

Lead NEPA Story: States take aim at Trump's NEPA overhaul in court

(Greenwire, 8/28/2020), Pamela King, E&E News Reporter

A coalition of 21 states, the District of Columbia and Guam today called on a federal court to strike down the Trump administration's changes to the implementing rules for a bedrock environmental statute.

The lawsuit, filed in the U.S. District Court for the Northern District of California, argues that the Council on Environmental Quality's revisions to National Environmental Policy Act regulations undermine vulnerable communities' power to get involved in decision making on pipelines, bridges and other major projects.

"With today's challenge, our goal is simple: preserve the public's voice in government decision-making as federal projects threaten to

harm the health of our families in our own backyards," California Attorney General Xavier Becerra (D) said in a statement.

The legal challenge is Becerra's 100th against the Trump administration, according to his office. The California attorney general has been a leading opponent of the president's efforts to unwind environmental protections.

Washington Attorney General Bob Ferguson (D) joined Becerra in announcing the lawsuit, which raises claims under the Administrative Procedure Act and NEPA.

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Endangered Species Act: Trump administration proposal could shrink critical habitat

(Greenwire, 9/4/2020) Michael Doyle, E&E News Reporter

The Fish and Wildlife Service today proposed new rules that could make it easier to shrink future critical habitats designated under the Endangered Species Act.

Opening a new front in the Trump administration's multipronged bid to reshape the ESA, the agency declared its latest proposal is intended to "articulate clearly when and how FWS will undertake" an analysis of whether to exclude certain lands from critical habitat.

"The proposed regulations would provide greater transparency for the public, improve consistency and predictability for stakeholders affected by ESA determinations and stimulate more effective conservation on the ground,"

FWS Director Aurelia Skipwith said in a statement.

The practical effect, in part through the identification of what the agency called a "non-

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exhaustive list of categories of potential impacts for FWS to consider," could be more exclusions designed to avoid disrupting development."

Citing school or hospital projects as examples, FWS said the "benefits of exclusion may include avoidance of additional permitting requirements, time delays, or additional cost requirements to the community development project ... due to the designation of critical habitat."

Federal lands, too, may become easier to keep out of future critical habitat designations.

"We will now consider whether to exclude ... Federal lands on which non-Federal entities have a permit, lease, contract or other authorization for use where the benefits of exclusion outweigh the benefits of inclusion, so long as the exclusion of a particular area does not cause extinction of a species," FWS said.

A 'thumb on the scale'?

Jamie Rappaport Clark, president and CEO of Defenders of Wildlife, said in a statement that the new proposal "puts a heavy thumb on the scale in favor of developers and industry, making it even easier to exclude areas from designation as critical habitat."

Under the ESA, 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 destroy or damage a critical habitat.

But recent litigation has made such decisions more murky.

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

Robert's declaration came in a case launched after FWS, in 2012, included more than 1,500 acres of private land in Louisiana in its critical habitat for the dusky gopher frog. The frog used to be found throughout coastal Alabama,

Louisiana and Mississippi, but most individuals now live around a single pond in Mississippi.

The Louisiana landowners argued that the 1,544 acres doesn't qualify as critical habitat because the land would need restoration to be useful.

Last month, in response to the Supreme Court ruling, the Fish and Wildlife Service and NOAA Fisheries opened for public comment several possible definitions of habitat.

The ESA states that critical habitat is to be designated "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact."

The law allows exclusion of areas if "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat," unless the exclusion "will result in the extinction of the species concerned."

The regulations proposed today would provide categories of "other relevant impacts" that may be considered, including public health and safety; community interests; and the environment, such as increased risk of wildfire or pest and invasive species management.

"The proposal does increase the likelihood that FWS will exclude an area from critical habitat," Ya-Wei Li, director for biodiversity with the Environmental Policy Innovation Center, said in an email.

In part, Li said, this is because FWS has, "for the first time ever, adopted the policy that if the benefits of exclusion outweigh the benefits of inclusion, then the agency 'shall' exclude that area" as opposed to this simply being the "general practice."

"Even though the proposed rule does constrain the scope of critical habitat, I agree with FWS that it also offers more transparency about how the agency will carry out its ... exclusion analysis," Li added.

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Clean Water Act: Feds: Army Corps permit ruling 'blindsided' developers

(Greenwire, 8/27/2020) Niina H. Farah, E&E News reporter

The Trump administration is calling for a federal appeals court to overturn a ruling on a key water crossing permitting program that it says "blindsided" industry and many states.

Justice Department attorneys told the 9th U.S. Circuit Court of Appeals that companies relying on the program had no warning that a federal judge planned to broadly block the use of the Army Corps of Engineers' Nationwide Permit 12 in May, as part of litigation over the Keystone XL pipeline.

They pointed repeatedly to statements from the pipeline challengers that said they only sought to block the use of the permitting program for dredge and fill activity for the crude oil pipeline.

"[N]either Plaintiffs nor the Corps even briefed the propriety of broad vacatur or injunctive relief during summary judgment, precisely because Plaintiffs and the court had made clear that those remedies were off the table," DOJ wrote in an opening brief to the 9th Circuit yesterday.

The Trump administration asked the court to reverse the amended order from Chief Judge Brian Morris of the U.S. District Court for the District of Montana that prevented the use of the nationwide permit for new oil and gas pipeline construction.

They called the order "grievously ambiguous in several basic respects," noting the judge himself had acknowledged the challengers in the case had not asked to vacate the program beyond its application to the Keystone XL project.

"In issuing broad relief that Plaintiffs themselves repeatedly and explicitly disclaimed, the district court acted contrary to basic principles of party presentation, waiver, and fair notice," DOJ wrote. "Nor were these defects somehow cured by the court's amendment of the order in response to Defendants' motion to stay.

DOJ attorneys said Morris, an Obama appointee, incorrectly found that it could act broadly because courts have latitude to provide remedies to challengers, even if they weren't requested. Also, the government said, the court had pointed to language in the complaint that asked for "such other relief as the Court deems just and appropriate."

But the Trump administration countered that challengers in the case had explicitly waived that authority for the judge to take broader action.

The Supreme Court this summer temporarily blocked Morris' order from going into effect for all new projects except Keystone XL, pending a decision from the 9th Circuit.

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NEPA: Interior flagged projects to expedite during pandemic

(Greenwire, 9/2/2020) Heather Richards and Kelsey Brugger, E&E News reporters

The Interior Department flagged for the White House dozens of high-profile fossil fuel projects it could push through environmental review during the pandemic, according to newly released documents.

The list, obtained by the Center for Biological Diversity in response to a Freedom of Information Act request, came in response to an executive order President Trump signed in June

evoking emergency authorities to circumvent environmental review and speed up construction of major projects during the coronavirus pandemic.

Projects on the list included high-profile and divisive ones like the Jordan Cove liquefied natural gas export terminal in Oregon.

The order built on the Trump administration's years-long energy-embracing agenda. In recent months, he has used the public health crisis to propel myriad deregulatory efforts, which critics lament would sidestep environmental protections and exacerbate climate change.

Brett Hartl, government affairs director at CBD, called the list a "massive giveaway" to oil and gas companies.

"The danger is that there is this top-down pressure to approve things," Hartl added. "That's what the career people are saying — they feel rushed to approve things. Now you have this emergency order on top of this."

He added: "Poisoning our air and killing endangered wildlife won't help fight the coronavirus."

CBD, an environmental group, filed a lawsuit against the administration after the White House declined to produce the list of projects that the order intended to speed up.

The Interior Department list, written by Katharine MacGregor, an Interior official, and addressed to Larry Kudlow, assistant to the president for economic policy, is the first document the group received. The Associated Press first reported on the document.

MacGregor notes that the listed projects are within Interior's authority to propel forward, and that under previous orders, many are already on a more expeditious track.

"All of these projects will assist in the Nation's economic recovery," she wrote.

Several of the projects on the June list have since completed environmental review and are awaiting records of decision, including a 5,000-well oil and gas project in Converse County, Wyoming; a major expansion of ConocoPhillips' Willow project in northern Alaska; and a new management plan for the National Petroleum Reserve-Alaska that contemplates opening most of the 23-million-acre reserve to oil and gas leasing.

Some of the listed projects have long navigated the National Environmental Policy Act process and are only recently approaching a federal

decision, such as the Converse County project, which began in 2014.

And others are still pending further review, like the Vineyard Wind offshore wind project, which would be the first offshore wind facility to clear federal permitting, and the Farmington Mancos-Gallup resource management plan amendment, which may expand drilling opportunities near the Chaco Culture National Historical Park but has had its public comment period extended due to COVID-19's impact on Native communities in the vicinity and pushback from local government leaders.

Andrea Woods, a spokesperson at the White House Council on Environmental Quality, dismissed the notion that the order would circumvent environmental analysis. "Our focus is on reducing unnecessary regulatory burdens that can delay much-needed projects and hold back the American economy," she wrote in an email. "Under this EO, agencies must continue to comply with all existing laws protecting our environment, including the Clean Air Act, the Clean Water Act, and the Endangered Species Act and other statutes."

A spokesman for the Interior Department did not directly address MacGregor's list or questions about the legality of expediting the environmental review process. "For far too long, critically important infrastructure, energy and other economic development projects have been needlessly paralyzed by federal red tape," Interior spokesman Conner Swanson said in an email.

"The Trump Administration has taken significant steps to improve the federal government's decision-making process, while also ensuring that the environmental consequences of proposed projects are thoughtfully analyzed."

Kathleen Sgamma, president of the Western Energy Alliance, said she doesn't believe the "administration's efforts to complete NEPA in a more timely manner" would make any of the listed projects more vulnerable to litigation from environmental groups. Those groups will sue regardless, she said.

Neither did Sgamma see the expedition request as rushing the process. Environmental groups

have used NEPA as a delay tactic, dragging out projects and increasing their costs, she said.

"The Trump administration has been bold enough to take on the problem of crumbling infrastructure caused by endless NEPA delays, and it inevitably will have to play out in courts," she said. "Hopefully, courts will recognize that a better balance needs to be achieved."

Hilary Tompkins, a former solicitor for Interior during the Obama administration and a current partner at the American-British law firm Hogan Lovells, said MacGregor's letter didn't appear to use emergency measures from the president's June executive order.

"I think it remains to be seen if there is any application of the emergency authorities that the E.O. references," she said. "I think [Interior officials] are being cautious and applying their existing authority under NEPA in a way that is very typical of how Interior reviews these projects."

The executive order called on agencies to determine if there were any projects that have been affected by the pandemic that agencies could use their existing authority to address, Tompkins said.

If you want to use "alternative measures" to expedite NEPA, there is a process for that, which the MacGregor letter and list doesn't appear to invoke, she said.

In that case, the agency would have to go to the CEQ for a green light. "It remains to be seen" if agencies have sought that path, Tompkins said.

Already, the administration has prioritized several projects, noted Christi Tezak of ClearView Energy Partners LLC. Those included Jordan Cove, Alaska LNG, Gulf LNG and Vineyard Wind.

"So no surprises from our perspective, the ones we are following are already 'prioritized' in the overall federal permitting process as FAST-41s," she wrote in an email.

Hartl noted that some of the projects identified in the document have been in the works for decades, like the Columbia River System Operations environmental impact statement. He called it "one of the most complicated projects in the world."

"I think there are some projects that were put on that list to make it look longer and more impressive than it is," he said. "Some of the projects probably had nothing to do with this order. It's a little unclear."

He added that it's strange that Trump officials have been so "obstructive" about producing the records. It would seem that the administration would want to broadcast its deregulatory push before Election Day, he noted.

"It's kind of remarkable," he said. "[Interior Secretary] David Bernhardt loves shouting all of the wonderful things he's doing for Trump."

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NEPA: Bureau of Land Management advances large Nevada solar project

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

The Trump administration has moved closer to approving one of the last major renewable energy projects that it has prioritized completing by year's end.

The Bureau of Land Management has completed a final environmental impact statement (EIS) for the Yellow Pine Solar Project, which is proposed to be built on about 3,000 acres of

BLM-managed lands about 32 miles west of Las Vegas.

The final EIS will be published in tomorrow's *Federal Register*, kicking off a 30-day public review period running through Oct. 5.

A record of decision is expected next month approving the photovoltaic solar project, as well

as a separate right-of-way application by GridLiance West LLC to build a substation and 230-kilovolt transmission line to move electricity from the solar plant to the energy grid.

The final EIS is notable in part because of BLM's handling of the Yellow Pine project — which if built would have the capacity to produce up to 500 megawatts of electricity, or enough to power 175,000 homes.

The release of the draft EIS in March sparked criticism from some conservation groups that wanted BLM to postpone the public comment period on the project due to the expanding COVID-19 health crisis. BLM pushed on anyway, and received 512 "individual comments," according to a notice in today's *Federal Register*.

The comments addressed "potential biological, cultural, tribal, soils, vegetation, hydrological, visual and creational resource impacts," among other concerns, the notice says.

Kevin Emmerich, co-founder of the Nevada-based group Basin and Range Watch, noted that BLM estimates there are thousands of Mojave yuccas on the project site. A number of species eat the plant, and yuccas also serve as nesting sites for birds, he said.

"The purpose of renewable energy should be to benefit the environment, not remove essential habitats for iconic and imperiled Mojave Desert species," Emmerich said.

He added, "Solar energy has a bright future on Nevada rooftops, over Nevada parking lots, on old mine sites and other previously developed regions. We are continuously saddened to see the Bureau of Land Management waste our public lands like this."

The final EIS is also noteworthy because the Yellow Pine Solar Project is among six major renewable energy projects BLM has prioritized for approval this year.

The Trump administration has made a concerted effort this year to approve major renewable energy projects. But it lags far behind the Obama administration, which over eight years approved 60 large-scale solar, wind and geothermal power projects with the capacity to

produce 15,500 MW of electricity, or enough to power about 5.1 million homes.

BLM has approved all but a couple of projects on the Trump administration's list, including the Gemini solar project in Nevada. The Gemini project would produce up to 690 MW of electricity, or enough to power about 260,000 homes and businesses, and would rank among the world's largest.

The bureau has also approved the Haiwee Geothermal Leasing Area, which would offer more than 22,000 acres in California for utility-scale geothermal power development. BLM estimates the leasing area could spur \$1 billion in investment in geothermal power projects capable of producing enough electricity to power 117,000 homes.

BLM and the Interior Department have cited these projects as evidence that large-scale renewable energy development is a major component of the administration's "all-of-the-above" energy plan, despite criticism from environmental groups and congressional Democrats.

The Yellow Pine Solar Project — proposed by a subsidiary of NextEra Energy Resources LLC — offers further proof that renewables play a role in the Trump energy plan.

The project's proponents, in a plan of development submitted to BLM in July 2019, noted that the project would help the state comply with its renewable portfolio standard, which mandates that "no less than 34% of the total amount of electricity sold by NV Energy to its retail customers in Nevada must be from renewable energy resources."

The proposed layout of the photovoltaic solar power plant "would be divided into four unique sub-areas to avoid three large washes that cross the study area," according to today's notice.

"The BLM continues to consult with Indian tribes on a government-to-government basis," it says. "Tribal concerns, including impacts to Indian trust assets and potential impacts to cultural resources, will be given due consideration."

Editor's Note: The Final EIS for the Yellow Pine Solar Project may be viewed at

<https://eplanning.blm.gov/eplanning-ui/project/81665/510>.

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Lead NEPA Story (continued from page 1)

Trump's NEPA rule revisions have already faced legal challenges from green groups and environmental justice advocates.

Legal experts say the rule changes — which are meant to expedite permitting and development of power plants, water projects and other infrastructure — could actually have the

opposite effect if they leave future NEPA analyses more vulnerable to judicial scrutiny.

Editor's Note: The lawsuit may be viewed at <https://oag.ca.gov/news/press-releases/attorneys-general-becerra-and-ferguson-lead-lawsuit-challenging-trump>.

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