Holland & Hart

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Public Land and Environmental News

BLM Terminates Minerals Withdrawal Areas in Sage-Grouse Habitat and Orders RMP Review

On October 5, the Bureau of Land Management (BLM) cancelled its proposed 10-million-acre mineral withdrawal in six western states. The proposed withdrawal had been initiated by the Obama administration for designated sagebrush focal areas. Acting Director Mike Nedd, describing the withdrawal as “a complete overreach,” also stated that it was unreasonable in light of data showing that mining affects less than 0.1 percent of sage-grouse-occupied range. Instead, Interior promised to focus on working with states as partners on a successful plan to conserve sage-grouse habitat without stifling economic development. In the same vein, BLM also announced that it would reopen the sage-grouse RMP amendments for public comment. In particular, BLM plans to move away from a habitat-based conservation approach toward managing for population targets.

Update on Mineral Resources Valuation Rule

On August 31, 2017, a California Federal judge ruled that the Trump administration acted unlawfully in postponing the implementation of the Consolidated Federal Oil and Gas and Federal and Indian Coal Valuation Reform Rule (the “Rule”).

The Rule, which had taken effect in January, sought to update how lease royalties for minerals on Federal and Native American lands are calculated. The judge found that the suspension of the rule after it had gone into effect contradicts the plain language of Section 705 of the Administrative Procedure Act.

Redefining Waters of the United States

The Environmental Protection Agency and the U.S. Department of the Army (the "Agencies") will hold teleconferences to hear from stakeholders regarding the recommendations to revise the definition of “Waters of the United States” under the Clean Water Act ("CWA"). Nine of the teleconferences will be tailored to specific sectors including agriculture (row crop, livestock, silviculture); conservation (hunters and anglers); small entities (small businesses, small organizations, small jurisdictions); construction and transportation; environment and public advocacy (including health and environmental justice); mining; industry (energy, chemical, oil/gas); scientific organizations and academia; and stormwater,

wastewater management, and drinking water agencies. One of the calls will be open to the public at large. The phone conferences began on September 19, 2017 and will occur each Tuesday thereafter for ten weeks from 1 pm to 3 pm ET.

Additionally, the agencies will conduct an “in-person” meeting with small entities on October 23, 2017 from 9 am to 11 am and will accept written recommendations from any member of the public. Written recommendations must be received on or before November 28, 2017.

Recommendations should be identified by Docket ID No. EPA-HQ-OW-2017-0480, at http://www.regulations.gov.

On February 28, 2017, President Trump issued an Executive Order ("EO") stating that it is in the national interest to ensure that the U.S.'s navigable waters are kept free from pollution, while at the same time promoting economic growth, minimizing regulatory uncertainty, and showing due regard for the roles of Congress and the states under the U.S. Constitution. The EO directs the Agencies to review the Clean Water Rule for consistency with these priorities and publish a proposed rule rescinding or revising the rule, as appropriate and consistent with law. Further, the EO directs that the Agencies shall consider interpreting the term “navigable waters,” as defined in 33 U.S.C. 1362(7), in a manner consistent with the opinion of Justice Antonin Scalia in Rapanos v. United States, 547 U.S. 715 (2006). Scalia's opinion considers CWA jurisdiction as including relatively permanent waters and wetlands with a continuous surface connection to relatively permanent waters.

The Agencies are implementing the EO in two steps. First, on July 27, 2017, the Agencies proposed a rule to re-codify the regulation in place prior to issuance of the Clean Water Rule and that will be implemented under the U.S. Court of Appeals for the Sixth Circuit's stay of that rule. Comment on the first step proposed rule expired on September 27, 2017. For the second step, the Agencies plan to propose a new definition that would replace the approach in the 2015 Clean Water Rule with one that is consistent with the approach in the EO. The Agencies completed a consultation process with the tribes and state and local governments on step two in June 2017. The meetings described above will provide interested stakeholders an opportunity to provide feedback on the second step rule.

For additional information, click here.

Court Determines BLM Suspension of Methane Rule Unlawful

On October 4, 2017, the United States District Court for the Northern District of California ruled that the Trump administration acted unlawfully by suspending implementation of the Waste Prevention, Production Subject to Royalties, and Resource Conservation Rule (the “Rule”) aimed at reducing waste of natural gas from venting, flaring, and leaks during oil and natural gas production activities on onshore Federal and Indian leases. The United States Department of the Interior issued the rule on November 18, 2016, with an effective date of January 17, 2017.

On March 28, 2017, President Trump issued Executive Order No. 13783, which instructed each executive agency to review all agency actions to identify those that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law. Accordingly, on June 15, 2017, the Bureau of Land Management issued a notice in the Federal Register that it was postponing the compliance dates for certain sections of the Rule. The postposed sections of the Rule were subject to a compliance date of January 17, 2018. The postponement notice did not apply to provisions of the Rule with compliance dates that had already passed.

California, New Mexico, and a coalition of environmental groups sued over the delay, arguing that Section 705 of the Administrative Procedure Act, while permitting the suspension of yet-effective rules for certain reasons, does not pertain to effective rules. The District Court agreed, finding that the postponement of the rule violated the Section 705 as the Rule had become effective prior to the notice of suspension.

Zinke Orders Aggressive Action to Prevent Forest Fires

In mid-September, Interior Secretary Ryan Zinke directed federal land managers to focus on speeding the thinning of dead trees and other forest fuel as a means of preventing fires. In a memorandum, Zinke set forth plans to focus on fuel management of trees and vegetation, maintenance of fire roads, and “defensible areas” around federal structures. Zinke's memo advocates for proactive forest fire prevention through aggressive and scientific fuels reduction management to “save lives, homes, and wildlife habitat.”

The announcement was praised by Republican lawmakers who have long worked to refine timber management, boost logging, and stave off forest fires. Several Democrats panned Zinke's plans, asserting that the Trump administration must address broader impacts of climate change.

CEQ Renews Efforts to Streamline NEPA

Calling the NEPA review process “fragmented, inefficient and unpredictable," the White House Council on Environmental Quality (CEQ) announced plans in September to streamline NEPA review. CEQ's efforts are intended to implement President Trump's Executive Order 13807 titled “Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects.” CEQ announced it would take the following actions to enhance and modernize the environmental review process:

- Develop, with the Office of Management and Budget, and in consultation with the Federal Permitting Improvement Steering Council (Permitting Council), a framework for implementing “One Federal Decision.”
- Refer various State projects, subject to State request, for designation as high priority projects.
- Revise, modify, and supplement existing guidance on categorical

exclusions, preparing Environmental Assessments, improving the process for timing of environmental review, appropriate use of monitoring and mitigation, and environmental conflict resolution.

- Review existing CEQ regulations and procedures to identify changes needed to update and clarify NEPA's requirements.
- Issue additional guidance as necessary to simplify and accelerate the NEPA process for infrastructure projects, including a NEPA practice handbook for those projects covering public involvement, deference to the lead Federal agency regarding purpose and need and alternatives, appropriate tools for cumulative impact analysis, sources of information for analysis, reliance on prior studies and information, and reliance on State, local, or tribal environmental review.
- Form an interagency working group to review regulations that may bog down reviews and permitting.

CEQ's announcement comes close on the heels of Interior Deputy Director David Bernhardt's August 31 memo directing Interior agencies that Environmental Impact Statements “shall not be more than 150 pages or 300 pages for unusually complex projects,” and that the agencies should target completing EISs within one year.

BLM Moving on Coal Leases; 10th Circuit Rebuffs BLM Coal Lease EIS for Failing to Closely Consider Climate Impacts

The Bureau of Land Management (BLM) has initiated the leasing process for a coal tract that was halted during the Obama administration. On August 24, 2017, the BLM posted a notice of intent to prepare an environmental impact statement on the possibility of leasing 441 million tons of coal in the West Antelope 3 Coal Lease. Antelope Coal LLC applied for the lease the same day.

Later, on September 15, 2017, the 10th Circuit Court of Appeals issued a decision that will likely impact this process, ruling that BLM violated the National Environmental Policy Act when it failed to complete an in-depth analysis of potential climate-related impacts of four coal leases in Wyoming's Powder River Basin. The court dismissed BLM's “perfect substitute theory,” which provides that approval of coal leases will not have a noticeable impact on greenhouse gas emissions because the same amount of coal would be mined somewhere else. Calling this theory “irrational” and “unsupported by hard data,” the court held that “it was an abuse of discretion to rely on an economic assumption, which contradicted basic economic principles, as the basis for” granting the lease permit. The court ordered BLM to revise the leases' environmental impact statements to more closely consider climate impacts.

Suits Filed to Stop Grizzly Bear Delisting

Since the U.S. Fish and Wildlife Service announced in June that it would delist the Yellowstone grizzly bear from the endangered species list, several tribes and environmental groups have filed suit against the agency in the U.S. District Court for the district of Montana in an attempt to maintain the bear's endangered status.

On June 30, nine tribes and three spiritual leaders sued the Service claiming violations of the Administrative Procedure Act for failure to properly consult with the tribes and violations of the Religious Freedom Restoration Act. The plaintiffs include the Crow Indian Tribe, the Crow Creek Sioux Tribe, the Standing Rock Sioux Tribe, the Piikani Nation, the Crazy Dog Society, the Hopi Nation Bear Clan and the Northern Arapaho Elders Society and other spiritual leaders.

On August 30, 2017, the Western Environmental Law Center filed suit against the Service on behalf of WildEarth Guardians, claiming the delisting decision violated the Endangered Species Act and failed to use best available science. The same day, Earthjustice also filed a complaint for the National Parks Conservation Association, the Northern Cheyenne Tribe, the Center for Biological Diversity, and the Sierra Club, making many of the same claims.

On September 6, 2017, the Alliance for the Wild Rockies, Western Watersheds Project and Native Ecosystems Council sued the Service, arguing that the Service's decision to delist the Yellowstone grizzly is inconsistent with the best available science and does not consider the impacts delisting may have on the grizzly population as a whole. The groups also claim that the bears warrant continued protection in part because of scarcity of some food sources, including whitebark pine and cutthroat trout.

The Yellowstone grizzly bear occupies northwest Wyoming, southwest Montana and eastern Idaho and is estimated to have a population of about 700. When the species was originally listed in 1975, there were estimated to be only 136 bears.

Trump Administration Begins Process of Repeal of Clean Power Plan

On Monday October 16, 2017, EPA published in the Federal Register a proposal to repeal the Clean Power Plan, which was promulgated October 23, 2015 (82 Fed. Reg. 48035). The Clean Power Plan is one of the cornerstones of the Obama Administration's climate change policy, and requires reductions in CO2 emissions from coal-fired power plants. The Plan was immediately embroiled in litigation, and was stayed by the U.S. Supreme Court on February 7, 2016 pending the disposition of the challenges to the Plan before the D.C. Circuit Court of Appeals. The comment period on the proposed repeal closes on December 15, 2017.

The proposal is based on the Trump EPA's conclusion that the Plan exceeds EPA's authority under the Clean Air Act. The proposal also indicates that the agency has not yet determined whether it will promulgate a rule to regulate greenhouse gas emissions from existing electric generating units, and if it does, what form that rule will take. EPA has submitted to the White House for its review an Advance Notice of Proposed Rulemaking to solicit information on emission reduction systems that are consistent with its legal interpretation that the Clean Power Plan exceeds its statutory authority.

EPA interprets section 111 of the Clean Air Act (the statute providing for standards of performance for new and existing sources) to only allow

emission guidelines for existing sources that can be applied to or at an individual plant. Under the legal interpretation supporting the Clean Power Plan, the Clean Air Act can be read expansively enough to require generating plants to shift generation to cleaner sources as a means of reducing greenhouse gas emissions. The proposal also dramatically changes the cost-benefit analysis underlying the Clean Power Plan to support the conclusion that the Plan's costs would significantly outweigh its benefits.

If finalized, the proposed repeal will certainly be litigated. Under section 307(b) of the Clean Air Act, the initial venue will be the D.C. Court of Appeals, with a significant likelihood of an appeal to the U.S. Supreme Court. There will likely not be a final resolution for some years, quite possibly not until after 2020.

State News

Todd Parfitt, Wyoming DEQ Administrator, Headed to Environmental Council of States

Wyoming Department of Environmental Quality Director, Todd Parfitt, was recently named the President of the Environmental Council of States (ECOS). ECOS is a national nonprofit, nonpartisan association of state and territorial environmental agency leaders. Its purpose is to “improve the capability of state environmental agencies and their leaders to protect and improve human health and the environment.” Regarding the appointment, Parfitt remarked, “Together, we will have an opportunity to recognize and build upon ECOS' record of contributing to and engaging in the most challenging environmental issues of our time.” Parfitt will serve as President for one year.
