

## MEMORANDUM

To: Mr. Kolman and Ms. Stockwell, Legislative Environmental Policy Office

From: Carolyn Sime, Sage Grouse Habitat Conservation Program Manager

Date: December 20, 2019

Re: Summary of Sage Grouse Stewardship Act Activities

Thank you for the opportunity to update the Memorandum previously provided to the Environmental Quality Council in September, 2019. This updated Memorandum will address activities by the Sage Grouse Habitat Conservation Program (Program) primarily for the calendar year 2018, with some additional information provided for 2019 through December 20<sup>th</sup>.

The Program implements the Stewardship Act (Act) and Executive Order 12-2015 under the oversight of the Montana Sage Grouse Oversight Team (Oversight Team or MSGOT). Key areas of implementation focus on Stewardship Account (Account) Grants and review of development proposed in designated sage grouse habitats for which state permits are required. Other facets of Program development and ongoing improvement occur simultaneously to those core functions.

### 2018 Activities

#### Stewardship Account Grants

One of the original Stewardship Account grants closed during calendar 2018, bringing the total number of Stewardship Account projects completed from the first grant cycle to three by the end of the year. A total of 36,149 acres of Core Area habitat was conserved through conservation easements.

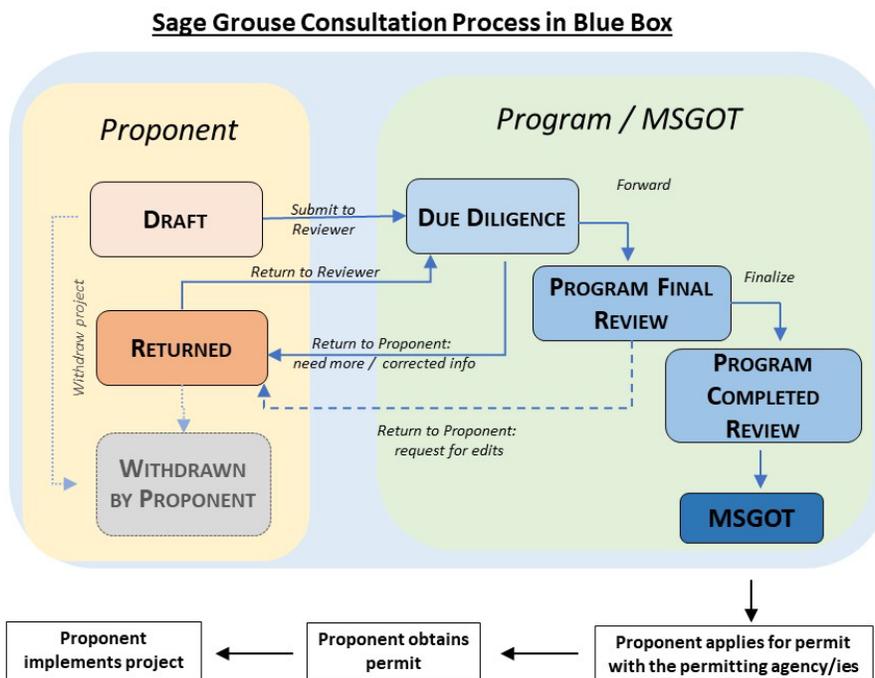
#### Review of Development Projects Proposed in Sage Grouse Habitat

Taken together, Executive Order 12-2015 and the Stewardship Act set out a process whereby development projects proposed in designated sage grouse habitats that require a state permit or that are not otherwise exempted by the Executive Order or the Oversight Team are reviewed first by the Program. The proponent then submits the Program's review, along with the permit application to the permitting agency.

The overall process is shown in Figure 1. The portion of the process shown in the shaded light blue area is the responsibility of the Program. Once the Program completes its review, the proponent works directly with the respective state permitting agency/ies. Once the proponent obtains their state permits, the proponent implements the project.

Figure 1 partitions out the overall review process into stages for which the Program is responsible for actively working to complete reviews (right side). This is referred to as "active review time" and it represents time during which the ball is squarely in the Program's court because the Program has all the information it needs to complete its work. The portion of the process for which the proponent (i.e. the developer) is responsible are shown on the left and corresponds to time during which the ball is squarely in the proponent's court.

Figure 1. Sage grouse project review workflow highlighted in the shaded light blue area with project permitting and implementation activities occurring afterwards and outside the scope of the Sage Grouse Program. Definitions for each of the stages of project review are included below the figure.



**Project Review Stage Definitions and Activities Occurring during a Particular Stage:**

**Draft** – The proponent is working on the project in the virtual sandbox and has not formally submitted it for Program Review. In the Draft stage, proponents can explore options and modify projects prior to initiating the consultation process. The website stores their information and proponents work at their own pace. The Program does not start the review process until the proponent clicks the “submit” button, which officially enters the information into the system and notifies the Program that a new project has been submitted for review.

**Due Diligence** – The proponent has completed their project submission and submitted their project for Program Review. The Due Diligence stage is the beginning of the active review process for the Program.

**Final Review** – The Program has received the submitted project, has all the necessary information for providing recommendations, and is in the process of finalizing the project review. The Final Review stage usually signifies that the active review process is coming to an end for a given project with the Program.

**Completed Review** – The Program has completed its review and provided written documentation (a letter, including mitigation obligations) to the proponent, who can then initiate a permit application with the appropriate permitting agency and move forward.

**Returned** – The Program returns projects to proponents when the Program does not have sufficient information to complete the review. Proponents receive an email notification with information about why their project was returned. Occasionally, project proponents request that the Program return the project after the official submission because the proponent desires to make a change on their own accord. Additionally, the Program may return a project to the proponent if the project is exempt or otherwise does not need a Sage Grouse Review letter. At that point, the proponent may withdraw their project from the active review process all together.

**Withdrawn** – The proponent may withdraw their project from the review process for some reason of their own accord (e.g., changed their mind). The Program *may not* withdraw a project on a proponent’s behalf. The withdrawn stage *does not* signify a denial of a Sage Grouse Review letter by the Program.

**Projects Reviewed:** During calendar year 2018, the Program received requests to review 532 projects proposed in designated sage grouse habitat and for which consultation was required. Of the 532 proposed projects, the Program completed reviews for 443 projects (83% completion rate). The remaining 89 projects were:

- returned to the project proponent because additional information was needed for the Program to complete its work (n=42);
- withdrawn by the project proponent of their own accord (e.g. changed their mind) or decided to wait to reinitiate the review process until a later time (n=40); or
- were still being reviewed by the Program as “due diligence” (n=7).

**Review Duration:** Of the 443 projects for which the Program completed reviews in 2018, the Program completed 415 project reviews (94%) within 42 days and 64% of all 2018 completed reviews were finalized within 14 days. More specifically, the Program reviewed and completed its work for:

- 122 projects within five days;
- 96 projects within 10 days;
- 67 projects within 15 days;
- 57 projects within 20 days;
- 40 projects within 25 days;
- 15 projects within 30 days;
- 10 projects within 35 days;
- 7 projects within 40 days; and
- 25 projects took greater than 40 days.

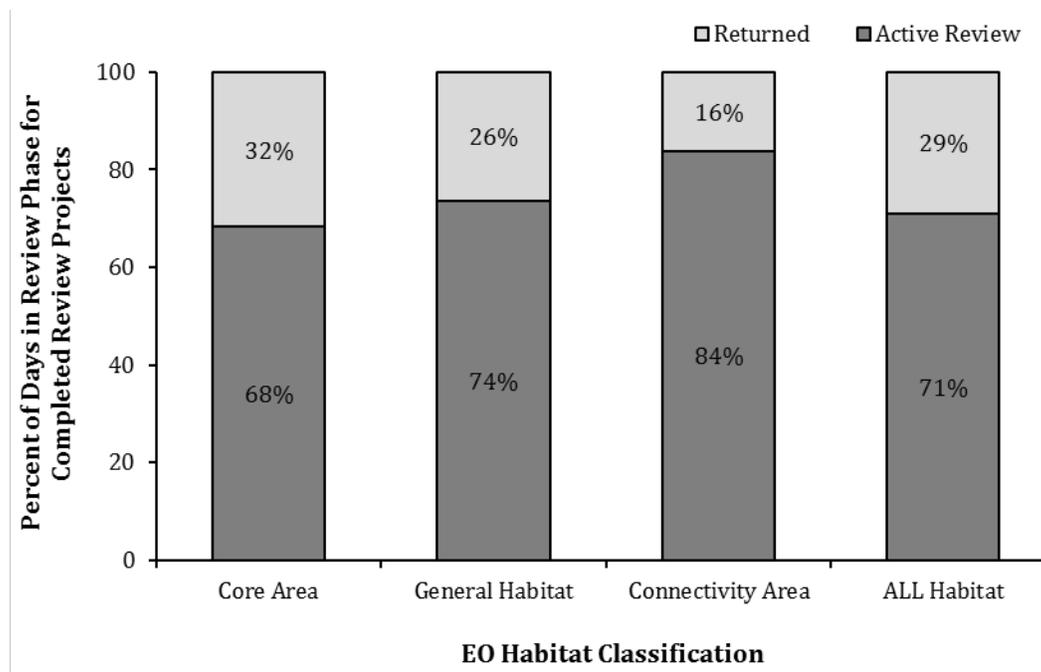
Stated succinctly, the Program completed its review of 49% of all projects within 14 days. This means that almost half of all proponents can submit their permit application to the respective permitting agency within 14 days of starting the review process with the Program. When a proponent actually does initiate the permitting process is not known by the Program, nor is whether or not a project is actually implemented. Thus, the Program can't report on the number of projects that did or did not proceed after the Program's review was completed.

While the Program works in close coordination with proponents through the consultation process for each project review, the Program may have to request additional information from proponents to complete the review. When the Program needs to reach back out to the proponent, the Program uses a project review stage called “Return” in order to **return** the project editing capabilities within the online web application so that the proponent can make changes or add new information. See Figure 1 and definitions. The proponent can then add the necessary information and resubmit the project so the Program can complete its work with all necessary information in hand.

In 2018, the total number of review days across all completed projects was 9,699 days. This represents the total number of days when a project is in an active review stage with the Program (i.e. the ball is in the Program's court) plus the total number of days when a project is in the returned stage and the Program is waiting for the additional necessary information (i.e. the ball is in the Proponent's court).

In 2018, 29% of the total number of “review” days for a project can be attributed to days for which the ball was in the proponent's court and the Program was awaiting the additional information (n = 2,804 days). See Figure 2. Proponents could complete the process faster by having all their information ready when the review process is first initiated.

Figure 2. The total number of days across all projects for which the Program completed reviews in 2018 and the percentage of days when the Program was awaiting additional information necessary to complete the review by habitat category. There was a total of 9,699 review days and 2,804 days were attributed to the returned status with proponents (light gray) and the remaining days were attributed to the active status with the Program (dark gray).



Because the Program, MSGOT, and stakeholders were still collaborating on development of the Habitat Quantification Tool, compensatory mitigation was not included in the review process for the vast majority of development projects in 2018.

However, MSGOT reviewed and approved 10 mitigation plans in 2018. These plans were placed before MSGOT prior to final adoption of the Habitat Quantification Tool and administrative rules due to unique facts and circumstances associated with each particular project and at the request of the proponents. In some cases, mitigation was required by other legal authorities. In others, the proponent knew that MSGOT had not yet adopted the final Habitat Quantification Tool but decided to move forward prior to final adoption. For example, in the case of three proposed transmission line projects, the proponents sought MSGOT review and approval in anticipation of construction of the Keystone pipeline in 2019. These proponents chose to develop sage grouse habitat mitigation plans so they would have certainty and that their review process was completed and could be implemented as soon as the pipeline is ready to move forward.

#### Other Activities

**Habitat Quantification Tool:** During 2018, collaboration with stakeholders to develop the Habitat Quantification Tool and associated mitigation framework continued. Between September 2016 and May 2018, the Program hosted 2-day meetings, webinars, conference calls (12 total opportunities for direct engagement). There were also multiple opportunities for informal and formal public comment. MSGOT considered the topic during four different meetings. Independent peer review of

the Habitat Quantification Tool and the Policy Guidance documents occurred from July 5 to August 16, 2018. MSGOT took additional public comment in October and November, 2018, respectively.

***Administrative Rulemaking:*** MSGOT initiated rulemaking to adopt the Policy Guidance Document (v1.0, October 2018) and the Habitat Quantification Tool Technical Manual (v1.0, October 2018). The draft administrative rules were published in the Montana Administrative Register and public comment was taken via postal mail, electronically through the online comment submission tool, and during a public hearing. In December, MSGOT formally adopted the proposed administrative rules. Final administrative rules were published in the Montana Administrative Record on January 11, 2019 and took effect on January 12, 2019.

## 2019 Activities

### Stewardship Account Grants

The fourth project selected by MSGOT for funding in the first grant cycle is expected to close by December 31, 2019. This project conserves an additional 2,657 acres of Core Area habitat through a perpetual conservation easement.

This brings the total number of acres conserved through the first grant cycle to 38,806 acres. By applying the MSGOT-approved Habitat Quantification Tool retroactively, a total of 987,287 credits were created from a total of four Stewardship Account grants. There was a total of \$3,067,000 expended from the Account, which was leveraged with \$7,851,865 of matching funds from other sources.

In early 2019, the second Stewardship Account grant cycle was announced. Complete applications were due in May. On September 18, 2019, the Oversight Team awarded funding to six conservation projects:

- Three conservation easements were selected for funding, conserving an additional 15,420 acres of Core Area habitat.
- Two 30-year term lease projects were selected for funding which would conserve 24,604 acres for the duration of the lease. One of the 30-year term leases selected for funding includes a habitat restoration component by converting 2,765 acres of previously cultivated land back to native species and by actively reseeding about 167 acres of sagebrush.
- One 25-year term lease project was selected. It also includes restoring approximately 98 acres back to native rangeland.

If all six 2019 projects close successfully and as originally proposed, a total of 835,344 credits will be created across 46,392 physical acres.

Considering all ten projects awarded funding from the Stewardship Account in both grant cycles, a total of 1,822,629 credits will have been created across a total of 77,233 physical acres.

Credits created through the Stewardship Account are used to offset the impacts of development when proponents opt to make a contribution to the Stewardship Account instead of implementing their own permittee-responsible mitigation projects.

## Review of Development Projects Proposed in Sage Grouse Habitat

The Program review process in 2019 continues to follow that shown in Figure 1, even with the new inclusion of mitigation. Because the reporting period adopted by the Program is the calendar year, 2019 data can't be fully compiled, analyzed, and presented at this time. However, preliminary review statistics follow.

**Projects Reviewed:** Between January 1 and mid-day December 20, 2019, a total of 380 projects were submitted for Program review. Of those:

- 27 projects were withdrawn by the proponent of their own accord;
- 49 projects were returned to proponents so that proponents could provide the additional information necessary for the Program to complete its review (i.e. the ball is in the proponent's court); the Program completes the review once all the additional information is provided but can't predict or control when the additional information is received;
- 23 projects were under active review by the Program (i.e. the ball is in the Program's court); and
- 281 project reviews were completed (92.4% completion rate).

## Other Activities

**Rulemaking:** As noted above, final administrative rules pertaining to Stewardship Account grants, the habitat quantification tool, and mitigation took effect on January 12, 2019. The Program and MSGOT are implementing the final administrative rules. These rules were followed during the 2019 Stewardship Account Grant cycle and with respect to mitigation.

**Senate Bill 299:** During the 2019 legislative session, Senate Bill (SB) 299 was passed and ultimately became law on May 2, 2019, upon the Governor's signature. In large measure, SB 299 codified language taken directly from Executive Order 12-2015, but also added a few new requirements.

Newly codified passages from Executive Order 12-2015 have been implemented ever since Executive Order 12-2015 first took effect on September 8, 2015. In that sense, the Program has always been cognizant and implemented the "grandfathering" principle when reviewing proposed development projects under Executive Order 12-2015, particularly if permits were obtained prior to September 8, 2015.

The primary adjustment has been that the Program works with developers and state permitting programs at a much greater level of detail. Additional details are needed to discern what, if any, aspect of the strategy applies, including mitigation. Additional research is often needed to determine what activities were previously permitted and where, to determine what, if anything, about the new proposal is different, and to determine whether or not new proposals constitute an existing land use or would occur within a previously permitted defined project boundary.

For example, a 5-acre gravel pit may have already been permitted prior to September 8, 2015, but the pit operator seeks to expand the pit to 12 acres. The state permitting agency requires a permit amendment and additional bonding to add the additional 7 acres to the gravel pit operation. Once these details are pinned down, only the newly-proposed portion of the project (7 acres or newly proposed disturbance to expand the pit to 12 acres) would be analyzed under the conservation

strategy for specific stipulations and mitigation, and whether or not seasonal use restrictions would be applicable.

In another example, the Oversight Team directly considered the applicability of SB299 Section 1 with respect to a proposed wind facility in Carbon County that has been in the planning stages since at least 2010. A storm water discharge permit (pollution prevention plan permit) was issued in April, 2014 by Montana Department of Environmental Quality (DEQ), prior to the September 8, 2015 effective date Executive Order 12-2015. The Oversight Team decided that the stipulations of Executive Order 12-2015 would not apply to infrastructure sited within the boundary of the 2014 permit issued by DEQ, including compensatory mitigation because it was permitted, but not yet constructed. Mitigation and other stipulations of Montana's strategy would be applicable to activities proposed outside the 2014 permit boundary. Here, and generally, project sponsors retain full discretion to site and implement their projects. The Program's consideration of stipulations and mitigation is then based on the decisions that project sponsors make, accordingly.

The key new requirements of SB 299: (1) directed state permitting agencies and MSGOT/Program to work together and identify what activities the respective state permitting agencies consider operations and maintenance and could be exempt from the habitat quantification tool calculations even though other stipulations of Montana's conservation strategy may still apply; (2) required inclusion of a few specific metrics in future reports; (3) directed MSGOT/Program to work with stakeholders to streamline the review process, including calculation or reduced mitigation costs for low impact projects like trenchless excavation; and (4) a report to the Environmental Quality Council on staffing.

Efforts to implement the new requirements of SB 299 have been ongoing since the bill became law. They include the following:

- The Program and individual MSGOT members have been working directly with state agency permitting programs to develop approaches to implement [new] Sections 1 and 3. Considerations include roles, protocols, data, record keeping and reporting, and the regulatory authorities of the respective state permitting programs. Collaboration with the Montana Board of Oil and Gas and the Montana Department of Transportation has already begun.
- The Program started working with the stakeholder community to begin devising a streamlined approach to the compensatory review process and calculation of reduced mitigation costs for low-impact projects using trenchless excavation methods.

The Program made some initial outreach calls to gauge interest and participation. The Program requested that affected stakeholders whose work incorporates trenchless excavation identify some standards around what would be considered trenchless and what type of machinery or methods would qualify. The Program has also started to pull together some data about projects that are buried and that have been reviewed to date so that the Program can share its experience. Buried projects may or may not involve trenchless excavation, in that some projects may entail blading the topsoil, use of a backhoe or boring equipment, or some other circumstance that may not comport with what stakeholders having the most knowledge about their industry practices would identify as standards for trenchless excavation methods.

An initial 3-hour meeting / conference call occurred on Nov. 15, with diverse stakeholder participation. Participants were asked to provide feedback on the current review process, share their ideas for a standardized definition and criteria to determine what is considered a trenchless method, and to share ideas for potential revisions and opportunities to reduce mitigation costs. Participants and the larger list of invitees could provide additional input in writing through December 9.

An in-person meeting will be scheduled in late January or early February. MSGOT would then consider whether to adopt the approach that emerged from the stakeholder process.

- The Program will incorporate the additional reporting metrics in its 2019 annual report. The 2019 annual report will be available by June 1, 2020.

**Website Updates:** The Program has contracted with the original developer of the Program' web application to add the Habitat Quantification Tool, the credit/debit registry and other enhancements. The additions and enhancements will be implemented on a rolling basis and made available to developers, credit providers, and the Program (i.e. additions, enhancements, and improvements are developed, tested, and implemented throughout the term of the contract). Stakeholder input is directly informing the updates.

When completed and deployed to the "live" web, these additions and enhancements will enable proponents to proactively design and site development projects in a way to minimize impacts and ultimately compensatory mitigation. Significant improvements in efficiency and new streamlined processes will benefit both external users and Program staff. The contract is expected to fully wrap up in late 2020.

### **Program Budget and Staffing**

The 65<sup>th</sup> Montana Legislature (2017 Session, HB 228) provided explicit direction as to the distribution of the original 2015 General Fund Appropriation. Up to \$400,000 could be used for Program administration and \$1.6 million for awarding Stewardship Account grants for each year of the biennia going forward and concluding with FY2021.

The Program expects to fully expend the statutory General Fund appropriation, on schedule and as directed by the Montana Legislature. The September 2019 grant awards will obligate the final allotment of \$1.6 million per year. The \$400,000 per year for Program administration has been and will continue to be used for staffing and contracted services through FY2021.

Going forward, the Program and DNRC will utilize the Executive Planning Process for continued funding beyond FY 2021.

The Program's current staffing includes the Program Manager, three individuals who review development proposed within designated sage grouse habitat for which state permits are required, and one individual who provides GIS and other data support.