

Wyoming Environmental Compliance and Public Land News - December 2017

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Public Land and Environmental News

Lawsuits Ask for Stay of BLM Venting and Flaring Rule

In late October, Western Energy Alliance and the Independent Petroleum Association of America ("Industry Petitioners") renewed their request before Judge Skavdahl for a preliminary injunction of BLM's Venting and Flaring Rule ("the Rule"). The move comes amidst significant uncertainty about the future effect of the Rule and in advance of the Rule's key January 2018 compliance deadlines, which remain in effect. BLM's attempts to rescind and revise the Rule have, thus far, been unsuccessful, leaving operators with compliance burdens that must be met by January 17, 2018. These include having all initial leak detection and repair inspections completed, pneumatic controllers replaced, and applicable storage tanks controlled.

Industry Petitioners' brief notes that the future costs of complying with the Rule's January 2018 deadline will exceed \$115 million, and the costs of complying with the leak detection and repair and storage tank provisions, alone, will exceed \$85 million. Industry Petitioners argue that it is illogical and unfair to impose such substantial compliance costs when the Rule is in the process of being reconsidered and will almost certainly change in material respects.

As for the administrative process, BLM has promised the court that its proposed rule to delay all compliance deadlines under the Rule for two years will be finalized and published by December 8, 2017. If this occurs, it is likely that the BLM will seek to further extend judicial consideration of this case. Meanwhile, the court set a hearing for December 18, 2017 to consider both Industry Petitioners' most recent preliminary injunction request as well as the merits of the case. Thus, it is likely that by the end of December, there will be some resolution for operators about their compliance obligations under the Rule. But for now, the Rule remains in effect.

Interior Issues Final Report Identifying Burdensome Regulations

On November 1, 2017, the Department of the Interior issued a final report on actions of the Department that may burden domestic energy production. The report recommends, among other things, rescinding or reviewing Obama-era policies such as the Hydraulic Fracturing rule, the Venting and Flaring rule, policies issued to protect the greater sage-grouse, oil and gas leasing policies, and numerous guidance documents of the Bureau of Land

Management and U.S. Fish and Wildlife Service relating to mitigating impacts on public lands. The report also proposes revisiting the Office of Surface Mining Reclamation and Enforcement's policy advisory and proposed rulemaking on self-bonding of coal mine operators. Overall, the Department focuses on streamlining leasing processes and removing barriers to energy development on public lands.

The report was prepared pursuant to President Trump's Executive Order 13783, Promoting Energy Independence and Economic Growth, which ordered federal agencies to review discretionary agency actions that inhibit the development or use of domestic energy resources, especially oil, natural gas, coal, or nuclear energy resources.

Hartnett White Nominated to head Council on Environmental Quality

In October, President Trump nominated Kathleen Hartnett White to lead the White House Council on Environmental Quality. Ms. Hartnett White formerly chaired the Texas Commission on Environmental Quality and is well-known for her conservative views, including her position that human contributions to climate change are highly uncertain. The Senate held confirmation hearings in November and greenlighted the nomination. If confirmed, Ms. Hartnett White is likely to prioritize streamlining environmental review.

Species News

U.S. Fish and Wildlife Service to Review Mitigation Policies

On November 6, 2017, the U.S. Fish and Wildlife Service (the "Service") issued a request for public comment on the agency's Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy ("ESA-CMP") in an effort to determine whether and how to revise the policies. The Mitigation Policy was originally published on November 21, 2016 and the ESA-CMP was published on December 27, 2016. The policies were developed to ensure consistency with and implementation of President Obama's directives regarding mitigation and minimizing harm to public resources, including the Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment. This Memorandum, and other Obama-era policies, were rescinded by President Trump's Executive Order 13783.

The request for comment specifically seeks input on whether the Service should remove or retain the policies' mitigation planning goal of net conservation gain. Comments must be submitted by January 5, 2018.

U.S. Fish and Wildlife Service Calls for Changes to CCAA Regulations and Guidance

On November 22, 2017, the Service noticed its intent to review and revise its regulations concerning enhancement-of-survival permits issued in association with Candidate Conservation Agreements with Assurances ("CCAAs") under the ESA. The goal of the CCAA program is to encourage private parties to voluntarily develop and implement conservation measures for candidate species that will prevent the need to list those species. In exchange for implementing conservation measures, the private party receives an enhancement-of-survival permit if the species is ever

listed, along with assurances that the private party will not be required to undertake any conservation actions other than those outlined in the CCAA and will not be subject to additional resource or land-use restrictions.

In 2016, revisions to the regulations changed the standard to qualify for a CCAA, requiring the private party to provide a net conservation benefit to the species. The Service now seeks comments on the regulations, and in particular, on the net conservation benefit standard.

The Service has simultaneously requested comment on its CCAA implementing policies.

Comments are due on or before January 22, 2018.

Forest Service Joins BLM in Sage-Grouse RMP Amendment Process

On November 21, 2017, the Forest Service announced its intent to join with BLM in the reconsideration of sage-grouse protections in land use plans across the West. The Forest Service is seeking comments on and considering changes to sage-grouse focal area designations, mitigation standards, disturbance and density caps, modification of habitat boundaries to reflect new information, changes to management approaches in priority habitat, causal factors, adaptive management, land use exemptions, and grazing guidelines.

The public comment period regarding BLM's proposed reconsideration ended November 27, but comments can be submitted to the Forest Service through January 5, 2018.

News reports continue to reflect divided opinions over reopening the sage-grouse Resource Management Plan amendments. Wyoming Governor Matt Mead maintained his position that major changes to the sage-grouse plans, in particular, a shift away from habitat protection and toward bird counts, was short-sighted and likely to lead to a listing decision. Governor Mead, along with Colorado Governor Hickenlooper, expressed frustration with BLM's wholesale review of the plans, saying it sends a message to states not to bother working together with the federal government, which may change its mind regarding critical public land management decisions. Governors in other Western states support extensive revisions to the plans.

State News

Wyoming DEQ Proposes Tightening Mine Reclamation Requirements

The Wyoming Department of Environmental Quality (WDEQ) recently released a preliminary draft rule and other documents to update financial assurance regulations designed to ensure that companies will reclaim and clean up their mining operations after extraction activities. The rule focuses on self-bonding, a recent hot topic when several major coal companies took billions of dollars in self-bonds with them into bankruptcy.

The proposed revisions will require, among other things, a different financial fitness test for companies that want to self-bond. Rather than offering income statements and balance sheets as evidence of fitness to

self-bond, companies will now be judged by their credit ratings from financial firms Moody's Investor Service, Standard and Poors, or Fitch Ratings. Regulators believe this is a forward-looking assessment, while the prior rules looked at how a company performed in the past.

Additionally, according to the proposed rule changes, a secondary company cannot be the guarantor for self-bonds. Either the operating company or its parent company must be on the hook. Even with a strong credit rating, a company will only be allowed to self-bond up to 70 percent of its obligations. A company with a marginal credit rating would be limited to 50 percent.

Prior to inviting public comment, the draft rule revisions will go before the Land Quality Advisory Board at a meeting in Gillette on December 6, 2017. For more information, [click here](#).

Wyoming DEQ Air Quality Division Board Meeting Set

The Wyoming Air Quality Advisory Board will meet on December 12, 2017 at 9:00 am at the Wyoming State Library, Conference Room 2800 to hear general updates from the Air Quality Division ("Division") and to consider proposed revisions to the DEQ's Rules of Practice and Procedure. The proposed revisions incorporate by reference the Wyoming Department of Administration and Information, Director's Office, Chapter 2, Uniform Procedures, Fees, Costs, and Charges for Inspections, Copying, and Producing Public Records.

The Division also continues to review for revision its presumptive Best Available Control Technology ("pBACT") guidance for applicability to oil and gas facilities across the state. The Division is considering revisions to the fugitive emissions monitoring program, regulation of intermittent pneumatic controllers, and a proposed definition of "modification" for the purpose of determining when controls are required.

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