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Lead NEPA Story: BLM: 'Negligible' impacts from central California fracking

(Greenwire, 10/31/2019) **Heather Richards, E&E News Reporter**

Federal land in central California could again be leased to oil and gas developers.

Two years after a settlement with environmental groups forced the Bureau of Land Management's Bakersfield, California, field office to halt oil and gas leasing on more than a million acres of land mineral estate and consider hydraulic fracturing impacts, the agency has released a final environmental review predicting negligible effects to air, water and other resources from the controversial industry technique to enhance production.

Gabe Garcia, BLM Bakersfield field manager, said the analysis used the most comprehensive science available on fracking in California. The study "does not change any land-use planning decisions, including making new public land available to oil and gas development, issuing leases or approving permits to drill," he said.

The fracking study, released today, is rooted in the Bakersfield Field Office's release of its 2014 resource management plan, which designated 1.2 million acres of federal minerals open for development.

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Clean Water Act: Economic analysis could undermine Trump rule repeal

(Greenwire, 10/30/2019) **Ariel Wittenberg, E&E News Reporter**

When the Trump administration finalized its repeal of the Obama-era Clean Water Rule last month, it also quietly updated an economic analysis of the repeal's costs and benefits.

The 195-page final analysis is nearly 10 times longer than the one that accompanied the Trump administration's initial proposal in 2017 to repeal the rule and estimates different costs and benefits of repealing the regulation, which clarified which wetlands and waterways are protected by the Clean Water Act.

The updated analysis — which the public did not have the chance to comment on — could leave the repeal vulnerable to legal challenges, experts say.

"The agencies aren't required to do an economic analysis, but once they decide to do it, courts typically want them to do it right," Vermont Law School professor Pat Parenteau said. "If there are flaws in the analysis, and if the public hasn't had a chance to see it, that could fit into the box of arbitrary and capricious."

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Already, a coalition of environmental groups have cited the new analysis in their legal challenge to the repeal filed last week.

The lawsuit, filed in the U.S. District Court for the District of South Carolina, argues that the administration already made its mind up to repeal the Clean Water Rule, also known as the Waters of the U.S. rule, or WOTUS, before beginning the rulemaking process. The new economic analysis is one of many factors the groups highlight to support their case, including former EPA Administrator Scott Pruitt's history of challenging the Clean Water Rule in court and President Trump's executive order directing EPA and the Army Corps of Engineers to repeal the rule.

"This is more evidence to us that they decided the result first and then did studies that they think purport to support the result," said Southern Environmental Law Center attorney Blan Holman, who is representing the challengers in the case. "I think it adds significantly to the picture."

EPA did not respond to questions about why it did a new economic analysis for the final rule or why it did not allow public comment on the document.

'Extreme' differences

The latest economic analysis isn't only much longer than the 2017 version, it also uses different methodology to examine the impacts of repealing the Clean Water Rule and reaches different conclusions about the costs and benefits of rescinding it.

Back in 2017, the Trump administration calculated that the repeal would result in $162.2 million to $476.2 million in annual avoided costs and $33.6 million to $72.8 million in forgone benefits.

That initial analysis was criticized by environmental groups and policy experts for slashing the benefits of wetlands by claiming several key studies were too old to be included in its calculation, even though the analysis included studies of similar ages about the costs of regulating wetlands.

EPA and the Army Corps did not immediately respond to those criticisms. Though the Trump administration issued a supplemental proposed repeal of the Clean Water Rule in 2018 to beef up the legal justifications for rescinding the Obama-era standard, it did not issue a new economic analysis until last month, when it finalized the repeal.

The new analysis finds that the repeal will produce annual avoided costs ranging between $116 million and $174 million and annual forgone benefits of $69 million to $79 million.

The different conclusions between the analyses are likely based on the fact that the administration used different methodologies to reach them.

The 2017 analysis largely borrowed from work the Obama administration had done to calculate the costs and benefits of the Clean Water Rule by predicting how many more wetlands and waterways would be protected nationwide under the standard.

Now, the Trump administration says both the 2017 and Obama-era analyses actually overstated the Clean Water Rule's costs and benefits by failing to look at how states would respond to changes in federal regulations, among other things.

"The analysis for this final rule responds to the concerns raised by commenters by incorporating a more balanced, robust characterization of possible state responses to a change in jurisdiction," the final repeal rule explains.

That includes calculations that 18 states would be "unlikely" to update their regulations for dredging and filling in wetlands in response to the Clean Water Rule repeal, while 10 would be "unlikely" to update their regulations for point source discharges in response to the repeal.

Those calculations mirror yet another economic analysis the Trump administration conducted earlier this year to support its new definition of Waters of the U.S., which also looked at potential state responses.

That analysis was also slammed by critics, who say the administration relied on incorrect assumptions about states to predict their behavior.

Betsy Southerland, a former career official in EPA's Office of Water, says the latest repeal economic analysis is similarly flawed.

She noted that very few states have their own programs regulating water pollution, and those that do generally cover fewer types of waterways and wetlands than the federal government.

"It is overly positive," she said, noting that the analysis predicts 39 states will likely update their regulations for point source discharges when only 25 states have set their own standards more stringently than the federal government's. "Thirty-nine is quite a bit more than 25."

Bethany Davis Noll, litigation director at New York University School of Law's Institute for Policy Integrity, agreed.

She also faulted the new analysis for only focusing on how the repeal would affect individual states, instead of looking at how varied levels of state waterway protections could lower water quality in states with strong protections if they are downstream of those that are more lax.

"The Mississippi River affects a lot of people in a lot of different states, and this is essentially acting like the only thing that matters is what happens in a single state," Noll said.

She characterized the difference between the 2017 analysis and last month's as "extreme."

'Either way it is a problem'

The new economic analysis could be a liability for the Trump administration in court, if a judge believes the administration improperly relied on the new analysis.

"There is case law that says if you rely on an economic analysis that is fundamentally flawed, it can be arbitrary and capricious," Noll said.

Whether the agency relied on it is an open question.

The final repeal states, "The agencies are repealing the 2015 rule to ensure that they do not exceed their statutory authority, not based on analyses of the economic impacts of the 2015 rule.

"While the agencies have striven to make the economic analysis supporting this final rule as transparent and accurate as possible, their goal in doing so is solely for informational purposes," it says.

Jonathan Adler, a law professor at Case Western Reserve University, said, "The fact that there is a new analysis out there, by itself, doesn't mean they did something wrong.

"If it is true that they weren't relying on it, and there is sufficient information in the record to justify the decision, then I would think they are OK," he said. "Multiple courts have already said that the Obama WOTUS rule is invalid, so there are lots of reasons they might have wanted to get rid of it."

He said a court will have to decide whether it agrees EPA and the Army Corps truly didn't rely on the analysis.

Parenteau, at Vermont Law School, said the new economic analysis may not be the strongest piece of evidence for challengers seeking to get the repeal rule thrown out. A judge would have to consider not just whether the Trump administration "relied" on the new analysis, but also whether allowing the public to weigh in would have made a difference to the final rule.

"If the public had been able to comment, would it have changed their mind?" he asked.

But he said the Trump administration's decision to redo the economic analysis in and of itself could undermine any argument that it did not rely on the analysis.

"It has to mean something, otherwise they wouldn't have done it," he said. "All a court is doing in a case like this is policing foul lines, like calling balls and strikes. And I can see a court saying, that's just not fair to the public to hide the ball."

Holman, at the SELC, said he will be paying close attention to whether the Department of Justice includes the new economic analysis in the administrative record it files in court. If it does, that could be a clue that the economic analysis was part of the administration's decision making.

"Either way it is a problem," he said. "Either they've relied on it explicitly and they didn't give the public the opportunity to comment on it and critique it, or they say that they didn't rely on it but they did," he added. "This is just a very strange process because they made the decision to repeal this rule, and bizarrely it took them two years to get it done, but then they were in enough of a hurry they couldn't get the economic analysis on the public record."

The document, *Economic Analysis for the Final Rule: Definition of "Waters of the United States"—Recodification of Pre-Existing Rules*, may be viewed at https://www.epa.gov/sites/production/files/2019-09/documents/wotus_rin-2040-af74_final_ea_508compliant_20190905.pdf.

Endangered Species Act: Judge restores right whale protections, blocks NOAA bid

(Greenwire, 10/29/2019) **Michael Doyle, E&E News reporter**

A Herman Melville-quoting judge has restored protections for the endangered North Atlantic right whale by blocking NOAA Fisheries' proposal to allow gill net fishing off the New England coast.

In an emphatic repudiation that he said was "not a close call," U.S. District Judge James Boasberg yesterday declared the federal agency violated two federal laws when it gave a green light to gill net fishing gear use in "large swaths" of the marine mammal's habitat.

"There is no folly of the beasts of the earth which is not infinitely outdone by the madness of men," Boasberg wrote, quoting from Melville's 1851 novel "Moby Dick."

An Obama administration appointee at the U.S. District Court for the District of Columbia, Boasberg agreed with the Conservation Law Foundation that NOAA Fisheries violated both the Endangered Species Act and the Magnuson-Stevens Act with its gill net fishing call. He imposed an injunction restoring a prior ban.

"The public interest in preventing the extinction of the whale, which has been listed as endangered since the passage of the ESA, is beyond dispute," Boasberg wrote.

Fewer than 500 North Atlantic right whales are now estimated to be alive. In recent years, the primary cause of death and serious injury for the species has been entanglement in fishing gear.

From 2010-16, entanglements accounted for 85% of right whale deaths.

In addition to causing outright death, scientists say entanglements require right whales to expend so much energy to recover that it delays how frequently otherwise reproductively viable females give birth.

"Expanded fishing in a right whale hot spot flies in the face of the Endangered Species Act," Erica Fuller, CLF senior attorney, said in a statement. "This ruling rightfully reverses a dangerous course and will give right whales the protection they need from fishing gear."

In April 2018, NOAA Fisheries opened two areas that had previously been closed to gill nets for over 20 years. The gear is used to catch groundfish, or bottom-dwellers such as cod, haddock and flounder.

"The opening of these areas is expected to have significant economic benefits for the fishing industry," NOAA Fisheries noted in a legal filing.

A fishing industry organization estimated in a legal filing that closing the areas again "could cost the scallop fishery an estimated $140 [million]-160 million per year and would set back scallop and habitat conservation efforts."

Boasberg found, though, that NOAA Fisheries' Sustainable Fisheries Division did not consult as it was supposed to with the agency's Protected

Resources Division on how reopening the areas to gill nets would affect North Atlantic right whales.

The judge reasoned that "at a minimum" some informal consultation should have occurred.

"Once an action agency makes the determination that its action 'may affect' a listed species, it is without discretion to avoid consultation with the expert agency as to the effects of the action on the listed species," Boasberg wrote.

Boasberg added that "when the global population of a species is as low as 400, every mortality is of huge significance to the potential for the species to avoid extinction."

NEPA: Outdoor groups launch legal campaign against e-bikes

(Greenwire, 10/24/2019) **Rob Hotakainen, E&E News reporter**

Outdoor groups in California sued the Forest Service yesterday in an attempt to block a plan that would permit electric bikes on nonmotorized trails in Tahoe National Forest.

The suit alleges that federal officials violated the Travel Management Rule, which limits motorized transportation to certain trails to prevent harm to natural resources.

"Allowing motorized bicycles on nonmotorized trails meant for hikers, backpackers and equestrians poses risks and conflicts for the many visitors who enjoy that type of quiet recreation," said Helen Harvey, president of the Gold Country Trails Council in Nevada County, one of the plaintiffs in the lawsuit.

The plaintiffs also say the Forest Service — which is part of the Department of Agriculture — did not follow the National Environmental Policy Act in assessing the impacts of its decision.

In a statement, the plaintiffs called the move a "dramatic change in trail policy" that was made with no public input.

"We believe there is a place for motorized bikes, but nonmotorized trails — by definition — are not the right place," said Darrell Wallace, chairman of the Back Country Horsemen of America, another plaintiff in the case.

The lawsuit is certain to be watched closely as the Trump administration moves to permit electric bikes on more public lands controlled by the Interior Department.

Interior Secretary David Bernhardt on Tuesday ordered three agencies — the Bureau of Land Management, Fish and Wildlife Service, and Bureau of Reclamation — to follow the lead of the National Park Service in allowing more e-bikes.

"To my knowledge, this is the first lawsuit addressing the issue of e-bike use on nonmotorized trails on federal public lands," said Alison Flint, director of litigation and agency policy with the Wilderness Society, another plaintiff in the lawsuit.

Flint said the Tahoe decision "violates decades of established laws and policies designed to ensure that decisions about where motorized recreation occurs on our shared public lands are subject to public input and environmental analysis."

A spokesperson for the Forest Service said the agency does not comment on pending litigation.

Tahoe National Forest touted its plan on its website, saying there would be "extended additional opportunities" for e-bikers on nonmotorized trails starting this year.

According to the plaintiffs, Tahoe officials decided to allow e-bikes on more than 130 miles of trails that had been developed and managed for hiking and other nonmotorized uses. Tahoe already has roughly 2,500 miles of roads and trails that allow motorized uses.

While opponents fear that allowing e-bikes on nonmotorized trails will lead to the use of more

motorized vehicles, supporters argue it will let more people gain access to public lands.

"Millions of Americans want to bike on our public lands, and pedal-assist bikes can facilitate the effort of those whose age, fitness level or disability limits their interest," Bernhardt said earlier this week.

The Western Environmental Law Center is representing the plaintiffs, which include the Backcountry Horsemen of California and Forest Issues Group. The suit was filed in the U.S. District Court for the Eastern District of California.

NEPA: How the Trump administration plans to fast-track Tongass logging

(Greenwire, 10/22/2019) **Marc Heller, E&E News reporter**

The Trump administration's proposal to ease logging restrictions in Alaska's Tongass National Forest would use a fast-track process to make thousands of acres of old-growth forest newly available for clear-cutting.

That approach would declare 165,000 acres of old-growth forest, as well as 20,000 acres of young growth, suitable for timber through an "administrative change" that provides limited opportunity for public comment.

The Forest Service included the process in a proposed rule exempting the 16.9-million-acre Tongass from the 2001 Roadless Area Conservation Rule. Opponents from conservation and environmental groups say it raises questions about the legality of the proposal.

But proponents of opening the Tongass to more timber production say the Forest Service is just reversing an earlier administrative move that went with the roadless rule. Removing the roadless rule, by extension, suggests areas previously considered unsuitable for timber should be dubbed suitable again, they said.

Any timber harvest project would still go through the usual case-by-case Forest Service process, which includes environmental reviews and opportunities for public opinion.

According to the roadless proposal, the Tongass forest supervisor would be directed to make an administrative change converting the "unsuitable" acres to "suitable" if they were made off-limits solely because of the roadless rule. That provision was also included in other roadless-rule alternatives the Forest Service considered.

Those designations were made in the 2016 forest plan for the Tongass, the document that governs how the nation's biggest national forest is managed. Normally, administrative changes are intended for minor matters such as fixing map boundary errors in forest plans, according to the 2012 National Forest Management Act planning rule. Each national forest has a forest plan.

"That process was definitely not meant to reclassify thousands of acres of old growth forest to be logged," said Randi Spivak, public lands program director at the Center for Biological Diversity. "This seems like a legally questionable maneuver."

A spokeswoman for Audubon Alaska called the administration's approach "underhanded and legally dubious."

To critics of the proposal, making thousands of acres of old-growth forest suitable for harvest should involve a more drawn-out process to change the forest plan itself. That would require more consultation with local officials, as well as a public comment period.

Officials' preference for administrative changes follows the Trump administration's overall approach to streamlining regulations. Forest management projects in particular can drag on for several years amid lawsuits and

environmental reviews, a sore point for industry groups and Western lawmakers who say the process hinders economic development.

It's also another chapter in a long-standing debate about the roadless rule, which has survived legal challenges and faced skepticism from Republican administrations and support from Democrats. Alaska officials asked for an exemption, saying the Tongass is unusual because of southeast Alaska's economic reliance on access to the forest for a mix of timber, mining and recreational activities.

The proposed exemption outlined in the rule and a draft environmental impact statement would apply to all of the forest's 9.2 million acres of inventoried roadless areas. It wouldn't apply to the smaller Chugach National Forest, also in Alaska, although the agency said administrative corrections could modify the roadless-area boundaries in the Chugach, after public comment periods end December 16.

In practice, the proposal seems to give one person — the forest supervisor — the power to make major changes in how the forest is managed, and sets up a process to make further changes in the future, said Andy Moderow, Alaska director for the Alaska Wilderness League.

The 5.4-million-acre Chugach is nearing the end of a land management plan revision to govern practices for the next 15 years. An objection period on that proposal ends Oct. 29, the last step before the revision is published and takes effect."

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BLM holds quarterly oil and gas lease sales of public lands and minerals based on tracts of land that the oil and gas industry has requested to be auctioned.

The Center for Biological Diversity and Los Padres ForestWatch sued over the 2014 plan, arguing that the BLM had failed to take a hard look at fracking impacts.

A judge agreed.

In 2017, leasing was placed on hold pending a study on fracking that covered central California, including the Central Valley, southern Sierra Nevada and San Joaquin Valley—California's most prolific oil and gas field.

California BLM hasn't issued a new federal oil and gas lease in six years, since a fracking dispute in 2013 halted leasing in Monterey County.

The Center for Biological Diversity slammed BLM's study in comments today, calling the allowance of more oil and gas development an "attack" on the state's future.

"Sacrificing these public lands to dirty drilling and fracking will worsen the climate crisis and expose California's people and wildlife to toxic pollution," said Clare Lakewood, a senior attorney at the Center for Biological Diversity, in a statement. "We'll do everything possible to stop this."

The federal analysis released today considered impacts from an estimated 40 wells drilled over a period of 10 years within the direct planning area, out of approximately 400 wells projected to be fracked throughout California over that time.

Lakewood said her organization has "deep concerns" about the analysis's narrow scope of greenhouse gas emissions estimates and development outlooks, calling the estimated number of wells to be drilled over the next decade "wildly unrealistic."

Fracking became the source of the last decade's shale drilling boom and continues to drive record national production.

Environmental and health groups continually raise concerns about its impacts, and many of the public comments on BLM's fracking analysis expressed opposition to the practice.

"I want to encourage you to leave any companies that use toxic practices to obtain mineral value off the table in your considerations," one commenter noted. "The damage to resources that we regularly rely on is

too great. Please don't allow financial pressures to bend your resolve to protect and maintain these pristine lands."

The pushback against fracking in recent years has come with increased regulations from state and federal agencies.

Though critics say water pollution from fracking persists, the practice is used in most new drilling in the country.

But not in California.

The state remains among the top 10 oil and gas producers in the country, but most of its production is non-federal. Development is also largely in legacy fields using traditional means of production.

The California shale layers of rock are too broken and mismatched for the long horizontal wells where fracking is often deployed, said Garcia, explaining the modest outlook for fracked wells.

"The big horizontal drilling that goes on in other places is not effective here in California," he said.

Fracking has also been criticized because of the increased earthquake activity that happened in Oklahoma following a fracking boom, which the U.S. Geological Survey tied to the large volumes of salty water from fracking that was being injected into the subsurface.

The California study notes the tie between increased seismic activity and fracking but reports a negligible impact on earthquake activity from potential fracking in the area, again because of California's industry practices, which use less water than the fracking hotbeds in other regions of the country.

As part of its study, BLM says it relied on fracking research from the California Council on Science and Technology and Lawrence Berkeley National Laboratory.

The central California field office also depended on Kern County's planning and natural resources division. Kern County is the center of the California oil and gas industry.

BLM has held three public meetings over the last year on the draft analysis.

Of 16,000 public comments submitted over the spring and summer, the majority were form letters, many of them expressing strong opposition to fracking or fossil fuel development more generally.

Of the issues most often noted in substantive comments, climate and air quality were the most frequent concerns.

A record of decision, finalizing the study and clearing the way for oil and gas leasing to recommence, is expected this fall.

The fracking study is the second BLM action in recent weeks expected to result in new oil and gas activity on federal land in the state. The Interior recently opened to development more than 600,000 acres of minerals and land that had been on hold since the George W. Bush administration.

The *Bakersfield Field Office Hydraulic Fracturing Final Supplemental EIS* may be viewed at https://www.blm.gov/programs/planning-and-NEPA/plans-in-development/California.

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