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Lead Story: White House plans fast turnaround on NEPA rules

(Greenwire, 5/23/2019) **Niina Heikkinen and Hannah Northey, E&E News Reporters**

The Council on Environmental Quality is banking on a fast White House review process as it prepares to release new rules on how the federal government should implement the National Environmental Policy Act.

CEQ plans to send reworked implementing regulations for NEPA to the White House Office of Information and Regulatory Affairs for review in June, a CEQ official told E&E News.

That gives OIRA a matter of weeks to review the highly anticipated action as CEQ plans to release a proposal to the public in June, according to the recently published spring Unified Agenda. Reuters first reported CEQ's plan to send its proposal to OIRA next month.

This is the first time CEQ will have updated its baseline for agency compliance with the environmental law since the 1980s.

The administration has sought to speed up permitting for federally funded projects and to limit the length of environmental impact assessments.

CEQ Chairwoman Mary Neumayr was mum about the timeline for the regulations during a Senate Environment and Public Works Committee last week, saying only that a draft had not yet gone to OIRA and the agency was still reviewing over 12,500 public comments.

Clean Water Act: Court sides with WOTUS foes as legal fight gets messier

(Greenwire, 5/29/2019) **Ellen M. Gilmer and Ariel Wittenberg, E&E News Reporters**

The Obama administration violated the law when it issued its embattled definition of "waters of the United States," a federal court ruled yesterday.

In a long-awaited decision, the U.S. District Court for the Southern District of Texas sided with three states and a coalition of agriculture and industry groups that have been trying to take down the joint EPA and Army Corps of Engineers rule since 2015.

The Trump administration is working on plans to rescind and replace the Obama-era Clean Water Rule, but the regulation — which defines which wetlands and waterways are covered by the Clean Water Act — is still in effect in almost two dozen states, and it's still being debated in a tangle of lawsuits.

Judge George Hanks Jr. ruled that Obama officials violated the Administrative Procedure Act by issuing a final regulation that was too

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different from the proposed version — depriving the public of a meaningful opportunity to comment.

The final rule, known as WOTUS for short, included physical limits on how far wetlands could be from waterways and still be regulated, a "substantial change" from the proposed version of the rule, Hanks found. Further, he wrote, EPA and the Army Corps issued a final version of a key scientific report after the public comment period for the Clean Water Rule had closed.

At issue is the definition of "adjacent" wetlands. The proposed rule would have included all wetlands adjacent to jurisdictional waterways, including those in a riparian area or floodplain or with surface or shallow subsurface connections to waterways.

The final rule, however, put limits on how far away wetlands could be from waterways and still be considered "adjacent." It would regulate waters within 100 feet of waterways and those within the 100-year floodplain of a waterway or waters 1,500 feet from the Great Lakes.

Hanks, an Obama appointee, noted that the final rule "was the first time that the agencies gave notice that they intended to define adjacency by precise physical distance-based criteria — rather than the ecologic and hydrologic criteria in the proposed rule."

"The change is significant — it alters the jurisdictional scope of the act," he wrote.

While the proposed rule did ask for comments on whether it should set some kind of geographic limitation on "adjacent" waters, Hanks found it was too vague for the public to comment on.

"The [Administrative Procedure Act] does not envision requiring interested parties to parse through such vague references like tea leaves to discern an agency's regulatory intent regarding such significant changes to a final rule," yesterday's decision said, noting that the change between the proposed and final versions "could not have been reasonably anticipated."

The public also was not able to comment on the final version of a 300-page "Connectivity Report," which reviewed how wetlands and small streams can affect water quality of larger downstream waters, Hanks wrote, calling the report "the most critical factual material used to support the final rule."

Only a draft of the Connectivity Report was available during the public comment period for the proposed Clean Water Rule. While the agencies reopened the comment period after the Science Advisory Board published a review of the report, the agencies did not do so after the connectivity report was finalized.

"Accordingly, depriving plaintiffs of a meaningful 'opportunity to comment' and possibly deconstruct the Final Connectivity Report violated the [Administrative Procedure Act]," the judge wrote.

Hanks remanded the WOTUS rule to EPA and the Army Corps in light of the administrative inadequacies. The agencies are already working on a plan to officially scrap the Obama regulation as soon as August and finalize a replacement at the end of the year.

"This ruling affirms the appropriate action already underway at the EPA to correct a deeply problematic regulation that impermissibly expanded federal jurisdiction to virtually any standing body of water — from roadside drainage ditches to groundwater to local recycling facilities," the National Mining Association said in a statement.

Texas Attorney General Ken Paxton (R) called the decision "a major victory for the people of Texas' ability to regulate their own natural resources, including ponds, puddles and streams on private property."

The Obama rule explicitly excluded puddles from federal regulation.

The Texas judge left in place a preliminary injunction issued last year that blocks the Obama rule from going into effect in Texas, Louisiana and Mississippi.

The ruling does not affect several other pending lawsuits challenging WOTUS. Experts note that district courts handling those cases may find the Texas court's reasoning persuasive, but they will not be bound by it.

Pacific Legal Foundation attorney Tony Francois, who is fighting the rule in separate litigation, said the Texas ruling "is welcome progress" but does not delve into many unresolved Clean Water Act questions.

"The court specifically declined to address the 2015 Definition on the merits and does not vacate the regulation while EPA cures the notice and comment defect," he said in an email. "So it will be important for the other lawsuits against the 2015 Definition proceed on the merits, and for this issue to continue percolating through the courts."

Is WOTUS still on hold in New Mexico?

Other WOTUS litigation has become even more complicated than before.

In a separate multistate lawsuit in federal district court in North Dakota, recent state withdrawals have resulted in changes to where the Obama rule is effective.

In March, Colorado and New Mexico, both under new Democratic leadership, asked to bow out of the case. The court granted their requests this month and stipulated that an earlier preliminary injunction of the Obama rule is no longer in effect in Colorado.

New Mexico is more complicated. After the two state agencies involved in the lawsuit moved to withdraw, a coalition of New Mexico and Arizona counties asked to join the case.

In its request, the Coalition of Arizona/New Mexico Counties for Stable Economic Growth — which includes 10 counties in New Mexico — argued that the court should continue to enjoin the Obama rule across the state.

When the court granted the New Mexico agencies' request to withdraw, it specified that the "preliminary injunction remains in effect as to Intervenor-Plaintiff Coalition of Arizona/New Mexico Counties for Stable Economic Growth."

There remains confusion about whether the injunction applies only to the 10 New Mexico counties in the coalition or throughout the state.

Francois, the PLF lawyer who represents the coalition, argued that because the coalition also includes individual members scattered across New Mexico and because the group asked the court to preserve the injunction in its request to intervene, the WOTUS freeze still applies statewide.

New Mexico officials told E&E News that they also interpret the court's order as keeping the injunction intact.

"Our reading of the Court's Order is that it preserves the preliminary injunction in the entire state of New Mexico," New Mexico Environment Department spokeswoman Maddy Hayden said in an email.

"When that party moved to intervene ... they expressed their interest in the injunction remaining in effect in the entire state, not just the ten member counties of their organization," she added. "Based on that, and the fact that no party opposed either of those requests, our reading of the Order is that the preliminary injunction against the 2015 WOTUS Rule going into effect in New Mexico remains in effect."

But federal government lawyers want the court to clarify what it meant and question whether the injunction should be in effect anywhere in New Mexico.

In a Friday filing, Justice Department attorneys said the extension of the injunction was "premature" because the county coalition never made a formal request for one and cannot be covered by one now.

"Nor have the counties advised the Court of the authority they have to seek injunctive relief where the State regulatory entities have withdrawn from the case," Justice Department lawyers told the district court. "The Agencies thus seek clarification of the applicability of the Court's 2015 preliminary injunction with respect to the ten counties in New Mexico that are part of the Coalition of AZ/NM Counties."

The county coalition has until June 7 to respond.

Ohio appeal

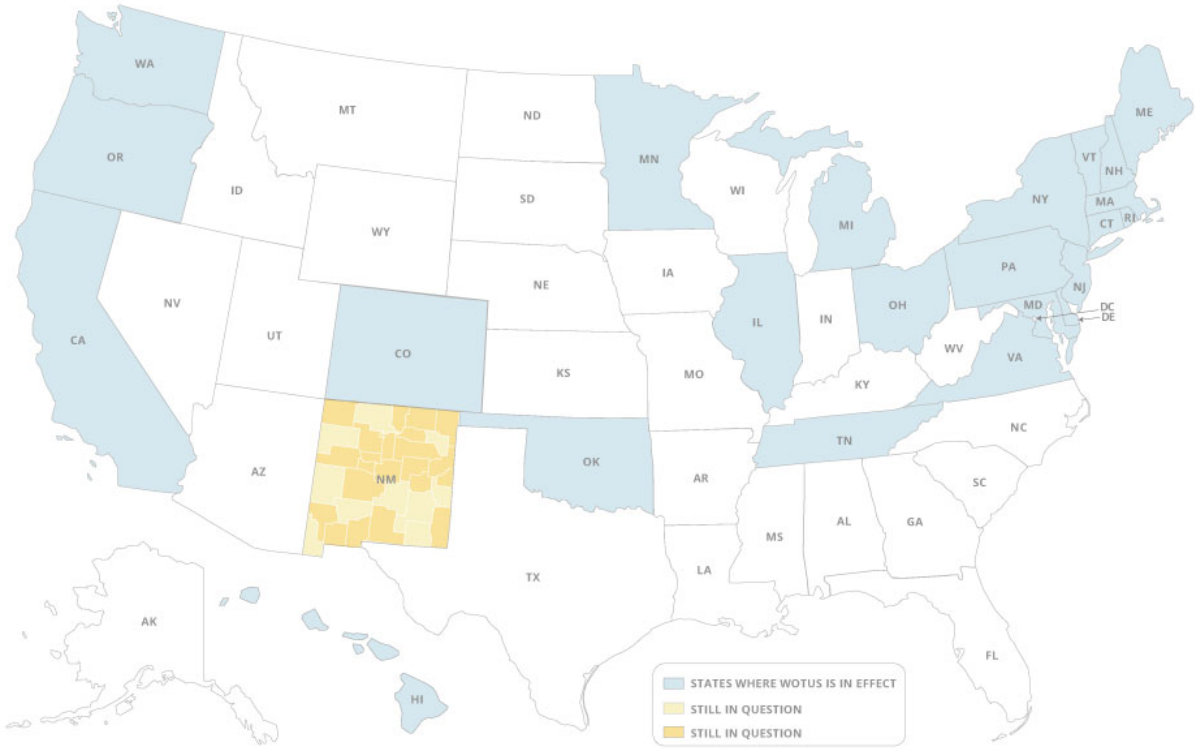
In yet another recent development in the legal fight over the Obama water rule, two Eastern states are preparing to take their fight to an appeals court.

The U.S. District Court for the Southern District of Ohio in March refused a request from Ohio

and Tennessee to block the Clean Water Rule in those states.

The states filed notice last night that they are challenging that ruling at the 6th U.S. Circuit Court of Appeals.

The nonstop legal twists come as the Trump administration works quickly on rescinding and replacing the Obama-era regulation. Finalization of those efforts would likely sideline all the existing WOTUS litigation.



After recent legal developments, the Clean Water Rule is now in effect in Colorado, along with 22 other states. Attorneys are asking a court to clarify the status in New Mexico, where just 10 counties are currently involved in litigation against the regulation. Claudine Hellmuth/E&E News

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NEPA: Court may let Virginia project keep permit despite bad NEPA review

(Greenwire, 5/31/2019) **Ellen M. Gilmer, E&E News reporter**

Federal judges today opened up the possibility that a troubled transmission line across the James River can retain a critical permit despite federal officials' faulty environmental review.

The U.S. Court of Appeals for the District of Columbia Circuit partially granted a request by the Army Corps of Engineers and Dominion Virginia Power to revisit a recent court order that scrapped the 17-mile power line's Army Corps permit after finding the agency fell short of the National Environmental Policy Act.

The D.C. Circuit passed the issue down to a lower court to determine the best remedy for the NEPA violations. The power line is already constructed and in service in Virginia. Dominion and the Army Corps say the power line should remain permitted while the government fixes its environmental analysis.

The three-judge panel that issued today's order criticized the two parties for not keeping the court abreast of the project's status.

"In support, the Corps observes that when this court decided the case it did not 'have before it the recent factual developments regarding completion of construction and the disruption that vacating the permit could cause,'" today's unsigned opinion said. "That, of course, is because neither petitioner bothered to advise us that construction on the project had been completed and the transmission lines electrified the week before we issued our opinion."

The panel sent the issue to the U.S. District Court for the District of Columbia to consider additional arguments and factual findings and ultimately decide whether the permit should be vacated.

National park advocates and preservationists have been fighting the Dominion-backed James River project for years. The power line crosses near the historic English settlement of Jamestown and several other protected sites.

Earlier in the litigation, they pushed for a preliminary injunction to block construction. At the time, Dominion and the Army Corps countered that a construction freeze was unnecessary because if the challengers won on their NEPA claims, the company could simply remove the towers. Now they warn of severe "disruptive consequences" if the transmission project loses its permit and has to come down or halt service.

"We find the foregoing more than a little troubling," the D.C. Circuit said today. "Had the Corps and Dominion said all along what they say now, either the district court or this court might have enjoined tower construction, in which case our consideration of 'disruptive consequences' would focus not on shutting down and removing the towers, but rather on prohibiting their construction — a very different balance indeed.

"Moreover," the opinion continued, "having completed construction, Petitioners now attempt to use it to place an even heavier thumb on the scale, as they represent that they have invested $400 million in tower construction, as compared to the '$178.7 million cost asserted in the Corps' [Environmental Assessment].'"

The Army Corps must still prepare an in-depth environmental impact statement for the transmission project, but the district court will decide whether the project can retain its permit in the meantime.

The D.C. Circuit panel included Chief Judge Merrick Garland and Judges David Tatel and Patricia Millett, all appointees of Democratic presidents.

The National Trust for Historic Preservation, one of the groups involved in the case, urged Dominion to take the project down.

"There are many ways to get power, but there's only one Jamestown," interim president and CEO Paul Edmondson said in a statement. "With vast resources at their disposal, Dominion should do the right thing by deconstructing these towers and working to provide reliable power in a way that does not come at the expense of America's birthplace."

NEPA: Interior advances major California project on tribal lands

(Greenwire, 5/24/2019) **Scott Streater, E&E News reporter**

The Interior Department today advanced a major new wind energy project on Native American lands, releasing a draft analysis of the proposal and an ambitious timeline that could see it approved by the end of the year.

The draft environmental impact statement for the Campo Wind Energy Project analyzed three alternatives, including a "full build-out" proposal of 60 wind turbines capable of producing up to 252 megawatts of electricity —

enough to power about 75,000 homes and businesses.

The project, proposed by the Campo Band of Diegueño Mission Indians and Terra-Gen Development Co. LLC, would place the 60 or so turbines on about 2,200 acres of tribal lands in California about 60 miles east of San Diego.

A 230-kilovolt power line from the wind project on the Campo Indian Reservation would need to use about 500 additional acres of private lands northeast of the reservation — an area identified as the Boulder Brush corridor. The power line would connect with a San Diego Gas & Electric substation/switchyard.

The Interior Department's Bureau of Indian Affairs, the lead agency on the project, began the EIS public scoping process last fall.

A BIA spokeswoman could not be reached for comment.

Publication of the draft EIS in today's *Federal Register* kicks off a 45-day public comment period running through July 8.

At least one public hearing is expected to be scheduled during the public comment period, according to the draft document.

A final EIS is expected by the end of the year, and a final decision record approving the project could be issued by BIA 30 days after the final EIS is published in the Federal Register.

The Campo Wind project comes as the Trump administration, and Interior's Bureau of Land Management in particular, has come under fire from congressional Democrats for essentially abandoning the Obama administration's focus on commercial-scale renewable energy development on federal lands.

The Obama administration approved 60 solar, wind and geothermal projects that would have a total capacity to produce about 15,500 MW of electricity — enough to power more than 5 million homes and businesses per year.

Mike Nedd, BLM's deputy director of operations, told a House Natural Resources subcommittee in March that the bureau has not approved any wind or geothermal power projects, and has approved only two solar power projects, on federal lands.

Developing renewable energy resources on Native American lands was a top priority of the Obama administration, not only to advance renewables but also to provide economic opportunities for tribes.

The Energy Department under President Obama estimated that solar projects on those reservations could produce up to 17,000 MW of electricity, or enough to power nearly 6 million homes.

The Draft EIS may be viewed at http://www.campowind.com/.

Clean Water Act: Did federal regulations really kill Trump's luxury development?

(Greenwire, 5/20/2019) **Ariel Wittenberg and Timothy Cana, E&E News reporters**

"I called it a puddle; they called it a lake."

That's how President Trump described his failed luxury mansion development in Bedford, N.Y., implying in a speech Friday to the National Association of Realtors that it was federal wetlands regulations that prevented him from building.

"They had a little area where water would sort of form when it rained. And all of a sudden, I found out I couldn't build on the land, because it was considered, for all intents and purposes, a lake," he said.

"That's what we're getting rid of; we're getting rid of a lot of regulations," the president said, referencing his administration's efforts to roll back Clean Water Act protections for many wetlands and streams nationwide.

Trump's account is contradicted by Army Corps of Engineers records.

The Army Corps issued two permits for the property in 1998 and 2000 for "general development activities ... involving discharge of fill material into headwaters and isolated waters," Army Corps New York District spokesman Hector Mosley wrote in an email.

In 2004, Trump applied and then rescinded his application for a third permit to "discharge of fill material into non-tidal waters."

In all three cases, the activities were deemed to have minimal adverse environmental impacts, and were reviewed under the expedited "nationwide permit" process.

The White House and Trump Organization did not respond to requests for comment on this story or to add detail to Trump's narrative.

A sketch of the subdivision for seven new mansions on file with the Bedford planning office does not show any buildings or roads within a 100-foot wetland buffer. That 2013 plan was agreed to after nearly 20 years of fighting with local officials from Bedford and other towns over development at the Seven Springs property.

But news reports chronicling the fight and town officials say wetlands were never an issue.

"I don't recall wetlands being a significant issue with that approval," said town planner Jeffrey Osterman.

Instead, Trump's proposal faced significant opposition over concern for the local water supply and emergency vehicle road access.

Ed Russo, a longtime environmental consultant for the Trump Organization, however, said he "never had to deal with" Clean Water Act permits at any Trump properties he worked on. He said most of the environmental work at the Bedford property occurred before he joined the Trump Organization in 2002.

The 216-acre Seven Springs property straddles three towns and neighbors the drinking water supply of another. Trump paid $7.5 million for the property in 1995, and after attempting to develop it for 20 years decided to preserve most of the untouched land in a conservation easement in 2015.

The easement describes the property as being "dominated" by mature forest and herbaceous meadows.

There are some wetlands — and a man-made, half-acre pond — on the Seven Springs property. But even if Trump had needed a Clean Water Act permit for plans in those wetlands, it's unlikely such a requirement alone would stop his plans because the law allows wetlands destruction if developers pay to offset the damage they cause. Though that mitigation can cost tens of thousands of dollars per acre, the price tag pales in comparison to the homes Trump planned to sell for $10 million to $30 million apiece.

The mansions were actually Trump's backup plan for the property. He initially wanted to build an 18-hole championship golf course and clubhouse in the late 1990s and early 2000s.

'Trump's guinea pigs'

The golf course plan was pulled in 2004 following years of local pushback by residents of Mount Kisco, N.Y., who were concerned that pesticides sprayed on an 18-hole golf course would make their way into nearby Byram Lake, which supplied the town's drinking water.

"It is a big lake; no one would call it a puddle," said Michael Gerrard, a Columbia University Law professor who represented Mount Kisco at the time.

When residents called on the Trump Organization to get a permit for pesticide runoff into the lake, the organization designed what it called a "linear absorption system" of trenches around portions of the golf course to direct runoff into carbon chambers that would remove toxins, according to permit information on file with New York regulators.

The project would have affected less than 1 acre of wetlands on site, which the Trump administration proposed offsetting by creating 1.76 acres of wetlands.

The system was cold comfort to the residents of Mount Kisco, Gerrard said.

"No one had ever built this technology before, and the people of Mount Kisco didn't want to be Trump's guinea pigs," he said.

Residents insisted that Trump create a "pilot system" to prove linear absorption could work, and after years of fighting over the size of the pilot, Trump dropped the golf course idea and decided instead to try to build 15 luxury mansions at Seven Springs.

Mount Kisco residents cheered the move, which Trump told *The New York Times* was financially motivated.

"The site has become too valuable for a golf course," he said.

But that plan didn't go smoothly either. The town of North Castle required that the Trump Organization build a second access road on the property so emergency vehicles could get there. The Trump Organization sued in a legal battle that lasted nearly a decade.

During that time, Trump agreed to limit the development to just seven mansions and a 20-horse stable. He told Bedford planners he was ready to break ground in 2008 when the recession hit and put those plans on hold.

"Who wants to build in a down market? I'm in no rush for many different reasons, and one of them is the market," Trump told therealdeal.com at the time.

Trump, however, didn't officially receive local approval for the property until 2013, after agreeing to build a second road, according to local news reports. Though the road was near Byram Lake, it was approved by Bedford planning officials under the condition that no blasting would take place on site, no more than 5 acres of land would be disturbed at one time and there would be no substantial changes to the water levels in Byram Lake.

But the property was never developed, and in December 2015, six months after launching his campaign for president, Trump preserved most of it with a conservation easement. He can claim a tax deduction from the easement. The property is listed in his financial disclosure form as being worth $50 million.

The conservation easement is now part of a June 2018 complaint filed by the New York attorney general alleging that the Donald J. Trump Foundation was improperly used to pay the president's expenses.

That includes a $32,000 payment the foundation made for the conservation easement to the North American Land Trust, which the attorney general alleged should have come from a different Trump-owned group called Seven Springs LLC. Seven Springs would later reimburse the Trump Foundation after the state began its investigation.

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