



Sent via facsimile and certified mail

Tom Vilsack
Secretary of the Agriculture
1400 Independence Avenue SW
Washington, DC 20250
Fax: (202) 720-6314

Dallas Tonsager
Under Secretary for Rural Development
USDA Rural Development, Room 205-W
Mail Stop 0107
1400 Independence Avenue SW
Washington, DC 20250-0107
Fax: (202) 720-2080

Re: Failure to comply with the National Environmental Policy Act in relation to administration of the Rural Housing Service and Rural Business and Cooperative programs.

On behalf of the Center for Biological Diversity and our over 350,000 members and activists, I am writing to call attention to violations of law related to the U.S. Department of Agriculture's (USDA) issuance of billions of dollar of loans and loan guarantees that facilitate oil and gas operations which have significant environmental impacts. Specifically, the Rural Housing Service and the Rural Business and Cooperative program of the USDA have issued close to \$20 billion in mortgages and other loans and/or loan guarantees over the past year to private and commercial entities without *any* environmental review as required under the National Environmental Policy Act (NEPA), notwithstanding the fact that many of the entities receiving the loans and guarantees have allowed, and continue to allow, oil and gas leasing and development, including hydraulic fracturing ("fracking"), to occur on the lands subject to the loans and guarantees.

While USDA's non-compliance with NEPA has been acknowledged by agency staff, widely-reported in the media, and has been the subject of Congressional inquiries, on March 19, 2012 Secretary of Agriculture Tom Vilsack issued a public statement that he was overriding staff recommendations to come into compliance with NEPA and instead directing the issuance of an Administrative Notice asserting that rural housing loans are categorically excluded from NEPA. Given such loans and loan guarantees fall squarely within the ambit of NEPA as interpreted by caselaw, Council of Environmental Quality regulations, and USDA's own regulations, any such Administrative Notice would be clearly unlawful. We urge the Secretary and USDA instead to issue a new Administrative Notice clarifying that these programs, to the degree they co-occur with fracking and other forms of oil and gas development, are indeed subject to full review under NEPA. Additionally, USDA must immediately begin preparation of a programmatic environmental impact statement (EIS) to analyze the full impacts of oil and gas leasing and development activities occurring on lands subject to its loan programs. To proceed otherwise

will run afoul of NEPA and the courts.¹

A. The National Environmental Policy Act

Pursuant to the National Environmental Policy Act (NEPA), all federal agencies must prepare a detailed Environmental Impact Statement (EIS) before implementing any “major Federal action” that “significantly affect[s]” the environment. 42 U.S.C. § 4332(2)(C)(i). The Council on Environmental Quality (CEQ) has promulgated regulations implementing NEPA that bind all federal agencies, including the USDA. *See* 40 C.F.R. § 1500.3 (CEQ regulations are “binding on all Federal agencies”); 7 C.F.R. § 1b.1(a) (USDA NEPA regulations “incorporat[ing] and adopt[ing]” the CEQ NEPA regulations).

The CEQ regulations define a “major Federal action” to “include[] actions with effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. “Actions” include “projects and programs *entirely or partly financed*, assisted, conducted, regulated, or approved by federal agencies.” *Id.* § 1508.18(a) (emphasis added); *see also id.* § 1508.18(b)(4) (also describing a “Federal action” as “federally assisted activities”). Numerous courts have found federal loan or housing assistance programs constitute major federal actions, triggering NEPA. *See Sierra Club v. United States Dep’t of Agric.*, 2012 U.S. Dist. LEXIS 10884 (D.D.C. Jan. 30, 2012) (discussing remedy after finding USDA’s Rural Utility Service failed to comply with NEPA before providing debt forgiveness and lien subordination for a power plant); *Southwest Williamson County Cmty Ass’n, Inc. v. Slater*, 243 F.3d 270 (6th Cir. 2000) (“Typically, a project is considered a major federal action when it is funded with federal money.”).

However, an agency may “categorically exclude” certain actions from the requirement to prepare an EIS if those actions “do not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4. The agency must adopt procedures identifying what activities fall under such “categorical exclusion” (CE), and also identify “extraordinary circumstances in which a normally excluded action may have a significant environmental effect,” thus rendering a CE inapplicable. *Id.*; *see, e.g., West v. Sec. of the DOT*, 206 F.3d 920 (9th Cir. 2000) (describing CEs generally and rejecting agency’s application of CE).

USDA has adopted general regulations identifying CEs. 7 C.F.R. § 1b.3 (listing activities, as well as agencies within USDA, that are generally exempt). However, USDA has not exempted loan, assistance, or grant programs. *Id.* Further, regulations specific to USDA’s Rural Development program also identify both CEs and extraordinary circumstances. Rural Development purports to exempt most financial assistance to support housing, businesses, and facilities under a CE. 7 C.F.R. § 1940.310(b), (c).

¹ USDA is not alone in its NEPA violations, as several other federal agencies including the Federal Housing Finance Agency, the Federal Housing Administration, Fannie Mae, Freddie Mac, the and the Veterans Administration also issue, oversee and/or guarantee mortgages and other loans that in certain circumstances facilitate oil and gas leasing and development with consequent significant environmental effects triggering NEPA. However, given Secretary Vilsack’s recent statements asserting that the actions of USDA are categorically exempted from NEPA review, this letter is directed only at USDA. We would hope other similarly-situated agencies do not follow USDA’s ill-advised course of action and instead act to rapidly bring their programs into compliance with NEPA.

However, numerous exemptions and extraordinary circumstances exist. For example, a CE may *not* be used to cover financial assistance provided to any facility that will “result in the increased production of gaseous, liquid, or solid wastes, or a change in the type or content of such wastes.” *Id.* § 1940.310(c)(1). Further, a CE may not be used for financing of most “natural gas facilities” due to increases in water pollution or water withdrawal. *Id.* § 1940.311(c). More generally, a CE may not be used for any action “which is controversial for environmental reasons, or which is the subject of an environmental complaint raised by a government agency, interested group, or citizen.” *Id.* § 1940.311(c), (d). Finally, the agency lists “extraordinary circumstances” that require more full NEPA analysis, including project that impact flood plains, state water quality standards, and certain farmlands and rivers. *Id.* § 1940.317(e).

B. The Significant Environmental Impacts of Fracking

There can be no reasonable dispute that oil and gas leasing and development has significant environmental effects. Of particular concern has been the recent rise of hydraulic fracturing, or “fracking,” which has led to a massive expansion of both the production of oil and natural gas in the United States, as well in the environmental impacts of such production. Among its many impacts, fracking has significant impacts to air and water quality. Fracking involves injecting huge amounts of water combined with sand and chemicals into the ground.² Many of these chemicals are known or possible carcinogens, or are regulated under the Safe Drinking Water Act due to their risk to human health.³ Further, the fracking fluid can escape—and has escaped—into ground water through deep well injection, migration through faulty casing, and surface spills due to pit leaks.⁴ In Pennsylvania, a number of small towns have lost their drinking water supply due to fracking.⁵ Additionally, fracking can have a significant impact on air pollution levels. Some of the chemicals in fracking fluid, including benzene and toluene, are toxic air pollutants that have been linked to eye irritation and headaches, asthma and some forms of cancer.⁶ Also, the process releases large quantities of methane, a potent greenhouse gas into the atmosphere.⁷ Because methane is at least seventy-nine times as potent as carbon dioxide over a twenty-year period and twenty-five times greater over a one-hundred year period, the warming effect of natural gas production and use can be greater than that of coal over a one-

² Renée Sharp & Bill Allayaud, *California Regulators: See No Fracking, Speak No Fracking* 7 (Feb. 2012).

³ U.S. House of Representatives Committee on Energy and Commerce Minority Staff, *Chemicals Used in Hydraulic Fracturing* (Apr. 2011).

⁴ Environmental Protection Agency, *Draft Investigation of Ground Water Contamination near Pavillion, Wyoming* xiii (Dec. 2011) (“when considered together with other lines of evidence, the data indicates likely impact to ground water that can be explained by hydraulic fracturing”); OGAP Analysis of data provided in New Mexico Energy, Minerals and Natural Resources Dep’t, Oil and Conservation Div., *Cases Where Pit Substances Contaminated New Mexico’s Ground Water* (2008) (surface pit leaks).

⁵ Riverkeeper, *Fractured Communities* 8-10 (Sep. 2010).

⁶ Gayathri Vaidyanathan, *Residents near Colo. wells face higher health risks*, E&E News (Mar. 20, 2012).

⁷ U.S. GOV’T ACCOUNTABILITY OFF., *FEDERAL OIL AND GAS LEASES: OPPORTUNITIES EXIST TO CAPTURE VENTED AND FLARED NATURAL GAS, WHICH WOULD INCREASE ROYALTY PAYMENTS AND REDUCE GREENHOUSE GASES* 6 (Oct. 2010), <http://www.gao.gov/new.items/d1134.pdf>.

hundred-year period.⁸ Finally, fracking can cause earthquakes. For example, the development of the Fayetteville Shale in Arkansas was associated with a massive increase in earthquake activity in that region,⁹ and in Ohio, officials believe that the underground injection of shale drilling wastewater caused a series of earthquakes.¹⁰

C. USDA's Violations of Law

As discussed above, the significant environmental impacts of fracking can not be subject to reasonable dispute. The only dispute goes to the magnitude of such impacts, exactly the sort of controversy that an EIS under NEPA is designed to assess. In light of such concerns, USDA staff recently concluded that categorical exclusions for loans and loan guarantees could no longer be issued for lands that might be subject to fracking. Specifically, in a March 8, 2012 email to Congressional staff, Kevin Bailey from the USDA's Office of Congressional Relations acknowledged that a new Administrative Notice (AN) clarifying the need to do more thorough NEPA was being developed by the agency:

Recent technological developments in the oil and gas industry have expanded operations to areas of the country not previously affected by mineral development for oil and gas production; the overall environmental effects of such development have not been addressed in any NEPA document by any Federal agency.

There is substantial controversy over the extent, range, and issues associated with hydraulic fracturing (fracking) for gas in the NE region of the U.S. Approval of such leases would allow for a number of potential impacts to possibly occur which would need to be analyzed in a NEPA document that would be reviewed by the public for sufficiency. Use of a CE level for such actions places the Agency at risk of NEPA related litigation. The AN clarifies that use of a CE level for those RHS/RBCS would not be appropriate, and the actions would be likely to require a more detailed environmental document.¹¹

Notwithstanding this determination by USDA staff, on March 19, 2012 Secretary Vilsack issued a press statement asserting that the internal decision to come into compliance with NEPA "was premature and does not reflect past, current or future practices of the department."¹² While Secretary Vilsack may have political reasons for wishing to dispense with NEPA, neither a press release nor a re-written Administrative Notice can change the underlying statute. USDA can and must comply with NEPA in its continued administration of the Rural Housing Service and the Rural Business and Cooperative programs.

⁸ Shindell, Drew T. et al, *Improving Attribution of Climate Forcing to Emissions*, 326 SCIENCE 716, 717 (Oct. 30, 2009) (text of figure 2).

⁹ See, e.g., Courtney Spradlin, *Earthquakes Increase Friday*, The Log Cabin Democrat (Apr. 8, 2011); Sarah Eddington, *Shutdown of Wells Extended in Arkansas Quake Study*, Bloomberg BusinessWeek (Apr. 20, 2011); Sarah Eddington, *3.9 Magnitude Quake Hits North-Central Arkansas* (Apr. 8, 2011).

¹⁰ Mike Soraghan, *Wastewater injection well sparked earthquake—Ohio officials*, E&E News (Mar. 9, 2012) (involved a process similar to fracking, but did not actually involve fracking).

¹¹ March 8, 2012 email from USDA's Kevin Bailey to Congressional offices.

¹² March 19, 2012 press release by Secretary Tom Vilsack.

D. Conclusion

As the above makes clear, USDA is currently operating in violation of NEPA. Obviously, our issues with USDA are not in regards to the existence of the loan programs themselves, nor do we wish to force otherwise-qualifying loans to be subject to detailed NEPA review if they legitimately fall within a lawful categorical exclusion. However, USDA's policy of facilitating oil and gas development on private lands through its issuance of loans and loan guarantees leads to significant, yet unexamined, and hence unmitigated, environmental effects. An appropriate path forward would be for USDA to (1) issue an Administrative Notice clarifying that loan and loan guarantees for properties potentially subject to oil and gas leasing are not categorically exempt from NEPA; (2) explicitly forbid oil and gas leasing on any lands subject to new federal loans or loan guarantees; (3) notify all existing holders of loans or loan guarantees that oil and gas leasing is a violation of the terms of such loans and guarantees; (4) conduct an inventory of lands covered by existing loans and loan guarantees to determine the extent to which oil and gas leasing has already occurred on such lands; and (5) prepare a programmatic environmental impact statement under NEPA to determine an appropriate path forward for resolving conflicts between existing loans and loan guarantees and any leasing and development that has already occurred or may occur on such lands. If you have any questions, or would like to discuss this issue, please contact me at bcummings@biologicaldiversity.org or by phone at 760-366-2232.

Sincerely,



Brendan Cummings
Senior Counsel
Center for Biological Diversity

Cc

Federal Housing Finance Agency
Federal Housing Administration
Fannie Mae
Freddie Mac
Veterans Administration