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Lead NEPA Story: Supreme Court water ruling could transform NEPA, Endangered Species Act

(*Greenwire*, 6/15/2023), Pamela King, E&E News Reporter

In its blockbuster Clean Water Act ruling last month, the Supreme Court did more than ratchet back EPA oversight of the nation's wetlands — the justices may have also removed key pathways to endangered species protections and climate reviews of major federal projects.

Sackett v. EPA, a case about whether an Idaho couple illegally filled in a wetland while building their dream home, set forth a massive cutback of federal safeguards for wetlands without a clear surface connection to traditionally navigable waters like lakes and streams — going further to restrict the Clean Water Act's scope than even the Trump administration had proposed.

Removing the need for many projects to obtain permits under Section 404 of the statute, which governs dredge-and-fill discharges, would also erase important triggers for National Environmental Policy Act and Endangered Species Act reviews, said Robert Glicksman, a law professor at George Washington University.

"The programs are intertwined in ways that aren't immediately obvious," he said.

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Executive Order 12898 on Federal Actions to Address Environmental Justice: EPA eyes update to environmental justice guidelines

(*Greenwire*, 6/16/2023) Sean Reilly, E&E News Reporter

EPA is moving to update its guidelines for assessing the cumulative risks to communities posed by pollution from a variety of sources for the first time in more than a quarter-century.

In a draft posted online Friday morning for public comment, the agency said the proposed guidelines are intended to "describe considerations for evaluating when CRA [cumulative risk assessment) is both suitable and feasible, and steps to plan a CRA when those conditions are met."

If made final, the proposed update would replace 1997 guidance issued under then-President Bill Clinton.

By the agency's definition, cumulative risk assessment "is an analysis, characterization, and possible quantification of the combined risks to

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health or the environment from multiple agents or stressors." Lengthier and more detailed than the 1997 version, the proposed guidelines are designed for EPA risk managers. Among other features, they lay out an eight-step process for planning the assessments and factors to take into account. They also offer examples of uncertainties that may affect the results.

Under the Biden administration, the draft update is part of a larger project to overhaul EPA's methods for addressing communities' total exposure to pollution of all types.

In part because current permitting practices typically examine the potential impact of a polluting plant or enterprise in isolation from other sources, environmental justice advocates see a more comprehensive tack as essential to addressing environmental justice, or the disproportionately heavy burden of pollution on people of color and low-income communities.

As one rationale for changing the status quo, the newly issued draft guidelines cite a Biden executive order on "advancing racial equity and support for underserved communities through the federal government.'

But in an environmental regulatory sphere defined by laws like the Clean Air Act and the Clean Water Act, the task of better evaluating both the cumulative risks and cumulative impacts of across-the-board pollution is scientifically and logistically complex. EPA, for example, had initially planned to release the updated risk assessment guidelines by the end of 2021. "We want to take the time to get it right!" an EPA spokesperson said in an email last year in response to a question about the delay.

Another EPA representative referred questions Friday on the proposed update to Lawrence Martin, science coordinator for EPA's risk assessment forum. Because the update is still in draft form, Martin declined to comment Friday on how it differs from the 1997 version. Asked why the revision process has lasted longer than expected, "it just takes a while to resolve comments and issues that are raised by our reviewers," Martin said.

EPA has set an August 15 deadline for public feedback on the draft; there will be another review cycle before the final version is released, Martin said, with no deadline for completion. "It's not a fast process," he said.

Editor's Note: The *Draft Guidelines for Cumulative Risk Assessment Planning and Formulation* may be viewed at https://www.epa.gov/risk/guidelines-cumulative-risk-assessment-planning-and-problem-formulation.

Endangered Species Act: Biden administration to strengthen endangered species protections

***(Greenwire,* 6/21/2023) Michael Doyle, E&E News reporter**

The Biden administration rolled out a package Wednesday to fortify protections for plants and animals at risk of going extinct, restoring Endangered Species Act provisions that were curtailed during the Trump administration.

The long-awaited proposals from the Fish and Wildlife Service and NOAA Fisheries would prohibit the killing or injuring of threatened species, providing them the same level of protection as for species listed as endangered.

They also would guide critical habitat designations, shape how federal agencies conduct ESA consultations and rebuild a firewall separating ESA listings from economic considerations.

They also open up a can of worms, sure to draw fire from a diverse set of critics.

"The Endangered Species Act is the nation's foremost conservation law that prevents the extinction of species and supports their

recovery," Fish and Wildlife Service Director Martha Williams said in a statement. "These proposed revisions reaffirm our commitment to conserving America's wildlife and ensuring the Endangered Species Act works for both species and people."

NOAA Fisheries Assistant Administrator Janet Coit added that "these proposed regulatory updates will help ensure the Act continues to serve as an effective conservation tool in the face of continued challenges, including biodiversity loss and climate change."

The two agencies administer the landmark 1973 environmental law as it applies to different species. Almost exactly two years ago, the Biden administration announced in June 2021 that they would redo ESA regulations imposed in 2019 during the Trump administration.

It's a move, put in the starkest possible terms, that's hailed by many environmentalists, assailed by industry, and all but assured of ending up in court.

"These are promising steps toward restoring the purpose and power of the Endangered Species Act, and getting these protections back is why we challenged the harmful Trump rules for the past four years," said Earthjustice attorney Kristen Boyles.

Jonathan Wood, vice president of law and policy at the Property and Environment Research Center, a free-market-oriented policy think tank, said in an email that "with two-thirds of endangered species located on private lands, the most effective way to increase the recovery rate for listed species is to improve the incentives for private landowners to restore habitat and perform proactive recovery efforts" but that the proposal "does the opposite."

Some environmentalists also weren't pleased with the revisions, saying they don't go far enough in reversing the Trump administration changes. Stephanie Kurose, senior endangered species policy specialist with the Center for Biological Diversity, lamented that "this proposal fails to protect our nation's endangered plants and animals ... [and] keeps many of the disastrous Trump-era provisions in place."

The proposals will be open for a 60-day public comment period following their publication in the *Federal Register* tomorrow. In some cases, they would essentially erase Trump-era regulatory language that shaped how the ESA was implemented.

"I don't know that we'll ever end ESA controversy," Gary Frazer, a 39-year veteran of the Fish and Wildlife Service and current assistant director for ecological services, said in an interview. "It's a powerful law that deals with issues that affect many parts of our society. It's inherently challenging, but it's also something that the public, I think, really supports, the conservation of species."

And though some of the proposals are big and obvious in their meaning, the package also includes acutely technical tinkering, some enduring questions such as the meaning of "forseeable future," and some chunks of Trump-era language that is left untouched.

"Most of the 2019 regs are not proposed for revision," Frazer said. "Although they're open for public comment, we focus in these revisions on those elements that were particularly challenging, they were controversial or difficult to interpret and apply."

The law, for instance, requires that listing decisions be made "solely on the basis of the best scientific and commercial data available," and the Fish and Wildlife Service had subsequently added the explanation that this meant "without reference to possible economic or other impacts of such determination." The Trump rule abandoned the latter phrase.

This could have meant that cost-benefit analyses would end up presented to the public at the time an ESA listing was proposed. Although technically not part of the listing criteria, these dollars-and-cents calculations could potentially have provided ammunition for one side or another — most likely for those fearful of a listing's economic and red-tape consequences.

"We find that this change was not the most reasonable interpretation and created the problematic impression that the Services would begin to compile information regarding the economic impacts of classification determinations and that the Services might

actually take such information into account directly or indirectly when making classification determinations," the agencies explained.

The proposed rule adds back the "without reference to possible economic or other impacts of such determination" phrase.

A second proposal, affecting only the Fish and Wildlife Service, concerns the protections given to species listed as threatened, rather than endangered, under the ESA.

The ESA prohibits the "take" of species designated as endangered. This covers myriad actions including those that "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect" an animal or plant. The ban is effectively absolute for endangered species, while Section 4(d) of the law allows the agency to establish special regulations for threatened species.

In 1978, FWS used this authority to extend the prohibition of take to all threatened species. This is known as the "blanket 4(d) rule," and it essentially meant threatened and endangered species presumptively enjoyed the same protection. Instead of this all-encompassing approach, the Trump administration shifted to a case-by-case consideration of protection levels for threatened species.

"While areas of concern exist within these new regulations, restoring automatic protections for our nation's threatened species is a huge step in the right direction for the Endangered Species Act and biodiversity," said Jamie Rappaport Clark, president and CEO of Defenders of Wildlife.

For example, private property owners worried that they might be blocked from forest thinning if all taking of the threatened Louisiana pine snake were absolutely prohibited, so FWS wrote a rule that allows for some potential short-term take of snakes or habitat.

The proposal made public restores the blanket 4(d) rule, while still allowing the Fish and Wildlife Service to craft individual rules for species.

Frazer said that he expects that for many animal species, FWS will could continue doing species 4(d) rules "so we can tailor that protections to those things that really make a difference and provide some incentives for good conservation practices."

Under the ESA, critical habitat is considered habitat "essential for the conservation of the species." The proposal includes new wording that FWS says demonstrates a "clear and logical approach for identifying unoccupied critical habitat," which has been a source of persistent debate.

In response to a challenge by environmental groups, a federal judge ruled that the 2019 Trump-era ESA rules should be taken off the books while the Biden administration worked to replace them. Prompted by industry groups and GOP-led states, the 9th U.S. Circuit Court of Appeals later ruled that the 2019 Trump administration rules would remain in place during the new rulemaking process.

A separate set of Trump-era ESA rules imposed in 2020 have already been erased.

Editor's Note: The Proposed Rule, Endangered and Threatened Wildlife and Plants: Regulations Pertaining to Endangered and Threatened Wildlife and Plants was published at *Federal Register* 88:40742-40753 (June 22, 2023). The Proposed Rule, Endangered and Threatened Wildlife and Plants: Listing Endangered and Threatened Species and Designating Critical Habitat, was published at *Federal Register* 88:40764-40774 (June 22, 2023).

NEPA: Bureau of Land Management proposes renewable energy rule, expanded solar in 5 states

(*Greenwire*, 6/15/2023) Scott Streater, E&E News reporter

The Biden administration announced plans Thursday designed to increase renewable energy development on federal lands across the West.

The centerpiece of the effort is a proposed rule that would allow the Bureau of Land Management to streamline permitting and cut by as much as 80 percent the acreage rental and capacity fees for wind and solar power projects proposed in specific areas.

The rule, which proposes amending BLM renewable energy and right of way program regulations, would give the bureau the option to approve projects in these priority "designated leasing" areas without holding a competitive lease auction. The areas are those BLM has determined are suitable for commercial-scale projects.

The proposed rule would codify interim internal guidance BLM issued to field offices in May 2022.

The Energy Act of 2020 authorized the changes to rental rates and capacity fees — a calculation of a project's energy output capacity — if the Interior secretary determined that doing so "is necessary to promote the greatest use of wind and solar energy resources," according to the law.

Among other highlights, the proposed rule would authorize cuts in some fees if the project developer's use "American made parts and materials" in building the project. It also states that lowering rental rates and capacity fees for these projects "may also reduce electricity costs to ratepayers" down the line.

"By implementing these proposed changes, the BLM would promote solar and wind energy use on public lands and underpin an increase to the share of clean energy that is part of the United States' domestic power infrastructure," according to the proposed rule, which will be formally published in Friday's *Federal Register*, kicking off a 60-day public comment period running through August 15.

Also Thursday, BLM unveiled preliminary alternatives for an updated 2012 Western Solar Plan. The decade-old plan identified 17 solar energy zones where projects would undergo streamlined permitting in Arizona, California, Colorado, Nevada, New Mexico and Utah. The updated plan would add potentially hundreds of thousands of acres in five additional states: Idaho, Montana, Oregon, Washington and Wyoming.

BLM, which began updating the Western Solar Plan last December, is conducting a programmatic environmental impact statement, and plans to release a draft this summer. It has targeted completing the updated plan next year.

The three main alternatives — outlined broadly, with no specific sites identified — include designating new priority areas on federal lands within 10 miles of transmission lines, on "previously disturbed or degraded lands," or on lands that are both degraded and within 10 miles of existing transmission lines.

The overall goal of expanding the Western Solar Plan, and the rule that would cut costs and streamline permitting for projects proposed within them, is to promote commercial-scale solar development in areas evaluated by BLM and determined to have high solar potential with low resource conflicts.

"The Department of the Interior takes seriously our responsibility to manage the nation's public lands responsibly and with an eye toward the increasing impacts of the climate crisis," Interior Principal Deputy Assistant Secretary for Land and Minerals Management Laura Daniel-Davis said in a statement. "The power and potential of the clean energy future is an undeniable and critical part of that work."

Support amid local concern

The draft renewable energy rule is the latest in the Biden administration's efforts to meet a goal in the Energy Act to permit 25,000 megawatts of onshore renewable energy by 2025.

Since President Joe Biden's inauguration in January 2021, BLM has approved 35 renewable energy projects, including 10 solar, eight geothermal and 17 smaller power lines that connect projects to the power grid. In total, these projects cover 23,396 acres of BLM-managed lands and have a cumulative capacity to produce 8,160 MW of electricity — enough to power more than 2.6 million homes, according to the bureau.

In addition, BLM is currently processing 74 utility-scale onshore solar, wind and geothermal projects, as well as interconnected gen-tie lines, across the West. If built, these projects have the combined potential to add over 37,000 MW of renewable energy to the Western electric power grid, the Interior Department said.

"This proposed rule would allow the BLM to continue leading the way on renewable energy while furthering President Biden's commitment to building a clean energy economy, tackling the climate crisis, promoting American energy security, and creating jobs in communities across the country," BLM Director Tracy Stone-Manning said in a statement.

Much of the work BLM is advancing originated during the Obama administration.

The Western Solar Plan, for example, was a critical component of former President Barack Obama's climate action plan.

BLM plans to rename the solar energy zones in the updated Western Solar Plan as "priority areas."

Some conservation leaders have applauded the Biden administration's focus on renewable energy public lands.

"We're encouraged by these steps from the administration to ramp up renewable energy on public lands," said Justin Meuse, director of government relations at the Wilderness Society, calling them "strong and comprehensive steps toward making public lands part of the climate solution."

But residents in communities in Nevada and California have expressed concerns about the solar build-out and the expanding Western Solar Plan.

During an online public hearing involving the plan updates in February, Don Sneddon, a resident of Desert Center, California, called for BLM to establish "exclusion zones" that place buffers around small towns and sensitive wildlife habitat to prevent utility-scale solar projects from encroaching on them. It's not clear whether BLM's updated plan will do that.

"We are basically, to put it very simply, we are right in the middle of this attack of solar on our community," Sneddon said at the time. "Very simply said, the human element needs to be considered."

Editor's Note: The Western Solar Programmatic EIS page is https://eplanning.blm.gov/eplanning-ui/project/2022371/510. The preliminary alternatives matrix may be found at https://eplanning.blm.gov/public_projects/2022371/200538533/20080676/250086858/Preliminary%20Alternatives%20Matrix.pdf.

NEPA: E-bikes not a big threat to national parks, review says

(*Greenwire*, 6/20/2023) Michael Doyle, E&E News reporter

Electric bikes pose little threat to national parks under the National Park Service's current management policy, a study by the agency has concluded.

While some environmental activists have warned about e-bikes' increasing popularity, the 48-page environmental assessment by NPS determined that allowing their use would not cause "national-level" impacts on park service lands.

There is the potential for slightly greater impacts to wildlife within a given park unit, due to the potential for increased numbers of visitors using e-bikes on administrative roads and trails and traveling farther distances than they would otherwise travel on traditional bicycles," the analysts acknowledged.

The study added, though, that "these impacts ... would be mitigated by superintendents incorporating aspects of sustainable trail design features, conducting trail maintenance activities in their specific park unit, implementing trail or area closures or other restrictions."

The assessment's availability will be formally posted in the *Federal Register* Wednesday, kicking off a 30-day public comment period that, if the past is any kind of prologue, could still get pretty bumpy.

In 2019, during the Trump administration, the National Park Service directed park superintendents to allow e-bike use in the same areas where traditional bicycles were allowed, unless they determined that restrictions or closures of certain areas were warranted.

The policy was finalized in 2020, with Interior asserting an environmental assessment wasn't needed.

At the time, approximately 130 of the more than 400 park units in the National Park System allowed e-bikes on specific administrative roads or trails in those park units.

The Bureau of Land Management, Bureau of Reclamation, and Fish and Wildlife Service also announced proposed rules that would allow each agency to authorize the use of e-bikes, which resemble standard bicycles but are powered by an electric motor.

The proposals followed the August 2019 order Interior Secretary David Bernhardt signed directing agencies to develop policies for e-bike usage as part of a strategy to increase access to public lands.

Public Employees for Environmental Responsibility challenged the park service policy with a lawsuit filed in the U.S. District Court for the District of Columbia. A June 2021 NPS memorandum made clear that the Trump-era policy was rescinded and directed superintendents of units where e-bikes were allowed on administrative roads or trails to reconsider those decisions.

In May 2022, Judge Rudolph Contreras ruled that the park service needed to comply with NEPA and conduct an assessment.

PEER Executive Director Tim Whitehouse said at the time of the judge's ruling that "in essence, the Park Service chose to leap before it looked."

"We will thoroughly review it to see whether it meets the strong public demand for ensuring that e-bikes are not allowed in those National Park areas where they conflict with the fundamental goal of preserving the nation’s natural and cultural heritage," Peter Jenkins, senior counsel for PEER, said in an email today.

The now-completed assessment identified as the preferred alternative the policy that gives park superintendents discretionary authority to allow the use of e-bikes, on a case-by-case basis, on park roads, parking areas, administrative roads and trails that are otherwise open to traditional bicycle use.

Superintendents may only allow e-bikes where traditional bicycles are allowed because traditional bicycles would continue to be prohibited on the majority of trails within the National Park System. Consequently, e-bike use would be prohibited on most trails, as well.

"While there is a perception that e-bikes result in more impacts to trail surfaces than traditional bicycles, observed effects indicate that there is no significant difference in impacts to soils between e-bikes and traditional bicycles," the study notes.

With vegetation, too, the study concluded that "while an increase in users could exacerbate impacts" to vegetation, it's likely that, "increases in use from e-bikes would only be seen on a relatively small subset of trails that allow traditional bicycle use."

"Studies have found that users of trails who aren't familiar with e-bikes often indicate a preference not to share those trails with e-bikes," the assessment recounts. "However, most of these users did not realize that they were actually using the trail alongside e-bikes and upon gaining exposure to e-bikes, many trail users' apprehensions regarding them tend to diminish."

The analysts determined that e-bike use on administrative roads and trails could "result in slight increases in risks of accidents and injuries," with one study finding that e-bike users on roads rode faster than traditional bicycle users.

The available literature concludes that there is no significant difference in impacts to wildlife between e-bikes and traditional bicycles.

Educating e-bike-using visitors regarding "proper etiquette with regard to wildlife viewing and encounters" will also help alleviate adverse consequences, the report states.

Editor's Note: The Programmatic Environmental Assessment on *Use of Electric Bicycles within the National Park System* may be viewed at https://parkplanning.nps.gov/projectHome.cfm?projectId=117364.

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Lead NEPA Story (*continued from page 1)*

Both NEPA and the ESA require federal action to trigger a review, which in turn forces developers to consider their project's effect on the environment and vulnerable species. Oftentimes, a Section 404 permit forms this federal connection.

But without a Clean Water Act permit, that federal nexus — in some cases — evaporates.

In *Sackett*, the court unanimously ruled that Idaho landowners Chantell and Michael Sackett did not need a Clean Water Act permit to build on their land and axed a long-running legal test for determining federal jurisdiction over waters that have a scientific connection to navigable waters. But the court's liberal wing and conservative Justice Brett Kavanaugh disagreed with their five colleagues in the majority about how narrowly they should interpret the Clean Water Act's application to wetlands that are "adjacent" to covered waters.

While the *Sackett* ruling is still under review by EPA and the Army Corps of Engineers, the Supreme Court decision is expected to shift power over Section 404 activity from the federal to the state and local level.

At present, only three states — Florida, Michigan, and New Jersey — run their own Section 404 programs, which require immense resources. Other states have sought to take over their own programs recently, sparking concerns from environmental groups who worry that push will translate to reduced protections and oversight.

Projects like natural gas pipelines that require federal approvals or highways that pull federal funding might still trigger NEPA and ESA analyses, even under a reduced Section 404 permitting regime. But permitting specialists say projects like housing developments in the arid West could potentially escape NEPA and ESA — or face a more complicated review process — in light of *Sackett*.

"To the extent the federal connection to that project was a 404 permit," said Kevin Minoli, a partner at the law firm Alston & Bird and a former EPA lawyer, "if you no longer need a 404 permit, there's no longer a federal connection."

New hurdles for developers

The Supreme Court's *Sackett* ruling was celebrated by the oil and gas industry, homebuilders and other parties subject to the Clean Water Act's requirements as a release from stringent federal regulation.

But in some cases, a Section 404 permit may have eased the path for developers that still have to protect threatened and endangered species affected by their projects, said Larry Liebesman, senior adviser for the consulting firm Dawson & Associates and a former Justice Department environment attorney.

"Cutting back in Clean Water Act jurisdiction does not eliminate risk to a private applicant for affecting endangered species habitat," he said.

Liebesman gave the example of a housing project in California that affects vernal pools — or wetlands that occur only during winter and spring and dry up during the summer and fall. Those water bodies would appear to fall outside of federal Clean Water Act jurisdiction in light of the *Sackett* ruling, potentially removing the requirement for a Section 404 permit and a trigger for an ESA review.

A developer in that situation cannot, however, simply ignore the potential risk to vulnerable species like fairy shrimp that might inhabit those vernal pools, said Liebesman. Citizens still have the power under the ESA to file a lawsuit against the project.

If that developer had secured a Clean Water Act jurisdictional determination from the Army Corps, said Liebesman, the permit would have considered potential harm to vulnerable species, serving as a "one-stop shop" of sorts for the applicant.

Decoupling water and ESA permitting "creates a lot more uncertainty" for developers, he said.

Shrinking the class of waters that fall under EPA and Army Corps jurisdiction — and by extension, cutting back on NEPA reviews — may also fuel calls for broader analysis of projects' environmental and climate impacts, independent of the Section 404 process, said Minoli.

That push could be amplified in the wake of Congress' debt ceiling legislation to soften NEPA's requirements and speed up development.

"There's nothing in NEPA that limits analysis to things that are in the Clean Water Act's jurisdiction," Minoli said.

Ripple effects

The Supreme Court's water ruling also has the potential to infiltrate other parts of the Clean Water Act — and leak into other corners of environmental law.

Permitting experts are still examining the impact of the *Sackett* decision for Section 402 of the Clean Water Act, which addresses broader discharges associated with construction and industrial activities, and Section 401 of the statute, which gives states and tribes a role in assessing whether federal projects meet local water quality standards.

"That's yet another process that's triggered by federal Clean Water Act jurisdiction," Liebesman said of Section 401 certifications.

The *Sackett* ruling also requires Congress to be exceedingly clear in its laws about the balance of state and federal power and the criminal repercussions of violations.

"There's almost going to be a presumption that we have to interpret the statute narrowly," said Glicksman of the court's posture in *Sackett*.

It's the latest example of the conservative-dominated court's skepticism of robust environmental laws, he said. Last year, the Republican-appointed justices limited EPA's ability to regulate carbon pollution from power plants and expressed similarly restrictive views about congressional delegations to federal agencies.

"To me," Glicksman said of the *Sackett* ruling, "it seemed like another way for the court to narrow the scope of federal regulatory power."

Reporters E.A. Crunden and Rocio Fabbro contributed.

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