflects data from a probe of the wellbore that uses sonic technology to detect voids or gaps in the cement and casing.

In response to industry concerns about the costs and delays of requiring CBLs, the revised proposal provides greater flexibility by broadening the methods that can be used to demonstrate cementing integrity. The revised proposal requires operators to submit cement evaluation logs (CELs) rather than CBLs, and allows operators to use a variety of technologies for testing well integrity.

The revised proposal also requires operators to successfully perform a mechanical integrity test of the casing prior to well stimulation. At minimum, the mechanical integrity test must be performed at the maximum expected treating pressure; the test will be considered successful if the pressure applied holds for 30 minutes with no more than a 10 percent loss of pressure.

### D. Flowback Water Management

Fracturing a single well can require between one million to five million gallons of water, and 25% to 100% of those volumes are returned to the surface as flowback. Like the initial proposal, BLM's revised rules require operators to submit a plan demonstrating how surface water and groundwater will be protected from contamination by flowback fluids. The plan must estimate the volume of water that is expected to be recovered, and describe how flowback water will be handled and disposed of. Operators may store flowback water in either lined open pits or in closed tanks. BLM, however, expressly solicited comments on the costs and benefits of limiting storage to closed tanks – a requirement that would impose more stringent requirements than those imposed by state-level hydraulic fracturing regulations.

### E. Variances

The revised rules respond to industry criticisms that BLM's initial proposal conflicted with, and duplicated, state-level regulations. The revised proposal provides BLM with the authority to grant variances in certain cases when state or tribal regulations meet or exceed federal standards. This provision should somewhat reduce the rule's regulatory burden.

### III. Conclusion

Public comments on BLM's revised hydraulic fracturing regulations must be submitted by August 23, 2013.

For further information, please contact Dustin Till or any member of Marten Law's Energy or Permitting and Environmental Review practice groups.

[1] Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Proposed Rule, 78 Fed. Reg. 31,636 (May 24, 2013).

[2] Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (May 11, 2012).

[3] Acidization is a well stimulation technique that is performed either before or during hydraulic fracturing, and involves pumping acid into rock formations so that the fractures in the well can be opened more effectively.

[4] See, 43 C.F.R. § 3162.3-2.

[5] Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27691 (May 11, 2012).

[6] Section 322 of Energy Policy Act of 2005 (P.L. 109-58) amended the definition of "underground injection" in the SDWA as follows:

The term "underground injection"—(A) means the subsurface emplacement of fluids by well injection; and (B) excludes—(i) the underground injection of natural gas for purposes of storage; and (ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

[7] 30 U.S.C. § 226(a).

[8] 43 U.S.C. § 1712(a).

[9] Pub. L. No. 100-203, 101 Stat. 1330 (1987), codified primarily at 30 U.S.C.A. §§ 188, 195, and 226.

[10] 30 U.S.C. §§ 181 to 287.

[11] 30 U.S.C. § 226(b)(1)(A).

[12] 30 U.S.C. § 226(c)(1).

[13] 43 C.F.R. § 3162.3-1.

[14] *Id.*

[15] *Id.*

- See more at: [http://www.martenlaw.com/newsletter/20130715-hydraulic-fracturing-public-tribal-lands?utm\\_source=Marten+Law+News&utm\\_campaign=6cbcc1b574-](http://www.martenlaw.com/newsletter/20130715-hydraulic-fracturing-public-tribal-lands?utm_source=Marten+Law+News&utm_campaign=6cbcc1b574-)

Marten\_Law\_News\_July\_16\_20137\_15\_2013&utm\_medium=email&utm\_term=0\_ff00f67215-6cbcc1b574-222415797#sthash.gqTrNFcW.dpuf

Cory J. Swanson  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

-----Original Message-----

From: Fox, Tim  
Sent: Wednesday, July 17, 2013 2:16 PM  
To: Swanson, Cory  
Cc: James, Julie  
Subject: RE: Scan from a Xerox WorkCentre

Yes, I put it on your desk. What is the status of our coordination with the Governor's office in making a joint comment on this rulemaking?

-----Original Message-----

From: Swanson, Cory  
Sent: Wednesday, July 17, 2013 1:51 PM  
To: Fox, Tim  
Cc: James, Julie  
Subject: FW: Scan from a Xerox WorkCentre

Not sure if you saw this yet. It is a response letter from the BLM saying they appreciate your comment, but they cannot extend any comment deadlines on their resource plans. They want the plan to be implemented by September 2014.

Cory J. Swanson  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

-----Original Message-----

From: AGXerox@mt.gov [mailto:AGXerox@mt.gov]  
Sent: Wednesday, July 17, 2013 7:47 AM  
To: Swanson, Cory  
Subject: Scan from a Xerox WorkCentre

Please open the attached document. It was scanned and sent to you using a Xerox WorkCentre.

Attachment File Type: PDF

WorkCentre Location: Xerox WorkCentre 5765 Center Copier Room  
Device Name: AGOXEROXWCP165

For more information on Xerox products and solutions, please visit <http://www.xerox.com>

## Swanson, Cory

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**From:** Clayton.Eubanks@oag.ok.gov  
**Sent:** Thursday, July 18, 2013 2:21 PM  
**To:** Johnson, Blake; Tambling, Robert; steve.mulder@alaska.gov; 'Charles Moulton (charles.moulton@arkansasag.gov)' (charles.moulton@arkansasag.gov); Turner, Kevin; Kendra Akin Jones (kendra.jones@arkansasag.gov); 'Bradford Phelps (bradford.phelps@arkansasag.gov)' (bradford.phelps@arkansasag.gov); terri.connell@state.co.us; cate.crutcher@myfloridalegal.com; bgrant@law.ga.gov; solens@law.ga.gov; npeterson@law.go.gov; 'jeff.chanay@ksag.org'; delberta.pfeifer@ksag.org; 'phillipst@ag.state.la.us' (phillipst@ag.state.la.us); 'manningp@michigan.gov' (manningp@michigan.gov); sonneveltd@michigan.gov; jessica.blome@ago.mo.gov; jeremy.knee@ago.mo.gov; Mary Jo Woods; hurdler.fox@gmail.com; Swanson, Cory; 'maiolson@nd.gov'; masagsve@nd.gov; michael.geraghty@alaska.gov; wstenehjem@nd.gov; frederick.nelson@ohioattorneygeneral.gov; rich.williams@state.sd.us; pmconckie@utah.gov; saexeter@utah.gov; 'meanssp@doj.state.wi.us' (meanssp@doj.state.wi.us); 'stjohnkm@doj.state.wi.us' (stjohnkm@doj.state.wi.us); doug.nick@azag.gov; dan.domenico@state.co.us; casey.shpall@state.co.us; Valerie.Tachtiris@atg.in.gov; 'Schneider, Staci' (Staci.Schneider@atg.in.gov); 'david.sheridan@iowa.gov'; Bender, Robyn (KYOAG) <Robyn.Bender@ag.ky.gov> (Robyn.Bender@ag.ky.gov) (Robyn.Bender@ag.ky.gov); 'Riley, Sean (KYOAG)' (Sean.Riley@ag.ky.gov); ktorgensen@utah.gov; 'Earle Getchell' (dgetchell@oag.state.va.us); mplowden@scag.gov; Emory Smith (ESmith@scag.gov); 'Charles.McGuigan@state.sd.us'; sherri.wald@state.sd.us; 'Jon Niermann' (jon.niermann@oag.state.tx.us); brooke.paup@oag.state.tx.us; Mattioli, Mark; 'Barry.Turner@ag.tn.gov' (Barry.Turner@ag.tn.gov); 'roxanne.giedd@state.sd.us'; alexandra.schimmer@; 'dvitale@ag.state.oh.us' (dvitale@ag.state.oh.us); 'Reed Clay' (reed.clay@oag.state.tx.us); jonathan.mitchell@oag.state.tx.us; dawsontj@doj.state.wi.us; Bridget Romano (bromano@utah.gov); 'restucciae@michigan.gov' (restucciae@michigan.gov); jeremiah.williamson@wyo.gov; elbert.lin@wvago.gov; kturner@ago.state.al.us; Abrasher@ago.state.al.us; Katie.Spohn@nebraska.gov; james.skardon@azag.gov  
**Cc:** Tom.Bates@oag.ok.gov; Patrick.Wyrick@oag.ok.gov; Melissa.Houston@oag.ok.gov  
**Subject:** Oklahoma - State Sign On -Letter to DOI on BLM Revised Proposed Hydraulic Fracturing Rule  
**Attachments:** Oklahoma - State Sign-on Letter to BLM-Revised Hydraulic Fracturing Rule.pdf  
**Follow Up Flag:** Follow up  
**Flag Status:** Completed

All,

Another sign-on opportunity. Attached is a letter we have prepared to the Department of Interior (BLM) on the Bureau of Land Management's Revised proposed hydraulic fracturing rule to apply on federal and Indian lands under BLM control. I think the letter speaks for itself and the issues involved. For a short synopsis, BLM previously issued a proposed rule to regulate hydraulic fracturing on all federal and Indian lands, after comment and a strong push from several States, Tribes, industry and trade groups, the BLM withdrew the proposed rule for revision. On May 24, 2013 the BLM reissued a revised proposed rule, the revised rule, while incorporating some of the changes suggested in comments, is still an unnecessary and over- burdensome rule that duplicates state efforts at an enormous cost to oil and gas producers.

States have an excellent record of protecting the environment and public health, while simultaneously facilitating oil & natural gas development and promoting economic growth. Rather than force an unnecessary, one-size-fits-all regulatory regime on top of carefully crafted state-specific programs, BLM should instead work with states on how best to address any health, safety or environmental issues arising from hydraulic fracturing and related operations on federal lands by deferring to proven state regulatory and enforcement programs. By focusing too much on achieving "consistent" regulation (that we hear from DOI and BLM as being needed), rather than the best regulation, the BLM's proposal fundamentally ignores local and regional differences among states. The attached letter also focuses on the Clean Water Act issues inherent in the BLM proposed rule and questions whether the BLM has any authority to regulate state water resources.

The comment deadline for the proposed rule is August 23, 2013, if your State is interested in joining this letter please let me know on or before **AUGUST 19, 2013.**

Thank you.

P. Clayton Eubanks  
Deputy Solicitor General  
Office of the Attorney General of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Tel: (405) 522-8992  
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[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)





OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

July 18, 2013

The Honorable Sally Jewell  
Secretary, U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20420

Secretary Jewell,

The undersigned Attorneys General of Oklahoma and [Insert Joining States] write to express serious concerns with, and strong objection to, the U.S. Bureau of Land Management's (BLM) recently re-proposed rule to regulate hydraulic fracturing operations on federal and Indian lands.

The states – and not the federal government – are best equipped to design, administer and enforce laws and regulations related to oil and gas development. State regulatory programs have been carefully designed to address state-specific issues and needs and are applied consistently, regularly reviewed, and continuously subjected to thoughtful administrative oversight. Importantly, the states have greater flexibility to respond to new information and modify or update their rules, as they have demonstrated in recent years.

The BLM has failed to justify the need for new federal regulations and requirements that will overlay the existing state programs in a burdensome and costly manner, beyond simply asserting that it has the authority to do so. Currently, state regulators employ highly trained staff that efficiently oversees operations on state, federal and fee lands within our borders and issues permits in a timely manner. This stands in stark contrast to a federal program that is notorious for frequent and prolonged delays and persistent staffing challenges. These will likely intensify once budget cuts are combined with onerous and unnecessary new federal rules and requirements.

While the newly proposed rule introduces a provision allowing the BLM to approve a “variance” when it determines that it would meet or exceed the effectiveness of the revised proposed federal rule, the “variance process” is unclear and has neither been adequately explained by the BLM nor analyzed by the states, industry or the public. We strongly urge that rather than undertake an unnecessarily complicated new approach, the BLM instead defer to the states on how best to address any health, environmental or safety issues arising from hydraulic fracturing and related operations on these lands.

Moreover, we question whether the BLM has the authority to administer procedures, reporting and engineering requirements for a range of well stimulation activities, including the regulation and management of water resources. The sole authority to regulate these activities and the protection and management of water resources resides with the states, and does not lie with the BLM.

The Supreme Court has long recognized that regulation of land and water use “is a quintessential state and local power.”<sup>1</sup> Thus, “[if] Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute.”<sup>2</sup> Importantly, Congress has not enacted any statute that gives BLM authority to pre-empt state water regulations.

On the contrary, federal statutes establishing limited federal regulation of water resources expressly preserve state primacy. For example, the Clean Water Act (CWA) reflects the Congressional policy “to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution, [and] to plan the development and use...of land and water resources[.]”<sup>3</sup> The statute further states that “[e]xcept as expressly provided in this chapter, nothing...shall...be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states.”<sup>4</sup> Nowhere does the CWA express a desire to adjust the federal-state balance. Similarly, the Safe Drinking Water Act (SDWA) also emphasizes state primacy over drinking water regulation and enforcement.<sup>5</sup>

Recognizing state jurisdiction over water resources, the CWA and SDWA carve out a narrow role for the federal government and vest federal regulatory authority in the U.S. Environmental Protection Agency (EPA). Thus, EPA shares, to a limited extent, state responsibility for protecting water resources. But nothing in these statutes confers regulatory authority over water resources on BLM. In a 2011 resolution, the Western States Water Council underscored this point by stating that “any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states.”

BLM rightfully recognizes that it does not have the state expertise or resources to regulate water resources. In fact, BLM’s Water Policy states the following:

- States have primary authority and responsibility for the allocation and management of water resources within their boundaries, except as specified by Congress on a case-by-case basis.

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<sup>1</sup> *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006).

<sup>2</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The statement in this opinion comes from parsing two quotes together from a previous Supreme Court case, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

<sup>3</sup> 33 U.S.C.A. § 1251(b).

<sup>4</sup> *Id.* § 1370.

<sup>5</sup> 42 U.S.C.A. § 300(f) *et. seq.*

- In order to implement the BLM water policy of state water resources primacy, Bureau personnel shall:
  - Cooperate with state governments under the umbrella of state law to protect all water uses identified for public land management purposes.
  - Comply with applicable state law, except as otherwise specifically mandated by Congress, to appropriate water necessary to manage public lands for the purposes intended by Congress.

Despite the BLM's recognition of state primacy in this regard, the newly proposed hydraulic fracturing rule is supposedly predicated on the need for ground and surface water protections and imposes specific regulatory requirements concerning water resources. Yet the BLM has no authority to approve or disapprove well stimulation activities to regulate operators' use of water resources, or to require operators to mitigate impacts on water resources. Because BLM has no jurisdiction to regulate water resources, BLM cannot demand information about them. Indeed, BLM should eliminate all provisions that seek information about or impose regulations on the use, transport, disposal or other activities involving waters.

Water management is only one example of the unnecessary and inappropriate federal encroachment on state regulations and practices. We therefore request that the BLM:

- Identify any health, safety or environmental issues arising from hydraulic fracturing on public lands that are not currently being addressed by state regulators before taking any further action to finalize its rule.
- Carefully review the many state comments in response to the BLM's rule. Rather than force an unnecessary "one-size-fits-all" regulatory regime on top of carefully tailored state-specific programs, we further request that BLM instead defer to our state programs, on federal lands, where these regulatory programs already exist.

Beyond the fundamental question of who is better equipped to provide the best regulations, in light of the fiscal realities we face, and in view of current and future budget constraints, the BLM should partner with the states to the greatest extent possible, to leverage the existing state programs, resources and infrastructure.

This is an extremely important matter to our states and we appreciate your serious consideration. Please contact us for any additional information or if you have any questions.

Sincerely,

E. SCOTT PRUITT

cc: Tommy Beaudreau, Acting Assistant Secretary, Land and Minerals Management, DOI  
Neil Kornze, Principal Deputy Director, BLM  
Jamie Connect, Acting Deputy Director (Operations), BLM  
Mike Nedd, Assistant Director, Minerals and Realty Management, BLM  
Steven Wells, Division Chief, Fluid Minerals Division, BLM

## Swanson, Cory

---

**From:** Fox, Tim  
**Sent:** Friday, July 26, 2013 3:19 PM  
**To:** Swanson, Cory; Mattioli, Mark; Darkenwald, Scott; VanDyke, Lawrence; Bennion, Jon  
**Subject:** RE: Oklahoma - State Sign On -Letter to DOI on BLM Revised Proposed Hydraulic Fracturing Rule

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

I agree that we should sign on to this letter, and it's a good idea to let the Governor's office know what we are doing shortly before the August 19<sup>th</sup> deadline for signing on.

**From:** Swanson, Cory  
**Sent:** Friday, July 26, 2013 1:36 PM  
**To:** Fox, Tim; Mattioli, Mark; Darkenwald, Scott; VanDyke, Lawrence; Bennion, Jon  
**Subject:** FW: Oklahoma - State Sign On -Letter to DOI on BLM Revised Proposed Hydraulic Fracturing Rule

Tim and team,

The Oklahoma AG is leading the charge on a joint AG's comment letter to the BLM regarding its hydraulic fracturing rule, which is in draft stage. The comment deadline for this rule is August 23.

I have reviewed the rule and some research and commentary on it. I spoke with Tim Baker in the Governor's office, and he said that DEQ and/or the Board of Oil & Gas Conservation will comment to BLM on the rule. This topic was included in our conversation which I referenced in my last e-mail in which he asked the technical / scientific matters be handled by the agency with jurisdiction, and they did not feel prior notification or coordination was needed if our office wanted to provide a legal interpretation comment or letter on something.

I told him I would recommend that as a general operating philosophy to our office, and have not gotten back to him on it yet. But in the conversation, we specifically referenced this BLM hydraulic fracking rule, and that it would probably be a technical, rather than a legal, comment. However, if you read this letter from the AG's, there is a strong legal argument to be made against the proposed rule. In light of this context, I recommend we consider reviewing this letter and joining it. If we do so, I would plan on notifying the Governor's office in advance.

**Cory J. Swanson**  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

**From:** Clayton.Eubanks@oag.ok.gov [mailto:Clayton.Eubanks@oag.ok.gov]  
**Sent:** Thursday, July 18, 2013 2:21 PM  
**To:** Johnson, Blake; Tambling, Robert; [steve.mulder@alaska.gov](mailto:steve.mulder@alaska.gov); 'Charles Moulton ([charles.moulton@arkansasag.gov](mailto:charles.moulton@arkansasag.gov))' ([charles.moulton@arkansasag.gov](mailto:charles.moulton@arkansasag.gov)); Turner, Kevin; Kendra Akin Jones ([kendra.jones@arkansasag.gov](mailto:kendra.jones@arkansasag.gov)); 'Bradford Phelps ([bradford.phelps@arkansasag.gov](mailto:bradford.phelps@arkansasag.gov))' ([bradford.phelps@arkansasag.gov](mailto:bradford.phelps@arkansasag.gov)); [terri.connell@state.co.us](mailto:terri.connell@state.co.us); [cate.crutcher@myfloridalegal.com](mailto:cate.crutcher@myfloridalegal.com); [bgrant@law.ga.gov](mailto:bgrant@law.ga.gov); [solens@law.ga.gov](mailto:solens@law.ga.gov); [npeterson@law.go.gov](mailto:npeterson@law.go.gov); 'jeff.chanay@ksag.org'; [delberta.pfeifer@ksag.org](mailto:delberta.pfeifer@ksag.org); 'phillipst@ag.state.la.us' ([phillipst@ag.state.la.us](mailto:phillipst@ag.state.la.us)); 'manningp@michigan.gov' ([manningp@michigan.gov](mailto:manningp@michigan.gov)); [sonneveltdtd@michigan.gov](mailto:sonneveltdtd@michigan.gov); [jessica.blome@ago.mo.gov](mailto:jessica.blome@ago.mo.gov); [jeremy.knee@ago.mo.gov](mailto:jeremy.knee@ago.mo.gov); Mary Jo Woods; [hurdler.fox@gmail.com](mailto:hurdler.fox@gmail.com); Swanson, Cory; 'maiolson@nd.gov'; [masagsve@nd.gov](mailto:masagsve@nd.gov); [michael.geraghty@alaska.gov](mailto:michael.geraghty@alaska.gov); [wstenehjem@nd.gov](mailto:wstenehjem@nd.gov); [frederick.nelson@ohioattorneygeneral.gov](mailto:frederick.nelson@ohioattorneygeneral.gov); [rich.williams@state.sd.us](mailto:rich.williams@state.sd.us); [pmconkie@utah.gov](mailto:pmconkie@utah.gov); [saexeter@utah.gov](mailto:saexeter@utah.gov); 'meanssp@doj.state.wi.us'

(meanssp@doj.state.wi.us); 'stjohnkm@doj.state.wi.us' (stjohnkm@doj.state.wi.us); doug.nick@azag.gov; dan.dufmenico@state.co.us; casey.shpall@state.co.us; Valerie.Tachtiris@atg.in.gov; 'Schneider, Staci' (Staci.Schneider@atg.in.gov); 'david.sheridan@iowa.gov'; Bender, Robyn (KYOAG) <Robyn.Bender@ag.ky.gov> (Robyn.Bender@ag.ky.gov) (Robyn.Bender@ag.ky.gov); 'Riley, Sean (KYOAG)' (Sean.Riley@ag.ky.gov); ktorgensen@utah.gov; 'Earle Getchell' (dgetchell@oag.state.va.us); mplowden@scag.gov; Emory Smith (ESmith@scag.gov); 'Charles.McGuigan@state.sd.us'; sherri.wald@state.sd.us; 'Jon Niermann' (jon.niermann@oag.state.tx.us); brooke.paup@oag.state.tx.us; Mattioli, Mark; 'Barry.Turner@ag.tn.gov' (Barry.Turner@ag.tn.gov); 'roxanne.giedd@state.sd.us'; alexandra.schimmer@; 'dvitale@ag.state.oh.us' (dvitale@ag.state.oh.us); 'Reed Clay' (reed.clay@oag.state.tx.us); jonathan.mitchell@oag.state.tx.us; dawsontj@doj.state.wi.us; Bridget Romano (bromano@utah.gov); 'restucciae@michigan.gov' (restucciae@michigan.gov); jeremiah.williamson@wyo.gov; elbert.lin@wvago.gov; kturner@ago.state.al.us; Abrasher@ago.state.al.us; Katie.Spohn@nebraska.gov; james.skardon@azag.gov  
**Cc:** Tom.Bates@oag.ok.gov; Patrick.Wyrick@oag.ok.gov; Melissa.Houston@oag.ok.gov  
**Subject:** Oklahoma - State Sign On -Letter to DOI on BLM Revised Proposed Hydraulic Fracturing Rule

All,

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States have an excellent record of protecting the environment and public health, while simultaneously facilitating oil & natural gas development and promoting economic growth. Rather than force an unnecessary, one-size-fits-all regulatory regime on top of carefully crafted state-specific programs, BLM should instead work with states on how best to address any health, safety or environmental issues arising from hydraulic fracturing and related operations on federal lands by deferring to proven state regulatory and enforcement programs. By focusing too much on achieving "consistent" regulation (that we hear from DOI and BLM as being needed), rather than the best regulation, the BLM's proposal fundamentally ignores local and regional differences among states. The attached letter also focuses on the Clean Water Act issues inherent in the BLM proposed rule and questions whether the BLM has any authority to regulate state water resources.

The comment deadline for the proposed rule is August 23, 2013, if your State is interested in joining this letter please let me know on or before **AUGUST 19, 2013.**

Thank you.

P. Clayton Eubanks  
Deputy Solicitor General  
Office of the Attorney General of Oklahoma  
313 N.E. 21st Street  
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Tel: (405) 522-8992  
Fax:(405) 522-0085  
[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)

## Swanson, Cory

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**From:** Baker, Tim  
**Sent:** Friday, August 09, 2013 8:04 AM  
**To:** Swanson, Cory  
**Subject:** RE: tomorrow afternoon is better

Thanks let me look at this list. Next week I'm in the office Th only – I've got a lot of stuff but let's see if we can squeeze a few minutes.

**From:** Swanson, Cory  
**Sent:** Thursday, August 08, 2013 3:21 PM  
**To:** Baker, Tim  
**Subject:** RE: tomorrow afternoon is better

Tomorrow might not work very well. I will be going to the Babcock funeral and then have to leave town in the afternoon for guard drill. Here are the issues I wanted to cover briefly:

1. *Vogele v. State Land Board* – are you and Andy Huff my points of contact for your office and does the Governor's office acknowledge DOJ as counsel for the case? Do you guys think we need a formal engagement letter? Mike Black is indifferent to it as long as everyone acknowledges we are counsel and acknowledges the process of keeping privileged information privileged. But we wanted to check with you guys if we should do an engagement letter – what did Andy do when he was in this office?
2. BLM fracking rule – I had originally recommended that our office not provide any comments on this rule, because your office or the appropriate agencies were going to do so. You and I had discussed the understanding between the offices that substantive, technical or policy matters under the province of a Governor's agency would be your arena and we would stay out, but that DOJ would take on the role of legal arguments, positions and representations where it was a legal issue. That is also the understanding that I have recommended to our leadership team, and they have all agreed. Since that conversation, a number of AG's mainly in the West have taken on the BLM fracking rule as a legal issue. They have drafted a comment that will be submitted to the BLM that argues the rule is legally unnecessary and also suspect. The main contention is that in the cooperative federalism context, the states should have the primary role in this regulatory matter, and the BLM should therefore leave it to the states to regulate. This argument has caught Tim Fox's eye, and he would like to join the letter and comment. He sees it as supportive of the position that the Governor and his agencies are also taking – based only a cursory reading of what you and I have discussed – and therefore not a conflict. I agree with him that is likely the case, but since we are in an area that you and I have already talked about, I want to make sure we have a clear understanding of this issue between us. Since another office is drafting the letter, I will need to check if I can send it to you before it goes out. But even if they want me to keep it close until publication, I can provide you a detailed summary. Anyway, let's talk about this when we can.
3. Sage Grouse – there is a growing agitation among Montana industry folks to do something more on this front. I wonder if you are hearing anything and maybe we can share some strategy or at least what is happening out in the field.
4. Coal lawsuit – thanks for the help on this. DEQ has sent me a bunch of information and I am drafting stuff to intervene in this lawsuit.

5. SO2 non-attainment – I am unclear whether DOJ needs to be focused or worry about this right now. A couple of other states have been hit with non-attainment designations this summer, and they are preparing for litigation. So let me know if there is something we should be doing that we are currently not doing.

**Cory J. Swanson**  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

**From:** Baker, Tim  
**Sent:** Thursday, August 08, 2013 1:29 PM  
**To:** Swanson, Cory  
**Subject:** tomorrow afternoon is better

Getting jammed today. Ugh.



## Swanson, Cory

---

**From:** Swanson, Cory  
**Sent:** Wednesday, August 21, 2013 10:36 AM  
**To:** 'Clayton.Eubanks@oag.ok.gov'  
**Cc:** Mattioli, Mark; Fox, Tim; VanDyke, Lawrence; Bennion, Jon; Darkenwald, Scott  
**Subject:** RE: Oklahoma - State Sign On -Letter to DOI on BLM Revised Proposed Hydraulic Fracturing Rule

Clayton, this is a follow-up to our phone conversation that Attorney General Tim Fox would like to sign onto this letter. Thank you for the leadership on this.

**Cory J. Swanson**  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

**From:** [Clayton.Eubanks@oag.ok.gov](mailto:Clayton.Eubanks@oag.ok.gov) [<mailto:Clayton.Eubanks@oag.ok.gov>]  
**Sent:** Thursday, July 18, 2013 2:21 PM  
**To:** Johnson, Blake; Tambling, Robert; [steve.mulder@alaska.gov](mailto:steve.mulder@alaska.gov); 'Charles Moulton ([charles.moulton@arkansasag.gov](mailto:charles.moulton@arkansasag.gov))' ([charles.moulton@arkansasag.gov](mailto:charles.moulton@arkansasag.gov)); Turner, Kevin; Kendra Akin Jones ([kendra.jones@arkansasag.gov](mailto:kendra.jones@arkansasag.gov)); 'Bradford Phelps ([bradford.phelps@arkansasag.gov](mailto:bradford.phelps@arkansasag.gov))' ([bradford.phelps@arkansasag.gov](mailto:bradford.phelps@arkansasag.gov)); [terri.connell@state.co.us](mailto:terri.connell@state.co.us); [cate.crutcher@myfloridalegal.com](mailto:cate.crutcher@myfloridalegal.com); [bgrant@law.ga.gov](mailto:bgrant@law.ga.gov); [solens@law.ga.gov](mailto:solens@law.ga.gov); [npeterson@law.go.gov](mailto:npeterson@law.go.gov); 'jeff.chanay@ksag.org'; [delberta.pfeifer@ksag.org](mailto:delberta.pfeifer@ksag.org); 'phillipst@ag.state.la.us' ([phillipst@ag.state.la.us](mailto:phillipst@ag.state.la.us)); 'manningp@michigan.gov' ([manningp@michigan.gov](mailto:manningp@michigan.gov)); [sonneveldtd@michigan.gov](mailto:sonneveldtd@michigan.gov); [jessica.blome@ago.mo.gov](mailto:jessica.blome@ago.mo.gov); [jeremy.knee@ago.mo.gov](mailto:jeremy.knee@ago.mo.gov); Mary Jo Woods; [hurdler.fox@gmail.com](mailto:hurdler.fox@gmail.com); Swanson, Cory; 'maiolson@nd.gov'; [masagsve@nd.gov](mailto:masagsve@nd.gov); [michael.geraghty@alaska.gov](mailto:michael.geraghty@alaska.gov); [wstenehjem@nd.gov](mailto:wstenehjem@nd.gov); [frederick.nelson@ohioattorneygeneral.gov](mailto:frederick.nelson@ohioattorneygeneral.gov); [rich.williams@state.sd.us](mailto:rich.williams@state.sd.us); [pmconckie@utah.gov](mailto:pmconckie@utah.gov); [saexeter@utah.gov](mailto:saexeter@utah.gov); 'meanssp@doj.state.wi.us' ([meanssp@doj.state.wi.us](mailto:meanssp@doj.state.wi.us)); 'stjohnkm@doj.state.wi.us' ([stjohnkm@doj.state.wi.us](mailto:stjohnkm@doj.state.wi.us)); [doug.nick@azag.gov](mailto:doug.nick@azag.gov); [dan.domenico@state.co.us](mailto:dan.domenico@state.co.us); [casey.shpall@state.co.us](mailto:casey.shpall@state.co.us); Valerie.Tachtiris@atg.in.gov; 'Schneider, Staci' ([Staci.Schneider@atg.in.gov](mailto:Staci.Schneider@atg.in.gov)); 'david.sheridan@iowa.gov'; Bender, Robyn (KYOAG) <[Robyn.Bender@ag.ky.gov](mailto:Robyn.Bender@ag.ky.gov)> ([Robyn.Bender@ag.ky.gov](mailto:Robyn.Bender@ag.ky.gov)) ([Robyn.Bender@ag.ky.gov](mailto:Robyn.Bender@ag.ky.gov)); 'Riley, Sean (KYOAG)' ([Sean.Riley@ag.ky.gov](mailto:Sean.Riley@ag.ky.gov)); [ktorgensen@utah.gov](mailto:ktorgensen@utah.gov); 'Earle Getchell' ([dgetchell@oag.state.va.us](mailto:dgetchell@oag.state.va.us)); [mplowden@scag.gov](mailto:mplowden@scag.gov); Emory Smith ([ESmith@scag.gov](mailto:ESmith@scag.gov)); 'Charles.McGuigan@state.sd.us'; [sherri.wald@state.sd.us](mailto:sherri.wald@state.sd.us); 'Jon Niermann' ([jon.niermann@oag.state.tx.us](mailto:jon.niermann@oag.state.tx.us)); [brooke.paup@oag.state.tx.us](mailto:brooke.paup@oag.state.tx.us); Mattioli, Mark; 'Barry.Turner@ag.tn.gov' ([Barry.Turner@ag.tn.gov](mailto:Barry.Turner@ag.tn.gov)); 'roxanne.giedd@state.sd.us'; [alexandra.schimmer@](mailto:alexandra.schimmer@); 'dvitale@ag.state.oh.us' ([dvitale@ag.state.oh.us](mailto:dvitale@ag.state.oh.us)); 'Reed Clay' ([reed.clay@oag.state.tx.us](mailto:reed.clay@oag.state.tx.us)); [jonathan.mitchell@oag.state.tx.us](mailto:jonathan.mitchell@oag.state.tx.us); [dawsontj@doj.state.wi.us](mailto:dawsontj@doj.state.wi.us); Bridget Romano ([bromano@utah.gov](mailto:bromano@utah.gov)); 'restucciae@michigan.gov' ([restucciae@michigan.gov](mailto:restucciae@michigan.gov)); [jeremiah.williamson@wyo.gov](mailto:jeremiah.williamson@wyo.gov); [elbert.lin@wvago.gov](mailto:elbert.lin@wvago.gov); [kturner@ago.state.al.us](mailto:kturner@ago.state.al.us); [Abrasher@ago.state.al.us](mailto:Abrasher@ago.state.al.us); [Katie.Spohn@nebraska.gov](mailto:Katie.Spohn@nebraska.gov); [james.skardon@azag.gov](mailto:james.skardon@azag.gov)  
**Cc:** [Tom.Bates@oag.ok.gov](mailto:Tom.Bates@oag.ok.gov); [Patrick.Wyrick@oag.ok.gov](mailto:Patrick.Wyrick@oag.ok.gov); [Melissa.Houston@oag.ok.gov](mailto:Melissa.Houston@oag.ok.gov)  
**Subject:** Oklahoma - State Sign On -Letter to DOI on BLM Revised Proposed Hydraulic Fracturing Rule

All,

Another sign-on opportunity. Attached is a letter we have prepared to the Department of Interior (BLM) on the Bureau of Land Management's Revised proposed hydraulic fracturing rule to apply on federal and Indian lands under BLM control. I think the letter speaks for itself and the issues involved. For a short synopsis, BLM previously issued a proposed rule to regulate hydraulic fracturing on all federal and Indian lands, after comment and a strong push from several States, Tribes, industry and trade groups, the BLM withdrew the proposed rule for revision. On May 24, 2013 the BLM reissued a revised proposed rule, the revised rule, while incorporating some of the changes suggested in comments, is still an unnecessary and over- burdensome rule that duplicates state efforts at an enormous cost to oil and gas producers.

States have an excellent record of protecting the environment and public health, while simultaneously facilitating oil &

natural gas development and promoting economic growth. Rather than force an unnecessary, one-size-fits-all regulatory regime on top of carefully crafted state-specific programs, BLM should instead work with states on how best to address any health, safety or environmental issues arising from hydraulic fracturing and related operations on federal lands by deferring to proven state regulatory and enforcement programs. By focusing too much on achieving "consistent" regulation (that we hear from DOI and BLM as being needed), rather than the best regulation, the BLM's proposal fundamentally ignores local and regional differences among states. The attached letter also focuses on the Clean Water Act issues inherent in the BLM proposed rule and questions whether the BLM has any authority to regulate state water resources.

The comment deadline for the proposed rule is August 23, 2013, if your State is interested in joining this letter please let me know on or before **AUGUST 19, 2013.**

Thank you.

P. Clayton Eubanks  
Deputy Solicitor General  
Office of the Attorney General of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Tel: (405) 522-8992  
Fax:(405) 522-0085  
[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)

## Swanson, Cory

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**From:** Baker, Tim  
**Sent:** Thursday, August 22, 2013 10:55 AM  
**To:** Swanson, Cory  
**Cc:** Mattioli, Mark  
**Subject:** RE: tomorrow afternoon is better

Thanks for sharing this – we're working on ours which I will send over.

**From:** Swanson, Cory  
**Sent:** Wednesday, August 21, 2013 10:35 AM  
**To:** Baker, Tim  
**Cc:** Mattioli, Mark  
**Subject:** RE: tomorrow afternoon is better

Tim, the deadline is upon us to join the BLM fracking rule letter (see item 2 below), so I need to affirm with the Oklahoma AG's office that we are joining the comment. I know between our schedules that it has been nearly impossible to get together, but I'll make an effort early next week to track you down. I am traveling Wed-Friday for a hearing in Denver.

Attached is the comment letter General Fox has joined. It will be sent out on Friday, but I got approval to distribute it before it is submitted. Let me know if you have any thoughts on it. Thanks,

**Cory J. Swanson**  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

**From:** Baker, Tim  
**Sent:** Friday, August 09, 2013 8:04 AM  
**To:** Swanson, Cory  
**Subject:** RE: tomorrow afternoon is better

Thanks let me look at this list. Next week I'm in the office Th only – I've got a lot of stuff but let's see if we can squeeze a few minutes.

**From:** Swanson, Cory  
**Sent:** Thursday, August 08, 2013 3:21 PM  
**To:** Baker, Tim  
**Subject:** RE: tomorrow afternoon is better

Tomorrow might not work very well. I will be going to the Babcock funeral and then have to leave town in the afternoon for guard drill. Here are the issues I wanted to cover briefly:

1. *Vogele v. State Land Board* – are you and Andy Huff my points of contact for your office and does the Governor's office acknowledge DOJ as counsel for the case? Do you guys think we need a formal engagement letter? Mike Black is indifferent to it as long as everyone acknowledges we are counsel and acknowledges the process of keeping privileged information privileged. But we wanted to check with you guys if we should do an engagement letter – what did Andy do when he was in this office?

2. BLM fracking rule – I had originally recommended that our office not provide any comments on this rule, because your office or the appropriate agencies were going to do so. You and I had discussed the understanding between the offices that substantive, technical or policy matters under the province of a Governor’s agency would be your arena and we would stay out, but that DOJ would take on the role of legal arguments, positions and representations where it was a legal issue. That is also the understanding that I have recommended to our leadership team, and they have all agreed. Since that conversation, a number of AG’s mainly in the West have taken on the BLM fracking rule as a legal issue. They have drafted a comment that will be submitted to the BLM that argues the rule is legally unnecessary and also suspect. The main contention is that in the cooperative federalism context, the states should have the primary role in this regulatory matter, and the BLM should therefore leave it to the states to regulate. This argument has caught Tim Fox’s eye, and he would like to join the letter and comment. He sees it as supportive of the position that the Governor and his agencies are also taking – based only a cursory reading of what you and I have discussed – and therefore not a conflict. I agree with him that is likely the case, but since we are in an area that you and I have already talked about, I want to make sure we have a clear understanding of this issue between us. Since another office is drafting the letter, I will need to check if I can send it to you before it goes out. But even if they want me to keep it close until publication, I can provide you a detailed summary. Anyway, let’s talk about this when we can.
3. Sage Grouse – there is a growing agitation among Montana industry folks to do something more on this front. I wonder if you are hearing anything and maybe we can share some strategy or at least what is happening out in the field.
4. Coal lawsuit – thanks for the help on this. DEQ has sent me a bunch of information and I am drafting stuff to intervene in this lawsuit.
5. SO2 non-attainment – I am unclear whether DOJ needs to be focused or worry about this right now. A couple of other states have been hit with non-attainment designations this summer, and they are preparing for litigation. So let me know if there is something we should be doing that we are currently not doing.

**Cory J. Swanson**  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

**From:** Baker, Tim  
**Sent:** Thursday, August 08, 2013 1:29 PM  
**To:** Swanson, Cory  
**Subject:** tomorrow afternoon is better

Getting jammed today. Ugh.

## Swanson, Cory

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**From:** Clayton.Eubanks@oag.ok.gov  
**Sent:** Friday, August 23, 2013 10:43 AM  
**To:** KTurner@ago.state.al.us; RobertTambling@ago.state.al.us; nancy.korting@alaska.gov; Mattioli, Mark; Fox, Tim; VanDyke, Lawrence; Bennion, Jon; Darkenwald, Scott; Swanson, Cory; jmb@wvago.gov; elbert.lin@wvago.gov  
**Cc:** Tom.Bates@oag.ok.gov; Melissa.Houston@oag.ok.gov; Patrick.Wyrick@oag.ok.gov  
**Subject:** State Comment Letter on BLM Hydraulic Fracturing - Final  
**Attachments:** BLM Hydraulic Fracturing Rule State Sign-on Letter 8-23-2013.pdf

All,

Attached is the final State comment letter to BLM on the proposed hydraulic fracturing rule.

Thank you for supporting the letter, Oklahoma sincerely appreciates it.

Have a great weekend.

P. Clayton Eubanks  
Deputy Solicitor General  
Office of the Attorney General of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Tel: (405) 522-8992  
Fax:(405) 522-0085  
[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)

## Swanson, Cory

---

**From:** Clayton.Eubanks@oag.ok.gov  
**Sent:** Friday, August 23, 2013 1:03 PM  
**To:** KTurner@ago.state.al.us; RobertTambling@ago.state.al.us; nancy.korting@alaska.gov; Mattioli, Mark; Fox, Tim; VanDyke, Lawrence; Bennion, Jon; Darkenwald, Scott; Swanson, Cory; jmb@wvago.gov; elbert.lin@wvago.gov  
**Cc:** Tom.Bates@oag.ok.gov; Melissa.Houston@oag.ok.gov; Patrick.Wyrick@oag.ok.gov  
**Subject:** State Comment Letter on BLM Hydraulic Fracturing - Revised  
**Attachments:** State Attorneys General Comment Letter-BLM Hydraulic Fracturing Rule 8-23-2013.pdf

All,

This is the actual letter that is being mailed today and submitted to Regulations.gov, same letter, same content,

Just on slightly different letterhead.

Thanks again.

P. Clayton Eubanks  
Deputy Solicitor General  
Office of the Attorney General of Oklahoma  
313 N.E. 21st Street  
Oklahoma City, OK 73105  
Tel: (405) 522-8992  
Fax:(405) 522-0085  
[clayton.eubanks@oag.ok.gov](mailto:clayton.eubanks@oag.ok.gov)



OFFICE OF ATTORNEY GENERAL  
STATE OF OKLAHOMA

August 23, 2013

The Honorable Sally Jewell  
Secretary, U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20420

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

And submitted via Regulations.Gov

RE: Comment From the Attorneys General of the States of Alabama, Alaska, Montana, Oklahoma and West Virginia on Docket ID: BLM-2013-0002-0011 Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands

Secretary Jewell,

The undersigned Attorneys General of the States of Alabama, Alaska, Montana, Oklahoma and West Virginia write to express serious concerns with, and strong objection to, the U.S. Bureau of Land Management's (BLM) recently re-proposed rule to regulate hydraulic fracturing operations on federal and Indian lands.

The states — and not the federal government — are best equipped to design, administer and enforce laws and regulations related to oil and gas development. State regulatory programs have been carefully designed to address state-specific issues and needs and are applied consistently, regularly reviewed, and continuously subjected to thoughtful administrative oversight. Importantly, the states have greater flexibility to respond to new information and modify or update their rules, as they have demonstrated in recent years.

The BLM has failed to justify the need for new federal regulations and requirements that will overlay the existing state programs in a burdensome and costly manner, beyond simply asserting that it has the authority to do so. Currently, state regulators employ highly trained staff that efficiently oversees operations on state, federal and fee lands within our borders and issues permits in a timely manner. This stands in stark contrast to a federal program that is notorious for frequent and prolonged delays and persistent staffing challenges. These will likely intensify once budget cuts are combined with onerous and unnecessary new federal rules and requirements.

While the newly proposed rule introduces a provision allowing the BLM to approve a "variance" when it determines that it would meet or exceed the effectiveness of the revised proposed federal rule, the "variance process" is unclear and has neither been adequately explained by the BLM nor analyzed by the states, industry or the public. We strongly urge that rather than undertake an unnecessarily complicated new approach, the BLM instead defer to the states on how best to address any health, environmental or safety issues arising from hydraulic fracturing and related operations on these lands.

Moreover, we question whether the BLM has the authority to administer procedures, reporting and engineering requirements for a range of well stimulation activities, including the regulation and management of water resources. The sole authority to regulate these activities and the protection and management of water resources resides with the states, and does not lie with the BLM.

The Supreme Court has long recognized that regulation of land and water use "is a quintessential state and local power."<sup>1</sup> Thus, "[if] Congress intends to alter the usual constitutional balance between the states and the federal government, it must make its intention to do so unmistakably clear in the language of the statute."<sup>2</sup> Importantly, Congress has not enacted any statute that gives BLM authority to pre-empt state water regulations.

On the contrary, federal statutes establishing limited federal regulation of water resources expressly preserve state primacy. For example, the Clean Water Act (CWA) reflects the Congressional policy "to recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution, [and] to plan the development and use...of land and water resources[.]"<sup>3</sup> The statute further states that "[e]xcept as expressly provided in this chapter, nothing...shall...be construed as impairing or in any manner affecting any right or jurisdiction of the states with respect to the waters...of such states."<sup>4</sup> Nowhere does the CWA express a desire to adjust the federal-state balance. Similarly, the Safe Drinking Water Act (SDWA) also emphasizes state primacy over drinking water regulation and enforcement.<sup>5</sup>

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<sup>1</sup> *Rapanos v. U.S.*, 547 U.S. 715, 738 (2006).

<sup>2</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). The statement in this opinion comes from parsing two quotes together from a previous Supreme Court case, *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985).

<sup>3</sup> 33 U.S.C.A. § 1251(b).

<sup>4</sup> *Id.* § 1370.

<sup>5</sup> 42 U.S.C.A. § 300(f) et. seq.



In fact, under the Clean Water Act, agencies like BLM are expressly required to comply with state water regulation—just as if they were private citizens.<sup>6</sup> Absent an express displacement of the Clean Water Act's requirement that BLM follow state water laws, BLM does not have the unilateral authority to set aside state regulations and impose its own preferred water pollution controls. Contrary to your agency's assertion, the Clean Water Act is not superseded by general language in the Federal Land Policy and Management Act (FLPMA), the Mineral Leasing Act, and the Mineral Leasing Act for Acquired Lands that directs BLM to preserve federal land. Such general language is insufficient to clearly override the more specific language of the Clean Water Act. Nor does such general language otherwise demonstrate a congressional intent to displace state water laws. BLM's proposed rules thus impermissibly interfere with state regulatory schemes and with the Clean Water Act.

Recognizing state jurisdiction over water resources, the CWA and SDWA carve out a narrow role for the federal government and vest federal regulatory authority in the U.S. Environmental Protection Agency (EPA). Thus, EPA shares, to a limited extent, state responsibility for protecting water resources. But nothing in these statutes confers regulatory authority over water resources on BLM. In a 2011 resolution, the Western States Water Council underscored this point by stating that "any weakening of the deference to state water and related laws is inconsistent with over a century of cooperative federalism and a threat to water rights and water rights administration in all western states."

BLM rightfully recognizes that it does not have the state expertise or resources to regulate water resources. In fact, BLM's Water Policy states the following:

- States have primary authority and responsibility for the allocation and management of water resources within their boundaries, except as specified by Congress on a case-by-case basis.
- In order to implement the BLM water policy of state water resources primacy, Bureau personnel shall:
  - Cooperate with state governments under the umbrella of state law to protect all water uses identified for public land management purposes.

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<sup>6</sup> 33 U.S.C. § 1323 ("Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges."); *Greater Yellowstone Coal. v. Lewis*, 628 F.3d 1143, 1149 (9th Cir. 2010).

- Comply with applicable state law, except as otherwise specifically mandated by Congress, to appropriate water necessary to manage public lands for the purposes intended by Congress.

Despite the BLM's recognition of state primacy in this regard, the newly proposed hydraulic fracturing rule is supposedly predicated on the need for ground and surface water protections and imposes specific regulatory requirements concerning water resources. Yet the BLM has no authority to approve or disapprove well stimulation activities to regulate operators' use of water resources, or to require operators to mitigate impacts on water resources. Because BLM has no jurisdiction to regulate water resources, BLM cannot demand information about them. Indeed, BLM should eliminate all provisions that seek information about or impose regulations on the use, transport, disposal or other activities involving waters.

Water management is only one example of the unnecessary and inappropriate federal encroachment on state regulations and practices. We therefore request that the BLM:

- Identify any health, safety or environmental issues arising from hydraulic fracturing on public lands that are not currently being addressed by state regulators before taking any further action to finalize its rule.
- Carefully review the many state comments in response to the BLM's rule. Rather than force an unnecessary "one-size-fits-all" regulatory regime on top of carefully tailored state-specific programs, we further request that BLM instead defer to our state programs, on federal lands, where these regulatory programs already exist.

Beyond the fundamental question of who is better equipped to provide the best regulations, in light of the fiscal realities we face, and in view of current and future budget constraints, the BLM should partner with the states to the greatest extent possible, to leverage the existing state programs, resources and infrastructure.

This is an extremely important matter to our states and we appreciate your serious consideration. Please contact us for any additional information or if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott Pruitt", with a long horizontal line extending to the right.

Scott Pruitt

*Luther Strange*

Luther Strange  
Attorney General  
State of Alabama

*Michael C. Geraghty*

Michael C. Geraghty  
Attorney General  
State of Alaska

*Tim Fox*

---

Tim Fox  
Attorney General  
State of Montana

*Patrick Morrissey*

Patrick Morrissey  
Attorney General  
State of West Virginia

cc: Tommy Beaudreau, Acting Assistant Secretary, Land and Minerals Management, DOI  
Neil Kornze, Principal Deputy Director, BLM  
Jamie Connect, Acting Deputy Director (Operations), BLM  
Mike Nedd, Assistant Director, Minerals and Realty Management, BLM  
Steven Wells, Division Chief, Fluid Minerals Division, BLM

**Swanson, Cory**

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**From:** Baker, Tim  
**Sent:** Friday, August 23, 2013 3:15 PM  
**To:** Swanson, Cory  
**Subject:** RE: BLM comment  
**Attachments:** Secretary Jewell 8-23-13.pdf

Back to you with ours, thanks!

**From:** Swanson, Cory  
**Sent:** Friday, August 23, 2013 11:37 AM  
**To:** Baker, Tim  
**Subject:** BLM comment

Tim, here is the final BLM comment.

**Cory J. Swanson**  
**Deputy Attorney General**  
**Montana Department of Justice**  
**Ph: 406-444-5774**

OFFICE OF THE GOVERNOR  
STATE OF MONTANA

STEVIE BELLOCK  
GOVERNOR



JOHN WALSH  
Lt. GOVERNOR

August 23, 2013

The Honorable Sally Jewell, Secretary  
U.S. Department of the Interior  
1849 C Street NW  
Washington, D.C. 20240

Re: Proposed Rules on Hydraulic Fracturing

Dear Secretary Jewell:

I am writing to express my deep concern about the proposed hydraulic fracturing rules. I believe the proposed rules impose a redundant regulatory process that, in Montana, will offer little in the way of improvements in the protection of human health and safety or involvement of the public. Hydraulic fracturing and the associated technology of horizontal drilling are of critical importance to the ongoing success of oil shale development in Montana. The proposed rules seem likely to adversely affect permit timeliness, increase confusion and potential non-compliance in the regulated community, and cause operators to choose locations that avoid federal property rather than best recover the resource.

Montana has a good record regulating hydraulic fracturing and associated technologies. Hydraulic fracturing is a customized technique that requires knowledge of the specific and unique geologic setting in which it is conducted. State regulators use that specific knowledge to effectively regulate these activities, and the Bureau of Land Management (BLM) should take advantage of that existing state expertise. In fact, the State of Montana and BLM have had a Memorandum of Understanding in place since 1992 recognizing the value and importance of state expertise and leadership in these matters.

The MOU "facilitate[s] communication and coordination" between Montana's Board of Oil and Gas Conservation (BOGC) and BLM regarding spacing hearings, pooling of interests, unitization, and adoption of uniform well set-back and minimum spacing requirements. BOGC spacing and setback rules are adopted "as standard practice" by BLM, and BOGC orders are

coordinated with BLM's needs to administer its lands inside the BOGC-approved spacing units. There is a seldom used procedure allowing BLM to object to a particular application or request for spacing/pooling. While both BLM and the BOGC retain all jurisdiction and authority, the BOGC is the lead authority and the BLM has avoided the need for duplicative rules.

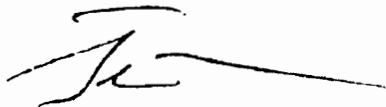
In addition, the MOU also applies to Indian Trust Lands under BLM's jurisdiction and provides a public forum for hearing applications which affect those lands for which BLM has no suitable federal process. On Trust lands, the BOGC gives public notice and conducts the hearing on the application, and then defers to BLM to issue the associated determinations or orders. BLM has used this process to provide for decision-making and public involvement, and presumably found it to be sufficient for the past 21 years.

While I understand BLM's concern for those states that do not regulate hydraulic fracturing, I believe your final rules should clearly state that for those states that do regulate hydraulic fracturing, they will retain primary authority for regulating the activity on public lands through an MOU with BLM.

Based on Montana's successful partnership with BLM for well-spacing, pooling, unitization, and set-backs, it would appear that a very similar MOU process could be used to adopt the state's hydraulic fracturing rules "as standard practice," allowing for exceptions or additional process when truly needed for a particular federal purpose (including specific issues related to Indian Trust Lands, as currently recognized under the existing MOU). As with the BLM's current adoption of the Board's spacing rules, such an approach would provide consistency and predictability for the regulated community and other interested parties.

Continued responsible development of Montana's natural resources will not only help lead America to energy independence, it will create jobs, keep energy affordable, and protect our environment and way of life.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Bullock", with a long horizontal flourish extending to the right.

STEVE BULLOCK  
Governor

**From:** Burton, Anastasia  
**Sent:** Monday, August 26, 2013 3:20 PM  
**To:** Swanson, Cory; Darkenwald, Scott; Mattioli, Mark; Bennion, Jon; Fox, Tim; Barnes, John  
**Subject:** RE: BLM comment / News Release / DRAFT

All, please comment. My goal is to release this first thing in the morning:



FOR IMMEDIATE RELEASE

Anastasia Burton,  
Deputy Communications Director  
(406) 444-9869

August 27, 2013

### **Montana Protests BLM's Proposed Hydraulic Fracturing Rules**

(HELENA)—Attorney General Tim Fox announced today that Montana has joined four other states protesting the U.S. Bureau of Land Management's (BLM) re-proposed rule to regulate hydraulic fracturing operations on federal and Indian lands.

In a letter to U.S. Department of the Interior Secretary Sally Jewell, the Attorneys General of Alabama, Alaska, Montana, Oklahoma, and West Virginia strongly assert that the BLM cannot justify a need for new federal regulations and requirements, which will duplicate existing state programs.

"The BLM would be hard pressed to explain why it needs to impose new 'one-size-fits-all' regulations on states where hydraulic fracturing operations are in place," said Attorney General Tim Fox. "These states, including Montana, already have well trained staff who regulate fracking operations and issue permits. This is another example of the federal government trying to complicate the way states self-regulate in ways that work best for them, and could impede the development of oil and gas within their borders."

The five Attorneys General also questioned whether the BLM has the authority to regulate land and water use within the states, in light of the Supreme Court's long-standing recognition of state and local regulation powers, citing the Clean Water Act and the Safe Drinking Water Act as examples.

Before the BLM finalizes its rule, the Attorneys General asked the agency to defer to the states' regulatory programs on federal lands, as well as identify any environmental, health, or safety concerns in relation to fracking operations that have not already been addressed by state regulators.



Governor Bullock also expressed his concerns about the proposed hydraulic fracturing rules in a letter to Secretary Jewell last week. Governor Bullock and Attorney General Fox share essentially the same position on the rule.

[Click here to read the Attorneys Generals' letter to Secretary Jewell](#)

-END-

## Anastasia Burton

Deputy Communications Director

Attorney General Tim Fox, Montana Department of Justice

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**From:** Swanson, Cory

**Sent:** Friday, August 23, 2013 4:48 PM

**To:** Darkenwald, Scott; Mattioli, Mark; Bennion, Jon; Fox, Tim; Barnes, John; Burton, Anastasia

**Subject:** FW: BLM comment

FYI, the Oklahoma AG submitted his comment – which Tim Fox joined – to the Interior Secretary regarding the BLM fracking rule. I notified Tim Baker of the Governor's office in advance and sent him the letter. Governor Bullock also submitted a comment on the rule. Governor Bullock and AG Fox share essentially the same position on the rule.

Another good example of cooperation between these offices, even while we navigate others issues such as the bison.

**Cory J. Swanson**

Deputy Attorney General

Montana Department of Justice

Ph: 406-444-5774

**From:** Baker, Tim

**Sent:** Friday, August 23, 2013 3:15 PM

**To:** Swanson, Cory

**Subject:** RE: BLM comment

Back to you with ours, thanks!

**From:** Swanson, Cory

**Sent:** Friday, August 23, 2013 11:37 AM

**To:** Baker, Tim

**Subject:** BLM comment

Tim; here is the final BLM comment.

**Cory J. Swanson**  
**Deputy Attorney General**  
**Montana Department of Justice**  
**Ph: 406-444-5774**

## Swanson, Cory

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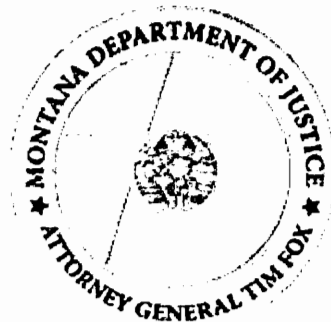
**From:** Swanson, Cory  
**Sent:** Monday, August 26, 2013 5:07 PM  
**To:** Burton, Anastasia; Darkenwald, Scott; Mattioli, Mark; Bennion, Jon; Fox, Tim; Barnes, John  
**Subject:** RE: BLM comment / News Release / DRAFT

I think this is good. I recommend we do not say (my internal comments) that Fox and Bullock share essentially the same position, as this characterizes the Governor's position. I recommend we simply say Fox agrees with Bullock's position. We don't want to put words into the Governor's mouth that he agrees with Fox.

**Cory J. Swanson**  
Deputy Attorney General  
Montana Department of Justice  
Ph: 406-444-5774

**From:** Burton, Anastasia  
**Sent:** Monday, August 26, 2013 3:20 PM  
**To:** Swanson, Cory; Darkenwald, Scott; Mattioli, Mark; Bennion, Jon; Fox, Tim; Barnes, John  
**Subject:** RE: BLM comment / News Release / DRAFT

All, please comment. My goal is to release this first thing in the morning:



FOR IMMEDIATE RELEASE

August 27, 2013

Anastasia Burton,  
Deputy Communications Director  
(406) 444-9869

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