

# Wyoming Environmental Compliance and Public Land News - October 2015

Insight — 10/07/2015

## Public Land News

### In Historic Decision, FWS Determines Sage-Grouse Listing is Not Warranted

On September 22, U.S. Department of the Interior Secretary Sally Jewell announced the Fish and Wildlife Service's (the Service) long awaited decision that listing the greater sage-grouse as threatened or endangered is not warranted. Secretary Jewell had hinted that the Service was likely to make a "not warranted" finding in statements leading up to the historic decision. At an event in Colorado marking the occasion, Secretary Jewell touted the "epic" conservation efforts and coordination of numerous stakeholders across the west that came together to avoid a listing decision. For more information on the decision, answers to your lingering questions about sage-grouse management, and the Bureau of Land Management's accompanying proposal to withdraw 10 million acres from mineral entry, [click here](#).

### Near Miss: EPA's Lowered Ozone Standard May Be Just High Enough to Avoid New Nonattainment Areas in Wyoming

On October 1, 2015, the U.S. Environmental Protection Agency (EPA) finalized the new primary National Ambient Air Quality Standard (NAAQS) for Ozone at 70 parts per billion (ppb), which is more stringent than the current 2008 Ozone NAAQS of 75 ppb. The current monitored values in Wyoming range from 63 ppb to 68 ppb, with the highest values in Albany County. Although it appears that Wyoming may escape nonattainment designations, the high levels of background ozone will make demonstrations of compliance with the new NAAQS difficult for entities planning new facilities or expansions.

Background ozone can be caused by elevation, types of vegetation, wildfire, international transport, and atmospheric intrusion. The Intermountain West (West) is also home to large, sparsely populated counties with few sources of emissions to control through state permits or rules. EPA acknowledges that high background levels of ozone in the West will pose unique problems for compliance, but the final rule offers few meaningful options to address the impacts of background ozone on attainment of a standard that is approaching background levels.

EPA promises to address background ozone through implementation guidance and a white paper with stakeholder input. Acting EPA air chief Janet McCabe asserts that EPA will work with states "to carry out the

duties of ozone air quality management in a manner that maximizes common sense, flexibility and cost-effectiveness while achieving improved public health expeditiously and abiding by the legal requirements [of the Clean Air Act].” See more here: <http://www.natlawreview.com/article/epa-lowers-ozone-ambient-air-standard#sthash.ldX6zAnu.dpuf>.

Learn more about how the lowered ozone NAAQS may impact your industry. Utah air quality regulators and Holland & Hart attorneys will provide practical advice to help you navigate this highly technical area and identify opportunities to have your concerns heard. A call-in line is available.

#### EPA Proposes New Oil and Gas Methane Rules

On September 18, 2015, EPA published proposed new methane emission limits for the oil and gas industry. While previous performance standards for volatile organic compounds have had the side effect of reducing methane emissions, EPA has proposed new source performance standards that focus directly on methane reduction and require controls specifically targeting methane emissions for the first time. The proposal include a leak detection and repair program modeled after Colorado's recent methane regulations, as well as requirements to reduce venting episodes that may occur when tank controls are underperforming or not adequately designed to handle periodic pressure changes and weather events. See more here.

#### EPA Proposes Control Technique Guidelines for Ozone Nonattainment Areas, Updates to the Source Determination Rule, and the Indian Country Minor New Source Review Federal Implementation Plan

Also on September 18, 2015, EPA issued draft Control Technique Guidelines (CTGs) for existing oil and gas equipment located in areas that are nonattainment for ozone. The CTGs will become very important for existing oil and gas sources in areas designated nonattainment for the new ozone NAAQS of 70 ppb. Areas designated as “moderate” or above will require existing sources to install reasonably available control technologies (RACT), and most regulatory agencies will look to the CTGs as examples of RACT. The CTGs include recommended controls and practices for storage tanks, pneumatic controllers, pneumatic pumps, centrifugal and reciprocating compressors, and equipment leaks. In addition to the CTGs, EPA clarified its interpretation of “adjacent,” which is one of three factors EPA uses to determine whether individual emission sources must be aggregated into a single source. Aggregation is important because combining emission sources can change several small sources into a single major source, which is subject to more air emission regulations and permitting requirements. EPA is taking comments on two alternative interpretations for “adjacent:” one definition would define adjacent in terms of proximity; the other would consider activities adjacent if they are either close together or are related by function. The second interpretation has been the subject of considerable controversy and disagreement in the past. For proximity, EPA suggests, “equipment or activities would be considered adjacent if they are located on the same site or are on sites that are within a short distance (1/4 mile) of each other.” Finally, EPA issued the Indian country minor New Source Renewal (NSR) Federal Implementation Plan (FIP), which will replace site-specific minor NSR

preconstruction permits in Indian country and incorporate standard emissions limits and other requirements that will apply throughout Indian country. See more [here](#).

#### Judge Blocks BLM's Hydraulic Fracturing Rule

On September 30, Judge Scott Skavdahl of the U.S. District Court for the District of Wyoming granted a preliminary injunction that halted enforcement of the Bureau of Land Management's (BLM) hydraulic fracturing regulations on federal and tribal lands in every state. In his order, Judge Skavdahl found that the Safe Drinking Water Act and the Energy Policy Act of 2005 indicate Congress' clear intention that the States should regulate hydraulic fracturing. Further, Judge Skavdahl found that none of the BLM's governing statutes contain the clear language that would be necessary to grant BLM such jurisdiction. Judge Skavdahl found the statutory evidence sufficient to grant the injunction, but went further to hold that even if the BLM had such authority, the BLM justified the hydraulic fracturing rule with hypotheticals and speculation. According to the Court, "The BLM has neither substantiated the existence of a problem this rule is meant to address, identified a gap in existing regulations the final rule will fill, nor described how the final rule will achieve its stated objectives. Rather, the Fracking Rule seems a remedy in search of harm." Without a reasonable justification, the judge found the rule itself arbitrary and capricious and therefore impermissible. The Court also held that BLM had failed to adequately consult with the individual Indian tribes that will be affected by the rule, as required by its own internal policy documents. Wyoming is a plaintiff in the suit, and Wyoming Gov. Matt Mead is pleased with the decision, echoing Judge Skavdahl's order: "Congress has addressed hydraulic fracturing and precluded federal regulation of it."

#### Judge Blocks Wetlands Rule in Some States

In late August, a federal district court judge in North Dakota granted an injunction blocking a new rule that defines the jurisdictional scope of the Clean Water Act. In the opinion granting the injunction, Judge Ralph Erickson said the rule, which was jointly issued by the EPA and the U.S. Army Corps of Engineers, would increase the number of wetlands, streams, and other bodies of water that may be regulated under the Clean Water Act. Such an expansion, Judge Erickson said, would exceed the authority granted to the agencies under the statute. Wyoming Gov. Matt Mead applauded the decision, noting that the EPA did not fully consult concerns of states and that the rule "unlawfully seeks to expand federal jurisdiction over water, undercuts state primacy and burdens landowners and water users in the West." The injunction only blocks implementation of the new regulation in the thirteen states that are party to the case: Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, South Dakota, and Wyoming.

#### BLM Extends Deadline for Comments on Onshore Order No. 3

In response to requests from the public, BLM extended the public comment period to **October 9, 2015** for a recently proposed rule that would update and replace Onshore Oil and Gas Order Number 3 (Order 3). According to BLM, the proposed rule (Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Site Security) is an update, which is intended to ensure accurate measurement, accountability, and royalty

payments for oil and gas production from federal and Indian leases. Order 3 which has not been updated since 1989, sets minimum standards for ensuring that oil and gas produced from leases overseen by BLM are properly and securely handled. BLM believes updates to these standards are necessary based on its experience with oil and gas measurement in the field and the changes in technology and industry operations that have occurred since Order 3 was issued. Although BLM is looking to replace Order 3 with this new rule, many of the definitions in the proposed rule will apply to Onshore Order Nos. 4 and 5, which BLM plans to release separately.

The proposed rules are anticipated to be largely codified at 43 CFR subparts 3173. Key changes include the following provisions:

**43 CFR 3160 – Onshore Oil and Gas Operations, Sec. 3161.1, Jurisdiction:**

The proposed rule requires BLM Applications for Permits to Drill (APDs) on private and/or state minerals within an approved Communitization or Unitized area. This expands the need for federal APDs to include non-federal wells in federal units and under Communitization Agreements (CAs).

**43 CFR 3170 – Onshore Oil and Gas Production, Sec. 3173.12, Applying for a facility measurement point:**

The proposed rule establishes a nationwide process for designating and approving the point at which oil and natural gas must be measured for the purpose of determining royalties. This rule would be applicable retroactively to existing facilities with only nine to 27 month compliance periods determined by the volume of production from a well.

**43 CFR 3170 – Onshore Oil and Gas Production, Sec. 3173.14, Conditions for commingling and allocation approval (surface and downhole):**

The proposed rule would provide specific standards and requirements for surface and downhole commingling and allocation approvals of production from different leases, unit PAs, or CAs that are consistent with BLM's existing guidance as reflected in Instruction Memorandum (IM) 2013-152. Unlike the existing IM, the provisions of the proposed rule would establish standards for both new and existing commingling agreements.

**43 CFR 3170 – Onshore Oil and Gas Production, Sec. 3170.7, Required recordkeeping, records retention, and records submission:**

The proposed rule expands recordkeeping to transporters and purchasers, in addition to operators.

**43 CFR 3170 – Onshore Oil and Gas Production, Sec. 3173.29, Immediate assessments:**

The proposed rule expands the number and types of violations that would be subject to immediate assessment and proposes that the assessment fee be increased from \$250 to \$1,000 per violation. The proposed rule may be viewed online at: [www.regulations.gov](http://www.regulations.gov) [Paste "RIN 1004-AE15" into the search bar].

#### Judge Vacates Lesser Prairie-Chicken Listing Decision

In early September, a federal district court judge issued an order vacating the Service's decision to list the lesser prairie-chicken as threatened under the Endangered Species Act. In *Permian Basin Petroleum Association v. Department of the Interior*, Judge Robert Junell of the Western District of Texas found the Service improperly evaluated a conservation program under its own policy and found the listing decision to be arbitrary and capricious as a result. For more information, please see an earlier H&H article, *Federal District Court Vacates Lesser Prairie-Chicken Listing Decision with Potential Implications for the Sage-Grouse Listing Decision*, by Tom Jensen and Sandi Snodgrass.

#### 2015 Surveys Show Sage-Grouse Populations on the Rise

The most recent surveys in Wyoming and across the west show sage-grouse populations are up compared to 2014 and substantially greater than populations surveyed during the lowest point in 2012. The ratio of active to inactive leks is also greater than in recent years. The higher numbers this year do not necessarily indicate a long-term trend given the cyclical nature of sage-grouse populations, but experts hope that the increase indicates that aggressive conservation measures in Wyoming and surrounding states are proving effective.

#### USDA to Spend \$211 Million on Sage-Grouse Conservation

The U.S. Department of Agriculture (USDA) has pledged an additional \$211 million over the next four years to fund the "Sage-Grouse Initiative 2.0." The money will primarily be used to fund private ranch efforts to conserve sage-grouse habitat through improvements to agricultural operations and conservation efforts, such as purchase of conservation easements. Currently over 4 million acres are protected under the original USDA sage-grouse conservation program. Agriculture Secretary Tom Vilsack hopes to double that number in the coming years. For more information, go [here](#).

### **State News**

#### Governor's Office Launches Endangered Species Act Initiative

In August, Wyoming Gov. Matt Mead, chairman of the Western Governors' Association, announced the launch of his Chairman's Initiative on improving the effectiveness and efficiency of the Endangered Species Act (ESA). Gov. Mead hopes to use his platform to improve the ESA's record for species recovery, noting that of the 2,280 species protected under the Act since 1973, only 30 have been recovered and delisted. Information collected at five forums will be compiled into a report to help guide future legislative, regulatory, and legal actions to improve the ESA.

#### Governor Announces Energy Strategy Meetings

More than three-fourths of the initiatives identified in 2013 in Wyoming's energy strategy, *Leading the Charge, Wyoming's Action Plan for Energy, Environment and Economy*, are complete. Nevertheless, Gov. Mead continues to work with the public to update the strategy. On October 5, Gov. Mead's offices conducted its final public meeting to review ideas identified in previous public meetings and to identify how these additional initiatives could support energy development, balanced with sound

environmental stewardship. After the meeting, the public was able to provide further comment and rank the initiatives posted on the Governor's website at [governor.wyo.gov](http://governor.wyo.gov). Comments and ranking of initiatives are available through October 30. The Governor will ultimately choose which initiatives to incorporate into Wyoming's energy strategy.

#### New Air Quality Rules Proposed

New regulations affecting oil and gas operations in the Upper Green River Basin (UGRB) nonattainment area became effective in July 2015, and Wyoming Department of Environmental Quality Air Quality Division (WDEQ-AQD) has proposed guidance that would require additional controls on oil and gas operations across the state. The revisions to control requirements in the UGRB nonattainment area include control requirements, including Leak Detection and Repair, on "pad" and single well oil and gas production facilities and compressor stations existing in the nonattainment area as of January 1, 2014. The proposed guidance, which will be discussed at the October 28 meeting of the Wyoming Air Quality Advisory Board, includes statewide presumptive Best Available Control Technology (BACT) for new or modified oil and gas facilities with a date of first production after January 1, 2016. The proposal would reduce the threshold for operations within the statewide area from 10 tons per year of Volatile Organic Compounds or Hazardous Air Pollutants to six tons per year and would impose new presumptive BACT for pneumatic pumps and controllers, dehydration units, flashing, truck loading, fugitive emissions, well completions, produced water tanks, and well blowdowns.

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