Department of the Interior's New "Fracking" Rules Highlight the Importance of Due Diligence and Compliance Efforts

On March 26, 2015, the Department of the Interior formally published a comprehensive set of new rules regarding Hydraulic Fracturing, commonly known as "fracking." Several years in the making, the new rules — which go into effect on June 25, 2015 — touch upon virtually every aspect of fracking operations on federal and tribal lands, including groundwater contamination, well integrity, fluid recovery, and public disclosure requirements.

From an enforcement perspective, the most significant modifications to existing law may be the new "self-certification" requirements. Under the new rules, a well operator is required to submit to the Bureau of Land Management self-certification statements on a variety of topics, including remedial cement jobs, wellbore integrity, fluids used during drilling, and compliance with laws and regulations. The operator is required not only to submit certifications with respect to its own actions, but also with respect to the actions of third parties with whom the operator has contracted (e.g., the subcontractor that performs the cement job on the casing string). In explaining the rationale for requiring an operator to certify actions of third-party contractors, the Department of the Interior's commentary to the rules states the "operator has always been responsible for everything that occurs on the permitted well site."[1] Therefore, if an "operator uses one or more service contractors for specific tasks, the operator remains fully responsible for those operations," including certifying that the third party's actions have complied with the applicable regulatory requirements.[2]

If an operator's self-certification statements — including statements certifying the actions of its third-party contractors — are later shown to be false, the operator may be subjected to significant regulatory penalties and potentially even criminal prosecution. In adopting the new rules, however, the Department of the Interior explicitly recognized that "an operator's diligence and good faith" in ensuring that it and its third-party contractors have complied with all applicable regulations is a factor that the Department will take "into consideration in exercising enforcement discretion where a certification was later shown to have been in error."[3] All of this underscores how critical it is for well operators not merely to enhance their own operations, but also to perform due diligence on and to properly oversee the operations of the third parties with whom it contracts.

Although the new rules do not provide specific guidance on what constitutes adequate "diligence" and good faith, government regulators traditionally have credited companies that designed a thoughtful and concrete internal compliance program, meaningfully funded its compliance program, rewarded employees who took the program seriously and penalized those who did not, and audited its compliance program from time to time and make necessary improvements. By contrast, government regulators typically have not given full credit to companies that relied exclusively on ad hoc compliance and oversight efforts. Accordingly, in response to the Department of the Interior's new rules, companies would be well served to review and, as necessary, to bolster their compliance programs, particularly compliance programs that relate to the oversight of third-party contractors.

If you have any questions or would like to learn more about the issues raised by the new fracking rules, please contact your usual Ropes & Gray advisor.

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[1] 80 Fed. Reg. 16159.
[2] *Id.*
[3] *Id.*