RECENT DEVELOPMENTS IN ENVIRONMENTAL LAW

I. NATIONAL HISTORIC PRESERVATION ACT

D.C. District Court Finds Army Corps of Engineers Lawfully Limited Its Jurisdiction: Standing Rock Sioux Tribe v. United States Army Corps of Engineers

When the Standing Rock Sioux Tribe (Sioux) sued to block construction of the Dakota Access Pipeline (DAPL) through sites of cultural and historical significance, the Sioux hoped for a preliminary injunction because the Army Corps of Engineers (Corps) failed to consult the Sioux as required by the National Historic Preservation Act (NHPA). *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 1:16-cv-01534, 2016 WL 4734356, at *1 (D.D.C. Sept. 9, 2016). The D.C. District Court held that the Corps complied with the NHPA and that the Sioux had not shown they would suffer injuries preventable by an injunction. On September 16, 2016, the D.C. Circuit Court of Appeals enjoined construction of the DAPL pending oral argument on the Sioux's appeal of the district court's decision on their

motion for injunction. *Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, No. 1:16-cv-01534-JEB at 1 (D.D.C. Sept. 16, 2016) (amended order granting admin. injunction).

A. Background

While the majority of DAPL's route crossed private land, some portions required permits from the Corps. *Standing Rock, 2016 WL 4734356, at *1.* However, instead of issuing these permits under the Clean Water Act (CWA) or the Rivers and Harbors Act (RHA), the Corps issued them under a permit known as Nationwide Permit 12 (NWP 12). NWP 12 is a type of general permit that pre-authorizes certain activities, allowing permittees like the builders of DAPL to build without notifying the Corps. *Id.* at *1, *4. Further, these general permits are only issued through public notice and comment once every five years. *Id.* at *4. Still, some activities must comply with general conditions that require pre-construction notice (PCN) and verification by the Corps before work begins. In those situations, a Corps engineer must ensure compliance with the general permit, supplementing NWP 12's basic requirements with project-specific ones.

NWP 12 authorizes the construction of a pipeline as long as it affects no more than a half-acre of regulated waters at any single water crossing. *Id.* at *4. General conditions mandate a PCN for any activity that could potentially impact historic properties, including previously unidentified properties of cultural or religious importance to a Native American tribe, even if the impact is limited to visual or noise effects outside the activity's project area. *Id.* at *5. The Corps engineer must verify either that the activity will not affect historic sites or that tribal consultations required under NHPA are complete.

Lake Oahe lies at the conflux of the Missouri and Cannonball rivers and is a site of particular importance to the Sioux. *Id.* at *6. The DAPL builders planned for the pipeline to cross the Missouri River underneath Lake Oahe, half a mile north of the Sioux's reservation. The DAPL builders first requested a Corps permit in November of 2014. *Id.* at *8. The request related to soil testing at the Lake Oahe site, which required formal tribal consultation under NHPA. On December 18, 2014, after soliciting responses from several tribes, including the Sioux, the Corps determined that no historic properties would be affected, even though the Sioux had not responded. Throughout this process, the Sioux declared that the Corps' abdication of its permitting responsibilities violated NHPA and sent letters reiterating that the Corps failed to respond to their concerns about the soil testing at Lake Oahe. *Id.* at *10.

In January and March of 2016, the Sioux commented extensively on the Corps' draft of the environmental assessment, reiterating that the Corps failed to consult with the Sioux to identify cultural sites. *Id.* at *13. Over the next few months, the Sioux and the Corps met to discuss cultural surveys and tribal burial sites at river crossings. The meetings resulted in shifts along the pipeline's route to avoid these sites, but ultimately did not address the Sioux's concerns that the Corps forced the undertaking on them in violation of NHPA. The Sioux argued that the area of potential effect should be redefined to include the entire pipeline, and they refused to comply with the Corps until it rectified its abdication of its permitting duty. *Id.* at *13-14. The Corps responded that it no longer had jurisdiction to regulate the vast majority of the pipeline as a result of NWP 12. *Id.* at *14. Concurrently, however, the Advisory Council, the agency responsible for overseeing compliance with NHPA, notified the Corps that it believed the entire pipeline was under the Corps' jurisdiction because the various PCNs required transformed the entire project into an undertaking covered by NPHA. *Id.* at *15.

After two more visits to Lake Oahe, the Corps sought to put an end to the NHPA process by issuing a Determination of Effect for the site, which concluded that no historic properties would be affected by the activity. *Id.* at *14. North Dakota's State Historic Preservation Officer agreed, while the Sioux objected. Because the Sioux were outvoted 2-1, the Corps finalized its review and verified all of the PCNs under NWP 12. *See id.* at *15. The Sioux responded by filing a motion for preliminary injunction to mandate a withdrawal of the Corps' NHPA permitting. At the motion hearing, the company asserted that most of the construction for DAPL was complete, including construction at all but eleven of the PCN locations. *Id.* at *16. The court denied the Sioux's motion for a preliminary injunction. *Id.* at *26.

B. Court's Decision

While the Sioux argued that the Corps failed to consult them as required by NHPA, the court disagreed, finding that the Sioux were unlikely to succeed on the merits of their claim. See *id.* at *18. The court also disagreed with the Sioux's assertion that failure to issue an injunction would result in damage or destruction of historically and culturally significant sites, and accordingly the court denied the Sioux's motion for injunctive relief. The court divided the Sioux's legal theory into four discrete arguments: (1) the Corps violated NHPA when it promulgated NWP 12 without consulting the Sioux; (2) the Corps

violated NHPA when it permitted DAPL activities on federally regulated waters without a determination required under NHPA; (3) the Corps unlawfully limited its own authority so that it could not consider the pipeline as a whole; and (4) consultations with the Sioux regarding the PCN sites were deficient under NHPA.

The crux of the court's decision lies in its interpretation of NWP 12. While the court acknowledged that much of the construction of DAPL would ordinarily require permits under the CWA or RHA, the construction was nonetheless pre-authorized at a general level by the re-promulgation of NWP 12 in 2012. Because the Corps did not consult with the Sioux or consider DAPL's effects on properties of cultural or historic significance prior to issuing the "permit" of NWP 12, however, the Corps did not fulfill its obligation under NHPA.

The court found that the Corps engaged in sufficient consultations prior to re-promulgating NWP 12 when it notified the Sioux in 2009 of the types of activities that could hypothetically be pre-authorized under the general permit and the Sioux did not participate in notice-and-comment. *Id.* at *19. The Corps then promulgated NWP 12, and the Corps included a section on compliance with NHPA, setting a general condition that consultation must occur prior to construction if a general permit activity has the potential to harm historic property.

The court found that the Corps made a reasonable effort to discharge its duties under NHPA prior to promulgating NWP 12 because the Corps could not have ascertained in 2012 the specific locations that would be incorporated into DAPL's route when it was plotted in 2014. In the court's opinion, the Corps had no knowledge of DAPL or its proposed route at the time it promulgated NWP 12. Because the court declined to hold that the Corps lacked the ability to promulgate general permits like NWP 12, it found that the Corps made a sufficient effort to discharge its obligations under NHPA.

The Sioux's next argument alleged that the Corps improperly delegated authority to the permittee to assess whether its own activities could have a potential effect on historic properties. *Id.* at *20. NWP 12, thus, is unlawful because it allows the Corps to ignore NHPA for all general permit activities outside of PCN sites and instead only consider potential effects on historic sites if the permittee decides there may be an effect by seeking a PCN. The Corps would then respond by stating that it lacks the authority to make these determinations (because it pre-authorized the activity in NWP 12). While the court conceded the strength of the Sioux's argument, it nonetheless found that the Corps had fulfilled its obligations by using maps of the pipeline and cultural

surveys by its own archeologists to determine that a number of crossings of DAPL could require PCN verification. Because the Sioux were unable to show that the Corps had unreasonably permitted any activities (within its self-limited jurisdiction) without a PCN, the court held that the Sioux did not meet their burden.

The Sioux next argued that, even at the PCN sites the Corps designated, the Corps neglected its NHPA obligations by failing to consider the potential indirect impacts of the entire pipeline on cultural resources. The court rejected this argument because the Corps already made the determination that it need not analyze the entire pipeline—just the areas in federally regulated waterways. *Id.* at *21. The Sioux argued that the entire pipeline should be analyzed for indirect effects because the pipeline could not exist without crossing federally regulated waterways. Despite the fact that the Corps itself made the determination that it lacked jurisdiction over the entire pipeline, the court concluded that the Corps need not consider areas outside of the crossings of federally regulated waterways.

The Sioux finally argued that they were not given an opportunity to participate in the consultations required under NHPA for the few construction activities for which the Corps acknowledged its jurisdiction. *Id.* at *22. The court rejected this argument because the Sioux declined the Corps' offers to consult in an effort to hold out for the chance to survey the entire pipeline, as the Sioux asserted was their right under NHPA. The court held that the Corps' efforts to consult the Sioux sufficed under NHPA even though no consultation took place because the NHPA does not require a good faith effort on the part of the Corps beyond a minimal identification of cultural properties. For these reasons, the court concluded that the Sioux were unlikely to succeed on the merits of their claim under NHPA. *Id.* at 50.

The Sioux then argued that the construction of DAPL was likely to damage or destroy sites of great significance. While the court acknowledged the need for caution in dealing with potential injury to tribes who have who have suffered greatly, it held that the Sioux could not show that any injury was likely to occur in the absence of an injunction. *Id.* at *23. The court reasoned that because the Sioux only sued the Corps and not the DAPL builders, an injunction would be unable to enjoin construction activities anywhere outside of the Corps' jurisdiction. At most, it would be capable of stopping these activities where they cross federally regulated waterways, especially because the work on DAPL is already complete in many locations. The court found that any potential harm to the Sioux's historically significant sites would

occur no matter what the court did. *Id.* at *23-24. Thus, the court held that the Sioux did not meet their burden of demonstrating that a grant of injunctive relief could prevent damage to important cultural resources. *Id.* at *26.

C. Analysis

The President of the Society for American Archaeology (SAA) sent a letter to the Commanding General of the Corps on September 13, 2016, expressing concern that the Corps neglected its duties under NHPA by failing to consider DAPL holistically as an undertaking and inappropriately used NWP 12 to circumvent NHPA's requirements. Letter from Diane Gifford-Gonzalez, President of the Soc'y for Am. Archaeology, to Lieutenant Gen. Todd Semonite, Commanding Gen. & Chief of Eng'rs. (Sept. 27, 2016) (on file at http://saa.org/Portals/0/SAA/GovernmentAffairs/DAPL_LETTER.pdf). The SAA asserted that the archeologists employed by the Corps lacked the benefit of complete consultations during their historical site surveys, causing them to be deficient under NHPA. The SAA agreed with the Advisory Council's position that the entire pipeline should be considered a federal undertaking because it could not be constructed without Corps permits. The SAA letter ended with a plea for caution given the Corps' past transgressions in handling cultural resources and human remains.

While the District Court for the District of Columbia found that the Corps substantially complied with NHPA, it made several contentious conclusions along the way. While it can be argued that the Corps appropriately narrowed the scope of its jurisdiction using NWP 12 and did not have to consider the DAPL to be a holistic undertaking, it is another thing for the court to say that the Sioux's argument to the contrary was so unlikely to succeed that an injunction should not be granted. From the Sioux's perspective, the Corps quietly re-promulgated NWP 12 in 2012 without the necessary NHPA consultations in order to withdraw its ability to regulate pipelines like DAPL. To the Sioux, it was no coincidence that the Corps claimed it could not anticipate the construction of a pipeline, and therefore its NHPA duties were not triggered, even though such a pipeline began construction less than two years later. From the Sioux's perspective, the Corps neglected its obligations to the Sioux under NHPA by entrusting the protection of their cultural resources to the pipeline builders. These are some of the issues

that the D.C. Circuit Court of Appeals will consider when it hears the Sioux's appeal from the D.C. District Court's decision.

Chance Raymond

II. TOXIC SUBSTANCES CONTROL ACT

The Frank R. Lautenberg Chemical Safety for the 21st Century Act

President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act, thus updating the Toxic Substances Control Act of 1976, on June 22, 2016. *Passing a Strong New Law*, ENVTL. DEF. FUND, https://www.edf.org/health/policy/chemicals-policy-reform (last visited Nov. 8, 2016) [hereinafter ENVTL. DEF. FUND, *Passing a Strong New Law*].

A. Background

On October 11, 1976, President Ford signed the Toxic Substances Control Act (TSCA) into law. *See generally* 15 U.S.C. § 2601 (1976); LINDA-JO SCHIEROW, CONG. RESEARCH SERV., RL31905, THE TOXIC SUBSTANCES CONTROL ACT (TSCA): A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS 2 (2013). The TSCA grants the United States Environmental Protection Agency (EPA) the authority to screen both existing and new chemicals for the detection of potentially dangerous products or uses of such chemicals used in manufacturing and/or commerce. *See* CONG. RESEARCH SERV., RL31905 at 1. While the TSCA regulates both naturally occurring and synthetic chemicals, there are substances generally excluded from the TSCA including food, drugs, cosmetics, pesticides, firearms, and other mixtures. *Id.*; *see generally* 15 U.S.C. § 2601 (2012) (President Obama signed the amendment to the TSCA on June 22, 2016). The requirements for chemical producers and manufacturers under the TSCA include, among others, reporting requirements, testing requirements, record keeping, and providing relative information on chemicals. *See generally* 15 U.S.C. § 2601 (2012); *see also* CONG. RESEARCH SERV., RL31905 at 1. The EPA then uses the available information to regulate the processing, distribution, production, manufacture, disposal, and/or use of any chemical that presents an unreasonable risk to human health or the environment. CONG. RESEARCH SERV., RL31905 at 1. Regulation of such potentially dangerous chemicals ranges from regulation of the uses or importation of

the chemicals to an absolute ban on the chemicals production. Additionally, the TSCA requires EPA to maintain an inventory of all the chemicals and chemical categories manufactured or processed in the United States.

Following the original TSCA, which is now referred to as Title I, five additional titles have been added over the years to address specific chemicals and concerns. These subsequent titles are Title II: Asbestos Hazard Emergency Response Act, Title III: Indoor Radon Abatement, Title IV: Lead Exposure Reduction, Title V: Healthy High-Performance Schools, and Title VI: Formaldehyde Standards for Composite Wood Products. *See generally*, 15 U.S.C. § 2601 (2012).

B. The Frank Lautenberg Chemical Safety for the 21st Century Act

The Frank Lautenberg Chemical Safety for the 21st Century Act (Lautenberg Act) began its journey in 2013 with the first bipartisan reform proposal by late Senator Frank Lautenberg and Senator David Vitter. *See* Richard Denison, *Historic Deal on TSCA Reform Reached, Setting Stage for a New Law After 40 Years of Waiting*, ENVTL. DEF. FUND HEALTH (May 23, 2016), http://blogs.edf.org/health/2016/05/23/historic-deal-on-tsca-reform-reached-setting-stage-for-a-new-law-after-40-years-of-waiting/?_ga=1.212705556.1000936988.1474516006 [hereinafter Denison, *Historic Deal on TSCA Reform*]. The House of Representatives passed the bill in June 2015 following its introduction in May 2015. The Lautenberg Act updates the core provisions of the TSCA, which had not been amended since its original passing in 1976. *See* ENVTL. DEF. FUND, *Passing a Strong New Law*. The new law strengthens the existing law through changes in information, requirements, and EPA authority. *See generally* Frank R. Lautenberg Chemical Safety for the 21st Century Act, H.R. 2576, 114th Cong. (2ND SESS. 2016).

The EPA breaks down explanation of the Lautenberg Act into six key provisions: existing chemicals, new chemicals, confidential business information, source of sustained funding, federal-state partnership, and mercury export and disposal. *See generally Highlights of Key Provisions in the Frank R. Lautenberg Chemical Safety Act for the 21st Century Act*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/highlights-key-provisions-frank-r-lautenberg-chemical (last updated June 23, 2016) [hereinafter EPA, *Highlights of Key Provisions*]. First, the assessments and standards for existing chemicals changed. The EPA must establish a prioritization system for assessing existing chemicals based on risk. A "high priority"

designation indicates the chemical may present an unreasonable threat of injury to health or the environment, including vulnerable populations, through its route of exposure or potential hazard. Once a chemical receives a "high priority" designation, the EPA must complete a risk evaluation on the chemical to assess its safety by a determined deadline. On the other hand, a "low priority" designation simply means that the substance did not meet the requirements for a "high priority" designation; however, a chemical may move up to a "high priority" designation based on new information. Existing chemicals will be evaluated through a new risk-based standard to determine the safety of the chemical. Factors in determining whether or not a chemical poses an unreasonable risk to safety include cost, non-risk factors, risks for vulnerable or high-exposure populations, and actions to address an unreasonable risk. If a chemical poses an unreasonable risk, then the EPA must take "final risk management action within two years, with the chance of extension to four years."

Second, for new chemicals, the EPA must now perform a review of the chemicals prior to their entry into the market. Specifically, the EPA must affirmatively find that a new chemical, or a substantively new use of an existing chemical, is safe before it can enter the market, but the EPA maintains the authority to take a range of action limiting the chemical in the market such as bans or additional testing requirements.

Third, the Lautenberg Act increases access to chemical information through changes in chemical information confidentiality. Companies must now meet new substantiation requirements for certain confidentiality claims. The EPA must review and reach decisions on all new confidentiality claims for chemical identifications, as well as another subset of confidentiality claims. Furthermore, the EPA must review prior chemical identity confidentiality claims to determine whether or not the information still merits confidentiality. These changes will also allow states, health, and environmental professionals to gain access to certain confidential chemical information. ENVTL. DEF. FUND, *Passing a Strong New Law.* Fourth, the changes in fees provide a reliable source of funding for the purposes of the TSCA. *See* EPA, *Highlights of Key Provisions*. The EPA can collect up to twenty-five million dollars in user fees from chemical manufacturers and processors. These new fees aim to aid in the costs of chemical reviews and implementation activities for existing chemicals.

Fifth, the Lautenberg Act affects state law in several ways. States maintain the authority to act on a chemical, its uses, or its risks if the EPA has not yet addressed that chemical. States also maintain their

authority over water, air, and waste. Both states and the federal government can enforce identical regulations. Moreover, state requirements existing prior to April 22, 2016, are grandfathered in. New and existing state requirements in effect on August 1, 2003, are also preserved. However, state action on a chemical is preempted when an EPA risk evaluation finds that a chemical is safe or the EPA takes a final action in response to a chemical's risk. When an EPA risk evaluation is in progress, state action on a chemical is placed on pause; this hold will be lifted when EPA finishes the risk evaluation or misses the deadline on the evaluation.

Sixth, amendments to the Mercury Export Ban Act affect storage and information gathering of mercury. The Department of Energy (DOE) has the responsibility of designating a long-term storage facility; if the facility is not operational by January 1, 2020, then the DOE must accept the title to pay for permitting and storage costs for mercury accumulated under the Mercury Export Ban Act prior to the 2020 date. The amendment also requires the EPA to develop an inventory of the use, supply, and trade of mercury and its compounds as well as prohibit the export of certain compounds. Lastly, the Lautenberg Act addresses animal testing under the TSCA. *See*, *e.g.*, Denison, *Historic Deal on TSCA Reform*. The Lautenberg Act requires the EPA to decrease and replace animal testing when a scientifically reliable alternative exists that would produce the same quality of information on the chemicals and substances.

C. Analysis

The fact that the core provisions of the TSCA have not been amended since its entry in 1976 exemplifies the challenges within the TSCA and the resulting ineffectiveness of some of its provisions. In 2009, the Government Accountability Office (GAO) presented testimony before the Subcommittee on Commerce, Trade, and Consumer Protection, Committee on Energy and Commerce, House of Representatives addressing ways to improve the effectiveness of the TSCA. *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-428T, CHEMICAL REGULATION OPTIONS FOR ENHANCING THE EFFECTIVENESS OF THE TOXIC SUBSTANCES CONTROL ACT (2009). The testimony addressed a number of issues within the TSCA, including how the burden of acquiring chemical information largely falls on the EPA rather than on the companies producing the chemicals, the number and validity of business confidentiality claims for chemical information, and testing expenses. A 2009 article from the Environmental Law Institute

addressed many of the same issues with the TSCA as the GAO testimony. *See generally*, Mark A. Greenwood, *TSCA Reform: Building a Program that Can Work*, ENVTL. L. REP. NEWS & ANALYSIS 10034 (2009). The article suggests that the distinction between new and existing chemicals causes conflict between deciding what qualifies as "new" rather than dealing with actual chemical issues such as risk; a potential remedy for the distinction would be to eliminate the distinction and manage chemicals through a risk-based review. *See id.* at 10039-40. The article also points out that the EPA Office of Pollution Prevention and Toxics "is one of the most underfunded programs in all of EPA," and has remained inactive despite significant budgetary growth of similar programs. *Id.* at 10036. A key point of the article highlights the TSCA's absence of a clear, laid out agenda. *See id.* at 10035-36.

As shown above, there is a general consensus that the original TSCA had the ability to manage chemicals, but has lacked the statutory strength to execute its goals successfully. The Lautenberg Act addresses the lack of existing chemical review through its new risk-based prioritization system, putting more weight on factors in addition to cost to measure safety risk. *See generally* EPA, *Highlights of Key Provisions*. New chemicals must undergo an affirmative finding of safety before they can enter the market. The Lautenberg Act appears to make substantive changes regarding chemical information confidentiality that will open access to chemical data and potentially improve federal-state agency partnership. The new user fees on manufacturers and processors may alleviate some of the strain the TSCA faced on funding. The passage of the Lautenberg Act is a large step forward in how the United States addresses chemicals, because it directly addresses several of the difficulties the original TSCA faced.

The enactment of the Lautenberg Act marks a significant point for environmental law as a whole. Many of the major United States environmental laws were passed in the 1970s, the TSCA among them. *See* Victor B. Flatt & Heather Payne, *Not One Without the Other: The Challenge of Integrating U.S. Environment, Energy, Climate, and Economic Policy*, 44 ENVTL. L. 1106, n. 242 (2014). The most recent amendments to major environmental laws, such as the National Environmental Policy Act, the Clean Air Act, and amendments through public laws, etc., were in the early 2000s. *See, e.g.*, U.S. SENATE COMM. ON ENV'T & PUB. WORKS, *Environmental and Public Works Compilations*, http://www.epw.senate.gov/environmental_laws.htm (last visited Sept. 26, 2016). Therefore, the Lautenberg Act's amendment to the foundations of the TSCA may become a defining point in

environmental law history, especially if the implementation and execution of the Lautenberg Act improves the effectiveness of the TSCA.

Amanda Callihan

III. ANTIQUITIES ACT

The Antiquities Act and the Conservation Legacy of the Obama Administration

This past August, the Obama Administration created the world's largest protected marine area by expanding the Papahanaumokuakea monument, which was established by the Bush Administration in 2006. Under the new expansion, the monument will grow from 140,000 to greater than 580,000 square miles. Located in the Pacific Ocean, the monument stands at the intersection of ecological, historical, and cultural importance. For example, Native Hawaiians hold the area sacred, the United States won the World War II "Battle of Midway" there, and the space is home to some 7000 species, many of which are unique to the area. Julie Hirschfeld Davis, *Obama To Create World's Largest Marine Reserve Off Hawaii,* N.Y. TIMES, (Aug. 26, 2016), http://www.nytimes.com/2016/08/26/us/politics/obamas-action-will-create-largest-marine-reserve-on-earth.html?_r=1.

In the opposite corner of the United States, on August 24th of this year, the Obama Administration created another national monument when the president designated over 87,500 acres of Maine as the Katahdin Woods and Waters National Monument. Like the expansion of the Papahanaumokuakea monument, the establishment of the Katahdin Woods monument is centered on ecological preservation, but also pays homage to the historic and cultural significance of the North Woods to Native Americans. Presidential Proclamation of Barack Obama, The Office of Communication of The White House (Aug. 24, 2016). The land, which was donated by a private citizen, now constitutes the largest region of federal parkland in Maine. Camila Domonoske, *In Maine, Land from Burt's Bees Co-Founder Is Declared a National Monument*, NAT'L PUB. RADIO, (Aug. 24, 2016, 1:09 PM) http://www.npr.org/sections/thetwo-way/2016/08/24/491206413/in-maine-land-from-burts-bees-co-founder-is-declared-a-national-monument [hereinafter *Burt's Bees*].

The recent establishments of the Papahanaumokuakea monument in the Pacific and the Katahdin Woods monument in the Maine North

Woods are the latest in a long pattern of the Obama Administration's decision to create or expand national monuments through the 1905 Antiquities Act. Using the authority granted to the executive branch through the Antiquities Act, President Obama has designated or expanded twenty-four national monuments in total.

Richard Pérez-Peña, *Obama Designates National Monument in Maine, to Dismay of Some,* N.Y. TIMES (Aug. 24, 2016), http://www.nytimes.com/2016/08/25/us/obama-maine-katahdin-woods-and-waters.html [hereinafter *Obama Designates National Monument*].

A. Background

Though the shear scope of the protection may be unprecedented, the Obama Administration finds the authority for implementing such measures in a century old piece of legislation. The Antiquities Act of 1906, also known as the American Antiquities Preservation Act or the National Monument Act, was first passed by Congress and signed into law by Theodore Roosevelt in 1906. The Act states that "The President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments." Antiquities Act of 1906, 54 U.S.C.A. § 320301 (a) (2014). Additionally, the Act states "The President may reserve parcels of land as a part of the national monuments. The limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."

Since the passage of the Act in 1906, sixteen presidents have used the power to establish national monuments. Only three presidents, Richard Nixon, Ronald Reagan, and George H.W. Bush, have refrained from using it. THE WILDERNESS SOCIETY, *Antiquities Act*, http://wilderness.org/article/antiquities-act (last visited Oct. 12, 2016). Parks and monuments established by the Antiquities Act include a wide range of cultural, historic, and ecological landmarks.

Beginning with the Devils Tower National monument established by President Theodore Roosevelt in 1906, the monuments and parks that owe their existence and preservation to the Act include everything from Grand Canyon National Park, also established by President Theodore Roosevelt in 1908, to the Statue of Liberty National Monument, established by President Coolidge in 1924, to the Stonewall National Monument, established by President Obama in 2016. National Parks Conservation Association, *Monuments Protected Under the Antiquities*

Act, (Aug. 29, 2016), https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act.

Though the Act has primarily been used to establish traditional national parks, the Obama Administration has also used the Act more often than others to commemorate and recognize other aspects of American history. In addition to the creating the Stonewall National Monument at Christopher Park in New York City, which commemorates the riots that marked the beginning of the modern American gay rights movement, President Obama has also used the Antiquities Act to preserve sites honoring groups and figures including Cesar Chavez, Harriet Tubman, Buffalo Soldiers, Japanese-Americans who were interned during the Second World War, and the early suffragists. *See Obama Designates National Monument*.

Although the monuments established by the executive are not technically national parks, which are designated and established by the legislature, monuments, established by executive authority through the Antiquities Act are typically managed, like national parks, by one or more of the following agencies: the National Park Service, the Bureau of Land Management, the Fish and Wildlife Service, or the National Oceanic and Atmospheric Administration. NAT'L PARKS CONSERVATION ASS'N, *Monuments Protected Under the Antiquities Act*, (Aug. 29, 2016), https://www.npca.org/resources/2658-monuments-protected-under-the-antiquities-act.

The Obama Administration's use of the Antiquities Act has not been without some controversy. Local stakeholders have spoken out most recently regarding establishment of both the Papahanaumokuakea monument in Hawaii, as well as the Katahdin Woods Monument in Maine. In response to the President's protection of an area twice the size of Texas in the Pacific, local Hawaiian fishermen have voiced concerns. Similarly, while some conservationists praise the administration's efforts in Maine, local industry groups including timber producers, object to federal control over the North Woods. *See Burt's Bees*.

The frustrations stemming from the federal expansion of power over the lands in question mirrors the frustrations that many people in the American West have incurred with the federal control of public lands. Opponents cite both ideological as well as economic reasons for their opposition. Similar to the west, which relies on land for grazing and ranching, the opponents to the monument in Maine worry federal control will interfere with business interests and stymie the economy. Proponents of the monument counter the concerns of the business

community with the idea that the monument itself establishes new economic opportunities for recreation and tourism.

In any event, the Maine monument is unlike the lands controlled by the Bureau of Land Management in the West, since a private citizen donated the land with conservation in mind. Therefore, it is unlikely that the citizen would have given much more leeway with land use than the National Park Service, which will oversee the new monument. The former owner of the land, Roxanne Quimby, has long restricted use of the land for recreation and timber, but hopes for the newly established monument to strike some level of compromise with light recreation including hiking, fishing, and camping. Susan Sharon, *In Wood Pulp Country, A New Plan for Conservation,* NAT'L PUB. RADIO, (Sep. 30, 2011, 4:06 AM), http://www.npr.org/2011/09/30/140632021/in-wood-pulp-country-a-new-plan-for-conservation.

In Hawaii, perhaps learning from a challenge to the previous administration's use of the Antiquities Act, the Obama Administration has announced its intention to defer to local management for the newly expanded Papahanaumokuakea monument. In doing so, it appears the Administration hopes to strike a balance between local fishing interests, and ecological preservation. During the previous administration, local Hawaiians brought suit against the United States for restricting fishing access related to the areas contained within the Papahanaumokuakea monument. The case was ultimately dismissed, as the court held that the National Oceanic and Atmospheric Administration (NOAA) had acted within its discretion and the fishermen had failed to show that NOAA's management decisions were arbitrary and capricious. *Dettling v. U.S.*, 983 F. Supp. 2d 1184, 1207 (2013).

B. Analysis

The Obama Administration's extensive and historic use of the Antiquities Act to expand protection of existing monuments, and conserve ecologically vulnerable areas will certainly be a legacy point of the current president. No other executive has used the Act so extensively. One explanation, proffered by the administration, is that the Act has allowed the President to move when a particularly uncooperative Congress would not. Supporters of the President view the monument establishments warmly as a demonstration of commitment to conservation while opponents critique the actions as more examples of federal overreach and unnecessary government interference. Without intervention from the legislature to curtail the power granted by the Antiquities Act, it appears the executive authority will continue to give

the executive wide discretion. Whatever the case may be, there is no arguing that the extensive use of the Antiquities Act by the current Administration to expand and establish national monuments will have a lasting impact on the landscape of the United States for years to come.

Nolan Bush

IV. NATIONAL OFFSHORE WIND STRATEGY: FACILITATING THE DEVELOPMENT OF THE OFFSHORE WIND INDUSTRY IN THE UNITED STATES

Feds Issue New Regulatory Plan for Offshore Wind Farms

On September 9, 2016, in a hangar at the Massachusetts Clean Energy Center's Wind Technology Testing Center, Secretary of Energy Ernest Moniz and Secretary of the Interior Sally Jewell jointly announced a new report prepared by their respective agencies. The report, titled "National Offshore Wind Strategy: Facilitating the Development of the Offshore Wind Industry in the United States," was prepared by the Department of Energy's (DOE) Wind Energy Technologies Office and the Department of the Interior's (DOI) Bureau of Ocean Energy Management (BOEM). U.S. DEP'T OF ENERGY & U.S. DEP'T OF THE INTERIOR, DOE/GO-102016-4866, NATIONAL OFFSHORE WIND STRATEGY: FACILITATING THE DEVELOPMENT OF THE OFFSHORE WIND INDUSTRY IN THE UNITED STATES (2016). It is intended to create a federal framework for the responsible development of offshore wind energy in America's coastal waters.

A. Background

Renewable energy has long been promoted as the long-term solution to wean industrial society off of its long-term dependence on fossil fuels. Yet these new technologies continue to face a variety of problems that prevent large scale implementation. One set of obstacles is logistical, such as creating wind or solar installations that are large enough to power heavily populated areas. Another logistical obstacle is having the infrastructure to move energy from wind farms located offshore or solar farms located in sunny deserts to the cities and population centers where energy is needed. Resistance to renewable energy from entrenched fossil fuel and power generation industries creates another set of obstacles. There are also attendant ecological concerns, as wind farms must be constructed in ways that cause as little

disruption as possible to fish and marine mammals, as well as in ways that afford protection for pelagic birds from the blades of wind turbines. Finally, another set of regulatory obstacles exists because slow moving governmental entities must create policies and regulations that encourage the development of renewable energy while simultaneously addressing the attendant ecological concerns.

The coastal waters near New England and the upper mid-Atlantic, due to high average wind speeds and proximity to population centers, create an excellent environment for the installation of wind farms. In August of 2016, Deepwater Wind, a company based in Providence, Rhode Island, completed construction of the Block Island Wind Farm. Alex Kuffner, *Block Island Wind Farm: Historic Project Enters Final Stage*, PROVIDENCE J., (Aug. 3, 2016, 7:51 PM), http://www.providence journal.com/news/20160803/block-island-wind-farm-historic-project-enters-final-stage. Located three miles off the coast, five massive turbines will create thirty megawatts of energy. The project is slated to go online in the fall of 2016, using underwater cables to send energy to Block Island and the mainland electrical grid. In Massachusetts, legislation was passed in 2016 that will lead to the construction of off-shore wind farms over the following decade that could generate as much as 1600 megawatts. Shira Schoenberg, *Gov. Charlie Baker Signs Hydropower, Wind Energy Bill into Law*, MASSLIVE (Aug. 8, 2016, 4:19 PM), http://www.masslive.com/politics/index.ssf/2016/08/gov_charlie_baker_signs_hydrop.html. In New York, Governor Andrew Cuomo expressed support for a ninety-megawatt wind farm project thirty miles from Montauk Point on Long Island. Kit Kennedy, *Governor Cuomo Supports Offshore Wind Power for Long Island*, NRDC: EXPERT BLOG, (July 15, 2016), https://www.nrdc.org/experts/kit-kennedy/governor-cuomo-supports-offshore-wind-power-long-island. At the federal level, DOI announced plans in the spring of 2016 to auction leasing rights to create a wind farm in another high wind area eleven miles south of Long Island. As part of a federal effort to encourage the continued development of wind power from offshore sources, DOE and the DOI issued a joint report in September 2016.

B. The Report

DOE's Wind Energy Technologies Office and DOI's BOEM researched and published the report in order to create a "framework for federal action intended to help facilitate the responsible development of a robust and sustainable offshore wind industry in the United States." NATIONAL OFFSHORE WIND STRATEGY, at 5. The report sets out the

particular challenges facing the development of a significant offshore wind industry.

The report begins by detailing the current state of the offshore wind power industry in the coastal United States and describing the growth opportunities for the industry. In making the case for a national approach and a federal regulatory framework, the report details the key remaining challenges and describes a plan for action. The report then details three major goals for U.S. offshore wind industry development. Each of these action areas is distilled as a "strategic theme." Each strategic theme is then divided into action areas, which are subdivided into numerous more specific goals.

The first strategic theme is "Reducing Costs and Technology Risks." The discussion of this theme begins with the statement that "the current estimated cost of offshore wind is too high to support widespread deployment[.]" *Id.* at 24. The report posits that increased technological development and economies of scale can significantly reduce implementation costs for offshore wind farms. To achieve this goal, the report breaks down the first strategic theme into three action areas. The first of these is "Offshore Wind Power Resources and Site Characterization." As the industry develops, wind energy companies will gain "a better understanding of the unique meteorological, ocean, and seafloor conditions" at sites that both the federal and state governments propose for wind farms. This will then lead to "optimized designs, reduced capital costs, greater safety, and less uncertainty in preconstruction energy estimates, which can reduce financing costs." The second action area is "Offshore Wind Plant Technology Advancement." As wind turbines become bigger and more efficient, they generate more energy, becoming more cost-effective, and the designs can be better suited to the specific conditions found along the coastal waters of the United States. *Id.* at 25. This will lead to "reduce[d] capital costs and increase[d] energy production at any given site." The third action area is "Installation, Operation and Maintenance, and Supply Chain Solutions." *Id.* at 24. Here, the report admits that the construction and maintenance of offshore wind farms requires specialized infrastructure, which, for the most part, is not currently present in the United States. *Id.* at 32-34. Finding ways to repurpose existing infrastructure, and thus reducing the need for new, specialized infrastructure, can reduce these costs.

The second strategic theme of the report is "Supporting Effective Stewardship." *Id.* at 34. Here, the report addresses two specific action areas relating to the regulatory process and environmental and human-

use concerns. As with any new technology, industry often moves faster than bureaucracy, which can lead to unclear regulatory processes. DOI, through the BOEM, "oversees the responsible development of energy on the Outer Continental Shelf." In order to encourage development by wind energy developers, the report suggests specific improvements to create "certainty when navigating the regulatory and environmental compliance processes." The suggested improvements include "more predictable review timelines," "[r]educing the [b]urden of [r]egulatory [r]equirements for [m]eteorological [b]uoys" (which are part of the site assessment process), and "[d]ecommissioning [f]inancial [a]ssurance [r]equirements," which would lower upfront costs for potential developers. *Id.* at 34, 37. The second action area, involving environmental and human use concerns, starts by admitting that there is little relevant information for such concerns because the first wind farm in American waters is only just becoming operational. This means that "some impact assumptions are founded in predictive information rather than in empirical information." *Id.* at 38. With the Block Island Wind Farm coming online in the fall of 2016, and with similar projects in the pipeline, the report envisions an increase in empirical information that will verify or contradict existing predictive information, as well as create new opportunities to study use conflicts. In terms of environmental concerns, the report addresses the impact on avian populations. This includes both seabirds and migratory shorebirds. BOEM consults with the U.S. Fish and Wildlife Service (FWS) to address the potential impacts on "threatened and endangered avian species." Under Executive Order 13186, both organizations may impose measures on the wind industry that will lessen the impact on avian populations in order to advance "the objectives of the Migratory Bird Treaty Act." The construction of wind farms also affects fish and marine mammals. The latter are protected under both the Endangered Species Act and the Marine Mammal Protection Act. *Id.* at 39. In 2014, Deepwater Wind reached an agreement with several environmental non-profits to increase mitigation measures to protect the migratory paths of whales. Kit Kennedy, *New England Offshore Wind Developer Announces Protections for Whales; Project Could Spin Clean Energy for Long Island*, NRDC EXPERT BLOG (May 7, 2014), https://www.nrdc.org/experts/kit-kennedy/new-england-offshore-wind-developer-announces-protections-whales-project-could. Many marine mammals migrate through the same coastal areas that are identified as prime locations for creating wind energy. The report addresses the impact on human use activities in addition to the impact on animals. NATIONAL OFFSHORE

WIND STRATEGY, at 39. The placement of wind farms could affect both recreational and commercial fishermen's access to long established fishing grounds. Long established shipping routes could also be affected by the construction of large, permanent structures offshore. The larger the turbines, the greater their potential impact on air traffic control, air surveillance, and weather and navigational systems. While most of the currently planned wind power projects are several miles out at sea, future projects could be within sight of shore, creating understandable aesthetic concerns in coastal communities.

The third strategic theme of the report, "Increasing Understanding of the Benefits and Costs of Offshore Wind," addresses public perception of the burgeoning wind power industry. *Id.* at 42. The report imagines that increased understanding by the public can reduce costs through increased research and development (R&D) and supply chain development. Two specific action areas are mentioned in this regard. The first is "Offshore Wind Electricity Delivery and Grid Integration." The report suggests that the impact on local power grids of significant offshore wind projects needs to be better understood by both the power industry and the general public. Europe is far ahead of the United States in terms of offshore wind projects with more than twelve gigawatts of offshore capacity installed through 2015. The report cites a 2010 analysis by the European Wind Energy Association that concluded that existing European power systems' ability to integrate wind power "is determined more by economics and regulatory frameworks than by technical or practical constraints." INTL. ENERGY AGENCY (IEA), *Technology Roadmap: Wind Energy—2013 edition* (2013). A recent DOE study confirmed a similar situation in the United States. The study points out that since 2011, DOE has funded more than $2 million of R&D to increase understanding of the impact of offshore wind power on existing power grids. NATIONAL OFFSHORE WIND STRATEGY, at 42. The second specific area involves "Quantifying and Communicating the Benefits and Costs of Offshore Wind." Here, the report posits that resistance to the current high costs of creating offshore wind projects will decrease as both the power industry and the general public become more aware of the long-term benefits of renewable wind energy. The report points out the importance of a clear regulatory and policy framework in this regard, noting that "much of the success of the European offshore wind energy market in the face of high costs can be attributed to long-term policy support." *Id.* at 43. Both federal and state programs can adjust the perception of the current high costs of wind energy installation

by mandating consideration of the offsetting economic and environmental benefits when evaluating costs.

C. Analysis

The report, which is the result of eighteen months of research by numerous federal employees in two departments in consultation with the alternative energy industry and non-profit environmental groups, presents a nuanced and comprehensive argument for the creation of a clear federal regulatory approach to encourage the development of the offshore wind power industry. The variety and breadth of the suggested actions are promising. The report employs admirable candor when admitting that existing federal regulations and processes must be streamlined and simplified in order to increase development and lower initial costs.

However, one large area that is only briefly touched on is the impact of maritime law, both domestic and international, on the construction of offshore wind farms. There is a brief mention of the Jones Act, which requires that vessels transporting merchandise or passengers between two points within the United States must be built and registered domestically, and owned and crewed exclusively by Americans. This includes coastal areas out to three nautical miles. But many of the proposed wind farms are beyond this limit. Some of them are outside the territorial seas of the United States. While the report does address human-use concerns, it does not explicitly confront how existing maritime laws could determine the impact on navigation and shipping when large offshore structures are constructed.

Dalton Hirshorn