

Wyoming Environmental Compliance and Public Land News - June 2016

Insight — 6/03/2016

Public Land News

EPA Final Rules Limits Methane Emissions from Oil and Gas Facilities

On May 16, 2016, the Environmental Protection Agency (EPA) issued three important rules for the oil and gas industry. The first is a final rule that directly limits methane emissions from oil and gas facilities and applies to new and modified oil and gas wells. The New Source Performance Standard (NSPS) directly regulates methane emissions and includes oil wells for the first time. The NSPS also requires more stringent leak detection and repair. Methane is a key constituent of natural gas, and EPA has estimated the global warming potential of methane at more than 25 times that of carbon dioxide.

The methane rule includes a draft information collection request (“ICR”) designed to help EPA issue future rules limiting methane emissions from existing sources. There are two opportunities for public comment before the ICR is finalized. EPA will accept comment on the draft ICR for sixty days following publication in the Federal Register. After EPA makes revisions based on the public comments, it will submit the final ICR to the Office of Management and Budget (“OMB”). After its review, OMB will publish an updated version of the ICR for an additional 30-day public comment period, after which the final ICR will be promulgated. While EPA does not give a timeline for this process, it does state that its goal is to receive information from the operator survey (outlined below) later this year.

The draft ICR is divided into two parts:

- Phase I (“the operator survey”): general methane emission source information will be required from all onshore oil and gas production facilities. Owners/operators will have 30 days to respond. EPA anticipates costs for responding to the operator survey at \$16 million or about \$700 per facility.
- Phase II (“the facilities survey”): more detailed and specific control equipment and emission source information will be required from a representative sample of facilities for phase 2. Owners/operators will have 120 days to respond. EPA anticipates costs for responding to the facility survey at \$24 million or \$7,000 per facility.

EPA expects to use the information from the surveys to establish a rule limiting methane emissions for existing oil and gas sources. EPA claims

that additional information is needed to develop standards for existing oil and gas sources under section 111(d) of the Clean Air Act and to evaluate the impact of those standards.

The second rule clarifies EPA's method for aggregation of oil and gas sources. This rule replaces EPA guidance on aggregation that was found unreasonable by the Sixth Circuit Court of Appeals. *Summit Petroleum Corp. v. U.S. E.P.A.*, 690 F.3d 733 (6th Cir. 2012). The rule clarifies when oil and gas equipment and activities must be aggregated together and deemed a single source for the purpose of determining whether major source permitting programs apply. The most significant change made by the aggregation rule is that EPA now defines the term "adjacent" as encompassing equipment and activities located on the same site or on sites within ¼ mile of each other (abandoning the functional relatedness test from its former guidance).

The third rule establishes a federal implementation plan (FIP) for new source review of minor sources in Indian country. The FIP will replace source-specific minor new source review (NSR) preconstruction permits in Indian country. The FIP incorporates emission limits and other requirements from eight federal standards, and applies limits for a range of equipment and processes used in oil and natural gas production and natural gas processing. Starting October 2, 2016, the majority of new and modified true minor sources in the oil and gas sector will be required to register those sources under the FIP instead of obtaining a site-specific permit. However, sources may still seek a source-specific permit instead of complying with the FIP.

While the requirements for leak detection and repair under the methane rule have raised cost and feasibility concerns for the oil and gas industry, it is the potential regulation of existing sources previewed by the draft ICR that has raised the most concerns. There are hundreds of thousands of existing oil and gas sources across the country, and EPA estimates that these existing sources are the biggest emitters of methane. However, because of the different levels of production, permitting, control technology, location, and oversight of existing sources, many oil and gas companies fear such regulation would lead to the shut-down of marginally producing wells and increase costs dramatically for older wells that are still producing. In addition, a rule for existing sources would likely apply simultaneously to hundreds of thousands of sources. Claiming that the methane rule ignores the great strides the industry has made in methane reductions, American Petroleum Institute's Vice President Kyle Isakower said, "Even as oil and natural gas production has risen dramatically, methane emissions have fallen, thanks to industry leadership and investment in new technologies."

The rules and additional information are available at:
<https://www3.epa.gov/airquality/oilandgas/actions.html>.

[Bridger Teton National Forest Proposes to Cancel Wyoming Range Oil and Gas Leases](#)

In April, the U.S. Forest Service released a Draft Supplemental Environmental Impact Statement (EIS) for oil and gas leasing in the

Bridger Teton National Forest. The Forest Service's preferred alternative would withdraw consent to lease 30 parcels on approximately 35,000 acres that were sold at auction over 10 years ago. In 2006, the original lease sales were challenged before the Interior Board of Land Appeals, which decided that the plaintiffs were likely to succeed on their claims that the U.S. Forest Service and Bureau of Land Management (BLM) had not completed sufficient environmental review. The agencies requested a voluntary remand to allow additional review, specifically for air quality and Canada lynx impacts. In 2011, after additional environmental review, the Forest Service decided that the leases should not have been offered for sale in the first place. After public comments identified significant flaws in the new analysis, the Service withdrew its decision. Now, five years later, the Forest Service has released yet another supplemental environmental review and proposes to cancel the existing leases.

The preferred alternative, if adopted after the supplemental EIS becomes final, will score a victory for conservation groups who have long sought to put the Wyoming Range off limits from oil and gas development. Those efforts culminated in 2009 with the passage of the Wyoming Range Legacy Act, which followed through on late Senator Craig Thomas's initiative to prevent new leasing in the Wyoming Range. A decision to cancel the existing leases on 35,000 acres and retire them from further lease sales would bring conservation groups much closer to realizing their goal. It is also likely, however, to raise unanswered questions about how to compensate the oil and gas lessees who originally purchased the leases in 2005 and 2006, subjecting the issue to future legal challenges.

BLM News

Mary Jo Rugwell Appointed Wyoming BLM State Director

Bureau of Land Management Director Neil Kornze announced in mid-April that the new BLM Wyoming State Director will be Mary Jo Rugwell. In her new position, Rugwell, who is originally from Cheyenne, will oversee management of nearly thirty percent of the state's surface area and about two-thirds of its mineral state.

Rugwell has been with BLM for seventeen years, holding numerous positions including Associate State Director for Wyoming, Acting Deputy Assistant Director of the Human Capital Management Directorate in the Washington office, District Manager for the Southern Nevada District Office, and management positions in other field offices. An interview with Rugwell can be found in the Casper Star Tribune [here](#).

BLM Appeals Judge Skavdahl's Injunction Against New Fracking Rules

Last month, the BLM urged the Tenth Circuit Court of Appeals to lift a stay of the agency's hydraulic fracturing rule imposed by U.S. District Court of Wyoming Judge Scott W. Skavdahl last year. The new rule would require developers to comply with stricter well integrity tests and release the contents of fracking fluids.

The BLM, which was joined by environmental groups, argued that the agency has the requisite authority to regulate fracking on public lands. Wyoming, Montana, and Colorado asked for the injunction in the fall of

2015 pending a substantive review of the rules. The states argue that the BLM lacks the authority to regulate fracking and that such power lies with individual states.

Wyoming BLM Issues Instruction Memorandum Governing Right-of-Way Bonds

On April 18, Wyoming BLM issued an instruction memorandum providing guidance for bonding requirements on BLM lands for rights-of-way, leases, and permits for authorized activities. Federal laws and regulations allow BLM to require an application for a right-of-way to provide a bond to secure obligations imposed by the grant. Under the new memorandum, a performance or reclamation bond is required for new grants and amendments, renewals, and assignments of existing grants, excluding solar and wind energy authorizations. Wyoming BLM has not historically required a bond on all grants but the memorandum cites “increasing concern over changes in financial markets and corporate volatility” as rationale for the change.

The memorandum includes the process for determining the bond amount, which is calculated in part by considering a reclamation cost estimate prepared by an independent state licensed engineer. The memorandum lists acceptable bond instruments which include personal bonds, surety bonds, or a policy of insurance. Bond waivers are only available if an applicant can show a hardship.

Special Status Species News

U.S. Fish and Wildlife Service to Consider Listing the Pocket Gopher

In April, WildEarth Guardians submitted a petition to list the Wyoming pocket gopher, a species found in the Red Desert of southern Wyoming, to the U.S. Fish and Wildlife Service's (FWS) endangered species list. WildEarth Guardians cited as a basis for listing “the rarity of the species and possible declines in abundance, limited range, fragmented nature of suitable habitats, and multiple range-wide threats to the species and its habitat particularly from oil and gas, uranium, and wind energy development.” The petition is not the first seeking to list the pocket gopher. A similar petition was filed by Biodiversity Conservation Alliance in 2009, but the FWS ultimately determined in 2010 that listing was not warranted. The petition sets in motion a process for considering whether to list the species, beginning with the FWS' 90-day finding whether the petition presents substantial scientific or commercial information in support of listing the pocket gopher. If the FWS answers the question in the affirmative, it will solicit information from the public and determine whether to propose to list the species within a year of its 90-day finding.

Judge Overturns Fish and Wildlife Service's Decision Not to List Wolverine

A federal judge in Montana recently held that the U.S. Fish and Wildlife Service erred in not listing the wolverine as an imperiled species under the Endangered Species Act (ESA), and referred the issue back to the agency.

On August 13, 2014, the FWS said the science is inconclusive on the need to list the wolverine, and declined to list the species as threatened or endangered. However, Dana L. Christensen, Chief Judge of the U.S.

District Court in Montana, said the FWS may have succumbed to political pressure in deciding not to list the species, because much of the rationale for its listing stemmed from threats posed by climate change. The court stated that under the mandate of the ESA, the FWS must take action to protect imperiled species at the earliest possible defensible point in time, and that because of climate change, that time for the wolverine is now.

In deciding not to list the species in 2014, the FWS said it did not have enough fine-scale data about how climate change would affect the ecology of the wolverine to determine that the species would be in danger of extinction within the foreseeable future. The FWS defended its conclusion by citing a peer review of its proposal to list the wolverine in which five out of seven scientists on the review panel agreed that the wolverine did not warrant listing. Environmentalists and two scientific societies disagree, arguing that a warming climate poses an immediate threat to the wolverine, which lives in cold, snowy habitats at high altitudes.

The wolverine's original range encompassed portions of Washington, Oregon, Montana, Idaho, California, Colorado, Wyoming, and New Mexico. The FWS estimates the current wolverine population at 250 to 300 individuals inhabiting nine contiguous western states, and has noted that wolverine numbers seem to have increased in the latter part of the last century.

Fish and Wildlife Service Proposes Changes to Eagle Take Rules and Candidate Conservation Agreement with Assurances Regulations

The Fish and Wildlife Service has proposed to increase the national nonpurposeful take limit for bald eagles from 1,103 to 4,200. The FWS cites a rise in the bald eagle population, along with the expansion of wind energy operations, for the change. However, because the golden eagle population appears to be declining, the take limit for golden eagles will remain at zero. The FWS also seeks to extend the duration of programmatic permits from five to thirty years in order to better match the duration of industrial activities. Additionally, the FWS proffered new criteria for issuing permits, revised compensatory mitigation requirements, and updated application fees. A more in-depth analysis of the proposed changes can be found [here](#).

The FWS has recommended several changes to its Candidate Conservation Agreements with Assurances (CCAA) policy. Most notably, the updated policy would add a new definition of “net conservation benefit” in order to clarify the level of effort required to gain approval of a CCAA; delete possibly confusing references to “other necessary properties”; and revise the definition of “non-federal property owner” to include a person with any property interest sufficient to carry out the conservation measures contained in the CCAA.

The FWS is accepting comments on the proposed changes until July 5, 2016.

Oil and Gas Industry Enters the Fray in New Sage-Grouse Lawsuit

In May, the Western Energy Alliance (WEA) was the latest to file suit challenging BLM's sage-grouse land use plan amendments. The suit, filed

in U.S. District Court in North Dakota, challenges land use plans covering millions of acres in California, Colorado, Idaho, Montana, Nevada, North Dakota, and Utah. The group chose not to target Wyoming's sage-grouse plan amendments, which are arguably more generous in allowing more disturbance in sage-grouse priority habitats than plans in other states.

The suit alleges a number of legal errors, including that the plans “unilaterally and substantively” revise BLM's oil and gas regulations for leasing and development without complying with the formal rulemaking procedures required by the Administrative Procedure Act. WEA also claims that the land use plans treat certain renewable energy project developers differently from other public land users, rendering the land use plans arbitrary and capricious under the APA. WEA further alleges that the plans cede oil and gas leasing and development decisions to the Fish and Wildlife Service, in violation of the Mineral Leasing Act and BLM's regulations. The suit challenges BLM's NEPA compliance based on the substantial changes between the draft and final plans, arguing a supplemental draft environmental impact statement should have been circulated for additional public comment.

State News

EPA Releases Pavillion Fracking Study

Stanford University has published a study that links fracking to groundwater contamination in Pavillion, Wyoming. The study concludes that the presence of chemicals in Pavillion groundwater is attributable to fracking in the area.

The research indicates that unlined pits used to dispose of fracking chemicals likely contaminated domestic wells in Pavillion. Further, the authors assert that oil and gas companies fracked in close proximity to the aquifer and, at times, directly fractured the geologic formations comprising the aquifer. Finally, the study suggests that the poor construction of cement barriers around steel casing can allow fracking chemicals to leak underground, and that chemicals could migrate along fissures into underground sources of drinking water.

The authors contend that these findings call into question the practices of the fracking industry. They argue for more robust cement work around steel casings and new regulations to limit fracking in close proximity to underground sources of drinking water.

Wyoming DEQ News

Air Quality Division to Finalize Infrastructure State Implementation Plan for PM2.5

The Wyoming Department of Environmental Quality (WDEQ) is holding a public hearing at 1:00 pm on June 6, 2016, to take comments on the proposed infrastructure state implementation plan (SIP) for PM2.5. The infrastructure SIP is required by EPA to ensure that Wyoming has the resources and infrastructure in place to adequately administer compliance with the PM2.5 ambient air quality standards. The SIP must include ambient air quality monitoring and data systems, programs for

enforcement of control measures, and a demonstration of adequate authority and resources to implement the plan.

Air Quality Division Releases Oil and Gas Guidance

WDEQ recently updated guidance for the oil and gas industry to align requirements for concentrated development areas with the newer areas of development in the state. Key changes for this guidance include:

- Establish a new area that combines the previous Statewide Area and Concentrated Development Area.
- Require controls for emissions of volatile organic compounds and hazardous air pollutants of 6 tons per year or more from tanks and dehydration units at single wells in the new area.
- Require controls for truck loading emissions of 6 tons per year or more of volatile organic compounds and hazardous air pollutants for all areas in the state.
- Update control requirements for pumping unit engines.
- Describe DEQ's new electronic air quality permitting system (IMPACT).

The guidance also presents the Air Quality Division's current understanding of Best Available Control Technology (BACT) to assist owners and operators who construct or modify oil and gas production facilities prior to initiating the permitting process. The updated guidance is available [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.