AAPL Powering The Profession

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GOVERNMENTAL AFFAIRS WEEKLY REPORT

Weekly Highlights At-A-Glance

FEDERAL – Legislative

Resources for Workforce Investments, not Drilling (ReWIND) Act. On May 5, a group of more than 40 federal lawmakers backed legislation to prevent fossil fuel companies from receiving coronavirus-related aid. The Resources for Workforce Investments, Not Drilling, or ReWIND, Act (bill not yet numbered) would prevent fossil fuel companies from receiving loans under federal loan programs; caps the Strategic Petroleum Reserve emergency oil supply at its current level of 714.5 million barrels and prevents private companies from storing their oil in the reserve; and would seek to halt the sale of new fossil fuel leases while the administration continues to sell leases on federal land and prevent the Interior Department from cutting royalties for companies with such leases. Other bill provisions would suspend new federal rulemaking and keep all public comment periods open and prevent banks affected by certain stimulus package provisions from making new equity investments in fossil fuel companies for two years. "It would be unconscionable to bail out big oil and gas corporations with money intended to help families, workers and small businesses survive this global pandemic," said a statement from Rep. Nanette Barragán (D-CA), who is leading the legislation alongside Sen. Jeff Merkley (D-OR) (Read more here). The bill is considered dead-on-arrival in the Republican-led Senate should it even move through the House. Read more.

FEDERAL – Regulatory

Financial Risk to Oil and Gas Companies. On May 4, a group of U.S. congressional representatives sent a letter to Federal Reserve Chairman Jerome Powell and the Commodity Futures Trading Commission Chair Heath Tarbert expressing their concerns that "major U.S. banks are poised to take ownership over highly leverage oil and gas assets." The letter urges them to "mitigate the risks to the financial system and consumers as oil and gas companies face financial challenges." As a result of COVID-19, "these conditions have seemingly necessitated a transfer of ownership to existing creditors, at a rate and scale that could prove to be disruptive to credit and commodity markets." The letter sets forth certain requested conditions to better protect against these financial risks. Read more.

BLM Exemptions from NEPA Review. On May 1, the Bureau of Land Management (BLM) published its notice of revisions, *National Environmental Policy Act Implementing Procedures for the Bureau of Land Management* (85 Fed. Reg. 25472), which establishes a categorical exclusion that will exempt from environmental review some proposals for oil drilling, road-building, sage-grouse habitat improvement and other projects under the National Environmental Policy Act (NEPA). The move has been lauded by industry representatives who remind environmental activists that habitat areas are still protected. These new procedures are being proposed as the Interior Department, the U.S. Forest Service, and other agencies are increasing the kinds of proposals excluded from environmental review under NEPA and reducing the time it takes for those reviews in order to speed up the approval process for energy development, logging, and other projects. The new procedures "will help to improve the BLM's NEPA compliance by allowing it to spend less time analyzing low-impact projects and give more attention to larger projects," said attorney Bob Comer, co-head of mining for Denver-based Norton Rose Fulbright US LLP and a former associate Interior Department solicitor in the George W. Bush administration. Read more.

BLM Director Appointment. (*Update to 1/13/20 Weekly Report*) Last week, Interior Secretary David Bernhardt issued a written order once again extending the tenure of William Perry Pendley as acting BLM Director until a Senate-confirmed appointee is in place. Pendley's assignment will continue until June 5, 2020, unless extended again or Pendley is formally nominated by President Trump. Pendley had been BLM Deputy Director of Policy and Programs. Prior to holding that position, Pendley, an attorney, was the president of the Mountain States Legal Foundation. Read more.

Federal Reserve Oil and Gas Industry Lending – Washington, DC. On April 30, the Federal Reserve announced changes to a lending program that paves the way for the oil and gas industry to qualify for government financing amidst the COVID-19 pandemic. The expanded criteria to qualify for the Main Street Lending Program follows requests from Sen. Ted Cruz (R-TX) and a push by small and mid-sized oil producers who said financing was needed to save the industry from bankruptcy. (See the news release from Sen. Cruz here) The new guidelines ease restrictions on borrowing for heavily indebted companies and also allows them to use the loans to refinance existing debts — a departure from the first set of criteria released by the board. "Because of these restrictions, small- and medium-sized oil and gas companies, who desperately need liquidity because of massive demand disruption caused by COVID-19 and foreign oil aggressive overproduction and price discounts, are unable to access the short-term liquidity they need to avoid bankruptcy," Cruz wrote in a letter to the Treasury Department and the Federal Resource Board last week. According to Cruz, this change to the lending program will alleviate those concerns. Read more.

U.S. Treasury Department Oil Producer Lending – Washington, DC. On April 28, U.S. Energy Secretary Dan Brouillette told industry representatives that lending programs under development include one within the Treasury Department that would provide "bridge loans" to smaller players, and another at the Federal Reserve that would provide emergency lending authority, as noted above. Brouillette's remarks were made to the North Dakota Petroleum Council which later posted them on their website. Brouillette also said he has asked Treasury Secretary Mnuchin and others to work with bank regulators to guard against "discriminatory lending" against the energy industry. This echoes comments previously made on April 24 by Secretary Mnuchin who announced the Trump administration is considering the creation of a lending program to provide money for U.S. oil producers. "One of the components we're looking at is providing a lending facility for the industry," said Mnuchin. "We're looking at a lot of different options and we have not made any conclusions," he added. Mnuchin also said there are internal discussions about alternative lending structures with banks if traditional lending programs are unavailable. Read more.

FEDERAL – Judicial

Clean Water Act – U.S. Supreme Court. On April 23, the U.S. Supreme Court rendered its Clean Water Act decision in *County of Maui v. Hawaii Wildlife Fund* (Case No. 18-260). The Clean Water Act forbids "any addition" of any pollutant from "any point source" to "navigable waters" without an appropriate permit from the Environmental Protection Agency (EPA). The Act defines "pollutant" broadly and defines a "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged," which includes, for example, any container, pipe, ditch, channel, tunnel, conduit, or well, and defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean, or coastal waters] from any point source." It then uses those terms in making "unlawful" the discharge of any pollutant by any person without an appropriate permit. Although the case facts focused on a wastewater reclamation facility that collects sewage from the surrounding area, treats it, and then pumps treated water into the ground through four wells, the case may have broader implications as to "the fundamental issue of

what is a discharge to navigable waters requiring a permit" under the Act. The Court held that a permit is needed when there is the "functional equivalent" of a direct discharge. According to law firm, Covington & Burling LLP, the "Court's opinion in *Maui* reflects an effort to find a 'middle ground' that avoids the consequences of an overly broad or overly narrow interpretation of the statute." However, this middle ground stance has left the decision muddled as a dissenting Justice Alito pointed out. "Unless or until more guidance is provided by EPA, the lower courts or Congress, affected parties will be left to wrestle with the Court's new 'functional equivalent' standard," noted Covington & Burling who added that the opinion leaves us in a situation where the lower courts will need to wrestle with this issue and "provide additional guidance through decisions in individual cases" as Justice Breyer states, referring to the "traditional common-law method" as useful even in an era of statutes. In the meantime, until the EPA weighs in, affected parties face uncertainty. Read more.

Sage-Grouse Habitat – Idaho. On February 27, in *Western Watersheds Project v. Zinke* (Case No. 1:18-cv-00187), the U.S. District Court for the District of Idaho addressed a dispute over BLM policy changes promulgated under the Trump administration. The case involves a lengthy history of procedural moves which resulted in a number of oil and gas lease sales being set aside in 2018 and subsequent review by the BLM to comply with certain court orders. However, this case "applies only to oil and gas lease sales contained in whole or in part within sage-grouse habit management areas." At issue was BLM Instruction Memorandum (IM 2018-034) which implemented new procedures for the handling of leasing oil and gas rights on certain federal lands. The environmentalist plaintiffs claim that IM 2018-034 "unlawfully restricts public participation in and environmental review of BLM oil and gas lease decisions that affect and threaten sage-grouse populations and habitats across the western United States." Here, the Court agreed, holding the "BLM inescapably intended to reduce and even eliminate public participation in the future decision-making process. Regardless of the reasons for doing so, the fact of doing so in the manner pursued by BLM cannot be reconciled with [the Federal Land Policy and Management Act and National Environmental Policy Act] overarching mandates. IM 2018-034 is therefore substantively invalid." Read more.

BLM Leasing – Montana. On May 1, the U.S. District Court for the District of Montana ruled in *Wildearth Guardians v. U.S. Bureau of Land Management* (Case No. CV-18-73-GF-BMM) that the Bureau of Land Management (BLM) failed to consider risks to Montana's environment and water supply before issuing 287 oil and gas leases covering 145,063 acres in December 2017 and March 2018 lease sales. In his opinion, Judge Brian Morris wrote that "the Court does not fault BLM for providing a faulty analysis of cumulative impacts or impacts to groundwater, it largely faults BLM for failing to provide *any* analysis." In sum, "the Court concludes that the proper remedy is to vacate BLM's finding of no significant impact and its issuance of the leases and to remand to BLM for further analysis and action consistent with this opinion." BLM officials said the agency would evaluate the ruling and determine its next steps. "With all due respect, we disagree with the Court's conclusion, and the BLM stands by its analysis in following the letter of the law to issue oil and gas leases in Montana," said the BLM in a statement. "Regardless of the ultimate outcome of this dispute and despite the attempts of radical, special interest groups, the Department and the BLM will continue to work towards ensuring America's energy independence while preserving a healthy environment." Read more.

Leasing; Royalties; Statute of Limitations – New Mexico. On February 27, the U.S. District Court for the District of New Mexico addressed a case where plaintiff-lessors alleged royalty underpayments for agreements dating back to 1989. In *Fullerton v. Energen Resources Corp.* (Case No. 1:19-cv-00346), Energen moved to dismiss the claim arguing the plaintiffs missed their opportunity to recover because the six-year statute of limitations ran on their action. The plaintiffs claimed their action was

tolled by a related class action lawsuit filed in 2013 under relevant case law. Here, the Court agreed concluding that since the claims filed in this matter are "nearly identical to those filed in the 2013 class action" tolling would apply to this case. Read more.

STATE – Legislative

Notaries Public – California. On May 11, AB 2424 was scheduled for a hearing by the Assembly Judiciary Committee. The bill, sponsored by Asm. Ian Calderon (D), would require a notary public who is not licensed as an attorney to disclose, prior to providing services, that the notary public is not authorized to practice law in the state, among other disclosures. The bill would require these disclosures be provided in writing, including by electronic means, and in the language the notary public uses to provide the services to the person. The bill would also require a notary public to obtain a signed, or electronically signed, acknowledgment of receipt of the written disclosures prior to rendering services as a notary public to that person. The bill would authorize the Secretary of State to refuse to appoint any person as a notary public or revoke or suspend the commission of any notary public on the ground that the notary public willfully violated these provisions. Read more.

Notaries Public; Recordation – Missouri. On April 30, SB 578 passed the Senate and has been transmitted to the House. The bill, sponsored by Sen. Sandy Crawford (R), provides processes for the recorder of deeds to record electronic documents and procedures for remote online notarization. Read more.

STATE – Regulatory

COGCC Rulemaking Update – Colorado. (*Update to 4/27/20 Weekly Report*) On April 29, we informed members that the Colorado Oil and Gas Conservation Commission (COGCC) released another notice regarding upcoming Mission Change rulemaking to implement SB19-181. "We are in uncharted territory, as we've never seen multiple large rulemakings folded together into a single mega rulemaking," said Dan Haley, President and CEO of the Colorado Oil & Gas Association. (Read more) At the April 29 hearing, the COGCC announced a revised schedule for the Mission Change Rulemaking. The COGCC determined that it was not feasible to begin the Mission Change rulemaking hearings on April 29. The schedule announced on April 29 provided additional time for parties to identify issues with proposed Mission Change rules and to come up with solutions. The new schedule also incorporates the hearing schedule for the 800, 900 and 1200 Series Rules. On May 1, 2020, Staff released draft 800, 900 and 1200 Series Rules. Staff is soliciting stakeholder input on the 800, 900 and 1200 Series Rules (Underground Injection for Disposal and Enhanced Recovery Projects; Environmental Impact Prevention; and Protection of Wildlife Resources, respectively). COGCC Staff requests stakeholders provide written feedback on these draft rules no later than 5:00 pm Friday, May 15, 2020. To access the COGCC announcement, copy of the Series draft rules, and for instructions on how to submit comments and access the COGCC Public Comment Portal, click here for more. Read more about SB19-181 here. For more coverage, Read more.

Hydraulic Fracturing Regulations – New Mexico. On May 6, the New Mexico Oil Conservation Commission announced it will hold a May 21 hearing regarding an application to amend the Commission's rules for produced water as it relates to hydraulically fractured wells. To access the virtual online meeting and the related docket: Read more.

Shut-In Discussions – North Dakota. (*Update to 4/27/20 Weekly Report*) As an update to the April 21 meeting held by the North Dakota Industrial Commission (NDIC), the "Oil and Gas Division of the Department of Mineral Resources has scheduled a special hearing to address the oil price that constitutes waste pursuant to North Dakota Century Code § 38-08-02(19); the consequences of determining that waste is occurring, and what relief may be appropriate and necessary to prevent the

waste of North Dakota crude oil production." The special hearing will be held on May 20. (Read more about the hearing and the public comment process here) NDIC will accept and consider written comments if received no later than 5:00 pm CDT May 15, 2020. Submit written comments to the Oil and Gas Division, 1016 E. Calgary Ave, Bismarck, ND 58503-5512 or email those to brkadrmas@nd.gov. Lynn Helms, director of the Oil and Gas Division of the state's Department of Mineral Resources, had previously advised against a decision to order output pro-rationing. Read more.

Industry Task Force – North Dakota. Last week, the state Department of Mineral Resources announced the formation of the Bakken Restart Task Force "to facilitate rapid recovery of the oil and gas industry and supporting sectors impacted by COVID-related demand shock." The task force pulls together representatives from the state's department of "Mineral Resources, Public Service Commission, Environmental Quality, Trust Lands, Pipeline Authority, Office of Management and Budget, Tax Department, Commerce, Bank of North Dakota and input requested from various industry subject matter experts." The task force will be focused on three key areas: regulatory relief, economic stimulus and long-term oil and gas industry recovery. Read more.

Railroad Commission Prorationing – Texas. (*Update to 4/27/20 Weekly Report*) On May 5, the Texas Railroad Commission (RRC) voted not to proceed with prorationing during its open meeting (Access the archived meeting here). "Only one of the three commissioners wanted to take conditional steps in that direction, but that commissioner, Ryan Sitton, recognized he did not have the votes and chose not to make a motion at the hearing." For background, on April 14 the RRC held an open meeting via teleconference to consider a joint motion filed by Pioneer Natural Resources U.S.A., Inc. and Parsley Energy Inc. Requesting a Market Demand Hearing and Market Demand Order Effective for May 2020 Production which requested that the agency conduct a hearing (a) to determine whether waste of oil and gas is taking place in Texas or is reasonably imminent and, if so, to adopt an order to prevent waste and (b) to inquire as to the reasonable market demand for oil pursuant to Section 85.058 of the Texas Natural Resources Code and to issue any order, effective for May 2020 production, as the RRC may deem appropriate in response to its findings." You may view the archived hearing here. You may review the submitted public comments here. (For further background information click here.) On April 21, RRC commissioners debated the matter and decided to hold off on a vote until May 5. "Chairman Wayne Christian and Commissioner Christi Craddick said they intend to consult with legal staff and the state attorney general in the hope of preventing any action from being hung up in court by lawsuits. Christian argued that a legal challenge could hold up action far longer than a 2-week delay to the May 5 meeting." Read more.

Notaries Public – Texas. As a reminder to prior reporting, Gov. Greg Abbott has suspended a state statute concerning appearance before a notary public to acknowledge real-estate instruments. "The temporary suspension allows for appearance before a notary public via two-way audio-video communication technology when executing such documents. The suspension is intended to permit flexibility for notaries to execute real-estate instruments without the need for in-person contact to protect themselves and others from COVID-19." This suspension will be in effect until the earlier of May 30, 2020 or the termination of the governor's March 13, 2020 disaster declaration (which currently remains in effect). Read more.

STATE – Judicial

Working Interests; Contract Formation – Texas. On February 27, in *Chalker Energy Partners III, LLC v. Le Norman Operating LLC* (Case No. 18-0352), the Texas Supreme Court addressed the issue of "whether an email exchange reflected the meeting of minds required for a contract, given the nature of the transaction and the parties' expressed

contemplations." The parties to the working interest asset sale negotiations at issue had agreed that "unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist." Thus, they agreed "that a definitive agreement was a condition precedent to contract formation." Here, the Supreme Court disagreed with the appellate court interpretation and held that [a]lthough the emails are writings, they do not form a definitive agreement." Further, "The emails here are more akin to a preliminary agreement than a definitive agreement to sell the Assets, and the parties' dealings suggest that they intended that a more formalized document, like a PSA, would satisfy the definitive-agreement requirement." In sum, the Court found that the parties' email exchange falls short of an agreement as a matter of law and reversed the judgment of the appellate court. Read more.

Assignments; Overriding Royalties – Texas. On February 21, in *Piranha Partners v. Neuhoff* (Case No. 18-0581), the Texas Supreme Court addressed a dispute involving a written assignment of an overriding royalty interest in minerals produced from land in Wheeler County. The Supreme Court reversed the judgment of the court of appeals reversing the trial court's judgment declaring that the assignment conveyed an overriding royalty interest in all production under the lease, holding that the assignment unambiguously conveyed the assignor's overriding royalty interest in all production under the lease. The assignment in this case identified the single well that was producing at the time of the assignment, the land on which the well was located, and the lease under which the overriding royalty interest existed. At issue was whether the assignment conveyed the assignor's interest in all production under the identified lease or only in production from the identified well or from any well drilled on the identified land. The court of appeals held that the assignment conveyed only the 3.75 percent overriding royalty interest in production from the tract of land on which the well was located. The Supreme Court reversed, holding that the assignment unambiguously conveyed all of the interest that the assignor owned at the time of the conveyance. Read more.

Easements; Servient Estates – Texas. On March 5, in *Atmos Energy Corp. v. Paul* (Case No. 02-19-00042), the Texas Court of Appeals, Second District (Fort Worth) addressed a dispute over the interpretation of a 1960 easement agreement that grants a right-of-way for the grantee to construct, maintain, and operate pipelines over and through 137 acres of property. The owner of a portion of the property denied Atmos access to construct a new pipeline which Atmos claimed was a violation of the easement agreement. Atmos argued that under standard principles of contract interpretation the unambiguous easement is a blanket easement that permitted Atmos to construct a new pipeline anywhere on the property, subject to the requirement that the use of the right does not unreasonably interfere with the property rights of the owner of the servient estate, and Paul did not conclusively prove that the new pipeline would unreasonably burden the property. The appellate court agreed with Atmos and reversed the lower court summary judgment ruling holding Paul "failed to conclusively establish" the unreasonable burdening of his property. Read more.

Permitting; Trespass – Wyoming. On February 27, in *Devon Energy Production Company, LP v. Grayson Mill Operating, LLC* (Case No. S-19-0170), the Wyoming Supreme Court addressed a "race to permit" dispute where both parties hold mineral interests in certain drilling and spacing units and both want to be the operator of those units. Grayson won the race to permit and ultimately obtained operator status over the lands in question. Devon then filed a complaint against Grayson, claiming Grayson illegally trespassed on the lands to obtain data to include in its applications for permits to drill. Devon claims Grayson's actions violated Wyoming law, which prohibits a party from trespassing on private lands to unlawfully collect resource data. The district court granted Grayson's motion to dismiss the complaint for lack of subject matter jurisdiction,

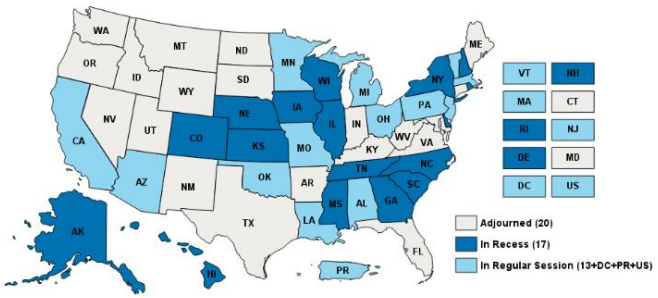
finding the Wyoming Oil and Gas Conservation Commission (Commission) had primary jurisdiction to resolve the dispute and Devon failed to exhaust its administrative remedies with the Commission. On appeal, Devon argued the district court, and not the Commission, is the proper forum to resolve the trespass claim. Here, the Supreme Court agreed with Devon and reversed and remanded the case back to the lower court for further proceedings, holding "[t]he Commission does not have jurisdiction to consider a civil trespass and, therefore, there was nothing for Devon to exhaust at the administrative level regarding its claim" under the applicable statute. Read more.

INDUSTRY NEWS FLASH

▶ **Permian drillers slash output on their own.** As Texas Railroad Commissioner Ryan Sitton called efforts to imposes state-mandated production cuts "dead" last week, more and more Permian Basin operators are curbing output voluntarily even without pro-rationing orders. This comes as global oil majors Exxon Mobil Corp., Chevron Corp. and ConocoPhillips announced plans to curb as much as 660,000 barrels a day of combined American output by the end of June. Read more.

LEGISLATIVE SESSION OVERVIEW

States in Session



Session Notes: Alabama, Arizona, California, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Jersey, Ohio, Oklahoma, Pennsylvania and Vermont are in regular session. The District of Columbia Council, the Puerto Rico House and the U.S. Congress are also in regular session.

Arizona was scheduled to adjourn on May 8. The following states have upcoming adjournments scheduled but are likely to postpone in response to the COVID-19 pandemic: South Carolina (May 14), Minnesota (May 18), Alabama (May 19) and Alaska (May 20).

The following legislatures are postponing their 2020 legislative sessions due to COVID-19 until the dates provided: Puerto Rico Senate (May 11), Illinois Senate, Rhode Island and South Carolina (May 12), Delaware and Iowa (May 15), Colorado, Mississippi and North Carolina (May 18), Kansas (May 21), Tennessee (June 1) and Alaska, Georgia, Hawaii, Illinois House, Nebraska, New Hampshire, New York and Wisconsin (TBD).

Signing Deadlines: Arkansas Republican Gov. Asa Hutchinson has 20 days from presentment to act on legislation or it becomes law without signature. Connecticut Democratic Gov. Ned Lamont must act on legislation within 15 days of presentment or it becomes law without signature. Florida Republican Gov. Ron DeSantis has 15 days from presentment to act on legislation or it becomes law without signature. Kentucky Democratic Gov. Andy Beshear has 10 days from presentment, Sundays excepted, to act or legislation becomes law without signature. Maine Democratic Gov. Janet Mills must act on legislation presented within 10 days of adjournment or it becomes law unless returned within three days after the next meeting of the same legislature. Maryland Republican Gov. Larry Hogan had a signing deadline of May 7.

Interim Committee Hearings: The following states are currently holding 2020 interim committee hearings: Arkansas, Colorado, Maryland, Montana, Nevada, North Dakota, Oregon, South Dakota, Washington and Wyoming. ■

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