



May 24, 2019

Lead Story: Critics say Army Corps trying to 'downplay' NEPA violations

(Greenwire, 5/7/2019) Ellen M. Gilmer, E&E News Reporter

National park advocates and preservationists say a Virginia transmission project must lose its federal permit because the government committed a serious violation of the National Environmental Policy Act when it failed to conduct a detailed impacts analysis.

In legal briefs yesterday, the National Parks Conservation Association and others urged the U.S. Court of Appeals for the District of Columbia Circuit to stick with its March decision to scrap a key Army Corps of Engineers permit and require the agency to prepare an in-depth environmental impact statement for a series of transmission towers across the James River near the historic English settlement of Jamestown.

Critics say granting the Army Corps and project backer Dominion Virginia Power's recent request for reconsideration would give them a free pass on NEPA violations.

"[T]he failure to prepare an EIS in the face of highly significant impacts flouts NEPA in the most flagrant way possible," NPCA said in a brief yesterday. "Nevertheless, Defendants attempt to downplay the seriousness of this defect."

The resolution of the fight will have implications for other federally approved projects that face NEPA litigation.

Continued on page 8

Endangered Species Act: Trump appointees choose coal over crawfish

(Greenwire, 5/15/2019) Dylan Brown, E&E News Reporter

Crawfish have been disappearing as fast as coal jobs in Appalachia.

But despite Obama-era endangered species rules meant to protect two freshwater crustaceans found nowhere else but southern West Virginia, a handful of mines have reopened.

A new trove of documents, first reported on by The Washington Post, reveals how that happened: The coal industry and West Virginia regulators convinced Interior Department political appointees to override concerns among Fish and Wildlife Service career staff.

The Center for Biological Diversity (CBD) last week said it and other environmental groups will sue if federal agencies do not reconsider coal

mining impacts on the threatened Big Sandy and endangered Guyandotte River crawfish species.

Inside This Issue...

NEPA: Draft Bureau of Land Management land-use plan shifts favor to oil and gas 4

Endangered Species Act: Gray wolf delisting debate heats up 6

NEPA: Bureau of Land Management may boost Hammonds' cattle grazing area 7

Only recently distinguished as separate species, the two lobster-like creatures are found in high-elevation streams surrounding the junction of Kentucky, Virginia and West Virginia. Environmentalists blame the region's mountaintop-removal coal mining for stream sedimentation that helped eliminate all but six Big Sandy populations and just two streams home to Guyandotte River crawfish.

In 2016, the Obama administration gave both protections under the Endangered Species Act and FWS issued draft guidance for nearby coal mining. A quick quiz would decide if coal companies needed to complete a crawfish protection and enhancement plan (PEP).

The new guidance was based on an updated FWS biological opinion completed as part of the Stream Protection Rule — an Obama-era crackdown on water pollution from coal mining.

Whereas a 1996 biological opinion found surface mining did not jeopardize any species survival, the 2016 version highlighted "the contribution of surface coal mining to the decline of some species and the new listing of species."

Industry refutes that conclusion.

One of President Trump's first acts in office — part of his promise to protect the coal industry — was repealing the Office of Surface Mining Reclamation and Enforcement (OSMRE) stream rule, which underpinned the 2016 biological opinion.

CBD requested and sued to obtain records under the Freedom of Information Act (FOIA) that now paint a picture of how state regulators and federal Trump administration appointees fought to override the regional FWS staffers who worry that new coal mining enterprises could lead to total extinction of the endangered crawfish.

'Extinction vortex'

Among the stream rule's top critics were states, the nation's primary coal mining regulators.

After the repeal, West Virginia Department of Environmental Protection (WVDEP) chief Austin Caperton asked Interior Secretary Ryan Zinke to settle a dispute with FWS's West Virginia Field Office in Elkins, W.Va.

In a March 2017 letter, Caperton, a former coal executive, argued that FWS was "arbitrarily" restricting mining without going through the prescribed process for designating "critical habitat."

"As of this writing, much of southern West Virginia is subjected to a [FWS] buffer zone — either on behalf of a bat, crayfish, or both," Caperton wrote.

The letter spurred a flurry of meetings with staffers for WVDEP and Sen. Shelley Moore Capito (R-W.Va.), but the Elkins office staff maintained WVDEP was "misinterpreting" things, but "fighting them on almost every point."

"Currently, they don't think mining has ANY [effects] at all, even after a recent sediment spill," a staffer wrote.

"Listed species and their habitats are protected by the Act whether or not they are in an area designated as critical habitat," Northeast Assistant Regional Director Paul Phifer wrote in an April 2017 memo.

But without the 2016 biological opinion, FWS suspended work on several West Virginia mining proposals, including Ramaco Resources' Berwind Deep Mine No. 1 and Booth Energy's Twin Branch mine, which threatened to lay off workers as a result of a delay.

During the halt, WVDEP drafted its own version of the crawfish guidance and kept up the pressure on FWS to approve the new quiz.

"I again want to point out that delays of this type have a direct impact on my agency ... as well as the regulated community and the associated jobs," WVDEP Deputy Secretary Harold Ward wrote in an email to FWS staff after several months without a response.

A week later, the Elkins office sent revisions back to WVDEP.

"It is in everyone's interest that we get miners back to work and protect these very rare species in the process," wrote John Schmidt, the Elkins office project leader.

Ward called the changes "unnecessarily overreaching."

But inside the Elkins office, officials said the measures didn't go far enough, particularly after a mine spill covered at least 14 miles of Guyandotte crawfish habitat in sediment.

"I am concerned that if we had another incident we could lose this species for good," Senior Endangered Species Biologist Barbara Douglas told FWS Northeast Region leaders.

Assistant Regional Endangered Species Coordinator Glenn Smith said his "gut reaction" was that the Guyandotte crawfish was already "pretty close to spiraling down the extinction vortex."

"Clearly, you and the species picked the wrong time to flirt with extinction given the administration's promotion of coal mining," he told Douglas, "however, it is what it is."

He urged FWS staff to consider more "desperate measures," like a captive breeding program.

"Heavy stuff here folks," he told staff, "but this is what the Act was created for, so now we are going to have to figure out how to make it work against all odds."

'Blowing up'

Internally, FWS staff began circling the wagons. They looked for OSMRE staff to help get WVDEP, as one staffer put it, "educated, or forcefully trained."

But state regulators also took their case to the agency.

WVDEP Deputy Secretary Ward sent a friendly email to Landon "Tucker" Davis, an OSMRE appointee and former Trump campaign staffer in Virginia, in May 2017: "I have heard nothing but positive things from industry representatives in the state as well as from my co-workers [here] at DEP," he said.

And the plea: "Our mining permit program is at a virtual standstill as a result of their continued delays and real jobs are on the line," Ward wrote.

Davis, who would later tell the department's inspector general "Science was a Democrat thing" on an unrelated issue, quickly spread the word at Interior that the West Virginia coal mines could use their help.

According to emails, Ward alerted Aurelia Skipwith, deputy assistant secretary for fish, wildlife and parks, to the issue. She, in turn, raised the issue with then-FWS Director Greg Sheehan, saying regional FWS staff were "stonewalling" coal companies. "It appears to me that the regional FWS office is overstepping their bounds," she wrote, noting visits by both Vincent DeVito, then Zinke's energy policy counselor, and Davis to the Elkins office.

Katharine MacGregor, then deputy assistant secretary for land and minerals management, also reached out to FWS staff.

"Your mining situation is blowing up," FWS endangered species coordinator John Morse told Smith, the department's deputy. "I'm getting calls from the national solicitor's office."

On June 16, 2017, Davis himself made an "unscheduled" visit to the Elkins office to talk about the Twin Branch and Berwind mines.

DeVito also paid a visit to West Virginia, including a meet-and-greet with WVDEP and a number of stops planned for him by the West Virginia Coal Association, *The Guardian* reported.

Then, on June 28, 2017, unbeknownst to FWS staff, DeVito approved WVDEP's guidance as drafted.

The Elkins office got word from WVDEP two weeks later.

FWS staff was trying to correct "can't live with" assumptions in the crawfish guidance, including WVDEP saying existing standards were "protective" and mining had no direct or indirect adverse effects on the species.

The lawsuit

Meanwhile, DeVito was looking for ways for Zinke to "own this success."

"This is something that would only happen under current, no-nonsense leadership," he told Interior's then-communications director, according to *The Washington Post*. "Copying Tucker [Davis] who brought this concern to my attention and helped run the traps."

As Interior stitched together a press release about the Berwind mine's approval, Davis got

West Virginia Coal Association Vice President Jason Bostic to track down quotes from not only his own trade group but also WVDEP's Caperton.

DeVito helped edit the press release, and acting Interior Solicitor Daniel Jorjani coordinated efforts with MacGregor and then-Assistant Secretary Todd Willens.

The press release was published Aug. 1, 2017. The next day, WVDEP signed off on restarting operations at the Twin Branch mine.

Environmental groups plan to challenge the ongoing reliance on the 1996 biological opinion, which they believe fails to protect crawfish from coal mining.

"Political appointees interfered to undermine endangered species safeguards, so we're relying on the courts to protect endangered animals and the creeks where they live," said Tierra Curry, a

senior scientist at the Center for Biological Diversity.

The National Mining Association disputes that the 1996 analysis is flawed when states regulate coal mining.

"No biological opinion can remove SMCRA permitting authority from state SMCRA regulators and give it to [FWS]," the coal trade group said in a statement.

But the West Virginia Highlands Conservancy's Cindy Rank said West Virginia has for too long ignored water regulations that affect not only wildlife but people, too.

"Protecting tiny critters like the Guyandotte and Big Sandy crayfish may seem insignificant or silly to some," she said, "but what we do to the least of our fellow travelers we ultimately do to ourselves."

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

NEPA: Draft Bureau of Land Management land-use plan shifts favor to oil and gas

(Greenwire, 5/16/2019) Scott Streater, E&E News reporter

The Bureau of Land Management wants to remove conservation measures covering tens of thousands of acres of sensitive wildlife habitat in north-central Montana, according to a new proposal.

The proposed land management plan is a stark departure from a previous, Obama-era version, riling environmentalists and others who called it a "gift" to the oil and gas industry.

The "preferred alternative" in the administration's new draft land-use plan would remove eight existing areas of critical environmental concern (ACECs) covering about 26,000 acres that were put in place to protect sensitive wildlife habitat and cultural resources.

"I don't think I've seen a plan that favors energy development and disregards conservation as much as" the draft Lewistown resource management plan (RMP), said Mike Penfold,

who retired more than 20 years ago as director of BLM's Montana-Dakotas state office.

"This is a plan obviously tailored for special interests, not for Montanans or the rest of the American public," he added.

Al Nash, a BLM spokesman in Montana, conceded that the draft RMP and associated environmental impact statement (EIS) "are changed somewhat from much earlier working drafts with which some people may be familiar."

"They include additional analysis in some areas, and offer a broader and reformulated range of alternatives that reflect the priorities of the Department of the Interior and the multiple use mission of the Bureau of Land Management," Nash said in an email to E&E News. The Trump administration's BLM has been clear that its priorities have shifted focus to include the economic benefits offered by public land.

The draft RMP and associated draft EIS would replace two decades-old land-use plans managing about 650,000 acres of public lands and 1.1 million acres of subsurface federal mineral estate.

Other options in the draft land-use plan propose establishing 10 possible ACECs covering roughly 29,000 acres — but none in BLM's preferred alternative.

The preferred alternative "emphasizes resource uses on BLM-administered lands and mineral estate targeting social and economic outcomes while protecting land health," according to the draft document.

Montana conservation groups say this new proposal represents a fundamental shift in land-use planning in the region — and they have proof.

Montana Wilderness Association obtained the draft RMP for the area that was done in 2016, in the closing months of the Obama administration, via a Freedom of Information Act request.

It shows that the new proposal includes major changes to conservation that were recommended by the Lewistown field office after public scoping.

For example, the Obama-era draft plan proposed managing 100,410 acres in the planning area as "lands with wilderness characteristics" because of their pristine nature, according to the documents obtained by the wilderness association. The new draft would remove those designations.

It also proposes removing "no surface occupancy" stipulations on about 6,400 acres for oil and gas drilling and mining activity of subsurface minerals underlying the ACECs that were in the Obama-era draft, as well as underlying sites listed in the National Register of Historic Places, the documents show.

Perhaps most concerning to Mark Good, Montana Wilderness Association's senior conservation adviser, is the removal of the lands with wilderness characteristics designations, which had been recommended by the BLM Lewistown Field Office.

"The Department of the Interior trashed the recommendations it received from the Lewistown Field Office, recommendations that came about after a transparent public process that included local input, citizen surveys, and a healthy regard for what makes this part of Montana special," Good said in a statement. "The RMP we see today was concocted in some swampy D.C. backroom as a gift to the oil and gas industry."

Notice of availability of the draft RMP and EIS will be published in tomorrow's *Federal Register*, kicking off a 90-day public comment period running through Aug. 14.

The draft RMP notes that the final version of the land-use plan could contain parts of different alternatives outlined in the draft, not just the preferred alternative as written.

"The thoughtful and substantive comments we receive from the public and stakeholders during this review and comment period will be thoroughly reviewed and considered as we finalize a document to guide land-use decisions and management actions on these public lands for the next two decades," Nash said.

Also tomorrow, BLM is publishing in the *Federal Register* a notice of availability of a Draft RMP and associated draft EIS for the bureau's Missoula Field Office in western Montana, though it covers a much smaller area of about 160,000 acres of land and 267,000 acres of subsurface mineral estate.

That draft plan's major focus is not oil and gas development, but rather "active forest management" that will allow "for the broadest range of management tools to provide forest products and meet forest management objectives." It will be open for public comment for 90 days, through Aug. 14.

The Draft Lewistown Resource Management Plan and DEIS may be viewed at
<https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=50899>.

The draft Missoula Resource Management Plan and DEIS may be viewed at
<https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?method>

[Name=renderDefaultPlanOrProjectSite&projectId=58107.](#)

Reprinted from Greenwire with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

Endangered Species Act: Gray wolf delisting debate heats up

(Greenwire, 5/10/2019) Michael Doyle, E&E News reporter

Lots of people care about the gray wolf, the Fish and Wildlife Service can now confirm.

Not that there was ever any real doubt, given the animal's many prior legal, regulatory and political entanglements. But with a public comment period about to close on a proposal to remove Endangered Species Act protections, officials can start to quantify the concern.

More than 60,000 comments have arrived as of today, most of them opposed the proposal to remove Endangered Species Act protections for gray wolves across most of the Lower 48. And if past practice holds true, it's likely that tens of thousands more will arrive just before the comment period expires Tuesday.

"The vast majority of the American public has shown time and again that they are supportive of wolf conservation and want science to guide wolf recovery," Michael Paul Nelson, a professor at Oregon State University, said in a statement this week.

Nelson joined more than 100 scientists in a letter publicized by the Center for Biological Diversity objecting to delisting the gray wolf.

Washington state Fish and Wildlife Director Kelly Susewind countered with his own letter, made public this week.

"This is the right direction for wolf conservation and management in our state long-term," Susewind wrote in a letter dated April 18 and released Wednesday. "The department is confident that Washington's wolf population is on a path leading to successful recovery."

Susewind joined the Washington Department of Fish and Wildlife as director last August, after

spending 28 years at the Washington Department of Ecology.

In a long-awaited move, the Fish and Wildlife Service in mid-March cited considerable progress in reviving a species first identified as endangered decades ago and concluded it could be safely delisted. The wolf's population now numbers an estimated 6,000 in the continental United States.

"The facts are clear and indisputable; the gray wolf no longer meets the definition of a threatened or endangered species," said Interior Secretary David Bernhardt. "Today the wolf is thriving on its vast range, and it is reasonable to conclude it will continue to do so in the future."

Prior to their receiving ESA protections, gray wolves declined in number due to government-funded predator eradication programs and the conversion of historical habitat into farmland, among other causes.

Since the 1990s, surveys show gray wolf populations have been rebounding. FWS cited wolf-protecting commitments by the Great Lakes states, as well as California, Oregon, Washington and others, as further reason for confidence.

An additional 12,000 or so gray wolves are estimated to live in eastern Canada, while others roam western Canada.

"I believe that the state wildlife divisions will properly manage this species based on scientific and population data and the decisions moving forward should rest with them and not on emotional opinions of the general public," a

Michigan resident identified as Bob Kangas wrote in support of the delisting proposal.

Opponents are far more numerous, with 13,904 comments including the phrase "I am appalled" as of today, while another 12,009 comments so far have included the phrase "I am alarmed." Form letters have proliferated, though some notes appear individually crafted.

"Delisting would prematurely turn wolf management over to the states," a commenter identified as Brett Ochs wrote. "We've already seen what can happen when rabid anti-wolf

Reprinted from Greenwire with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

politics are allowed to trump science and core wildlife management principles."

If the wolf is delisted, FWS will continue to monitor the species for five years. The agency can relist the species and provide federal protections again if the population declines and it's deemed necessary. Litigation will likely ensue.

The proposal does not affect Mexican gray wolves, which would remain listed under the ESA.

NEPA: Bureau of Land Management may boost Hammonds' cattle grazing area

(Greenwire, 5/7/2019) Scott Streater, E&E News reporter

Oregon ranchers Dwight and Steven Hammond spent years in prison on arson charges for fires they claimed were needed to curb invasive species.

Now, the Bureau of Land Management is contemplating asking the Hammonds for help with that same problem.

BLM is considering significantly increasing the number of cattle on a federal grazing allotment held by the Hammonds, the Oregon ranchers that President Trump pardoned last year after they were convicted of arson.

The reason, according to BLM, is that the bureau did not allow grazing on the 5,800 acres of federal lands in question in the years after the Hammonds were convicted of setting fire to federal property adjacent to their southeast Oregon ranch. That, in turn, allowed the buildup of thick stands of dead and dying vegetation underneath thick stands of crested wheatgrass that some local authorities and property owners fear could spark, or help spread, large wildfires in the region, according to an environmental assessment (EA) the bureau released last month.

The change to the grazing allotment is not out of step with typical BLM moves, but the controversy surrounding the Hammonds has drawn criticism of the proposal.

The Interior Department reinstated the Hammonds' grazing permits earlier this year.

That came about six months after President Trump issued a full pardon of the Hammonds, saying "justice is overdue" for the father-and-son ranchers.

Now, BLM is evaluating adding the equivalent of roughly 1,000 head of cattle to the animals allowed to graze on one of the Hammonds' four federal allotments, in hopes that it will trim back five years' buildup of dead vegetation underneath the crested wheatgrass.

The extra cattle would only be allowed to graze on the Hammond allotment for two years, and only between March 1 and Dec. 15 — though there is a process to allow the extra cattle for additional years.

The problem is not crested wheatgrass, which contributes to overall rangeland health by slowing the spread of invasive grasses like cheatgrass and medusa head. Rather, cattle are needed to eat the built up "biomass" to "reduce the fine fuel accumulation, reduce fine fuel continuity, and reduce the risk of wildfire spread overall," according to the EA.

BLM is expected to make a final decision on the increased grazing in the coming weeks.

It's not unusual for BLM to temporarily authorize additional grazing on an allotment for issues like the wildfire concerns at the Hammonds' ranch.

But the proposal angered some environmental groups, given the ranch's role in sparking the 2016 armed takeover of the nearby Malheur National Wildlife Refuge led by Ammon and Ryan Bundy after the Hammonds were resentenced to five years in prison for arson.

"It's appalling that the Trump administration is planning to reward the Hammonds for committing arson on public lands, for which they were convicted in court," said Randi Spivak, public lands director at the Center for Biological Diversity, in an email to E&E News.

"The Hammonds shouldn't receive a penny of taxpayer subsidies. The BLM should restore the area and allow native sagebrush and bunch grasses to once again flourish to benefit native wildlife," Spivak added.

But Ethan Lane, senior executive director of the Public Lands Council and of federal lands for the National Cattlemen's Beef Association, said the proposal is part of good rangeland management.

Reprinted from Greenwire with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

Lead Story (continued from page 1)

At issue is a 17-mile transmission line across the James River that went into service the same week as the D.C. Circuit's decision. The court ridiculed the Army Corps for not taking seriously input from other expert federal and state agencies that had concerns about the project's location near Jamestown and other protected historical sites in the area, including Carter's Grove National Historic Landmark and the Captain John Smith Chesapeake National Historic Trail.

The unanimous opinion from a three-judge panel vacated the Army Corps permit and directed the agency to do an EIS.

But the Army Corps and Dominion urged the court to reconsider the permit cancellation, noting that the transmission line provides electricity to more than 600,000 people. Without

"Grazing is a critical tool for managing overgrown fuel loads on rangelands, and the Hammond Ranch is no exception to that rule," Lane said in an email. "We applaud the BLM for leveraging their resources to curb the threat of wildfire and encourage anyone clinging to old political fights to instead recognize good range management such as this."

BLM says in the EA it is considering the proposal because of "mounting interest locally to address the issue," specifically the Harney County Court and Steens Landowners Working Group, as well as nearby landowners.

"The public's concern has largely been due to the additional risk of large wildfires in the area as a result of fine fuel build up," the EA notes. "There are scattered private lands with residences and associated structures within and near the Hammond Allotment."

The EA for Authorization of Nonrenewable AUMs in Hammond Allotment may be viewed at https://eplanning.blm.gov/epl-front-office/projects/nepa/121277/170391/207034/NR_Hammond_Allotment_EA_Comment_Version.pdf.

a permit, the transmission towers might have to be torn down.

The project backers say the judges should have applied the so-called Allied-Signal legal test to weigh potential disruptive consequences and the seriousness of the NEPA violation to determine whether permit vacatur was appropriate.

The National Trust for Historic Preservation and the Association for the Preservation of Virginia Antiquities argued in a D.C. Circuit brief yesterday that the Army Corps' NEPA work for the transmission line — a simple environmental analysis concluding the project would have no significant impacts — represented "a fundamental error that goes to the heart of NEPA's environmental impact assessment framework."

NPCA further argued that the agency and the power company waived their opportunity to push the Allied-Signal test because they never raised it in earlier briefs for the case.

The court is expected to issue a ruling on whether to reconsider the permit cancellation in the next weeks or months.

Reprinted from *Greenwire* with permission from Environment & Energy Publishing, LLC. www.eenews.net; 202-628-6500

The **NAEP National Desk** is published every two weeks using content originally published in *Greenwire*. The NAEP *National Desk* is emailed directly to approximately 1,000 NAEP General, Associate, Student, and Senior members, and indirectly to more than 3,100 chapter-affiliate members through 17 state or regional affiliate chapters. News articles are provided through a licensing agreement with Environment and Energy (E&E) Publishing, LLC (www.eenews.net). E&E's five daily online publications are ClimateWire, EnergyWire, E&E Daily, *Greenwire* and E&E News PM. **Subscription discounts are available to NAEP members. Sign up for a subscription by sending an email to cchinivata@eenews.net.**

This edition of the National Desk was compiled by Harold Draper. For more information on NAEP, please contact the NAEP office at office@naep.org.

The National Association of Environmental Professionals (NAEP) is a multidisciplinary, professional association dedicated to the promotion of ethical practices, technical competency, and professional standards in the environmental fields. Our members reflect a diversity of employers, including government, industry, academia, consulting firms, and the private sector in the U.S. and abroad. They have access to the most recent developments in environmental practices, research, technology, law and policy.