

Wyoming Environmental Compliance and Public Land News - February 2017

Insight — 2/02/2017

Public Land News

Trump Picks Zinke to Lead Department of the Interior

The U.S. Senate Committee on Energy and Natural Resources considered President Trump's nominee for the U.S. Department of the Interior, U.S. Rep. Ryan Zinke, on January 31, 2017. The committee approved Rep. Zinke's nomination 16-6, mostly along party lines. His nomination now goes to the full Senate for consideration. Rep. Ryan Zinke, who was just elected to serve a second term in the U.S. House of Representatives as Montana's only member, has seen support from the Independent Petroleum Association of America, Speaker of the House, Paul Ryan, and outdoor sportsmen's groups. Environmental advocates have been more critical. Zinke generally supports commodity development of federal lands and the retention of public lands in federal hands.

The meeting considering Zinke's nomination will be broadcast live on the web. To watch the meeting, and for more information, visit the committee's website.

EPA Proposes Bonding Requirements for Hardrock Mining Industry

The U.S. Environmental Protection Agency proposed new financial responsibility standards for the hardrock mining industry in early December. The proposed rule would require owners and operators of certain hardrock mines to obtain bonds under the Comprehensive Environmental Response, Compensation, and Liability Act to help cover the costs of environmental cleanups. The proposed rule comes after the U.S. Circuit Court of Appeals for the District of Columbia ordered the EPA to draft regulations requiring financial assurances by December 1, 2017. The American Exploration and Mining Association, and Senate Energy Committee Chairman, Lisa Murkowski, oppose the proposed rule.

Public comment on the rule is open until March 13, 2017. To comment, or read the full text of the proposed rule, visit the Federal Register.

U.S. Forest Service Decides No Drilling in Wyoming Range

In January, the U.S. Forest Service issued its final decision to take back pending and issued oil and gas leases on 40,000 acres in the Bridger Teton National Forest. The leases, originally challenged in 2005, were initially sent back to the Forest Service for supplemental NEPA review after environmental groups challenged the adequacy of the environmental analysis. Around the same time, Congress passed the Wyoming Range

Legacy Act, putting much of the Wyoming Range off limits to oil and gas development. The fate of the 40,000 acres, which was not subject to the Act, remained in limbo, awaiting the Forest Service's supplemental NEPA review. After more than ten years, and two rounds of Environmental Impact Statements, the Record of Decision represents the Forest Service's final decision to foreclose oil and gas development in the Wyoming Range. How the Forest Service intends to compensate the oil and gas lessees who paid for leases held in suspense since 2005 is still in question.

The Final Supplemental Environmental Impact Statement and Record of Decision are available [here](#).

BLM News

BLM Announces Leadership Changes

The U.S. Bureau of Land Management recently announced changes in key leadership positions. Kristin Bail will succeed Neil Kornze as the agency's Acting Director, and Jody L. Hudson will take Carole Carter-Pfisterer's position as the Assistant Director for Human Capital Management. The changes come as part of the transition to the new Trump administration.

Bail, who has worked in public management for more than three decades, recently served as BLM's Assistant Director for the Resources and Planning Directorate and Assistant Director for National Conservation Lands and Community Partnerships.

Hudson gained experience in human resources serving as the Deputy Chief Capital Officer and the Chief Learning Officer and Associate Director, Human Resources Training and Development at the U.S. Nuclear Regulatory Commission.

BLM Releases Final Planning 2.0 Rule

BLM completed its new land use planning rule on December 12, 2016. The new rule is intended to modernize the agency's planning process and increase public involvement, although state and local governments allege that the planning rule does just the opposite by shortening public comment times and de-valuing the unique knowledge and input of local communities. Key changes to the planning rule include:

- **Earlier Public Involvement.** The public would be invited to submit data and information early in the planning process to provide more input at the scoping stage.
- **Best Available Science.** The rule adopts the best available science standard to ensure that resource decisions are made based on high quality information. High quality information will also be used to set specific desired resource outcomes and conditions for various resources in the planning area.
- **Planning Assessment.** A new step would be added to the process to prepare a pre-planning assessment describing the baseline environmental, ecological, social, and economic resources in the planning area. The public would be given an opportunity to submit data and information for inclusion in the planning assessment.

- **Emphasis on Landscape-Level Planning.** The rule would provide for planning across traditional RMP and field office boundaries, and discretion to adjust RMP boundaries for better management.
- **Protest.** The protest process would be modernized with opportunities for electronic submission. More precise rules would also detail what constitutes a valid protest issue.

Western GOP leaders have vowed to attempt to reverse the rule, stating that local planning decisions should be made by local experts. State and local governments are also urging the Trump administration to reverse course and withdraw the rule.

Additional information regarding the rule is available on BLM's website [here](#).

BLM Finalizes Right-of-Way Rules for Wind and Solar

On December 19, 2016, the BLM published a final Solar and Wind Energy Rule that purportedly strengthens existing policies and creates a new leasing program to support renewable energy development through competitive leasing processes and incentives to encourage development in suitable areas.

The rule, titled "Competitive Processes, Terms and Conditions for Leasing Public Lands for Solar and Wind Energy Development and Technical Changes and Corrections for 43 CFR Parts 2800 and 2880," amends BLM's regulations governing rights-of-way issued under the Federal Land Policy and Management Act (FLPMA) and the Mineral Leasing Act (MLA). Specifically, the final rule (i) promotes the use of preferred areas for solar and wind energy development, called "designated leasing areas" (DLAs); (ii) builds upon existing regulations and policies to expand BLM's ability to utilize competitive processes to offer authorizations for development inside or outside of DLAs; (iii) addresses the appropriate terms and conditions (including payment and bonding requirements) for solar and wind energy development rights-of-way issued under the regulations; and (iv) makes technical changes, corrections, and clarifications to the existing rights-of-way regulations.

Notably, some of the revisions affect all rights-of-way, while others affect only specific rights-of-way, such as those for transmission lines with a capacity of 100 kilovolts (kV) or more. The final rule also complements BLM's landscape-scale planning efforts, including the Western Solar Plan, California's Desert Renewable Energy Conservation Plan, and Arizona's Restoration Design Energy Project.

Additional information is available on BLM's website [here](#).

BLM Releases Draft Conformity List for Upper Green River Basin

On December 29, 2016, the Bureau of Land Management (BLM) released the Draft Presumed to Conform List that includes actions under the General Conformity Law for the Upper Green River Basin (UGRB) ozone nonattainment area located in western Wyoming. Comments on the Draft will be accepted through February 13, 2017.

The list is designed to streamline environmental review efforts and eliminate unnecessary costs associated with evaluating common, recurring actions with minimal emissions. This will allow BLM to focus resources and time analyzing proposed actions that produce significant emissions levels or may adversely impact air quality in the UGRB.

Copies of the Draft Presumed to Conform List are available at the BLM Wyoming State Office, 5353 Yellowstone Road, Cheyenne, WY 82009 and online at <http://bit.ly/WYPtCList>.

Comments may be submitted to BLM_WY_PTCLList_comments@blm.gov. Additional information is available [here](#).

Final Revisions to Onshore Order No. 1 Released

The Bureau of Land Management recently released final revisions to its Onshore Oil and Gas Order Number 1. The amendments require the electronic filing of all Applications for Permit to Drill and Notices of Staking. The previous version of the rule required applications to be filed with a BLM field office. The changes make electronic filing mandatory. The revised version of the rule, which can be viewed [here](#), is effective February 9, 2017.

Species News

U.S. Fish and Wildlife Service Issues Final Eagle Take Rule

In mid-December 2016, the U.S. Fish and Wildlife Service finalized revisions to its eagle take rule that would extend the period in which projects can be permitted to injure or kill protected eagles from five years to 30 years. An eagle take permit protects the holder from liability for eagle injury or take under the Bald and Golden Eagle Protection Act. To obtain a permit, the applicant must commit to extensive mitigation to reduce and compensate for impacts. The new rule addresses, among other things, the criteria for permit issuance, compensatory mitigation requirements, permit duration, and data standards for submitting an application.

Since 2009, the Service has issued only three eagle take permits, two in California and one in Wyoming, all for wind farms and all for five-year terms. The new 30-year term is intended to entice developers on private land to enter into an agreement that both benefits eagles and provides developers certainty that eagle take will not be prosecuted under the Act. Though the term of the new permits will be 30 years, a five-year review period is mandatory, during which the Service may require additional conservation measures.

The Record of Decision and final rule are available [here](#).

DOI Solicitor's Office Defends "Net Conservation Benefit" Standard

On December 21, 2016, the Department of the Interior's Office of the Solicitor released an M-Opinion confirming the Bureau of Land Management's authority under the Federal Land Policy and Management Act (FLPMA) to require that activities on public lands result in "no net loss" or a "net conservation benefit" in some instances. The M-Opinion determines that BLM's authority derives from the broad authority vested in

the Secretary of the Interior and the agency by FLPMA to manage the public lands for multiple use and sustained yield and the requirement to prevent unnecessary or undue degradation. BLM's authority, according to the Solicitor's Office, is limited only by principles of administrative law, which preclude BLM from imposing arbitrary and capricious mitigation measures.

The M-Opinion also states that compensatory mitigation to offset project impacts can occur on either public or private lands with a connection to the affected resource—mitigation efforts need not occur exclusively on public land and need not be in geographic proximity to the project.

FWS and BLM Release Final Mitigation Policies

The U.S. Fish and Wildlife Service (FWS) and the Bureau of Land Management (BLM) recently released final policies regarding mitigation of impacts to public lands and resources. Both policies are components of the Obama administration's broader effort to expand the use of mitigation on public lands.

The BLM's regional mitigation strategy, released on December 23, 2016, is meant to guide agency officials on avoiding and minimizing impacts of development on federal lands. Agency officials are instructed to mitigate impacts "through a landscape-scale approach, utilize best management practices, maintain durability for mitigation measures, monitor mitigation measures for compliance and effectiveness, and adaptively manage mitigation measures[.]" The new BLM policy can be viewed [here](#).

The FWS's new policy, also issued on December 23, 2016, addresses strategies to offset development impacts to at-risk species and their habitats. The policy calls for, among other things, the use of mitigation mechanisms such as permittee-responsible mitigation, conservation banking, in-lieu fee programs, and habitat credit exchanges. The full policy and more information can be found [here](#).

FWS Completes New CCAA Policies

In December 2016, the Obama administration issued its final rule and released its final implementation policy addressing the requirements for Candidate Conservation Agreements with Assurances (CCAs). CCAs are agreements between private landowners and the U.S. Fish and Wildlife Service in which landowners agree to certain conservation measures for species listed as candidates for the endangered or threatened species list in exchange for assurances that if the species is ever listed, the landowner will not be liable for take so long as the landowner abides by the terms of the agreements.

The primary purpose of the new rule is to change the standard necessary to obtain a CCAA. The prior rule required the landowner to demonstrate that the proposed conservation measures, when combined with those benefits that would be achieved if the same measures were implemented on other necessary properties, would be sufficient to preclude the need to list the species. The prior language led some property owners to believe that they would have to prove that their efforts alone would be sufficient to preclude the need to list the species. While not the intent of the rule, the

language was confusing. The new rule would require landowners demonstrate that the proposed conservation measures will result in a "net conservation benefit" to qualify for a CCAA. The standard is consistent with the Obama administration's push, reflected in Department of Interior mitigation policies, the sage-grouse land use amendments, and other policies, to require all projects on public land to demonstrate a "net conservation benefit" or "no net loss" goal.

The fate of the CCAA rule and policy remain in limbo after the Trump administration delayed their effective dates for 90 days. See 82 Fed. Reg. 8501 (Jan. 26, 2017); 82 Fed. Reg. 8540 (Jan. 26, 2017).

The final rule and policy change can be accessed [here](#).

State News

[Wyoming Department of Environmental Quality \(WDEQ\) finalizes updates to the WAQSR](#)

At the end of 2016, Wyoming Department of Environmental Quality (WDEQ) finalized updates to the Wyoming Air Quality Standards and Regulations (WAQSR), which became effective statewide on December 20, 2016. Updates were made to Chapters 2, 3, 4, 5, 6, 7, 8, and 11. Many of the changes adopted by reference the Code of Federal Regulations (CFR) as of July 1, 2016. Additional changes include revising the ozone standard per EPA regulations, clarifying greenhouse gas reporting and permitting requirements to reflect the United States Supreme Court's decision in *UARG v. EPA*, 134 S.Ct. 2427, and incorporating New Source Performance Standards OOOO, OOOOa, and TTTT. A memorandum from WDEQ regarding the adoption is available [here](#). As noted, previous versions of the updated chapters should be replaced with the revised chapters, available [here](#).

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