

# Wyoming Environmental Compliance and Public Land News - April 2016

Insight — 4/04/2016

## Public Land News

### FAST Act to Streamline New Federal Infrastructure Permitting

In December 2015, Congress passed and President Obama signed the Fixing America's Surface Transportation Act (FAST Act), the first multi-year federal transportation bill enacted in a decade. Almost unnoticed among nearly five hundred pages of transportation law were twenty-one pages of new, highly detailed procedural rules for federal permitting of most major infrastructure and other capital projects, and authorization for a large administrative apparatus within the Executive Office of the President. The new law applies to almost every form of large capital project that requires a federal environmental review or permit—not just transmission projects and pipelines, but mines, energy generation, water projects, and more. The new rules amount to a significant augmentation of the core NEPA regulations that have been in place since 1979. If funded and implemented, the new rules should prove to be a welcome boost to ongoing efforts by the current Administration to improve the federal permitting and siting process.

For a detailed discussion of the FAST Act and its implications for infrastructure project permitting, go [here](#).

## BLM News

### BLM Proposes New Land Use Planning Rules

In February, the Bureau of Land Management (BLM) proposed new rules governing the procedures used to prepare, revise, and amend land use plans. 81 Fed. Reg. 9674 (Feb. 25, 2016). The proposed rules are intended to modernize the agency's planning process and increase public involvement in the management of 245 million acres of public lands. The goal is to make future land use planning more collaborative, transparent, and effective. Key proposed changes to the planning process include:

- **Earlier Public Involvement.** The public would be invited to submit data and information early in the planning process and new opportunities would be provided to review preliminary statements of purpose and need, alternatives selected for full consideration and BLM's rationale, and procedures, assumptions, and indicators to be used in the effects analysis.
- **Planning Assessment.** A new step would be added to process to prepare a pre-planning assessment describing the baseline

environmental, ecological, social, and economic resources in the planning area. The public would be given an opportunity to submit data and information for inclusion in the planning assessment.

- **Emphasis on Landscape-Level Planning.** The rule would provide flexibility for planning across traditional RMP and field office boundaries, and discretion to adjust RMP boundaries for better management.
- **Distinguishing Mandatory Requirements and Advisory Recommendations.** The rule would include a planning framework to distinguish between mandatory plan elements requiring conformance and optional implementation strategies.
- **Protest.** The protest process would be modernized with opportunities for electronic submission. More precise rules would also detail what constitutes a valid protest issue.

Discussing the importance of proposed rules, including the renewed collaboration with public stakeholders, BLM Director Neil Kornze stated, “The BLM’s land-use plans serve as the foundation for everything we do to manage the public lands on behalf of the American people. Managing the public’s land is a tremendous responsibility for the employees of this agency, and our work depends on close, cooperative relationships with our partners and local communities.”

Comments on the proposed rule are due on or before April 25, 2016. More information on the proposed rule can be found on BLM’s Planning 2.0 website.

#### BLM Proposes New Flaring and Venting Rules

The BLM recently published a proposed rule governing Waste Prevention, Production Subject to Royalties, and Resource Conservation. 81 Fed. Reg. 6616 (Feb. 8, 2016). This proposed “Venting and Flaring Rule” would require oil and gas producers on federal and tribal lands to limit the rate of flaring to an average of 1,800 Mcf per month per well within three years of the effective date of the rule. In addition, a leak detection and repair program would be required, including replacement of outdated equipment that vents excess quantities of gas. The proposed rule also includes limits on venting from storage tanks and requires best practices for liquid removal from wells, as well as imposing royalties on some flared gas. The proposed rule also considers allowing BLM to set some royalty rates above the current 12.5 percent of the value of production.

Industry has expressed concerns that several of the rules would require equipment replacement at existing wells, the cost of which may require hundreds to thousands of marginal wells to be shut in. Additional concerns include redundant or conflicting requirements with EPA oil and gas regulations such as the NSPS for oil and gas (otherwise known as OOOO), EPA’s recent proposal to regulate methane emissions from existing oil and gas facilities, and existing state requirements. Industry is also concerned about BLM’s traditionally long review times.

The rule includes additional reporting requirements, requires the use of infrared cameras for leak detection, imposes a 15-day time limit for leak

repair and documentation, and requests comments on increasing royalty rate limits for future leases and the use of a fluctuating royalty rate for flared gas. Several oil and gas companies and associations are preparing comments on the rule, including the Petroleum Association of Wyoming.

#### New BLM Policy Intended to Reduce Threats to Migratory Birds

In response to a recent Executive Order designed to help protect migratory birds, the BLM issued a new policy that aims to minimize the threat uncapped pipes can pose to migratory birds and other wildlife on BLM properties. Birds and other small animals sometimes fall into uncapped pipes, become trapped, and die.

The new policy requires agency employees to identify potentially hazardous pipes on BLM properties, and cap, close, remove, or place screening on open pipes where possible. Also, all open pipes on new facilities must have permanent caps or screens to minimize the hazard they present to wildlife. While the policy does not require BLM lessees or permittees to close off uncapped pipes themselves, it does offer helpful guidance for those willing to take voluntary action.

Additionally, mining claimants commonly use uncapped pipes to mark mining claims in areas of the West. The new policy encourages claimants to use wildlife-safe markers for new mining claims, and to take voluntary action to reduce hazards from existing uncapped claim markers. The agency estimates that every wildlife-safe marker used in place of an uncapped pipe could save two to four birds and other small animals annually.

#### Wyoming BLM Announces Mitigation and Setbacks from Occupied Structures

In September of 2015, the Wyoming BLM issued an internal instruction memorandum regarding the procedures by which district and field offices will permit new development of oil and gas lease surface facilities near occupied structures. Before approval of an application for permit to drill or a sundry notice, offices will consider and evaluate mitigation requirements when such activities are located within a quarter mile of existing occupied structures. Wyoming BLM uses the same definition of occupied structure that the Wyoming Oil and Gas Conservation Commission adopted, which includes a residence, school, office, or hospital, and not sheds or barns. When considering impacts to occupied structures, the offices will consider a number of factors including the type, nature, and duration of the proposed operations and potential hazards to human health. Mitigation, such as screening and noise and dust abatement, may be required for approval of proposed development.

#### **Special Status Species News**

##### Environmental Groups Challenge BLM's Sage-Grouse Resource Management Plans as Not Protective Enough

Within the past two months, two new lawsuits (bringing the total to seven) were filed challenging the sage-grouse resource management and land use plan revisions, this time by environmental groups claiming that the plans do not go far enough in protecting the bird. The first lawsuit, filed by

four environmental groups led by Western Watersheds Project in the U.S. District Court in Idaho, challenges all the plans and associated Environmental Impact Statements across the sage-grouse's range and is based primarily on the alleged failure of the BLM and Forest Service to strictly adhere to and enforce the recommendations of BLM's National Technical Team Report on sage-grouse conservation issued in December 2011. The complaint claims that all the plans are riddled with loopholes, but specifically targets the Wyoming plans, which manage large areas of sage-grouse habitat but include fewer restrictions on development than plans in other states (compare 5 percent disturbance caps in priority habitat in Wyoming with 3 percent disturbance caps in other states, and 0.6-mile lek buffers in Wyoming with 3.1-mile lek buffers in other states).

In March, the State of Wyoming moved to intervene in the District of Idaho lawsuit. In a statement, Governor Mead said, "Wyoming's proactive approach to protect Greater sage-grouse and its habitat is effective. This lawsuit is another indication that the Endangered Species Act needs to be fixed. Successful conservation efforts are challenged instead of celebrated."

The second lawsuit, filed by Western Organization of Resource Councils, the Sierra Club, and other groups in the U.S. District Court in Great Falls, Montana, specifically targets BLM's Resource Management Plans for the Miles City, Montana and Buffalo, Wyoming field offices, which manage the Powder River Basin along the border of Montana and Wyoming. The complaint does not specifically name sage-grouse as a concern in the case. The NEPA claims are aimed specifically at the alleged impacts of coal and oil and gas development in the Powder River Basin on global climate change. However, the lawsuit also raises issues regarding the impacts of those energy development activities on wildlife, which could directly implicate consideration of BLM's proposed sage-grouse management measures.

#### U.S. Fish and Wildlife Service Proposes New Mitigation Policy

The U.S. Fish and Wildlife Service (Service) is proposing to revise its 36-year-old policy on mitigation for the adverse impacts of land and water development activities on fish, wildlife, plants, and their habitats. The public comment process on the proposed revisions closes May 9, 2016.

The changes stem from a recent Presidential memorandum requiring that certain federal agencies adopt a common set of best practices designed to minimize detrimental effects of land- or water-disturbing activities on wildlife and habitat, and to make sure the agencies address or mitigate any remaining harm. The proposed revisions widen the focus of mitigation efforts to address larger-scale stressors, such as climate change and invasive species, that may exacerbate the negative impacts of development and habitat loss associated with human population growth.

Designed to ensure a "net gain" in conservation outcomes (or at least no net loss) as a result of successful project mitigation, the proposed revisions aim to incorporate mitigation into landscape-level conservation strategies.

The revised policy would apply to all of the Service's program areas and all

resources for which the agency has authority to recommend or require mitigation. Additionally, unlike the existing policy, the revised policy includes impacts to resources covered by the Endangered Species Act. While the revised policy would at first serve as an overarching “umbrella” covering all Service actions related to mitigation, the agency would likely release more detailed policies or guidance documents pertaining to specific activities at a later date.

For a detailed analysis of the proposed revisions, [click here](#).

#### U.S. Fish and Wildlife Service Propose Grizzly Bear Delisting

In response to the successful recovery of the grizzly bear in the Greater Yellowstone Ecosystem, and in a move supported by Wyoming Governor Matt Mead, the U.S. Fish and Wildlife Service (Service) has issued a proposed rule to remove the bears from the Federal Lists of Endangered and Threatened Wildlife. The agency expects to implement complete delisting of the bears by the end of this summer.

Since it was listed as threatened in 1975, the Yellowstone grizzly bear population has increased from a low of 136 bears to an estimated 700 or more bears. Monitoring efforts indicate that grizzlies have more than doubled their range since the mid-1970s, currently occupying over 22,500 square miles of the Yellowstone ecosystem. The fact that the grizzly population has remained stable for more than a decade also suggests that the Yellowstone ecosystem is at or near its carrying capacity for the bears.

The proposed rule can be found [here](#). The Service will accept comments for 60 days after the rule's publication date of March 11, 2016. Comments may be submitted electronically at <http://www.regulations.gov>. To comment, enter Docket Number FWS–R6–ES–2016–0042 in the “Search” field, then click on the “Comment Now!” button.

The Service has also released two other documents for public comment which address population and habitat management of the bears in a post-delisting environment: a draft supplement to the 1993 Grizzly Bear Recovery Plan for the Yellowstone grizzly bear population and a draft conservation strategy.

#### U.S. Fish and Wildlife Service Revises Critical Habitat Rules

On February 11, the U.S. Fish and Wildlife Service, with the National Marine Fisheries Service, issued two rules and a final policy implementing the Endangered Species Act critical habitat provisions. One rule revises the definition of the term “critical habitat” and the process for designating critical habitat. The other rule redefines the term “destruction or adverse modification” of critical habitat. The policy explains the process the agencies will use to exclude critical habitat from designation. An H&H detailed analysis and interpretation of these changes can be found [here](#).

### **State News**

#### Wyoming Oil and Gas Conservation Commission Finalizes Flaring Rule

In early February, the Wyoming Oil and Gas Conservation Commission approved new flaring rules intended to reduce methane emissions from oil

wells. These rules require operators to report what they are emitting, rather than what they are flaring or venting, and reduce the daily venting limit from 60,000 cubic feet of gas to 20,000 cubic feet. The rules also require operators to provide a gas capture plan with an application for flaring.

#### Governor Mead Announces Updated Energy Strategy

On March 14, Wyoming Governor Matt Mead released an update to the state's energy strategy. The strategy builds on the comprehensive energy strategy released in 2013 – *Leading the Charge, Wyoming's Action Plan for Energy, Environment and the Economy*. This update emphasizes clean coal research and calls for additional funding for research on ways carbon could be captured and utilized. The new strategy also gives more attention to renewable energy. The strategy also calls for revisiting the state's reclamation policies, including Wyoming's self-bonding program. The Governor's office has made progress since the last strategy was released, completing 28 of the 45 initiatives set forth in 2013.

---

*This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.*