

Wyoming Environmental Compliance and Public Land News - December 2016

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Public Land News

BLM Finalizes Venting and Flaring Rules, Followed Closely by Industry Lawsuit

The Bureau of Land Management's (BLM) final rule aimed at reducing emissions of methane and volatile organic compounds (VOC) from existing oil and gas production on federal and Indian Country lands will impose sweeping new requirements on producers as early as January of 2017—but it faces an uncertain future.

The Western Energy Alliance and Independent Petroleum Association of America filed challenges to the rule in Wyoming federal district court, followed by the states of Wyoming and Montana, and on November 23 the parties requested a stay of the regulation pending resolution of the litigation. Wyoming Senator John Barrasso, among others, have vowed to overturn the rule using Congressional Review Act authority, and the rule is on the list of EPA's recently promulgated regulations that the Trump Administration plans to reverse next year.

Unlike the Environmental Protection Agency's New Source Performance Standards (Subpart OOOO and OOOOa), which apply to new and modified sources, the BLM's rule is directed at existing sources. BLM estimates that the requirements will cover more than 96,000 Federal onshore oil and gas wells, which account for 11 percent of the country's natural gas supply and 5 percent of the oil supply, at an annual capital cost of between \$110 million to \$275 million.

The rule ramps down flaring at natural gas and oil wells and imposes capture requirements, requires operators to use an instrument-based approach to leak repair and detection, and imposes technology requirements for limiting leaks from pneumatic controllers and pumps, venting from storage vessels, and emissions from well maintenance and liquids unloading. The technology requirements are effective in January of 2017.

The rule also amends BLM's royalty provisions to specify that loss of gas is "unavoidable" and therefore royalty-free only under narrow circumstances. The loss is avoidable if gas is flared from a well that is not connected to a gas pipeline, as well as when gas is flared in violation of the capture requirements, regardless of whether the well is connected to a pipeline.

BLM issued these regulations pursuant to its statutory authority under the Mineral Leasing Act to “use all reasonable precautions to prevent waste of oil or gas on developed lands” and to regulate surface-disturbing activities so as to avoid damaging natural resources or environmental quality. Industry groups, along with Wyoming and Montana, oppose the rule on grounds that BLM has exceeded its narrow grant of statutory authority in an area that is already regulated by EPA and the states.

EPA Issues Proposed Rule to Regulate GHGs in PSD and Title V Permits

On October 3, 2016, EPA published a proposed rule to revise the permitting rules for Greenhouse Gas (GHG) emissions under the Clean Air Act. Most significantly, the proposed rule would set the Significant Emissions Rate (SER) for GHGs under the major source permitting program at 75,000 tons of carbon dioxide equivalent (CO₂e) per year, which is consistent with the threshold EPA has been applying informally since the Supreme Court overturned EPA's Tailoring Rule in the 2014 case *Utility Air Regulatory Group v. EPA*.

The rule, if finalized, would require a new major source or source with a major modification that triggers Prevention of Significant Deterioration (PSD) permitting for other criteria pollutants, (such as NO_x) to go through the Best Available Control Technology (BACT) review for GHG if the potential to emit GHG exceeds the 75,000 tpy SER. EPA is, however, taking comments on a SER as low as 30,000 tpy of CO₂e, which would sweep numerous sources into a technology review for GHGs.

See additional information [here](#).

Interior Releases Report on Mineral Potential Across 10 Million Western Acres

The Department of the Interior (DOI) is one step closer to deciding whether to withdraw approximately 10 million acres of sage-grouse focal areas from mineral development in Idaho, Montana, Nevada, Oregon, Utah, and Wyoming. On October 4, 2016, the U.S. Geological Survey released a comprehensive assessment inventorying mineral potential within the proposed withdrawal area. The report identified 1.3 million acres as moderate or high potential for mineral development, and immediately drew criticism from the mining industry and western lawmakers concerned with putting minerals in these areas off limits. The proposed withdrawal is a key element in the Bureau of Land Management's and Forest Service's land use management plan amendments across 11 western states to conserve sage-grouse habitat.

Department of the Interior Issues New Directive for Tribal Involvement in Federal Land Management

On October 21, 2016, U.S. Secretary of the Interior Sally Jewell issued a Secretarial Order encouraging cooperative management opportunities between the Department of the Interior and tribes. The directive was announced as protests at the site of the Dakota Access pipeline crossing in North Dakota swelled to a crescendo. The directive is designed to help fulfill the United States' trust responsibilities to the tribes and orders the Interior agencies to identify opportunities and undertake efforts to partner with tribes in the active management of lands, waters, and fish and wildlife

resources. Through the directive, the DOI recognizes the value of integrating traditional ecological knowledge and practices into land management decisions, but also cautions that the federal government is limited from delegating inherently federal functions to the tribes. In large part, each agency will be responsible for determining how to best implement the directive.

U.S. Fish & Wildlife Service Finalizes Mitigation Policy

On November 21, 2016, the Fish & Wildlife Service (FWS) released its final mitigation policy for addressing adverse impacts of land and water development on fish, wildlife, plants, and their habitats. The policy is the first comprehensive rewrite of the FWS's mitigation policy since 1981 and responds to challenges from accelerated habitat loss, climate change, and invasive species. It also seeks to employ advances in conservation science. The policy focuses largely on landscape scale conservation and seeks to achieve a net conservation gain, or in some cases, no net loss, when authorizing activities that may adversely affect species and their habitats.

U.S. Fish & Wildlife Service Reopens Proposed Rule to List the Wolverine

The U.S. Fish and Wildlife Service (FWS) reopened the comment period on a 2013 proposal to list a distinct population segment of the wolverine as threatened under the Endangered Species Act. The FWS withdrew its proposed rule to list the wolverine on August 13, 2014. The District Court for the District of Montana recently vacated the FWS's withdrawal. The process of determining whether listing the wolverine is warranted, beginning with the comment period, has now resumed. The comment period ended on November 17, 2016. More information can be found [here](#).

National Park Service and U.S. Fish & Wildlife Service Issue Final Rules for Oil and Gas

The National Park Service (NPS) issued final rules for oil and gas development covering private and state-owned oil and gas rights in the National Park System. Non-federal oil and gas rights exist in the National Park Service where the mineral rights were either not owned by a grantor who conveyed property to the NPS or reserved the rights. The new regulations update earlier regulations issued over 37 years ago by, in part, removing previously exempt operations, eliminating a bonding cap, improving enforcement authority, and authorizing the federal government to require compensation for access not included in an operator's oil and gas rights. For more information and to see the final rule, which will be effective December 5, 2016, go [here](#).

The U.S. Fish and Wildlife Service also recently issued new rules regarding oil and gas development on national wildlife refuges outside Alaska. These new regulations will increase oversight, require operators to obtain permits from the FWS to drill or modify wells, and to plug wells. It also outlines tougher standards for other activities, including waste management and unused infrastructure, and requires access fees for disturbing refuge resources. The new rule will cover the more than 100 operations that currently exist on wildlife refuges, not including wildlife refuges in Alaska, which operate under the Alaska National Interest Lands Conservation Act. The final rule, which will take effect on December 14,

2016, can be found here.

Onshore Orders 3, 4, and 5 Revised

The Bureau of Land Management (BLM) finalized revisions to Onshore Oil and Gas Orders 3, 4, and 5 in October. The revisions are meant to assure that production from federal and Indian tribal oil and gas leases is properly measured and recorded and that operators keep accurate records. The new rules also contemplate the new technology, "incorporate[ing] the latest industry standards, measurement technology, and use of practices" according to the agency. The new rules "establish a one-stop, national process for the review and approval of new measurement technologies and practices to allow them to be deployed quickly across BLM-managed leases." The revised Orders and more information can be found here.

State News

Wyoming Report Questions Wisdom of Federal Land Takeover

In November, a state-commissioned study warned of the implications of state management of Wyoming's federal lands. The study highlighted not only the legal and political impediments to state control of the federal lands, but also questioned whether the "sizeable infrastructure of human capital . . . and administrative and technological resources" could be brought to bear by the state to manage 25 million acres of federal land in addition to the 3.5 million acres currently owned by the state. The report also questioned whether the goals of state management, which are heavily focused on revenue generation, would conflict with the goals of multiple use of the public lands. State control could also jeopardize critical Payment in Lieu of Taxes and Secure Rural Schools payments that support rural communities and schools.

As an alternative to state management of the federal lands, the report recommended a stepwise approach to gain more state influence and control of federal management activities. The Theodore Roosevelt Conservation Partnership, which advocates for game conservation and land access for hunters, applauded the report, which it described as confirming its fear that state control would ultimately mean less access to public lands. Despite the report, members of the state lawmakers (members of the Select Federal Natural Resource Management Committee) voted to move forward with a proposed constitutional amendment that would specify how federal lands would be managed if ever transferred to state control.

Wyoming DEQ News

WDEQ Proposes New Bonding Rules

Amid worries that the downturn in the oil and gas industry could put additional oilfield wastewater treatment companies out of business, the Wyoming Department of Environmental Quality (WDEQ) is considering promulgating new rules, which would require bonding for all oil and gas wastewater facilities, regardless of age. On October 10, 2016, WDEQ presented this concept to the Wyoming Legislature's Minerals, Business and Economic Development Interim Committee. WDEQ next plans to discuss bonding with the oil and gas industry before deciding whether to

draft new rules, a process which could take several years.

Under the current rules, wastewater facilities under 27 years old must be bonded. Eleven older facilities are grandfathered under the 1989 rules and are not bonded. According to WDEQ, cleaning up and restoring older wastewater disposal facilities in Wyoming to a semi-natural state could cost between \$7.2 million and \$9.2 million. The new rules, if promulgated, would allow WDEQ to avoid spending state money to clean up abandoned oil and gas wastewater facilities.

WDEQ Extends Public Comment Period On New Procedural Rules

After discovering an error in the public noticing process, the Wyoming Department of Environmental Quality (WDEQ) has extended the public comment period and the Environmental Quality Council (EQC) has changed the hearing date for proposed revisions to WDEQ's Rules of Practice and Procedure. The comment period has been extended through 4:59 p.m. (MST) on December 20, 2016. Additionally, the EQC will now consider the proposed revisions at a public hearing on January 19, 2017, in Room 171, the Elk Room, of the Game and Fish Department, 5400 Bishop Boulevard, Cheyenne, Wyoming, commencing at 9:00 a.m. (MST).

Under the new procedural rules, the WDEQ, proposes to (1) revise the Rules of Practice and Procedure Chapters 1, 2, 3, 5, 6, and 7; (2) repeal Chapter 4 in its entirety; and (3) repeal Chapter 6 and replace it with a new Chapter 9. The proposed revisions adopt those portions of the uniform contested case rules developed by the Wyoming Office of Administrative Hearings that are consistent with the specific and distinct requirements of the WDEQ and EQC, and state or federal law governing or applicable to the WDEQ and EQC, in accordance with Wyoming Statute § 16-3-103(j). The proposed revisions also update and clarify requirements applicable to rulemaking, petitions for award of costs and expenses under Wyoming Statute § 35-11-437(f), director review involving surface coal mining operations, hearings before the WDEQ, and other very rare or uncommon areas.

The proposed rule revisions can be found at <https://rules.wyo.gov/>. Written comments should be sent to the Wyoming Department of Environmental Quality, 200 W 17th St, Cheyenne, Wyoming, 82002 or faxed to (307) 635-1784. Electronic comments may only be submitted through and accepted by the WDEQ comment portal provided at <http://deq.wyoming.gov/wqd/resources/public-comments-online/>.

WDEQ Releases Final Pavillion Groundwater Report—Fracking Not Causing Water Issues

On November 10, 2016, the Wyoming Department of Environmental Quality (WDEQ) released its 80,000 page Pavillion, Wyoming Area Domestic Water Wells Final Report and Palatability Study (Report), and concluded that bacteria is more likely to blame for the taste and odor problems in Pavillion area well water than fracking.

In addition to its own sampling, the WDEQ relied on 2014 Pavillion studies conducted by the Wyoming Oil and Gas Conservation Commission (WOGCC) to reach its conclusions. The WOGCC and WDEQ retained the

services of independent experts to assist staff with the reviews, investigations, analyses, and preparation of their final reports.

The Report contradicts a five-year-old United States Environmental Protection Agency (EPA) report suggesting hydraulic fracturing was the cause of the Pavillion area contamination, and is the result of the State of Wyoming's continued investigation into drinking water quality concerns in the Pavillion Gas Field area. While evidence could not tie water pollution to hydraulic fracturing in the gas fields near Pavillion, the Report recommends further monitoring.

The Report does not deviate substantially from the draft report released by Wyoming regulators in December 2015, which was heavily criticized by the EPA. In March 2016, EPA argued that Wyoming's draft report downplayed health risks and failed to provide evidence to support Wyoming's findings on the source of water contaminants. EPA averred Wyoming failed to provide proof of its claim that Pavillion field's gas wells were stimulated with small amounts of fracking fluid, and failed to address whether fluids could have escaped gaps in the protective layers around the field's gas wells.

WDEQ acknowledged it had difficulty determining how much seepage was due to gas wells because of natural movement of gas in the Wind River Formation, but WDEQ did not retract its previous conclusions.

A copy of the Final Report can be found at <http://deq.wyoming.gov/wqd/pavillion-investigation/>. The WOGCC's reports, are available at http://wogcc.state.wy.us/pavillion_wrk_grp.cfm.

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