



Women in Energy and Environment Webinar Series

Key Regulatory Issues in the US in Energy and Environment: 2021 and Beyond

Tuesday, January 26



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Welcome and Introduction

- [Karen Winters](#), ES&H Practice Group Leader, Squire Patton Boggs, Columbus

Speakers

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Biden Administration Priorities

1. COVID-19
2. Climate
3. Racial Equity
4. Economy
5. Health Care
6. Immigration
7. Restoring America's Global Standing

<https://www.whitehouse.gov/priorities/>

Executive Orders related to Climate Change:

- Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis
- Acceptance of the Paris Climate Accord on behalf of the United States of America
- Revoking the Keystone XL Pipeline permit and pausing energy leasing in the Arctic National Wildlife Reserve

Memoranda Likely Impacting Renewable Energy:

- Modernizing and improving regulatory review

- Paris Climate Accord was adopted December 12, 2015 with a goal to limit global warming to below 2 degrees Celsius.
- US helped to negotiate the treaty, but President Trump withdrew the US from the agreement in 2019.
- Biden's January 20th Executive Order initiated 30-day process whereby United Nations will confirm US's re-entry into the accord
- As largest contributor to global warming, the US rejoins nearly 200 other nations that have signed on to reduce emissions leading to global warming.

- Establish an enforcement mechanism that includes milestone targets by 2025;
- Establish historic investment in clean energy and climate research and innovation;
- Incentivize the rapid deployment of clean energy innovations, especially in communities most impacted by climate change.
- Infrastructure Overhaul – build to withstand climate change; increase funding to renewable and clean energy sources

- John Kerry, International Presidential Envoy on Climate Change
- Gina McCarthy, Head of White House Office Climate Policy
- Jennifer Granholm, Secretary of Energy
- Deb Haaland, Secretary of the Department of Interior
- Michael Regan, US EPA Administrator

Energy Act of 2020:

- Measures to facilitate permitting
- DOI required to set national goals for wind, solar and geothermal
- DOI must seek to issue permits for no less than 25 GW of electricity from wind, solar and geothermal by 2025
- Authorizes \$1B over 5 years for storage technology R&D
- Grid modernization funding

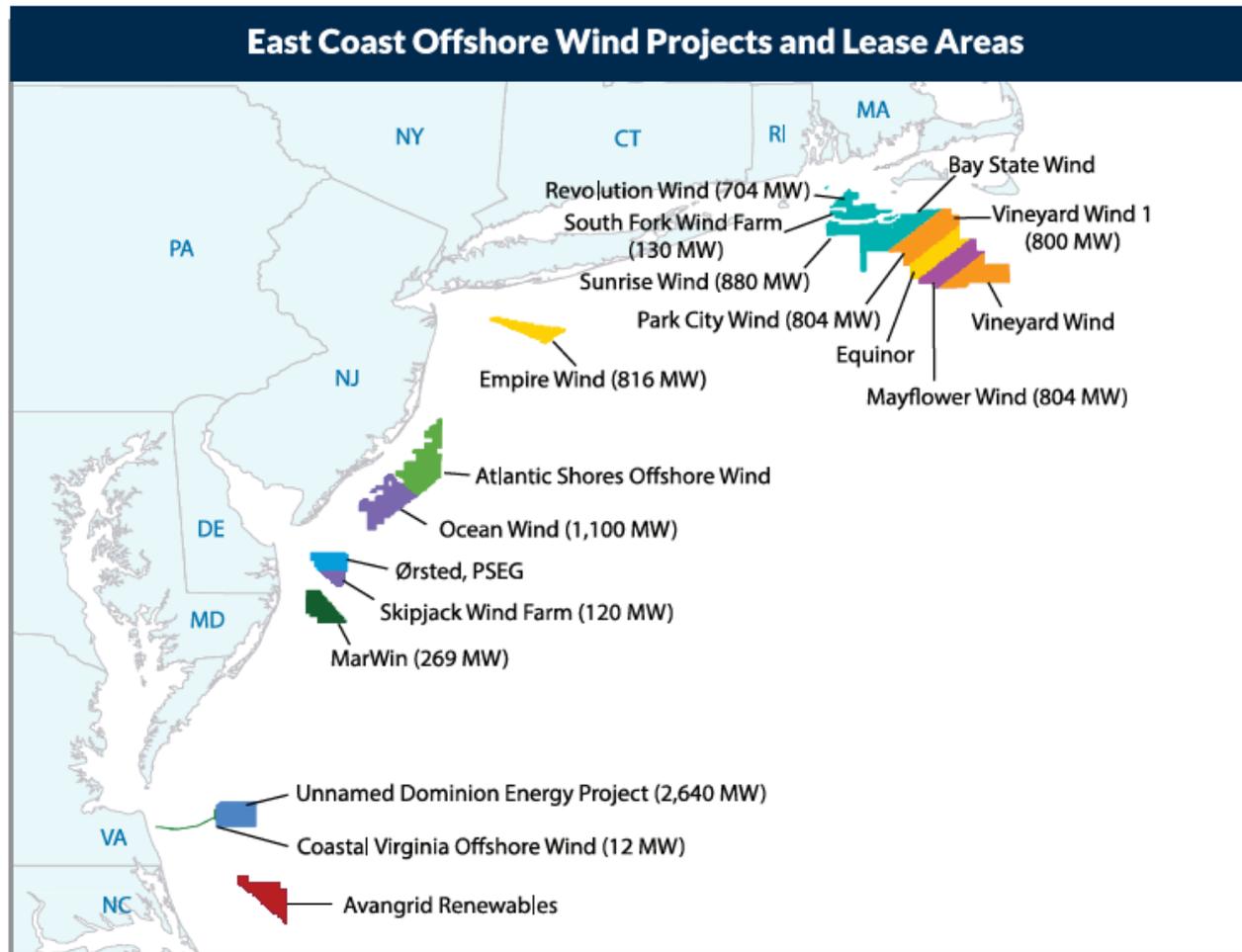
Taxpayer Certainty and Disaster Relief Act of 2020:

- One year PTC extension for wind Projects
- Two year ITC extension for solar projects
- Five year ITC extension for offshore wind projects
- One year PTC extension for electrical facilities

Key Figures for the US Offshore Wind Market:

- US wind resource is estimated to exceed twice the total demand for electricity in the US, based on 2018 usage.
- Estimates up to 30MW by 2030; \$57B investment in US economy
- Estimates for up to \$24.5B in economic output by 2030.
- 15 active commercial leases
- 19 commercial-scale projects in develop
- 1 Draft EIS issued (Southfork)
- 1 Draft EIS withdrawn (Vineyard Wind)
- Projected to create 19,000 to 45,000 US jobs by 2025, and 45,000 to 83,000 jobs by 2030.

BOEM Offshore Wind Leases



Why Offshore Wind?

- Significant draw for foreign developers with capital and expertise, who partner with US companies to develop US projects.
- A brand new industry that crosses other industry sectors in unique ways:
 - Offshore wind turbines are much larger than onshore and require supply chains to support development.
 - GE, maker of Haliade-X (14MW) manufactures in St. Lazaire, France but considering opening a US manufacturing site.
 - There are no manufacturers of submarine power cables in US, which are a significant element for every project.
 - Nexans is nearing completion on its South Carolina manufacturing plant; first in US.
 - Installation requires a fleet of coastwise qualified vessels, which the US lacks
 - No WTIVs or special purpose cable lay vessels
 - Only a handful of CTVs and SOVs
 - Huge opportunity to reinvigorate the US shipbuilding industry and merchant marine
 - AWEA estimates 74 occupations will be required to support the industry
 - Infrastructure commitments: \$307M for ports, \$650M for transmission, and \$342M in US manufacturing facilities and supply chain development.

Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis

1. Statement of Policy

- Listen to the science
- Ensure access to clean air and water
- Limit exposure to dangerous chemicals and pesticides
- Hold polluters accountable, including disproportionate harm to frontline communities
- Reduce greenhouse gas emissions & bolster resilience to impacts of climate change
- Restore and expand our national treasures and monuments
- Prioritize both environmental justice and the creation of the well-paying union jobs

2. Order

- Directs executive departments/agencies to review and appropriately address Federal regulations, orders, guidance documents, policies, & other actions of the last 4 years
- Consider suspending, revising, or rescinding such agency actions
- Immediately commence work to confront the climate crisis

3. Regulatory Freeze (issued 1/20/21 by Ronald Klain, President's Chief of Staff)

- Freeze rule proposal or publication in FR
- Postpone effective date of published rules by 60 days; consider new 30-day comment period

Fact Sheet:

List Of Agency Actions For Review

1. List contains 104 agency actions for review
2. Environmental Protection Agency Actions—Select Priorities
 - Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions (86 FR 469 (1/6/21))

Clean Air Act

- Increasing Consistency & Transparency in CAA Rulemaking Cost/Benefit Analysis (85 FR 84130 (12/23/20))
- Oil and Natural Gas Sector Emission Standards (85 FR 57018 (9/14/20), 85 FR 57398 (9/15/20))
- Pollutant Specific Significant Contribution Finding for GHGs: Electric Utilities (86 FR 2542 (1/13/21))
- GHG Emission Standards for Airplanes (86 FR 2136 (1/11/21))
- NAAQS for Ozone (85 FR 87256 (12/31/20))
- NAAQS for Particulate Matter (85 FR 82684 (12/18/20))
- Reclassification of Major Sources as Area Sources Under CAA Section 112 (85 FR 73854 (11/19/20))
- SAFE Vehicles Rule for Model Years 21-26 Passenger cars/light trucks (85 FR 24174 (4/30/20))
- Accidental Release Prevention Requirements: CAA RMPS (84 FR 69834 (12/19/19))
- Repeal of the Clean Power Plan; GHG Emission Guidelines: Electric Utilities (84 FR 32520 (7/8/19))
- Various NAAQS State Implementation Plan-related actions

Review of Existing Power Plants Regulations

- US EPA promulgated the **Clean Power Plan (CPP)** in 2015 under the Obama Administration to limit GHG emissions from existing fossil-fuel-fired power plants, taking a broad approach to reduce GHG emissions across the power sector.
- The CPP was the subject of ongoing litigation and was never implemented due to a stay from the US Supreme Court.
- In 2017, EPA reviewed the CPP in response to Trump Administration's Executive Order (E.O.) 13783, which directed federal agencies to “review existing regulations and policies that potentially burden the development or use of domestically produced energy resources.”
- In 2019, EPA completed its reconsideration of the CCP, repealing it and promulgating new guidelines for coal-fired power plants in the **Affordable Clean Energy (ACE) rule** that focused on a narrow, site-specific approach to emission reductions rather than the sector-wide approach of the CCP.
- On January 19, 2021, the **DC Circuit Court of Appeals vacated the ACE rule** and remanded it to EPA providing the Biden Administration a fresh start to craft greenhouse gas standards for existing sources.

Vehicle Emissions Standards Review

- Obama-era vehicle emission rules required the average fuel economy of new vehicles to increase by 5% each year through 2025.
- In April 2020, the Trump Administration finalized a rollback of U.S. fuel economy standards to require 1.5% annual increases in efficiency through 2026, and withdrawing the waiver that had allowed California to set its own tougher tailpipe emissions rules.
- Voluntary emissions agreements were finalized in July 2020 between the California Air Resources Board and five major automakers, requiring 3.7% annual reductions in GHG emissions from new passenger cars.
- Following the voluntary agreements may prove to be an easier path, but may not be enough for the Biden Administration's bold climate energy plans

National Ambient Air Quality Standards Review

- Ozone and Particulate Matter NAAQS
 - December 17, 2020 and December 23, 2020 rulemakings respectively determined that existing NAAQS were sufficiently protective based on its review of available scientific evidence and exposure/risk information
 - Biden has called for a review of these and other similar NAAQS-related actions

Fact Sheet:

List Of Agency Actions For Review (cont'd)

2. Environmental Protection Agency Actions—Select Priorities Continued

TSCA/Chemicals

- Procedures for Chemical Risk Evaluation Under TSCA (82 FR 33726 (7/20/17))
- Regulation of Persistent, Bioaccumulative, and Toxic (PBT) Chemicals Under TSCA Section 6(h) (84 FR 36728 (7/29/19))
- Regulation of specific PBT chemicals under TSCA Section 6(h):
 - Hexachlorobutadiene (HCBD);
 - Pentachlorothiophenol (PCTP);
 - Phenol, Isopropylated Phosphate (3:1) (PIP 3:1);
 - Decabromodiphenyl Ether (DecaBDE); and
 - 2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP) (1/6/21)
- Methylene Chloride (MC) Final TSCA Risk Evaluation (85 FR 37942 (6/24/20))

- The initial list of EPA actions that the Biden Administration will review including the overall rule governing the TSCA risk evaluation process as well as the evaluations of five PBT chemicals that were slated for expedited action under TSCA.
- Importantly, this list is not exhaustive – Biden’s Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis calls for the immediate review of all Trump-era agency actions “that are or may be inconsistent with, or present obstacles to” Biden’s environmental justice goals, among other priorities, which may include:
 - Review of risk evaluations for the first 10 substances under TSCA, as amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act, could include supplemental risk evaluations that will look at additional uses and affected subpopulations
 - Expanding the scope for the next 20 risk evaluations to include additional uses and subpopulations
- Biden EPA also likely to use TSCA data-collection authorities to get information it needs to adequately conduct risk evaluations and to impose broader restrictions on evaluated substances as part of an overall departure from the Trump EPA focus on developing “narrowly tailored” regulations.

Additional Biden Administration Appointees

- Jane Nishida, Acting US EPA Administrator
- Joseph Goffman, EPA Assistant Administrator, Office of Air and Radiation
- Tomás Carbonell, EPA Assistant Administrator for Stationary Sources, Office of Air and Radiation
- Michal Ilana Freedhoff, EPA Assistant Administrator for Chemical Safety and Pollution Prevention
- Dan Utech, EPA Chief of Staff

Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis: Additional Actions

1. Sec. 3: Directs the Interior Secretary to review within 60 days boundaries of:
 - Bears Ears National Monument modified by Proclamation 9681 (12/4/17)
 - Grand Staircase-Escalante National Monument modified by Proclamation 9682 (12/4/17)
 - Northeast Canyons and Seamounts Marine National Monument modified by Proclamation 10049 (6/5/20)
2. Sec. 4: Establishes
 - A temporary moratorium on implementation of the Coastal Plain Oil & Gas Leasing Program in the Arctic National Wildlife Refuge
 - Reinstates E.O. 13754 (12/9/16) and associated Presidential Memorandum of 12/20/16 withdrawing certain offshore Arctic waters and the Bering Sea from O & G
3. Sec. 5: Establishes an Interagency Working Group on the Social Cost of GHG
4. Sec. 6: Revokes the March 2019 Keystone XL Pipeline permit
5. Sec. 7: Revokes E.O.s including: 13766 (1/24/17) (expediting environmental review of high priority infrastructure; 13778 (2/28/17) (review of the WOTUS definition); 13792 (4/26/17) (review of Antiquities Act designations); 13927 (6/4/20) (accelerating economic recovery from COVID-19 by expediting infrastructure investment), among others

1. Environmental Protection Agency Actions—Select Priorities (cont'd)

- Primary Drinking Water Standards for Lead and Copper (86 FR 4198 (1/15/21))

Clean Water Act

- Section 401 Certification Rule (85 FR 42210 (7/13/20))
- The Navigable Waters Protection Rule: Definition of WOTUS (85 FR 22250 (4/21/20))

CERCLA

- Financial Responsibility Under CERCLA § 108(b) for Hardrock Mining (83 FR 7556 (2/21/18))

2. Council on Environmental Quality

- Update to the Regulations implementing NEPA procedural provisions (85 FR 43304 (7/16/20))

3. Department of Defense/Army Corps of Engineers

- Reissuance and Modification of Nationwide Permits (86 FR 2744 (1/13/21))

4. Department of Interior (31 rules)

- Various rules re: threatened & endangered species & habitat, including all sage grouse RMPs
- Regulations governing “take” of migratory birds (86 FR 1134 (1/7/21))
- BLM’s NEPA implementation rule (516 DM 11) (85 FR 25472 (5/1/20))

5. Department of Justice

- Prohibition on settlement payments to NGO 3rd parties (85 FR 81409 (12/16/20))

6. Department of Agriculture: Roadless rule in Alaska (85 FR 68688 (10/29/20))

Congressional Review Act

1. What it Does

- Gives Congress 60 days to review and nullify federal agency “major rule” finalized within 60 Senate session days or 60 House legislative days before the date on which the previous Congress adjourned its final session. 5 U.S.C. § 801(d)
- “Look-back” date: August 21, 2020
- Requires a simple majority vote of both chambers (no filibuster available)
- The agency is then prohibited from issuing a new rule that is “substantially the same”

2. When used

- Once (for OSHA rule) before 2017
- 16 times in the 115th Congress

3. Possible Biden Administration Uses

- Oil & gas emission standards: removes transmission/storage from O & G source category, rescinds methane requirements, expands exemptions (Sept. 14, 2020)
- CAA § 112 Major to Area source reclassification rule (Oct. 1, 2020)
- Roadless rule exemption for Alaska’s Tongass National Forest (Oct. 29, 2020)
- Secret Science Rule (Jan. 6, 2021)
- Migratory bird act “takings” rule (Jan. 7, 2021)

Navigable Waters Protection Rule (2020 WOTUS Rule)

The definition of “Waters of the US” answers the legal question where to draw the line between Federal and State waters, based on the overall framework and construct of the CWA.

EPA: 85 Fed. Reg. 22261 (April 21, 2020)

■ Pre-2015 Definition

- Navigable waters
- Perennial streams
- Adjacent wetlands
- Intermittent Streams

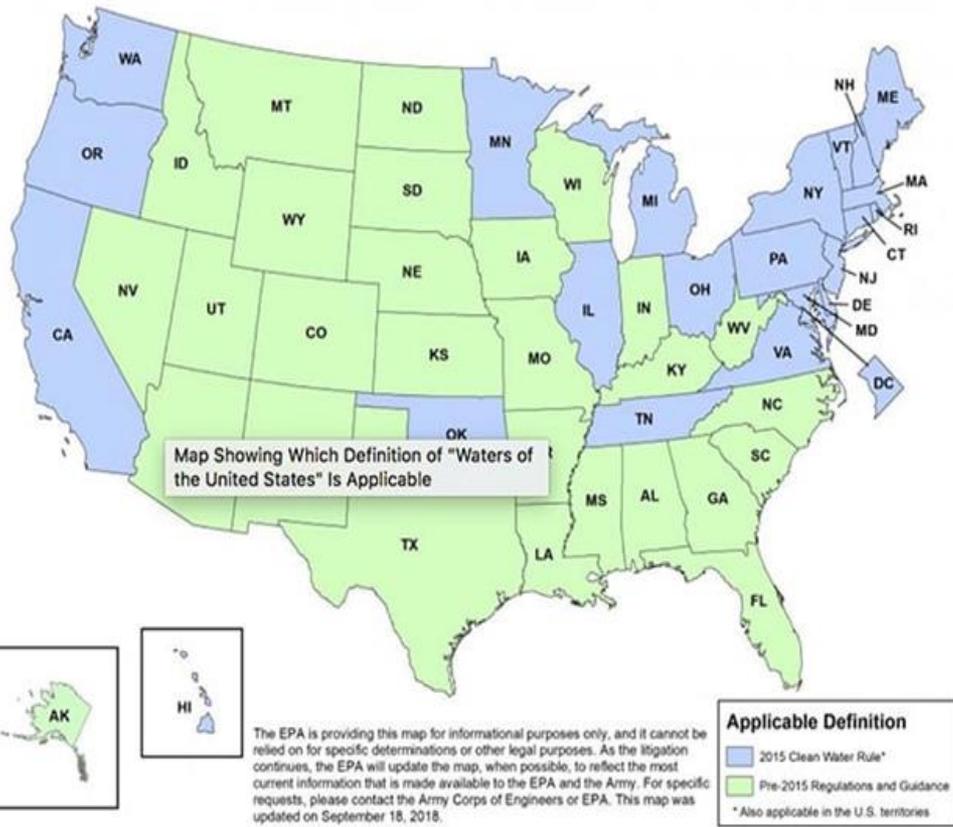
■ 2015 Definition

- Three categories
 - Categorically jurisdictional (including neighboring waters)
 - Case-by-case (including cooling ponds, construction ponds, ditches, storm drain systems)
 - Categorically excluded
- Isolated wetlands, prairie potholes
- Seasonal flows
- Waters (ephemeral streams, wetlands) with significant nexus to navigable waters

EPA's New Proposed Rule Greatly Expands Their Jurisdiction over Water and Land Use



States where 2015 WOTUS Rule Applied



- Green states: Pre-2015 regulations and guidance applied
- Blue states: 2015 WOTUS Rule applied
- Created a chaotic patch-work
- Relevant still because these conditions are likely to return with litigation under the new rule

The 2020 Rule Timeline

- February 28, 2017, President Trump issues Executive Order 13778
- 2020 WOTUS Rulemaking Process
 - Step One – Repeal of the 2015 Rule, notice of repeal issued July 27, 2017
 - Step Two – Revised Definition of “Water of the United States” issued February 14, 2019
- February 6, 2018: 2015 Rule Applicability Date established as February 6, 2020
- February 28, 2018: Sixth Circuit lifts nationwide injunction
- October 22, 2019: EPA and the Department of the Army finalize the repeal rule
- December 23, 2019: Final repeal rule effective, temporarily restoring pre-2015 regulations
- April 21, 2020: Final Navigable Water Protection Rule: Definition of “WOTUS” issued
- June 22, 2020: The WOTUS Rule became effective

Elements of 2020 Rule

- Relatively permanent waterbodies that are traditional navigable waters
- Territorial seas & traditional navigable waters
- Tributaries to the territorial seas and traditional navigable waters
 - Must be perennial or intermittent tributaries that contribute surface water flow to a territorial sea and a traditional navigable water either directly or indirectly through other jurisdictional waters
 - *Ephemeral streams are not included*
- Lakes, ponds and impoundments
 - Standing bodies of water
 - Contribute surface water flow in a typical year to a territorial sea or a traditional navigable water either directly or indirectly through another jurisdictional water



- Wetlands that abut a territorial sea or traditional navigable water or other jurisdictional water
- Inundated by flooding by a jurisdictional water in a typical year
- Physically separated from a jurisdictional water by a natural berm, dune or other similar feature or by an artificial structure that has a direct hydrologic surface connection between the wetland and a jurisdictional water in a typical year
- “Typical year” “when precipitation and other climatic variables are within normal periodic range on a rolling 30-year basis

Practical Implications & Potential Biden Administration Response



- Narrows the scope of CWA federal jurisdiction from the 2015 Rule
 - Particularly with respect to adjacent wetlands and ephemeral streams
 - Somewhat broader than pre-2015 Rule
- Abandons the “significant nexus” test of the 2015 Rule for more certainty and reduced case-by-case
- Reduction of federal jurisdiction likely means more state jurisdiction
- Biden Administration can
 - Decline to defend the rule in litigation
 - Repeal and re-enact the rule with new notice and comment
 - Amend the rule to add back certain areas of jurisdiction such as ephemeral streams

Clean Water Act § 401 Certification

- CWA § 401 requires an applicant for a federal permit that “may result in a discharge to waters of the US” provide the federal permitting agency a certification from the discharge originating state
- Certification means the state has determined that the discharge will comply with the CWA
- CWA § 401(a)(1) says if the state “fails or refuses to act on a request for certification, within a reasonable period of time (**which shall not exceed one year**) after receipt of such request, the certification requirements of this subsection shall be waived”
- CWA § 401 has been abused by some states. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1105 (D.C. Cir. 2019) (repeated resubmittals over 10 years)
- August 8, 2019: EPA issues proposed rule, “Updating Regulations on Water Quality Certification”
- July 13, 2020: “Clean Water Act Section 401 Certification Rule” published
- The potential discharge
 - Must be into WOTUS
 - Must be from a point source
- Analysis limited to water quality impacts
- Certifying authority must act “within a reasonable time... **which shall not exceed one year** and there is no tolling provision to stop the clock at any time.”
- Trigger is receipt of request, not “complete” request or NEPA review
- Conditions must be incorporated and are enforceable by federal permit

- Nationwide Permits
 - Apply to discharge categories with minimal adverse effects (33 CFR Part 330)
 - Renewed every 5 years
 - If the proposed discharge activities are not within the nationwide permit categories, an individual permit is required (33 CFR 323.3(a)).
- NWP 12: Activities required for the construction, maintenance, repair, and removal of utility lines and associated facilities in waters of the United States, provided the activity does not result in the loss of greater than 1/2-acre of waters of the United States for each single and complete project.
- In challenge to the Keystone pipeline, Montana Chief U.S. District Judge Morris vacated and enjoined the use of this permit **nationwide** for lack of Endangered Species Act consultation, later narrowed to invalidate only new oil and gas pipelines
- Corps published new permits January 13, 2021, splitting **NWP 12** into 3 and
- Replaced **NWP 21** (Surface coal mining); **NWP 29** (Residential development); **NWP 39** (Commercial & institutional development); **NWP 40** (Agricultural activities); **NWP 42** (Recreational facilities); **NWP 43** (Stormwater management); **NWP 44** (Mining); **NWP 48** (Commercial shellfish mariculture); **NWP 50** (Underground coal mining); **NWP 51** (Land-based renewable energy generation facilities); and **NWP 52** (Water-based renewable energy generation pilot projects)
- Biden Administration can withdraw and reissue in 2022 at current permits' expiration

Two Recommendations To Retain

1. E.O. 13817: “A Federal Strategy To Ensure Secure and Reliable Supplies of Critical Minerals”
 - Recognizes the importance of critical minerals to the nation's security and economic prosperity, including most renewable technologies
 - The US is currently heavily dependent upon foreign sources for most critical minerals
 - Directs the Secretaries of Interior and Defense to publish a list of critical minerals and directs all agencies to foster policy to enable development of domestic critical mineral supplies
2. EPA’s September 2, 2020 establishment of the Office of Mountains, Deserts and Plains
 - At the existing Federal Center in Lakewood, Colorado
 - Would oversee cleanup of abandoned uranium mines in the Navajo Nation, speed the cleanup of former hardrock mining sites through closer oversight, promoting “Good Samaritan” remediation, and serve as a technology transfer hub

Questions?



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