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Latest Developments in Federal Environmental Law

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New Regulations Redefine the Scope of the Clean Water Act

The Clean Water Act applies by its terms to "navigable waters," which the act defines merely as "waters of the United States." A clear and consistent definition of this critically important phrase, which demarcates the boundaries of federal jurisdiction and permitting authority under the act, has for years proved painfully elusive—and highly controversial. On January 23, 2020, the U.S. Environmental Protection Agency and the Army Corps of Engineers, the two federal agencies charged with implementing the act, jointly issued new regulations to redefine what types of waterbodies are covered by the act and what types of waterbodies are instead subject only to state and local authority. The new regulations, dubbed the "Navigable Waters Protection Rule," will dramatically narrow the scope of the act as compared to the previous regulations.

The new rule is the culmination of the administration's efforts to undo the broad interpretation of federal jurisdiction embodied in the Obama administration's 2015 "Clean Water Rule." These efforts started in February 2017 with the President's Executive Order 13778, which directed the agencies to propose new regulations to rescind or revise the 2015 rule. The agencies then embarked on a two-step rulemaking process, first to repeal the 2015 rule and then to replace it. The agencies completed their "step one" repeal in the fall of 2019, but the repeal rule merely left in place the preexisting regulations from 1986, which have been a significant source of the pervasive uncertainty in recent years surrounding the act's reach. The agencies signaled their approach towards the "step two" replacement rule in proposed regulations issued in December 2018, and the new final rule largely tracks that approach.

According to the preamble, the new rule maintains "federal authority over those waters that Congress determined should be regulated by the Federal government under its Commerce Clause powers, while adhering to Congress' policy directive to preserve States' primary authority over land and water resources." The agencies also contend that the new rule "increases the predictability and consistency of Clean Water Act programs by clarifying the scope of 'waters of the United States' federally regulated under the Act."

The new rule will become effective 60 days after publication in the Federal Register, which is expected to occur in the coming days. But the rule hardly represents the final word on what qualifies as a "water of the United States." Litigation to challenge the new rule is certain, and litigation challenging both the 2019 repeal rule and the 2015 Clean Water Rule is ongoing. The current uncertainty over the Clean Water Act's reach is therefore likely to continue until the courts definitively resolve the interpretation of what is inescapably an open-ended and indeterminate statutory phrase that has long puzzled stakeholders, scholars, regulators, and judges.

Background

The regulations adopted in 1986 reflected a broad interpretation of federal jurisdiction under the act. But two U.S. Supreme Court decisions, in 2001 and 2006, scaled back this broad view. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001); *Rapanos v. United States*, 547 U.S. 715 (2006). In 2008, the agencies published non-binding, interpretive guidance that sought to interpret and apply the *Rapanos* decision, and, in particular, Justice Anthony Kennedy's "significant nexus" test. But the guidance did little to clarify the boundaries of federal jurisdiction, and it called for a case-by-case scientific analysis for many waterbodies without an obvious connection to a larger river, lake, or bay. This resulted in a complicated and time-consuming process just to figure out as a threshold matter if the Clean Water Act applied to a particular parcel.

The agencies adopted the Clean Water Rule in June 2015 in an effort to resolve this uncertainty and to establish clearer standards for federal jurisdiction. 80 Fed. Reg. 37,054 (June 29, 2015). But due to a nationwide stay resulting from litigation, the 2015 rule did not take effect until 2018. And when the 2015 rule finally did take effect, it did so only in 22 states, with various district court orders preventing application of the rule in 27 other states (and a lack of clarity over which rules applied in New Mexico). *See, e.g., State of North Dakota et al. v. U.S. Environmental Protection Agency*, 127 F. Supp. 3d 1047 (D.N.D. 2015); *State of Georgia v. Pruitt*, 326 F. Supp. 3d 1356 (S.D. Ga. 2018); *State of Texas v. U.S. Environmental Protection Agency*, 2018 WL 4518230 (S.D. Tex. 2018). The result was a confusing patchwork, compelling the EPA to post a color-coded map on its website to show which set of rules—either the 2015 Clean Water Rule, or the preexisting 1986 regulations as supplemented by Rapanos and other case law and by the agencies' 2008 interpretive guidance—applied in which states.

The agencies' repeal of the 2015 rule then took effect on December 23, 2019. *See* 84 Fed. Reg. 56,626 (Oct. 22, 2019). The repeal restored national uniformity, but it did not establish certainty over the scope of federal jurisdiction. Indeed, the repeal simply reverted back to the fact-specific, case-by-case approach reflected in the 2008 Rapanos guidance.

But this state of affairs was short lived. Only a month after the repeal regulation took effect, the agencies have now published their new replacement definition of what qualifies as a "water of the United States."

Description of New Rule

The rule sets forth the following four categories of waterbodies that are subject to federal jurisdiction under the act:

1. **Traditional navigable waters.** This category includes "[t]he territorial seas, and waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including waters which are subject to the ebb and flow of the tide."

   This category of waterbodies has been subject to the act since its initial passage in 1972. But the rule adds a new definition of what it means to be subject to the ebb and flow of the tide. The new definition covers "those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitation pulls of the moon and sun," and this coverage ends "where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects."

2. **Tributaries.** A tributary is defined as "a river, stream, or similar naturally occurring surface water channel that contributes surface flow" to a traditional navigable water in a typical year, either directly or indirectly through another tributary or through one of the two categories of waterbodies described below.

   The rule specifies that a tributary must be perennial or intermittent in a typical year. "Perennial" means "surface water flowing continuously year-round," and "intermittent" means "surface water flowing continuously during certain times of the year and more than in direct response to precipitation (e.g., seasonally when the groundwater table is elevated or when snowpack melts)." A "typical year" means "when precipitation and other climatic variables are within the normal periodic range (e.g., seasonally, annually) for the geographic area of the applicable aquatic resources based on a rolling thirty-year period."

   The rule provides that a tributary does not lose its jurisdictional status if its contribution of surface water flow to a traditional navigable water occurs through "a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar nature feature."

3. **Lakes, ponds and impoundments.** This category covers "standing bodies of open water that contribute surface water flow" to a traditional navigable water in a typical year, either directly or indirectly through a tributary; through another lake, pond or impoundment; or through an "adjacent wetland" (which is described below). As with a tributary, a lake, pond, or impoundment does not lose its jurisdictional status if its contribution of surface water flow to a traditional navigable water occurs through "a channelized non-jurisdictional surface water feature, through a subterranean river, through a culvert, dam, tunnel, or similar artificial feature, or through a debris pile, boulder field, or similar nature feature."

   This category also covers standing bodies of open water that are inundated by flooding in a typical year from a traditional navigable water, a tributary, or another jurisdictional lake, pond, or impoundment.

4. **Adjacent wetlands.** This term covers wetlands that either (1) "abut, meaning to touch at least one point or side of," a waterbody in one of the first three categories above; (2) "are inundated by flooding in a typical year" by such a waterbody; (3) are physically separated from such a waterbody "only by a natural berm, bank, dune, or other similar feature"; or (4) are physically separated from such a waterbody "only by an artificial dike, barrier, or similar artificial structure so long as that structure allows for a direct hydrological surface connection" between the wetlands and the waterbody in a typical year.

   An adjacent wetland is jurisdictional "in its entirety when a road or similar artificial structure divides the wetland, as long as the structure allows for a direct hydrologic surface connection through or over that structure in a typical year."

The new rule then excludes from the act's coverage 12 specific categories of waterbodies. Some of these categories already were excluded under the previous regulations, but some of the exclusions are new. The exclusions cover the following:

1. Waterbodies that do not fit into one of the four jurisdictional categories outlined above
2. Groundwater
3. Ephemeral features such as swales, gullies, rills, and pools, with "ephemeral" defined as "surface water flowing or pooling only in direct response to precipitation"
4. Diffuse stormwater runoff and directional sheet flow over uplands
5. Ditches that do not otherwise qualify as a jurisdictional water
6. Prior converted cropland
7. Artificially irrigated areas that would revert to upland if the irrigation ceased
8. Artificial lakes and ponds, such as irrigation and farm ponds, constructed or excavated in uplands or in non-jurisdictional waters
9. Water-filled depressions incidental to mining and construction activity, and pits used to obtain fill, sand, or gravel, that are constructed or excavated in uplands or in non-jurisdictional waters
10. Stormwater control features constructed or excavated in uplands or in non-jurisdictional waters to convey, treat, infiltrate, or store stormwater runoff

11. Groundwater recharge, water reuse, and wastewater recycling structures, including detention, retention, and infiltration basins and ponds, constructed or excavated in uplands or in non-jurisdictional waters
12. Waste treatment systems

What Comes Next

As the inevitable legal challenges wind their way through the courts, it likely will be many months, and perhaps even years, before there is a clear and reliable definition of federal jurisdiction under the Clean Water Act. Absent congressional action to define once and for all what it meant when it said that the act regulated “waters of the United States,” the fate of the agencies’ new regulatory definition lies with the courts—at least until different regulations are adopted by a future administration.

Major Changes in 2019 to Endangered Species Act Regulations

In August 2019, three new regulations were adopted that substantially revised the regulations implementing the Endangered Species Act.

- First, the U.S. Fish & Wildlife Service adopted a regulation that changes the protections for species that are listed or reclassified as "threatened" after the regulation's effective date (September 26, 2019). 84 Fed. Reg. 44,753 (Aug. 27, 2019).
- Second the USFWS and National Marine Fisheries Service (collectively, the "Services") jointly adopted a regulation that changes the standards for listing and delisting species and for designating critical habitat. 84 Fed. Reg. 45,020 (Aug. 27, 2019)
- Third, both Services also jointly adopted a regulation that revises the interagency consultation process under Section 7 of the ESA, which is used to determine whether a federal action—including the federal issuance of a permit approving a private project—would jeopardize a listed species' continued existence or result in an adverse modification of a listed species' designated critical habitat. 84 Fed. Reg. 44,976 (Aug. 27, 2019).

Each regulation is described individually below. The three rules are controversial and have been challenged in the U.S. District Court for the Northern District of California by a coalition of plaintiffs—led by the State of California—that includes 17 states, the District of Columbia and New York City. Several other states have intervened on the other side to assist the Services in defending the regulations. The case is likely many months away from a final district court decision, and then an appeal to the Ninth Circuit is a very high probability, with a potential further appeal to the Supreme Court. If allowed to stand by the courts, the regulations reflect a significant change in the way that a number of key provisions of the ESA are interpreted and implemented.

1. Threatened Species—Rescission of USFWS Blanket 4(D) Rule

The ESA defines an "endangered species" as "any species which is in danger of extinction…." 16 U.S.C. § 1532(6). It further defines a "threatened species" as "any species which is likely to become an endangered species within the foreseeable future…." 16 U.S.C. § 1532(20).

Section 9 of the ESA sets forth a variety of prohibitions that apply to fish and wildlife species listed as endangered, including most importantly the prohibition against "take" of the species. 16 U.S.C. § 1538(a)(1). Section 9 also sets forth protections for endangered plant species, including the prohibition against removing, damaging or destroying plants in areas under federal jurisdiction or in any other areas in knowing violation of state law. 16 U.S.C. § 1538(a)(2). The ESA does not directly apply the same prohibitions that apply to endangered species to those species that are listed as threatened. Instead, Section 4(d) of the ESA leaves it to the USFWS to "issue such regulations as it deems necessary and advisable for the conservation of such species." 16 U.S.C. § 1533(d).

For fish and wildlife species under its jurisdiction, the USFWS previously had a "blanket rule" that automatically extended the Section 9 prohibitions to threatened species, except for any threatened species covered by its own special "Section 4(d) rule." Thus, in the absence of a special rule, endangered and threatened fish and wildlife species under the USFWS' authority have all been subject to the same

prohibitions and protections. Similarly, with respect to plants, the USFWS previously had a blanket rule that automatically extended most (but not all) of the Section 9 protections to threatened species.

The new regulation rescinds this blanket rule for all species that the USFWS lists as threatened, or reclassifies from endangered to threatened, after the regulation's effective date, which is September 26, 2019. For these newly listed or reclassified "threatened" species, the USFWS will now craft rules specific to each species on a case-by-case basis, such that the applicable prohibitions and restrictions are tailored specifically to each species' conservation needs. This change means that the USFWS's approach to "threatened" species is now aligned with the approach used by NMFS, which has not adopted a similar blanket rule for the threatened marine species it administers.

For species that the USFWS listed or reclassified as threatened on or before the regulation's effective date of September 26, 2019, the prior blanket rules remain in place, such that the protections and prohibitions applicable to these species will remain the same as those for endangered species.

The lawsuit challenging the new regulations claims that the USFWS' rescission of its prior blanket rule "constitutes a radical departure from the longstanding, conservation-based agency policy and practice of providing default section 9 protections to all newly-listed species" and "contravenes the ESA's conservation purpose and mandate by leaving threatened species without protections necessary to promote their recovery and increasing the risk that they will become endangered." *State of California v. Bernhardt* (N.D. Cal. Case No. 4:19-cv-06013-JST, filed Sept. 25, 2019), Complaint at p. 5.

Coupled with the new definition of "foreseeable future" as described below, the rescission of the USFWS' prior blanket rules could have a significant impact on the future protections afforded to species that do not meet the standard for qualifying as "endangered."

2. Section 4 Rule—Listing & Delisting of Species and Designation of Critical Habitat

The second regulation changes the way both Services make decisions under Section 4 to list or delist a species or to designate critical habitat for a listed species.

Listing and Delisting Decisions. The regulation makes the following three changes concerning decisions to list, delist or reclassify a species:

- Economic effects from listing decisions: The ESA specifies that listing decisions must be made "solely on the basis of the best scientific and commercial data available" about the status of the species, after taking account any efforts by state and local governmental agencies to protect the species. 16 U.S.C. § 1533(b)(1)(A). This means that, when making listing decisions, the Services may not consider the negative economic impacts that the listing could have on landowners or developers. This contrasts with the designation of a listed species' critical habitat, which may take economic impacts into account.

  Like the prior rules, the new regulation continues to require that listing decisions be based "solely" on the data concerning the species' biological status. However, the regulation deletes the prior text stating that listing decisions must be made "without reference to possible economic or other impacts of such determination." The Services reasoned that this text is duplicative of the statute and therefore redundant and unnecessary. The Services also reasoned that while listing decisions may not be based on economic impacts, the ESA does not prohibit compiling economic information and presenting that information to the public, "as long as such information does not influence the listing determination."

- "Foreseeable future": As noted above, the ESA defines "threatened species" as any species that is likely to face the danger of extinction "within the foreseeable future." However, the ESA does not contain any definition of what "foreseeable" means. The prior regulations also did not provide a definition.

  The new regulations add the following definition: "The term foreseeable future extends only so far into the future as the Services can reasonably determine that both the future threats and the species' responses to those threats are likely. The Services will describe the foreseeable future on a case-by-case basis, using the best available data and taking into account considerations such as the species' life-history characteristics, threat-projection timeframes, and environmental variability. The Services need not identify the foreseeable future in terms of a specific period of time."

  This definition relies on several recent circuit court decisions. *See In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 709 F.3d 1, 3 (D.C. Cir. 2013) (the USFWS has the discretion to define on a case-by-case "the timeframe over which the best available scientific data allows us to reliably assess the effect of threats on the species"); *Alaska Oil & Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016), *cert. denied*, 138 S. Ct. 924 (2018) (in upholding the listing of two seal populations in Alaska as threatened, the court deferred to NMFS' scientific projections out to the year 2095, emphasizing that the ESA did not require the agency to wait until there was definitive quantitative data that is currently unavailable or to estimate a specific "extinction date" to justify a listing decision).

- Delisting decisions: The new regulation clarifies that, when considering whether to delist a species, the Services must "consider the same factors and apply the same standards" that they use when making an affirmative listing decision. The new rule specifies that a species may be delisted if it is extinct, does not meet the definition of a species, or does not meet the standards for being listed as endangered or threatened.

- The Services rejected the position that once a species is listed, the standard for delisting should be higher than for the initial listing, as a precautionary and protective measure. The Services explained: "We must consider the best available scientific data in the same way regardless of whether it is in the context of delistings or downlistings versus initial listings."

Designation of Critical Habitat. The new regulation also makes several important changes to the criteria for designating a listed species' critical habitat.

- Unoccupied areas: When designating critical habitat, the first step involves consideration of the geographical areas that are occupied by the species. Geographical areas that are unoccupied by the species also may be considered, but the new regulation makes it harder to include such areas in a critical habitat designation.

  Unoccupied areas may be included only if two hurdles are cleared. First, the occupied areas must be "inadequate to ensure the conservation of the species." Second, it must be determined that one or more unoccupied areas are "essential for the conservation of the species." For an unoccupied area to be essential, there must be "a reasonable certainty both that the area will contribute to the conservation of the species and that the area contains one or more of those physical or biological features essential to the conservation of the species."

  This change relies on the Supreme Court's recent decision in *Weyerhaeuser Co. v. U.S. Fish & Wildlife Service*, 139 S. Ct. 361 (2018), which involved a 1,544-acre site in Louisiana that the Service designated as critical habitat for the dusky gopher frog. The site contained high-quality

breeding grounds, but it lacked the type of open-canopy forest required by the frog, which had not occupied the site in decades. The Service found that the habitat could be restored to be suitable for the frog "with reasonable effort." But the Court ruled that an area is eligible for designation as critical habitat under the ESA only if it also is "habitat" for the species. The Court remanded the case for consideration of two disputed issues: (1) whether an endangered species' habitat can include areas that would require some modifications to support the species, and (2) whether the dusky gopher frog could survive at the site without any modifications to the existing features.

- Not prudent determinations: A critical habitat designation is supposed to made concurrently with a species' listing, but the Services may decide that it is "not prudent" to make a designation. The new regulation broadly provides that such a "not prudent" determination is permissible if any of the following apply: (1) identifying the habitat can be expected to increase the threat posed by human activity, (2) the destruction, modification or curtailment of a species' habitat is not a threat to the species, or such threats to the species stem from causes that cannot be addressed through habitat management actions; (3) areas within the jurisdiction of the United States provide only negligible conservation value for a species occurring primarily outside of the United States; (4) no areas meet the definition of critical habitat for the species; or (5) the USFWS or NMFS (as the case may be) "otherwise determines that designation of critical habitat would not be prudent based on the best scientific data available." Note, however, that the Ninth Circuit long ago explained that the "imprudence" exception is narrow and is reserved for extraordinary circumstances. *See Natural Resources Defense Council v. U.S. Dept. of Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

California's lawsuit claims that this second regulation "unlawfully and arbitrarily injects economic considerations and quantitative thresholds into the ESA's science-driven, species-focused analyses; limits the circumstances under which species can be listed as threatened; eliminates consideration of species recovery in the delisting process; expands the ESA's expressly narrow exemptions from the requirement to designate critical habitat; and severely limits when presently unoccupied critical habitat would be designated, particularly where climate change poses a threat to species habitat." *State of California v. Bernhardt*, Complaint at p. 5.

While these regulatory changes may not have a significant immediate effect on how the ESA implemented, as with the first regulation, the changes may be particularly impactful over the longer term.

3. Section 7 Regulation—Interagency Consultation

The third regulation makes a broad set of changes to the ESA's interagency consultation process. Under Section 7 of the ESA, when a federal agency undertakes, funds or approves an action that may affect a listed species or its designated critical habitat, that agency must consult with the USFWS or NMFS (depending on the species) to ensure that the action is not likely to jeopardize the species' continued existence or result in the destruction or adverse modification of the species' designated critical habitat.

The consultation requirement applies, for example, when a federal agency issues a permit for a non-federal project, such as wetlands fill issued by the U.S. Army Corps of Engineers under Section 404 of the Clean Water Act, and the permitted action may affect a listed species or critical habitat. In this instance, the Corps is the "action agency" and must initiate consultation with the USFWS or NMFS.

The most significant aspects of the new wide-ranging Section 7 regulation are as follows:

- *The definition of the "effects of the action" that must be considered as part of the consultation*. The regulation eliminates the prior references to "indirect effects" and the effects of "interrelated

or interdependent" actions, such that the term is now simplified to mean "all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action." Causation is based on a "but for" test, under which "[a] consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur." The effects of the action "may occur later in time and may include consequences occurring outside the immediate area involved in the action."

The conclusion that a consequence of the proposed action is "reasonably certain to occur" must be based "on clear and substantial information." Further, this assessment must consider whether the consequence (1) "is so remote in time from the action under consultation that it is not reasonably certain to occur"; (2) "is so geographically remote from the immediate area involved in the action that it is not reasonably certain to occur"; and (3) "is only reached through a lengthy chain that involves so many steps as to make the consequence not reasonably certain to occur."

The conclusion that another activity is caused by the proposed action similarly must be based on "clear and substantial information" and must consider the following factors: (1) past experiences with activities that have resulted from actions that are similar in scope, nature and magnitude to the proposed action; (2) existing plans for the activity; and (3) any remaining economic, administrative or legal requirements necessary for the activity to proceed. These same factors also must be considered to define the set of other activities, which are not caused by the proposed action, that may result in "cumulative effects" that are part of the evaluation of impacts under Section 7.

- *The jeopardy standard and the definition of the "environmental baseline*." When the Section 7 consultation process is triggered by a federal action, and when it is likely that the action will adversely affect a listed species or its critical habitat, "formal consultation" is required. This process culminates in the issuance of a biological opinion by the USFWS or NMFS (as applicable), which determines whether the action would jeopardize a continued species' existence or result in the destruction or adverse modification of critical habitat. If the action would result in either of these effects, the outcome of formal consultation is a "jeopardy" biological opinion, which generally means that the action may not proceed, unless mitigation measures are incorporated to reduce the impacts to species.

  The Ninth Circuit has ruled that when the existing "baseline" conditions for a species already are poor, even a small, incremental effect on the species or its critical habitat from a proposed action can push a species past its "tipping point" and lead to a "jeopardy" determination in a biological opinion. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 929–930, 936 (9th Cir. 2008).

  But the Services have rejected this notion of "baseline jeopardy," asserting in the preamble to the new Section 7 regulation that a jeopardy determination looks "prospectively to the effects of Federal actions, not to the pre-action status of the species." The Services' position is reflected in the new standalone definition of the term "environmental baseline" (which was previously defined as part of the "effects of the action"). Under the new regulation, the "environmental baseline" refers to "the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action." Consistent with the prior definition, the environmental baseline "includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private

actions which are contemporaneous with the consultation in process." But the definition clarifies that "[t]he consequences to listed species or designated critical habitat from ongoing agency activities or existing agency facilities that are not within the agency's discretion to modify are part of the environmental baseline."

The preamble explains that this new definition is designed "to make it clear that 'environmental baseline' is a separate consideration from the effects of the action." In practice, "the environmental baseline should be used to compare the condition of the species and the designated critical habitat in the action area with and without the effects of the proposed action, which can inform the detailed evaluation of the effects of the action…"

Thus, to cause "jeopardy" under the Services' interpretation of the ESA, an action must either "reduce *appreciably* the likelihood of both the survival and recovery of a listed species in the wild" (the definition of "jeopardize the continued existence" of a species), or result in a "direct or indirect alteration that *appreciably* diminishes the value of critical habitat as a whole for the conservation of a listed species" (definition of "destruction or adverse modification" of critical habitat) (emphasis added). Under the Services' interpretation, it is not sufficient to cause "jeopardy" if an action has only a small, incremental (i.e., less than appreciable) impact—even if the impact worsens a species' ability to survive under already degraded conditions.

- *Mitigation measures need not be formalized in binding plans*. As noted above, sometimes mitigation measures—which are referred to as "reasonable and prudent alternatives" (or RPAs)—are required to avoid a "jeopardy" determination in a biological opinion. The Ninth Circuit has ruled that when mitigation or project revisions are needed to avoid jeopardy, there must be "specific and binding plans" to implement the requisite measures with a "clear, definite commitment of resources." *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 935–36 (9th Cir. 2008).

  The Services have again rejected the Ninth Circuit's position. The new regulation states: "Measures included in the proposed action or a reasonable and prudent alternative that are intended to avoid, minimize, or offset the effects of an action *are considered like other portions of the action and do not require any additional demonstration of binding plans*." (Emphasis added.)

- *Deadline for "Informal Consultation*." When the consultation requirement is triggered by a federal action, but the action is not likely to adversely affect a listed species' or critical habitat, formal consultation culminating in a biological opinion is not required. Instead, the ESA's requirements are satisfied through "informal consultation," which culminates in a "not likely to adversely affect" determination by the USFWS or NMFS (as applicable).

  The new regulation establishes a 60-day time limit (which can be extended to 120 days) for completing the informal consultation process. Thus, for example, if the Army Corps proposes to issue a Clean Water Act Section 404 permit and submits a written determination to the USFWS that the permitted action is "not likely to adversely affect" listed species or critical habitat, the USFWS must issue a written concurrence or non-concurrence within this timeframe. This change is intended to increase regulatory certainty and timeliness for federal agencies and permit applicants.

In addition to these significant changes, the regulation makes a number of other revisions to the Section 7 process:

- *Initiation of formal consultation*: The regulation specifies what is necessary to initiate the formal consultation process. Specifically, it outlines the information—commonly called the "initiation

package"—that the federal "action agency" (i.e., the agency undertaking, funding or approving the action that triggers the consultation, such as the Corps in the example above involving the issuance of a Section 404 permit) must provide to the USFWS or NMFS, as applicable. In turn, the regulation allows the Services to adopt all or part of the initiation package—which can include any environmental review of the proposed action completed under the National Environmental Policy Act—in the biological opinion.

- *Expedited consultation*. The regulation establishes a new "expedited consultation" process, which provides opportunities to streamline consultation for actions that have minimal or predictable effects based on the nature, size and scope of the action and previous consultation experience. This process is intended to apply to actions ranging from those with a minimal impact to those that have a potentially broad range of effects that are known and predictable, but unlikely to result in jeopardy.

- *Reinitiation of consultation*. When the consultation process has been completed for an action, but there are new circumstances or information or project changes such that the action would have increased impacts on listed species or critical habitat, consultation must be "reinitiated" if there is still discretionary federal involvement or control over the action. This requirement can be triggered, for example, if the original amount or extent of permitted "incidental take" is exceeded, if new information reveals impacts that were not previously considered, or if a new species is listed or new critical habitat designated that may be affected by the project.

  In contrast with the prior regulation, the new Section 7 rule does not strictly require that this reinitiation lead to a new *formal* consultation process; instead, it allows for a new *informal* process if appropriate based on the circumstances. This change is intended to provide opportunities for streamlining the reinitiation process. The new regulation also specifies that the duty to reinitiate does not apply, under specified circumstances, to an existing programmatic land management plan when a new species is listed or new critical habitat is designated.

- *Programmatic consultation*. The regulation contains a new definition that codifies an optional programmatic process, which already exists in practice, that is designed to improve efficiency. This process may be used to evaluate multiple actions within a particular geographic area, or broad agency programs, plans or policies that provide a framework for future proposed actions. Note that the preexisting regulations already include a definition of "framework programmatic action."

Lastly, while the proposed Section 7 regulation published in July 2018 requested comment on whether to restrict the need for interagency consultation under certain circumstances, the final regulation deferred any action on this issue, which the Services may address at a future time. For example, the proposed rule presented the situation where a federal action would have effects that are only "manifested through global processes" or that "cannot be reliably predicted or measured at the scale of a listed species' current range."

The lawsuit challenging the regulations in the federal district court in San Francisco claim that the new Section 7 rule "unlawfully and arbitrarily limits when a federal agency action would be deemed to destroy or adversely modify designated critical habitat; significantly restricts analysis of the type and extent of effects of a federal agency action; limits when changed circumstances require re-initiation of consultation on a federal agency action; limits federal action agencies' duty to insure mitigation of the adverse effects of their proposals and gives these agencies the ability to make biological determinations that the Services are required to make themselves; places an unexplained time limit on informal consultation; and allows

for 'programmatic' and 'expedited' consultations that lack the required and in-depth, site-specific analysis of a proposed federal agency action." *State of California v. Bernhardt*, Complaint at p. 5.

By changing the procedures, standards and requirements for the consultation process, the Section 7 regulation likely will have an immediate and significant effect on how the ESA is implemented for actions affecting species that involve federal participation, funding or approval.

Impacts of the New Rules

To recap, the first two regulations (under Section 4 of the ESA) may have greater significance over the long term—especially as they may affect the number of species that are listed; how species are taken off the list; the extent to which the ESA's "take" prohibition will apply to "threatened" species; and how areas unoccupied by a listed species are taken into account for its critical habitat designation. But these two regulations may not have as great of an impact in the near-term, as they mostly relate to future decisions to list, delist or reclassify a species or to designate critical habitat.

By contrast, the Section 7 rule could pose more immediate impacts, as it changes the way interagency consultations are conducted. Some of the changes reflected in the Section 7 regulation are more technical in nature, such as simplifying the language and clarifying existing requirements, rather than altering or removing such requirements. But other changes may have more of an impact—such as drawing a clear dividing line between the environmental baseline and the effects of the action; rejecting the notion of a pre-existing "baseline jeopardy" when the prevailing conditions for a species already are highly degraded; cabining the definitions of causation, foreseeability and reasonable certainty; specifying that mitigation actions need not be definite or binding; and imposing a timeline on informal consultations.

But as with the government's approach to defining jurisdiction under the Clean Water Action, the ultimate fate of the new regulations is far from clear at this juncture. It will be up to the courts to decide whether the regulations represent a permissible interpretation of the ESA's statutory requirements. This battle has just started and is likely years away from a final resolution.

White House Proposes Overhaul of NEPA Regulations

Taking the next step in its efforts to streamline the environmental review process for projects under federal jurisdiction, the White House Council on Environmental Quality (CEQ) published proposed regulations on January 10 that would revamp the rules implementing the National Environmental Policy Act. NEPA (43 U.S.C. §§ 4321–4347) applies to a host of projects, programs, and activities that involve federal participation or approval, mandating that federal agencies fully consider the potential environmental consequences of their proposed actions before making a final decision. CEQ regulations apply to all federal agencies, although many agencies supplement these regulations with their own rules or guidance.

As NEPA turns 50 years old, the new rules—if finalized as proposed—would be the first comprehensive overhaul of the statute's implementing regulations since they were adopted in 1978. Since their enactment, NEPA and the CEQ regulations have been a source of friction between proponents and critics of the federal environmental review process. Hundreds of court cases have interpreted the statute and regulations.

The proposed rules are controversial and wide-ranging, and have significant ramifications for many types of actions that are carried out by the federal government, receive federal funding, or require a permit or other approval from a federal agency. CEQ published an advanced notice for the proposed rules in June 2018, requesting input on a variety of issues concerning how the current regulations should be revised. The agency received over 12,500 comments.

The public comment period for the new proposed rules closed on March 10, 2020, with over 170,000 additional comments from groups, agencies and individuals. If CEQ adopts the new rules as a final set of regulations, it is certain that numerous stakeholders, such as environmental groups, will challenge the regulations in court.

In summary, the proposed rules:

- Shift the emphasis of the NEPA regulations toward procedural efficiency and predictability, while narrowing consideration of potential environmental impacts.
- Encourage agencies to identify circumstances that could obviate the need to apply NEPA to a proposed action, such as insufficient federal control over a non-federal project or conflicting requirements under another law.
- Strengthen the scoping process, which is used to delimit the environmental issues to be analyzed, and allow agencies to begin this process earlier on in the NEPA review.
- Consolidate multiple agency reviews into a single NEPA document and project approval.
- Eliminate the requirement that NEPA reviews consider the cumulative impacts of a proposed action in light of the effects of other activities, instead mandating consideration only of the action's "reasonably foreseeable" impacts.

- Limit the number and scope of "reasonable alternatives" that must be evaluated by, for example, excluding alternatives beyond the agency's jurisdiction and, for non-federal projects, alternatives that do not meet the goals of the project applicant.
- Establish presumptive time limits for the completion of the NEPA process and presumptive page limits for environmental documents.
- Allow a project proponent to prepare an Environmental Impact Statement (EIS) when federal agency approval is required for a non-federal project.
- Encourage agencies to exempt actions from more detailed environmental review through expanded use of categorical exclusions.
- Modernize the means of public engagement in the NEPA process by greater use of contemporary technology, and clarify the obligations of commenting parties and of agencies in responding to comments.

This update explains the key components of the proposed rules, with citations to the revisions to 40 C.F.R. parts 1500–1508. The update concludes by highlighting the implications of the proposed rules for the NEPA review process. We will continue to closely monitor any new developments on the CEQ rules; explore in depth the potential ramifications of the rules, if enacted; and identify key questions and topics that may warrant comments on the proposed rules.

Key Components of the Proposed NEPA Regulations

INTRODUCTORY PURPOSE AND POLICY

The existing regulations emphasize that NEPA is an "action-forcing" statute that requires federal agencies to "take actions that protect, restore and enhance the environment," and that the purpose of an EIS is to ensure that NEPA's environmental goals and policies are "infused into the ongoing programs and actions of the federal government." The introductory provisions of the proposed rules remove this text, emphasizing instead that NEPA is a "procedural statute" and that its requirements are satisfied "if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision-making process." (Sections 1500.1(a) & 1502.1)

APPLICABILITY OF NEPA

The proposed rules instruct federal agencies to assess as a threshold matter whether NEPA applies to a proposed action. (Section 1501.1) Under the proposed rules, NEPA review is *not* required for:

- Actions that are excluded from the definition of "major Federal action," such as: (1) "non-Federal projects with minimal funding or minimal Federal involvement where the agency cannot control the outcome of the project"; (2) "non-discretionary decisions made in accordance with the agency's statutory authority or activities that do not result in final agency action"; and (3) "loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise significant control and responsibility over the effects of the action." (Sections 1501.1(a)(1), 1508.1(q))
- A wholly or partly non-discretionary action for which "the agency lacks authority to consider environmental effects as part of its decision-making process." (Section 1501.1(a)(2))
- An action for which compliance with NEPA "would clearly and fundamentally conflict with the requirements of another statute." (Section 1501.1(a)(3))

- An action for which NEPA compliance "would be inconsistent with Congressional intent due to the requirements of another statute." (Section 1501.1(a)(4))
- An action for which the function of NEPA compliance is served by "other analyses or processes under other statutes." (Section 1501.1(a)(5))

Agencies may make this threshold determination either in their NEPA procedures or on an individual project basis. (Section 1501.1(b))

SCOPING

Scoping represents the beginning of the process for the EIS and is used to engage interested parties and agencies to define the environmental issues to be evaluated. The proposed rules eliminate the existing requirement that an agency may not start the scoping process until it first publishes a notice of intent (NOI) indicating that an EIS will be prepared. Instead, the proposed rules allow agencies to start the scoping process "as soon as the proposal for action is sufficiently developed for agency consideration." (Section 1501.9(a)) CEQ explains that these revisions are intended to avoid "the artificial distinction between scoping and pre-scoping."

The proposed rules further instruct agencies to publish the NOI "as soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an [EIS]." (Section 1501.9(d)) The NOI must include a variety of additional details, including the purpose and need for the proposed action, a brief summary of expected impacts, anticipated permits and other authorizations, a schedule for the decision-making process, and a specific request for comments on potential alternatives and impacts. (Section 1501.9(d))

MULTIPLE AGENCY APPROVALS

The proposed rules provide that where a proposed action requires review by more than one federal agency, to the extent practicable, all of the federal agencies involved must evaluate the proposal in a single EIS and issue a joint record of decision (ROD), or in a single environmental assessment (EA) and finding of no significant impact (FONSI), depending on which level of review the lead agency determines is appropriate. (Section 1501.7(g)) According to CEQ, these changes are motivated by the administration's "One Federal Decision" policy to ensure coordinated and timely reviews.

The lead agency must determine the purpose and need for the proposed action and the alternatives to be evaluated in consultation with cooperating agencies. (Section 1501.7(h)) The lead agency also must develop a schedule with milestones for all the environmental reviews and project authorizations. (Section 1501.7(i)) If a milestone is missed, the matter must be elevated within the responsible agencies "for timely resolution." (Sections 1501.7(j) & 1501.8(b)(6)) Cooperating agencies are charged with meeting the lead agency's schedule and must limit their comments on the lead agency's NEPA review to those matters where they have jurisdiction by law or special expertise concerning the environmental issues. (Section 1501.8(b)(7))

ENVIRONMENTAL IMPACT STATEMENTS

The proposed rules make a number of significant revisions to the requirements for preparing an EIS. The most notable revisions are:

- The assessment of whether a project's impacts are significant, and thus whether to prepare an EIS, is based on "the potentially affected environment and the degree of the effects of the action." This revision substantially simplifies the requirements in the existing regulations, which define "significantly" in terms of the project's "context" and 10 enumerated factors of "intensity." This

revision also eliminates the references in the existing rules to impacts on "society as a whole" and "the world as a whole," and instead focuses on "the affected area (national, regional, or local)." (Section 1501.3(b))

- An EIS cannot be more than 150 pages (or 300 pages for proposed actions of "unusual scope or complexity") or take more than 2 years to complete (as measured from the date the NOI is published to the date of the ROD). These page and time limits can be exceeded only when a "senior agency official" provides written approval and sets new limits. (Sections 1502.7, 1501.10(b)(2)) The existing rules state only that an EIS must "normally" meet the page limits and that, while agencies are encouraged to set time limits on a case-by-case basis, "prescribed universal time limits for the entire NEPA process are too inflexible."

- A private project applicant may prepare an EIS, so long as the responsible federal official provides guidance, participates in its preparation, independently evaluates it prior to approval, and takes responsibility for its scope and content. (Section 1506.5(c)) The existing rules authorize this practice only for EAs and specify that an EIS must be prepared directly by the lead agency or its contractor (or where appropriate, by a cooperating agency). The proposed rules also eliminate the requirement that a contractor preparing an EIS certify that it has no financial or other interest in the outcome of the project.

- The proposed rules eliminate the requirement to consider "direct," "indirect," and "cumulative" effects. Instead, an EIS need only evaluate the "effects" of the action, which are defined to include only those impacts "that are reasonably foreseeable and have a reasonably close relationship to the proposed action or the alternatives." Under the proposed rules, a "but for" causal relationship "is insufficient to make an agency responsible for a particular effect under NEPA." Similarly, effects "should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain." The definition also excludes "effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action." Lastly, an "[a]nalysis of cumulative effects is not required." (Section 1508.1(g), (aa))

- When the agency has a statutory duty to review an application to authorize a non-federal project (such as issuance of a permit), the purpose and need of the proposed action must be based on "the goals of the applicant and the agency's authority." (Section 1502.13)

- An EIS must "[e]valuate reasonable alternatives to the proposed action." (Section 1502.14) "Reasonable alternatives" are defined as "a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant." (Section 1508.1(z)) The proposed rules eliminate the requirement that a lead agency consider reasonable alternatives not within its jurisdiction. The proposed rules also eliminate the text requiring an EIS to examine "all" reasonable alternatives. As CEQ explains, "an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum. The reasonableness of the analysis of alternatives in a final EIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action."

- The proposed rules clarify that agencies "are not required to undertake new scientific and technical research to inform their analysis," and "may make use of any reliable data sources, such as remotely gathered information or statistical models." (Section 1502.24) Further, an agency must obtain relevant information only if it is essential to a reasoned choice among

alternatives and the overall costs of getting the information are not "unreasonable." (Section 1502.22)

- "Where applicable," the discussion of environmental consequences must include "economic and technical considerations, including the economic benefits of the proposed action." (Section 1502.16(a)(10))
- The cover of the EIS must include the estimated total cost of preparing the EIS. (Section 1502.11(g))
- An EIS may be published and transmitted electronically (unless a paper copy is requested due to economic or other hardship). (Section 1502.21)

COMMENTS ON AN ENVIRONMENTAL IMPACT STATEMENT

The proposed rules establish new requirements for comments submitted on an EIS:

- Comments should provide sufficient detail to explain why the issue raised is significant to the consideration of the potential impacts of the proposed action or the alternatives. Comments on the draft EIS should reference specific sections or pages of the EIS, propose specific changes to the EIS where possible, and include or describe supporting data and methodology. (Section 1503.3(a))
- The draft EIS must include a summary of all alternatives, information, and analyses submitted by commenters during the scoping process. (Section 1502.17) The lead agency must request comments on the completeness of this summary in the draft EIS, and it must further provide a 30-day comment period on this summary after publication of the final EIS. (Section 1503.1(a)(3), (b)) Based on the summary, the lead agency decision-maker must certify in the ROD that the agency has considered all of the alternatives, information, and analyses submitted by public commenters—the agency is then entitled to a "conclusive presumption" that it considered the information included in the summary of submitted alternatives, information, and analyses in the EIS. (Section 1502.18)
- There is no duty for the agency to respond to comments that are not substantive or that are not timely submitted during the public comment period. The proposed rules provide that the agency must explain why comments do not warrant a response, but eliminate the existing requirement to cite "the sources, authorities, or reasons" that support this explanation. (Section 1503.4)
- Agencies may use electronic means to notify those who have requested notice for the proposed action. Agencies also may use electronic means (e.g., project or agency website, email, or social media) to provide notice to the public that a draft or final EIS has been published, except for proposed actions "occurring in whole or part in an area with limited access to high-speed internet." (Section 1506.6(b)) Agencies also must provide for electronic submission of comments. (Section 1503.1(c)) Agencies may conduct public hearings and meetings by "means of electronic communication," except where a traditional public meeting is required by law. (Section 1506.6(c))

CATEGORICAL EXCLUSIONS

Under the proposed rules, if extraordinary circumstances exist that could prevent the use of a categorical exclusion (CE), the agency "should consider whether mitigating circumstances or other conditions are sufficient to avoid significant effects" such that the CE would still apply. (Section 1501.4(b)) CEQ explains that this change "would clarify that the mere presence of extraordinary circumstances does not preclude the application of a CE." Rather, "the agency could modify the proposed action to avoid the extraordinary circumstances so that the action fits in the [CE]." Agencies also would be authorized to adopt another

agency's determination that a CE applies to a proposed action, "if the adopting agency's proposed action is substantially the same." (Section 1506.3(f))

ENVIRONMENTAL ASSESSMENTS

The proposed rules require preparation of an EA if a proposed action is not likely to have significant effects or if the significance of the effects is unknown, unless a CE applies or the agency has decided to prepare an EIS. (Section 1501.5(a)) An EA cannot be more than 75 pages or take more than one year to complete (as measured from the date of decision to prepare an EA to the publication of a final EA), unless a "senior agency official" approves exceeding these limitations in writing and sets new limits. (Sections 1501.5(e) & 1501.10(b)(1))

LIMITATIONS ON ACTIONS DURING NEPA PROCESS

In clarifying that ongoing NEPA processes do not preclude an applicant's development of project plans or designs, the proposed rules specify that an agency considering a proposed action for federal funding may authorize certain activities by the applicant, including acquisition of interests in land, purchase of long lead-time equipment, and purchase of options. (Section 1506.1(b))

LITIGATION AND REMEDIES

The proposed rules specify that comments or objections that are not submitted in a timely manner will be deemed "unexhausted and forfeited"; that NEPA lawsuits challenging a completed EIS should not be filed until there is a ROD; and that the NEPA regulations "create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm." (Section 1500.3(b)–(d))

ROLE OF TRIBES

The proposed rules add "Tribal" to the phrase "State and local" throughout the NEPA rules to ensure consultation with tribal entities and to reflect existing NEPA practice to coordinate or consult with affected tribal governments and agencies. The proposed rules also eliminate provisions in the current regulations that limit tribal interests to reservations.

AGENCY NEPA PROCEDURES

If CEQ adopts the proposed rules, agencies would have 12 months after the effective date of the new rules to update their NEPA procedures. (Section 1507.3(a)) These procedures may not impose additional requirements beyond the CEQ rules "except as otherwise provided by law or for agency efficiency." (Sections 1500.3(a), 1507.3(a)) These procedures also must require the combination of environmental documents with other agency documents, and agencies may designate other statutory processes, reports or analyses that qualify as the "functional equivalent of an EIS" for purposes of complying with NEPA. (Section 1507.3(b))

CEQ's Request For Additional Input

In addition to the substantial set of changes reflected in its proposed revisions to the existing regulations, CEQ has requested comments on a host of issues, including:

- Whether to eliminate the current requirement that an agency prepare an EIS when it proposes legislation to Congress, and the proposed legislation would cause significant environmental impacts (such as proposed legislation to withdraw public lands from military use for civilian reuse).

- Whether non-NEPA studies that one or more agencies already are conducting in relation to a proposed action can be used, "in whole or when aggregated," as a "functional equivalent" to an EIS for purposes of NEPA compliance.
- Whether to include in CEQ's proposed definition of "effects" the concept that the requisite close causal relationship is "analogous to proximate cause in tort law," and, if so, how CEQ could provide additional clarity regarding the meaning of this phrase.
- Whether existing CEQ guidance or handbooks should be adopted as part of the revised regulations.
- How greenhouse gas emissions should be addressed in the new regulations, and specifically, whether CEQ should codify any aspects of its Draft NEPA Guidance on Consideration of Greenhouse Gas Emissions, issued June 2019.
- Whether the regulations should clarify that NEPA does not apply extraterritorially, in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that such application is intended by Congress.
- Whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources.
- Whether there should be a threshold (percentage or dollar figure) for the level of "minimal Federal funding" below which a project would not be considered a "major federal action" subject to NEPA, and whether certain types of financial instruments or other *per se* categories of federal activities also should be considered exempt.
- Whether and subject to what procedures CEQ should specifically allow an agency to apply a CE established in another agency's NEPA procedures to its proposed action.
- Whether the revised regulations should establish government-wide CEs to exempt certain types of activities from additional NEPA review across the board.
- Whether the revised regulations should establish a presumptive *maximum* number of alternatives for evaluation of a proposed action (or for certain categories of proposed actions).
- Whether the "overall costs" to an agency of obtaining incomplete or unavailable information warrants further definition to address whether certain costs are or are not "unreasonable."
- Opportunities for agencies to combine data to streamline environmental review, such as a new single NEPA application that facilitates consolidation of datasets and can run several GIS analyses to help standardize analysis. CEQ envisions this application having a public-facing component to aid prospective project sponsors with site selection and project design and increase public transparency.

Implications of the Proposed Rules

The proposed rules have far-ranging implications for many projects and programs requiring federal government approval, funding, or participation. Some of the revisions clearly are part of the administration's broader ongoing effort to expedite, streamline, and consolidate the federal agency review process for major infrastructure and energy projects. These procedural changes track closely the concepts and requirements embodied in Title 41 of the Fixing American's Surface Transportation Act (FAST-41) and numerous executive orders.

Other revisions reflect a more fundamental debate around defining the parameters for NEPA review—what categories of federal actions are subject to NEPA, what level of environmental review is appropriate, and what types of impacts and alternatives need to be included in the analysis. Many of the proposed changes appear specifically tailored to advance the current administration's policies on energy and climate change. The proposal to allow a non-federal project proponent to prepare the EIS may, from a practical perspective, have the greatest impact on the NEPA process. From a legal standpoint, the most significant change from the existing regulations may be eliminating the requirement to evaluate cumulative impacts.

In a White House briefing on January 9, CEQ indicated it intended to make the proposed rules effective immediately upon final adoption, and that federal agencies with projects under NEPA review as of the rules' effective date would need to decide whether to proceed under the existing NEPA regulations or the revised rules. This may prove challenging given the number of federal agencies that would need to update their NEPA regulations to be consistent with the new rules. Project sponsors with proposals currently under NEPA review should watch developments closely.

As the comments on the new rules begin to pile up, CEQ will be developing its response with one eye firmly on the clock, in order to avoid negation of the final rule under the Congressional Review Act (5 U.S.C. § 801). This law authorizes Congress (via a joint resolution subject to a presidential veto) to disapprove of agency rulemakings. The law has been characterized as a way to prevent "midnight rulemakings" by lame-duck administrations, but it can have significant retroactive effect. The law gives Congress 60 working days to review rules. The clock starts when the rules are formally submitted to Congress or published in the Federal Register, whichever is later. Any rule finalized after September 1, 2020, could be vulnerable to congressional nullification, depending on the outcome of the November election.

If the new rules avoid this fate, ultimately it will fall to the courts to sort out the key question of whether the extensive changes in CEQ's longstanding regulations constitute a permissible interpretation of NEPA's statutory requirements. We will continue to monitor closely both CEQ's rulemaking process for its new regulations as well as the legal, policy, and practical issues raised by the first major regulatory proposal to update the implementation of NEPA since 1978.

Bird Is the Word: US Fish & Wildlife Service Proposes Narrow Interpretation of Migratory Bird Treaty Act

The U.S. Fish and Wildlife Service issued a proposed rule on January 30, 2020, that narrowly interprets the protections afforded by the Migratory Bird Treaty Act. The new rule would provide that the MBTA prohibits only the intentional take of migratory birds, and not incidental and unintentional take associated with land development activities or project operations. The new rule seeks to codify a December 2017 U.S. Department of Interior guidance memorandum (known as Memorandum M-37050), which reversed the agency's January 2017 guidance issued at the end of the Obama administration.

Background

The MBTA prohibits the unauthorized taking or killing of over one thousand species of migratory birds, many of which are common and abundant. The MBTA is a strict liability criminal law with potentially broad applicability. Specifically, the act makes it illegal to "pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird . . . or any part, nest, or egg of any such bird." 16 U.S.C. §§ 703-712. The MBTA was enacted in 1918 to implement an international treaty to protect migratory birds threatened by the commercial trade of birds and their feathers.

Unlike the federal Endangered Species Act, which clearly applies to the incidental and unintentional take of listed species, neither the MBTA nor its legislative history addresses whether the law was intended to prohibit the incidental and unintentional take of migratory birds, or only hunting and other forms of direct, intentional take. Federal courts have been split on this issue for decades, and attempts by the FWS to promulgate regulations have fizzled.

A Tale of Two Solicitors' Opinions

On January 10, 2017, in the final days of the Obama administration, the Department of Interior Office of the Solicitor issued Memorandum M-37041, which expressed the agency's legal opinion that the MBTA prohibits both intentional and incidental take. The opinion concluded that the MBTA's broad prohibitions on taking and killing migratory birds apply to any activity and are not limited to hunting, poaching, or any other similar factual contexts. Accompanying the opinion was a new section of the FWS Service Manual providing guidance regarding what types of situations would potentially be subject to prosecution—namely, projects in which the proponents either do not cooperate or do not attempt to avoid impacts to migratory birds.

In a 180-degree reversal, on December 22, 2017, the current administration issued Memorandum M-37050, which reaches the opposite conclusion: the definition of take under the MBTA is limited in relevant part to affirmative and purposeful actions, such as hunting and poaching. The December 2017 memorandum discusses at length the relevant statutory text, interpreting it to criminalize only purposeful and affirmative actions intended to reduce migratory birds to human control. It argues that the more ambiguous terms "kill" and "take" should be read together with "pursue," "hunt," and "capture," which suggest affirmative acts. The opinion also looks to common law definitions of "take" for support.

The December 2017 memorandum closes by discussing the legal implications of prosecuting incidental take under the MBTA, arguing that a narrow reading of the take prohibition is necessary to avoid constitutional due-process concerns. The memorandum cites a list of top human-caused threats to birds compiled by the FWS—including pet cats, collisions with building glass and vehicles, poisons, electrical

lines, and so on—to argue that a broad interpretation of "take" would have the "absurd result" of turning the "vast majority of Americans" into potential criminals. The memorandum also points to the rule of lenity, which affirms that the resolution of reasonable doubt under a criminal statute should lean in a defendant's favor. Based on these considerations, the memorandum concludes that the correct interpretation of the MBTA's take prohibition is to limit it to intentional take only.

New Proposed Rule Seeks to Codify M-37050

The new proposal would take the December 2017 Department of Interior memorandum a step further by codifying the narrow interpretation of the statutory protections for migratory birds into the federal regulations that formally implement the MBTA. The proposed rule retains much of the Interior memorandum's discussion of the common understanding of active versus passive terms, specifically "pursue," "hunt," and "capture" compared to "kill" and "take"—the former being active, and the latter being potentially active or passive, depending on the context and circumstances. Utilizing the tools of statutory construction, including caselaw, the proposed rules rest on the determination that when these terms are read together with the other active verbs, the interpretation of "take" and "kill" should be construed to mean only active and affirmative conduct.

According to Rob Wallace, assistant secretary for Fish and Wildlife and Parks, "it is important to bring regulatory certainty to the public by clarifying that the criminal scope of the MBTA only reaches to conduct intentionally injuring birds." In the news release for the proposed rule, the FWS clarifies that the new regulations would not affect the interpretation of the term "take" under the Endangered Species Act or the Bald and Golden Eagle Protection Act.

As expected, those who favor the proposed rule have emphasized the certainty and reliability from a clear interpretation where previously there was uncertain application of the MBTA with potentially significant consequences. Those who oppose the rule claim that it would remove crucial protections for migratory birds and allow for indiscriminate killing of birds at project sites across the country.

Implications of Proposed Rule

There are two key considerations when looking at the implications of the proposed rule. First, as a practical matter, the lifetimes of energy and infrastructure projects, where ongoing operations have the potential to affect migratory birds, are measured in decades, not years. As demonstrated by the Trump administration's swift withdrawal of the January 2017 guidance memorandum, executive branch opinion can change abruptly with a new administration, suggesting that developers and other entities would be wise to keep a long-term perspective of MBTA-related risk. It therefore would be prudent to maintain a cooperative approach with FWS staff on migratory bird issues. It is also recommended that companies continue to (1) implement best management practices to mitigate impacts on migratory birds and (2) document those efforts, including discussions with FWS.

Second, it is essential to keep in mind the applicable state laws that protect migratory birds. For example, in California, the state has repeatedly emphasized that—regardless of whether the federal protections in the MBTA are interpreted broadly or narrowly—it will vigorously enforce the independent state law requirements in the Fish and Game Code, which prohibits the incidental as well as the intentional take of migratory birds and their nests.

Thus, as with other recent regulatory initiatives, a narrow application of federal law may simply serve to shift the focus to state and local enforcement.