

BLM RESPONDS TO ALLEGATIONS OF FRACKING-RELATED ENDANGERED SPECIES ACT VIOLATIONS

K. ERIC ADAIR

As we previously reported, on August 29, 2012, 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). Last week, BLM responded to CBD's notice, rejecting CBD's central contention 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.

The fact that BLM responded at all is somewhat surprising. The content of the response, however, is not. As summarized in the conclusion to its response, BLM contends that "because hydraulic fracturing techniques in California have not changed, and have not increased the level of oil and gas activities on Federal mineral estate in California, and there is no new information on the impacts of hydraulic fracturing specific to California, it follows that:

1. The proposed action has not been modified in a manner that causes an effect to listed species or critical habitat that was not considered in the Caliente RMP [Resource Management Plan] Biological Opinion or the Hollister RMP Biological Opinion, as applicable; and
2. There is no new information that reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not considered in the Caliente RMP, the Hollister RMP, or the associated Biological Opinions.

Supporting its conclusion, BLM contends that fracking in California is fundamentally different from fracking elsewhere in the United States in several respects. First, fracking has been employed in California to stimulate oil production, rather than natural gas production. The opposite is true in other regions of the United States, such as the Marcellus Shale in Pennsylvania, where

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natural gas is the dominant natural resource. Moreover, BLM argues, California has not seen a significant increase in drilling activity associated with fracking technology, such that surface disturbance — and presumably, disturbance of habitat protected under the ESA — is within the levels contemplated by previous analyses. Indeed, BLM states that “[a]s of late 2012, the large increase in horizontal drilling and hydraulic fracturing occurring elsewhere in the country has largely bypassed California.” BLM also points out that, in California, fracking typically occurs in shorter, vertically-drilled wells, and occurs on lands already developed for oil exploration and production, thereby minimizing any additional disturbance of critical habitat. BLM also notes the stringent statutory and regulatory protections in place in California to preserve air and water quality.

BLM also asserts that it has fully complied with the ESA in various ways. First, it has developed “plan level documents that address the impacts of oil and gas development” on a programmatic basis. Second, BLM consults with the Fish and Wildlife Service (FWS) and complies with the requirements of existing biological opinions. Third, it develops “site-specific environmental review documents” as it considers the impacts from proposed oil and gas activities. And fourth, BLM engages in project-specific consultation, as appropriate.

The sufficiency of BLM’s response will undoubtedly be tested in the coming months, as it is merely prelude to the inevitable filing of an action by CBD. Now that the 60-day notice period has expired, we expect that CBD will file its ESA action any day now. We will provide a further update when the action is filed.

HINSON GRAVELLE & ADAIR LLP

For more information regarding California fracking issues, please contact:

K. Eric Adair
HINSON GRAVELLE & ADAIR LLP
28470 Avenue Stanford, Suite 350
Valencia, California 91355
adair@hinsongravelle.com
www.hinsongravelle.com
661-294-0130
@kericadair

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