

Washington Update

NASTL Summer Conference

Santa Fe, New Mexico

July 11, 2023

118th Congress

- ▶ 6 Month Review:
 - ▶ Speaker McCarthy walking a fine line
 - ▶ Minority Leader Jeffries low profile
 - ▶ Debt Limit, Spending Agreements, and Appropriations



Member Legislative Initiatives and Congressional Action

North Dakota—North Dakota Trust Lands Completion Act—HR 2405 and S. 1088: allows removal of 31,000 acres of trust lands from tribal reservations and select unappropriated federal lands or minerals. Lands within reservations to be held in trust for tribes.

Utah—Agreement between Utah Governor and Sec. Haaland to trade trust lands and minerals (162,000 acres) within Bears Ears Monument for BLM lands and minerals (167,000 acres) across Utah. Must be ratified by Congress. HR 3049 and S 1405

Permitting Reform—Debt Ceiling Deal

- ▶ Reasonably Foreseeable—amends NEPA to require evaluation of reasonably foreseeable impacts and includes the evaluation of the environmental cost of not taking action on a project.
- ▶ Data--Federal agencies may make use of publicly available information without ordering new information to be developed by a project applicant.
- ▶ Major Federal Action—Federal financing alone does not trigger major federal action.
- ▶ Categorical Exclusions—Allows a federal agency to adopt a categorical exclusion from NEPA review from another federal agency.
- ▶ Lead Agency Process—provides specific roles for lead agency and requires single environmental document.
- ▶ Timelines—2-year time limit on EIS from the time lead agency determines EIS is required: 150 page limit or 300 for complex reviews
 - ▶ 1-year limit on EA and 75 page limit.
- ▶ Allows enforcement provisions for agency missing deadlines.
- ▶ Allows sponsor to conduct its own environmental review with agency approval.

Permitting Reform—is there more?

- ▶ Senator John Barrasso (R-Wyo.) and Senator Shelley Moore Capito (R-W.Va.) have introduced their SPUR Act (oil, gas, and mineral development) and RESTART Act (CWA, ESA, climate) with additional permitting priorities. Senator Joe Manchin (D-W.Va.) and Senator Tom Carper (D-Del.) have introduced their own pieces of permitting legislation. There is significant interest in the Senate to move additional permitting legislation.
- ▶ Senator Manchin has announced he plans marking up permitting legislation in the Senate Energy and Natural Resources Committee this summer.
 - ▶ Mountain Valley Pipeline—Debt deal gave Manchin approval of the pipeline which was largely driving his permitting reform interest. Summer is here and little talk of further movement so far.
- ▶ House Position—HR 1 passed early in the Congress contains sweeping reforms unlikely to be fully adopted in the Senate.

WOTUS—Sackett v. EPA

- ▶ In a 9-0 opinion, the Court fully rejected the “significant nexus” test.
 - ▶ The Court called the agencies’ significant nexus theory “particularly implausible,” noting the “meaning of ‘waters’ is more limited than the EPA believes.”
 - ▶ Notably, the Court asserted, “the CWA never mentions the ‘significant nexus’ test, so the EPA has no statutory basis to impose it.”
- ▶ Establishment of a new test similar to the decision in *Rapanos*.
 - ▶ Court held the CWA extends only to those wetlands that are “as a practical matter indistinguishable from [WOTUS]” which requires the agencies to establish “first, that the adjacent [body of water constitutes] . . . ‘water[s] of the United States,’ (i.e., a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”
- ▶ The Court seems to reject the Biden WOTUS Rule
- ▶ The Court acknowledges the complex process of obtaining jurisdictional determinations from the Corps and the severe criminal penalties for violating the CWA; and the primary role of states in managing their own land and water resources.
- ▶ EPA has announced it will issue a new WOTUS Rule in September—that is likely to attract litigation once again.
- ▶ Congress needs to act on this issue to stop overreach on either side by the agency.

2023 Farm Bill

- ▶ Bulk of authorizations expire at end of fiscal year—September 30
- ▶ 5-year authorization for 19 programs
- ▶ Senate expected to begin marking up the bill in September.
- ▶ House spending restrictions make a bi-partisan bill difficult
- ▶ Congress will need to pass an extension of existing programs
- ▶ Congress is forcing itself to write a farm bill during an election year which complicates and already massive undertaking

Spring Regulatory Agenda

- ▶ WOTUS (September)
- ▶ Interagency Working Group (IWG)
- ▶ NEPA Phase II Rule
- ▶ NEPA guidance for consideration of greenhouse gas emissions and climate change.
- ▶ US Forest Service Locatable Minerals Regulations (Spring 2023)
- ▶ US Forest Service Old Growth Definition and Inventory
- ▶ BLM Conservation and Landscape Health Proposed Rule

Interagency Working Group (IWG)

- ▶ Designed to recommend legislative and regulatory changes for hardrock mining on public lands.
- ▶ Report was due in November 2022—expecting the Report at any time.
- ▶ Expected recommendations:
 - ▶ Replace Mining Law of 1872 with leasing system with limited tenure provisions
 - ▶ Repeal “right to mine” and make mine leasing a discretionary Secretarial act.
 - ▶ Implement a gross royalty in the 12% range
- ▶ Regulatory Expectations
 - ▶ Rule implementing Rosemont decision restricting ancillary uses of mining lands.
 - ▶ Proposed 3809 regulation changes
 - ▶ Expect regulatory efforts will be initiated as soon as report is issued.

Sage Grouse Planning

- ▶ DOI has represented to Federal Court that the sage grouse west-wide plans will be released this summer.
- ▶ Delay in release likely due to mineral review of lands under consideration for withdrawal and lack of band width.
 - ▶ Expect another 10-million-acre mineral withdrawal as proposed under 2015 plans.
- ▶ Timing is politically sensitive with Senator Rosen (D-NV) running for re-election.
- ▶ BLM may try to use Conservation and Landscape Health proposed rule as justification for sage grouse plans and mineral withdrawal.
- ▶ BLM has been very quiet on this issue for the past 8 months.
- ▶ USFS has not announced how they will proceed. Expecting them to follow BLM lead.

NEPA Phase II Rule

- ▶ Phase I Rule: (1) restoring requirement that agencies evaluate all relevant environmental impacts, including direct, indirect and cumulative impacts particularly when addressing climate change and impacts to “environmental justice” communities; (2) allowing agencies to develop and analyze alternative approaches, including those that will not meet the stated objectives of the proposed project; and (3) clarifying that while agency NEPA procedures need to be consistent with CEQ regulations, agencies have the discretion and flexibility to develop procedures beyond the CEQ’s requirements.
- ▶ Phase II Rule Expectations:
 - ▶ Was promised early 2023
 - ▶ Rule to address concerns regarding consideration of climate change, environmental justice; and enhanced public participation.
 - ▶ Manchin rumored to be attempting to include permitting reform within Phase II proposal.
 - ▶ Proposed Rule still at OMB review.
- ▶ NEPA amendments in debt ceiling deal likely delaying the Rule.

CEQ Interim Guidance Green House Gas Emissions

- ▶ CEQ directs agencies to quantify the reasonably foreseeable GHG emissions of a proposed action and all alternatives;
 - ▶ Agencies should quantify the gross emission increases or reductions individually by GHG, as well as aggregated in total terms of carbon dioxide (CO₂) equivalence.
- ▶ Disclose and provide context for GHG emissions and climate impacts associated with the proposed action and each alternative;
 - ▶ Agencies should apply best available estimates of the Social Cost of Greenhouse Gases to the incremental metric tons of each individual type of GHG emission expected from a proposed action and each alternative.
- ▶ Analyze reasonable alternatives that would reduce GHG emissions.
 - ▶ CEQ asserts that the urgency of the climate crisis calls on agencies to use the information provided through NEPA to help inform decisions that align with climate change commitments and goals.
- ▶ Direct and Indirect Foreseeable Effects
 - ▶ Example on oil & gas project: Reasonably foreseeable indirect effects of such an action likely would include effects associated with the processing, refining, transporting, and end-use of the fossil fuel being extracted, including combustion of the resource to produce energy.
- ▶ The new “reasonably foreseeable” amendments in debt ceiling deal is likely sending CEQ back to the drawing board on this Rule.
- ▶ Hard to see how “social cost of greenhouse gases” and other long-range impacts could fall within the new “reasonably foreseeable” language from Congress.

BLM Conservation and Landscape Health

- ▶ Elevates conservation and landscape health on equal playing field with multiple uses.
- ▶ ACEC—expands regulations to promote protection of historic, cultural, scenic values, fish, and wildlife resources.
- ▶ Would require compensatory mitigation for any surface disturbing activities.
- ▶ Authorizes conservation leases for NGO restoration of lands.
- ▶ Would extend rangeland health standards to all BLM lands and require action within management plan to address deficiencies.
- ▶ Memories of BLM 2.0 under the Obama Administration which drew broad opposition from Congress and the public.
- ▶ Over 216,000 comments submitted by July 5th deadline
- ▶ House Natural Resources Committee approved HR 3397 that would require BLM to withdraw the rule.
- ▶ 12 Senators have written Director Stone-Manning expressing concerns about failure to proper procedures and requesting the rule be withdrawn.
- ▶ Expect House Appropriations Committee to include language withholding funding from BLM for further implementation.
 - ▶ Possible to see how Senate Republicans could secure sufficient Democrat support for passage in the Senate as well.

US Forest Service Old Growth Definition and Inventory—Proposed Rulemaking

- ▶ US Forest Service published an Advanced Notice of Proposed Rulemaking on old growth definitions, identification, and inventory.
- ▶ USFS seeks input on how the agency can better manage for climate change and future resilience of old and mature forests.
- ▶ Based on Biden Executive Order 14072, Strengthening the Nation’s Forests, Communities, and Local Economies, April 22, 2022.
- ▶ Invited public comment on how USFS can adapt current policies and management to promote conservation and climate resilience to support ecologic, social and economic sustainability in light of climate change, human induced changes, and other stressors such as:
 - ▶ Wildfire, drought, insects and disease, extreme weather events, and chronic stress on ecosystems.
- ▶ Climate resilience is essential for ecological integrity and social and economic sustainability according to the Proposed Rule.
- ▶ Comment Period closed on June 20th.

What to expect in second half of 2023

- ▶ 2024 Elections will begin to play larger role in policy making with Democrats defending 23 of 33 seats in 2024 with 6 seats in swing states.
- ▶ Appropriation process:
 - ▶ The spending race of COVID is over.
 - ▶ Republicans will attempt to cut funding across all agencies.
 - ▶ Senate Democrats will attempt to fund the President's priorities which includes new spending.
 - ▶ Likely to end up with a Continuing Resolution or CR to fund the government unless Republicans give up spending to get riders implemented such as additional permitting reform or defunding BLM landscape health Rule, etc.
- ▶ Committees are in full legislating mode. Expect a fast and furious July, September, October on the legislating front.

Questions or Discussion?

Allen Freemyer
allen@adfpc.com