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Legal Opinion Letter

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# LAWSUIT ON "FRACKING" CONFIRMS NEPA LAW HAS LOST ITS RUDDER

by
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A lawsuit that the New York Attorney General recently filed against the U.S. Army Corps of Engineers to halt development of natural gas in Marcellus Shale Formation brings into sharp relief the need to reform the National Environmental Policy Act of 1969 ("NEPA"), or at the very least to refocus its implementation. NEPA is a procedural statute; it directs all federal agencies to prepare an Environmental Impact Statement ("EIS") before undertaking a "major federal action significantly affecting the quality of the human environment." NEPA § 102(2)(C). The EIS must include an analysis which, among other things, identifies unavoidable adverse environmental impacts of the proposed action, as well as alternatives to the proposed action. With NEPA now being used to prevent development of green energy, such as the Cape Wind project off the coast of Massachusetts and cleaner-burning natural gas in the Marcellus Shale formation, we have come full circle. Change is needed – and fast.

Over the past 50 years, the reach of NEPA has extended well beyond its initial purpose of ensuring that mission-oriented agencies such as the Department of Transportation and the Army Corps of Engineers take a "hard look" at the environmental effects of their projects (highways, dams, etc.) and identifying opportunities to mitigate those effects before project approval. With each passing year, litigants find creative new ways of using NEPA to block projects they don't like even when such opposition clashes with a national objective. Such is the case in *State of New York v. Army Corps of Engineers, et al.*, CV-11-2599 (E.D.N.Y.), where the plaintiff's use of NEPA runs counter to the national objectives of energy security and protection against climate change.

Through this lawsuit, New York seeks to use NEPA to block a *non*-federal agency – the Delaware River Basin Commission ("DRBC" or the "Commission") – from *proposing* regulations for development of natural gas within the Delaware River Basin. The five-person Commission includes the Governors of four states (PA, NY, DE, and NJ) and an Army Corps of Engineers representative. New York asserts that the Corps (and other federal agencies) must prepare a draft environmental impact statement before the DRBC issues the regulation.

There are numerous reasons why this lawsuit is likely to fail. First and foremost, it is barred under the doctrine of sovereign immunity, which provides that the United States cannot be sued without its express consent. The 1961 legislation establishing the DRBC and authorizing the United States to serve as one of the five Commissioners did not waive sovereign immunity. Second, the suit must fail for lack of subject matter jurisdiction. NEPA does not confer subject matter jurisdiction over a dispute concerning a federal agency's compliance with NEPA. Rather, the only basis for obtaining judicial review of NEPA compliance is under the Administrative Procedure Act ("APA"). Under the APA's judicial review provisions, only *final* action

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by a *federal* agency may be challenged. *See* 5 U.S.C. § 704. Here, we have neither. The Corps did not publish a final rule. Rather the DRBC, which is *not* a federal agency, issued a *proposed* rule.

New York's attempt to block the DRBC's proposed rules for development of Marcellus Shale Gas though a tortured interpretation of NEPA is just one of many examples of NEPA being used to block a project with clear environmental benefits. Consider the Cape Wind saga. Cape Wind, an offshore wind power project that would supply nearly 500 kilowatts of renewable energy, may be the most carefully scrutinized energy project in history. It has undergone ten years of painstaking environmental analysis under NEPA by six federal agencies. And now, environmental groups and their wealthy investors are using NEPA-based lawsuits in an attempt stop the Cape Wind project in its tracks.

As the Cape Wind and Marcellus Shale suits illustrate, the ever-expanding reach of NEPA now threatens to undermine the development of cleaner sources of energy. Burning natural gas, by all accounts, emits less carbon dioxide than "dirtier" fuels such as petroleum and coal. Our government is investing billions of dollars to accelerate the use of lower carbon energy sources in an effort to battle climate change. Those investments are being undermined by use of an antiquated statute in ways that were never intended. How ironic that NEPA would be the tool of choice to block development of environmentally preferable sources of energy such as Marcellus Shale Gas.

A new paradigm is needed. Over the next decade, the number of low-carbon energy projects needing federal licenses and approvals will greatly increase. For many of these projects, environmental reviews under the NEPA will likely be the critical pathway to the development of low-carbon energy. But unlike NEPA reviews of the past, low-carbon energy projects will require the NEPA process to explore unique opportunities to harness natural and/or cleaner resources for energy use, and at the same time preserve and protect the environment. Energy project development and finance now have an environmental purpose. Two policy changes are needed ever so quickly.

1. Federal agencies must give greater weight to the environmental benefits of clean energy projects. In one of the earliest legal battles over implementation of NEPA, the D.C. Circuit directed federal agencies to consider *both* environmental benefits and environmental harms of a federal action: "[A]gencies must 'identify and develop methods and procedures . . . which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations." *Calvert Cliffs Coordinating Committee, Inc. v. Atomic Energy Commission*, 449 F.2d 1109, 1113 (D.C. Cir. 1971). Yet, over the years, almost no cases have taken up the challenge to balance environmental benefits against environmental harm. Impact analyses tend to weigh the economic benefits of a project against its potential environmental impacts and stop there, even when a project generates environmental benefits. The preferred alternative for a clean energy project can no longer be the one with the fewest environmental impacts; rather, it should be the one that confers the greatest environmental benefits.

2. Congress should consider amending NEPA to establish two jurisdictional limits found in many other federal environmental statutes. First, Congress could require that NEPA challenges to final agency action be filed within a 60-day period. Currently, NEPA challenges are subject to the APA's six-year statute of limitations. Imposing a 60-day filing deadline would reduce uncertainty for energy developers and their financiers – a key factor in financing energy projects. Second, Congress could designate the U.S. District Court for the District of Columbia as the only venue for filing NEPA suits. This would prevent forum shopping, advance consistency of judicial decisions and thereby promote the certainty needed for investment by developers and financiers. Both reforms would help move meritorious cleaner energy projects from application to operation more expeditiously than has been the case to date.

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