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Mining Law Monitor

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Volume 26 - Issue 1 - Spring 2011

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CLEAN WATER ACT JURISDICTION: NAVIGATING THE *RAPANOS* QUAGMIRE

by Amy Chasanov and Michael Bogert

This summer it will be five years since the U.S. Supreme Court handed down its *Rapanos* decision "defining" the scope of Environmental Protection Agency (EPA) jurisdictional authority under the Clean Water Act. The opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), is so confusing and convoluted that a senior federal district judge in Alabama aptly summarized it as such in a 2007 decision: "I will not compare the 'decision' to making sausage because it would excessively demean sausage makers." Since then, lower courts and the agencies have struggled to discern the "holding" of a Supreme Court decision that split 4-1-4, and the resulting federal limits on the government's Clean Water Act jurisdiction.

A draft of a revised *Clean Water Protection Guidance* ("Draft Guidance") was released on April 27 by EPA and the U.S. Army Corps of Engineers (Corps). Don't expect this Draft Guidance to provide the agencies' promised clarity about when and where your mining operations are likely to need a permit, or when the federal government is likely to come knocking with an enforcement action for operating without a permit or spilling into jurisdictional waters. Let's back up a bit to talk about Clean Water Act jurisdiction—where it has been in recent years, where it is likely to go, and how it could affect mining operations.

Background

The Clean Water Act includes several different sections that could affect mining operations: sections 311 (spills), 402 (National Pollutant Discharge Elimination System (NPDES) permits), 404 (dredge and fill permits), as well as 303 (water quality standards and total maximum daily load programs). The Clean Water Act's key jurisdictional term is "navigable waters," which the Act defines as "waters of the United States." The regulations adopted by EPA and the Corps, which share jurisdiction of the Clean Water Act, have identical definitions of "waters of the United States" and include a long list of the types of waters that are considered jurisdictional, whether or not they are truly "navigable."

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Until the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) *(SWANCC)*, the agencies enjoyed essentially unfettered jurisdiction with seemingly no limit. At issue in *SWANCC* was whether the Corps could assert jurisdiction over an abandoned sand and gravel pit used as habitat for migratory birds, and, thereby, require the landowner to obtain a section 404 permit to fill the isolated wetlands. The Supreme Court held that the Corps did not have jurisdiction over such isolated, intrastate non-navigable waters. The agencies interpreted *SWANCC* narrowly, and most lower court decisions agreed. There are exceptions, however. For example, in *API v. Johnson*, 541 F. Supp. 2d 165 (D.D.C. 2008), the U.S. District Court for the District of Columbia vacated and remanded EPA's definition of "navigable waters" in its Spill Pollution, Control, and Countermeasure regulation because its rulemaking failed to consider the *SWANCC* decision.

The *Rapanos* Decision

Rapanos involved a civil enforcement action by the Corps against a landowner who, seeking to develop the property, had filled areas the government claimed were jurisdictional wetlands without a section 404 permit. In this instance, each wetland that was filled was adjacent to a channel (or tributary) that ultimately reached a water that was in fact navigable. The Supreme Court was divided 4-1-4, with no majority opinion. Instead, there were two distinct (albeit overlapping) tests to determine whether the federal government had Clean Water Act jurisdiction. Justice Scalia authored a plurality opinion of four and Justice Kennedy authored a sole opinion that concurred in the result but for an entirely different reason. Under Justice Scalia's rationale, in order to constitute a "water of the United States," the tributaries at issue must be

> relatively permanent, standing or continuously flowing bodies of water "forming geographic features" that are described in ordinary parlance as "streams[,] . . . oceans, rivers, [and] lakes". . . The phrase does *not* include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall.

Justice Scalia's opinion also intimated that a relatively permanent stream is one that would flow naturally three months a year. Under his opinion, purely intrastate waters are unlikely to be considered jurisdictional, whether or not they are navigable.

Justice Kennedy's opinion found jurisdiction when there is a "significant nexus between the wetland in question and the navigable waters in the traditional sense." He defined a significant nexus as when the water in question "significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" Under Justice Kennedy's test, when the effects on water quality are "speculative or insubstantial," there is no jurisdiction. Thus, the government must demonstrate jurisdiction on a case-by-case basis.

Since the *Rapanos* decision, lower courts have struggled with its interpretation. Some circuits have held jurisdiction is appropriate under Justice Kennedy's significant nexus test (e.g., Seventh, Ninth, and Eleventh Circuits), whereas others have found jurisdiction when *either* Justice Kennedy's or Justice Scalia's test is met (e.g., First and Eighth Circuits).

Previous *Rapanos* Joint Guidance

On June 5, 2007, almost one year after *Rapanos* was decided, the Corps and EPA issued joint guidance interpreting *Rapanos*. The 2007 *Rapanos* Guidance was effective immediately, but was accompanied by an opportunity for public comment, and then reissued on December 2, 2008. According to the government, because it is guidance—and not a regulation—it does not have the force of law but is instead meant to be a policy that guides consistent decisionmaking across the regions.

The Guidance essentially identified three buckets of waters:

(1) waters over which the government will categorically assume jurisdiction;

(2) waters over which the government generally does not have jurisdiction; and

(3) a middle category, in which the government will assert jurisdiction only if there is a demonstrated significant nexus to a traditional navigable water.

This last category requires a significant amount of factfinding and expenditure of resources to determine whether a water is jurisdictional. According to EPA, since *Rapanos*, jurisdictional confusion has affected hundreds of Clean Water Act investigations, and enforcement has decreased roughly 60 percent from its pre-*SWANCC* 1990s peak, as measured by both the number of EPA cases initiated and the number of convictions. Companies have been able to assert the lack of Clean Water Act jurisdiction as a viable defense to enforcement actions, and the burden on the government to demonstrate jurisdiction can be significant.

Judicial Gloss on the Scope of *Rapanos*: The Fourth Circuit and the *Precon* Case

A recent decision by the U.S. Court of Appeals for the Fourth Circuit provides some insight into how the post-*Rapanos* reach of the Federal government affects private land development. In *Precon Development Corp. v. Army Corps of Engineers*, 633 F.3d 278 (4th Cir. 2011), the Fourth Circuit remanded a Corps "significant nexus" determination concerning the proposed development of a several-hundred-acre residential and retail facility near Chesapeake, Virginia.

Between 2004 and 2006, the Corps granted Precon permits to fill 77 acres of wetlands in order to proceed with a 658-acre planned unit development (PUD), based in part on an understanding that this was the totality of the development planned for the PUD. After announcing a plan to develop another 10 residential lots in the PUD, the Corps objected and the developer subsequently proposed reducing the additional impact on wetlands from 10.7 acres to 4.8. An impasse between the Corps and the developer ensued, and Precon then suggested that the United States had no jurisdiction over the proposed 4.8 affected acres.

The developer later applied to the Corps for a jurisdictional determination. The Corps determined that it had jurisdiction over the 4.8-acre site as wetlands adjacent to a ditch which qualified as "waters of the United States." The Corps denied the developer's request for a Clean Water Act permit, and the developer administratively appealed the jurisdictional determination as well as the permit denial. After the Corps and EPA jointly issued the 2007 *Rapanos* Guidance, a Corps appeals officer remanded the jurisdictional determination for reconsideration in light of the new policy.

Upon remand and application of the 2007 Guidance, the Corps again asserted jurisdiction over the 4.8 acres. Utilizing the "significant nexus determination" as instructed in the 2007 Guidance, the Corps identified the relevant reaches of the wetlands drainage feature and determined that two ditches (the first, a 2,500-foot long seasonally flowing drainage ditch, the second, a perennial drainage ditch that joined with the first ditch downstream of the 4.8-acre site) were "man-altered" tributaries to a running river. The Corps concluded that the tributaries and their adjacent wetlands had "a significant nexus that has more than a speculative or insubstantial effect on the Northwest River," and that the loss of those wetlands "would have a substantial negative impact on water quality and biological communities of the river's ecosystem." The Corps reaffirmed its previous conclusion that it had jurisdiction over the wetlands and that Precon would be required to obtain a Clean Water Act permit before filling them.

Precon then sought judicial review of the Corps determination. The U.S. District Court for the Eastern District of Virginia found that the Corps had permissibly defined the scope of its review area as including the 448 acres of similarly situated wetlands and that the Corps' determination that these wetlands had a significant nexus to the Northwest River was supported by substantial factual findings. The District Court also upheld the Corps' denial of the Clean Water Act permit.

Precon appealed the District Court's finding that the Corps properly asserted Clean Water Act jurisdiction over the disputed 4.8 acres of "wetlands." Precon first challenged the aggregation by the Corps of 448 acres of wetlands as being appropriately "similarly situated" to the 4.8 acres under review. The Fourth Circuit upheld the determination, but scolded that it had a "bare minimum of persuasive reasoning to which [it] might defer."

Precon next argued that the Corps did not adequately establish a "significant nexus" between the 4.8 acres in dispute and the nearest navigable waterway, the Northwest River. On that issue, the Fourth Circuit held the administrative record contained insufficient information to allow it to assess the Corps' conclusion that the wetlands had a significant nexus to the Northwest River, a navigable water situated several miles away.

After briefly touching upon the evidentiary requirement of Justice Kennedy's "significant nexus" test, the Fourth Circuit agreed that the test did not require a laboratory test or particular quantitative measurements in order to establish "significance." In examining whether the administrative record contained enough quantitative and qualitative physical evidence to uphold the Corps' "significant nexus" determination, the Fourth Circuit faulted the Corps for failing to show data of actual flow from the tributaries as well as a legitimate connection of the 4.8 acres to the Northwest River downstream 7 miles away. Further, the record failed to show that the functions the wetlands performed were of any "significance" to the Northwest River. The court reasoned:

> Accordingly, we must conclude that this record does not support the Corps' determination that the nexus that exists between the 448 acres of similarly situated wetlands and the Northwest River is "significant." Particularly given the facts of this case, involving wetlands adjacent to two manmade ditches, flowing at varying and largely unknown rates towards a river five to ten miles away, we cannot accept, without any information on the River's condition, the Corps' conclusion that the nexus here is significant.

The lessons of the *Precon* saga are twofold. First, the Fourth Circuit hinted that future "significant nexus" determinations involving adjacent wetlands will be examined closely for their evidence of "significance" on downstream water quality: "We ask only that in cases like this one, involving wetlands running alongside a ditch miles from any navigable water, the Corps pay particular attention to documenting why such wetlands significantly, rather than insubstantially, affect the integrity of navigable waters." Those disputing the reach of the Clean Water Act will likely key off the burden the Fourth Circuit imposed on the Corps in *Precon*.

Second, a theme that permeates *Precon* is the level of deference to be accorded to agency *guidance* interpreting *Rapanos*. The Court of Appeals reinforced that the Corps' interpretation of the phrase "significant nexus" would *not* be accorded higher deference under *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), but instead only "some" deference under *Skidmore v. Swift*, 323 U.S. 134 (1944), because the Corps' interpretation emanated from a non-binding guidance document and not a formal rule. Under the Fourth Circuit's analysis, the Obama Administration Draft Guidance, when finalized, will be accorded a similar level of deference as the 2007 *Rapanos* Guidance reviewed in *Precon*.

The Draft *Rapanos* Joint Guidance

To address the perceived shortcomings of the existing guidance, EPA and the Corps have been redrafting the *Rapanos* Guidance. The April 27 Draft Guidance – which is open for a 60-day comment period – distinguished the Bush Administration's 2008 guidance as a "policy choice" to interpret Justice Kennedy's opinion narrowly.

As a result of this Obama Administration review aimed at making "full use of the authority" under the Clean Water Act (tripling the number of pages in the previous version and upping the original 41 footnotes to a bewildering 104), the Draft Guidance states that "the extent of waters over which the agencies assert jurisdiction under the CWA will *increase* compared to the extent of water over which jurisdiction has been asserted under the existing [2003 *SWANCC* and 2008 *Rapanos*] guidance" (emphasis added). EPA's April 27 Economic Impact Analysis, released with the Draft Guidance, confirms this point, estimating that approximately 17 percent of the waters deemed non-jurisdictional under the current guidance will now be considered jurisdictional under the revised Guidance. While the Draft Guidance may certainly undergo changes as a result of the notice and comment process, some shifts from the existing guidance are worth emphasizing and likely to be part of any final Obama Administration guidance (or rule).

First, the Draft Guidance is a conspicuous shift away from the Bush Administration's interpretation of Justice Kennedy's significant nexus test. For example, the Draft Guidance addresses how to determine CWA jurisdiction for a number of waters that were not addressed in the 2008 version (e.g., interstate waters). The Draft Guidance also adopts a regional, or watershed-based approach that will expand the reach of jurisdiction and was not part of the prior version.

Second, the Draft Guidance makes clear the agencies' plan to undertake a subsequent rulemaking "to clarify further via regulation the extent of Clean Water Act jurisdiction," including whether the mere existence of an ordinary high-water mark alone is sufficient to establish *per se*

jurisdiction over tributaries, and when to assert jurisdiction over section (a)(3) other waters, which include intrastate lakes, rivers, (intermittent) streams, mudflats, wetlands, prairie potholes, wet meadows, and natural ponds. Public statements suggest that subsequent rulemaking may convert all of the Draft Guidance into a final rule, but that is not entirely clear.

Finally, many reports on the Draft Guidance have noted that the burden of proof in jurisdictional disputes will shift from the government to the private sector, although this is less clear from the text.

The Draft Guidance is instructive of the natural inclination of the Administration to assert broader Clean Water Act authority by empowering Justice Kennedy's solo opinion in *Rapanos* to provide a broader reach by the Federal government in reviewing actions potentially impacting waters of the United States.

Likely Next Steps

There are a number of next steps from the Administration, Congress, industry, and environmental groups that could unfold and would be fertile ground for active industry participation to shape the future of Clean Water Act jurisdiction.

- **Congressional Oversight.** The change in political leadership in the House of Representatives has brought a new scrutiny to the expansion of Federal jurisdiction over private lands. Particularly by members of Congress from the West, the Draft Guidance, if it is finalized in the same framework, is likely to receive attention from key policy committees, such as the House Transportation and Infrastructure Subcommittee with Clean Water Act jurisdiction, as well as the House Interior Appropriations Subcommittee.

- **Legislative Solutions.** Members of Congress—e.g., Democratic Congressman Jim Oberstar (D-Minn.)—have championed legislation to address the confusion over Clean Water Act jurisdiction. If ever passed, that legislation might bring the clarity some seek, though unfortunately for private landowners and industry that clarity would essentially mean all waters are covered. The primary thrust of the language (most recently H.R. 5088, America's Commitment to Clean Water Act, introduced Apr. 21, 2010) has been to excise the term "navigable" from the Clean Water Act, allegedly to return agency jurisdiction to its unfettered pre-*SWANCC* days and to reverse the "30 years of precedent" that have narrowed the Act. With the Republicans controlling the House of Representatives, the likelihood of passage is currently low, but a legislative approach that expands jurisdiction is nonetheless looming in the future.

- **Rulemaking Process.** That the Draft *Rapanos* Guidance is subject to a 60-day comment period suggests that, at a minimum, elements in the guidance will be subject to future rulemaking under the Obama Administration. The current comment period and any future rulemaking provide opportunities for regulated industry, as well as others, to share their views about Clean Water Act jurisdiction, the proposed guidance and regulatory language, and the significant impacts it might have on operations, permitting, and costs. While the ultimate rule could be subject to legal challenge, the final rule will receive a higher level of deference than agency guidance would.

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ENDANGERED SPECIES ACT AND GLOBAL CLIMATE CHANGE: THE POLAR BEAR LITIGATION TURNS FIVE

by Michael Klise

Litigation brought by activist groups aimed at regulating greenhouse gas (GHG) emissions by protecting the polar bear under the Endangered Species Act (ESA) reached its fifth anniversary this past December, but there was little cause for celebration. Since the Center for Biological Diversity (CBD) filed its first suit on December 15, 2005, in the U.S. District Court for the Northern District of California, this litigation has swelled to encompass eleven other lawsuits. The suits originally were filed in three different federal district courts and now have been consolidated by the Judicial Panel on Multidistrict Litigation in the U.S. District Court for the District of Columbia as *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation*. This article takes a look back at the litigation and explains why, just a few weeks after the third oral argument before Judge Emmet G. Sullivan, no end is in sight.

How It Started

In the beginning, on February 16, 2005, CBD submitted a petition to list the polar bear for protection under the ESA because of alleged threats from global climate change (by which CBD means, primarily, GHG emissions). Following no issuance of a 90-day or a 12-month finding by the U.S. Fish and Wildlife Service (FWS) on the petition (as prescribed by ESA § 4(b)(3)), CBD filed suit in federal district court. The lawsuit settled, with FWS agreeing to issue a 12-month finding by December 27, 2006. On that date, FWS announced a proposed rule to list the polar bear as a "threatened species" under the ESA.

FWS actually published the proposed rule in the Federal Register on January 9, 2007, which under the ESA gave it until January 9, 2008 to publish a final listing determination. When that deadline passed without a final listing rule, CBD filed a new suit on March 10, 2008 to force FWS to make the final listing determination. The court granted summary judgment to CBD and ordered FWS to publish its final listing determination for the polar bear by May 15, 2008 and to waive the usual 30-day notice period for a new rule. FWS published its 92-page final determination listing the polar bear as a "threatened species" under the ESA on May 15, 2008.

The Challenges to the Listing Rule and ESA Section 4(d) Rule

The issuance of the listing rule by the court-ordered deadline of May 15, 2008, resolved the claim presented in CBD's lawsuit – or so it seemed. But CBD was dissatisfied with listing the polar bear as a "threatened" species rather than a more imperiled "endangered" species; and also with FWS's decision to issue, on the same date, an interim final rule for the polar bear under section 4(d) of the ESA. Section 4(d) allows FWS, in the case of a "threatened" species, to issue a rule that modifies the protections otherwise available for an "endangered" species. The interim 4(d) rule for the polar bear adopted the regulatory protections of the Marine Mammal Protection Act and the Convention on International Trade in Endangered Species as the appropriate regulatory provisions for the polar bear. And, of critical importance for GHG emissions, the interim 4(d) rule stated that the provisions prohibiting "take" of an endangered species do not apply to the taking of polar bears that is "incidental to, but not the purpose of, lawful activity within any area subject to the jurisdiction of the United States except Alaska." FWS replaced the interim rule by a final 4(d) rule on December 16, 2008. The final rule was similar to the interim rule, but modified the Alaska exception quoted above to read "within the current range of the polar bear."

Rather than file a new suit, CBD amended its complaint to include challenges to the listing rule and the interim 4(d) rule. The amended complaint posed far broader implications than the original lawsuit, when the only issue had been FWS's failure to meet the deadline for making the listing determination. Even before FWS issued the final listing determination, groups representing hunting interests moved to intervene to protect their members' interests in hunting polar bears and importing polar bear trophies. And once FWS issued the rules and CBD amended its complaint (twice) to challenge them, the rush was really on. Over the next four months, the Alaska Oil and Gas Association (AOGA), the Arctic Slope Regional Council, and seven national trade associations (including the National Mining Association) moved to intervene as defendants. And Defenders of Wildlife moved to intervene as a plaintiff.

Meanwhile, new suits sprang up in other courts. Hunting groups, the State of Alaska, a coalition led by the American Petroleum Institute, and another coalition led by the California Cattlemen's Association filed a total of six suits in the U.S. District Court for the District of Columbia challenging various restrictions imposed by the listing rule and interim 4(d) rule. Defenders of Wildlife also filed suit in that court challenging the 4(d) rule as under-protective of the polar bear. And holders of permits to import polar bear trophies filed two suits in the U.S. District Court for the Eastern District of Pennsylvania, alleging that the listing rule unlawfully interfered with their import permits and permit applications.

The Multidistrict Litigation

With so many lawsuits pending in so many different courts, AOGA petitioned the Judicial Panel on Multidistrict Litigation to transfer all the cases and consolidate them either in Washington, D.C. (where the decisions were made and the decisionmakers were located) or in Alaska (the only location of polar bears and polar bear habitat in the U.S.). CBD and the other activist groups opposed and argued that, if the cases were to be consolidated, it should be in their highly preferred forum of the Northern District of California, which they said was the court most familiar with the subject matter. The Federal Defendants and most of the other litigants joined in AOGA's request that all the cases be consolidated in Washington D.C. – exactly what the Judicial Panel on Multidistrict Litigation ordered on December 3, 2008, when it assigned all the cases to Judge Sullivan.

Not surprisingly, the parties differed over how the consolidated cases should proceed from there. Lengthy negotiations followed. Eventually, the parties agreed on a tripartite grouping of the cases for summary judgment briefing and oral argument: (1) challenges to the listing rule; (2) challenges to the 4(d) rule; and (3) the trophy import cases. Judge Sullivan set a briefing schedule for the listing rule cases that ran through May 3, 2010; and for the 4(d) rule cases that would close on August 16, 2010. The page limits he authorized reflect the complexity of the issues and the breadth and diversity of the parties' interests – a total of 830 pages for the five listing rule cases, and another 356 pages for the two 4(d) rule cases.

The Listing Rule Cases – Still Unresolved

The court scheduled the listing cases for briefing first for a reason: as the government and the industry litigants had explained, depending on how the court rules on the listing rule, there might be no need to resolve the challenges to the 4(d) rule, which owed its existence to FWS's decision to list the polar bear as "threatened" rather than "endangered." Unfortunately, nearly a year after the close of briefing, the listing rule cases remain unresolved.

Judge Sullivan heard an initial round of oral argument October 20, 2010. Two weeks later, he issued an order remanding the listing rule to FWS for the "limited purpose of providing additional explanation for the legal basis of the listing determination." Specifically, he questioned FWS's interpretation of the ESA's definition of "endangered species," which refers to "any species which is in danger of extinction throughout all or a significant portion of its range." FWS had argued that the polar bear did not fall within this definition, and thus could be properly classified as "threatened" rather than "endangered," because the bear was not in "imminent" danger of extinction. FWS argued that the ESA was clear on this point, but Judge Sullivan concluded that "the definition of an endangered species was intentionally left ambiguous" in the ESA and did not bind FWS to follow a "bright-line imminence requirement for all endangered species." He remanded for FWS to explain why, given his view that the ESA was ambiguous, the listing rule should be upheld.

The remand order raised concerns that the Obama Administration would provide only lukewarm support, if any, for the Bush Administration's decision to classify the bear as "threatened." But those fears were abated when, on December 22, 2010, FWS weighed in with a detailed 18-page singled-spaced explanation of why, even assuming the ESA's definition of "endangered species" did not *require* a showing of "imminent" danger, Congress gave FWS the discretion to assign that meaning to the statutory phrase "in danger of extinction." FWS argued that it had properly exercised that discretion when it determined, based on the best scientific information available, that the polar bear did not meet the definition of an "endangered species."

Another round of briefing followed, and then a day-long oral argument on February 23, 2011. Judge Sullivan's questions reflected how complex he perceives the listing rule to be.

Among the questions he raised were:

- whether FWS focused on all five statutory factors relevant to listing;
- whether FWS fully considered the record, using best available science, and fairly and accurately evaluated the studies considered;
- whether the record demonstrates a probability of extinction sufficient to warrant listing as "endangered" now;
- whether FWS provided new reasoning in its explanation following remand, such that the agency is not entitled to deference;
- whether FWS picked a reasonable "foreseeable future" and accurately assessed the state of the polar bear now and in that time frame; and
- whether FWS followed adequate procedures in consulting states and foreign nations as part of the listing decision process.

Judge Sullivan said he would likely ask for supplemental briefs on the listing rule. He has not done so yet, however, nor has he issued his final decision on the rule.

The 4(d) Rule Cases – Also Still Unresolved

Despite not issuing his final decision on the listing rule, Judge Sullivan held oral argument on the 4(d) rule on April 13, 2011. Although this argument too was wide-ranging and lasted nearly the entire day, Judge Sullivan seemed most interested in whether FWS had complied with the National Environmental Policy Act (NEPA) when it issued the 4(d) rule without preparing an Environmental Assessment or Environmental Impact Statement. FWS had argued that NEPA documents were unnecessary because the 4(d) rule preserved the environmental and regulatory status quo and therefore was not a "major federal action" that triggered NEPA. FWS also argued that ESA section 4(d) rules, like ESA section 4(a)(1) listing determinations, were exempt from NEPA as a matter of law.

Judge Sullivan seemed skeptical of FWS's position on NEPA and also was puzzled by what he perceived as the 4(d) rule's failure to address GHG emissions, which he saw as the primary threat to the polar bear and the main reason the polar bear was listed under the ESA to begin with. Following the oral argument, he issued two orders for supplemental briefing. The first order directed the parties to file 5-page supplemental briefs by April 29 addressing whether, if he finds a basis to remand the 4(d) rule for one of the reasons the plaintiffs had identified ("i.e., either a violation of [NEPA] or a violation of the [ESA]"), he must also reach the remaining issues. The viewpoints in those supplemental briefs fell along party lines: the federal defendants and defendant-intervenors told Judge Sullivan that he should reach all the issues, whereas CBD urged him not to do so.

In the second order, he established a full supplemental briefing schedule (which concludes on June 15, 2011) for the parties to address the appropriate remedy if he finds that the 4(d) rule violated either the ESA or NEPA. The central issue in the remedy briefing will be whether, if Judge Sullivan finds a violation and remands the 4(d) rule to FWS, he must vacate the rule (as the plaintiffs have argued) or, instead, can leave the rule in place while FWS cures the violation.

* * *

Will the polar bear listing and 4(d) rule litigation be resolved anytime soon? It seems highly unlikely. Judge Sullivan is at least two rounds of supplemental briefing away from deciding the 4(d) rule cases and may yet order supplemental briefing on the listing rule too. And, however he decides the cases, one or more of the losing parties may well appeal, which would keep the matter in court for at least another year. This is truly, and aptly, litigation at a glacial pace.

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[Editors' Note: As the polar bear litigation illustrates, mining and industrial operations can bump into legal issues under the ESA, whether the protected species are on mine property or miles away. The experience often is not a pleasant one for the companies involved. The ESA's tenacious protection of listed species has caused the statute to be called the "pit bull of environmental laws."

To help those who are new to the ESA's bite or who desire a summary of the law, Crowell & Moring's ENR attorneys have prepared an overview of the ESA. The summary is available at http://www.crowell.com/PDF/The-Endangered-Species-Act-An-Overview-Crowell-Moring.pdf, which also links to several other articles pertinent to the mining industry. We have experience under all the major federal wildlife laws, including the ESA, the Migratory Bird Treaty Act, the Bald and Golden Eagle Protection Act, and the Marine Mammal Protection Act.]

DEEPSEA MINERAL MINING: FROM PIPEDREAM TO REALITY

by Brian Barner

In October 2007, the U.S. Senate Committee on Foreign Relations held hearings on the 1982 United Nations Convention on the Law of the Sea (the "Convention"), and voted to report the Convention to the full Senate for consideration. Secretary of State Hillary Clinton later wrote to the Senate Committee on Foreign Relations in October 2009 expressing strong support for U.S. accession to the Convention, noting that "as a party, the United States would have access to procedures that would maximize international recognition and legal certainty for U.S. sovereign rights over offshore resources (including minerals) beyond 200 miles of our coastline." Also, in May 2009, numerous nations submitted continental shelf claims under the Convention to the UN Commission on the Limits of the Continental Shelf. The Convention is likely to come up again while the Obama Administration continues efforts to obtain ratification. The following is a discussion of the Convention's implications for offshore mining.

Background

Seabed minerals represent a vast resource for mankind. Mining companies have historically collected sand and gravel aggregate and deposits of continental rocks in the shallow coastal regions. More recently, oil and gas companies have stretched the limits of deep seabed resource extraction. Mining companies are starting to move into deep seabed exploration and extraction of mineral deposits formed within the oceans. The most common deposits are polymetallic nodules – potato-sized rocks sitting on the sedimentary ocean floor, cobalt-rich crusts that are precipitates of metals from the seawater onto barren rocks of seamounts, and polymetallic sulfide deposits that form around hydrothermal vents atop areas of seafloor plate tectonic spreading or collision.

Commercial recovery has necessitated the creation of an international legal framework to regulate seabed mining. The 1982 Convention created an International Seabed Authority (ISA) to regulate seabed mining beneath waters outside of national jurisdiction. Part XI of the Convention governs the international "Area." The Convention declares the resources of the Area to be the common heritage of mankind. The ISA acts as the trustee of mankind in regulating resource extraction in the Area. When nations join the Convention, they become *ipso facto* members of the ISA. The structure of the ISA mirrors that of the UN, with an Assembly, Council, and Secretariat.

Concerns over the international seabed-mining regime caused industrialized nations to withhold consent for the Convention until an additional agreement was reached in 1994. The 1994 Agreement took a more market-based approach and removed forced subsidies, technology transfer, and privileges of the Enterprise that was to be the commercial arm of the ISA to develop the international area on behalf of mankind. Since the 1994 Agreement was reached, more industrialized nations have joined and there are currently 161 states party to the Convention.

Offshore Zones of Sovereignty

The Convention's framework created different zones of sovereignty as one moves further away from shore. Coastal states have sovereign rights over the mineral resources of their territorial sea, exclusive economic zone, and continental shelf. The area within 12 nautical miles of the shore baseline, called the territorial sea, is under the sovereignty of the coastal state from the seafloor to the water column to the sky overhead, subject to the right of innocent passage. Outside of the territorial sea, the coastal state is not sovereign, but possesses limited "sovereign rights" to develop natural resources within the exclusive economic zone (EEZ) and on the continental shelf. The EEZ extends from the end of the territorial sea to 200 nautical miles from the shore baseline, and the continental shelf can extend beyond the EEZ up to 350 nautical miles from shore, depending on the gradient of the slope. When the coasts of two states are opposite or adjacent, the territorial sea and EEZ are delimited in accordance with the median line of equidistant points between the states' baselines. Marine mining within the territorial sea, EEZ, and continental shelf is subject to the laws and permissions of the coastal state. Outside of those areas lies the international seabed Area.

The regime for the continental shelf is highly important, because it governs the extraction of resources in the band of seabed between the territorial sea and the deep seafloor. A coastal state has exclusive sovereign rights for the

purpose of exploring and exploiting the natural resources of its continental shelf. When a coastal state exploits minerals of the continental shelf beyond the 200-nautical mile EEZ, however, the coastal state is supposed to pay royalties to the ISA. The ISA is charged with distributing the money to states that are party to the Convention on the basis of equitable sharing criteria, taking into account the interests and needs of developing States, particularly the least developed and land-locked among them.

Delimiting the Continental Shelf

The continental shelf consists of the seabed and subsoil of the submarine areas that extend beyond a coastal state's territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or at least 200 nautical miles from the shore baselines where the continental margin is less than 200 nautical miles out to sea. When the continental shelf exceeds the EEZ, coastal states must establish the outer limits of their continental shelf in accordance with a formula based upon the location of the continental slope, which is the point of maximum gradient change. The outer limits of the continental shelf can extend up to 350 nautical miles from the shore baselines (150 nautical miles past the EEZ), or 100 nautical miles from the 2,500-meter isobath (a line connecting the depth of 2,500 meters).

Coastal states must submit information on the outer limits of the continental shelf to the UN Commission on the Limits of the Continental Shelf (the "Commission"), which consists of scientists elected by member states. Once a coastal state and the Commission agree on the limits of the continental shelf, they are final and binding on other Convention parties. The process of delimiting the extent of continental shelf claims is still underway, but in mid-2009 many states submitted continental shelf claims. If the U.S. ratifies the Convention, it can have its continental shelf delimited and respected by other nations under the Convention.

Regulations, Ratification, and U.S. Law

Some marine minerals are on barren seabed, while others are located on hydrothermal vents that support unique ecosystems. The ISA is promulgating regulations regarding exploration concessions and environmental issues. Of particular concern to marine mining, the Convention calls for measures necessary to protect and preserve rare or fragile ecosystems, and minimize to the fullest possible extent pollution from installations and devices used in exploring or extracting the natural resources of the seabed and subsoil. To fulfill this mission, the ISA's regulations invoke the precautionary principle, and call for environmental baseline studies and annual reporting of ongoing biological monitoring. The ISA has promulgated environmental guidance to marine miners regarding what sorts of testing is required to fulfill their environmental baseline and impact assessment responsibilities.

The U.S. remains one of a handful of nations that have not yet ratified the Convention. As an alternative to the Convention, the U.S. adopted the Deep Seabed Hard Mineral Resources Act of 1980, which Congress declared to be an "interim legal regime" until the U.S. adopts the Convention. The Act recognizes the "high seas freedom" to explore for and commercially recover hard mineral resources in areas outside of national jurisdiction, subject to a duty of reasonable regard to the interests of other states. The Act allows U.S. citizens to apply to the Administrator of the National Oceanic and Atmospheric Administration (NOAA) for a permit to explore and commercially recover hard mineral resources in areas outside of any state's national jurisdiction. The Secretary of State is obligated to use all peaceful means to resolve any controversy between a U.S. and foreign permittee. The U.S. claims not to assert any sovereignty over resources in international waters, but rather to exercise its jurisdiction over U.S. citizens who exercise their own high seas freedom to engage in exploration for, and commercial recovery of, hard mineral resources of the deep seabed. Because U.S. citizens are free to obtain a permit from NOAA and go explore and recover hard mineral resources in the international Area, the possibility exists for a showdown between a U.S. permittee and an ISA concessionaire, which adds uncertainty to development.

Recent Commercial Activity

Although capital intensive, offshore mining has numerous advantages over land-based mining. For example, offshore mining requires little fixed-in-place mining infrastructure (the ship, rover, and ore barges can move around, unlike land-based mining investments with relatively higher political risk); minimal overburden or stripping (deposits are lying on the ocean floor); minimal mining waste (waste rock can go back into the sea); increased worker safety (a remote operated vehicle does most of the mining); and limited social disturbance (mining occurs offshore where few people see it, and not in indigenous communities' or anyone else's backyards).

These advantages, along with relatively high metal concentrations in some offshore deposits, have spawned recent commercial developments. China was the first country to submit an application to the ISA for commercial development of polymetallic sulfide deposits following the promulgation of ISA regulations. AngloGold and De Beers have entered into a joint venture exploration program. The venture is exploring off the coasts of New Zealand, South Africa, and Canada for seafloor gold and diamonds. Nautilus Minerals is conducting a polymetallic sulfides mining project off Papua New Guinea, where extremely high copper grades have been reported. Nautilus Minerals plans to increase licenses and exploration applications in waters under the jurisdiction of Papua New Guinea, Fiji, Tonga, the Solomon Islands, and New Zealand. Diamond Fields International is conducting an Atlantis II high-grade sediment mining project in the Red Sea in joint venture with Manafa International. Manganese nodules have also become more interesting lately because, in addition to their copper and nickel content, they contain rare earth metals that are considerably more valuable now that China is reducing exports. DeepGreen Resources, Inc. is raising capital to mine copper-nickel nodules in international waters between Hawaii and Mexico.

U.S. Ratification Needed

The Clinton Administration submitted the Convention to the Senate in 1994 for ratification and maintained that the provisions of the 1994 Agreement and Annex correct the objectionable elements in the Convention on deep seabed issues. The Bush Administration supported ratification of the Convention as well. The Convention has been reported out of the U.S. Senate Committee on Foreign Relations a couple of times in the past few years, but has not yet reached a full-Senate vote on ratification. The Obama Administration has indicated its strong support for the Convention.

Ratification of the Convention would pave the way for U.S. nationals to compete on an equal footing through the UN process. It is notable that the current deep seabed developers are non-U.S. entities. In the past, U.S. companies such as Lockheed were involved in deep seabed mining, but they relinquished their licenses, which is further evidence that America is being left behind. Further attention to ratification is warranted to avoid deterring American investment and to foster the competitiveness of U.S. entities in this global enterprise.

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