

Wyoming Environmental Compliance and Public Land News - February 2014

Wyoming Environmental Compliance and Public Land News - February 2014

Insight — 2/3/2014

Public Lands News

Landmark EPA Decision Expands the Boundaries of the Wind River Reservation

On December 6, EPA approved the application filed by the Eastern Shoshone and Northern Arapaho Tribes of the Wind River Indian reservation to be treated in the same manner as states under the Clean Air Act. 78 Fed. Reg. 76829. In its decision, the agency defined boundaries of the Wind River Reservation that contradict Wyoming precedent and agency practices. The decision was effective immediately and affects all environmental permitting in the area, placing the permitting and enforcement programs in EPA control until such time as the Tribes develop their own implementation plans. This definition of jurisdictional boundaries also raises a variety of questions related to taxation and other criminal and civil jurisdiction. The State of Wyoming filed a request for stay and petition for reconsideration before the Tenth Circuit Court of Appeals.

[Click here to view Holland & Hart client alert](#)

[Click here to view Governor's press release regarding petition for stay](#)

EPA Proposes New NSPS and GHG Rules for New Stationary Sources

The proposed New Source Performance Standards (NSPS) rule, proposed in April 2012, regulating emissions from fuel-powered electricity generation units has been withdrawn, after EPA received and reviewed 2.5 million comments to the proposed rule. 79 Fed. Reg. 1352. Instead, a new proposed rule has been published for fossil fuel-fired electric utility steam generating units and stationary combustion turbines. 79 Fed. Reg. 1430. A separate standard would apply to integrated gasification combined cycle units that burn coal, coke, and other fossil fuels based on partial implementation of carbon capture and storage as the best system of emission reduction. Standards for natural gas-fired stationary combustion turbines using combined cycle technology as the best system of emission reduction are also proposed. The proposed rule also include provision(s) regarding Title V permitting fees, greenhouse gas reporting, and the definition of "pollutant" under the Prevention of Significant Deterioration (PSD) program.

EPA is accepting comments on the new proposed rule until March 10. The

proposed rule can be found [here](#).

EPA Aims to Clarify Rules for CO2 Use in Oil Recovery

EPA issued a final rule that CO2 streams captured from emissions sources, injected underground into Class VI Underground Injection Control (UIC) wells that have been approved for geologic sequestration, and meet certain other conditions are exempt from regulation as hazardous waste. The rule also clarifies that CO2 injected for enhanced oil recovery is not expected to be considered a waste management activity. The final rule is available [here](#).

Wells used for enhanced oil recovery are classified as Class II UIC wells. As resources are extracted from Class II wells, and the recoverable resource is depleted, EPA believes those wells may need to be re-permitted as Class VI injection wells. EPA issued draft guidance regarding the transition of Class II UIC wells used for enhanced oil recovery to Class VI UIC wells. Public comment will be accepted until March 1.

Although Suh's position would not directly oversee gas production, the position would oversee both the National Park Service and Fish and Wildlife Service, the latter advising agencies and permitting projects that could harm threatened or endangered species or protected birds. Barrasso noted that Suh would also wield influence over listing decisions and critical habitat designations for the greater sage grouse.

In response, Suh said she is a strong supporter of natural gas and called production on public lands "hugely important." Responding to questions regarding her 2007 statement, Suh said that "development has consequences for landscapes." Chairwoman Barbara Boxer (D-Calif.) and Senator Michael Bennet (D-Colo.) came to Suh's defense. The nominee was also endorsed by her former Republican employer, retired Colorado Senator Ben Nighthorse Campbell.

Shoshone National Forest Plan Released

On January 17, 2014, eight years of planning efforts have culminated in the release of a final Environmental Impact Statement and forest management plan for the Shoshone National Forest. The plan will allow oil and gas leasing on 126,000 acres, and does not make any changes to winter motorized access or wilderness boundaries. The final plan is available [here](#). Objections to the final plan can be submitted for 60 days following the January 24, 2014 notice of the revised plan.

Sage-Grouse news

BLM Releases Draft RMP Amendments for 9 Wyoming RMPs

On December 27, 2013, BLM released its draft Resource Management Plan amendments to address sage-grouse conservation over six BLM planning areas (Newcastle, Casper, Rawlins, Rock Springs, Kemmerer, and Pinedale) and the Thunder Basin National Grassland and Bridger-

Teton and Medicine Bow National Forest planning areas. The draft RMP amendments and Draft Environmental Impact Statement can be found [here](#). The nine-plan Wyoming RMP amendment draft is the last of the Wyoming sage-grouse RMP amendments to be released, following the Lander, Buffalo, and Big Horn Basin RMPs. The preferred alternative incorporates guidance from the Wyoming core area strategy for sage-grouse as well as additional management requirements based on the BLM National Technical Team recommendations. It would include a surface disturbance cap of 5% per 640 acres within core sage-grouse habitat. The draft is available for public comment for 90 days from December 27, the date on which it was announced in the Federal Register. See 78 Fed. Reg. 78955 (Dec. 27, 2013).

Secretary Jewell Meets with Western Governors on Sage-Grouse
In December, Secretary of the Interior Sally Jewell addressed the Western Governors' Association winter meeting in Las Vegas. Her message on sage-grouse was that conservation efforts are not yet where they need to be and it is time for states and the federal government to "redouble" their efforts before the Fish and Wildlife Service reaches a new listing decision in September 2015. Both Secretary Jewell and Fish and Wildlife Director Dan Ashe credited the unprecedented cooperation between the states and the federal government and were optimistic about conservation efforts. Both touted the work of BLM and the U.S. Forest Service to propose changes to 98 land management plans in the sage-grouse's range. They described the next six months as vital to demonstrate sufficient efforts to conserve the sage-grouse and avoid a listing decision. The DOI press release describing the meeting can be found [here](#).

Report: Did Extra Funding Speed Federal Drilling Permits in Wyoming

A recent federal government audit cannot verify whether additional funds Congress gave to seven BLM offices, including Buffalo and Rawlins in Wyoming, helped speed the processing of applications to drill for oil, natural gas, or coalbed methane. The U.S. Government Accountability Office (GAO) conducted the audit by studying BLM for the fiscal years of 2007 to 2012.

An employee of Denver-based oil and gas producer Yates Petroleum reviewed the audit, saying BLM is not doing enough to permit drilling. An employee of Sheridan-based Power River Basin Resource Council said BLM is not doing enough to protect public lands from environmental damage after reviewing the audit.

Bev Gorny, a spokeswoman for BLM's Wyoming state office, emphasized that the Buffalo office was inundated with nearly 30 percent of all federal oil and gas applications for permits to drill during those years. The additional funds from Congress helped with the backlog, Gorny said, and now the Buffalo office does one-fifth of the environmental inspections of all the BLM offices. Gorny also noted that GAO researchers were unable to determine whether the program's funds were well-spent because the database used by GAO was missing certain data and a decrease in natural gas prices resulted in fewer applications for natural gas and coalbed

methane wells.

Budget Deals May Cut Royalties to the States

Congress's budget deal will cost Wyoming, New Mexico, North Dakota, and other states \$415 million in lost oil and gas royalties over the next decade, according to the Congressional Budget Office. Legislation implementing the agreement makes an effective 51-49 split permanent in favor of the federal government when dividing the 12.5 percent royalty collected from energy companies on oil and gas production on federal land. After the House and Senate passed the measure, President Obama signed it into law on December 26, 2013. Its primary provisions go into effect this year.

Senate Spars Over Interior Pick

The Environment and Public Works Committee recently sparred over President Obama's pick to oversee wildlife and parks management at the Interior Department. Rhea Suh, the nominee for Interior assistant secretary, testified in front of the Committee in December and faced pointed questions regarding her past positions on natural gas development. In a 2007 interview with the William and Flora Hewlett Foundation, Suh said the pace and magnitude of natural gas development is the "single greatest threat to the ecological integrity of the West." Senator John Barrasso (R-Wyo.) responded, "I find this viewpoint way out of the mainstream, and I'm sure other members of the committee do so as well."

Returning to the effective 50-50 split would have provided Wyoming with an extra \$19 million next year and nearly \$200 million over the next decade. Representative Cynthia Lummis (R-Wyo.) said, "By perpetuating the policy of taxing mineral-producing states to pay for federal government bureaucracy, the deal unfairly burdens Wyoming to support increased spending in Washington." Lummis and other western lawmakers have pushed legislation that would allow states to collect their share of federal royalties on their own, eliminating the two percent administrative fee collected by the federal government.

Patrick Etchart, spokesman for the Interior Department's Office of Natural Resources Revenue, said the recent budget agreement makes the two percent fee permanent and does not change the disbursement formula used for royalty payments to states.

CEQ Chief Steps Down in February

Nancy Sutley, the chairwoman of the White House Council on Environmental Quality will leave her post in February. Sutley is one of the longest-serving Obama administration leaders on environmental and energy issues, and has been tasked with overseeing Obama's efforts to adapt and respond to climate effects. Sutley plans to pursue other opportunities in the environmental energy arena.

Challenge to Gray Wolf Delisting Decision Proceeds in Federal Court

Conservation groups that challenged the Fish and Wildlife Service's decision to delist the gray wolf in Wyoming had their say in federal court in December when Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia heard oral argument in the case. Defenders of Wildlife, the Sierra Club, and the Center of Biological Diversity told Judge Jackson that Wyoming's state regulations are insufficient for maintaining the necessary wolf population, and it should not have been delisted in 2012. The U.S. countered that the Fish and Wildlife Service was fully satisfied with the state's wolf management plan. The case was taken under advisement for future decision from the court.

DOI Releases Revised Rules for Eagle Protection and Renewable Energy Development

On December 9, 2013, the U.S. Fish and Wildlife Service released changes to its eagle permitting regulations under the Bald and Golden Eagle Protection Act. The new rules can be found at 78 Fed. Reg. 73704 (Dec. 9, 2013). The Bald and Golden Eagle Protection Act prohibits the take, including the disturbance, of bald and golden eagles without a valid permit. Previous regulations allowed the Fish and Wildlife Service to issue permits for five years for eagle take, a period that did not reflect the actual operating life of many renewable energy projects. The revised rules will allow permits to be issued for 30 years, with a five year review. Only applicants who commit to adaptive management measures to ensure the preservation of eagles will be considered for permits longer than five years.

State News

Governor Mead Proposes Plan for Orphaned Wells

A combination of depressed gas prices and declining production from coal bed methane wells in the Powder River Basin have created an increased number of coal bed methane wells that are currently idle, orphaned or at risk of becoming orphaned. Currently, the Wyoming Oil and Gas Conservation Commission's records indicate there are over 19,000 idle wells in the Basin including more than 10,000 that are on state and fee lands that are subject to the WOGCC idle well program. Of these state and fee idle wells, there are approximately 1,200 wells that are already "orphaned" and another 3,200 that are "of concern" that could soon be orphaned.

Governor Mead has tasked the WOGCC and the Wyoming DEQ with creating a plan to plug these orphaned wells on a four year schedule. Included in the plan is the authority to hire a project manager to coordinate these efforts. The WOGCC currently has approximately \$16 million in its accounts. Most of this money has been accumulated through the conservation tax levied against oil and gas production. Governor Mead's proposal would give the WOGCC authority to use \$3 million of its current funds to plug orphaned wells. This \$3 million would supplement the money from forfeited bonds related to some of the orphaned wells.

Looking forward, the Legislature and the Governor's Office will consider additional funding alternatives to ensure that the well plugging program is funded by industry and that appropriations from the general fund will not be necessary. Current suggestions include increasing the conservation tax on producing wells, increasing bonding requirements, and requiring bonds to be put in place before a well becomes idle. The state agencies have been asked to review this program and come forward with proposals to fund the plugging of orphaned wells on a go forward basis.

Converse County Drilling Plans and Draft EIS

On January 15, 2014, the Converse County Commissioners and the local Wyoming legislative delegation sponsored a "Converse County Oil Development Seminar" at the Douglas High School. More than 100 landowners and concerned citizens attended the seminar to visit with and hear presentations from the Wyoming Department of Environmental Quality, the Wyoming Oil and Gas Conservation Commission, the Wyoming State Engineers Office, WYDOT, the Wyoming Water Development Commission, and the Wyoming Game and Fish. The state agencies discussed the regulatory requirements and listened to citizen concerns mostly revolving around air quality/flaring, water quality/fracking and well spacing/set back requirements.

In addition to the state agencies, the Casper Field Office of the BLM indicated that BLM's draft EIS for drilling in Converse County is suspected to be out for public review in the near term and will likely include a drilling estimate of as many as 5,000 new wells. A new EIS that includes a 5,000 well estimate for new wells is sure to create a great deal of controversy and many difficult issues with sage-grouse, water, and surface impacts, just to name a few. Holland & Hart will be watching closely to see the draft EIS as soon as it is public. Any entity with interests in Converse County should likewise monitor the progress of the draft EIS.

Update on Governor's Water Strategy

In November and December 2013, Governor Matt Mead's listening sessions designed to allow local residents to provide input into the Governor's water strategy continued around the state including Torrington, Lovell, Cheyenne, and Casper. One of the most consistent comments heard by Mead is a request for more water storage projects. During a December 20, 2013 news conference, Mead mentioned his interest in exploring small, medium and large water projects for the state of Wyoming. Mead noted challenges to Wyoming's water rights under the Colorado River Compact as a result of drought, particularly with respect to the upper Green River. Further, he cited Fontenelle Reservoir, located on the Green River, as a potential project source of 20,000 acre-feet of water, which has never been used, despite the fact that the state pays the federal government about \$640,000 per year to store the water. While storage projects are expensive, Mead said the state needs to do what it can, given the growing population in the West and the corresponding demands for water.

Legislative Update

The Wyoming 2014 Legislative Session is set to start Monday, February 10. This year is a budget session which means the legislature will only be in session for 20 working days. Any non-budget legislation is required to get a 2/3 vote in order to be introduced and considered in the budget session. This supermajority requirement and the limited number of days in session serve to limit non-budget bills. While early, there appears to be very little pre-filed legislation that would impact Environmental Compliance and Public Lands.

The legislature continues to examine its ability to control and manage public lands and legislation has been filed to create a "Select Committee on the Transfer of Public Lands." If enacted, the President of the Senate and the Speaker of the House would each nominate three respective members from their chambers to serve on the Select Committee. The Select Committee would be tasked with creating and analyzing processes to provide for the transfer of federal public lands to the State of Wyoming.

While not related to environmental compliance, a different piece of legislation could be of interest to oil, gas and coal producers. Currently, if the Department of Audit completes an audit of severance or ad valorem taxes and finds an underpayment, the interest rate associated with the monies owed to the State is an automatic 18% from the time the money would have been due. In most instances, it is many years from the time the money would have been due until the time the audit is complete. This proposed legislation would adjust the interest from a mandatory 18% to a minimum of 12% and up to 18%.

The Wyoming Mining Association is hosting a reception at Little America on February 18 at 6:00. Holland & Hart will be hosting a reception at Little America at 5:00, immediately before the Wyoming Mining Association reception on the 18th. We hope to see you there!

State Sues EPA Over Air Quality State Plan for Ozone Non-Attainment Areas

The State of Wyoming has filed its intent to sue EPA for the agency's failure to act on the state's implementation plan for non-attainment for new source review. The Upper Green River Basin in western Wyoming is currently designated as a non-attainment area for ozone. The state's plan provides a process for regulating and remitting new sources of emissions in that area, which incorporates federal standards but maintains state primacy over the program. The Clean Air Act requires EPA to take action on the plan within 18 months after the plan is submitted by a state.

EPA Issues Regional Haze Regulations

The longstanding battle over regional haze in Wyoming continues in light of EPA's release of sweeping regulations in early January. Wyoming submitted its regional haze plan in 2011. EPA then released its own strategy for regional haze in 2012, which included only parts of Wyoming's plan. Environmental groups then sued EPA for failing to meet federal

deadlines for establishing a regional haze plan, and the court in that case ordered, through a Consent Decree, that EPA issue a final rule by January 10, 2014. EPA issued its proposed rule in June 2013 for public comment. A series of public hearings occurred in Wyoming regarding the proposed rule and EPA accepted comments from Governor Mead, WDEQ, Wyoming's congressional delegation, and others.

The final rule released in January partially approves and partially disapproves of Wyoming's 2011 proposed plan. EPA did approve portions of the rule that had been previously proposed for disapproval in June 2013. EPA's plan requires specific emission control technologies on certain units at three power plants in Wyoming. These requirements contradict the state's determination for Best Available Retrofit Technology at those units. The final rule can be found [here](#).

Office of State Lands and Investments (OSLI)

Request for Royalty and Operator Report Cover Sheets

On November 18, 2013, the Wyoming Office of State Lands and Investments (OSLI) issued a Memorandum to all operators and payers of the state of Wyoming oil and gas lease and royalty interests reminding them to provide a cover sheet for each separate operator and royalty report submitted via eRMA2. The cover sheet should contain the following information: (i) company name and its OSLI company number; (ii) the production date(s) the media represents; (iii) the form types reported; (iv) the report payment number; (v) the payment type and amount; and (vi) the report(s) reference number(s) and the payment amount associated with each. The cover sheets should also contain any additional information that may be helpful in processing the report such as credit balances created from amendments. Additionally, if funds are to cover items such as interest or penalty payments, that information should be included on the cover sheet. The cover sheet allows the OSLI to more accurately process operator and royalty reports. Cover sheets can be emailed along with the support media or sent via United States Postal Service with the support media and payment.

Wyoming Oil & Gas Conservation Commission (WOGCC)

Along with DEQ, WOGCC Hosts Pavillion Working Group Meeting in December

On December 17, 2013, the Wyoming Department of Environmental Quality (WDEQ) and the Wyoming Oil and Gas Conservation Commission (WOGCC) hosted a Pavillion working group meeting in Riverton, Wyoming. The purpose of the meeting was to provide updates regarding the state's status on compiling and reviewing previously developed data on the East Pavillion water contamination issue. Additionally, a brief update was made about the cistern system for the Pavillion East Water Supply Project. Todd Parfitt, Director of the WDEQ, and Grant Balck, WOGCC Supervisor, reported that despite the addition of new team members, the process is continuing and several of the promised reports were still on track for the end of 2013. The studies include reviews of data on well bore integrity, abandoned surface pits adjacent to the wells, and domestic water wells. The domestic water well report is not expected to be complete until the

spring of 2014.

The Pavillion controversy involves landowners who contend that an oil and gas operator, and its predecessors, caused water well contamination near Pavillion, Wyoming through hydraulic fracturing (fracking) and other oil and gas recovery methods. An initial two-year study and investigation by the federal Environmental Protection Agency (EPA) was discontinued in June 2013 and the investigation was turned over to the state of Wyoming, after industry and the state expressed doubts over the EPA's conclusions and testing methods.

The state's process is to review all of the data developed by the EPA, plus outside data that was not previously studied, and hire experts to analyze the information in each of the three major areas of investigation.

The next working group meeting will likely be scheduled for March of 2014.

WOGCC Considers Increasing Oil & Gas Setback for Homes

The WOGCC is poised to consider increasing the current 350-foot minimum distance that oil and gas wells must be located from homes. The issue was raised in petitions from the Powder River Basin Resource Council in 2013, and has become a greater concern as oil and gas development is proposed near Douglas in the Niobrara Shale formation. The Casper Star Tribune reported that Grant Black, the WOGCC Director, commented, "We're going to look at the health and safety, obviously, and make sure if changes need to be made they're as appropriate as possible." A new standard for setbacks has not yet been proposed, and WOGCC will give the public an opportunity to weigh in on any proposal.

Wyoming Department of Environmental Quality (WDEQ)

State Prepares Forecasts for Winter Ozone in Upper Green River Basin
Ozone forecasting in Sublette County has resumed. Recent years have seen spikes in ozone during winter, particularly on days with no wind, lots of sunlight, and snow on the ground. Keth Guille, spokesperson for DEQ, says forecasts allow people to take precautionary measures like staying indoors. Forecasting also allows industry to plan for possibly curbing emissions. The Air Quality Division will continue the short-term emission reduction ozone contingency plan program with industry, government agencies, and other interested parties. These contingency plans are implemented on ozone action days, when weather conditions will likely cause elevated ozone levels. On those days, participants in the plan take short-term actions to further reduce emissions, such as eliminating vehicle idling and postponing nonessential trips.

Forecasting starts in January and runs through March. The public may access data about ozone levels [here](#).

AQD Approves Converse County Natural Gas Processing Plant
DEQ's Air Quality Division recently approved a permit for the Converse County Natural Gas Processing Plant. Construction will begin at the facility, which is jointly owned and operated by Access Midstream Partners and Crestwood Midstream Partners. The plant will satisfy a tremendous

need to move natural gas production in Converse county to market, preventing the flaring of gas producers cannot ship. At full capacity, the plant will process up to 120 million cubic feet of natural gas per day, said Debbie Nauser, an Access spokesperson.

Many Douglas residents opposed the plant due to concerns that it will degrade local air quality. The Powder River Basin Resource Council also said the facility might exceed federal ozone standards, causing the region to be classified as a nonattainment zone. Other Douglas residents, the industry proponents, and DEQ officials disagreed. The plant's permit is more stringent than federal standards and Converse county is not close to exceeding federal safety standards for ozone. "We issued a permit that we feel meets all the requirements from a regulatory and technical standpoint," said Steve Dietrich, administrator of DEQ's Air Quality Division. "It gives us no reason to believe the facility is not going to meet its permit requirements."

Mobile Air Monitor Remains in Converse County

DEQ has decided to keep an air quality monitor in Converse county for another year. After residents voiced concerns about emissions from new energy development, DEQ placed a mobile monitor near Douglas. So far there are no indications that air quality standards have been violated, though several days had high pollution levels.

DEQ typically moves its mobile air quality monitors to new locations each year. Due to more development occurring in Converse county, the agency decided to keep the monitor there until it becomes clear where the development will occur. Powder River Basin Resource Council praised the decision.

Mobile Air Monitor Placed in Lincoln County

In addition to the air quality monitor in Converse county, DEQ's Air Quality Division has begun operating an air monitor in Lincoln county. The monitor is located inside the city limits of Afton and will remain there for approximately one year. Real-time monitored data, including meteorological data, can be found www.wyvisnet.com.

Wyoming Industrial Siting Council Grants Delay for Medicine Bow Fuel & Power Plant

The Wyoming Industrial Siting Council granted a construction delay to Medicine Bow Fuel & Power LLC's proposed coal to liquids plant in Carbon county. Medicine Bow Fuel & Power requested an amendment to its permit due to delays and other project complexities. After concluding that the requested amendment would comply with land use plans and not cause significant adverse effects, the Industrial Siting Council granted the proposed delay amendment. The terms of the amendment require construction to resume by March 2017.

Land Quality Division Advisory Meeting on February 24, 2014

DEQ's Land Quality Division Advisory Board will meet on February 24, 2013. The primary agenda topic are proposed revisions to Chapters 1, 2, 6, 12, and 16 of the Land Quality Division's coal rules and regulations. The proposed rules address valid existing rights, ownership and control,

transfer or sale of permit rights, and blasting for coal mining regulations. More information regarding the meeting may be found in the agenda and public notice.

Water Quality Division Seeks Public Comment on Stream Reclassification
DEQ's Water Quality Division is gathering public comment on the reclassification of many streams in the state from primary contact recreation to secondary contact recreation. Primary contact recreation waters are those where recreational activities include immersion in or ingestion of the water. Secondary contact recreation waters are those where contact with water is expected to be incidental or accidental, not resulting in immersion or ingestion. The reclassification project is based on a categorical use attainability analysis that identifies streams unable to support primary contact recreational activities. Two main factors inform whether a stream should be reclassified: (1) insufficient stream flow to support primary contact recreational activities; and (2) distance from areas frequented by the public and/or children.

The preliminary public comment period ended September 30, 2013 and the Water Quality Division developed a response. Written comments on the proposed reclassifications are due by March 14, 2014. Information on how to submit comments is available in the public notice.

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.