

# Wyoming Environmental Compliance and Public Land News - October 2014

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Insight — 10/1/2014

### Public Land News

#### **BLM News**

##### BLM and State Historic Preservation Office to Provide Training on New Protocol

On October 7, 2014, the BLM and Wyoming State Historic Preservation Officer will provide training on the use of the new State Protocol Agreement released in April 2014. The State Protocol Agreement governs how the Wyoming SHPO and BLM will cooperate to implement the National Historic Preservation Act to protect sites eligible for listing on the National Register of Historic Places. Section 106 of the NHPA requires BLM to consult with the Wyoming SHPO on proposed projects that may affect historic properties to ensure that actions are taken to protect, manage, reduce, or mitigate the potential harm to those properties. For more information on the State Protocol Agreement and the public training session, [click here](#).

#### **Special Status Species News**

##### D.C. District Court Nixes Wyoming's Wolf Plan

On September 23, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia reversed a September 2012 Fish and Wildlife Service rule delisting the gray wolf in Wyoming. Judge Berman held that Wyoming's existing regulatory mechanisms were not adequate to ensure maintenance of a 50% buffer over the minimum required 10 breeding pairs and 100 wolves within the state. The court noted that the maintenance of more than the minimum 10 breeding pairs and 100 wolves was necessary to the FWS' delisting decision, but that the state's assurances that it would maintain a buffer above the minimum was an unenforceable promise, on which the FWS could not rely.

On September 24, Governor Mead signed an emergency rule establishing that Wyoming's commitment to a buffer population is legally enforceable. In conjunction with the emergency rule, the state has sought a stay of the court's ruling. On September 30, Judge Berman Jackson denied the state's request for a stay of the decision. In the meantime, the hunt, which was scheduled to begin on October 1, has been suspended.

To review Judge Berman Jackson's ruling in its entirety, [click here](#).

#### ESA Revisions Considered by House Committee

On September 9, the House Natural Resources Committee held a hearing on six bills to amend the ESA. None of the six, however, is expected to leave committee before the end of the year. All six of the proposed measures would change the way in which the ESA is administered, in some cases constraining the discretion of the U.S. Fish and Wildlife Service and National Marine Fisheries Service ("Services") to make listing decisions or enter into settlements relating to such decisions. Several of the bills are in response to a legal settlement entered into with several environmental groups in 2011 that requires the FWS to make final listing determinations by 2018 on hundreds of species:

- H.R. 1314 would require the Services to seek approval from affected states and counties before entering into a settlement with a plaintiff bringing an ESA suit against it. Also, in an attempt to reduce the number of ESA lawsuits, the bill would prohibit courts from requiring the Services to pay an ESA plaintiff's legal fees in the event of a settlement.
- H.R. 4256 would require the Services to take into account the number of individuals of a species found on private lands, as well as on public lands, when making a determination whether to list the species as endangered or threatened.
- H.R. 4284 would prevent the Services from listing a species as endangered or threatened if a state or states have adopted voluntary conservation measures, known as a State Protective Action, to protect the species.
- H.R. 4319 would require additional analysis and disclosure of economic effects before designating an area as critical habitat for an endangered or threatened species.
- H.R. 4866 would reverse the Fish and Wildlife Service's recent decision to list the lesser prairie chicken as a threatened species.
- H.R. 1927 would relax restrictions on water pumping in the habitats of certain endangered fish species in California to provide more water for the state's agricultural areas to address drought conditions.

#### Sage Grouse News

- Office of Surface Mining Reclamation and Enforcement Declines Invitation to Develop Sage-Grouse Rules

On August 11, 2014, the Department of the Interior's Office of Surface Mining and Reclamation denied WildEarth Guardian's petition to conduct rulemaking to protect greater sage-grouse and its habitat from coal mining activities. Director Joseph Pizarchik wrote that while he shares WildEarth Guardian's concern for sage-grouse, the regulations implementing the Surface Mining and Reclamation Act already contain provisions adequate to protect the species to the extent authorized and required under the law. The Director explained that the petition did not meet the threshold for

acceptance and did not establish a reasonable basis for rulemaking. The letter denying the petition can be found [here](#).

- **FWS Requests Stakeholder Data on Sage-Grouse Conservation Efforts Throughout the Range**

On August 11, the FWS issued a request for information on sage-grouse conservation actions being implemented across the bird's range. The information will be used to help the Service determine whether the sage-grouse should be proposed for listing under the ESA by the September 2015 deadline.

Specifically, the Service requested detailed data on the regulations, plans, and projects that have been implemented, or that are expected to be implemented, to protect the greater sage-grouse and sagebrush habitat. The information will be entered in the Service's "Conservation Efforts Database" developed in partnership with the U.S. Geological Survey. In a statement, the FWS' Mountain-Prairie Region Director Noreen Walsh stated, "We want to be sure we have the best, most up-to-date information on which to base our determination."

For more information, and to submit information to the database, go [here](#).

- **FWS Releases Sage-Grouse Mitigation Framework**

On September, 4, the FWS released guidance to help policymakers across the sage-grouse's range plan effective mitigation strategies that conserve the species so that its listing will not be warranted under the ESA. The Greater Sage-Grouse Region-Wide Mitigation Framework is aimed at encouraging federal agencies, and state governments, and other stakeholders to implement effective mitigation strategies when grouse habitat is affected by human activities. The Framework sets out the factors the Service is likely to consider in evaluating the efficacy of mitigation practices and programs in reducing threats to sage-grouse. The Service recommends an avoidance first strategy for activities proposed in sage-grouse habitat, especially Priority Areas for Conservation and other areas of habitat identified as important to sage-grouse populations. Unavoidable impacts occurring in any sage-grouse habitat should be fully compensated. According to the Framework, "There is no one right or correct design for a mitigation program." Rather, the goal is to "encourage consistency across the range and help [the Services] many partners develop mitigation processes that simultaneously conserve sage-grouse while maintaining or enhancing economic opportunities throughout the sage-grouse range. Mitigation processes should be fair, implementable, fully compensatory, and effective for sage-grouse."

- **Challenge to Lander Resource Management Plan Appears Likely**

Potential plaintiffs appear to be gearing up to challenge BLM's first Resource Management Plan amendment designed to conserve sage-grouse and implement the BLM's National Greater Sage-Grouse Planning Strategy. On August 18, the Center for Biological Diversity and five other groups released a so-called "scorecard" measuring the final Lander,

Wyoming RMP against the recommendations for sage-grouse conservation in BLM's National Technical Team Report, a controversial document that purports to set out the "best available science" on sage-grouse conservation but does not take into consideration the BLM's multiple use mandate under the Federal Land Policy and Management Act. One of the environmental groups' primary complaints is that leasing has not been placed off limits in all areas designated as "core" habitat. On September 3, the groups sent a letter to Secretary Jewell asking that the final amendment to the Lander RMP be withdrawn and that BLM start the RMP process again. The groups' positioning seems to portend litigation if Secretary Jewell declines to withdraw the RMP.

- \$100,000 Awarded to Wyoming Sage-Grouse Local Working Groups

The Wyoming South Central Sage-Grouse Local Working Group met in Saratoga in July to review project funding applications for projects that benefit sage-grouse conservation efforts. The local working group reviewed conservation project applications and awarded \$100,000 to the University of Wyoming, Utah State University, and BLM for studies of sagebrush treatments, wind energy research, raven research, and the efficacy of conifer removal projects. The South Central Sage-Grouse Local Working Group is one of eight local working groups statewide. Each is composed of citizens representing various stakeholder groups interested in sage-grouse conservation and associated land management issues. The South Central Sage-Grouse Local Working Group's Conservation Plan can be found on the Wyoming Game and Fish Department's website.

- Department of the Interior Agencies Meet to Coordinate Western RMP Amendments

In August and September, the U.S. Fish and Wildlife Service, the U.S. Forest Service, and BLM engaged in high-level meetings to coordinate the finalization of sage-grouse RMP amendments across its range in an effort to prevent the need to list the bird under the ESA. The goal of the "roll-up" meetings was to review and make consistent the final Environmental Impact Statements ("EISs") and 98 final land use plan amendments that are the centerpiece of the National Greater Sage-Grouse Planning Strategy. The agencies are targeting the release of the final RMPs before the end of the year, or early next year, to allow sufficient time for the Fish and Wildlife Service to take the new land use planning decisions into account in the listing decision.

Mitch Snow, a BLM spokesman in Washington, D.C., said in a statement, "We're getting all draft final EISs together and making sure that they can be rolled up into a coherent, cohesive final plan that allows the Fish and Wildlife Service to analyze what we're doing." Snow described the meetings as "a very common-sense approach, in that we're trying to get things as clean and clear as possible among the agencies." A July internal memorandum from Steven Ellis, BLM's deputy director of operations, and Leslie Weldon, the Forest Service's deputy chief of the National Forest System explains that the meetings are necessary to "address differences in how important elements [of grouse protection measures] are addressed

in the final plans."

- **Wyoming CCAA for Range Management Reaches Final Stages**

On September 4, the Fish and Wildlife Service published notice of nine applications for enhancement of survival permits associated with the proposed Greater Sage-Grouse Umbrella Candidate Conservation Agreement with Assurances for Wyoming Ranch Management (Umbrella CCAA). 79 Fed. Reg. 52743 (Sept. 4, 2014). Under the CCAA program, farmers and ranchers can agree to implement conservation actions for the sage-grouse, and in exchange, the Service will provide assurances that permit recipients will not be required to take additional measures in their operations in the event the sage-grouse is listed. The Fish and Wildlife will receive public comment on the permit applications until October 6.

### **EPA News**

#### EPA Approves Wyoming Air Quality Standards for Particulate and Lead

On August 26, the EPA approved Wyoming's State Implementation Plan revisions for particulate matter and lead ambient air standards. The rules will become effective October 27, 2014. The proposed rule changes were submitted by the Wyoming DEQ in August 19, 2011. The revisions are intended to make Wyoming's rules consistent with federal standards. For more information please [click here](#).

### **Other Public Land News**

#### Department of the Interior Objects to Broadly Supported State/Federal Land Swap Bill

The Interior Department recently objected to most of the provisions contained in HR 4901 that would authorize the transfer of conservation inholdings to states. The Interior Department's objections came in the face of broad support for the legislation from Republicans, Democrats, states and conservationists.

Under HR 4901, states would transfer lands that they hold within conservation areas to the federal government. In return, the states would obtain public lands of equal value that the states could put to work making money for local schools. The bill seeks to transfer as many as two million acres of state lands that are trapped within conservations areas and cannot be developed. However, in testimony before the House subcommittee on Public Lands, BLM Deputy Director Steve Ellis, questioned the possible inequity of land deals, questioned whether there were conflicts with existing land uses, and questioned the short time limits.

### **State News**

#### **WOGCC News**

#### WOGCC Proposes New Setback Rules

The Wyoming Oil and Gas Conservation Commission is expected to release a draft new rule increasing setback for new wells in Wyoming.

While not yet public, it has been reported that the draft rules will require a 750 foot setback from any occupied building for horizontal rigs and a 500 foot setback from any occupied building for vertical rigs.

The Commission is expected to release the draft rules at their October 14, 2014 hearing. Interested parties will be allowed to provide formal comments to the rules for 40 days after the draft rules are released. Many environmental groups are arguing for setbacks of 0.25 miles or more and have been circulating information to try to encourage public involvement.

#### Pavillion Water Study Shows Wells Properly Drilled

On August 8, 2014, the Wyoming Oil and Gas Conservation Commission released a draft report which found that gas wells drilled near the town of Pavillion were properly permitted and constructed, and provided no migration pathway to domestic water wells. However, the report also concluded that more water well information and pressure monitoring is required in order to complete a full analysis. The WOGCC accepted public comments on the draft study until September 6, 2014.

The review is one of three concurrent state investigations into Pavillion water contamination first reported in 2009. Wyoming officials are also conducting studies on water quality and disposal pits in Pavillion. The results will be sent to EPA and Encana for review. All three investigations will be combined into a single final report. See <http://wyofile.com/dustin/pavillion-water-investigation-continues-slow-drip/> and [http://wyofile.com/ee\\_daily/probe-pavillion-gas-wells-finds-need-data/](http://wyofile.com/ee_daily/probe-pavillion-gas-wells-finds-need-data/)

#### Orphan Well Program Charges Ahead

Wyoming's plan to plug abandoned coalbed methane wells around the state is ahead of schedule, but the number of wells requiring closure has grown. Governor Matt Mead's initial target to close 300 orphaned wells in each of the next four years has been surpassed this year, as Wyoming is now on track to plug 479 wells in 2014. However, state regulators have also added 340 wells to the original list of 1,200 in need of plugging. Click [here](#) to learn more.

### **News From the Governor's Office**

#### Wyoming Joins Suit Challenging EPA's Limits on Existing Coal-Fired Power Plants

Wyoming recently joined eleven other states to oppose an EPA regulation to further limit carbon dioxide emissions from existing coal power plants. The lawsuit asserts that EPA's settlement agreement overregulates coal and violates the Clean Air Act. Governor Matt Mead noted the rule "is an overreach and is harmful to the economy of the entire country and in particular to Wyoming. We need affordable energy and a clean environment. We can have both, but this is not how we get there. This rule goes too far." Wyoming is part of another lawsuit challenging the EPA's proposed rule regulating existing power plants. Wyoming and eight other



states joined a suit led by Murray Energy.

#### Tenth Circuit Stays EPA's Rejection of Wyoming Regional Haze Rule

The U.S. Court of Appeals for the Tenth Circuit recently blocked EPA's demand that Wyoming's large coal-powered generators reduce pollution over national parks and wilderness areas. The decision was based on the state's likelihood of success on appeal, as well as the irreparable harm to the state and utilities without a stay.

The Regional Haze rule is part of the Clean Air Act. EPA rejected portions of Wyoming's plan, including utility controls. EPA proposed a federal plan for the state on June 10, 2013, which Governor Matt Mead said would cost utilities hundreds of millions, if not billions, of dollars. The state filed its lawsuit at the beginning of September. It argued EPA's rule would not significantly improve visibility over "Class 1" areas while incurring tremendous cost. The lawsuit noted, "EPA proposed to require the installation of the most stringent control technology. . . . Those controls would cost about eight times as much as Wyoming's BART controls . . . . EPA found these costs to be 'reasonable' even though they would deliver an imperceptible visibility improvement over Wyoming's plan."

Responding to the Tenth Circuit's decision, Governor Mead said, "The rejection of Wyoming's plan by the EPA was wrong. This decision sends a message to the federal government and affirms Wyoming's leadership in these important areas."

#### Wyoming Challenges Forest Service Water Management

A proposed directive from the U.S. Forest Service related to water management would require the Forest Service to evaluate and manage surface and groundwater resources that directly affect Forest Service land, even if that water source is on State or private property. The directive would also allow the Forest Service to evaluate and manage surface and groundwater as a single hydrogeological resource unless individual water users could show otherwise. Wyoming water law provides that surface and groundwater resources must be proven to be hydrologically connected in order to warrant conjunctive administration.

Currently, Wyoming and the Forest Service have an existing Memorandum of Understanding that provides a framework to work together. Governor Matt Mead is concerned that the proposed directive allows the Forest Service to encroach on Wyoming's jurisdiction over water within state boundaries. Accordingly, Governor Mead has encouraged the Forest Service to withdraw the directive. See <http://governor.wy.gov/media/pressReleases/Pages/GovernorDefendsWyomingWater.aspx>

#### **Wyoming Department of Environmental Quality (WDEQ)**

##### Air Quality Division Advisory Board to Consider Phase I Rulemaking

WDEQ's Environmental Quality Council will hold a public hearing at 10:00

a.m. on October 8, 2014, at the Herschler Building in Cheyenne. The Air Quality Division will propose a rulemaking before the Council to revise general emission standards, national emission standards, permitting requirements, monitoring regulations, and the national acid rain program.

Documents relevant to the meeting are available [here](#).

#### EPA Agrees with WDEQ Analysis Regarding Aquifer Exemption

EPA recently approved WDEQ's aquifer exemption request associated with Linc Energy's coal gasification pilot project in Campbell County. WDEQ's Land Quality Division approved a research and development license for Linc Energy's project in 2013. Part of the license requires an aquifer exemption by EPA. EPA determined that Linc Energy's exemption request meets the regulatory requirements.

"I'm pleased that EPA's scientists arrived at the same conclusions that we did," said Kevin Frederick, Water Quality Administrator. "Namely, that the portions of the Wyodak aquifer associated with the project met the federal requirements for exemption because it doesn't serve as a source of drinking water and the coal is expected to be commercially producible."

Todd Parfitt, DEQ Director, was also happy to see both EPA and WDEQ agreed that Linc Energy's project warranted an aquifer exemption. "It's encouraging to see that the EPA and DEQ, after conducting independent reviews of the scientific information and public comments, have come to the same conclusions. EPA and DEQ both agree that the proposed aquifer exemption will meet the requirements of the Safe Drinking Water Act."

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