

INTRODUCTION

1. Plaintiffs Sierra Club, WildEarth Guardians, and Rocky Mountain Clean Air Action bring this suit against Dirk Kempthorne, Secretary of the United States Department of Interior, and the United States Department of Interior (“DOI”) in order to compel them to comply with the Energy Policy Act of 2005 (the “Energy Policy Act”). In the Energy Policy Act, Congress mandated that Defendants “enter into an arrangement under which the National Academy of Sciences shall conduct a study on the effect of coal bed natural gas production on surface and ground water resources[.]” P.L. 109-58 § 1811(a)(1). Congress mandated that this study be completed by August 8, 2006. Id. at § 1811(d).

2. In this mandatory duty “deadline” suit, Plaintiffs Sierra Club, WildEarth Guardians, and Rocky Mountain Clean Air Action seek an order compelling the Secretary of Interior to comply with his mandatory duty to obtain the study. The study will contain information that will result in increased protection of public health and welfare from harm caused by the massive growth of coal bed natural gas, which is often referred to as “methane,” production in parts of the Western United States.

3. Defendants’ violation of this mandatory duty is particularly egregious given that dramatic rate at which natural gas extraction has increased in the Western United States and the devastating effects that it can cause, both locally and globally via the release of greenhouse gases into the atmosphere.

JURISDICTION

4. Plaintiffs bring this action under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, which authorizes civil actions for failure to perform any non-discretionary duty. Thus, this case raises a federal question. Therefore, the Court has subject matter

1 jurisdiction over the claims pursuant to 28 U.S.C. § 1331 (an action for declaratory, injunctive
2 and other relief arising under the Constitution or laws of the United States). The relief requested
3 is authorized by 28 U.S.C. §§ 2201-2202 (declaratory and injunctive relief).

4 5. Defendants have not remedied their violations of the mandatory duty imposed by
5 the Energy Policy Act of 2005 and, thus, are in violation of the APA. There exists an actual
6 controversy between the parties within the meaning of 28 U.S.C. § 2201 (declaratory judgments).

7 **VENUE**

8 6. Pursuant to Civil Local Rule 3-2(c), Plaintiffs state that they base venue in this
9 district and assignment to the San Francisco Division on the following: (a) Plaintiff Sierra Club
10 is incorporated in California and resides and maintains its headquarters in San Francisco County
11 in this judicial district; (b) this action seeks relief against federal officials acting in their official
12 capacities; and (c) 28 U.S.C. §§ 1361 and 1391(e) (West 2006) provide for venue in the judicial
13 district of a plaintiff's residence, including the San Francisco Division. There is no real property
14 involved in this action.

15 **PARTIES**

16 7. Plaintiff SIERRA CLUB was founded in 1892 and is the nation's oldest
17 grassroots environmental organization. The Sierra Club is incorporated in California, and has its
18 headquarters in San Francisco, California. It has more than 710,000 members nationwide,
19 including over 177,000 members in California, 20,500 members in Colorado, 7,300 members in
20 New Mexico, 2,200 members in Montana, 1,000 members in Wyoming, 600 members in North
21 Dakota, and 4,200 members in Utah.

22 8. The Sierra Club is dedicated to protecting and preserving the natural and human
23 environment. One of the Sierra Club's national initiatives is the Wild Legacy Conservation

1 Initiative, which seeks to engage a broad spectrum of citizens around the value of protecting
2 wildlife, public lands and special places and block threats to these lands from oil and gas drilling,
3 commercial logging, mining, abusive recreation, and overgrazing.

4 9. The Sierra Club has worked to prevent environmental damage, particularly to
5 water resources, from coal bed methane development for years. The Club successfully litigated
6 to stop the Bureau of Land Management from expanding oil and gas drilling in New Mexico's
7 Otero Mesa, organized to prohibit drilling and mining in the Valle Vidal area of New Mexico's
8 Carson National Forest, and engaged in a notice letter campaign to force companies to clean up
9 numerous dirty well sites in the San Juan basin. The issues surrounding gas drilling in the West
10 fit well within all three of the Club's priority campaigns: to protect public lands and wild places
11 from destructive practices, to move away from our reliance on fossil fuels, and to protect
12 drinking water from toxic substances used during the energy development process. The Sierra
13 Club will continue to fight to protect the environment from the destructive practices of extracting
14 coal bed methane.

15 10. Plaintiff WILDEARTH GUARDIANS is a non-profit environmental organization,
16 with offices in New Mexico, Colorado, and Arizona. WildEarth Guardians is committed to
17 protecting wild rivers, wild life and wild places in the greater Arid West, including Montana,
18 Wyoming, Colorado, New Mexico, North Dakota, and Utah. WildEarth Guardians participates
19 and will continue to participate in numerous governmental actions involving the production of
20 coal bed methane including commenting on and filing legal challenges to: Resource Management
21 Plans and Amendments to such documents that authorize coal bed methane production on public
22 lands; quarterly lease sale auctions by the Bureau of Land Management for coal bed methane
23 located under surface lands owned by a variety of owners; Applications for Permits to Drill for

1 coal bed methane; State and county authorizations for production of coal bed methane; and
2 National Environmental Policy Act and Endangered Species Act documents and processes, or
3 lack thereof, regarding the various plans, permits and authorizations.

4 11. Plaintiffs WildEarth Guardians work and will continue to work to protect wild
5 rivers, wildlife, wild places and ground water from the destructive impacts of coal bed methane
6 production, including the Lesser Prairie Chicken and Northern Aplomado Falcon and the various
7 Wilderness Areas, Citizen Proposed Wilderness Areas and Areas of Critical Environmental
8 Concern throughout the Arid West.

9 12. Rocky Mountain Clean Air Action is a non-profit corporation with its
10 headquarters in Denver, Colorado. Rocky Mountain Clean Air Action is actively involved in
11 environmental advocacy as part of its mission to protect clean air in Colorado and the
12 surrounding Rocky Mountain region for the health and sustainability of local communities.
13 Rocky Mountain Clean Air Action members and volunteers live, work, recreate and engage in
14 other economic activities throughout the Rocky Mountain region, and are concerned about air
15 quality in the Rocky Mountain Region of the western United States and its effects on the health
16 and welfare of people, plants, and animals.

17 13. Rocky Mountain Clean Air Action is actively engaged in working to clean up air
18 pollution from oil and gas operations in the Rocky Mountain region, including in relation to coal
19 bed methane production. Rocky Mountain Clean Air Action and its members are concerned that
20 air pollution from coal bed methane is posing threats to human health and welfare, and that a lack
21 of environmental safeguards--including safeguards for surface water and ground water quality--is
22 fueling more air pollution.

23 14. Plaintiffs' members live, work, recreate, and study, and will continue to live,

1 work, recreate and study in areas that are adversely affected by coal bed methane production or
2 have been proposed for coal bed methane production or are hydrologically connected to areas
3 where coal bed methane production is currently occurring or is proposed to occur.

4 15. The acts and omissions of Defendants alleged herein, related to their failure to
5 secure a report on the impacts of coal bed methane production on surface waters and ground
6 waters, deprive Plaintiffs and their members of information guaranteed to the public by the
7 Energy Policy Act of 2005. Plaintiffs and their members are adversely affected by Defendants'
8 failure to make public this legally required information.

9 16. If Plaintiffs and their members had this information, they would use it to further
10 educate the public about the impacts of coal bed methane exploration and extraction. They
11 would also use the information to advocate for adoption of measures to further reduce or mitigate
12 the impacts of coal bed methane exploration and extraction. Defendants' failure to produce this
13 information as required by the Energy Policy Act of 2005 deprives the Plaintiffs and their
14 members of these benefits and thus causes them injury. Granting the requested relief would
15 redress the injuries described above.

16 17. Defendant United States Department of Interior is a Department of the Executive
17 Branch of the United States Government. Congress mandated that the Department of Interior
18 perform certain actions under the Energy Policy Act of 2005. The Department of Interior is an
19 "agency" within the meaning of the APA, 5 U.S.C. § 701(b) (West 2008).

20 18. Defendant Dirk Kempthorne, sued in his official capacity as Secretary of Interior,
21 is charged under P.L. 109-58 § 1811 with entering into an arrangement under which the National
22 Academy of Sciences shall conduct a study on the effect of coal bed natural gas production on
23 surface and ground water resources. If ordered by the court, Mr. Kempthorne has the authority

1 and ability to remedy the harm inflicted by Defendants' failure to act.

2 **LEGAL AND FACTUAL BACKGROUND**

3 19. Coal bed methane is a form of natural gas held in coal seams by water pressure.
4 Water completely permeates the coal beds and its pressure causes the methane to be absorbed
5 onto the grain surfaces of the coal. To extract methane, the water must first be pumped out of the
6 coal seams, which lowers the pressure, allowing the release of methane gas from coal.

7 20. A hydraulic fracturing technique is employed to extract the largest quantity of
8 methane possible. This technique uses a mixture of water, fluids and sand, which are forced into
9 wells at very high pressures to hydraulically fracture the coal seams. Sand particles in the
10 hydraulic fluid prop up the widened and newly created fractures in the coal, allowing more
11 methane gas to escape after much of the hydraulic fluid and ground water have been pumped out
12 the wells. Hydraulic fracturing fluids cause adverse health effects.

13 21. There are a number of environmental concerns associated with coal bed methane.
14 One problem is disposing of the large quantities of surplus water, which has high saline or
15 dissolved sediment levels and the hydraulic fracturing fluids. This surplus water is often
16 discharged to surface waters and lands, which may negatively impact the environment and
17 wildlife. In addition, the porosity and permeability that makes many coal formations effective
18 receptacles for methane gas also allow them to hold large quantities of ground water, which often
19 serve as important sources of drinking and irrigation water. Thus, coal bed methane extraction
20 can deplete ground water and contaminate aquifers.

21 22. Coal bed methane sources exist in the Powder River Basin of Wyoming and
22 Montana, the Greater Green River Basin of Wyoming, Colorado, and Utah, the Uinta-Piceance
23 Basin of Colorado and Utah, and the Raton and San Juan Basins of Colorado and New Mexico,

1 among other places.

2 23. The Energy Policy Act of 2005 required the Secretary of Interior to enter into an
3 agreement with the National Academy of Sciences to study the impacts of coal bed methane
4 production on the surface waters and ground waters of certain western states. Specifically, the
5 law provides:

6 **SEC. 1811. COAL BED METHANE STUDY.**

7 (a) STUDY.—

8 (1) IN GENERAL.—The Secretary of the Interior, in consultation with the
9 Administrator of the Environmental Protection Agency, shall enter into an
10 arrangement under which the National Academy of Sciences shall conduct a study
11 on the effect of coal bed natural gas production on surface and ground water
12 resources, including ground water aquifers, in the States of Montana, Wyoming,
13 Colorado, New Mexico, North Dakota, and Utah.

14 (2) MATTERS TO BE ADDRESSED.—The study shall address the effectiveness
15 of—

16 (A) the management of coal bed methane produced water;

17 (B) the use of best management practices; and

18 (C) various production techniques for coal bed methane natural gas in minimizing
19 impacts on water resources.

20 (b) DATA ANALYSIS.—The study shall analyze available hydrologic, geologic and
21 water quality data, along with—

22 (1) production techniques, produced water management techniques, best management
23 practices, and other factors that can mitigate effects of coal bed methane
development;

(2) the costs associated with mitigation techniques;

(3) effects on surface or ground water resources, including drinking water, associated
with surface or subsurface disposal of waters produced during extraction of coal
bed methane;

and

(4) any other significant effects on surface or ground water resources associated with

1 production of coal bed methane.

2 (c) RECOMMENDATIONS.—The study shall analyze the effectiveness of current
3 mitigation practices of coal bed methane produced water handling in relation to
4 existing Federal and State laws and regulations, and make recommendations as to
changes, if any, to Federal law necessary to address adverse impacts to surface or
ground water resources associated with coal bed methane development.

5 (d) COMPLETION OF STUDY.—The National Academy of Sciences shall submit
6 the findings and recommendations of the study to the Secretary of the Interior and
7 the Administrator of the Environmental Protection Agency within 12 months after
the date of enactment of this Act, and shall upon completion make the results of
the study available to the public.

8 (e) REPORT TO CONGRESS.—The Secretary of the Interior and the Administrator
9 of the Environmental Protection Agency, after consulting with States, shall report
to the Congress within 6 months after receiving the results of the study on—

10 (1) the findings and recommendations of the study;

11 (2) the agreement or disagreement of the Secretary of the Interior and the
12 Administrator of the Environmental Protection Agency with each of its findings
and recommendations; and

13 (3) any recommended changes in funding to address the effects of coal bed methane
14 production on surface and ground water resources.

P.L. 109-58 § 1811 (Aug. 8, 2005).

15 24. On October 31, 2007, the Honorable Henry Waxman, Chair of the House
16 Committee on Oversight and Government Reform, wrote to Secretary Kempthorne about his
17 failure to produce the coal bed methane report.

18 25. Rep. Waxman explained that:

19 Congress required that the study be completed within one year of enactment and
20 include recommendations for changes to federal law to address adverse impacts of
coal bed methane development. Unfortunately, it appears that the Department has
failed to comply with this requirement.

21 The statutorily-mandated study is now 14 months late and has not yet been started.
22 Moreover, documents the Oversight Committee has obtained from the Bureau of
23 Land Management (BLM) indicate that the Administration does not intend to
meet the substantive requirements of the Energy Policy Act. Specifically, the
documents reveal that BLM is planning to ask the National Academy to conduct a
public meeting - not a study as required by law. Under BLM's approach, there
will be no study and no recommendations to Congress.

1 This approach is flatly inconsistent with the legal requirements of the Energy
2 Policy Act and the law's mandate for better information on the impacts of coalbed
3 methane development. I am writing to urge you to abandon this approach, to
4 comply with the law, and to immediately contract with the National Academy for
5 a full report with recommendations.

6 Oct. 31, 2007 Letter from Rep. Waxman to Secretary Kempthorne.

7 26. Rep. Waxman went on to provide this additional information:

8 Background

9 Natural gas produced from underground coal seams is known as coalbed
10 methane. Unlike conventional gas production that simply taps reservoirs of natural
11 gas trapped in underground geologic formations, coalbed methane is produced
12 from methane that clings to the surface of the coal. A key technique in developing
13 coalbed methane is known as "hydraulic fracturing." Under this practice, a
14 mixture of water, chemicals, and sand is typically forced into a well at high
15 pressure. This mixture, or "fracturing fluid," is put under enough force that it
16 fractures the underground rock formation, allowing natural gas to escape. Ground
17 water is then pumped out of the coal seam in order to decrease pressure on the
18 coal and allow the natural gas to release from the coal and be produced from the
19 well.

20 While hydraulic fracturing has been used in conventional oil and gas well
21 development, it raises particular concerns in the context of coalbed methane
22 development. Hydraulic fracturing fluids sometimes contain chemicals that cause
23 adverse health effects. According to EPA, coalbed methane wells tend to be
shallower and closer to underground sources of drinking water than conventional
oil and gas production wells. Also, hydraulic fracturing of coalbed methane wells
actually occurs in underground sources of drinking water across the country.

Additionally, the ground water pumped out of coalbed methane wells,
known as "produced water," raises concerns. Produced water is often high in salt
content and if released can adversely affect the environment. Producing water
also depletes groundwater sources, a limited resource in the arid West.

Over the objections of many members, the Energy Policy Act of 2005
exempted hydraulic fracturing from the Safe Drinking Water Act. At the same
time, however, the law required the Secretary of Interior to enter into an
arrangement with the National Academy of Sciences to "conduct a study on the
effect of coalbed natural gas production on surface and ground water resources,
including ground water aquifers, in the States of Montana, Wyoming, Colorado,
New Mexico, North Dakota, and Utah." The study is required to examine the
effectiveness of current management approaches to development, including best
management practices and various production techniques, mitigation approaches
and their costs, and the effects of coalbed methane development on water

1 resources, including drinking water. The National Academy of Sciences is also to
2 offer any recommendations for changes to federal law that would be necessary to
address adverse impacts to surface or ground water resources associated with
coalbed methane development.

3 The Interior Department's Actions

4 The National Academy of Sciences study was required to be completed by
5 August 8, 2006, one year after enactment. The study is now 14 months late and
has not yet been started. After receiving an inquiry on this matter from the House
6 Oversight Committee on September 5, 2007, the Department of Interior finally
decided to proceed with funding the National Academy for limited activity on this
7 subject. However, it appears that the activity that the Interior Department intends
to fund does not comply with the requirements of the Energy Policy Act.

8 In a letter to BLM, the National Academy of Sciences offered four
9 alternatives for work the Academy could do on coalbed methane development.
The alternatives ranged in cost from \$15,000 to \$430,000. The National Academy
10 identified the \$430,000 report as “a full Academies report with recommendations,
as specified in Section 1811” of the Energy Policy Act of 2005. The \$15,000
11 alternative would be simply a “meeting and oral summary, without
recommendations.” According to the National Academy, the \$15,000 alternative
12 should not even be referred to as a “study” and no written document will be
produced as a result of the effort.

13 Internal documents show that the Bureau of Land Management decided to
14 proceed with the \$15,000 option on September 27, 2007. Yet prior to selecting
the \$15,000 alternative, an internal BLM report found that it would be only “of
15 limited value” to BLM.

16 It appears that the agency may have selected this alternative based, in part,
upon a desire not to divert any resources from approving additional permits for
17 development. According to the BLM report, “The costs for further review by the
Academy would have an impact on BLM’s ability to provide sufficient funding to
18 process additional oil and gas Applications for Permit to Drill.” An internal BLM
e-mail suggests that BLM was also concerned that the National Academy review
19 could identify additional needs for studies: “It is implied that based on review and
recommendations, additional studies may be recommended that would cost an
20 unknown amount of money.”

21 Conclusion

22 Although the National Academy of Sciences has offered to produce a “full
Academies report with recommendations, as specified in Section 1811” of the
23 Energy Policy Act, BLM has apparently requested that the Academy provide
merely a “meeting and oral summary, without recommendations.” If BLM stays
on this course, not only will the agency fail to meet the clear requirements of the

1 Energy Policy Act, it will also fail to provide the Congress, the states, the public,
2 and affected citizens with a useful analysis of current practices and necessary
policy responses. I urge you to abandon BLM's approach and engage the National
Academy of Sciences to complete a full report as required by law.

3 Oct. 31, 2007 Letter from Rep. Waxman to Secretary Kempthorne (footnotes omitted).

4 CLAIMS FOR RELIEF

5 (Violation of the Energy Policy Action of 2005 and the Administrative Procedure Act)

6 27. Plaintiffs reassert and reallege paragraphs 1 through 26 above.

7 28. The Administrative Procedure Act, 5 U.S.C. § 702 (West 2008), provides that "[a]
8 person suffering legal wrong because of agency action, or adversely affected or aggrieved by
9 agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The
10 APA defines "agency action" to include an agency's "failure to act," 5 U.S.C. §§ 701(2), 551(13)
11 (West 2008).

12 29. The APA, 5 U.S.C. § 706(1) (West 2008), further provides that a reviewing court
13 shall "compel agency action unlawfully withheld or unreasonably delayed."

14 30. The Energy Policy Act of 2005 requires the Secretary of Interior to enter into an
15 arrangement under which the National Academy of Sciences shall conduct a study on the effect
16 of coal bed natural gas production on surface and ground water resources. P.L. 109-58 §
17 1811(a)(1).

18 31. The Energy Policy Act of 2005 further requires that the study be completed within
19 12 months of enactment of the Energy Policy Act of 2005, which was August 8, 2006. *Id.* §
20 1811(d).

21 32. It is after August 8, 2006. Yet, the Secretary of Interior has not entered into an
22 arrangement under which the National Academy of Sciences shall conduct a study on the effect
23 of coal bed natural gas production on surface and ground water resources, including ground water

1 aquifers, in the States of Montana, Wyoming, Colorado, New Mexico, North Dakota, and Utah.
2 Furthermore, the National Academy of Sciences has not submitted the findings and
3 recommendations of the study to the Secretary of the Interior and the Administrator of the
4 Environmental Protection Agency and has not made the results of the study available to the
5 public.

6 33. Defendants' failures violate P.L. 109-58 § 1811 and constitute agency action
7 unlawfully withheld, unreasonably delayed, and contrary to law and agency action that is
8 arbitrary and capricious within the meaning of the APA. 5 U.S.C. §§ 706(1), (2).

9 **PRAYER FOR RELIEF**

10 WHEREFORE, Plaintiffs respectfully request the Court grant the following relief:

11 A. A declaratory judgment that Defendants have violated their mandatory duty, under
12 P.L. 109-58 § 1811, by failing to enter into an arrangement under which the National Academy
13 of Sciences shall conduct a study on the effect of coal bed natural gas production on surface and
14 ground water resources, including ground water aquifers, in the States of Montana, Wyoming,
15 Colorado, New Mexico, North Dakota, and Utah;

16 B. An injunction ordering Defendants, pursuant to an expeditious schedule including
17 interim deadlines, to enter into an arrangement under which the National Academy of Sciences
18 shall conduct a study on the effect of coal bed natural gas production on surface and ground
19 water resources, including ground water aquifers, in the States of Montana, Wyoming, Colorado,
20 New Mexico, North Dakota, and Utah by a date certain that requires the National Academy of
21 Sciences to finish the study by a date certain and make the study available to the public, and
22 prohibiting Defendants from taking actions that may be prejudiced by the lack of the study until
23 the study is complete;

1 C. In the court's order, retain jurisdiction of this action to ensure compliance with its
2 decree;

3 D. An award of attorneys' fees and costs to the Plaintiffs pursuant to the Equal
4 Access to Justice Act;

5 E. Such other and further relief as this Court deems just and proper.

6 DATED: February 7, 2008

Respectfully Submitted,

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DATED: February 7, 2008

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