

INSIGHTS

Highlights from the Trump Administration's Rulemaking Agenda

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The Office of Management and Budget's [Spring 2019 Unified Regulatory Agenda](#) includes many items with significant implications for the energy and infrastructure sectors. This blog post offers highlights from the Agenda, with an emphasis on upcoming actions by the Department of the Interior, Environmental Protection Agency, Army Corps of Engineers, and the Council on Environmental Quality.

A few particularly big ticket items are on the horizon:

The White House Council on Environmental Quality will issue a proposed revision to the regulations implementing the National Environmental Policy Act (NEPA) – this will be the first significant revision since the regulations were promulgated in 1978. Because they apply to countless actions taken by nearly every federal agency, a revision of these regulations is sure to be a momentous event.

The US Fish and Wildlife Service and NOAA Fisheries are expected to finalize certain revisions to the regulations implementing various provisions of the Endangered Species Act. As with the potential for revision of the NEPA regulations, the federal government does not tinker with ESA regulations often and the proposed changes have attracted a good deal of interest. The comment period on the proposed regulations ended in September of 2018. The proposed regulations included the removal of the blanket application of rules governing endangered species to threatened species.

The Environmental Protection Agency and U.S. Army proposed a new definition of “waters of the United States” under the Clean Water Act earlier this year. The Unified Agenda predicts a final rule in December of 2019 – once issued, it will trigger an end to the complex litigation surrounding the Obama-era definition and a new beginning for another round of litigation over the geographic reach of the Clean Water Act.

Other items of interest:

1. Department of the Interior/Bureau of Indian Affairs (BIA): Proposed rule amendments related to Tribal Energy Resource Agreements.

Why it matters: Tribal Energy Resource Agreements (TERAs) allow Tribes to enter into energy-related business agreements and leases and to grant energy-related rights-of-way

without the review of the Secretary of the Interior. TERAs further the policy of promoting Tribal management of energy development on tribal lands. The proposed rule would amend existing regulations to comply with the 2018 Tribal Energy Development and Self-Determination Act Amendments. Generally, the proposed amendments would streamline the process by, for example, easing the TERA approval process, imposing timelines for TERA approval, and limiting the grounds upon which the Secretary could disapprove a TERA application.

What to watch for: DOI released the NPRM on July 2, 2019. The comment period ends on September 3, 2019.

Helpful links:

Proposed Regulation (84 FR 31529) <https://www.govinfo.gov/content/pkg/FR-2019-07-02/pdf/2019-13265.pdf><https://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Part-224-CURRENT-to-PROPOSED-redline.508.pdf>

[Senate Committee on Indian Affairs Press Release-https://www.indian.senate.gov/news/press-release/hoeven-s-tribal-energy-bill-headed-president-legislation-empowers-tribes-develophttps://www.bia.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/Part-224-CURRENT-to-PROPOSED-redline.508.pdf](https://www.indian.senate.gov/news/press-release/hoeven-s-tribal-energy-bill-headed-president-legislation-empowers-tribes-develop)

2. Department of the Interior/Fish and Wildlife Service (FWS): Streamlining FWS Permitting of Rights of Way

Why it matters: FWS proposes to streamline its right-of-way regulations for infrastructure projects. The three main reforms proposed are 1) implementation of pre-application consultation, 2) use of a standard application form, and 3) flexibility in determining the fair market value of rights-of-way across FWS lands. The FWS Manual already calls for pre-application consultation, but it is not a regulatory requirement and there is no standard application form, so standardization is likely to simplify the process.

What to watch for: Based on the Unified Agenda, DOI was scheduled to release an NPRM in June 2019, but has not done so.

Helpful links:

FWS Manual <https://www.fws.gov/policy/340fw3.html>

3. Department of the Interior/Bureau of Ocean Energy Management (BOEM): Streamlining Renewable Energy Regulations

Why it matters: BOEM has “identified deregulatory opportunities for reforming, streamlining, and clarifying its renewable energy regulations.” The purpose of these possible reforms is to “facilitate offshore renewable energy development without decreasing environmental safeguards.” This action is likely to follow BOEM’s recent trend of removing regulatory barriers to energy production, generally.

What to watch for: Based on the Unified Agenda, BOEM was scheduled to publish a Notice of Proposed Rulemaking (NPRM) in June 2019, but nothing has been released.

Helpful links: National Offshore Wind Strategy <https://www.boem.gov/National-Offshore-Wind-Strategy/>

4. Environmental Protection Agency: Clarification of State Certification Procedures Under Section 401 of the Clean Water Act

Why it matters: CWA Section 401 gives states a role in permitting large, interstate infrastructure projects. Unless the relevant state grants a 401 certification request (or fails to act on a request), a federal agency may not issue a permit or license to conduct an activity that may result in a discharge to the waters of the United States. The 401 certification verifies compliance with water quality standards.

EPA seeks to clarify and add structure to the 401 certification process by: 1) implementing “reasonable timeline[s]” for state 401 review, 2) limiting the scope of the conditions states may attach to 401 certifications, and 3) limiting the scope of information states consider in the 401 process. The main goals of this effort are to improve the 401 review process and focus it on compliance with water quality criteria.

What to watch for: Based on the Unified Agenda, the NPRM is scheduled to be released in August 2019, and the final rule is set for publication in May 2020.

Helpful links:

EPA Section 401 Guidance- https://www.epa.gov/sites/production/files/2019-06/documents/cwa_section_401_guidance.pdf

[Statements of EPA Administrator Wheeler- https://www.reuters.com/article/us-usa-epa-text/text-transcript-of-reuters-interview-with-epa-administrator-andrew-wheeler-idUSKCN1RO02H](https://www.reuters.com/article/us-usa-epa-text/text-transcript-of-reuters-interview-with-epa-administrator-andrew-wheeler-idUSKCN1RO02H)

5. Environmental Protection Agency: Clean Water Act Section 404(c) Regulatory Revision

Why it matters: Section 404(c) allows the EPA to restrict the designation of a specific site for disposal of dredge and fill material after a finding that discharge of such material would have an adverse impact on certain resources, including wildlife. Recently, 404(c) has been the subject of controversy related to the proposed Pebble Mine in Bristol Bay, Alaska. In June 2018, EPA Administrator Scott Pruitt issued a memo calling for changes to the 404(c) process. The memo addressed several key policy changes. First, eliminating authority to start the 404(c) process before a 404 permit application is filed or after a permit is issued. Second, requiring review and consideration of a final Environmental Impact Statement or Environmental Assessment before proposing a 404(c) determination. Third, requiring the EPA to publish and seek comment before a 404(c) determination takes effect. Though the EPA has not yet acted on the 2018 memo, its policy proposals may form the basis of the upcoming 404(c) regulatory revision.

What to watch for: Based on the Unified Agenda, the NPRM is scheduled to be released in December 2019 and the final rule is set for publication in September 2020.

Helpful links:

Section 404(c) Overview <https://www.epa.gov/cwa-404/restriction-disposal-sites-under-cwa-section-404c>

[EPA's 404\(c\) Memo https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf](https://www.epa.gov/sites/production/files/2018-06/documents/memo_cwa_section_404c_regs_06-26-2018_0.pdf)

6. Department of Defense/U.S. Army Corps of Engineers: Regulatory Program of the Army Corps of Engineers Tribal Consultation and NHPA Compliance

Why it matters: USACE engages in pre-decisional government-to-government consultation with Tribes and must consider the effects of its actions on historic properties pursuant to the National Historic Preservation Act (NHPA). USACE implemented its current NHPA regulations in 1990. Currently, USACE operates under 2005 interim guidance with respect to NHPA compliance. USACE proposes to publish an Advanced Notice of Proposed Rulemaking to solicit feedback for a future rulemaking that would revise its regulations concerning Tribal consultation and NHPA compliance.

What to watch for: Based on the Unified Agenda, the ANPRM is scheduled for September 2019.

Helpful links:

Corps of Engineers Interim Guidance on NHPA Compliance-
<https://usace.contentdm.oclc.org/digital/collection/p16021coll11/id/2478/>

7. Department of Defense/U.S. Army: Corps of Engineers Nationwide Permits

Why it matters: USACE proposes the revision and reissuance of nationwide permits based on changes recommended to 9 nationwide permits that authorize activities related to domestic energy production and use. USACE will likely modify and/or reissue the rest of the nationwide permits in advance of their scheduled expiration date of 2022 in order to keep all of them on one schedule.

What to watch for: Based on the Unified Agenda, the NPRM is scheduled for October of 2019.

8. Department of Defense/U.S. Army: Administrative Appeal Process for the Regulatory Program of the Corps of Engineers

Why it matters: In *United States Army Corps of Engineers v. Hawkes Co., Inc.*, the Supreme Court ruled that Corps of Engineers approved jurisdictional decisions (AJDs) under the Clean Water Act are final agency actions. This makes AJDs judicially reviewable. USACE is

updating its regulations to require parties to exhaust all administrative remedies before challenging an AJD in court. Exhaustion is already required to challenge other Corps final actions such as permit denials.

What to watch for: Based on the Unified Agenda, the NPRM is scheduled to be released in February 2020.

Helpful links:

U.S. Corps of Engineers v. Hawkes, Co. (2016)-
https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf

But Wait! There's More:

Department of the Interior:

- **Migratory Bird Permits; Regulations Governing Take of Migratory Birds:** The agency proposes to define the scope of the Migratory Bird Treaty Act (MBTA) by codifying DOI Solicitor's opinion M-37050, which says that incidental take resulting from an otherwise lawful activity is not prohibited by the MBTA. Based on the Unified Agenda, the NPRM was scheduled to be released in June 2019, but it has not been published.
- **Revisions to the Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf:** Proposes revisions to the Arctic Exploratory Drilling Rule (81 FR 46478) which established a regulatory framework for exploratory drilling and related operations on the Alaskan Outer Continental Shelf. Based on the Unified Agenda, the NPRM is set to be published in July 2019.
- **Revisions to NEPA Process:** The Department proposes to establish universal categorical exclusions for certain types of activities. Based on the Unified Agenda, the agency anticipates issuing a NPRM in September of 2019.

DOD/USACE:

- **Revisions to Procedures for Implementing NEPA:** USACE anticipates updating its list of categorical exclusions based on a recommendation of the DOD Regulatory Reform Task Force. Based on the Unified Agenda, the NPRM is scheduled to be released in September of 2019.

EPA & DOD/USACE:

- **Compensatory Mitigation for Losses of Aquatic Resources—Review and Approval of Mitigation Banks and In-Lieu Fee Programs:** The agencies propose a rulemaking to simplify and streamline the establishment of mitigation banks and in-lieu fee programs. Based on the Unified Agenda, the NPRM is scheduled to be released in December 2019 and the final rule is scheduled for publication in September 2020.