

Wyoming Environmental Compliance and Public Land News - October

Wyoming Environmental Compliance and Public Land News - October

Insight — 10/2/2013

Public Lands News

EPA Proposes Sweeping Greenhouse Emission Standards for New Power Plants

On September 20, 2013, the Environmental Protection Agency repropose sweeping greenhouse gas New Source Performance Standards (NSPS) for new electric utility generating units (EGUs). EPA's justification for the reproposal—issued in response to President Obama's June 2013 Climate Action Plan—differs from the NSPS initially proposed by EPA in April 2012. The stringency of the standards, however, remain essentially the same and would require installation of carbon capture and sequestration at all newly constructed coal-fired EGUs. EPA acknowledges that the NSPS as proposed would forestall construction of any new coal-fired generation for at least the next decade. A 60-day public comment period will commence after the proposal is officially published in the Federal Register. For more information on the proposal, [click here](#).

Kornze to be Nominated for BLM Director Position

Insiders anticipate that the President will nominate Neil Kornze as the next BLM Director. Kornze currently serves as BLM's principal deputy director and was once an aide to Senate Majority Leader Harry Reid (D-Nev.), advising Senator Reid on public land issues. Kornze has also had a recent hand in implementing BLM's solar energy plan in the Southwest and the new hydraulic fracturing rules.

Highlights from BLM-PAW Quarterly Meeting

New Commingling IM Accommodates Central Delivery Points

The new commingling Instruction Memorandum (IM) was released by BLM's Washington D.C. Office on July 3, 2013. IM 2013-152 replaces the previous commingling IM that was opposed by the oil and gas industry. The new IM allows for central delivery points, particularly where environmental benefits are gained. No new approval process is required for commingling requests approved prior to the date of the IM, nor is new approval needed for minor modifications to previously approved requests including the addition of new wells. The addition of new leases could be considered a major modification warranting new approval. IM 2013-152 also clarifies that the beneficial use of off-lease oil or gas at a central delivery point, for processing, separation or other activities, is no longer inferred when

commingling requests are approved. Rather, off-lease, royalty-free beneficial use of production must be separately approved based on the merits of that use.

BLM has indicated that applications for new comingling activities can occur by sundry notice. If a commingling request is associated with low production, BLM will need some justification for the request in order to issue its approval. IM 2013-152 is available [here](#).

BLM Releases IM for Bonding Adequacy and Evaluation

BLM's Washington Office released IM 2013-151 to clarify bond re-evaluation procedures in response to recent Government Accountability Office (GAO) reports finding that it was unclear how and when BLM would request bond increases. The IM largely follows 43 CFR § 3104.5(b), which provides triggers for bond re-evaluation. Every bond in the state should be reviewed once every five years, or more frequently if one of the triggers occurs, which may include when a change of operator occurs or based on a request for an APD approval. Each Field Office will use a checklist, attached to the IM, and a point system. Points may be assigned based on a variety of factors including numbers of Incidents of Non-Compliance within the previous 3 years; number of idle wells; average production at existing wells; and status of plugged wells and reclamation. If the points add up to 100 or greater, then the Field Office will recommend a bond increase and send that recommendation to the Wyoming State Office which would issue a letter ordering the bond increase. If the operator disagrees with the bond increase, State Director Review (SDR) is available. In conjunction with any SDR, information about points and the checklist should be obtained from the Field Office. These bond re-evaluation procedures also apply to Nationwide Bonds and any bond increases would apply as riders to the Nationwide Bond. IM 2013-151 is available [here](#).

Petitions for Reinstatement will be Subject to NEPA Review

Pursuant to a new policy, all petitions for lease reinstatement will now be subject to NEPA analysis. This includes any petitions in Wyoming (approximately 30) that have been delayed pending this new policy. A petition for reinstatement will be rejected if the subject lease is in an area that has been closed to leasing.

Memorandum of Understanding (MOU) Between WOGCC and BLM Expected in 2014

Negotiations between WOGCC and BLM regarding a new MOU are ongoing. The anticipated MOU will address, among other things, wells that cross jurisdictional boundaries. The anticipated MOU may be issued in mid-2014.

BLM Resource Management Planning Update

Wildhorse and Burros Management Scoping Reopened for Rawlins and Rock Springs Field Offices

On August 16, BLM reopened scoping and extended the public comment period on the Rock Springs and Rawlins RMPs to address wildhorse and burros management. 78 Fed. Reg. 50090 (Aug. 16, 2013). Multiple public

meetings were held in September and scoping closed on September 27. A draft RMP and Environmental Impact Statement is anticipated in July 2014. For more information, [click here](#).

Rawlins Field Office Issues Draft Visual Resource Management Plan

On August 30, the Rawlins Field Office published its Draft Visual Resources Management and Area of Critical Environmental Concern RMP Amendment and a Draft Environmental Assessment. 78 Fed. Reg. 53777 (Aug. 30, 2013). Public comments will be accepted until October 28, and a final Decision Record is anticipated in November 2013. For more information, [click here](#).

BLM and ONRR Propose New Coal Royalty Regulations

On August 13, 2013, the Bureau of Land Management and Office of Natural Resources Revenue published draft companion rules to implement congressionally-mandated changes to federal coal royalties outlined in the 2005 Energy Policy Act, as well as other policy and program changes to the coal royalty program proposed by the two agencies. Comments on both proposed rules are due October 11, 2013.

Highlights of the BLM Proposed Rule include:

- Elimination of the 160-acre cap for a lease-by-modification (LBM), replacing it with a 960-acre cap, and allowing the value for LBMs to be paid on a deferred 5-year basis;
- Repeal of the 40-year limit for logical mining units (LMU) and clarification of other LMU provisions;
- Establishing greater flexibility for the calculation and payment of advance royalties in lieu of production and increases from 10 to 20 the aggregate number of years for which an operator or lessee may pay advance royalties;
- Elimination of 3-year deadline for submission of coal lease operation and reclamation plans;
- Exempting lessees with history of timely royalty payments from the requirement to provide financial assurances with bonus bids.
- Establishing new, fixed fees for determinations of timely payment (\$160), applications to pay advance royalties (\$170), and applications to extend LMUs for additional 10 years (\$170)

Highlights of the ONRR Proposed Rule include:

- Transferring the responsibility for royalty valuation from BLM to ONRR;
- Clarification that ONRR will use weighted average spot market prices for comparable coal from same region during last month of the applicable continued operation year (COY) for determining appropriate royalty;
- Provision allowing for alternative means of valuation when spot prices for comparable coal from same region are lacking.
Alternative method involves using weighted average spot market

prices for comparable coal from another region (when available), or "any other reasonable value" determined by ONRR;

- Imposition of significant new information collection requirements on federal coal lessees related to coal spot market prices and other valuation matters;

[Link to Proposed Rules here.](#)

Feds Release State Mineral Payments from Sequester

In August, amidst pressure from western lawmakers and governors, the federal government reversed course and agreed to pay approximately \$110 million in mineral royalty revenues previously withheld from the states under the 2013 budget sequester. Wyoming is anticipated to receive approximately \$53 million. The Department of the Interior stated it withheld the money under current budget rules. The money will be returned to the states after the close of the 2013 fiscal year on September 30. In early September, Senators Michael Bennett and Mark Udall of Colorado indicated plans to file a bill exempting federal mineral royalty revenue collected under the Mineral Leasing Act from future sequesters.

Sage-Grouse News

Wyoming Federal District Court Finds for BLM in Challenge to Uranium Project

In a September 18, 2013 decision, United States District Judge Scott Skavdahl rejected a challenge by the Biodiversity Conservation Alliance (BCA) to BLM's decision to approve the Lost Creek In-Situ Uranium Recovery Project. *Biodiversity Conservation Alliance v. Bureau of Land Management*, No. 2:12-CV-252 (D. Wyo., Sept. 18, 2013). The Lost Creek Project consists of the construction, operation, and reclamation of a series of injection, monitoring, and recovery wells used for *In-Situ* Recovery (ISR) of uranium in Sweetwater County, Wyoming.

The BLM signed a record of decision approving the Lost Creek Project on October 5, 2012, following five years of extensive state and federal permitting and related environmental reviews. Shortly thereafter, BCA filed suit in federal district court in Wyoming alleging that in approving the project, BLM had violated its obligations under the National Environmental Policy Act and the Federal Land Policy and Management Act by (1) failing to fully analyze the cumulative impacts of the project's use as a "regional processing plant" for uranium produced from other sites, (2) failing to consider all relevant factors and evidence in attempting to mitigate harm to the sage-grouse, (3) failed to analyze the effectiveness of the project's mitigation measures, and (4) failing to consider all relevant factors and evidence regarding the Wyoming pocket gopher.

In his decision, Judge Skavdahl rejected each of BCA's claims. In rejecting BCA's first claim, the Court held that BLM properly analyzed other uranium production projects to the extent they were "reasonably foreseeable," (including a discussion about the environmental impacts of exploration activities at these projects) and reasonably concluded that a more exhaustive analysis of these projects' impacts would be done once project

proponents sought specific regulatory approval.

The Court similarly rejected BCA's second claim and found that BLM had fairly considered the potential adverse impacts from the Lost Creek project on sage grouse even if the agency had not addressed in detail two reports cited by BCA. The Court similarly rejected BCA's third claim in concluding that BLM had thoroughly considered a variety of environmental protection measures designed to mitigate the impacts of the Lost Creek project. BLM was not required to independently assess the effectiveness of each of these measures.

Finally, the Court concluded that BLM had properly considered the impact of the Lost Creek project on the pocket gopher in rejecting BCA's fourth claim. In particular, BLM had not run afoul of its NEPA obligations by relying on a 2005 BLM report on the pocket gopher rather than a 2006 U.S. Forest Service report on the same species. The Court found that BLM's reliance on the earlier report was appropriate since both reports acknowledged how little is known about the pocket gopher and the latter report did not contain any new information about the species.

The Court's decision affirming BLM's decision on the merits follows the Court's earlier rejection of BCA's motion to preliminarily enjoin operations at the Lost Creek Project.

Endangered Species Act Hearing Held in Casper

On September 4, the House Natural Resources Committee was in Casper to hear testimony on the ESA. The hearing, entitled "A New War on the West," focused primarily on the potential sage-grouse listing, with many presenters arguing that the ESA is not working, that tremendous efforts have been made to avoid listings with little effect, and that once a species is listed, delisting is delayed far beyond the point where species goals have been met.

Chesapeake Proceeds with Project in Sage-Grouse Core Area

Working closely with the Wyoming Game and Fish Department, Chesapeake Energy has unveiled a proposal that would allow its oil drilling project to move forward in sage-grouse core area habitat near Douglas. The proposal will concentrate drilling within already disturbed areas, which make up approximately 22% of the Douglas Core Area. Chesapeake has committed to several measures to minimize disturbance, including directional drilling and phased development. It has also committed \$2.3 million to enhance sage-grouse habitat within the Douglas Core Area.

Wyoming Seeks Exemption from BLM Fracking Rules

On August 19, 2013, Wyoming's U.S. Senators, Mike Enzi and John Barrasso, along with U.S. Representative Cynthia Lummis, sent a letter to U.S. Secretary of the Interior, Sally Jewel, requesting an exemption from the Bureau of Land Management's (BLM) proposed national rule on hydraulic fracturing, which was published May 24, 2013. Wyoming's lawmakers believe Wyoming's standards are sufficient and no benefit would be gained by following federal regulations.

In the letter, Enzi, Barrasso and Lummis expressed concern with the BLM's proposed rule stating that it duplicates Wyoming's existing regulations of wellbore integrity and flowback fluids and could significantly delay oil and gas permitting. They noted that there may be a trend toward oil and gas producers targeting private lands in the East and South where they can avoid years of federal law regulation compliance. This apparent shift may cost public lands states such as Wyoming hundreds of millions of dollars in revenue. The Wyoming delegation concluded that states are best positioned to regulate hydraulic fracturing and that state regulations are working for the nation's public lands states.

Wyoming Governor, Matt Mead, also sent an August 23, 2013 letter asking Jewel to reject BLM's regulations and to defer to states where regulations are already functioning. Mead remarked that Wyoming continues to set the standard for development and environmental stewardship. He further pointed to Wyoming's published energy strategy, which is expected to establish baseline groundwater testing, analysis and monitoring regulations. Additionally, Mead asserted that BLM's regulations are redundant to Wyoming's existing regulations, which will add unnecessary delays to federal permitting. While Mead conceded the draft BLM rule allows variances, he expressed concern that variances would only be provided to oil and gas operators, not to the states.

Fish and Wildlife Service Finalizes Critical Habitat Economic Cost Rule

On August 28, the FWS issued its final rule for calculation of economic effects of critical habitat designation. 78 Fed. Reg. 53058 (Aug. 28, 2013). The ESA requires the FWS to designate critical habitat for listed species at the time of listing. Economic costs cannot be considered by the FWS in determining whether a species should be listed, but the ESA requires the FWS to consider the economic effects of designating critical habitat, such as increased costs associated with obtaining permits for activities in critical habitat. The FWS can choose not to designate critical habitat where the economic costs outweigh the benefit to the species. The new rule codifies the FWS's policy of calculating only the "incremental" economic effects of critical habitat designation, rather than the economic costs of both listing the species and designating its critical habitat. The rule also requires that the economic analysis be made available for public comment at the same time as the proposed critical habitat designation. The rule takes effect October 30.

EPA May Withdraw Proposal for Coalbed Methane Effluent Guidelines

EPA is seeking public comment on the Preliminary 2012 Effluent Guidelines Program Plan ("Preliminary 2012 Plan") in which EPA, among other things, is proposing to delist from the effluent guidelines plan the rulemaking for the Coalbed Methane Extraction subcategory. EPA's proposal is based on new information regarding the declining prevalence and economic viability of the coalbed methane industry, due in large part to the increased extraction of natural gas from other sources, such as shale formations. Information on this EPA proposal can be found [here](#). All

comments must be received by EPA on or before October 7, 2013.

Wyoming State Agency News

Interim Legislative Committee May Study Environmental Effects of Flaring

At the Joint Minerals, Business and Economic Development Interim Committee meeting on September 26, Senator Jim Anderson, of Converse and Platte Counties, requested the committee conduct a study of the environmental effects of natural gas flaring. Abandoned and orphaned wells reclamation and bonding were also agenda items for discussion. The committee did not make a decision on September 26 on whether to proceed with the environmental study. This request for a study is another step in legislative scrutiny of flaring activities. The Revenue Interim Committee is considering a draft bill that would limit tax-free flaring to 15 days.

Office of State Lands and Investments (OSLI)

Ryan Lance Resigns Post as Director of the OSLI

Ryan Lance, Director of the Office of State Lands and Investments, announced in September that he would be resigning his post to take a position in the private sector. Ryan's last day will be October 18 and a search for his replacement is ongoing.

Suspension Rentals May Increase.

Suspension rentals may increase from the current rental of \$20 per acre to \$50 per acre. The goal of any increase is to motivate action on the affected wells, and increase production. A show cause requirement to justify a suspension request is also required.

Lease Termination

A number of leases on state lands have expired pursuant to lease terms. Any operator that receives a letter from OSLI regarding termination should have 30 days to file a reply and correct any mistakes in the agency's determination that the lease had terminated, such as any evidence the lease is held by a unit.

Flaring Requests Subject to Case-By-Case Show Cause Hearings

OSLI continues to apply its Natural Gas Flaring Policy, as posted in draft form on the agency's website. Case-by-case show cause hearings are available regarding applications for royalty-free flaring of production from state lands. Particular scrutiny may be applied if requests to flare are at wells near existing pipeline infrastructure or at wells in groups that could be aggregated for a sales line. Information in show cause cases can be treated confidentially upon request. OSLI's policy on natural gas flaring, in draft form, is available [here](#).

Wyoming Oil & Gas Conservation Commission (WOGCC)

Comments on Baseline Groundwater Testing Rule Due October 11.

Following preliminary input from the public earlier this year, WOGCC's Proposed Baseline Groundwater Testing Rule is in the official rulemaking process and public comment is currently being solicited. All public comments are due by the amended deadline of October 11 at 5:00 pm. A public meeting will be held October 15 at the WOGCC building in Casper, beginning at 9:00 am. The rules may be slated for discussion by the Commission at its November 12 meeting. The draft rules are available [here](#).

Comprehensive Rule Review May be on the Horizon

At a recent meeting with Young Professionals in Energy, Oil & Gas Supervisor Grant Black indicated that a comprehensive review of WOGCC rules may be anticipated in the future.

Idle Wells and Conservation Tax

Accelerated reclamation of abandoned wells is scheduled to begin in Spring 2014. This reclamation program applies to both coal bed natural gas wells and to conventional wells throughout the state. WOGCC will identify priority areas throughout the fall and winter, and priority areas are likely to include sage-grouse areas and concentrated areas with limited private surface owners in order to use reclamation funds efficiently. Some of the funds for reclamation activities will come from the conservation tax, which every producer pays, in addition to bonds. WOGCC is evaluating whether the conservation tax should be increased, although no decisions have been issued. The cost and source of funding for the reclamation of abandoned wells was also discussed by Wyoming's Joint Minerals, Business, and Economic Development Committee earlier this year and may be a continued source of discussion between the legislature, WOGCC, and other state agencies.

Flaring Discussions Continue and Solutions Solicited

Flaring of natural gas from wells continues to be a source of public interest and pressure for WOGCC which issues permits for flaring that would not constitute waste. Because many wells that use flaring are isolated from infrastructure, or certain flared gas streams have constituents that make the gas unmarketable, solutions to curtail flaring are not simple or uniform. At a meeting with Young Professionals in Energy, Oil & Gas Supervisor Grant Black encouraged industry representatives to continue to develop and propose technological solutions that could curtail flaring as potential solutions become available.

Wyoming Department of Environmental Quality (WDEQ)

Chapter 1 Water Quality Rules Finalized

The Environmental Quality Council adopted revisions to the Water Quality Division's rules and regulations on July 11, 2013. *Chapter 1: Wyoming Surface Water Quality Standards* was revised to fulfill Clean Water Act Section 303(c)'s requirement of triennial standards review, resolve EPA disapprovals from the last review, update numeric criteria for priority and non-priority pollutants, and revise the duration of the *E. coli* criteria. The

Chapter 1 changes became effective on September 24, 2013.

Stricter Air Quality Rules for the Upper Green River Basin

The Wyoming Air Quality Advisory Board met on September 24, 2013 in Rock Springs. The Air Quality Division updated the board on changes to the *Oil and Gas Production Facilities, Chapter 6, Section 2 Permitting Guidance*. Specifically, AQD discussed the stricter air quality rules for the Upper Green River Basin. The rules already covered the Jonah and Pinedale Anticline gas fields, but will now extend to the entire Upper Green River Basin. The new rules go into effect on November 1, 2013.

Industrial Siting Council Permitting

The Industrial Siting Council will meet on October 1, 2013 at 9:00 a.m. in Wheatland's First State Bank Conference Center. The Council will consider the proposed amendments to ISC Permit 07-01, the Medicine Bow Fuel and Power, LLC's coal-to-liquid project, and ISC Permit 10-02, Wasatch Wind Intermountain LLC's Pioneer Wind Park I and II, as well as other business items.

Revisions to Noncoal Rules and Regulations

The Environmental Quality Council considered proposed revisions to Chapters 9, 10, and 11 of the Land Quality Division's noncoal rules and regulations addressing requirements for small mining operations, limited mining operations, and in situ mining operations during a September 12, 2013 hearing in Cheyenne. The comment period on the proposed revisions closed on September 9, 2013.

Use Attainability Analysis for Recreational Waters

The Water Quality Division has developed a draft of a Categorical Use Attainability Analysis (UAA) for Recreation. The draft UAA identifies streams in the state that do not support primary contact recreation based on two main factors: (1) insufficient stream flow to support primary contact recreational activities and (2) distance from recreation sites and areas frequented by the public. WQD has requested public assistance to identify Wyoming streams that are used for primary contact recreation that are not currently identified as primary in the draft UAA. An initial round of public comment closed on September 30, 2013. WQD will provide an additional opportunity for formal public comment once recently received information has been incorporated into the UAA.

TMDL *E.coli* Report

WQD recently closed the public comment period on a Total Maximum Daily Load assessment for *E.coli* in the Big Horn River watershed. The draft TMDL report is available online. The study involves evaluating existing studies, determining pollutant loads, and identifying needed reductions in pollutant loading to achieve water quality standards.

Revisions to Small Wastewater and Biosolid Use and Disposal Regulations

During a Wyoming Water and Waste Advisory Board (WWAB) meeting on September 19, 2013, WWAB made recommendations about the WQD's proposed revisions to *Chapter 25: Small Wastewater Systems* and *Chapter 15: Standards for the Use or Surface Disposal of Biosolids*.

Additional information about the recommendations may be obtained by

contacting William Tillman.

Wyoming State Geological Survey (WSGS)

WSGS releases energy project map

In July, the WSGS introduced a new map feature on its website showing oil and gas projects in planning around the Cowboy State. The map is part of WSGS's initiative to enhance and update its website as new information becomes available on Wyoming's oil and gas resources. The map currently locates 20 oil and gas projects, with detailed information regarding the operator, project size, number and types of wells, the geologic formations targeted, and in some cases, potential production and life of the field. To view the map, [click here](#).

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.