Attachment 3: General Conformity Reviews for Oil and Gas Projects

Oil and Gas Leasing

The BLM maintains that oil and gas leasing is **exempt** from the general conformity regulations based on the following:

1. The act of leasing is an administrative action that does not directly authorize emissions generating activities, and no direct emissions occur.
2. Indirect emissions from the development of leases are not reasonably foreseeable, and a conformity determination is not required "where the emissions (direct or indirect) are not reasonably foreseeable," see 40 C.F.R. § 93.153(c)(3). "Reasonably foreseeable emissions are projected future direct and indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known, and the emissions are quantifiable as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency," *see* 40 C.F.R. § 93.152. The following further explains why emissions are not reasonably foreseeable at the leasing stage:
    a. Emissions inventories developed for lease sale environmental reviews are speculative. The BLM makes several assumptions to provide some information for these inventories at a broad scale; however, they do not qualify as "reasonably foreseeable" under the conformity definition at 40 C.F.R. § 93.152. As a practical matter, this is true because, it is unknown if all or any of the available parcels will be leased; it is unknown when or if any development will occur on any leased parcels (lease terms are initially valid for 10 years); and, there may be multiple lessees with independent business/development plans that should NOT be aggregated under a single conformity evaluation given the independent nature of the federal permitting process and decision making.
    b. The regulations at 40 C.F.R. § 93.153(c)(3) list Initial Outer Continental Shelf leasing as not having reasonably foreseeable emissions, because they "are made on a broad scale and are followed by exploration and development plans on a project level." Onshore leasing follows a similar pattern and requires additional permitting by the BLM before emissions generating activities can begin on any lease. Once development plans or a permit application is submitted, the BLM can review the provided data and determine if any other exemptions would apply to the project, such as the major or minor New Source Review (NSR) exemption at 40 C.F.R. § 93.153(d)(1).

Oil and Gas Permitting

The act of permitting oil and gas projects subjects the BLM to the General Conformity regulatory requirements due to the continuing program of responsibility definition at 40 C.F.R. § 93.152, which states that a Federal agency has responsibility for emissions caused by actions it takes itself; or actions of non-Federal entities that the Federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits, provided the agency can impose conditions on any portion of the action that could affect the emissions. The BLM has no general

authority to regulate sources of emissions; however, emissions may be limited by Conditions of Approval imposed by BLM on an Applications for Permit to Drill (APD), which may include operator committed design features that can affect the emissions.

APDs with wells on split-estate lands, such as FEE/FED (private surface over federal minerals) and FED/FEE (federal surface over private minerals), present unique challenges for applying the Clean Air Act general conformity requirements. Under 42 U.S.C. § 7506(c) and 40 C.F.R. Part 93 Subpart B, general conformity applies only to the emissions caused by the federal action itself, such as the BLM's approval of a drilling permit for federal mineral development. Emissions from the non-federal (FEE) portions of the project are not automatically subject to conformity, unless they are reasonably foreseeable and caused by (40 C.F.R. § 93.152) the federal action.

In evaluating conformity, "direct emissions" and "indirect emissions" should be calculated. "Direct emissions . . . are caused or initiated by the Federal action . . . and occur at the same time and place as the action and are reasonably foreseeable." 40 C.F.R. § 93.152. "Indirect emissions" are emissions:

> (1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action;
>
> (2) That are reasonably foreseeable;
>
> (3) That the agency can practically control; and
>
> (4) For which the agency has continuing program responsibility.
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> For the purposes of this definition, even if a Federal licensing, rulemaking or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a Federal agency can practically control any resulting emissions.

Id.

Emissions from FEE components may be considered "indirect emissions" if they meet the criteria above. However, if the FEE portion of a well would still be drilled if the FED portion were not approved, then the FEE emissions are not practically controlled by the agency and must not be included in the conformity evaluation. Estimating the FEE emissions that will be excluded from the conformity evaluation requires a case-by-case assessment. To get help with project level emissions assessments, case-by-case exemption assessments, or any other air related issues, please contact your local or national Air Resource Specialist.