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Lead NEPA Story: Enviros to court: Trump 'cut every corner' on NEPA overhaul

***(Greenwire, 7/29/2020)*, Niina H. Farah, E&E News Reporter**

Environmental groups are hauling the Trump administration to court for what they argue was a failure to follow the correct process for updating regulations on how to comply with the National Environmental Policy Act.

Coalitions of groups from across the country filed two lawsuits today challenging the White House Council on Environmental Quality's newly finalized implementing regulations for NEPA, which govern analysis of projects ranging from highways and bridges to oil and gas leases.

The lawsuits are the first of what will likely be a series of challenges against regulations that CEQ has argued would speed up and simplify the federal project permitting process.

The revisions overturn decades-old standards outlining how to comply with the bedrock environmental statute, in violation of the Administrative Procedure Act, or APA, one coalition of challengers said.

"Rather than make this drastic change deliberately and with the careful process the APA requires, CEQ cut every corner," 17 environmental groups wrote in a complaint filed this morning in the U.S. District Court for the Western District of Virginia.

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Magnuson-Stevens Fishery Conservation and Management Act: Court: Trump aquaculture 'regime' overstepped authority

***(Greenwire, 8/4/2020)* Rob Hotakainen, E&E News Reporter**

NOAA Fisheries lacks the legal authority to regulate aquaculture in the Gulf of Mexico, a federal appellate court in Louisiana ruled yesterday, delivering a major blow to the Trump administration's long push to allow industrial fish farms in federal waters.

In a 2-1 ruling, the 5th U.S. Circuit Court of Appeals in New Orleans rejected NOAA's argument that it could issue aquaculture permits because of the 1976 Magnuson-Stevens Fishery Conservation and Management Act to regulate the "catching, taking or harvesting of fish."

"'Harvesting,' we are told, implies gathering crops, and in aquaculture the fish are the crop," the judges said in their decision. "That is a slippery basis for empowering an agency to create an entire industry the statute does not even mention. We will not bite."

The appellate court affirmed a 2018 decision by U.S. District Judge Jane Triche Milazzo, who ruled that NOAA only had authority to regulate the "traditional fishing of wild fish" and that if Congress meant for the agency to oversee fish farming, lawmakers would have made that explicit in the nation's primary fisheries law.

"The act neither says nor suggests that the agency may regulate aquaculture," the appellate judges wrote. "The agency interprets this silence as an invitation, but our precedent says the opposite: Congress does not delegate authority merely by not withholding it."

Agreeing that the Trump administration had exceeded its authority by devising a fish farming "regime" in the Gulf of Mexico, the judges said only Congress had the power to grant such powers to NOAA.

"If anyone is to expand the 40-year-old Magnuson-Stevens Act to reach aquaculture for the first time, it must be Congress," they said.

For greens, 'a landmark victory'

The ruling marked a big win for green groups that have spent years battling the federal government over aquaculture proposals.

"The administration could try to bring this to the U.S. Supreme Court, but I hope they don't," Marianne Cufone, executive director of the Recirculating Farms Coalition, an environmental group and a plaintiff in the lawsuit, said this morning.

"The push for an offshore marine finfish farming industry has already wasted hundreds of thousands [of] public dollars."

George Kimbrell, the legal director for the Center for Food Safety, called the ruling "a landmark victory protecting our oceans and fishing communities."

"Allowing net-pen aquaculture and its environmental harms in the Gulf of Mexico is a grave threat, and the court properly held the government cannot do so without new and proper congressional authority," he said. "Aquaculture harms cannot be shoehorned under existing law never intended for that purpose."

While yesterday's ruling dealt with aquaculture only in the Gulf of Mexico, opponents are confident it will have national implications and make it easier to thwart any similar projects proposed elsewhere.

Congress has shown little appetite for advancing aquaculture legislation in recent years, though proponents hope they have a better shot as technology to grow fish has improved and a broader coalition of interests has emerged to push the idea.

Cufone said NOAA should just abandon the idea, with the public having "loudly and repeatedly rejected development of an offshore marine finfish aquaculture industry in the U.S. through protests, letters, in-person testimony and more."

"It is long time for the administration to hear this clear message and use resources to support our currently struggling fishing communities and related businesses rather than continue to push an outdated and unnecessary industry," she said.

It's uncertain how NOAA will react to its latest setback.

"NOAA Fisheries is aware that the Fifth Circuit issued a decision affirming the lower court's decision about aquaculture under the Magnuson-Stevens Act," Kate Goggin, spokeswoman for NOAA Fisheries, said in an email this morning. "NOAA Fisheries is reviewing the Fifth Circuit decision."

Editor's Note: The decision may be viewed at https://www.centerforfoodsafety.org/files/ca5-gulf-aquaculture-decision_8_3_2020_71933.pdf.

NEPA: Fishermen's call for moratorium flusters industry

***(Greenwire*, 7/27/2020) Heather Richards, E&E News reporter**

A fishermen's group is pushing the Interior Department to call a five-year moratorium on the burgeoning offshore wind sector, stoking frustration from an industry that's been on pause for the better part of a year.

The conflict comes days after Interior Secretary David Bernhardt hosted a roundtable with fishermen in Boston to hear concerns about offshore wind impacts, and in the closing days of a public comment period on the administration's first cumulative impact study on offshore wind.

The supplemental environmental impact statement was launched last summer, stalling progress on the presumptive first utility-scale offshore wind farm in the United States.

Last week, the Responsible Offshore Development Alliance (RODA) circulated a petition for the Bureau of Ocean Energy Management demanding that fishermen be brought to the table earlier in offshore wind permitting discussions and be given comprehensive compensation for negative impacts in addition to the moratorium charge.

"The current process does not protect our sustainable fisheries and we repeat, enough is enough," the petition states.

RODA is one of the most vocal representatives of fisheries' interests in recent months. It was co-founded in 2018 by a former lawyer for the Fisheries Survival Fund, which represents most of the East Coast scallop fishermen.

The call for a moratorium last week rippled across the offshore wind sector, where it was perceived as underhanded given the recent years-long delay and a process that's included several public meetings and multiple open public comment periods.

The RODA petition inspired a call to action Friday from the Business Network for Offshore Wind, urging supporters to submit comments to the federal government by today in favor of the presumptive first full-scale offshore wind facility, Vineyard Wind, and against two of RODA's pleas in particular — a long-standing push for wide transit lanes across wind farms and this newer call for a five-year stay on wind.

"The offshore wind industry is at stake," Business Network for Offshore Wind CEO Liz Burdock wrote in a Friday email blast.

Leased offshore wind areas in federal waters now exceed 20 gigawatts of potential power, and several large potential projects hold power purchase agreements with states like New York that need large pulses of offshore wind energy to meet their ambitious climate targets.

Vineyard — an 84-turbine proposal off the coast of Martha's Vineyard, Mass. — is likely to be the first raised in federal waters. Interior has committed to finalizing the environmental review of its construction and operations plan by the end of the year.

Vineyard permitting was placed on hold last summer after NOAA Fisheries disagreed with some of the impacts Interior charted for the project, and Bernhardt appeared to side with critics in the fisheries sector by launching a broader analysis.

In the roundtable last week, Bernhardt said he was "eager" for an offshore wind industry to take off but noted that it had to be sited properly.

Previous calls for timeout

RODA is not the first group to call for a moratorium, an idea that individual fishermen have espoused in public hearings.

In a letter to Interior last year, prior to the Vineyard delay announcement, Capitol Hill climate champion and offshore wind supporter Sen. Sheldon Whitehouse (D-R.I.) signed a letter with his fellow state delegates seeking a two-year moratorium on offshore wind until impacts could be investigated fully.

Whitehouse later told E&E News that he felt Massachusetts was failing to follow Rhode Island's example of how to build offshore wind right.

Rhode Island is home to the first offshore wind facility in the U.S., the five-turbine Block Island pilot project that went live in 2016. Virginia's Dominion Energy Inc. has recently raised a second offshore pilot with two turbines off the Mid-Atlantic coast, the first in federal waters.

The public comment period for Vineyard's supplemental environmental analysis closes today.

More than 90% of the 12,885 comments Interior had received by this morning on the Vineyard supplemental review are a form letter circulated by the Union of Concerned Scientists supporting the project.

RODA had not yet uploaded its public comments to the docket by press time.

Endangered Species Act: Feds launch high-impact debate over habitat

(Greenwire, 7/31/2020) **Michael Doyle, E&E News reporter**

The Fish and Wildlife Service and NOAA Fisheries today proposed defining the absolutely crucial term "habitat" under the Endangered Species Act, a long-awaited move jump-started by a frog.

While skeptics dissect the words, Trump administration officials say the definition will provide "consistency" for the much-litigated law passed in 1973. In particular, it should guide designation of "critical habitat" for protected species.

"Improving how we apply this important tool will result in better conservation outcomes and provide more transparency for ... private landowners, industry and states," said Rob Wallace, the Interior department's assistant secretary for fish and wildlife and parks.

The proposed definition identifies habitat as "the physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species."

As an alternative, the two agencies also solicit comments on a possible definition that "habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist."

The debate formally commences with publication of the proposed definition in the *Federal Register*, which is expected next week, and it will turn upon a few words like "depend upon" and whether "use" might work better.

A key question will be how the definition handles habitat not currently lived in by the protected species. Notably, the alternative definition limits unoccupied habitat to areas where the "attributes" that the species needs "presently" exist, without need of restoration.

"We are proposing these changes on behalf of improved conservation and transparency in our processes for designating critical habitat," said Fish and Wildlife Service Director Aurelia Skipwith.

Environmentalists have been anticipating the proposal.

"A definition that is too narrow and excludes degraded but restorable habitat, or areas that are likely to become habitat in the foreseeable future, could leave areas essential to species recovery unprotected," Defenders of Wildlife senior counsel Jason Rylander and three colleagues wrote earlier this month.

Critical habitat is that deemed "essential for the conservation of the species."

Any federal agency seeking to authorize, fund or carry out an action on designated land must first consult with FWS to ensure that the action is

"not likely to ... result in the destruction or adverse modification" of critical habitat."

Last month, for instance, the Fish and Wildlife Service proposed designating almost 1.5 million acres as critical habitat for the endangered Florida bonneted bat. In April, the agency proposed reducing the northern Mexican garter snake's critical habitat to approximately 27,784 acres, down from the approximately 421,423 acres proposed during the Obama administration.

A frog's tale

But the definition-writing really got hopping thanks to the dusky gopher frog.

In 2012, FWS included more than 1,500 acres of private land in Louisiana in its designation of critical habitat for the frog. FWS and consulting scientists identified the property as having the type of ephemeral ponds essential to the animal's recovery.

The frog used to be found throughout coastal Alabama, Louisiana and Mississippi in longleaf pine forests, but most individuals now live around a single pond in Mississippi. The Louisiana landowners argued that the 1,544 unoccupied acres in St. Tammany Parish don't qualify as critical habitat because the land would need restoration to be useful.

In a 2018 Supreme Court decision, Chief Justice John Roberts observed that the Endangered Species Act does not provide a "baseline definition" of habitat.

"It identifies only certain areas that are indispensable to the conservation of the endangered species," Roberts wrote. "The definition allows the [Interior] Secretary to identify the subset of habitat that is critical, but leaves the larger category of habitat undefined."

The federal government and the landowners in the case subsequently reached a settlement and left unresolved questions over how "habitat" should be defined in the law.

The Trump administration issued final rules for the ESA last year — including language requiring "critical habitat" to have "one or more of the physical or biological features essential to the conservation of the species" — but it did not address the broader habitat issue.

Editor's Note: The proposed definition of habitat may be viewed at *Federal Register* 85:47333-47337 (August 5, 2020).

Clean Water Act: Army Corps moves to split utilities from streamlined permits

(Greenwire, 8/4/2020) **Ariel Wittenberg, E&E News reporter**

The Army Corps of Engineers is proposing to separate oil and gas pipelines from its streamlined permits for utilities — a move that follows a court battle over the program.

Nationwide permits allow waterways and wetlands to be dredged and filled if there will be minimal impacts to the environment. Since 1977, Nationwide Permit 12 has authorized all utility lines.

This May, Montana federal Judge Brian Morris barred the use of Nationwide Permit 12 for pipeline projects, saying the Army Corps had not followed the Endangered Species Act for those projects during a case specifically taking aim at the Keystone XL project. Indeed, environmental groups have long criticized the use of nationwide permits for major pipeline projects, like Dakota Access and Keystone XL, because they say it allows developers to circumvent more in-depth analyses of environmental impacts under the Clean Water Act and National Environmental Policy Act.

The Supreme Court has since stayed Morris' injunction, and the 9th U.S. Circuit Court of

Appeals will now consider whether nationwide permits are appropriate for oil and gas pipelines.

The Army Corps proposed to separate oil and gas from other utility permits yesterday as part of its annual reissuance of the 52 nationwide permits in the program.

The agency did not mention the legal dispute over the permits in its proposal, rather noting that oil and gas pipelines are usually larger than other utility lines, meaning they could have different environmental impacts.

"The Corps is proposing to remove electric utility lines and telecommunication lines, as well as utility lines that convey water and other substances, from NWP 12 because of the differences between oil and natural gas pipelines, electric and telecommunication lines, and utility lines that carry water and other substances," the agency writes.

Impact on court ruling

Larry Liebesman, a former Justice Department attorney who now serves as senior adviser for the consulting firm Dawson & Associates, said he didn't think the Army Corps' decision would affect the court case.

"It is somewhat apples and oranges," he said. "I'm not sure that it is going to have any impact on the 9th Circuit's ruling."

The Army Corps' proposal also changes the circumstances under which developers have to notify the corps prior to construction of oil and gas pipelines.

Previously, developers had to notify the Army Corps of any activity that involves mechanized land clearing in forested wetlands, if a utility line in jurisdictional waters was longer than 500 feet, if a utility line ran parallel to a streambed, if more than one-tenth of an acre of waters or wetlands would be damaged, if permanent access roads were longer than 500 feet, or if permanent access roads were built with impervious materials.

Now the Army Corps is proposing that developers would have to notify local agency commanders only if the oil and gas projects are longer than 250 miles and if the project involves the construction of new pipeline, rather than merely repairing an old one. In such cases, developers would have to inform the Army Corps of all potential damage to wetlands and waterways.

The Army Corps is asking for public comment on the 250-mile threshold but says the proposal will "ensure that the activities authorized by [Nationwide Permit] 12 will result in no more than minimal individual and cumulative adverse environmental effects."

The American Petroleum Institute says it is still reviewing the proposal but called nationwide permits "integral to America's infrastructure and to a broad spectrum of our industries."

"We wholeheartedly endorse the [nationwide permit] renewal, and are committed to working with the corps to finalize this rule," Senior Vice President of Policy, Economics and Regulatory Affairs Frank Macchiarola said.

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They noted that the agency had worked quickly to finalize the rule in just four months after receiving 1.1 million public comments on the impacts of the changes.

"We went through all their responses to comments," said Kym Hunter, a senior attorney at the Southern Environmental Law Center (SELC), which is representing the coalition in the Virginia district court. "They really failed to grapple with any of the concerns that were raised during the public comment process."

Those concerns include the costs of upending long-standing regulatory practice, the environmental impacts of removing categories for action and the disproportionate harm the changes could have on communities of color.

"Here, where the government has completely rewritten the regulations implementing one of

our nation's most significant environmental laws — a law that has been in place for over fifty years with regulations that have remained unchanged for decades — the government's responsibility to follow procedure is at its highest," wrote the groups involved in the SELC lawsuit.

Among the new regulatory changes, CEQ removed language about consideration of cumulative and indirect effects of projects. It also eliminated consideration of project impacts that are geographically remote or remote in time.

The new rules could markedly shift how project developers evaluate climate and other project risks.

Highways, for example, carry indirect effects like increases in traffic and subsequent development near thoroughfares that have a greater effect on the environment than construction of the project itself, said Hunter.

"In the past, it was pretty clear you had to consider these things," she said. "It's going to create a lot of confusion."

The regulations also put greater emphasis on considering public comments that are specific and technical, which could place members of the public directly harmed by projects at a disadvantage, environmental challengers warned. Similarly, a proposal to eliminate all guidance documents, including environmental justice guidance, would harm efforts to encourage greater consideration of communities facing disproportionate risks from projects.

Environmental groups involved in the SELC lawsuit said they would work to defend wildlife and people harmed by the new NEPA rules.

"The current administration's attempt to topple 50 years of fundamental environmental law is an illegal and transparent gift to industry; another assault on the environment to meet and defeat," Jack West, policy director at the Alabama Rivers Alliance, said in a statement. "We are proud to be joining in this important legal challenge to stop these reckless rollbacks."

This afternoon, a separate coalition of 20 environmental justice, outdoor recreation and conservation groups — led by the Western Environmental Law Center (WELC) and Earthjustice — filed their own lawsuit over CEQ's regulations in the U.S. District Court for the District of Northern California.

The groups argued that the changes in CEQ's regulations go against "Congress's manifest intent" in enacting the federal environmental law in the 1970s.

"We have consistently defeated this administration's relentless, vicious dismantling of safeguards for people and the environment, and we will do so again for this critically important law," Susan Jane Brown, WELC co-counsel on the case, said in a statement.

CEQ does not comment on litigation.

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