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Stuart Butzier and Christina Sheehan, co-editors

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The Clean Water Rule: Troubled Waters Ahead for the EPA and Corps

Two federal courts have preliminarily halted the enforceability of the "Clean Water Rule"[1] promulgated jointly by the U.S. Environmental Protection Agency ("EPA") and the U.S. Army Corps of Engineers ("Corps") to define anew "waters of the United States," the jurisdictional lynchpin under the Clean Water Act. On August 27, 2015, the United States District Court for the District of North Dakota enjoined enforcement of the Clean Water Rule in at least the 13 States that are parties to the lawsuit, including New Mexico.[2] The Sixth Circuit Court of Appeals, on October 9, 2015, stayed the effectiveness of the Clean Water Rule nationwide, pending its analysis of whether it has jurisdiction over the claims raised by 18 states in four consolidated actions.[3]

The courts were troubled by the broad "ripple effects" of the Rule's bright-line approach to jurisdictional boundaries, particularly the inclusion of remote and intermittent waters as jurisdictional tributaries, and the use of geographic distance as a jurisdictional determinant without sufficient notice or scientific support.

BACKGROUND

The Clean Water Rule was promulgated on June 29, 2015, with an effective date of August 28, 2015. In the Federal Register preamble to the Rule, EPA and the Corps ("Agencies") stated that the Rule was promulgated to define the scope of waters protected under the Clean Water Act ("Act" or "CWA"), in light of the Act, science, several United States Supreme Court decisions, including *Rapanos v. United States*,[4] and the Agencies' experience and technical expertise.[5] The Agencies asserted the Rule would simplify and speed up the permit process through clearer definitions and increased use of bright-line boundaries to establish features that are "jurisdictional by rule" and therefore do not require case-specific analyses of a significant nexus to a downstream water of the United States to establish jurisdiction. The rulemaking included reference to substantial technical analyses. We provide a more detailed analysis of the Rule on our website.

THE COURT DECISIONS

The Federal District Court for the District of North Dakota

The day the Clean Water Rule was published, 12 States and the New Mexico Environment Department and New Mexico State Engineer (collectively "States") filed a complaint against EPA challenging the Clean Water Rule, and then a motion for a preliminary injunction, in North Dakota Federal District Court. On August 27, 2015, the day before the Rule would have become effective, the North Dakota federal district court enjoined it. The court first held that it had jurisdiction over the suit, and in so doing rejected the Agencies' argument based on 33 U.S.C. § 1369(b)(1) that jurisdiction lies exclusively in the United States Circuit Courts of Appeals.[6] The court next determined that the States had established the four factors necessary for granting a preliminary injunction, *i.e.*, a) whether the movant would have success on the merits, b) the threat of irreparable harm to the movant, c) a balance of harms, and d) the public interest.

Following discussion of the appropriate standard to apply to the merits analysis, the court concluded the States had a "fair chance" of successfully prevailing on the merits. The court also concluded the States would suffer irreparable harm if the Rule was not enjoined, and the balance of harms and public interest favors injunction, and therefore granted the States' motion for preliminary injunction.

The Sixth Circuit Court of Appeals

Another 18 states[7] (also "States") filed four separate lawsuits challenging the Clean Water Rule, which were transferred to and consolidated in the Sixth Circuit Court of Appeals by the Judicial Panel on Multi-District Litigation. The States have moved the court to dismiss their petitions for lack of subject matter jurisdiction, under 33 U.S.C. § 1369(b)(1), but also asked the Sixth Circuit to stay the effectiveness of the Clean Water Rule pending the Sixth Circuit's ruling on its jurisdiction.

The Sixth Circuit reasoned that the purpose of the stay was to preserve the status quo and concluded that the status quo "is the pre-Rule regime of federal-state collaboration that has been in place for several years, following the Supreme Court's decision in *Rapanos*…."[8] In so doing, the court rejected the argument that, because the Clean Water Rule had an effective date of August 28, 2015, the status quo is leaving the Clean Water Rule in place. In its October 9, 2015 order, the Sixth Circuit applied factors similar to those the North Dakota federal district court applied and granted a nationwide stay of the Rule pending its determination regarding its jurisdiction.

KEY ISSUES ON THE MERITS

The Definition of Jurisdictional Tributaries

The Agencies' definition of all tributaries as jurisdictional by rule purports to rely upon Justice Kennedy's concurrence in *Rapanos v. United States*,[9] which requires the Agencies establish a "significant nexus" with a downstream water of the United States "more readily understood as navigable" in order to exert jurisdiction over upstream tributaries under the Clean Water Act.[10] The Agencies also rely upon a 400+ page technical support document and other reports that reference numerous scientific studies of the contributions of headwater and other tributaries to downstream waters.[11] Nevertheless, both courts concluded the Agencies overstepped their statutory authorities in defining jurisdictional tributaries too broadly without sufficient support.

The North Dakota federal district court held that the Clean Water Rule violated the Kennedy concurrence test because the Rule "allows EPA regulation of waters that do not bear any effect on the 'chemical, physical, and biological integrity' of any navigable-in-fact water."[12] In part, the court found the Clean Water Rule arbitrary and capricious because it "asserts jurisdiction over waters that are remote and intermittent waters. No evidence actually points to how these intermittent and remote wetlands have any nexus to a navigable-in-fact water."[13] The court faulted the Agencies' overly broad definition of "tributary," because it "allows for regulation of any area that has a trace amount of water so long as 'the physical indicators of a bed and banks and an ordinary high water mark' exist."[14] Noting that is precisely the concern Justice Kennedy warned against, the court concluded "the definition of a tributary here includes vast numbers of waters that are unlikely to have a nexus to navigable waters within any reasonable understanding of the term."[15] The Sixth Circuit also concluded that the Clean Water Rule's "treatment of tributaries, 'adjacent waters,' and waters having a 'significant nexus' to navigable waters is at odds with the Supreme Court's ruling in *Rapanos*…."[16]

The Establishment of Geographic Distance as a Jurisdictional Determinant

The North Dakota federal court found to be arbitrary the Agencies' use of a 4,000 foot "bright-line" test for jurisdiction over features that are nearby waters of the United States. The court was "unable to determine the

scientific basis for the 4,000 feet standard" where a water situated 4,001 feet away is not similarly situated to warrant being jurisdictional.[17] The court continued: "the Rule must be supported by some evidence why a 4,000 foot standard is scientifically supportable. On the record before the court, it appears that the standard is the right standard because the Agencies say it is."[18]

The Sixth Circuit also faulted the Agencies for failing to identify "specific scientific support substantiating the reasonableness of the bright-line standards they ultimately chose."[19]

Lack of Notice and Comment on the Geographic Distance Standard

The North Dakota federal district court also ruled that the Clean Water Rule as finally promulgated was not a "logical outgrowth" of the proposed rule because it materially altered the proposed Rule that was circulated for notice and comment "by substituting the ecological and hydrological concepts with geographical distances that are different in degree and kind and wholly removed from the original concepts announced in the proposed rule."[20] The court concluded that the Clean Water Rule thus violated the Administrative Procedure Act's notice and comment provisions because "[n]othing in the call for comment would have given notice to an interested person that the rule could transmogrify from an ecologically and hydrologically based rule to one that finds itself based in geographic distance." [21]

The Sixth Circuit also warned that the "the rulemaking process by which the distance limitations were adopted is facially suspect" because the proposed rule did not include any distance limitations, unlike the Clean Water Rule as finally promulgated. The Sixth Circuit had the benefit of the administrative record, which it characterized as "extensive," yet the Agencies "failed to identify anything in the record that would substantiate a finding that the public had reasonably specific notice that the distance-based limitations adopted in the Rule were among the range of alternatives being considered." [22]

IRREPARABLE HARM, THE BALANCE OF HARMS, AND PUBLIC INTEREST

The North Dakota federal district court found that the States demonstrated irreparable harm since the States would lose their sovereignty over intrastate waters that would be subject to the Clean Water Act if the Clean Water Rule was not enjoined. In other words: "Immediately upon the Rule taking effect, the Rule will irreparably diminish the States' power over their waters."[23] In addition, the court found that the States would suffer an irreparable harm in the form of monetary losses, which the States could not recover because the United States has not waived its immunity from suit. The court cited as examples of monetary harm North Dakota's contention that the Clean Water Rule will require the state to "undertak[e] jurisdictional studies for every proposed natural gas, oil, or water pipeline project" and Wyoming's similar assertion that it would incur additional costs relating to Section 401 certifications of the Act's applicability.[24]

The North Dakota federal district court next concluded that the balance of harms favored injunctive relief. The court noted that the risk of harm to the States was "imminent and likely" and that delaying the Clean Water Rule's implementation would cause the Agencies "no appreciable harm."[25] The court "acknowledge[d] that implementation of the Rule will provide a benefit to an important public interest, both in providing some protection to the waters of the United States and because it would provide increased certainty as to what constitutes

jurisdictional waters as some people will be categorically removed from the definition of waters of the United States…."[26] The court, however, stated that the benefit would extend to only a small percentage of the public, while a broader segment of the public would benefit from the injunction "because it would ensure that federal agencies do not extend their power beyond the express delegation from Congress." [27]

The Sixth Circuit, unlike the North Dakota court, found "no compelling showing" that the States would suffer immediate irreparable harm either as to the States' sovereignty or unrecoverable monetary damages given the limited duration of the stay. The court noted, however, that there also was no "indication that the integrity of the nation's waters will suffer imminent injury if the new scheme is not immediately implemented and enforced."[28] The court reasoned that a stay was required given the burden on the public in general, as well as governmental bodies, "implicated by the Rule's effective redrawing of jurisdictional lines over certain of the nation's waters." The court reasoned:

> A stay allows for a more deliberate determination whether this exercise of Executive power, enabled by Congress and explicated by the Supreme Court, is proper under the dictates of federal law. A stay temporarily silences the whirlwind of confusion that springs from uncertainty about the requirements of the new Rule and whether they will survive legal testing. A stay honors the policy of cooperative federalism that informs the Clean Water Act and must attend the shared responsibility for safeguarding the nation's waters….In light of the disparate rulings on this very question issued by district courts around the country—enforcement of the Rule having been preliminarily enjoined in thirteen states—a stay will, consistent with Congress's stated purpose of establishing a national policy, 33 U.S.C. § 1251(a), restore uniformity of regulation under the familiar, if imperfect, pre-Rule regime, pending judicial review.[29]

WHAT HAPPENS NOW?

The North Dakota federal district court's preliminary injunction of the Clean Water Rule is effective in the 13 states that joined the lawsuit there. The Sixth Circuit applied its stay of the Rule nationwide, but noted that the stay is for the purpose of "silencing the whirlwind of confusion and uncertainty" while the Rule is legally tested. Further, the issue of the Sixth Circuit's jurisdiction over the matter is expected to be resolved shortly. If either or both cases continue, the parties will address the merits of the case on the full administrative record. The fact that both courts concluded the challenging States were likely to prevail on their claims suggests that the Clean Water Rule may not withstand scrutiny on the merits.

Republican Senators have pursued action in the Senate to try to block the Clean Water Rule as well. Senator John Barrasso (R-Wyoming) sponsored a bill that would have nullified the Clean Water Rule and would have imposed additional consultation requirements on EPA and the Corps when promulgating a new rule. That bill failed to pass. Shortly after that bill failed, Senator Joni Ernst (R-Iowa) proposed a measure that would block the Clean Water Rule, which the Obama administration has threatened to veto.[30] Thus, even if the Clean Water Rule survives a judicial challenge, the Rule may face further hurdles in Congress.

In the meantime, the Corps and EPA have confirmed they have "resumed nationwide use of the agencies' prior

regulations defining the term 'waters of the United States.' Those regulations will be implemented as they were prior to August 27, 2015, by applying relevant case law, applicable policy, and the best science and technical data on a case-by-case basis in determining which waters are protected by the Clean Water Act." [31]

For more information, please contact Joan E. Drake or Deana M. Bennett.

[1] 80 Fed. Reg. 37,054 (June 29, 2015), available here.
[2] *North Dakota v. U.S. Envtl. Prot. Agency*, No. 3:15-cv-59, 2015 U.S. Dist. LEXIS 113831 (D.N.D. Aug. 2015) ("*North Dakota*"). The thirteen States are North Dakota, Alaska, Arizona, Arkansas, Colorado, Idaho, Missouri, Montana, Nebraska, Nevada, New Mexico, South Dakota, and Wyoming.
[3] *In re "Clean Water Rule"*, Nos. 15-3799/3822/3853/3877, 2015 U.S. App. LEXIS 17642, 2015 Fed App. 0246P (6th Cir. Oct. 9, 2015). The 18 States are Alabama, Florida, Georgia, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, West Virginia, and Wisconsin.
[4] 547 U.S. 715 (2006).
[5] 80 Fed. Reg. at 37,054.
[6] Conversely, two other federal district courts, Georgia and West Virginia, held that jurisdiction over the challenges to the Clean Water Rule lies exclusively in the Circuit Courts of Appeals. *See Georgia v. McCarthy*, No. 2:15-cv-79, 2015 U.S. Dist. LEXIS 114040 (S.D. Ga. Aug. 27, 2015) (denying motion for preliminary injunction because district court lacks jurisdiction); *Murray Energy Corp. v. U.S. Envtl. Prot. Agency*, No 1:15-cv-111, 2015 U.S. Dist. LEXIS 112944, *17 (N.D. W.Va. Aug. 26, 2015) ("[T]he Court views exclusive appellate jurisdiction over this action as furthering the congressional goal of ensuring prompt resolution of challenges to EPA's actions." (quoted authority omitted)).
[7] *In re "Clean Water Rule"*, 2015 U.S. App. LEXIS 17642 (6th Cir. Oct. 9, 2015).
[8] *Id.* at *19-20.
[9] *North Dakota*, 2015 U.S. Dist. LEXIS 113831, *14 (quoting *Rapanos*, 547 U.S. at 780 (Kennedy, J., concurring).
[10] *Id.* at *15.
[11] Available here.
[12] *Id.* (quoting 80 Fed. Reg. at 37,105).
[13] *Id.* at *19.
[14] *Id.* at *17.
[15] *Id.* at *16.
[16] *Id.* at *20-23.
[17] *Id.* at *18.
[18] *Id.* at *19-21.
[19] *In re "Clean Water Rule"* at *22.
[20] *North Dakota* at *20-21.
[21] *Id.* at *21.
[22] *In re "Clean Water Rule"* at *21-22.
[23] *North Dakota* at *22.
[24] *Id.*at *23.
[25] *Id.* at *24.
[26] *Id.* at *24-25.
[27] *Id.*
[28] *North Dakota* at *23.
[29] *Id.* at *24-25 (citation and footnote omitted). The Sixth Circuit acknowledged that the Clean Water Rule was preliminarily enjoined in 13 states, citing North Dakota. *In re Clean Water Rule*, 2015 U.S. App. LEXIS 17642, *25 and n.4.
[30] *See* Natasha Geiling, *Just Hours After a Separate Attack Failed, the Senate Voted to Overturn the EPA's Clean Water Rule*, ClimateProgress (Nov, 4, 2015), available here.
[31] The Agencies' litigation statement is available here.

BLM's Controversial Hydraulic Fracturing Rule is Postponed Nationwide

The Spring 2015 issue of Energy Resources Notes reported on the Bureau of Land Management's (BLM's) adoption of a controversial final rule addressing hydraulic fracturing (HF) operations and related water handling, well casing, chemical reporting and monitoring requirements for federal and Indian lands. A day before the rule was to become effective, however, a group of tribal, state and industry interests successfully challenged the rule in the Federal District Court for the District of Wyoming, convincing the court to stay the rule's application nationwide.[1] As a result of the Order, existing BLM rules for processing applications for permits to drill and conducting well site inspections on federal and tribal lands are still in effect.

A basis for the court's ruling is to prevent the "credible threat" of grave financial harm to oil and gas operators during a period when the court will take up and rule on pending preliminary injunction motions. The court's recognition that a stay is necessary to prevent irreparable injury—a concept embedded in the Administrative Procedure Act (APA) postponement statute at 5 U.S.C. Section 705—may signal the likely outcome of the preliminary injunction motions, because "probable irreparable harm" is the "single most important" element to be established in order to obtain a preliminary injunction, according to the Tenth Circuit in *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*[2]

The consolidated Wyoming litigation over BLM's HF rule was originally brought on behalf of the Independent Petroleum Association of America and Western Energy Alliance, and was expanded to include—as additional challengers of the rule—a handful of western states and

the Ute Indian Tribe. Other nongovernmental organizations intervened in support of BLM's rule. The pending challenges include asserted failures to adequately comply with the APA, lack of consideration of the financial impact of compliance with the rule, inadequacy of BLM's jurisdiction over regulation of downhole activities, and alleged infringements on state regulatory jurisdiction and tribal sovereignty. It is not clear when the court may rule on the pending preliminary injunction motions or otherwise dispose of the challenges pending review. In any event, for now, BLM's HF rule is not in effect nationwide.

For more information, contact Stuart R. Butzier.

[1] *See* Order Postponing Effective Date of Agency Action dated June 24, 2015 (Order) in *State of Wyoming, et. al v. United States Dept. of Interior*, Case Nos. 2:15-CV-043-SWS and 2:15-CV-041-SWS (consolidated).
[2] 356 F.3d 1256, 1260 (10th Cir. 2004)

EPA Assesses Potential for Hydraulic Fracturing to Impact Drinking Water Sources[i]

The Environmental Protection Agency ("EPA") recently released a draft assessment analyzing the potential impacts of hydraulic fracturing ("fracking") on drinking water resources[1] (both on quality and quantity) for public comment and peer review.[2] The draft assessment finds that fracking causes no widespread, systematic impacts on drinking water.[3] The draft assessment notes that the findings do not mean that water contamination cannot happen, and clarifies that contamination was reported in a small portion of cases the EPA reviewed.[4] The assessment indicates that the potential for contamination needs to be determined on a local level and not on a national level because the probability for contamination is regionally specific.[5]

Barring accidents, the assessment maintains that competition for water over time is a concern that should be considered at a local level.[6] EPA notes that "[h]igh fracturing water use or consumption alone does not necessarily result in impacts to drinking water resources. Rather, impacts most often result from the combination of water use and water availability at a given withdrawal point."[7] The assessment finds that "[t]he potential for impacts to drinking water resources from hydraulic fracturing water withdrawals is highest in areas with relatively high fracturing water use and low water availability."[8] The assessment goes on to state that "[g]round water withdrawals exceeding natural recharge rates decrease water storage in aquifers, potentially mobilizing contaminants or allowing the infiltration of lower quality water from the land surface or adjacent formations," which could affect drinking water quality.[9] In New Mexico, Oklahoma and Kansas "[this] potential for water quantity and quality impacts from hydraulic fracturing water withdrawals . . . appears to be low at present."[10] [11] In western and southern Texas the potential impact is much higher.[12] EPA found it important to note that water scarcity is a concern that plagues many industries and is not unique to the oil and gas industry.[13]

Other concerns over hydraulic fracturing come in the form of accidents and inadequate procedures,[14] including "spills of hydraulic fracturing fluids and produced water; fracturing directly into underground drinking water resources; below ground migration of liquids and gases; and inadequate treatment and discharge of wastewater."[15] EPA notes that other problems can occur due to inadequate design or construction of casing or

[i] This summary was prepared by Robin James, a 2015 summer associate now in her third year of law school at the University of New Mexico. Ms. James will join Modrall Sperling in 2016.

cement, which can allow fluid movement and a potential for contamination of drinking water.[16] "Frac hits" have been reported, but the assessment notes that there are potential solutions even when accounting for the escape of fluids in general.[17] "[V]ertical separation between the production zone and drinking water resources" can help protect drinking water from these kinds of accidents.[18] The chemical makeup of the fluids also largely affects the impact of a potential spill.[19] In summary, the draft assessment finds that drinking water generally has not been contaminated by fracking, acknowledging that there are exceptions and areas that have yet to be explored.[20] This lack of conclusory findings has allowed organizations to summarize the report differently. It has allowed those who oppose fracking to report that there are still valid concerns regarding drinking water and fracking, and has allowed many others to report that fracking is harmless to drinking water resources.

What is certain is that the EPA's draft assessment is unable to directly cite hydraulic fracturing as having widespread effects on drinking water. The EPA concludes its report by stating that it hopes that "the identification of limitations and uncertainties will promote greater attention to these areas through pre- and post-hydraulic fracturing monitoring programs" and research. EPA hopes that the report "advances the scientific basis for decisions by federal, state, tribal, and local officials; industry; and the public, on how best to protect drinking water resources now and in the future."[21]

For more information, please contact Stuart Butzier.

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[1] *See id.* at 3-1 (It should also be noted that for the purpose of this study, "drinking water resources are defined broadly as any body of ground water or surface water that now serves, or in the future could serve, as a source of drinking water for public or private use.").
[2] *Id.* at ES-3.
[3] *See id.* at ES-6.
[4] *See id.* at ES 10-1.
[5] *See id.* at 4-51.
[6] *See id.* at ES-6.
[7] *Id.* at 4-15.
[8] *Id.* at ES-9; *see also id.* at 4-47; *id.* at 4-46 (stating that in New Mexico the average is only 175,000 gal per well).
[9] *Id.* at ES-10.
[10] *Id.* at 4-46.
[11] *See id.* at 4-41.
[12] *See id.* at 4-21.
[13] *See id.* at 4-16 (stating, "This possibility is not unique to the oil and gas industry, as any large-volume water withdrawal has the potential to affect water quality.").
[14] *See id.* at 5-75 (stating the frequency of on-site spills in two states).
[15] *Id.* at ES-6.
[16] *See id.* at ES-14; *see also id.* at 6-1.
[17] *See id.* at 6-52
[18] *Id.* at 6-54; *see also id.* at 6-57 (summarizing the conclusion that induced fractures occur and in order to prevent fluid migration these fractures "must not intersect existing fractures or permeable zones that lead to drinking water resources.").
[19] *See id.* at 5-24.
[20] *See, e.g., id.* at 8-72 (uncertainties with the report are labeled throughout); *id.* at ES-6.
[21] ASSESSMENT OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING, *supra* note i, at 10-20 to 10-21.

BLM's Mancos Shale APD Approvals Survive Preliminary Injunction Motion Brought Within a NEPA Challenge

The United States District Court in New Mexico has upheld decisions by the Bureau of Land Management (BLM) approving hundreds of applications for permit (APDs) to drill into the Mancos Shale formation in the San Juan Basin, which contains one million acres of public land and three million acres of federal minerals.[1] The area overlying the Mancos Shale formation is culturally important for various tribes in northern New Mexico. Since 2000, the BLM granted 265 APD approvals for both directional drilling and hydraulic fracturing (HF) operations in the Mancos Formation. Plaintiffs, the Dine Citizens and various environmental groups, petitioned the court for a preliminary injunction to nullify all 265 APD approvals and enjoin the BLM from issuing new applications for permits to drill (APDs) to operators in the Mancos Shale. The Plaintiffs alleged that the BLM had failed to adhere to the National Environmental Policy Act (NEPA)[2] when issuing the APDs by (1) tiering the NEPA documents to the BLM's 2003 Resource Management Plan (RMP), which Plaintiffs alleged insufficiently addressed the impacts of directional drilling and HF Operations in the Mancos, and (2) utilizing boilerplate Environmental

Assessments (EAs) when issuing the APDs.[3] The court ultimately denied the preliminary injunction despite recognizing that Plaintiffs' evidence had cast some doubt on the thoroughness of BLM's actions, and that the harms Plaintiffs' sought to prevent would be irreparable.

The NEPA Documents: In 2000 the BLM began drafting its Reasonably Foreseeable Development Scenario Report (RFDS)[4] in which the BLM analyzed oil and gas prospects for the succeeding twenty years in the San Juan Basin,[5] including the surface and subsurface impact of oil and gas development.[6] Although the RFDS focused on the larger San Juan Basin, it briefly and specifically addressed the impact of drilling in the Mancos Shale. The RFDS described the Mancos as "marginally economic," stating most reservoirs were "not currently considered candidates for increased density development or further enhanced oil recovery operations."[7] The RFDS further predicted, based on "then-existing drilling technology," that the Basin's Dakota Pool—as opposed to the Mancos Formation—would likely undergo the majority of development in the next twenty years.[8] The RFDS contained a section entitled "impacts of future technology" that specifically addressed impacts from directional drilling and HF operations over the next twenty years. [9]This section's focus was basin-wide, rather than specific to the Mancos Formation. The 2001 RFDS, in total, contained fewer than two pages of analysis regarding the impact of directional drilling or HF advancements, and concluded that the such techniques are "currently complex and costly, and therefore typically inappropriate for most onshore U.S. reservoirs."[10]

In December 2003, the BLM adopted alternative D of the RMP—which utilized the BLM's 2001 RFDS analysis and findings. For NEPA purposes, the RMP served as the BLM's Environmental Impact Statement (EIS).[11] Importantly, the adopted version of the RMP made no specific mention of drilling in the Mancos Shale Formation (only in the broader San Juan Basin), estimated that 9, 942 new wells would be drilled, and addressed the cumulative impacts based on that estimation.

In 2010, the BLM received and approved APDs for directionally drilled and fracked wells in the San Juan Basin and the Mancos Shale. In approving the APDs, the BLM conducted EAs specific to each proposed APD that analyzed the individual impacts of that APD on the Basin, and did not analyze the aggregate effects of drilling on the Basin. Additionally, the BLM approved every APD with a Finding of No Significant Impact (FONSI) that was tiered to the RMP. From 2003 until May 2015, 3,860 new wells of the projected 9, 942 were drilled in San Juan Basin, with 185 of those wells in Mancos Shale.

In 2014, the BLM announced that it would be amending the 2003 RMP to address development possibilities that previously did not exist due to technological restraints, but which now exist or could exist very shortly. Because this RMP would be an amendment to the 2003 RMP, significant portions of the previous document would be left unchanged. The BLM Scoping Report, released November 2014, identified its purpose as reviewing the impacts from additional new development that was possible due to new technology. Significantly, the Scoping Report indicated that the BLM initiated the amendment process because of technological trends in drilling, rather than challenges to APDs issued for any particular site. The amended RMP is expected to be completed in 2017 or 2018.

BLM's NEPA Documents and the Tenth Circuit's Four-Pronged Preliminary Injunction Test: The court applied the Tenth Circuit's four-pronged preliminary injunction test to determine whether the preliminary injunction sought by Plaintiffs would be proper.[12] Tenth Circuit precedent requires that a movant conclusively

establish all four prongs of the preliminary injunction test for an injunction to issue: (1) a likelihood of irreparable harm, (2) a likelihood of success on the merits, (3) balance of harms weighs in movant's favor, and (4) the requested injunction is in the public's interest, before being entitled to a preliminary injunction. [13] The court found that the Plaintiffs conclusively established one of the four requirements for injunctive relief, finding that irreparable harm would occur if the court failed to grant the requested preliminary injunction, The court found Plaintiffs failed to conclusively establish the remaining three prongs of the test.

The court's consideration of the "likelihood of success on the merits" is the most central to understanding the court's determination. According to the court, "some evidence" that an agency failed to take the requisite hard look at the potential environmental effects is insufficient to obtain a preliminary injunction.[14] In the context of NEPA, the "likelihood of success" prong requires the movant demonstrate that the agency's actions, such as the BLM's actions in approving APDs, were arbitrary and capricious, *i.e.*, that the agency failed to take the requisite hard look at the environmental consequences of its actions. [15]In reviewing such actions, if the agency is evaluating technical and scientific data within its expertise, then the agency is entitled to an "extreme degree of deference." [16]In this case, the "likelihood of success" prong required the Plaintiffs to conclusively establish that the BLM actions of (1) tiering the NEPA documents to the 2003 RMP, which analyzed the impacts of directional drilling and HF operations at the Basin level, and (2) utilizing boilerplate EAs when issuing APDs, was arbitrary and capricious. The Court found the Plaintiffs failed to proffer enough evidence to conclusively demonstrate that the BLM failed to take the requisite hard look and, therefore, determined its actions were neither arbitrary nor capricious.

The court first examined whether the APDs were properly tiered to the RMP. Despite the fact that the RMP was basin-wide, and the APDs were site specific, the Court reasoned that this BLM action was not "arbitrary and capricious."[17] The court noted that NEPA documents need only "concentrate on issues that are truly significant to the action in question, rather than amassing needless detail,"[18] and found that the BLM's NEPA documents focused on truly significant details, as opposed to needless minutia.[19] The court determined that the documents, although tiered to the 2003 RMP, fully addressed the impacts of directional drilling and HF operations, technologies that existed for a long time and whose impacts on the San Juan Basin were well studied in the RFDS. [20] Additionally, the Court, reasoned that, while the BLM is undertaking further study on the impacts of directional drilling and HF operations in the Basin, via the Amended RMP, the BLM's reliance on the 2003 RMP did not make its actions arbitrary and capricious.[21] Instead, the court held that the BLM is entitled to rely on documents like the 2003 RMP since the document was "well-reasoned."[22] The court noted that an agency is not free to ignore technological advancements and continue to tier a NEPA analysis to an EIS using underpinning technology that is different than modern technology in such a way that environment impacts—such as technological advancements in directional drilling—are "quantitatively significant."[23] The court found that the Plaintiffs failed to establish that the technological advancements in directional drilling and fracing that occurred after 2003 caused environmental impacts that were "significant" enough to trigger a new EIS.

Next, the court addressed the Plaintiffs' allegations that the EAs were "boilerplate" and, therefore, arbitrary and capricious. In disagreeing with the Plaintiffs' "boilerplate" allegations, the court asserted that NEPA does not prevent "an agency from creating an EA that resembles

another EA in a similar environment."[24] The court reasoned that similar EAs were not only likely, but appropriate in this case given the similarities between drilling locations and the fact that the drilling technology used across all the EAs was the same. [25]Also, the court noted the EAs were "robust documents" that considered both the "context" and "intensity" of the BLM's actions. Accordingly, the court found the Plaintiffs failed to demonstrate that the BLM's EAs lacked the requisite hard look.

Take Away: The *Dine Citizens* court reemphasized that a preliminary injunction is an extraordinary remedy, and relief is only appropriate upon extraordinary showings. In the context of a challenge to an agency's NEPA documents, the court requires that a movant provide evidence that (1) environment effects of the agency's actions are "significant" within the meaning of NEPA and that (2) the agency failed to analyze these effects. The court reiterated that it will not indulge a movant with any assumptions about environmental effects or potential paradoxes that may arise from technological advances occurring after an initial EIS, requiring instead that a movant proffer hard data as to these effects.

For further information, contact Cristina A. Mulcahy.

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[1] *See* Dine Citizens Against Ruining the Environment, et al. v. Jewell, et al., No. CIV 15-0209 JB/SCY (_____, 2015).
[2] Dine Citizens' petition includes claims under both NEPA and the National Historic Preservation Act of 1966, Pub. L. No. 89-665, 80 Stat. 915 ("NHPA"). *Dine Citizens*, at 27. The Motion for Preliminary Injunction, however, utilized only NEPA claims.
[3] *Dine Citizens* at 28.
[4] The RFDS is not a NEPA document within the meaning of the statute; instead, only the (1) RMP/EIS, (2) EAs, (3) FONSIs, and (4) Notices of Intent are NEPA documents. For ease of reference, however, the RFDS is discussed in the context of the other NEPA documents in this article.
[5] The BLM published the final RFDS in late 2001. The RFDS was intended to serve as the BLM's underlying support for the RMP that was finalized in 2003, after the requisite notice and comment period.
[6] *Dine Citizens* at 8.
[7] *Id.*
[8] *Id.*
[9] *Id.* at 10.
[10] *Id.* at 11 (internal citations omitted).
[11] *Id.* at 12
[12] *Id.* at 64.
[13] *Id.* at 65.
[14] *Id.* at 75.
[15] *Id.* at 77.
[16] *Id.* at 78.
[17] *Id.* at 81.
[18] *Id.*
[19] *Id.* at 83.
[20] *Id.* at 85.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 88.
[24] *Id.* at 89
[25] *Id.*

Overview of the Twelve Objectives in New Mexico's New Energy Plan

New Mexico Governor Susana Martinez unveiled the state's New Energy Plan ("Plan") on September 14, 2015. The Plan, entitled "Seizing our Energy Potential: Creating a More Diverse Economy in New Mexico," focuses on an "all of the above" approach to promote job creation and to encourage energy development in the state. The Plan focuses on industries that the Martinez administration believes New Mexico is best suited to pursue, develop and promote. The Plan supports expanding markets for the coal and natural gas industries, clarifying tax credits for all energy producers, streamlining and simplifying the regulatory process for permitting, and promoting infrastructure development to help transport oil, gas and electricity in and out of New Mexico. For the first time, water policy is included in the Plan, emphasizing the need to consider water use, and New Mexico's water supply, when planning energy development and generation projects in the state.

The Plan provides policy for twelve identified objectives. This article provides a brief summary of the Plan's twelve objectives and the recommendations to meet those objectives.

1. Energy Diversity

The Plan seeks to diversify New Mexico's energy

portfolio by considering all forms of energy production from the state's different geographic areas. The Plan encourages a diverse energy portfolio to "provide multiple pathways for economic success and hedge against changes in market conditions." To do so, the Plan recognizes that the state must have mechanisms to recognize changing market conditions and to evaluate the economic value and availability of different energy resources. The Plan indicates that the state had commissioned an analysis of the state renewable energy production tax credits that considered both the costs incurred by the tax credits and the benefits of the tax credits. The Plan recommends enacting a consistent tax policy to provide certainty for industries.

2. Natural Gas Market Enhancement

Falling natural gas prices have decreased revenue in New Mexico. The Plan highlights the need for new markets to increase demand for natural gas, and proposes to attract petrochemical manufacturers to the state and to expand rail infrastructure to support this industry. The Plan also proposes to promote the use of natural gas vehicles by improving the infrastructure needed to support these vehicles, such as natural gas fueling stations,and creating tax credits and vouchers for vehicle owners. The Plan also suggests the state procure a fleet of natural gas vehicles.

3. Energy Market Expansion

The Plan states that, as federal regulations increasingly encroach upon coal-fire electricity markets in New Mexico, the state should look to other markets to promote its coal resources in order to support local communities that depend on coal mines and coal-fired power plants. The Plan suggests evaluating converting coal to liquid fuels or gases, adopting clean coal technologies and exporting coal internationally. Moreover, the Plan suggests that in order for Coal from the San Juan Basin to be exported to foreign markets, a freight rail service should be expanded to the region.

The Plan also promotes the development of small modular reactors ("SMRs") as a viable pathway for New Mexico to provide carbon-free power. The Plan identifies New Mexico's established nuclear industries—including the US's only uranium enrichment plant and the State's Waste Isolation Pilot Plan—as reasons that SMRs are a viable new market for New Mexico to consider. The Plan suggests putting together a taskforce to look at the feasibility of SMRs providing energy in New Mexico and developing hypothetical incentives for SMR developers.

The Plan identifies energy storage as a possible sector for economic growth in New Mexico. The plan indicates that New Mexico is well suited to expand its involvement in energy storage because of the national laboratories located in the state and the state's existing battery energy storage demonstration projects. The Plan proposes to support a state initiative to establish an "Advanced Battery Chemistry and Materials Center", to pursue more energy storage technology and development demonstration projects and to minimize the regulatory and permitting costs of energy storage financing and grid interconnection.

4. Regulatory Clarity for Existing & Emerging Industries

The Plan recognizes there is a need to streamline oil and gas regulation in New Mexico, and to

discourage counties from regulating this industry. The Plan also notes that the state has received feedback that local regulatory agencies at times act as impediments to energy project development. The Plan recognizes a need to promote timely permitting for energy projects to facilitate financing, and to expedite revenue flow and job creation within the state.

Finally, the Plan acknowledges that the local regulatory costs for the solar industry are high. It proposes that the state initiate an effort to encourage local jurisdiction of the solar industry in order to reduce the regulatory costs for solar PV installation.

5. State, Federal & Tribal Cooperation

Because of New Mexico's checkerboard of private, federal, state and tribal lands, energy projects are often subject to permitting and regulation from multiple stakeholders. The Plan identifies the need to collaborate with these stakeholders to expedite permitting decisions. The Plan proposes to comment on federal rulemakings, NEPA processes and Resource Management Plans to promote streamlined processes. It also recommends implementing agreements with the Bureau of Land Management to streamline permitting, operating, and inspecting requirements.

6. Infrastructure

The Plan acknowledges that the state's infrastructure to transport oil and gas and electricity is out of date, and identifies specific areas in New Mexico where natural gas and oil products experience significant delays in transportation. The Plan proposes to reallocate tax revenue in order to fund road repair and road construction projects. The Plan also supports a feasibility study for a rail branch line that would extend from Interstate 40 to the Farmington Four Corners Region.

The Plan prioritizes upgrading the state's electrical grid to promote economic development, to provide reliable electricity delivery, to increase renewable energy on the grid and to allow the state to export its solar and wind resources. The Plan also proposes that New Mexico engage in regional transmission planning, consider installing smart meters to accommodate a basic smart grid, and incentivize electricity users to voluntarily curtail energy consumption during peak times.

7. Public Building Efficiency

The Plan recognizes that New Mexico's public buildings have the potential to be energy efficient. The Plan offers to create a program for energy performance in public buildings that would require annual benchmarking of energy and water use for state buildings, disclosing energy use in benchmarked buildings, establishing energy performance targets for public buildings, and monitoring energy usage. The Plan also endorses the energy savings performance contracting (ESPC) program, which establishes partnerships between government entities and energy service companies to retrofit buildings to save energy.

8. Public Health, Safety & The Environment

The Plan acknowledges public concern for health and safety implications in energy development (eg. concern about the impact hydraulic fracturing will have on groundwater supplies, and concern about the impact coal-fired power plants have on air quality in New Mexico communities). The Plan

recommends encouraging those in the oil and gas industry to voluntarily test baseline groundwater around drilling sites. Moreover, the Plan supports accelerating the development of natural gas gathering pipelines to reduce flaring, and supports efforts to capture and sequester carbon dioxide from energy production.

9. Energy & Water

The Plan states that New Mexico should focus on reducing fresh water use, and suggests one way to do this is to recycle produced water in oil and gas operations. The Plan also directs that alternative sources of fresh water should be used to meet the large need for water in power generation. The Plan provides that the state should promote the study and use of brackish water resources, non-potable water, and reused produced water.

10. Energy Education

The Plan suggests that the state implement an education campaign to better inform the public on oil and gas operations, renewable energy development, uranium mining and nuclear power development. The Plan provides that in order to make the most informed energy decisions, the state needs access to unbiased scientific information.

11. Workforce Training

The Plan acknowledges the state's need for a workforce trained in engineering, geology and hydrology to meet the energy industry's employment needs. The Plan recommends encouraging colleges and universities to align their curricula with energy workforce needs and develop specialized degree and certification programs. The Plan supports two-year college training programs in applied energy technologies, and encourages Science, Technology, Engineers and Mathematics (STEM) courses in college and high school.

12. Commitment to Energy Policy

This is New Mexico's first formal energy policy in more than twenty years. Given this history, the Plan suggests that the state review and implement an energy plan on a regularly scheduled basis.

Please contact Zoë E. Lees for more information.

Seismic Operations Held Subject to Notice and Negotiation Requirements of Surface Owners Protection Act

In a July 28, 2015 opinion, the New Mexico Court of Appeals (Court of Appeals) determined that geophysical seismic operations constitute "oil and gas operations" under NMSA 1978, § 70-12-5(A) of the Surface Owners Protection Act (SOPA), thereby subjecting an operator to strict liability for damages caused by its operations under the SOPA. The SOPA requires advance notice of oil and gas operations, negotiation of a surface use agreement, and payment of compensation for any damages sustained by the surface owner. The SOPA differentiates between "activities which do not disturb the surface," which require 5 days advance notice of the activities and "oil and gas operations," which are subject to 30 days' notice as well as the negotiation of a surface use agreement.

The district court had ruled that the seismic operations at issue in the case, which involved surveying, laying of

cables and seismic equipment, and use of a vibroseis truck, were a non-surface disturbing activity. Accordingly, the district court found that the surface owner had no claim for damages under the SOPA.

On appeal, based on its review of surface owner protection statutes in other states and prior New Mexico case law considering oil and gas exploration, the Court of Appeals reversed the district court's findings. The Court of Appeals ruled that seismic operations are considered oil and gas exploration activities and therefore fall within the SOPA's definition of "oil and gas operations." That definition broadly includes "all activities affecting the surface owner's land that are associated with *exploration*, drilling or production of oil or gas." NMSA 1978, §70-12-5(A) (emphasis added). The Court of Appeals agreed with the operator's contention that that the seismic operations were "activities that do not disturb the surface" under NMSA 1978 §70-12-5(A) and were therefore subject to the 5 days' notice provision. However, because the surface owner was claiming that the seismic operations had caused surface impacts, including the cutting of roads and damage to vegetation, the Court of Appeals held it was entitled to compensation for such damages under the SOPA.

Additionally, the Court of Appeals ruled that the surface owner was entitled to proceed to trial on claims for breach of contract based on language in a state oil and gas lease and the seismic permit granted by the State Land Office for the portion of the geological seismic survey conducted on the surface of the state oil and gas lease. Although the surface estate was owned by the state, the plaintiff held a grazing lease for the lands and under State Land Office rule NMAC 19.2.17.15(B), which requires the grantee of a seismic permit to "settle with and compensate state land office surface lessees for actual damages to or loss of livestock, authorized improvements, range, crops, and other valid existing rights recognized by law."

The result of the Court of Appeals' interpretation of the SOPA is that operators can no longer assume that all casual use operations are exempt from the SOPA. The Supreme Court of New Mexico has denied cert., meaning that the Court of Appeals decision stands, with no further opportunity for appeal.

Federal District Court Sets Aside Fish and Wildlife Service's 30-Year Take Permit Rule Under Bald and Golden Eagle Act

On August 11, 2015, a federal district court judge in the United States District Court for the Northern District of California[1] vacated the United States Fish and Wildlife Service's (FWS) rule authorizing 30-year take permits under the Bald and Golden Eagle Protection Act (BGEPA). The court held that the FWS violated the National Environmental Policy Act (NEPA) by relying on a categorical exclusion rather than conducting a fuller NEPA review. The court's decision may create uncertainty for wind developers who will, at least in the short-term, only be able to apply for and obtain 5-year take permits under the BGEPA. On October 9, 2015, the FWS filed a notice of intent to appeal the Ninth Circuit's decision.

Background: The Bald and Golden Eagle Protection Act prohibits the taking of bald and golden eagles. In 2009, the FWS promulgated a rule that authorized incidental take of bald and golden eagles, *i.e.*, take that is

"associated with, but not the purpose of, an activity."[2] The 2009 rule authorized a 5-year term for programmatic incidental take permits. Programmatic take is take that is "recurring" and that "occurs over the long term."[3] After the 2009 rule was issued there was an increase in wind energy projects, which, in 2012, led the FWS to propose a new rule extending the term of programmatic incidental take permits to 30 years. The FWS adopted the rule extending the term of incidental take permits in 2013.[4] The purpose of the 30-Year Rule was to "facilitate the development of renewable energy and other projects that are designed to be in operation for many decades and to provide more certainty to project proponents and their funding sources, while continuing to protect eagles consistent with statutory mandates."[5]

FWS concluded that the change in term from 5 years to 30 years was categorically excluded from full NEPA review because the change in the rule was "strictly administrative," the impacts from the change in term were too broad or speculative to lend themselves to meaningful review, and no extraordinary circumstances existed requiring additional NEPA analysis.[6] FWS' determination to not conduct a NEPA analysis was met with opposition from other federal agencies, conservation and wildlife protection groups, and Indian tribes, who collectively formed the basis for the judicial challenge to the 2013 rule.[7]

Standing to Challenge Rule: The Federal Defendants argued that the Plaintiffs lacked standing to challenge the rule because the "Plaintiffs merely speculate that the Final 30-Year Rule might encourage development of wind projects at as-yet-unknown locations within large expanses of eagle habitat that they claim they use."[8] The court rejected this argument based on declarations the Plaintiffs submitted demonstrating they had certain plans to visit specific locations to observe and enjoy bald and golden eagles. The court also found that the Plaintiffs asserted an injury that was not speculative given a Federal Register Notice regarding a utility's application for a 30-year programmatic take permit for a project in the county in which the Plaintiffs live.[9]

NEPA Violation: The court found that the FWS violated NEPA by relying on the categorical exclusion in 43 C.F.R. § 46.210(i), which excludes from further NEPA review regulations that are "of an administrative…nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case."

The court first held that the FWS had failed to demonstrate that either of the two elements of the categorical exclusion applied to the 30-Year Rule.[10] The court concluded that changing the term from five years to thirty years was not "merely administrative in nature," because the increase has the "effect of reducing public participation in permitting decisions." The court reasoned that, under the 5-Year Rule, a project would be subject to NEPA's public participation requirements six times during a 30-year period, whereas under the 30-Year Rule, a project would only be subject to those requirements once. The court also concluded that the substantive concerns that motivated the Rule's adoption, *i.e.*, the Rule would facilitate construction of wind power facilities by allowing the projects to operate longer term, weighed against the FWS' conclusion that the 30-Year Rule was purely administrative. In addition, internal FWS staff emails suggested that relying on a categorical exclusion was not appropriate. The court further held that FWS failed to adequately demonstrate that environmental effects were too broad or speculative to lend themselves to meaningful analysis.

The court also reasoned that extraordinary circumstances precluded FWS from relying on the categorical exclusion.[11] The court stated that there was "substantial evidence in the record indicating that the Final 30-Year Rule's increase in the maximum duration for programmatic take permits may have 'highly controversial environmental effects' on bald and golden eagles." In reaching this conclusion, the court cited FWS' awareness that eagles can be killed by colliding with structures, that FWS expressed concern about the effects wind power facilities may have on eagle populations, and that other agencies, as well as FWS staff, expressed concerns about the impacts of extending the permit term on bald and golden eagles. The court summarized: "Where, as here, the agency has failed to adequately address concerns raised by its own experts indicating that the Final 30-Year Rule may have highly controversial environmental effects—and has failed to cite expert opinion to the contrary—the agency action should be set aside."[12] The court held that FWS violated NEPA by failing to prepare an EA or EIS, and remanded the rule to the agency for further consideration.

For more information, please contact Deana M. Bennett.

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[1] *Shearwater v. Ashe*, Case No. 14-CV-02830-LHK, 2015 U.S. LEXIS 106277 (N.D. Cal. August 11, 2015)
[2] 50 C.F.R. § 22.26.
[3] 50 C.F.R. § 22.3.
[4] *Shearwater*, Case No. 14-CV-02830-LHK, slip op. at 9-10, 16.
[5] *Id.* at 13 (quoting 78 Fed. Reg. 73,704, 73,721 (Dec. 9, 2013).
[6] *Id.* at 10, 16 (quoted authority omitted). FWS also concluded that it was not required to comply with the Endangered Species Act (ESA) consultation requirements in promulgating the draft or final Rule, a position with which the court agreed. *Shearwater*, Case No. 14-CV-02830-LHK, at 44-45.
[7] *Id.* at 20.
[8] *Id.* at 21 (quoted authority omitted).
[9] *Id.* at 20-26.
[10] *Id.* at 29-37.
[11] *Id.* at 37-43.
[12] *Id.* at 43.

Lawyers

Larry Ausherman
Deana Bennett
Susan Bisong
Jennifer Bradfute
Sonya Burke
Stuart Butzier
John Cooney
Earl DeBrine
Joan Drake
Tomas Garcia
Marco Gonzales
Paul Halajian
Stan Harris
Gbenoba Idah
Zoë Lees
George McFall
Meg Meister
Cristina Mulcahy
Brian Nichols
Maria O'Brien
Debora Ramirez
Bill Scott
Christina Sheehan
Lynn Slade
Walter Stern
Sarah Stevenson
R.E. Thompson