Hydraulic Fracturing and the National Environmental Policy Act (NEPA): Selected Issues

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Summary

Hydraulic fracturing is a technique used to recover oil and natural gas from underground low permeability rock formations. This process involves pumping fluids under high pressure into the formations to crack them, releasing oil and gas into the well. The technique has been the subject of controversy due to some of its potential effects on the environment.

The National Environmental Policy Act (NEPA) requires federal agencies to consider the potential environmental consequences of the actions they propose to take by preparing one of three NEPA documents. Actions that fit within a categorical exclusion (CE) undergo a relatively low level of review because these are actions that an agency has found do not have a significant effect on the environment. A CE may not be used when extraordinary circumstances occur. An environmental assessment (EA) provides a more comprehensive level of review and may be prepared when an agency wishes to determine whether an action requires the preparation of an environmental impact statement (EIS). An EIS is the most comprehensive NEPA document; it requires, among other things, that the agency explain how the proposed action will affect the environment; what unavoidable adverse effects will result; and what alternatives to the proposed action exist.

This report provides an overview of three situations in which parties have argued that agencies do not need to conduct a comprehensive environmental review of hydraulic fracturing under NEPA. In March 2013, a federal district court in California held that the Bureau of Land Management (BLM) had violated NEPA and the Administrative Procedure Act (APA) when it prepared an EA and Finding of No Significant Impact (FONSI) for a lease sale in the Monterey Shale. The court held that BLM could not rely on an analysis that (1) assumed that only one exploratory well would be drilled on the leased acres, and (2) did not contain a detailed assessment of the impact of hydraulic fracturing and horizontal drilling on the environment.

In 2011, New York Attorney General Eric Schneiderman filed a complaint on behalf of the state of New York alleging that the Delaware River Basin Commission (DRBC) and five federal agencies were in violation of NEPA. New York sought an injunction compelling the defendants to prepare an EIS before the defendants adopted regulations that would allow natural gas development in the basin. In September 2012, the United States District Court for the Eastern District of New York granted the defendants' motions to dismiss New York's complaint for lack of subject matter jurisdiction.

On March 21, 2012, the U.S. Department of Agriculture Rural Development agency reaffirmed its use of a CE to exempt from further NEPA review the loans it makes for the purchase of single-family homes on properties leased for drilling. The agency stated that, by itself, the existence of a drilling lease on a property is not an extraordinary circumstance that will prevent the agency from using a CE for a loan.

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Introduction

Hydraulic fracturing is a technique used to recover oil and natural gas from underground low permeability rock formations.[1] Hydraulic fracturing involves pumping fluids (primarily water and a small portion of chemicals, along with sand or other proppant) under high pressure into rock formations to crack them and allow the resources inside to flow to a production well.[2] The technique has been the subject of controversy because of the potential effects that hydraulic fracturing and related oil and gas production activities may have on the environment and health.

The National Environmental Policy Act (NEPA) requires federal agencies to consider the potential environmental consequences of the actions they propose to take but does not compel agencies to choose a particular course of action.[3] Under NEPA and its implementing regulations issued by the Council on Environmental Quality (CEQ), actions taken by a federal agency may fall into one of three categories for the purposes of environmental review. Actions that fit within a categorical exclusion (CE) undergo a relatively low level of review because these are actions that an agency has found do not have a significant effect on the environment.[4] An environmental assessment (EA) provides a more comprehensive level of review and may be prepared when an agency wishes to determine whether an action requires the preparation of an environmental impact statement (EIS).[5] An EIS is the most comprehensive NEPA document; it requires, among other things, that the agency explain how the proposed action will affect the environment; what unavoidable adverse environmental effects will result; and what alternatives to the proposed action exist.[6]

This report provides an overview of three situations in which parties have argued that agencies do not need to conduct a comprehensive environmental review of hydraulic fracturing under NEPA.

Drilling in the Monterey Shale: Federal Oil and Gas Leases

Oil and gas companies have shown increased interest in drilling in the Monterey Shale in Central California.[7] The shale formation has been estimated to contain billions of barrels of oil, most of which may be economically recovered only through the use of hydraulic fracturing and horizontal

[1] Department of Energy, Modern Shale Gas Development in the United States: A Primer, ES-4 (2009), *available at* http://www.netl.doe.gov/technologies/oil-gas/publications/epreports/shale_gas_primer_2009.pdf.

[2] *Id.* Hydraulic fracturing often is referred to as "fracing" within the industry and as "fracking" by others.

[3] *See* 42 U.S.C. §4332.

[4] *See* 40 C.F.R. §§1500.4(p), 1500.5(k); *see also* Council on Environmental Quality, Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act 3 (2010), *available at* http://ceq.hss.doe.gov/ceq_regulations/NEPA_CE_Guidance_Nov232010.pdf. For more information on the legal aspects of NEPA, see CRS Report RS20621, *Overview of National Environmental Policy Act (NEPA) Requirements*, by (name redacted). For a discussion of the policy aspects of NEPA, see CRS Report RL33152, *The National Environmental Policy Act (NEPA): Background and Implementation*, by (name redacted).

[5] 40 C.F.R. §§1501.4, 1508.9.

[6] 42 U.S.C. §4332.

[7] Order Re: Cross Motions for Summary Judgment at 1-2, Ctr. for Biological Diversity v. Bureau of Land Mgmt., No. 11-06174 (N.D. Cal. March 31, 2013).

drilling.[8] In 2011, the Bureau of Land Management (BLM) sold leases in four parcels, which accounted for about 2,700 acres of public land, to private parties.[9] The Center for Biological Diversity and the Sierra Club sued BLM, claiming that the agency had violated the Administrative Procedure Act (APA) and NEPA when it prepared an EA and a Finding of No Significant Impact (FONSI) instead of an EIS for the proposed lease sale.[10]

BLM's EA for the proposed lease sale was based on a Proposed Resource Management Plan and Final Environmental Impact Statement (PRMP/FEIS) that the agency's Hollister Field Office (HFO) had prepared in 2006 for the Southern Mountain Diablo Range and the Central Coast of California, which included the leased land.[11] The PRMP/FEIS relied on historical data showing a low amount of oil and gas development in the region and noted the limited amount of federal lands in areas of high development potential.[12] It estimated that no more than 15 wells would be drilled on the land overseen by the HFO in the next 15-20 years.[13] It did not discuss hydraulic fracturing.[14]

In June 2011, BLM prepared a 125-page EA for the proposed lease sale based in part on the PRMP/FEIS.[15] During the public comment period for the EA, several parties expressed concerns about the potential environmental effects of hydraulic fracturing.[16] However, BLM declined to analyze these impacts because, in its view, they were "not under the authority or within the jurisdiction of the BLM."[17] After issuing a FONSI, BLM proceeded with the auction.[18]

Under CEQ regulations, whether a major federal action significantly affects the quality of the human environment depends on the context and intensity of the action.[19] The district court examined the 10 factors for determining intensity under CEQ regulations and identified three of the intensity factors that it believed required the preparation of an EIS.[20] According to the court, these were (1) hydraulic fracturing is highly controversial because of its potential effects on health and the environment; (2) the proposed lease sale would affect public health and safety because of the risk of water pollution; and (3) the environmental impacts of hydraulic fracturing are uncertain.[21]

[8] Order Re: Cross Motions for Summary Judgment at 2-3, Ctr. for Biological Diversity v. Bureau of Land Mgmt., No. 11-06174 (N.D. Cal. March 31, 2013).

[9] *Id.* at 12.

[10] *Id.* at 1.

[11] *Id.* at 4-5.

[12] Order Re: Cross Motions for Summary Judgment at 5.

[13] *Id.*

[14] *Id.* at 23.

[15] *Id.* at 6-7.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 10. The FONSI discussed potential impacts on protected wildlife and plant species but did not discuss hydraulic fracturing. *Id.* at 27.

[19] 40 C.F.R. §1508.27. The court also held that in determining whether to prepare an EIS for the sale of the leases, BLM was required to consider both direct and reasonably foreseeable (indirect) effects of the sale. Order Re: Cross Motions for Summary Judgment at 20-21; *see also* 40 C.F.R. §1508.8.

[20] Order Re: Cross Motions for Summary Judgment at 20.

[21] *Id.* at 24-27.

In March 2013, the district court held that the BLM NEPA review was "erroneous as a matter of law."[22] The court held that BLM unreasonably relied on an environmental analysis that (1) assumed only one exploratory well would be drilled on the leased acres when it was reasonably foreseeable that more wells would be drilled, and (2) did not contain a detailed assessment of the environmental impacts of hydraulic fracturing and horizontal drilling.[23] The court asked the parties to meet and confer about an appropriate remedy for the agency's NEPA and APA violations and submit it to the court.[24]

Delaware River Basin Commission (DRBC): Proposed Regulations on Natural Gas Development

In May 2011, New York Attorney General Eric Schneiderman brought a federal lawsuit on behalf of the state of New York alleging that five federal agencies and their officers were in violation of NEPA.[25] In November 2011, the complaint was amended to add the Delaware River Basin Commission (DRBC) and its executive director as defendants.[26] The plaintiffs asked the court to compel the defendants to prepare an EIS "before proceeding to adopt federal regulations to be administered by the DRBC that would authorize natural gas development within the Delaware River Basin."[27] New York alleged that the refusal of the five federal agencies that are represented by the DRBC's federal member[28] to prepare an EIS was not in accordance with law and was arbitrary, capricious, and an abuse of discretion under the APA.[29] Because it appears that the Delaware River Basin Compact exempts the DRBC from compliance with the APA,[30] New York argued that the DRBC's refusal to prepare an EIS was subject to judicial review under the compact itself.[31]

[22] *Id.* at 2. The court also held that BLM had an obligation to prepare a NEPA document *prior to* the sale of leases that did not contain No Surface Occupancy (NSO) provisions rather than *during* the Application for Permit to Drill (APD) process. *Id.* at 15-18. This was because once non-NSO leases had been issued, BLM retained limited authority to deny a lessee drilling rights during the APD process, and thus an "irretrievable commitment of resources" under NEPA had occurred. *Id.*; *see also* 42 U.S.C. §4332(C)(v); 40 C.F.R. §§1501.2, 1502.5.

[23] Order Re: Cross Motions for Summary Judgment at 1-2.

[24] *Id.* at 28. "Possible avenues of relief include enjoining further surface-disturbing activity pending EIS analysis, or invalidating the improperly-granted leases." *Id.*

[25] Initial Complaint at ¶¶ 1, 95, New York v. U.S. Army Corps of Eng'rs, No. 11-2599 (E.D.N.Y. May 31, 2011).

[26] Amended Complaint at ¶ 1, New York v. U.S. Army Corps of Eng'rs, No. 11-2599 (E.D.N.Y. November 22, 2011).

[27] Amended Complaint at ¶ 1 (abbreviations omitted). According to the complaint, if the DRBC approved the regulations, "between 15,000 and 18,000 natural gas wells" would be developed within the Delaware River Basin using high-volume hydraulic fracturing. *Id.* at ¶ 4. High-volume hydraulic fracturing has raised concerns among some groups because of its potential effects on water resources and the environment.

[28] These agencies are the Army Corps of Engineers, Fish and Wildlife Service, National Park Service, Department of the Interior, and Environmental Protection Agency.

[29] *Id.* at ¶ 106; *see also* 5 U.S.C. §706(2)(A). NEPA does not contain a private right of action.

[30] *See* Delaware River Basin Compact, P.L. 87-328, §15.1(m), 75 Stat. 688, 715 (1961) ("For purposes of ... the Act of June 11, 1946, 60 Stat. 237, as amended ... the Commission shall not be considered a Federal agency.").

[31] Amended Complaint at ¶¶ 11, 115; *see also* Delaware River Basin Compact, §3.3(c), 75 Stat. 688, 693 ("Any other action of the commission pursuant to this section shall be subject to judicial review in any court of competent jurisdiction.").

The Delaware River Basin Compact is an agreement among the federal government, Delaware, New Jersey, New York, and Pennsylvania.[32] The compact creates the DRBC and grants it certain powers to manage the water resources of the basin.[33] The commission's membership is composed of five voting members: one member from each of the four states and one representative of the federal agencies.[34] The federal commissioner of the DRBC is appointed by the President of the United States and serves "at the pleasure of the President."[35]

NEPA states, "The Congress authorizes and directs that, to the fullest extent possible: ... all agencies of the Federal Government shall ... include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" an EIS.[36] Under CEQ regulations, *federal agency* refers, in relevant part, to "all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office."[37] The regulations define a *major Federal action* as one that has "effects that may be major and which are potentially subject to Federal control and responsibility."[38] The regulations list typical categories for federal actions that include the approval of "specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities."[39]

New York alleged that the approval of the DRBC regulations was a major federal action requiring at least one of the defendants to prepare an EIS.[40] The state alleged that the DRBC was a federal agency for purposes of NEPA for several reasons. These included that the language in the compact suggests that the DRBC is a federal agency;[41] DRBC rules have been published in the Code of Federal Regulations;[42] and the CEQ allegedly considers the DRBC to be a federal agency for purposes of NEPA.[43] The complaint stated that the approval of the DRBC regulations amounted to a federal action requiring an EIS for two reasons. First, the complaint maintained that it was a federal action because it was a project approved by the DRBC, which New York asserted was a federal agency for purposes of NEPA.[44] Additionally, the complaint alleged that

[32] Delaware River Basin Compact, 75 Stat. at 689. The text of the compact is contained in the federal law approving the compact.

[33] Delaware River Basin Compact §§1.3(c), (e); 2.1; 3.1.

[34] *Id.* §§2.1, 2.2, 2.5.

[35] *Id.* §15.1(d).

[36] 42 U.S.C. §4332.

[37] 40 C.F.R. §1508.12.

[38] *Id.* §1508.18.

[39] *Id.*

[40] Amended Complaint at ¶¶ 37, 95, 99-100, 109-11.

[41] "Neither the Compact nor this Act shall be deemed to enlarge the authority of *any Federal agency other than the Commission* to participate in or to provide funds for projects or activities in the Delaware River Basin." Delaware River Basin Compact §15.1(o) (emphasis added); *see also* Amended Complaint at ¶ 29. As the complaint acknowledges, the compact states that the DRBC is *not* a federal agency for purposes of certain statutes. Amended Complaint at ¶ 29. These include the Federal Tort Claims Act, the Tucker Act, and the Administrative Procedure Act. Delaware River Basin Compact §15.1(m).

[42] Amended Complaint at ¶ 29.

[43] Amended Complaint at ¶ 30.

[44] Amended Complaint at ¶ 95; *see also* 40 C.F.R. §1508.18.

approval of the regulations was a federal action because federal agencies "play a significant role in conducting, approving, and implementing the Action."[45] The complaint argued that under CEQ regulations, when multiple federal agencies have authority over a major federal action that significantly affects the environment, at least one of the agencies must prepare an EIS for the action.[46] New York claimed NEPA was violated because the five federal agencies and the DRBC had not prepared an EIS.[47]

In the 1970s, the DRBC complied with NEPA by publishing procedures implementing the statute in the *Federal Register*.[48] In 1980, the DRBC stated that it would no longer prepare NEPA documents for projects in the basin, citing a lack of funding.[49] The agency deleted its NEPA procedures in 1997.[50]

The federal defendants moved to dismiss the lawsuit on the grounds that the court lacked subject matter jurisdiction over the plaintiff's claims.[51] The federal defendants argued that (1) the complaint was precluded by the sovereign immunity of the United States from suit; (2) New York lacked Article III standing to sue; and (3) the plaintiff's claims were not ripe for judicial review.[52] In addition to these procedural arguments, the federal defendants maintained that NEPA did not apply because the DRBC's development of proposed regulations was not a "major federal action."[53] The federal defendants argued that no federal action existed because, in their view, the DRBC was not a federal agency.[54] In addition, the federal defendants argued that they did not exercise enough decision-making power, authority, or control over the DRBC's development of the proposed regulations to render it a federal action.[55]

In September 2012, the United States District Court for the Eastern District of New York granted the defendants' motions to dismiss New York's complaint for lack of subject matter jurisdiction.[56] The court held that it lacked subject matter jurisdiction for two reasons. First, the court held that New York lacked standing because it could not show an immediate threat of injury to its interests from the proposed regulations.[57] Alternatively, the court held that it lacked subject matter jurisdiction because New York's complaint was not ripe for review.[58] This was because (1) the

[45] Amended Complaint at ¶ 96.

[46] *Id.* at ¶ 37; *see also* 40 C.F.R. §§1501.5, 1501.6, 1508.5, 1508.15, 1508.16.

[47] Amended Complaint at ¶¶ 101-07, 111-15.

[48] *See, e.g.*, Environmental Impact Statements: Guidelines for Preparation, 36 Fed. Reg. at 20,381-82 (October 21, 1971); *see also* Amended Complaint at ¶ 31.

[49] *See* Proposed Amendments to Administrative Manual—Rules of Practice and Procedure, 62 Fed. at 45,766 (August 29. 1997) (relating the history of the DRBC's NEPA review procedures); *see also* Amended Complaint at ¶ 32.

[50] Amendments to Administrative Manual—Rules of Practice and Procedure, 62 Fed. Reg. at 64,154 (December 4, 1997) (showing that Article 4 of the DRBC's administrative manual, which formerly contained its NEPA procedures, had been deleted); *see also* Amended Complaint at ¶ 32.

[51] Memorandum of Law in Support of Motion to Dismiss at 1, New York v. U.S. Army Corps of Eng'rs, No. 11-2599 (E.D.N.Y. June 4, 2012). The DRBC and its executive director also filed a motion to dismiss the complaint.

[52] *Id.*

[53] *Id.* at 33.

[54] *Id.* at 33-34.

[55] *Id.* at 34-39.

[56] Memorandum and Order at 4, New York v. U.S. Army Corps of Eng'rs, No. 11-2599 (E.D.N.Y. September 24, 2012).

[57] *Id.* at 22.

[58] *Id.* at 28.

case was not fit for judicial review because it was speculative that final regulations would be issued authorizing natural gas development in areas that would affect New York; and (2) delay in considering the claim would not impose hardship on the parties because the proposed regulations did not affect the legal rights or obligations of New York, in part because of an existing moratorium on natural gas development in the Delaware River Basin.[59]

Because the court dismissed the plaintiffs' complaint on procedural grounds, it did not reach the merits of the plaintiffs' claims. However, because the court dismissed the suit without prejudice, the plaintiffs may file it again in the future if final regulations are adopted.[60]

USDA Rural Development Agency: Mortgages on Properties with Drilling Leases

As part of its housing program, the U.S. Department of Agriculture (USDA) Rural Development agency lends money to qualifying borrowers for the purchase of single-family homes.[61] Some of these homes are located on properties where hydraulic fracturing may occur because the mineral rights have been leased to oil and gas companies for drilling. Rural Development has issued an administrative notice stating that the existence of drilling leases on a property will not prevent the agency from using a categorical exclusion (CE) to exempt these loans from further NEPA review, at least in ordinary circumstances.[62]

CEQ regulations define a "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effect on the human environment.... Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect."[63]

The guidelines that govern Rural Development's compliance with NEPA are found in its environmental program in RD Instruction 1940-G.[64] In this guidance, the agency has provided a list of CEs that it may use to exempt an agency action from more detailed NEPA review.[65] This list contains actions that the agency has concluded do not "have a significant impact on the quality of the human environment, either individually or cumulatively," and thus do not require the preparation of an EIS or EA.[66] Among the actions that may be excluded is the "provision of

[59] *Id.* at 27-28.

[60] *Id.* at 23. This report will be updated to analyze the parties' respective arguments if the case is refiled.

[61] USDA, Rural Development Housing & Community Facilities Programs, *available at* http://www.rurdev.usda.gov/rhs/common/program_info.htm.

[62] USDA, Rural Development Administrative Notice No. 4632 (1940-G), NEPA Compliance for Rural Development Single Family Housing Loan Programs (2012), *available at* http://www.rurdev.usda.gov/SupportDocuments/an4632.pdf.

[63] 40 C.F.R. §1508.4.

[64] RD Instruction 1940-G, *available at* http://www.rurdev.usda.gov/SupportDocuments/1940g.pdf; *see also* 7 C.F.R. pt. 1940-G; Revision of Policies and Procedures for Considering the Environmental Impacts of Proposed Agency Actions, 53 Fed. Reg. 36,237 (September 19, 1988).

[65] RD Instruction 1940-G §310.

[66] RD Instruction 1940-G §310(a).

financial assistance for the purchase of a single family dwelling or a multi-family project serving no more than four families, i.e. units."[67]

As required by CEQ regulations, Rural Development has also promulgated a list of extraordinary circumstances in which an action that would otherwise qualify for a CE may have to undergo further NEPA review because the action may have a significant environmental effect.[68] These circumstances may be present when actions "would be located within, or in other cases, potentially affect" certain wetlands; wild or scenic rivers; critical habitats or endangered/threatened species; sole source aquifer recharge areas; and state water quality standards, among other natural or historical resources.[69] Rural Development uses Form RD 1940-22 when it documents its use of a CE.[70] The form provides a checklist with a column of land uses and environmental resources on the left side. The preparer must indicate whether each of these uses or resources is "present within the site(s) of the proposed action," within the action's "area of environmental impact," or is "affected by the proposed action."[71] Completion of the checklist determines whether extraordinary circumstances exist, and thus whether a CE may be used. At the bottom of the form, the preparer must certify that

> [t]his proposal meets, in terms of its size and components, the criteria for a categorical exclusion as defined in Section 1940.310 and 1940.317. As indicated in [the checklist above], the proposal does not affect any important land uses or environmental resources that would subject it to disqualification as a categorical exclusion. Finally, the proposal is neither a phase nor segment of a project which when viewed in its entirety would not meet the requirements of a categorical exclusion per Section 1940.317 (d).[72]

On March 18, 2012, a news article appeared suggesting that Rural Development was reconsidering the use of a CE for loans made for the purchase of homes on properties leased for drilling.[73] The article stated that the agency might subject these loans to more detailed NEPA environmental review in part because of the potential environmental impact of hydraulic fracturing on properties with drilling leases.[74] However, on March 21, 2012, Rural Development issued an administrative notice stating that it would continue to use a CE for the provision of "financial assistance for the purchase of a single family dwelling" on properties with drilling leases.[75] The notice stated that "[t]he presence of gas leases on a property alone does not constitute any of the special circumstances listed in [RD Instruction 1940.310, which refers to

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[67] *Id.* §310(b)(1).

[68] *Id.* §317(a); *see also* 40 C.F.R. §1508.4.

[69] RD Instruction 1940-G §§310, 317(e). Other resources on the list include floodplains; wilderness; historical and archaeological sites; coastal barriers; natural landmarks; important farmlands; prime forest lands; prime rangelands; and approved coastal zone management areas.

[70] Form RD 1940-22, *available at* http://www.rurdev.usda.gov/de/1940-22.pdf; *see also* RD Instruction 1940-G §317(b)-(c).

[71] Form RD 1940-22.

[72] *Id.*

[73] Ian Urbina, *Mortgages for Drilling Properties May Face Hurdle*, N.Y. Times, March 18, 2012, *available at* http://www.nytimes.com/2012/03/19/us/drilling-property-mortgages-may-get-closer-look-from-agriculture-dept.html?pagewanted=all.

[74] *Id.*

[75] USDA, Rural Development Administrative Notice No. 4632 (1940-G), NEPA Compliance for Rural Development Single Family Housing Loan Programs (2012), *available at* http://www.rurdev.usda.gov/SupportDocuments/an4632.pdf.

1940.317,] or the policy considerations contained in RD Instructions 1940.303 through 1940.305."[76] In other words, according to Rural Development, loans made to facilitate the purchase of homes on properties leased for drilling may continue to fit within a CE. Additionally, it appears that the agency does not consider the existence of drilling leases on a property alone to implicate any of the extraordinary circumstances that would prevent the use of a CE as listed in Sections 310 or 317 of the agency's environmental program.

Conclusion

Hydraulic fracturing has been controversial for its potential effects on the environment. NEPA requires federal agencies to consider the environmental consequences of the actions they propose to take by preparing a NEPA document. In at least three situations, it has been unclear whether agencies have to prepare an EA or EIS because it is not certain whether NEPA's threshold requirements are satisfied.

In March 2013, a federal district court in California held that BLM had violated NEPA and the APA when it prepared an EA and FONSI for a lease sale in the Monterey Shale. The court held that BLM could not rely on an environmental analysis that (1) assumed that only one exploratory well would be drilled on the leased acres, and (2) did not contain a detailed assessment of the impact of hydraulic fracturing on the environment.

The state of New York brought a lawsuit against the DRBC and five federal agencies, arguing that they were required to prepare an EIS before approving natural gas development in the Delaware River Basin. The defendants argued that the approval of the regulations was not a federal action requiring an EIS because the DRBC was not a federal agency. They also argued that the participation of a federal member on the five-member DRBC did not make the approval of the regulations a federal action. In September 2012, a federal district court dismissed the lawsuit for lack of subject matter jurisdiction.

The USDA Rural Development agency has stated that it will continue to use a CE to exempt its home loans from further NEPA review, even if they are made for the purchase of homes on properties leased for drilling. The agency does not consider gas leases on properties by themselves to be extraordinary circumstances requiring further environmental review.

It appears that courts and agencies have developed various viewpoints about the legal necessity of conducting NEPA environmental reviews for hydraulic fracturing, as well as the proper extent of such reviews. Additional clarification on these points may occur once courts and agencies have rendered more decisions in these areas.

[76] *Id.* The notice also states that "[n]ormal security and appraisal requirements under RD Instruction 1980-D and RD Handbook 3550 continue to apply for these properties." *Id.*

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