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*John R. Chadd**

Table of Contents

I. Introduction	512
II. Regulatory Developments	512
A. Attorney General Opinion on Increased Density Applications	512
B. WOGCC Changes to Application Filing Requirements	513
C. "B" Docket Policies Rescinded	513
III. Judicial Developments	514

* John R. Chadd is a Member with Steptoe & Johnson PLLC in the Denver, Colorado office, where he focuses his practice in oil and gas transactions and corporate and securities law. He is licensed in Colorado, Massachusetts, and Wyoming.

A. United States District Court..... 514
 1. Arbitrary and Capricious Agency Action..... 514
 2. NEPA 515

I. Introduction

This article summarizes and discusses significant developments in Wyoming’s oil and gas law between August 1, 2021, and July 31, 2022. During this period, there were no notable Wyoming legislative developments. The Wyoming Attorney General issued an opinion interpreting statutory language regarding increased density applications at the Wyoming Oil and Gas Conservation Commission (“WOGCC”). Additionally the WOGCC promulgated a new policy concerning application deadlines and rescinded policies which had the effect of ending the WOGCC’s “B” (inactive) Docket.

Also, during this applicable period there were cases of note which dealt with alleged arbitrary and capricious action by the United States Department of the Interior (“DOI”) Office of Natural Resources Revenue (“ONRR”) and alleged violations of the National Environmental Policy Act (“NEPA”) by the DOI’s Bureau of Land Management (the “BLM”).

II. Regulatory Developments

A. Attorney General Opinion on Increased Density Applications

In an opinion dated March 15, 2022, the Wyoming Attorney General answered a question posed by the WOGCC concerning the interpretation of Wyoming Statute § 30-5-109(d), which allows the WOGCC to issue orders modifying existing drilling units.¹ The WOGCC asked if it was creating new, smaller spacing units when it issues an order for more allowable wells within an established spacing unit.²

The Attorney General found that 30-5-109(d) was clear and unambiguous on the issue, and therefore the plain meaning of the provision applied.³ The Attorney General noted that 30-5-109(d) “simply permits more wells to be drilled within an already established unit” and when the WOGCC “finds that additional wells are appropriate, the original drilling unit is maintained at its original size and the Commission’s order simply

1. *Opinion Request/Wyoming Statute § 30-5-109(d)*, Wyo. Att. Gen., March 15, 2022, <https://drive.google.com/file/d/1OYwSRboT75X2HelU0GNZc4x63DdEgrCC/view>.
 2. *Id.*
 3. *Id.*

authorizes additional wells to be drilled within that original drilling unit.”⁴ The Attorney General also noted, as a point of differentiation, that Wyo. Stat. § 30-5-109(a)–(c) pertained to the creation of new drilling units.⁵ Additionally, the opinion cited to multiple Wyoming cases that supported the Attorney General’s analysis.⁶

B. WOGCC Changes to Application Filing Requirements

On March 18, 2022, the WOGCC posted two changes to application filing requirements.⁷ First, applications for new spacing units may only request one drilling unit for one formation. Applicants may no longer request multiple units in a general area within one application or request spacing of multiple formations under one unit area within one application.⁸ The WOGCC states that these changes are necessary to reduce the review burden for WOGCC staff.⁹

Second, the filing deadline for all types of applications, except those related to underground injection control wells, has been shortened from sixty (60) days prior to the hearing to forty-six (46) days prior to the hearing.¹⁰ The new deadline went into effect for the June 14, 2022 hearing date.¹¹

C. “B” Docket Policies Rescinded

Effective February 9, 2022, the WOGCC rescinded the previous policies that created the “B” (inactive) Docket.¹² Prior to this rescission of the “B” Docket, any Application for Permit to Drill (“APD”) that was protested prior to August 3, 2020,¹³ or any protested spacing related application that

4. *Id.*

5. *Id.*

6. *Id.*

7. *Two Changes to Filing Requirements*, WOGCC, March 18, 2022, <https://wogcc.wyo.gov/hearings/filing-changes-03182022>.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *3rd Protest Policy for Applications for Permit to Drill (APD)*, WOGCC, August 3, 2020, *rescinded* February 9, 2022; *Protest Policy for Spacing Related Hearings*, WOGCC, June 12, 2018, *rescinded* February 9, 2022.

13. *3rd Protest Policy for Applications for Permit to Drill (APD)*, WOGCC, August 3, 2020, *rescinded* February 9, 2022

was subsequently continued two times,¹⁴ was placed on the “B” Docket where the protest would not be heard by the WOGCC until the parties either settled the protest, the implicated APD expired, or the parties affirmatively set the protest for a hearing. The creation of the “B” Docket was found to be necessary to deal with the large number of protests being filed at the WOGCC.

In recent years the WOGCC has made rule changes that have caused a significant drop in the number of protests. Now that use of the “B” Docket has been rescinded, protests will be handled in the manner used previous to the “B” Docket—protests will be scheduled to be heard at the next occurring hearing date.

III. Judicial Developments

A. United States District Court

1. Arbitrary and Capricious Agency Action

In *Cloud Peak Energy Inc. v. United States Department of the Interior*, energy producers brought action against the Department of the Interior’s Office of Natural Resources Revenue (“ONRR”), challenging the ONRR’s 2016 valuation rule for calculating royalties on oil and gas produced from federal onshore and offshore leases, and on coal produced from federal leases and Indian lands, as arbitrary and capricious and exceeding ONRR’s authority in violation of the APA.¹⁵

With regard to oil and gas royalty calculation, Petitioners argued that the ONRR exceeded its legal authority by enacting the rule, and that multiple ONRR actions under the 2016 rule were arbitrary and capricious: (1) the reclassification of certain offshore expenses from a transportation expense (deductible expense in the royalty calculation) to a gathering expense (non-deductible in the royalty calculation), (2) the implementation of a cap on certain transportation and processing expenses, (3) the addition of a new index pricing option for non-arm’s length gas transfers, (4) the requirement of written contracts for oil and gas sales and also transportation and processing contracts, and (5) the addition of certain default provisions.¹⁶

14. *Protest Policy for Spacing Related Hearings*, WOGCC, June 12, 2018, rescinded February 9, 2022.

15. *Cloud Peak Energy Inc. v. Dep’t of the Interior*, 559 F. Supp. 3d 1203 (D. Wyo. 2021), *appeal dismissed sub nom.* *Am. Petroleum Inst. v. Dep’t of the Interior*, No. 21-8076, 2022 WL 1416664 (10th Cir. Jan. 7, 2022).

16. *Id.* at 1212-21.

The Court noted generally that “Congress delegated to ONRR a substantial amount of responsibility to collect and audit royalty payments, along with a substantial amount of discretion to accomplish the task.”¹⁷

The Court analyzed each disputed part of the rule, finding in each case that the action was not arbitrary and capricious. The Court noted that the ONRR met the standard for valid agency action, which is to consider relevant information and articulate a rational basis for its decision.¹⁸ The Court further noted that when an agency changes its position on a matter, it is not necessary for the agency to show to a court’s satisfaction that the new position or rule is better than the prior position or rule—however, the new rule must be permissible under the applicable statute, the agency must have good reasons for the new rule, and the agency must believe it is better, as shown through agency action.¹⁹

2. NEPA

In *Upper Green River Alliance v. BLM*, environmental organizations brought actions under the federal Administrative Procedures Act and NEPA, challenging BLM’s approval of a project to extract natural gas.²⁰ The petitioners argued that the BLM’s approval was arbitrary and capricious because it did not take a “hard look” at impacts to wildlife as required by NEPA.

Specifically, the petitioners argued that the BLM’s NEPA review did not take a sufficiently hard look at pronghorn migratory routes, did not consider pronghorn buffer zones, and failed to conduct additional studies on greater sage grouse winter concentration areas.

The Court noted that the BLM’s action would be arbitrary and capricious if: (1) the agency relied on factors not enumerated by Congress; (2) it did not consider an important aspect of the problem; (3) the agency offered justifications for the action that were contrary to the evidence; or (4) it is so implausible that the action cannot be attributed to differing opinions or levels of expertise.²¹

The Court further specifically noted that to comply with NEPA, the agency must provide a detailed environmental impact statement (EIS) on any major federal action which significantly affects the quality of the

17. *Id.* at 1221.

18. *Id.* at 1218.

19. *Id.* at 1215.

20. *Upper Green River All. v. Bureau of Land Mgmt.*, No. 2:19-CV-146-SWS, 2022 WL 1493053 (D. Wyo. Apr. 5, 2022).

21. *Id.* at *11.

human environment.²² Additionally, relevant case law provides that under NEPA the agency must take a “hard look” at all the relevant information.²³

The Court then examined the specific claims of the petitioners. As to the EIS’s address of pronghorn migratory routes, the Court found that the BLM was not arbitrary and capricious, even though possible “buffer zones” were not discussed in the EIS.²⁴ The EIS discussed other viable alternatives and satisfied the legal standard.²⁵

As to the sage grouse winter concentration areas, the Court found the BLM decision was not arbitrary and capricious. The Court noted that a “hard look” under NEPA only requires the agency to adequately identify and evaluate environmental concerns—beyond those steps, no further agency action is required.²⁶

The Court found that the BLM took the requisite hard look—even though baseline data on winter concentration areas was largely unavailable. The Court found that the BLM took the required steps and disclosures in the EIS with regard to the lack of baseline data to satisfy the “hard look” standard.²⁷ Additionally, the petitioners did not show how baseline data was necessary for a reasoned decision by the BLM.²⁸

22. *Id.*

23. *Id.* at *12.

24. *Id.* at *16.

25. *Id.*

26. *Id.* at *17.

27. *Id.* at *18.

28. *Id.* at *19.