



P.O Box 1700, Helena, Montana 59624

Phone: (406) 443-5541

Email: [ptrenk@tsria.net](mailto:ptrenk@tsria.net) Web: [tsria.org](http://tsria.org)

## TSRIA NEWS

### September 2015

## There Is Still Time to Register for the TSRIA 2015 Annual Meeting

The 2015 Treasure State Resource Industry Association Meeting will be held September 22-23, 2015 at the Lodge at Whitefish Lake. There's still time to register but don't delay. We've got a great program planned with special attention to breaking issues. BLM State Director Jamie Connell will offer an update on Sage Grouse. Learn the latest on the North Dakota District Court actions on the Waters of the United States Rule. We'll also explore the implications of the Clean Power Rule from the perspective of state regulators, power plants, the coal industry and energy experts. Please contact the TSRIA Office at 406-443-5541 or by email at [ptrenk@tsria.net](mailto:ptrenk@tsria.net) for registration information. The TSRIA room block has expired but there still may be a few rooms available at the Lodge at Whitefish Lake. Contact the group reservations specialist at 877-887-4026, extension 4013, or by email at [groups@lodgeatwhitefishlake.com](mailto:groups@lodgeatwhitefishlake.com). Please be sure to mention you are with the **Treasure State Resource Industry Association**. There are other great lodging options in Whitefish as well. Hope to see you there.

## Input Needed on Asbestos Regulation

As a result of legislation passed in the 2015 Legislative Session, the Department of Environmental Quality (DEQ) has impaneled an Asbestos Advisory Group that will meet over the next year and a half with a goal of providing recommendations on specific topics relating to asbestos regulation. The Advisory Group consists of 13 members representing a broad variety of interests. TSRIA member Dave Galt, Executive Director of the Montana Petroleum Association represents Major Facilities. TSRIA Executive Director Peggy Trenk represents Trade Associations. Advisory Group members are expected to seek input from their different constituencies as different topics are considered.

According to legislative direction and the group's charter, the advisory group will be considering:

- (a) the regulatory thresholds for permits and whether a tiered permitting systems is appropriate;
- (b) the appropriate types or projects and the size of structures subject to permitting;
- (c) the appropriate timeframe for asbestos project notification and issuance of permits;

---

The mission of the Treasure State Resource Industry Association is to establish and maintain coalitions to promote and advocate for responsible natural resource development and reasonable environmental regulation in Montana.

- (d) the scope of the department's enforcement and cleanup authority;
- (e) appropriate funding options;
- (f) the relationship between federal and state authority over various issues related to asbestos control and methods to clarify conflicts;
- (g) options to streamline the permitting process while still protecting public health and safety;
- (h) any other issues related to asbestos regulation considered appropriate by the advisory group.

The Advisory Group held its organizational meeting on Wednesday, September 2<sup>nd</sup>. Members agreed to hold monthly meetings in order to meet the reporting deadline of December 31, 2016. Meeting dates will be established in the near future, with an initial emphasis on learning more about the different regulatory requirements that exist and what agencies are involved in enforcement. It is too early to tell if potential recommendations will involve legislative changes or whether they can be accomplished through rulemaking. Information about the Advisory Group can be found on DEQ's website at: <http://deq.mt.gov/asbestos/advisorygroup.mcp.x>.

**Action Item: TSRIA will be establishing an Asbestos Work Group to review information and recommendations that will be considered by the DEQ Asbestos Advisory Group. If you are interested in serving, please contact TSRIA Executive Director Peggy Trenk at [ptrenk@tsria.net](mailto:ptrenk@tsria.net). Your input would be appreciated.**

## Comment Period on 2015 Asbestos Fee Rule Extended

As a result of what can only be described as a series of unfortunate circumstances, DEQ also noticed a proposal in late July to amend various administrative rules pertaining to annual asbestos project permits, training provider requirements, permit fees, accreditation and accreditation renewal fees and related sections. While underway internally for some time, it appeared that the rule notice was on a parallel track to the work of the Advisory Group, causing some confusion – if not irritation – for many involved. As a result, the **comment period on the 2015 Asbestos Fee Rule has been extended to November 1, 2015. MAR Notice No. 17-371 can be found on the DEQ website.** In the meantime, the Department is still considering how best to proceed with adoption of any new rules in light of the Advisory Group's ongoing work.

## Federal Judge Stays Implementation of Rule Defining “Waters of the United States” under the Clean Water Act

*Editor's Note: The following analysis of the court ruling was shared by the Montana Mining Association and was prepared by attorneys from the firm of Crowley Fleck.*

On August 27, 2015, a North Dakota Federal Court issued a preliminary injunction enjoining implementation of the new Clean Water Act (“CWA”) rule (“Rule”) jointly promulgated by the U.S. Environmental Protection Agency (“EPA”) and the U.S. Army Corps of Engineers (“Corps”) (collectively “Agencies”) that purports to define “waters of the United States.” The preliminary injunction effectively, if temporarily, halts the Agencies' ability to exercise greater control over waters traditionally governed by the states.

The Rule has met with strong opposition since its proposal on April 21, 2014. Thirty states wrote the EPA in July 2014 requesting its enactment be postponed nine months. After no response from the EPA, North Dakota, joined by twelve other states, including Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, New

Mexico, South Dakota, and Wyoming, filed a lawsuit seeking an injunction. On August 27, 2015, the Court granted the States' request and issued an injunction shielding, at least, these thirteen states from the Rule, which was to be effective as of August 28, 2015.

In reaching his decision, Chief District Judge Ralph R. Erickson first found that the District Court, and not the United States Court of Appeals, had jurisdiction. In so finding, the Judge found unpersuasive the Agencies' argument that the Rule was a form of "effluent limitation" or, in the alternative as, directly related to the permitting process under 33 U.S.C. Section 1342.

The Judge then turned to the requested preliminary injunction, applying the standard four factor test. The Judge quickly found the first three factors to be satisfied, weighing that the threat of infringement on state sovereignty over state waters and the potential for monetary costs posed imminent and irreparable harm greater than the harm to the Agencies caused by postponement of the Rule's implementation. The Judge spent the majority of the decision demonstrating that the States had established a "likelihood of success on the merits." Although lacking the administrative record, the Judge found that the promulgation of the Rules was a "process that is inexplicable, arbitrary, and devoid of a reasoned process." More importantly, the Judge found that the promulgation of the Rule violated the EPA's Congressional grant of authority; the Rule was likely arbitrary and capricious; and violated 5 U.S.C. Section 553 (b)'s requirement that a final rule be a "logical outgrowth" of the initially proposed rule.

The EPA may appeal the preliminary injunction under 28 U.S.C. Section 1292(a)(1). Any appeal must be filed with sixty days (Fed.R.App.R.4(a)(a)(B)) and will be reviewed under the "abuse of discretion" standard. The Rule's implementation will be halted until the injunction is overturned on appeal, or a decision is issued after a full hearing on the merits.

North Dakota Attorney General, Wayne Stenehjem, has stated the injunction is applicable nationwide, but the EPA asserts it will begin enforcement of the Rule in thirty-seven other states effective Monday. This difference in opinion may lead to additional requests for injunctive relief.

The full impact of the Rule would likely be far reaching and dramatic. The Rule uses the "significant nexus test" set forth in Justice Kennedy's concurrence in *Rapanos v. United States*, 547 U.S. 715 (2006), to expand federal control over certain waters. Under the Rule, "waters of the United States" would be expanded to include areas where there is a trace amount of water that could present a "physical indicator of bed and bank and an ordinary high water mark." While the Agencies dispute the significance of the Rule, they have acknowledged that "at least 2.84-4.65% of waters traditionally under the sovereign control of the states will be ceded to the Agencies. Also, by expanding what is considered "waters of the United States," oil and gas producing states will potentially be required to undertake jurisdictional studies for every proposed natural gas, oil or water pipeline project. Further, the Rule will result in a dramatic increase in CWA Section 401 certifications, thus increasing costs to the states, industry and agricultural users.

Crowley Fleck Contacts - North Dakota: Craig Smith (701)224-7521 [csmith@crowleyfleck.com](mailto:csmith@crowleyfleck.com); Montana: Mark Stermitz (406) 523-3625 [mstermitz@crowleyfleck.com](mailto:mstermitz@crowleyfleck.com) and Wyoming: Lynne J. Boomgaarden (307) 772-4842 [lboomgaarden@crowleyfleck.com](mailto:lboomgaarden@crowleyfleck.com). DISCLAIMER: Crowley Fleck prepared these materials for the reader's information, but these materials are not legal advice. We do not intend these materials to create, nor does the reader's receipt of them constitute, an attorney-client relationship. Online readers should not act upon this information without first obtaining professional counsel. Specifically, please do not send us any confidential information without first speaking with one of our attorneys and obtaining information to send us information.

# Effort to Extend Application of the WOTUS Injunction Nationwide Unsuccessful

In a decision handed down on Friday, September 4, 2015 Chief District Judge Erickson declined to apply the preliminary injunction nationwide. Giving deference to other courts, Judge Erickson wrote:

*A district court has broad discretion in its power to shape a preliminary injunction. Equitable decrees, such as a preliminary injunction, 'are a special blend of what is necessary, what is fair, and what is workable.' While a district court may exercise its discretion to extend injunctive relief beyond the parties to the case, nothing requires the court to do so.*

*The instant case presents a situation where the court declines to exercise its discretion to extend the preliminary injunction beyond the parties to the proceedings. Four courts have denied preliminary injunctions in cases on the issue before the court. Two courts denied preliminary injunctions because they found they lacked subject matter jurisdiction. The remaining two courts deferred their decision until the Judicial Panel for Multidistrict Litigation decides on consolidations of the district court cases. Seven states and the District of Columbia have moved to intervene on behalf of the Agencies in the consolidated matter before the Sixth Circuit.*

*The court has fully explained its reasoning for the issuance of the injunction and there are compelling reasons in favor of both extension of the injunction and limitation of the injunction. On the one hand, there is a desirability for the uniformity regarding a national rule with national implications. On the other hand, there is the idea of respecting the decisions of other courts and other sovereign states. As the matter is left to the sound discretion of the court, it suffices to recognize that the decision involves balancing of the interests of competing sovereign entities, as well as undermining the ruling of other courts. Under these circumstances, the court declines to extend its decision beyond the entities that are actually parties to this litigation.*

*Editor's Note: To learn more about these rulings, and what we might expect in the future, be sure to attend the TSRIA Annual Meeting in Whitefish where speaker Peter G. Scott, the attorney who represented the Montana Association of Counties in the seeking the injunction, will provide an update.*

## New Life for Bid to Block Drilling on Public Lands

Source: [Helena Independent Record](#), September 2, 2015

Matthew Brown, Associated Press

BILLINGS – A federal appeals court ruling has revived a bid by environmentalists to block drilling for oil and gas on public lands in Montana until the government looks more closely at climate change impacts. The case had been dismissed two years ago by a judge who said the environmentalists could not demonstrate drilling activities would cause them harm. But a three-judge panel from the 9<sup>th</sup> U.S. Circuit Court of Appeals disagreed in a Monday ruling that sends the case back to U.S. District Judge Sam Haddon.

The Montana Environmental Information Center, WildEarth Guardians and Earthworks' Oil and Gas Accountability Project want the government to force companies to take steps to reduce emissions of methane from oil and gas fields. Haddon ruled in 2013 that emissions from future drilling activities would be too small – only a fraction of 1 percent of total emissions in Montana – to make a “meaningful contribution” to global greenhouse gas levels.

But the appeals panel said Haddon had erred in focusing only on the climate - effects of drilling. It said potential “surface harms” – the immediate impacts from drilling such as water pollution or increased truck traffic to service drilling rigs -- were enough to give the environmental groups legal standing to pursue their lawsuit. “You don't have to show that specific greenhouse gas emissions will contribute to climate change, and that the contribution will in turn impact our clients,” said Shiloh Hernandez, the lead attorney for the environmental groups during the appeal. But Hernandez said that as the case is being heard, the plaintiffs still will be able to argue about the need to control those emissions.

---

The mission of the Treasure State Resource Industry Association is to establish and maintain coalitions to promote and advocate for responsible natural resource development and reasonable environmental regulation in Montana.

Methane is a far more potent greenhouse gas than carbon dioxide. It gets into the atmosphere when pipelines leak and when companies vent or flare excess natural gas from production. The BLM manages oil and gas development on federal and Indian lands, and was the lead defendant in the case before Haddon. Agency spokesman Al Nash said he could not immediately comment on the ruling.

Kathleen Sgamma with the Western Energy Alliance, an industry advocacy group, said the environmentalists were seeking to block activity that has an “infinitesimal impact on climate change.” She described the case as a test of whether the energy industry’s opponents can stop all fossil fuel development on the basis of theoretical impacts, which Sgamma said would undermine the foundation of the economy.

President Barack Obama has proposed cutting methane emissions from U.S. oil and gas production by nearly half over the next decade. (See next article) The rule would require energy producers to find and repair leaks at oil and gas wells and capture gas that escapes from wells.

## US Proposes to Cut Methane Leaks from Oil, Gas

Source: [Helena Independent Record](#), August 19, 2015

Matthew Daly and Josh Lederman, Associated Press

WASHINGTON – The Obama administration on Tuesday proposed cutting methane emissions from U.S. oil and gas production by nearly half over the next decade, part of the ongoing push by President Barack Obama to curb climate change. The administration’s target is to cut methane from oil and gas drilling by 40 to 45 percent by 2025, compared to 2012 levels. The move was not unexpected; officials had set the same goal in a preliminary blueprint in January. Still, by moving forward with the official proposal, Obama is adding to a list of energy regulations that have drawn applause from environmentalists and ire from energy advocates.

To help meet the goal, the administration has issued a rule cutting emissions from new and modified oil and natural gas wells, along with updated standards for drilling to reduce leakage from wells on public lands. The rule would require energy producers to find and repair leaks at oil and gas wells and capture gas that escapes from wells that use a common drilling technique known as hydraulic fracturing or fracking. Officials estimate the rule would cost industry from \$320 million to \$420 million in 2025, with reduced health care costs and other benefits totaling about \$460 million to \$550 million...The administration is expected to finalize the rules next year shortly before Obama leaves office...The methane rules follows a landmark regulation Obama finalized earlier this month to cut carbon dioxide emissions from coal-fired power plants by 32 percent.

Katie Brown, a spokeswoman for Energy in Depth, an oil industry group, said methane emissions from fracking are already declining because of improved drilling techniques. “Cheap natural gas has delivered substantial benefits that came largely from voluntary reductions by industry and technological innovation,” she said. “Federal regulations, especially if crafted poorly, could inflict more pain on the men and women who work in the oil and gas industry.”

The administration said the rule would apply only to emissions from new or modified natural gas wells, meaning thousands of existing wells won’t have to comply. Environmentalists say that the ambitious goals announced under the proposed rule would be difficult to meet without targeting existing wells.

David Doniger, climate policy director for the Natural Resources Defense Council, an environmental group, called the new rule a “good start.” But Doniger said, “EPA needs to follow up by setting methane standards for existing oil and gas operations nationwide.

# Interim Legislative Committee Schedule

Source: The September 2015 Interim Newsletter published by the Montana Legislative Council  
Sheri Scurr, Editor

## **Environmental Quality Council – September 9-10, 2015 in Helena**

Roads and Sage Grouse will be a primary focus of the EQC this interim. The EQC is studying road management on federal land, with a focus on recreational access. The 2015 Legislature passed House Joint Resolution 13 that tasks the EQC with assessing road closures on federal lands over the last 35 years, identifying landlocked parcels of public land, and evaluating deer and elk population trends in relation to limited access to federal lands.

The EQC will also continue its work tracking the implementation of the Montana Greater Sage-grouse Stewardship Act. The purpose of the legislation passed in 2015 is to provide competitive grant funding, and establish ongoing free-market mechanisms for voluntary, incentive-based conservation measures that benefit sage grouse habitat and populations. They will also hear a comparison of sage grouse conservation plans adopted by the state and proposed by the BLM.

The EQC will also review the agriculture and grazing program within DNRC, wildlife conflict management by DFWP, and the coal and open cut mining programs administered by DEQ.

## **Energy and Telecommunications Interim Committee – September 11, 2015 in Helena**

The Energy and Telecommunications Interim Committee will focus on the costs and benefits of net metering in Montana. National experts from the Solar Electric Power Administration and the Electric Power Research Institute will present information about the safety and reliability of net metering. An overview of net metering policies in other western states will also be presented.

## **111d Subcommittee on EPA Clean Power – September 11, 2015**

A subcommittee that includes four Energy and Telecommunications Committee members and four members of the Environmental Quality Council will begin its work tracking EPA's Clean Power Rule (111d Rule) that requires states to reduce carbon dioxide emissions in the power sector by 2030. MT DEQ is charged with developing a plan to implement the rule by September 6, 2016, or submit an initial plan with a request for an extension. The plan must provide that carbon dioxide emissions from fossil fuel-fired electric facilities (there are nine in Montana) are reduced to an interim level between 2022 and 2029, with the full reduction achieved by 2030.

The required carbon dioxide emission reductions may be achieved in terms of either rate or mass. Emission rates are typically measured as pounds per megawatt hour (lbs/MWh). Emission mass is typically measured in terms of short tons (as opposed to metric tons). By rate, Montana must achieve an interim emission rate of 1,534 lbs/MWh and a final rate of 1,305 lbs/MWh by 2030. For perspective, Montana's 2012 emission rate was 2,481 lbs/MWh. By mass, the final rule limits emissions in Montana to a total of about 11 million short tons by 2030. Colstrip Units 3 and 4 alone annually emit about 12 million short tons of carbon dioxide.

The 111d Subcommittee will also address its role in working with DEQ and potentially with an advisory group expected to be formed by Governor Steve Bullock.

## **Revenue and Transportation Committee – September 24 - 25, 2015**

RTIC will finalize its work plan at the September meeting. The committee plans to study: tax increment financing districts, the elderly homeowner and renter credit, the Highway State Special Revenue Account, the adequacy of local government revenue-generating capacity, the treatment of intangible property for centrally assessed property

---

The mission of the Treasure State Resource Industry Association is to establish and maintain coalitions to promote and advocate for responsible natural resource development and reasonable environmental regulation in Montana.

valuation, property taxable value neutrality, nonprofit reporting of community benefits, tax liens and deeds and the taxation of international corporations doing business in Montana. The committee will also hold a discussion on improving revenue estimates.

## Upcoming Events/Dates

September 10-11, 2015 MT. Wood Products Assoc. Annual Convention Hilton Garden Inn, Missoula
September 11, 2015 10:00 am. Water Pollution Control Advisory Council (WPCAC) Teleconference – Room 111 Metcalf Building
September 22-23, 2015 Treasure State Resource Industry Association Annual Meeting – Lodge at Whitefish Lake
October 16, 2015 Board of Environmental Review Helena