From: Berglund, Jeff
To: Bush, Jodi
Cc: Brent Esmoil
Subject: Re: DRAFT DRAFT Follow up notes from meeting DRAFT DRAFT -- to be refined!
Date: Monday, March 30, 2015 12:46:51 PM

Please see my initial thoughts below. I cross checked the WY stuff with Alex S. in WY. Turns out the MT plan is actually less restrictive than the WY plan in core. Now plunging into BLM plans. Thanks,

J

On Sun, Mar 29, 2015 at 8:04 PM, Bush, Jodi <jodi_bush@fws.gov> wrote:

> Please review in light of our comments on the EO and the EO itself. In order to get this into the record, I need you to review and let me know how close you think we are. This includes the reanalysis of the additional elements of the distance buffers in core and GH.
>
> We will need to get back to Tim asap so he can get us a final memo. JB
>
> Jodi L. Bush
> Field Supervisor
> Montana Ecological Services Office
> 585 Shepard Way, Suite 1
> Helena, MT 59601
> (406) 449-5225, ext.205
>
> ---------- Forwarded message ----------
> From: **Baker, Tim** <TBaker@mt.gov>
> Date: Sun, Mar 22, 2015 at 12:31 PM
> Subject: DRAFT DRAFT Follow up notes from meeting DRAFT DRAFT -- to be refined!
> To: "Bush, Jodi" <jodi_bush@fws.gov>
>
> Hi Jodi,
>
> Thanks for the productive meeting on sage grouse. Based on that discussion, I think we are making good progress on a common understanding on the Governor's Executive Order (EO). Assuming that we continue to make progress, I think it is very likely that we would be able to make some adjustments to our program. But the timing of our second EO will be very dependent on our progress in the Legislature, and on our further discussions. With that in mind, and addressing a few key issues that you have raised, here are a few thoughts:
>
> 1. We anticipate a second EO that activates a mandatory program – a lot of that will

depend on the last 30 days of the Legislature, and then our efforts to hire staffing, which should be in place before the Program becomes effective. It's possible that parts of our Program could move earlier – for example, if we can achieve a unified approach across all lands regardless of ownership, we could work on a BLM/Board of Oil and Gas Conservation MOU to move those provisions to implementation on an expedited basis.

There is unlikely to be an immediate unified approach across all lands - at least in terms of BLM dropping their current direction and adhering to the proposed State approach. BLM is finalizing RMPs (we just received "draft" finals) and the BLM's final allocations for O&G development are more GRSG conservation-oriented than are the State's (e.g., BLM is NSO for O&G in core, vs State 0.6-mi lek buffer) and so are viewed more positively by FWS currently. Substantive concern does remain regarding when the EO will become mandatory - and also regarding when the Land Board may approve the associated stipulations and also the approaches for ag conversion, grazing, sagebrush eradication, etc. on State Lands - Tim's latest indication in the draft regulatory review doc was that this Land Board vote would happen by September 2015 - which may be too late for consideration in the listing decision.

2. Regulatory certainty for state authorizations – I have put together an analysis of our regulatory reach on private lands, which comprise 54% of core habitat. Our mandatory permitting authority, to which the sage grouse EO stipulations will attach, covers most the higher profile threats that are mentioned in the COT report such as energy, infrastructure, and mining. The private lands habitat fund to be proposed to the Legislature would go a long ways to filling in for those activities, like grazing and agricultural conversion, where our reach is not as strong.

The regulatory summary that Tim put together is very helpful - the last draft that I saw captured the vast majority of our comments. A remaining issue there is, again, timing of when the EO would be mandatory and when the Land Board would approve various components (assuming they vote to approve). I'm still not clear on how (or if) the forthcoming regulatory memo and "EO clarification memo" factor into these timing issues and, given that, the extent of implementation certainty we can afford to the EO in our listing analysis. The stewardship fund is a good thing also.

3. Operation of Program relative to BLM lands—as you know, we believe strongly that the EO should operate across all lands seamlessly, regardless of ownership. The express terms of SB 261 will likely preclude us from including BLM and USFWS on the Oversight Team, but we can include language in the second EO that mandates BLM and USFWS attendance and active participation at all meetings.

That is an improvement, as we and BLM would be in the room, but would our agencies' opinions carry weight that is different from any other at-large meeting attendee (industry, NGO, etc)? Could that be addressed by some other special designation?

4. BMPs – the concept of Best Management Practices is intended to cover those activities of minimal or no significance that may be common in occurrence – the EO already sets forth certain activities that are exempt and it seems likely that as we move forward with implementation we will discover other activities that, while not exempt, may be commonplace and of minor or no significance if conducted in a certain manner. We can clarify this intent.

Clarification would be helpful. The concern here was that BMPs could be "self-implemented in place of MSGOT or Program review". Any such activities, and the BMPs, should be very well-defined and well-supported by science.

5. Sequencing – our starting point when looking at activities proposed for core habitat is "avoidance first" and "avoid when possible," and this determination must be clearly documented. Our sequencing provisions are strong and set forth a clear hierarchy: avoid, minimize, reclaim, offset.

The latest language added to the regulatory authority memo is very helpful and should be strongly emphasized in whatever EO clarification materials are produced. The mitigation discussion in the EO occasionally truncates at "reclamation" (e.g., short of "offet") - and also isn't always clear as to when offset mitigation would be required. The new language in the regulatory memo is much clearer on these points, and also on the intent to require mitigation to a net conservation gain standard.

6. Mitigation – we were purposely very broad in the EO about mitigation. There's so much good work going on that we didn't want to preclude or limit our efforts. We also want to make sure that the subject receives due attention, and is something that the Service can ultimately support. In this regard I'm sure that the MSGOT will give strong preference to the Service's September Mitigation Framework – in fact, the express terms of SB 261 will require it (p. 8, lines 14-16). As an aside, I forgot to mention that the Montana Stockgrowers have approached me about sponsoring and administering a habitat exchange.

I still strongly recommend that a bullet list of at least minimum components of a mitigation plan be included to inform this process until the MSGOT formalizes a mitigation approach (see p. C14 of our 12/9/13 comments). These items would be needed regardless of the mitigation mechanism.

7. Wind development – it is our intention that wind development not be allowed in core areas, except if it can be demonstrated that the project will not cause a decline in sage grouse populations. The phrase "should be avoided" may not be clear enough, and "excluded" is more indicative of our intent. For general habitat our language ("not recommended") may be too ambiguous, especially given the 4-mile siting restriction and exceptions language. In general habitat such projects should not be allowed within 4 miles of an active lek, unless the exceptions can be met (burden on developer).

This is an improvement and I think meets our intent - it should be emphasized that meeting the exception standard is a high bar, must be science-based, and cannot be achieved by simply combining the project with offset mitigation. Would also be helpful to clarify that, relative to applying lek buffers in GH, that leks may occur in either core or general habitat.

8. Noise – with regard to noise limitations, our objective is to adopt the Wyoming provisions, recognizing that site-specific conditions may allow for a different restriction to

be agreed upon. The EO already provides for exceptions based on site-specific conditions.

It would be helpful to see the final proposed version. Among other things, per our Oct 2014 comparison of the WY EO and MT EO noise provisions and discussions, I thought we had agreed to remove "from construction activity" and "existing activity included", specify measurement at edge of lek at sunrise, leave in the longer MT day (6 pm to 8 am) and seasonal (3/1 to 7/15) periods - and also consider adding cap at 30-34db?

9. Power lines – for all activities subject to the EO, the overriding principles are avoid, minimize, reclaim, offset. Our existing provisions for power lines and communication towers are somewhat unclear as to how they fit within the sequencing scheme, and an explicit "step-down" analysis can better capture the intent of the EO as a whole.

So is a step down approach now proposed? Would be helpful to see that.

10. Fire – I understand that the BLM has developed language on prescribed burns that would be helpful and we will include it. Prescribed burning seems like an important tool, but only if it can be shown to be beneficial or neutral in sage grouse country. As for fire generally, one of our adjustments we made to the recommendations of our Advisory Council was the inclusion of fire as an existing disturbance in the DDCT analyses, regardless of whether natural or human-caused.

This is all helpful and consistent with our recommendations - there is "one last" revision of the prescribed fire language from the RMPs that just came out - I can forward if interested.

11. Staffing – although the Program will have a lead biologist, the Montana Fish, Wildlife and Parks folks who are out in the field will play a significant role in regard to matters concerning on-the-ground conditions, such as monitoring and data collection.

So how will this message be conveyed?

12. Application of EO – when the second EO activates the mandatory aspects of the Program, it is well understood that those stipulations will have the full force and effect of law and will be applied to their maximum legal extent to existing rights.

That is good - we also asked that specific criteria for waivers be applied in future iterations of the EO, and that they be minimized to the extent possible. Can that be addressed in the clarification memo?

I fully recognize the urgency that you feel in addressing these issues. I believe we are making good progress.

Other remaining issues not addressed here:

0.6-mile NSO in core and 0.25-mile NSO in general habitat. In comparison to WY: WY institutes 0.6 mi NSO in core, and prohibits activity outside the 0.6 mi NSO throughout all core nesting habitat during the main nesting season (activity allowed 7/1 to 3/14; prohibited 3/15-6/30), and in sole winter concentration habitat during the wintering period (activity

allowed 3/14-12/1; prohibited 12/2-3/13). Vegetation stripping/topsoil removal within 4 mi of active leks must occur outside of nesting season (allowed 7/1-3/15). Site-specific exceptions allowed.

MT institutes 0.6 mi NSO and additional 2 mile nest season seasonal restriction buffer in nesting habitat (activity allowed 7/16-3/14, prohibited 3/15-7/15). However, unlike Wyoming, activities are allowed throughout the rest of core habitat during the nesting season. In all areas throughout core used as winter concentration areas, activity is prohibited 12/1-3/15 (allowed 3/16-11/30). Vegetation stripping/topsoil removal within 4 mi of active leks must occur outside of nesting season (allowed 7/16-3/14).Site-specific exceptions allowed. Montana's seasonal restrictions in core areas are therefore weaker than Wyoming's with regard to nesting and nesting habitat, the same with regard to vegetation stripping/topsoil removal within 4 mi of leks and comparable regarding winter restrictions and habitat (assuming that MT's winter restrictions also apply core-wide).

Montana also institutes 0.25 mi NSO and additional 2 mile nest season seasonal restriction buffer in nesting habitat (activity allowed 7/16-3/14, prohibited 3/15-7/15) in general habitat. Again, activities are allowed throughout the rest of general habitat during the nesting season. In all areas throughout general habitat used as winter concentration areas, activity is prohibited 12/1-3/15 (allowed 3/16-11/30). Noise stipulations are also implemented in general habitat, as are wind energy stipulations, and mitigation sequencing may(?) apply once standards are developed by MSGOT. In comparison, Wyoming institutes a 0.25 mi NSO for leks outside of core, and also imposes a 2-mile (unspecified) "seasonal buffer" (assumed both nesting and winter where applicable) in these areas, but imposes no other restrictions outside of core and designated transmission corridors. Wyoming's EO does not map or address "general habitat" specifically, as does Montana's EO. Montana's approach in non-core (general) sage grouse habitat therefore will likely be stronger than Wyoming's, although some of this discrepancy may be offset because Wyoming encapsulated much more of their GRSG population within core (84%) initially than did Montana (76%).
How this may factor into offsetting the relatively (in comparison with WY) less seasonally protective elements in Montana core habitat is unknown; particularly given the remaining concerns regarding the 0.25-mile NSO in general habitat. Montana is also considering adjusting core borders to encompass 80% of its GRSG population.

The 0.25-mi NSO has been shown largely ineffective in the literature for most activities (see our many previous comments) - the 2014 USGS report suggests that a 0.25-mi buffer is at the lower end of the interpreted range of buffers that may be appropriate relative to activities without habitat loss (such as noise), but is far from the 1.2 mile to 5 mile ranges recommended for most activities.

We therefore still recommend that buffers be increased in Montana to the extent possible in core and general habitats in order to maximize conservation benefit, incorporating the results of the 2014 USGS lek buffer report to the extent possible into project-level decisions. Enacting core-wide seasonal restrictions (instead of limiting to 2-mile CSU) in core, as originally proposed in the Strategy, would further benefit GRSG, as would increasing the extent of core to include more of the population.

Thanks,

Tim

--
Jeff Berglund
Fish and Wildlife Biologist
U.S. Fish and Wildlife Service
Montana Field Office
585 Shepard Way, Suite 1
Helena, MT 59601
(406) 449-5225, ext. 206