INTRODUCTION

I have been asked to research possible penalties and mitigation for the natural gas drilling malfunction at Rowberry Gas Development Corporation's (RGDC) Parcel 7 in Bountiful Basin. Further, I have also been asked to explain the federal permits and authorizations RGDC should obtain to continue drilling there. I will begin by discussing law regarding the penalties that apply to RGDC, followed by possible mitigation strategies. Next, I will discuss the permits and authorizations needed, including the law and its application to natural gas drilling at Parcel 7.

I. PENALTIES

A. Endangered Species Act

The deaths of the Flatter Smelt expose RGDC to penalties. The U.S. Fish and Wildlife Service has listed the Flatter Smelt in the White River as an endangered species. Under the Endangered Species Act, it is unlawful for any person to take an endangered species.[1] The term "take" includes harassing, harming and killing.[2] The Act provides both civil and criminal penalties[3] and each take is a separate offense.[4]

RDGC technicians found seven dead juvenile Flatter Smelt, so this constitutes seven violations of the ESA take prohibition. Penalties may incur in the future for each known take of a Flatter Smelt and we do expect the numbers to rise. The key issue related to possible penalties is whether RGDC took the fish knowingly, and fortunately it appears they did not. RGDC was aware that the Flatter Smelt were endangered and were living in the section of the White River adjacent to Parcel 7. However, while the ESA does not provide a definition for "knowing," courts have held that knowing violations of the Act are related to intentional acts and not to

[1] Endangered Species Act, 16 U.S.C. § 1538(a)(1). In this act, the term "person" includes corporations. 16 U.S.C. § 1532(13).
[2] 16 U.S.C. § 1532(19).
[3] 16 U.S.C. § 1540.
[4] *Id.* at (a)(1).

whether the actor knows a particular species is listed.[5] In the case of the carcasses discovered so far, the cause of the deaths was the ingestion of the chemicals *accidentally* released into the river, and not from intentional killing or harassment. This should not constitute a knowing violation, and as such, RGDC should only be liable for a $500 fine per deceased Flatter Smelt.[6] However, the vibrations that inhibit Flatter Smelt from eating could be a knowing violation, and RGDC should not continue to drill without first obtaining permits.[7]

B. Clean Water Act

RGDC faces potential penalties for the release of the chemicals after the seal on the drill ruptured under the Clean Water Act, because the chemicals entered the White River. The Clean Water Act (CWA) prohibits the "discharge of any pollutant by any person" except as in compliance with the Act.[8] The term "discharge of any pollutant" means "any addition of any pollutant to navigable waters from any point source."[9] The chemicals released here meet the definition of pollutant under the CWA.[10] The well here is a point source because it is "a discernible, confined, and discrete conveyance;" furthermore, the statute lists "well" as an example of a point source.[11] Though the chemicals spewed into an airborne stream before

[5] United States v. Billie, 667 F. Supp. 1485, 1493 (S.D. Fla. 1987); United States v. St. Onge, 676 F. Supp. 1044, 1045 (D. Mont. 1988).
[6] Civil penalties may range from $500 fines for violations not committed knowingly to $25,000 fines for knowing violations. 16 U.S.C. § 1540 (a)(1). Criminal penalties are only available for knowing violations, and include fines up to $50,000 and a year of imprisonment, as well as giving the head of any Federal Agency that has issued a lease the ability to immediately modify, suspend, or revoke the lease upon criminal conviction. 16 U.S.C. § 1540 (b)(1–2).
[7] See *supra* Part III.
[8] Clean Water Act, 33 U.S.C. § 1311(a).
[9] 33 U.S.C. § 1362(12)(A). The White River is a "navigable water" under the CWA because it is an interstate river and "the term 'navigable waters' means the waters of the United States, including the territorial seas." *Id.* at (7).
[10] 33 U.S.C. § 1362(6) (defining "the term pollutant" as including "chemical waste…discharged into water."). Interestingly, the term pollutant does *not* include "water, gas, or other material which is injected into a well to facilitate production of oil or gas, … *if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources*." *Id.* [emphasis added]. Unfortunately, our facts do not indicate that RGDC has received any State approval of the well, so the chemicals likely still constitute a pollutant.
[11] 33 U.S.C. § 1362 (14).

entering the White River, this likely will not exclude the well as a point source. It is still a discernible and discrete source, and although for the moment of being airborne they were not confined within the conveyance, the conveyance still confined the chemicals and upon their release they directly entered the water. Thus, RGDC discharged a pollutant into the White River when the casing of the drill at Parcel 7 ruptured.

The CWA allows for civil, criminal, and administrative penalties under its enforcement provision.[12] Civil actions under the CWA are not relevant to this issue because the discharge is not ongoing.[13] Administrative penalties apply when "the Administrator finds that any person has violated section 301."[14] The five minute long discharge into the White River is a single violation, because "a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation."[15] Though it is unclear how many chemicals infiltrated the River, for the purpose of administrative penalties, RGDC faces liability of no more than $10,000 because it was a single violation on a single day.[16] Relevant factors that influence the amount of the penalty include the nature, circumstances, extent, and gravity of the violation, and the degree of culpability.[17] In this case, the extent and gravity of the violation, as well as the degree of culpability, are rather low, given that the discharge was the result of a mistake on the part of a technician and the violation was ended quickly. However, the drilling activity was performed without any permits, and this may weigh against RGDC in assessing the

[12] 33 U.S.C. § 1319.
[13] 33 U.S.C. § 1319 (b). Civil penalties apply to persons "in violation" and allow for permanent or temporary injunctions. *Id*.; 33 U.S.C. § 1319 (a)(3).
[14] 33 U.S.C. § 1319(g)(1)(a).
[15] 33 U.S.C. § 1319(g)(3) ("Determining Amount").
[16] 33 U.S.C. § 1319(g)(2)(A–B). This section divides the penalties into Class I and Class II. For our purposes, the determination of the Class of our violation is irrelevant, because either class will result in a $10,000 penalty. If it is Class 1, the discharge is a single violation so the amount of the penalty may not exceed $10,000. *Id.* at (g)(2)(A). If it is Class 2, the violation only occurred over five minutes, and the penalty may not exceed $10,000 per day. *Id.* at (g)(2)(B).
[17] 33 U.S.C. § 1319(g)(3).

penalty. I would recommend that RGDC expect to pay the maximum amount in this case. RGDC could also be liable for criminal penalties. The discharge was a result of a mistake when a technician forgot to seal the casing, so the violation is best characterized as negligent, and *if* a criminal conviction occurs, the fine will be between $2500 and $25,000.[18] In addition to the corporate liability, criminal penalties may apply to any responsible corporate officer.[19]

II. MITIGATION OF PENALTIES

The Environmental Protection Agency (EPA) has a policy to encourage self-reporting of violations through mitigation of penalties that was first promulgated in 1995 and was revised in 2000.[20] The purpose of the policy is to "encourage greater compliance with Federal laws and regulations that protect human health and the environment."[21] The EPA assesses civil penalties based upon the economic benefit as a result of the violation and gravity-based penalties that "constitute the punitive portion of the penalty."[22] In order to encourage reporting, EPA has chosen to waive or reduce by 75% gravity-based penalties that meet certain conditions.[23] Whether the gravity-based penalties are waived or reduced depends upon the first of nine conditions—systematic discovery.[24] All the other eight conditions must be met in order to receive the 75% reduction.[25] Additionally, the EPA will not recommend criminal prosecution for

[18] 33 U.S.C. § 1319(c)(1)(A).
[19] 33 U.S.C. § 1319(c)(7).
[20] 60 Fed. Reg. 66,706 (Dec. 22, 1995); 65 Fed. Reg. 19,618 (Apr. 11, 2000).
[21] 65 Fed. Reg. 19,618 (C).
[22] 65 Fed. Reg. 19,618 (D)(1).
[23] 65 Fed. Reg. 19,618 (D)(1–2)
[24] 65 Fed. Reg. 19,618 (D)(2). " 'Systematic discovery' means the detection of a potential violation through an environmental audit or a compliance management system that reflects the entity's due diligence in preventing, detecting and correcting violations." 65 Fed. Reg. 19,618 (D)(1). The nine conditions include systematic discovery, voluntary discovery, prompt disclosure, discovery and disclosure independent of government or third party plaintiff, correction and remediation, prevent recurrence, no repeat violations, other violations excluded, and cooperation. 65 Fed. Reg. 19,618 (E)(1–9).
[25] 65 Fed. Reg. 19,618 (D)(2).

the disclosing entity that meets conditions two through nine.[26] Though systematic discovery is not required, "the entity must be acting in good faith and must adopt a systematic approach to preventing recurring violations."

It is imperative RGDC report the discharge in writing to the EPA within 21 days of its occurrence in order to mitigate its penalties.[27] While the discovery of the leak does not appear to be systematic, if RGDC can meet the other eight conditions, it will still be eligible for a 75% mitigation of penalties and avoid criminal prosecution. RGDC discovered the leak voluntarily and independently of other actors, and it corrected the leak quickly, so prompt disclosure, preventing recurrences of a leak, and cooperation with the EPA must now occur. RGDC should also begin work to institute an environmental audit or compliance management system to show it is adopting a systematic approach to prevent violations to avoid the criminal prosecution.

III. PERMITS AND AUTHORIZATIONS

A. National Environmental Policy Act Authorizations

In order for RGDC to receive necessary federal permits, the permitting agencies must follow procedures mandated by NEPA.[28] The operative section of NEPA focuses on information generation and dissemination, requiring that in every report on "major Federal actions significantly affecting the quality of the human environment," the responsible official issue a detailed statement, including information such as the environmental impact of the proposed action.[29] If the agencies issuing RGDC's permits decide the impacts are significant, they will

[26] 65 Fed. Reg. 19,618 (D)(3).The entity must be acting in good faith and must adopt a systematic approach to preventing recurring violations. *Id*.
[27] 65 Fed. Reg. 19,618 (E)(3).
[28] National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.
[29] 42 U.S.C. § 4332.

issue what is known as an Environmental Impact Statement (EIS).[30] The Agency can first conduct an Environmental Assessment (EA) to determine whether an EIS is necessary; if the impacts are deemed insignificant, they may issue a Finding of No Significant Impact (FONSI).[31]

I recommend pursuing an EIS initially. Whether an action is significant depends upon the context and intensity of the proposed action, and one intensity factor is whether the action adversely affects and endangered species.[32] Parcel 7 is adjacent to the endangered Flatter Smelt's breeding shoals in the White River and the intense vibrations of the drills are known to inhibit juvenile Smelt from eating, so the action is highly likely to be significant.

I do not recommend that RGDC "segment" Parcel 7 at this time. It is possible that, given the discrete nature of the parcels of land and the immense size of Bountiful Basin, wells on each parcel could be seen to have independent utility.[33] However, the nature of the lease for the overall gas drilling operations indicate this is likely to be considered "connected" as part of a single project.[34] Creating an EIS takes time and money, so I recommend we prepare an EIS for the entire lease in order to prevent further delay or expense incurred by beginning with an EA.

B. Public Land Use and BLM's Issuance of the Lease

The Bureau of Land Management (BLM) finalized the RGDC lease for Bountiful Basin (BB) lands after reversing a drilling ban. Federal land is generally subject to three types of mandates—multiple use lands, dominant use lands, and single use lands.[35] Here, nothing indicates that BB is a dominant or single use land because it does not appear to be a national park

[30] 42 U.S.C. § 4332(C); 40 C.F.R. § 1501.4. The EIS should discuss the potential environmental impacts, including the effects on juvenile Flatter Smelts, as well as an analysis of several reasonable alternatives to the proposed action, including no action; name a preferred alternative; and list mitigation measures. 40 C.F.R. § 1502.
[31] 40 C.F.R. § 1501.4.
[32] 40 C.F.R. § 1508.27.
[33] Thomas v. Peterson, 753 F.2d 754, 759–60 (9th Cir 1985).
[34] 40 C.F.R. § 1508.25(a)(iii). Connected actions are "interdependent parts of a larger action," and the drilling projects are part of a single lease and probably would not exist on their own because RGDC would likely not drill with just one well on one parcel as this would not be financially feasible.
[35] Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq.

or wilderness area,[36] so this analysis will proceed with the assumption that BB is multiple use.[37] The decision of BLM to open BB for resource extraction and to issue the lease could themselves be considered major actions under NEPA that require an EIS. These actions have already occurred, opening BLM up to potential citizen suits.

The judicial review of agency action under the Administrative Procedure Act is rational basis review, in which agency action can be set aside only if it is arbitrary and capricious.[38] Here, BB is geologically suitable for natural gas and may hold enough gas to provide a large source of power, and BLM is responding to fiscal pressures that could be substantially alleviated by the lease. Rational basis review is highly deferential to the agency, so it is unlikely an APA suit would set aside BLM's decision, so long as it has an administrative record available for review.[39] However, a NEPA suit could delay further progress until an EIA or EA/FONSI is issued with regards to the lease, or it could set aside the lease altogether, so for this reason I also recommend we work with BLM to immediately begin preparing an EIS.

If BLM is subject to a citizen suit, its decision to issue the lease and allow drilling in BB may be subject to judicial review of its interpretation of the FLPMA or other public land use statutes. In reviewing BLM's interpretation that it is authorized to issue the lease and allow drilling, a court will follow the Chevron two-step method for agency interpretation of a statute.[40] The court will first look whether Congress has spoken precisely to the issue; if the statute is clear and its language plain and unambiguous that the interpretation is correct, the analysis ends.[41] If the language is unclear, the agency interpretation faces will only be overturned if arbitrary and

[36] Organic Act of 1916, 16 U.S.C. § 1; Wilderness Act, 16 U.S.C. § 1133(c).
[37] 43 U.S.C. § 1732.
[38] 5 U.S.C. § 706.
[39] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).
[40] Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984).
[41] *Id*.

capricious.[42] Thus BLM will receive great deference in its interpretation that it has the authorization to issue the lease and to change the rules allowing drilling unless the FLPMA or other statutes clearly do not authorize it to do so.

C. Endangered Species Act Permits

RGDC needs an incidental take permit (ITP) from the Fish and Wildlife Service (FWS) in order to conduct its drilling activities in Parcel 7. The ESA allows for ITPs for any taking "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity."[43] The definition of take includes to harass or harm a species, and the intentional drilling that results in vibrations that inhibit juvenile Flatter Smelt from eating would likely qualify as harassment.[44] The purpose of the drilling is not to harass the smelt, and drilling will be lawful assuming all other permits are issued, so it should not be a problem to obtain the ITP. However, in order to obtain the ITP, we will need to create a Habitat Conservation Plan (HCP), which should discuss the impact on the Flatter Smelt the will result from our taking, steps we will take to minimize and mitigate these impacts and the funding for such steps, and alternative actions we considered and why we did not use them.[45]

CONCLUSION

RGDC faces penalties under ESA and CWA for the takes of the Flatter Smelt and for the chemical leak. However, we can follow the EPA policy to mitigate the CWA penalties, and the ESA penalties will not be significant if we discontinue drilling and prevent additional takes that result from vibration harassment. RGDC also needs to obtain NEPA authorization and an ESA ITP in order to continue drilling on Parcel 7.

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[42] *Id.*
[43] 15 U.S.C. § 1539.
[44] 16 U.S.C. § 1532(19).
[45] 15 U.S.C. § 1539 (a)(2)(A).