

November Boise EENR Newsletter

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Insight — 11/14/2013

Public Lands News

BLM Publishes Greater Sage-Grouse Conservation Measures Draft RMP/EIS for Idaho and Southwestern Montana

On November 1, the U.S. Bureau of Land Management ("BLM") and U.S. Forest Service published the Draft Management Plan Amendments and Draft Environmental Impact Statement ("Draft EIS") providing for Greater sage-grouse conservation measures on BLM and Forest Service lands in Idaho and portions of southwestern Montana. Interested individuals and organizations (or entities or companies) may provide comments on the Draft EIS during the 90-day comment period.

On March 23, 2010, the United States Fish and Wildlife Service determined that listing the Greater sage-grouse as a threatened or endangered species under the Endangered Species Act ("ESA") was "warranted, but precluded" by higher listing priorities. Pursuant to court settlement, the Fish and Wildlife Service will make a final ESA listing determination by September 2015. To potentially avoid an ESA-listing of the sage-grouse, the BLM and Forest Service are amending their management plans affecting sage-grouse habitat to incorporate sage-grouse conservation measures.

The Idaho and southwestern Montana Draft EIS would amend 21 BLM resource management plans and eight Forest Service land use plans. The amendments would affect approximately 9.3 million acres of sage-grouse habitat managed by the BLM and 1.9 million acres of sage-grouse habitat on National Forest System land in Idaho and southwestern Montana. The management plan amendments would apply to BLM- and Forest Service-administered lands, and not to private lands.

The Draft EIS includes six alternatives for managing sage-grouse habitat:

- Alternative A is the No Action Alternative.
- Alternative B includes conservation measures from the BLM Sage-Grouse National Technical Team Report.
- Alternative C includes conservation measures submitted to the BLM by conservation groups.
- Alternative D includes the Idaho and Southwestern Montana subregional alternative formulated by the BLM and Forest Service.
- Alternative E is the alternative developed by the Idaho Governor's Office.

- Alternative F, similar to Alternative C, was derived from comments from various conservation groups.

BLM and the Forest Service identified Alternatives D and E as co-Preferred Alternatives for purposes of public comment and review.

Informational public meetings will be held around Idaho and southwestern Montana on the following dates and at the following locations. Specific meeting venues and times can be found on the BLM website available [here](#).

January 6, 2014	Murphy, ID
January 7, 2014	Idaho Falls, ID
January 8, 2014	Salmon, ID
January 9, 2014	Dillon, MT
January 13, 2014	Pocatello, ID
January 14, 2014	Twin Falls, ID
January 15, 2014	Boise, ID

The Draft EIS is available for download on the BLM website [here](#).

Additional Sage-Grouse Updates

- **USGS Sage-Grouse Baseline Report Available.** On June 3, 2013, the United States Geological Survey ("USGS") released a report that documents and summarizes several decades of sage-grouse study, including activities, programs, and policies affecting the species' conservation. The BLM and Forest Service likely will consider, among other things, the information in the USGS report during the agencies' sage-grouse conservation planning efforts.
- **Northwest Mining Association Questions Process and Science Behind BLM's National Technical Team Report Recommendations.** On May 20, 2013, the Northwest Mining Association ("NWMA") released a report prepared by biologist Megan Maxwell critical of BLM's process for developing and final findings in the National Technical Team Report on sage-grouse released in December 2011. NWMA's report concludes that BLM's team made significant mischaracterization of past research, methodological bias, substantial errors and omissions, lack of

independent authorship and peer review, and substantial technical errors. NWMA further criticizes the National Technical Team for failing to place its recommendations within the context of the Endangered Species Act and BLM's Special Status Species Manual. The report questions BLM's reliance on the NTT recommendations as it considers changes to resource management in its regional planning efforts.

Agriculture News

On October 25, 2013, the U.S. Department of Agriculture issued a proposed rule pursuant to the Food Safety Modernization Act providing for Current Good Manufacturing Practices ("CGMPs") and preventative controls for facilities and personnel involved in manufacturing, processing, packing and holding animal food. The preventive controls would apply to domestic and imported animal food, including pet food, animal feed, and raw materials and ingredients. Facilities producing animal food would be required to have written plans that identify hazards, specify the steps that will be put in place to minimize or prevent those hazards, identify monitoring procedures and record monitoring results, and specify what actions would be taken to correct problems that arise. The proposed rule would also establish certain CGMPs that specifically address animal food. Interested individuals or entities may provide comments on the proposed rule during the 120-day comment period.

Environmental Compliance News

EPA Reverses Course, Disapproves 2-Year-Old *de minimis* Water Quality Rule

In a July 23, 2013, letter, the Environmental Protection Agency ("EPA") reconsidered and withdrew its 2011 approval of the "*de minimis*" exemption to Tier 2 review under Idaho's water quality standards. The EPA's letter is available [here](#).

EPA's Clean Water Act ("CWA") regulations require that states develop water quality standards that include, among other things, an anti-degradation policy that limits impairment of water quality below existing conditions, establishing levels of water quality protection for three categories of waters: Tier 1, Tier 2, and Tier 3. See 40 CFR § 131.12(a). Tier 2 applies to high quality waters where quality "exceed(s) levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water." 40 CFR § 131.12(a)(2). No degradation of Tier 2 waters is permitted unless the State finds that, after intergovernmental coordination and public participation referred to as a "Tier 2 review," allowing lower water quality "is necessary to accommodate important economic or social development in the area in which the waters are located." *Id.*

On August 18, 2011, EPA approved Idaho's anti-degradation implementation procedures that included a *de minimis* exemption providing that no Tier 2 review is required for "insignificant" activities or discharges. The exemption applies to actions that "from conditions as of July 1, 2011, will not cumulatively decrease assimilative capacity by more than ten

percent." Idaho Code § 39-3603(2)(c)(i).

On February 14, 2012, the Greater Yellowstone Coalition filed a lawsuit against the EPA, arguing that, among other things, the *de minimis* exemption was unlawful. The plaintiff asserted that, under Idaho degradation policy, any action that causes degradation but that will not cumulatively consume more than ten percent of a water body's remaining capacity for a pollutant must be allowed without Tier 2 review, even if the action will otherwise significantly degrade water quality or adversely impact existing or designated uses. After reviewing the plaintiff's challenge, EPA filed a motion to remand the issue to Idaho for further consideration.

EPA then issued its letter, disapproving the *de minimis* exemption because, "in at least some cases, the provision could require Idaho to deem insignificant and, therefore, exempt from Tier 2 review, certain proposed activities or discharges involving bioaccumulative pollutants even though such activities or discharges may cause significant degradation." As a result of EPA's disapproval, there is no *de minimis* exemption in effect in Idaho. Therefore, activities proposing to lower water quality in Tier 2 waters must undergo Tier 2 review, even if the activities would have been deemed insignificant (i.e., *de minimis*) degradation in accordance with Idaho Code § 39-3603(2)(c). The activities can be authorized if, after completion of a Tier 2 review, Idaho finds that such lowering is necessary to accommodate important economic or social development in the area in which the waters are located.

Clean Water Act Stormwater Multi-Sector General Permit Expires

EPA's Clean Water Act implementing regulations require that industrial activities discharging stormwater into jurisdictional waters must obtain a National Pollutant Discharge Elimination System ("NPDES") permit. In 2008, EPA issued a Multi-Section General Permit ("MSGP") that applies in Idaho and that provides NPDES coverage to industrial activities in 29 industrial sectors. For MSGP coverage, a facility must meet certain eligibility requirements and, among other things, implement control measures and develop a site-specific stormwater pollution prevention plan. On September 29, 2013, the 2008 MSGP expired, and a new permit has not been issued. However, EPA has proposed a new MSGP.

Until a new MSGP is finalized, EPA has determined that facilities that obtained coverage under the 2008 MSGP prior to its expiration are automatically granted an administrative continuance of permit coverage. The administrative continuance will remain in effect until a new permit is issued. Facilities already covered under the 2008 MSGP must continue to comply with all of the requirements in the 2008 permit, including requirements for monitoring and reporting.

EPA has issued a memorandum regarding new industrial facilities that begin discharging industrial stormwater after September 29, 2013. The memorandum provides a "no action assurance" for new facilities that: (1) meet the 2008 MSGP eligibility criteria; (2) prior to discharging stormwater, notify the appropriate EPA permitting authority of their operator status and their intention to operate in accordance with the 2008 MSGP; and (3)

comply with the requirements of the 2008 MSGP.

EPA expects to reissue the MSGP in the spring of 2014. At that time, all facilities desiring coverage under the MSGP, including those with administrative continuance under the 2008 MSGP, will need to submit a Notice of Intent for permit coverage.

More information regarding EPA's proposed 2013 MSGP and the 2008 MSGP can be found [here](#). EPA's no action assurance memorandum is available [here](#).

Idaho Legislative News

Idaho Convenes Federal Public Lands Committee to Consider Acquiring Federal Lands

The Federal Lands Interim Committee was a result of House Concurrent Resolution 21, a bill that was sponsored by former Speaker of the House, and current Natural Resources Committee Chairman, Representative Lawrence Denney. The resolution calls for creation of a committee to study the process for the state to acquire federal public lands in Idaho. The committee held meetings on August 9th and, October 28th, and it is scheduled to meet again on December 4th. The interim committee will not be making any recommendations to the legislature until the 2015 legislative session.

Idaho State Agency News

Idaho Department of Environmental Quality Initiates Rulemaking to Evaluate Fish Consumption Rates

IDEQ is evaluating local and regional fish consumption rates to determine whether Idaho's statewide water quality criteria are protective of designated uses and, if the current criteria are not protective, to determine appropriate new criteria. The rulemaking will derive the human health criteria for acrolein and phenol, and will set a human health criterion for copper based on drinking water standards.

On May 10, 2012, EPA disapproved 167 of Idaho's proposed human health water criteria for 88 toxic pollutants. In determining the proposed criteria, IDEQ used the nationally recommended fish consumption rate, 17.5 grams per day. EPA determined that IDEQ did not consider several sources of information suggesting some Idahoans consume more fish than the national average and the national default fish consumption rate of 17.5 grams per day was not applicable in Idaho. EPA suggested IDEQ should use a higher fish consumption rate in determining its human health water criteria and thus the water quality standards should be stricter.

Rulemaking meetings are scheduled for December 10, 2013, from 9 a.m. to 12:30 p.m. (mountain time) in Boise, Pocatello, Lewiston, and Coeur d'Alene. For those who cannot participate by attending the meetings, written comments may be submitted to IDEQ. More information regarding

the rulemaking meetings and public comment opportunities can be found [here](#).

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