

Update

PUBLIC LANDS AND NATURAL RESOURCES



VanNess
Feldman

NOVEMBER 2009
IN THIS ISSUE

EPA Issues New Clean Water Act Enforcement Action Plan

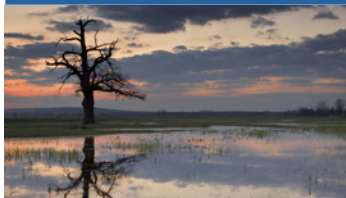
Congress Seeks to Regulate Coal Mine Methane

Interior to Outline Policies to Address Climate Change

Wind Turbines Challenged in Federal Court Over Impacts to Endangered Bats

Montana Court Finds Grizzlies "Threatened"

Ninth Circuit Rejects Land Exchange for Proposed California Landfill



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

EPA ISSUES NEW CLEAN WATER ACT ENFORCEMENT ACTION PLAN

On October 15, 2009, the Environmental Protection Agency ("EPA") issued a new Clean Water Act Enforcement Action Plan ("Action Plan"). This Action Plan seeks to revamp EPA's enforcement of the Clean Water Act ("CWA") to: 1) target enforcement efforts to the most serious violations; 2) strengthen oversight of state permitting and enforcement programs; and 3) improve transparency in order to "increase pressure for better compliance performance." As it works to implement these goals, EPA will take certain short-term actions to address water quality issues, such as targeting violations and water pollution from Concentrated Animal Feeding Operations ("CAFOs").

According to the Action Plan, "[m]any of the nation's waters are not meeting water quality standards and . . . the threat to safe drinking water is growing." This is due to a variety of causes, including an expanded universe of point and non-point source pollution, deficiencies in EPA's permitting program under the National Pollutant Discharge Elimination System ("NPDES"), a lack of up-to-date information concerning potential polluters, and ineffective and uneven enforcement by states. EPA also cited confusion over the scope of the CWA, resulting from the Supreme Court's decisions in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and *Rapanos v. United States*, 547 U.S. 715 (2006).

In order to target the most serious violations of the CWA, EPA will pursue a "new approach" for ensuring appropriate responses to water quality issues and NPDES violations. EPA will establish an EPA/State Work Group to assess the regulated universe and determine

whether water quality problems are due to regulatory, permitting, or compliance issues. Based on these findings, EPA may undertake enforcement actions, revisions of problematic regulations, or modification or reissuance of permits. Additionally, EPA will develop new tools to link environmental information to compliance data, in order to target discharges for compliance monitoring and enforcement.

The Action Plan also calls for EPA to strengthen its oversight of state water quality enforcement programs. Although EPA has authorized 46 states to run the NPDES program, EPA retains the responsibility to ensure that states are protecting water quality and consistently enforcing CWA requirements. According to the Action Plan, EPA will develop expectations for states and will define how state performance will be measured. Based on these performance standards, EPA will negotiate enforcement agreements, and replace outdated Memoranda of Agreement, that were entered into between EPA and the states. In the short term, EPA will determine whether states are meeting the minimum requirements for NPDES program performance and may disapprove permits, and initiate enforcement actions, where states are underperforming.

In order to improve accountability and transparency, EPA will require electronic reporting from facilities that are required to submit reports to a regulatory agency. This will allow EPA to receive information more quickly and efficiently, and enable real-time targeting of serious violations. As an initial step, EPA will develop a rule to require the electronic submission of discharge monitoring reports.

EPA also has identified three short-term actions it can take to address known compliance and water quality issues. First, EPA will pursue new strategies to enforce

existing rules limiting pollution from CAFOs. Second, EPA will revisit the division of work with states, given existing resource problems, to utilize the combination of existing data and targeting tools to pursue known violations. Third, EPA will aggressively push for immediate electronic reporting.

INSPECTOR GENERAL URGES OVERHAUL OF EPA'S SECTION 404 ENFORCEMENT PROGRAM

On October 26, 2009, the Office of Inspector General ("OIG") released an Evaluation Report of EPA's enforcement of Section 404 of the CWA. Section 404 provides for the regulation of the discharge of dredged and fill material into "waters of the United States," including streams and wetlands. The OIG was highly critical of the agency's enforcement efforts, concluding that "EPA lacks a systematic framework for identifying [section] 404 violations[,] and that, "without an effective framework or strategy, EPA cannot be assured that it is sufficiently protecting wetlands and other surface waters from [section] 404 violations." The Report echoed some of the findings of EPA's Action Plan, discussed above, and recommended, among other things, that EPA: 1) create a national tracking system for complaints and referrals from the U.S. Army Corps of Engineers ("Corps"); 2) improve communication between EPA's headquarters/regions and the Corps's headquarters/districts; and 3) leverage other CWA program resources to identify section 404 violations.

Although the Corps is responsible for issuing permits for dredge and fill activities under section 404, both EPA and the Corps share section 404 enforcement duties under a 1989 Memorandum of Agreement ("MOA"). Under the 1989 MOA, EPA serves in the lead enforcement role with regard to repeat violators, flagrant violations, instances where EPA requests a case, and situations where the Corps determines that an EPA penalty is warranted. The Corps serves in the lead enforcement role regarding all other unpermitted activities and all other violations of section 404 permits.

The OIG Report concluded that the EPA has not proactively utilized its section 404 enforcement power, but rather has primarily relied on tips and referrals from citizens and other agencies. The Report attributed this largely to EPA's limited field presence, and concluded that the agency lacks sufficient tools and procedures to carry out its section 404 duties. Among the deficiencies noted in the Report was that EPA's enforcement database does not contain complete violation histories and that EPA staff cannot directly access the Corps's enforcement records. The Report also suggested that the 1989 MOA does not provide clear guidance as to when the Corps will refer a case to EPA for enforcement, and recommended that this MOA should be revised.

In response to the Report, EPA indicated that it plans to comprehensively evaluate its wetlands program and the Report's recommendations. EPA also may expand the role of its inspectors to investigate potential section 404 violations, and develop a regional pilot program to implement and test the OIG's recommendations.

CONGRESS SEEKS TO REGULATE COAL MINE METHANE

On September 8, 2009, Congressman Nick Rahall (D-WV) introduced H.R. 3534, the Consolidated Land, Energy and Aquatic Resources Act of 2009 ("CLEAR"). This bill, which would significantly overhaul federal oil and gas leasing and royalty programs, also would regulate the emission of Coal Mine Methane ("CMM") from coal mines on federal land. If enacted, this legislation would increase the co-production of natural gas with coal mining and decrease the amount of methane released into the atmosphere from coal mine operations. Specifically, the CLEAR Act would require lessees of federal coal reserves to "recover the coal mine methane associated with the leased coal resources to the maximum feasible extent, taking into account the economics of both the mining and the methane capture operation."

CMM has long been considered a dangerous by-product of underground

coal mining. While no federal or state laws currently prohibit the venting of CMM, according to some, this practice can contribute to global warming and wastes a potential energy source. EPA has found that "methane is 23 times as potent as carbon dioxide at trapping heat in the atmosphere and contributing to global warming[,] and that CMM can potentially be used for "natural gas pipeline injection, power production, co-firing in boilers, district heating, coal drying, and vehicle fuel." Some sources have indicated that by 2020 CMM will constitute up to 8 percent of all methane emissions caused by human activities.

H.R. 3534 would amend the Mineral Leasing Act, 30 U.S.C. 201 *et seq.*, to require that CMM released from mining activities will be included in the coal lease if the U.S. owns both the coal and gas resources. This would provide lessees with an ownership interest in the CMM. The bill further requires that any such coal lease must include a provision requiring the recovery of associated CMM to the maximum extent feasible, taking into account the economics of both the mining and CMM capture operations. When applying for a deep mining lease, the lessee would be required to pay for an analysis to determine whether the CMM can economically be put to productive use or flared: i.e., burned off to create a more benign by-product. If the recovery or flaring of CMM is not economical, or cannot be safely done, the legislation allows coal mining to proceed without CMM capture or flaring.

Under H.R. 3534, where the federal government owns the coal, but the gas is privately owned, the lessee would be required to make a reasonable effort to work with the gas owner for the joint recovery of coal and CMM, if economically feasible. If no agreement can be reached, the Department of the Interior ("DOI") could seek a court order to allow coal mining and methane capture to proceed, subject to a reasonable division of the proceeds from the sale of the coal and CMM. Under H.R. 3534, Federal CMM resources would be subject to a royalty of no less than 12.5 percent.

district court alleging that CRMC's concurrence was conclusively presumed because it had not acted within six months, and that the Rhode Island state license was preempted by the NGA.

The district court held for Weaver's Cove on both counts. The appeals court affirmed, finding that Weaver's Cove was not obligated to provide CRMC with a letter certifying the acceptance of the dredged material, because the material was to be deposited in Massachusetts, not Rhode Island. Thus, by failing to act within six months, CRMC's concurrence was conclusively presumed. Next, the appeals court held that Rhode Island's state licensing program was preempted by the NGA. According to the Court, given that FERC had found the dredging activities to be within its jurisdiction, and given that the state license requirement could block the dredging activity, and thus block the full licensing of the LNG terminal, Rhode Island's licensing requirement was preempted by FERC's authority under the NGA.

A further analysis of this decision is provided in Van Ness Feldman's issue alert, "First Circuit Affirms District Court Decision Striking Down State Effort to Regulate Siting and Construction of LNG Terminal," available at <http://www.vnf.com/news-alerts-405.html>.

WIND TURBINES CHALLENGED IN FEDERAL COURT OVER IMPACTS TO ENDANGERED BATS

On June 11, 2009, the Animal Welfare Institute ("AWI") and other organizations filed suit in a Maryland federal court alleging that a proposed wind energy facility in West Virginia will result in the illegal taking of endangered Indiana bats (*Myotis sodalis*), in violation of the ESA. *Animal Welfare Institute v. Beech Ridge Energy LLC*, No. 09-1519 (W.D. Md. 2009). According to AWI, this lawsuit "is believed to be the first federal lawsuit challenging an industrial wind energy project on environmental grounds." The case went to trial on October 20, 2009, and a decision has not yet been rendered.

Indiana bats live exclusively in the eastern United States and spend most of the year above ground, residing in caves only during hibernation in winter. Despite having been listed as an endangered species since 1967, Indiana bat numbers have declined steadily over the last four decades. In the 1970s, the population was estimated at 883,720; by 2003, that number had fallen to 387,300. According to the FWS, Indiana bats in FWS's Northeast Region alone have dropped by 30 percent from 2007 to 2009, due largely to White-Nose Syndrome, a fungus-caused ailment that has caused hundreds of thousands of bat mortalities.

According to the plaintiffs, significant numbers of Indiana bats are known to hibernate and forage within five to ten miles of the proposed wind energy facility. The plaintiffs assert that the project will result in the "take" of protected Indiana bats due to: turbine-bat collisions; "barotrauma" or a condition caused by low-pressure zones near wind turbines where the lungs of bats hemorrhage, leading to death; disruption of "all essential behaviors of the Indiana bat, including breeding, feeding, and sheltering in the local area"; modification of the bats' essential habitat, including the removal of four-hundred acres of forest used by the bats for roosting and foraging; and disruption of the bats' migration corridors.

The defendants, Beech Ridge Energy, deny AWI's allegation that "wind power poses a grave threat to Indiana bats" and assert "that it has not been shown that any wind energy facility has killed, harmed, or otherwise adversely affected an Indiana bat." This litigation comes after a February 2009 decision by the West Virginia Public Service Commission to allow Beech Ridge Energy to construct a 186 megawatt wind-powered facility in Greenbrier County, West Virginia, and a 138 kilovolt transmission line to connect the facility to the transmission grid. The project will consist of up to 124 wind turbines, each roughly 390 feet tall, and will have an expected lifespan of approximately 20 years.

MONTANA COURT FINDS GRIZZLIES "THREATENED" UNDER THE ENDANGERED SPECIES ACT; SUGGESTS SOME THREATS CAUSED BY CLIMATE CHANGE

On September 21, 2009, a federal judge in Missoula, Montana vacated and remanded a March 2007 decision by FWS to remove the Yellowstone Distinct Population Segment ("DPS") of grizzlies (*Ursus arctos horribilis*) from the list of "threatened" species under the ESA. *Greater Yellowstone Coalition v. Servheen*, No. 07-134, (D. Mont., Sept. 21, 2009). Finding that FWS's 2007 delisting decision failed to take into account the effects of climate change and other factors on bear food supplies, and was predicated on inadequate state and federal management plans, the Montana court held that "[w]ithout the protections of the ESA, the Yellowstone grizzly bear DPS will be placed in jeopardy." The court enjoined FWS from removing the Yellowstone DPS from the threatened species list and remanded the matter to FWS for further consideration.

The Yellowstone DPS currently consists of approximately 580 bears living in Idaho, Wyoming and Montana. In 1975, when grizzlies were first listed as threatened under the ESA, there were between 136 and 312 bears in the Greater Yellowstone Area. By 2007, the number of bears in the region had risen to approximately 500, prompting the FWS to issue a final rule removing grizzlies in the Yellowstone DPS from the threatened species list. According to the 2007 delisting decision, "threats to this population have been sufficiently minimized over the entire current and foreseeable range of the Yellowstone grizzly bear DPS including all 'suitable habitat' within the DPS boundaries, and there is no significant portion of the range where the DPS remains threatened or endangered."

In 2008, in *Greater Yellowstone Coalition v. Servheen*, several environmental groups alleged that the delisting decision violated the ESA by: failing to impose sufficient regulatory mechanisms to protect grizzlies once they are

The House Natural Resources Committee held two days of hearings on the bill in mid-September, hearing testimony from Secretary of the Interior Ken Salazar, National Oceanic and Atmospheric Administration Chief Dr. Jane Lubchenco, and other Obama administration officials, as well as representatives of the mining and energy production industries, environmental groups, local governments, and others. Although Chairman Rahall had hoped that the CLEAR Act would proceed quickly to mark-up after the hearings, with the Senate focused on health care, appropriations, financial reform legislation, and energy and climate change, House leadership has put the brakes on the CLEAR Act for the time being.

OBAMA SEEKS GREATER FEDERAL COORDINATION WITH INDIAN TRIBES

Following remarks before the White House Tribal Nations Conference, on November 6, 2009, President Barack Obama signed a Memorandum for the Heads of Executive Departments and Agencies, for the purpose of increasing federal coordination with Indian tribes. President Obama's Memorandum directs all federal agencies to submit a tribal consultation plan within 90 days and a progress report within 270 days, and annually thereafter, on the status of each action included in the agency's plan. The Memorandum calls for "a complete and consistent implementation of Executive Order 13175[.]" which was issued by President Clinton in 2000, and established tribal consultation requirements for federal agencies. According to President Obama, "[o]ver the past nine years, only a few agencies have made an effort to implement that executive order—and it's time for that to change."

As outlined in Executive Order 13175, the U.S. "recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination[.]" and, when formulating policies with tribal implications, federal agencies must consult with tribes and, where possible, encourage tribes to develop their own

standards to meet federal objectives. The Executive Order instructs federal agencies to develop procedures to ensure that tribes have input on agency policies that have "substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes." In addition, Executive Order 13175 prohibits federal agency regulations that impose "substantial direct compliance costs" on tribal governments, unless the federal government provides funds to meet those costs or the agency consults with tribes and submits a tribal summary impact statement to the Office of Management and Budget ("OMB"), outlining tribal consultation efforts and the agency's position as to the need for the regulation.

According to President Obama's Memorandum, each agency head must submit "a detailed plan of actions the agency will take to implement the policies and directives of Executive Order 13175[.]" and must designate an official to implement the consultation plan. Based upon these agency plans, and progress reports submitted within nine months, "the Director of the OMB, in coordination with the Assistant to the President for Domestic Policy, shall submit to me, within 1 year . . . a report on the implementation of Executive Order 13175," including any proposals for improving tribal consultation.

INTERIOR TO OUTLINE POLICIES TO ADDRESS CLIMATE CHANGE

On September 14, 2009, Interior Secretary Ken Salazar issued Secretarial Order No. 3289, which establishes a series of new DOI programs and initiatives to assess and mitigate the effects of climate change "on tribes and on the land, water, ocean, fish and wildlife, and cultural heritage resources that the Department manages." The September 2009 Secretarial Order replaces a January 16, 2009 Secretarial Order issued during the Bush Administration, and reinstates and expands upon a Clinton-era policy

requiring DOI bureaus to consider the impacts of climate changes when undertaking long-range planning efforts.

Among other things, the September 2009 Secretarial Order established a DOI Climate Change Response Council ("Council"), eight Regional Climate Change Response Centers, and a series of climate change cooperatives. The Council will be composed of top agency officials and will be responsible for developing and coordinating DOI's climate change strategy with other federal agencies. The Council also will work to broaden the mandate of eight U.S. Geological Survey science centers throughout the country, which will be charged with assessing the impact of climate change on DOI resources as well as collecting and synthesizing climate change data. The Resource Centers will receive input from "Landscape Conservation Cooperatives," which have already been formed in some areas, and will help coordinate adaptation efforts in areas that extend beyond the borders of DOI-managed land.

The September 2009 Secretarial Order establishes two policy programs for DOI: the DOI Carbon Storage Project and the DOI Carbon Footprint Project. The Carbon Storage Project is being implemented under Pub. L. No. 110-140, the Energy Independence and Security Act of 2007, and will work to "enhance carbon storage in geologic formations and in plants and soils." The Carbon Footprint Project will "develop a unified greenhouse gas emission reduction program, [for DOI projects] including setting a baseline and reduction goal for the Department's greenhouse gas emissions and energy use."

In addition to Secretary Salazar's Order, on October 27, 2009, Senate Energy & Natural Resources Committee Chairman Jeff Bingaman (D-NM) introduced S. 1933, the Natural Resources Climate Adaptation Act of 2009. This legislation, among other things, would require federal agencies with relevant expertise to work together across jurisdictional boundaries, and to prepare a national

strategy and individual agency plans, in order to address the affects of climate change upon natural resources. The bill would also fund federal, state and tribal programs to restore watersheds and wetlands, and to manage forests. S. 1933 has been referred to the Senate Committee on Environment and Public Works.

FISH AND WILDLIFE SERVICE ESTABLISHES NEW INCIDENTAL TAKE PERMITS FOR BALD AND GOLDEN EAGLES

On November 10, 2009 the U.S. Fish and Wildlife Service (“FWS”) adopted a new permitting regime for the incidental take of bald eagles (*Haliaeetus leucocephalus*) and golden eagles (*Aquila chrysaetos*) and their nests under the Bald and Golden Eagle Protection Act (“Eagle Act”), 16 U.S.C. § 668-668d. Since bald eagles were removed from the endangered species list in August of 2007, there has been no federal permit available to shield parties from liability for the incidental take of eagles. Unlike most fauna, bald and golden eagles are protected by a specific statute, the Eagle Act, which generally prohibits the taking, possessing, selling or bartering of bald or golden eagles, whether alive or dead. The Eagle Act imposes both criminal and civil penalties against violators, but did not, until now, provide for any exception for incidental take, such as can be found in the Endangered Species Act (“ESA”).

Since 2007, to avoid liability under the Eagle Act, parties have had to rely upon guidelines published by the FWS, but have had no guarantee that their activities would not lead to prosecution. However, under the new regime, incidental take permits will become available for the individual take of eagles, or takes that stem from a specific activity, and for the programmatic take of eagles, or takings that result from activities that are “recurring, [are] not caused solely by indirect effects, and that occur[s] over the long term or in a location or locations that cannot be specifically identified.” In both instances, the taking must be “compatible with the preservation of the bald and gold eagle;

necessary to protect an interest in a particular locality; [and] associated with but not the purpose of the activity[.]”

In order to obtain an incidental take permit under the Eagle Act, parties must apply with the FWS, which must make the following determinations, among others: 1) the effects of the take and required mitigation are compatible with preservation of eagles; 2) the taking is necessary to protect a legitimate interest; 3) the taking is not the purpose of the activity; 4) the taking cannot be practicably avoided; and 5) the applicant has avoided and minimized impacts to eagles to the extent practicable, and for programmatic authorizations, the taking will occur despite application of advanced conservation practices. In all instances, the length of the permit is not to exceed five years.

NEW HEAD OF NATIONAL PARK SERVICE APPROVED BY SENATE

On September 24, 2009, the Senate confirmed Jonathan Jarvis to be director of the National Park Service. A thirty-year veteran of the Park Service, Jarvis has held such positions as superintendent of Mount Rainier National Park in Washington, Craters of the Moon National Monument and Preserve in Idaho, and Wrangell-St. Elias National Park Service & Preserve in Alaska. Since 2002, Jarvis has headed the Park Service’s Pacific West Region.

Natural Resource Litigation

FIRST CIRCUIT AFFIRMS DISTRICT COURT DECISION STRIKING DOWN STATE EFFORT TO REGULATE SITING AND CONSTRUCTION OF LNG TERMINAL

On October 26, 2009, the U.S. Court of Appeals for the First Circuit upheld a decision of the U.S. District Court for the District of Rhode Island, reaffirming the Federal Energy Regulatory Commission’s (“FERC”) exclusive jurisdiction over the siting of Liquefied Natural Gas (“LNG”) facilities under the Natural Gas Act (“NGA”), as amended by Section 311 of EPAAct 2005. Additionally, the Court held that a state’s

parallel licensing program for dredging activities is preempted by FERC’s exclusive jurisdiction under the NGA.

In December 2003, Weaver’s Cove Energy, LLC proposed an LNG terminal in the City of Fall River, Massachusetts. FERC approved the project in 2005, subject to certain conditions. Weaver’s Cove amended the proposed project in 2009 to permit ships to deliver their cargo to an offshore berth in the Massachusetts coastal waters of Mount Hope Bay, from which LNG would be transported via a submerged pipeline to the onshore terminal. The terminal, offshore berth, and pipeline would all be located in Massachusetts. The only planned activity in Rhode Island waters is dredging in a federal navigation channel. Material from the dredging would be deposited in Massachusetts.

The Coastal Zone Management Act (“CZMA”) provides states with a limited opportunity to review activities proposed by an applicant under a federal permit to ensure that any activities that reasonably could affect the state’s coastal zone are consistent with the state’s federally-approved coastal management program. If the state agency does not either concur with or object to the consistency certification application within six months, the state’s concurrence is “conclusively presumed.”

In order to proceed with dredging in Rhode Island waters, Weaver’s Cove sought a consistency certification from the Rhode Island Coastal Resources Management Council (“CRMC”). Weaver’s Cove also sought a state license for the dredging, as required under Rhode Island state law.

Following a dispute over whether Weaver’s Cove was required to provide CRMC with documentation relating to where the dredged material would be disposed of, CRMC refused to commence review of the consistency certification, or the state license, based on its belief that Weaver’s Cove had failed to provide it with a complete application. On June 29, 2007, Weaver’s Cove filed suit in federal

delisted; not adequately considering “the impacts of global warming . . . on whitebark pine nuts, a grizzly food source”; failing to provide for an adequately sized grizzly bear population to ensure genetic diversity; and failing to consider whether grizzlies are recovered over a significant portion of their range.

The Montana court held that FWS’s 2007 delisting decision failed to demonstrate how federal and state conservation plans would maintain a sufficient grizzly population. The court further found that that FWS erred in determining that grizzlies would adjust to declines in whitebark pine nuts, which provide an important fall food source. According to the court, “the best available science” suggests that whitebark pines “are expected to decline due to a variety of causes, including climate change” and the “science relied on by [FWS] does not support its conclusion that declines in the availability of whitebark pine will not negatively affect grizzly bears. In fact, much of the cited science directly contradicts [FWS’s] conclusions.”

A nearly identical lawsuit remains pending in Idaho federal court.

NINTH CIRCUIT REJECTS LAND EXCHANGE FOR PROPOSED CALIFORNIA LANDFILL

In the latest chapter in a 20-year battle over what would be the nation’s largest landfill, on November 11, 2009, the U.S. Court of Appeals for the Ninth Circuit upheld a district court decision setting aside a land exchange between the Bureau of Land Management (“BLM”)

and Kaiser Eagle Mountain, Inc., which would have placed the proposed landfill within one-and-a-half miles of Joshua Tree National Park. The three-judge panel found that BLM had violated the Federal Land and Policy Management Act (“FLPMA”) by undervaluing the public land in question, and had violated the National Environmental Policy Act (“NEPA”) by adopting an overly narrow statement of “purpose and need” for the project and by considering an unduly narrow range of alternatives to the land exchange. The Ninth Circuit also held that BLM had failed to fully consider the possibility of eutrophication or the introduction of nutrients into the environment by the landfill, also in violation of NEPA.

From 1948 to 1983 Kaiser operated an iron-ore mine near the Eagle Mountain range in Riverside County, California. In 1989, Kaiser sought to turn the mine site, as well as adjacent BLM-owned land, into the largest landfill in the United States, which would serve the population of Southern California, and would be capable of accepting “20,000 tons of garbage per day, six days a week.” To acquire the BLM land, Kaiser proposed to exchange over \$20,000 and 2,846 acres for 3,841 acres of BLM land and other interests. Following a Record of Decision (“ROD”) by BLM approving the land exchange, local citizens and a national interest organization filed suit, challenging the adequacy of BLM’s ROD.

Under FLPMA, BLM must appraise lands before agreeing to a land exchange. In so doing, BLM must determine

the “market value” of the land, based upon the land’s “highest and best use.” BLM appraised the land in question at the price of \$77 an acre, which was based upon the land’s status as a remote area containing inoperative mines. The Ninth Circuit held that the “highest and best use” of the land was instead as a potentially lucrative landfill, and that BLM had thus not met its requirements under FLPMA.

The Ninth Circuit also held that BLM had not adequately delineated the need and purpose of the land exchange, or alternatives to the land exchange, as required by NEPA. BLM found that the purpose for the land exchange was to “develop a new . . . municipal solid waste landfill to meet the projected long-term demand for environmentally sound landfill capacity in Southern California.” Based on this purpose, BLM only considered alternatives to the land exchange that “would result in landfill development of some sort and would require some portion of the land exchange to occur.” According to the court, BLM had “adopted Kaiser’s interests as its own to craft a purpose and need statement so narrowly drawn as to foreordain approval of the land exchange” and had only considered an unreasonably narrow range of alternatives to the project.

Additionally, the Ninth Circuit held that the BLM’s analysis of eutrophication was disorganized, spread throughout many sections, and did not qualify as a “reasonably thorough” discussion of the eutrophication issue.

This Update was written by: Jeff Winnill | Sam Kalen | Matthew Love | Tyson Kade | Jon Simon | Ashley Garber

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.

We invite you to contact Jonathan Simon (202.298.1932, jxs@vnf.com) in our Washington, DC office or Matthew Love (206.829.1809, mal@vnf.com) in our Seattle, WA office, or your usual Van Ness Feldman contact.

© 2009 Van Ness Feldman, P.C.
All Rights Reserved. This document has been prepared by Van Ness Feldman for informational purposes only and is not a legal opinion, does not provide legal advice for any purpose, and neither creates nor constitutes evidence of an attorney-client relationship.