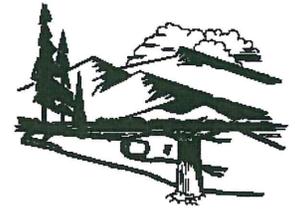




Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Matthew H. Mead, Governor

Todd Parfitt, Director

February 9, 2016

The Honorable James M. Inhofe
Chairman
U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Bldg.
Washington, D.C. 20510-6175

Re: Response to January 12, 2016 letter on cooperative federalism and necessary state resources and efforts to comply with EPA actions

Dear Chairman Inhofe,

Thank you for the opportunity to share with the U.S. Committee on Environment and Public Works Wyoming's perspective on the current U.S. Environmental Protection Agency's (EPA) regulatory framework, particularly in the context of cooperative federalism. One of the benefits of the system of cooperative federalism is that individual states can leverage local knowledge. This helps to build upon the baseline of federal requirements and find additional opportunities for environmental benefits and administrative efficiencies. When cooperative federalism is present, that benefit is evident in Wyoming. When cooperative federalism is lacking, benefits and efficiencies are lost and the state is faced with a heavy drain on its resources and efforts. Over the past several years, Wyoming has experienced an ever increasing drain on its resources from efforts necessary to comply with EPA and other regulatory actions.

In regard to the Clean Power Plan, EPA stated that states and utilities have sufficient time to implement, given that the first compliance date is in 2022. Prior to the Supreme Courts stay, the Clean Power Plan was draining substantial state resources. *See West Virginia et al. v. EPA*, U.S. Sup. Ct. Case No. 15A773, *West Virginia et al. v. EPA*, D.C. Cir. Case No. 15-1363, *Wyoming Petition for Reconsideration*, EPA (Dec. 21, 2015). Even though the Rule is stayed, Wyoming is still expending state resources on other EPA initiatives associated with the Clean Power Plan, such as the model rule, Clean Energy Incentive Program and the like.

The Honorable James M. Inhofe
February 9, 2016
Re: Response to January 12, 2016 letter
Page 2

EPA recently proposed significant changes to the process of determining when to aggregate sources in the oil and gas sector for various permitting decisions. In Wyoming, this proposal would undermine our established and effective minor source oil and gas permitting program, which EPA has relied upon to develop other regulations in the oil and gas sector. For a more detailed analysis of the illegality and impracticability of this proposal, see Letter from Director Parfitt to Administrator McCarthy (November 30, 2015). Should this proposal become law, it will create significant additional work for Wyoming's New Source Review permitting program, Title V permitting program and compliance program. That additional work will not result in additional environmental benefits because the analysis of appropriate pollution controls does not change in different permitting pathways.

Wyoming has a history of maintaining an effective working relationship with EPA regional compliance staff. This can be a productive relationship whereby the federal agency provides the state with training and other assistance. However, EPA's recently announced national enforcement initiatives for 2017-2019 adds unnecessary complexity to this relationship. EPA's national enforcement initiative focuses on what EPA views as the most pressing national environmental problems. In these cases, EPA is driven by a national policy instead of an analysis of local environmental concerns. As a result, these cases often involve protracted negotiations over several years which consume and shift state resources from matters of local concern. Additionally, these national enforcement initiatives legal cases are often not filed in a Wyoming court. *See, e.g., U.S. v. Frontier Refining Inc.*, No. 09-CV-1032 (D. Kans. 2009). This means that the state must appear in an inconvenient forum and expend additional resources to hire outside counsel to represent the State.

A recent letter from Governor Matthew H. Mead to Chairman Rob Bishop (November 4, 2015) highlights specific examples of federal overreach that harmed Wyoming. The specific examples highlight the lack of cooperative federalism when federal agencies do not work with the state to leverage local knowledge and instead thrust the federal agency decision upon the state. Those examples are germane to your request for information regarding cooperative federalism and necessary state resources and efforts to comply with EPA actions

This lack of cooperative federalism eliminates the opportunity for federal agencies to consider local knowledge and priorities when establishing the baseline of federal requirements. The possibility to identify additional environmental benefits and administrative efficiencies is lost. Instead, because the federal agencies hijack the process, states like Wyoming are left with no choice but to expend a significant amount of state resources litigating against the federal government. Wyo. Stat. Ann. § 9-4-218(a)(iii). These are lost resources that would otherwise be available to spend towards achieving those environmental benefits and administrative efficiencies.

The Honorable James M. Inhofe
February 9, 2016
Re: Response to January 12, 2016 letter
Page 3

These are but a few examples that highlight how the federal government, through cooperative federalism, could better recognize state authority, responsibilities and expertise. Allowing state and federal resources to work together provides for increased environmental benefits and administrative efficiencies.

Thank you again for the opportunity to share Wyoming's perspective on this matter. Please let me know if I can be of further assistance.

Sincerely,



Todd Parfitt
Director

Attachments

Cc: Governor Matt Mead
Senator John Barrasso
Senator Michael B. Enzi
Representative Cynthia Lummis

Attachment A

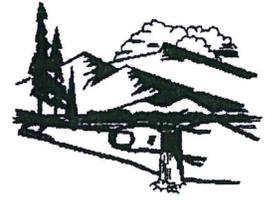
November 30, 2015

Letter from Director Parfitt to
Administrator Gina McCarthy



Department of Environmental Quality

To protect, conserve and enhance the quality of Wyoming's environment for the benefit of current and future generations.



Matthew H. Mead, Governor

Todd Parfitt, Director

November 30, 2015

Gina McCarthy
Administrator
U.S. Environmental Protection Agency
Attention Docket ID No. EPA-HQ-OAR-2013-0685
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Submitted electronically via www.regulations.gov

**Re: Source Determination for Certain Emission Units in the Oil and Natural Gas Sector;
Docket ID No. EPA-HQ-OAR-2013-0685**

Dear Administrator McCarthy:

In the above-referenced docket, the United States Environmental Protection Agency (EPA) has proposed to clarify the term “adjacent” for the purpose of determining when to aggregate sources in the oil and gas sector in the New Source Review (NSR), Prevention of Significant Deterioration (PSD), and Nonattainment NSR permitting contexts (Proposed Rule). The State of Wyoming Department of Environmental Quality, Air Quality Division (AQD), respectfully requests that the EPA rescind this rulemaking. The AQD has an established oil and gas minor source permitting program that ensures public participation and imposition of best available control technology (BACT). The EPA’s Proposed Rule will bar many Wyoming facilities from utilizing our minor source permitting program and will greatly burden the AQD with no environmental benefit and no additional public involvement. This Proposed Rule exceeds the EPA’s statutory authority under the Clean Air Act and does not comport with relevant case law.

Regulatory Background

The Clean Air Act establishes that air pollution prevention is the “primary responsibility of States and local governments.” 42 U.S.C. § 7401(a)(3). Under the Clean Air Act, the EPA is empowered to provide “financial assistance and leadership” to the States. 42 U.S.C. § 7401(a)(4). Once a State has obtained primacy through the EPA’s approval of a State Implementation Plan (SIP), the State is directly responsible for ensuring that sources within its borders are permitted in accordance with the Clean Air Act and related regulations. The State of Wyoming has an EPA-approved permitting program that addresses all of the federal permitting requirements for issuing and enforcing PSD and Title V permits.¹

One of the benefits of the system of cooperative federalism is that individual States can leverage local knowledge to build upon the baseline of federal requirements and find additional opportunities for

¹ See, Chapter 6, Sections 2 and 4 of the Wyoming Air Quality Standards and Regulations (WAQSR). Permitting requirements for all facilities under Chapter 6, Section 2 of the WAQSR have been in existence since May 29, 1974, and the PSD requirements under Chapter 6, Section 4 of the WAQSR have been in existence since January 25, 1979. Chapter 6, Section 13 of the WAQSR contains all federally required nonattainment NSR permitting requirements. This section of the WAQSR was submitted to Region 8 of the EPA as a SIP submission on November 6, 2015.

environmental benefits and administrative efficiencies. This is certainly the case in Wyoming, where we have developed a minor source permitting program for the oil and gas production sector, portions of which the EPA has relied upon when developing federal regulations. See *e.g.*, 76 Fed. Reg. 52738, 52757 (Aug. 23, 2011) (The EPA's new source performance standards for crude oil and natural gas production, transmission, and distribution were based partially on Wyoming's minor source permitting program.).

In Wyoming, owners and operators of minor oil and gas production facilities have two permitting pathways: (1) they may wait to drill until they have applied for and received a Chapter 6, Section 2 construction or modification permit; or (2) they may wait to permit a well until 90 days after the first date of production (FDOP), assuming that they have installed BACT within 60 days of FDOP. Although it seems counterintuitive, waiting until after the well has been drilled to perform control analyses enables operators to make more precise pollution control decisions. It is not possible to accurately predict certain important factors about a well prior to production, such as flow rate and hydrocarbon liquid composition. The AQD has issued and frequently updates an interpretive policy that describes presumptive BACT (P-BACT) for minor oil and gas production sources. See Wyo. Stat. Ann. § 35-11-801(e) and Oil and Gas Production Facilities Chapter 6, Section 2 Permitting Guidance, last revised September 2013 (Guidance). Virtually all permit applications, whether they occur during the pre-drill period or after the initial well or wells have been drilled, involve a 30-day public comment period, which will culminate with a public hearing on air quality concerns, when requested.

Under this permitting program, the AQD is able to ensure more public participation and derive additional environmental benefits than would be possible under a permitting program predicated on the EPA's proposed definition of "adjacent." Currently, if an operator wants to add an additional well to a preexisting site, that operator must control that new well's emission sources with BACT. The operator must also permit the well, which will almost always involve a 30-day comment period, and will involve a public hearing on air quality concerns, when requested. Under the current state permitting regime, there is no possible exercise, netting for PSD applicability or otherwise, that would enable an operator to legally modify an existing wellsite by adding a well without installing AQD-approved controls 60 days after FDOP.

The EPA's Proposed Rule creates administrative burden for the AQD without benefit

However, under the EPA's proposed regime, if an operator wanted to add an additional well to an existing well site, then the operator would not have to control air emissions from the additional well as long as it could perform a PSD analysis demonstrating that there would not be a significant net emissions increase of a regulated NSR pollutant. Taking into consideration factors such as declining production from preexisting wells, it is likely that many operators would be able to modify preexisting well sites without controlling air pollution from the new well or wells. In other words, the EPA's Proposed Rule would minimize the AQD's ability to cut emissions of volatile organic compounds and other harmful pollutants from the oil and gas sector. Moreover, making certain modifications to PSD facilities does not require a public comment period. Thus, the EPA's Proposed Rule would also allow operators to add additional wells to groups of wells classified as "major sources" without first engaging with members of the public.

In addition, this Proposed Rule will create additional administrative burden for regulatory agencies without creating additional environmental benefits. This Proposed Rule would require the AQD to reopen and reanalyze many pre-existing permits, and not for the purpose of additional environmental controls, but for the sole purpose of determining whether pre-existing sites require Title V permits. If the AQD does not do this voluntarily, they may be compelled to do so by citizen suits. This Proposed Rule would not change

the AQD's analysis of BACT at any new or modified well site. When the AQD performs a BACT analysis, regardless of whether it is in the NSR context, the PSD context, the Title V context, or as an intellectual exercise, the process is the same. The factors which alter a BACT analysis relate to where a facility is sited and what emission sources it contains, but not the permitting pathway. BACT is BACT, regardless.

The Proposed Rule will also increase the administrative burden of reviewing permits for new minor oil and gas production sites. Instead of focusing their resources on best available, cost-effective control technologies, AQD permit writers would also be required to review PSD modeling (Class I, Class II, and Air Quality Related Values), coordinate with federal land managers, which may include consultation meetings, assess secondary growth, and perform site ownership review of all wells within a one-quarter mile distance throughout the entire process to ensure that there have been no sales, transfers, or corporate restructuring that would alter the number of facilities subject to the PSD analysis. Finally, the Proposed Rule would require AQD inspectors to perform additional inspections on sites that are determined to be Title V facilities. In the absence of additional financial resources from the EPA, this would require significant additional work from current AQD employees, and might not even be possible.

Finally, the one-quarter mile bright line test could impact production well sales between companies, arbitrarily creating permitting challenges for companies seeking to buy neighboring well sites. In the Jonah field, for instance, the majority of wells are located within one-quarter mile of each other. (See Attachment). The EPA's proposal would add a layer of permit analyses onto many transactions in the Jonah field, for no environmental benefit. Currently, if one company wants to acquire another company's production facility, all it has to do is comply with the preexisting permit and submit name change paperwork to the AQD. Under the Proposed Rule, acquiring one preexisting well could require a company to perform expensive PSD analysis. The AQD would not require additional controls, as the preexisting well would already be permitted and controlled, but the AQD would still be required to review the PSD analysis.

In short, the EPA's Proposed Rule alters the AQD's permitting program in a manner that greatly increases administrative burden, minimizes the AQD's ability to ensure that all new and modified oil and gas production facilities utilize BACT, and lessens public involvement in the permitting process. It creates a new incentive for oil and gas production companies to site facilities over much larger areas. This will negatively impact the Wyomingites who live near oil and gas production areas and understandably desire the smallest possible surface area disturbances in their backyards. This will also harm Wyoming wildlife populations that require sufficient undisturbed wintering habitats and migration pathways. This Proposed Rule will increase the AQD's workload without providing any public benefit to justify the additional use of state resources; accordingly, the AQD respectfully requests that the EPA rescind this proposed rulemaking.

The EPA's Proposed Rule is unlawful

Under the Clean Air Act and relevant case law, the emissions from certain sources may be aggregated for the purposes of determining whether the minor sources, in combination, qualify as one "major source" that requires additional permitting oversight. *Alabama Power v. Costle*. 636 F.2d 323, 397 (D.C.C 1980); *See also* 45 Fed. Reg. 154, 52,676, 52,694 (Aug. 7 1980) ("In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source" : (1) it must carry out reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting

activities that as a group would not within the ordinary meaning of ‘building,’ ‘structure,’ ‘facility,’ or ‘installation.’ ”).

The concept of aggregation enables air pollution prevention agencies to make realistic analyses of industrial operations without expending substantial administrative resources. For many years, the EPA has struggled to find a common sense and straightforward approach towards determining when one or more oil and gas production sources should be considered, together, as one “building, structure, installation, or facility.” *Compare* Memorandum from EPA Acting Assistant Administrator William L. Wehrum to Regional Administrators I-X. *Source Determinations for Oil and Gas Industries* (Jan. 12, 2007) with Memorandum from Assistant Administrator Gina McCarthy to Regional Administrators Regions I – X. *Withdrawal of Source Determinations for Oil and Gas Industries* (Sep. 22, 2009).

Most recently, the EPA attempted to incorporate an additional layer of analysis into the question of adjacency related to “functional interrelatedness.” The Sixth Circuit Court of Appeals vacated a permitting decision by the EPA to aggregate a natural gas sweetening plant with multiple wells in a 43 square mile area. *Summit Petroleum Corp. v. EPA*, 690 F.3d 733 (6th Cir. 2012). The Court noted that the EPA’s permitting decision was “an ironic showcase of the very fears that caused the agency not to adopt a functional relatedness test for source determinations in the first instance.” *Id.* at 750.

In this Proposed Rule, the EPA puts forward two definitions for adjacent – the first definition, preferred by the EPA, defines multiple facilities as adjacent if they are within one-quarter mile. This definition contains no guidance on whether this would entitle permitting agencies to link together multiple facilities into a “daisy chain” or whether the one-quarter mile distance must be used as a radial distance from a central facility. The EPA’s second definition, which they have identified as the less preferred option, defines multiple facilities as adjacent if they are within one-quarter mile and if they are located at a distance of more than one-quarter mile but have “exclusive functional interrelatedness.” The EPA does not attempt to explain how regulatory agencies should approach this analysis. These definitions are both unlawful because they exceed the legal boundaries established by the *Alabama Power* Court. Further, the first definition is unlawful because it purports to define the term in a way that exceeds the ordinary meaning of adjacent, and the second definition is unlawful because in addition to defining the term in a way that exceeds its ordinary meaning, it also inexplicably adds “functional interrelatedness” as a factor that should be used to define the word adjacent.

The EPA’s proposed definition of “adjacency” is at odds with the *Alabama Power* Court’s guidance on the EPA’s statutory authority to aggregate minor sources. The *Alabama Power* Court interpreted the Clean Air Act to bar the EPA from aggregating minor sources in a manner that would not “fit within the four permissible statutory terms[,]” i.e., structure, building, facility, and installation. *Alabama Power* at 397. By arbitrarily selecting one-quarter mile as the defining factor for adjacency, the EPA necessarily sets up a permitting analysis that will aggregate production wells that do not fit within the ordinary understanding of the term “facility” or “installation.” This will be exacerbated in areas where companies have chosen to minimize their footprints for the purposes of minimizing impact to wildlife, at the request of local residents, or for any other beneficial reason.

Agencies do not have the authority to define unambiguous terms. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council*, 467, U.S. 837, 842 (1984). If a term is contextually ambiguous, the agency may define the term, but only to clarify the contextual ambiguity. The ordinary meaning of adjacent is “close or near; sharing a border, wall, or point.” Merriam-Webster Dictionary, *available at* www.merriam-webster.com

(search “adjacent”) (last visited November 19, 2015). This leaves open the question of how close facilities must be to be considered adjacent and how large the shared border, wall, or point must be. Courts have agreed that if the term “adjacent” is ambiguous, it is only ambiguous with reference to physical proximity. *See, Summit Petroleum* at 743 (“While some courts conclude that ‘adjacent’ is ambiguous in the limited sense of lacking an abstract definition, there is common recognition of the fact that adjacency is a purely physical and geographical, even if case-by-case, determination.”)

Here, the EPA seeks to define the term “adjacent” with a bright-line distance or with a bright-line distance and additional analysis unrelated to the concept of adjacency or closeness. The EPA does not have the authority to put forth its first and preferred definition because a one-quarter mile distance implies that the two facilities are not touching, *i.e.* not adjacent. Additionally, the EPA does not have statutory authority to define the term “adjacent” with reference to functional interrelatedness, because the term ‘adjacent’ is only ambiguous, if at all, relative to distance, and not any other factor.

Despite consistently conflicting advice from federal leadership, the Wyoming AQD has followed a relatively straightforward process, based on the initial approach put forward by the EPA. This analysis involves a three-part test that looks at common control, common industrial grouping, and co-location. 45 Fed. Reg. 52,694. The EPA’s purpose in developing this test was to avoid “embroil[ing] the Agency in numerous, fine-grained analyses.” 45 Fed. Reg. 52,695. However, at times even this simplified approach requires significant analysis. *See, e.g.,* In the Matter of a Permit Application (AP-10535) From Encana Oil & Gas (USA) to Modify the Pavillion Compressor Station in Fremont County, Wyoming (June 16, 2011). The AQD would encourage the EPA to rescind this Proposed Rule to allow our program to continue to utilize the current, effective approach, built from the EPA’s initial approach towards analyzing aggregation of oil and gas production facilities.

The EPA’s Proposed Rule adds confusion instead of clarity

The Proposed Rule creates more questions than it answers. Where does the one-quarter mile distance begin and end? Is it measured from the center of each facility, the edge of each facility’s concrete pad, or each facility’s fence line? How does the one-quarter mile distance interplay with any ambient air boundaries permitted through the PSD process? Is there a central facility from which the one-quarter mile is measured, or are facilities daisy-chained together? Is there a size above which a footprint of aggregated facilities definitively exceeds the “common-sense notion of a plant?” In certain fields with concentrated development, Wyoming producers could end up with so-called facilities larger than some Eastern states.

Additionally, if one company owns oil and gas production facilities on two sides of a state line, within one-quarter mile of each other, with aggregated emissions that exceed major source thresholds, should the EPA act in oversight role over the two states, who must then issue proportionate Title V permits? What happens if there is a compliance issue? And, how will this Proposed Rule interact with plugged and abandoned coalbed methane wells? If a company plugs and abandons several coalbed methane wells and then seeks to drill new oil or gas wells within one-quarter mile, will it be required to perform monitoring on the plugged and abandoned wells? Finally, what are the implications for other industries? Although the EPA proposed this definition in the oil and gas context, there are other industries, such as bentonite mining and sand mining, with equally spread out operations that are undoubtedly watching this Proposed Rule. Should these industries consider the one-quarter mile buffer when they make decisions about future mining investments?

Conclusion

In conclusion, Wyoming respectfully requests that the EPA rescind this Proposed Rule. Wyoming has a robust minor source program that enables us to achieve significant environmental benefits while maximizing administrative efficiencies and ensuring adequate public involvement whenever a new oil or gas production facility is constructed or modified. EPA's Proposed Rule would place great administrative burdens on the AQD without providing any environmental benefit or additional public involvement to justify those significant costs. EPA's Proposed Rule would also limit the AQD's ability to control air emissions from new and modified oil and gas production facilities.

Thank you for the opportunity to provide comment on this Proposed Rule. Please feel free to contact me at 307-777-7937, or Nancy Vehr, Air Quality Division Administrator, at 307-777-7391, should you have any questions regarding these comments.

Sincerely,

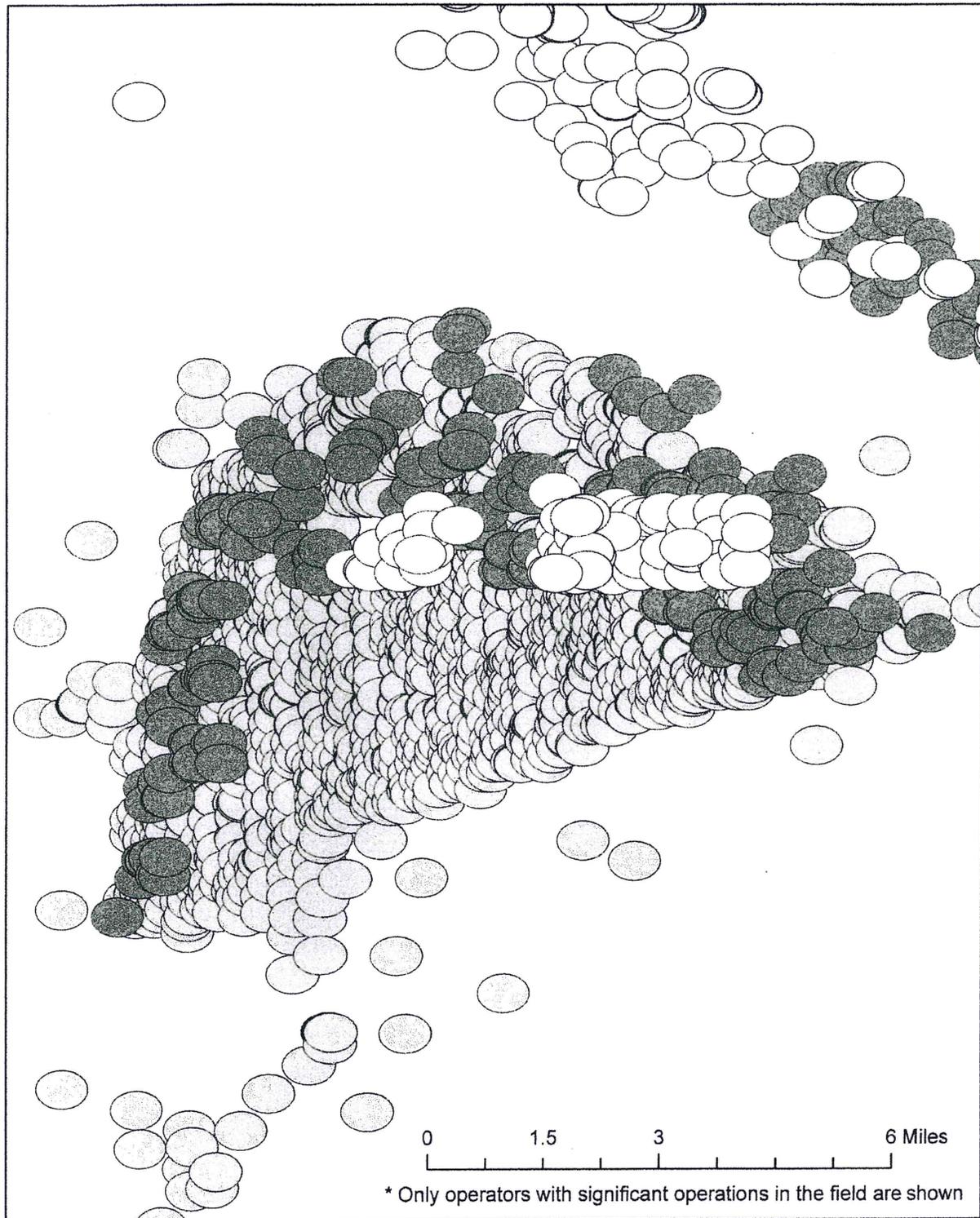


Todd Parfitt
Director
Dept. of Environmental Quality

Attachment: Map of Quarter Mile Buffers Around Well Sites in Jonah Field

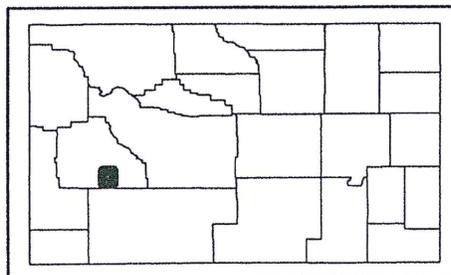
cc: Nancy Vehr, Air Quality Division
Elizabeth Morrisseau, Wyoming Attorney General's Office
Cole Anderson, Air Quality Division

Quarter Mile Buffers Applied in the Jonah Field in Sublette County, Wyoming



Companies

-  ULTRA RESOURCES INC
-  LINN OPERATING INC
-  JONAH ENERGY LLC



Attachment B

November 4, 2015

Letter from Governor Matthew H. Mead to
The Honorable Rob Bishop

MATTHEW H. MEAD
GOVERNOR



STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

November 4, 2015

The Honorable Rob Bishop
Chairman
House Committee on Natural Resources
1324 Longworth House Office Building
Washington, D.C. 20515

Re: Additional responses to October 21, 2015 letter on oversight hearing – “Respecting State Authority, Responsibilities and Expertise Regarding Resource Management and Energy Development.”

Dear Chairman Bishop,

You wrote asking for specific examples of federal overreach that had harmed Wyoming. There are, unfortunately, too many. I have chosen several that are illustrative of the problem.

The U.S. Environmental Protection Agency (EPA) made a jurisdictional determination that expanded the boundaries of the Wind River Indian Reservation for the purposes of the Clean Air Act. That expanded Reservation boundary now covers Wyoming’s 9th largest city. To achieve this result, the EPA had to misinterpret a clear act of Congress from 1905 in which the Tribes ceded nearly half of their Reservation to the United States. The EPA’s decision upsets 110 years of settled expectations for the residents of the City of Riverton, Wyoming. Its impacts go well beyond the Clean Air Act, for example the EPA’s decision has the potential to suddenly change the way many civil and criminal issues are handled. Wyoming is currently challenging the EPA’s decision before the 10th Circuit Court of Appeals.

Another example is seen in the EPA denying Wyoming’s Regional Haze State Implementation Plan (SIP). The Federal Implementation Plan will cause utility rate increases and complicate long term planning. The SIP developed by the State, is by contrast, sensible and meets the goal of the Regional Haze Rule. The EPA’s proposal requires new and different emission controls for Wyoming facilities costing hundreds of millions of dollars more than Wyoming’s plan, ironically, with no perceptible increase in visibility. These more restrictive and costly controls without measurable benefit will ultimately cost ratepayers millions of dollars.

Chairman Bishop
November 4, 2015
RE: Additional responses to Oct. 21, 2015 letter
Page 2

Next, the Bureau of Land Management (BLM) proposes to regulate hydraulic fracturing on federal lands in Wyoming. In 2010, Wyoming was the first state in the nation to adopt rules for the public disclosure of chemicals used in hydraulic fracturing operations. Wyoming also updated its well bore integrity standards and water management practices. Wyoming's rules are enforced on federal, state and private lands. BLM acknowledges the State of Wyoming's regulations are strong. Wyoming not only regulates hydraulic fracturing, it has committed resources to implement its regulatory program. The BLM rule creates unnecessary duplication and expense. It causes confusion and delays. It harms Wyoming and the nation. I have attached my comments on this rule.

This final example demonstrates why states believe federal agencies have lost touch with their mission. The state developed a non-attainment new source review state implementation plan (NNSR). Wyoming submitted the NNSR to EPA Region 8. EPA disapproved our NNSR. Wyoming's NNSR was identical to the EPA regulation in that it incorporated by reference EPA's regulation. Other states had done this exact same thing and were approved by EPA. EPA threatened to withhold federal highway funds from Wyoming. This action on our NNSR and overreaction on the proposed penalties are expensive and inexplicable. Wyoming has had no approved NNSR for over four years as a result of EPA's actions.

I hope these examples are helpful. Please contact my office if you have any further questions. Colin McKee on my staff will be available to assist. He can be contacted at 307-777-7930.

Sincerely,



Matthew H. Mead
Governor

MHM:dh

MATTHEW H. MEAD
GOVERNOR



STATE CAPITOL
CHEYENNE, WY 82002

Office of the Governor

August 23, 2013

The Honorable Sally Jewell
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Re: Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Proposed Rule

Dear Secretary Jewell,

Wyoming is proud of its progressive and effective regulation of the oil and gas industry. In 2010, Wyoming was the first state in the nation to adopt rules for the public disclosure of chemicals used in hydraulic fracturing operations. Wyoming also updated its well bore integrity standards and water management practices. Last year the Environmental Protection Agency (EPA) released its final rule setting air standards for natural gas production and wells that are hydraulically fractured. Not surprisingly, the EPA's regulations were modeled after those Wyoming had already implemented. Wyoming and other states have demonstrated meaningful leadership. The federal government, including the Bureau of Land Management (BLM) should defer to state leadership, not implement duplicative regulation. The BLM's proposed rule on hydraulic fracturing should be rejected. If the BLM is allowed to implement the proposed rule, then Wyoming should be exempted. BLM should defer to states effectively regulating the practice.

As a leading energy producer, Wyoming continues to set the standard for development and environmental stewardship. Earlier this year, I released Wyoming's Energy Strategy – *Leading the Charge: Wyoming's Action Plan for Energy, Environment and Economy*. Guided by this energy strategy, Wyoming is establishing baseline groundwater sampling, analysis and monitoring regulations. Later this year, Wyoming will initiate a review of state oil and gas environmental regulations. Wyoming's vision is to achieve excellence in energy development, production, and stewardship of its natural resources for the highest benefit of its citizens. Wyoming is committed to cooperation, evidence-based decision making, and a responsible balance between environmental protection and energy production. The BLM's proposed rule disrupts this balance at the expense of jobs, revenue and efficient, effective government. I do not oppose regulation of hydraulic fracturing; rather, I challenge the BLM's authority to

Secretary Jewell

August 23, 2013

Re.: Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Proposed Rule

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promulgate these rules. In 2005, Congress expressly prohibited EPA from regulating hydraulic fracturing under the Safe Drinking Water Act (SDWA) for practices that do not use diesel fuel in the fracturing fluid. This prohibition removed hydraulic fracturing (fracturing without the use of diesel) from federal purview. Congress reserved exclusive authority to the states for the regulation of non-diesel hydraulic fracturing. Based on this clear direction from Congress, Wyoming promulgated its own hydraulic fracturing regulation. These regulations control well bore integrity, flowback and produced water, and fracturing fluid disclosure. BLM's proposed rule supplants Wyoming's regulations and disregards Congress's intent to prohibit federal regulation of hydraulic fracturing.

BLM's statutory authorities do not allow BLM to regulate hydraulic fracturing. BLM cites four sections of the Federal Land Policy and Management Act of 1976 (FLPMA) in support of the proposed rule. None of these citations or FLPMA's general management policies authorize BLM to develop an underground injection control program. FLPMA only authorizes BLM to promulgate rules for which FLPMA grants BLM underlying authority. BLM has not identified any underlying authority for the agency to regulate hydraulic fracturing. Had Congress intended FLPMA to grant BLM authority to regulate underground injections outside the SDWA, Congress would have said so. It did not. In fact, Congress made it clear that FLPMA may not be construed "as affecting in any way any law governing...use of...water on public lands." Yet, this is precisely what BLM's proposed rule does.

BLM cites mineral leasing statutes as alternative authority, giving it the ability to regulate hydraulic fracturing. These statutes authorize BLM only to promulgate rules necessary for leasing federally owned minerals and calculating and collecting royalties. They do not authorize BLM to create its own special underground injection control program.

Wyoming and the BLM are co-regulators of oil and gas development on federal lands. BLM's proposed rule discounts Executive Order 13132, *Federalism*, stating, "...this rule would not have significant Federalism effects. A Federalism assessment is not required because the rule would not have a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among various levels of government." The BLM incorrectly surmises "the rule would affect the relationship between operators, lessees, and the BLM, but would not impact States."¹ I disagree. I request the BLM analyze state impacts this rule will have. The BLM consulted with some states earlier this month, after numerous requests by Wyoming and others states. I understand that the conversation was productive. I appreciate the time the BLM staff committed to the discussion. I request the BLM engage with Wyoming and other states in substantive ways – alleviating any appearance that the initial meeting was only a formality. This is important if the BLM is sincere in its approach to maintain "efficiency and flexibility while reducing duplication."²

¹ Federal Register, Vol. 78, No. 101, p. 31669

² Federal Register, Vol. 78, No. 101, p. 31644

Secretary Jewell

August 23, 2013

Re.: Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Proposed Rule

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Current federal permitting is plagued by delay and undercapitalization. The BLM acknowledges, "...the rule would pose additional burden to the BLM; however, it is unclear the extent to which the BLM can meet the additional burden with existing capacity."³ The BLM estimates the additional administrative burden to implement the proposed rule includes an additional 8.44 FTE of workload in the first year of implementation. This appears to be a gross underestimation. Unfortunately, the BLM provides no justification for its estimate or technical qualifications necessary to carry out the rule. The BLM cannot assume current staff have the technical expertise to implement the proposed rule (i.e., review of cement evaluation logs). The BLM should conduct this analysis immediately. This analysis will inform the BLM and others of the true cost of staffing resources. It is critical that implementation of the proposed rule be adequately capitalized with budget and expertise; otherwise, both development and protection of natural resources are compromised.

In your testimony before the U.S. Senate Committee on Energy and Natural Resources on June 6, 2013 you state, "Wyoming is one of the states that leads in terms of having sophisticated fracking regulations that are likely to meet or exceed the standards we're coming out with." I appreciate your recognition that hydraulic fracturing is a process that is already efficiently and effectively managed by the State of Wyoming. Unfortunately the BLM's rule, as drafted, does not allow compliance to Wyoming's regulation.

The background section of the proposed rule mentions, "for lands within the jurisdiction of a State or tribe that the State or tribe could work with the BLM to craft a variance that would allow compliance with State or tribal requirements to be acceptable as compliance with the rule, if the variance meets or exceeds this rule's standards."⁴ However, the actual rule language states, "The *operator* may make a written request to the authorized officer for a variance from the requirements under this section."⁵ [*Emphasis added*] Despite BLM's contention that states will be afforded opportunity to work with the BLM to craft a variance, the mechanism in the rule only allows operators to pursue a variance.

The BLM states, "Variances apply only to operational activities, including monitoring and testing technologies, and do not apply to the actual approval process."⁶ In Wyoming, an operator submits an application for permit to drill (APD) prior to drilling on federal, private or state land. Approval of that APD signifies that an operator's plan for drilling complies with applicable state regulations, including those for hydraulic fracturing. If the BLM and Wyoming execute a memorandum of understanding that recognizes that Wyoming's rule meets or exceeds the BLM's standard (variance), then the BLM should consider an operator's state-approved APD to constitute a federal approval. If not, what efficiency is achieved? I request reconsideration of this provision and provide a meaningful mechanism for government-to-government consultation, approvals and administrative agreements.

³ Federal Register, Vol. 78, No. 101, p. 31666

⁴ Federal Register, Vol. 78, No. 101, p. 31640

⁵ Federal Register, Vol. 78, No. 101, p. 31677

⁶ Federal Register, Vol. 78, No. 101, p. 31660

Secretary Jewell

August 23, 2013

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In conclusion, Wyoming adequately regulates hydraulic fracturing and has committed resources to implement its regulatory program. In light of Wyoming's commitment, there is no need for the BLM to expand its administrative footprint in Wyoming.

State agencies will provide detailed individual comments to the extent these rules pertain to the mission of their offices. Those comments are incorporated here by reference. Please review and consider my previous comments and those submitted by state agencies as they pertain to this revised proposed rule and previous drafts.

Please contact me if I can provide additional information or if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew H. Mead', written in a cursive style.

Matthew H. Mead
Governor

MHM:md

cc: The Honorable Michael B. Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Cynthia Lummis, U.S. House of Representatives