

Wyoming Environmental Compliance and Public Land News - October 2016

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Public Land News

EPA Revisions to the Exceptional Events Rule Intended to Ease Burden of Demonstrating Effect of Wildfires, Dust Storms, and Ozone Incursions on Air Quality Data

The Environmental Protection Agency (EPA) has issued final revisions (2016 Revisions) to the 2007 Exceptional Events Rule that are designed to streamline the process for excluding from regulatory decisions air quality data attributable to events such as wildfires, dust storms, and ozone incursions. The 2016 Revisions do not, however, provide a meaningful avenue for exclusion of transported background ozone from future designations, which is an issue of particular importance to intermountain states like Wyoming.

The 2007 Exceptional Events Rule set out the standards, including definitions, procedures, and criteria, required for EPA approval of demonstrations by state air agencies to exclude air quality data attributable to "exceptional events," including designation of an area for attainment or nonattainment of a particular National Ambient Air Quality Standard ("NAAQS"). Interpretation and application of the Exceptional Events Rule has proven difficult for both state air agencies and EPA. EPA issued the 2016 Revisions to clarify the standards and processes for making an "exceptional event" demonstration and to ease implementation for both state agency demonstrations and EPA review.

EPA finalized a potentially significant change to the 2007 Exceptional Events Rule by removal of the "but for" requirement. This requirement of the 2007 rule required that air agencies demonstrate the monitored emissions would not have occurred "but for" the exceptional event. As EPA notes, this provision has been interpreted as requiring a "strict quantitative analysis" of the impacts from the event. Instead in the 2016 Revisions, EPA finalized language requiring a state to demonstrate that an event has a clear causal relationship to a monitored exceedance based on a "weight of evidence" approach.

EPA has also signaled that it will consider exclusion of air quality data influenced by exceptional events in the permitting process, including in the development of background concentrations. EPA plans to release more detailed guidance on the role of data influenced by exceptional events in the major source permitting process in the near future.

The rule does not, however, allow exclusion of background ozone – or ozone that occurs naturally or from anthropogenic sources and is transported from areas outside of Wyoming's control – as an exceptional event and may create compliance problems with ozone NAAQS.

In conjunction with the 2016 Revisions, EPA released the Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations. This non-binding guidance document will assist agencies and EPA in preparing and reviewing these types of events.

BLM Releases Instruction Memoranda for Activities in Sage-Grouse Habitat

On September 1, 2016, the BLM Deputy Director issued seven "Instruction Memoranda" ("IMs") to all subordinate offices implementing the directives of the Sage-Grouse Approved Resource Management Plan Amendments that BLM issued a year ago. These plan amendments affect BLM lands in 10 western states.

The IMs touch on nearly every public land use that requires BLM authorization, including grazing, renewable resources, and oil and gas development. Implementation will require significant resources for habitat assessment, development, and monitoring of hard and soft management triggers and surface disturbance and reclamation monitoring.

For a more detailed discussion of the new IMs, see our recent analysis.

U.S. Fish and Wildlife Service Proposes Compensatory Mitigation Policy

On August 31, 2016, the U.S. Fish and Wildlife Service (FWS) released a new proposed policy on compensatory mitigation for species protected under the Endangered Species Act as well as other "at-risk" species that would replace long-standing policy on mitigation banking and recovery crediting. The policy reinforces other mitigation efforts implemented by the FWS and the Obama administration, including a continued focus on landscape-level approaches and application of mitigation to achieve a "net gain," or at a minimum, "no net loss," of protected resources. The policy also aims to incentivize conservation efforts to offset species impacts before they occur by encouraging conservation banking in priority conservation areas. It sets standards and provides criteria for mitigation programs and credits to ensure projects can meet conservation goals, including providing for the types of lands that should be available for banking and the durability of credits.

A detailed discussion of the proposed policy, along with other current mitigation and conservation initiatives can be found [here](#).

Comments on the proposed policy are due on or before October 17, 2016.

Wyoming Sage-Grouse Populations Continue to Rise

Sage-grouse numbers are up across Wyoming this year, reaching their highest levels since 2007. The average male lek attendance was 35.7 birds, 16% more than in 2015. The 2015 counts were up 66% from 2014, and the 2014 counts were up 10% from 2013, indicating a steadily rising

trend over time. Approximately, 42,000 males were observed on leks this year. Despite the increase, state sage-grouse coordinator Tom Christiansen warned against reading too much into the numbers, noting that sage-grouse populations naturally cycle from year-to-year and that it is decade-by-decade trends that matter.

State News

Wyoming DEQ News

Water Quality Division Adopts New Rules

The Wyoming Department of Environmental Quality (DEQ) adopted revised Wyoming Water Quality Rules and Regulations in late July. The revisions include modifications to streamline the regulations and process, revisions to the Underground Injection Control Program incorporating financial and liability insurance requirements, and conditions for conversion of other class wells to Class VI wells. For the full text of these rules, visit the Wyoming Secretary of State's Office website. DEQ also recently announced its revisions to Categorical Use Attainability Analysis for Recreation, which will be used to identify waterways in Wyoming that are not used for swimming or similar water activities.

Environmental Quality Council Set to Consider Rule Changes for Practice and Procedure

On September 9, 2016, the Wyoming Environmental Quality Council (EQC) announced that it will consider proposed revisions to DEQ's Rules of Practice and Procedure, Chapters 1, 2, 3, 5, 6, and 7, as well as repeal of Chapters 4 and 6 and replacing Chapter 6 with a new Chapter 9. The purpose of the revisions are to adopt the uniform contested case rules developed by the Wyoming Office of Administrative Hearings consistent with the specific and distinct requirements of DEQ and the EQC. The proposed revisions will also update and clarify requirements applicable to rulemaking, petitions for award of costs and expenses under Wyoming statute, Director review involving surface coal mining operations, hearings before the department, and very rare or uncommon areas.

A public hearing is scheduled for November 17, 2016 at the Herschler Building, Room 1699, 122 W 25th St, Cheyenne, Wyoming, at 10:30 a.m. Comments are due by October 24, 2016. For information on the proposed rules and how to submit comments, [click here](#).

Wyoming Game & Fish News

Proposed Protections for Migration Corridors Peak Interest

The Wyoming Legislature's Federal Natural Resource Management Committee heard comments on a Wyoming Game and Fish Commission policy known as the Ungulate Migration Corridor Strategy. The policy's purpose is to study, conserve, and protect migration corridors of ungulates such as mule deer, pronghorn, and elk in Wyoming, which are some of the longest corridors in North America. Industry groups, including the Petroleum Association of Wyoming have expressed concern about the effects of the policy, pointing out that the policy covers large expanses of land, mostly public, where oil and gas exploration could happen in the

future.

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