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Lead NEPA Story: Industry wants 'more oomph' in planned NEPA overhaul

(*Greenwire*, 5/21/2018) Nick Sobczyk, E&E reporter

The Trump administration has sought a slate of quick regulatory reforms over the past year, tweaking environmental permitting requirements everywhere from EPA to the Federal Communications Commission.

But potentially the most consequential change will be a slower burn. The White House Council on Environmental Quality is seeking to update its National Environmental Policy Act regulations, a process experts expect could take over a year.

The CEQ standards serve as the framework for NEPA permitting across the federal government. They got a minor amendment in 1986 under President Reagan, but otherwise, they've been untouched since they were first finalized in 1978.

"Any time regulations are changed for the first time in more than 40 years — significantly changed — it's a big deal," said Fred Wagner, a partner with Venable LLP's Environmental Group who served as chief counsel for the Federal Highway Administration in the Obama administration.

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Clean Water Act: No offsets, no problem as Army Corps OKs wetland projects

(*Greenwire*, 5/29/2018) Ariel Wittenberg, E&E reporter

The Army Corps of Engineers is greenlighting development in thousands of acres of Alaskan wetlands without requiring companies to offset resource damage, according to an *E&E News* analysis of five years of Clean Water Act permits.

As the permitting agency for development in wetlands, the Army Corps is supposed to require "compensatory mitigation" — restoring or preserving wetlands and streams to offset damage done by projects.

That changed in 2015 after Senate Energy and Natural Resources Chairwoman Lisa Murkowski (R-Alaska) convinced officials in the Army Corps' Alaska District to relent on mitigation, helping mining and oil interests by lowering the cost of energy development. After the Murkowski meeting, the agency greenlighted more wetland projects without requiring mitigation.

Even when developers themselves proposed mitigation for their projects, the Army Corps often refused.

Inside This Issue…

Now, the Army Corps is eschewing offsets as prospects for major developments are on the rise in pristine ecosystems — including the Bristol Bay watershed and the Arctic National Wildlife Refuge (ANWR), which Congress recently opened to oil and gas drilling.

"To have the Alaska District in charge of permitting in ANWR, that's kind of a scary thought," said Gail Terzi, who led the Army Corps Seattle District's mitigation program before her retirement last year.

The policy shift at the Army Corps' Alaska District alarms officials at EPA and the Fish and Wildlife Service, but their power to intervene is limited.

Sheila Newman, deputy chief of the Alaska District's regulatory division, defended the district's permitting, saying that while decisions are made on a "case by case basis," the agency has been striving for "consistency in our decision making."

"That," she said, "has definitely been the focus since 2015."

Proposed projects as small as a single-family house or as large as an oil pipeline must obtain an Army Corps permit if they are going to damage federally regulated wetlands or waterways. The agency must first ensure a development's wetland impacts are as small as possible and then require damage be mitigated or offset through restoration or preservation of similar water resources.

In 2015, an Army Corps' study found roughly 50 percent of permits nationwide required compensatory mitigation, with rates steadily rising.

But in Alaska, the agency's wetland mitigation rate has decreased.

The Alaska District required mitigation for 26 percent of permit applications filed between 2015 and 2017, according to an *E&E News* review of 222 district decision documents. The records were obtained through a Freedom of Information Act request for all 298 standard permits for wetland projects posted for public notice during the past five years.

Since 2015, the Army Corps required 872 acres of wetlands to be restored or preserved while allowing 1,937 acres to be destroyed.

By contrast, from 2012 to 2014, the Alaska District required mitigation for 73 percent of applications, requiring 2,825 acres of mitigation for the loss of 1,571 acres of wetlands.

Bottom line: Nearly identical projects were treated differently depending on when permit applications were filed.

Consider two projects along the Dalton Highway, the 414-mile gravel road between Fairbanks and Deadhorse near the Arctic Ocean. Just 11 miles apart, both projects were located along the Sagavanirktok River, an important rearing and spawning habitat for numerous fish species.

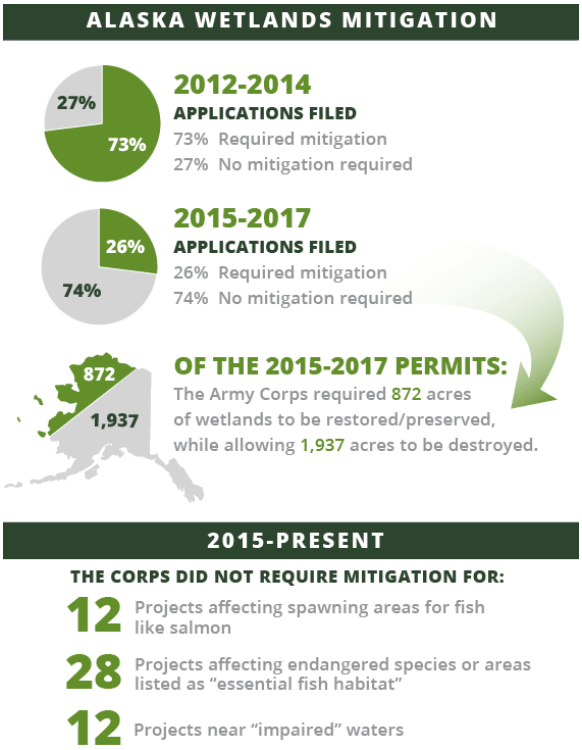
In 2013, the Alaska Department of Transportation and Public Facilities filed an application that would affect 115.7 acres of habitat and the Army Corps' Alaska District required 163 acres of mitigation. Two years later, the district required no mitigation for a 163-acre project.

Wetlands are protected under the Clean Water Act because of the wide range of ecological services they provide — as habitat for fish and wildlife, buffers for storm water, sponges for pollution that keep contaminants out of waterways, and traps for heat-capturing carbon dioxide.

To be sure, Alaska is a soggy state. Even 100 acres of swamps or marshes can seem like a small patch in a state with 174 million acres of wetlands covering 43 percent of the land area.

Terzi, the former Army Corps official, says skeptics need only look to the Lower 48 states to see what happens when wetlands are destroyed without offsets: persistent flooding, habitat fragmentation and decreased water quality.

"We know what happens because we have seen it happen everywhere else," said Terzi, who is now a consultant for a mitigation program in Alaska. "These are the most important places for polar bears, the most important places for caribou, and we are seeing a death by 1,000 cuts."



Source: Claudine Hellmuth/E&E News; Data: E&E News analysis of Army Corps of Engineers permits

'No science behind it'

David Olson, regulatory program manager at Army Corps' headquarters in Washington, D.C., said regulations give district offices a wide berth on mitigation decisions.

"The corps' position is that the Alaska District is doing things consistent with current regulations and policy," he said. "These things are determined on a case by case basis, depending on the kinds of resources you have there."

But Terzi, who reviewed some permits at *E&E News*' request, took issue with the Alaska District's approach.

"The justifications are cursory at best," she said. "There is no science behind it."

The Alaska District often justifies the destruction of wetlands without mitigation by arguing that environmental impacts of even large projects are minor when they occur in remote areas, surrounded by unspoiled wetlands.

For a permit allowing a 125-acre gravel mine built entirely in wetlands — mostly sedge-shrub meadow and moist tussock tundra — the Alaska District acknowledged the project was "relatively large and will impact a relatively large amount of wetlands." But it decided against mitigation because only 1 percent of the Ugnuravik River watershed had been developed.

EPA faulted similar reasoning in a letter to the district about a pipeline project proposed by Armstrong Energy Inc.

"Using the percentage of loss within the watershed as the sole basis of analysis is scientifically unsupportable; the impacts from wetland loss are dependent on type of wetland loss, location within the watershed, as well as spatial context in relation to other aquatic resources," the letter said.

The district has used similar reasoning to allow unmitigated wetland damages for 10 projects in national forests and wildlife refuges, *E&E News* found.

That includes a February permit to expand a hydroelectric dam in the Kodiak National Wildlife Refuge. The project would submerge 44 acres of wetlands, destroying them.

The district rejected Kodiak Electric Association Inc.'s mitigation proposal to help remove barriers to salmon migration in nearby streams, deciding offsets were unnecessary because "the watersheds where the project would occur are not degraded due to human activity."

Terzi called the reasoning "crazy."

"They completely downplay that this activity is on national refuge land, which should remain pristine," she said.

E&E News found that, since 2015, the Army Corps didn't require mitigation for 12 projects affecting spawning areas for anadromous fish like salmon and 28 projects affecting endangered species or areas listed as "essential fish habitat" under the nation's primary fisheries law, the Magnuson-Stevens Act.

The Alaska District also didn't require mitigation for 12 projects near "impaired waters" where Alaska must reduce pollution and improve water quality under the Clean Water Act.

In one case, the district approved a placer mine — the mining of a stream for minerals — that

would destroy 64.7 acres of wetlands next to Crooked Creek, listed as "impaired" from mining discharges.

While wetlands can filter contaminants from waterways, the Army Corps argued the project "will not impact Crooked Creek" because it would not physically divert the creek, as many placer mines do, and the wetlands were 600 feet away from the creek's banks.

E&E News' analysis also found 27 permits where mitigation was not required even though the applicants had proposed it.

That goes against federal regulations requiring mitigation if it's "practicable," or "available and capable of being done." EPA has argued in comments on multiple project permits that mitigation is automatically practicable if an applicant proposes it.

In the letter about Armstrong Energy's pipeline, which was being proposed for the second time, EPA noted that while the company had proposed mitigation in 2015 for nearly 300 acres of wetland damage, it was not proposing mitigation in the 2017 version of its application.

"The EPA is unaware of changes to regulations or policies regarding compensatory mitigation in the intervening time," EPA wrote.

Alaska is different

Federal regulations do allow flexibility in Alaska.

Unlike Washington, D.C., which was built in a swamp long before the Clean Water Act, Alaska is still developing basic infrastructure.

With so many pristine wetlands in the state, avoiding them is difficult, as is finding damaged wetlands to restore for mitigation.

That's why in 1994, the Army Corps, Fish and Wildlife Service, EPA and NOAA signed the Alaska Wetlands Initiative, which says mitigation requirements could be fulfilled just by minimizing impacts "where there is a high proportion of land in a watershed or region that is wetlands" or if there are few damaged wetlands to restore.

"Applying a less rigorous permit review for small projects with minor environmental impacts is consistent with ... regulations," it says.

Experts say that vision has been distorted since 2015, with the Army Corps permitting unmitigated environmental impacts for bigger and bigger projects.

E&E News found that the average size of unmitigated wetland losses more than doubled before and after 2015 — from 6 to 14 acres. Only two projects that damaged more than 25 acres were permitted without mitigation prior to 2015. After that, the Alaska District permitted seven that damaged more than 25 acres and six that destroyed more than 50 acres of wetlands.

Steve Brockmann, who works for FWS in Juneau, says the Army Corps is incorrect to say even larger projects' environmental impacts can be minor if they are in remote areas.

"The reality is like the song 'The First Cut Is the Deepest,'" he said, referencing a 1967 pop hit by Cat Stevens.

"When you are talking about putting a human development footprint in an otherwise ... pristine environment that allows access for industrial or public use, that brings a lot of secondary impacts," he said.

Noise from humans and machinery or leaking chemicals that travel downstream can change migratory patterns for birds and caribou.

"When you take a ... pristine watershed and introduce a human presence, however small, there are species that don't tolerate that well," he said.

'We are not a park'

So why did the Army Corps change course on mitigation? Alaska's mining and oil industries, and Sen. Murkowski, take credit.

In 2014, companies became concerned that the Obama administration would ramp up mitigation requirements to protect aquatic resources and lobbied their congressional delegation.

"We are not a park," says Bill Jeffress, with SRK Consulting Inc., who was involved in the effort. "We are trying to have jobs and be self-sustaining."

The mining industry had multiple conference calls with Murkowski's staffers, arguing the district wasn't following the 1994 initiative at all.

Murkowski says she spoke with Col. Christopher Lestochi, the Alaska District's commander at the time, in the spring of 2014.

"We were pretty aggressive in saying you need to work with us to make sure there is a rationale, that it can be understood and that it can be anticipated," she told *E&E News* in April. "There is a lot of turnover at the corps, so sometimes you feel you have to educate people."

Alaska District project managers had been relying on a 2009 guidance letter to help determine when mitigation was required. Terzi, the former Seattle District corps mitigation manager, had spent three months in Alaska helping the district draft the document, which she said was largely in line with requirements for offsets in other regions.

After the Murkowski meeting, the Alaska District quietly rescinded the letter in the summer of 2014. In July, they released an "internal memo" on mitigation that significantly reduced the circumstances under which offsets for environmental damage should be required.

"It was like all the project managers had a copy of the 1994 initiative on their desks after she met with them," Jeffress said.

Newman, who came to work at the Alaska District from Ohio in September 2014, said she "couldn't speak to things that did or did not occur before my time here."

But, she said, she and Alaska regulatory chief David Hobbie "both are very interested in consistency in rulemaking, and we are always looking to improve it."

Hobbie worked as a project manager in Alaska in the 1990s, returning in early 2015 after stints in the Army Corps' Mobile, Ala., and Jacksonville, Fla., districts.

He spoke the developers' language, said Victor Ross, a former Alaska District employee who now consults at Michael Baker International LLC.

"It was clear he had a different philosophy from his predecessors, he already knew the 1994 initiative when he came on," Ross said.

That winter, Hobbie invited oil, gas and mining groups to district headquarters to discuss mitigation.

When participants said they were paying too much for mitigation, Hobbie told them to stop proposing offsets in their permit applications, multiple people at the meeting recalled.

"He said the corps is a big freighter and it takes time to turn a big ship, so if we walk in offering a check, they are going to take it," Jeffress said. "He told us we shouldn't propose mitigation if we didn't want to do it."

"Everyone involved wanted to find a solution," recalled Joshua Kindred, environmental counsel at the Alaska Oil and Gas Association.

Murkowski continued to press for less mitigation, holding an Energy and Natural Resources Committee hearing in Wasilla in August 2015. There, she said her constituents had been likening mitigation to "extortion."

In testimony, Hobbie said the Army Corps had required mitigation for 12 of the 75 standard permits and 17 of the 431 general permits approved for smaller projects that year.

"I believe this number reflects the corps' ability to work closely with the applicant and partner agencies to avoid and minimize impacts so that compensatory mitigation is not always a requirement for the authorization of a project," he said.

In testimony, Deantha Crockett, executive director of the Alaska Miners Association, thanked the Army Corps for its progress on mitigation.

"One thing that can be said at this time is 'kudos' to the agency," she said.

Two months later, Hobbie emailed his staff a document called the "2015 Alaska Mitigation Thought Process."

The document, labeled "for INTERNAL review only," describes six instances where mitigation "may be" required in Alaska. Those include when fish-bearing waters or wetlands within 500

feet of them are destroyed, or cases where the impacted waterways are "impaired" under the Clean Water Act. Mitigation could also be required when projects occur in "rare, difficult to replace wetlands," areas with critical habitat for endangered species, or intertidal wetlands associated with "special aquatic sites."

It emphasizes requiring mitigation in watersheds only where more than 5 percent of land is covered in "impervious surfaces" like roads or driveways.

E&E News' analysis found multiple permits where the Army Corps didn't require offsets for wetland impacts that fall into those categories.

"I could blow holes in any of these and show where they haven't followed them," Terzi said.

Hobbie's document also specifically states that Alaska District project managers do not have to require mitigation for wetland impacts even if applicants propose it.

"The determination to require mitigation is ours alone," it says.

Asked about current internal guidance this fall, the Alaska District initially denied that it had replaced the rescinded 2009 guidance letter until after *E&E News* obtained a copy of the "Thought Process" through the Freedom of Information Act.

Newman now says the document is meant to guide project managers through their decision making but does not require compensatory mitigation.

"The 'Thought Process' is saying, 'Here are examples of times when you may consider compensatory mitigation,' which is absolutely different than saying to require compensatory mitigation at these times," she said. "We are not telling our staff what the outcome is, but we are looking for consistency in making the determination. That's different than saying, 'I want you to require this every single time.'"

The "Thought Process" also refers project managers to a 1992 memo on mitigation in Alaska.

That memo concludes that "there are areas, including many locations in Alaska, where it may not be practicable to restore or create wetlands; in such cases compensatory mitigation is not required."

But the memo was written right after the George H.W. Bush administration had proposed exempting Alaska from mitigation requirements and says it is supposed to serve in the "interim" until an exclusion is finalized — which never happened.

The Clinton administration yanked the proposal in favor of the 1994 Wetlands Initiative, allowing limited flexibility in mitigation decisions for small projects with minor impacts.

Newman argues the 1992 memo remains relevant even though the proposed exemption was dropped 34 years ago because it is "consistent" with the 1994 initiative.

She argues the initiative shows mitigation regulations have "inherent flexibility" in Alaska, where, she said, minimizing the footprint of a project, however large, complies with regulations.

"The point is still applicable that there are cases in Alaska where mitigation is not practicable, and that's what our 'Thought Process' says," she said.

Alaska District's policy shift has left FWS and EPA officials scratching their heads.

Employees for both agencies say they have asked the district to share internal mitigation policies, only to be told such documents don't exist or are for corps' eyes only.

FWS's Brockmann said he had heard a rumor that the district was relying on the 1992 interim memo.

"That's really troubling, and I don't think it squares with [current] regulations," he said. "When the regulations came out, that memo should have been obsolete."

By contrast, industry has remained in the loop.

Permit applications for major pipelines not yet approved have argued that mitigation should only be required for wetlands destroyed in watersheds where more than 5 percent have already been destroyed.

The Alaska Stand Alone pipeline would permanently destroy 7,573 acres of wetlands,

but the Alaska Gas Development Corp. is proposing offsetting 1 percent of the damage by mitigating 106.97 acres.

Company spokesman Jesse Carlstrom said the proposal was developed "following guidance from the U.S. Army Corps of Engineers" and "is in accordance with internal guidance from USACE, utilizing a large body of scientific literature."

"They won't listen to us"

While the Army Corps of Engineers issues or denies Clean Water Act permits for projects in wetlands, three federal agencies are encouraged by 1992 memoranda to comment on permit applications and decisions.

The three — EPA, the Fish and Wildlife Service, and NOAA — are supposed to advise the Army Corps on whether a proposed project complies with the National Environmental Policy Act and Clean Water Act Section 404(b) guidelines. The corps is supposed to fully consider their comments.

FWS and EPA officials have often expressed concern about the Alaska District of the Army Corps' move away from requiring compensatory mitigation for projects since 2015.

But Bob Henszey, FWS's branch chief for conservation planning assistance in Alaska, said he hasn't been as aggressive about commenting on a lack of mitigation lately.

"I kind of backed off that because it doesn't seem very fruitful," he said. "There will be something we feel very strongly on that is very significant, high-value wetland habitat, and they won't listen to us."

E&E News reviewed 111 permit applications filed since 2015 and found the agencies argued in favor of more mitigation on 26 projects. The Army Corps required mitigation for 15 of those.

In some cases when the Alaska District does require mitigation in response to the agencies' comments, officials say, the offsets don't compensate for the entire loss.

For example, the Army Corps required Hilcorp Alaska LLC to remove gravel from 0.64 acre worth of old tractor trailer trails to compensate for a 19.5-acre mine in wetlands near the Beaufort Sea. The offset was required only after FWS asked the corps to "try to find an opportunity to mitigate."

In other cases, the Army Corps' Alaska District required mitigation but rebuffed concerns that the projects' impact on wetlands could be reduced.

For example, the Army Corps required the Tanana Chiefs Conference to preserve 5.2 acres of wetlands to compensate for 2.86 acres of damage caused by a parking lot at the Chief Andrew Isaac Health Center in Fairbanks.

But the agency opted not to heed EPA's advice that wetland damage could be significantly reduced if the lot was replaced with a "multi-level parking garage."

The Alaska District said the garage would be unsightly and inconvenient for patients.

A garage, they wrote, "would cause an unacceptable visual and aesthetic impact."

David Olson, regulatory program manager at Army Corps headquarters in Washington, said he's not concerned if agencies don't agree with the Alaska District's decisions.

"They are certainly entitled to their view of what requires compensatory mitigation and what doesn't, but it is the corps' decision," he said. "FWS and EPA can submit comments and the district gives them full and careful consideration, but the decision ultimately lies with the district."

The Clean Water Act allows EPA to request certain permits receive a higher-level review if they would affect particularly important aquatic resources.

Most recently, EPA Region 10 sent a pair of letters requesting such reviews of an Armstrong Energy Inc. permit application for a pipeline that would destroy 271 acres of wetlands on the North Slope.

Armstrong's permit application asserts mitigation isn't necessary because the region has plenty of wetlands, which the EPA letter called "scientifically unsupportable."

The EPA letter takes the Army Corps to task for its handling of such project proposals.

"The EPA is also concerned that the Alaska District has recently issued several Public Notices in which no compensatory mitigation is proposed," the letter states. "These proposed projects are likely to have more than minimal impacts to the aquatic ecosystem, and as such, compensatory mitigation should be required."

But EPA conceded defeat.

"EPA has identified this issue previously to District staff," the letter concludes, before requesting another "discussion of this issue with the District, to address what appear to be emerging issues of policy."

NEPA: BLM advances another large-scale project in Nevada desert

(*Greenwire*, 5/31/2018) Scott Streater, E&E News reporter

The Bureau of Land Management is once again working to advance renewable energy development, announcing that it plans to conduct a detailed analysis of a proposed commercial-scale solar power project that would cover close to 10,000 acres near Las Vegas.

BLM will prepare an environmental impact statement (EIS) analyzing the Yellow Pine Solar Project, which is proposed to be built about 32 miles west of Las Vegas.

The notice of intent will be formally published in tomorrow's *Federal Register*, kicking off a 90-day public comment period running through Aug. 28 that's designed to help BLM determine the major issues it will need to evaluate.

The proposed Yellow Pine photovoltaic project would have the capacity to produce up to 250 megawatts of electricity, or enough to power about 75,000 homes and businesses. The project is proposed by Yellow Pine Solar LLC, a wholly owned indirect subsidiary of Juno Beach, Florida-based NextEra Energy Resources LLC.

The project would cover roughly 9,200 acres of BLM managed lands 10 miles southeast of Pahrump, Nevada.

BLM is proposing to withdraw the area from new mining claims for as long as two years while it conducts the EIS.

But the Yellow Pine project does come with some environmental concerns.

"At present, the BLM has identified the following preliminary issues: threatened and endangered species, cultural resources, visual resources, surface water, recreation, socioeconomic effects, and cumulative impacts," today's notice says.

BLM Las Vegas Field Office Manager Gayle Marrs-Smith said in a statement that the agency "is committed to supporting working landscapes across the nation for current and future generations and we invite the public to provide input on this proposal."

But these possible impacts and others concern Kevin Emmerich, co-founder of Basin and Range Watch in Nevada, which has been tracking large-scale renewable energy projects on federal lands since the early days of the Obama administration.

"The Yellow Pine Solar Project would compromise an unbroken stretch of very scenic Mojave Desert located in the Southern Pahrump Valley," Emmerich said in an email to *E&E News*. "The region contains important desert tortoise habitat and is recovering nicely from a recent drought."

He said the project site is part of an area that BLM two years ago determined is suitable habitat to relocate desert tortoises affected by development projects.

"Desert tortoises removed from other development sites are now being relocated to this region," he added. "It seems ironic that the BLM will now allow NextEra Energy to bulldoze the same region for solar panels that they selected to help recover the species."

The Yellow Pine EIS is the latest in a slate of moves by the Trump administration in recent

months to advance commercial-scale solar power on federal lands.

The Trump administration has focused on advancing mostly oil and natural gas drilling projects on federal lands, and to date, BLM has approved one solar project — First Solar's 210 MW White Wing Solar Project in Arizona. That project is on private land, and BLM's right of way grant was limited to allowing a 3.5-mile transmission line from the power plant to cross federal land.

But BLM earlier this month announced it has completed its review of a 500-MW solar power project in Southern California that was once left for dead after its Spain-based developer went bankrupt.

And last month, BLM announced it plans to establish a new leasing zone for large-scale solar power development in southern Nevada — the 1,800-acre Dry Lake East Designated Leasing Area, about 10 miles northeast of Las Vegas.

BLM is currently working on a resource management plan amendment and an environmental assessment studying the impacts of commercial-scale solar power development in the region.

The bureau in March also announced it will partner with California on a joint analysis of the 350-MW Crimson Solar Project.

NEPA and Migratory Bird Treaty Act: FWS cans migratory bird study as no longer necessary

(*Greenwire*, 5/23/2018) Michael Doyle, E&E reporter

The Fish and Wildlife Service is clipping the wings of a Migratory Bird Treaty Act study begun almost exactly three years ago.

Officials say the study, a programmatic environmental impact statement (EIS), was rendered irrelevant by a controversial Interior Department legal opinion that effectively limited the MBTA's reach. Critics aren't surprised but still lament the broader implications.

At the least, the study's cancellation announced today is an unceremonious end to an undertaking that had once incited public debate and had the prospect of putting more data on the table.

"Of course, we have concerns," Jason Rylander, senior staff attorney with Defenders of Wildlife, said today, "but they stem from the service's radical reinterpretation of the MBTA."

Announced on May 26, 2015, the EIS was intended to evaluate the potential environmental impacts of a proposal to authorize incidental take of migratory birds. At the time, Interior held open the possibility of charging companies and individuals for actions that incidentally, but not intentionally, caused migratory bird deaths.

In initiating the study of potential incidental take permits, FWS cited its "longstanding position that the MBTA applies to take that occurs incidental to, and which is not the purpose of, an otherwise lawful activity."

That position shifted last December, though, when Interior's Office of the Solicitor put out a new opinion that the MBTA covered only intentional take. With that opinion, oil and gas companies and others were off the hook for otherwise innocent actions that happened to result in bird deaths.

The opinion also meant FWS would no longer be considering individual permits or other approaches to regulating incidental take of migratory birds. Hence: no more study.

"Due to issuance of the December 22, 2017, DOI Solicitor Opinion, the actions contemplated are superseded, and we are no longer pursuing action on the [study]," FWS stated today.

Environmentalists understand the decision even if they don't embrace it.

"While we would prefer the study, and the permit rule, to go forward, it is true that it

doesn't make sense for FWS to continue to develop an EIS for a rule they have no intention of promulgating," Rylander said.

Hilary Tompkins, Interior's solicitor during the Obama administration, agreed that "theoretically, there is no need for a permit system under the current administration's position that they will not prosecute for incidental take" under the MBTA.

"Having said that," Tompkins added in an email today, "there still could be outside forces that press the issue, be it judges in federal circuits that have found incidental take under the MBTA or plaintiffs that will file suit against Interior for authorizing activities that result in incidental take."

FWS received 148 written comments during the 2015 public comment period. The opinions and recommendations spanned a wide range but underscored the potential muscle the now-discarded permit idea might have had.

"We believe that the energy sector is a good place to focus this effort as there are specific actions and examples that regularly occur during energy development and delivery that have implementable remedies," wrote Rebecca Humphries, chief conservation officer of the National Wild Turkey Federation.

Southern California Edison, the kind of company that would have been seeking permits, urged that the approach used for each industry sector be "appropriately tailored" to that industry.

"For example, wind energy generation and communication towers both operate in a different manner than electric facilities, and therefore an incidental take program for each sector should be considered separately to fully address how each industry's specific activities and facilities may interact with migratory birds," the electric utility firm stated in 2015.

NEPA: Judge clears way to compete Va. power line NPS opposes

(*Greenwire*, 5/25/2018) Scott Streater, E&E reporter

A federal judge has ruled that the Army Corps of Engineers adhered to federal law in evaluating a proposed 17-mile transmission line across the James River that critics, including the National Park Service, have warned will ruin the site of the first permanent English settlement at Jamestown.

The ruling issued by U.S. District Judge Royce Lamberth stems from two lawsuits, both filed last year — the first by the National Parks Conservation Association, the second by the National Trust for Historic Preservation and the Association for the Preservation of Virginia Antiquities.

Both lawsuits, filed in the U.S. District Court for the District of Columbia, challenged the legality of the Army Corps' permit allowing Dominion Virginia Power to string 17 transmission towers — some 295 feet high, or almost as tall as the Statue of Liberty — from its Surry Power Station across the 4.1-mile width of the James River to a switching station.

But Lamberth's ruling, made public late yesterday, says the Army Corps complied with the mandates outlined under the National Environmental Policy Act, Clean Water Act and National Historic Preservation Act when analyzing the project and its potential impacts to natural resources and the region's historic setting.

"Ultimately, the Corps did enough," Lamberth wrote in a section of the 44-page ruling dealing with impacts to the region's historical setting. "It engaged in a reasoned analysis, consulted experts, responded to criticisms of both its methodologies and conclusions, took a hard look at the potential impacts, and concluded that the impact of the Project would be 'moderate at most.'"

He added: "This may not satisfy the plaintiffs, but it is enough to satisfy the Court that the Corps had a rational basis for determining that the impacts would not be significant to the unique geographic area and historical places."

The ruling is a major victory for Dominion, which is already constructing the transmission tower foundations in the James River and has told the court it could begin construction of the towers as early as July 1.

Dominion has long argued the power line is badly needed to offset the loss of two coal-fired power units that were shut down because they can't meet federal air quality regulations. The company has warned that without the power line bringing in electricity from new sources, nearly 600,000 residents on the southeast Virginia peninsula stretching from Richmond to Norfolk will face rolling blackouts on as many as 80 days a year.

"We are pleased the judge denied the lawsuit seeking to halt construction of this project that is so critical to our customers who live and work on the Peninsula," Le-Ha Anderson, a Dominion spokeswoman, said in a statement.

Anderson added that the construction "is going well and on track for completion by the summer of 2019."

The NPCA lawsuit filed last July accused the Army Corps, among other things, of violating federal law by failing to take a "hard look" at the full impacts of the Surry-Skiffes Creek-Whealton Transmission Line Project.

The second lawsuit, filed a few weeks later by the National Trust for Historic Preservation and the Association for the Preservation of Virginia Antiquities, asked the court to throw out the Army Corps permit and require it to conduct a detailed environmental impact statement (EIS) that included a robust review of alternatives to the overhead power line crossing the river.

Lamberth wrote that an EIS was not required. He also ruled that the Army Corps did consider reasonable alternatives in its analysis, including burying the line under the river. The Army Corps rejected that option, he wrote, because it would take twice as long and cost three times as much to build.

"Additionally, the Corps concluded that once the underwater line was constructed it would be far more difficult to repair, leading to longer outages," Lamberth wrote. "Given those considerations, it was proper for the Corps to find the underwater alternatives not reasonable."

'Continue to fight'

NPCA, the National Trust for Historic Preservation and the Association for the Preservation of Virginia Antiquities said in statements they are reviewing the ruling and weighing options, which could include appealing Lamberth's decision.

Either way, the legal fight over the power line is not over.

NPCA this week sent the Army Corps and NOAA Fisheries a 60-day notice of intent to sue the agencies, claiming they violated the Endangered Species Act by failing to adequately evaluate the impacts of the power line on endangered Atlantic sturgeon.

Patrick Bloodgood, an Army Corps spokesman in Norfolk, Va., told *E&E News* that the agency cannot comment on Lamberth's ruling because of the "pending litigation" and the "potential for appeal." He referred questions to the Justice Department.

Wyn Hornbuckle, a DOJ spokesman, said in an email that the department is "reviewing the decision" and declined additional comment.

NPCA maintains that running the power line across the river would "deface" nearby historic Jamestown and surrounding national park sites like Colonial National Historical Park, Colonial Parkway and the Captain John Smith Chesapeake National Historic Trail — the first and only congressionally designated water trail.

Theresa Pierno, NPCA's president and CEO, said yesterday in a statement that Lamberth's ruling "was a major setback for historic Jamestown and the other national park sites in the region."

"The James River and its surrounding landscape protect our rich history and provide an opportunity for millions of visitors to learn about our country's founding stories," Pierno added. "Sadly, the court's decision today puts that history and the health of our public lands in jeopardy."

She said NPCA, which is represented by the public interest environmental law firm Meyer

Glitzenstein & Eubanks LLP, "will continue to fight to ensure this place and all it represents is protected."

So did Sharee Williamson, associate general counsel for the National Trust for Historic Preservation.

"This outcome is a real disappointment, and we are currently considering our next steps," Williamson said in a statement.

Advocacy groups were not the only ones to raise concerns about the power line project.

Former Interior Secretary Sally Jewell and the National Park Service expressed serious problems with the power line, warning that if built it will ruin the historic setting of the area where Captain John Smith and more than 100 colonists made their historic voyage to Jamestown in 1607.

Jewell sent a letter to the Army Corps in January 2017, in the final days of the Obama administration, noting "substantial concerns" the department had with the project. Jewell wrote that "no mitigation measure can effectively offset the impact to the landscape that the presence of the transmission line would cause," according to court records.

But the court had sided with the Army Corps once before, rejecting a motion filed by NPCA last fall asking the court to stop construction of the power line until all the legal challenges are resolved.

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"The regulations have served the community pretty well for a long time," he said, "but I think there's a general sense that updating them in light of recent statutory changes, in light of recent administrative initiatives, makes sense."

CEQ declined to comment for this story. But Ted Boling, associate director for NEPA at CEQ, said at a conference this month that changes to the regulations are just one in a range of tools CEQ is looking at to clean up what the Trump administration sees as inefficiencies in the NEPA process.

For an infrastructure project, the average time between the beginning of scoping and producing a draft environmental impact statement is two years and 10 months, Boling said at the conference, sponsored by the Environmental Law Institute.

"So what you're saying as part of the scoping process is, 'Thank you for your input on this project. We'll get back to you in maybe 2 ½ years with a draft environmental impact statement,'" Boling said. "We can do better than that."

Most projects don't require an environmental impact statement. And some of those inefficiencies come as the result of individual agency policy or staffing, rather than CEQ's regulations.

Still, delays on major projects that do require an EIS cost money year after year, Wagner said. And the two most recent major transportation bills — the Moving Ahead for Progress in the 21st Century Act (MAP-21) and the Fixing America's Surface Transportation (FAST) Act in 2015 — provide models of what CEQ might seek to change.

CEQ might require, for example, that agencies combine the final EIS and record of decision (ROD) into a single document, a change that is already in place for certain transportation projects under MAP-21.

Currently, the law requires a 30-day cooling-off period between the two documents, but it sometimes gets extended as agencies deal with more public comments on the final EIS, Wagner said.

Another possibility would be to have one ROD document for the whole federal government, rather than one for each agency. That's a tweak President Trump has already floated with his Aug. 15, 2017, executive order and a subsequent interagency agreement signed last month.

Other changes based on the FAST Act and MAP-21 might be in order, but generally speaking, the regulations are sound, said Larry Liebesman, a senior adviser with Washington water resources firm Dawson & Associates who worked on the 1978 standards during his time at the Justice Department.

"I think a lot of the real objections can be addressed through fine-tuning of the existing regs," he said. "Don't throw the baby out with the bathwater, so to speak."

'A little bit more oomph'

Industry groups and environmentalists alike will get a chance to weigh in as public comments get underway in coming months, but the process will be complicated.

CEQ earlier this month submitted a draft advance notice of proposed rulemaking to the Office of Information and Regulatory Affairs. It was included in the spring Unified Agenda, though it hasn't yet been published in the *Federal Register* for comment.

But for those seeking to streamline the regulations, it may be difficult to find common ground with the environmental groups that will inevitably comment and possibly sue if there are any legal blips in the process.

They're looking to go in the opposite direction with reforms to CEQ's NEPA regulations, said Raul Garcia, legislative counsel with Earthjustice.

"There is very little in there, and I think there needs to be more, on how to engage communities on the ground," Garcia said.

Garcia and other environmentalists argue that it's a lack of staffing and funding — rather than statutes or regulations — that holds up the process.

"The problem is not NEPA; the problem is that you're not funding the agencies that carry out NEPA, CEQ being front and center on this," Garcia said.

Other observers point out that one of the biggest holdups in the NEPA process — litigation — would have to be addressed through statute, rather than regulations.

For CEQ, it may also be difficult to pinpoint how, exactly, it can change its regulations to fix what the administration sees as a laborious NEPA process.

The current regulations state that EIS documents "shall normally" be fewer than 150 pages, and fewer than 300 for unusually complex projects.

The wording of that guidance is nearly identical to a memo Interior Deputy Secretary David Bernhardt issued to his agency last year.

"It's already here, but it's just never really been enforced," Wagner said. "So the question becomes, why not? And if it's already in the regulations, what else do you have to say?"

CEQ also issued a document in 1981 titled "Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations."

The memo advises that even large complex energy projects "would require only about 12 months for the completion of the entire EIS process."

Those are just two of many examples of where critics of NEPA — namely, the transportation and energy industries — might be able to work with agencies to cut down permitting time within existing regulatory frameworks, Wagner said.

"But I think what people want to see is a little bit more oomph, for lack of a better word, in the regulations," he said.

Road ahead

Environmentalists fear that even apparently reasonable changes to the NEPA regulations could be co-opted by bad-faith political forces in the Trump administration.

But for now, CEQ is without appointed political leadership, since Kathleen Hartnett White withdrew her name from consideration as its chair when it became clear that her nomination would not pass the Senate.

"Without a leader there that understands the NEPA process, that's a problem," Liebesman said.

Boling, for his part, is a well-respected career official with more than a decade of experience

working under Democratic and Republican presidents. He could help fend against those in the administration that see NEPA as an "albatross," Liebesman said.

Still, the agency may have time to get a leader confirmed before the process wraps up. Each step is likely to draw a wealth of public comments.

"I think it's going to be several years before you see any revised NEPA regulations," Liebesman said.

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