

## Federal Court Requires Additional Environmental Review for Offshore Fracking Off California Coast

A federal court recently prohibited the U.S. Department of the Interior from approving any plans or permits for offshore fracking off the California coast until it complies with the Endangered Species Act (ESA) and the Coastal Zone Management Act (CZMA). *Environmental Defense Center v. Bureau of Ocean Energy Management*, No. 16-cv-8418, 2018 WL 5919096 (C.D. Cal. Nov. 9, 2018). While enforcing compliance with procedural requirements of the ESA and the CZMA, the court largely deferred to the agencies on the plaintiffs' substantive claims under the ESA and the National Environmental Policy Act (NEPA). The court's decision may provide guidance on permitting approvals and environmental review for future energy development activities off the coast of California, including offshore wind.

### Background

The present case arose over plans by two bureaus within the Department of the Interior—the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE)—to allow offshore well-stimulation treatments (commonly known as "fracking" or "acidizing") on the Pacific Outer Continental Shelf off the coast of California.

In 2016, BOEM and BSEE settled two cases brought by the plaintiffs that challenged their approval of 51 permits for offshore well-stimulation treatments on the Pacific Outer Continental Shelf. As part of these settlements, the agencies agreed to a temporary moratorium on permit approvals until they prepared a programmatic environmental assessment (EA) to analyze environmental impacts of foreseeable future well-stimulation practices on the Pacific Outer Continental Shelf. The agencies issued a final EA and Finding of No Significant Impact (FONSI) in May 2016. The plaintiffs in this case then filed lawsuits alleging violations of the ESA, the CZMA and NEPA.

### Endangered Species Act

The court evaluated the timing of the agencies' consultation with the U.S. Fish and Wildlife Service (FWS) and National Marine Fisheries Service (NMFS) under Section 7 of the ESA. BOEM and BSEE initiated informal consultation with the Services *after* they issued the final EA and FONSI. The biological assessments (BAs) concluded that well-stimulation treatments were unlikely to adversely affect most species, but that three species under FWS's regulatory purview were likely to be adversely affected by oil spills.

NMFS concurred in the agencies' determination that well-stimulation treatments may affect, but are not likely to adversely affect, listed marine animals. The court held that an agency can cure an earlier failure to consult so long as it has not made an irreversible commitment of resources. The court determined that the BAs contained a thorough analysis of the effect of well-stimulation treatment on listed species, which indicated that BOEM and BSEE engaged in good-faith efforts to consult with NMFS. The court explained that substantive challenges to the BAs should be brought in a separate case challenging NMFS's concurrence letter, rather than the current case, which alleged a failure to *initiate* consultation.

In contrast, FWS requested more information from the agencies before beginning the formal consultation process. As such, the court agreed with the plaintiffs that BOEM and BSEE did not adequately consult with FWS because FWS was still waiting for additional information before beginning the formal consultation process. The court prohibited BOEM and BSEE from approving any plans or permits for the use of well-stimulation treatments on the Pacific Outer Continental Shelf until they completed consultation with FWS.

## **Coastal Zone Management Act**

The court ruled that BOEM and BSEE violated the CZMA by failing to submit to the California Coastal Commission a determination as to whether the proposed use of well-stimulation treatments is consistent with California's coastal management program.

The court found that the programmatic EA was a "federal agency activity" that triggered the CZMA because it reflected a plan for the agencies to allow well-stimulation treatments on the Pacific Outer Continental Shelf, and it was reasonably foreseeable that the decision to consider permits for well-stimulation treatments would have costal effects.

The court also held that the agencies were required to submit a consistency determination for the programmatic EA. The court explained that the CZMA does not prohibit multiple rounds of consistency review, first for antecedent plans and later for approvals that are not subsidiary to those plans. Here, the agencies were required to submit a consistency determination for the programmatic decision to allow well-stimulation treatment on the Pacific Outer Continental Shelf because this was antecedent to review of future approvals for the use of well-stimulation treatments. Thus, the court prohibited BOEM and BSEE from approving any plans or permits for the use of well-stimulation treatments on the Pacific Outer Continental Shelf until they submitted a consistency determination to the California Coastal Commission and completed the CZMA review process for the EA.

## **National Environmental Policy Act**

Before considering the plaintiffs' NEPA claims, the court first considered whether there was a "major federal action" subject to NEPA. Under NEPA, a plaintiff can challenge programmatic authorizations prior to site-specific approvals. The court held that the EA described and analyzed a definite proposal for an overall plan of allowing the use of well-stimulation treatments on the Pacific Outer Continental Shelf, which was a major federal action subject to NEPA. The court concluded that the agencies had made some programmatic decisions about how permit requests would be handled because the EA evaluated and rejected proposed limitations on well-stimulation treatments.

In comparison, another district court recently held that a plaintiff could not bring NEPA claims to challenge BOEM's lease sale for a wind energy project off the coast of New York. In that case, the court ruled that a NEPA challenge to the lease sale was not ripe because the lease sale did not constitute an irreversible and irretrievable commitment of resources. Rather, the court explained, no activity could take place until the project developer submitted, and BOEM approved, a construction and operations plan—an action that would be subject to NEPA. *See Fisheries Survival Fund v. Jewell*, No. 16-cv-2409, 2018 WL 4705795 (D.D.C. Sept. 30 2018).

The court then addressed, and rejected, each of the plaintiffs' various NEPA claims. The court's most notable NEPA holdings include the following:

- The court held that it was appropriate for the EA to forecast pollutant concentrations based on an assumption that site operators would comply with limits in the National Pollutant Discharge Elimination

System general permit for offshore oil and gas facilities.

- The court held that an environmental impact statement (EIS) was not required despite the numerous negative comments submitted on the Draft EA. The court observed that most of the comments questioned the sufficiency of the data on which the agencies relied, which did not give rise to a public controversy requiring an EIS. The court also explained that even though the effects of *onshore* fracking may be controversial, this controversy did not translate to *offshore* fracking given the latter's limited scope.
- The court held that an EIS was not required due to drilling platforms' proximity to environmentally sensitive areas. The court noted that the drilling platforms would be at least 1,100 meters from the outer boundary of Channel Islands Marine Sanctuary, which itself is six nautical miles from Channel Islands National Park. The court concluded that the EA adequately explained why, given this distance, well-stimulation treatments would not likely impact these sensitive areas.
- The court held that the lack of toxicity data for many constituent chemicals in the fluids used for well-stimulation treatment did not require preparation of an EIS. The court noted that the EA described the agencies' attempts to identify all credible information that was available, and the EA evaluated environmental impacts in light of data gaps. The court explained that the lack of data did not render the effects of well-stimulation treatment highly uncertain, and an EIS was not likely to contain any more information than what was already in the EA.

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