TO: Robert Smith, DEQ Coal Section Permit Coordinator
      Jen Lane, DEQ MEPA Coordinator
FROM: Mark L. Lucas, Esq., DEQ Staff Attorney
RE: DEQ Proposal to Grant in Part and Deny in Part Western Energy Area F Permit
     (SMP C2011003F)
DATE: April 15, 2019
SUBJECT: Private Property Assessment Act Analysis

Overview

Western Energy seeks an amendment to its Montana Strip and Underground Mining Reclamation Act (MSUMRA) coal mining permit to add 6,746 acres of permit area (4,260 acres of disturbance) involving 2,159 acres of open pit mining and 71 million tons of coal to the existing Rosebud coal mine in Colstrip. A small portion of the coal at the far northwest permit boundary cannot be mined as proposed by the applicant without resulting in material damage to groundwater outside the permit boundary which cannot be approved under § 82-4-227(a)(3), MCA. This small portion of coal is roughly 74 acres (roughly 2.2 million tons of coal with a net worth range of 2.5 to 5.5 million dollars). The balance of the proposed mining will not result in material damage to groundwater outside the permit area and can be approved. Thus, DEQ proposes to in part grant and in part deny the amendment application. The applicant does not consent to a permit condition which excludes the subject 74 acres of coal.
As discussed below, the proposed action does not have implications with respect to the taking or damaging of private property, and does not constitute a taking under state or federal law.

**Initial and Secondary Private Property Assessment Act Impact Analyses**

The Fifth and Fourteenth Amendments to the United States Constitution together prohibit a state from taking private property for public use without just compensation. Article II, Section 29 of the Montana Constitution contains a similar prohibition, but goes further to prohibit the taking or damaging of private property without just compensation. The Private Property Assessment Act (§§ 2-10-101-2-10-112, MCA, hereinafter the PPAA) requires state agencies to assess whether their actions have implications relating to the taking or damaging of private property. State agencies are required to use the attorney general’s guidelines and checklist to prepare a taking or damaging impact assessment for each state agency action with taking or damaging implications. § 2-10-105(2), MCA. A taking or damaging impact assessment must in turn assess a number of factors including the likelihood that a court would hold the action is a taking, any alternatives which would fulfill the agency's statutory obligations while reducing the risk for a taking or damaging, the estimated compensation required for the taking, and the source for payment of the compensation. § 2-10-105(2), MCA. Such a "taking or damaging" impact assessment must then be provided to the Governor in advance of final agency action. § 2-10-105(3), MCA, if the agency action has implications for the taking or damaging or private property. §§ 2-10-105(2) and (3), MCA. As is set forth more fully herein, that is not the case here.

The PPAA defines a permit condition or denial "that if adopted and enforced would constitute a deprivation of private property in violation of the United States or Montana
constitution" as an action with "taking or damaging implications."§ 2-10-103(1), MCA. Thus, a state agency action which does not constitute an unlawful deprivation of property rights is not an action with taking or damaging implications.

The Action at Issue Does Not Involve Taking or Damaging Implications

The analysis for compliance with the PPAA is a two-step process. An initial analysis is performed to determine whether the proposed agency action is covered under the PPAA. If the proposed action is covered, an analysis must then be performed to determine whether the proposed action has takings implications.

Under the initial analysis checklist, a proposed agency action is covered by the PPAA if 1) the action affects real property; 2) the action is a rule, rule amendment, policy is a permit condition or denial; and 3) the agency has discretion legally not to take the action or to take the action another way that would have less impact on private property (In other words, is the agency bound by a statute or rule?). Here, the property interests at issue include mineral and surface leases for the subject property. A leasehold interest in mineral estate is property interest, the unlawful taking of which must be justly compensated. *Western Energy Co. v. Genie Land Co.*, 227 Mont. 74, 78, 737 P.2d 478,481 (1987). In addition, the DEQ’s proposal to deny Western Energy’s amendment application to exclude the subject 74 acres of coal is a permit denial.

However, DEQ does not have the discretion legally not to take the action or to take the action another way that would have less impact on private property. Section 82-4-227(3)(a), provides as follows:

(3) The department may not approve an application for a strip-or underground-coal-mining permit or major revision unless the application affirmatively demonstrates that:
(a) the assessment of the probable cumulative impact of all anticipated mining in the area on the hydrologic balance has been made by the department and the proposed operation of the mining operation has been designed to prevent material damage to the hydrologic balance outside the permit area...

Material damage is thus defined as "degradation or reduction by coal mining and reclamation operations of the quality or quantity of water outside of the permit area in a manner or to an extent that land uses or beneficial uses of water are adversely affected, water quality standards are violated, or water rights are impacted." 82-4-203(32), MCA. Here, mining the subject 74 acres of coal as proposed by the applicant would violate groundwater standards outside the permit area and further adversely affect the beneficial uses of groundwater by increasing TDS from 1,165 mg/L to 4,937 mg/L. This corresponds to an increase in specific conductivity from 1,725 μS/cm to 7,310 μS/cm. This represents a change in groundwater class from Class II before mining to Class III after mining, constituting material damage. See ARM 17.30.1006(2) and (3); accord In re Signal Peak Energy (Bull Mountain Mine No. 1), BER-2-13-07-SM, Findings of Fact, Conclusions of Law and Order (Jan. 14, 2016) at 56. Because DEQ is bound by § 82-4-227(3)(a) to deny the portion of the permit amendment application that would authorize the mining of the subject 74 acres of coal, no further analysis for taking and damaging implications is required under the PPAA. I have attached a copy of the “Private Property Assessment Act: Initial Analysis” checklist to this memo.
PRIVATE PROPERTY ASSESSMENT ACT: INITIAL ANALYSIS

IS THE PROPOSED AGENCY ACTION COVERED UNDER THE PRIVATE PROPERTY ASSESSMENT ACT?

The purpose of this checklist is to determine whether a proposed agency action is covered under the Private Property Assessment Act. If it is not, no further evaluation for taking and damaging implications is required under that Act. (Further evaluation may be required, however, under the Montana Environmental Policy Act, if applicable.) If the proposed agency action is covered under the Private Property Assessment Act, the agency must complete the Attorney General's Private Property Assessment Act Checklist and any further impact assessment determined to be necessary under that checklist.

If the answer to any question below is "No", no further analysis for taking and damaging implications is required under the Private Property Assessment Act or this checklist.

Does the action affect real property, including water rights? (Real property in this sense includes land, whatever is erected upon, growing upon or affixed to land and interests related to land.) 

YES X NO

Is the action a rule, rule amendment, policy or permit condition or denial?

X

Does the Department have discretion legally not to take the action or to take the action in another way that would have less impact on private property? (In other words, is the Department bound by a statute or rule?)

X

Proceed to this section only if none of the answers above are "No". If the answer to any question below is "Yes," no further analysis for taking and damaging implications is required under the Private Property Assessment Act or this checklist.

Is the action an eminent domain proceeding?

YES NO

Is the action a seizure of property by law enforcement officials as evidence or under a state forfeiture statute?

YES NO

Is the action a forfeiture of property during or as the result of a criminal proceeding?

YES NO

Is the action a proposal to repeal a rule, discontinue a government program, or implement a proposed change that has the effect of reducing regulation of private property?

YES NO