
Lead NEPA Story: Judge axes key Trump revision to Obama-era sage grouse regulations

(Greenwire, 2/12/2021), Scott Streater, E&E News Reporter

A federal judge late yesterday struck down another major component of the Trump administration's revisions to Obama-era greater sage grouse protection plans.

At issue is the 2017 decision by the Bureau of Land Management to cancel a proposed ban on new mineral mining claims within formally designated "sagebrush focal areas," which are defined as sage grouse habitat considered critical to the bird's survival.

The Obama administration designated about 10 million acres of sagebrush focal areas in six states as part of the sweeping sage grouse protection plans it finalized in 2015 covering

tens of millions of acres. The Interior Department subsequently placed a two-year moratorium on new mining claims within these areas while BLM conducted an environmental impact statement on the merits of implementing a permanent withdrawal.

Judge B. Lynn Winmill of the U.S. District Court for the District of Idaho issued an order late yesterday ruling that the Trump administration's October 2017 decision to cancel that mining withdrawal proposal violated federal laws.

Continued on page 6

Clean Air Act: States press for fast-track review of soot standard

(Greenwire, 2/19/2021) Sean Reilly, E&E News Reporter

Intensifying their attack on one of the Trump administration's most contested environmental decisions, states and advocacy groups are asking EPA to swiftly revisit a December rule that leaves national soot standards unchanged for years to come.

In two parallel petitions submitted this week, they raise a battery of objections to the rule in arguing that EPA must take the rarely used route of administratively reconsidering a specific set of National Ambient Air Quality Standards. Among them: an alleged failure by the Trump administration to consider the status quo's disproportionate impact on low-income, Black and Latino communities, and new studies on the

harm done by exposure to soot, more formally known as fine particulate matter or PM_{2.5}.

Those studies "establish that EPA's decision not to lower the particulate matter NAAQS represents a massive failure to address one of the

Inside This Issue...

Clean Water Act and Endangered Species Act:
 Greens go after Trump-era Army Corps
 permitting program 2

NEPA: Biden administration greenlights major
 California solar project 4

NEPA and Migratory Bird Treaty Act: Migratory
 bird advocates flock together..... 5

NEPA Bonus: CEQ withdraws 2019 greenhouse
 gas guidance 8

most critical environmental justice issues facing the nation," the office of California Attorney General Xavier Becerra (D) wrote in a filing brought on behalf of a coalition of 16 states and New York City.

In the other petition, Earthjustice, allied with 10 public health and environmental organizations, asked EPA to stay the rule for 90 days while conducting reconsideration proceedings.

"We think this is a rule that can and should be teed up for quick action by this administration," Seth Johnson, an Earthjustice attorney, said in a phone interview this morning.

As E&E News has previously reported, the Biden administration has already signaled plans to review the soot rule, along with dozens of other Trump EPA policy moves.

Asked today whether the agency has settled on a specific approach, spokesperson Nick Conger said in an email that "we have not made these determinations yet."

In opting to keep the soot standards at levels last tightened in 2012, the Trump administration sidestepped the conclusions of EPA career staff

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

that the annual exposure threshold is too weak to protect public health and is effectively contributing to thousands of premature deaths each year. While many of the same states and advocacy organizations are already challenging the December rule with the U.S. Court of Appeals for the District of Columbia Circuit, the reconsideration route would be faster, said John Bachmann, a former senior EPA air official who worked on NAAQS reviews for more than three decades before retiring in 2007.

While the Obama administration, more than a decade ago, voluntarily launched a reconsideration of EPA's 2008 reset of its ground-level ozone standards, the review was later scrapped. Bachmann, who opposed the Trump administration's decision to leave soot standards unchanged, did not know of any precedent for the agency administratively reconsidering other air quality standards in response to the formal urging of states or advocacy groups.

Under the Clean Air Act, particulate matter is one of a half-dozen pollutants for which EPA must set and periodically review ambient air quality standards with the goal of protecting public health and the environment. Exposure is linked to an array of cardiovascular and respiratory ills, including a higher chance of premature death in some circumstances.

EPA's current annual fine particulate standard is 12 micrograms per cubic meter of air; the 24-hour benchmark is 35 micrograms per cubic meter. Fine particulates are also known as PM_{2.5} because they are no bigger than 2.5 microns in diameter, or one-thirtieth the width of a human hair.

Clean Water Act and Endangered Species Act: Greens go after Trump-era Army Corps permitting program

(Greenwire, 2/8/2021) Niina H. Farah, E&E News reporter

Today, a coalition of conservation groups announced their plans to sue the Army Corps of Engineers over its eleventh-hour authorization of

its updated, streamlined waterway permitting program under the Trump administration.

The Center for Biological Diversity and other groups sent a notice of intent letter to the federal agency that it was challenging its reissued and modified nationwide permit (NWP) program for violating the Endangered Species Act. The letter gives the agency a 60-day heads-up before the lawsuit is filed in federal court.

The Trump administration renewed the nationwide permit program on Jan 13, just days ahead of Biden's inauguration, even though the prior permitting program remains valid until 2022.

They said the program, which authorizes activities like oil and gas pipeline construction that are deemed to have minimal impact on at-risk species, allowed an "unquantified and virtually limitless number of 'discharges' of dredged or fill material to the nation's waters and wetlands."

Projects using the streamlined permitting process under Section 404 of the Clean Water Act do not have to undergo the same rigorous analysis or public comment process that they would if they were seeking individual project permits for construction in waterways.

Jared Margolis, a senior attorney for the Center for Biological Diversity, who is leading the planned challenge, said the groups were aware the new administration had directed a review of the changes to the general permitting program under Biden's climate executive order.

"We're hopeful that the Biden administration will reach out to discuss these things," he said.

The groups are issuing the notice as a precaution to ensure they don't miss statutory deadlines to challenge the program in the event the agency didn't take action to correct the ESA violation, Margolis added.

The conservation groups say the Army Corps failed to conduct an interagency consultation to study the overall impact of the project on endangered species, the same problem that they said also invalidated the program when it was reauthorized in 2017.

"There can be no doubt that the NWP program — including all 16 of the NWPs that the Corps authorized on January 13, 2021 — 'may affect,'

and is 'likely to adversely affect,' listed species," the groups wrote.

The issues with the new permit mirror those at the center of litigation last year over the Keystone XL crude oil pipeline, which challenged a specific part of the nationwide permit program, called Nationwide Permit 12.

That program authorizes waterway crossings for linear utility projects, including oil and gas pipelines.

Chief Judge Brian Morris for the U.S. District Court for the District of Montana had ruled last spring that the Army Corps had violated the ESA by failing to conduct a programmatic consultation when the entire program was reauthorized in 2017.

Morris then initially blocked any use of the NWP 12 program, while he directed the Army Corps to go back to assess its risks to listed species. He later narrowed the ruling to apply only to new oil and gas pipelines. The Supreme Court then stepped in and applied the ban only to Keystone XL.

The 9th Circuit has yet to rule on an appeal of Morris' ruling, and Biden has recently withdrawn the presidential permit for the pipeline. It's unclear how that action will affect a ruling on whether the 2017 permitting program had violated the ESA.

The conservation groups are pursuing another issue also raised in Morris' ruling, that the agency could not rely on permittees to determine whether actions may affect listed species, and would require project-specific consultation.

The newly authorized program similarly relies on permittees, which is an "insufficient" approach, the groups said.

"[T]he Corps has therefore failed to ensure that project-specific consultations will even occur for all NWP-authorized activities that may adversely affect listed species," they wrote.

Because of the risks posed by the program, the Army Corps should not authorize construction on waterways using the nationwide program until consultation under ESA is completed, they said.

"The Corps must consider the cumulative impacts that the issuance of the NWP will have on listed species and ensure through national-scale programmatic ESA consultation with both [the Fish and Wildlife Service] and [NOAA Fisheries] that the NWP program complies with the ESA," the groups wrote.

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

NEPA: Biden administration greenlights major California solar project

(Greenwire, 2/11/2021) Scott Streater, E&E News reporter

A major solar power project in California will move forward after the White House temporarily halted it as part of a broad effort to review significant rules and regulatory actions undertaken by the Trump administration.

The review of the massive Crimson Solar Project — proposed to be built on about 2,000 acres of federal land in Southern California's Riverside County — apparently found no major issues, according to an advance notice published in today's *Federal Register*.

Thus, the Bureau of Land Management will publish tomorrow for the second time the final environmental impact statement (EIS) and proposed land-use plan amendment for the project on EPA's *Federal Register* webpage. The documents will be open for public review through March 15, during which time administrative protests can be filed.

BLM originally published the final EIS and land-use plan amendment last month on EPA's *Federal Register* page, kicking off a public review and protest period that was supposed to run through Feb. 22.

But the bureau abruptly requested that EPA withdraw the documents days later, citing a White House memo issued hours after President Biden's inauguration titled "Regulatory Freeze Pending Review."

The White House memo said any "rule" or "regulatory action" that already had been published in the *Federal Register* but had not yet gone into effect should be postponed "for 60 days from the date of this memorandum" until

In addition to CBD, groups joining the letter include: the Sierra Club, Friends of the Earth, the Waterkeeper Alliance, the Natural Resources Defense Council, the Center for Food Safety and the Recirculating Farms Coalition.

each is reviewed for compliance with Biden administration policies.

Recurrent Energy LLC is developing the project, which if built would have the capacity to produce 350 megawatts of electricity, or enough to power about 87,500 homes.

"We are pleased to see the Crimson project moving forward in the federal review process," Mike Arndt, Recurrent Energy's general manager, said in an emailed statement.

"This project is well designed and has undergone a very thorough review by many stakeholders over the last several years," he added. "We look forward to bringing this important solar battery storage project online to support grid reliability in California."

It's not clear what specific issues associated with the \$550 million photovoltaic solar power project were reviewed during the temporary freeze.

BLM today issued a press release confirming that the project is back on track, and that the Interior Department "has initiated a review of processes and procedures to date as it re-invests in a rigorous renewable energy program."

But the project had raised concerns about impacts to desert tortoise and Mojave fringe-toed lizard habitat, among other things.

Kevin Emmerich, co-founder of Nevada-based Basin and Range Watch, said in an emailed statement that his group is "disappointed" to see the project advance.

"The approval of the Crimson Solar Project will result in the loss of important archaeology sites, cultural landscapes, biological resources and impair the experience of visitors to the Bradshaw Trail National Back Country Byway," he said.

But the proposed project would be sited within the boundaries of a formally designated solar energy zone approved by the Obama administration as suitable for commercial-scale solar development. It would connect to the regional electrical grid at a substation operated by Southern California Edison.

What's more, BLM has proposed a "reduced acreage" blueprint designed to "avoid key areas containing sensitive vegetation, sand dune habitat, and cultural resources," according to the final EIS, which can still be viewed on EPA's National Environmental Policy Act webpage (<https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/details;jsessionid=BCE030D9B25A7E43A87370C43C72C635?eisId=320014>)

BLM California State Director Karen Mouritsen said in a statement that projects like Crimson

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

Solar have "the potential to help our nation combat climate change, improve resilience through reliable power, and spur economic development to create good-paying jobs."

She added, "We will continue to support responsible development of clean energy projects as part of our mission to sustainably manage public lands in California for a variety of uses."

The Crimson Solar Project was one of six high-priority renewable energy projects the Trump administration had targeted for approval by the end of 2020.

It and the Walker Ridge Wind Energy Project, also in California, are the only ones that have yet to receive final approval.

Among the noteworthy projects on the list that have been approved is the Gemini Solar Project in Nevada. When built, Gemini Solar will have the capacity to produce up to 690 MW of electricity, or enough to power about 260,000 homes and businesses, ranking among the world's largest solar projects.

NEPA and Migratory Bird Treaty Act: Migratory bird advocates flock together

(Greenwire, 2/16/2021) Michael Doyle, E&E News reporter

The latest round in the Migratory Bird Treaty Act fight shows every sign of being as one-sided as last time, though it's heading toward a different result.

One week into a reopened public review period, opposition is running strong against the Trump administration's effort to restrict the law's protections for birds. None of the 200-plus new comments received so far appears to side with the Trump team's narrow take.

"Now is the time to act to save our nation's birds, and I stand in strong support of the MBTA to help give them a fighting chance," Pittsburgh resident Brian Vitunic wrote in a comment posted today.

Louisa Evers of the Idaho-based Golden Eagle Audubon Society added that the now-suspended rule is "highly likely to result in continued litigation over environmental justice issues, particularly tribal treaty rights, and result in increasing eligibility" for Endangered Species Act listings.

This is just the start.

Thousands more comments will almost certainly end up flooding the Fish and Wildlife Service in response to the agency's delaying until at least March 8 the Trump-era Migratory Bird Treaty Act rule that restricted the law's coverage to intentional actions and would no longer have

covered birds killed through accidents like oil spills.

"The public has a strong interest in conserving the migratory bird resource and fulfilling shared objectives and obligations with a treaty partner, Canada," FWS stated. "These interests could be harmed by allowing this regulation to take effect on its current effective date."

The Biden administration previously told a federal court that it is "considering whether to suspend or withdraw" a related Trump-era legal opinion that justified cutting bird protections.

The Justice Department asked the 2nd U.S. Circuit Court of Appeals to put a Trump administration appeal of a trial judge's ruling "in abeyance."

The extension will "provide additional time for agency officials with decision-making responsibility to review this case [and] the issues it presents," including the disputed Interior Department legal opinion, the Justice Department explained.

In early January, FWS published a final rule that limited the 1918 bird protection law to apply only with intentional killings. An "incidental take," like one caused by power lines, will no longer trigger potential prosecution.

"This rule simply reaffirms the original meaning and intent of the Migratory Bird Treaty Act by making it clear that the U.S. Fish and Wildlife Service will not prosecute landowners, industry and other individuals for accidentally killing a

migratory bird," former Interior Secretary David Bernhardt said in a statement about the change.

The Biden administration suspended the rule before it could take effect.

FWS' environmental impact statement predicted that "negative impacts on migratory birds are expected to increase over time as more entities react to the certainty that incidental take is not prohibited" and that "for some industries ... there would likely be cost savings from not implementing beneficial practices."

One practice, for instance, is to delay construction and vegetation clearing during migratory bird nesting season. FWS states that "some operators may choose to avoid such costs if there is no threat of enforcement under the MBTA.

Several commenters suggested a permit system as an alternative, a potentially promising but complex idea briefly mentioned as a possibility in the FWS environmental impact statement.

"This general-permit system could take many forms, but one possibility would be to use a risk-management approach that identifies specific hazards associated with particular activities and establishes best practices as permit conditions to reduce or avoid those hazards," FWS stated.

The agency added that "a general-permit framework could require a nominal application fee and potentially an in-lieu fee to compensate for any remaining take after implementation of avoidance and minimization measures."

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

Lead NEPA Story (continued from page 1)

Among other things, Winnill wrote that the decision violated the Administrative Procedure Act by failing to "provide a reasoned explanation for the BLM's change in position regarding whether the withdrawal was needed for sage grouse conservation."

He also noted that BLM "failed" to consider that the Fish and Wildlife Service's 2015 decision not to list the greater sage grouse for Endangered Species Act protection was based, in part, on a mineral mining withdrawal being implemented in the sagebrush focal areas. The

judge chastised BLM for not considering cumulative habitat loss from not only mining, but other factors like wildfires.

"In sum, the BLM failed to consider functional habitat loss in making its determination that the withdrawal was no longer needed and deciding to cancel the withdrawal application," Winnill wrote. "The failure to do so renders the BLM's cancellation decision arbitrary and capricious."

The judge did reject claims that BLM violated the National Environmental Policy Act because

it nixed the withdrawal proposal before completing the EIS analysis.

Winmill's order directs BLM to reconsider its 2017 decision and evaluate "whether the withdrawal is needed for sage grouse conservation." He added, "Such proceedings shall include re-initiation of the NEPA process," apparently referencing the incomplete environmental impact statement.

It's not clear whether the Biden administration will formally reopen the proposal to withdraw the sagebrush focal areas from mining claims.

An Interior Department spokesperson said the agency had no comment regarding Winmill's latest order. A BLM spokesperson said the bureau was working on a "proposed response" but did not submit one in time for publication.

The Biden administration has already placed a freeze on any Trump administration revisions to the Obama-era sage grouse plans.

But Winmill's order is another major legal setback for the Trump changes finalized in March 2019.

Among other things, those revisions removed nearly all of the 10 million sagebrush focal area designations. They also added "modifications, exemptions and waivers" to mandates in the Obama blueprint that reduced buffers around sage grouse breeding grounds and limited no-surface-occupancy requirements and seasonal restrictions near sensitive habitat.

A coalition of environmental groups quickly challenged the revisions.

Winmill subsequently issued a preliminary injunction that blocked BLM from implementing the revisions. That injunction remains in place today.

As for Winmill's latest ruling, it would appear to have little practical impact because the proposed withdrawal had never gone into effect. And the two-year moratorium on new mineral mining claims that was in place while BLM conducted the EIS had already expired at the time the bureau canceled the proposed withdrawal.

But environmental groups say they are banking on the Biden administration using the latest

court order to restart the mining withdrawal process in sagebrush focal areas.

"We are hopeful that the new Biden-Harris administration will take the biodiversity crisis seriously and see this decision as a step toward getting greater sage grouse the protection they need in order to thrive," said Lindsay Larris, wildlife program director at WildEarth Guardians, in a statement.

Western Watersheds Project, WildEarth Guardians, the Center for Biological Diversity and the Prairie Hills Audubon Society are plaintiffs in the lawsuit challenging the Trump revisions.

A decision to reopen the withdrawal proposal would reject an argument made by the current top BLM leader. The Biden administration has not yet named its nominee to head the bureau.

Mike Nedd, BLM's deputy director of operations who is performing the duties of the bureau director on a temporary basis, was BLM's acting director in 2017 when the decision was made to ax the mining withdrawal proposal in sagebrush focal areas.

Nedd, both publicly and behind the scenes, supported eliminating the proposed mining withdrawal for reasons Winmill largely rejected. In press materials at the time, Nedd called the 10-million-acre mining withdrawal proposal "a complete overreach" by the Obama administration.

Winmill's order notes that on the day the decision to cancel the proposed withdrawal was announced, Nedd wrote a memo to David Bernhardt, who at the time was deputy Interior secretary, calling the proposal "unreasonable in light of the data available at the time of the decision."

Nedd, in the memo, also pointed to mining activity data from the U.S. Geological Survey and individual states "which confirmed that the proposed withdrawal was unnecessary," Winmill's order says. The data indicates that only about 10,000 acres within the sagebrush focal areas would be affected "from locatable mining and exploration" over a 20-year period.

Winmill rejected those arguments.

"The Court has considered in depth the reasons given by the Nedd Memo for cancelling the withdrawal application," Winmill wrote. "The Court finds that the reasons given do not provide

the reasoned explanation needed to support the BLM's change in position regarding the need for the withdrawal, rendering the cancellation decision arbitrary and capricious."

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

NEPA Bonus: CEQ withdraws 2019 greenhouse gas guidance

Harold Draper, National Desk Editor

On February 19, 2021, the Council on Environmental Quality announced that it is rescinding the June 26, 2019, Draft Greenhouse Guidance, which was never finalized (see *Federal Register* 86:10252). The guidance was withdrawn as required by Executive Order

13990, Protecting the Public Health and the Environment and Restoring Science to Tackle the Climate Crisis. In the notice, CEQ indicated that the agency will address in a separate notice its review of and any appropriate revisions and updates to the 2016 guidance.

The **NAEP National Desk** is published every two weeks using content originally published in *Greenwire*. The *NAEP National Desk* is emailed directly to approximately 1,000 NAEP General, Associate, Student, and Senior members, and indirectly to more than 3,100 chapter-affiliate members through 17 state or regional affiliate chapters. News articles are provided through a licensing agreement with Environment and Energy (E&E) Publishing, LLC (www.eenews.net). E&E's five daily online publications are ClimateWire, EnergyWire, E&E Daily, Greenwire and E&E News PM. **Subscription discounts are available to NAEP members. Sign up for a subscription by sending an email to cchinyata@eenews.net.**

This edition of the National Desk was compiled by Harold Draper. For more information on NAEP, please contact the NAEP office at office@naep.org.

The National Association of Environmental Professionals (NAEP) is a multidisciplinary, professional association dedicated to the promotion of ethical practices, technical competency, and professional standards in the environmental fields. Our members reflect a diversity of employers, including government, industry, academia, consulting firms, and the private sector in the U.S. and abroad. They have access to the most recent developments in environmental practices, research, technology, law and policy.