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WildEarth Guardians v. United States Bureau of Land Management

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***WildEarth Guardians v. United States Bureau of Land Management*, 2018 U.S. Dist. 322 F. Supp.3d 1134 (D. Colo. April 23, 2018)**

Seth Sivinski

Whether a potential impact is reasonably foreseeable is one of the standards by which agencies decide the level of analysis required before agency action. This distinction is especially difficult when it comes to potential future emissions with the rapid increase in scientists' understanding of climate change and human impact on it. In *WildEarth Guardians v. U.S. BLM*, the District Court of Colorado showed that economic and developmental uncertainty is an area where agencies are given broad discretion in deciding whether an impact is reasonably foreseeable and requires a further conformity analysis under the Clean Air Act. This case exemplifies the tactical limitation of using climate change and the science around it to force greater analysis of projects undertaken by federal agencies. However, the court presented a potential roadmap for successful future challenges.

I. INTRODUCTION

In March 2015, and again in November 2015, WildEarth Guardians ("WildEarth") challenged the Bureau of Land Management's ("BLM") decision not to conduct additional analysis of potential future impacts from proposed oil and gas lease sales in Colorado.¹ WildEarth alleged that the Clean Air Act's ("CAA") National Ambient Air Quality Standards ("NAAQS") required the BLM to perform a conformity analysis of how new leases would affect air quality in the region.² The BLM argued, and the court agreed, that there was too much uncertainty about the nature of the leases' development for the CAA to require the BLM to conduct a conformity analysis of the proposed oil and gas leases' effects.³

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Statutory Background

Through the CAA, Congress has charged the Environmental Protection Agency ("EPA") with setting NAAQS, which control air quality in states and regulate pollutants such as ozone and ozone precursors.⁴ Regions which comply with the air quality standards set by

1. *WildEarth Guardians v. United States Bureau of Land Management*, 2018 U.S. Dist. 322 F. Supp.3d (D. Colo. April 23, 2018).

2. *Id.* at 1136.

3. *Id.* at 1145-1148 (citing 58 Fed. Reg. 63,214, 63,226).

4. *Id.* at 1137.

EPA are deemed in “attainment” with ozone NAAQS, while those which are not in attainment are deemed to be a “nonattainment” area.⁵ Once a NAAQS is set, a State Implementation Plan (“SIP”) must be implemented, which is subject to EPA approval.⁶

The federal government may not approve an agency action which is not in conformity with an approved SIP.⁷ Conformity is defined as conformity in purpose (eliminating or reducing severity and number of violations), and by showing such activities will not add to an existing violation, increase the severity and frequency of violations, or delay attainment.⁸ The CAA’s “General Conformity Rule” requires that further analysis is done through an “ozone conformity analysis” if the proposed project will result in a set amount of ozone precursors, here 100 tons per year (“tpy”).⁹

EPA guidelines define direct emissions as those which are “caused or initiated by the Federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.”¹⁰ Indirect emissions are those which occur in the same area but by a different time or place from the federal action, are reasonably foreseeable, and are both practically controllable and within the responsibility of the agency.¹¹

B. Factual Background

In August 2014, the BLM released an Environmental Assessment (“EA”) which analyzed proposed oil and gas leases in northeastern Colorado.¹² In March 2015, WildEarth officially “protested BLM’s plan for the May 2015 lease sales” and its decision not to perform a NAAQS conformity analysis.¹³ In its EA, BLM reasoned that it did not need to perform the conformity analysis because the leasing process did not on its own create direct or indirect emissions regulated by the CAA’s conformity analysis requirement.¹⁴ Further, to justify its decision to not perform the analysis on indirect emissions, BLM analogized the leasing process to land transfers and offshore leasing, both of which are exempted from conformity analysis.¹⁵ After WildEarth’s objection, BLM released a revised EA which incorporated comments and objections and largely repeated its previous analysis about not completing a conformity analysis.¹⁶

5. *Id.* at 1137-1138.
 6. *Id.* at 1137.
 7. *Id.* (citing U.S.C § 7409(b)(1)).
 8. *Id.* at 1138.
 9. *Id.* at 1137.
 10. *Id.* at 1138 (citing 40 C.F.R. § 93.152).
 11. *Id.*
 12. *Id.* at 1139.
 13. *Id.* at 1140.
 14. *Id.* at 1141.
 15. *Id.* at 1140.
 16. *Id.*

BLM later put eighty-six parcels up for auction and seventy-three were sold, some in the Nonattainment Area.¹⁷ In November 2015, BLM put 121 more parcels up for auction and sold 106 of them.¹⁸ Again, WildEarth objected to BLM’s decision to skip the conformity analysis and BLM issued another revised EA and repeated its arguments from the May 2015 dispute.¹⁹

The court framed this dispute as boiling down to the validity of BLM’s decision not to conduct a conformity analysis as to whether the lease sales would prolong ozone issues in the Nonattainment Area because BLM found it was not reasonably foreseeable that emissions from these leases would indirectly lead to the 100 tpy emission of an ozone precursor.²⁰

III. ANALYSIS

The root of the court’s analysis was the foreseeability of emissions. Unlike other cases, the uncertainty here was a practical one. BLM argued that it was not able to accurately forecast how the parcels would be used and at what pace the development would take place.²¹ BLM stated that it had enough information to make broad predictions to satisfy the CAA’s requirements for determining when a conformity analysis is needed, but not how specific parcels will be developed during their ten-year primary lease period.²² The court agreed with the BLM.²³

A. *WildEarth’s Arguments*

WildEarth argued that because at least one well needs to be put on a parcel to hold a lease open, BLM could reasonably foresee “at a minimum, . . . [thirty-one] new wells [in the Nonattainment Area].”²⁴ WildEarth further argued that the potential emissions from these wells would be well over the threshold to trigger a conformity analysis.²⁵ This analysis was applied to both the May and November 2015 lease sales.²⁶ WildEarth assumed that all activities on the leased parcels— construction, maintenance, operation, and reclamation—would all occur in the same year.²⁷

Additionally, WildEarth argued that the reports BLM relied upon regarding its decision-making process showed that the agency had enough

17. *Id.* at 1137.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 1141, 1144.

22. *Id.* 1145.

23. *Id.* at 1148 (citation omitted).

24. *Id.* at 1143 (citation omitted).

25. *Id.*

26. *Id.*

27. *Id.* at 1144.

information to categorize emissions from the leased parcels, and was thus required to conduct the conformity analysis.²⁸ WildEarth asserted that BLM offered no explanation why it had the information to estimate direct emissions, but indirect emissions were not reasonably foreseeable.²⁹

B. BLM Responds

In response, BLM argued that WildEarth's calculations were "fraught with problems."³⁰ BLM's first set of uncertainties dealt with the development of the individual parcels.³¹ The primary lease term—the period where production is not required to maintain the lease—is ten years and BLM stated it was impossible to know how and when all the leased parcels would be developed.³² Essentially, BLM argued that while it was true the leases required certain levels of development, it was impossible to know when that would take place and that assuming it would all happen at once was absurd.

Following this first uncertainty, BLM pointed out that it would be impossible to know how many wells would be drilled on any single parcel, with density depending on the resource potential.³³ BLM further argued that it was impossible to know the equipment or type of drill rig each lessee would use in development.³⁴

BLM pointed to the wide range in estimates from two of its own reports as an example of uncertainty, arguing that this demonstrated the nature of future indirect emissions was not reasonably foreseeable.³⁵

BLM also argued that WildEarth's method of calculation, applying a regional-scale estimation to individual parcels, yielded "absurd" results.³⁶ For instance, BLM pointed out that some of the parcels concerned are forty acres, with maximum projected development at 150 wells per township would mean that some parcels would have .26 wells which is "not something that exists."³⁷ Essentially, the calculations used to estimate large-scale impacts are not so simply scaled. BLM's argument hinged on the idea that indirect emissions from these lease sales were not reasonably foreseeable because they could not be estimated with "sufficient precision" as required by the General Conformity Rule.³⁸

C. Holding

28. *Id.*
 29. *Id.*
 30. *Id.*
 31. *Id.*
 32. *Id.*
 33. *Id.*
 34. *Id.*
 35. *Id.* at 1145.
 36. *Id.*
 37. *Id.*
 38. *Id.* at 1146.

The court focused on the question of “sufficient precision.”³⁹ The court emphasized that WildEarth read the EPA guidance broadly, while BLM looked at it narrowly.⁴⁰ Importantly, the court reasoned that it owed no deference to BLM’s interpretation because the CAA, which put the NAAQS framework in place, is not administered by the BLM.⁴¹

The court’s analysis relied on the Ninth Circuit’s decision in *South Coast Air Quality Management District v. Federal Energy Regulatory Commission*.⁴² In *South Coast*, the Ninth Circuit stated that numerous, large-scale reports about a pipeline were “significantly less than meets the eye” and agreed with the agency that it did not have enough information to do a more detailed analysis.⁴³ The court here stated that BLM’s information was also “significantly less than meets the eye.”⁴⁴ More bluntly, the court enunciated that while it may seem like WildEarth presented a great deal of evidence, it actually didn’t say very much.

According to the court, the information contained in BLM’s reports was only enough to make assessments on a regional scale and did not meet the level of information needed to trigger a conformity analysis.⁴⁵ Furthermore, the court likened WildEarth’s argument to a “worst case scenario” analysis which EPA counsels against relying on for conformity review.⁴⁶

The court concluded that WildEarth did not meet this burden and upheld BLM’s action, holding that BLM’s “own information and . . . information presented to it” was enough to quantify emissions finely enough to predict ozone precursor emissions.⁴⁷

D. A Missed Opportunity?

Interestingly, the court presented an argument which WildEarth *could* have made but “quite surprisingly” did not.⁴⁸ The court pointed out that according to one of the reports available to both parties it would only take ten oil wells, or twenty-three natural gas wells, to reach the ozone precursor limit and trigger a conformity analysis.⁴⁹ According to the court, BLM could have been “reasonably sure” that, given the number of leased parcels, this threshold would be met.⁵⁰ The court stated that given the clarity of this argument, it could be assumed that WildEarth chose not to make this argument and, as such, considered it no further.⁵¹

39. *Id.*

40. *Id.* at 1147.

41. *Id.*

42. *Id.* (citing 621 F.3d at 1101).

43. *Id.*

44. *Id.* at 1147-48.

45. *Id.*

46. *Id.* at 1148 (citing 58 Fed. Reg. 63.214, 63.226).

47. *Id.* at 1148.

48. *Id.* at 1143.

49. *Id.*

50. *Id.*

51. *Id.*

IV. CONCLUSION

This case shows that currently, while courts may be less lenient on agencies claiming climate impacts and emissions analysis as an excuse to avoid further analysis, the economic uncertainties of resource development is an area where agencies get broad deference in their interpretation. Moreover, the court's inclusion of a potentially successful argument based on established atmospheric science and industry knowledge, that WildEarth didn't make, shows this clearly. WildEarth's argument based on the development of the leases was unpersuasive, but the court here left a door open to future challenges rooted in science.