

Lead NEPA Story: Amid backlash, USPS will consider buying more EVs

(Greenwire, 6/2/2022), Arianna Skibell, E&E News Reporter

The U.S. Postal Service yesterday announced it will reconsider the number of electric vehicles it plans to purchase as part of its multibillion-dollar effort to replace its aging delivery fleet.

The quasi-independent agency stopped short of making a firm commitment but said its plan to consolidate facilities and make other operational changes merits a second look. The USPS said it will conduct a supplemental environmental impact analysis, a step environmental groups and Biden administration officials have long called for.

Postmaster General Louis DeJoy said he expects the updated analysis may lead the agency to purchase more zero-emission vehicles for its "next generation delivery vehicles" (NGDV). He did not say when the analysis would be concluded.

The agency did not say when the supplemental review will be completed, but the first batch of new vehicles is expected to hit the road in late 2023.

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Clean Water Act and National Historic Preservation Act: Army Corps deals blow to Georgia titanium mine, reverses Trump move

(Greenwire, 6/6/2022) Hannah Northey and Jael Holzman, E&E News Reporters

The Army Corps of Engineers has dealt a massive blow to a titanium mining project in Georgia close to the nation's largest blackwater swamp.

Assistant Secretary of the Army Michael Connor in a memo on Friday reversed decisions made under a now-defunct, Trump-era Clean Water Act rule that excluded 556 acres of wetlands from federal protection and paved the way for the proposed mine near Okefenokee National Wildlife Refuge in Georgia to move forward.

Those wetlands would intersect with a titanium mine proposed by Twin Pines Minerals LLC, an Alabama-based company. Twin Pines wants to extract titanium in the swamp for a wide array of markets, from consumer paint pigments to

military equipment and medical technologies. Titanium is a mineral critical to national security, according to the U.S. Geological Survey.

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But environmentalists and Indigenous activists have argued mining titanium near the Okefenokee refuge could have serious environmental drawbacks, saying the project would irreparably harm swampland crucial to the wildlife refuge's freshwater ecosystem.

The mine also became a nexus for conflict over the future of federal regulation governing the "waters of the U.S.," or WOTUS.

After President Joe Biden nixed the Trump WOTUS rule last year, legal experts said that Twin Pines' project would potentially be vulnerable to lawsuits or federal enforcement without a new dredge-or-fill permit based on a more protective pre-2015 definition of WOTUS that the Biden administration has reverted to.

Sen. Jon Ossoff (D-Ga.) joined in the efforts to stop the mine shortly after coming to the Senate in 2021. Earlier this year, Ossoff asked the Army Corps to restore the water protections at the project site that were removed under Trump.

Ossoff this morning took partial credit for the Army Corps' actions, saying he "always knew and loved the Okefenokee" as a child growing up in Georgia, and declaring he "succeeded" at making sure "the protections of the wildlife refuge, wilderness and surrounding wetlands are restored."

Christian Hunt, southeastern representative for conservation group Defenders of Wildlife, said the Army Corps' action does not kill the mine, as Twin Pines can proceed through a federal permitting process if it so chooses.

Yet Hunt saw the agency's decision on the mine as a step in the right direction when it comes to water quality protection and tribal engagement under the Biden administration.

"This was very low-hanging fruit," Hunt said. "The Okefenokee is really one of the world's last freshwater ecosystems that hasn't been damaged yet."

A representative for Twin Pines Minerals did not respond to requests for comment. In a statement to the Associated Press, Twin Pines President Steve Ingle said the company still intends to "move forward" with its mine "and fulfill all requirements."

RaeLynn Butler, manager of the Muscogee Creek Nation's Department of Historic and Cultural Preservation, said local corps officials had initially told the tribe they would be consulted as the Twin Pines mining project moved forward. Those plans were derailed when the definition of WOTUS shifted under the Trump administration and federal protections — along with the need to consult tribes — were pulled, she said.

Butler applauded Ossoff for drawing attention to the tribe's request for consultation, and said the Muscogee are pushing the corps to conduct a deeper environmental review of the proposed mine. The tribe is also working with the Fish and Wildlife Service to designate the swamp as a traditional cultural property under the National Historic Preservation Act.

"We're really glad to see this decision reversed and in line with respecting tribal sovereignty and understanding how critical it is to have tribal input on these types of decisions that impact not just natural and cultural resources, but our significant water resources for everybody in the region," said Butler.

'Uphill climb'

In the memo, Connor concluded the corps erred when issuing the so-called jurisdictional determinations because the agency declined to consult with the Muscogee Creek Nation despite the tribe's request.

These kind of corps determinations, good for five years, pave the way for mining companies, developers and property owners to obtain permits to fill or dredge streams, tributaries, lakes and wetlands, ditches, swales, and stormwater ponds. Wetlands and streams that are not given federal protections can be damaged and destroyed forever, along with their abilities to sequester carbon and protect downstream water quality.

The Muscogee tribe had asked to consult with the Army Corps' Savannah District in a January 4, 2021, memo, Connor said, but the agency at the time was following a policy that precluded tribal consultations on draft determinations.

Last April, the corps scrapped that controversial policy and vowed to discuss the fate of wetlands

and waterways with tribes at the Rosemont mine in Arizona and around the country.

Connor likewise said the corps failed to consult the Tohono O’odham Nation, Pascua Yaqui Tribe and Hopi Tribe when granting developers of the controversial Rosemont copper mine a similar determination last year that excluded all ephemeral waters present on the site using the Trump-era WOTUS definition.

“Given the specific circumstances associated with these [jurisdictional determinations], it is my policy decision that the Corps should have honored these government-to-government consultation requests,” he wrote.

Unlike the Twin Pines decision, it’s unclear how consequential the Army Corps’ action will be for the Rosemont mine, as Hudbay Minerals Inc. voluntarily gave back a previous water permit issued under the Trump rule.

The corps’ decision on Friday aligns with a memo the agency unveiled in January, stating the agency would no longer rely on decisions made under the Trump rule about which waters are federally protected when making new permit determinations.

Some say the more protective, pre-2015 WOTUS definition that the Biden administration has imposed since last year may not allow the mines to move forward even if developers do apply for new corps determinations. Then again, a fight over WOTUS is also playing out in the Supreme Court, where industry and red states are pushing the nation’s highest bench to narrow the scope of the Clean Water Act.

"Moving forward under the more protective pre-2015 standard for both of these projects is going to be an uphill climb," said Lowry Crook, a former corps official under the Obama administration.

Crook said he’s not aware of other projects that would see similar reversals. Connor in the memo on Friday clarified that the document only applied to the Rosemont and Twin Pines projects.

“These circumstances are unique to the Rosemont and Twin Pines parcels [approved jurisdictional determinations],” Connor wrote. “Accordingly, the direction in this memorandum

is limited to these [determinations] and is not intended to establish or rescind any separate, nationwide policy guidance.”

Boosting tribal consultation

The corps’ decision is the latest move by the Biden administration to ensure tribal concerns are front and center at the Army Corps and beyond.

On Friday, the corps quietly published in the *Federal Register* a new effort to “modernize and advance” the Civil Works program to better meet the needs of tribal nations and other disadvantaged and underserved communities.

One area the corps plans to address when updating its tribal consultation requirements: WOTUS decisions.

“Some Tribes have questioned previous issuances of approved jurisdictional determinations, which are final agency actions under the Administrative Procedure Act, without pre-decisional government-to-government consultation,” the agency wrote.

Tribes, on one hand, can be directly impacted by jurisdictional decisions, the corps wrote. They may also have Indigenous Traditional Ecological Knowledge (ITEK), which may assist in making such decisions but is unknown to the corps and may only be provided in consultation with tribes.

“The Biden-Harris Administration recently issued a memorandum providing that ITEK can and should inform Federal Government decision making where appropriate,” the agency wrote. “The Army solicits input on conducting Tribal consultations on approved jurisdictional determinations as a policy matter.”

The effort builds on an executive order President Joe Biden signed that year that recognized tribal sovereignty and self-governance and directed federal agencies to establish “regular, meaningful and robust consultation” with tribes.

For the first time ever, tribal members are overseeing and updating the corps’ environmental justice plan. Connor, a policy expert, former Capitol Hill staffer and Interior official, is a member of the Taos Pueblo and the

first tribal member to be tapped to oversee the corps.

The increased focus on tribal consultation has also led to direct policy changes. Last year, for example, the Biden administration ditched an earlier corps policy that barred early consultation with Native American tribes over the fate of wetlands and streams under the Clean Water Act.

And the push goes beyond the corps. Last week, EPA announced a new proposed rule that would give states, tribes and territories more latitude when deciding the timelines and substance of reviews of applications for Clean Water Act permits to build mines, pipelines and other projects.

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Clean Air Act: EPA to address rampant delays in toxic air pollutant reviews

(Greenwire, 6/8/2022) Sean Reilly, E&E News reporter

In the wake of a scathing audit, acting EPA air chief Joe Goffman is pledging to come up with a strategy for ending the agency's chronic inability to meet Clean Air Act deadlines for updating hazardous air pollutant standards for an array of industries.

But executing that strategy will hinge on money, Goffman again acknowledged in a newly released memo.

For starters, the Office of Air and Radiation will conduct a "high-level analysis" to determine the employees and funding needed to complete overdue reviews and meet future deadlines for revisiting the emission standards for various industries, Goffman told EPA's inspector general.

But that analysis won't be completed until early next year, Goffman indicated, and a final strategy for carrying out the reviews will come only in 2024. While EPA plans to begin implementation soon after, that step is "contingent on resource funding received" through the congressional appropriations process, he added.

"We plan to seek the necessary resources to implement the strategy in a future budget formulation opportunity (i.e., [fiscal] 2024 and out years)," Goffman wrote.

Goffman's comments, dated May 27, were posted on the inspector general's website yesterday. They came in response to the March

audit, which implicitly called the Biden administration's commitment to environmental justice into question by singling out EPA's continued failure to meet the statutory deadlines for completing the reviews of standards for dozens of industrial sources of pollutants linked to cancer and other serious health problems.

Because people of color and low-income populations are more likely to live near such sources, the delays "may disproportionately impact communities with environmental justice concerns," the audit said. Inspector General Sean O'Donnell's office also urged the air office to conduct a workforce analysis to determine the staffing needed to complete the reviews and come up with the strategy for getting them done. After deeming EPA's initial response to the audit findings insufficient, O'Donnell now considers the recommendations to be resolved, according to a reply to Goffman also released yesterday.

After setting the hazardous air pollutant standards for a specific industrial source, EPA is supposed to follow up with a review within eight years that looks both at any "residual risk" to public health and whether improved pollution control technology makes additional emission cuts possible. In practice, EPA has routinely flouted those deadlines, often acting only after environmental groups sued to force action. As E&E News has previously reported, the budget for the air office branch with lead responsibility

for carrying out the reviews last year was almost one-quarter below the level of a decade earlier.

In an agency with more than 14,000 employees, the branch's headcount has also consistently totaled fewer than 100, according to figures obtained under the Freedom of Information Act. The odds of Congress providing significantly more money are low; despite Democratic control of both the House and Senate, lawmakers largely rebuffed the Biden administration's bid for a hefty budget increase for EPA in the current fiscal year.

Even before the audit's release, however, Goffman wrote that EPA had committed to working on reviews that cover at least 25 source categories by the fall of 2023, including development of "proposed and final actions." In a proposed settlement to a lawsuit released this week, the agency also agreed to belatedly undertake reviews of the standards for plants that make a variety of products used in plastics and rubber manufacturing.

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NEPA: Bureau of Land Management slows solar permitting near Death Valley National Park

(Greenwire, 6/3/2022) Scott Streater, E&E News reporter

The Bureau of Land Management is siding with local leaders and residents in Nevada who have raised concerns about three proposed commercial-scale solar projects near Death Valley National Park.

BLM has notified the companies developing the Beatty Energy Center Project, Bonnie Clare Solar Project and Sawtooth Energy Center Project — all proposed to be built in Nye County, Nevada — that the projects have been given a "low priority" permitting status due, in large part, to their proposed location near the national park.

A low-priority status is not a final decision by BLM rejecting the proposed solar projects' right-of-way applications. But it is a strong indication to proponents early in the permitting and review process that the bureau has identified problem areas and it "may not be feasible to authorize" the project, according to nearly identical form letters BLM sent last month to the three companies.

The Biden administration has made it a top priority to permit 25,000 megawatts of commercial-scale renewable energy on federal lands by 2025. Collectively, the three proposed projects, if built, would have the capacity to

produce a total of 3,300 MW of electricity — enough to power roughly 1 million homes.

The projects are also proposed to cover nearly 25,000 acres of BLM managed lands in Nye County, a vast desert region west of Las Vegas that's larger in size than Delaware and Connecticut combined.

Solar power developers have proposed at least 14 photovoltaic power projects that would cover 124,000 acres of federal lands.

If all 14 projects were built, they would have the capacity to produce more than 14,000 MW of electricity, enough to power at least 4.2 million homes.

The Interior Department and BLM have vowed to properly evaluate and site renewable energy projects on federal lands.

The Beatty Energy Center Project, Bonnie Clare Solar Project, and Sawtooth Energy Center Project are among six proposed projects near the unincorporated town of Beatty, at the doorstep of the popular Death Valley National Park that straddles Nevada and California.

The BLM letters to all three developers notes the project location "adjacent to Death Valley National Park," as well as the proximity near "lands designated by Congress, the President, or

the [Interior] Secretary for the protection of sensitive viewsheds, resources, and values."

Among those values BLM is prioritizing are "sensitive habitat areas" for the federally threatened Mojave Desert tortoise, the bureau wrote.

And, in the case of the Bonnie Clare and the Sawtooth projects, both proposals are "located within 5 miles" of the Air Force's Nevada Test and Training Range.

All three BLM letters request that the developers schedule a meeting with the bureau to discuss next steps in the process.

BLM representatives could not be reached for comment on this story before publication.

But Kevin Emmerich, the co-founder of Nevada-based Basin and Range Watch, thanked BLM "for recognizing the concerns many people raised over these poorly sited solar proposals."

Emmerich added, "The BLM clearly sees that the environmental and economic impacts from these three projects outweigh the benefits."

It was also welcome news to Erika Gerling, who chairs the Beatty Town Advisory Board.

Gerling said BLM told her in March that it would ask the developer of the Beatty Energy Center Project — Boulevard Associates LLC, a subsidiary of Juno Beach, Fla.-based NextEra Energy Resources LLC — to withdraw its project application, in large part due to the proposed location near Death Valley.

Gerling said in an email that the low priority designation for all three projects "is a victory for our small town," noting their concerns with the proposed locations near the national park.

"The rules worked to our advantage this time," she wrote, "but we remain vigilant and focused on what's happening around us."

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Clean Water Act: EPA proposes reversing contentious Trump water permit policy

(Greenwire, 6/2/2022) Hannah Northey and Pamela King, E&E News reporters

EPA proposed a rule today that would reshape critical state and tribal permit reviews under the Clean Water Act, reversing a Trump-era policy that roiled Capitol Hill, industry and environmental groups.

The proposed rule lays out a process under the law's Section 401 by which developers of pipelines, power lines, mines and other projects request federal permits to discharge into regulated waterways and wetlands.

For the first time, the EPA proposal allows states and tribes to take part in defining a "reasonable time" to conduct such reviews — an issue that's sparked political fights in the past — and restore flexibility on what states and tribes consider when reviewing applications, according to an EPA fact sheet.

EPA Administrator Michael Regan said the proposal would line up the review process with

the Clean Water Act while reinstating a "broader and more environmentally protective scope" of review under Section 401.

"For 50 years, the Clean Water Act has protected water resources that are essential to thriving communities, vibrant ecosystems, and sustainable economic growth," Regan said in a statement. "EPA's proposed rule builds on this foundation by empowering states, territories, and Tribes to use Congressionally granted authority to protect precious water resources while supporting much-needed infrastructure projects that create jobs and bolster our economy."

Environmental groups and Democrats applauded the proposal, which is now open for 60 days of public comment.

"The Clean Water Act quite clearly gives states, territories, and Tribes the ability to protect their water quality when projects are permitted or

licensed,” Senate Environment and Public Works Chair Tom Carper (D-Del.) said.

New Mexico Gov. Michelle Lujan Grisham (D) also welcomed the proposed rule, saying it would let states, territories and tribes protect their water resources “as they deem appropriate.” She applauded EPA’s “collaborative approach to ensuring that our state and federal partnership on this important issue leads to improved water quality for ecosystems, cultural uses and continued economic growth.”

Karen Harbert, president and CEO of the American Gas Association, said the group was concerned that the Biden proposal would veer too far from what Congress intended when it passed the Clean Water Act and would increase costs for energy infrastructure.

“It should not take longer to get the permits and permissions for a pipeline than it does to build one,” Harbert said in a statement. “A few states have misused their authority under section 401 of the Clean Water Act in an attempt to block projects they do not like for unrelated reasons. They have concocted objections not related to water quality and have taken longer than one year for their review.”

'Restoring some of the discretion'

The proposal appears to broaden the scope of what states and tribes can consider when reviewing permit applications and eases strict deadlines that would have been imposed under the Trump administration's rule.

Under the Biden administration proposal, for example, developers would be able to request a meeting with regulators a month before requesting a permit, a move that could prompt early coordination. The proposed rule also lays out what applicants would need to show to request a permit.

And the proposal allows states and tribes to take part in determining what constitutes a “reasonable period of time” to review the request for certification, a clock that starts ticking when states or tribes receive a developer's permit application.

Under Section 401 of the Clean Water Act, states and tribes have one year to issue their

certifications before they are considered to have waived their authority, but that deadline is sometimes surpassed.

In comparison, the Trump-era regulation attempted to hold states and tribes to the one-year deadline for reviews.

The EPA proposal also clarifies that when states, tribes or territories receive a request for certification, they can look at “whether the activity as a whole will comply with water quality requirements, which include water quality-related state or Tribal laws.”

EPA said such an approach would allow “a certifying authority to holistically evaluate the water quality impacts of a federally licensed or permitted project.”

“Certifying authorities may evaluate impacts from any aspect of the project activity with the potential to affect water quality,” EPA wrote. “This approach reinstates the broader and more environmentally protective scope of review that the Supreme Court affirmed in 1994.

Ben Cowan, a Houston-based environmental attorney with Locke Lord LLP who works with large pipeline and energy projects, said that while the 60-day default period is significant, it appears certifying authorities will be able to negotiate extensions and he expects this EPA to be flexible.

“The Biden EPA is restoring some of the discretion to the certifying authorities that the Trump rule had limited through imposition of a one-year time frame and by limiting the scope of their review,” he said. “It provides more definition to the process, which could be helpful, but it’s giving the certifying authorities the ability to review projects more broadly.”

Legal scrutiny

Debate over Section 401 of the Clean Water Act made its way to the Supreme Court earlier this year after Republican-led states asked the justices to reverse a federal judge’s ruling that had blocked the Trump rule while the Biden administration worked to replace it.

In a short order issued through the Supreme Court’s emergency docket, five members of the conservative wing agreed to revive the Trump

rule, which dismantled about 50 years of precedent on how states, tribes and the federal government had approached water quality certifications. They did not explain their reasoning.

Four justices made their frustrations known, with Chief Justice John Roberts joining Justice Elena Kagan's dissent decrying the order as an abuse of the court's emergency — or “shadow” — docket.

The underlying question of the legality of the Trump rule now sits with the 9th U.S. Circuit Court of Appeals, which is considering whether Senior Judge William Alsup of the U.S. District Court for the Northern District of California erred last year when he found that the regulation violated decades of Supreme Court precedent.

Alsup, a Clinton appointee, cited the court's 1994 ruling in *Public Utility District No. 1 of Jefferson County v. Washington Department of Ecology*, which said states could require federally approved hydropower projects to preserve minimum stream flow, even though that issue is not directly addressed in the Clean Water Act.

EPA referenced that ruling in its fact sheet today.

“This approach reinstates the broader and more environmentally protective scope of review that the Supreme Court affirmed in 1994,” the agency wrote.

The question of the timing of state and tribal water certifications has also been the subject of legal scrutiny.

In one 2019 case, for instance, the U.S. Court of Appeals for the District of Columbia Circuit faulted California and Oregon for engaging in a scheme to reset the clock on approvals for dam relicensing, rather than handing the decision over to the Federal Energy Regulatory Commission.

The Supreme Court later declined to revisit the D.C. Circuit's ruling.

Editor's Note: The proposed *Clean Water Act Section 401 Water Quality Certification Improvement Rule* was published at *Federal Register* 87:35318-35381 (June 9, 2022).

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“As I noted when we placed our initial NGDV delivery order, the Postal Service would continue to look for opportunities to further increase the electrification of our fleet in a responsible manner, as we continue to refine our operating strategy and implement the Delivering for America plan,” DeJoy said in a statement. “A modernized network of delivery facilities provides us with such an opportunity.”

The announcement comes as USPS faces numerous lawsuits charging the agency's environmental analysis violated the National Environmental Policy Act and relied on faulty data to draw its conclusions.

As the rest of the Biden administration moved to electrify the federal fleet, the Postal Service last year signed a 10-year, \$11.3 billion contract to replace as many as 165,000 delivery trucks with 90 percent gas-powered vehicles.

Since announcing the contract with Wisconsin-based Oshkosh Defense LLC, USPS has faced a severe backlash from Democratic lawmakers, environmental and labor groups, and the White House.

Top Democratic lawmakers have called on USPS to throw out its environmental analysis, and earlier this year, EPA and the White House Council on Environmental Quality sent letters to the Postal Service urging it to reconsider its plan but stopped short of intervening.

In March, the Postal Service paid nearly \$3 billion for its first batch of 50,000 new delivery trucks to begin replacing its Grumman Long Life Vehicles, many of which are over 30 years old and lack modern safety and efficiency features, such as air conditioning.

While the Postal Service doubled its initial order of EVs from 5,000 to 10,000 following months of outside pressure, the agency had said its

overall percentage of EVs would remain the same.

Now, USPS said it will explore options for accelerating the production of its initial battery-electric vehicle purchase and “anticipates taking advantage of the flexibility built into the contract with Oshkosh Defense to increase the number of BEVs purchased in the initial delivery order.”

The agency said its plan to modernize its facilities and aggregate carrier operations may streamline the installation of charging infrastructure for EVs because it would reduce the number of facilities where chargers are needed.

“This available industrial infrastructure significantly reduces the risks associated with deployment of new electric vehicles to facilities with less robust infrastructure,” the agency said.

The Postal Service is key to achieving President Joe Biden’s goal of electrifying the federal fleet by 2035. Its 212,000 delivery vans account for a third of all federal vehicles, the largest civilian fleet in the world.

Transportation electrification is a cornerstone of Biden’s climate plan. The sector is the single-largest source of greenhouse gas emissions in the country.

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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.

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