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Lead NEPA Story: Greens lose court fight against Trump NEPA regulations

(*Greenwire*, 12/22/2022), Pamela King, E&E News Reporter

A federal appeals court has found that it does not have authority to scrap a Trump-era rule — currently under revision by the Biden administration — that limited the scope of environmental reviews for projects like pipelines and highways.

The ruling Thursday from the 4th U.S. Circuit Court of Appeals left the door open for the groups to challenge the 2020 National Environmental Policy Act rule in the context of its application to specific projects.

Judge James Wynn, who led the opinion, emphasized the "limited nature" of the decision.

"[W]e are not saying that Plaintiffs will be unable to challenge the 2020 Rule at all," wrote the judge, an Obama appointee. "They just will need to bring such a challenge under circumstances where they can present evidence sufficient to support federal-court jurisdiction."

At issue in the case is the White House Council on Environmental Quality's Trump-era NEPA implementing regulation, which the Biden administration is in the process of replacing. CEQ issued an initial set of changes in the spring but has yet to move forward with Phase 2 of the rulemaking.

Continued on page 9

Inflation Reduction Act: White House unveils climate law guidebook

(*Greenwire*, 12/15/2022) Robin Bravender, E&E News Reporter

Confused by the details of the huge new energy and climate law? The White House wants to help.

The Biden administration issued a lengthy guidebook Thursday packed with details of the climate and energy funds available under the sweeping law Democrats have dubbed the Inflation Reduction Act.

The guidebook provides a program-by-program overview of the law's clean energy, climate mitigation and resilience, and conservation tax incentives and investment programs. Notably, the guide provides details about who is eligible to apply for funds under the law and when those funds are available.

Inside This Issue…

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"The Inflation Reduction Act includes some two dozen tax provisions that will save families money on their energy bills and accelerate the deployment of clean energy, clean vehicles, clean buildings, and clean manufacturing," John Podesta, Biden's senior adviser for clean energy innovation and implementation, said in a note included in the guidebook.

Podesta previewed the guide's release in remarks at the White House on Wednesday, where he also noted that some of the tax credits included in the law will become available on January 1, 2023, in just a few weeks.

The Biden administration is eager to convince consumers and businesses to take advantage of the incentives in the new law in order to maximize the emission-reduction benefits.

The White House has also launched a website to help consumers determine which benefits they might be able to utilize.

Expect more guidance from the administration as it continues to roll out the law, which includes nearly $370 billion for climate and renewable energy.

"As these programs develop, you can expect more detail to come in the weeks and months ahead," Podesta wrote. "Federal agencies are working around the clock to design new programs and push out funding as quickly as possible while being good stewards of taxpayer dollars."

Editor's Note: *Building a Clean Energy Economy: A Guide to the Inflation Reduction Act's Investments in Clean Energy and Climate Action* is available at https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/.

NEPA: Bureau of Land Management to consider lithium mine near endangered plant

***(Greenwire*, 12/19/2022) Scott Streater, E&E News reporter**

The Biden administration will formally analyze a proposed lithium-boron mine in southwest Nevada that would be located near a rare wildflower the Fish and Wildlife Service listed last week as an endangered species.

The Bureau of Land Management published in the *Federal Register* on Monday an advance notice of intent to conduct a detailed environmental impact statement of Australian-based Ioneer Ltd.'s proposed mine proposed to be built near critical habitat for the Tiehm's buckwheat wildflower.

This follows the Fish and Wildlife Service decision last week to list the wildflower for protection under the Endangered Species Act. FWS established about 910 acres of critical habitat for the plant that must be left undisturbed.

BLM had paused all permitting activity on the proposed mine until the FWS decision on the buckwheat plant's ESA status.

Environmental groups blasted BLM's decision to move forward with an EIS for the mine after the endangered listing decision.

But Ioneer officials say they had been expecting the endangered species listing, and senior company officials said Monday they are pleased BLM can now begin the EIS required under the National Environmental Policy Act.

The EIS would likely take about two years to complete, and the company has estimated it needs another two years to build the mine. That means the facility would not be in operation until at least 2026.

The company is confident it can design the mine in a way that results in extracting the valuable lithium without damaging the rare flower and its

dwindling habitat. It has already proposed relocating the quarry to avoid individual Tiehm's buckwheat plants, as well as erecting fencing and other buffers around the plants.

"We understand the Rhyolite Ridge Project is the first lithium project to be issued a Notice of Intent under the Biden administration, and we see this as a significant step toward ensuring a strong domestic supply of critical minerals and strategic materials necessary for development of a domestic battery supply chain essential to the electrification of transportation in the U.S.," said Ioneer's Executive Chair James Calaway in a statement.

The notice of intent will be formally published in Tuesday's *Federal Register*, kicking off a 30-day public scoping period for comments running through January 19.

Need for lithium

There's a lot of pressure to build the mine.

With the Biden administration working to promote renewable energy and wean the nation off fossil fuels, the mine has drawn substantial industry interest, particularly from companies that need lithium to manufacture electric vehicles, the batteries that power them and EV charging stations.

In July, Ford Motor Co. announced it had signed an agreement to obtain over 7,000 metric tons of lithium carbonate over five years from the Rhyolite Ridge mine.

Less than a month later, the proposed lithium mine signed a supply deal with battery manufacturer Prime Planet Energy & Solutions Inc., a joint venture between Toyota Motor Corp. and Panasonic Corp., in which the battery manufacturer would get 4,000 metric tons of lithium carbonate annually from the mine over a five-year period.

If constructed, the mine would yield roughly 20,600 metric tons of lithium chemicals every year, according to Ioneer.

Perry Wickham, BLM's Tonopah Field Office manager, said in a statement that the bureau is "committed to transparent engagement in this review process and will utilize the public comments received to inform development of the Environmental Impact Statement."

The company in early 2020 submitted to BLM a plan of operations for the mine that would have resulted in significant losses of the plant.

But in July it submitted a revised plan of operations that called for moving various parts of the mine layout and buffer zones around the Tiehm's buckwheat populations to protect the plants.

FWS in its ESA listing decision expressed concern with the revised plan's potential impacts to the Tiehm's buckwheat, whose only known population is limited to eight "subpopulations" of plants on 10 acres of federal rangelands spread across 3 square miles that are split by a dirt road.

A 2019 survey estimated that the total Tiehm's buckwheat population was 43,921 individual plants, according to the listing decision published last week in the Federal Register.

A subsequent 2021 survey estimated the population at 15,757 living plants, FWS said.

'There is a solution'

It's going to take a delicate balance to protect the rare plants, FWS said in its listing decision.

"Rare plant species, like Tiehm's buckwheat, that have restricted ranges, specialized habitat requirements, and limited recruitment and dispersal, have a higher risk of extinction due to demographic uncertainty and random environmental events," FWS said its listing decision.

"The effects of habitat fragmentation from the proposed Rhyolite Ridge lithium-boron project on Tiehm's buckwheat may be compounded by the inherently poor dispersal of the species and its specific soil requirements."

FWS also stated in its listing decision that even with buffers in place, it is concerned that dust from year-round truck traffic through the region will hinder the plants' photosynthesis, reproduction and transpiration.

"The combination of the quarry development and over-burden storage facilities are projected to disturb and remove up to 38 percent of critical

habitat for this species, impacting pollinator populations, altering hydrology, removing soil, and risking subsidence," FWS stated.

Ioneer Managing Director Bernard Rowe told E&E News in an interview that the plan of operations submitted in July is not final, and "without a doubt" it will be revised again through the EIS process to address the listing and the newly designated critical habitat.

"We only found out last week from the Fish and Wildlife Service what the critical habitat was going to be; it was only announced last week," Rowe said. "We have a number of strategies we have been working on for quite some time to minimize disturbance inside the critical habitat. That's what we will continue to do. The quarry is one of those things that we've moved, and there are other things. But you can't move something outside of an area until you know what the area is. And that's what the NEPA process is all about."

He added: "We've listened to the concerns of the environmental community, we've listened to the concerns of the Fish and Wildlife Service, and we've listened to the concerns of the BLM, and we've gone away and we've reworked things. And that's what we will continue to do. And wherever possible we will minimize disturbances within the critical habitat. So, am I confident that there is a solution so that there can be coexistence of the plant and our proposed mine operation? Absolutely: 100 percent. I'm confident about that."

'Gearing up for a fight'

Environmental groups say they'll be watching closely.

Patrick Donnelly, the Center for Biological Diversity's Great Basin director in Nevada, said the center, which requested FWS list the plant for ESA protection in 2019, would oppose the mine and is disappointed BLM is still analyzing it despite the endangered listing last week.

The proposed mine "poses an existential threat to Tiehm's buckwheat, and we're gearing up for a fight," Donnelly said in an email.

"Last week's Endangered Species Act listing gives us the most powerful tool in the conservation toolbox to prevent the extinction of this rare, beautiful wildflower," he added. "Ioneer's latest plan, leaving a tiny island of habitat for Tiehm's buckwheat, would spell doom for the special little wildflower."

Editor's Note: The Notice of Intent to Prepare an Environmental Impact Statement for Ioneer Rhyolite Ridge LLC's Proposed Rhyolite Ridge Lithium-Boron Mine Project, Esmeralda County, NV, appeared at *Federal Register* 87:77879-77880 (December 20, 2022).

Clean Air Act and Clean Water Act: Seven cases that reshaped environmental law in 2022

(*Greenwire*, 12/22/2022) Pamela King, E&E News reporter

The Supreme Court over the last 12 months has moved swiftly to cuff federal agencies from addressing climate change, health emergencies and other key issues.

Legal observers said to expect more of the same in 2023.

"Administrative law is moving in a direction that is going to be less favorable to agencies, especially as they try to adapt new statutes to old problems," said Dietrich Hoefner, a partner at the firm Lewis Roca.

Court rulings of 2022 — particularly *West Virginia v. EPA*, which limited the federal government's power to address a potent source of greenhouse gas emissions — are packed with lessons for Biden administration regulators who are soon expected to fill the Federal Register with new rules on everything from water pollution to auto emissions.

"Agencies will have to be a lot less cavalier in finding justifications for regulations," said Jim Burling, vice president of litigation at the Pacific Legal Foundation.

That might be tough, he added, because "we don't have a lot of specific language in federal law."

Hoefner said environmental lawyers should be wary of relying on legal precedent that could be at risk of being eradicated by conservative jurists. Those concerns were heightened by the Supreme Court's decision in June to overturn nearly 50 years of abortion precedent established in the landmark case *Roe v. Wade*.

"It's hard to overstate that this court is willing to revisit prior opinions that they believe are bad law and change them to an extent that I don't think prior courts were willing to do," he said.

State courts may be more receptive to climate claims than the federal bench, and local governments are fighting to keep dozens of liability lawsuits against Exxon Mobil Corp., BP PLC and other oil majors in front of state judges. Oil and gas companies are urging the Supreme Court to step in and bump the cases to the federal level.

And the Supreme Court is expected to hand down a decision in the coming months in a blockbuster battle that could narrow the scope of the Clean Water Act.

Although the case, *Sackett v. EPA*, represents another opportunity for the justices to chip away at pollution protections, Kirti Datla, director of strategic legal advocacy at Earthjustice, said oral argument in October left her optimistic that environmental advocates can still score wins in federal court by keeping their arguments focused on statutory text.

"In any case," she said, "you think about your adjudicator and what arguments will appeal to them, and you put together the best argument for them."

Here are seven cases that reshaped environmental law in 2022 — and could be consequential in 2023.

West Virginia v. EPA

In 2023 and beyond, the justices are expected to flesh out the "major questions" doctrine, which it used in *West Virginia v. EPA* to strike down a signature Obama-era climate rule.

Their next opportunity may come in their decision on one of the Biden administration's most controversial policies: a plan to forgive up to $20,000 in student loan debt for eligible borrowers.

Red-state challengers have argued in the courts that the debt relief program — like the Clean Power Plan in West Virginia — violates the major questions doctrine, which says that Congress must clearly authorize agencies to regulate matters of vast economic and political significance.

While the doctrine has existed for many years, environmental lawyers say the way the court used it in West Virginia is new — and the limits of its application unclear.

They fear the justices' updated approach will be inherently anti-regulatory.

Oral argument in the student loan case, Biden v. Nebraska, is scheduled for February 28.

Dobbs v. Jackson Women's Health Organization

The Supreme Court's decision in June to overturn 50 years of precedent on abortion access left a question on the mind of environmental lawyers: What other cases are the justices ready and willing to upend?

Massachusetts v. EPA — the 2007 case that said the Clean Air Act authorizes the agency to regulate greenhouse gases as air pollutants — was top of mind for environmental lawyers after the Dobbs ruling.

While Congress has taken steps to enshrine the Massachusetts finding in federal law, legal observers say other key precedents — like Chevron deference — could be at risk.

The justices had a chance in 2022 to overturn *Chevron v. Natural Resources Defense Council* — the 1984 case that said federal agencies like EPA should be given leeway to interpret ambiguous statutes like the Clean Air Act — in

a complex Medicare case but ended up ruling without even mentioning the doctrine.

Since then, more petitions have arrived at the court asking the justices to do away with Chevron.

At least one of those requests has been rejected — as most petitions are — but Justice Neil Gorsuch has said he would like to bury the doctrine once and for all.

Suncor Energy Inc. v. Boulder

The Supreme Court could soon wade back into the procedural mess that has stymied dozens of lawsuits from state and local governments seeking payment from the oil industry for flooding, wildfires and other climate change hazards.

After winning a related Supreme Court battle in 2021, oil and gas companies suffered resounding losses in the lower courts as they tried to move the climate liability cases from state to federal benches, where the lawsuits may be more likely to fail.

Now, the companies have asked justices to get involved again. They believe the conservative-dominated Supreme Court may help them stop or delay legal claims that could potentially cost industry hundreds of billions of dollars.

In *Suncor Energy Inc. v. Boulder*, the first of the new round of Supreme Court petitions, the justices have asked the Biden administration to share its view on the cases. President Joe Biden has faced pressure to support the lawsuits after making a campaign promise to back litigation against the oil industry.

The Justice Department's response, expected in early 2023, will mark Biden's first foray into the climate liability tangle.

The Supreme Court will then decide whether to add the Suncor case to its docket. It takes the vote of four justices to grant a petition, and the court rejects most requests.

Missouri v. Biden

A fight over the metric the federal government uses to justify its climate rules could reach the Supreme Court once more in the new year.

Coalitions of Republican-led states have failed to block the Biden administration's social cost of greenhouse gas estimates in the lower courts. The 8th U.S. Circuit Court of Appeals recently rejected a challenge led by Missouri, and the states December 5 asked the court to rehear the case.

They could soon petition the Supreme Court to get involved.

During December oral argument in a separate but related case, the 5th U.S. Circuit Court of Appeals also appeared skeptical that Louisiana and other states had been harmed by the Biden administration's decision to use an interim social cost of carbon value of $51 per metric ton.

Earlier in 2022, Louisiana lost its Supreme Court bid for emergency relief from the climate metric.

A petition stemming from the 8th Circuit case — or a new plea from the 5th Circuit litigation — would ask the justices to dig into the merits of the red states' arguments.

A higher estimate of the social cost of emitting greenhouse gases helps federal agencies support the costs of implementing climate regulations. The Trump administration set the number as low as $1 per metric ton.

The Biden administration has not finalized its social cost figure, but EPA in November recommended placing the number as high as $190 per metric ton of CO_2.

Students for Fair Admissions v. Harvard

One of the Biden administration's top priorities — addressing pollution and climate impacts in Black communities — could be in jeopardy if the Supreme Court limits colleges from considering race in admissions.

During oral argument October 31, the justices appeared open to ruling that Harvard University and other institutions must use "race-neutral" factors — like socioeconomic status and cultural struggles — to achieve diversity goals.

Depending how broadly it is written, a decision along those lines could limit the Biden administration from explicitly mentioning or

considering race when crafting environmental justice policy.

Environmental lawyers have said such an outcome would undercut efforts to address generations of racial injustice that have left Black neighborhoods exposed to higher levels of pollution and more vulnerable to the impacts of climate change.

As one example, the White House Council on Environmental Quality in November unveiled the latest version of its Climate and Economic Justice Screening Tool, but left out race as a factor in determining need for federal funds directed toward disadvantaged communities, although it does display information about race and age.

The justices are expected to rule in *Students for Fair Admissions v. Harvard* and a companion case by summer.

Environment Texas Citizen Lobby Inc. v. Exxon

In Texas, a legal fight is brewing over a threshold issue that could make it harder for environmentalists and concerned citizens to sue to stop pollution.

The 5th Circuit in August upheld a landmark $14.25 million Clean Air Act fine against Exxon for violations at its Baytown refinery and petrochemical complex near Houston. The ruling was prompted by citizen lawsuits, and Exxon had argued that the court was too sympathetic to challengers' standing to bring their cases.

Exxon has asked the full slate of the 5th Circuit's active judges to rehear the case.

If Exxon's request is rejected — or if the company loses on rehearing — its next stop would be the Supreme Court.

Conservative jurists, including some current members of the Supreme Court, have historically fought for a higher barrier to entry for environmental organizations or individuals who allege violations under the nation's pollution laws.

Some lawyers say the Baytown refinery case, *Environment Texas Citizen Lobby v. Exxon*, could offer the next opportunity for the justices to clarify their views on standing for environmentalists.

The Supreme Court could also speak on standing in *United States v. Texas*, a case argued in November that deals with states' ability to sue over federal immigration policies. The ruling could potentially limit states' standing to sue over or intervene in litigation related to environmental policy.

The justices could also use the immigration case to address nationwide injunctions — or broad orders from lower courts that halt federal policy. Both Republican and Democratic administrations have been affected by the orders.

Sackett v. EPA

In perhaps the biggest environmental ruling of 2023, the Supreme Court is expected to decide *Sackett v. EPA* by early summer, potentially narrowing the scope of the Clean Water Act.

At issue in the case is the definition of which streams and wetlands qualify as "waters of the U.S.," or WOTUS.

Idaho landowners Michael and Chantell Sackett, represented by the Pacific Legal Foundation, have asked the justices to revisit their ruling in the 2006 case *Rapanos v. United States*, which splintered the court 4-1-4 and resulted in two competing Clean Water Act tests to determine if a property is beholden to federal permitting requirements.

While federal courts have largely adopted the more expansive "significant nexus" test penned by former Justice Anthony Kennedy in his Rapanos concurrence, the Sacketts and others argue that the late Justice Antonin Scalia's more restrictive "continuous surface water connection" approach should be considered.

The outcome of *Sackett* could complicate the Biden administration's efforts to craft a new WOTUS rule, which is expected to be grounded in Kennedy's approach.

Ahead of oral arguments in October, legal observers had expected the justices to hand the Sacketts a win. But during arguments, even some members of the court's conservative wing appeared skeptical of the landowners' claims.

Datla of Earthjustice said EPA could score a win in Sackett if some of the court's more moderate conservatives find that the landowners went too far in their attempt to narrow the Clean Water Act's application.

Sackett and other opinions expected in early 2023, she said, may be "instructive and illuminating about how this court is thinking about just how much the law should move."

Clean Air Act: EPA spells out environmental justice principles for air permits

(*Greenwire*, 12/23/2022) Sean Reilly, E&E News reporter

EPA has issued a list of eight advisory principles for weaving environmental justice concerns into the process of issuing Clean Air Act permits.

The roster marks the agency's latest attempt to flesh out the practical steps needed to make good on a priority for President Joe Biden's administration.

The principles, posted online Thursday with no formal announcement, "encourage consideration of all relevant statutory and regulatory authorities to develop permit terms and conditions to address or mitigate identified air quality impacts to the extent feasible," acting air chief Joseph Goffman wrote in an accompanying memo to EPA regional officials.

Among them: Start early in the permitting process "to promote meaningful participation and fair treatment"; conduct environmental justice analyses when a permitting action "may result in disproportionately high adverse human health or environmental effects on a community"; and document a community's concerns and address them "to the extent possible."

But while Goffman's primary audience is EPA officials, most air permits are issued by state and local regulators who are not bound to follow the newly issued guidance. While welcome, the principles are "aspirational," said Carolyn McCrady, a member of Gary Advocates for Responsible Development, a community group in Gary, Indiana, that's contesting state regulators' decision to grant a permit for a planned biorefinery in a mostly Black city that ranks among the nation's most polluted areas.

Among other objections, the group's administrative appeal alleges that officials at the Indiana Department of Environmental Management disregarded advice from their EPA counterparts to conduct an environmental justice analysis and thus failed "to ensure that the public's health was protected."

"Until there's an actual relationship between what the EPA says it wants and a mandate for state agencies to carry it out, it's going to be on the advocates to make it happen," McCrady said Friday. Even so, she added, the roster does give advocates leverage to move forward more programmatically "because we can cite all these guiding principles."

An IDEM spokesperson previously declined to comment on the group's challenge. An EPA representative, noting that many staffers were out Friday, had no immediate responses to written queries asking where there was any precedent for the new principles and whether EPA had any plans to foster their use by state and local air agencies.

Editor's Note: Principles for Addressing Environmental Justice Concerns in Air Permitting may be viewed at https://www.epa.gov/caa-permitting/ej-air-permitting-principles-addressing-environmental-justice-concerns-air.

Lead NEPA Story (*continued from page 1)*

Other lawsuits against the Trump rule were put on hold pending the release of the Biden administration's changes. But Wild Virginia and 16 other groups continued to pursue their challenge in the 4th Circuit on the grounds that delays to CEQ's process have left communities, wildlife and the environment vulnerable to projects that may be fast-tracked under the Trump procedures.

NEPA requires federal agencies like the Interior Department and the Federal Energy Regulatory Commission to take a "hard look" at the climate, air and water impacts of actions like oil and gas leasing on public lands and electricity line construction.

"We will continue to push for a return to a robust NEPA process which is essential to ensure that communities have a voice in decisions that affect them," said Kym Meyer, senior attorney at the Southern Environmental Law Center, which represented Wild Virginia and other groups.

"While we hope CEQ will reverse the Trump administration's cuts to the NEPA process," she continued, "we stand ready to file additional litigation where communities are harmed by the Trump administration's illegal rulemaking."

Neither CEQ nor industry groups that intervened on the agency's behalf responded to requests for comment.

During oral argument in the case, a Justice Department attorney argued on behalf of CEQ that Wild Virginia and other groups filed their lawsuit in federal district court before the Trump rule had gone into effect. The groups lost their case before the lower bench and appealed to the 4th Circuit.

"I'm unaware of any NEPA challenge … where the 2020 rule caused the harm," said DOJ attorney Allen Brabender during the 4th Circuit argument.

Senior Judge Diana Gribbon Motz, a Clinton appointee, and Judge G. Steven Agee, a George W. Bush pick, also joined the court opinion."

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