

Lead NEPA Story: Could NEPA hamstring Postal Service changes?

(Greenwire, 8/20/2020), Kelsey Brugger, E&E News Reporter

U.S. Postal Service reforms that have sparked a political firestorm across the nation could encounter an unlikely obstacle: the National Environmental Policy Act.

Reports indicate the Postal Service has moved to cut overtime, reduce post office hours, and remove some collection boxes and processing machines.

New Postmaster General Louis DeJoy has denied claims from critics and has defended any moves as addressing drops in letter volumes, but Democrats — fueled by comments from President Trump — see an effort to undermine mail-in voting.

Politics aside, environmental experts have noted that significant changes in how the Postal Service operates could trigger the need to conduct environmental analysis.

"The statute says you have to look before you leap," said Michael Gerrard, director of the Sabin Center for Climate Change Law at Columbia University.

Under NEPA, agencies are required to study the environmental impacts of major federal actions. Postal Service reforms could fall under that category.

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Migratory Bird Treaty Act: Judge restores migratory bird protections

(Greenwire, 8/12/2020) Pamela King and Michael Doyle, E&E News Reporters

The Trump administration's controversial approach to migratory bird safeguards runs afoul of the law, a federal judge ruled yesterday.

The U.S. District Court for the Southern District of New York struck down the Interior Department's 2017 interpretation of the Migratory Bird Treaty Act (MBTA) that removed penalties for activities or hazards, such as power line electrocutions, that result in the accidental taking of a bird.

"It is not only a sin to kill a mockingbird, it is also a crime," wrote Judge Valerie Caproni, citing a famous excerpt of the 1960 novel "To Kill a Mockingbird." "That has been the letter of the law for the past century.

"But if the Department of the Interior has its way," she continued, "many mockingbirds and other migratory birds that delight people and support ecosystems throughout the country will be killed without legal consequence."

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Interior Solicitor General Daniel Jorjani wrote in a 2017 legal opinion that "[i]nterpreting the MBTA to apply to incidental or accidental actions hangs the sword of Damocles over a host of otherwise lawful and productive actions."

Caproni, an Obama appointee, scrapped the Jorjani opinion and remanded the issue to Interior.

"Yesterday's opinion undermines a commonsense interpretation of the law and runs contrary to recent efforts, shared across the political spectrum, to decriminalize unintentional conduct," said department spokesman Conner Swanson.

The court decision strands one of Interior's most controversial moves, as the department has been seeking to solidify the now-rejected solicitor's opinion as a formal rule.

"With the legal basis for its actions over the past year defeated, the administration should expect more defeats in court if they try to lock in their attempt to roll back the MBTA," said Sarah Greenberger, interim chief conservation officer for the National Audubon Society, one of the challengers in the case.

Eight states that had also thrown their weight behind the lawsuit celebrated Caproni's decision.

"Migratory birds, including the bald eagle, are not only national symbols of freedom and liberty — they are vital for our country's ecosystem," said California Attorney General Xavier Becerra (D). "Today's decision recognizes the critical importance of protecting our precious wildlife and upholding the rule of law."

If the Trump administration appeals, as would be likely for such a high-stakes defeat, the case could be on track for the Supreme Court because of a potential split in how different appellate circuits have interpreted the law's ambiguous language.

Impact on rulemaking

The proposed regulation now under review would codify the opinion of the Interior solicitor's office that incidental bird take resulting from an otherwise lawful activity is not prohibited under the MBTA.

Bird mortality estimates vary widely. The number of birds killed annually by power pole electrocutions, for instance, is figured at between 900,000 and 11.6 million. Collisions with wind turbines currently kill an estimated 234,000 birds per year, while oil pits kill an estimated 750,000 birds annually.

In a regulatory impact analysis that accompanied the proposed rule, FWS reported it had pursued an average of 57 incidental take cases annually between 2010 and 2018. Eighty-one percent of the cases were brought against electrical or oil and gas businesses.

Four percent of the cases were brought against wind energy companies.

"A legal opinion of the Department of the Interior does not provide the public or other federal departments and agencies with the certainty of a codified regulation," a draft environmental impact statement (EIS) explained.

The draft EIS was the subject of a boisterous public comment period that expired July 20. The Fish and Wildlife Service has said a final rule could be expected in the fall.

The draft EIS said narrowing MBTA protections would have a "likely negative" impact on birds that includes "increased" mortality. The draft EIS further predicted that "some entities" such as energy companies will "likely reduce" compliance with industry standards designed to protect birds.

Other non-avian species and certain cultural resources are also said in the draft EIS to face "likely negative" consequences from the narrower protections.

Companies, though, could anticipate "likely reduced legal and financial costs" with the certainty they won't be prosecuted for actions that inadvertently lead to the deaths of migratory birds, according to the federal agency.

"For some industries and some practices, there would likely be cost savings from not implementing beneficial practices," the study predicted.

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Endangered Species Act: Judge slams Army Corps 'failed' management of Northwest dams

(Greenwire, 8/18/2020) Jeremy P. Jacobs, E&E News reporter

Federal agencies illegally delayed — and in some cases just didn't take — required measures to protect threatened salmon and steelhead at a series of dams in the Pacific Northwest, putting the species in further peril, a federal judge ruled yesterday.

Conservationists had challenged the Army Corps of Engineers' management of dams in the Willamette River Basin and its impact on wild spring chinook salmon and winter steelhead.

They alleged that the Army Corps violated the Endangered Species Act and other laws by failing to implement mitigation requirements in a 2008 biological opinion, including passage for migrating fish at multiple dams.

Those requirements were "unequivocal," Chief Judge Marco Hernandez of the U.S. District Court for the District of Oregon wrote in his ruling.

The biological opinion laid out measures in a "Reasonable and Prudent Alternative," or RPA. It included nearly 100 measures, but some of the most important were constructing passage systems for migrating fish at four of the dams, including the 519-foot Cougar Dam in Oregon.

"The Corps," Hernandez wrote, "has failed to carry out several of the most important RPA measures."

He noted that the deadline for fish passage at Cougar was 2014, and the Army Corps is "now only in the design phase." Further, the Army Corps "essentially abandoned" designing a passage program at the 276-foot Lookout Point Dam, also in Oregon.

The Northwest Environmental Defense Center, WildEarth Guardians and the Native Fish Society filed the lawsuit in 2018. Several local interests, including the city of Salem, Ore., and Marion County, intervened in support of the Army Corps.

The dams were built in the 1940s as part of the Willamette Valley Flood Control Project, which

consists of 13 dams on the river and its tributaries that provide irrigation and municipal water, recreation and hydropower.

After the salmon were listed as threatened under the Endangered Species Act in 1999, the Army Corps consulted with NOAA Fisheries.

It wasn't until 2008 that the biological opinion was finished, and it contained the finding that the dams were jeopardizing the species and its habitat. In some of the tributaries, 70% to 90% of the spawning habitat was blocked off by the dams, Hernandez wrote.

The Army Corps argued that the delays were largely attributable to the need to conduct in-depth studies of the mitigation measures before beginning construction.

Hernandez, an Obama appointee, was unconvinced.

"The delays in completing those studies are attributable to the Corps," he wrote.

The ruling represents the first phase in the lawsuit, and it assigns liability to the Army Corps. In the next phase, the conservationists and Army Corps will argue about what remedies the court may order, which will take place in the next couple of weeks, according to lawyers involved in the case.

Hernandez also explicitly highlighted that the fish populations have continued to dwindle.

"Although the nature and extent of delays are matters of dispute between the parties, it is undisputed that significant RPA measures were never carried out, some were delayed, some have not yet occurred, and some will not occur in time to meet future deadlines," he wrote. "Meanwhile, [the] Chinook and steelhead populations continue to decline."

The challengers in the case welcomed the ruling.

"Over a decade ago, the Corps agreed to complete numerous actions to recover wild Chinook salmon and steelhead but since then has

dodged, skipped, and delayed at every turn and squandered precious time and resources," Marlies Wierenga, Pacific Northwest conservation manager of WildEarth Guardians, said in a statement.

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NEPA: Trump Admin greenlights drilling in Alaska's Arctic refuge

(Greenwire, 8/17/2020) Heather Richards and Lesley Clark, E&E News reporters

The Trump administration today finalized the first ever oil and gas leasing program in the Arctic National Wildlife Refuge.

The move sets up potential exploration, drilling and production of crude oil and natural gas in a pristine ecosystem within the Arctic Circle, just east of the declining Prudhoe Bay oil field that was once Alaska's crown jewel.

While environmental groups have promised a barrage of litigation to stymie the new leasing program, today's action represents significant progress in the administration's quest to allow oil and gas to take root in the refuge.

The record of decision signed today is a "major step for Interior and the United States," said Interior Secretary David Bernhardt in a call with reporters this morning, noting that there "certainly could be a lease sale by the end of the year."

Lawmakers opened part of the 19.3-million-acre refuge to oil development in the Republicans' 2017 tax reform package, breaking a nearly 40-year blockade on development.

Congress tasked Interior with creating a leasing and development program and holding two oil and gas auctions, one by 2021 and a second by 2024.

Aside from a single exploratory well drilled in 1986, no development has yet taken place in ANWR, where interest is high but development would be expensive.

The U.S. Geological Survey has estimated that ANWR holds the single largest remaining onshore oil reserve in the country.

"The Court confirmed what was known all along — fish passage is vital to saving Oregonians' culturally important wild fish and the pulse of a living river," Wierenga said.

Trump confusion

President Trump, who has in the past touted ANWR drilling, undermined his own administration's news by denying he had decided to allow drilling in the refuge shortly after a Wall Street Journal interview with Bernhardt broke the news.

"We're looking at different things; we may or may not do it," Trump told Fox News' "Fox & Friends." "No, we are looking at it. We are looking at different things in Alaska," he said.

Bernhardt declined to comment on the president's exchange during a call with reporters. "I'm not aware of what the president specifically said," he said.

'Noise' of lawsuits

The Alaska congressional delegation uniformly supports opening ANWR for potential development to replace declining oil and gas production on the state's North Slope.

Senate Energy and Natural Resources Chairwoman Lisa Murkowski (R-Alaska), who authored the tax bill provision opening ANWR, today said the record of decision was a "capstone moment" in the work to allow development of a "small part" of the refuge.

"New opportunity in the [Arctic Coastal Plain] is needed both now, as Alaskans navigate incredibly challenging times, and well into the future as we seek a lasting economic foundation for our state," she said in a statement.

Actual drilling is likely a long way off, if it happens at all, said Carl Tobias of the University of Richmond School of Law.

He noted that violations of process have been an Achilles' heel for the administration in its energy dominance efforts, as have violations of the National Environmental Policy Act.

"I think there are lots of procedural questions about whether what Interior has done is sufficient," he said of the "noise" about litigation.

Reporters asked Bernhardt this morning about whether the environmental review and record of decision met congressional demands to consider the full impact of leasing, drilling, development and transportation of fossil fuels.

He said the appropriate "scope" of the environmental review was something he had "looked at very closely."

"I would not be going forward if I was not very comfortable with the lines we drew in this case," the secretary said.

In a statement, Bernhardt said the oil program met the "legal mandate that Coastal Plain leaseholders get the necessary rights-of-way, easements and land areas for production and support facilities they need to find and develop these important Arctic oil and gas resources."

Biden 'totally opposed'

The response from environmental groups today was immediate and hinted at court action.

Matt Lee-Ashley, a senior fellow at the left-leaning Center for American Progress, said an oil and gas sale would be "environmentally catastrophic" and called the environmental analysis undergirding an oil and gas program in the coastal plain "laughably indefensible."

Kristen Monsell, an attorney for the Center for Biological Diversity, criticized drilling in a

pristine location at a time when global markets are awash with oil.

"There's no good time to open up America's largest wildlife refuge to drilling, but it's absolutely bonkers to endanger this beautiful place during a worldwide oil glut," she said.

The president argued on Fox News this morning that he "should go down as a great environmental president," noting the Great American Outdoors Act, a major bipartisan package that passed this summer, and the ANWR leasing program, "a big deal that Ronald Reagan couldn't get done, nobody could get done."

The president has also said he will review the contentious Pebble mine in Alaska as prominent conservatives, including his son Donald Trump Jr., call for blocking it.

Trump cited energy and hydraulic fracturing as two of the issues that differentiate him from former Vice President Joe Biden, the Democratic Party's presumptive presidential nominee.

Biden has said he is "totally opposed" to drilling in the refuge. His climate plan includes a commitment to block new permitting on federal land and extends ANWR protections indefinitely.

Asked this morning about election-time pressures, Bernhardt said he will move "expeditiously" but said he is "not really driven by the political dynamics."

Ultimately, he said, the leasing in ANWR has to progress because Congress has mandated it. "That's a reality Congress created," he said. "The issue now is how do we go about it and how durable that is."

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NEPA: Democrats demand details on expedited permitting

(Greenwire, 8/10/2020) Kelsey Brugger, E&E News reporter

Top Democrats are calling on the White House to release records related to the president's

executive order to speed up infrastructure permitting during the pandemic.

A letter last week led by Senate Environment and Public Works ranking member Tom Carper (D-Del.) demands that documents related to waiving environmental laws be made public.

"By keeping these reports from the public, this administration is concealing its own response to the economic crisis brought on by the COVID pandemic," said the letter.

"If the administration is confident that this Executive Order can legally and legitimately provide economic relief, it should disclose which projects and decisions it is advancing under the auspices of the Order."

President Trump signed an executive order in June directing agencies to invoke emergency provisions in environmental laws, including the National Environmental Policy Act, to accelerate construction of major projects. Trump billed the effort as a way to turbocharge the sluggish economy.

The order required federal agencies to send the White House a report of priorities and actions within 30 days.

But in early July, 30 days after the order, the White House told reporters it did not intend to make the agency lists public, Bloomberg reported. Greens and Democrats immediately objected.

"These reports contain information on how billions of taxpayer dollars will be spent on

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Cutting staffing levels could force less efficient delivery routes, increasing air pollution. Building a new facility in a state with a dirtier fuel mix could increase emissions.

While environmental analysis for postal actions is rare, it has happened. In 2017, USPS conducted an environmental assessment for purchasing commercial vehicles to accommodate route growth.

Specifically, according to the agency's NEPA regulations, USPS would be required to complete environmental analysis for cutting 1,000 or more workers, relocating 300 or more employees more than 50 miles, or changing a

projects impacting the health and safety of their communities," the lawmakers wrote last week. "How these taxpayer dollars are spent should be subject to taxpayer scrutiny."

Also signing the letter were House Natural Resources Chairman Raúl Grijalva (D-Ariz.) and Transportation and Infrastructure Chairman Peter DeFazio (D-Ore.).

The White House Council on Environmental Quality declined today to release the reports but reiterated that the Trump administration "is committed to streamlined, efficient permitting processes that will improve our Nation's infrastructure while ensuring environmental protection."

CEQ spokeswoman Andrea Woods wrote in an email, "Our focus is on reducing unnecessary regulatory burdens that can delay much-needed projects and hold back the American economy."

In the past, emergency provisions have been used after natural disasters to facilitate cleanup, noted analysts with the research firm ClearView Energy Partners.

But an executive order may have been unnecessary because the agencies already have discretionary authorities.

The Democratic lawmakers asked CEQ to provide any reports that agencies sent to the White House by next Monday.

facility's function to include new uses of "greater environmental intensity," among other things.

Those metrics are rather opaque and environmental review could be waived, experts noted. In addition, exactly what changes USPS has carried out in recent weeks is somewhat murky. Details have come out sporadically through union and press reports, Gerrard said.

"It's not as if there is an announced plan," he said. "It's clear that they are doing it, and the intent has also become very clear."

David Partenheimer, a USPS spokesman, said in an email that the moves changed the organizational structure only. "The

announcement did not include any terminations or layoffs and very specifically stated that the changes did not initiate a reduction in force and there were no immediate impacts to USPS employees," he wrote.

On Tuesday, DeJoy — a Republican donor and Trump ally who owns millions of dollars in USPS competitor stock — announced he would pause changes until after the November election.

"The Postal Service is ready today to handle whatever volume of election mail it receives this fall," he said in a statement.

"Even with the challenges of keeping our employees and customers safe and healthy as they operate amid a pandemic, we will deliver the nation's election mail on time and within our well-established service standards."

Still, the scandal — which many Republicans call a conspiracy — had already sparked congressional intervention.

Tomorrow, the Senate Homeland Security and Governmental Affairs Committee will hold a hearing on the issue, largely at the prodding of Democrats.

"There is simply no excuse for why Postmaster General DeJoy began instituting changes that have severely disrupted service for Michiganders and people in communities all across the country during an unprecedented public health and economic crisis," said ranking member Gary Peters (D-Mich.) in a statement.

"While it is a positive development that the Postmaster General says he will be temporarily rolling back some of these harmful changes as I have demanded," Peters said, "there are still too many unanswered questions."

The House plans to return from recess this weekend to vote on legislation, H.R. 8015, meant to return the Postal Service to pre-DeJoy service.

Oversight and Reform Chairwoman Carolyn Maloney (D-N.Y.), who sponsored the bill, is demanding documents from DeJoy by tomorrow and holding a hearing with him Monday.

After DeJoy's announcement postponing any changes, the American Postal Workers Union expressed skepticism on Twitter.

"[T]his fight for the public Post Office is far from over," the union wrote. "The Covid-19 induced economic crisis is deeply affecting the projected finances of the United States Postal Service."

The group said, "In order for postal workers to continue to carry out their vital work and deliver for the people every day, the USPS is in immediate need of \$25 billion in Covid-related financial relief. It's time for Congress to deliver."

Reporter Hannah Northey contributed.

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