

Wyoming Environmental Compliance and Public Land News - December 2015

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Public Land News

EPA's Power Plan Released – Challenged by Wyoming

Wyoming joined a coalition of states challenging the Environmental Protection Agency's recent release of the Clean Power Plan. Twenty-four states petitioned the U.S. Court of Appeals for the D.C. Circuit to review and strike down the rule. The states had also requested the D.C. Circuit Court issue a stay of the rule to halt implementation of the Clean Power Plan during litigation. North Dakota and Oklahoma also filed petitions. As Governor Mead commented, “[T]his rule is legally and scientifically flawed. We do not believe EPA has the authority for this rule.” Wyoming's concerns focus on the final rule's increased requirements for Wyoming, which were more than double what EPA originally proposed. Wyoming has indicated it will also independently file a petition with EPA to reconsider the rule in light of state-specific issues. The Clean Power Plan regulates greenhouse gas emissions from existing power plants and represents the key climate commitment the U.S. is presenting at the current world climate talks taking place in Paris. The Clean Power Plan essentially requires coal-fired power plants to switch to natural gas. It is also being challenged by numerous industry and business groups that claim severe consequences to the reliability of the electrical grid and the economy.

Eight States Challenge Ozone Rules

In October, Arizona and four other states (Arkansas, North Dakota, Oklahoma, and New Mexico) challenged EPA's new ozone standard of 70 ppb in the U.S. Court of Appeals for the D.C. Circuit. The states have expressed concerns that the 70 ppb ozone standard will be unattainable in several areas due to background ozone and ozone transport issues that are beyond the states' control. The states also allege that EPA failed to conduct the required scientific review and analyses needed to justify moving to the lower standard. Three additional states, Wisconsin, Utah, and Kentucky, joined the challenge in November, also citing concerns that the new 70 ppb standard was set without adequately taking into account the impacts of altitude and transport that cause higher ozone levels and constrain a states' ability to meet the lower standard. The challenges have been consolidated with other challenges from Murray Energy Corp., and several environmental groups have requested leave to intervene on EPA's behalf.

BLM Proposes Changes to Onshore Order No. 5

The Bureau of Land Management has issued a proposed rule to revise

and replace Onshore Oil and Gas Order No. 5. The new rule aims to promote accountability by operators, lessees, purchasers, and transporters by establishing minimum standards for proper measurement and reporting of gas removed or sold from Federal and Indian leases (except the Osage Tribe), units, unit participating areas, and areas subject to communitization agreements. The proposed rule includes new standards for approved metering equipment, overall measurement performance, and reporting and record keeping. The rule also enumerates specific acts of noncompliance that would result in immediate assessments, and provides a mechanism by which BLM may consider variances from the rule's requirements.

Comments on the proposed rule must be submitted on or before December 14, 2015. Additionally, BLM will hold public outreach meetings regarding revisions to Onshore Order No. 5 at the locations below:

December 1, 2015 at 1 pm

Double Tree by Hilton
501 Camino Del Rio
Durango, CO 81301

December 3, 2015 at 1 pm

Renaissance Oklahoma City Convention Center Hotel
10 N. Broadway Avenue
Oklahoma City, OK 73102

December 8, 2015

Astoria Hotel and Event Center
363 15th St. W.
Dickinson, ND 58601

Sixth Circuit Blocks Wetlands Rule

On October 9, the Sixth Circuit Court of Appeals granted a motion to stay the Clean Water Rule nationwide until the court can review it more closely. The rule has been heavily criticized and challenged by some states as well as industry and agricultural representatives. The rule was jointly issued by the U.S. Environmental Protection Agency and the U.S. Army Corps of Engineers to clarify the jurisdictional scope of the Clean Water Act by further defining the term "Waters of the United States." The Sixth Circuit's block came shortly after a decision from the United States District Court of North Dakota staying implementation of the rule in thirteen states, including Wyoming. The Sixth Circuit is also currently considering whether the case properly belongs in a court of appeals, or whether federal district courts have jurisdiction over the current challenges.

Litigation of Controversial Sage-Grouse RMP Amendments Begins in Earnest

On September 24, 2015, the Bureau of Land Management (BLM) and the U.S. Forest Service issued their final Records of Decision (ROD) on the sage-grouse land use plan amendments, ushering in sweeping changes to public land management across 10 western states. The land use plan amendments were initially triggered by the Fish and Wildlife Service's (FWS or the Service) decision in 2010 that the greater sage-grouse was "warranted" for listing under the Endangered Species Act (ESA), but the

listing was precluded by higher priority listing activities. The warranted finding was premised on the existing threats to the sage-grouse across its range, as well as the lack of adequate regulatory mechanisms to conserve the species. BLM's and the Forest Service's land use plan amendments are a response to the latter finding and will be implemented with the goal of ultimately reducing the identified threats. On September 22, 2015, the FWS endorsed the plan amendments, announcing its decision that listing the greater sage-grouse was no longer warranted in light of historic conservation efforts on the part of BLM, the Service, and state, local, and private stakeholders.

The plan amendments themselves will require significant changes in land use patterns and practices and have significant social and economic impacts. For instance, a soon-to-be published study estimates that the Wyoming plan will have \$1 billion economic impacts on the state, including loss of up to 5,500 jobs and millions of dollars in revenues. The plans have already triggered three legal challenges: one from the State of Idaho challenging the Idaho plan; one from a coalition of northern Nevada counties and mining companies challenging the Nevada plan, which suit was later joined by the Nevada attorney general; and one from the Wyoming Stock Growers Association challenging the Wyoming plan. The lawsuits allege violations of the Federal Land Policy and Management Act, National Environmental Policy Act, National Forest Management Act, and other laws.

The land use plans generally divide sage-grouse habitat into Priority Habitat Management Areas (PHMA) and General Habitat Management Areas (GHMA). Within PHMA, the final plans designate 10 million acres of sagebrush focal areas (characterized as the “best of the best” habitat “essential for the species survival”), which BLM and the Forest Service have proposed be withdrawn from mineral entry. Pending completion of the two-year withdrawal process, the sagebrush focal areas are temporarily segregated from mineral entry.

Other significant land management changes under the plan amendments generally include:

- A 3% surface disturbance cap on land uses in PHMA in states other than Wyoming, where a 5% disturbance cap was imposed, consistent with Wyoming's Sage-Grouse Executive Order. The 3% cap is subject to exception where the project applicant can show a net conservation gain through offsite mitigation, methods for which have not yet been fully defined.
- A density disturbance cap of one energy or mining facility per 640 acres.
- Conservation buffers around sage-grouse communal breeding locations—known as leks—which generally prohibit surface disturbance within 3.1 miles of active leks, except in Wyoming, where lek buffers are 0.6 miles in PHMA and 0.25 miles in GHMA, and in South Dakota, where lek buffers in GHMA are 0.6 miles.
- Designation of PHMA and GHMA as open to fluid mineral leasing,

but subject to no surface occupancy stipulations, with the exception of Wyoming (no surface occupancy stipulations will only apply within 0.6 miles of a lek in PHMA and within 0.25 miles of a lek in GHMA), Colorado (areas within one mile of both PHMA and GHMA are closed to leasing, other areas within PHMA can be leased subject to no surface occupancy stipulations, and areas within two miles of a lek in GHMA can be leased subject to no surface occupancy), and South Dakota and portions of Montana (in GHMA, areas within 0.6 miles of a lek are subject to no surface occupancy stipulations, and the remaining area is open to leasing).

- Designation of PHMA as exclusion areas and GHMA as avoidance areas for wind energy development, except in Wyoming, where PHMA is designated as avoidance and no restrictions are placed on GHMA, and other minor exceptions for wind projects in South Dakota.
- Designation of both PHMA and GHMA as exclusion areas for solar energy development, with minor exceptions in GHMA in some states such as Oregon, North Dakota, and portions of Montana.

As public land users and other stakeholders mull over the final land use plan amendments, concerns abound over how the agencies will implement and enforce the changes. Legal challenges to key provisions of the plans also raise questions about how the Service's "not warranted" finding, which is closely tied to the plans, would fair if those challenges are successful. For more information on the not warranted finding and proposed land withdrawals, readers can follow the embedded links.

[Obama Administration Issues New Policies on Mitigation](#)

On November 3, 2015 President Obama issued a memorandum relating to mitigation of impacts to natural resources resulting from activities of selected federal agencies, including the Department of the Interior, the Department of Agriculture, and the Environmental Protection Agency. The Department of the Interior also issued a new policy on mitigation, which directs agency officials to use compensatory mitigation to offset impacts to public lands and to tailor mitigation actions to anticipate and address the impacts of climate change. Find a detailed H&H analysis of the policies [here](#).

State News

[Integrated Test Center to Develop Uses for Carbon Dioxide Emissions Announced](#)

Governor Matt Mead recently announced the location for the Integrated Test Center (ITC) - Basin Electric Power Cooperative's Dry Fork Station outside Gillette, Wyoming. The ITC is designed to help researchers find alternative uses for carbon dioxide emissions released from coal-fired power plants. Governor Mead noted that the "facility allows [Wyoming] to provide the same leadership in research and to do all we can to make sure the coal industry can continue to serve Wyoming and the country for many years to come." The ITC will be built with funds from Wyoming, Tri-State Generation and Transmission Association, Inc., and the National Rural

Electric Cooperative Association.

Wyoming Oil and Gas Conservation Commission Considers New Flaring Rules

The Wyoming Oil and Gas Conservation Commission recently released proposed changes to the agency's flaring rule. The changes codify existing policies already in place, including limitations on daily venting quantities and the requirement that operators include in their gas capture plans details about gathering, transportation, and treatment facilities in the area. The proposed changes will be reviewed by Governor Matt Mead's office and then the public will be asked to provide comment. The Petroleum Association of Wyoming has not expressed concerns about the new rules, but environmental groups, including the Powder River Basin Resource Council and the Wyoming Outdoor Council, say it does not go far enough.

Wyoming Water and Waste Advisory Board Meets to Consider Proposed Revisions to Existing Regulations

On December 11, 2015, the Wyoming Water and Waste Advisory Board (Board) will meet at 9:00 a.m. in Room B-63 of the Herschler Building (122 W. 25th Street, Cheyenne, Wyoming) to consider changes proposed by the Water Quality Division to existing regulations. The meeting will be open to public comment. Proposed revisions include changes to two chapters of the Water Quality Rules and Regulations: Chapter 25, titled *Septic Tanks, Soil Absorption Systems, and other Small Wastewater Systems*; and Chapter 15, titled *Standards for the Use or Surface Disposal of Biosolids*. The Board will consider the proposed revisions (described below) and make a recommendation regarding adoption of the revisions to the Environmental Quality Council.

Chapter 25 was renamed and reorganized by section to clarify and update small wastewater system requirements, as the regulations for small wastewater systems in Wyoming have not been significantly updated since they were first promulgated as part of Water Quality Rules and Regulations Chapter 11 in 1984. Appendix C of Chapter 15 was relocated to a newly created Appendix B in Chapter 25, and the remainder of Chapter 15 was repealed. Because the U.S. Environmental Protection Agency (EPA) currently serves as the permitting authority for the use or surface disposal of biosolids in Wyoming, the repealed provisions are no longer necessary. If EPA fails to issue a permit, the Water Quality Division will require submission of a permit application seeking authorization for such disposal under Chapter 3 of the Water Quality Rules and Regulations.

Additional information, including instructions for submitting public comments, is located at:

<http://deq.wyoming.gov/shwd/wwab/resources/upcoming-meeting/>.

Wyoming Adopts New Air Quality Rules

Wyoming Department of Environmental Quality adopted some minor changes to the Wyoming Air Quality Standards and Regulations (WAQSR). Chapters 2 and 6 of the WAQSR were updated to reflect the latest PM2.5 National Ambient Air Quality Standards and to update references to federal regulations and the state implementation plan. Chapter 6 was also restructured to include nonattainment new source

review permit requirements to align with federal rules.

Wyoming DEQ Releases New Ozone Strategy for Upper Green River Basin

On October 28, 2015, the Wyoming Department of Environmental Quality released an updated Ozone Strategy for the Upper Green River Basin (UGRB). The ozone levels in the UGRB have improved dramatically, and the EPA published a Proposed Rule on August 27, 2015, that included a "Determination of Attainment" for the UGRB. However, the proposed determination of attainment does not constitute the official redesignation. Todd Parfitt, DEQ Director, indicated, "In order to officially remove the nonattainment designation, DEQ will need to satisfy additional criteria." Activities to address ozone in the UGRB include analysis of the requirements and impacts of the new ozone National Ambient Air Quality Standards for the UGRB; forecasting the 2016 winter ozone season to identify ozone action days for 2016; developing ozone contingency plans for action days; completing a field inventory of oil and gas emissions in the UGRB; conducting a field study to quantify emissions from oil and gas disposal ponds in the UGRB; and addressing ways to ensure that new growth functions effectively under the existing regulations.

Wyoming DEQ Director Appoints Air Quality Division Administrator

Nancy Vehr is the new Administrator for the Air Quality Division of the Wyoming Department of Environmental Quality as of November 30, 2015. Vehr's previous experience includes fourteen years with the Wyoming Attorney General's Office, ten of which she spent as a Senior Assistant Attorney General representing the Air Quality Division. Most recently, Vehr served as special counsel at Hickey & Evans, LLP, where her practice included a broad range of civil and environmental matters. Vehr's extensive background in air quality issues and environmental regulations is expected to be a substantial asset to the Division.

Cole Anderson, who served as interim Air Quality Division Administrator during the hiring process, will resume his leadership role as the Manager for the Division's New Source Review Program.

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