



Regulatory Update: Nationwide Permit Rule; Migratory Bird Rule; and 2020 Valuation Reform and Civil Penalty Rule

By: [Nicole Blevins](#)

This article provides a brief update on recent regulatory actions taken by the Biden Administration that are significant to industry.

Nationwide Permits

Last week, the Center for Biological Diversity (CBD) issued a 60-day [notice of intent](#) to sue the U.S. Army Corps of Engineers (Corps) regarding its [January 13, 2021 issuance, reissuance, and modification](#) of 16 nationwide permits (NWP), including NWP 12 applicable to oil and gas pipeline activities. Similar to the arguments made in *Northern Plains Resource Council et al. v. U.S. Army Corps of Engineers et al.*, CBD alleges that the Corps violated Section 7 of the Endangered Species Act (ESA) because it did not conduct a nationwide programmatic ESA consultation with respect to the January 13 rule.

This is significant for the oil and gas industry because NWP 12 provides a streamlined permitting mechanism for certain pipeline projects that discharge dredge and fill material into Waters of the U.S and because the *Northern Plains* Court vacated the prior NWP 12 as it applies to new oil and gas pipeline projects. Without NWP 12, operators must get individual permits which are significantly more expensive and time-consuming to obtain.

The notice lays the foundation for a “sue and settle” tactic popular under the Obama Administration, wherein CBD would get to negotiate directly with the Biden Administration on a legal settlement beneficial to CBD, circumventing any public process or ability for industry to affect the outcome.

The rule, including the modified NWP 12, was originally scheduled to take effect on March 15 but may be delayed under the Biden Administration’s regulatory freeze memorandum.

Migratory Birds

The U.S. Fish and Wildlife Service (FWS) delayed the effective date of the Trump Administration’s [migratory bird regulations](#) until March 8, 2021, citing a procedural rule for the extension. This is significant for the oil and gas industry because the proposed regulations would make clear that a migratory bird’s death due to industry practices, where not intentional and where

proper controls are in place, is not a “take” under the Migratory Bird Treaty Act and companies would not be subject to criminal liability for such routine activity that harmed a migratory bird. The proposed regulations were to modify regulations in place since the Clinton Administration.

The FWS reopened public comment on the rule making, comments are due by March 1, 2021. Companies are encouraged to provide comments to FWS, citing their migratory bird protection best practices and other supporting information encouraging FWS to not entirely backtrack on the proposed regulations. Beatty & Wozniak is available to assist in drafting and submitting comments.

2020 Valuation Reform and Civil Penalty Rule

The Office of Natural Resources Revenue (ONNR) delayed the effective date of the [2020 Valuation Reform and Civil Penalty Rule](#) to April 16, 2021, pursuant to the Biden Administration’s regulatory freeze memorandum. This is significant to the oil and gas industry because the Rule allows for certain deductions, allowances, flexibility in valuation of arm’s length Federal gas sales, and more favorable valuation of unprocessed and residue gas with respect to oil and gas produced from Federal and Indian leases. In addition, the Rule updates ONNR’s civil penalty regulations to clarify that ONNR will consider unpaid, underpaid, or late payments in the severity analysis for payment violations only; ONNR may consider aggravating and mitigating circumstances when calculating civil penalties; and remove an administrative law judge’s (ALJ) ability to vacate a benefit of a stay of accrual of penalties if the ALJ later determines that a violator’s defense to a notice of noncompliance was frivolous.

The ONNR reopened the public comment on the rule making, comments are due by March 15, 2021.

Suggested topics for comment include but are not limited to: (1) whether the Department of Interior should consider science on the source and impacts of climate change in setting royalty and revenue management policy; and (2) whether the rule should be amended, rescinded, or delayed pending further review by the agency, or allowed to go into effect.

Please contact [Nicole Blevins](#), [Theresa Sauer](#), or [Bret Sumner](#) with any questions regarding any of the above, including how to best advocate for your company’s interests.