

Wyoming Environmental Compliance and Public Land News - February 2018

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Public Land and Environmental News

Department of the Interior Considers Move West

In January, Department of the Interior Secretary Zinke revealed plans for sweeping changes to reorganize and redistribute its agencies and workforce. The agencies would be divided into 13 regions based on ecological features rather than state lines. The Bureau of Land Management, the Fish and Wildlife Service, and Bureau of Reclamation headquarters would be relocated to Denver in an effort to bring federal leadership closer to the communities they serve. Zinke is also calling for joint management agreements among Interior agencies to increase efficiencies of shared management decisions. The changes are likely to be costly and would require congressional approval. Budget cuts across the Department are also anticipated. A map of the proposed regional reorganization can be found [here](#).

Litigation Over the BLM Venting and Flaring Rule Heads to California

California and New Mexico and numerous environmental groups filed lawsuits in the Northern District of California challenging BLM's December 8, 2017 final Delay Rule, which delayed major portions of the Venting and Flaring Rule for one year. Under the Delay Rule, operators are not required to comply with the most costly and burdensome portions of the Venting and Flaring Rule, including leak detection and repair, pneumatic controller and pump replacement, and storage tank controls until January 17, 2019. The plaintiffs have asked the California court for a preliminary injunction, which, if successful, would immediately invalidate the Delay Rule and spring the Venting and Flaring Rule back into effect. Oral argument on the preliminary injunction motions is set for February 14th in San Francisco and a decision is likely to be issued shortly thereafter. Meanwhile, the BLM, Western Energy Alliance and the Independent Petroleum Association of America, North Dakota, and Texas have requested that the California court transfer the case back to Wyoming where initial lawsuits over the Venting and Flaring Rule have been pending for over one year. As of this newsletter, the Court has not yet ruled on these transfer motions.

Meanwhile, the Wyoming Court has put litigation over the Venting and Flaring Rule on hold during BLM's ongoing administrative process to substantively revise or rescind the Venting and Flaring Rule. The Court noted it would be a waste of the parties' and the Court's resources to move forward on a merits decision while the agency is in the process of changing

the rule. By all accounts, BLM will be publishing a proposed revision/rescission rule very soon. BLM will take public comment on this proposal and is expected to issue a final rule later this year.

BLM Rescinds Fracking Rule

BLM closed out 2017 by officially rescinding the 2015 hydraulic fracturing rule. 82 Fed. Reg. 61924 (Dec. 29, 2017). BLM explained that the rule imposes administrative burdens and compliance costs that are not justified. The rule itself had been the subject of litigation in Wyoming, in which the U.S. District Court held it was beyond the agency's authority and stayed its effect. That decision was later vacated by the Tenth Circuit. BLM's December decision to rescind the rule has now spawned new litigation. The State of California and environmental groups filed suit in U.S. District Court in California in January. *Sierra Club et al v. Ryan Zinke et al*, No. 3:18-cv-00524, and *State of California v. BLM et al*, No. 4:18-cv-00521

Species News

ESA Listing Rules Get Review

In December, the Department of the Interior signaled its intention to revise the Endangered Species Act rules for listing species as threatened or endangered and for designating critical habitat. Details on the potential changes and timing of the rulemaking are not yet clear. While western landowners and developers welcome potential changes, environmental groups fear a loosening of the rules for species protection.

Canada Lynx Headed for Delisting

Following an October 2017 species status assessment, the U.S. Fish and Wildlife Service announced in January that the Canada lynx is on the road to recovery and the agency will take steps to remove it from the list of threatened and endangered species. The Service will publish a delisting rule for notice and comment before making its final decision. Delisting is likely to trigger litigation from conservation groups who have cited continued threats to the species from climate change.

State News

Wyoming DEQ Proposes Changes to Water Quality Rules

In a public hearing scheduled for February 21, 2018, the Wyoming Environmental Quality Council will consider changes to the Department of Environmental Quality (WDEQ), Water Quality Division's (WQD) Water Quality Rules and Regulations (Rules). The hearing to consider the proposed revisions to Chapter 1, Wyoming Surface Water Quality Standards, and Chapter 5, Certification of Operators of Public Water and Distributions Systems and Publicly Owned Wastewater Treatment and Collection Systems, will commence at 10 am (MST) at the Herschler Building, Room 1699, 122 W. 25th Street, Cheyenne, Wyoming.

The Clean Water Act allows states to adopt a time limited modification to a designated use and water quality criteria in circumstances where meeting water quality standards may not currently be feasible, but may become feasible in the future. Consistent with the Clean Water Act and federal

regulations, the revisions to Chapter 1 will add a variance process for specific discharges in cases where meeting a water-quality based effluent limit would result in substantial and widespread economic and social impacts.

Pursuant to the proposed changes, in lieu of meeting a water-quality based effluent limit, dischargers must implement actions necessary to achieve the highest attainable condition in the receiving water. The highest attainable condition is identified through a comprehensive alternatives analysis and/or other supporting documentation, which requires the permittee to meet an interim effluent condition that represents the greatest pollutant reduction achievable and develop and implement a pollutant minimization program.

The revisions to Chapter 5 are designed to: (i) clarify requirements concerning operator availability; (ii) add certification levels for simple water and wastewater treatment facilities; (iii) specify designation of substitute responsible charge operators; (iv) remove designation grace periods of systems that terminate responsible charge operators; (v) add continuing education requirements for state and/or federal rule training; and (vi) correct redundancies, grammar and formatting errors.

For more information on the proposed revisions, Chapter 1, Docket 17-3102 and Chapter 5, Docket 17-3103 are located at:
<https://eqc.wyo.gov/Public/Dockets.aspx>

Also of note, the EQC adopted revisions to Chapter 14 of the Rules at a public hearing on December 5, 2017. The final rule was filed with the Wyoming Secretary of State on January 19, 2018. The revisions to Chapter 14, Financial Assurance Requirements, remove the financial assurance exemption for "grandfathered" facilities permitted before February 24, 1989; corrects cross-referencing errors, formatting inconsistencies, capitalization errors, grammar errors, numbering errors; and removes duplicative sections. Copies of the Rules are available at <https://rules.wyo.gov/>

Wyoming Supreme Court Punts Conflicting Mineral Rights Decision to the Feds

A recent Wyoming Supreme Court decision failed to answer the question on what happens when the forward progress of a coal mine and development of federal coal leases comes in conflict with existing federal deep oil wells. In *Berenergy Corp. vs. BTU Western Resources Inc.*, 2018 WY 2, the Court examined a conflict between development of federal coal leases and the development of federal oil and gas leases. The Court determined that the Mineral Leasing Act reserved discretion in how to resolve multiple federal mineral development disputes to the Secretary of the Interior. The Court concluded that "Balancing of competing rights to mineral production in the public's interest is in part an intensely policy driven matter committed to the Secretary... Federal resource policy is not our province." *Id.* at ¶ 36. Based on this reasoning, the Court remanded the case to the district court and instructed the parties that they must go to the Secretary of Interior and his designees at the Bureau of Land Management to resolve this dispute. A copy of the decision is available at

<https://services.courts.state.wy.us/Documents/Opinions/2018WY2.pdf>

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