Trump Administration Regulatory Reforms
Federal Natural Resource Law

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A. National Environmental Policy Act (NEPA).

1. Presidential Executive Order 13807 (Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects) (August 15, 2017):

   Applies to any project that requires approval by multiple federal agencies, requires an EIS, and has a "reasonable availability" of funding. Requires NEPA reviews to be limited to 2 years, publication of all federal decisions in a single ROD ("One Federal Agency") and federal authorizations to be issued within 90 days of ROD.

2. Interior Secretary Order 3355 (Streamlining National Environmental Policy Act Reviews and Implementation of Executive Order 13807) (August 31, 2017).

   Limits environmental impact statements to 150 – 300 pages (the latter for unusually complex projects), excluding appendices, for all EIS documents prepared by DOI. Final environmental impact statements required to be completed within one year (except for unusually complex projects) from issuance of NOI unless Asst. Sect'y approves 3-month extension.

3. Memorandum of Understanding for Implementing One Federal Decision under Executive Order 13807 (April 10, 2018).

   Established guidance for coordination by federal agencies on page limits, time limits and other efficiency measures, including provisions re scoping, inter-agency concurrence on purpose and need, alternatives analyses under NEPA, and joint RODs. Also allows state agencies to serve as NEPA cooperating agencies. Includes Agriculture, Interior, HUD, Transportation, Energy, Homeland Security, Corps, EPA, FERC and ACHP.

4. Advanced Notice of Proposed Rulemaking re 40 CFR 1500-1508 (June 20, 2018):

Provided notice that administration is considering changes to CEQ NEPA regulations and 40 questions documents. Comment period concluded July 20, 2018.

B. <u>Federal Endangered Species Act.</u> On July 25, 2018, the administration published three separate federal register notices proposing changes to the administration of FESA. Highlights are as follows:

1. <u>Rescission of Protection for Threatened Species under FESA § 4(d) (83 Fed. Reg. 35174).</u>

   The ESA prohibits the take of species listed as "endangered." The take prohibition does not apply to "threatened" species unless USFWS (or NMFS relative to aquatic species) adopts a rule extending that protection to threatened species. USFWS relies on a "blanket" 4(d) rule automatically extending protections to threatened species. The proposed rule would rescind the blanket 4(d) rule and permit USFWS to extend protection on a species-by-species basis (e.g., like the special 4(d) rules for gnatcatcher and California tiger salamander).

2. <u>Restrictions on Listing of Species and Designation of Critical Habitat (83 Fed. Reg. 35193).</u>

   FESA prescribes certain standards for the listing of threatened and endangered species. The proposed rule would allow introduction of economic data into some listing decisions (for informational purposes) despite statutory requirement that listings are supposed to be made based upon the best available scientific information. The proposed rule would also narrow the "forward look" employed by the USFWS to determine whether a species is threatened with future endangerment. This change would, among other things, limit the agency's need to consider the impacts of climate change in some listing decisions.

   FESA requires USFWS to designate "critical habitat" for a listed species at the time of listing "to the maximum extent prudent." A CH designation theoretically increases the level of protection afforded a listed species from a jeopardy standard to a recovery standard. The proposed rule would clarify the circumstances under which the USFWS can decline to designate CH. More significantly, it would limit USFWS' ability to designate as CH areas that are not currently occupied by a listed species.

3. <u>Other Section 7 Reforms (83 Fed. Reg. 35178).</u>

   The proposed rule would change a number of definitions and procedural steps association with Section 7 consultations, including "adverse modification of

critical habitat," "Effects of the Action," "Environmental Baseline," "Programmatic Consultations." These changes are largely procedural and either helpful or benign.

4. Guidance on Trigger for an Incidental Take Permit Under Section 10(a)(1)(B) of the Endangered Species Act Where Occupied Habitat or Potentially Occupied Habitat Is Being Modified (April 26, 2018).

On April 26, 2018, the U.S. Fish and Wildlife Service's Principal Deputy Director issued a memorandum to the Service's Regional Directors providing guidance on how to determine whether a project is likely to result in "take" of a listed species as it relates to habitat modification. The memorandum states that a Section 10(A)(1)(B) incidental take permit is only needed in situations where a non-federal project is likely to result in "take" of a listed species of fish or wildlife. The memorandum further explains that habitat modification, in and of itself does not necessarily constitute take.

Relying on the landmark U.S. Supreme Court decision *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687 (1995), the memorandum concludes that the law clearly requires that in order to find that habitat modification constitutes a taking of listed species under the definition of 'harm," all aspects of the harm definition must be triggered. Accordingly, the memorandum identifies three questions that should be asked before a determination is made that an action involving habitat modification is likely to result to take: (1) is the modification of habitat significant? (2) if so, does that modification also significantly impair an essential behavior pattern of a listed species? and (3) is the significant modification of the habitat, with a significant impairment of an essential behavior pattern, likely to result in the actual killing or injury of wildlife? All three components of the definition are necessary to meet the regulatory definition of "harm" as a form of take through habitat modification under Section 9 of the ESA, with the "actual killing or injury of wildlife" as the most significant component of the definition.

C. Other Policies

1. Guidance on Migratory Bird Treaty Act (MBTA) Implementation (December 22, 2017).

On December 22, 2017, the Solicitor's Office issued Opinion M-37050 entitled "The Migratory Bird Treaty Act Does Not Prohibit Incidental Take." This M-Opinion concludes that the prohibition on the taking and killing of migratory birds in the Migratory Bird Treaty Act, 16 U.S.C. section 703, is limited to affirmative and purposeful acts, such as hunting and poaching, and does not

apply to acts that result in only incidental or accidental deaths of migratory birds. The opinion concludes that "'Incidental take' is take that results from an activity, but is not the purpose of the activity." The opinion offers this provocative comment to underscore a point: "Reading the [Act] to capture incidental takings casts an astoundingly large net that potentially transforms the vast majority of average Americans into criminals." The opinion supersedes a prior opinion that determined the Act broadly prohibited the taking and killing of migratory birds "by any means and in any manner," including incidental or accidental taking and killing.

2. Redefinition of Waters of the United States (83 Fed. Reg. 32227).

On June 29, 2015, the US Army Corps of Engineers and the EPA issued a final rule that amended the definition of "waters of the United States" for purposes of the Clean Water Act and made other amendments to the Corps' and EPA's regulations pertaining to other regulatory aspects of "waters of the United States," such as defining "significant nexus." These changes were collectively referred to as the Clean Water Rule. A number of states and other interested parties brought legal challenges against the Clean Water Rule. Those challenges essentially culminated in a Sixth Circuit Court of Appeal decision in which the Sixth Circuit stayed implementation of the Clean Water Rule nationwide. In January 2018, the US Supreme Court held that the Clean Water Rule is subject to direct review in the district courts, rather than the Circuit Courts of Appeal. As a result, on February 28, 2018, the Sixth Circuit lifted the nationwide stay of the Clean Water Rule.

During this litigation, on February 28, 2017, President Trump issued Executive Order 13778 (*Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the "Waters of the United States" Rule*). This Order directed EPA and the Corps to issue a proposed rule rescinding or revising the Clean Water Act, and directs the agencies to "consider interpreting the term 'navigable waters' . . . in a manner consistent with" Justice Scalia's plurality opinion in *Rapanos v. United States*, 547 U.S. 715 (2006). That opinion interpreted "navigable waters," and by extension "waters of the United States" to include only those relatively permanent, standing or continuously flowing bodies of waters "forming geographic features" that are described in ordinary parlance as "streams," "oceans, rivers, [and] lakes," and does not include channels that periodically provide drainage for rainfall, This opinion also viewed only those wetlands with a continuous surface connection to "waters of the United States" in their own right as being "adjacent" and therefore covered by the Clean Water Act.

On July 27, 2017, the agencies published a Notice of Proposed Rulemaking that proposed to rescind the Clean Water Rule (82 Fed. Reg. 34899). Shortly after the US Supreme Court decision directing the Sixth Circuit to dismiss challenges to the

Clean Water Rule for lack of jurisdiction, the agencies issued a final rule making the Clean Water Rule applicable on February 6, 2020, essentially giving the administration additional time to prepare the revised definition of "waters of the United States." On July 12, 2018, the agencies published a Supplemental Notice of Proposed Rulemaking clarifying that the intent of the July 27, 2017 Notice of Proposed Rulemaking was to permanently repeal the Clean Water Rule in its entirety and that the rule adding the February 6, 2020 applicability date does not change the agencies' decision to proceed with the proposed repeal (83 Fed. Reg. 32227).

As of August 22, 2018, the agencies have not yet provided any notice of rulemaking regarding the substantive provisions of a new definition of "waters of the United States." Some observers expect that the Trump administration's proposed version of the new definition will be issued by October 2018 and that the rule repealing the Clean Water Rule will be finalized by November 2018.

3. Rescission of USFWS Mitigation Policy (83 Fed. Reg. 36472).

On November 21, 2016, the Obama administration published a "Mitigation Policy" (81 Fed. Reg. 83440) to guide USFWS recommendations on mitigating the adverse impacts of land and water development on fish, wildlife, plants and their habitats. The 2016 Mitigation Policy reflected the development of mitigation practices over the prior two decades and implemented President Obama's *Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (November 3, 2015), which Presidential Memorandum was rescinded by President Trump's March 28, 2017 Executive Order 13783 (*Promoting Energy Independence and Economic Growth)*. The July 30, 2018 action by the Trump administration revokes the 2016 Mitigation Policy based upon that policy's establishment of a "net conservation gain" target for USFWS decision-making.

4. Field Guidance on ACOE Scope of Review under NEPA and ESA in light of "Enbridge" decision.

In 2015, the D.C. Circuit Court of Appeals issued a significant ruling in connection with the Corps' review of a set of (more than a thousand) NWP authorizations for a linear pipeline. The Court held that, under FESA and NEPA, the Corps was not obligated to look at the upland impacts (i.e., impacts outside of the discrete segments of Corps jurisdiction involved in the case) of its action even though those impacts would naturally follow from the Corps' authorizations. The decision was highly problematic for applicants seeking a "Section 7 nexus" to avoid the need for a habitat conservation plan (HCP) for upland species.

On May 22 and October 7, 2017, the Corps and USFWS exchanged a set of guidance letters establishing the principle that, although the Corps may not consult on upland impacts, the USFWS' biological opinion may still address those impacts even if they are not under the control and jurisdiction of the Corps, thus conferring incidental take authority on private applicants for activities without a clear ACOE nexus. While welcome, the strategy has legal risks and may invite NGO litigation challenging the validity of such USFWS opinions.

5. BLM Policy on Compensatory Mitigation (Instruction Memorandum July 24, 2018).

   This IM provides guidance to the Bureau of Land Management (BLM) in its implementation of the Federal Land Policy and Management Act of 1975 ("FLPMA"), which is the organic statute for BLM. The IM establishes a policy that, expect where the law otherwise specifically requires, the BLM "must not require compensatory mitigation from public land users." The IM further states that, while the BLM may consider "voluntary" proposals for compensatory mitigation, it will "not accept" any monetary payment to mitigate the impacts of a proposed action; provided, however, that BLM must nonetheless refrain from authorizing any activity that causes "unnecessary or undue degradation" in accordance with Section 302(b) of FLPMA.

6. Memorandum re Assumption of Wetlands Permitting Authority (July 30, 2018).

   On July 30, the Office of the Assistant Secretary of the Army for Civil Works issued a memorandum clarifying those circumstances under which a state might assume responsibility for administering the 404 wetlands permitting program within its boundaries. The memorandum specifically endorsed the findings of a 2017 report by EPA's *National Advisory Council for Environmental Policy and Technology (NACEPT)* regarding the authority of states to assume permitting responsibility under Section 404(g) of the Clean Water Act.