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CBD v. BLM, BLM's Revised Proposed Regulations, and the Thorny Way Forward for Fracking

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On March 31, 2013, a magistrate judge with the U.S. District Court for the Northern District of California ruled in *Center for Biological Diversity (CBD) v. Salazar*[1] that the U.S. Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA)[2] in issuing several oil and gas leases without first adequately analyzing the impacts of horizontal drilling and multistage hydraulic fracturing (fracking).[3] Recognizing that land use planning for public lands has been outpaced by developments in drilling technology, the court held that additional NEPA review of fracking is required before BLM may issue leases that would constrain the agency's ability to prevent surface disturbance on the leased land.

The ruling, which remains subject to appeal, is one of the early takes at the thorny legal pathway that lies ahead for parties seeking to develop federal shale oil and gas reserves. Significantly, while the court ruled against BLM on NEPA and called for further environmental review of fracking, the opinion leaves open several ways forward for parties seeking to drill in federal minerals, at least until BLM finalizes its proposed fracking regulations.

1. Ctr. for Biological Diversity v. BLM, No. C 11-06174-PSG, __ F. Supp. 2d __, 2013 WL 1405938, 43 ELR 20076 (N.D. Cal. Mar. 31, 2013) [hereinafter *CBD v. Salazar*].
2. 42 U.S.C. §§4321-4370h, ELR Stat. NEPA §§2-209. NEPA requires federal agencies to (1) take a "hard look" at all environmental impacts of their decisions, and (2) disclose and provide an opportunity for public comment on such environmental impacts. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 350, 19 ELR 20743 (1989).
3. Hydraulic fracturing involves the injection of fluid under high pressure to create or enlarge fractures in rocks, such as shale, that contain reservoirs of oil and gas. The fluid used in hydraulic fracturing usually is accompanied by another material such as sand, which is carried into the newly fractured rock and helps to keep the fractures open. In addition to water and sand (which BLM states typically makes up 98% to 99% of the materials pumped into a well during a fracturing operation), chemical additives frequently are used for purposes that include limiting growth of bacteria and preventing corrosion of the well casing. The exact formulation of the chemicals varies depending on the rock formation and the operator.

I. The Multistep Management Process for Oil and Gas Activities on Federal Land

The *CBD v. Salazar* decision addresses complications that recent advancements in drilling technology raise for BLM's multistep management process for oil and gas activities on public lands. The Federal Land Policy and Management Act (FLPMA)[4] and Mineral Leasing Act (MLA) of 1920 provide for three distinct levels of BLM decisionmaking that oil and gas interests must navigate before drilling in federal minerals: (1) the planning level; (2) the leasing level; and (3) the drilling level.[5]

At the first level, BLM develops a "land use plan"—usually called a Resource Management Plan (RMP)—for a geographic region, which establishes broad planning goals.[6] Among other things, the RMP typically determines what parts of the planning area will be open to oil and gas leasing, and establishes conditions that apply to drilling within those areas.[7] In developing or revising the RMP, BLM must provide for public participation and generally must prepare a detailed environmental impact statement (EIS) under NEPA.

At the second level, BLM develops, sells, and executes oil and gas leases for parcels within the planning area. As with all other decisions approving site-specific projects within the planning area, leasing decisions must be consis-

4. 43 U.S.C. §§1701-1785, ELR Stat. FLPMA §§102-603.
5. BLM manages public lands pursuant to FLPMA, 43 U.S.C. §§1701-1785, while the U.S. Forest Service (USFS) administers the National Forest System pursuant to the National Forest Management Act (NFMA), 16 U.S.C. §§1600-1687, ELR Stat. NFMA §§2-16. The NFMA similarly requires USFS to issue "land and resource management plans" for units of the National Forest System. 16 U.S.C. §1604. Under the MLA, 30 U.S.C. §§181 et seq., BLM has authority to manage oil and gas resources on both BLM-managed public lands and USFS-managed national forests. 30 U.S.C. §226. This discussion focuses on BLM's management of public lands but applies equally to management of national forest lands.
6. 43 U.S.C. §1712(a); *see generally* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 59, 69-70 (2004) (addressing BLM's land use planning process).
7. 43 C.F.R. §1601.0-5(k).

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tent with the standards set forth in the governing RMP.[8] BLM may impose reasonable measures or stipulations in the lease to minimize impacts to other resources and ensure consistency with the RMP.[9] BLM's leasing decision requires additional NEPA review, unless the site-specific environmental impacts of the leasing decision were sufficiently analyzed in the EIS that accompanied the RMP, or the lease terms provide BLM with sufficiently broad discretion to deny development of the parcel at the drilling stage.[10]

At the final stage before drilling may proceed, BLM reviews an Application for a Permit to Drill (APD) a well, which it must approve before any "drilling operations" or "surface disturbance preliminary thereto."[11] BLM may condition its approval of an APD on additional reasonable terms and conditions that ensure consistency with the RMP.[12] BLM's decision to grant an APD typically requires additional environmental review under NEPA and other applicable laws, such as the Endangered Species Act (ESA)[13] and the National Historic Preservation Act. In some cases, the APD will qualify for a Categorical Exclusion under NEPA, but that does not exempt the APD from compliance with other laws.[14]

II. The *CBD v. BLM* Decision

The *CBD v. BLM* decision primarily addresses the second stage of decisionmaking described above, but its ramifications also reach the planning and drilling stages in unconventional sources like shale.

The case involves a challenge by a coalition of municipal and environmental groups to four oil and gas leases issued by BLM for parcels covering a total of 2,700 acres of land in Monterey County and Fresno County in California, within the Monterey Shale Formation.

BLM prepared an environmental assessment (EA) under NEPA and made a finding of no significant impact (FONSI).[15] BLM concluded that a more detailed review in an EIS was not required at the leasing stage, because a 2006 EIS issued by BLM contained a Reasonable Foreseeable Development Scenario (RFDS) that predicted that fewer than 15 wells would be drilled in the planning area, including just one well on the parcels at issue, during the next 15 to 20 years.[16] Accordingly, BLM found that "very little (if any) disturbance to the human environment" would occur. BLM noted that it would conduct additional analysis of the impacts of fracking when and if the lessees submitted APDs for individual wells. BLM reasoned that analyzing site-specific impacts, including those associated with fracking, would be more feasible at the drilling stage and that it retains sufficient authority to protect sensitive resources even after lease issuance.

BLM included its "standard" stipulations and two special stipulations related to protection of endangered species and cultural resources in all four leases. BLM also included a No Surface Occupancy (NSO) stipulation in two of the four leases, which precludes the lessee from using the surface of the leased land without additional specific authorization from BLM.

Reviewing this record of NEPA compliance and evidence related to advancements in drilling techniques, the court held that "BLM violated NEPA in its environment [*sic*.] assessment of the leases by unreasonably relying on an earlier single-well development scenario[, which] did not adequately consider the development impact of hydraulic fracturing techniques popularly known as 'fracking' when used in combination with technologies such as horizontal drilling."[17] The court explained that "it was unreasonable for BLM not to at least consider reasonable projections of drilling in the area that include fracking operations, or else limit its sale to leases with NSO provisions that would permit it to prohibit all surface disturbances until more specific information becomes available."[18]

In other words, the court found that BLM's 2006 prediction of how many wells would be drilled in the area had been outpaced by drilling advancements, which the court indicated have significantly changed the development

8. 43 C.F.R. §1610.5-3(a); *see generally* Pennaco Energy, Inc. v. U.S. Dep't of the Interior, 377 F.3d 1147, 1151 (10th Cir. 2004) (summarizing BLM's multistep decisionmaking process for management of federal oil and gas resources).
9. *See* 43 C.F.R. §3101.1-2; *see also id.* §§3162.1(a), 3162.5, 3164.1.
10. *See* Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356, 24 ELR 21264 (9th Cir. 1994); Conner v. Burford, 848 F.2d 1441, 1446, 18 ELR 21182 (9th Cir. 1988).
11. 30 U.S.C. §226(g); 43 C.F.R. §3162.3-1(c).
12. *See* 43 C.F.R. §3162.3-1(h).
13. 16 U.S.C. §§1531-1544, ELR Stat. ESA §§2-18.
14. *See* 40 C.F.R. §§1508.4, 1507.3(b)(2); *see also* Energy Policy Act of 2005, 42 U.S.C. §15942 (establishing five statutory categorical exclusions for oil and gas development).
15. NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §4332(2)(C). Major federal actions are "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies." 40 C.F.R. §1508.18(a). They include the "approval of specific projects . . . by permit or other regulatory decision." *Id.* §1508.18(b)(4). Agencies may first prepare an EA to determine if the impacts of a major federal action may be significant. *Id*. §1501.4(c). If an EIS is deemed unnecessary, agencies must detail the reasons why the impacts are insignificant in a FONSI. *Id.* §1508.13. NEPA's significance threshold is not particularly high. "If *any* 'significant' environmental impacts might result from the proposed agency action then an EIS must be prepared . . . ." Grand Canyon Trust v. F.A.A., 290 F.3d 339, 340, 32 ELR 20677 (D.C. Cir. 2002) (quoting Sierra Club v. Peterson, 717 F.2d 1409, 1411, 13 ELR 20888 (D.C. Cir. 1983)).
16. An RFDS is a planning tool that provides a rough estimate of the development potential of a particular area. *See* Theodore Roosevelt Conservation Partnership v. Salazar, 605 F. Supp. 2d 263, 280, 39 ELR 20078 (D.D.C. 2009), *aff'd*, 616 F.3d 497, 40 ELR 20199 (D.C. Cir. 2010) (explaining that "initial projections for development, or 'reasonably foreseeable development scenario' (RFD), serve as a tool to evaluate existing management, and not a planning decision").
17. *CBD v. BLM*, 2013 WL 1405938, at *1.
18. 2013 WL 1405938, at *24.

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potential of both the parcels subject to the lease and of the larger Monterey Shale Formation. According to the court, because these changed conditions were not addressed in the 2006 EIS, postponing detailed NEPA review to the drilling stage was only appropriate for the two NSO leases.[19] The court reasoned that even strict stipulations enabling BLM to deny all surface-disturbing activities if certain resources like endangered species would be adversely impacted are insufficient bases to delay NEPA review if BLM "will not be able to unilaterally deny the permit."[20] Accordingly, the court held NEPA analysis of the foreseeable impacts of fracking was required before issuing the two leases that did not contain the NSO provisions.[21]

III. The Outdated Resource Management Plan/EIS Problem

The *CBD v. BLM* decision reflects the fact that recent advancements in fracking appear to have significantly changed the oil and gas development potential of many federal planning areas. While both horizontal drilling and hydraulic fracturing have existed for many years, the decision found that the "evidence shows that in just the past few years fracking has been combined with horizontal drilling and other modern technologies to provide access to previously unattainable shale oil such as that in the four parcels of Monterey shale at issue" in the case.[22]

As a result of these recent advancements, the RMPs and associated EISs for many federal planning areas—particularly those that include "unconventional" sources like shale—may be outdated. As the *CBD v. BLM* case illustrates, many of these RMPs and EISs, most of which were prepared well over five years ago, may have been based on anticipated levels of oil and gas development that are much lower than the development potentials that now exist.

This issue appears to be widespread. For example, another pending federal district court case challenges BLM's and the U.S. Forest Service's management of federal oil and gas reserves in the Fayetteville Shale Formation in Arkansas.[23] Like the RMP at issue in *CBD v. Salazar*, the RFDS that informed the 2005 Plan and EIS at issue in the *Ozark Society v. U.S. Forest Service (USFS)*[24] case predicted that fewer than 15 wells would be drilled across the entire Ozark-St. Francis National Forest during a 10-year planning period. But, just a few years later, BLM issued a new RFDS for this same area that predicted up to 1,730 wells could be drilled during this period—an over 100-fold increase.[25]

Additionally, the CBD and Sierra Club recently filed another suit in the District Court for the Northern District of California challenging a different BLM lease sale covering close to 18,000 acres in the Monterey Shale Formation.[26] The new suit presents the same arguments that the court found convincing in the *CBD v. BLM* case.

FLPMA does not require RMPs to be amended or replaced due to the increased development potential of planning areas resulting from drilling advancements.[27] NEPA similarly does not require EISs for RMPs to be supplemented.[28]

Nonetheless, additional hurdles are raised under NEPA to the extent that technological advancements have rendered many RFDSs obsolete. As the court held in *CBD v. BLM*, because "the emergence of fracking raises potential concerns that were not considered by the 2006 [EIS]," BLM could not "tier" to or rely on the 2006 EIS for NEPA compliance.[29] These "potential concerns that were not considered" at the planning level may trigger several of NEPA's "significance factors," the presence of which can require detailed review in an EIS rather than in an EA or through a Categorical Exclusion.[30] Accordingly, before additional implementation actions triggering NEPA are approved—including decisions to issue a lease without NSO provisions or to approve APDs—BLM may face a heightened burden to explain why preparation of an EIS is unnecessary.

IV. Some Ways Forward for Fracking in Federal Minerals

While the *CBD v. BLM* decision ruled against BLM and indicated the need for more detailed and up-to-date NEPA review of fracking, the opinion may allow for various ways forward for parties seeking to drill federal shale formations under current regulations.

19. 2013 WL 1405938 at **7-8.
20. 2013 WL 1405938 at *8.
21. *See* 2013 WL 1405938. The decision is unclear whether all four leases are deficient under NEPA because all four relied on the same EA, or whether the holding is limited to the two leases without NSO stipulations. The court requested further briefing on the remedy. 2013 WL 1405938 at *14.
22. 2013 WL 1405938 at *10; *see also* 2013 WL 1405938 at **1-2. The court pointed out that a 2010 U.S. House of Representatives Appropriation Conference Committee noted that recent advancements in fracking have resulted in a significant spike of natural gas production and that an EPA study predicted that by 2020 shale gas would comprise over 20% of the total U.S. gas supply. 2013 WL 1405938 at *4.
23. *See* Ozark Society v. U.S. Forest Serv., No. 4:11CV00782 SWW, 2012 WL 994441 (E.D. Ark. Mar. 23, 2012) (denying the plaintiffs' motion for a preliminary injunction).
24. 2012 WL 994441 at *1.
25. 2012 WL 994441.
26. Ctr. for Biological Diversity v. Jewell, Case No. CV-13-01749 (N.D. Cal.) (complaint filed Apr. 18, 2013).
27. *See Ozark Society*, 2012 WL 994441 at *3; Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 59, 69-70 (2004).
28. *Norton*, 542 U.S. at 72-73. The U.S. Supreme Court and lower courts have held that not upon approval of a Resource Management Plan, no major federal action necessary to trigger NEPA supplementation requirements remain, even if new information surfaces that raises significant questions about the environmental impacts of approving the Plan. *Id.*; *see also* Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085 (9th Cir. 2013) (no major federal action remained after BLM approved a Mining Plan of Operations); Buckeye Forest Council v. U.S. Forest Serv., 378 F. Supp. 2d 835, 845 (S.D. Ohio 2005) ("Because the Forest Plan was approved in 1988, the agency action was completed and there was no ongoing major federal action requiring supplementation.").
29. *CBD v. BLM*, 2013 WL 1405938, at *11.
30. 2013 WL 1405938, at **9, 11-13. The court found that the degree of controversy regarding fracking, potential effects of fracking on public health and safety (especially water pollution), and level of uncertainty regarding the impacts of fracking all supported the need for an EIS. 2013 WL 1405938, at **11-13.

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First, the decision held that BLM may issue oil and gas leases without further environmental review so long as the lease includes an NSO stipulation or "absolute right to deny exploitation of [the] resources."[31] Following U.S. Court of Appeals for the Ninth Circuit precedent, the court found that such leases do not mark "irreversible and irretrievable commitments of resources," and thus NEPA review can wait until the drilling stage.[32] The court was not convinced by plaintiffs' argument that even leases with NSO stipulations should be considered "irreversible commitments of resources" requiring NEPA review due to advancements in horizontal drilling and hydraulic fracturing.[33] Securing NSO leases, however, likely only postpones NEPA requirements until the drilling stage. Accordingly, at least to the extent that surface disturbance of the leased land is necessary to develop the NSO lease, a lessee would likely not be able to move forward before BLM completes further NEPA analysis of the potential effects of fracking.

Second, to the extent a lessee with an NSO lease can horizontally drill into the leased federal minerals from nearby state or private land, and thus avoid surface disturbance of the leased federal land, drilling may be allowed without additional NEPA review. Under existing regulations, no further federal approval triggering NEPA would likely be needed to drill from state or private lands.

Third, consistent with *CBD v. Salazar* and *Conner v. Burford*, NSO lessees may be able to enter into "unitization" or "communitization agreements" with nearby federal lessees and thereby directionally drill into the leased federal minerals from other leased land that is not encumbered by an NSO provision.[34] BLM's approval of an APD for a well on the nearby federal lease, however, would be subject to NEPA and would face some litigation risk to the extent an adequate environmental review of fracking has not yet been completed for the larger area. To the extent the leased minerals may be accessed by horizontally drilling from a well that has already been drilled on the nearby lease, though, additional BLM approval triggering NEPA may not be required.

Finally, the oil and gas industry could work with BLM (and, where applicable, USFS) to expedite more comprehensive and current NEPA reviews of fracking, and thus remedy the outdated RMP/EIS issue discussed above. Such a review may be more efficiently conducted at the regional level and address multiple RMPs than piecemeal at the leasing or drilling levels. These NEPA reviews likely would take the form of a programmatic EIS on fracking or new or supplemental EISs analyzing proposed RMP amendments specific to mineral management. Given tight federal budgets, industry may need strong support from the U.S. Congress and agency leadership to move this process forward.[35] As long as NEPA's conflict-of-interest provisions are not violated, industry may also be able to help fund independent contractors to complete the EIS process under the supervision of agency staff and decisionmakers.

V. Fitting BLM's Proposed Fracking Regulations Into the Multistep Management Process for Oil and Gas Activities on Federal Land

On May 16, 2013, BLM issued a revised proposed rule for regulating hydraulic fracturing.[36] The proposed rule applies only to hydraulic fracturing conducted on federal and Indian lands.

The proposed rule would require BLM approval of all new hydraulic fracturing activities on federal and Indian lands, and addresses three major topics: (1) disclosure to the public of chemicals used in hydraulic fracturing on public and Indian lands; (2) confirmation that wells used in fracturing operations meet appropriate construction standards; and (3) a requirement that well operators put in place appropriate plans for managing "flowback" water that returns to the surface.[37] The revised proposed rule also eases some of the regulatory burden that would have been created by the original proposal, by providing BLM with discretion to grant parties a variance in certain cases when state or tribal regulations meet or exceed federal standards.

The requirement under the proposed rule that BLM approve of all new hydraulic fracturing activities on federal and Indian lands may raise additional hurdles to existing lessees and operators seeking to hydraulically fracture federal shale formations. While BLM indicated in the proposed rule that it will generally review and approve of hydraulic fracturing operations in approving APDs, separate review and approval may be required in several situa-

31. 2013 WL 1405938, at *7.
32. 2013 WL 1405938 (citing Conner v. Burford, 848 F.2d 1441, 1448-49, 18 ELR 21182 (9th Cir. 1988)). Other circuit courts have held similarly. *See* New Mexico ex rel. Richardson v. BLM, 565 F.3d 683, 718 (10th Cir. 2009) (ruling that in oil and gas leasing, "assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made"); Sierra Club v. Peterson, 717 F.2d 1409, 1411-12, 13 ELR 20888 (D.C. Cir. 1983) (finding an "irreversible, irretrievable commitment of resources" when leases "d[id] not authorize the [agency] to *preclude* any activities which the lessee might propose").
33. *CBD v. BLM*, 2013 WL 1405938, at **7-8; *see also Conner*, 848 F.2d at 1447.
34. *See* 43 C.F.R. §3217.11 (describing communitization agreements); *id.* §3180 (describing unitization agreements).
35. Further complicating budget concerns is the fact that in areas where BLM manages the mineral estate and a different agency analyzes the surface estate, there may be disagreement between agencies about who should fund and staff the analyses. The line between "down-hole" impacts managed by BLM and surface impacts managed by other agencies can be unclear, particularly with respect to resources like water.
36. *Available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/hydraulicfracturing.Par.91723.File.tmp/HydFrac_SupProposal.pdf (last visited May 21, 2013) [hereinafter Proposed Rule]. BLM's Supplemental Notice of Proposed Rulemaking will be published in the *Federal Register* soon, starting a 30-day comment period, which may be extended by BLM. Public comments may be submitted by using: (1) the Federal eRulemaking Portal at http://www.regulations.gov; (2) U.S. mail; or (3) hand delivery to BLM.
37. *See id.* For a more detailed summary of the Proposed Rule, see BLM Issues Revised Proposed Fracking Regulations, *available at* http://www.perkinscoie.com/news/pubs_detail.aspx?op=updates&publication=4269.

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tions, including before hydraulic fracturing operations in existing wells may proceed.[38]

Accordingly, implementation of the proposed regulations may add an additional step to the multistep management process for oil and gas activities on public lands. Placed in the context of the arguments environmental groups advanced in *CBD v. Salazar*, this additional layer of BLM approval raises the risk of significant delays for hydraulic fracturing operations, even those conducted on existing leases and in existing wells. If BLM's approvals of hydraulic fracturing and refracturing operations are considered major federal actions triggering NEPA, the approvals may face similar vulnerabilities as did the leases at issue in *CBD v. Salazar*, at least to the extent an adequate environmental review of fracking has not yet been completed for the larger area. Accepting the arguments plaintiffs advanced in *CBD v. Salazar* could mean that hydraulic fracturing operations could not proceed even on existing leases and existing wells until BLM completes a detailed EIS addressing fracking.

VI. Conclusion

The *CBD v. Salazar* decision illustrates the thorny agency decisionmaking process that may lie ahead for parties interested in drilling in unconventional federal oil and gas reserves. While additional, updated NEPA analyses of fracking may ultimately be necessary before fracking on federal public lands hits full steam, under existing regulations, operators may be able to tap into federal shale formations now by drilling horizontally from nearby leases.

38. *See* Proposed Rule at 43 (declining to exempt wells permitted prior to the effective date of the proposed rule or to treat such wells differently in terms of necessary approval); *see also id.* at 51.