



Alaska Energy & Environmental Policy Update

May 8, 2009

Today, Secretary Salazar announced that the Department of the Interior will not withdraw the Polar Bear Special 4(d) Rule, commenting that “the Endangered Species Act is not the proper mechanism for controlling our nation’s carbon emissions.” In April, the Secretaries of the Interior and Commerce announced the withdrawal of the December 2008 final rule modifying the Endangered Species Act section 7 consultation regulations, while simultaneously initiating a comprehensive review of the section 7 consultation regulations in an effort to improve the highly inefficient federal consultation process. The U.S. Court of Appeals for the D.C. Circuit vacated the Bush Administration’s five-year oil and gas leasing program for the Outer Continental Shelf. The Environmental Protection Agency published a proposed endangerment finding, which declares that six greenhouse gases endanger public health and welfare. President Obama continues to develop his natural resources management team, and individuals who have been confirmed, nominated or appointed for federal posts of interest to Alaska are listed in this Update. Federal legislation introduced on behalf of Sealaska Corporation may represent the greatest economic stimulus measure available to Southeast Alaska. On May 1, the Federal Energy Regulatory Commission approved TransCanada’s April 23 request for approval to commence the Commission’s pre-filing process for its proposed Alaska natural gas pipeline project.

ADMINISTRATION

As previously reported, federal agencies have set about the task of distributing \$743 billion available under the economic stimulus bill passed in February, formally known as the “American Recovery and Reinvestment Act,” (Pub. L. 111-5). A summary of stimulus funding available for energy-related programs is now available at Van Ness Feldman’s website, <http://www.vnf.com/>, and can be accessed by following the link entitled, “Energy Related Stimulus Funding Opportunities.” The \$743 billion federal stimulus package provides over \$30 billion for investments in energy and energy infrastructure.

Interior Secretary Salazar Will Not Withdraw the Polar Bear Special 4(d) Rule

On May 8, 2009, Secretary Salazar announced that the Department of the Interior (DOI) will not withdraw the Polar Bear Special 4(d) Rule. On May 15, 2008, the U.S. Fish and Wildlife Service (USFWS) published its Final Rule listing the polar bear as a threatened species under the Endangered Species Act



(ESA). In conjunction with the ESA listing, the USFWS promulgated an interim final rule identifying protective measures necessary for the conservation of the polar bear pursuant to section 4(d) of the ESA, issuing final regulations for conservation of the polar bear on December 16, 2008.

Both the interim and final rules promulgated for the polar bear adopted the existing conservation regulatory requirements under the Marine Mammal Protection Act (MMPA) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as the protective measures for polar bears under the ESA. Under the Polar Bear Special 4(d) Rule, if an activity is authorized or exempted under the MMPA or CITES, the USFWS “will not require any additional authorization under the ESA,” meaning that a separate permit issued under the ESA is not required.

The Omnibus Appropriations bill passed by Congress in March gave the Secretary of the Interior the authority to overturn certain regulations that the Bush Administration adopted under the ESA. One of the regulations was the Polar Bear Special 4(d) Rule. The rider gave the Secretary of the Interior 60 days to withdraw or “reissue” the regulations, with a deadline of May 10. Today, Secretary Salazar announced that he will not withdraw the polar bear rule. Instead, USFWS will “wisely implement the current rule, monitor its effectiveness, and evaluate ... options for improving the recovery of the species.”

Secretary Salazar also clarified the position of the administration with respect to greenhouse gas emissions, commenting “the Endangered Species Act is not the proper mechanism for controlling our nation’s carbon emissions.” Instead, carbon emissions should be managed under “a comprehensive energy and climate strategy that curbs climate change and its impacts - including the loss of sea ice.”

The decision by DOI not to withdraw the Polar Bear Special 4(d) Rule is a critical decision for Alaska, particularly residents of the North Slope. Under the polar bear rule, certain activities can occur without exposing the participant to ESA and MMPA liability, including activities associated with oil and gas development in the Beaufort and Chukchi Seas, Alaska Native subsistence use, self-defense, and the protection of private property and human safety. Overturning the ESA rule also would have opened the door to additional lawsuits by organizations attempting to regulate greenhouse gas emissions using the ESA. Alaska’s congressional delegation and other policymakers have consistently argued that regulation of greenhouse gases should occur through comprehensive climate change legislation.

For activities not covered by a MMPA or CITES authorization or exemption, the applicable ESA prohibitions and requirements still apply. USFWS will still require an intra-agency consultation under section 7 of the ESA for any action authorized, funded, or carried out by a Federal entity, including the issuance of any take authorization under the MMPA. In addition, civil and criminal penalties authorized under the ESA apply if a person fails to comply with the terms and conditions of an authorization or exemption under the MMPA or CITES.



Administration Repeals Endangered Species Act Section 7 Consultation Rules, But Remains Open to Revising the Federal Consultation Process

On April 28, 2009, the Secretaries of the Interior and Commerce announced the withdrawal of the December 2008 final rule modifying the ESA section 7 consultation regulations.

The withdrawal rule reinstates the section 7 consultation regulations as they were in effect on January 14, 2009. This withdrawal decision was made pursuant to section 429 of the recently enacted Omnibus Appropriations bill, which provided a 60-day window in which the Secretaries of Interior and Commerce could “withdraw or reissue” the Section 7 consultation rule and the polar bear section 4(d) rule without public notice and comment procedures under the Administrative Procedure Act (APA).

While restoring the status quo, the withdrawal of the amended consultation regulations does not foreclose the possibility of future revisions. On the contrary, the USFWS and National Marine Fisheries Service will undertake a comprehensive review of the ESA section 7 consultation regulations in an effort to identify any appropriate improvements. To assist in this effort, the agencies have requested public comments, to be submitted by August 3, 2009, regarding potential changes to the existing consultation regulations.

On a related note, the integration of climate change considerations into federal ESA decisions continues to increase. In a decision issued on April 27, 2009, USFWS announced a 90-day finding that the listing of the Tehachapi slender salamander as a threatened species may be warranted and initiated a status review of this species. An important element of this decision is the specific consideration of whether climate change is negatively affecting the species. In this instance, USFWS concluded that there are insufficient climate change models to make meaningful predictions of climate change for the range of the salamander, which is in California. USFWS notes, however, that it will continue to consider climate change impacts on the salamander as part of its further consideration of this potential listing, and USFWS is likely to similarly consider such impacts on other species proposed for listing.

Bush Administration’s U.S. Oil and Gas Policy Vacated by the D.C. Circuit

On April 17, 2009, the U.S. Court of Appeals for the D.C. Circuit vacated the Bush Administration’s five-year oil and gas leasing program for the Outer Continental Shelf (OCS) “on the grounds that the [2007-2012] Program’s environmental sensitivity rankings are irrational.”

The D.C. Circuit found that the five-year plan assessed environmental risk based only on conditions along the coastline and not in open water or sea ice where the actual leasing was to take place. The D.C. Circuit’s decision requires DOI to reconsider the five-year program and to substitute a new program in accordance with the court’s ruling and the Outer Continental Shelf Lands Act (OCSLA). On remand, the Secretary of the Interior must conduct a more complete analysis of the environmental sensitivity of the OCS and “must at least attempt to identify those areas whose environment and marine productivity are most and least sensitive to OCS activity.” Once DOI has conducted its analysis pursuant to OCSLA, DOI



must determine whether its reconsideration of the environmental sensitivity analysis warrants the exclusion of any proposed area from the leasing program. After reconsidering its analysis, DOI also must reassess the timing and location of the leasing program “so as to obtain a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impacts on the coastal zone.”

In response to the April 17 decision, Senator Murkowski commented that she was disappointed that vacating the five-year program would delay in the development of the oil and gas resources that America still requires to fuel its economy. Senator Mark Begich commented that the D.C. Circuit’s decision represents a setback for Alaska, and that the decision resulted from an attempt by the Bush Administration to rush development of the five-year plan.

EPA Proposes Endangerment Finding for Greenhouse Gases

On April 17, 2009, the Environmental Protection Agency (EPA) published a proposed endangerment finding, which declares that six greenhouse gases endanger public health and welfare. Pursuant to section 202(a) of the Clean Air Act, this endangerment finding is a first step in the regulation of emissions of these six greenhouse gases from new motor vehicles.

Any final endangerment finding made by EPA could be argued to justify other federal agency actions regarding impacts of climate change on wildlife, public lands and water resources—including taking measures to address climate change in the implementation and enforcement of the ESA. Some environmental groups already have raised this possibility.

EPA concludes that the effects of these greenhouse gas emissions on wildlife and ecosystems have implications for our “public welfare” and, therefore, are the underlying elements of the endangerment finding that greenhouse gas emissions contribute to air pollution, which may reasonably be anticipated to endanger public health and welfare. As part of its announcement, EPA has released a technical support document that provides, among other things, an assessment of climate change impacts on the environment. The technical support analysis highlights many of the same issues and supporting science addressed in the 2008 USFWS listing of the polar bear. Both the endangerment finding and technical support documents address effects on wildlife and conclude that changes in climate will cause species to shift north and to higher elevation and “fundamentally rearrange U.S. ecosystems.” Further, EPA asserts that coral reefs, sea-ice ecosystems, high altitude boreal forests and mountain ecosystems are especially vulnerable ecosystems.

Van Ness Feldman’s Kyle Danish, Doug Smith, and Tomás Carbonell cover EPA’s proposed endangerment finding in more detail in this April 20 Issue Alert: <http://www.vnf.com/news-alerts-355.html>.



President Obama Continues to Shape Natural Resources Team

President Barack Obama continues to develop his natural resources team, drawing on individuals from the private sector, interest groups, state government, academia, and former officials from the Clinton administration. Among those individuals of interest to Alaska who have been confirmed, nominated or appointed, for federal posts:

Department of the Interior

On May 7, Secretary Salazar appointed Pat Pourchot to be his Special Assistant for Alaska Affairs, based in Anchorage. Early in his career, Mr. Pourchot worked for DOI on environmental issues surrounding the transport of Alaska oil to U.S. markets, and on Capitol Hill, working on oil and gas, mining, forestry and environmental issues. In Alaska, Mr. Pourchot has served as a land manager for the Alaska Federation of Natives, as resource manager for an Alaska Native Corporation, in leadership positions in the Alaska House of Representatives and Alaska Senate, as executive director for Commonwealth North, and as legislative director as well as Commissioner of the Alaska Department of Natural Resources for former Governor Tony Knowles. Currently, Mr. Pourchot is the Senior Policy Representative for Audubon Alaska. Mr. Pourchot will work with DOI's senior management in Alaska as well as DOI's Director of Alaska Affairs Kim Elton.

Thomas L. Strickland was confirmed as Assistant Secretary of Interior for Fish and Wildlife and Parks on April 30, 2009. Strickland currently serves as Chief of Staff to Secretary Salazar and will serve double duty as both Chief of Staff and Assistant Secretary. Strickland is a former United States Attorney and two-time Democratic candidate for the U.S. Senate in Colorado.

David Hayes has been nominated as Deputy Interior Secretary, the number two position at Interior and a position he also held during the Clinton Administration. Senator Murkowski recently added her name to Utah Senator Bob Bennett's procedural hold on Hayes's confirmation, prompted by the administration's decision to overturn the ESA section 7 consultation rule without following notice and comment procedures and other decisions she believes are harmful to the nation's energy security. In addition to serving in the DOI under President Clinton, Hayes directed the energy and natural resources transition for President Obama, and is a former chairman of the board of the Environmental Law Institute and senior fellow at the World Wildlife Fund.

Hilary Tompkins has been nominated as Solicitor of DOI. Tompkins is a member of the Navajo nation and a former counsel to Governor Bill Richardson (D-NM). Currently, Tompkins an adjunct professor at the University of New Mexico School Of Law, and is a former trial attorney with the Justice Department Natural Resources Division, and a former law clerk to the Navajo Nation Supreme Court. Tompkins's confirmation is also being delayed by a hold by Senator Bennett.



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Larry EchoHawk has been nominated as Assistant Secretary of Interior for Indian Affairs. Echohawk is a member of the Pawnee tribe and is a former tribal attorney, Idaho State legislator, and Idaho Attorney General. Echohawk has been on the faculty of the Brigham Young University Law School since 1994.

Wilma A. Lewis has been nominated as Assistant Secretary of the Interior for Land and Minerals Management. If confirmed, Lewis will oversee the Bureau of Land Management, the Minerals Management Service, and the Office of Surface Mining Reclamation and Enforcement. Lewis served as inspector general of the Interior Department from 1995-1998.

Will Shafroth has been appointed Deputy Assistant Secretary for Fish and Wildlife and Parks at the Department of Interior. Previously, Shafroth served as Executive Director of Colorado Conservation Trust, and as Assistant Secretary for Land and Coastal Resources in the California Resources Agency.

Ned Farquhar has been appointed Deputy Assistant Secretary for Land and Minerals Management at DOI. Farquhar is a former member of President Obama's energy and natural resources transition team and worked at the Natural Resources Defense Council and as a policy adviser to Gov. Bill Richardson. In 2007 Farquhar was appointed chairman of the New Mexico Renewable Energy Transmission Authority.

Department of Energy

Cathy Zoi has been nominated as Assistant Secretary of Energy for Energy Efficiency and Renewable Energy. Zoi has worked as an energy analyst for Pacific Gas and Electric Co., as a manager at the EPA, and as chief of staff to the White House Office of Environmental Policy during the Clinton administration. Currently, Zoi is an executive at Al Gore's Alliance for Climate Protection.

Inés Triay has been nominated as Assistant Secretary of Energy for Environmental Management. Triay has worked at DOE's Environmental Management program for 24 years and has been acting assistant secretary since November 2008.

U.S. Forest Service

Jay Jensen has been appointed as Deputy Undersecretary for Natural Resources and Environment. Prior to his appointment, Jensen worked on the Western Governors' Association's biomass energy program. He has also served executive director of the Council of Western State Foresters/Western Forestry Leadership Coalition.

National Oceanic and Atmospheric Administration (NOAA)

Jane Lubchenco has been confirmed as the Administrator of NOAA. Lubchenco is a marine biologist and former professor of zoology at Oregon State University.



CONGRESS

Sealaska Bill Now before U.S. Congress May Represent the Greatest Economic Stimulus Measure Available to Southeast Alaska's Village Economy

On April 23, 2009, Senators Lisa Murkowski and Mark Begich and Representative Don Young introduced the Southeast Alaska Native Land Entitlement Finalization Act, S. 881 and H.R. 2099, respectively, to permit Sealaska Corporation to finalize Native land selections pursuant to the Alaska Native Claims Settlement Act (ANCSA). The legislation would amend ANCSA to permit Sealaska to select its remaining land entitlement from a revised pool of federal lands. Under current law, Sealaska is required to choose approximately 65,000 acres of remaining ANCSA entitlement lands within small "boxes" of land that were made available to Sealaska under ANCSA in 1971. No other Alaska Native Corporation was required to choose from within such boxes. The legislation would permit Sealaska to use part of its entitlement for sacred and cultural sites as well as alternative economic development sites, to be used for ecotourism and green energy development, and to select lands for economic development that are predominantly roaded.

Sealaska is the largest private, for-profit employer in Southeast Alaska, on the basis of direct and contractor employment, but the Native Corporation's success also has a statewide economic impact. ANCSA requires all ANCSA Regional Corporations to share 70 percent of their revenues from the development of natural resources on their lands. From 1971 to 2005, Sealaska contributed nearly \$300 million to other Regional Corporations, which was 42 percent of the total of revenues shared, and this from a land base totaling less than 1 percent of all ANCSA lands. Sealaska's Alaska operations maintain over 52 percent Native shareholder hire, and corporate headquarters currently has over 83 percent shareholder hire.

Hearings on the Sealaska bill are expected take place later this summer before the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources.

NATURAL RESOURCE PROJECTS MOVING FORWARD IN ALASKA

Alaska Natural Gas Pipeline

On May 1, 2009, the Federal Energy Regulatory Commission (FERC) approved TransCanada's April 23 request for approval to commence the Commission's pre-filing process for its proposed Alaska pipeline project. Although TransCanada's original schedule initially provided for a later pre-filing date in accordance with FERC's regulations, which provide for pre-filing after the completion of an initial open season and closer to the formal application date, FERC made it clear that it wanted modify the normal process and require pre-filing earlier for Alaska pipeline projects. As a result, TransCanada agreed to file its pre-filing request about two years earlier than originally anticipated.



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FERC’s pre-filing process is designed to facilitate Commission staff and stakeholder involvement prior to the filing of a formal project certificate application, and to help to identify issues and study needs that otherwise could potentially delay submittal or consideration of an application. According to TransCanada Vice President Tony Palmer, “Initiating the pre-file processes now will enhance the exchange of information between FERC staff and also assist with coordination of the agency activities for this important project.”

FERC granted a similar request by the Denali pipeline project, a partnership of BP and ConocoPhillips, last summer.

FOR ADDITIONAL INFORMATION

Previous additions of the Alaska Policy Update are available at Van Ness Feldman's website, <http://www.vnf.com/news-policyupdates.html>.

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With 80 lawyers and policy professionals in Washington, DC and Seattle, WA, Van Ness Feldman has a unique and significant understanding of federal and state laws, regulations, and policies that impact companies and other organizations operating in Alaska. Members of the firm have been involved in the drafting and enactment of many of Alaska’s landmark federal laws or have served in a federal agency with oversight responsibility over Alaska natural resources and environment issues. This knowledge and experience, together with excellent professional relationships with the Alaska Congressional Delegation and other key policy makers in the Congress, the executive branch agencies, and the Alaska State government, make Van Ness Feldman uniquely situated to develop and implement cost-effective strategies and solutions for clients on a broad range of Alaska-related matters, from energy and natural resources development to the unique concerns of Alaska municipalities and Alaska Native organizations.

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