

Update

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IN THIS ISSUE

Energy Development on the
Outer Continental Shelf

Federal Action on Wetlands

Endangered Species Act
Developments

Renewable Energy
on Public Lands

Courts and the
Clean Water Act

Salmon Recovery Litigation

Sage Grouse Litigation



Van Ness Feldman's Public Lands and Natural Resources Update is 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

INTERIOR DEPARTMENT AND FEDERAL ENERGY REGULATORY COMMISSION TAKE IMPORTANT STEPS TO FACILITATE RENEWABLE ENERGY PROJECT DEVELOPMENT ON THE OUTER CONTINENTAL SHELF

The U.S. Department of the Interior (DOI) and the Federal Energy Regulatory Commission (FERC) recently took important steps to address the legal and regulatory uncertainties that have, to date, hampered the development of wind and hydrokinetic renewable energy projects on the Outer Continental Shelf (OCS). DOI and FERC signed a Memorandum of Understanding (MOU) settling a long-standing jurisdictional dispute regarding oversight of hydrokinetic and other renewable energy projects on the OCS. Following this MOU, DOI's Minerals Management Service (MMS) issued new final regulations clarifying its authority to grant leases, easements, and rights-of-way for renewable energy projects on the OCS. These new regulations took effect on June 29, 2009.

It is hoped that these actions, together with additional guidance promised by MMS, will help facilitate renewable energy project development on the OCS. For detailed analysis of both the FERC/DOI MOU and the new OCS regulations, see the following issue alerts by Van Ness Feldman.

- [FERC & MMS Sign Agreement Clarifying Jurisdiction Over Renewable Energy Projects on the OCS \(April 10, 2009\)](#)
- [MMS Issues Final Regulations Governing Renewable Energy Projects on the OCS \(April 24, 2009\)](#)

CONGRESS AND THE OBAMA ADMINISTRATION MOVE TO EXPAND PROTECTIONS FOR WETLANDS

On June 18, 2009, the Senate Committee on Environment and Public Works approved S.787, the Clean Water Restoration Act, which was originally sponsored by Senator Russ Feingold. The bill was approved by the Committee along party lines (12-7) after being amended by Senators Baucus (D-MT), Klobuchar (D-MN) and Boxer (D-CA) and represents the most successful attempt in recent years "to clarify the jurisdiction of the United States over waters of the United States," in light of several Supreme Court decisions narrowing protections for wetlands under the Clean Water Act (CWA). In addition to S.787, which will now be considered by the full Senate, key members of the Obama Administration recently outlined the Administration's position regarding wetlands in letters to Representative James Oberstar (D-MN), Chair of the House Transportation and Infrastructure Committee, and Senator Barbara Boxer (D-CA), Chair of the Senate Environment and Public Works Committee. Given these legislative and executive efforts, there appears to be growing momentum in Washington to reassess the treatment of wetlands under the CWA.

As amended, S.787 specifically references the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (Jan. 9, 2001), and *Rapanos v. United States*, 547 U.S. 715 (June 19, 2006) and states that these decisions "have resulted in confusion, permitting delays, increased costs, litigation, and reduced protections for waters of the United States." In *Cook County*, the Supreme Court held that the CWA's authority to require permits for discharges into "navigable waters" did not extend to discharges into seasonal ponds. In *Rapanos*, the Court



effectively provided two separate tests for determining when wetlands are among the “waters of the United States” that are subject to regulation under the CWA. Under Justice Scalia’s plurality approach in *Rapanos*, federal jurisdiction exists over a wetland only if the wetland is adjacent to a channel that “contains a . . . relatively permanent body of water connected to traditional interstate navigable waters,” and has a “continuous surface connection” to that water. In contrast, Justice Kennedy in *Rapanos* announced that the CWA applies to wetlands that have a “significant nexus” to waters that are commonly understood as navigable.

If enacted into law, S.787 would effectively reverse the holdings of *Cook County* and *Rapanos* by defining “[w]aters of the United States” to include “all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.”

Key Obama Administration officials have urged congressional action on this issue. On May 20, 2009, Council of Environmental Quality Chair Nancy Sutley, Environmental Protection Agency Administrator Lisa Jackson, U.S. Army Corps Assistant Secretary Terrance Salt, Agriculture Secretary Tom Vilsak, and Interior Secretary Ken Salazar wrote to congressional leaders, urging that: (1) the CWA should broadly protect the Nation’s waters, “consistent with the full extent of Congressional authority”; (2) the definition of “waters of the United States” should be made more understandable and transparent; (3) there should be more consistency between the CWA and agricultural wetlands programs; and (4) long-standing practices, such as exemptions under the CWA for “prior converted cropland,” should be encoded into law. The Administration officials further stated that “[e]nactment of legislation amending the Clean Water Act — based on these principles — would go a long way toward addressing the substantial confusion and uncertainty arising from the recent Supreme Court decisions.”

To date, no similar provision has been introduced in the House of Representatives.

OBAMA ADMINISTRATION TAKES ACTION ON BUSH ADMINISTRATION AMENDMENTS TO ENDANGERED SPECIES ACT CONSULTATION REGULATIONS AND SPECIAL POLAR BEAR RULE; SEEKS PUBLIC COMMENTS ON POTENTIAL CHANGES TO CONSULTATION REGULATIONS

Pursuant to authority granted to the Secretary of Interior under section 429 of the 2009 Omnibus Appropriations Act, Pub. L. 111-8, the Obama Administration has withdrawn the Bush Administration’s Endangered Species Act (ESA) section 7 consultation regulations, but has declined to withdraw the Bush Administration’s Special 4(d) Rule regarding polar bears.

The withdrawn section 7 regulations primarily addressed changes to “applicability” rules regarding when consultation with the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) is required, the definitions for direct and indirect effects of a proposed action which must be addressed in a consultation inquiry, and certain procedural changes to the consultation process. Notably, the regulations precluded the use of the ESA to regulate greenhouse gases by excluding effects of “global processes,” such as climate change, from the scope of section 7 consultations.

Concurrently, USFWS and NMFS implemented the section 7 consultation regulations as they existed prior to the effective date of the December 2008 amendments, effectively restoring the longstanding regulatory status quo. While restoring the status quo, the withdrawal of the amended consultation regulations does not foreclose the possibility of future revisions. On the contrary, USFWS and NMFS 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 May 8, 2009, Secretary Salazar announced that DOI would not withdraw the Polar Bear Special 4(d) Rule. On May 15, 2008, USFWS published a Final Rule listing the polar bear as a threatened species under the ESA. In conjunction with the ESA listing, 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.

The Polar Bear Special 4(d) Rule provides exemptions from “take” liability otherwise applicable to polar bears as a threatened species. Specifically, the Special 4(d) Rule holds that any activity that is authorized or exempted under the Marine Mammal Protection Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora, “will not require any additional authorization under the ESA,” meaning that a separate permit under the ESA will not be required for polar bears. Rather than withdraw the Special 4(d) Rule, Secretary Salazar suggested that USFWS will “wisely implement the current rule, monitor its effectiveness, and evaluate . . . options for improving the recovery of the species.”

SECRETARY OF AGRICULTURE VILSACK ASSERTS AUTHORITY OVER ROADLESS AREAS

On May 28, 2009, Department of Agriculture Secretary Tom Vilsack issued an interim directive providing that any road construction or timber harvesting within the more than 58 million acres of the nation’s roadless areas will require the Secretary’s personal approval. The directive applies only to prospective projects and requires that Secretary Vilsack approve or disapprove “the construction and reconstruction of roads and the cutting, sale, or removal of timber in inventoried roadless areas on certain lands administered by the Forest

Service.” The directive specifically exempts roadless areas in Idaho, which has adopted its own roadless rule.

The roadless rule, first adopted by President Bill Clinton in January, 2001, severely limited development in approximately one-third of America’s national forests. The Bush Administration revised this policy by providing state governors with the latitude to petition the U.S. Forest Service to determine the size of roadless areas within their states. The Bush Administration also settled a case with the state of Alaska to specifically exempt certain areas of the Tongass National Forest from the roadless rule. After much litigation, the legal status of the roadless rule remains uncertain. Courts in California and Wyoming have issued conflicting decisions for and against the roadless rule, and appeals are currently pending in the Ninth and Tenth Federal Circuits.

According to Secretary Vilsack, “This interim directive will provide consistency and clarity that will help protect our national forests until a long-term roadless policy reflecting President Obama’s commitment is developed.” The interim directive will last for one year, unless otherwise revoked or renewed.

NEW CLIMATE CHANGE BILL TO GIVE DOI GREATER SITING AUTHORITY OVER RENEWABLE ENERGY PROJECTS

Congress continues to explore ways to give DOI a greater role in siting renewable energy projects, as evidenced by the passage of the H.R. 2454, the

American Clean Energy and Security Act, which was passed in the House on June 26, 2009. Among the many climate change and energy policy issues addressed in the bill, H.R. 2454 contains a transmission planning and siting provision, which has the stated goal of facilitating “renewable and other zero-carbon and low-carbon energy sources for generating electricity.” In furtherance of this goal, H.R. 2454 designates DOI as the “lead agency” for purposes of coordinating all permitting and environmental reviews for electricity projects to be constructed on federal lands in the Western Interconnection. Projects in the Eastern Interconnection, and the States of Alaska, Hawaii, and parts of Texas, are not covered by this provision. H.R. 2454 also requires the Secretary of the Interior to coordinate with tribes, multistate entities, and state agencies and to establish “prompt and binding intermediate milestones and ultimate deadlines” for review of proposed projects. In all cases, the Secretary of the Interior is required to complete “permit decisions and related environmental reviews” within one year of receiving a completed application.

DOI IDENTIFIES AREAS FOR SOLAR ENERGY DEVELOPMENT IN SIX WESTERN STATES

In a joint announcement with Senator Harry Reid (D-NV) on June 29, 2009, Interior Secretary Salazar announced new federal initiatives to expedite the production of solar energy on public lands in six western states—Nevada, Arizona, California, Colorado, New Mexico, and Utah. Among other



things, Secretary Salazar announced the designation of 24 tracts of land, comprising roughly 670,000 acres, as “Solar Energy Study Areas” which, according to DOI, “have excellent solar development potential and limited resource conflicts.” The 24 tracts of land, all of which are administered by the Bureau of Land Management (BLM), will be studied further to determine whether they should be designated as “Solar Energy Zones,” or areas suitable for utility-scale solar energy production. As a result, BLM has placed a two-year moratorium on new mining claims, and other third-party activities, while these areas are being evaluated. Currently, BLM has received approximately 158 applications to produce solar energy on BLM land. However, to date, these applications have not been processed. In addition to designating the Solar Energy Study Areas, Secretary Salazar also announced the creation of four renewable energy coordination offices in Nevada, Arizona, California and Wyoming to help speed the permitting of renewable energy projects.

The locations of the 24 BLM Solar Energy Study Areas can be viewed at http://www.blm.gov/wo/st/en/prog/energy/solar_energy/Solar_Energy_Study_Areas.html.

Natural Resource Litigation

SUPREME COURT HOLDS THAT MINE TAILINGS MAY BE REGULATED AS “FILL MATERIAL” UNDER THE CLEAN WATER ACT

On June 22, 2009, in *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council et al.*, Nos. 07-984, 07-990, 2009 WL 1738643 (June 22, 2009), the Supreme Court held (6-3) that the U.S. Army Corps of Engineers (Corps), not the Environmental Protection Agency (EPA), had authority to issue a permit authorizing an Alaska gold mine to discharge 4.5 million tons of mine waste into Lower Slate Lake, located roughly three miles from the mine site. In addition, the Court held that



the Corps did not violate the CWA in issuing the permit. At issue before the Court was whether mine slurry, a combination of crushed rock and liquid, constituted “fill material” under the CWA, and thus could be discharged into navigable waters pursuant to a section 404 permit issued by the Corps. The Court determined that under joint regulations by the Corps and EPA, the mine slurry did constitute fill material, and thus could be discharged under the Corps’ authority.

The Court also considered whether the slurry discharge would violate EPA’s New Source Performance Standards, as promulgated under section 306(b) of the CWA. On this point, the Court found that neither the CWA nor the agency’s regulations resolved the question, and thus the Court would defer to an internal EPA memorandum, which explained that “the performance standard applies only to the discharge of water from the lake into the downstream creek, and not to the initial discharge of slurry into the lake.” On July 8, 2009, in response to the Supreme Court’s ruling, the Ninth Circuit suspended an injunction blocking the slurry disposal.

This decision carries significant implications for mines seeking permits under the CWA for the discharge of mine tailings.

For detailed analysis of the *Coeur Alaska* decision, see the following issue alert by Van Ness Feldman.

- *Supreme Court Holds that Mine Tailings May Be Regulated as “Fill Material” under the Clean Water Act (June 24, 2009)*

ELEVENTH CIRCUIT HOLDS THAT TRANSFERS OF POLLUTANTS AMONG WATERS OF THE UNITED STATES ARE EXEMPT FROM CLEAN WATER ACT SECTION 402 REQUIREMENTS

On June 4, 2009, the U.S. Court of Appeals for the Eleventh Circuit held, in *Friends of the Everglades v. South Florida Water Management District*, No. 07-13829, 2009 WL 1545551 (11th Cir. June 4, 2009), that section 402 of the CWA does not apply to discharges of pollutants resulting from a transfer of water between distinct bodies. This opinion marks the latest chapter in the long-standing litigation over the jurisdictional reach of the CWA’s National Pollutant Discharge Elimination System, which requires permits for discharges of pollutants from point sources into waters of the United States. The decision also is the first to rule on EPA’s 2008 Water Transfers Rule, which excludes from Section 402 requirements activities that convey or connect waters of the United States and do not subject the transferred water to an intervening industrial, municipal, or commercial use.

For detailed analysis of the *Friends of the Everglades* decision, see the following issue alert by Van Ness Feldman.

- *Eleventh Circuit Holds that Transfers of Pollutants among Waters of the United States Are Exempt from Clean Water Act Section 402 Requirements (June 15, 2009)*

COLUMBIA RIVER BiOp LITIGATION ON HOLD PENDING THE OBAMA ADMINISTRATION’S REVIEW OF THE 2008 BiOp

The ongoing litigation before Judge Redden in the U.S. District Court of Oregon over the National Oceanic and Atmospheric Administration Fisheries’ 2008 Federal Columbia River Power System Biological Opinion (BiOp) is currently on hold until August 14, 2009. To date, the Obama Administration has

been studying the issues raised in the BiOp litigation and has conferred with the plaintiffs to hear their concerns. On May 4, 2009, the court gave the parties 30 to 60 days to better understand the BiOp, and stated that it would provide the parties with guidance to resolve the key issues in the BiOp.

On May 18, 2009, the court sent a letter to the involved parties regarding its tentative position on the validity of the BiOp and suggested additional actions that may avoid another remand. Notably, the court stated that it still has “serious reservations” about whether the “trending toward recovery” standard complies with the ESA. The court then indicated that it believed the BiOp’s conclusion that all 13 salmonid species are, in fact, on a “trend toward recovery” is arbitrary and capricious. The court also urged the federal defendants to consider implementing the following measures as part of the adaptive management process: (1) committing additional funds to estuary and tributary habitat mitigation, monitoring, and evaluation; (2) identifying specific tributary and estuary habitat improvement projects beyond December 2009; (3) providing periodic reports to the court, and allowing for independent scientific oversight of the tributary and estuary habitat mitigation actions; (4) committing additional flow to both the Columbia and Snake Rivers; (5) developing a contingency plan to study specific, alternative hydro actions, such as flow augmentation and/or reservoir drawdowns, as well as what it will take to breach the lower Snake River dams if all other measures fail (*i.e.*, independent scientific evaluation, permitting, funding, and congressional approval); and (6) continuing the Independent Scientific Advisory Board’s recommended spring and summer spill operations throughout the life of the BiOp. The court concluded its letter by stating that “the entire region may be able to avoid the additional costs and uncertainty of yet another round of consultation and litigation” if there is a “commitment to these additional and specific mitigation actions,

independent scientific review, and the development of a contingency plan.”

On June 19, 2009, the United States informed the court of the steps being taken by the Obama Administration to review the BiOp, including staff briefings, solicitation of regional viewpoints, technical briefing sessions, a site visit to view the dams and fish passage facilities, and consideration of the court’s May 18, 2009 letter. The Obama Administration has requested additional time to more fully assess the BiOp.

D.C. CIRCUIT VACATES FIVE-YEAR OIL AND GAS LEASING PROGRAM FOR OUTER CONTINENTAL SHELF

On April 17, 2009, the D.C. Circuit vacated DOI’s five-year oil and gas leasing program for areas of the OCS. *Center for Biological Diversity v. Dep’t of Interior*, No. 07-1247 (D.C. Cir. Apr. 17, 2009). In doing so, the court rejected the claims of three environmental groups and an Alaskan Native village, which argued that the Outer Continental Shelf Lands Act (OCSLA) requires DOI to consider both the effects of climate change on OCS areas and the effects of the leasing program on climate change. The court also rejected the groups’ National Environmental Protection Act and ESA claims as unripe, holding that because this was the first stage of

a multi-stage leasing program there was no irreversible and irretrievable commitment of resources or harm to ESA-listed species. The court nevertheless found that, by relying solely on a study examining the sensitivity of shorelines to oil spills, DOI failed to comply with the OCSLA requirement to examine the environmental sensitivity of the OCS. As a result, the court vacated the Leasing Program and remanded it to DOI for reconsideration.

This decision delays efforts to expand oil and gas leasing in the Beaufort, Bering, and Chukchi Seas off the coast of Alaska. Pursuant to the remand, DOI must reconsider several significant elements of the leasing program before any exploration, production, or development can occur. Further, while not addressed by the court, the decision likely has negative implications for the 2008 Chukchi Sea lease sale.

The Justice Department, on behalf of DOI, has since filed a petition for rehearing and/or clarification, asking the D.C. Circuit to clarify that its April 9 order does not invalidate existing leases on the OCS and does not require DOI to promulgate an entirely new five-year program while DOI corrects errors in the current five-year OCS program. The American Petroleum Institute also filed a petition for rehearing, and asked the court to clarify whether its April 17 order invalidates the 2007-2012 leases.





FISH AND WILDLIFE SERVICE AND ENVIRONMENTAL GROUP AGREE TO DELAY LISTING DECISION FOR GREATER SAGE GROUSE

In a stipulation filed with the Idaho U.S. District Court, USFWS announced that it will delay a decision whether to list the greater sage grouse (*Centrocercus urophasianus*) as endangered or threatened under the ESA until sometime before a February 2010 deadline. *Western Watersheds Project v. U.S. Fish & Wildlife Serv., D. Idaho, No. 06-CV-277*. USFWS's listing decision will have significant implications for environmental groups, energy developers and policymakers because greater sage grouse live primarily in the

sage-brush plains of the intermountain West, an area that holds significant oil and gas deposits and is increasingly looked to for wind energy production.

The agreement between USFWS, through the Justice Department, and the Western Watersheds Project, an Idaho-based environmental group, extends a May 2009 deadline for the decision, and comes against the backdrop of a December 2007 court order, which set aside a former determination by USFWS that listing the greater sage grouse was not warranted under the ESA.

According to a USFWS 2008 Interim Status Update, the number of greater

sage grouse hovers somewhere between 150,000 and 500,000 across the West. While the "range-wide greater sage-grouse populations have experienced long-term declines in the past 43 years" according to the Interim Status Update, "that decline [has] lessen[ed] in the past 22 years." The primary threats to sage grouse, according to USFWS, come from habitat loss due to oil and gas exploration and development, "increased fire frequency which has exacerbated the spread of invasive species such as cheatgrass," development of "renewable energy such as wind power," and "the increased threat posed by West Nile Virus."

USFWS cited "timing and workload concerns" as reasons for extending the filing decision, as well as a desire to consider private scientific research currently being conducted on sage grouse populations. Although the sage grouse has not yet been formally listed under the ESA, federal agencies are considering the impact of development on the sage grouse, as seen in a recent BLM decision on June 23, 2009 not to issue oil and gas leases on 31 parcels in Utah, although the sale of the leases had already been completed. In not issuing the leases, BLM cited a need to consider the protest of an environmental group regarding the impact of oil and gas development on greater sage grouse and the Gunnison grouse (*Centrocercus minimus*).

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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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