

# Wyoming Environmental Compliance and Public Land News - June

## Wyoming Environmental Compliance and Public Land News - June

**Insight — 6/5/2013**

### **Public Lands News**

#### **BLM's revised draft hydraulic fracturing rule released**

On May 16, 2013, the Interior Department released a revised draft rule governing hydraulic fracturing on public and Indian lands. The release follows an initial proposal released on May 11, 2012, which received over 177,000 comments. The revised draft rule will undergo another 30-day comment period before the BLM issues a final rule.

Like the initial proposal, the revised draft rule has three central components:

1. Required disclosure of chemicals used in fracking operations on public lands;
2. Improved assurances of well-bore integrity to verify that fluids used during fracking operations are not contaminating groundwater; and
3. Preparation of a water management plan for handling fluids that flow back to the surface.

The revised draft rule, however, provides somewhat more flexibility in ways to comply and allows states to seek variances from these requirements if they can demonstrate that their regulations meet or exceed those proposed by the revised rule.

For a more information on the revised draft rule please [click here](#). Comments on the revised draft rule are due June 24, 2013.

#### **Federal Court in California finds BLM fracking analysis inadequate**

In *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, No. C11-06174PSG, 2013 WL 1405938, (N.D.Cal. March 31, 2013), a federal district court in California held BLM violated the National Environmental Policy Act (NEPA) when BLM sold four oil and gas leases for approximately 2,700 acres of federal land in Monterey and Fresno counties without considering the impacts of hydraulic fracturing. The leases concerned California's Monterey Shale Formation, which is estimated to contain over 15 billion barrels of oil, much of which cannot be retrieved through conventional drilling methods. BLM argued that its NEPA analysis obligation related to hydraulic fracturing was not triggered until there was a

site-specific proposal at the Application for Permit to Drill (APD) stage. Even if its NEPA analysis requirement had been triggered, BLM argued that it satisfied this obligation when it prepared an Environmental Assessment and issued a Finding of No Significant Impact.

The court found that BLM unreasonably relied on an earlier single well development scenario across the four parcels to be leased, which did not consider the development of hydraulic fracturing when combined with other technologies such as horizontal drilling. Instead, the court held that BLM chose to ignore the impacts of fracking, stating, "these issues are outside the scope of this EA because they are not under the authority or within the jurisdiction of the BLM." The court questioned how the environmental impacts of fracking could be outside BLM's jurisdiction when NEPA "plainly assigns all studying all environmental impacts of its own decision to BLM." While the court conceded that the effects of fracking on the parcels at issue were largely unknown, proper investigation was crucial. NEPA requires agencies to consider the range of possible environmental effects before resources are committed. The court held that BLM's dismissal of any development scenario involving fracking as "outside" its jurisdiction did not provide the "hard look" required by NEPA. The court also held that the lease terms used by BLM for the lease sale did not violate the Mineral Leasing Act of 1920 (MLA), as the MLA merely requires that leases contain language requiring the lessee to use reasonable precautions to avoid waste. The MLA does not suggest that courts may compel BLM to require lessees to use certain technologies, however reasonable or economically viable.

Though the California court's decision is not binding on Wyoming federal courts, it highlights the importance of adequate NEPA review at the leasing stage, particularly for leases where horizontal drilling and hydraulic fracturing are anticipated.

### **Sage-Grouse Updates**

- **Lander RMP Revisions Protested.** On February 22, 2013, BLM released the final Environmental Impact Statement and Proposed Resource Management Plan for the first of 68 RMPs under revision to better address sage-grouse conservation. The proposed RMP revision was protested by a local county, an oil and gas operator, and an environmental organization. The pending protests set the stage for potential litigation once BLM issues a final RMP. Biodiversity Conservation Alliance and Western Watersheds Project argue that the proposed plan relies too heavily on the state's "core sage-grouse areas" to address sage-grouse conservation, rather than adopting the more restrictive conservation measures recommended for consideration in BLM's 2011 National Technical Team report.
- **New Sage-Grouse Report and Study.** On March 25, 2013, the U.S. Fish and Wildlife Service released its Greater Sage-Grouse Conservation Objectives: Final Report. The report provides guidance on rangewide sage-grouse conservation objectives that

would be sufficient to ensure the long-term viability of the species. The report is the result of a collaborative effort between the Fish and Wildlife Service and state fish and wildlife agency experts. The report identifies priority areas for conservation (PACs) and develops specific conservation objectives and measures. PACs largely overlap BLM's preliminary priority habitat areas developed as part of its resource management plan revision process, with primary differences being noted in Utah and Nevada where state wildlife agency maps were adopted. General conservation objectives set out in the report include: (1) stopping population declines and habitat loss; (2) implementing targeted habitat management and restoration; (3) developing and implementing proactive, voluntary conservation actions; (4) developing monitoring plans; and (5) prioritizing funding to implement necessary research. Specific conservation objectives relating to identified threats to the species were also developed.

In April, results of a new sage-grouse study from the U.S. Geological Survey and University of California's Center for Conservation Biology were published in the journal *Ecology and Evolution*. Using computer models, the study compared habitat characteristics with lek locations across 355,000 square miles and concluded that sage-grouse require sagebrush-dominated landscapes with minimal levels of human land use. The study also examined movement corridors that allow for multiple interconnected populations, noting that connected populations have a far greater chance of survival than isolated populations along the periphery of the grouse's range. The researchers anticipate the results of the study will be useful to BLM in its sage-grouse resource management planning efforts, but cautioned that the study was based solely on lek locations and did not take into account other seasonal habitat needs.

- **Pathfinder Proposal.** Pathfinder Renewable Wind Energy LLC recently discussed plans for a 600,000-acre sage-grouse conservation bank in central Wyoming. The proposal includes a 20-year restoration project on the conservation bank land that would increase its value as sage-grouse habitat, and in the future, the value of the restoration project might be quantified and credits sold to developers proposing projects adversely affecting sage-grouse habitat. Though the bank is currently conceptual, Meyer believes conservation banking has real potential to benefit sage-grouse and other sensitive resources. For more information see Adam Voge's article discussing the conservation bank in the May 13, 2013 edition of the Casper Star Tribune, or visit the project website here.
- **Wyoming Sage-Grouse Executive Order Addendum for Grazing.** On April 5, 2013, Governor Mead signed Executive Order 2013-3, which supplements the sage-grouse core area strategy (Executive Order 2011-5). The supplement finds that livestock grazing is a "de minimus" practice that is compatible with and can

improve sage-grouse conservation. As a "de minimus" practice, grazing does not require state agency review for consistency with the core are policy. However, the Executive Order provides that the state will collaborate with federal agencies to define a framework for evaluating whether improper grazing activities are causing the failure to meet sage-grouse conservation objectives on federal lands, and to develop appropriate site-specific action to address those situations.

### **EPA proposes revised compliance standards for oil and gas storage tanks**

On March 28, 2012, EPA proposed revisions to 40 CFR part 60, Subpart OOOO, Standards of Performance for Crude Oil and Natural Gas Production, Transmission and Distribution. The current rule requires control devices on storage vessels at oil and gas facilities, including tanks containing condensate, crude oil, produced water, or intermediate hydrocarbon liquids, to reduce Volatile Organic Compounds (VOC) emissions by up to 95 percent. Due to an insufficient supply of control devices, the proposed revisions to Subpart OOOO would allow operators who installed storage vessels between August 23, 2011 and April 12, 2013 to comply with the rule by providing notice of the location of the storage vessels. Operators who installed new storage vessels after April 12, 2013, or whose storage vessels change in a manner that could increase VOC emissions, must install control devices by April 15, 2014, or within 60 days of startup, whichever is later.

EPA's proposed revisions would also clarify that the rule does not apply to fuel tanks and could allow for an alternative emissions limit for tanks with sustained uncontrolled emissions of less than 4 tons per year. The EPA rulemaking docket may be found [here](#). Written comments regarding the proposed revisions may be submitted until May 28, 2013.

### **BLM proposes updates to onshore oil and gas orders**

In response to recommendations from the Interior Department and the Government Accountability Office, BLM is proposing to update Onshore Oil and Gas Orders 3, 4 and 5 concerning site security and oil and gas production and measurement. Orders 3, 4 and 5 apply to all Federal and Indian (except the Osage Tribe) oil and gas leases and were last updated in 1989. Order 3 establishes standards for ensuring that oil and gas produced from Federal and Indian leases are properly and securely handled, while Orders 4 and 5 currently provide standards for measurement and proper reporting of oil and gas produced from Federal and Indian leases.

BLM proposes to update Order 3 by increasing minimum standards for ensuring that oil and gas produced from Federal and Indian onshore leases are properly and securely handled, so as to prevent theft and loss and to enable accurate measurement and production accountability. Potential changes to Order 3 include establishing a new nationwide process for designating official points for royalty measurement, new standards for commingling approvals and additional recordkeeping and

reporting requirements.

Proposed updates to Orders 4 and 5 include adding new requirements for the equipment and procedures that ensure accurate and verifiable oil and gas measurement and royalty payments. BLM is considering enhanced requirements for oil sales by tank gauging, vapor tight tanks, enhanced requirements and inspection for electronic gas meters, and improved standards for oil and gas sampling and testing.

For a more detailed explanation of the proposed changes, please see the Holland & Hart update and the BLM's side-by-side comparison of the potential changes. BLM plans to publish the text of the proposed Orders in the Federal Register later this year, which will initiate a formal public comment period.

### **BLM updates guidance for processing of Applications for Permit to Drill (APD)**

On April 15, 2013, BLM released Instruction Memorandum No. 2013-104, "Notice of Staking and Application for Permit to Drill Processing." The IM supplements existing BLM policy and guidance for processing APDs and outlines regulatory and statutory requirements of Onshore Oil and Gas Order Number 1 and the Energy Policy Act of 2005. The IM identifies specific process requirements and mandatory timeframes for BLM and operator action.

Under the IM, an APD must be complete (no "deficiencies") and include all additional "necessary information" needed by BLM in order to process the APD. Deficiencies and necessary information are different and trigger different sets of actions. Deficiencies are items BLM requires for a complete APD that are missing or insufficient. Necessary information includes items an operator can provide BLM, such as a water management plan, alternate bonding, or air quality monitoring, to help BLM meet its responsibilities.

BLM will notify operators via 10-day letter if an APD has deficiencies. The operator has 45 days to resolve deficiencies, making the APD complete, or to request an extension in writing. BLM will notify operators via 30-day letter if an APD lacks the necessary information and defer action on the APD until the operator submits the necessary information. Operators have up to 2 years from the BLM notice of deferral (30-day letter) to provide the necessary information. Otherwise, BLM will take formal action to deny the APD. The components of a complete APD are listed and discussed in the IM, along with the critical steps in APD processing.

---

## **Wyoming State Agency News**

### **Governor Mead releases energy strategy, includes implications for WDEQ**

Governor Mead's comprehensive Wyoming energy strategy, *Leading the*

*Charge: Wyoming's Action Plan for Energy, Environment and Economy*, was released May 13, 2013. The strategy includes 47 initiatives to begin in 2013, including: 1) developing rules to require oil and gas operators to test for baseline water quality before drilling activities; 2) creating a statewide network of pipelines to transport carbon dioxide; 3) reviewing natural gas flaring rules; 4) developing off-site mitigation frameworks to reclaim or maintain wildlife habitat and other resources; 5) exploring whether to become an Agreement State pursuant to the Atomic Energy Act in order to exercise primacy over the regulation of radioactive materials, instead of relying on the jurisdiction of the Nuclear Regulatory Commission; 6) updating the Wyoming State Protocol between the Wyoming State Historic Preservation Office and the Bureau of Land Management; and 7) developing new regulations regarding eminent domain and landowner compensation. Addressing issues related to mineral and wind energy taxation are also included in the suite of initiatives. The energy strategy is designed to be reviewed and updated annually. The entire plan can be found [here](#).

### **Groups petition WOGCC for changes to flaring rules**

On May 17, the Powder River Basin Resource Council and other environmental groups petitioned the Wyoming Oil and Gas Conservation Commission to revise WOGCC rules for natural gas flaring at Chapter 3, Section 39, as well as other rules relating to setbacks from homes and businesses and dealing with accidents and spills. Arguing that flaring permits waste of natural gas resources as great expense to the state, Petitioners request rule changes to: (1) ensure that flaring can only be approved by the WOGCC at a public hearing; (2) require proof of notice to surface and mineral owners of flaring applications; (3) require best available technology to control air emissions and noise associated with flaring; and (4) put limits on the amount of flaring. Requested flaring limits include: (1) limiting emergency flaring to no more than 48 hours; (2) limiting well purging and evaluation test flaring to no more than 48 hours; (3) limiting production test flaring to no more than seven days or no more than 1,500 MCF; (4) limiting the flaring of low rate casing head gas to no more than 30 MCF per day; (5) limiting the gas that can be flared with WOGCC approval to no more than 90 days of flaring; and (6) limiting the amount of gas that can be flared with WOGCC approval to 250 MCF per day.

The Petition also proposes to amend the setback from homes and businesses from 350 feet to 0.25 mile, with exceptions requiring WOGCC approval and notice to landowners. Petitioners claim greater setbacks are needed to reduce impacts to residents from noise, traffic, and light and air pollution. Finally, the Petition proposes new rules imposing fines for accidental spills released on lands outside the well permit area.

Petitioners request that the WOGCC hold a hearing to consider the proposed rule changes. Under Wyoming statute, the WOGCC must either deny the petition in writing or initiate rulemaking proceedings as soon as practicable. The Petition can be found [here](#).

### **Notices of rulemakings and public meetings**

**WQD proposes changes to Chapter 1 rules**

On July 11, 2013, WQD will host a public hearing at the Herschler Building in Cheyenne at 9:00 on proposed revisions to Water Quality Rules Chapter 1. The rules are being revised to meet Clean Water Act triennial review requirements, resolve EPA disapprovals from the last rulemaking, update numeric criteria from priority and non-priority pollutants, revise the duration of the E. coli criteria, and correct a number of errors and inconsistencies. The written comment period closes on June 27. For more information on the proposed revisions, go [here](#).

**AQD to consider proposed changes to air quality rules on June 5**

The Wyoming Air Quality Advisory Board will meet on June 5, 2013 at Central Wyoming College in Riverton to consider revisions to Chapter 3 (General Emissions Standards), Chapter 5 (National Emissions Standards), and Chapter 8 (Nonattainment Area Regulations) of the Wyoming Air Quality Standards and Regulations (WAQSR). The proposed changes include revising the emission standards for particulate matter in response to a proposed EPA action. The Chapter 5 definition of "commenced" could be revised to be consistent with EPA's federal definition of the same term. Updates to the table of hazardous air pollutants have also been proposed. The addition to Chapter 8 of the "ozone nonattainment emission inventory rule" would establish the requirements for the submission of emission inventories from sources in an ozone nonattainment area.

The Board will also be considering revisions to the Oil and Gas Best Available Control Technology (BACT) Guidance. The agenda and the proposed rule revisions are available [here](#). Public comments regarding the proposed revisions may be submitted in writing or may be submitted at the meeting.

**Wyoming Water and Waste Advisory Board to discuss new rules**

The WDEQ-Solid and Hazardous Waste Division is considering new rules regarding general permits for closing municipal solid waste landfills of 30 acres or less, pursuant to Senate Enrolled Act 114 and Wyoming Statute § 35-11-531. The Division will present recommendations regarding this new program to the Wyoming Water and Waste Advisory Board on June 14 at the Oil and Gas Conservation Commission Building in Casper. The Board will also consider proposed rule revisions to Chapter 25 of the WDEQ-Water Quality Division rules. These proposed revisions would update design requirements and correct inconsistencies identified in the rules governing Small Wastewater Systems, which have remained unchanged since originally promulgated in 1984. The agency's Public Notice and the proposed rule revisions can be found [here](#).

**WDEQ accepting surface water quality data until July 15**

WDEQ-Water Quality Division (WQD) is preparing its biannual 2014 Wyoming Water Quality Assessment and Impaired Waters List (also referred to as the Integrated 305(b) and 303(d) Report). The Integrated Report summarizes the water quality conditions of surface water in the state and includes an updated list of waterbodies requiring Total Maximum Daily Loads (TMDLs). The agency is soliciting water quality data and other water quality-related information until July 15, 2013. The draft report is

expected in December 2013, with a final report to be submitted to EPA in April 2014. The agency's Public Notice, including the technical requirements for submitting credible water quality data, can be found [here](#).

**DEQ intends to continue compliance checks of engines at oil and gas production sites.** WDEQ-Air Quality Division announced it will continue its program of increased compliance checks of engines at oil and gas production facilities across the state. These compliance inspections, which began in 2011, utilize portable analyzers to test emissions in real-time conditions. The full press release including audio clips from agency administrator Steve Dietrich, can be read [here](#).

---

### Agency personnel changes

Bob Gill retires from AQD – After 18 years with WDEQ-AQD, Bob Gill will be retiring at the end of May 2013.

Tia Raamont recently left the WDEQ, Industrial Siting Division. Until further notice, all inquiries regarding WDEQ-ISD issues should go directly to ISD Administrator Luke Esch at (307) 777-7192.

John Emmerich retires from G&F – After 34 years of service with the Wyoming Game & Fish Department, John Emmerich, Deputy Director of External Operations, is retiring. John oversaw the department's habitat protection program and also served as liaison with the Wyoming legislature, the Bureau of Land Management, the U.S. Forest Service, and the U.S. Fish and Wildlife Service.

---

*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.*