

# Wyoming Environmental Compliance and Public Land News - December 2014

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### Public Land News

#### **EPA News**

##### EPA Proposes New Standards for Ozone

Today EPA released a proposed primary National Ambient Air Quality Standard (NAAQS) for Ozone of 65-70 parts per billion (ppb) (annual fourth highest daily maximum eight-hour concentration, averaged over three (3) years). The proposed NAAQS is more stringent than the previous ozone NAAQS of 75 ppb. The change has been anticipated for months and was compelled by a Sierra Club lawsuit in the Northern District of California. The proposed NAAQS has already been denounced by various groups as too stringent, too lenient, or too costly. Gina McCarthy is staunchly defending the proposed standards, and EPA is taking comments on a standard as low as 60 ppb. The comment period is open for 90 days, commencing when the proposed rule is published in the Federal Register.

The new Ozone NAAQS also establishes a complicated secondary standard of 13-17 ppm-hours (3-year average W126 index values). The Clean Air Act defines the secondary standard as "requisite to protect the public welfare from any known or anticipated adverse effects." CAA § 109(b)(2). The Act also provides that the public welfare includes "effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being." CAA § 302(h). Since the D.C. Circuit Court remanded the 2008 Ozone NAAQS to EPA to provide more analysis and justification for its decision not to set a separate secondary standard, EPA has assembled studies and analyses (at §§ 5.6 and 5.7) to support the more stringent secondary Ozone NAAQS and associated claims that the more stringent standard is necessary to protect "sensitive vegetation and ecosystems in federally protected Class I and similar areas." (at 5-88). The secondary NAAQS has elicited considerable concern, especially from western states, where, based on current measurements, the standard will result in large areas designated as nonattainment.

For more information, please go [here](#).

## Special Status Species News

### Utah Judge Bars ESA Regulation on Private Lands

On November 7, U.S. District Court Judge Dee Benson in Utah made news by barring the Fish and Wildlife Service from regulating the taking of prairie dogs on private property. The case was brought by People for the Ethical Treatment of Property Owners ("PETPO") as a challenge to the FWS' regulation of "take" of prairie dogs on their private lands. PETPO argued that the FWS' regulation impermissibly exceeded Congress' Commerce Clause powers, and Judge Benson agreed, writing "Although the Commerce Clause authorizes Congress to do many things, it does not authorize Congress to regulate takes of a purely intrastate species that has no substantial effect on interstate commerce."

The ruling is the first of its kind. Several previous decisions have upheld regulation of intrastate species under the ESA. The newly created split portends a likely appeal and possible resolution of the issue by the U.S. Supreme Court.

Judge Benson's decision was immediately praised by conservatives and property rights activists. Utah Republican Sen. Orin Hatch said in a statement, "The court's decision confirms what we have said all along: the federal government has no business interfering with property rights where the allegedly endangered species has no connection to, or effect on, interstate commerce." The decision only affects activities on private lands, and prairie dogs on public land are still subject to "take" prohibitions."

To read Judge Benson's decision, go [here](#).

### Proposed Critical Habitat Rules Meet with Mixed Reviews

In May, the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the "Services") proposed new rules governing the designation of critical habitat, a new policy on critical habitat exclusions, and a new regulatory definition of "destruction or adverse modification" for purposes of Section 7 consultation. The proposed critical habitat designation rules would loosen the standards for designating critical habitat that does not currently, but could in the future, exhibit the physical and biological features essential to the species' conservation. The revised definition of adverse modification could then be applied to preclude or limit the ability to undertake actions in the degraded habitat if those actions would "significantly delay" the development of the physical or biological features necessary for the species' recovery. For additional discussion of the proposed changes, please refer to the October 2014 edition of the Wyoming Environmental Compliance and Public Land News.

Hundreds of comments were received by the October 9 deadline, and many were critical of the proposed changes. Republican Senators warned that the proposals "follow a troubling trend, at both Services, of expanding the ESA beyond its lawful scope." Lawmakers pointed to the ESA itself, which defines critical habitat to mean those areas in which the physical or biological features essential to species' conservation "are found." Similar criticisms were lodged by several states and trade associations. Other industry and agricultural groups described the proposed changes as

inexcusably vague and economically damaging.

On the opposite side, the Center for Biological Diversity and others, questioned the proposed definition of adverse modification, which requires a finding that the action will "appreciably" diminish the conservation value of habitat. Environmental groups are concerned that the new definition would leave a loophole in Section 7 by allowing piecemeal rather than cumulative consideration of impacts.

### Sage Grouse News

- Sage-Grouse Numbers on the Rise in Wyoming

A new state survey shows Greater sage-grouse populations in Wyoming have risen by 10% in 2014 over 2013 levels. The population increase is attributed both to conservation efforts and a wet spring that provided more cover and food. The survey results are based on lek counts for male sage-grouse, but grouse chicks numbers also appear to be up. The Wyoming Game and Fish Department cautioned that it is too early to tell whether the increasing numbers signal the beginning of a long-term upward trend or are part of natural cyclical population patterns. Despite rising statewide numbers, a recent BLM monitoring report indicates declines continue in sage-grouse populations in the Pinedale Anticline.

- BLM and U.S. Forest Service Pledge to Work with States as Land Use Plan Amendments are Finalized

The BLM's and U.S. Forest Service's sage-grouse land use planning efforts, which began in December 2011, are anticipated to reach a milestone in early 2015 as Final Environmental Impact Statements and plan amendments are rolled out. The purpose of the amendments is to put in place conservation measures to support the U.S. Fish and Wildlife Service's finding that adequate regulatory mechanisms are in place for the sage-grouse and are sufficient to avoid the need to list the species. Of the 98 land use plans scheduled for amendment as part of the agencies' sage-grouse conservation strategies, only one has become final—the BLM's Lander Resource Management Plan in Wyoming, which in general terms implements Wyoming's core area strategy on federal lands in the planning area. Some environmental groups have strongly criticized the Lander Plan alleging it fails to implement adequate conservation measures, and litigation appears likely.

In the face of mounting pressure from all sides, the federal agencies met in Portland in August in closed door "roll-up" meetings to carefully vet the proposed amendments. In October, the agencies invited state wildlife agencies to a meeting in Denver to present their plans to conserve sage grouse on state and private lands, and to get feedback on the plans from BLM and FWS officials to ensure that they adequately address habitat fragmentation, energy development, wildfire risks, and other threats to the grouse. The meeting came shortly on the heels of a letter from the Western Governor's Association questioning the BLM's and U.S. Forest Service's alleged lack of communication with the states. The letter states, "As Governors, we feel that federal coordination with the states in this

planning process is being ineffectually approached and treated more as an afterthought by BLM and [the Forest Service] at the D.C. level." BLM deputy director of operations Ben Ellis and U.S. Forest Service Deputy Chief Leslie Weldon responded with a one-page letter acknowledging the importance of dialogue with the States and saying, "We look forward to continuing to work with you on the planning and implementation of the Greater Sage-Grouse strategy. Together, our planning effort will help us maintain Western economies, protect wildlife that rely on sagebrush habitat, and promote balance between open space and development." The agencies agreed to change the land use plan amendment schedule to meet individually with States if requested.

- Secretary Jewell's Visit to Pinedale Highlights Sage-Grouse Conservation Efforts on Wyoming Ranches

On October 15, Secretary of the Interior Sally Jewell was in Pinedale to take part in a signing ceremony for nine Candidate Conservation Agreement with Assurances intended to both conserve sage-grouse and provide regulatory assurances and reduce uncertainty to participating Wyoming ranchers. Secretary Jewell joined BLM State Director Don Simpson, U.S. Fish and Wildlife Service Director Dan Ashe, and Governor Mead at the event. Secretary Jewell lauded Wyoming's cooperative efforts at conserving sage-grouse, stating, "Successful conservation of sagebrush habitat depends on a spirit of collaborative partnership among states, tribes, federal partners, private landowners and other stakeholders—and this is especially true for the greater sage-grouse, which inhabits both public and private lands across the West. Today we're celebrating a group of committed private landowners who are stepping up to the plate to take voluntary actions that will take care of the land and wildlife, and preserve their ranching heritage and the Western way of life." The nine CCAAs cover over 39,000 acres in Wyoming. Whether the CCAAs and other conservation efforts by private land owners, federal land managers, and state and local governments across the sage-grouse range will be sufficient to avoid a proposed listing in September 2015 remains uncertain.

- Wyoming Releases Study on Sage-Grouse Habitat Prioritization

The U.S. Geological Survey, Wyoming research biologists, and other scientists recently collaborated to complete the largest known habitat prioritization modeling effort for the Greater sage-grouse. Using telemetry data and land condition geographic information system data, scientists identified resource selection functions to develop regional and statewide habitat suitability models for sage-grouse during nesting, late brood-rearing, and winter. The goal of the models is to provide a scientific basis for land managers and conservation planners to identify and understand the location of important habitats and land use patterns to balance wildlife requirements with multiple human land uses. The USGS press release described the models as improving "our understanding of landscape resource use by sage-grouse" and stated the models "represent the most comprehensive understanding of sage-grouse habitat selection currently available." The peer reviewed report can be found [here](#).

## **BLM News**

### BLM Healthy Forest Initiative Succeeding

The Bureau of Land Management and Wyoming State Forestry Division have joined together in an initiative to create more healthy forests in Wyoming. The Wyoming Legislature funded a contract position to work together with the BLM to assist with timber sales in Carbon, Albany and Sweetwater counties. The purpose of the joint effort is to identify areas with potential salvage in bug-kill areas, promote forest health and provide timber for the local forest products industry.

"They've made great progress in identifying a lot of areas, doing a lot of timber cruising, laying out some potential salvage in the bug-kill areas," said Wyoming State Forester Bill Crapser. The sale of timber will allow dead trees to be removed and will help promote forest health. The success of the initial program may lead to future joint efforts.

"We're already talking about having coordinated meetings this winter. We're talking about some other foresters helping out with state forestry," said BLM Wyoming State Director Don Simpson. "We should be able to leverage each other and be much more effective in Wyoming."

### BLM NHPA "Undertakings" Now Available for Comment on NEPA Register

The Wyoming BLM has announced a way for the public to be involved in the National Historic Preservation Act process in Wyoming. The Wyoming BLM will take advantage of the NEPA Register, found at [www.wy.blm.gov/nepa/search/index.php](http://www.wy.blm.gov/nepa/search/index.php) to allow State Historic Preservation Office comments and undertakings to be listed.

Governor Matt Mead signed a State Protocol that allowed for the expansion of the NEPA Register to include State Historic Preservation Office information. This allows the BLM Wyoming and the Wyoming State Historic Preservation Office to implement Section 106 of the National Historic Preservation Act in Wyoming.

## **State News**

### **WOGCC News**

#### WOGCC Continues to Consider New Setback Rules

The Wyoming Oil and Gas Conservation Commission recently voted to recommend an increase to the minimum allowable distance between oil and gas drilling rigs and dwellings. The proposed new rule would extend the setback distance between homes and oil and gas wells from 350 feet under the current rule to 500 feet. The increase to 500 feet was recommended by the commission's staff. The Powder River Basin Resource Council, a landowners group, issued a statement criticizing the proposal for offering insufficient protection to homeowners. The group asked the Commission to set the minimum setback at a quarter mile, saying drill rigs are noisy and hazardous to health. John Robitaille, vice president of the Petroleum Association of Wyoming, said his group wanted the setback distance to remain at 350 feet. The association will analyze

how extending the setback would affect drilling operations and respond based on how the rulemaking process proceeds. After the commission's vote, Tom Kropatsch, deputy oil and gas supervisor, emphasized that the proposed rule is not yet in effect. Anyone may still submit comments on the proposal for the commission's evaluation, he said.

### **News From the Governor's Office**

#### Wyoming's Sulfur Dioxide Plan Upheld by the Tenth Circuit

The U.S. Court of Appeals for the Tenth Circuit upheld Wyoming's plan for controlling emissions of sulfur dioxide (SO<sub>2</sub>) under the Clean Air Act's regional haze program. New Mexico, Utah, and Wyoming adopted a regional cap-and-trade program regulating sulfur-dioxide emissions over the Colorado plateau. Under the program, each participant agreed to a ceiling on sulfur-dioxide emissions. If the ceiling was met, polluters would receive allocations of sulfur dioxide to emit, which they could use to cut emissions and trade unused allocations. EPA approved the trading program.

Environmental groups challenged the EPA's approval, alleging it failed to guarantee progress toward natural visibility conditions in national parks and wilderness areas. In the unanimous three-judge opinion, the Court of Appeals agreed with EPA that the plan fulfills the regional haze program's requirements. The Court rejected the environmental groups' argument that the program would not achieve greater reasonable progress than implementation of best available retrofit technology. The Court also held EPA was justified in finding the program would achieve reasonable progress towards eliminating visibility impairments.

Wyoming Governor Matt Mead issued a statement: "Wyoming's plan has already proven successful, resulting in substantial reductions of SO<sub>2</sub> and helping to protect Wyoming's pristine natural vistas. This decision validates Wyoming's hard work to appropriately balance visibility and costly emission controls."

#### Governor Mead Promises to Focus on Coal and Endangered Species Issues in Second Term

Looking ahead to his second term, Governor Matt Mead stated he plans to continue his efforts to lobby for markets for coal. Wyoming is the leading coal-producing state and has been looking for solutions such as deep water port access in the Northwestern United States in order to facilitate coal exports to Asia. During his first term, Mead traveled to Asia and reported that Asian nations are hungry for Wyoming coal. Domestic demand for coal has fallen due to supplies of cheaper natural gas and increasingly strict federal emission standards that have left many industry officials skeptical that any new coal-fired power plants will ever be constructed. Nevertheless, Mead remains optimistic and notes that the U.S. gets 40 percent of its electricity from coal and that the nation cannot simply take coal off the table as a competitive and affordable source of energy.



Another challenge facing Mead is finding ways to address decisions involving the federal Endangered Species Act (ESA). The U.S. Fish and Wildlife Service is set to decide next year whether to propose to list the sage-grouse under the ESA. A decision to list the sage-grouse could threaten energy development statewide. Noting that Wyoming has led the nation in voluntary efforts to conserve the sage-grouse, Mead cautions that once a species is listed, the state has no way of knowing what Wyoming must do to end federal protections and reinstate state management. Expressing his frustration, Mead said, "And some judge somewhere is going to determine so much of what's going to happen in Wyoming. That doesn't seem like it is working to me, and I think the Endangered Species Act needs to be looked at carefully on how it could be improved."

#### Wyoming Seeks Congressional Action to Approve Wolf Management Plan

Governor Matt Mead has decided to pursue congressional action in order to regain state management over wolves in Wyoming. Control over wolves in Wyoming was recently returned to the federal government pursuant to the Endangered Species Act when a judge found that Wyoming's management plan did not contain a buffer for the wolf population. Any future change in plan must come from collaboration between the Wyoming State Legislature, Governor Mead and the Wyoming Game and Fish Commission working together with the U.S. Fish and Wildlife Service. In order to break the endless cycle of litigation over the state's wolf management plan in Washington, D.C. courtrooms, Governor Mead stated the best path forward is to call on the Wyoming congressional delegation to sponsor legislation, similar to existing laws covering Idaho and Montana, which specify that there can be no legal challenges to the state's management plan.

All three Wyoming congressional delegates support such action, including Mead's position that Wyoming is in the best position to manage wolves in the state, not Washington.

#### **Wyoming Department of Environmental Quality (WDEQ)**

##### WDEQ Updates Upper Green River Basin Ozone Strategy

The Wyoming Department of Environmental Quality (DEQ) released an update to the Ozone Strategy for the Upper Green River Basin at the end of October. The update largely focuses on winter ozone season work.

Since the last update, several components of the Ozone Strategy have been completed, including improvements to the Air Quality online monitoring network website ([www.wyvisnet.com](http://www.wyvisnet.com)), creation of the Online Emission Inventory Query Wizard, submission of the Produced Water Ponds Study request for proposals, 2014 Winter Ozone Monitoring Study data, Produced Water Tank Study fieldwork, and a Phase 1 proposed rule for the rulemaking process that focuses on reducing emissions from existing sources.

"The completion of elements from the Ozone Strategy are all important in continuing to build the foundation to help bring the UGRB back into ozone

attainment," said Darla Potter, Air Quality Division program manager. "For example, the rulemaking element most popularly known as the existing source rule for the Upper Green River Basin, has been initiated, and is anticipated to be completed during calendar year 2015." Potter added that implementation of this new regulation will ultimately reduce emissions from existing oil and gas sources in the ozone nonattainment area.

DEQ will host a public open house in Pinedale on Tuesday, December 9, 2014, to discuss the upcoming winter ozone season. For more information, please see DEQ's news release.

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