Environmental Defense Center v. Bureau of Ocean Energy Management—Ninth Circuit enjoins use of well stimulation treatments in California's Outer Continental Shelf pending NEPA, ESA and CZMA compliance

The Bureau of Ocean Energy Management and the Bureau of Safety and Environmental Enforcement agreed in settlement of 2014 and 2015 suits alleging violation of the National Environmental Policy Act to study the environmental impacts of well stimulation treatments (or WSTs) for oil drilling projects within the Pacific Outer Continental Shelf off southern California. Such treatments seek to extract oil unreachable through use of conventional drilling techniques and include hydraulic fracturing or "fracking" where a mixture of water, sand, and chemicals is injected at high pressure into a well to fracture the rock formation and had been authorized by the agencies prior to the litigation. The agencies issued in 2016 a programmatic environmental assessment and accompanying finding of no significant impact. They did not consult with the National Marine Fisheries Service or the Fish and Wildlife Service under the Endangered Species Act or with the State of California under the Coastal Zone Management Act.

Various environmental organizations sued BOEM, BSEE, the Department of the Interior, and federal officials alleging NEPA and ESA violations, while California sued them under the CZMA. The district court granted summary judgment to (1) the federal defendants as to the NEPA claims, (2) the plaintiff environmental groups as to the ESA claim for failure to consult with the FWS, and (3) California as to the CZMA claim. It dismissed as moot the environmental groups' ESA-based claim predicated on lack of NMFS consultation because consultation had been completed. The court further enjoined federal defendants "from approving any plans or permits ... for the use of WSTs on the POCS unless and until they (1) complete consultation with FWS under the ESA and (2) complete the CZMA process under 16 U.S.C. § 1456(c)(1) for the proposed action described in the Final EA." *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, No. CV 16-8418 PSG (FFMx), 2018 WL 5919096, at *27 (C.D. Cal. Nov. 9, 2018). All parties appealed.

The Ninth Circuit affirmed in part, reversed in part, and remanded for further proceedings consistent with its opinion. *Env't Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, Nos. 19-55526 et al., 2022 WL 1816515 (9th Cir. June 3, 2022). The panel began with the jurisdictional question of whether the EA and the FONSI constituted final agency action subject to review under the Administrative Procedure Act and then addressed the NEPA, ESA and CZMA claims.

- Final Agency Action. The panel applied the settled standard for APA final agency action—whether "'[t]he action ... mark[s] the consummation of the agency's decision-making process,' and ... [whether it] determine[s] 'rights or obligations' or be one 'from which legal consequences will flow.'" It found the first element present because "the effect of the FONSI is that it provides the agencies' final word on the environmental impacts of the proposed action and concludes that the authorization of well stimulation treatments will not have a significant impact." As to the second element, "[b]y finding that well stimulation treatments have no significant environmental impact, the agencies have allowed the permitting process for these treatments to proceed[,]" thus returning "to the pre-settlement status quo and lifting of the moratorium on well stimulation treatments in the Pacific Outer Continental Shelf[.]" The panel concluded by rejecting the federal defendants' contention that the NEPA and CZMA procedural violation claims were not ripe for review given the hardship that would be imposed on the environmental groups absent "review[] now[,]" the fact

"that the agencies' decision making is at an administrative resting place[,]" and the principle that "[f]or claims of procedural injury, we have held that the need for factual development ceases when the alleged procedural violation is complete."

- NEPA. The panel concurred with the environmental groups "that the agencies' EA is inadequate and violates NEPA because the agencies relied upon erroneous assumptions instead of taking the requisite 'hard look' at the potential environmental effects of authorizing well stimulation treatments offshore California." The first assumption—"that the use of well stimulation treatments in the Pacific Outer Continental Shelf would happen so infrequently that any adverse environmental effects would be insignificant"—foundered on the incompleteness of the historical record of well stimulation treatments on the Pacific Outer Continental Shelf and "legitimate questions about the soundness of the agencies' estimates of future usage of well stimulation treatments [there] given the age of the reservoirs in this region and their declining production[.]" The second assumption—"that compliance with a permit issued by the EPA under the Clean Water Act, the National Pollution Discharge Elimination System General Permit ..., would render the impacts of well stimulation treatments insignificant"—was unsupported because the NPDES permitting process "was not created or intended to be used for the offshore well stimulation treatments at issue in this appeal." Instead, "[t]he [Environmental Protection Agency] developed the NPDES permit in 2014 to broadly regulate discharges from a range of offshore oil and gas activities[,]" and that process "does not require monitoring for the most common well stimulation treatment fluids." The panel also pointed to the quarterly or annual "whole efficiency toxicity" testing process attendant to NPDES permits and the EA's acknowledgment "that fluids from well stimulation treatments may not actually be present in samples from WET testing because of this time problem." Further undermining the second assumption was the lack of any control by BOEM or BSEE over NPDES permits.

Aside from reliance on erroneous assumptions, the environmental groups argued "that the EA violates NEPA because the agencies failed to consider a reasonable range of alternatives and relied upon too narrow a statement of 'purpose and need' in the EA." The panel again agreed in part. Although parting ways with them on the assertion "that the EA's statement of 'purpose and need' unduly constrained the agencies' consideration of alternatives regarding the use of well stimulation treatments[,]" the panel found the three no-action alternatives—authorizing well stimulation without restriction, authorizing it "at depths more than 2,000 feet below the seafloor surface[,]" and authoring it but "prohibiting the open water discharge of waste fluids"—"highly arbitrary" because the agencies "used a five-per-year estimate to calculate environmental impacts" and but did not consider an alternative that contained that limit.

The final NEPA issue was whether the agencies erred in not preparing an environmental impact statement. The panel held that they did. It stated:

> The NEPA regulations in effect at the time the agencies issued the EA set forth criteria for the agencies to consider when determining whether an action will significantly affect the environment and consequently requires a full EIS. 40 C.F.R. § 1508.27. These regulations required an agency to consider "both context and intensity." ... Context refers to the setting and circumstances of the proposed action, including "society as a whole (human, national), the affected region, the affected interests, and the locality." ... Intensity "refers to the severity of impact" and requires analysis of ten specific factors. ... Meeting

> just one of these "significance factors" may be sufficient for us to require an agency to prepare an EIS, ... but here we find multiple factors met.

The panel held that such factors were present because the well stimulation treatments (1) could affect endangered or threatened species as reflected by "the requisite wildlife agencies ... advis[ing] that they concluded that the western snowy plover, the California least tern, and the southern sea otter all were likely to be adversely affected by oil spills[;]" (2) would affect the Santa Barbara Channel, a unique geographical area with "[m]any of its waters and islands have special designation, including the Channel Islands National Park and Marine Sanctuary[;]" and (3) are accompanied by "'highly uncertain or involve unique or unknown risks'" (40 C.F.R. § 1508.27(b)(5)). The panel therefore "remand[ed] to the district court with instructions to amend its injunction to prohibit the agencies from approving permits for well stimulation treatments until the agencies have issued an EIS and have fully and fairly evaluated all reasonable alternatives."

- ESA. The federal defendants contended that that the EA and FONSI did not constitute an "agency action" subject to ESA consultation. Unpersuaded, the panel started by explaining:

> We use a two-step test to determine whether an action qualifies as a sufficient "agency action" under the ESA. First, relying on the text of the statute, which is always the appropriate starting place for analysis, ... we consider whether an agency "affirmatively authorized, funded, or carried out the underlying activity." ... If this standard is met, we next determine whether the action was discretionary, in this context meaning that the agency had "some discretion to influence or change the activity for the benefit of a protected species."

It then held that "[t]he district court correctly held that by issuing the EA and FONSI for the proposed action of allowing well stimulation treatments offshore California, the agencies 'affirmatively authorized' private companies to proceed with these treatments." The second step was satisfied "because the agencies had 'discretion to influence or change the activity for the benefit of a protected species.' ...This standard is met by agency action that itself does not directly authorize private activity but rather establishes criteria for future private activity and has an 'ongoing and long-lasting effect.'"

- CZMA. California's claim turned on whether the proposed activity was a "Federal agency action" taken by BOEM and BSEE:

> Whenever a "Federal agency activity" may affect a state's coastal zone, the CZMA requires review of the action to confirm that it is consistent with the affected state's coastal management program. 16 U.S.C. § 1456. Not all consistency review under the CZMA is the same, however. If the federal agency takes the action itself, then § 1456(c)(1) of the CZMA requires the agency to "provide a consistency determination" to the designated state agency specifying whether the proposed action is consistent with the state's coastal management program. But if the agency is not taking the action itself, and instead is approving a proposed plan or issuing a federal license or permit to an applicant, then § 1456(c)(3) requires the applicant to conduct the consistency review and include a "consistency certification" in its application confirming that the proposed activity complies with the affected state's coastal management program. ... In other words, § (c)(1) review reaches activities where the federal agency is the "principal actor" while § (c)(3) review encompasses the "federally approved activities of third parties." ... If a proposed federal agency activity can be reviewed under § (c)(3), the CZMA specifically provides that it

cannot be reviewed under § (c)(1). 16 U.S.C. § 1456(c)(1)(A). Review under § (c)(1) and § (c)(3) is therefore mutually exclusive.

The panel, concurring with the district court, concluded that the programmatic EA embodied a "Federal agency action" because "[b]y concluding that the proposed action of allowing well stimulation treatments would not lead to significant environmental impacts, the agencies return[ed] to the pre-moratorium status quo of approving well stimulation treatments offshore California that existed prior to Plaintiffs' FOIA requests and the ensuing litigation." It next held, relying heavily on *California v. Norton*, 311 F.3d 1162 (9th Cir. 2002), which "involved the Department of the Interior's decision to grant suspensions of oil leases off the coast of California to extend the lives of the leases and avoid their premature expiration[,]" that this "Federal agency action" fell outside the scope of § 1456(c)(3):

> Like the agency action at issue in *Norton*, the proposed action of allowing well stimulation treatments without restriction in the Pacific Outer Continental Shelf "has never been reviewed by California" and is a "significant decision to extend the life of oil exploration and production" by allowing companies to access oil they could otherwise not obtain through conventional drilling methods. ... As in *Norton*, we are not concerned about duplicative review because there is none: the agencies' programmatic decision differs in scope and in stage from the agencies' later decisions about specific permit applications.

Consequently, "Section (c)(1) review must be available now for the 'broader effects implicated' by the agencies' proposed action."

The panel, finally, affirmed the district court's award of injunctive relief but, as discussed above, directed it on remand to "amend its injunction to enjoin the agencies from approving well stimulation treatment permits until the agencies issue a complete EIS, rather than the inadequate EA on which they had relied."

Decision link: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/06/03/19-55526.pdf