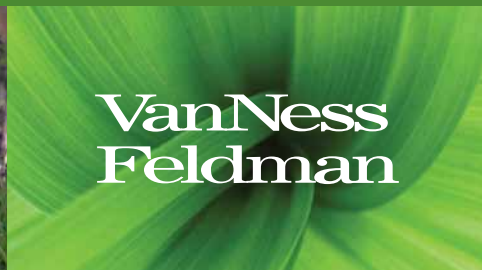
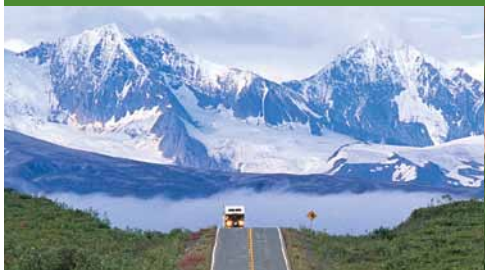


Update

PUBLIC LANDS AND NATURAL RESOURCES



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Welcome to the first edition of Van Ness Feldman's Public Lands and Natural Resources Update—a monthly summary of noteworthy policy, regulatory, and litigation developments relating to federal lands and natural resources. For questions, or to be added to the distribution list, please e-mail publiclands@vnf.com.

Natural Resource Policy

DEPARTMENT OF THE INTERIOR'S
ALLOTMENT OF STIMULUS FUNDS
Interior to receive \$3 billion under
the 2009 American Recovery and
Reinvestment Act

Congress's economic stimulus package allocated \$3 billion to be spent by the Department of the Interior (DOI), including \$1 billion for the Bureau of Reclamation, \$750 million for the National Park Service, \$500 million for the Bureau of Indian Affairs, \$320 million for the Bureau of Land Management (BLM), \$280 million for the U.S. Fish and Wildlife Service (USFWS), and \$140 million for the U.S. Geological Survey. Secretary Salazar has established a Recovery Act Task Force to determine which proposed projects should be funded, and appointed a "Recovery Czar" to oversee DOI's implementation of the program. Although projects have not yet been determined, many are likely to reflect the Secretary's emphasis on renewable energy and energy efficiency, youth programs, and protection of national icons and landscapes. Recovery activities can be tracked at www.recovery.gov.

2009 PUBLIC LAND MANAGEMENT ACT
President Obama Signs Omnibus Land Bill
Codifying the National Landscape
Conservation System and Designating Two
Million Acres of Wilderness

On March 30, 2009, President Obama signed the Omnibus Public Land Management Act of 2009 (Public Land Management Act), which, among other things, designates two million acres of wilderness area in nine states, and codifies the establishment of the National Landscape Conservation System (NLCS) within the BLM.

The NLCS, originally created by BLM in 2000, consists of over 26 million acres of National Conservation Areas, National Monuments, Wilderness Areas, Wilderness Study Areas, Wild and Scenic Rivers, and National Scenic and Historic Trails, for the purpose of conserving, protecting and restoring nationally significant landscapes. The Public Land Management Act provides a congressional stamp of approval on this originally administratively-created program, with only the broad directive that NLCS be managed "in a manner that protects the values for which the components of the system were designated," and provides only limited protection for certain types of recreation in specified areas. Among many other provisions, the Act also establishes thousands of miles of new wild and scenic rivers, provides for grants to compensate ranchers for livestock predation to wolves, and prohibits further oil, gas and geothermal leasing and mining near the Bridger-Teton National Forest.

ENERGY DEVELOPMENT
ON PUBLIC LANDS

Secretary Salazar Outlines Renewable
Energy Policy and Announces 2009 Oil and
Gas Lease Schedule—Forest Service to
Designate Energy Corridors

On March 11, Secretary of the Interior Salazar issued Order No. 3285, Renewable Energy Development by the Department of the Interior, where he indicated that "[e]ncouraging the production, development, and delivery of renewable energy is one of the Department's highest priorities," and he established a task force to develop strategies for the development and transmission of renewable energy from appropriate areas of public lands and on the Outer Continental Shelf (OCS). Secretary Salazar again echoed this theme during his March 17, 2009

testimony before the Senate Energy and Natural Resources Committee. The Department of Energy and DOI are currently promulgating a Programmatic Environmental Impact Statement (PEIS) to evaluate utility-scale solar energy development in six western states (Arizona, California, Colorado, New Mexico, Nevada, and Utah). This dovetails with congressional proposals to encourage and facilitate transmission siting, including potentially on public lands.

In addition, Secretary Salazar extended the public review period for the draft 5-year oil and gas leasing program for the OCS. The Secretary also announced the 2009 oil and gas lease schedule, which includes at least four major lease sales. And, while the Secretary has withdrawn leases that were offered on 77 parcels of U.S. public land in southern Utah, DOI has indicated that it will offer a second round of research, development, and demonstration leases for oil shale in Colorado and Utah.

On March 24, the U.S. Forest Service published a notice in the Federal Register that it will designate approximately 990 miles of energy corridors on National Forest System lands in 10 Western States, “as the preferred location for oil, natural gas, and hydrogen pipelines as well as electricity transmission and distribution lines.” This will be accomplished by revising 38 Forest Service land management plans throughout the west. In the March 24 notice, the Forest Service also indicated it will adopt BLM’s “coordinated, interagency permitting and environmental compliance process.”

ENDANGERED SPECIES ACT Obama Administration Likely to Act Soon on the Bush Administration Changes to Section 7 Consultation Regulations

The Obama Administration is actively reviewing the Endangered Species Act (ESA) section 7 consultation rule finalized by the Bush Administration in



December 2008, and can be expected to take action on its review by May 10, 2009. On Monday, March 23, the California federal district court judge overseeing court challenges to the section 7 consultation rule granted a 60-day stay in that proceeding at the request of the federal agencies. In their stay request, the federal agencies represented that the Obama Administration is examining and reconsidering the rule as directed by a March 3, 2009 presidential memorandum. Further, the federal agencies noted that, as a result of Section 429 of the recently enacted omnibus appropriations bill (Pub. L. No. 111-8), the section 7 consultation rule may be withdrawn without following notice and comment rulemaking under the Administrative Procedure Act, if such action is taken no later than May 10, 2009.

A primary focus of the challenges to the December 2008 consultation rule has been the narrowing of the “concurrence requirement” that previously required a federal agency to obtain written concurrence from either the USFWS or the National Marine Fisheries Service (NMFS), if the federal agency determined that its actions were not likely to adversely affect listed species or designated habitat. The new rule eliminated this “concurrence requirement” in certain instances, instead allowing agencies to independently determine when formal consultation is required under the ESA. The 2008 consultation rule

also addressed other changes to the consultation regulations, including specifically exempting endangered species consultations on the basis of “global processes” such as climate change, establishing firm deadlines for the completion of informal consultations, and modifying the definition of the term “effects of action” as used in the consultation analysis.

Any withdrawal of the 2008 consultation rule is likely to revive the issue of whether the Service agencies will need to address the effect of greenhouse gas emissions on threatened and endangered species. In a recent hearing before the Senate Energy and Natural Resources Committee, David Hayes, who is nominated to be Deputy Secretary of the Interior, reiterated that it is DOI’s intent that the ESA not be used as a tool to regulate greenhouse gas emissions.

Secretary Salazar Affirms Fish and Wildlife Decision to Delist Gray Wolves in Certain States

On March 6, 2009, Secretary of the Interior Salazar affirmed a Bush Administration decision to remove gray wolves (*canis lupus*) from the endangered species list in the Great Lakes region, and in the states of Idaho and Montana and parts of Washington, Oregon, and Utah. Gray wolves will remain on the endangered species list in Wyoming. This decision reaffirmed the January 14, 2009 announcement by the USFWS providing for removal of the Great Lakes and Rocky Mountain populations of gray wolves from the endangered species list, after determining that these populations had met established recovery targets and each of the States (other than Wyoming) had adequate state wolf management plans to justify delisting. Secretary Salazar’s decision does not affect the status of other listed wolf populations in the lower-48 States.

Interior Department Considering Withdrawal of Polar Bear Section 4(d) Rule

After listing the polar bear (*ursus maritimus*) as a threatened species under the ESA, the USFWS

promulgated an interim and then final Special Rule adopting specific prohibitions and exceptions for activities affecting polar bear habitat and behavior. This special rule, issued in December 2008 and promulgated under section 4(d) of the ESA, provides exceptions from “take” liability otherwise applicable to the polar bear as a threatened species, including specific exceptions for activities which are subject to a separate authorization under the Marine Mammal Protection Act, and exempting the incidental take of polar bears resulting “from activities that occur outside of the current range of the species.” The apparent intent of these exceptions is to ensure that greenhouse gas emissions are not regulated under the ESA in an effort to protect polar bear habitat. Congressional Democrats have signaled their intent to reverse this policy. The recently-enacted omnibus spending bill (Pub. L. No. 111-8) contains a provision, section 429, allowing the Secretary of the Interior to withdraw or reissue the section 4(d) rule on polar bears without following notice and comment rulemaking under the Administrative Procedure Act, if such action is taken no later than May 10, 2009.

Natural Resource Litigation

COURTS AND THE CLEAN WATER ACT

U.S. Supreme Court OK’s EPA’s Use of Cost Benefit Analysis—Fourth Circuit Gives Go-Ahead on Mountaintop Mining—Sixth Circuit Rules on Wetlands and Pesticides—and U.S. Supreme Court to Address Conflict Between EPA and Army Corps Permitting Authority

Several noteworthy decisions involving the application of the Clean Water Act (CWA) have been issued during the first few months of 2009. On April 1, in *Enterger Corp. v. Riverkeeper, Inc., et al.* Nos. 07-588, 07-589 and 07-597, 2009 WL 838242 (U.S. Apr. 1, 2009), the Supreme Court determined that the



Environmental Protection Agency (EPA) permissibly relied on a cost-benefit analysis in setting national performance standards for cooling water intake structures and in providing for cost-benefit variances from those standards. Cooling water intake structures are subject to regulation under the CWA, which mandates that “the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.” Pursuant to the CWA, EPA promulgated national performance standards for large existing facilities, which require that these facilities reduce mortality rates for aquatic organisms, but also allows for site-specific variances if the permit-issuing authority imposes remedial measures. In promulgating these regulations, the EPA specifically declined to require reductions in impingement and entrainment for existing facilities, because the cost of these measures would be substantially higher than in imposing other requirements. The Supreme Court upheld EPA’s regulations, finding that “consideration of the technology’s costs and of the relationship between those costs and the environmental benefits produced” was a reasonable interpretation of the CWA’s requirement to use “the best technology available for minimizing adverse environmental impact.”

In *Ohio Valley Environmental Coalition v. Aracoma Coal Co.*, 556 F.3d 177 (4th Cir. 2009), the

Fourth Circuit overturned a lower court decision enjoining certain mountaintop mining operations in West Virginia. For CWA purposes, at issue was whether a short stretch of stream running to a sediment pond is a water of the United States, and thus requires a permit under CWA section 402 to discharge into it. The Fourth Circuit agreed with the Army Corps of Engineers that those stretches of stream are part of a wastewater treatment system, not necessitating a section 402 permit. Several recent trade press reports have chronicled EPA’s recent efforts to address such activities.

In yet another effort to interpret the scope of jurisdiction over wetlands in light of *Rapanos v. United States*, 547 U.S. 715 (2006), the Sixth Circuit, in *U.S. v. Cundiff*, 555 F.3d 200 (6th Cir. 2009), avoided deciding what test to apply and held, instead, that under either of the approaches in *Rapanos* (the plurality test involving a continuous surface connection and a relatively permanent body of water connected to traditional interstate navigable waters or Justice Kennedy’s significant nexus test), CWA jurisdiction existed.

In *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), the Sixth Circuit held that EPA’s attempt to avoid regulating pesticides (and, more importantly, pesticide residues or excess pesticides) applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), pursuant to section 402 of the CWA, was impermissible. The court concluded that pesticides intentionally applied to areas and leaving a residue are pollutants discharged from a point source: “If ... a chemical pesticide is known to have lasting effects beyond the pesticide’s intended object, then its use must be regulated under the [CWA].”

And, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 486 F.3d 638 (9th Cir. 2007), cert. granted, 128 S.Ct. 2995 (U.S. June 27, 2008) (No. 07-990), the Supreme Court will determine whether the Ninth Circuit

erred in invalidating a permit issued by the Army Corps of Engineers for discharges from a gold mine in Alaska. At issue, again, is the apparent conflict between the Corps's permitting authority under section 404 of the CWA and EPA's permitting authority under CWA section 402. Oral argument was held on January 12, 2009 and a decision is pending.

ARTICLE III STANDING

Standing Doctrine Invoked with Increasing Frequency

Courts recently have dismissed several visible cases based upon a party's lack of standing to pursue the challenge. In *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009), the Supreme Court (5-4) avoided deciding whether regulations exempting small fire-rehabilitation and timber-salvage projects from a notice, comment and appeal process violated the Forest Service Decision-making and Appeals Reform Act. The Court concluded that the respondents lacked standing to bring the challenge, because they failed to demonstrate that application of the regulations to a particular salvage sale of timber caused them any injury in fact when the parties settled the dispute over that particular salvage sale. The Court observed that "[w]e know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests."



On March 13, 2009, the D.C. Circuit dismissed for lack of standing a petition by the Delaware Department of Natural Resources and Environmental Control challenging FERC's approval of an application to site a liquefied natural gas terminal at the mouth of the Delaware River, conditioned on the project obtaining state authorizations under the Coastal Zone Management Act (CZMA) and Clean Air Act (CAA). Delaware claimed that FERC had exceeded its statutory authority by conditionally approving the application before the requirements of the CZMA and CAA had been satisfied. The court held that, because FERC's approval could not authorize the project absent Delaware's approval, Delaware had suffered no injury in fact and therefore lacked standing. *Del. Dep't of Natural Res. & Envtl. Control v. FERC*, No. 07-1007 (D.C. Cir. Mar. 13, 2009). And, in another case, the D.C. Circuit dismissed for lack of standing a challenge to the Federal Aviation Administration's reliance on a list of certain activities that are presumed to be in conformity with a state's State Implementation Plan (SIP), in accordance with the CAA. *County of Del., Pa. v. Dep't. of Transp.*, 554 F.3d 143 (D.C. Cir. 2009).

COURTS AND THE ENDANGERED SPECIES ACT

Ninth Circuit affirms National Marine Fisheries Service Hatchery Listing Policy

On March 16, 2009, the Ninth Circuit upheld NMFS's policy on treatment of hatchery populations in listing decisions under the ESA. *Trout Unlimited v. Lohn*, No. 06-00483 (9th Cir. Mar. 16, 2009). The Ninth Circuit reviewed and reversed a federal district court's finding (in the context of a listing decision on the Upper Columbia River steelhead) that NMFS's 2005 Final Hatchery Listing Policy (2005 Hatchery Policy) violated the ESA. The 2005 Hatchery Policy requires, among other things, that hatchery fish be considered as part of the same evolutionarily significant unit (ESU), or "species," as natural fish when they are not genetically or reproductively isolated. The 2005 Hatchery Policy also requires that NMFS consider the ESU as a whole when making listing decisions and allows for the take of hatchery fish, under certain circumstances, even where the population is listed as threatened. In reversing the lower court decision, the Ninth Circuit held that, while the "ESA's primary goal is to preserve the ability of natural populations to survive in the wild," NMFS could consider the role of hatchery fish in preserving wild steelhead. Further, because NMFS had sufficient scientific data and expertise favoring its position, the court would not disturb NMFS's findings or regulations. This decision, consequently, leaves in place NMFS's 2005 Hatchery Policy, which allows for both wild and hatchery fish to be considered in listing decisions and allows for different levels of protection for wild and hatchery fish under the ESA.

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FOR ADDITIONAL INFORMATION

With over 80 lawyers and policy professionals in Washington, DC and Seattle, WA, Van Ness Feldman offers comprehensive regulatory, policy advocacy, permitting, and litigation services in connection with the access to and use of natural resources and federally-managed lands. The firm advises energy and real estate project developers, mining and commercial fishing enterprises, cruise lines and hospitality companies, National Park concession operators, Indian tribes, and Alaskan Native Communities on a wide range of strategic business and legal issues.

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