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Energy Client Alert

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Federal Court Invalidates Forest Service Regulations Governing NEPA Categorical Exclusions, Including Oil and Gas Seismic Exploration Projects

Updated information:

On December 13, 2005, the Forest Service issued a notice to amend its Handbook 1909.15 to categorically exclude from NEPA certain oil and gas activities. See 70 Fed. Reg. 73,722 (Dec. 13, 2005). Specifically, the new handbook provisions would exclude activities in a new oil and/or gas field as long as the approval does not exceed a total of: (a) 1 mile of new road construction, (b) 1 mile of road reconstruction, (c) three miles of pipeline, and (d) four drill sites.

Under the proposal, categorical exclusion decisions will still be subject to public notice and comment, and the administrative appeals process. A categorical exclusion will not be applied to areas where there are extraordinary circumstances, e.g. critical habitat for threatened and endangered species. These categorical exclusions are separate and independent of the activities proposed in Section 390 of the Energy Policy Act of 2005.

Comments on the proposal are due by February 13, 2005.

On July 2, 2005, a judge from the Eastern District of California invalidated five sections of the U.S. Forest Service's regulations governing public comment and administrative appeals procedures for certain decisions implementing National Forest plans. *See Earth Island Institute v. Pengilly*, 376 F. Supp. 2d 994 (E.D. Cal. 2005) (Judge James K. Singleton). This ruling impacts oil and gas exploration on Forest Service lands in the highly prospective areas of the Intermountain West. Specifically, the most detrimental effect of the ruling on the nation's oil and gas shortage is that it will delay, by as much as six months, approvals for geophysical seismic survey exploration projects on lands managed by the Forest Service.

Background:

In 1992, the Forest Service proposed new rules eliminating administrative appeals except for decisions approving, revising, or significantly amending National Forest Land and Resource Management Plans.[1] In a rider to an appropriation bill, Congress rejected these proposed rules and enacted the Appeals Reform Act[2] ("ARA") governing the notice, comment, and appeals procedure for projects implementing National Forest land use plans.

[1] 57 Fed. Reg. 10,444 (Mar. 26, 1992).

[2] Pub. L. No. 102-381, Title III Sec. 332(a), 106 Stat. 1419 (1992), codified at 16 U.S.C. § 1612.

Under the regulations the Forest Service issued to implement the ARA,[3] numerous projects were categorically excluded from compliance with the National Environmental Policy Act ("NEPA"), including geophysical seismic surveys. These categorical exclusions precluded the lengthy process of preparing NEPA documents, allowing for faster authorization of seismic exploration projects. In addition, decisions authorized by categorical exclusion were exempted from the Forest Service's protracted administrative appeals process, which otherwise could delay implementation of a project by as much as 105 days.[4]

In 2003, as part of a settlement to a separate lawsuit, the Forest Service amended the appeals process regulations to "clarify and reduce the complexity of the rule," with special attention on the scope of decisions subject to appeal and stays of emergency actions.[5] Geophysical surveys remained categorically excluded from NEPA.

The Lawsuit:

A coalition of environmental plaintiffs including the Earth Island Institute, Sequoia Forestkeeper, Heartwood, Center for Biological Diversity, and the Sierra Club (collectively "Earth Island") facially challenged the 2003 Forest Service regulations implementing the ARA. The genesis of this action arose from Earth Island's challenge to a Forest Service post-fire timber sale that the Forest Service categorically excluded from NEPA.

Earth Island argued that the Forest Service regulations violated the ARA by "exempting certain Forest Service decisions that are subject to appeal from the automatic stay provision of the ARA, and by limiting the required public comment and appeals process." *Earth Island*, 376 F. Supp. 2d at 999. In response, the Forest Service countered that its regulations are not contrary to the ARA because Congress delegated to the Forest Service the authority to determine which projects are subject to the notice, comment, and appeals processes.

The court held that the ARA permits exclusion of insignificant projects from the notice, comment, and appeals processes (e.g. maintaining buildings and mowing lawns), but actions concerning Forest Service land use plans shall be subject to those processes. *See Earth Island*, 376 F. Supp. 2d at 1005-06. The court explained that Congress enacted the ARA in direct response to the Forest Service's proposal to eliminate administrative appeals, and that the public comment and appeals regulations[6] are "manifestly contrary" to the plain language of the ARA. *Id.* at 1005-06. The court recognized that not all minor projects are subject to the appeals process, but that the Forest Service must delineate between the major and minor ones to give "permissible effect to the language of the ARA." *Earth Island*, 376 F. Supp. 2d at 1005.

Judge Singleton invalidated five sections of 36 C.F.R. Part 215, holding that the Forest Service improperly promulgated the regulations pertaining to the notice, comment, and appeals procedures for categorically excluded actions. *See Earth Island*, 376 F. Supp. 2d at 1011.[7] The court concluded that the absence of these rules will not impair the Forest Service regulations as a whole and therefore, these five sections shall be severed from 36 C.F.R. Part 215. *Id.*

The Forest Service sought clarification of the July 2nd Order. The Forest Service argued that the

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[3] 36 C.F.R. Part 215-Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities.
[4] 36 C.F.R. §§ 215.12(f) and 215.15.
[5] 67 Fed. Reg. 77,452 (Dec. 18, 2002); 68 Fed. Reg. 33,582 (June 4, 2003).
[6] 36 C.F.R. §§ 215.4(a) & 215.12(f).
[7] Specifically, the court struck the following sections: 215.4(a), 215.12(f), 215.20(b), 215.10(a), and 215.18(b)(1).

court's holding was restricted to the Eastern District of California and that it only applied to Forest Service decisions approved after July 2, 2005. On September 16, Judge Singleton ruled that the order applied nationwide to Forest Service projects approved after July 2, 2005. In a separate order, Judge Singleton explained that by severing the 2003 Forest Service regulations, he intended for the 1993 rules and 2000 supplemental rules to be reinstated.

Both the Forest Service and the plaintiffs appealed Judge Singleton's decision to the U.S. Court of Appeals for the Ninth Circuit. On October 12, 2005, the Forest Service filed a motion for stay pending appeal claiming that it would suffer irreparable harm in its management of the nation's forests without the use of categorical exclusions for minor projects (*e.g.*, approving permits for public utilities and hazardous fuel reduction projects that protect against wildfires).

On November 30, 2005, Judge Singleton denied the Forest Service's motion for stay pending appeal. The Forest Service may still seek a stay from the Ninth Circuit.

Response to the Court's Ruling:

In response to the court's order, the head of the Forest Service issued a memorandum to Forest Service personnel directing that projects and activities implementing land and resource management plans approved after July 2, 2005 will be subject to the legal notice, comment, and appeals processes.

Due to the tremendous impact that this court ruling will have on the Forest Service's ability to manage its lands, governors from six western states[8] urged Congress to pass an amendment to the ARA in response to the court's decision. On October 20, 2005, U.S. Representatives Pombo and Goodlatte introduced legislation that would re-affirm use of the Forest Service comment and appeal regulations by declaring the regulations in full compliance with the ARA. On November 11, 2005, the House Committee on Agriculture held a hearing on the bill, but no action was taken prior to the congressional recess.

Impact on Oil and Gas Geophysical Exploration Projects:

Until this matter is favorably resolved - either judicially or legislatively - companies seeking to conduct oil and gas seismic survey projects on Forest Service lands will have to take extra steps when planning these activities. In particular, due to various seasonal restrictions that may be applicable to an area, combined with the protracted Forest Service administrative appeals process, companies will need to allow for adequate lead time and coordinate their efforts with the agency to ensure that upon authorization there is an adequate operational window to conduct the survey.

In addition, public comments filed on these projects will provide an opportunity to minimize litigation risk for projects that might be challenged by anti-development or environmental groups. Upon review and legal analysis of comments filed on their project, companies can work with the Forest Service to ensure that the administrative record adequately addresses any legal issues or areas of concern to strengthen the decision record to withstand legal challenge.

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[8] South Dakota, Utah, Colorado, Nevada, Wyoming, and North Dakota.

Fulbright & Jaworski L.L.P.'s Energy Practice Group

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