Keeping Up: What Wyoming Practitioners Need to Know About Recent Energy & Environmental Regulations

Thursday, September 15th

2:45 - 5:00 PM
Keith Burron joined Crowley Fleck PLLP's Cheyenne office as a Senior Counsel in 2015. His practice in the areas of water rights and water quality spans 25 years in both the public and private sectors. Keith maintains a regional practice in water and natural resource matters serving clients in the industrial, agricultural, energy and commercial sectors. In 2015, he was appointed as an Alternate Commissioner for Wyoming on the Upper Colorado River Commission and he closely follows water policy issues in the western states.

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After winning an upset victory as a Democrat in one of America's most overwhelmingly Republican states, former Governor Dave Freudenthal served two terms as Wyoming's 31st governor. Freudenthal's eight years in office were marked by a constructive bi-partisan relationship with a Republican-dominated legislature, which ultimately moved the State of Wyoming forward on many fronts. Freudenthal strove to ensure Wyoming's long-term future by focusing on education, community-building and resource preservation. Freudenthal's administration worked to balance resource extraction and preservation with regulatory approaches designed to enhance long-term growth. Under his leadership, Wyoming was the first state to adopt meaningful regulation of hydraulic fracturing and worked to prevent a listing by the federal government of the Greater Sage Grouse. Freudenthal’s administration was also devoted to establishing a legal framework for carbon capture and sequestration and increasing pipeline capacity and electric transmission infrastructure to move Wyoming's energy to national markets. Upon leaving the office of Governor, Freudenthal enjoyed one of the highest approval ratings in the nation.

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Katie Schroder is a partner at Davis Graham & Stubbs LLP in Denver. Ms. Schroder counsels clients on oil and gas leasing and development on federal lands and agency compliance with
the National Environmental Policy Act, Endangered Species Act, and National Historic Preservation Act.

Mr. Schroder is currently a vice-chair, and former chair, of the Public Land and Resources Committee within the ABA’s Section of Environment, Energy, and Resources and sits on the board of directors of Western Energy Alliance. She also serves as a trustee to the Rocky Mountain Mineral Law Foundation.

After clerking for Justice Alex J. Martinez of the Colorado Supreme Court, Ms. Schroder began her career as an attorney-advisor in the U.S. Department of the Interior’s Office of the Solicitor as part of the Solicitor’s Honors Program. She then spent 10 years with a boutique law firm in Denver. She holds a B.A. from Rice University and a J.D. from the University of Colorado School of Law.

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Alexander K. Obrecht concentrates his practice on natural resources and energy regulation and litigation, including appeals, with a developing focus on energy transportation - particularly crude oil transportation by rail. He is part of the BakerHostetler team representing the Independent Petroleum Association of America and Western Energy Alliance in litigation against the U.S. Bureau of Land Management regarding its final rule on hydraulic fracturing on federal and Indian lands. Alex holds a B.A. in economics from Harvard University and a J.D. from the University of Wyoming College of Law. Prior to law school, Alex worked at Credit Suisse, a Swiss investment bank.

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Nancy has been the Administrator for the Wyoming Department of Environmental Quality, Air Quality Division since November 2015. Prior to joining the Division, Nancy served as special counsel for a Wyoming law firm. Nancy also represented the Division for ten years while serving as a Senior Assistant Attorney General at the Wyoming Attorney General's Office. Prior to practicing law, Nancy was a nurse.
BLM'S HYDRAULIC FRACTURING RULE AND THE OBAMA ADMINISTRATION'S OIL & GAS AGENDA

Alexander K. Obrecht
Wyoming State Bar Convention
Keeping Up: What Wyoming Practitioners Need to Know About Recent Energy & Environmental Regulations
Laramie, Wyoming
September 15, 2016

The Agenda

• The Hydraulic Fracturing Rule
• The Lawsuit
• Scope and Stakes of Hydraulic Fracturing on Federal Lands
• History and Politics
Hydraulic Fracturing: What Is It?

It is a well stimulation technique by which water, sand, and certain chemicals are injected into tight-rock formations (typically shale) to create fissure in the rock that allow oil and gas to escape for collection in a well.

Rulemaking Timeline

November 2010: Work Begins on HF Rule
May 2012: First Proposed Rule
May 2013: Revised Proposed Rule
March 2015: Final Rule
First Proposed Rule

Focus on “Best Practices”

- Confirmation that wells used in fracturing operations meet appropriate construction standards:
  - Isolation of “usable water” up to 10,000 TDS ppm
  - CBLs before stimulation activities
- Require the public disclosure of chemicals used in hydraulic fracturing operations on Federal lands; and
- Require that operators put in place appropriate plans for managing flowback waters from fracturing operations.

Moving the Needle:

- Well Integrity
  - Type well concept
  - CEL v. CBL
  - Limited application to hydraulic fracturing
  - Revised definition of “usable water”
- FracFocus
- Water Management
  - Flowback vs. Produced Water
  - Pits vs. Tanks
- Variances
Final Rule: 80 Fed. Reg. 16,128
Key Provisions

The Lawsuit

- Petitioners
- Procedural History
- Preliminary Injunction
- Ruling on the Merits

March 20-26, 2015: Petitions for Review
June 24, 2015: HF Rule Stayed
September 30, 2015: Preliminary Injunction Entered
June 21, 2016: HF Rule Set Aside
The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

U.S. Const. art. 4 § 3, cl. 2.
The Safe Drinking Water Act prohibits "any underground injection" without a permit, 42 U.S.C. § 300h(b)(1)(A), (C), and defines "underground injection" as "the subsurface emplacement of fluids by well injection."

"Underground injection of contaminants is clearly an increasing problem. Municipalities are increasingly engaging in underground injections of sewage, sludge, and other wastes. Industries are injecting chemicals, byproducts, and wastes. Energy production companies are using injection techniques to increase production and to dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems by underground disposal methods. Part C is intended to deal with all of the foregoing situations insofar as they may endanger underground drinking water sources."


Legal Envtl. Assistance Found., Inc. v. EPA, 118 F.3d 1467, 1474-75 (11th Cir. 1997).

"The process of hydraulic fracturing obviously falls within this definition, as it involves subsurface emplacement of fluids by forcing them into cavities and passages in the ground through a well."

"Congress directed EPA to regulate ‘underground injection’ activities, not ‘injection wells.’"
Energy Policy Act of 2005

Regulations of the Administrator under this section for State underground injection control programs may not prescribe requirements which interfere with or impede—

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas.

Unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

42 U.S.C. § 300h(b)(2)

The term “underground injection” excludes “the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.”

42 U.S.C. § 300h(d).
Scope & Stakes

- Federal Lands
- Surface Management
- Revenues
The Federal Mineral Estate

- 700 million subsurface acres
- 56 million acres of Indian mineral estate
- Appx. 36 million acres currently under lease (in 33 states)
- 47,000 active oil and gas leases on public lands*
- 95,000 oil and gas wells*

*As of June 30, 2014

U.S. Offshore Undiscovered Technically Recoverable Federal Oil and Natural Gas Resources
(billion barrels — Bbl and trillion cubic feet — Tcf)

87% of federal offshore acreage is off limits to development

Source: The Bureau of Ocean Energy Management (BOEM)

Source: API, Feb 2015 Offshore Access Report
Management Responsibility

Percent of Federal Lands

- BLM, 247.3 million acres
- Forest Serv., 192.9 million acres
- FWS, 89.1 million acres
- NPS, 79.6 million acres
- Defense, 14.4 million acres
- Other Agencies, apx. 20 million acres

Source: Congressional Research Serv., Fed. Land Ownership: Overview & Data at 1 & Table 2 (Dec. 29, 2014).

In fiscal year 2014, onshore federal oil and gas leases alone produced about 148 million barrels of oil, 2.48 trillion cubic feet of natural gas, and 2.9 billion gallons of natural gas liquids, with a market value of almost $27 billion and generating royalties of almost $3.1 billion. 80 Fed. Reg. 22,148, 22,150 (Apr. 21, 2015).

“one of a handful of Federal agencies that generates more revenue for the United States than it spends”
8/17/2016 Wyoming State Bar: HF Rule

Obama Administration

- The HF Rule: History and Significance
- Candidate Obama
- President Obama
- The Second Term “Regulatory Assault”
- The Federal Exodus

Source: Center for Western Priorities, *A Fair Share: The Case for Updating Oil and Gas Royalty Rates on Our Public Lands* at 5 (June 18, 2015).
Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands

The BLM began work on this rule in November 2010, when it held its first public forum amid growing public concern about the rapid expansion of complex hydraulic fracturing.

June 24, 2011: U.S. oil rig count exceeds 1,000

Source: Baker Hughes North American Rig Count

8/17/2016 Wyoming State Bar: HF Rule
State Response September 2010

1. Protection of Groundwater and the identification of permitted water supply wells within a quarter-mile of the drilling site;
2. Clarification of Requirements for well integrity, casing setting depths, casing design, and cementing properties;
3. Requirements for disclosure of well stimulation fluid chemical additives, compounds, and concentrations or rates; and
4. Requirements for the handling of recovered fluids

Local Efforts

August 2011: The Town of Dryden amends its zoning ordinance “to specify that all oil and gas exploration, extraction and storage activities were not permitted in Dryden.” In re Wallach v. Town of Dryden, 16 N.E.3d 1188, 1192 (N.Y. 2014).

Cecil Ordinance No. 9-2011 (December 2011)

- Converts oil and gas development to a conditional use
- Includes regulatory oversight of:
  1. Road Use, Bonding, and Traffic Safety
  2. Site preparation (clearing and cutting)
  3. Equipment Placement
  4. Work and access hours
  5. Coordination with first responders
  6. Dust control
  7. Noise control
  8. Air Quality & Emissions
  9. Lighting restrictions
  10. Notice to adjacent stakeholders and local officials
  11. Application and Attorneys’ fees
  12. Insurance
  13. Local officials’ inspections
  14. Wildlife protection
  15. Security
  16. Worker Housing
• Four oil and gas leases covering 2,700 acres in Fresno and Monterey counties

• Prepared an EA at leasing stage, relying on a 2006 EIS that envisioned a development scenario of fewer than 15 wells (and only one well on the lease parcels) within the next 15-20 years

• BLM reasoned site-specific review could be performed at drilling state

• 2 of 4 leases included NSO provisions


I am absolutely certain that generations from now, we will be able to look back and tell our children that this was the moment when we began to provide care for the sick and good jobs to the jobless; this was the moment when the rise of the oceans began to slow and our planet began to heal.

Barack Obama
St. Paul, Minnesota
June 3, 2008
“We’re going to have to prioritize”

“Energy we have to deal with today, . . . Health care is priority number two.”
Belmont University (Nashville, Tennessee)
Broad Regulatory Initiatives

### Regulations Rundown | Moves planned by the Obama Administration

<table>
<thead>
<tr>
<th>REGULATORY ACTION</th>
<th>THE BASICS</th>
<th>PROPOSAL</th>
<th>FINAL</th>
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</thead>
<tbody>
<tr>
<td>Hydraulic Fracturing</td>
<td>The Interior Department plans to require chemical disclosure and tougher standards for fracking for natural public lands.</td>
<td>May 2013</td>
<td>Early 2015</td>
</tr>
<tr>
<td>Methane Emission Regulations by the EPA</td>
<td>EPA has a high-level goal to establish the first national standard for methane emissions as an air pollutant.</td>
<td>January 2015</td>
<td>To Be Determined</td>
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<tr>
<td>Arctic Drilling</td>
<td>The Interior Department is reviewing proposed regulations for offshore drilling in the Arctic.</td>
<td>Early 2015</td>
<td>October 2015</td>
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<tr>
<td>Royalty Rules for Onshore Oil and Gas Leases</td>
<td>The Interior Department will seek comment on whether it should change the royalty process for onshore oil and gas leases, as it could result in “meaningful public benefit,” according to the administration.</td>
<td>Early 2015</td>
<td>To Be Determined</td>
</tr>
<tr>
<td>Blowout Preventers</td>
<td>The Interior Department is promulgating tougher standards for blowout preventers, a kind of safety equipment that prevents downhole and surface pressure events.</td>
<td>February 2015</td>
<td>July 2015</td>
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<tr>
<td>Methane Emission Regulations by the Interior Department</td>
<td>Interior’s Bureau of Land Management is working on a rule to require companies to report how much methane they emit, as a component of natural gas, is vented from oil and gas wells.</td>
<td>April 2013</td>
<td>April 2016</td>
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<tr>
<td>Necessity of a 2013 EPA Fracking Rule Repeal</td>
<td>EPA is reviewing a 2013 finding that the agency’s regulations for disclosure of chemical ingredients in hydraulic fracturing are unnecessary.</td>
<td>May 2015</td>
<td>June 2016</td>
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<td>Transportation of Crude Oil by Rail</td>
<td>Focused on the threats to safety and environment posed by crude oil shipments by train.</td>
<td>July 23, 2014</td>
<td>2015</td>
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<td>Renewable Fuel Standards</td>
<td>Lowers the amount of renewable fuels that must be blended into transportation fuels, accounting for the increased uncertainty in oil prices.</td>
<td>November 15, 2013</td>
<td>2015</td>
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Source: WALL STREET J. (Dec. 29, 2014)

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Second Term Regulatory & Enforcement Initiatives

<table>
<thead>
<tr>
<th>Initiative</th>
<th>Date</th>
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<tr>
<td>“Unbundling” of processing costs</td>
<td>2012-2013</td>
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<tr>
<td>Private Oil and Gas Development within NWRS</td>
<td>Feb. 24, 2014</td>
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<td>ONRR Civil Penalty Assessment</td>
<td>May 20, 2014</td>
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<td>Rights-of-Way on Indian Lands</td>
<td>June 17, 2014</td>
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<td>Valuing of Oil and Gas for Royalty Assessment</td>
<td>Jan. 6, 2015</td>
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<td>Lease Terms</td>
<td>Apr. 21, 2015</td>
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<td>“Major Portion Pricing” for Indian royalties</td>
<td>June 12, 2015</td>
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<td>Onshore Order 3</td>
<td>July 13, 2015</td>
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<td>Sept. 30, 2015</td>
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<td>Onshore Order 5</td>
<td>Oct. 13, 2015</td>
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<td>Venting &amp; Flaring</td>
<td>Feb. 5, 2016</td>
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Total Number of “Major” Final Rules Published 1997-2014

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<td>2013</td>
<td>80</td>
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<td>2014</td>
<td>80</td>
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Source: Government Accountability Office
Ensuring the Taxpayer a Fair Return for Federal Onshore Oil and Gas Resources Act of 2015

- Amend 30 U.S.C. § 226 to raise minimum royalty from 12.5% to 18.75%
- Double minimum bonus bid from $2 to $4 per acre
- Double minimum annual rentals from $1.50 to $3 per acre (and from $2 to $4 per acres after five years)

Baker Hostetler

Falling Behind

BLM believes that the additional information that would be required by this rule would be reviewed in conjunction with the APD and within the normal APD processing timeframe. If an operator submits a request in an NOI, however, further processing time should be expected. 80 Fed. Reg. at 16,177.
Dare to Flare?

That's why I'm going to push to change the way we manage our oil and coal resources, so that they better reflect the costs they impose on taxpayers and our planet.
Thanks and Go Pokes!

Alex Obrecht concentrates his practice on natural resources and energy regulation and litigation, including appeals, with a developing focus on energy transportation, particularly crude oil and liquefied natural gas transportation by rail. Having grown up and attended law school in Wyoming, one of the leading energy-producing states in the country, Alex adds a practical understanding to the complex legal environment in which his clients operate.

Prior to law school, Alex worked with Credit Suisse, a Switzerland-based investment bank. During his tenure, he was involved in securities trading that occurred after the Macondo well blowout, which gave Alex insight into the corporate and financial aspects of issues affecting his energy clients.

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Recent Federal Water-Related Initiatives Important to Wyoming Practitioners

Keith Burron
Crowley Fleck PLLP
Wyoming State Bar Annual Meeting, 2016

High Points for Wyoming Practitioners:

• Federal Initiatives and Updates:
  • Waters of the United States Rule (WOTUS)
  • US Supreme Court’s ACOE v. Hawkes Co. Decision
  • EPA “Draft Technical Report” on the effect of stream depletions on aquatic life
1. WOTUS Rule:

- EPA & Corps 2015 Rule defining “Waters of the United States” for jurisdictional purposes under the CWA. Proposed as a result of Supreme Court decisions providing guidance on reach of CWA that suggested a need for clarity over what is jurisdictional.

- Rule is Controversial and extensive PR campaigns on both sides:
  - Farm Bureau “Ditch the Rule”
  - EPA “Ditch the Myth” and extensive social media campaigns
  - GAO—Aspects of EPA’s social media campaign violated prohibitions against publicity or propaganda and grass roots lobbying.

Debate and uncertainty is most evident where there is typically little or no water — “Adjacent” and “Other” Waters under the Rule (“Significant Nexus”)

![Image of a field and road]
WOTUS Determination--Broad Reaching Effects

• Implicates several sections of the Clean Water Act—
  • Federal prohibition on discharges of pollutions except in compliance with CWA (Sec. 301)
  • Requirements for point source discharge permits (NPDES) and Dredge and Fill Permits (Sec. 402, 404)
  • Water quality standards and measures to attain them (Sec. 303)
  • Oil spill liability and spill prevention and control measures (Sec. 311)
  • Certification of compliance with state water quality standards (Sec. 401)
  • Enforcement (Sec. 309)
• Also impacts other federal laws, e.g., Oil Pollution Act, ESA (T&E consultation triggered by issuance of federal permits).
Current Status of WOTUS Rule and Challenges

- Judicial review started before rule was final. Dozens of federal court challenges in district and circuit courts.
- Many circuit cases consolidated in 6th Circuit, which issued nationwide stay of the Rule on October 9, 2015 and found petitioners had demonstrated a substantial possibility of success on the merits of their claims. Subsequent 6th Circuit determination that it in fact has jurisdiction to hear the merits.
- North Dakota District Court challenge by 13 states, including Wyoming. District Court ordered stay of rule in the 13 states. Case on hold pending 6th Circuit’s decision, but not dismissed.
- 11th Circuit also has case pending which could result in potential circuit split.
- Congress passed a joint resolution of disapproval that would have stopped the rule. President vetoed the resolution in February, 2016. Cases continue.

2. Supreme Court Case: ACOE v. Hawkes Co., 5/31/16

- Issue: Is a Corps of Engineers approved Jurisdictional Determination (JD) final agency action appealable to federal district court under the APA?
- Background: Project proponent can seek a JD where there is a question about whether an action will affect WOTUS and require a federal permit, or whether no permit is required.
- Corps can issue a JD that is binding on EPA and the Corps for 5 years (“safe harbor”).
- But, if JD finds jurisdiction present and the proponent disagrees, the Corps has historically said the JD is not reviewable final agency action under APA.
- That leaves proponents the option of risking an enforcement action if they proceed without a permit, or following the permitting process (time and money) and seeking review after a final permit decision.
- Proponent in Hawkes disagreed with Corps JD finding of jurisdiction and appealed the JD. D. Ct. found the JD not reviewable, 8th Cir. reversed, unanimous Supreme Court affirmed the 8th Circuit. So, approved JD’s are final agency action appealable under the APA.
Thoughts Regarding *Hawkes* Decision

- Will Corps be reluctant to issue approved JD’s and instead rely more on advisory preliminary determinations, which offer proponents less certainty and protection from potential enforcement?

- What does it mean for WOTUS cases, if anything? Justice Kennedy concurring opinion—CWA reach is notoriously unclear and “continues to raise troubling questions regarding the government’s power to cast doubt on the full use and enjoyment of private property throughout the Nation.”

- Justice Kennedy concurrence viewed as significant to WOTUS cases due to EPA and Corps heavy reliance on his prior concurring opinion in *Rapanos*, which spawned the agencies extensive development of the widely criticized “significant nexus” test in the WOTUS rule.


- EPA asserts the draft Report was “developed because hydrologic alteration can be a contributor of impairment for water bodies that are designated to support aquatic life.” (Regulations.gov EPA notice)

- Draft Report purports to be a “nonprescriptive framework” to “quantify flow targets for the preservation of aquatic life and habitat” and provides framework to “develop flow targets to protect aquatic life and habitat.”

- Comment period produced significant opposition to the draft Report from industry, states, water suppliers and agriculture.
EPA-USGS Draft Technical Report (Continued)

- Public Comments widely criticize the Report, highlighting that:
  - CWA jurisdiction is over pollutants, not flow.
  - The CWA does not permit regulation of flow and the Report recommends action in contravention of Section 101(g), which expressly protects the authority of states to allocate quantities of water.
  - The Report fails to consider the importance of water uses other than aquatic life, fails to accommodate unavoidable hydrologic alteration associated with all human activities, and incorrectly implies that hydrologic alteration is necessarily detrimental to aquatic life.
  - The report, styled as a “technical” document, also discusses policy and legal issues, recommending that states take certain actions to incorporate flow into water quality standards under the auspices of the CWA.
  - Wyoming commented through Governor’s Office, WDEQ and WSEO.

4. Water Issues Summary

- Current federal initiatives are asserting broader jurisdiction over what land and water features are jurisdictional under the CWA.
- Current federal initiatives are examining ways to broaden traditional water quality regulation to include control of land use and to include flow as a component of water quality regulation.
- Strong resistance by states and other stakeholders has been important to counterbalancing these federal efforts.
- The interplay between federal and state jurisdiction over water resources, and the evolving judicial landscape on these issues present significant challenges for Wyoming practitioners trying to advise clients on “routine” industry, agricultural and land use issues.
Thank You
Keeping Up: What Wyoming Practitioners Need to Know About Recent Energy & Environmental Regulations - Air Quality

Wyoming State Bar - September 15, 2016
Nancy E. Vehr

Disclaimer
Nancy is here on her own time. Her views and opinions are her own and do not necessarily represent the official policy or position of the State of Wyoming, the Department of Environmental Quality, or the Air Quality Division.
Highlights for the next 20 minutes . . .

- Overview of the Clean Air Act and Wyoming’s Air Quality Program
- Recent/Pending Air Quality Regulations:
  - Clean Power Plan
  - Regional Haze
  - Sulfur Dioxide (SO₂)
  - Ozone
  - Exceptional Events
  - OOOOa (pronounced “Quadoay”)
  - Source Determination
  - and many others . . .

Overview of the Clean Air Act

- Title I: Air Pollution Prevention and Control

PRIMACY - “Congress finds ... that air pollution prevention ... and air pollution control at its source is the primary responsibility of States and local governments ...”  CAA § 101(a)(3)

PURPOSE: “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population”  CAA §101(b)(1)

How?
- National Ambient Air Quality Standards (NAAQS)  CAA § 109
- Implementation Plans (SIP/FIP)  CAA § 110
- New Source Performance Standards (NSPS)  CAA § 111
- National Emission Standards for Hazardous Air Pollutants (NESHAPS)  CAA § 112
- Prevention of Significant Deterioration (PSD)  CAA §§ 160 - 169
- Visibility (aka Regional Haze)  CAA §§ 169A & B
- Nonattainment Area Provisions  CAA §§ 171-193
Overview of Wyoming Air Quality

- Wyoming Environmental Quality Act (W.S. § 35-11-102)
  “Whereas pollution of the air... of this state will imperil public health and welfare [create nuisances, be harmful, and impair beneficial uses]; it is hereby declared to be the policy and purpose of this act to enable the state to prevent, reduce and eliminate pollution; to preserve, and enhancement of the air ... resources of the state; to preserve and exercise the primary responsibilities and rights of the state of Wyoming; to retain for the state the control over its air ... and to secure cooperation ... in carrying out these objectives”

- How? (W.S. § 35-11-___)
  - Article 1: General Provisions
  - Article 2: Air Quality
    - Discharge/Emission restrictions (-201)
    - Ambient Standards (-202)
    - Title V Operating Permits (-203 to -212)
    - Greenhouse Gas Restrictions (-213)
    - Emission Trading (-214)
  - Article 7: Complaints
  - Article 8: Permits
  - Article 9: Penalties
  - Article 10: Judicial Review

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  - (O) 307-777-8578
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  - (O) 307-777-3746
  - (C) 307-421-1692
- Air Quality Advisory Board
  - Timothy Brown
  - Diana Hulme
  - Klaus Hanson, PhD
  - Douglas Vickrey
  - John Heyneman
Inventory, Monitoring, Permitting, And Compliance Tracking (IMPACT)

- Enhance the quality, efficiency, and consistency of the Division’s management of air quality data
- Minimizes administrative permit processing time
- Minimizes repetitive data entry
- Submit data electronically
- Data transparency
Recent/Pending Air Quality Regulations

Clean Power Plan
* New Sources
* Existing Sources
* Federal Plan
* Model State Plan
* Clean Energy Incentive Program
**Background: Electrical Grid**

- 49.6 MWh
- 66% consumed outside of Wyoming
- Generation mix of 88% coal, 9% wind, and 3% NG and hydro
- Rate Based Generation of 2,331 lbs CO₂/MWh
- Mass Based Generation of 49,998,736 tons CO₂

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**Background: Wyoming Electrical Generation in 2012**

- 49.6 MWh
- 66% consumed outside of Wyoming
- Generation mix of 88% coal, 9% wind, and 3% NG and hydro
- Rate Based Generation of 2,331 lbs CO₂/MWh
- Mass Based Generation of 49,998,736 tons CO₂
New Sources aka § 111(b)

- **2012:** EPA proposal
- **2014:** EPA withdrew previous and re-proposed
- **10/23/2015:** Final Rule - 80 FR 64510
- **Coal Limits**
  - New: 1400 lbs CO2/MWh-gross with Supercritical Pulverized Coal and Carbon Capture
  - Modified: If >10% increase/5 years then standard = best historical annual since 2002
  - Reconstructed: 1800 - 2000 lb CO2/MWh-gross if heat input >/< 2000 MMBtu/hr
- **Natural Gas Limits**
  - New/reconstructed 1000 lb CO2/MWh-gross; 120 lb CO2/MMBtu for non-base load
- **Briefing through November 2016**

Existing Sources aka § 111(d)

- **6/18/2014:** Proposal (79 FR 34830) (WY Rate goal = 1714 lb/MWh; DSM)
  - WY DEQ and PSC Comments
- **10/23/2015:** Final Rule 80 Fed. Reg. 64662
  - Decrease CO2 EGU Emissions by 32% by 2030
  - WY Rate based goal for 2030 of 1299 lb CO2/MWh (44.27%)
  - WY Mass based goal for 2030 of 31,634,412 tons of CO2
  - Differences: State/regional; 3 Building Blocks (Efficiency, gas, RE)
    - Appealed to DC Circuit
- **12/21/2015:** Wyoming Petitioned EPA for Reconsideration
- **1/21/2016:** DC Circuit denied Motions for Stay
  - 27 State Petitioners / 18 State Respondents
- **2/9/2016:** US Supreme Court Stay
- **3/3/2016:** Wyoming Budget Bill § 020, footnote 3
- **9/27/2016:** Oral Argument, DC Circuit en banc panel
Existing Sources Briefing:

- **Legal Issues:**
  - EPA’s methodology for setting emission rates is flawed
    - No clear congressional authorization for significant effects on US economy
    - Standards not achievable at individual sources
    - Generation shifting ≠ standard of performance
  - § 111(d) clause prohibits regulation because plants already regulated under § 112
  - § 111(d) grants authority to States not EPA to establish standards of performance
  - Tenth Amendment prohibits EPA from forcing States to implement

- **Procedure/Record-based Issues:**
  - Violates rulemaking procedures because final rule is not logical outgrowth of proposal
  - EPA did not adequately demonstrate BSER (reliable, efficient, not exorbitantly costly)
  - Arbitrary & Capricious not to allow plants constructed before 2013 to generate credits
  - Arbitrary & Capricious not to consider lignite unique, infrastructure build, & reliability
  - Arbitrary & Capricious state goals

Existing Sources: Wyo Budget § 20, fn 3

3. No funds appropriated in this section shall be expended to produce a state plan to implement provisions of the Environmental Protection Agency’s Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (October 23, 2015) while the stay issued by the United States Supreme Court in the case of West Virginia, et al. v. EPA, et al., Docket No. 15A773, remains in force and effect. Nothing in this footnote shall prohibit the expenditure of funds by the department to attend meetings and otherwise be informed as to any potential need to develop and submit a state plan.
Existing Sources: STAY

- 9/6/2016: Final Plan or Extension Demonstration Submittal
- 9/6/2017: Extension Demonstration Progress Update
- 9/6/2018: Extension Demonstration Final Plan
- 7/1/2021: State milestone status reports
- 1/1/2022: Start of Compliance Periods
- 7/1/2025: Step 1 goal state demonstration for period 2022-2024
- 7/1/2028: Step 2 goal state demonstration for period 2025-2027
- 1/1/2030: Deadline to meet emission goal
- 7/1/2030: Step 3 goal state demonstration for period 2028-2029
- 7/1/2032: State demonstration for final 2030 goal and every 2 years

Existing Sources NOT Stayed:

- Federal Plan and Model Trading Rules
  - 10/23/2015 - Proposed - 80 FR 64965
  - Rate - emission reduction credit
  - Mass - allowances
  - 1/21/2016 - Wyoming Comments
    - Stranded assets - remaining useful life
    - Impediments to market development
    - Early action credits/allowances is illusory
    - Automatic approval to avoid state plan backlog
    - Prefer state instead of federal administrative appeals process

- Clean Energy Incentive Program
  - 6/30/2016 - Proposed - 81 FR 42940
  - 9/2/2016 - Comment period ends
Regional Haze

Regional Haze: haziest day causes - 2014
Regional Haze

- 7/1/1999: EPA’s Regional Haze Rule
- 2003 - 2011: Wyoming submits plan and revisions to EPA
- 12/12/2012: EPA approves Wyoming’s Plan for SO₂ and PM
- 12/16/2013: Wyoming’s 5-year progress report out for public comment
- 1/30/2014: EPA partially disapproves Wyoming’s Plan for Nox
- 9/9/2014: Tenth Circuit stays EPA’s disapproval
- 5/4/2016: Proposes Amendments to Plan Requirements - 81 FR 26942
  Clarify, 7/2021 SIP due dates; Revise RAVI & Progress Reports
- 7/8/2016: Draft guidance document available for comment - 81 FR 44608
- 7/31/2018: Updated SIPs due

Sulfur Dioxide (SO₂)
SO\textsubscript{2}:  2010 Standard/Implementation and DRR

- 6/22/2010: EPA Final Rule (75 Fed. Reg. 35520) - 75 ppb/1hr
- 8/5/2013: EPA nonattainment designations (78 FR 47191)
- 3/20/2015: EPA Updated Guidance for Area Designations
- 8/21/2015: Data Requirements Rule - 80 FR 51052 - Sources >2000 tons/yr
  - Emission Limit < 2000 TPY, Model, or Monitor
- 1/15/2016: AQD source list submitted
- 7/1/2016: AQD submitted Monitoring Plan and Protocols
- 7/2/2016: Round 2 Designations - None in Wyoming
- 1/1/2017: Monitoring Sites operational x 3 years
- 1/13/2017: Modeling Analyses submittal deadline
- 12/31/2017: Round 3 Designations [non-monitored areas]
- 12/31/2020: Round 4 Designations [monitored/other areas]

DRR:  Wyoming Sources
Ozone:

- **2008**: Ozone Standard - 75 ppb (annual 4th-highest daily max 8hr avg)

- **5/21/2012**: Nonattainment Designations
  Wyoming UGRB

- **7/20/2015**: Marginal Area Attainment Date

- **5/4/2016**: Determination of Attainment for Wyoming’s UGRB - 81 FR 26697

- **6/29/2016**: Notice of lodging proposed Consent Decree - 81 FR 42351
**Ozone: 2015 Standard/Implementation**

- **10/1/2015:** Final Rule
  - EPA Ozone Implementation Memo
- **12/30/2015:** EPA issued white paper on background ozone
- **2/25/2016:** EPA issued Area Designations Guidance
  - EPA workshop on background ozone
- **10/1/2016:** State’s Proposed Designation Recommendations Due
- **6/2/2017:** EPA’s 120-day designation response letter
- **10/1/2017:** EPA final designations
- **10/2018:** Infrastructure State Plans Due

**Background Ozone**

[Map showing background ozone levels across the United States]
Ozone Design Values: 2012-2014

Exceptional Events
Exceptional Events and Wildfire Guidance

- CAA § 319 - may exclude monitoring data influenced by exceptional events from the calculation of whether a monitor is violating an ambient standard


- 2/3/2016: Wyoming Comments on proposed Rule and Guidance

- Final Rule (pending)
NSPS OOOOa Coverage:

- **Production & Processing**
  1. Drilling and Well Completion
  2. Producing Wells
  3. Gathering Lines
  4. Gathering and Boosting Compressors
  5. Gas Processing Plant

- **Transmission & Storage**
  6. Transmission Compressor Stations
  7. Transmission Pipeline
  8. Underground Storage

- **Distribution** (not covered by these rules)
  9. Distribution Mains
  10. Regulators and Meters for:
      a. City Gate
      b. Large Volume Customers
      c. Residential Customers
      d. Commercial Customers

Source: Adapted from American Gas Association and EPA Natural Gas SEIS Program

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**NSPS OOOOa**

- **4/15/2014:** EPA White Papers - Wyoming submitted comments
- **9/18/2015:** EPA Proposed OOOOa
- **6/3/2016:** EPA Final Rule - 81 FR 35824
- **5/12/2016:** Wyoming’s 2016 Oil and Gas Permitting Guidance

  - DEQ’s comments
    - BLM lacks air quality regulatory authority
    - Inaccurate emission stream assumptions
    - Creates redundancy and inconsistency
    - Variance process flaws

- Information Collection Requests: Existing Sources & Emerging Technologies
Source Determination

Source Determination aka Aggregation

- **9/18/2015:** EPA Proposed
  - Option 1 - “Adjacent” means nearby (1/4 mile)
  - Option 2 - “Adjacent” means functionally interrelated (> ¼ mile ok)

- Wyoming’s robust permitting program applies Best Available Control Technology (BACT) and uses 3 part test:
  - Common control and ownership
  - Same 2-digit Source Industrial Classification Code
  - Contiguous or adjacent

- **6/3/2016:** EPA Final (81 FR 35622)
Source Determination: Adjacent

Many other items . . .

- Ambient Standard reviews and implementation (Designations and Infrastructure plans)
- PSD Compliance Demonstration Tools (pending)
  - Significant Impact Level (SILs) Guidance for Ozone and PM$_{2.5}$
  - Model emissions rates for precursors
- Guideline on Air Quality Models (Appendix W to 40 CFR Pt. 51) (pending)
- E-Notice Rule for NSR and Title V Permitting (Wyoming Comments)
- Regional Consistency regulation amendments (final)
- Title V
  - Removal of the Title V “emergency” affirmative defense regulations (pending)
  - Title V Petitions (pending)
  - Title V Program and fee evaluation guidance (pending)
- Cross-State Air Pollution Rule (CSAPR aka “Transport Rule”) (pending)
QUESTIONS?

THANK YOU!
THE UNINTENDED IMPACTS OF AVOIDING A SAGE-GROUSE LISTING

KATHLEEN C. SCHRODER
SAGE-GROUSE LISTING BACKGROUND

- Not warranted determination on January 12, 2005.
  - Overturned by court in December of 2009.
- Warranted but precluded determination in March of 2010.
- Threats cited included:
  - Lack of protection in land use plans
  - Energy development
- Center for Biological Diversity settlement required listing decision in FY 2015.

CHALLENGES TO LAND USE PLANS

- Western Watersheds Project challenged all Bush Administration RMPs in Idaho, Nevada, and Wyoming.
- In 2011, court in Idaho found that the Craters of the Moon RMP and the Pinedale RMP did not adequately protect sage-grouse.
- Court ordered BLM to prepare new RMPs by 2014 and 2016, respectively.
BLM’S RESPONSE


LAND USE PLAN AMENDMENTS

- Records of Decision released September 23, 2015 (Forest Service) and September 24, 2015 (BLM).
WHAT IT LOOKS LIKE: WYOMING

- 1 location per 640 acres
- 5% disturbance cap
- 0.6 mi NSO from leks in core
- 0.25 mi NSO from leks outside core
- Seasonal and timing – Dec. 1 to June 30

WHAT IT LOOKS LIKE: UTAH

- 1 location per 640 acres
- 3% disturbance cap
- 3.1 mi USGS lek buffers
- 4 mi noise restrictions and tall structures restrictions
- Seasonal and timing – Nov. 15 to Aug. 15 (2 to 4 mi)
- Compensatory mitigation = net conservation gain
- Adaptive management
WHAT IT LOOKS LIKE: COLORADO

- 1 location per 640 acres
- 3% disturbance cap
- 1 mi NSO around leks
- 3.1 mi USGS buffers
- Seasonal and timing – Mar. 1 to July 15 (4 mi)
- Compensatory mitigation = net conservation gain
- Adaptive management

AND THE VERDICT IS...

- Not warranted for listing as endangered or threatened.
LITIGATION!

  - Preliminary injunction requested and denied January 5, 2016.


MORE LITIGATION

- **Herbert v. Jewell**, No. 2:16-cv-00101 (D. Utah filed Feb. 4, 2016) (suit brought by Governor Gary Herbert, the State of Utah, and the Utah State School and Institutional Trust Lands Administration). Environmental interests’ motion to intervene is pending.
