

Wyoming Environmental Compliance and Public Land News - April 2014

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Public Lands News

Proposed Rule Expands CWA Definition of Waters of the United States

On March 25, 2014, the Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers jointly released their proposed revised rule defining "waters of the United States" under the Clean Water Act ("CWA"). The proposed rule is meant to expand CWA jurisdiction over wetlands and smaller water bodies following the Supreme Court's decisions in *Rapanos v. U.S.* and *SWANCC v. U.S. Army Corps of Engineers* which limited CWA jurisdiction. The proposed rule applies to all programs under the CWA, including National Pollution Discharge Elimination System permits, Section 404 dredge and fill permits, and Section 401 state certifications.

Of note, the proposed rule aims to eliminate case-by-case determinations regarding whether smaller water bodies have a "significant nexus" to jurisdictional waters by finding that all tributaries to traditional navigable waters and interstate waters, as well as all adjacent water bodies (defined in the rule as including adjacent wetlands), are categorically jurisdictional.

The rule has not yet been published for comment in the Federal Register, but a pre-publication copy of the rule is available here and further information is available at www.epa.gov/uswaters.

Interior Picks Clear Senate Committee

On March 27, the Senate Energy Committee approved the nominations of Rhea Suh as assistant secretary of Interior for Fish and Wildlife and Parks and Janice M. Schneider as assistant secretary of Interior for Land and Minerals Management. The vote on Suh was a close 12-to-10 party-line vote. The vote on Schneider was 18-to-4. The full Senate must still approve the nominations.

USGS Study Concludes that Powder River Basin Water Quality Issues May be Tied to Methane Production

U.S. Geological Survey testing recently found that water quality in the Powder River, after the boom in coal bed methane production, may have deteriorated due to elevated levels in sodium at three testing sites downstream from the town of Arvada. The three sites also registered higher alkalinity, which may indicate elevated bicarbonate levels and increased sodium absorption rates between 1980 and 2010. However, the

study's authors also note that water quality showed few substantial changes at 13 other testing sites in the Powder River and Tongue River watersheds during the 30 years of study. The study's authors explained that both rivers boast a high number of constituents, making it difficult to determine whether a change in water quality is occurring and what might be the cause of any change.

Report Proposes Updating the Endangered Species Act, Again

On February 4, 2014, a Congressional working group of thirteen Republican members of the House of Representatives released its report, findings, and recommendations on the Endangered Species Act, found [here](#). The report found that on the 40th anniversary of the Endangered Species Act, there remains substantial room for improvement. Targeted recommendations for change include:

- Refocusing agency resources on species recovery, rather than listing, including requiring development of recovery plans concurrently with the listing process;
- Limiting ESA litigation and settlements by making deadlines for listing decisions more flexible;
- Empowering states, local governments, and tribes; and
- Improving transparency and accountability of ESA data and science.

House Natural Resource Chairman Doc Hastings (R-Wash.) anticipated legislation proposing these changes to the ESA could be introduced in February or March, though none has yet been filed. The political hurdles to overhauling the Endangered Species Act are great, and like most recent efforts, this one is unlikely to lead to substantial changes.

GAO Issues Report on Federal Coal Leasing

The U.S. Government Accountability Office recently issued a report on federal coal leasing. Issued in December of 2013 under the subtitle "BLM Could Enhance Appraisal Process, More Explicitly Consider Coal Exports, and Provide More Public Information." The report was addressed to Representative DeFazio of California and Senator Markey of Massachusetts. Senator Markey, who initiated the request, had asked GAO to examine the federal coal leasing program with a particular emphasis on how BLM assesses fair market value for federal coal that is leased to private companies for development.

The GAO report noted that coal is an important domestic energy source and was responsible in 2011 for providing roughly 42 percent of America's electricity. In fiscal year 2012, 42 percent of the 1.05 billion tons of coal produced in the U.S. came from federal coal tracts and the federal coal leasing program generates significant revenue to the federal government: \$1.2 billion in FY 2012.

Among the report's findings were the following:

- BLM's current administrative guidance offers flexibility in how to estimate fair market value (FMV) for coal leases, and BLM offices

vary in how they arrive at FMV calculations;

- BLM did not consistently document the rationale for accepting bids that were initially below the agency's FMV presale estimate;
- BLM considers coal exports to a limited extent when estimating FMV and does not explicitly consider estimates of the amount of coal that can be mined economically;
- The Wyoming and Montana BLM offices did consider coal exports in their FMV calculations, although their discussion of exports in agency reports was limited;
- BLM limits the public disclosure of information on federal coal leases due to proprietary nature of some of this information, although this practice is changing somewhat given recent requests under the Freedom of Information Act ("FOIA");

Senator Markey, a longtime opponent of America's coal industry, cited the report as grounds to halt all new federal coal leasing until BLM could develop consistent methods for assessing FMV for federal coal leases. In contrast, Senator Barrasso of Wyoming explained that the best way to increase FMV for federal coal and the related federal tax revenue was to expand access to export markets for America's coal. Marion Loomis of the Wyoming Mining Association noted that there was nothing in the GAO report that would justify a moratorium on new federal coal leases.

CEQ Delays Issuance of Climate Change Guidance for NEPA Reviews

The Council on Environmental Quality, the executive office within the White House tasked with promulgating rules and regulations and providing guidance on NEPA implementation, is no closer to issuing final guidance on addressing green house gas emissions and climate change in NEPA documents than it was four years ago. In 2010, CEQ proposed draft guidance that would have ensured some level of consistency in the way various agencies consider climate change in environmental reviews. Currently, NEPA treatment of climate change varies widely between agencies. For example, the U.S. Army Corp of Engineers analyzes climate change in detail for project permits, including emissions caused by the proposed project as well as indirect emissions from electricity use, induced growth, and construction and maintenance activities. By contrast, the Federal Aviation Administration limits greenhouse gas emissions analysis solely to aircraft emissions when considering permits for new airports, not considering emissions associated with induced growth or construction itself. Whenever CEQ issues a new draft or the final guidance, it will likely be controversial.

Sage-Grouse News

BLM Puts 10-month Hold on Rock Spring RMP Revision Process

In February, BLM announced it would put a 10-month hold on the Rock Spring Field Office Resource Management Plan revision to allow BLM to complete the Wyoming Greater Sage-Grouse Land Use Plan Amendment, anticipated in December 2014. The hold would allow BLM to incorporate the management direction in the Greater Sage-Grouse RMP Amendment to be incorporated into the Rock Springs RMP and avoid the potential need for a supplemental Environmental Impact Statement if the Rock

Springs RMP is finalized prematurely. For more information, [click here](#).

[Montana Governor's Council Recommends Development Restrictions](#)

In early February, Montana Governor Steve Bullock's 12-member council on sage-grouse released controversial new recommendations for how to protect Montana's sage-grouse and avoid listing decision. The recommendations include restricting new development in sage-grouse habitat by (1) creating "no surface occupancy" buffer zones within one mile of active leks within core habitat, and a 0.25-mile buffer in general habitat; (2) avoiding construction of roads within two miles of active leks; (3) and limitations on surface mining and well pads near leks. The recommendations will be used to help prepare a state grouse-protection proposal to be submitted to the U.S. Fish and Wildlife Service.

[BLM Releases Sage-Grouse Mitigation Plan for Pinedale Anticline](#)

The BLM Pinedale Field Office is finalizing a sage-grouse mitigation plan in response to declining populations in the Pinedale Anticline. The three-part mitigation plan is designed to increase the number of active leks in the Duke's Triangle area and will include immediate onsite mitigation, near-site projects, and longer term projects outside the Pinedale Anticline. The primary response objective is to increase areas of key forage for chick and hens with other objectives to reduce development within two miles of leks within specific timeframes. The draft mitigation plan is available [here](#).

[DOI to Unveil Sage-Grouse Database to Aid FWS Listing Decision](#)

This summer, the Department of the Interior will launch an unprecedented effort to catalog sage-grouse conservation effects for the greater sage-grouse. While similar conservation action databases have been used in past listing decisions, the new database will allow state and federal agencies, non-profits, landowners, and other interested parties to classify conservation efforts geospatially to overlay conservation efforts with specific sage-grouse populations. The database will be used by the Fish and Wildlife Service as an information source for its decision whether to list the sage-grouse and could also be a useful tool to states, conservation organizations, and others.

FWS Releases Draft Recovery Plan for Wyoming Toad

On February 7, the Fish and Wildlife Service released a draft recovery plan for the Wyoming toad, a glacial relict species known only to exist in Albany County, Wyoming. Currently, approximately 500 individuals survive in captivity. The primary goal of the recovery plan is to acquire suitable habitat within or nearby the toad's historic range to allow for reintroduction. Comments on the plan are due by April 10, 2014. See 79 Fed. Reg. 7693 (Feb. 10, 2014).

State News

Legislative Report

The Wyoming Budget Session ended March 6. Governor Mead signed a budget bill very similar to what he submitted to the Legislature. The budget included a footnote that creates a Legislative Select Task Force on "Value Added Energy and Industrial Plan." The task force is to: (a) develop an integrated test center to study the capture, sequestration and management

of carbon emissions from a Wyoming power plant; (b) develop a model for Wyoming, likely southwest Wyoming, based on the "industrial heartland" of Alberta, Canada; (c) develop LNG export facilities using Wyoming natural gas; (d) address the development and construction of electronics manufacturing facilities; (e) develop strategies to improve Wyoming's access to and growth of domestic and international markets for natural gas, oil, coal, uranium, power, manufacturing, tourism and other commodities and products; (f) encourage development of deep water ports to export WY coal and participate in legal challenges to secure access; (g) oversee the development and construction of a core sample repository or library located at University of Wyoming for public research and private industrial development. All this work to be done this year. It appropriates over \$17 million, \$15 million of it for the carbon management test center.

Several pieces of legislation were considered expressing Wyoming's frustration with the EPA. Senate File 75 was passed and signed by Governor Mead which made specific legislative findings that "The Legislature declares it is the state's policy to vigorously defend its interest and those of its citizens against federal rulemaking and other EPA actions which rest upon questionable authority." The legislation authorizes expenditures from the federal natural resource policy account for the attorney general, with approval of the governor, to take action against the EPA.

Interim Committees will be looking at several topics of interest for the energy and natural resources industries. The Joint Judiciary Committee is looking at enhanced penalties for trespassing to collect environmental data. The Joint Revenue Committee is going to look at the mineral industry and tax valuation methods. Joint Agriculture is looking at pipeline liability and possible bonding requirements for pipelines. Joint Minerals is looking into orphaned/abandoned wells; flaring of gas from oil wells; and bonding on split estate lands.

Wyoming Challenges EPA Regional Haze Decision

On March 28, the Wyoming Attorney General filed suit in the 10th Circuit Court of Appeals to challenge EPA's decision that rejected part of the state's plan for reducing regional haze. At the same time, Wyoming has asked the agency to reconsider its decision. The regional haze program is intended to address visibility concerns. EPA's final decision would require new and different emissions controls for a number of Wyoming facilities, and cost millions of dollars more than Wyoming's proposed plan. In a statement, Governor Mead said, "Wyoming put forward a strong plan for reducing regional haze. The EPA should have recognized state primacy and deferred to our leadership on this matter. EPA did neither, and I felt it necessary to have the Attorney General file suit. This is a visibility issue. Wyoming already has some of the clearest air in the nation. EPA's plan does not noticeably improve air visibility, compared to Wyoming's plan, but EPA's plan will cost far more to Wyoming businesses and ratepayers."

Wyoming to Hold First Energy Summit

Wyoming Governor Matt Mead, the Wyoming Business Report and the Energy Summit Steering Committee has put together Wyoming's first "Energy Summit" to be held May 19th and 20th at the Parkway Plaza Hotel

in Casper, Wyoming. Topics for the two-day event will include:

- Transmission lines
- Coal export market
- The Clean Air Act's impact
- Oil by rail
- "Pandora's Promise" and uranium panel
- Statewide CO2 pipeline
- New water treatment methods
- Solving the energy talent crisis
- Workforce safety
- Wind plus natural gas equals steady, reliable power
- Overview of new water testing regulations
- Progress in fracking technology
- Sage grouse and the Endangered Species Act
- K-12 energy and natural resources literacy programs

For more information call Belinda Nelson at 307-638-3200 or go to www.wyomingbusinessreport.com.

Wyoming Supreme Court Remands Fracking Trade Secrets Case

On March 12, 2014, the Wyoming Supreme Court (Court) remanded the case, *Powder River Basin Res. Council, v. Wyoming Oil and Gas Conservation Comm'n*, 2014 WY 37, 2014 WL 950383 (Wyo.), on hydraulic fracturing trade secrets back to the district court, stating that the lower court failed to carry out its duties under the Wyoming Public Records Act (WPRA). In November 2011, the Powder River Basin Resources Council, the Wyoming Outdoor Council, Earthworks and the Center for Effective Government (collectively, Appellants) filed a request under the WPRA seeking disclosure from the Wyoming Oil and Gas Conservation Commission (WOGCC) of the chemical additives and compounds added to fracking fluids for 14 operators whose compounds were not listed on the WOGCC's website. 2014 WY 37, ¶ 9. The Supervisor of the WOGCC, who is the custodian of the WOGCC's records, denied the public records request as he found the information to be exempt from public disclosure as trade secrets under the WPRA. *Id.* at ¶ 14.

Rather than request that the district court issue an order to show cause requiring the Supervisor to justify his decision at an evidentiary hearing under the WPRA, Appellants sought review of the Supervisor's decision under the Wyoming Administrative Procedure Act. *Id.* at ¶ 15. The district court affirmed the Supervisor's decision, finding it to be reasonable and legally correct. *Id.* at ¶ 17.

On appeal, the Court held that Appellants were required to follow the procedures in the WPRA, which require the district court to independently determine whether information must be disclosed, rather than to review the

decision of the Supervisor as an administrative decision. *Id.* at ¶¶ 28-30. Further, the Court adopted the definition of "trade secret" used under the federal Freedom of Information Act, which includes "a secret, commercially viable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Id.* at ¶ 38. This definition requires that there be a "direct relationship" between the trade secret and the productive process. *Id.* The Court declined to determine whether individual chemical ingredients can be trade secrets, as the Court found that question not to solely be one of law and the record before the Court was inadequate to make that decision. *Id.* at ¶ 44. A copy of the Court's Opinion can be found [here](#).

Governor Mead Works with Pavillion Residents to Find a Water Solution

Governor Mead recently met with Pavillion residents regarding drinking water and polluted well concerns. Some residents expressed continued concern about polluted wells, while some felt any problems were minimal or nonexistent. The state provided \$750,000 to install cisterns for residents who live in the Pavillion East Gas Field. The state has also paid for a nearly complete water loading station.

The Agency for Toxic Substances and Disease Registry told Pavillion resident to not drink the water in 2010. Recently, the Environmental Protection Agency released a draft report saying hydraulic fracturing compounds from Encana Oil and Gas's nearby well field could be linked to compounds found in the groundwater.

Mead seeks additional testing and peer review of EPA's findings. He also wants to work with the state legislature to find funding from state and federal sources to help with the water issue this year. Connecting rural residents to Pavillion's town water supply, which has tested safe, would cost \$2 million.

Long-Time Wyoming-Based Environmental Group Calls it Quits

After more than 25 years, Biodiversity Conservation Alliance (BCA) has decided to disband as of February 28, 2014, amid financial difficulties over funding issues. In recent years, BCA has opposed gas drilling in the Red Desert and in-situ uranium mining in northeastern Sweetwater County. The group has been a frequent objector to federal oil and gas leasing in Wyoming, often opposing dozens of leases at a time before the U.S. Bureau of Land Management offered them for auction.

Public Meeting on Orphaned Wells

Representatives from Governor Mead's office and other state agencies will meet with interested members of the public about the plan for claiming and capping orphaned CBM wells. "State agencies are working diligently to coordinate plugging of abandoned wells and reclamation efforts to minimize disturbance to landowners," Governor Mead said. "Plugging abandoned wells and reclaiming the sites are necessary to safeguard our land, water and wildlife. I thank the Legislature for authorizing the use of an additional \$3 million from conservation tax revenue for these purposes." The meeting will take place on April 2, 2014 at Gillette College's

Presentation Hall, Room 120 at 6:00 p.m. Governor Mead has developed a draft plan for abandoned wells.

Wyoming Oil & Gas Conservation Commission

The Wyoming Oil & Gas Conservation Commission ("WOGCC") has scheduled an informal public meeting on April 15, 2014 at 6:00 p.m. at the WOGCC building's hearing room in Casper. The meeting will discuss a possible flaring rule, bonding requirements, and setbacks for surface oil and gas operations. This discussion will occur informally in advance of a formal rulemaking process on these topics and WOGCC seeks public input from stakeholders.

Wyoming Oil and Gas Supervisor Resigns

Wyoming's Oil and Gas Supervisor, Grant Black, has resigned. In this position, Black played a pivotal role as director of the Wyoming Oil and Gas Conservation Commission (Commission). In a statement, Governor Matt Mead noted the Commission's key role in Wyoming by helping "safeguard public safety and health while also facilitating the responsible development of natural gas and oil, which are key to the entire country and to our economy. I thank Grant for his efforts on these matters and wish him well." Mark Watson, the lead petroleum engineer for the Commission, has been appointed as interim supervisor effective April 1, 2014. Watson holds a petroleum engineering degree from the University of Wyoming and has worked at the Commission for about thirty years. Governor Mead noted the Commission's significant projects will move forward: "The baseline water rule, which is a model nationally; the plan for reclaiming and plugging orphaned wells; a rules review related to issues liking flaring, setbacks and bonding; and the investigation of the wells outside of Pavillion—all are significant and need to be done as well as possible. These efforts will move forward and we are confident the staff at the Commission will advance these projects and they will remain on schedule."

Wyoming Department of Environmental Quality (WDEQ)

Air Quality Division Task Force Developing Framework for Addressing Ozone Emissions

The Air Quality Division is developing an existing source rule for the Upper Green River Basin as part of the Ozone Strategy released in March and September 2013. The Division already released guidance for new or modified sources.

Seven members of the now-disbanded Upper Green River Basin Air Quality Citizens Advisory Task Force released a progress report on March 3 emphasizing that state regulators have made progress limiting harmful emissions, but have yet to curtail pollution from existing facilities. Governor Mead established the task force in 2012 to address high ozone levels around Pinedale. The task force consisted of twenty-eight local government officials, environmentalists, and industry representatives. The task force's original report contained recommendations for reducing harmful emissions, which the Department of Environmental Quality ("DEQ") adopted in early 2013. The task force was then disbanded.

Steve Dietrich, the air quality administrator at DEQ, said the agency is moving forward with new regulations to address emissions from existing

facilities.

Air Quality Advisory Board Meeting Regarding Regulation Changes

The Wyoming Air Quality Advisory Board will meet on April 22, 2014 at 9:00 a.m. in Laramie. The Air Quality Division requested the Board's input on proposed changes to Chapter 3: General Emission Standards; Chapter 5: National Emission Standards; Chapter 6: Permitting Requirements; Chapter 7: Monitoring Regulations; and Chapter 11: National Acid Rain Program. The Air Quality Division will also present information on the five-year review of the Natural Events Action Plan for the Powder River Basin.

Water Quality Division Solicits Comments on "Wyoming Methods for Determining Surface Water Quality Conditions and TMDL Prioritization"

The Water Quality Division recently updated a policy document called "Wyoming's Methods for Determining Surface Water Quality Condition and TMDL Prioritization." The Division is soliciting public comment on the draft documents, which may be found here.

Water and Waste Advisory Board Meeting Regarding Rule Changes

The Water Quality division's Water and Waste Advisory Board (WWAB) will meet on April 18, 2014 at 9:00 a.m. in Room B-63 of the Herschler Building in Cheyenne. WWAB will discuss proposed revisions to Chapter 15: Standards for the Use or Surface Disposal of Biosolids; Chapter 24: Class VI Injection Wells and Facilities; and Chapter 25: Small Wastewater Systems and. The proposed revisions to Chapter 24 include incorporation of federal financial assurance requirements, conditions for conversion of other class wells to Class VI wells, and conditions for a waiver of the requirement to inject below the lowermost underground source of drinking water. WWAB welcomes written comments.

Personnel changes – Luke Esch is now head of both SHWD and Industrial Siting

The Department of Environmental Quality (DEQ) Recently named Luke Esch as the new administrator for the Solid and Hazardous Waste Division (SHWD). Esch already worked as the administrator for the Industrial Siting Division and will now oversee both divisions.

"Luke brings to the division and [sic] broad and comprehensive knowledge of environmental programs including the Resource Conservation and Recovery Act, Clean Air Act, and Clean Water Act," said Todd Parfitt, DEQ director. "Luke also brings proven leadership and communication skills to the division."

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