



TREASURE STATE
RESOURCES ASSOCIATION
OF MONTANA

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TREASURE STATE RESOURCES ASSOCIATION NEWS
June, 2019

**There's Still Time to Register for the
TSRA Annual Meeting – June 19-20, 2019
Holiday Inn Downtown Missoula**

TSRA members and guests will soon gather at the Holiday Inn Downtown Missoula, 200 South Pattee, Missoula, MT for the TSRA Annual Meeting. The meeting begins with the “traditional” golf scramble on Wednesday afternoon, June 19th and continues with a full day program on June 20th. As a reminder:

- On Wednesday, June 19, the 4-person scramble golf tournament begins at **1:00 pm.** at the **Canyon River Golf Club, Missoula, MT.** We still have room for additional golfers but tee times have to be confirmed soon. Let us know ASAP if you plan to play. Arrive early to grab your lunch (provided for registered golfers).
- **No Host Dinner** - TSRA Meeting Attendees and Guests are invited to a No-Host Group dinner at **The Ranch Club Restaurant, 8501 Ranch Club Road, Missoula, MT.** The dinner starts at 6:30 pm.

Following dinner, (approximately 8:00 pm.) you are invited to enjoy “dessert” and refreshments at the home of TSRA Executive Director Peggy Trenk . The address is 3084 Rustler Drive, Missoula, MT - just two blocks from The Ranch Club Restaurant. Even if you don't make it to dinner, you are welcome to attend.

- **TSRA's Annual Business Meeting is scheduled for Thursday, June 20th at 9:00 am.** at the Holiday Inn Downtown Missoula. We will be electing officers for the coming two years.
- **A Preliminary Meeting Agenda is Attached** but please note it is subject to change. Check the Events page on our website at: treasurestateresources.org for up-to-date agenda information and other details as the meeting approaches.

We're excited to catch up with the remarkable progress being made under the Superfund clean up efforts of ARCO and others. We will have representatives from the MT Department of Environmental Quality, legal experts, and MT Legislative staff give us a preview of upcoming rulemaking, litigation, interim studies and other matters.

We look forward to receiving your registration(s) ASAP. (See Attached Forms)

Great Options for Meeting and Golf Sponsors

We need your help to assure a quality program. **If you haven't already done so, please consider being a sponsor and/or donating prizes for golf. See the attached Sponsorship Form for details about the value you'll receive. Your support is greatly appreciated.**

TSRA sincerely thanks our Sponsors to date. They are:

Trailblazer Level: MDU Resources Group

Champion Level: Atlantic Richfield, Crowley Fleck, Denbury Resources, NorthWestern Energy, Washington Business Services and Weyerhaeuser

Groundbreaker Level (Golf Sponsorship): Citizens for Balanced Use, Hecla Montana, IBEW Local #44, NorthWestern Energy and Solvay U.S.A

Advocate Level: ABS Legal, Browning, Kalecyzc, Berry and Hoven, Energy Laboratories, Montana Chamber of Commerce, Montana Farm Bureau Federation, Phillips 66 and Solvay U.S.A.

Registration forms can be found on the TSRA website at: treasurestateresources.org. (Events Page) We look forward to seeing you on June 19-20, 2019.

Montana Board of Environmental Review Adopts Groundwater Standards for PFOS and PFOA's – Standards for Iron and Manganese on Hold for Now

As anticipated, on May 31st, the MT Board of Environmental Review approved DEQ's recommendation to adopt groundwater standards for 4 "man made" chemicals, including PFOS and PFOA's. As requested by TSRA and others, they didn't adopt changes proposed earlier for iron and manganese. Because the latter are naturally—occurring, DEQ has encountered some challenges in addressing conditions where existing levels are higher than the proposed standards. The Department also stated that due to the diversity of regulatory and remediation programs under their purview, they needed to develop more clear and consistent internal protocols for application of any new standards before proceeding.

DEQ did note they expected to revisit the issue of setting new standards for iron and manganese in the near future, though the specific timeline is not entirely clear. A representative from the Missoula County Health Department urged DEQ to act in a timely manner due to new evidence suggesting health risks for some populations. The Board asked for an update on the Department's progress at their next meeting.

Sage Grouse Update: What Does Being Grandfathered Mean?

Source: Montana Sage Grouse Conservation Program

At their May 14, 2019 meeting, the Montana Sage Grouse Oversight Team considered a request from sponsors of a proposed wind facility in Carbon County as to whether or not language included in SB 299 passed by the 2019 Montana Legislature would allow a larger project area to be considered "grandfathered" under the Governor's 2015 Executive Order. The project is known as the Mud Springs Wind Energy Project.

Development began in 2008, with the signing of the first land agreements and approval of a conditional use permit from the county. Key to the consideration of the request before MSGOT was the Stormwater Permit issued by MTDEQ in 2014 that outlined the proposed project boundary at that time. The project developers had negotiated agreements outside the 2014 Stormwater Permit boundary, but for whatever reason did not include that affected area in their submittal.

In 2015, the Governor issued Executive Order 12-2015, that provided land uses that existed prior to its adoption, including those authorized by existing permits, could continue within a defined project boundary, even if they conflicted with the sage grouse conservation strategy that was established under the Executive Order.

The project area defined under the 2014 Stormwater Permit has been recognized by the Sage Grouse Conservation Program as being “grandfathered”. The project area was later expanded to include other lands in a revised stormwater permit approved in 2017.

As noted earlier, project developers secured a number of easements and land purchase option agreements between January 2014 and September 7, 2015. Those agreements were recorded in Carbon County. They pointed to the language in Senate Bill 299 that states:

Existing land uses and activities are recognized and respected, and those uses and activities, including those authorized by permit but not yet conducted, that existed as of September 8, 2015, may not be managed under the stipulations of a sage grouse conservation strategy adopted by the governor through executive order or a policy, rule, or regulation adopted by the oversight team. Those existing land uses and activities may continue within an existing defined project boundary even if they exceed the stipulations of those documents.

Section 1. (2) of Senate Bill 299 states *for the purposes of this section, the term : (a) ‘defined project boundary’ includes but is not limited to a right-of-way, easement corridor, recognized oil and gas unit, drilling or spacing unit, mine plan, and subdivision plat.*

Project developers suggested that the wind and transmission easement agreements prior to September 8, 2015 are a right-of-way and/or an easement corridor, as defined in Section 1.(2) of Senate Bill 299. They also proposed that wind activities that took place prior to that date should be recognized and respected by MSGOT and included within the Grandfathered project area.

Department of Natural Resources Attorney Dana Jackson disagreed with that interpretation, noting that under Section 1. (2) of the bill subparts (a) and (b), which states *“existing land uses and activities “means those uses and activities that require a permit or other authorization from a state agency to be conducted need to be read together.*

The majority of MSGOT members agreed, approving a motion that limited the area considered “grandfathered” to the boundary of the original 2014 stormwater permit. Members did agree they would consider wind generation activities outside the grandfathered area if the project proceeds

Court Sides with WOTUS Foes as Legal Fight Gets Messier

Source: E&E News, May 29, 2019 By: Ellen M Gilmer and Ariel Wittenberg

The Obama administration violated the law when it issued its embattled definition of “waters of the United States,” a federal court ruled on May 28.

In a long-awaited decision, the U.S. District Court for the Southern District of Texas sided with three states and a coalition of agriculture and industry groups that have been trying to take down the joint EPA and Army Corps of Engineers rules since 2015.

The Trump Administration is working on plans to rescind and replace the Obama-era Clean Water Rules, but the regulation -- which defines which wetlands and waterways are covered by the Clean Water Act -- is still in effect in almost two dozen states, and it's still being debated in a tangle of lawsuits.

Judge George Hanks, Jr. ruled that Obama officials violated the Administrative Procedure Act by issuing a final regulation that was too different from the proposed version -- depriving the public of a meaningful opportunity to comment.

The final rule, known as WOTUS for short, included physical limits on how far wetlands could be from waterways and still be regulated, a "substantial change" from the proposed versions of the rule, Hanks found. Further, he wrote, EPA and the Army Corps issued a final version of a key scientific report after the public comment period had closed.

At issue is the definition of "adjacent" wetlands. The proposed rule would have included all wetlands adjacent to jurisdictional waterways, including those in a riparian area or floodplain or with surface or shallow subsurface connections to waterways.

The final rule, however, put limits on how far away wetlands could be from waterways and still be considered "adjacent". It would regulate waters within 100 feet of waterways and those within the 100-year floodplain of a waterway or waters 1,500 feet from the Great Lakes.

Hanks, an Obama appointee, noted that the final rule "was the first time that the agencies gave notice that they intended to define adjacency by precise physical distance-based criteria -- rather than the ecologic and hydrologic criteria in the proposed rule. The change is significant -- it alters the jurisdictional scope of the act," he wrote.

While the proposed rule did ask for comments on whether it should set some kind of geographic limitation on "adjacent" waters, Hanks found it was too vague for the public to comment on. The public was also not able to comment on the final version of a 300-page "Connectivity Report", which reviewed how wetlands and small streams can affect water quality of larger downstream waters, Hanks wrote, calling the report "the most critical factual material used to support the final rule.

Hanks remanded the WOTUS rule to EPA and the Army Corps in light of the administrative inadequacies. The agencies are already working on a plan to officially scrap the Obama regulation as soon as August and finalize a replacement at the end of the year.

However, other WOTUS litigation has become even more complicated than before.

In a separate multistate lawsuit in federal district court in North Dakota, recent state withdrawals have resulted in changes to where the Obama era rule is effective. In March, Colorado and New Mexico, both under new Democratic leadership, asked to bow out of the case.

The court granted their requests this month and stipulated that an earlier preliminary injunction is no longer in effect in Colorado.

The New Mexico case is more complicated. After the two state agencies involved in the lawsuit moved to withdraw, a coalition of New Mexico and Arizona counties asked to join the case.

Editor's Note: There is currently some confusion as to whether the action of the counties in New Mexico means the injunction remains statewide, or only within those counties.

Ohio appeal....

In yet another development in the legal fight over the Obama water rule, two Eastern States are preparing to take their fight to an appeals court. The U.S District Court for the Southern District of Ohio in March refused a request from Ohio and Tennessee to block the Clean Water rule in those states. The states have filed notice that they are challenging the ruling at the 6th U.S. Circuit Court of Appeals.

And in Oklahoma (Source: E & E News, May 30, 2019 By: Ellen M. Gilmer)

On May 29th, a federal court refused to block the Obama administration's Clean Water Rule in Oklahoma. The U.S. District Court for the Northern District of Oklahoma rejected a request from the Sooner State and business groups opposed to the EPA-Army Corps of Engineers regulation designed to clarify which wetlands and waterways are subject to the Clean Water Act....

Judge Claire Eagen found that alleged harm from the Obama rule – including administrative costs from increased permit applications and uncertainty among landowners about permitting – was vague and speculative, falling short of the high legal bar for a preliminary injunction.

“The State claims that the 2015 Rule infringes on its sovereignty to regulate its lands and waters and assumes that the 2015 Rule will lead to an expansion of federal regulation in Oklahoma,” the George W. Bush appointee wrote. “However, the 2015 Rule has been in effect for varying periods of time since this case was filed, and the State can identify no evidence of an aggressive expansion of federal regulation in Oklahoma waters.”

Landowner affidavits describing hesitation to develop land in light of the regulation are “not the type of harm that is so imminent and serious that it would warrant the extraordinary remedy of a preliminary injunction,” Eagan wrote.

Editor's Note: Montana remains under the injunction issued by the North Dakota District Court, blocking implementation of the WOTUS rule at this time. As noted, the Trump Administration expects to finalize the repeal and replacement of the Obama-era Clean Water Rule this year. The final repeal rule is expected in August and a new definition of “waters of the United States” is expected to be final in December. But don't expect implementation to be easy ...

Streams could 'come in and out' of WOTUS with climate change

Source: E & E News, June 3, 2019 By: Ariel Wittenberg

The Trump administration's proposed Clean Water Act rollbacks are meant to draw clean lines showing which waterways are protected and which are not.

But climate change could complicate that as extended drought and increased storms change the hydrology of wetlands and streams nationwide.

The proposed Waters of the U.S., or WOTUS, rule would erase federal protections for streams that flow only after rainfall or wetlands without surface water connections to larger waterways.

But drought could dry up wetlands that are normally connected to waterways, and lower groundwater tables that normally feed streams. Increased rains could have the opposite effect.

Under the Trump administration's proposal, that means streams and wetlands could "come in and out" of Clean Water Act jurisdiction, EPA officials told a Science Advisory Board (SAB) working group, because Army Corps of Engineers jurisdictional determinations last only five years.

"At the end of the permit period, a new jurisdictional determination might produce a different result if climatological changes had occurred, thus waters could come in and out of jurisdiction," EPA Office of Water Deputy Assistant Administrator Lee Forsgren and staffer Owen McDonough told the advisory board's WOTUS Working Group, according to a summary of the conversation posted online.

The SAB will discuss the WOTUS proposal at a meeting Thursday. Members of its 10-person WOTUS Working Group have raised questions about the scientific justifications for the regulation and participated in a teleconference briefing and received written responses from the agency. A summary of the teleconference and EPA's written responses were posted on the SAB's website, along with a memo from the working group outlining their "concerns" about the proposal.

Forsgren and McDonough's admission that climate change could affect Clean Water Act protections followed a question from one working group member who asked how "temporal variability" would influence whether streams are protected by the Clean Water Act.

Climate change causing waterways to lose protections would be much less likely under current regulations from the Obama administration and those in place since the 1980s because they are not as concerned with the presence of surface water flow.

Instead, current regulations protect any streams with a streambed, banks or ordinary high-water mark — landscape signatures to indicate whether streams have a significant impact on downstream waters, regardless of how often they flowed. Obama- and Reagan-era protections currently in place also allow for regulation of wetlands without surface water connections to waterways if they are relatively nearby or have shallow subsurface water connections.

The working group's questions stem from concerns nine of the 10 members have about EPA and the Army Corps' decision to erase protections for ephemeral streams. Though they flow only after rain, torrents of rain or snowmelt can carry significant pollution downstream into more consistently flowing waterways, in turn polluting favorite fishing holes and drinking water intakes.

In their memo, the WOTUS Working Group said agencies should consider the "scientific basis" for excluding ephemeral waters that flow only after rainfall and wetlands without a direct surface water connection to larger waters. The group also recommends considering "the scientific importance of ground water protection and ground water," noting that the WOTUS proposal would protect spring-fed creeks but not isolated waters or wetlands with shallow subsurface groundwater to larger waterways that have previously been protected.

The working group also asks EPA to further consider whether some waterways are too small to warrant Clean Water Act protections, even if they flow all year round.

All four recommendations were based on a 300-page "Connectivity Report" commissioned by the Obama administration before it wrote the Clean Water Rule. The SAB had reviewed and signed off on the final version of that report in 2014.

That report explains how even small streams that don't flow consistently and wetlands without surface water connections can have large impacts on downstream waterways by helping to absorb floodwaters, slow the flow of water and filter out pollution.

EPA and the Army Corps have justified rolling back clean water protections — some of which have been in place since the 1980s — by saying the question of Clean Water Act jurisdiction is a question of law, informed by court decisions and not by science (*Greenwire*, Dec. 11, 2018).

That argument was apparently not convincing to the working group members, who laid out recommendations in a memo to the larger SAB.

"We recognize that the agency views the definition of Waters of the United States as a legal and policy decision that is informed by the statute," they wrote. "However, in reviewing the proposed rule we find that there are some gaps between science and policy that warrant review and bridging."

Nine of the 10 work group members signed off on those recommendations.

Don van der Vaart, who questions mainstream climate science and is the former secretary of the North Carolina Department of Environmental Quality, argued in a dissenting statement that the Clean Water Act does not regulate waters "based on the likelihood of their contributing pollution to actual navigable waters."

He also echoed EPA talking points, saying the question of Clean Water Act jurisdiction "is not a scientific inquiry, but a legal one."

'Typical year'

But the rest of the working group was so concerned about excluding ephemeral streams, they asked whether EPA had considered regionalizing its proposal to account for the fact that the majority of waterways in the arid Southwest flow only after rainfall.

"Given the differing roles that ephemeral streams play in influencing the chemical, physical and biological integrity of the Nation's waters, why not consider a regional approach to regulation of ephemeral streams?" the work group asked.

Forsgren and McDonough did not directly answer the question, instead describing the technical difficulties of basing Clean Water Act protections on specific flow requirements, such as only protecting streams that flowed at least 185 days per year.

But the pair did note "the importance of a typical year" — the methodology the Trump administration proposes to use to determine whether waterways and wetlands are covered by the Clean Water Act.

The proposal would determine whether waterways and wetlands are covered by the Clean Water Act by looking at what their surface water connections to larger waterways look like in a "typical year."

That means EPA and the Army Corps would look at a rolling 30-year average of precipitation for an area to determine whether a stream flows independent of rainfall, for example. But the proposal specifically says a typical year "would not include times of drought or extreme flooding" and would look only at rainfall from the previous three months that falls within the 30th or 70th percentiles of the 30-year average.

Forsgren and McDonough "indicated the concept allowed for regionalization" to the working group.

But scientists and environmental groups that oppose the WOTUS rule say the "typical year" concept would ignore climate change and the regional variabilities it could exacerbate by eliminating the wettest and driest precipitation data.

The Natural Resources Defense Council accused the agencies of ignoring the effects of climate change, writing in comments that "what has been typical in the past will not reflect what the future holds."

And a coalition of scientific groups, including the Society of Wetlands Scientists, said the proposal "ignores the periodic and substantial connectivity that occurs during increasingly frequent atypical years resulting from climate change."

Advisory Council Touts Potential for New Products

Source: E&E News, May 17, 2019 By: Dylan Brown

The National Coal Council trumpeted non-burning uses of coal in a report published yesterday (May 16, 2019).

The report recommends that the Department of Energy create a dedicated coal-to-products research and development program and incentivize private-sector investment.

"Advanced uses of carbon from coal can also lead to cleaner energy, cleaner water and cleaner air," council CEO Janet Gellici said in a statement. "The environmental benefits of durable, light-weight and high-strength carbon products provide more incentives to advance the commercialization of these technologies."

The federal advisory committee's report, [Coal in a New Carbon Age – Powering a Wave of Innovation in Advanced Products and Manufacturing, \(May, 2019\)](#) stems from a request from Energy Secretary Rick Perry to look at coal uses beyond electricity and steel production.

DOE has been fixated on saving rapidly shuttering coal-fired power plants — the destination for four-fifths of all U.S. coal.

The coal industry, which dominated the advisory panel, has long been tinkering with turning coal into carbon fiber, liquid fuels and other products.

Ramaco Carbon LLC CEO Randall Atkins, who served as chairman for the report, has pitched DOE for years to foster ideas like his company's quest to build cars using coal ([Greenwire](#), July 31, 2017).

"The analysis undertaken in this report indicates that volume utilization of domestic U.S. coal resources for coal-to-products applications has the potential to be on the same order of magnitude as applications for coal power generation," he said in a statement.

Other estimates have been far less optimistic about the potential, but Atkins and the council say the issue merits more study ([Greenwire](#), June 30, 2017).

Legislative Wrap-Up

TSRA testified on a wide range of bills in 2019. A complete list of those bills and their status can be found on the association's website at: treasurestateresources.org.

Upcoming Events/Dates

June 6, 2019	Economic Affairs Interim Committee 1:00 pm. – 3:00 pm. Room 102, State Capitol, Helena, MT
June 10, 2019	Water Policy Interim Committee Room 152, State Capitol, Helena, MT
June 12-15, 2019	Montana Stockgrowers Mid-Year Meeting, Miles City, MT
June 19-20, 2019	TSRA 2019 Annual Meeting Holiday Inn Downtown, Missoula, MT
June 27, 2019	Revenue Interim Committee State Capitol, Helena
August 27-29, 2019	Montana Petroleum Association Annual Meeting Billings, MT

If you don't want to receive the TSRA Newsletter, please let me know. If you want to share with others in your company or organization, please do so. The mission of the Treasure State Resources Association is to promote and enhance the Montana Way of Life through responsible resource development.