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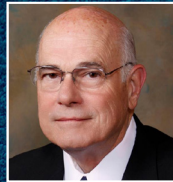
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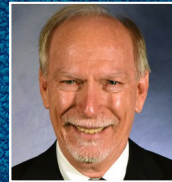
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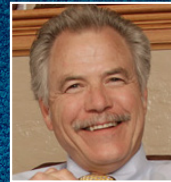
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WILDLIFE AND FEDERAL REGULATORY ROLLBACKS

Under the Trump Administration

By Nicholas Arrivo and Bruce Wagman

Even with few legislative victories since inauguration, the Trump Administration demonstrated how deregulation can lead to significant changes in wildlife policy through its strategy of repeal of federal regulations and substantial changes to agency rules. This approach has been wide-ranging and loudly publicized: Executive Order 13,771, one of the first issued, directed federal agencies that “for every new regulation issued, at least two prior regulations [shall] be identified for elimination.” 82 Fed. Reg. 9339 Environmental (and animal protection) regulations have been targeted “for elimination” with particular zeal. One environmental “regulatory rollback” database tallies more than ninety such actions as of September 2020. Wildlife and their habitat have been among the most consistent victims of this deregulatory agenda. The repeal of the Refuge Rule and the reinterpretation of the Endangered Species Act illustrate the dramatic weakening of federal wildlife policy under the Trump Administration.

The deregulation began with a campaign to wipe out Obama-era regulations using the Congressional Review Act of 1996 (“CRA”). 5 U.S.C. §§ 801-808 (2006). The CRA enacts a special procedure by which Congress, with the assent of the President, may override a recently promulgated agency regulation using an expedited and filibuster-proof joint resolution. From March through May 2017, fifteen Obama administration regulations were repealed using the CRA’s fast-track procedure. In contrast, only *one* regulation had previously been repealed using the CRA in the twenty-one years since it was adopted.

Among the casualties of this CRA-enabled blitz was a 2016 U.S. Fish and Wildlife Service regulation that protected native carnivores on the 76 million acres of national wildlife refuges administered by the Service in Alaska (the “Refuge Rule”), Fed. Reg. 52,247 (Aug. 5, 2016). The Refuge Rule was adopted in response to Alaska’s aggressive “predator control” mandate. Under Alaska’s Intensive Management statute, Alaska Statutes § 16.05.255, the state Board of Game is directed to suppress predator populations for the express purpose of inflating big game populations to provide increased numbers of animals for hunters. The Board of Game authorized state agents and the general public to kill wolves, black bears, brown (grizzly) bears, and coyotes using cruel, controversial, and ruthlessly efficient methods including aerial gunning, snaring, steel-jawed leghold trapping, and baiting (where animals are lured with piles of food and shot while they eat). In an especially offensive move, the Alaska agency even allows hunters to kill mother bears who are with cubs in their winter dens.

The Refuge Rule prohibited these practices on national wildlife refuges, recognizing that Alaska’s state-sponsored massacre of native predators was fundamentally incompatible with Congress’ mandate to administer the National Wildlife Refuge System to “ensure that the biological integrity, diversity, and environmental

health of the System are maintained for the benefit of present and future generations of Americans.”¹ The National Park Service adopted a parallel rule prohibiting these practices on Alaska’s National Preserves (another type of federally owned and protected land, distinct from national wildlife refuges).² Collectively, these rules protected predators on about 100 million acres of federal land in Alaska. Both agencies emphasized the fundamental conflict between the *purpose* of Alaska’s intensive management program – suppressing predator populations to artificially inflate big game populations – and their mandates to manage for natural ecosystem diversity.

Both federal rules were killed in the first term of the Trump administration. The Refuge Rule was effective for less than a year before it was repealed using the CRA in early 2017. Pub. L. 115-20. The National Park Service’s Preserve rule survived longer because it was insulated from fast-track override under the CRA due to its earlier date of adoption. Although appointed officials directed NPS to reverse the rule during the first year of the administration, the substantially slower mechanism of an administrative rulemaking finalized the repeal in June 2020.³ With both rules repealed, the practices authorized by Alaska’s Board of Game are now allowed on an additional 100 million acres of federal land. The administration’s official policy of deference to states has since been invoked to dramatically expand state-regulated hunting programs on National Wildlife Refuges across the country. U.S. Fish and Wildlife Service rules adopted each year from 2017-2020 opened new federal refuges to hunting – in some cases, for the first time – in consecutive years.⁴

The administration has even taken aim at the long-standing and popular Endangered Species Act (“ESA”), which the Supreme Court, in *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978), praised as “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” The ESA seeks to conserve and recover imperiled species by listing them as “threatened” or “endangered” based on an objective assessment of threats to their survival using the “best scientific and commercial data available.” 16 U.S.C. § 1533. Once a species is listed, the ESA provides powerful protections. For example, ESA Section 7, 16 U.S.C. § 1536(a)(2), requires biological consultation to ensure that activities authorized, funded, or carried out by the federal government do not jeopardize listed species or their habitat. Further, ESA Section 9, 16 U.S.C. §§ 1538 strictly prohibits the direct or incidental “take” of listed species, defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

In 2019, the Trump administration finalized a sweeping set of amendments to the regulations implementing the ESA.⁵ This package of regulatory rollbacks, which are being challenged in federal court by a coalition of conservation organizations

and a group of more than twenty states and municipalities, collectively represents the most significant change to the ESA's implementation since the 1970s. While these changes affect a wide swath of the listing, delisting, and Section 7 consultation processes, two provisions stand out as particularly harmful to imperiled wildlife.

First, the new rules rescinded a decades-old regulation that automatically extended the ESA's prohibition on taking to all threatened species, unless a "special rule" for a particular species had been adopted by the relevant federal agency, for example the U.S. Fish and Wildlife Service under 16 U.S.C. § 1533(d). "Take" is a broadly defined term, which includes virtually any disturbance of an animal, and protects listed animals from both direct harm (whether intentional or not) as well as indirect harm through the destruction of habitat. While the ESA only expressly prohibits taking of *endangered* species, the former rule automatically extended those same protections to *threatened* species. Now, species added to threatened list (like the wolverine, which is expected soon) will no longer presumptively receive the most fundamental protections afforded by the ESA.⁶ Protections by special regulation on a species-by-species basis is not a substitute: less than one quarter of the 300 species listed have received a species-specific regulation, and the Service's has a regulatory backlog of over 500 species awaiting consideration for ESA listing. Default protections ensure that threatened species are not irreparably harmed while waiting for species-specific regulations that may take years to arrive (or never arrive at all). Because of the administration's rollback, additional listed species threatened with extinction could be exposed to human-caused injury, harassment, and killing while waiting for more focused regulatory consideration.

Second, the new rules put forward a new interpretation of a statutory term ("foreseeable future") that is key to assessing whether a species should be listed as endangered on the basis of long-term threats such as habitat loss due to climate change. The ESA, 16 U.S.C. § 1532(6), (20), defines "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range," and "threatened species" as "any species which is likely to become an endangered species *within the foreseeable future* throughout all or a significant portion of its range." While the ESA does not define "foreseeable future," a 2009 Department of Interior Solicitor's memo, M-37021, at 13 (Jan. 16, 2009), advised the agency to interpret the term based on "the best available data that allow predictions into the future...so far as those predictions are reliable." Departing significantly from both the text of the ESA and this guidance, the new rules require that "both the future threats and the species' responses to those threats are *likely*," meaning "more likely than not."⁷

This interpretation effectively raises the evidentiary bar required to list a species as threatened on the basis of projected future threats from "reliable" to "likely." It carries potentially grave consequences in an era when scientific projections of the impact of climate change on species and their habitat, though necessarily uncertain, must motivate conservation decisions. Under the new rules, climate-sensitive species like the sea ice-dwelling Pacific walrus, or the snowpack-reliant wolverine, may not be eligible for

ESA listing status until it is too late to pull them back from the brink of extinction. Indeed, it is not even clear that the polar bear – universally recognized as a symbol for the habitat-destroying effects of climate change, and listed as "threatened" on the basis of projected sea ice loss over a 45-year time horizon⁸ – would qualify for listing today.

While the 2019 ESA rollbacks are the clearest example of the administration working to weaken or circumvent this formidable law, they are not the only ones. A recent executive order has directed the entire federal government to circumvent mandatory ESA consultation provisions in the interest of expediting economic recovery from the COVID-19 pandemic.⁹ The pending rule to strip ESA protections from gray wolves across the continental United States (where they occupy less than 10% of their historic range) reflects the administration's constrained view of the ESA's mandate to conserve and recover the country's most imperiled (and most iconic) wildlife species.¹⁰ Another wave of rollbacks weakening ESA implementation by making it more difficult to designate and protect "critical habitat" for listed species have already been proposed.¹¹ This administration has amply demonstrated how deregulation can lead to significant changes in wildlife policy, and additional rollbacks before the election are all but certain.

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Endnotes

¹ 81 Fed. Reg. at 52,250; 16 U.S.C. § 668dd(a)(4)(B) (National Wildlife Refuge System Improvement Act).

² National Park Service, "Final Rule: Alaska; Hunting and Trapping in National Preserves," 80 Fed. Reg. 64,325 (Oct. 23, 2015).

³ National Park Service, "Final Rule: Alaska; Hunting and Trapping in National Preserves," 85 Fed. Reg. 35,181 (June 9, 2020).

⁴ 82 Fed. Reg. 37,398 (Aug. 10, 2017); 83 Fed. Reg. 45,758 (Sept. 10, 2018); 84 Fed. Reg. 47,640 (Sept. 10, 2019); 85 Fed. Reg. 54,076 (Aug. 31, 2020).

⁵ 84 Fed. Reg. 44,753 (Aug. 27, 2019) (ESA Section 4(d) regulation); 84 Fed. Reg. 44,976 (Aug. 27, 2019) (ESA Section 7 regulations); 84 Fed. Reg. 45,020 (Aug. 27, 2019) (ESA Section 4 regulations).

⁶ 84 Fed. Reg. 44,753.

⁷ 84 Fed. Reg. 45,052 (emphasis added).

⁸ 73 Fed. Reg. 28, 212 at 253-54 (May 15, 2008) (polar bear listing rule).

⁹ Executive Order on Accelerating the Nation's Economic Recovery from the COVID-19 Emergency by Expediting Infrastructure Investments and Other Activities (June 4, 2020) (available at: <https://www.whitehouse.gov/presidential-actions/accelerating-nations-economic-recovery-covid-19-emergency-expediting-infrastructure-investments-activities/>).

¹⁰ 84 Fed. Reg. 9648 (Mar. 15, 2019).

¹¹ 85 Fed. Reg. 47,333 (Aug. 5, 2020); 85 Fed. Reg. 55,398 (Sep. 8, 2020).



The Migratory Bird Treaty Act: *Intentional vs. Incidental*¹

By Guy Dicharry

Woodrow Wilson signed the Migratory Bird Treaty Act (“MBTA”) in 1918. The MBTA followed the devastation of migratory bird populations during the late 19th and early 20th centuries from commercial demands for plumage to adorn ladies’ hats and meat for fine dining. The law implemented a treaty with Great Britain, signed on behalf of Canada, then a British colony. MBTA today protects 1,000 species of migratory birds.

This article explores the tension between two mutually exclusive interpretations of MBTA’s Section 2, which makes it unlawful for persons “at any time, by any means or manner to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess . . . any migratory bird.” One question pits wildlife advocates against industry lobbyists, is an issue in MBTA prosecutions, and divides the appellate circuits. Does MBTA prohibit incidental take of protected species?

Pre-2017: A Difference of Opinion in the Federal Courts

Three decisions preceding the Interior Solicitor opinions discussed below illustrate the divergent approaches by the federal courts to interpreting Section 2 of the MBTA.

Moon Lake Electric Association, an electric coop in Colorado, was charged in 1998 with violating MBTA. Moon Lake had poles used by raptors scouring the land for food. The government alleged that birds were injured or killed because Moon Lake did not install “inexpensive” electrocution prevention measures on its poles. Moon Lake argued MBTA did not apply to the unintentional electrocutions because the law targets hunting and poaching. The trial court held intent was irrelevant because MBTA imposes a strict liability standard by “proscribing taking and killing ‘by any means or in any manner.’”

Apollo Energies and another oil drilling operator were convicted of taking or possessing migratory birds after dead birds were discovered in their equipment. On appeal the Tenth Circuit in 2010 held the MBTA take provision is a strict liability offense and rejected defendants’ position that an intent to kill is an element of the offence.

Citgo was indicted for using uncovered oil-water separators which caused the deaths of birds. The trial court convicted. The Fifth Circuit in 2015 reversed, comparing the take provisions of the Endangered Species Act, the Marine Mammal Protection Act, and MBTA. The Fifth Circuit reasoned that because the other laws included “harm” and “harass” they prohibited acts MBTA did not as it lacked those terms. It concluded MBTA prohibited only intentional acts leading to injury to migratory birds.

The Tompkins Opinion

Ten days before the end of the Obama Administration, Hilary Tompkins, solicitor (i.e., general counsel) of the Interior Department issued Opinion M37041, concluding that incidental take violated MBTA.

Tompkins’s conclusion was backed by these facts:

- The original version of MBTA prohibited the taking of birds without reference to mental state, thus creating a strict liability offense.
- The original MBTA prohibited hunting and used terms such as “take,” “kill,” and “possess.”
- Congress amended MBTA, placing “by any means or in any manner” at the beginning of Section 2 as a modifier to all prohibited acts.
- After a district court enjoined military training, Congress in 2002 exempted military training from the law but gave the Fish and Wildlife Service authority to suspend or incidental take. The need to carve out a military exception showed MBTA already prohibited incidental take.
- Fish and Wildlife interpreted MBTA as applying to incidental take as demonstrated in enforcement cases arising out of open oil pits, power line electrocutions, contaminated waste pools, pesticide applications, and oil spills and by implementing a program to authorize incidental take for activities outside the scope of permits,
- The United States government affirmed to international bodies that MBTA is a strict-liability statute that applies to incidental take.

The Jorjani Opinion

Daniel Jorjani, Principal Deputy Interior Solicitor, in December 2017 issued Opinion M37050 that argued incidental take did not violate MBTA. Jorjani concluded that MBTA prohibitions on pursuing, hunting, taking, capturing, and killing, applied only to actions that have as their purpose taking or killing birds.

Jorjani emphasized these points from legislative history:

- The Weeks-McLean Act of 1913 attempted to protect birds through federal legislation regulating hunting seasons. Courts found that law unconstitutional as Congress had no power to regulate hunting.
- Conservationists then used the Constitution’s treaty power to achieve the same goal. Once the treaty was signed, Congress could fulfill the terms of a treaty even though it lacked constitutional authority to legislate upon the same subject. Thus the United States signed a treaty requiring it to establish closed seasons and to prohibit taking of nests and eggs.
- In 1936, Congress amended Section 2 of by adding “pursue,” moving “by any means” to the beginning of the operative clause, and placing “at any time or in any manner” was after “by any means.”

- Congress adopted legislation allowing incidental taking during military training.
- “Incidental take” does not appear in either MBTA or in the implementing regulations.

After the Tompkins opinion was published, the Fish and Wildlife Service issued a definition of “incidental take” as “take of migratory birds that directly and foreseeably results from, but is not the purpose of an activity.” Federal courts have held MBTA includes prohibitions on incidental take with the requirement the government establish proximate cause in order to convict. “Proximate cause” is something “which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the accident could not have happened.” In two cases where migratory birds died after exposure to pesticides, courts analogized the duty to protect birds from toxic chemicals to state tort laws imposing strict liability on exposure to ultrahazardous or abnormally dangerous materials.



Jorjani designated the “relevant portion” of MBTA as “it shall be unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, [or] any part, nest, or egg of any such bird.” His analysis begins with the operative verbs without first addressing the statutory predicate “by any means or in any manner.” Parsing the operative verbs of Section 2, Jorjani divides them into two groups: three (pursue, hunt, capture) which “unambiguously require affirmative and purposeful action” and two (kill, take) which “may refer to active or passive conduct.” Jorjani combines all five of the “operative” verbs together without any further analysis of how “take” and “kill” need not be affirmative acts. The opinion quotes from a dissent by Justice Scalia in support of the opinion that the five operative verbs in Section 2 are “all affirmative acts.”

A Brief Comment on Construing the MBTA

The plain language of Section 2 prohibits a broad range of conduct that results in the killing or taking of migratory birds. Jorjani limits the application of the MBTA by employing an unnecessarily narrow reading of both the statutory predicate and the operative verbs of Section 2.

According to the general terms canon, “General terms are to be given a general meaning.” The U.S. Supreme Court tells us “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” Viewing the words “at any time, by any means or manner” through the general terms canon gives an expansive view of what constitutes taking or

killing “by any means or manner.” A literal reading of “any” would include any means that intentionally or incidentally kills or takes a migratory bird in any manner. The words “at any time, by any means or manner” cannot simply be a reference to hunting and poaching.

Post-2017

A number of state attorneys general challenged the Jorjani opinion in a 2018 federal lawsuit, alleging violations of the Administrative Procedures Act. In August 2020 the court decided the summary judgment motion and cross motion in favor of the plaintiffs and against the Department of Interior. Judge Valerie Caproni of the Southern District of New York opened the opinion with, “It is not only a sin to kill a mockingbird, it is also a crime.” Judge

Caproni evaluated the positions set out by both Tompkins and Jorjani, and concluded, “Section 2’s clear language making it unlawful “at any time, by any means or in any manner, to . . . kill . . . any migratory bird” protected by the conventions is in direct conflict with the Jorjani Opinion.”

Congressman Alan Lowenthal in January 2020 introduced a bill, H.R. 5552, to amend MBTA to prohibit “incidental take” due to commercial activity and mandates Fish and Wildlife Service regulate incidental take through permitting and fees. The Committee on Natural Resources on September 1 sent the bill to the House and recommended its passage.

On February 3, 2020, the Fish and Wildlife Service published a proposed rule to codify the Jorjani opinion by amending 50 C.F.R. §10.14. The proposed rule clarifies that MBTA applies only to intentional injuring or killing of birds and conduct that results in the unintentional and incidental injury or would not be prohibited. On June 5, 2020, the Service published a draft environmental impact statement with a 45-day public comment period ending July 20, 2020. The Service’s preferred alternative in the draft Environmental Impact Statement is to “promulgate regulations defining the scope of the MBTA to not prohibit incidental take”.

Conclusion

All of us — and all of the MBTA activity described above — must await the results of November 3, 2020. As we have seen, elections have consequences, and the future of the MBTA depends greatly upon the individuals we elect this fall.

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Endnotes

¹ For version with endnote citations, see the electronic version at *Animal Law Section State Bar of New Mexico web page* <https://nmbar.org/animallaw> click on “Articles and Resources” link for document.

A New Federal Scorched Earth Approach to Rare Earth Production

By Logan Glasenapp

Hardrock mining, as a practice and an industry, has always embodied the Old West. In fact, to this day the regulatory apparatus applied to the hardrock mining industry still allows for the kind of “gung ho” individualism and cut-throat resource accumulation that characterized that time period.¹ Of the extractive industries, hardrock mining is one of the least regulated;² and with few exceptions, federal land managers have no choice but to allow hardrock mineral extraction on the public lands they oversee.³ Land managers can, of course, establish guardrails to protect other resources on the land, but they cannot bar access, prospecting, and extraction. Additionally, it is still possible for anyone, from a curious citizen to a multinational corporation, to go onto our public lands with a few stakes and a rubber mallet and essentially proclaim that “any hardrock mineral under this square is now mine to exploit.”⁴



Hardrock mining law at the federal level has been virtually unchanged since 1872.⁵ To put into perspective how long ago that was: the Great Mining Act of 1872 was signed by President Ulysses S. Grant; the most recent state admitted to the Union was Nebraska, the 37th state; and women did not yet have the right to vote.

There have been attempts to modernize federal mining law but these efforts have largely failed in the face of massive pressure from the lucrative—and, thus, influential—hardrock mining industry. The lack of federal royalties is one of the reasons the hardrock mining industry remains so lucrative to this day. Indeed, valuable hardrock minerals, the rights to which have been withheld by the federal government in most land transactions, are essentially free for the taking under federal mining law.⁶ No other extractive industry operates within a free-for-all framework quite like the hardrock mining industry.

Executive Order 13817

Recently, there was one notable move to revolutionize the hardrock mining industry from the executive branch of the United States federal government, and that is where

this article now turns its attention. Since inauguration day, the Trump Administration has taken steps that have made and continue to make public lands advocates and environmental watchdogs nervous, disappointed, and ultimately angry. These steps include withdrawing the United States from the Paris climate accord scaling back National Monument designations made by the previous administration,

eliminating regulations meant to protect the environment, and making it easier for extractive industry to operate and profit. This article cannot delve into the rationale and practical impacts of all such activities and policies, nor can it discuss the substance of the hundreds of lawsuits brought in response. This article, however, can provide background, rationale, and discuss potential impacts of one new policy intended to streamline and restrict the public’s voice from the National Environmental Policy Act (NEPA) process to facilitate the mining of so-called “critical minerals.”

Ordered in the name of national security, Executive Order 13817, A Federal Strategy to Ensure Secure and Reliable Supplies of Critical Minerals (Critical Mineral order), “streamlin[es] leasing and permitting processes to expedite exploration, production, processing, reprocessing, recycling, and domestic refining of critical minerals.”⁷ To achieve this bold new policy, the Trump Administration directed the “Secretary of the Interior, in coordination with the Secretary of Defense and in consultation with the heads of other relevant executive departments and agencies” to “publish a list of critical minerals[.]”⁸ The Critical Minerals order defined a critical mineral as:

a mineral identified by the Secretary of the Interior . . . to be (i) a non-fuel mineral or mineral material essential to the economic and national security of the United States, (ii) the supply chain of which is vulnerable to disruption, and (iii) that serves an essential function in the manufacturing of a product, the absence of which would have significant consequences for our economy or our national security.⁹

The final list of critical minerals, as of March 30, 2018, included:

Aluminum (bauxite), antimony, arsenic, barite, beryllium, bismuth, cesium, chromium, cobalt, fluor spar, gallium, germanium, graphite (natural), hafnium, helium, indium, lithium, magnesium, manganese, niobium, platinum group metals, potash, the rare earth elements group, rhenium, rubidium, scandium, strontium, tantalum, tellurium, tin, titanium, tungsten, uranium, vanadium, and zirconium.¹⁰

According to the New Mexico Bureau of Geology and Mineral Resources, housed at the New Mexico Institute of Mining and Technology, barite, beryllium, helium, potash, rare earth elements, tellurium, and uranium are all mined in New Mexico. In fact, “New Mexico leads the U.S. in production of potash[.]”¹¹

As of this writing, federal land management agencies are still working on administrative rulemakings to apply the policy changes of the Critical Mineral order into their permitting processes.¹² The Forest Service, for example, is presently in a rulemaking process to “provide a more efficient process for approving exploration activities for locatable minerals,” in order to “enhance operators’ interest in, and willingness to, conduct exploratory operations on National Forest System lands and ultimately increase the production of critical minerals[.]”¹³ As directed by EO 13817, the Forest Service is actively looking for strategies to not only streamline permitting processes but also to make mining *more appealing* to industry.

Federal Mining Reform on Capitol Hill

It is worth noting one more potential update to hardrock mining law in the United States, possibly spurred by the issuance of EO 13817. Senator Tom Udall (D-NM) and Representative Raul Grijalva (D-AZ) have both introduced legislation to reform the outdated Mining Act in their respective houses of Congress.¹⁴ Senator Udall’s bill would introduce federal royalties for new hardrock mines between 5% and 8%, and would put an end to the free-for-all that is the current claim-staking and patenting system,¹⁵ while Representative Grijalva’s bill would set the royalty rate at 12.5%.¹⁶ These bills propose common sense reforms that would begin to address the inequity that stems from the current scheme of federal mining law, one in which industry steals the people’s minerals out the back door while charging exorbitant amounts for those same minerals at the front door.

Conclusion

America’s national security cannot stand or fall based simply on where these critical minerals come from. Rather, it must stand or fall based on how we as a society value our natural resources and care for our land. For what, truly, are we protecting if our magnificent vistas and pristine streams fall by the wayside in the name of uranium production and sickeningly large profits for the hardrock mining industry.

For every effort by the current administration to streamline hardrock mining operations, whether by EO 13817 or any of the other various executive orders stripping NEPA requirements or further shutting the public out of the process, there are dozens of lawsuits and public awareness campaigns working to prevent further exploitation of our public land. Only time will tell, of course, but one only need to look at recent developments such as the creation of New Mexico’s Outdoor Recreation Division to understand that there is a new and growing awareness and fondness for untrammelled outdoor spaces and feel comforted that organizations are working non-stop to protect the last vestiges of true nature left in New Mexico and the country at large.

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Endnotes

¹ Santa Fe Nat’l Forest, *Scoping Notice, Comexico Jones Hill Exploration Project* (Dec. 2, 2019), https://www.fs.usda.gov/nfs/11558/www/nepa/112173_FSPLT3_5076438.pdf (“The General Mining Law of 1872 (as amended) grants individuals and corporations the right to prospect for and develop mineral deposits on federal lands.”).

² Nat’l Wildlife Fed., *Hardrock Mining*, <https://www.nwf.org/Our-Work/Waters/Hardrock-Mining>.

³ Santa Fe Nat’l Forest, *Scoping Notice, Comexico Jones Hill Exploration Project* (Dec. 2, 2019), https://www.fs.usda.gov/nfs/11558/www/nepa/112173_FSPLT3_5076438.pdf (“The General Mining Law of 1872 (as amended) grants individuals and corporations the right to prospect for and develop mineral deposits on federal lands.”).

⁴ Bureau of Land Management, *Staking a Claim*, <https://www.blm.gov/programs/energy-and-minerals/mining-and-minerals/locatable-minerals/mining-claims/staking-a-claim>.

⁵ Nicole Gentile, *Multinational Mining Corporations Are Exploiting U.S. Taxpayers*, CENTER FOR AMERICAN PROGRESS (Nov. 21, 2019, 12:01 am), <https://www.americanprogress.org/issues/green/reports/2019/11/21/477569/multinational-mining-corporations-exploiting-u-s-taxpayers>; Kyle Ashby, *Just How Outdated is the 1872 Mining Law?*, AMERICAN RIVERS, (Sep. 24, 2015), <https://www.americanrivers.org/2015/09/just-how-outdated-is-the-1872-mining-law/>; Frances Causey, *1872 Mining Law is Obsolete and in Need of Reform*, HUFFINGTON POST (Jan. 11, 2013, 3:14 pm, updated Mar 13, 2013) https://www.huffpost.com/entry/1872-mining-law-obsolete_b_2456346.

⁶ Nicole Gentile, *Multinational Mining Corporations Are Exploiting U.S. Taxpayers*, CENTER FOR AMERICAN PROGRESS (Nov. 21, 2019, 12:01 am), <https://www.americanprogress.org/issues/green/reports/2019/11/21/477569/multinational-mining-corporations-exploiting-u-s-taxpayers> (“[The General Mining Act of 1872] allows companies to mine for metals and other minerals on public lands for free[.]”).

⁷ EO 13817, 82 Fed. Reg. 60836, Dec. 26, 2017.

⁸ *Id.* at 60835.

⁹ *Id.*

¹⁰ Final List of Critical Minerals 2018, 83 Fed. Reg. 23295, May 18, 2018.

¹¹ *Industrial Mineral Resources in New Mexico*, New Mexico Bureau of Geology & Mineral Resources, New Mexico Institute of Mining and Technology, <https://geoinfo.nmt.edu/resources/minerals/industrial/home.html>

¹² Locatable Minerals, 83 Fed. Reg. 46451, Sep. 13, 2018 (Department of Agriculture Advance notice of proposed rulemaking; request for comment).

¹³ *Id.* at 46453.

¹⁴ Press Release, Senator Udall, Udall, Grijalva Introduce Hardrock Mining Reform Legislation to Make Mining Companies Pay Their Fair Share (May 9, 2019), available at <https://www.tomudall.senate.gov/news/press-releases/udall-grijalva-introduce-hardrock-mining-reform-legislation-to-make-mining-companies-pay-their-fair-share>.

¹⁵ Face Sheet, Hardrock Mining Reform Act of 2019, available at <https://www.tomudall.senate.gov/imo/media/doc/2019%20Hardrock%20Mining%20Reform%20Act%20of%202019,%20title%20by%20title.pdf>, accessed August 14, 2020; *see also*, S. 1386, 116th Cong. Session 1 (2019).

¹⁶ H.R. 2579, 116th Cong. Session 2 (2019).

TRUMP ADMINISTRATION ISSUES

Comprehensive Revisions of NEPA Regulations

By Mark F. Rosebrough

On July 16, 2020, the Council on Environmental Quality (CEQ) issued its final rule titled “Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act” (Final Rule).¹ Hailed by CEQ as the first comprehensive update to its National Environmental Policy Act (NEPA) regulations since they were promulgated in 1978, the Final Rule substantially revises what CEQ states has become an “increasingly complicated” process characterized by “excessive paperwork and lengthy delays.”² The Final Rule updates the procedures which Federal agencies are required to follow when undertaking federal projects by streamlining the Environmental Impact Statement and Record of Decision processes, removing the requirement that Federal agencies consider the cumulative impacts of a proposed action, and redefining what constitutes a major Federal action.³

Signed into law by President Richard Nixon on January 1, 1970, NEPA ushered in a new era of environmental law in the United States. NEPA establishes the procedural requirements which Federal agencies must follow when undertaking “major federal actions significantly affecting the quality of the human environment.”⁴ The Final Rule is a comprehensive and far reaching document which will substantially impact how Federal agencies apply the nation’s bedrock environmental law. While each of the revisions contained within the Final Rule are important and will have an impact on the implementation of NEPA, three of the revisions discussed in this article are particularly noteworthy and warrant attention. Nonetheless, New Mexico attorneys whose practices include NEPA compliance should consider reading the Final Rule in its entirety for an understanding of all of the revisions to NEPA’s regulations.

Streamlining the Environmental Impact Statement and Record of Decision Processes

Under Section 102 of NEPA, Federal agencies are required to prepare an Environmental Impact Statement (EIS) on:

- (1) The environmental impact of the proposed action;
- (2) any adverse environmental effect that cannot be avoided;
- (3) alternatives to the proposed action;
- (4) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity;
- and (5) any irreversible and irretrievable commitments of



resources that would be involved in the proposed action should it be implemented.⁵ NEPA regulations require that “each agency shall prepare a concise public record of decision” at the conclusion of the EIS process known as a Record of Decision (ROD).⁶

According to CEQ’s most recent review of the Federal Government, “the average time for completion of an EIS and issuance of a ROD was 4.5 years and the median was 3.5 years.”⁷ Additionally, CEQ found that the average EIS was 661 pages in length.⁸ In response to these perceived excesses in the NEPA review process, the Final Rule implements two significant revisions to the EIS and ROD issuance process. First, the Final Rule requires that Federal agencies shall complete “Environmental impact statements within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit.”⁹ Second, the Final Rule now requires that a final EIS be limited to 150 pages or fewer.

Removal of Cumulative Impact Review

Pursuant to NEPA, Federal agencies are required to review the “impacts” and “effects” of a proposed Federal action.¹⁰ The Final Rule removes specific references to “direct, indirect, and cumulative effects” to achieve CEQ’s goal of clarifying and simplifying the scope of NEPA review.¹¹ Accordingly, the Final Rule has revised the definition of “impacts and effects” to mean “changes to the human environment from the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives including those effects that occur at the same time and place as the proposed action or alternatives and

may include effects that are later in time or farther removed in distance from the proposed action or alternatives.”¹² The Final Rule goes on to state that a “but for” causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should generally not be considered if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include those effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the action.”¹³ These changes will significantly impact the scope of what Federal agencies may review in fulfilling their NEPA responsibilities.

New Definition of “Major Federal Action”

In the Final Rule, CEQ argues that the previous definition of “Major Federal action” misconstrued NEPA’s plain language by improperly conflating the definitions of “major” and “significant” in contradiction with the statutory usage of the two terms.¹⁴ Accordingly, the Final Rule now defines “Major Federal action” as an activity or decision subject to Federal control or responsibility” subject to specific enumerated exceptions.¹⁵ The Final Rule goes on to state that Major Federal actions tend to fall within one of the following categories: (1) Adoption of official policy, such as rules, regulations, and interpretations adopted under the Administrative Procedure Act...or other statutes; implementation of treaties and international conventions or agreements, including those implemented pursuant to statute or regulation; formal documents establishing an agency’s policies which will result in or substantially alter agency programs; (2) Adoption of formal plans, such as official documents prepared or approved by Federal agencies, which proscribe alternative uses of Federal resources, upon which future agency actions will be based; (3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive; (4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.¹⁶

The Final Rule also lists seven specific categories which do not constitute “Major Federal Action” for the purpose of NEPA review. Those seven categories include extraterritorial activities or decisions whose effects are located outside the jurisdiction of the United States, non-discretionary activities or decisions made in accordance with the agency’s statutory authority, activities or decisions that do not result in final

agency action under the Administrative Procedure Act or other statute that also includes a finality requirement, judicial or administrative civil or criminal enforcement actions, Non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project, and loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effect of such assistance.¹⁷

Possible Challenges

The Final Rule has been designated as a major rule subject to congressional review under the Congressional Review Act (CRA).¹⁸ However, for the Final Rule to be overturned by Congress, the CRA requires a joint resolution disapproving the rule which appears an unlikely prospect with the current makeup of Congress.¹⁹ Additionally, at least one lawsuit challenging the Final Rule has been filed in Federal Court by 17 environmental groups.²⁰ Nonetheless, if the Final Rule withstands these challenges, the changes to how NEPA is applied by New Mexico practitioners will be significant and worthy of deeper review.

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Endnotes

¹ 85 Fed. Reg. 43304-43376 (July 16, 2020).

² *Id.* at 43305.

³ CEQ’s revisions to NEPA regulations are not limited those discussed in this article. For a comprehensive review of all revisions, a full review of the Final Rule itself is suggested.

⁴ 42 U.S.C. § 4332 (C)

⁵ 42 U.S.C. § 4334 (C)(i-v).

⁶ 40 C.F.R. § 1505.2.

⁷ 85 FR 43304, 43305.

⁸ *Id.*

⁹ *Id.* at 43363.

¹⁰ 42 U.S.C. § 4332(C).

¹¹ 85 Fed. Reg. 43304, 43343.

¹² *Id.* at 43375.

¹³ *Id.*

¹⁴ 85 Fed. Reg. 43304, 43345

¹⁵ *Id.* at 43375.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 433044.

¹⁹ 5 U.S.C. § 801(3)(B).

²⁰ *Wild Virginia, et al. v. Council on Environmental Quality, et al.*, No. 3:20-cv-00045 (W.D. Va., July 29, 2020).

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