

ENVIRONMENTAL GROUP THREATENS SUIT FOR FRACKING-RELATED ENDANGERED SPECIES ACT VIOLATIONS

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On August 29, the Center for Biological Diversity (CBD) gave notice of its intent to sue the Bureau of Land Management (BLM) for alleged violations of the Endangered Species Act (ESA). CBD’s notice asserts that BLM has unlawfully failed to reinitiate consultation under the ESA in connection with claimed risks to various ESA-listed species caused by hydraulic fracturing, or “fracking,” in California’s Monterey Shale Formation.

CBD’s notice, delivered to BLM, the U.S. Fish & Wildlife Service, the National Marine Fisheries Service, and the Departments of Interior and Commerce, contends that BLM “continues to issue oil and gas leases and drilling permits that allow intensive, controversial, and environmentally destructive [fracking] techniques, but the agency relies on outdated biological opinions that fail to evaluate the substantial impacts these techniques – and the consequent increase in drilling these techniques facilitate – may have on ESA-listed species.” CBD argues that new information

demonstrates that newly-combined and more widely employed fracking techniques will impact wildlife in ways that were “not previously considered” in past consultations. *Id.* Further, the oil and gas activities authorized by BLM have been “modified in a way not previously considered” because the recent fracking boom may cause actual drilling to greatly exceed the level anticipated by BLM.

Specifically, the notice states that the enhanced and expanded use of fracking in California will impact habitat, water, and air, and thus will impact listed species. CBD cites the chemicals employed in fracking, the intense industrial activity associated with the drilling technique, and the increased demand on scarce water resources as examples of the “new information” that arguably triggers BLM’s obligation to reinitiate consultation. It also maintains that “the recent boom in fracking” will greatly expand oil and gas development

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in the Monterey Shale, to a much greater degree than BLM anticipated in past consultations.

CBD's ultimate legal contentions are that (a) BLM's failure to reinstate consultation is a violation of its ESA Section 7 obligation to avoid jeopardy to listed species, and (b) BLM is violating Section 9 of the ESA by authorizing activities that harm or harass listed species without coverage from a lawful incidental take statement. Until consultation is complete, CBD argues that BLM must "suspend any leasing or approval of site-specific drilling activities that may 'foreclos[e] the formulation or implementation of any reasonable and prudent alternative measures' until consultation is complete. [16 U.S.C.] § 1536(d)." Simply put, CBD seeks the imposition of a moratorium on fracking on affected BLM lands during consultation.

The notice identifies several species that, in CBD's estimation, will be impacted by fracking activities on BLM land in California, including the following:

- California Condor
- San Joaquin Kit Fox
- Blunt-nosed Leopard Lizard
- Steelhead
- Giant Kangaroo Rat

Commenting on the notice, CBD's public lands director and senior counsel Brendan Cummings said:

A fracking boom could push some of California's most beloved endangered species over the edge. Yet the federal government is leasing out large tracts of our public lands for drilling with no real consideration of the risks fracking development poses to the California condor and other imperiled animals. That's bad for wildlife, and it's a tremendous breach of trust.

CBD's 60-day notice is a necessary precursor to a formal lawsuit under the ESA, as required by Section 11(g) [16 U.S.C. § 1540(g)]. The notice gives BLM an opportunity to correct the alleged violations before CBD may file suit.

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Here, however, it is unlikely that BLM will reinitiate consultation within the 60-day notice period, at the conclusion of which CBD will be permitted to file an action in federal court to enjoin further alleged violations.

CBD's action presents an interesting development in the treatment of fracking in California. As we previously reported (see our August 16 blog report), recent efforts to legislate fracking activities at the state level died in committee, and further legislative efforts are not likely to be taken up again until the 2013 session. The state's Division of Oil, Gas & Geothermal Resources (DOG) is currently developing regulations that will govern the practice. Those regulations will likely include, at a minimum, a disclosure requirement that would mandate the use of a public chemical disclosure registry such as FracFocus. We outlined the DOG's projected timing and rulemaking procedure on our blog on August 1. We consider it extremely unlikely that California will ever ban fracking, or even impose a moratorium on the practice. A CBD lawsuit should only impact federal oil and gas leasing activity in California, and thus should not affect whatever the DOG or the legislature may elect to do. It could, however, create a potentially conflicting overlay on California's expected regulatory scheme, particularly if CBD is successful in enjoining fracking on federal land in the state during any period of reconsultation.

For more information regarding California fracking issues, please contact:

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