



***Lead NEPA Story:* White House mulls new NEPA climate guidance**

(Greenwire, 11/27/2018) Niina Heikkinen, E&E News Reporter

The Council on Environmental Quality is taking a fresh look at how federal agencies should consider greenhouse gas emissions under the National Environmental Policy Act.

The review comes after the Trump administration rescinded Obama-era guidance on how to account for greenhouse gases under the 1970 law.

A CEQ spokesman confirmed the administration was considering greenhouse gas accounting

under NEPA but remained vague on whether the administration was taking any specific actions.

"It's an issue CEQ has been looking at since the prior guidance was withdrawn for further consideration. Should CEQ propose guidance, we would submit it to [the Office of Information and Regulatory Affairs] for interagency review," the spokesman said.

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***Endangered Species Act and NEPA:* Wind project spins forward on reduced bird death rate**

(Greenwire, 11/29/2018) Michael Doyle, E&E News Reporter

A Washington state wind power project that presents a trade-off between bird mortalities and renewable energy production today reached a key turning point with the Fish and Wildlife Service.

The Skookumchuck Wind Energy Project's 38 wind turbines could endanger the marbled murrelet, bald eagle and golden eagle. The marbled murrelet is listed as threatened under the Endangered Species Act, and the eagles are under the umbrella of the Bald and Golden Eagle Protection Act.

But the project near Centralia, Washington, has also shrunk from an earlier proposal for 51 turbines, and it's accompanied by a draft habitat conservation plan designed to cut the risk to treasured bird species over the course of a 30-year incidental take permit.

"The applicant will mitigate the impacts of the potential take of murrelets by acquiring conservation lands that promote the preservation and enhancement of suitable nesting habitat ... which will also provide mitigation for bald eagles," the draft environmental impact statement notes.

Project developers also plan a "mammal carrion reporting program" to reduce scavenging by eagles on the project site, as well as efforts to minimize cover for prey animals such as rabbits and testing of technology intended to reduce eagle collisions with operating turbine blades.

In return, the Skookumchuck project offers the prospect of 137 megawatts of clean energy, after all 38 turbines are constructed on the approximately 22,000-acre site.

In an advance notice today, the Fish and Wildlife Service announced it will be opening a 45-day public comment period on the project's draft EIS and habitat conservation plan.

Public hearings on the project will also be held in Chehalis, Washington, on Wednesday and in Lacey, Washington, on December 10.

The wind turbines are proposed to be constructed on a prominent ridgeline on the Weyerhaeuser Vail Tree Farm, about 18 miles east of Centralia. The site is within the Pacific flyway, a major north-south migratory route. Surveys have identified 68 bird species around the site.

While eminently green in their energy production, wind power developments also pose risks to birds and bats due to construction and collisions. President Trump, starting before he was elected president, has been particularly vehement about the dangers.

"Wind energy is a destructive force for wildlife," Trump retweeted in 2014, adding "True!"

Appearing at a campaign event last August, Trump further declared that wind energy projects "kill so many birds. You look underneath some of those windmills, it's like a killing field of birds."

Wind industry officials have stressed they've been developing ways to minimize bird strikes with wind turbines, including through better

siting and use of technologies to deter birds from flying through wind farms.

The Skookumchuck project, for instance, proposes testing of a new technology called "IdentiFlight," which includes mounting cameras designed to detect eagle-sized objects up to 1,000 meters away. The idea is to curtail turbines when eagles are at risk.

The draft habitat conservation plan concludes that "the take over 30 years is predicted to be 66 bald eagles and 23 golden" eagles as a result of the project.

Studies of newer generation wind energy facilities throughout North America have reported about 60 percent to 80 percent of documented mortalities have been songbirds, according to the Skookumchuck draft EIS.

Environmentalists in the Black Hills Audubon Society, among others, say they see potential value in the Skookumchuck project.

"Because wind energy contributes to reducing fossil-fuel carbon emissions ... BHAS is willing to support wind energy projects as long as sufficient mitigation is provided for the protection of birds and other wildlife," the organization states on its website.

The project is being undertaken by Renewable Energy Systems Americas, which describes itself as "the world's largest independent renewable energy company."

The EIS for the Skookumchuck Wind Energy Project Proposed Habitat Conservation Plan and Incidental Take Permit for Marbled Murrelet, Bald Eagle, and Golden Eagle, Lewis and Thurston Counties, Washington, may be viewed at <https://www.fws.gov/wafwo/>

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Endangered Species Act:
Narrow frog ruling reopens endangered species debate
(Greenwire, 11/27/2018) Ellen M. Gilmer, E&E News reporter

The dusky gopher frog's long legal journey isn't over yet.

The Supreme Court today remanded a closely watched dispute over the federal government's power to designate certain critical habitat for the rare Southern amphibian.

The 5th U.S. Circuit Court of Appeals will now weigh loaded questions over the meaning of "habitat" and the Fish and Wildlife Service analysis underpinning the agency's approach to protecting land for the warty frog.

The unanimous decision is a narrow victory for private landowners, including timber giant Weyerhaeuser Co., which opposed FWS's inclusion of their Louisiana property as critical habitat for the species, one of the 100 most endangered in the world.

The ruling wipes out a 5th Circuit decision that upheld the habitat designation. While the land protections will remain in place for now, the landowners have an opportunity to make their case to the appeals court that their land doesn't count as "habitat" for the frog and therefore cannot be included.

"The nation's hardworking property owners can rest easier tonight knowing government-sponsored land grabs just became a lot more difficult," Pacific Legal Foundation attorney Mark Miller, who represented some of the landowners, said in a statement.

Government officials declined to comment on the ruling, but environmentalists who intervened on FWS's side stressed that the Supreme Court did not actually answer many of the key legal questions in the case.

"Considering how narrow it was, if we were going to lose, this is a good way to lose," Center for Biological Diversity senior attorney Collette Adkins said in an interview. "It's technically a loss, but it's so narrow that it's a punt."

At issue in the case is FWS's 2012 decision to include more than 1,500 acres of private land in Louisiana in its designation of critical habitat for the dusky gopher frog. FWS and consulting scientists identified the property as having the type of ephemeral ponds perfect for the animal's recovery.

The frog used to live across the South, but its numbers have collapsed through the years, and most individuals now cluster around a single pond in Mississippi.

What is habitat?

A major contention in the case is whether the Louisiana property counts as "habitat" under the Endangered Species Act.

The law allows land protections in unoccupied areas of habitat, but the landowners argue that the 1,500 acres don't qualify because they're simply not habitat: The frog could not survive there right now. The land would need modifications to serve as a suitable home.

"This property is not just not optimal. It's not habitat," said Mayer Brown attorney Timothy Bishop, representing Weyerhaeuser, during oral arguments in October.

Chief Justice John Roberts wrote today that the ESA does not provide a "baseline definition" of habitat. The opinion directs the 5th Circuit to consider the issue.

The ruling was unanimous. Justice Brett Kavanaugh, who wasn't seated in time for October 1 arguments, did not participate. Many court watchers speculated that the eight justices would issue a narrow decision to avoid a 4-4 split on broader ideological issues.

Adkins said environmentalists are hopeful the 5th Circuit, which upheld FWS's designation before, will side with the government again.

But, she noted, the appeals court is known for being conservative, and the Supreme Court's ruling reopens issues that could result in unfavorable precedent for endangered species advocates.

Economics

Today's ruling delivered a more decisive victory to landowners on a secondary issue: whether FWS's economic analysis for a critical habitat designation is subject to judicial review. The Supreme Court ruled that it is.

Weyerhaeuser and the other landowners had argued that they should be able to challenge the agency's cost-benefit analysis supporting its

refusal to exclude the 1,500 Louisiana acres from its designation.

Government lawyers countered that the ESA leaves that decision to the agency's discretion and does not provide a standard for judicial review.

But the Supreme Court found that such decisions can be reviewed by a court to determine whether they were arbitrary and capricious, or an abuse of discretion.

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Landowner Edward Poitevent hailed the ruling this morning as a major victory for private property advocates.

"It's astounding to find out the highest court in the land has not only your back, but the backs of all American landowners," he said in a statement.

The case now goes to the 5th Circuit for further proceedings.

NEPA: Army Corps releases final plan for repelling Asian carp

(Greenwire, 11/21/2018) Cecilia Smith-Schoenwalder, E&E News reporter

The Army Corps of Engineers is urging the use of sound barriers, an electric fence and air bubbles as defenses against Asian carp swimming toward Lake Michigan.

In a final EIS released yesterday, the Army Corps recommends that carp blockers be set up around the Brandon Road Lock and Dam in Joliet, Ill., and also calls for construction of a concrete channel in the lock to increase effectiveness of other fish controls and allow for testing new technologies.

The EIS makes some changes from the Army Corps' draft, which was released in August 2017.

One change would create an "air bubble curtain" on the bottom of the engineered channel to help remove small and stunned fish.

Experts have suggested that it would take just 10 females and 10 males to establish an Asian carp population in the Great Lakes.

"We are in a race against the clock to keep Asian carp out of the Great Lakes, and current defenses are inadequate," Molly Flanagan, of the nonprofit Alliance for the Great Lakes, said in a statement.

Flanagan said new controls at Brandon Road are broadly supported, adding that "we need action sooner rather than later."

The estimated initial cost of the project is \$777.8 million.

"The investment in this project pales in comparison to the economic risk if Asian carp invade the Great Lakes," Marc Smith of the National Wildlife Federation's Great Lakes Regional Center said in a statement.

Last year, an Asian carp was found beyond an electrified barrier just 9 miles from Lake Michigan.

A carp invasion would completely disrupt the food chain in the Great Lakes. Asian carp would compete with native bass and walleye for habitat.

The official review period for the report begins Friday, when the draft will be posted in the *Federal Register*, and will run through Dec. 24.

The Great Lakes and Mississippi River Interbasin Study—Brandon Road Integrated Feasibility Study and EIS, Will County, Illinois, may be viewed at <https://usace.contentdm.oclc.org/utis/getfile/collection/p16021coll7/id/8630>.

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Endangered Species Act and NEPA: Florida panther habitat plan splits environmentalists

(Greenwire, 11/27/2018) Michael Doyle, E&E News reporter

An ambitious habitat conservation plan meant to accommodate both property owners and the Florida panther is now illuminating the difficulties in striking a universally acceptable Endangered Species Act compromise.

Put another way: You can't please everyone, especially when it comes to the ESA.

Following years of work, the Fish and Wildlife Service is at a crucial turning point for the plan crafted by environmentalists and landowners in Florida's Collier County. The proposal allows some development and the incidental take of the panther, as well as 18 other protected species, in exchange for the preservation of habitat.

"The plan is the result of a novel partnership between eleven private landowners and four leading conservation organizations," the proposal states.

Spelled out over 376 pages, the plan calls for permanently setting aside approximately 107,000 acres as species habitat in southwest Florida. In return, the property owners would be allowed to develop approximately 45,000 acres now primarily devoted to row crops and citrus groves.

When built out, the developable land is expected to hold some 91,480 dwelling units that will accommodate 174,000 residents. Some mining will also be allowed.

The landowners developed the plan with Defenders of Wildlife, the Florida Wildlife Federation, Audubon Florida and Audubon of the Western Everglades.

"The plan will offset the potential impacts of development through extensive preservation and perpetual maintenance of lands with high natural resource values," it states.

But in a heavily trafficked public comment period that expires Dec. 3, the Eastern Collier Habitat Conservation Plan has drawn more

mixed reviews. Some environmentalists contend it's a bad trade-off for some remarkable species.

Besides the panther, other vulnerable animals in the area include the Florida bonneted bat, red-cockaded woodpecker, wood stork and Florida scrub jay.

"The proposed HCP would allow destruction of ... habitat heavily utilized by the Florida panther and will result in many adverse cumulative impacts to a species that is already grossly under threat due to habitat loss," wrote St. Petersburg, Florida, resident Amy Hill.

Kevin King, a Collier County resident, added that "what little is left of natural Florida habitat needs to be preserved and restored for future generations" and denounced what he's seen as "greed and destruction for 30 years."

Similar expressions of opposition, many of them identically phrased, appear to dominate the 930-plus public comments registered so far. The debate was also the focus of a 2016 public hearing conducted in Naples, Florida.

"There are parts of this plan that we don't necessarily think are fantastic," Meredith Budd, southwest Florida field representative for the Florida Wildlife Federation, told Florida's WCGU public radio station last week, while adding that "we are supportive of this landscape-scale planning process."

Habitat conservation plans accompany applications for an incidental take permit from the Fish and Wildlife Service. They describe the anticipated effects of the proposed taking, how those impacts will be minimized or mitigated, and how the plan is to be funded.

The draft Eastern Collier Multiple Species Habitat Conservation Plan may be viewed at <http://easterncollierhcpeis.com/related-links-documents/>.

Lead NEPA Story (continued from page 1)

Environmental groups are bracing for something they will likely not like. "We don't know what's in the guidance, but we don't expect good things," said Raul Garcia, senior legislative counsel at Earthjustice.

Any new guidance would add to changes already in the works for NEPA. In June, CEQ published an advance notice of proposed rulemaking aimed at making the permit review process more efficient. The comment period closed at the end of August.

NEPA requires projects built or funded by the federal government, like highways, bridges or pipelines, to analyze how they will affect the environment around them. Members of the public also have the opportunity to offer input.

The Obama administration had released specific guidance to federal agencies in 2016 on how to consider greenhouse gases. This included details for weighing far up- and downstream emissions.

President Trump rescinded that guidance soon after taking office in 2017. While such documents aren't binding the way rulemaking is, they do help provide consistency across the federal government.

The Obama-era guidance "clarified a lot of case law that climate change must be considered under NEPA and set up a structure for how to go about it. The fact that it was rescinded without a

second thought, it points to an assumption that what the administration is doing is reactionary to what Trump's base wants," said Garcia.

A spokesman for Protect NEPA, a coalition of environmental and public advocacy groups, noted that repeal of the guidance has gone against the direction of the courts, which have ruled in favor of greater analysis of climate impact.

"I would certainly argue recent court rulings, the trend is not that we should be analyzing less," said Justin McCarthy, communications director for the NEPA Campaign.

One recent example was the district court stay of construction of the contentious Keystone XL pipeline.

Earlier this month, a U.S. District Court for the District of Montana judge ruled that the State Department had to reassess the cumulative greenhouse gas emissions from the pipeline.

Garcia noted that the administration's actions on permitting so far had ended up making the process more confusing.

"Judging by the administration's history on the issue of NEPA, I don't expect a lot of clarity," he said.

Reporter Nick Sobczyk contributed.

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