

## Lead NEPA Story: Court rules against Dakota Access easement in win for tribe

(Greenwire, 1/26/2021), Niina H. Farah and Carlos Anchondo, E&E News Reporters

A federal appeals court declined today to reinstate an easement for the Dakota Access pipeline in a big win for the Standing Rock Sioux Tribe.

The decision leaves the project vulnerable to being shut down by President Biden, who last week revoked a permit to allow the contentious Keystone XL pipeline to cross the U.S.-Canada border.

On Dakota Access, the U.S. Court of Appeals for the District of Columbia Circuit upheld a lower court's decision to ax the Army Corps of

Engineers' approval for the pipeline to cross beneath Lake Oahe — a reservoir on the Missouri River in South Dakota — after finding that the agency's analysis of the risk of potential oil spills and leaks violated the National Environmental Policy Act.

But the three-judge panel declined to halt the flow of oil through the pipeline.

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## Executive Order 14008: Biden climate plan: Environmental justice 'writ large'

(Greenwire, 1/28/2021) Jeremy P. Jacobs, Pamela King, and Hannah Northey, E&E News Reporters

With the stroke of a pen, President Biden brought nearly half a century of environmental justice activism to its culmination yesterday.

Biden signed an executive order that promises a governmentwide approach to the disproportionate pollution burdens faced by many communities of color. But many advocates say Biden's success on confronting environmental justice will be judged on how the order is implemented.

"As we framed it more than four decades ago, it deals with how these various issues intersect and how policy really needs to be formulated that shows that connectivity — where we live, work, play and learn, as well as the physical world," said Robert Bullard, a professor at Texas

Southern University who is widely regarded as the father of the EJ movement.

"It's very refreshing to see the work we've done on the ground ... to see it writ large," he said.

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Biden's executive order seeks to put the country on a path to net-zero carbon emissions by 2050. But in a first for the federal government, the order identifies environmental justice as central to that work.

"We must deliver environmental justice in communities all across America," it says. "To secure an equitable economic future, the United States must ensure that environmental and economic justice are key considerations in how we govern."

To that end, the order makes significant changes to the federal bureaucracy.

It creates a White House interagency council on environmental justice, as well as a new branch of the Department of Health and Human Services. It refocuses the Justice Department, asking it to consider renaming its environmental division and establishing a new one dedicated to EJ issues.

And it sets a goal that 40% of funds the government spends on meeting its climate goals should flow to disadvantaged communities or programs that serve them.

Frontline communities near refineries, landfills, power plants and other pollution sources have long shouldered disproportionate pollution burdens.

WE ACT, an EJ advocacy group, found that more than 70% of Black Americans live in areas failing to meet EPA air quality standards.

That problem has been exacerbated by the COVID-19 pandemic, which has struck communities of color particularly hard.

Interagency coordination has long been a goal of EJ advocates. Those communities face not only pollution burdens, but also housing, transportation and other socioeconomic hardships.

Environmental justice advocate and former EPA official Mustafa Santiago Ali said the multilayered coordination could be "transformational" in providing assistance for disadvantaged communities that have faced the brunt of pollution and poverty, made worse by the ongoing pandemic. But Ali also said it will be critical for the Biden administration to

connect federal efforts with state and local government where the "rubber hits the road."

Historically, those issues have been siloed in the federal government within their respective agencies, making it nearly impossible for an assessment of the cumulative problems weighing on disadvantaged communities.

"This executive order is so much better than we've ever had," said Marva King, an EPA veteran and longtime EJ advocate. "But they have to look at it as how do all of the things impact a community that has been inundated with environmental, economic and social injustice forever."

Identifying all of those burdens has always been a problem for EPA and other agencies.

For that reason, the order requires the creation of a "climate and economic justice screening tool," which appears to build on a tool developed during the Obama administration — the EJSCREEN mapping program — that largely sat dormant during the Trump years.

EPA's tool played a pivotal role in a Louisiana state court ruling last year in which a judge chastised regulators for failing to analyze how a massive petrochemical complex could harm the health of Black residents who live near the site.

The approach is "all in one," Bullard said, "as opposed to somehow segmenting it, or placing it in a way that compartmentalizes it. That's a very good advancement in accepting what environmental justice really is."

Activists will be watching closely to see how the order is implemented.

In some ways, they've been burned before.

In 1994, President Clinton signed an executive order that established an EJ office in EPA, following advocacy from Bullard and others.

But that office fell short of achieving some of its lofty goals. It lacked enforcement authority, and Congress never passed any legislation codifying Clinton's goals.

Parts of Biden's order directly amend Clinton's, and there are some signs that Democrats on Capitol Hill will make another push for legislation.

Sen. Ed Markey (D-Mass.) and Rep. Cori Bush (D-Mo.) are expected to introduce EJ legislation today.

Correctly implementing Biden's orders would generate jobs, tackle climate change and ensure equality, which would in turn result in reforms that would survive should the White House change hands in four years, added Ali.

"If you do the work properly, it can not only be embedded, but people can see value, detractors will see value in this work," he said. "It makes it much more difficult and less likely that you will see folks moving back to an antiquated positioning."

### **DOJ, HHS offices**

Biden's order reshapes federal agencies beyond EPA.

The president directed DOJ to consider a number of options to prioritize environmental justice work — including creating a new office dedicated to protecting low-income communities and communities of color.

The president asked the attorney general — Biden has tapped Judge Merrick Garland of the U.S. Court of Appeals for the District of Columbia Circuit for the role — to consider establishing an Office of Environmental Justice within the department.

That office would "coordinate environmental justice activities among Department of Justice components and United States Attorneys' Offices nationwide," Biden wrote in his order.

The language of yesterday's directive appears to provide greater leeway for DOJ to structure its environmental justice efforts than did Biden's campaign platform, which said the then-president-elect would establish an Environmental and Climate Justice Division within DOJ.

"What I think would make the most sense is if there is an office of environmental justice created up in the associate AG's office," said Kelly Johnson, a partner at Holland & Hart LLP who worked at DOJ during the George W. Bush administration. "I think that makes it clear that while the Environment and Natural Resources Division obviously has environment in its name,

there are other components in DOJ that can contribute to these efforts."

Those components include DOJ's Civil Division and Civil Rights Division, she added.

Biden also recommended that DOJ consider changing ENRD's name to the Environmental Justice and Natural Resources Division.

The president gave HHS, an agency Biden has asked California Attorney General Xavier Becerra (D) to lead, more specific direction on creating a new office.

"The Secretary of Health and Human Services shall, consistent with applicable law and within existing appropriations ... establish an Office of Climate Change and Health Equity to address the impact of climate change on the health of the American people," Biden's order says.

### **New initiatives**

The executive order also includes new programs that caught the eyes of activists.

There is a "Justice40" initiative, which sets a goal of 40% of all governmentwide sustainability spending going into disadvantaged communities.

That can include investments in clean energy, efficiency, clean transit, affordable housing, clean water infrastructure, the remediation of polluted areas — among others.

Michelle Romero, national director of Dream Corps Green for All program, said Justice40 hits directly at a key theme of Biden's announcement: that addressing climate change must include jobs and economic growth.

"He understands something that a lot of leaders have yet to understand," she said. "The only way to get out of this crisis we are in is to build an economy that is inclusive."

That idea is central to Romero's work, and, she noted, other states have already enacted similar programs. California, for example, gives at least 35% of its revenues from its carbon cap-and-trade program to programs serving disadvantaged communities. New York gives 40% of its climate investments to EJ communities, and last December, Massachusetts,

Connecticut and Rhode Island made similar commitments.

"It builds off of what other states across the country have begun to figure out," Romero said.

One program in California, for example, provides an electric ride-share program in the state's agricultural center so farmworkers and others have access to health care. Another is an urban forestry program called Planting Justice in Oakland, Calif., that employs individuals who were recently released from prison.

The job opportunities are there, Romero said, if the right infrastructure is put in place.

Bullard, the veteran EJ advocate, said Biden's order "sends a clear message that at the highest level of government that these actions will be taken seriously."

"The job ahead is to make sure we follow through," he said. "It won't be easy. There is

always resistance to change. We just have to keep working."

Nevertheless, Ali said the orders marked a watershed moment.

"It's the answering of a prayer for those who gave their lives for this issue and those who are still continuing to be in the fight, folks gave blood, sweat and tears and watched so many people in communities fight diligently to have some basic protections in place, a set of resources and a true voice in the process," he said. "And we're finally seeing those seeds that so many incredible early environmental justice leaders plant now bearing fruit."

Editor's Note: Executive Order 14008, Tackling the Climate Crisis at Home and Abroad, was published at *Federal Register* 86:7619-7633 (February 1, 2021).

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## **Clean Water Act: EPA nominee offers Congress a peek at plans for WOTUS**

**(Greenwire, 2/4/2021) Hannah Northey, E&E News reporter**

EPA administrator nominee Michael Regan yesterday appeared to somewhat ease Republican anxiety over the fate of President Trump's controversial rule that rolled back federal protections for streams and wetlands by vowing to listen to farmers at the center of the fight.

Citing his experience at North Carolina's Department of Environmental Quality, which he has led since 2017, Regan told the Senate Environment and Public Works Committee during his confirmation hearing that he has had to respond to both the Obama-era Clean Water Rule released in 2015 and the Trump administration's replacement Navigable Waters Protection Rule, which took effect in June.

The Biden administration has already moved away from defending Trump's rule in court and has said it will review the regulation.

Regan said that, if confirmed, he plans to hear from all stakeholders to ensure any final "Waters of the U.S.," or WOTUS, regulation is clear and understandable, not overly burdensome. But he also took a shot at the current Trump regulation and its effect on vulnerable wetlands like North Carolina's bays, small depression wetlands that were left unprotected under the most recent Trump revisions.

"What I saw with the 2019 rule was a rollback that went even further back than presidents of both of our parties," Regan told Sen. John Boozman of Arkansas, the ranking Republican on the Senate Agriculture, Nutrition and Forestry Committee.

"What I'm hopeful for is that we don't have to go with the slingshot approach, that we can look for a common ground where we give the farming community and the environmental community

some certainty that as we move forward that we're going to follow the science, follow the law, look at a pragmatic approach that doesn't overburden the farmer," Regan continued. "But we don't have to sacrifice precious wetlands in North Carolina like our Carolina bays and the others."

Any potential federal regulation that would protect Carolina bays would likely come under similar fire as the Obama-era Clean Water Rule, which conservatives and industry slammed for its treatment of isolated wetlands. That regulation would have allowed EPA and the Army Corps of Engineers to protect isolated wetlands like Carolina bays by considering whether all such isolated wetlands in a particular watershed had a biological, chemical or hydrologic connection to the nearest waterway. By contrast, any wetlands without surface water connections would be unregulated by the Trump administration. They are also not regulated under North Carolina state law, meaning they are completely unprotected in the current regulatory scheme.

Regan has so far toed a delicate line, recently slapping a nearly \$90,000 fine on a polluting hog farm in North Carolina, while continuing to hold on to the goodwill of the industry behind the problem.

In introducing Regan to the committee, Republican Sen. Richard Burr of North Carolina said the nominee has done a good job building a partnership with rural communities that's constructive and not adversarial. Burr also noted that more than 20 agricultural groups support Regan's nomination.

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Boozman likewise applauded Regan's collaborative reputation while pushing for more details about the fate of WOTUS.

Regan at the confirmation hearing repeatedly said that it's difficult for any federal regulation to address the unique needs of the nation's agriculture regions, and that he ultimately wants a rule that gives states the flexibility to protect water quality and local agricultural economies.

Boozman pushed Regan for details on what he sees as the definition of which waters should obtain federal protection, but the nominee said he's going to have an "open door policy" to hear about administrative burdens the agriculture community suffered under "definitions they didn't understand."

Regan also said he doesn't believe small farmers are "looking for a shortcut" or "don't want to protect water quality." He and Boozman agreed there are not sufficient resources to educate farmers on how to implement the rule, and the senator said he could potentially help with resources moving forward.

Sen. Joni Ernst (R-Iowa), who is floating a resolution in the upper chamber to keep Trump's rule intact, urged Regan to move forward cautiously and reiterated that Trump's rule enjoys broad support among farmers and ranchers.

"What we don't want to do is exacerbate the problem further," said Ernst.

*Reporter Ariel Wittenberg contributed.*

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## **Clean Air Act and Clean Water Act: Judge scraps Trump's 'secret science' rule**

**(Greenwire, 2/1/2021) Pamela King, E&E News reporter**

At the request of the Biden administration, a federal court today tossed out a Trump-era rule limiting the use of science to craft EPA regulations.

Today's order by Chief Judge Brian Morris of the U.S. District Court for the District of Montana follows a plea yesterday by President Biden's EPA to scrap the rule and send the issue back to the agency for further consideration.

The judge found last week the Trump administration could not speed up the rule's effective date and expressed "significant doubt" that EPA had properly promulgated the rule.

"Under these circumstances, where EPA lacked the authority to promulgate the Final Rule, remand without vacatur would serve no useful purpose because EPA would not be able to cure that defect on remand," the Biden team wrote in its motion to the court yesterday.

EPA's request stemmed from a lawsuit over the "Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information" rule, which is the culmination of efforts by the Trump administration to heed calls by conservatives and industry groups to eliminate use of "secret science" — where the underlying data cannot be disclosed or reproduced — in environmental rulemakings. The standard offers difficulty for studies that rely on subjects' personal medical information.

The rule, finalized last month, instructed EPA to de-emphasize nonpublic scientific studies and to prioritize research that discloses "dose-response data," or the human health impact of a measured amount of a pollutant.

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Critics said the rule could lead to weaker EPA regulations.

The Environmental Defense Fund, the Montana Environmental Information Center and Citizens for Clean Energy sued EPA to stop the Trump administration from speeding through a 30-day waiting period required under the Administrative Procedure Act. Morris, an Obama appointee, sided with the environmental groups in his decision last week.

Lawyers for Biden's EPA had asked the judge to take the next step of tossing out the rule before it took effect Friday.

"We are thankful that the Biden Administration has decided to prioritize science instead of demonize it," Anne Hedges, director of policy and legislative affairs for the Montana Environmental Information Center, said in a statement. "EPA's quick action on this rule will make it easier for it to use science to pursue President Biden's agenda to protect public health and address the climate crisis."

Editor's Note: The Final Rule, Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information, was published at *Federal Register* 86:469-493 (January 6, 2021).

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## **NEPA: Federal judge halts Montana mine expansion**

**(Greenwire, 2/5/2021) Kylie Mohr, E&E News reporter**

A federal court in Billings, Montana, blocked the expansion of the state's largest coal mine Wednesday, pointing to climate, environmental and health consequences.

U.S. District Court Judge Susan Watters found that the Interior Department's Office of Surface Mining Reclamation and Enforcement failed to disclose and account for the full impacts of expanding the Spring Creek mine in the southeastern corner of Montana just north of the Wyoming border.

Those include the impacts of trains hauling coal from the mine, the air pollution consequences of

burning more coal and the climate costs of greenhouse gas emissions.

Watters said OSMRE "failed to take a hard look at the costs of greenhouse gas emissions and failed to reasonably justify its reasoning for not quantifying the Social Cost of Carbon Protocol was available to do just that."

That's a measure of economic harm, expressed as the dollar value of the damages of emitting 1 ton of carbon dioxide. The Biden administration is looking to increase reliance on the metric.

The Navajo Transitional Energy Co. (NTEC), which owns the mine, said operations at the

mine would continue and highlighted protecting jobs.

"The court affirmed that the lease is valid and rejected the [environmental group] claims otherwise," the company said in a statement.

"NTEC believes that OSM has already adequately met NEPA [National Environmental Policy Act] obligations and is considering further legal options," the statement added.

The mine has extracted about 13 million tons of coal annually, mostly to generate electricity, in recent years. Using Bureau of Land Management estimates that every ton of Powder River Basin coal produced equates to 1.659 metric tons of carbon dioxide emissions, the mine is linked to approximately 21 million tons of CO<sub>2</sub> pollution a year.

The legal battle began when owners filed an application with BLM to lease an additional 1,100 acres of federal coal in 2005. OSMRE is involved in the mine expansion plan approval process.

The ruling gave Interior 240 days to do a corrective National Environmental Policy Act analysis and prepare an updated environmental assessment.

"This can and should continue to set the precedent and the expectation that if we're going to analyze the environmental and social consequences of fossil fuel projects, we have to consider carbon emissions," Derf Johnson, a staff attorney with the Montana Environmental Information Center, told E&E News yesterday.

"We can't just look at the benefits, the taxes on the payroll," said Johnson. "We have to think about the costs for continuing to use our atmosphere as a dump for carbon."

A magistrate judge in 2016 said OSMRE violated NEPA public participation and notice provisions and didn't take a "hard look" at consequences of approving the mine plan modification.

"Ultimately, this ruling is another potent reminder that we need to make a just and equitable transition from fossil fuels reality in the U.S.," said Jeremy Nichols, the climate and energy director for WildEarth Guardians, in a press release.

The ruling continues a history of tumult in and out of the mine. Its previous owner, Cloud Peak Energy Inc., filed for bankruptcy protection in 2019. The operation then became part of the Navajo Transitional Energy Co., and temporary layoffs occurred in the early days of the coronavirus pandemic, when demand for coal dropped.

Nationally, the news comes on the heels of a dire prediction for the state of coal. A Morgan Stanley report earlier this week estimated that coal will cease to exist in the U.S. power grid by 2033.

"Let's not talk about fairy tales about how much more coal we're going to mine over the next couple of decades," Johnson said. "Let's talk about a transition; let's talk about wrapping up these coal mines and starting to reclaim them adequately."

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## **Lead NEPA Story** (continued from page 1)

Under the Trump administration, the Army Corps had let the pipeline remain operational even without the easement in place. The 1,200-mile pipeline carries half a million gallons of crude a day between North Dakota and Illinois.

"We agree with the district court that the Corps acted unlawfully, and we affirm the court's order vacating the easement while the Corps prepares an environmental impact statement," Judge David Tatel wrote in the opinion for the court. "But we reverse the court's order to the extent it

directed that the pipeline be shut down and emptied of oil."

Judge James Boasberg for the U.S. District Court for the District of Columbia had sought to temporarily shut down and drain the project while the Army Corps redid its analysis of its crossing beneath the artificial reservoir.

The D.C. Circuit had stepped in last August to block the order from Boasberg, an Obama

appointee, earlier last year as it considered the merits of the case.

The panel agreed that the Army Corps' decision qualified as "highly controversial" under NEPA, citing tribes' concerns that the pipeline developers' leak detection system was inadequate and that it had relied on general pipeline safety data rather than Energy Transfer Partners LP's own safety record.

The tribes had also warned that the Army Corps had not adequately considered the challenges of addressing spills in winter conditions or analyzed the impact of a "worst case scenario."

"The Tribes' unique role and their government-to-government relationship with the United States demand that their criticisms be treated with appropriate solicitude," wrote Tatel, a Clinton appointee.

While the Army Corps and Energy Transfer had held that the risk of major problems was low, the court warned of the "very significant" consequences to future development of exempting such a "vast category of projects" from more rigorous environmental analyses under NEPA.

Although the panel declined to halt operation of the pipeline, the court suggested that the Army Corps may be obligated either by law or its own regulations to shutter the pipeline on its own.

"But how and on what terms the Corps will enforce its property rights is, absent a properly issued injunction, a matter for the Corps to consider in the first instance, though we would expect it to decide promptly," the court wrote.

Energy Transfer did not return a request for comment.

The decision drew cheers from pipeline foes who had been fighting the project in court for four years.

"We are pleased that the D.C. Circuit affirmed the necessity of a full environmental review, and we look forward to showing the U.S. Army Corps of Engineers why this pipeline is too dangerous to operate," Standing Rock Sioux Tribal Chairman Mike Faith said in a statement.

Jan Hasselman, a staff attorney with environmental group Earthjustice, called today's court decision "another milestone in our four-year legal battle on behalf of the Standing Rock Sioux to shut down this pipeline."

"This decision affirms what the Tribe has been saying from the start," Hasselman said in an email. "This pipeline is a threat to clean water and Indigenous sovereignty, and we must examine the consequences it brings for the future."

Judge Patricia Millett, an Obama appointee, and Senior Judge David Sentelle, a Reagan appointee, joined in the opinion.

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