National Association of Environmental Professionals
Be Connected

NAEP's Bi-Weekly
NATIONAL DESK

August 12, 2022

Lead NEPA Story: More delays for National Park Service effort to curb flight noise at parks

(*Greenwire*, 7/27/2022), Rob Hotakainen, E&E News Reporter

The National Park Service has told a federal appellate court that its long-delayed plans to limit noise from helicopters and other aircraft at 24 national parks face another setback and will not be completed until the end of 2024.

Responding to an order from the U.S. Court of Appeals for the District of Columbia Circuit, NPS Director Chuck Sams and Billy Nolen, the acting administrator of the Federal Aviation Administration, said the agencies are moving "as expeditiously as possible" but will still miss an August 31 court-ordered deadline.

As of last week, they said, they had finalized plans for only two parks: Mount Rainier National Park and Olympic National Park, both in Washington state.

Sams and Nolen told the court that their agencies "do not have ultimate control over the timing" due to difficulties in complying with the National Historic Preservation Act, the National Environmental Policy Act and other statutes that require consultation with other parties.

Continued on page 6

Executive Order 14008 on Tackling the Climate Crisis at Home and Abroad: White House meets another environmental justice benchmark

(*Greenwire*, 8/4/2022) Kelsey Brugger, E&E News Reporter

The White House this week advanced one of its trademark environmental justice initiatives after repeated delays.

The Council on Environmental Quality yesterday launched the comment process on its Environmental Justice Scorecard, a progress report that will track federal agencies' efforts to fight legacy pollution in underserved communities.

It's part of the Biden administration's Justice40, an amorphous plan to direct 40 percent of "benefits" from federal climate-related investments to disadvantaged communities.

The scorecard, now out for public comment, includes three categories: reducing burdens in communities, delivering benefits to communities and centering justice in decision making.

It "will be updated over time, with the goal of creating a durable, robust, and comprehensive platform for assessing the Federal Government's efforts to secure environmental justice for all," CEQ said in a press release. "The Scorecard will

Inside This Issue…

eventually be available on a publicly accessible, easy-to-use web platform."

The update comes as CEQ hopes to smooth over tensions from advocates who sit on the White House Environmental Justice Advisory Council.

The 26-member panel has pressured the administration to accelerate the release of environmental justice tools, including the scorecard and a community screening tool released earlier this year. Both came six months behind schedule.

But for now, the advisers, who met virtually yesterday, seem to be giving CEQ an opportunity to reset. The agency last month hired Jalonne White-Newsome as its new senior director on environmental justice.

She has considerable experience in nonprofits and philanthropy, and she spoke yesterday about her elderly parents' experience with repeated flooding in Detroit.

"In an ideal world, advancing environmental justice is not an afterthought," she told the group. "I want to get to a point where we no longer need a WHEJAC."

White-Newsome acknowledged past difficulties and told the group her mantra: "Make it simple and keep it real."

Some of the advisory members — who see their role as holding the government accountable — have met with White-Newsome in recent weeks. They say they are excited about her appointment but stress the difficulty of taking on a task as gargantuan as rejiggering hundreds of federal programs to remedy decades of environmental racism.

"What we're hoping for is that position inside of government is a different animal," longtime environmental justice leader Bob Bullard recently told E&E News. "It will take a level of toughness to get some traction where it's been difficult to get things moving in government."

Yesterday's meeting turned tense after officials from the Department of Energy gave an update on plans to dole out $12 billion for carbon capture projects.

The money is coming from last year's bipartisan infrastructure law. The outside advisers — who are meeting again today — have opposed carbon capture systems because the projects can be a lifeline for fossil fuels to keep polluting.

"I just want to be clear," said Maria Belen-Power, an advisory board member said following the DOE remarks. "We didn't hear anything about the dangers. Communities need to be educated about the dangers."

Editor's Note: The Request for Information: Environmental Justice Scorecard Feedback may be viewed at https://www.regulations.gov/document/CEQ-2022-0004-0001 or at *Federal Register* 87:47397-47398 (August 3, 2022).

Clean Water Act: California has authority to review hydro projects, judges rule

(Greenwire,* 8/5/2022*) **Niina H. Farah, E&E News reporter**

A three-judge panel yesterday affirmed California's authority to determine whether three federally licensed hydroelectric projects complied with state water quality standards. That ruling reverses a determination by federal energy regulators.

The 9th U.S. Circuit Court of Appeals axed orders from the Federal Energy Regulatory Commission blocking the state from imposing its own conditions on federal licenses on the existing projects. The commission said state officials took more than a year to certify that the projects complied with California's standards, a violation of federal law.

The lawsuit highlights a contentious debate playing out in the courts, federal agencies and on Capitol Hill about the role states and tribes play in approving federal projects. A proposal in Congress that is expected to get a vote in September would give states one year to review projects. EPA, however, is drafting a rule that would give states more leeway.

FERC had argued before the 9th Circuit that the California State Water Resources Control Board had waived its authority to review the Yuba-Bear and Yuba River projects as well as the Merced River and Merced Falls projects under Section 401 of the Clean Water Act.

FERC accused the board in engaging in a "coordinated scheme" with local officials to withdraw and resubmit applications that reset the one-year review deadline.

But the 9th Circuit found that FERC's determination that there had been coordination was "not supported by any substantial evidence in the record."

"Instead, the evidence shows only that the State Board acquiesced in the Project Applicants' own decisions to withdraw and resubmit their applications rather than have them denied," said Judge Michelle Friedland, writing the opinion for the court.

Rather than seek to thwart the projects, the judge found the state board had an interest in moving the projects forward since their interim licenses did not require them to follow state water quality standards.

"The Project Applicants, by contrast, stood to benefit from any delays because a Section 401 certification likely would have imposed additional environmental-protection measures," said Friedland, who was appointed by former President Barack Obama.

The 9th Circuit ruling diverges from a landmark decision in *Hoopa Valley Tribe v. FERC* from the U.S. Court of Appeals for the District of Columbia Circuit in 2019. In that case, the court found that California and Oregon had waived their authority to certify the Klamath Hydroelectric Project by repeatedly withdrawing and resubmitting certification requests.

The D.C. Circuit had found that this constituted a refusal to act by the state and the ruling prompted FERC to change its longstanding acceptance of the practice.

Friedland noted that the court's ruling yesterday did not address whether FERC's standard for determining coordination was consistent with Section 401.

The decision is a win for the state water board as well as local environmental and sporting groups that had challenged FERC's orders in court.

"Today's reversal of FERC's string of illogical rulings errantly waiving states' rights to enforce their environmental laws under the Clean Water Act feels like the end of an era of abuse," said Andrew Hawley, senior attorney at the Western Environmental Law Center, in a statement.

The Hoopa Valley ruling had been "weaponized" to restrict well-established state and tribal rights under the Clean Water Act, Hawley said.

"Today, we closed the Hoopa Valley Clean Water Act loophole, he said.

FERC declined to comment on the ruling.

50-year licenses

Friedland noted that the consequences of waiving the state's authority to recertify projects was potentially significant because federal licenses for hydroelectric projects can last up to 50 years.

"Accordingly, if a state waives its authority to impose conditions on a hydroelectric project's federal license through Section 401's certification procedure, that project may be noncompliant with prevailing state water quality standards for decades," she wrote.

Each of the hydroelectric projects the state water board was reviewing for recertification came after their 45- or 50-year licenses had expired under the Obama administration. In the interim, the projects have continued to operate under temporary one-year licenses that do not require compliance with state water quality standards.

The 9th Circuit found that the source of delay in certifying the projects was the state's criteria for water quality compliance under the California

Environmental Quality Act, which made the one-year federal deadline "impracticable."

Yesterday's ruling is the latest development to shape the role states and tribes play in approving major federal projects.

West Virginia Sen. Joe Manchin (D) has targeted Section 401 reform in his proposed permitting reform bill. A summary of the bill said states would have one year to review projects.

That time frame appears to be at odds with a rule EPA is in the midst of drafting that would allow states and tribes to determine a "reasonable time" to conduct project reviews.

Judge Paul Watford, an Obama pick, and Judge Carol Bagley Amon, a judge on the U.S. District Court for the Eastern District of New York, and appointed by George H.W. Bush, also joined the ruling.

NEPA: Bureau of Land Management to revise management plan for Grand Staircase-Escalante

(*Greenwire*, 7/29/2022) Scott Streater, E&E News reporter

The Bureau of Land Management intends to revise a land use plan for the Grand Staircase-Escalante National Monument in Utah that will focus on protecting the natural, scientific and cultural resources there after former President Donald Trump dramatically cut the size of the monument in 2017.

President Joe Biden last year reversed that decision, and BLM is now kicking off the process to develop a revised resource management plan (RMP) that will consider how to balance livestock grazing and recreational activities with conservation and preservation of the restored 1.87-million-acre site.

BLM today published a formal notice of intent to prepare an environmental impact statement and revised management plan in the *Federal Register*, kicking off a 60-day scoping period for public comments running through Sept. 27.

The plan is to have a record of decision approving a new plan for the national monument by early 2024, BLM said.

As part of the process, BLM is asking the public to nominate sections of the national monument that should be designated as "areas of critical environmental concern" (ACECs), and worthy of extra protection, usually on behalf of a specific species such as the Mojave Desert tortoise in the area. There currently are no ACECs within the monument.

BLM lists in the *Federal Register* notice seven overarching goals for the revised plan, including protecting and restoring "the entirety of the large, remote, rugged, and markedly impenetrable landscapes," along with protecting and restoring the "biological resources" and the "historical and cultural understanding and appreciation related to Monument objectives and values."

Each of the goals is consistent with Biden's proclamation signed last year restoring the national monument to the original size established by former President Bill Clinton in 1996.

Trump cut the Grand Staircase-Escalante monument in half, breaking it into three parts: the Grand Staircase unit of about 210,000 acres, the Kaiparowits unit of 551,000 acres, and the Escalante Canyons unit of 243,000 acres.

Biden's proclamation restoring the original boundaries of Grand Staircase-Escalante "represents a new milestone in the management and protection of some of the most spectacular lands in America," said BLM Utah Director Greg Sheehan in a statement.

"By harnessing input provided by the public, partners including state and local government, Tribes, and interested groups, we can prioritize protection of the monument's objects and values

through this land use planning process," Sheehan added.

But BLM also says in the *Federal Register* notice that a top goal of the new RMP will be to protect "Monument objects and values within a multiple-use context," noting the area has been used for "grazing, hunting, and recreation," and that some parts before being designated as a monument "were being used related to mining, rock hounding for alabaster, and other purposes."

Another goal is to "Protect and restore world-class outdoor recreation opportunities, including hiking and backpacking, hunting, canyoneering, mountain biking, and horseback riding" at the monument site, the notice says.

Such prior uses are part of the reason Clinton's 1996 monument designation was so controversial, with the Utah congressional delegation then — and now — objecting to it.

"Such controversy spans the spectrum of use: allowing for uses such as mining and livestock grazing while also supporting conservation and recreation uses and promoting strong preservation interests," the notice states. "Establishing management that ensures protection of monument objects and values and serves other monument purposes while accommodating other uses, as appropriate, is vital in this planning process."

Grand Staircase-Escalante is part of BLM's National Conservation Lands system, which includes 28 national monuments, among them the 1.35-million-acre Bears Ears National Monument, also in Utah.

In addition to Grand Staircase-Escalante, Trump slashed the size of the Bears Ears monument — which BLM co-manages with the Forest Service and Native American tribes — by about 85 percent. Trump broke the monument into two parts: the Indian Creek unit with 72,000 acres, and the Shash Jáa Unit with about 130,000 acres.

Biden's October proclamation also restored Bears Ears to its original size, as designated by former President Barack Obama in 2016.

As for the revised RMP, the bureau says in the notice that it plans to use an "interdisciplinary team" of experts in areas such as "cultural resources, Native American concerns, paleontology, minerals" and other areas, such as rangeland management and livestock grazing.

BLM plans to hold five public scoping meetings: three in-person hearings and two online hearings.

Editor's Note: the Notice of Intent to Prepare a Resource Management Plan for the Grand Staircase-Escalante National Monument in Utah and an Associated Environmental Impact Statement was published at *Federal Register* 87:45796-45799 (July 29, 2022).

Endangered Species Act: Feds advance conservation bank rules

(*Greenwire*, 7/26/2022) Michael Doyle, E&E News reporter

The Fish and Wildlife Service today launched an effort to set uniform rules for conservation banks, an increasingly popular tool important for property owners, environmentalists and vulnerable species alike.

In a belated move pushed by Congress, the federal agency initiated the first step in the rule-setting that's supposed to culminate in improved protections for plants and animals listed under the Endangered Species Act.

"Conservation banks contribute to the recovery of listed species and help reduce threats such as habitat fragmentation and lack of habitat connectivity by consolidating and managing priority habitat areas in a reserve network," the Fish and Wildlife Service stated.

So far, 173 FWS-approved conservation banks have covered approximately 260,000 acres of habitat for 57 endangered or threatened species.

With conservation banking, industry groups or other entities protect land and species and sell impact credits to land users who need to mitigate a project.

In exchange for permanently protecting and managing land for the species of interest, FWS approves a specified number of habitat or species credits that the bank owners may sell to developers and others.

In California, for instance, a developer might buy San Joaquin Valley kit fox credits to offset harm to this endangered species from housing construction. The credits represent protected kit fox habitat located away from the project site.

A 2017 review in the journal *Biological Conservation* recounted that the first species conservation bank was established in California for the least tern and several fish species. By 2002, the first conservation bank outside of California was established in Arizona, and a year later FWS issued its first guidance for the practice.

The "advance notice of proposed rulemaking" announced today is the invitation for interested parties, of which there could be many, to start weighing in.

"As the conservation banking program continues to grow, it is important to ensure consistency, transparency, and predictability for project proponents and mitigation providers," FWS said.

Congress in the fiscal 2021 National Defense Authorization Act required FWS to issue regulations for species conservation banking programs, starting with an advance notice of proposed rulemaking within one year of enactment of the defense bill.

The defense bill was enacted into law in January 2021.

"We share an interest with the regulated community in introducing greater efficiency and predictability into species conservation banking, while ensuring conservation of our most imperiled fish, wildlife and their habitats," FWS Director Martha Williams said in a statement.

Williams added that the regulations that result should "make the establishment and use of species conservation banks more effective and efficient."

In particular, the agency is soliciting advice on what level of detail the new rules should include, how much monitoring and data tracking will be required and what current hurdles to establishing conservation banks can be eased.

The Ecological Restoration Business Association, which represents companies that create conservation banks, wrote Interior Secretary Deb Haaland last year to note that the organization "cannot over-emphasize the significance of stable regulation for advancing environmental markets."

"A species mitigation rule is an opportunity for DOI to establish a formal structure and greater assurances for mitigation providers and stakeholders on the requirements and standards for successful species mitigation projects," the association wrote.

Editor's Note: The Advance Notice of Proposed Rulemaking on Compensatory Mitigation Mechanisms was published at *Federal Register* 87:45076-45078 (July 27, 2022).

Lead NEPA Story (continued from page 1)

"A good example of this is the snowstorm in April 2022 that forced the agencies to reschedule their first in-person tribal consultation meeting regarding the plans for Badlands National Park and Mount Rushmore National Memorial," they said in their report to the court.

The advocacy group Public Employees for Environmental Responsibility (PEER) accused the agencies of using "the-dog-ate-my-homework type excuses" for failing to comply with the National Parks Air Tour Management Act, which Congress passed in 2000.

"The court has ruled that the agencies' long inaction constituted unreasonable delay and must soon decide how much more unreasonable delay it will abide," PEER General Counsel Paula Dinerstein said yesterday.

"In the coming weeks, we will again ask the court to enforce the law and end the reign of unmanaged overflights across our national parks," she added.

In an order last month, the appellate court gave Sams and Nolen until July 21 to provide a written explanation for why they were running behind schedule in meeting the August deadline and to sign a report proposing "firm compliance dates" to get the plans done.

In their report, Sams and Nolen, along with their government attorneys, said that plans for another 13 parks will be finalized in 2023, while others won't be done until the following year. The final plan for Canyon de Chelly National Monument will be completed by December 31, 2024, they said.

The 22-year-old law passed by Congress required the agencies to develop plans to limit noise and disruption in any park with more than 50 overflights a year. PEER said the issue has been particularly contentious at Hawai'i Volcanoes National Park, "which suffers a noisy helicopter tour every eight minutes from dawn to dusk."

After PEER sued the agencies for failing to comply, the organization won a court judgment in 2020 that required plans for two dozen parks that host more than 45,000 commercial air tours every year. The list included many popular parks, including Arches, Canyonlands, Death Valley, Glacier and Great Smoky Mountains national parks.

In their report to the court, Sams and Nolen said their agencies "remain committed to meeting their obligations" and noted that they "have devoted substantial resources to get to the point where they are today."

They said they intend to involve the public as more plans are developed, adding: "But public participation takes time; it is often unpredictable and not entirely within the agencies' control."

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 state or regional affiliate chapters. News articles are provided through a licensing agreement with Politico, LLC (www.eenews.net). ***Sign up for a subscription by contacting*** cchinyanta@eenews.net (202-446-0405)

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.