

Wyoming Environmental Compliance and Public Land News - April 2017

Insight — April 2017

Public Land News

Zinke Confirmed to Lead Department of the Interior

On March 1, 2017, the U.S. Senate confirmed Representative Ryan Zinke as Secretary of the Interior by a wide margin—the final vote was 68 to 31. Of those supporting Zinke's confirmation were Wyoming Senator John Barrasso and Montana Senator Jon Tester. Many environmental groups, including the Center for Biological Diversity, WildEarth Guardians, and Friends of the Earth opposed Zinke's confirmation. Zinke stated that he opposes selling federal lands and indicated during his confirmation hearings that the Interior Department may reverse national monument designations made by President Obama. One of Zinke's first actions as Secretary was directing the Interior Department to increase hunting and fishing access to public lands.

Pruitt Confirmed to Lead Environmental Protection Agency

On February 17, 2017, U.S. Senators voted 52 to 46 to confirm Scott Pruitt, the Oklahoma Attorney General, as Administrator of the EPA. Pruitt is known as a staunch legal opponent of the EPA and is expected to pursue the Administration's goal of cutting the size and authority of the Agency – including cutting back Obama-era actions to combat climate change. As part of the overhaul of the Agency and Pruitt's goal of promoting federalism, an EPA transition team member issued a directive to EPA employees commanding them to identify and send any final agency actions that "would limit the flexibility of the States, limit energy resource use, impose significant costs on industry or commerce, or otherwise likely result in significant public attention on the proposed decisions or final agency actions" to the Administrator for his review and approval.

BLM Halts Fracking Rule

In March, the Trump Administration announced its intention to roll back the Obama Administration's fracking rule, which required oil and gas development companies to disclose chemicals used in the production process. Implementation of the rule had been on hold since last year when U.S. District Court Judge Scott Skavdahl (D. Wyo.) ruled that BLM lacked congressional authority to regulate fracking. The Trump Administration stated in filings to the Tenth Circuit Court of Appeals, which was just weeks away from hearing the government's appeal of Judge Skavdahl's ruling, that it was withdrawing the appeal and would begin a new rule-making process later this year. Representatives of the oil and gas industry hailed the decision to ditch the fracking rule, citing state oversight in regulating

fracking that made the federal rule unnecessary and duplicative. Environmental groups decried the decision as an example of the new administration's alleged affinity for the oil and gas lobby. BLM stated it expects to issue a notice of proposed rulemaking within 90 days.

Republican-Led Congress Moves to Amend the Endangered Species Act, Revoke BLM Planning Rule 2.0, and Modify Sage-Grouse Land Management Policies

The 115th Republican-led U.S. Congress has taken action to begin rolling back numerous environmental laws and policies, including revisions to the Endangered Species Act ("ESA"), revoking the Bureau of Land Management's ("BLM") Planning Rule 2.0, and modifying sage-grouse land management policies.

The Senate has started the process of revising or replacing the ESA. Wyoming Senator John Barrasso and former Wyoming Governor Dave Freudenthal have been active in these efforts. Senator Barrasso, who chairs the Senate Environmental and Public Works Committee, stated that the statute does not work and that it should be revised, in part, to identify species that have recovered to the point they no longer warrant ESA protection.

Republicans are also taking action to stop Obama-era sage-grouse policies. In February, a bill was introduced that would forbid the U.S. Fish and Wildlife Service from listing the greater sage-grouse under the ESA and would prohibit BLM and the U.S. Forest Service ("Forest Service") from implementing sage-grouse plans if states already have management plans in place.

On March 27, 2016, President Trump signed a bill repealing BLM Planning 2.0, a federal rule designed to help the agency plan and manage 245 million acres of public land. The rule was meant to modernize public involvement and collaboration in the planning process and to update BLM's planning tools. Opponents viewed the rule as an overly burdensome regulation of the use of federal lands that limited economic growth.

Trump Administration Reverses Course on Stream Protection Rule

On February 16, 2017, President Trump signed H.J. Res. 38, repealing the Department of the Interior's Stream Protection Rule, which imposed new water quality and monitoring standards on surface coal mines. Issued by the Office of Surface Mining Reclamation and Enforcement, the Stream Protection Rule prescribed best management practices, reclamation standards and monitoring requirements aimed at minimizing impacts on surface waters.

Congress "disapproved" the rule through the Congressional Review Act ("CRA"), 5 U.S.C. § 801, which allows Congress to review and overrule any agency regulation within 60 legislative days of its effective date through an expedited legislative process. Once a rule is "disapproved" under the CRA, the rule may not take effect and the agency may not issue a substantially similar rule without a subsequent statutory authorization. 5 U.S.C. § 801(b).

Trump Administration Eyes Clean Water Rule

On February 28, 2017, President Trump issued an Executive Order aimed at undoing the Obama Administration's Rule, which defined "Waters of the United States" ("WOTUS") for purposes of jurisdiction under the Clean Water Act ("CWA"). The Executive Order directs the U.S. Environmental Protection Agency ("EPA") and the Army Corps of Engineers ("Corps") to undertake a review of the Rule and to interpret any necessary revisions in light of the late Justice Antonin Scalia's opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). Following the issuance of the Executive Order, EPA and the Corps issued a notice of intent to rescind or revise the Rule, which was published in the Federal Register on March 6, 2017.

Under Justice Scalia's opinion in *Rapanos*, wetlands and other waters would need to be "relatively permanent, standing or continuously flowing bodies of water" in order to be jurisdictional waters under the CWA, a definition which would exclude waterways "through which water flows intermittently or ephemerally[.]" *Rapanos*, 547 U.S. at 739. Under the existing Rule, many intermittent or ephemeral tributaries and wetlands fall within the definition of WOTUS. In addition, other waters that have been regulated historically by the EPA and Corps even prior to issuance of the Rule would not be jurisdictional under the terms of the Executive Order.

On March 6, 2017, the Trump Administration filed a motion with the U.S. Supreme Court asking it to stay the pending litigation regarding the Rule in light of the Executive Order and the prospect that the Rule may be revised or rescinded.

On April 3, 2017, the Court denied the motion and will continue to hear litigation while the Trump Administration considers changes to the rule.

The WOTUS Rule, which was the subject of more than one million comments during the rulemaking process, was appealed in 17 District Court complaints and in 23 petitions to various Circuit Courts of Appeal and was expected to ultimately be decided by the U.S. Supreme Court. Any rescission or revision of the Rule by the Trump Administration will almost certainly meet the same fate. Notably, the Rule was based on a body of scientific evidence, which must be countered with a new scientific bases to support any new rulemaking by the Trump Administration. A new rulemaking is therefore likely to take years, and in the short term, jurisdictional determinations will likely continue to be made by the Corps and EPA based on prior guidance applying the "significant nexus" test outlined by Justice Anthony Kennedy in *Rapanos*.

Court Upholds Wyoming Wolf Delisting

On March 3, 2017, a federal appeals court upheld the U.S. Fish and Wildlife's 2012 decision to remove Endangered Species Act protections for Wyoming's gray wolf population. See *Defenders of Wildlife v. Zinke*, 2017 WL 836089 (D.C. Cir. Mar. 3, 2017). Under the decision, the gray wolf is no longer considered endangered in Wyoming. Governor Mead applauded the decision, which affirms that Wyoming's proposed post-listing management plan for the wolf is adequate. That plan requires Wyoming to establish a permanent trophy game area in which wolves will be managed as game animals and commits to the maintenance of at least 10 breeding

pairs and at least 100 wolves, not including the population in Yellowstone and the Wind River Indian Reservation, in the state. The D.C. Circuit Court's decision held that Wyoming's commitments were sufficiently certain to be implemented such that the Fish and Wildlife Service could rely on them. Reports from as recently as April 2016 indicate that the wolf population in the northern Rockies remains "robust" and is spreading.

State News

Wyoming Retains Clean Air Act Jurisdiction Over City of Riverton

A divided panel of the Tenth Circuit Court of Appeal held in March that the City of Riverton is not within the exterior boundaries of the Wind River Reservation for purposes of Clean Air Act regulatory jurisdiction. The Tenth Circuit's decision centered on whether a 1905 act of Congress diminished the Reservation so that land sold under the act was no longer within the Tribes' jurisdiction. In 2011, the Department of the Interior Solicitor's Office opined in a legal memorandum that the 1905 act did not change the boundaries of the Reservation, which was the basis for the Environmental Protection Agency's decision to grant the Tribes' application to manage air quality programs over an area covering both the current day Reservation and lands sold under the 1905 act, including the City of Riverton. The court held, based primarily on the text of the 1905 act, but also on the historical context and subsequent treatment of land sold under the act, that the 1905 act did effect a diminishment of the Reservation.

The Tenth Circuit's decision means that the State of Wyoming retains regulatory jurisdiction of the City of Riverton for air quality permitting purposes. The decision also has larger jurisdictional implications. In particular, the Tribes will not be able to impose Tribal Employment Rights Ordinance taxes on businesses within the City or exercise other regulatory authority. The Tribes have indicated they intend to seek *en banc* review by the Tenth Circuit.

Wyoming Legislature Authorizes Greater Sage Grouse Bird Farms

Enrolled Act Number 0091 (the Act), available [here](#), an act authorizing and regulating greater sage grouse bird (GrSG) farms in the State of Wyoming, became law on March 14, 2017, despite considerable reservations expressed by the environmental community, Legislators and Governor Matt Mead. The adopted legislation modified existing bird farm licensing and certification provisions to provide for the breeding, propagation, handling, taking, rearing and release of GrSG. Prior to the Act, Wyoming law generally prohibited taking or intentionally destroying the nest or eggs of any non-predacious bird, including the GrSG.

The intent of the Act is to establish a captive breeding GrSG population for purposes of studying and conserving the species. If successful, the captive bred and reared GrSG could play a vital role in bolstering existing GrSG populations across the west, including mitigating disturbance of GrSG habitat on public lands.

The Act authorizes a licensed bird farm certified by the Wyoming Game and Fish Commission (WGF) to possess, propagate, breed, raise, sell, and gather GrSG eggs and release GrSG. To qualify for certification, a bird

farm must provide evidence to the WGF that:

1. The licensee has successfully raised from eggs or chicks at least two other species of game bird in accordance with Wyoming law for not less than three consecutive years;
2. An adequate enclosure exists at the game bird farm to confine and handle GrSG physically separated from other game birds;
3. The enclosures for GrSG include vegetation consistent with the needs of the GrSG;
4. The facility is disease free;
5. The licensee submits an annual national poultry improvement plan certificate and annual avian influenza free certification; and
6. The licensee reports the detection of any disease at the game bird farm and remedial acts taken to mitigate the effects of any disease.

The Act permits a licensee holding a current bird farm certification to collect GrSG eggs for the purpose of establishing a captive breeding population. Pursuant to the Act, all collections must be conducted by the licensee under the supervision of a professional wildlife biologist and in coordination with the WGF. Collections are limited to 250 eggs by any licensee in any calendar year to be collected in either April or May, and no more than forty nest sites in a single collection area may be disturbed by the licensee in any calendar year. The provision, temporarily amended by the Wyoming Senate to allow for the annual collection of 1000 eggs, caused considerable debate and discussion.

The Act became law without the signature of Governor Mead. In his March 14 letter to the Secretary of State, available [here](#), Governor Mead expressed "considerable reservations" concerning disease control, genetic diversity, survivability of the released birds, and timing, location and method of egg collection. Governor Mead directed the Wyoming Game and Fish Department to involve the Wyoming Sage-Grouse Implementation Team during the rulemaking process required by the bill and insure that the State of Wyoming incurs no financial burden as a result of the legislation. Given his position and requirements, the WGF will no longer proceed with emergency rulemaking to allow for collection of GrSG eggs in 2017.

The Act directs the WGF to promulgate rules and regulations establishing a system to certify game bird farm licensees to possess, propagate, breed, raise, sell, gather GrSG eggs and release GrSG. Specifically, the Act directs the WGF to establish the time of day and restrictions on methods of collection of eggs, the number of licensees authorized to collect eggs; the areas approved for collection of eggs, as well as any other limitations on egg collections, including the complete suspension of egg collections as determined by the WGF to be beneficial to prevent the listing of the species.

The Act will sunset by its terms on December 31, 2022. As such, absent an extension by the Legislature, collections of GrSG eggs will be limited to the calendar years of 2018 through 2021.

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