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ENVIRONMENTAL PROVISIONS OF THE FAST ACT

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On December 4, 2015, President Obama signed into law the "Fix America's Surface Transportation Act," Public Law 114-94, called the FAST Act. As finally enacted, the FAST Act exceeds 400 pages in length. This paper reviews those provisions related to the environment. To facilitate review against other provisions of the FAST Act, the sequence below follows the order in which each item appears in the act, not the relative importance of each section. Section numbers refer to sections of the FAST Act. References to the "Secretary" mean the Secretary of Transportation, unless otherwise specified. References to the "Department" mean the United States Department of Transportation or US DOT, unless otherwise noted. The complete FAST Act is at: https://www.congress.gov/114/bills/hr22/BILLS-114hr22enr.pdf

There are numerous and extensive provisions that make changes to the existing sections of the highway and transit laws, as well as provisions that improve the rail environmental review process. A new agency is established designed to improve environmental processes government-wide. However, for highway and transit projects, Congress may have missed a number of opportunities to make more aggressive changes that could have resulted in a much more efficient environmental review processes.

Section 1109. Surface Transportation Block Grant Program.

This section changes the Surface Transportation Program, 23 U.S.C. §133, into a "block grant program." This section is not a true block grant program because it does not clearly assign full responsibility to the states. For example, the law requires consultation with metropolitan planning organizations ("MPO") or other local officials. Nevertheless, an argument may be made that since project selection is now a state responsibility (or a shared responsibility with state, local and MPO officials), that the National Environmental Policy Act of ("NEPA") does not apply. There was considerable litigation about this point when block grants were developed for the Community Development Block Grant Program. However, it is pretty clear that the mere contribution of federal funds is enough to invoke NEPA. See *Ely v. Velde,* 497 F.2d 252 (4th Cir. 1974). Under Section 1109, it is not clear that there are no federal responsibilities once the state selects a project.

Section 1114. Congestion Mitigation and Air Quality Improvement Program ("CMAQ")

The amendments to the CMAQ program are rather limited, see 23 U.S.C. §149. In a number of places, the law was clarified that maintenance areas are also eligible for CMAQ funding. Some relief was provided for rural PM2.5 nonattainment areas from demonstrating cost effectiveness, and CMAQ eligibility was expanded to include projects to reduce PM2.5 emissions from landside port non-road and on-road equipment in PM2.5 nonattainment and maintenance areas.

Section 1301. Satisfaction of Requirements for Certain Historic Sites.

This section contains the amendments to Section 4(f) of the Department of Transportation Act of 1966 ("Section 4(f)"), and, although it largely codifies existing practice, further solidifies the already close relationship between Section 106 of the National Historic Preservation Act of 1966 ("Section 106") and Section 4(f). The amendments to 23 U.S.C. §138 and 49 U.S.C. §303 are identical. The FAST Act adds new subsection (e) which:

1. Charges the Secretary, in consultation with the Secretary of the Interior and the Executive Director of the Advisory Council on Historic Preservation ("ACHP") to align, to the maximum extent practicable, the requirements of Section 4(f) with the requirements of NEPA and Section 106, including the issuance of regulations (note: as passed the language contains some technical errors).

2. Provides that when the Secretary determines pursuant to a NEPA analysis that there is no feasible and prudent avoidance alternative to a significant historic site, and that determination is concurred in by the State or Tribal Historic Preservation Office ("SHPO/THPO"), the Secretary of the Interior, and the ACHP, then that determination may appear in the record of decision ("ROD") without the need to prepare a separate Section 4(f) analysis, as is presently the case. The concurrences must appear in the ROD and be published on a website within three days of receipt of all concurrences by the Secretary.

3. Provides that when there is a finding of no feasible and prudent avoidance alternative concurred in by the SHPO (or THPO), the Secretary of the Interior and the ACHP, then the Secretary may use the Section 106 process to comply with the requirement in Section 4(f) to undertake all possible planning to minimize harm.

These changes represent only minor changes from existing practice. The Federal Highway Administration's ("FHWA") and Federal Transit Administration's ("FTA") NEPA regulations expressly integrate Section 106 procedures already, the Section 4(f) analysis and determination are already made part of the environmental impact statement ("EIS") or environmental assessment ("EA"), and the mitigation agreement process under Section 106 typically produces a mitigation plan or requirement that corresponds to all possible planning to minimize harm.

Finally, note that **Section 1303** of the Act exempts certain common post 1945 bridges and culverts from Section 4(f) protection.

Section 1304. Efficient Environmental Reviews for Project Decisionmaking.

This section makes a number changes to 23 U.S.C. §139, expanding the breadth of the provision to include all US DOT agencies in the definition of multimodal projects and strengthening a number of measures added to the law by the Moving Ahead for Progress in the 21st Century Act ("MAP-21"). Thus:

1. Although still focused on highway and transit projects, the section 139 procedures will now apply to multimodal projects, meaning any project that requires approval of more than one operating administration or secretarial office of the Department. As written, this may not have to have involvement of FHWA or FTA.

2. Although encouraging the use of programmatic reviews, provisions are added to require transparency and clarity about how programmatic reviews are used and what information they contain, as well as ensuring openness and public comment. In addition, a rulemaking implementing the provisions related to programmatic reviews is required no later than one year after the enactment of the FAST Act.

3. Greatly strengthens the push to reduce multiple NEPA documents by:

a. Requiring the lead agency to (i) identify other federal and non-federal agencies (i.e., participating agencies) that may have an interest in the project not later than 45 days after the date of publication of a notice of intent to prepare the environmental documentation and (ii) consider and respond to comments received from participating agencies during the environmental review process on matters within the special expertise of those participating agencies;

b. Requiring participating agencies to provide comments, responses, studies or methodologies within their areas of special expertise and to use the environmental review process to address any environmental concerns of the participating agencies; and

c. Directing the lead agency to develop an environmental document sufficient to satisfy the requirements for all federal approvals, actions, and permits to the maximum extent possible, and participating agencies to provide cooperation and timely information to assist the lead agency in the development of the environmental document.

4. Imposing specific time frames for response by federal agencies during the project initiation process, such as:

a. Requiring written determination (or request for additional information) by the Secretary no later than 45 days after the date on which the project initiation notification is received; and

b. Permitting the project sponsor to request an operating administration or secretarial office as the lead agency and requiring the Secretary to respond to such a request not later than 45 days after receipt.

In addition, Section 1304 requires the lead agency to develop an "environmental checklist" to help a project sponsor identify potential natural, cultural, and historic resources in the area of the project.

5. Provides additional guidance on the alternatives analysis, including:

a. Requiring the lead agency to offer the opportunity for involvement in the alternatives analysis to participating agencies and the public as early as practicable in the environmental review process;

b. Requiring that the range of alternatives developed under the alternatives analysis is used for all federal environmental reviews and permits required for the project; and

c. Reducing duplication between the alternatives analysis required for compliance with NEPA and any evaluation of alternatives conducted as a part of the metropolitan transportation planning process or under state environmental laws.

6. Requiring the lead agency to establish a plan for coordinating public and agency participation in and comment during the environmental review process not later than 90 days after the date of publication of a notice of intent to prepare environmental documentation.

7. Foreclosing the opportunity for any issue resolved by the lead agency with concurrence of participating agencies to be reconsidered unless significant new information arises and further defines the financial penalties on federal agencies that do not meet approval dates related to environmental documentation.

8. Clarifying the ability of public entities receiving federal financial assistance to provide funding to federal and state agencies to conduct certain activities related to the environmental review process and requires that the public entity and affected federal and/or state agency enter into an agreement establishing projects and priorities to be addressed by the use of the federal funds.

9. Attempting to accelerate the decisionmaking process by permitting the lead agency to use an errata sheet to respond to minor comments on a final environmental impact statement ("FEIS") and develop a single document that consist of an FEIS and ROD, unless the FEIS makes substantial changes to the proposed action or there are significant new circumstances relevant to the proposed action or its impacts.

10. Establishing a website where the status and progress of projects requiring environmental documentation is made public, and requiring participation from federal agencies and states with delegated authority and encouraging participation from state and local agencies.

Section 1305. Integration of Planning and Environmental Review.

This section rewrites 23 U.S.C. §168 relating to the interplay of the planning process and the environmental review process, specifically:

1. Introduces the idea of the "relevant agency," which is either the lead agency for a project (as defined in 23 U.S.C. §139(a)) or a cooperating agency with responsibility for environmental permits, approvals, reviews, or studies required under federal law other than NEPA.

2. Permits not only adoption and use of all or a portion of a "planning product" during the environmental review process, but also incorporation by reference of said planning products, which include any decision, analysis, study or other documented information resulting from the metropolitan or statewide transportation planning process.

3. Expands the planning decisions from planning products that may be adopted or incorporated by reference and used in the environmental review process to include the purpose and need for the proposed action and the preliminary screening of alternatives, in addition to the following:

a. the necessity of tolling, private financing, or other special financial assistance;

b. the general travel corridor or modal choice;

c. methodologies for analysis; and

d. programmatic level mitigation for potential impacts of a project.

Section 1307. Technical Assistance for States

Section 1307 adds a new subsection to 23 U.S.C. §326 -- State Assumption of Responsibility for Categorical Exclusions--- providing for technical assistance, training and other support. This clarifies that such support is appropriate. This section also modifies the procedures for terminating the state assumption by adding a number of procedural steps which must occur prior to actual termination.

Section 1308. Surface Transportation Project Delivery Program

This section amends 23 U.S.C. §327 and enhances the oversight and auditing responsibilities of the Secretary over states that have assumed the responsibility for actions required of the Secretary under federal environmental laws. It also provides that the Secretary may terminate a state for failing to carry out its responsibilities properly. These provisions give additional authority for provisions already in the state/federal contracts governing the delegation of federal authority.

The section also provides for training of state officials in order to enhance their capacity to implement the delegation.

Section 1309. Program for Eliminating Duplication of Environmental Reviews

This provision adds 23 U.S.C. §330, and establishes a new pilot for up to five states to test whether state environmental law can be substituted for NEPA and related regulations and Executive Orders. Note that only NEPA, and not additional federal environmental laws, are covered by this pilot.

To be eligible, a state must already be participating in the Surface Transportation Project Delivery Program (23 U.S.C. §327). This will significantly limit the number of states eligible for this new program. However, it also ensures that the same agency (the state Department of Transportation, or state DOT) carries out both NEPA and other environmental requirements, albeit with a mixture of state and federal requirements.

For a state to participate in the pilot, it must submit to the Secretary a detailed application describing the state laws, regulations, and financial resources that demonstrate that these are at least as stringent as the federal laws and regulations it seeks to replace. The state must also have sought public input on its application, and it must explain how it intends to apply its laws and procedures during the pilot.

The Secretary must receive the concurrence of the Chair of the Council on Environmental Quality ("CEQ") in order to approve the state application, and, after review, must enter into an agreement with the governor or a top ranking official of the state DOT responsible for construction that sets forth the terms of the pilot.

In a very unusual provision, federal district courts have exclusive jurisdiction over any civil action against the state challenging compliance with the state environmental laws substituting NEPA laws and regulations under the pilot. Lawsuits must be brought within two years of publication in the Federal Register of notice of a state license, permit or approval made under the state laws and regulations approved for the pilot. Note that this is different from approvals made under federal laws, which have a150 day window for filing a similar challenge. Section 330 also provides for the possibility of a supplemental environmental review, which creates a new two year window for bringing suit.

The state may provide up to 25 municipalities with the ability to operate local environmental reviews consistent with the state approved procedures.

The Secretary, in consultation with the Chair of CEQ, may terminate a state program at any time after giving notice and an opportunity to correct the issues that led to the possibility of termination.

Finally, the Secretary is charged with providing a report to Congress within two years of the effective date of Section 330. The Secretary, in consultation with the Chair of the CEQ, is directed to issue regulations implementing Section 330 within 270 days of the effective date of the Section. It is not clear that the Secretary has to wait that long before accepting and, if appropriate, approving state applications filed before the issuance of final regulations.

Section 1310. Application of Categorical Exclusions for Multimodal Projects.

This section revises the ability initially granted in MAP-21 of a lead authority to apply the categorical exclusions ("CE") designated by a cooperating authority to a multi-modal project. Notably:

1. The lead authority may apply CEs designated under NEPA and implementing regulations and procedures of a cooperating authority for a proposed multi-modal project if it:

a. Makes a determination, with concurrence of the cooperating authority, on the applicability of the CE and that the multi-modal project satisfies the conditions for a CE under NEPA.

b. Follows the implementing regulations of the cooperating authority.

c. Determines that the proposed multi-modal project does not have significant impact on the environment, either individually or cumulatively, and does not merit additional analysis or documentation through an EIS or EA due to extraordinary circumstances.

2. A cooperating authority is required to provide expertise to the lead authority on aspects of the multi-modal project for which it has expertise.

Section 1311. Accelerated Decisionmaking in Environmental Reviews.

A new section is inserted at 49 U.S.C. §304a that broadens a provision of MAP-21 to all programs administered by the Department, accelerating the environmental review process by:

1. Permitting the lead agency to use an errata sheet to respond to minor comments on an FEIS and develop a single document that consists of a FEIS and ROD, unless the FEIS makes substantial changes to the proposed action or there are significant new circumstances relevant to the proposed action or its impacts, in substantially the same way as implemented under Section 1304 of the FAST Act (applying to Title 23).

2. Allowing the Department to adopt and incorporate by reference documents and information to avoid duplication of analyses, including:

a. Adopting documents of other operating administrations or secretarial offices within the Department, such as a draft environmental impact statement ("DEIS"), an EA, or an FEIS if the proposed action is substantially the same as the project considered in the document, the operating administration concurs with that decision, and the action is consistent with NEPA.

b. Incorporating by reference all or a portion of a DEIS, EA, or FEIS if the incorporated information is cited in source document, is briefly described, is reasonably available for inspection by interested persons with in the time period for review, and does not include proprietary information.

Section 1312. Improving State and Federal Agency Engagement in Environmental Reviews

This section adds 49 U.S.C. §307, a provision already in 23 U.S.C. §139(j) for highway and transit projects. It allows any recipient of any US DOT funding to transfer funds to federal agencies (including the Department), state agencies, and Indian tribes to facilitate the timely environmental review of projects using US DOT funds. The agencies receiving funds must use them to accelerate the review of US DOT projects, and sign an agreement with the agency that is the recipient of US DOT funding.

Section 1313. Aligning Federal Environmental Reviews.

This Section adds 49 U.S.C. §310, and requires the Secretary, in cooperation with the federal agencies likely to have review and approval responsibilities over US DOT actions, to establish coordinated and concurrent reviews. This process shall ensure that:

1. The purpose and need and range of alternatives are sufficient to provide agencies with jurisdiction sufficient information to enable concurrent environmental review and permitting.

2. Purpose and need environmental issues are addressed and resolved during the scoping process, and other issues are resolved during the course of preparing the EIS, to enable concurrent reviews and approvals.

3. Issues are resolved in an expedited manner.

Section 1313 also charges the Secretary to create a checklist that provides a list of the agencies with jurisdiction, their responsibilities and requirements, and ensures that US DOT environmental documents address the purpose and need and range of alternatives required by agencies with jurisdiction. The purpose is to improve coordination with these agencies.

Finally, this section requires the Secretary to host annual "collaboration sessions" with US DOT agencies and other agencies with jurisdiction over US DOT projects to address areas where interagency collaboration could be improved. This includes improving working relationships with state and local officials. These collaboration sessions shall

also include consultation with state and local officials involved in the permitting and approval of infrastructure projects.

Section 1314. Categorical Exclusion for Projects with Limited Federal Assistance.

This section amends existing law by indexing to inflation the project limits for the categorical exclusion of projects receiving limited federal assistance. See 23 C.F.R. §771.117(b)(23).

Section 1315. Programmatic Agreement Template.

In Section 1318 of MAP-21, the Department was required to issue a rulemaking adding certain new CEs to the Department's regulations and to find opportunities to enter into programmatic agreements with states that establish efficient administrative procedures for carrying out environmental and other project reviews. Section 1315 of the FAST Act provides additional guidance regarding the programmatic agreement template, requiring the Secretary to:

1. Develop a programmatic agreement template that provides for efficient and adequate procedures for evaluating federal CE actions.

2. Use the programmatic agreement template upon request from a state, and modify the template only upon consent of the state.

3. Establish a method to verify that CE's are evaluated and documented consistently by any state that used the template programmatic agreement.

4. Revise the regulations at 23 C.F.R. § 771.117(g) not later than 30 days after the date of enactment to allow a programmatic agreement to include responsibility for CE determinations not only for CEs under 23 C.F.R. § 771.117 (c) and (d), but also under 40 C.F.R. § 1508.4 and identified in the programmatic agreement.

Section 1317. Modernization of the Environmental Review Process.

This section requires the Secretary to consider the use of current technology to improve the information presented in NEPA documents, including, searchable databases, better mapping and geographic information, integrating fiscal information, and other innovative technologies. Agencies with jurisdiction should find ways to provide information in a concise format, compatible with US DOT systems (that is, better interagency coordination on technology issues). Finally, the section requires a report to Congress in one year.

Section 1318. Assessment of Progress on Accelerating Project Delivery

This section directs the Comptroller General to report to Congress in two years on the effectiveness of the streamlining provisions of this Act, as well as those of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (or, "SAFETEA-LU") and MAP-21, and make recommendations on the effectiveness of these provisions and on possible additional streamlining measures.

Section 1415. Administrative Provisions to Encourage Pollinator Habitat and Forage of Transportation Rights-of-Way.

This section is aimed at encouraging the creation of habitat, forage areas and native plantings that benefit Monarch butterflies, other native pollinators, and honey bees.

Section 1422. Emergency Exemptions.

This section puts into law a number of provisions governing procedures applicable to emergencies. It specifically applies the emergency procedures of the CEQ regulations to highway reconstruction due to emergencies (40 C.F.R. §506.11), requires the application of Environmental Protection Agency's general permit dealing with stormwater discharge for highway reconstruction projects, and requires the application of emergency projects under 33 C.F.R. §325.2(e)(4) (Section 404 permits), the National Historic Preservation Act, the Endangered Species Act, and other federal environmental laws.

Section 9001. National Surface Transportation and Innovative Finance Bureau.

This section creates a new office within the Office of the Secretary of Transportation that centralizes administration of the Department's credit and innovative finance programs. It amends Title 49 of the U.S. Code by adding a new Section 116. Although it is not clear how responsibility for complying with NEPA insofar as credit financed projects will be divided within the Department, the bureau is charged with identifying ways of improving the environmental review and permitting of projects and programs within the scope of its jurisdiction.

Sections 11501 through 11502. Short Title and Treatment of Improvements to Rail and Transit Under Preservation Requirements.

Sections 11501 and 11502 incorporate the Track, Railroad, and Infrastructure Network Act ("TRAIN Act") into the statutory schemes at 23 U.S.C. § 138 and 49 U.S.C. § 303. Specifically, Section 11502:

1. Indicates that improvement to, or the maintenance, rehabilitation, or operation of, railroad or rail transit lines that are in use or were historically used for the transportation of goods or passengers will not be considered a use of an historic site regardless of whether the line is on or eligible for the National Register of Historic Places.

2. Excepts from the exemption above stations and bridges or tunnels located on railroad lines that have been abandoned or transit lines that are not in use. This language, when read with the language below, is ambiguous but for purposes of this article is interpreted to mean railroad lines that have been abandoned in accordance with Surface Transportation Board regulation and transit lines that are not in, and not intended to return to, use.

3. Clarifies that the exception above does not apply to bridges or tunnels located on railroad or transit lines over which service has been discontinued or that have been railbanked or otherwise reserved for the transportation of goods and services. As

stated above, when read together these provisions of the TRAIN Act are ambiguous. For purposes of this article, it appears that bridges or tunnels located on railroad or transit lines over which service has been discontinued means a temporary suspension of use of the bridge or tunnel for transportation purposes.

Section 11503. Efficient Environmental Reviews.

Section 11503 applies to intercity passenger rail, including Amtrak, and:

1. To the extent applicable, applies the project development procedures described in 23 U.S.C. § 139 to any railroad project that requires the approval of the Secretary under NEPA, including:

a. Requiring the Secretary to incorporate into agency regulations aspects of project development procedures determined appropriate by the Secretary; but

b. Limiting claims arising under federal law seeking judicial review of a permit, license, or approval issued by a federal agency unless they are filed within two years after notice in the Federal Register.

2. Requires the Secretary to survey the use by the Federal Railroad Administration of CEs in transportation projects since 2005, and publish a review of the survey in the Federal Register, not later than six months after enactment of the Passenger Rail Reform and Investment Act of 2015 ("PRRIA"). It should be noted that PRRIA is included under the rail title of the FAST Act.

3. Not later than one year after the enactment of PRRIA, requiring the Secretary to publish a notice of proposed rulemaking proposing new and existing CEs for railroad projects that require the approval of the Secretary and establishing a process for considering new CEs to the extent that the CEs meet the criteria under 40 C.F.R. § 1508.4.

Title XLI – Federal Permitting Improvement

This title addresses ways of improving NEPA review and permitting for large projects (in excess of $200 million). Most highway and transit projects are excluded, as are certain water resources development projects. The title is complex, requiring a review of existing processes and the development of proposals to improve those processes. It establishes the "Federal Permitting Improvement Council," which is composed of the heads of 13 cabinet departments and agencies. The Council staff includes an Executive Director appointed by the President. The Council has the authority to step into the environmental review of projects to facilitate the process. A full explanation of this extensive new provision is not provided here. It is worthy of a separate article that explains and explores this new entity properly.

MARITIME BALLAST DISCHARGE NPDES PERMIT PARTIALLY UPHELD, PARTIALY REMANDED

Submitted by

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Environmental groups petitioned for review of the 2013 Vessel General Permit issued by EPA under 33 U.S.C. § 1342, section 402 of the Clean Water Act. The Vessel General Permit covers discharge of ballast water from ships and is intended among other things to address the spread of invasive species through discharge of ballast water. The court noted that this is a particular problem in the Great Lakes. The U.S. Court of Appeals for the Second Circuit remanded the permit to EPA, finding that its setting of some effluent limits was arbitrary and capricious. The opinion provides a good discussion of the "technology-forcing" aspects of the Clean Water Act's effluent limit requirements in 33 U.S.C. §1311.

The petitioners alleged that the Vessel General Permit effluent limits were arbitrary and capricious. These included technology-based effluent limits (TBELs), which are based on how effectively available technology can reduce pollutants. They also included water quality-based effluent limits (WQBELs), which require that a certain level of water quality be maintained; these may be narrative when calculation of numeric limits is not feasible. EPA must set these effluent limits based on the "best available technology economically achievable."

The Second Circuit reviewed the petitions and the permit under 33 U.S.C. § 1369(b)(1). The court granted the petitions in part and remanded the permit to EPA, leaving the 2013 Vessel General Permit in place while a new permit is developed.

During development of the 2013 Vessel General Permit, EPA engaged two scientific boards to provide it with expert advice -- EPA's own Science Advisory Board and the National Academy of Sciences Committee on Assessing Numeric Limits for Living Organisms in Ballast Water. However, EPA posed different questions to each board, and limited the scope of each board's study. Specifically, EPA identified a maritime industry standard as the standard it wanted to meet, and it directed that the studies be focused on shipboard water treatment systems and not onshore treatment systems. The court held that EPA acted arbitrarily in choosing the industry standard as the TBEL for invasive organisms, rather than allowing the two committees to determine whether technology was available that could meet an even higher standard. The court also held that EPA arbitrarily limited the scope of the committees' inquiries to shipboard technology, when there was evidence that onshore treatment facilities were available in other industries and thus were part of the "best available technology" that needed to be employed. The court also noted that the record documented EPA's efforts to "curtail discussion of onshore treatment" in the studies. The record was thus deficient in failing to address whether onshore treatment could be considered "available." EPA also failed to perform any economic analysis to compare the costs of shipboard and onshore

technology. The court concluded that had EPA done the requisite inquiry, it could have determined that onshore treatment of ballast water was "available."

The court also found EPA's exemption of older ships that work primarily in the Great Lakes to be arbitrary, noting that the purpose of requiring "best available technology" is to "force technology to keep pace with need." It also noted that EPA's record on this issue was inadequate for having failed to consider onshore treatment as well as a cost-benefit analysis.

The court upheld EPA's decision to decline to set a TBEL numeric limit for organisms that it demonstrated it did not have the ability to test for. It also upheld EPA's monitoring requirements under the permit, which included "functionality monitoring" to determine if equipment is working properly, and tests for the presence of indicator organisms. The court found that these monitoring requirements are "other measurement" allowed by the Clean Water Act, and the court concluded that it should defer to EPA's expertise. However, with regard to WQBELs, the court found that the monitoring requirements provided little information on water quality and were inadequate.

Natural Resources Defense Council v. U.S. Environmental Protection Agency, 804 F.3d 149 (2d Cir. 2015)

CLEAN WATER RULE (WOTUS) UPDATE

Submitted by

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The Clean Water Rule, issued by the U.S. Environmental Protection Agency ("EPA") and U.S. Army Corps of Engineers ("Corps") in June 2015, 80 Fed. Reg. 37,054 (June 29, 2015) ("Rule"), is one of the most significant and controversial regulatory developments of 2015, as demonstrated by the currently pending legal challenges instituted by more than 35 different parties, including at least 28 states. There are also at least two lines of legislative attack, including proposed bills both to de-fund the Rule's implementation, as well as to repeal it.

The Rule is intended to clarify regulatory confusion over which aquatic features, including dry washes, streams and wetlands, constitute "waters of the United States," and are therefore subject to Clean Water Act protection. The Rule is significant and controversial primarily because, while the Rule makes a handful of aquatic features clearly non-jurisdictional, on balance, the Rule significantly expands jurisdiction by:

- Eliminating former provisions requiring a showing that entire categories of features are, have been, or could be navigable before considering them jurisdictional;

- Increasing the number and types of features that are jurisdictional "per se"; and

- Increasing the types of features that are potentially jurisdictional, subject to case-specific technical "significant nexus" analysis.

In short, the Rule more broadly defines jurisdiction, thereby effectively increasing regulation for a broad spectrum of activities. The status of legal and legislative challenges to the Rule is summarized below.

Legal Challenges to the Rule

The U.S. Court of Appeals for the Sixth Circuit is poised to rule on a motion to dismiss for lack of subject matter jurisdiction in a suit brought by 18 states challenging the validity of the Rule. The case was transferred to the Sixth Circuit at the request of respondents EPA and the Corps, who assert that the Rule falls within a narrow class of specific EPA actions listed in 33 U.S.C. § 1369(b)(1) that are reviewable only by circuit courts. The 18 state petitioners that brought the motion to dismiss disagree, arguing the case should be litigated in district court under the Administrative Procedure Act. According to the state petitioners, reviewability under section 1369 has the potential to insulate the Rule from future challenges in enforcement proceedings like those at issue in landmark cases such as *Rapanos v. United States,* 547 U.S. 715 (2000) and *Sackett v. EPA,* 132 S.Ct. 1367 (2012).

In their papers, EPA and the Corps assert that, pursuant to 33 U.S.C. § 1369(b)(1)(E) and (F), the Rule is "an effluent limitation or other limitation under [33 U.S.C. §§ 1311, 1312, 1316, or 1345]," or alternatively, involves the issuance or denial of a permit, and therefore original jurisdiction belongs in the court of appeals. The state petitioners assert that the Rule does not impose any "effluent limitation" or "other limitation," or constitute an "issuance of a permit," within the statutory definitions. Three district courts have issued decisions on this issue; a North Dakota district court rejected EPA and the Corps' arguments, *North Dakota v. EPA,* 2015 WL 5060744, at *1-3 (D. N.D. Aug. 27, 2015), whereas a Georgia court, *Georgia v. McCarthy,* 2015 WL 5092568, at *2-3 (S.D. Ga. Aug. 27, 2015), and a West Virginia court, *Murray Energy Corp. v. EPA,* 2015 WL 5062506, *3-6 (N.D. W.Va. Aug. 26, 2015), accepted them. On balance, practitioners with Clean Water Act expertise tend to agree with the North Dakota court, who found that the Rule does not impose any "effluent limitation" or "other limitation" within the statutory definition. Rather, the Rule "redefines what constitutes 'waters of the United States.'"

A judicial finding that the Rule is an "effluent limitation" or "other limitation" would have important implications for the equally controversial Clean Water Act issue regarding judicial review of jurisdictional delineations performed pursuant to the Rule. If the Rule is ultimately upheld, it will govern jurisdictional delineations, which are technical studies and reports that involve the application of the Rule to particular projects to determine if features in those properties are subject to Clean Water Act protections. Currently there is a split among the circuits, with the U.S. Court of Appeals for the Fifth Circuit[1] holding that jurisdictional delineations are not final agency actions subject to judicial review, and

[1] *Belle Co. v. U.S. Army Corps of Engineers,* 761 F.3d 383, 386 (5th Cir. 2014) *cert. denied sub nom. Kent Recycling Servs., LLC v. U.S. Army Corps of Engineers,* 135 S. Ct. 1548 (2015)

the U.S. Court of Appeals for the Eighth Circuit[2] holding the opposite. EPA and the Corps have argued that the Supreme Court should resolve this split as determined by the Fifth Circuit, finding that jurisdictional delineations are not final actions subject to judicial review. However, arguably, if the Rule is an "effluent limitation" or "other limitation," as argued by EPA and the Corps in challenges to the Rule, then the application of that effluent limitation to particular properties and activities would be an adjudicatory determination that should, in fact, be subject to judicial review, which is contrary to the position argued by EPA and the Corps in the lawsuits relating to judicial review of jurisdictional delineations. Notably, on December 11, 2015, the U.S. Supreme Court granted certiorari to resolve the circuit split over this issue.[3]

The Sixth Circuit heard oral argument on the motion to dismiss on December 8, 2015. The hearing on the motion follows the court's October 9, 2015 decision to stay the Rule nationwide, after finding that the state petitioners were likely to succeed on the merits. The North Dakota district court had stayed the Rule in 13 states, which had caused uncertainty from a regulatory standpoint. Now the Rule is stayed across the nation, pending further action by the Sixth Circuit, or some other legislative action.

As respects the merits, the North Dakota court was the first to address substantive legal challenges to the Rule. Specifically, the North Dakota court held that the Rule failed to satisfy the standards set forth by the U.S. Supreme Court in *Rapanos v. United States*, 547 U.S. 715 (2006). The court explained that the Rule allows EPA and the Corps to regulate "waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water." Specifically, the court found that the definition of "tributary" includes "vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term." The court also found that the agencies likely promulgated the Rule in violation of the Administrative Procedure Act. When determining that the state petitioners were likely to succeed on the merits, and thus granting a nationwide stay, the Sixth Circuit reached a similar conclusion.

Legislative Challenges to the Rule

Lawmakers have also challenged the rule through a dual-track approach, attempting to attack the rule substantively and through defunding. Sen. Joni Ernst (R-Iowa) authored a resolution (S.J. Res. 22) that would block the rule under the 1996 Congressional Review Act. As of November 16, 2015, the resolution passed the Senate and was sent to the House of Representatives, but is being "held at the desk," which means it is awaiting a decision to refer it to committee, to place it on the calendar, or to bring it directly to the floor for consideration by unanimous consent. But President Obama is expected to veto the resolution, and opponents of the Rule may not have the needed votes to override him. Republican leaders also attempted to include a policy rider prohibiting funding for the Rule in the appropriations bill negotiated in early December. However, on December 16, 2015, Congress passed an appropriations bill that leaves the Clean Water Rule unscathed. The Federal Water Quality Protection Act (S. 1140),

[2] *U.S. Army Corps of Engineers v. Hawkes Co. Inc.*, 782 F.3d 994 (8th Cir. 2015).

[3] *U.S. Army Corps of Engineers v. Hawkes Co. Inc.*, No. 15-290, 2015 WL 8486656, at *1 (U.S. Dec. 11, 2015).

a measure from Sen. John Barrasso (R-Wyo.), which would have repealed the Rule and also set new criteria for any future rule pertaining to streams and wetlands that fall under the scope of the Clean Water Act, was blocked by Senate Democrats in early November.

Conclusion

While the primary purpose of the Rule is to clarify jurisdiction, the proper scope of Clean Water Act jurisdiction and resulting limits of regulation have been debated for years. It will likely take many more years before the litigation and legislative challenges to the Rule finally settle the scope of Clean Water Act regulation. The concurrent judicial and legislative challenges to the Rule, and the continued debate of longstanding issues regarding the scope of Clean Water Act regulation make for interesting law, but introduce a good deal of uncertainty for the regulated community—which is what the Rule was first and foremost supposed to eliminate.

GROUND BIRDS AND THE ENDANGERED SPECIES ACT: THE RISING TRENDS IN CONSERVATION EFFORTS AND HOW THE GREATER SAGE GROUSE'S STORY COMPARES TO OTHER RECENT UPLAND GAME BIRD LISTING DECISIONS

Submitted by

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The greater sage grouse was perhaps the most hotly anticipated species determination arising out of the 2011 court-approved listing settlements. *Endangered Species Act Section 4 Deadline Litig.,* Misc. Action No. 10-377 (EGS), MDL Docket No. 2165 (D. D.C. 2011) ("Listing Settlement"). With much of the western U.S. impacted by its decision, on October 2, 2015, the U.S. Fish and Wildlife Service ("Service") published its determination that listing the greater sage grouse under the Endangered Species Act ("ESA") was not warranted. 80 Fed. Reg. 59858 (Oct. 2, 2015). The Service's determination was based largely on the collective conservation efforts of the Bureau of Land Management ("BLM"), U.S. Forest Service ("USFS"), state agencies, and private landowners.

Greater Sage Grouse: The Conservation Efforts and Fall-out

Preceding the Service's publication of its finding, a press release from Secretary of the Interior Sally Jewell described the various voluntary conservation efforts as unprecedented. Concurrent with the announcement that listing the greater sage grouse was not warranted, the BLM and USFS announced the finalization of 98 land-use plans designed to conserve greater sage-grouse habitat and avoid disturbance of essential habitat areas on public lands across 11 states (California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming). These plans place restrictions on land use on more than 35 million acres of land for many activities, including energy development, infrastructure, and ranching.

Additionally, several states have issued their own plans aimed at greater sage grouse conservation on lands that are beyond BLM and USFS jurisdiction. Finally, private landowners have developed Conservation Agreements with Assurances (known as "CCAAs") whereby the landowners agree to implement certain conservation measures for the benefit of the species. In return, should the bird ever be listed, the landowners will not be required to implement conservation measures beyond what has already been included in the CCAA. The Service took into account all of these efforts and demonstrated successes since 2010 (when the Service had last made findings on the bird's status). Shortly after the no-listing announcement, the U.S. Geological Survey and several other agencies announced the issuance of a three-part handbook series focused on sagebrush steppe ecosystems. These handbooks will focus on conservation measures designed to protect the greater sage grouse and the ecosystem as a whole.

Immediately upon the announcement of the listing and the 98 land-use plans, several lawsuits were filed alleging violations of the Administrative Procedure Act, National Environmental Policy Act, and Federal Lands Policy and Management Act. Several Nevada counties and two mining companies (Western Exploration and Quantum Minerals) have jointly filed two complaints – one dealing solely with amendments to federal plans in Nevada and the other addressing amendments to federal plans in all states in the Great Basin region (Idaho, Montana, Nevada, California, Oregon, and Utah). Idaho is also challenging all of the Idaho plan amendments. The general refrain from these lawsuits is that the plans' restrictions are equally, if not more, onerous than had the Service listed the species under the ESA, and that the restrictions will stifle economic development.

Other Upland Game Birds – How Have They Fared in Comparison?

The Listing Settlement included listing deadlines for other upland game birds and those decisions have been similarly contentious and make an interesting study in comparison. In April 2014, the Service published its decision to list the Lesser Prairie Chicken ("LEPC") as a threatened species. 79 Fed. Reg. 19974 (Apr. 10, 2014).[4] Concurrent with its announcement of the LEPC listing, the Service also published its final 4(d) rule for the LEPC. The 4(d) rule exempted those potentially "take-causing" activities conducted by those who participate in the Western Association of Wildlife Agencies' ("WAFWA") LEPC Range-Wide Plan ("Plan"). The Plan allows participants to offset their potential impacts to LEPC throughout the LEPC range (Colorado, Oklahoma, Texas, Kansas, and New Mexico) through mitigation payments that WAFWA then aggregates and spend on conservation transactions. WAFWA had initially developed the Plan in an effort to stave off listing of the LEPC (e.g. hoping for the same decision as the Service subsequently made with regard to the greater sage grouse). However,

[4] As an aside, listing a species as "endangered" versus "threatened" is a matter of the imminence of extinction (facing risk of extinction versus facing risk of extinction in the foreseeable future). Under the ESA the Service has the discretion to issue a "4(d) rule" for species listed as threatened. These 4(d) rules delineate activities that, even if they result in "take" of the species would be exempt from violating ESA Section 9 (which prohibits the take of listed species)

the Service instead chose to list the LEPC as threatened and then included the Plan as part of the 4(d) rule.

Industries, states and environmental organizations challenged the Service's decision to list the LEPC and the accompanying 4(d) rule. Of the several suits filed, the U.S. District Court for the Western District of Texas recently ruled on a lawsuit filed by the Permian Basin Petroleum Association and several counties in New Mexico. On September 1, 2015, the court vacated the Service's listing of the LEPC on the basis that the Service failed to follow its own guidelines for evaluating existing conservation efforts. *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-50, 2015 WL 5192526 (W.D. Tex. Sept. 1, 2015). The court found that the Service gave short shrift to the Plan's efficacy. The court's decision was largely based on its finding that the Service's failed to consider its own Policy for Evaluation of Conservation Efforts When Making Listing Decisions ("PECE Policy") 68 Fed. Reg. 15,100 (Mar. 28, 2003). Under the ESA, the Service is required to take "into account those [conservation] efforts, if any, being made by any State" before making a listing decision. 16 U.S.C. § 1533(b)(1)(A). The PECE allows FWS to consider conservation efforts that have not yet been implemented or demonstrated their effectiveness, so long as FWS evaluates the certainty the conservation effort will be implemented and effective. PECE, 68 Fed. Reg. at 15,114. The court found that the Service did not appropriately evaluate the Plan. The Service has since asked the court to amend its judgment to remand the listing rule rather than vacate it. The court has not yet ruled on this motion though the judge held a hearing on November 12, 2015. Currently, the rule remains vacated and the LEPC is not listed under the ESA.

Another ground bird species included in the Listing Settlement species is the Gunnison sage grouse; a species occurring in Colorado and Utah. In November 2014, the Service announced its decision to list the Gunnison sage grouse as a threatened species. 79 Fed. Reg. 69311 (Nov. 11, 2014). Citing small population size, drought, climate change, and disease, the Service determined that the Gunnison sage grouse would be in danger of extinction in the foreseeable future. In contrast to the greater sage grouse but similar to the LEPC determination, the Service did not find existing conservation efforts sufficient to prevent a listing. The state of Colorado filed a lawsuit against the Service alleging that the Service did not properly evaluate the existing conservation efforts. Conversely, environmental organizations sued the Service alleging that the Service should have listed the species as endangered rather than threatened. The Service did not issue a 4(d) rule concurrent with its listing of the Gunnison sage grouse as it did for the LEPC. However, the Fall 2015 Unified Agenda published by the Office of Information and Regulatory Affairs (a statutory part of the Office of Management and Budget) indicates that the Service will be publishing a proposed 4(d) rule for the Gunnison Sage Grouse as early as January 2016.

What Next?

At the heart of the disputes regarding the upland game bird species is the extent and efficacy of the conservation efforts in place prior to listing. The results of the lawsuits arising out of these three species' listing status could have significant impacts on voluntary conservation efforts for other species. The resolution of these challenges

could greatly impact the role pre-listing voluntary conservation efforts play in the world of species conservation and regulation.

EA FOR BAYONNE BRIDGE RAISING UPHELD

Submitted by

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The Port Authority of New York and New Jersey proposed to lift the clearance of the Bayonne Bridge to accommodate the new generation of taller cargo ships entering the port. The Bayonne Bridge connects Bayonne, NJ to Staten Island, NY. The lead agency under NEPA was the Coast Guard because of the need for a Section 9 permit. When the Coast Guard ruled that the project would not have significant impacts, a group of Plaintiffs sued claiming inadequate consideration of induced growth, construction impacts, cumulative impacts and impacts on environmental justice.

An earlier study by the Corps of Engineers concluded that raising the height of the bridge would provide great economic benefits but would not increase the amount of cargo moving through the port. There would be larger ships, but there would be fewer. The Coast Guard concluded there would be little cargo diverted to the port as a result of the project. The Coast Guard relied on an empirical analysis done by a consulting firm retained by the Port Authority which relied on a proprietary model. The model predicts how shipping companies will respond to changes in costs of shipping to a specific port. Because the model was proprietary, neither the Port Authority nor the Coast Guard had access to it. Since there was no significant increase in cargo, there was no significant increase in truck trips, rail trips, or noise and no significant impacts on air quality. The Coast Guard engaged another consulting firm to perform a peer review of the modeling results. The peer review found the results to be reasonable. The Court found that the Coast Guard was reasonable in relying on the model results and that the Coast Guard had sufficiently involved the agencies and the public in comments and disclosure on the model methodology.

Construction impacts were either adequately disclosed or properly mitigated. The Court found that the cumulative impacts analysis was based on an adequate review of the effects of other projects in the area that were reasonably foreseeable. The environmental justice analysis was adequate because there were no significant impacts on any community so no disproportionate effects on protected communities.

Coalition for Healthy Ports, et al. v. The United States Coast Guard, et al., S.D.N.Y # 13-CV-5347 (RA), 11/24/15.

NOTES FROM THE CHAIR

Submitted by

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It feels like it was just yesterday when we met in Chicago during the annual TRB Legal Affairs conference. As we prepare to gather for the 95th TRB Annual Meeting in Washington, D.C., it strikes me how much has changed in such a short period of time.

Most important, Congress passed the first long-term surface transportation authorization bill in over a decade, the "FAST Act." This five-year bill provides a great deal of the certainty that our clients and colleagues had long sought, even if it comes nowhere close to addressing the need for sustainable funding sources for the Highway Trust Fund. Like its two-year predecessor, MAP-21, this bill contains many new environmental and permitting streamlining provisions, many of which will impact other infrastructure sectors beyond transportation. I suspect this will be a topic of a great deal of conversation for our upcoming Committee meeting.

The last six months also witnessed the conclusion of climate discussions in Paris, with an agreement in principle signed by hundreds of nations to commit to action to address the impacts of increasing global temperatures. The transportation sector will continue to play a large role in the advancement of innovations to reduce carbon emissions consistent with the commitments established in Paris. Even while climate regulations get tied up in national politics here in the U.S., the transportation industry will forge ahead with dramatic new fuel and vehicle technologies that will clearly impact climate policy at home and abroad.

As usual, therefore, the TRB Annual Meeting presents an excellent opportunity for all of us to take stock of these rapidly changing times and to consider how we and our clients will be affected by these developments.

Our Committee meets on January 12 from 3:45-5:15 PM in the Howard University Room in the Marriott Marquis Hotel. I will send out a proposed agenda prior to our meeting. In addition, I will distribute an email summarizing the many relevant panel discussions through TRB week that I hope you will put on your personal Annual Meeting calendar. Be sure to use the TRB website to find other committee meetings and panels that are sure to make your time in Washington extremely valuable.

I look forward to seeing all of you again in January 2016.