Message

From: POLITICO Pro Energy [politicoemail@politicopro.com]
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Subject: Morning Energy: What's happening with WOTUS — Keystone fight far from over — Wheeler to Michigan

By Kelsey Tamborrino | 08/17/2018 05:44 AM EDT

With help from Annie Snider, Ben Lefebvre and Alex Guillén

A COUNTRY DIVIDED: Which streams and wetlands are protected under the Clean Water Act? As of Thursday, the answer depends on where you're standing. After a South Carolina District Court ruling overturning the Trump administration's attempted delay of the Obama administration's Waters of the U.S. rule for failing to offer the public a proper opportunity to comment, the 2015 rule is now officially on the books in 26 states — but not in the other 24 states where other district court injunctions are in place.

"**The agencies refused to engage** in a substantive reevaluation of the definition of the 'waters of the United States' even though the legal effect of the Suspension Rule is that the definition of 'waters of the United States' ceases to be the definition under the WOTUS rule and reverts to the definition under the 1980s regulation," Judge David Norton wrote in Thursday's ruling. "An illusory opportunity to comment is no opportunity at all."

Environmental groups hailed the decision, with Jon Devine of the Natural Resources Defense Council calling it a "sharp rebuke to the Trump administration." Meanwhile, Zippy Duvall, president of the American Farm Bureau Federation, one of the fiercest critics of the Obama-era rule, called on the Trump administration to "to take immediate steps to limit the impact of this dangerous court decision."

But will it hold? The Justice Department is reviewing the decision, a spokesman said, and players on both sides broadly expect an appeal. Separately, EPA said in a statement it and the Army Corps of Engineers "will review the order as the agencies work to determine next steps." But the fate of the delay rule could ultimately become moot if the federal district judge in Texas grants a nationwide injunction request.

And don't forget, this is just the warm-up fight. The battle royale will be over the Trump administration's rule to repeal the 2015 rule, which the agency has not finalized. Geoff Gisler, the Southern Environmental Law Center attorney who brought yesterday's case on behalf of local environmental groups, argued that Thursday's South Carolina court decision has implications for that fight and "should give the agencies pause" as they move forward. "The agencies just aren't telling the public what they're doing," he argued. "What this decision said was you can't just have a comment period, it has to be a meaningful comment period."

WE MADE IT TO FRIDAY! I'm your host, Kelsey Tamborrino. Simon and Company's Jen Covino named the eight senators who formerly served as mayors: Dianne Feinstein, Cory Booker, Jim Inhofe, Bob Corker, Bernie Sanders, Tim Kaine, Mike Enzi and Bob Menendez. For today: Who are the three current House lawmakers who previously served as ambassadors? Send your tips, energy gossip and comments to ktamborrino@politico.com, or follow us on Twitter @kelseytam, @Morning_Energy and @POLITICOPro.

FAR FROM OVER: A federal judge's order directing the State Department to conduct a supplemental environmental review for the Keystone XL pipeline's updated path through Nebraska is another setback in nearly a decade full of them for TransCanada. The order is sure to stall construction of the pipeline for months, Pro's Ben Lefebvre reports. Plaintiffs in the case said the review would involve public hearings in Nebraska and consultations with Native American tribes whose land the pipeline would traverse.

Pipeline opponents are hoping to use the new review to push for a broader study of the project, Ben reports. Doug Hayes, a lawyer for the Sierra Club and one of the plaintiffs in the case, said the judge's ruling that the "entire pipeline remains interrelated and requires one [environmental review] to understand the functioning of the entire unit" could open the door for them to seek a new review for the pipeline's entire route. "If they are going back to do a supplemental environmental impact statement, our position is they would need to evaluate all the new impacts of the pipeline," Hayes said. "That would take definitely months."

WHERE'S WHEELER? Acting EPA Administrator Andrew Wheeler travels to Michigan today to discuss issues plaguing the Great Lakes and meet with GOP Rep. Tim Walberg, a member of the Energy and Commerce Committee, and officials from the Michigan Department of Natural Resources and Department of Environmental Quality.

WHEELER DELIVERS MESSAGE ON HARASSMENT: Wheeler reaffirmed EPA's policy against harassment in a memorandum sent to staff Thursday. Wheeler wrote that he expects "all individuals working at the EPA — employees, supervisors and non-employees — will not engage in or be subjected to unlawful and prohibited harassment."

MURKOWSKI: FERC NOMINEE SHOULD GO LITMUS TEST-FREE: Senate Energy Chairman Lisa Murkowski wouldn't comment on POLITICO's report that DOE's Bernard McNamee will be nominated to FERC. But the Alaska Republican said she believes that the next nominee shouldn't face a litmus test over their view of the Trump administration's efforts to prop up coal and nuclear power plants, Pro's Darius Dixon reports . "I worry that this is going to be viewed as, 'If you don't commit to voting against or voting for, then you're not going to have my support,'" Murkowski said. "That's not the way that we should be selecting commissioners for the FERC."

GET YOUR COMMENTS IN: American Petroleum Institute's Frank Macchiarola reiterated the need for Renewable Fuel Standard reform on a call with reporters Thursday outlining the group's comments for EPA's proposed biofuel blending requirements for the coming year under the RFS. "Very simply what we want is an end to this program by 2022," he said. Macchiarola said API is "willing to compromise" on certain policies like a waiver for summertime sales of E15, but only if the program will sunset by 2022. "The problem again is that the ethanol industry has been dug in to not doing anything," Macchiarola said. He added legislation is being drafted to reform the program in both chambers, but noted challenges and lengthy debate are likely ahead. Comments are due today on EPA's proposed volumes, with the final rule due to be released by Nov. 30.

— **API is also looking at the proposed plan** by EPA and the Department of Transportation to freeze fuel efficiency standards for cars and trucks. "It is a very complex proposal to a very complex program," Macchiarola said. "We will say that we appreciate the administration's relooking at CAFE in the light of changing energy market realities."

SECRET'S OUT: Thursday was the last day for comments on EPA's proposed "secret science" rule, which would ban the use of studies that don't publicly disclose all their data. Getting their thoughts in under the wire, Sens. Sheldon Whitehouse, Brian Schatz, Maggie Hassan, Jeff Merkley, Ed Markey, Tammy Duckworth, Kirsten Gillibrand, Tom Carper and Kamala Harris banded together to make their opposition known. "The proposed rule is illegal because it is arbitrary and capricious," they write, adding that "the proposed rule is illegal because it is the result of an effective delegation of rulemaking authority to private interests."

The American Chemistry Council, meanwhile, applauded the proposal in its comment Thursday. "EPA's proposal codifies an important good governance principle — that government agencies should be as transparent as possible, within the bounds of the law, about scientific information relied upon and the justifications for the significant regulatory decisions they make." Still, the trade association also highlighted that implementation of the plan would benefit from better historical context and applicability, and that greater clarity is required on key definitions and regulatory text, among other recommendations.

FIGHTING FIRE WITH A FEDERAL PLAN: The Agriculture Department released a new, aggressive approach to fighting wildfires Thursday, with proactive steps. During a bipartisan press conference, Secretary Sonny Perdue unveiled a plan that emphasizes increased collaboration with states, implementation of mapping and remote sensing tools, and management practices such as prescribed burns and timber sales, Pro's Liz Crampton reports . Though Perdue brushed aside specific questions on climate change's role, he said Interior Secretary Ryan Zinke is on board with the plan and noted further details and costs will be forthcoming from the U.S. Forest Service. "Really a lot of people ... when you talk about climate change, they want to talk about what the causes are," Perdue said. "[What] we're trying to talk about is the impact."

FERC RESTARTS PART OF PIPELINE: FERC modified a stop work order for the Mountain Valley Pipeline this week, allowing construction to restart for around 77 miles of the pipeline's West Virginia route with the exception of a 7-mile area surrounding the Weston and Gauley Bridge Turnpike Bridge Trail, MVP said Thursday. However, the company said about half of its construction workforce has been released due to continued delays. MVP said that it "remains committed to the earliest possible in-service date," though it noted that is now expected to arrive during the fourth quarter of 2019.

GREENS CALL FOR FERC REVIEW: The Southern Environmental Law Center and Appalachian Mountain Advocates petitioned the 4th U.S. Circuit Court of Appeals on Thursday to review FERC's approval of the Atlantic Coast Pipeline. The suit was filed on behalf of 13 other conservation groups. "FERC ordered the ACP construction stopped because the 4th Circuit determined that permits were issued without proper scrutiny," SELC attorney Greg Buppert said in a statement. "On the very same day, FERC rejected a rehearing request in which the conservation groups asserted that it also rushed through its decision to permit a pipeline that we don't need." The 4th Circuit last week vacated two permits issued for the project by the U.S. Fish and Wildlife Service and the National Park Service.

GREENS FILE FOIA SUIT: Environmental group Friends of the Earth filed a lawsuit Thursday against the Interior Department for lack of response to a Freedom of Information Act request. The lawsuit seeks to compel DOI to produce documents related to senior members of the department and the industries they regulate. The suit points to David Bernhardt's work as a lawyer and lobbyist for oil and gas companies and Vincent DeVito's time working as an energy industry representative. Friends of the Earth is being represented by the law firm Meyer Glitzenstein & Eubanks LLP.

AD-ING IT UP: Ahead of Wyoming's gubernatorial primaries Tuesday, a partnership between the Wyoming Wildlife Federation and Rocky Mountain Farmers Union, dubbed the Wyoming Conservation Legacy, will launch a five-figure ad campaign asking candidates to support conservation. The campaign will begin on Saturday and run through Aug. 21 with full-page print ads in the Casper Star Tribune and the Wyoming Tribune Eagle, separate radio buys on Wyoming Public Media programs, and digital ads across the state. See the ads here.

MAIL CALL! ON THE FARM: The National Biodiesel Board sent a letter to farm bill conference committee lawmakers reiterating its support for the inclusion of biodiesel programs in the five-year bill.

STAR-STUDDED SUMMIT: Attendees of the Global Climate Action Summit in San Francisco in September will hear from former White House officials, including former Vice President Al Gore and Secretary of State John Kerry. The summit announced Thursday night that new delegates will join the event, including Executive Secretary of the United Nations Framework Convention on Climate Change Patricia Espinosa and U.N. Special Envoy for Climate Action Michael Bloomberg. Actor Alec Baldwin and chimpanzee expert Jane Goodall will also attend.

GO NUCLEAR: The American Nuclear Society this week launched a nuclear science educational program for middle schoolers that covers topics like fission and fusion, and detecting radiation. The "Navigating Nuclear:

Energizing Our World" program is aligned with the Next Generation Science Standards framework, which provides an evidence-based foundation for scientific research.

MOVER, SHAKERS: Jack Cramton, policy adviser for Sen. Bill Cassidy (R-La.), will start Monday as a legislative affairs adviser at the Department of Energy's Congressional and Intergovernmental Affairs Office.

QUICK HITS

— "U.S. energy chief applauds Mexico's plan to end fuel imports," Reuters.

— "Trump's CO2 rule is coming, and industries wonder who's next," E&E News.

— "California fire risk won't abate until November, U.S. warns," Bloomberg.

— "Zinke said he would never sell public land. But Interior is considering it," The Washington Post.

— "Elon Musk confronts a fateful tweet and an 'excruciating' year," The New York Times.

HAPPENING TODAY

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Stories from POLITICO Pro

Judge restores WOTUS rule in 26 states Back

By Alex Guillén | 08/16/2018 03:20 PM EDT

A federal judge today ruled that the Trump administration violated administrative legal requirements when it delayed the start of the Obama administration's Waters of the U.S. rule by two years — a move that means the rule will now go into effect for about half the country.

The judge said EPA and the Army Corps of Engineers had unlawfully declined to consider any comments addressing substantive issues related to WOTUS or an earlier 1982 version when it proposed delaying the rule to give the agencies more time to repeal and replace it.

That was a fatal flaw, ruled Judge David Norton of the U.S. District Court for South Carolina, a George H.W. Bush appointee. Delaying the WOTUS rule has the effect of reverting to the 1982 rule, he wrote.

Norton's injunction means the Obama-era rule will take effect in 26 states. The other 24 are covered by two different injunctions, one issued to 13 states in 2013 and one issued to another 11 states in June.

However, WOTUS may be blocked nationwide again if the rule's opponents get their way. In another WOTUS lawsuit in a federal court in Texas, three states in February asked for a nationwide injunction of WOTUS. That court has yet to decide on the matter.

WHAT'S NEXT: The Trump administration is working to finalize its repeal of the Obama WOTUS rule. And EPA and the Corps are expected to propose a replacement rule in the near future.

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Montana ruling could set back Keystone XL for months Back

By Ben Lefebvre | 08/16/2018 04:37 PM EDT

The fight over the Keystone XL pipeline isn't over yet.

District Court Judge Brian Morris' partial order that the State Department must conduct a supplemental environmental review to account for the pipeline's new path through Nebraska is another setback for developer TransCanada that's likely to delay construction of the nearly decade-old project by at least several months.

The order was a response to Nebraska regulators' approval in November 2017 of a route for the 830,000 barrel-a-day pipeline through the state that TransCanada had not proposed. The original environmental assessment the Trump administration used to approve Keystone XL earlier that year — a review conducted during the Obama administration — only considered a different route that TransCanada had planned for the pipeline.

The new route through Nebraska would cross through five counties that weren't included in the State Department's original environmental review, Morris noted in his order, meaning it would cross different waterways and require an additional pump station, .

Pipeline opponents say they hope to use Wednesday's ruling to push for a new broader study of the project.

Doug Hayes, a lawyer for the Sierra Club, one of the plaintiffs in the case, told POLITICO that Judge Morris' statement in his ruling that the "entire pipeline remains interrelated and requires one [environmental review] to understand the functioning of the entire unit" could open the door for them to seek a new review for the pipeline's entire route through the U.S.

"If they are going back to do a supplemental environmental impact statement, our position is they would need to evaluate all the new impacts of the pipeline," Hayes said. "That would take definitely months."

Jane Kleeb, who has long fought the pipeline and is now chairwoman of the Nebraska Democratic Party, said she thought process would drag out even longer.

"We think it buys us a year," she told POLITICO. "We just think there's a lot of significant hurdles in front of them."

Plaintiffs in the case said a new review would entail holding public hearings in Nebraska and consulting with Native American tribes whose land the pipeline would traverse.

Environmental groups have argued the pipeline posed a special risk because of the nature of the heavy oil it would transport, and that it would increase global carbon emissions. The Obama administration quashed the project in 2015, only to see their decision reversed when President Donald Trump took office a year and a half later.

A TransCanada spokesman declined to comment pending the company's review of the judge's decision.

Russ Girling, the company's chief executive officer, said during a call with investors earlier this month that the company hoped to make a final decision on whether to build the pipeline later this year or in early 2019. If approved, construction could start during the first quarter of 2019, Girling added.

A State Department official was not immediately available to comment.

Keystone XL also faces a test in Nebraska Supreme Court, where a lawsuit filed by environmental groups and state landowners challenges Nebraska regulators' approval of a route that TransCanada never formally requested. Hearings in that case are expected to start in October.

TransCanada is also waiting for several permits from federal agencies. Interior's Bureau of Land Management must issue right-of-way permits to cross federal land in Montana, and the Army Corp of Engineers must approve the pipeline's path over several waterways across the country.

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Sources: DOE's McNamee to get FERC nod Back

By Eric Wolff and Darius Dixon | 08/08/2018 04:07 PM EDT

The White House plans to nominate Energy Department official Bernard McNamee to fill the FERC leadership seat being vacated by departing Commissioner Rob Powelson, three sources familiar with discussions tell POLITICO.

McNamee helped roll out Energy Secretary Rick Perry's proposal last year to save struggling coal and nuclear power plants — an issue that sources have said served as a key litmus test for Trump administration officials evaluating a replacement for Powelson, who is set to resign Friday.

FERC in January unanimously voted down that plan, which sought to create special payments for power plants capable of holding 90 days of fuel on-site. But the administration has been considering additional options such as invoking rarely used emergency powers to force power plants to run, which would potentially give McNamee a chance to provide the pivotal vote on the subsequent rates and rules as a commissioner.

It is unclear when President Donald Trump would formally nominate McNamee, and the vetting process still seems to be underway. It would likely take the Senate several months to confirm him, a process that would start with hearings at the Energy and Natural Resources Committee.

Neither the White House nor DOE immediately responded to requests for comment Wednesday.

McNamee, who runs the DOE's Office of Policy, has been in and out of the agency under Trump. He was deputy general counsel for energy policy last year when he worked on Perry's ill-fated proposal to FERC. In February, he left DOE for a senior post with the Texas Public Policy Foundation, a conservative think tank with ties to Perry, before returning to DOE in May.

Before joining the Trump administration, McNamee previously worked at McGuireWoods, as chief of staff to Texas Attorney General Ken Paxton and as an aide to Sen. Ted Cruz (R-Texas).

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Murkowski: Next FERC nominee should be free of litmus tests Back

By Darius Dixon | 08/16/2018 05:38 PM EDT

Alaska GOP Sen. Lisa Murkowski today declined to comment on POLITICO's report that DOE's Bernard McNamee would be nominated to FERC, but said she believes that the next nominee shouldn't face a litmus test over their view of the Trump administration's efforts to prop up coal and nuclear power plants.

"I worry that this is going to be viewed as 'If you don't commit to voting against or voting for, then you're not going to have my support,'" Murkowski, who chairs the Senate Energy and Natural Resources Committee, told POLITICO, referring to the administration's efforts to stave off coal retirements by potentially issuing emergency orders. "That's not the way that we should be selecting commissioners for the FERC."

Trump will want someone fairly aligned with the administration, she said, though she added that FERC came to the "right decision" in rejecting the Energy Department's controversial push to create special market payments for coal and nuclear plants last year. Still, she hoped that FERC's independence would be respected and that Democrats won't be reflexively opposed to the White House nominee in the way that they have been for Supreme Court nominee Brett Kavanaugh.

"A seat on the FERC is different than being a deputy secretary of Energy or Labor or whatever. Again, this is an independent regulatory agency that has a very different mission," she said. "The mission is not whatever the White House says it is. It is a very specific, statutory mission and so you want somebody who is going to be true to that. My hope is that the White House picks somebody who can demonstrate that they will be true to that."

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USDA unveils plan for fighting wildfires Back

By Liz Crampton | 08/16/2018 03:00 PM EDT

USDA said today it's embarking on a new, aggressive approach to combat wildfires by taking preventative steps like working more with states and upping use of forest management tools.

Department officials at a press conference unveiled a 22-page plan that emphasizes increased collaboration with states, implementation of mapping and remote sensing tools, and management practices such as prescribed burns and timber sales.

Further details and costs of the initiative will be forthcoming after the U.S. Forest Service and other agencies hold discussions with state partners, USDA Secretary Sonny Perdue said. He added that Interior Secretary Ryan Zinke is on board, although he was not in attendance.

The plan comes as the West is enduring yet another brutal wildfire season after 2017 ranked as the most expensive year for wildfires. Federal agencies last year spent $2.9 billion to suppress wildfires across the country, according to USDA.

"Today to truly protect our forest and communities, we must increase the size of our projects and access larger landscapes across boundaries," Perdue said. "Frankly we cannot do it ourselves. It's got to be done in the shared stewardship of state and local communities."

Perdue was joined by interim Chief of the U.S. Forest Service Vicki Christiansen and Sens. Maria Cantwell (D-Wash.), Lisa Murkowski (R-Alaska), Ron Wyden (D-Ore.) and Steve Daines (D-Mont.).

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