

**To:** 'Micah Chambers'[micah\_chambers@ios.doi.gov]  
**Cc:** Orth, Patrick (Portman)[patrick\_orth@portman.senate.gov]  
**From:** Pearce, Sarah (Portman)  
**Sent:** 2017-03-20T10:18:57-04:00  
**Importance:** Normal  
**Subject:** RE: Venting Flaring  
**Received:** 2017-03-20T10:19:27-04:00

Thanks Micah. Feel free to call my desk line at (b) (5) I will be conferencing Pat in.

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**From:** Micah Chambers [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Sunday, March 19, 2017 7:24 PM  
**To:** Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov>  
**Cc:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Subject:** Re: Venting Flaring

Be glad to chat. Let's do 230. My cell phone isn't working so I can call you or I can give you my office number.

Sent from my iPhone

On Mar 17, 2017, at 8:23 PM, Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov> wrote:

Hi Micah,

Thanks so much, this is extremely helpful.

Would you be available for a call Monday afternoon? 2:30, 4, 4:30, 5, or 5:30?

Sent from my iPhone

On Mar 17, 2017, at 1:42 PM, Chambers, Micah <micah\_chambers@ios.doi.gov> wrote:

Sarah. As promised, but still late. Hope this helps and glad to clarify anything needed.

### **Key Concerns with BLM's Venting and Flaring Regulations**

- Subpart 3103* revises BLM's approach to royalties, inviting uncertainty both in the leasing process and existing and pending investments;
- Subpart 3162* creates new paperwork requirements that are burdensome, require the disclosure of confidential information, and

are duplicative of existing state requirements.

- *Subpart 3179* creates additional limits on venting and flaring that ignore operational realities. This includes delays in obtaining rights-of-way approvals, which are an ongoing issue that threaten all current and future production. This would likely be the portion we would focus on at Interior with expedited procedures for methane capture infrastructure so less is vented or flared.
- *Subpart 3179* includes extensive emissions control requirements that exceed BLM's authority and encroach upon EPA and state air quality authority under the Clean Air Act.

Collectively, the rule disregards BLM's long standing practices and authorities. We believe repealing the rule with the Congressional Review Act tool would continue to maintain BLM's authority to regulate waste and conservation of the resource under the Mineral Leasing Act. This is due to the fact that any subsequent actions within BLM's authority would be substantially different when compared to the current rule which we believe has substantial overlap with EPA and is out of our jurisdiction.

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Domenech, Douglas[douglas\_domenech@ios.doi.gov]  
**From:** Chuck Cunningham  
**Sent:** 2017-03-20T15:49:56-04:00  
**Importance:** Normal  
**Subject:** RE: SAFE Criticizes Move to Block Offshore Drilling  
**Received:** 2017-03-20T16:16:28-04:00

### **Trump's energy executive order delayed again**

By ANDREW RESTUCCIA and ANTHONY ADRAGNA

The White House has again delayed the release of a wide-ranging executive order that would start the process of rolling back former President Barack Obama's climate regulations, two sources familiar with the issue told POLITICO.

President Donald Trump is expected to sign the order by the end of the month, and possibly as soon as later this week.

People close to the White House were told that the order would be signed today, but that timing slipped. The order's release has been repeatedly delayed over the last few weeks, but the precise reasons for the delay are unclear.

A draft version of the order obtained by POLITICO calls on EPA to rewrite Obama's climate regulations for power plants, and mandates the withdrawal or review of rules on fracking and methane, among other things.

A White House spokeswoman declined to comment, saying she had no announcements on scheduling.

WHAT'S NEXT: The D.C. Circuit Court of Appeals could rule any day on a wide-ranging lawsuit from states and industry groups seeking to overturn the Clean Power Plan. And Trump is expected to sign the order directing EPA to undo it as soon as this week.

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**From:** Domenech, Douglas [mailto:douglas\_domenech@ios.doi.gov]  
**Sent:** Monday, March 20, 2017 1:26 PM  
**To:** Chuck Cunningham  
**Subject:** Re: SAFE Criticizes Move to Block Offshore Drilling

Nothing I can share on the first one.

If you know Scott, send it to him. Either way it goes to the scheduler.

Doug Domenech  
Senior Advisor  
US Department of the Interior

On Mon, Mar 20, 2017 at 1:18 PM, Chuck Cunningham <[chuckc@visi.net](mailto:chuckc@visi.net)> wrote:  
Send it through you or Scott Hommel?

Any news on the first question?

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**From:** Domenech, Douglas [mailto:[douglas\\_domenech@ios.doi.gov](mailto:douglas_domenech@ios.doi.gov)]  
**Sent:** Monday, March 20, 2017 1:17 PM  
**To:** Chuck Cunningham  
**Subject:** Re: SAFE Criticizes Move to Block Offshore Drilling

Second one is easy. Just write a letter and ask to meet.

Doug Domenech  
Senior Advisor  
US Department of the Interior

On Mon, Mar 20, 2017 at 1:15 PM, Chuck Cunningham <[chuckc@visi.net](mailto:chuckc@visi.net)> wrote:  
Any news on something happening on public lands this week?

What is the best way to get our top leadership at SAFE (including me) to meet with Secretary Zinke?

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**From:** Domenech, Douglas [mailto:[douglas\\_domenech@ios.doi.gov](mailto:douglas_domenech@ios.doi.gov)]  
**Sent:** Thursday, March 16, 2017 4:27 PM  
**To:** Chuck Cunningham  
**Subject:** Re: SAFE Criticizes Move to Block Offshore Drilling

Ha well I hope he will do this.

I would say, confidentially, there could be a signing ceremony at DOI to respond to a Presidential EO. Will keep you in the loop.

Doug Domenech  
Senior Advisor  
US Department of the Interior

On Thu, Mar 16, 2017 at 4:24 PM, Chuck Cunningham <[chuckc@visi.net](mailto:chuckc@visi.net)> wrote:  
Rumor is that Trump will be signing executive orders to reverse this Obama action (SAFE news release below criticizing it). What can we at SAFE do to help show our support for these actions other than a news release of praise? Attend the signing event?

<http://secureenergy.org/press/safe-ceo-condemns-obama-administration-move-block-offshore-drilling>

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[Spam](#)  
[Phish/Fraud](#)  
[Not spam](#)  
[Forget previous vote](#)

**To:** Micah Chambers[micah\_chambers@ios.doi.gov]; Pearce, Sarah (Portman)[Sarah\_Pearce@portman.senate.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-03-20T17:32:57-04:00  
**Importance:** Normal  
**Subject:** Fwd: Venting and Flaring ideas  
**Received:** 2017-03-20T17:35:30-04:00  
[BLM Venting +Flaring Outreach Presentation - May 15 2004.pdf](#)

Micah - see below for the ideas I mentioned. Let us know if you have any questions.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

**From:** Patrick Orth <(b) (6)>  
**Date:** 3/20/17 5:29 PM (GMT-05:00)  
**To:** "Orth, Patrick (Portman)" <patrick\_orth@portman.senate.gov>  
**Subject:** Venting and Flaring ideas

Micah - thanks for taking the time today.

Below is a matrix of some of the ideas I offered this afternoon. I've been told that these changes could be made quickly by means of a "Notice to Lessees" that supersedes the 1974 era NTL 4A.

Here is a link to the EIA blog post on how North Dakota's flaring rules using flaring targets. EIA describes how flaring rules have helped to sharply curtail the practice of flaring gas in North Dakota: <https://www.eia.gov/todayinenergy/detail.php?id=26632>

Here's an article about Colorado that has EDF praising their regulations as a standard for the country: <https://www.scientificamerican.com/article/colorado-first-state-to-limit-methane-pollution-from-oil-and-gas-wells/>

Here's a factsheet about the regulation: [https://www.colorado.gov/pacific/sites/default/files/AP\\_Regulation-3-6-7-FactSheet.pdf](https://www.colorado.gov/pacific/sites/default/files/AP_Regulation-3-6-7-FactSheet.pdf) Page 3 has a table that shows the tiered inspection schedules for existing marginal wells that I was talking about. As you'll see LDAR surveys are only required for the first inspection and then depending on the leakage they are not required to do LDAR surveys again. If BLM is willing to keep any of the rule on existing wells I think this would be a change that industry and EDF could support.

Finally, attached is slide deck that the BLM used in their initial public outreach on Venting & Flaring back in May 2014. As you will see, their initial proposals are basically what I suggested as 'rational middle ground' solutions.

Let me know if you have any questions and thanks again.

Pat

<p><b>Well Development Phase</b></p>	<p><b>Current Practice under NTL-4a</b></p>	<p><b>Practice Under November 2016 BLM Rule</b></p>	<p><b>Middle Ground</b></p>
<p><b>Venting &amp; Flaring during Well Completion</b> (Casing &amp; Cementing, Perforation, Fracturing usually 7-10 days)</p>	<p>Venting &amp; Flaring is royalty-free with BLM approval.</p>	<p>If there is no pipeline in place, flared volumes are subject caps stated below.</p>	<p>Royalty could be charged in order to incentivize waste-reduction.</p>
<p><b>Venting &amp; Flaring during Initial Production Test</b> (1<sup>st</sup> 30 days or 1<sup>st</sup> 50,000 mcf of production)</p>	<p>Vented/flared gas is royalty-free for 1st 30 days or 1st 50 MMCF of production whichever comes first.</p>	<p>If there is no pipeline in place, flared volumes are subject caps stated below.</p>	<p>Require operator to be on site during all tests; limit performance tests to the time needed to validate performance. Charge royalty to incentivize waste-reduction.</p>
<p><b>Flaring with Gas Conservation Plan</b>  (BLM allowed operators to flare gas for up to 1 year if they had a Gas Conservation Plan typically a plan to build a</p>	<p>BLM required permit applications to explain the specific economic and technical reasons for the flaring,</p>	<p>Total “flaring allowable” volumes are imposed. These phase down from 2018-2025 from 5,400 Mcf/per well to 750 Mcf/per well, on average across</p>	<p>Flaring is authorized only during the time it takes to construct a pipeline.  Restrict number of extensions</p>

<p>gas pipeline that would be active after 1 year.</p>	<p>including estimates of total flared volumes and ultimate production expected from wells</p>	<p>operations in a state.</p>	<p>allowed for approval of flaring.</p>
<p><b>Flaring during “Force Majeure” Events</b> (Pipeline maintenance, pressure relief, safety)</p>	<p>Royalty is not charged for vented/flared volumes during Force Majeure events.</p>	<p>Royalty is charged during Force Majeure events BLM deems should have been predictable. Also certain flared volumes contribute to the cap above.</p>	<p>Royalty may be charged for flared volumes associated with maintenance events, but these events would not contribute to a ‘cap’ on flared volumes.</p>



# **Bureau of Land Management**

## *Venting & Flaring*

### *Public Outreach*

May 15, 2014



# **Bureau of Land Management**

## *Venting & Flaring*

### *Public Outreach*

Tim Spisak  
Senior Advisor – Conventional Energy  
BLM – Washington Office  
May 15, 2014



# Venting & Flaring Public Outreach

## *Reasons for Considering the Various Options*

- NTL-4A doesn't reflect current best management practices.
- Recent OIG/GAO Reports suggest progress can be made to minimize waste and promote conservation of produced gas through better management of venting and flaring.
- EPA New Source Performance Standards (NSPS) require new actions to minimize venting and flaring.



# Venting & Flaring Public Outreach

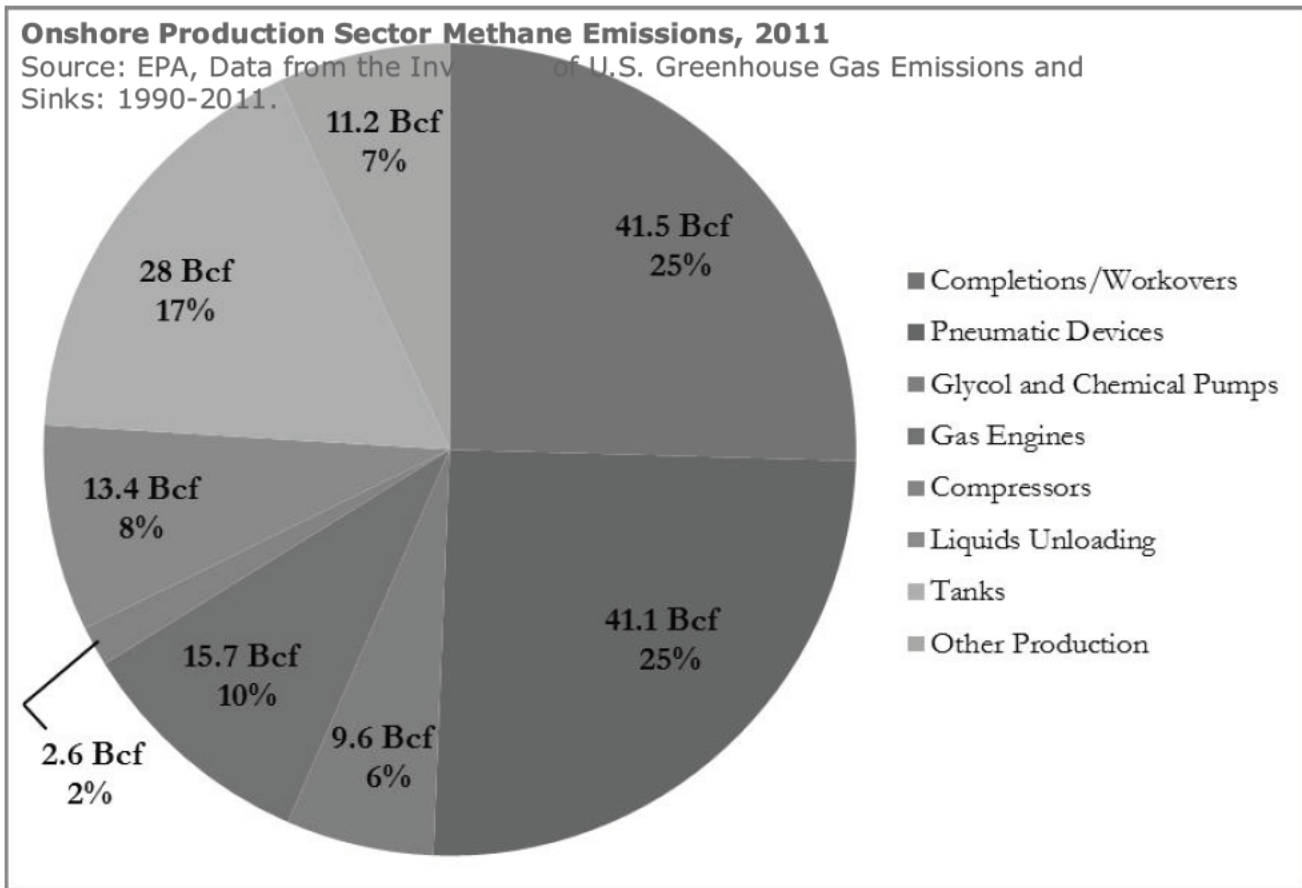
## *Process and Application*

1. Public Outreach designed to begin the dialog with interested parties.
2. More public sessions planned for this month in North Dakota, New Mexico and Washington, DC.
3. The BLM will consider existing Federal, tribal, and state rules and industry best practices.



# Venting & Flaring Public Outreach

## EPA Analysis of Emissions (from all onshore production--not limited to Federal leases)



# Venting & Flaring Public Outreach

## *Major Topics*

- Well completions
- Production tests
- Liquids unloading – Well Purging
- Casing head and associated gases
- Gas conservation plans
- Storage vessel/tank emissions
- Pneumatic devices
- Leak detection and repair



# Venting & Flaring Tribal Outreach

## *Ground Rules*

- Purpose of the Outreach
  - Solicit views on how to address major topics
  - Not intended to be complete list
  - Keep in mind:
    - Are there others that should be considered?
    - Are some of these unrealistic?
  - We welcome your input  
(comment period)



# Venting & Flaring Public Outreach

## *Well Completions*

- Defined as:
  - The process to establish production from a well after the production-casing string has been set, cemented, and pressure-tested until the permanent wellhead is installed for production.
- Current BLM policy:
  - “No royalty obligation shall accrue on any produced gas which . . . is vented or flared with the [Area Oil and Gas] Supervisor’s prior authorization or approval during drilling, completing, or producing operations . . .”





# Venting & Flaring Public Outreach

## *Well Completions*

- Potential options:
  - Place no new requirements on well completions.
  - In certain situations in addition to HF gas wells, consider requirement to:
    - Capture
    - Inject
    - Use
    - Combust
    - Flare



# Venting & Flaring Public Outreach

## *Production Tests*

- Defined as:
  - Tests on an oil or gas well to determine its flow capacity at specific conditions of reservoir and flowing pressures.
- Current BLM policy:
  - Initial Production Test: Venting & flaring authorized up to 30 days or 50 million cubic feet (MMcf) of gas.
  - Evaluation test: Not to exceed 24 hours.



# Venting & Flaring Public Outreach

## *Production Tests*

- Potential options:
  - Extend well completion requirements to production tests.
  - Gas wells: Limit initial well evaluation tests to XX (30) days or XX (20) MMcf of gas and require the use of Best Available Control Technology (BACT).
  - Oil wells: Limit initial well evaluation tests to XX (30) days or XX (10) MMcf of gas.
  - Require operator to be on site during all tests; limit performance tests to the time needed to validate performance.



# Venting & Flaring Public Outreach

## *Liquids Unloading – Well Purging*

- Defined as:
  - Process of opening the well bore to the atmosphere and allowing the reservoir pressure to push the accumulated liquids out of the well bore.
- Current BLM policy:
  - Limits events to 24 hours but does not set cumulative duration limits, i.e., monthly.



# Venting & Flaring Public Outreach

## *Liquids Unloading – Well Purging*

- Potential options:
  - Operator must first attempt to unload liquids without venting.
  - Requiring operator to be on site during the treatment.
  - Must record cause, date, time and duration of the event.
  - Opening well bore to atmosphere as a last resort.
  - For new wells, if and when liquids unloading is necessary, a method other than well purging must be employed.
  - Establish lower cumulative duration limits.



# Venting & Flaring Public Outreach

## *Casinghead and Associated Gases*

- Defined as:
  - The natural gas that is produced from an oil well and is either sold, re-injected, used for production purposes, vented (rarely), or flared, depending on whether the well is connected to a gathering line.
- Current BLM policy:
  - Require operators to receive approval to flare casinghead gas.
  - The BLM considers the total leasehold production (including both oil and gas) as well as the economics of the field-wide plan.



# Venting & Flaring Public Outreach

## *Casinghead and Associated Gases (1 of 2)*

- Potential options:
  - Establish a clear and rigorous economic test that *may* include:
    - Specific rate of return and/or discount rate;
    - Define specific pay-out criteria;
    - Field-wide economics for gas capture and transportation regardless of operator;
  - Consider gas combustion efficiency standard.



# Venting & Flaring Public Outreach

## *Casinghead and Associated Gases (2 of 2)*

- Potential options:
  - If gas conservation is not economic:
    - An operator may only flare with an approved Application to Flare
    - Consider whether the approvals should be valid for a fixed time period and/or consider limitations to the approval term.
    - If valid for a fixed time, subsequent Applications to Flare must have a revised economic analysis that reflects any changes in conditions.
    - When new wells are added to a field that the economics are re-evaluated.





# Venting & Flaring Public Outreach

## *Gas Conservation Plan*

- Defined as:
  - An action plan that eliminates or minimizes venting or flaring of the gas from oil wells.
- Current BLM policy:
  - An action plan that will eliminate venting or flaring of the gas within one year from the date of application.
  - Royalty free during implementation of plan



# Venting & Flaring Public Outreach

## *Gas Conservation Plan (1 of 2)*

- Potential options:
  - With an operator's commitment to install gas gathering infrastructure, then flaring is authorized during the construction time.
  - Restrict number of extensions allowed for approval of flaring.
  - If gas conservation is economic and the infrastructure is not in place, an operator may only flare under an approved Gas Conservation Plan.



# Venting & Flaring Public Outreach

## *Gas Conservation Plan (2 of 2)*

- Potential options:
  - In cases where gas recovery is clearly economic, refine definition of unavoidably lost gas to a fixed time period (causing gas to become royalty bearing thereafter).
  - Conditionally approve APDs if it is clear there will be gas, but infrastructure will be ready ‘soon’ (i.e. 90 days, 180 days, one year).



# Venting & Flaring Public Outreach

## *Storage Vessel/Tank Emissions*

- Defined as:
  - Gas vapors lost from storage tanks on lease.
- Current BLM policy:
  - Gas vapors released from storage tanks to be unavoidably lost and not royalty-bearing unless the Authorized Officer requires recovery.



# Venting & Flaring Public Outreach

## *Storage Vessel/Tank Emissions*

- Potential options:
  - New wells: Require the capture or combustion of gas vapors from certain tanks.
  - Existing wells: Install combustors or equivalent device for storage vessels with emissions potential greater than X(?) tons per year of volatile organic compounds.
  - Is there another threshold or throughput equivalent that might work better? Safety-related threshold?



# Venting & Flaring Public Outreach

## *Pneumatic Devices*

- Defined as:
  - Devices powered by pressurized natural gas as liquid level controllers, pressure regulators, and valve controllers and other similar devices.
- Current BLM policy:
  - Gas used to power pneumatic devices (regardless of bleed rate) is considered used on lease and not royalty-bearing.



# Venting & Flaring Public Outreach *Pneumatic Devices*

- Potential options:
  - New (or replacement) devices: NSPS controls.
  - Existing devices: Requiring replacement of existing pneumatic devices if the cost of replacement, when considering the following, is consistent with economic operation:
    - (a) the reduction in bleed rate,
    - (b) cost of replacement equipment/installation
    - (c) the price of natural gas and
    - (d) the rate and extent of recovery of cost through additional gas capture.
  - How would this be administered?



# Venting & Flaring Public Outreach

## *Leak Detection and Repair*

- Defined as:
  - Programs to identify and repair leaks to reduce gas loss from lease operations.
- Current BLM policy:
  - Does not have a leak detection/monitoring standard.





# Venting & Flaring Public Outreach

## *Leak Detection and Repair*

- Potential options:
  - Operators' periodic inspection of facilities to identify and repair leaks.
  - What threshold might be used to determine which leaks require repair?



# Venting & Flaring Public Outreach

## *Next Steps*

- Comments from Session accepted until May 30
  - Email comments to: [BLM\\_WO\\_OG\\_Comments@blm.gov](mailto:BLM_WO_OG_Comments@blm.gov)
- Additional Outreach Sessions
  - Three planned
    - Albuquerque, NM on May 7 (complete)
    - Dickinson, ND on May 9 (complete)
    - Washington, DC on May 15 (Live streamed)
- See website: *Public Events on Oil and Gas*
  - Under the **Energy** or **Oil & Gas** tabs
  - [www.blm.gov/wo/st/en/prog/energy/public\\_events\\_on\\_oil.html](http://www.blm.gov/wo/st/en/prog/energy/public_events_on_oil.html)



# Venting & Flaring Public Outreach



Questions?

Email comments to:

[BLM\\_WO\\_OG\\_Comments@blm.gov](mailto:BLM_WO_OG_Comments@blm.gov)

[tspisak@blm.gov](mailto:tspisak@blm.gov) – 202-912-7311



**To:** amanda\_kaster@ios.doi.gov[amanda\_kaster@ios.doi.gov];  
'katharine\_macgregor@ios.doi.gov'[katharine\_macgregor@ios.doi.gov]; Ronk,  
Joshua[Joshua.Ronk@mail.house.gov]  
**From:** Small, Jeff  
**Sent:** 2017-03-20T19:03:28-04:00  
**Importance:** Normal  
**Subject:** OGR Hearing Tomorrow  
**Received:** 2017-03-20T19:26:30-04:00

Amanda, Kate and Josh,

Wanted to connect you all.

Kate and Amanda are former House staffers who now work for DOI. They are wonderful.

Josh Ronk is our Legislative Assistant who is handling the OGR hearing tomorrow and handles OGR Committee work. He is great too. We have had a lot going on but he is finishing up questions now.

Josh, Amanda and Kate both reached out. Please send them our draft questions for Richard Cardinale when you have them.

Josh, here are some possible questions for Frank Rusco:

1. Director Rusco, how does your agency determine what it studies?
  - 1a. In [GAO report 16-607](#), entitled "Interior Could Do More to Account for and Manage Natural Gas Emissions, you state "GAO was asked to review Interior's management of natural gas emissions onshore?"
  - 2a. Who specifically asked you to review Interior's management of natural gas emissions onshore?
  - 3a. Are you at all concerned that this report led to a very political rule that was rejected by the House with bipartisan support?
  - 4a. I am normally a big fan of GAO, but this report had some conclusions that encouraged the terrible BLM Venting and Flaring rule implemented by the Obama Administration. This new mandate seeks to allow BLM the ability to exceed its statutory authority and regulate air quality. Given that methane emissions from oil and natural gas have significantly declined in recent decades and that the final rule would destroy responsible energy production, I am still trying to understand your contribution here and why you all decided to spend taxpayer money commissioning this report that contributed to this extremely political rule?
2. Director Rusco. Here's another example. [GAO report 15-39](#) from April of 2015 entitled "Interior's Production Verification Efforts and Royalty Data Have Improved, but Further Actions Needed." Again this reported contributed to another very political rule from the Obama Administration in the form of ONRR's Valuation Rule. This flawed rule is essentially a new tax that will stifle oil, gas, and coal production on federal and Indian lands.

2a. You stated in the report “GAO was asked to review Interior's efforts to improve verification of oil and gas produced from federal leases and the accuracy of royalty data.”

2b. Again, who specifically asked you to commission this report?

3b. Does it cause you any heartburn that the Obama Administration would twist your words and then put out very political, job-killing rules and claim they did so in part because GAO recommended it?

Thanks all!

**Jeff Small**

*Executive Director | Congressional Western Caucus*

*Senior Advisor | Congressman Paul A. Gosar, D.D.S.*

2057 Rayburn HOB | Washington, DC 20515

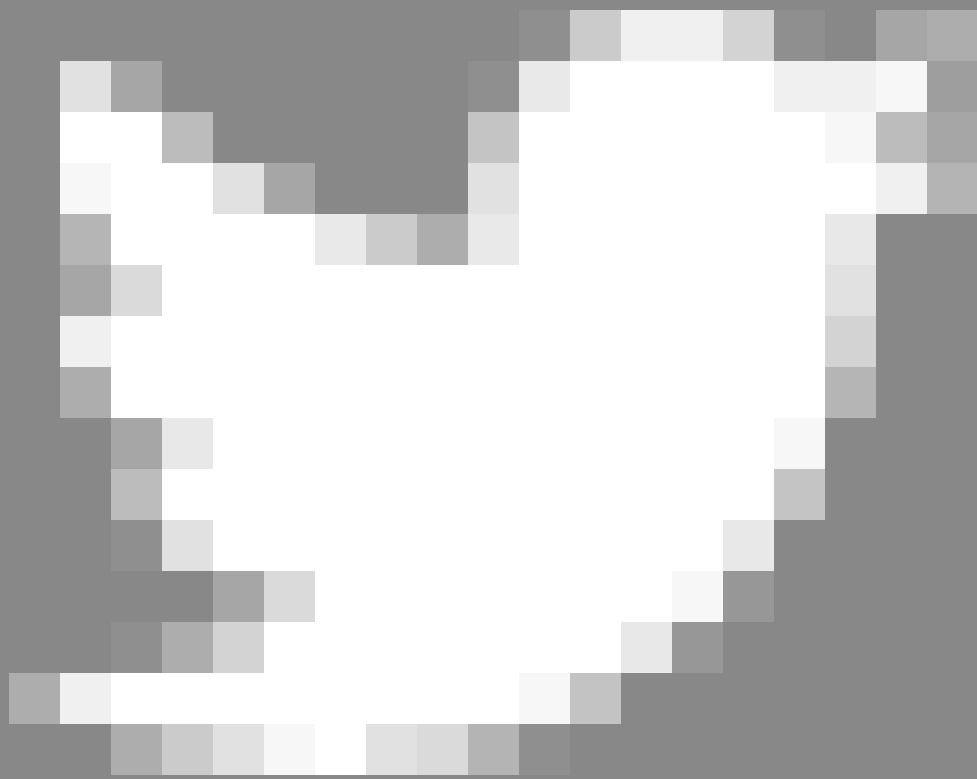
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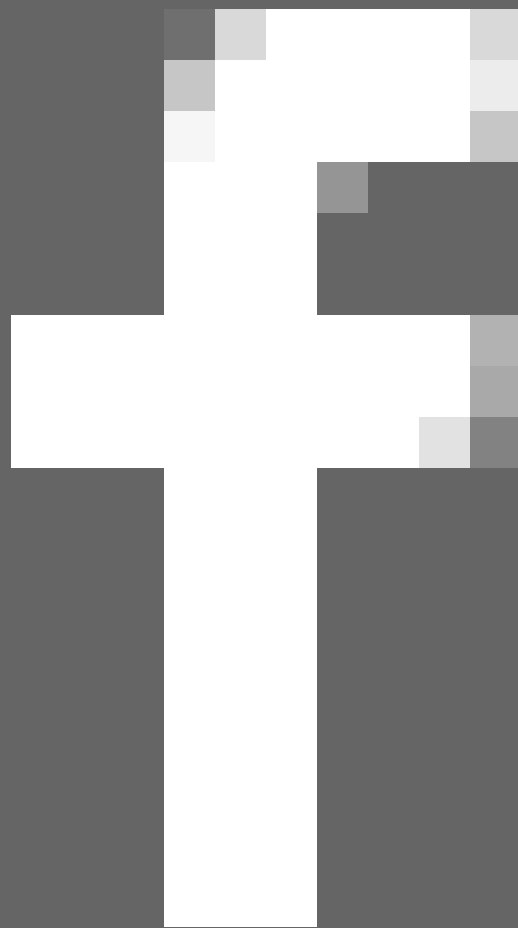
[jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov)



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WORLD

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**To:** Christine Bauserman[christine\_bauserman@ios.doi.gov]  
**From:** Summers, Christina  
**Sent:** 2017-03-21T09:06:21-04:00  
**Importance:** Normal  
**Subject:** Fwd: U.S. Department of the Interior News Briefing for Tuesday, March 21, 2017  
**Received:** 2017-03-21T09:06:50-04:00

Hi Christine,

It was nice chatting with you. Here is the daily news bulletin I receive and review each morning. You can click on the blue link at the top of the email below to subscribe.

It is a great resource, as it compiles the latest media info on Interior, as well as some of the broader political stories. FYI - The bulletin normally gets truncated in your email due to its length, so you can click on the link at the very bottom to view all of the stories.

Have a great morning!

Christina

----- Forwarded message -----

**From:** **Bulletin Intelligence** <[Interior@bulletinintelligence.com](mailto:Interior@bulletinintelligence.com)>  
**Date:** Tue, Mar 21, 2017 at 7:01 AM  
**Subject:** U.S. Department of the Interior News Briefing for Tuesday, March 21, 2017  
**To:** [Interior@bulletinintelligence.com](mailto:Interior@bulletinintelligence.com)

**Mobile version and searchable archives available [here](#). Please [click here](#) to subscribe.**

**DATE: TUESDAY, MARCH 21, 2017 7:00 AM EDT**

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- E&E Publishing: Budget Losses Could Point To Secretaries' Lack Of Influence.
- The Hill: White House Delays Executive Order On Climate Policies.

### **America's Great Outdoors**

#### **National Park Service**

- Alabama Live: Birmingham Civil Rights National Monument Dedication To Be Held In April.
- Roll Call: Eisenhower Memorial Could Break Ground As Early As September.
- Las Vegas Review Journal: NPS Plans To Offer Wireless Internet Access At Popular Spots Around Lake Mead.
- Charleston (WV) Gazette Mail: NPS Seeks Vandals Of Historic Thurmond Boarding House.

- Los Angeles Times: Additional Coverage: Half Of DC Cherry Blossoms Survive Cold.

#### **Fish And Wildlife Service**

- Law360: Supreme Court Won't Hear FWS Worker's Whistleblower Suit.

- Lewis Clark Valley DailyFLY (WA): 600,000 Juvenile Spring Chinook Die After Mechanical Failure At Kooskia Hatchery.

- Huffington Post: Senate Urged To Protect Alaska's Wildlife Refuges.

### ***Bureau Of Land Management***

- Palm Springs (CA) Desert Sun: Controversy Erupts Proposed Housing Development Nearby Sand To Snow National Monument.

- Washington Times: BLM Proposes Accelerated Timetable For Wyoming Horse Roundup.

- Washington Times: BLM Offers Reward For Information About Black Cliffs Climbing Area Graffiti.

### **Securing America's Energy Future**

#### ***Offshore Energy Development***

- The Hill: House Committee Subpanel To Hold hearing On Shortcomings At BSEE.

- Law360: Supreme Court Won't Hear Challenge To Well Plug Order.

- Wall Street Journal: Shell Betting On Low Cost Deep Water Drilling.

#### ***Onshore Energy Development***

- WDRB TV Louisville (KY): Trump Says He Is Keeping Promises To Kentucky's Miners.

- Associated Press: ETP Says Attacks, Threats On Dakota Access Will Not Stop Oil Flow.

- Canton (OH) Repository: Senate Urged To Reject Efforts To Roll Back Methane Standards.

- The Hill: Op Ed: Pro Coal Policies Could End Up Hurting Coal Workers.

### **Empowering Native American Communities**

- Washington Post: Federal Recognition Sought For Six Virginia Tribes.

- Napa Valley (CA) Register: Appeal Courts Hears Arguments In Mishewal Wappo Court Case.

### **Tackling America's Water Challenges**

- KBOI TV Boise (ID): Federal Agencies Plan To Increase Boise River Flows.

### **Top National News**

- Associated Press: Media Analyses: White House On Defense After Comey's "Bombshell" Testimony.

- Lexington (KY) Herald Leader: Trump Pitches GOP Healthcare Bill In Louisville, Doesn't Mention Comey Testimony.

- ABC: Gorsuch Hearings Kick Off With Amiable Remarks And Invocation Of Garland.

### **Editorial Wrap-Up**

- New York Times.

  - "Comey's Haunting News On Trump And Russia."

  - "Neil Gorsuch Faces The Senate."

  - UN Accepts Blame But Dodges The Bill In Haiti.

- Washington Post.

  - "Republican Arguments Against Obamacare Are In A Death Spiral."

  - "No, Republicans, The Real Story Is Not 'The Leaks.'"

  - "Don't Let The D.C. Council Handpick Development Deals."

- Wall Street Journal.

  - "Saving Private Health Insurance."

"Comey Doesn't Say Much."

"Neil Gorsuch, How Would You Vote?"

### **Big Picture**

- Headlines From Today's Front Pages.

### **Washington Schedule**

- Today's Events In Washington.

### **Last Laughs**

- Late Night Political Humor.

### **DOI In The News**

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#### **Budget Losses Could Point To Secretaries' Lack Of Influence.**

E&E Publishing (3/20) reports that "despite publicly vowing to fight proposed budget cuts and to defend certain programs, the heads of U.S. EPA and the Interior and Energy departments lost their battles with the White House." Notably, Interior Secretary Ryan Zinke "promised to fight — and win — against the White House's initially floated 10 percent slash, but the budget blueprint proposed a 12 percent cut." The article says that "the secretaries' apparent lack of influence in the Trump administration is unusual, according to top former agency officials." However, Interior spokeswoman Megan Bloomgren "noted that the budget blueprint isn't the final word from the White House on the department's funding, with details set for release later this spring." The end result "will maintain [the Department of the Interior's] core functions of land access and protection and save taxpayers \$1.5 billion during tight fiscal times," she said in a statement.

Additional coverage of the budget proposal was provided by the Broomfield (CO) Enterprise (3/20, Brennan), KHQ-TV Spokane (WA) Spokane, WA (3/20), KECI-TV Missoula (MT) Missoula, MT (3/20, Salas), and KPAX-TV Missoula (MT) Missoula, MT (3/20, McKay).

**Davidson: Budget Proposal, Executive Order Indicate Trump Aims To Slash Federal Workforce.** In his Washington Post (3/20) "Federal Insider" column, Joe Davidson calls President Trump's budget outline "hardhearted," writing that it "brings more anxiety to federal employees who already are nervous about a president who considers so many of them expendable." He also writes that a mostly overlooked executive order on reorganizing the Executive Branch presents "a management strategy designed to jettison agencies, oust programs, slow hiring and dump employees."

**White House Will Recommend Federal Pay Increase.** However, the Washington Post (3/20, Rein) reports that the Trump Administration "will recommend a 1.9 percent raise for federal workers" to take effect in January 2018, according to "a senior budget official."

#### **White House Delays Executive Order On Climate Policies.**

The Hill (3/20, Henry) reports that "sources confirmed" Monday that the White House "has pushed back the release of an executive order related to federal climate change policies." President Trump "was expected to sign an order as

early as Monday beginning the process of ending several climate initiatives advanced” by the Obama Administration, but that has been pushed back “until potentially next week.”

## **America’s Great Outdoors**

### ***National Park Service***

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#### **Birmingham Civil Rights National Monument Dedication To Be Held In April.**

Alabama Live (3/20, Garrison) reports that the National Park Service and “local partners will host a celebration of the new Birmingham Civil Rights National Monument next month.” The dedication will be held Saturday, April 15 outside the Birmingham Civil Rights Institute. Stan Austin, regional director for the National Park Service, said, “We look forward to dedicating the new Birmingham Civil Rights National Monument with our partners who were central the park’s establishment. The park preserves and interprets an important chapter in America’s modern civil rights movement.”

#### **Eisenhower Memorial Could Break Ground As Early As September.**

Roll Call (3/21, Akin) reports that “construction could begin as early as September on a proposed memorial for President Dwight D. Eisenhower,” according to the Dwight D. Eisenhower Memorial Commission and the chairman of the House committee that oversees the funding for the project. Rep. Ken Calvert, the chairman of the House Appropriations Subcommittee on Interior, Environment, and Related Agencies, said, “I don’t think there are any obstacles in front of us. We need to get it done. Our World War II heroes are leaving us very quickly.” However, “completing the project would require a significant commitment from Congress at a time when it is being asked by the Trump administration to make deep and painful cuts to federal funding for domestic programs.”

#### **NPS Plans To Offer Wireless Internet Access At Popular Spots Around Lake Mead.**

The Las Vegas Review-Journal (3/20, Brean) reports that Lake Mead National Recreation Area on Monday announced plans “to provide wireless internet access to developed areas of the 1.5 million acre playground, possibly as early as this summer.” The National Park Service is “seeking public input on the proposal, which involves putting up some small antennas and dishes as part of a five-year contract with an internet service provider.” According to the article, “if the service is put in place, visitors would be able to access the Wi-Fi network — for an as-yet-undetermined fee to be paid to the service provider — at Boulder Beach, Cottonwood Cove, Echo Bay, Katherine Landing and Temple Bar.”

#### **NPS Seeks Vandals Of Historic Thurmond Boarding House.**

The Charleston (WV) Gazette-Mail (3/20, Steelhammer) reports that “rewards of up to \$1,000 are available from the National Park Service for those who provide

information leading to an arrest in the vandalism” of the John Bullock/Roger Armandtrout House in the Thurmond Historic District. Earlier this month, vandals damaged “numerous doors and windows on the structure, threw furniture from a second-floor window onto the ground, spray painted walls with graffiti and profanity, and ripped the railing off a second-story porch.”

### **Additional Coverage: Half Of DC Cherry Blossoms Survive Cold.**

Additional coverage that half of Washington, D.C.’s cherry blossoms have survived the cold was provided by the [Los Angeles Times](#) (3/20, Forgiore).

### ***Fish and Wildlife Service***

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### **Supreme Court Won’t Hear FWS Worker’s Whistleblower Suit.**

[Law360](#) (3/20, Atkins) reports that the U.S. Supreme Court “refused Monday to consider a Ninth Circuit decision that tossed a whistleblower-reprisal claim from a former U.S. Fish and Wildlife Service employee, who alleged the service discriminated against her, told her to ‘learn to be more feminine’ and then retaliated against her when she complained.” The decision brings “an end to a Whistleblower Protection Act suit brought against the acting secretary of the interior by former Fish and Wildlife employee Leslie Kerr.”

### **600,000 Juvenile Spring Chinook Die After Mechanical Failure At Kooskia Hatchery.**

The [Lewis-Clark Valley DailyFLY \(WA\)](#) (3/20, Carlson) reports that “approximately 600,000 juvenile spring Chinook died early Friday morning after a failed breaker box at the Kooskia National Fish Hatchery resulted in lost power to the water recirculation system.” According to officials, “an alarm system also failed to sound.” A press release from the Nez Perce Tribe said, “The lost fry were from adult Chinook that returned in 2016. The fry had just hatched from eggs and were about a month old. The failure of the breaker box and the failure of the alarm system to alert staff that live on-site of the loss of power to the pump is being investigated.”

### **Senate Urged To Protect Alaska’s Wildlife Refuges.**

In a piece for the [Huffington Post](#) (3/20, Kangas, Contributor), Cathy Kangas, a member of the Board of Directors of the Humane Society of the United States, calls for the Senate to reject bill that would “permit cruel hunting and killing practices on National Wildlife Refuges in Alaska.” Kangas warns that the measure “sets a dangerous precedent” because “if members of Congress start to manage wildlife refuges, we can bet they’ll try to do the same with 170 million acres of National Park Service lands throughout the United States.”

### ***Bureau of Land Management***

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### **Controversy Erupts Proposed Housing Development Nearby Sand To Snow National Monument.**

The [Palm Springs \(CA\) Desert Sun](#) (3/20, Kennedy) reports that “a prospective

residential development in Desert Hot Springs, first proposed in 2007, is generating controversy, splitting the city between those who feel increasing density could threaten the natural environment surrounding the city and those who feel such projects could help promote the city and its natural features." Developer Adkan Engineers is "facing opposition from conservation groups as it has tried to secure the extension." The article notes that "the project site sits at the entrance to the Mission Creek Preserve, which serves as a gateway to the Sand to Snow National Monument, designated by former president Barack Obama near the end of his second term in office."

### **BLM Proposes Accelerated Timetable For Wyoming Horse Roundup.**

The [AP](#) (3/20) reports that a Bureau of Land Management official "says he'd like to round up excess wild horses from an area southeast of Riverton later this year." The gather "had been planned next year but BLM Lander Field Office Manager Rick Vander Voet tells Fremont County commissioners the horse population is way above desired numbers." BLM officials "want to maintain a population on the low end of between 480 and 720 horses" and the BLM "estimates more than 1,000 wild horses currently inhabit the area."

Coverage by the AP was also picked up by [U.S. News & World Report](#) (3/20) and [WRAL-TV Raleigh \(NC\)](#) Raleigh, NC (3/20).

### **BLM Offers Reward For Information About Black Cliffs Climbing Area Graffiti.**

The [AP](#) (3/20) reports that the Bureau of Land Management is "looking for information about the person or people who spray-painted graffiti on the Black Cliffs climbing area along Highway 21 just outside of Boise." The BLM is "offering a \$1,000 reward for information that leads to a conviction of those responsible for the vandalism." It was "first reported on March 7, and BLM officials say it will be cleaned up."

Coverage by the AP was also picked up by the [Spokane \(WA\) Spokesman-Review](#) (3/20), [U.S. News & World Report](#) (3/20), and [KHQ-TV Spokane \(WA\)](#) Spokane, WA (3/20).

## **Securing America's Energy Future**

### ***Offshore Energy Development***

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### **House Committee Subpanel To Hold hearing On Shortcomings At BSEE.**

[The Hill](#) (3/20, Cama, Henry) reports that "a House Natural Resources Committee subpanel will hold a hearing on an imminent Government Accountability Office (GAO) report on shortcomings at the Interior Department's Bureau of Safety and Environmental Enforcement." GAO's energy director Frank Rusco will testify, as will Richard Cardinale, Interior's acting secretary for lands and minerals.

### **Supreme Court Won't Hear Challenge To Well-Plug Order.**

[Law360](#) (3/20, Phillis) reports that the Supreme Court will "not review a decision

by the D.C. Circuit that upheld the U.S. Department of the Interior's order forcing Noble Energy Inc. to plug and abandon an oil well off the coast of California, according to an order handed down Monday."

### **Shell Betting On Low-Cost Deep-Water Drilling.**

The Wall Street Journal (3/20, A1, Cook, Kent, Kiernan) has a front-page feature on Royal Dutch Shell's efforts to engage in low-cost deep-water drilling, wagering that if it can succeed, it can turn a profit even if oil sinks to \$15 per barrel. Shell has been working on drilling cheaper and faster as a response to an ongoing glut due to shale oil.

### ***Onshore Energy Development***

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### **Trump Says He Is Keeping Promises To Kentucky's Miners.**

In an interview with WDRB-TV Louisville, KY (3/20, 10:01 p.m. EDT), President Trump was asked why he was focusing on Kentucky. Trump said, "Well, I've been with them and they've been with me. Kentucky has been one of our great states and I love the people of Kentucky. The miners, we are putting them back to work. We've already signed legislation environmentally that allows the mines to start reopening and keep open. And I made a lot of promises to the miners, and I'm keeping those promises, so I wanted to come back here and tell them that." Reuters (3/20) briefly reported on the interview.

### **ETP Says Attacks, Threats On Dakota Access Will Not Stop Oil Flow.**

The AP (3/20, Press) reports Energy Transfer Partners said Monday that the Dakota Access pipeline remains on track to start moving oil this week despite "coordinated physical attacks" on the line. In a court filing, the company did not detail the attacks, but said they "pose threats to life, physical safety and the environment." ETP cited the threats for redacting most of the report to the court, but ended, "These coordinated attacks will not stop line-fill operations. With that in mind, the company now believes that oil may flow sometime this week." The Hill (3/20, Henry) also provided coverage.

### **Senate Urged To Reject Efforts To Roll Back Methane Standards.**

In an editorial, the Canton (OH) Repository (3/20) urges support for the Bureau of Land Management's Methane and Waste Prevention Rule. According to the paper, "methane poses a recognized danger to the environment and human health." It adds that "allowing this resource to continue to be wasted in the ways it has for years makes little business sense, either." It concludes that "a better approach would be to address any concerns that might exist within the rule, rather than to eliminate it in its entirety."

In an op-ed for the Arizona Republic (3/20, King), Sarah King, who chairs the Earth Care Commission of Arizona Faith Network, writes that "anyone who cares about fiscal stewardship, conserving the gifts of God's creation, health and climate change should know natural gas waste is a moral issue of national concern." King asserts that "we have an urgent moral responsibility to cut

dangerous methane greenhouse gas emissions.”

### **Op-Ed: Pro-Coal Policies Could End Up Hurting Coal Workers.**

For the “Pundits” blog of [The Hill](#) (3/20, Cohan), Dan Cohan, associate professor of civil and environmental engineering at Rice University, warns that “Republican policies are putting the profits and pollution of corporations ahead of the jobs and well-being of coal miners.” According to Cohan, “such policies will not only fail to increase the quantity of mining jobs, but could worsen their quality as well.” Cohan dismisses claims that “protections for workers and the environment are holding back coal,” and argues that “coal struggles despite its cheapness and abundance.”

### **Empowering Native American Communities**

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#### **Federal Recognition Sought For Six Virginia Tribes.**

The [Washington Post](#) (3/20, Heim) reports that on Tuesday, Sens. Tim Kaine and Mark R. Warner will “reintroduce a bill that would grant federal recognition to six Virginia Indian tribes that were among the first to greet English settlers in 1607.” The bill’s sponsors says that it will “help right a long-standing wrong” for the Chickahominy, the Eastern Chickahominy, the Upper Mattaponi, the Rappahannock, the Monacan and the Nansemond tribes. Kaine and Warner said in a joint statement, “Four hundred years after the death of Pocahontas, our country continues to do a disservice to her descendants by failing to recognize the major role Virginia’s tribes have played in American history and the fabric of our nation. These six tribes have treaties that predated the United States, but because of this historical quirk and the systematic destruction of their records, they have been denied federal recognition and the services that come along with it. Congress can fix this injustice by passing our bill and granting these tribes the federal recognition they deserve.”

#### **Appeal Courts Hears Arguments In Mishewal Wappo Court Case.**

The [Napa Valley \(CA\) Register](#) (3/20, Eberling) reports that the United States Court of Appeal for the 9th Circuit heard arguments last Monday in a bid by the Mishewal Wappo Tribe of Alexander Valley to gain federal recognition as a tribe. Lawyers for the tribe “have said that the tribe was unlawfully terminated.” Meanwhile, “among other things, the federal government claims the tribe waited 40 years too long to sue, given the statute of limitations is usually six years.”

### **Tackling America’s Water Challenges**

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#### **Federal Agencies Plan To Increase Boise River Flows.**

[KBOI-TV](#) Boise, ID (3/20) reports that the Bureau of Reclamation and the U.S. Army Corps of Engineers “said Monday that they plan to increase Boise River flows from its current rate of 7,500 cubic feet per second to 7,750 cfs due rain this week and the above-normal winter precipitation in the Boise River drainage.” Officials are hoping “to reduce the increased risk of flooding later this spring.”



## Top National News

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### **Media Analyses: White House On Defense After Comey's "Bombshell" Testimony.**

FBI Director Comey's testimony before the House Intelligence Committee generated extensive print and online reporting, led all three major network newscasts (which devoted nearly 20 minutes of combined coverage to the story) and dominated discussion on the evening cable shows. Reports indicate Comey unequivocally denied the President's wiretapping claims, and that he confirmed the FBI has been investigating potential collusion between Russian intelligence and the Trump campaign since last July. With near unanimity (Fox News and the AP took a less ominous tone), analyses cast the day's events as a dire setback for the White House, describing Comey's words with terms such as "bombshell" and "stinging rebuke." The Washington Post (3/20, Rucker, Parker) quotes presidential historian Douglas Brinkley going so far as to say, "There's a smell of treason in the air." Also given some play were comments by Chairman Devin Nunes, who urged Comey to complete his investigation quickly, because "there is a big gray cloud that you have now put over people who have very important work to do to lead this country."

USA Today (3/20, Page), for example, titles its report "FBI Bombshell Creates 'A Big Gray Cloud' Over Trump's White House," and starts off its story saying such a situation hadn't taken place "since Watergate." David Gergen said on CNN's Anderson Cooper 360 (3/20) that "when the day was over...Trump had taken two major hits below the water line." Tom Brokaw said on NBC Nightly News (3/20, story 4, 1:15, Holt) that a "lot of outstanding questions" remain after the hearing, "not just about the integrity of the election, but the integrity of the President of the United States, who continues to govern by tweet," and Gloria Borger said on CNN Wolf (3/20) that "this now hangs out there over the Administration like a soggy, wet tent over their heads and it's going to be very difficult for them to escape it."

ABC World News Tonight (3/20, lead story, 4:35, Llamas) showed Comey saying of the ongoing probe that it "includes investigating the nature of any links between individuals associated with the Trump campaign and the Russian government and whether there was any coordination between the campaign and Russia's efforts." NBC Nightly News (3/20, lead story, 4:20, Holt), meanwhile, reported that Comey "joined a growing chorus of intelligence officials and lawmakers rejecting...Trump's tweeted claims of being wiretapped by President Obama." Said Comey, "I have no information that supports those tweets. And we have looked carefully inside the FBI. The Department of Justice has asked me to share with you that the answer is the same for the Department of Justice and all its components."

NBC Nightly News (3/20, story 3, 2:20, Holt) also asked last night, "After a string of unproven claims, will this President struggle to keep the trust of the American public?" NBC's Peter Alexander added that "for a President who's often loose with the facts" it was "a moment of truth." On its website, NBC News (3/20, Murray) referred to "a political gut-punch to...Trump," Vanity Fair (3/19,

Kosoff) to a "brutal rebuke of Trump," and Katy Tur of MSNBC MTP Daily (3/20) to "a stunning rebuke." Anderson Cooper said on CNN's Anderson Cooper 360 (3/20) that "a sitting President of the United States was rebuked publicly by a sitting FBI Director and the head of the NSA." On CNN's The Lead (3/20), Jeff Zeleny said "the White House is in defense mode," and Politico (3/20, Goldmacher, Nussbaum) that "the White House was knocked on the defensive."

Likewise, Kristen Welker said on MSNBC MTP Daily (3/20), "There's no doubt the White House is in defense mode. They are trying to tamp down what we heard on Capitol Hill." Jeffrey Toobin said on CNN's Situation Room (3/20) that "it's a very big deal for the White House to be under criminal investigation and given the complexity, particularly all of the classified information here, there is no way this can be resolved in three months. This is a long time."

To Bloomberg Politics (3/20, Sink), Comey "dealt...Trump a stinging rebuke on Monday at a time of acute political vulnerability for the White House." The FBI Director, "who boosted Trump's political fortunes in the closing days of the presidential campaign by acknowledging his agency had reopened an investigation into rival Hillary Clinton's use of private email, dealt the president one of the worst political blows of his young administration." The New York Times (3/20, Apuzzo, Rosenberg, Huetteman) similarly reports Comey's testimony "created a treacherous political moment for Mr. Trump, who has insisted that 'Russia is fake news' that was cooked up by his political opponents to undermine his presidency." Comey "placed a criminal investigation at the doorstep of the White House and said agents would pursue it 'no matter how long that takes.'"

Less ominous is the tone of the AP (3/20, Tucker, Sullivan) report, which concludes that "regardless of the outcome, the investigation is unquestionably an unwelcome distraction for an administration that has struggled to move past questions about ties to Russia." Brit Hume said on Fox News' Special Report (3/20), "I think the Democrats got a talking point out of it that they will be using and having a field day with for a while, that being the fact that there is an open FBI investigation dating back to July into whether there was collusion between the Trump campaign and the Russians and their efforts to influence the election. There is still no real evidence that such collusion existed but the mere fact of an FBI investigation will keep the story in the headlines for some time to come."

James Rosen said on Fox News' The O'Reilly Factor (3/20) that "what we saw on display today...was the difficulty that lawmakers have in holding James Comey to a coherent, consistent standard in terms of what he discloses about the FBI's investigation and when."

Republican House Intelligence Committee member Peter King said on CNN's Situation Room (3/20) that he has "not seen one shred of evidence that in any way links the Trump campaign to Russian intelligence or the Russian government." He added, "Something may turn up. If it does, it does. If anyone is guilty they should be prosecuted. But I am saying, up until now, there is no evidence I am aware of. And Director Clapper says, as far as he knows, up until January 20th there is no evidence." King acknowledged there is "circumstantial" evidence, as the committee's ranking Democrat, Adam Schiff, has claimed, but

added that "in almost any campaign you'll find people involved in business in Russia."

House Speaker Ryan said on [Fox News' Hannity](#) (3/20), "I don't think we learned anything new here and it only confirmed what we have been saying all along. At the end of the day, we will get to the bottom of all of the stuff."

The [CBS Evening News](#) (3/20, story 3, 3:00, Pelley), meanwhile, reported on an interview with Schiff, who said, "I think what we saw in the hearing today was Director Comey acknowledged that there was sufficient evidence and credible information that warranted his opening up a counterintelligence investigation" into whether there was "coordination with a foreign power, has someone become an agent of a foreign power?" Scott Pelley: "But to be crystal clear, this evening, as we speak, there is no hard evidence of collusion between the Trump campaign and the Russians? You said there is circumstantial evidence?" Schiff: "You know, I would not say... I would not phrase it the way you do. Circumstantial evidence can be very powerful and it is hard evidence." Schiff was asked on [CNN's The Lead](#) (3/20) about his claim that there is circumstantial evidence of collusion between Russia and the Trump campaign. Schiff said, "Circumstantial evidence can be very, very powerful. I can't go into what the evidence is that we have seen or been presented. ... I certainly think that an investigation is warranted. I think the FBI is right to investigate this. I think we are right to investigate this."

The [New York Times](#) (3/20, Steinhauer) reports that "as attack dogs go," Schiff "is more labradoodle than Doberman, his partisanship disguised by a thick fur of intense preparation, modulated locution and gentle accusations." Yet his performance yesterday "showed how an avalanche of information can leverage the limited power of the minority party to damage a president."

Democratic House Intelligence Committee member Eric Swalwell said on [CNN's Situation Room](#) (3/20) that it may be necessary to "drag Russian witnesses" to testify about potential collusion because "the American people should know if the President or anyone on his team was working with Russia as they were interfering in our elections." When asked what he meant by "Russian witnesses," Swalwell replied, "We know, for example, Carter Page, one month after Russia was attacking us, went over to Russia as a senior policy adviser from the Trump campaign with permission from the Trump campaign." Swalwell was also asked if he would subpoena Trump to testify, and responded, "I think we need to subpoena all relevant witnesses, from the President to his family to his security team, to Manafort, Page, Stone, Flynn." Swalwell said on [MSNBC MTP Daily](#) (3/20) that "for most Americans, I think it's quite disturbing that another country would attack us. And they're wondering, do these deep political personal and financial ties that Donald Trump and his team have with Russia – do they extend to working with Russia as they were attacking us? Basically, were these coincidences or was it a convergence?"

On [CNN's Situation Room](#) (3/20), Sen. Chris Murphy, a member of the Foreign Relations Committee, said the confirmation of a probe into potential collusion "should certainly concern every single American," because if it turns out collusion did occur, it "would be terrible for American democracy." Murphy

also touched on Trump's claim Monday morning that Democrats are pushing the Russian collusion story to excuse Hillary Clinton's election loss. Murphy stated, "This is not about trying to explain the results of this election. This is about whether or not a foreign government gets away with trying to influence a presidential election." He said Republicans may not be as alarmed "like Democrats are today because it happened to us. But the Russians are not sympathizers of the Republican party. ... Two years or four years from now the Russians may be trying to manipulate elections against Republicans."

USA Today (3/20, Johnson), The Washington Times (3/20, Dinan), Roll Call (3/20, Lucas), US News & World Report (3/20, Neuhauser), TIME (3/20, Beckwith), The Hill (3/20, Williams), Business Insider (3/20, Smith) and Wall Street Journal (3/20, Harris, Viswanatha), among other news outlets, run similar accounts of the hearing. The Charlotte (NC) Observer (3/20) editorializes that the hearing "confirmed for Americans something that's real and something that's not. The difference between the two is a distinction...Trump seems incapable or unwilling to understand, but the rest of us should." USA Today (3/20) writes in an editorial that "it's time for Trump to take the advice of many, including Republican congressmen such as Tom Cole of Oklahoma and Will Hurd of Texas, and apologize for" his wiretapping claims, "explaining that he simply misinterpreted news reports."

In his "Talking Points Memo" segment on Fox News' The O'Reilly Factor (3/20), Bill O'Reilly said, "The accusation that President Obama was actively involved in harming the Trump campaign has now harmed the President himself. He needs the American people to focus on the economy, the new healthcare proposal, border security, not alleged conspiracies. In the future, the President would be wise to embrace only facts in his pronouncements."

***Trump: Russia Collusion Stories Are "Fake News" Made Up By Democrats.*** ABC World News Tonight (3/20, story 2, 3:25, Llamas) reported, "Despite what you heard from the FBI Director, President Trump's aides are doubling down on that wiretapping claim." The Washington Times (3/20, Sherfinski) notes the President "on Monday declared the notion that he colluded with Russia during last year's election 'fake news,'" tweeting, "James Clapper and others stated that there is no evidence Potus colluded with Russia. This story is FAKE NEWS and everyone knows it!" He later wrote, "The Democrats made up and pushed the Russian story as an excuse for running a terrible campaign. Big advantage in Electoral College & lost!" Trump also said, "The real story that Congress, the FBI and all others should be looking into is the leaking of Classified information. Must find leaker now!"

The New York Post (3/20, Moore, Halper) notes that Nunes also "asked [NSA Director] Rogers if he had evidence that 'Russia cyber actors' changed vote tallies in several states, including Michigan, Pennsylvania, Wisconsin, Florida and North Carolina." Rogers replied, "I have nothing generated by the national security industry." To the same question, Comey answered, "No." Trump "crowed in his tweet: 'The NSA and FBI tell Congress that Russia did not influence electoral process.'"

The Washington Post (3/20, Kessler) said "the president's tweets

throughout the day were misleading, inaccurate or simply false." While "the gravity of the disclosures might have called for a more restrained response...the president chose another approach – which clearly backfired, tweet after tweet."

USA Today (3/20, Jackson), meanwhile, reports that White House press secretary Sean Spicer "played down confirmation Monday that...Trump's campaign is under investigation over possible contacts with Russians who sought to influence last year's election." Said Spicer, "Following this testimony, it's clear that nothing has changed. ... Investigating it and having proof of it are two different things."

The Washington Times (3/20, Miller) casts Trump and the White House as "not backing down," and Politico (3/20, Nelson) reports that "without naming names, Spicer also characterized many of the former Trump campaign officials who have been tied in media reports to Russia as 'hangers-on' who had in reality had little to do with the president's team."

To NBC Nightly News (3/20, story 2, 2:05, Holt), in fact, the White House "sought to distance itself from some former senior advisers," such as Manafort, "who had business ties to pro-Russian Ukrainians and today is denying any involvement with the Russians." Spicer was shown saying, "Paul Manafort, who played a very limited role for a very limited amount of time."

In an interview which took place before Comey's testimony, Assistant to the President and director of communications for the Office of Public Liaison Omarosa Maginault said on Fox News' Fox & Friends (3/20), "Folks at home should ask themselves if the Democrats didn't have Russia to talk about, what would their message be? They have squandered an opportunity to reach out to Democrats across the country because they have been so obsessed on a story where there is nothing there."

***Media Analyses: With GOP Focused On Leaks, "Starkly Partisan Divides" Apparent Within Intel Panel.*** Reuters (3/20, Zengerle) reports that Comey and Rogers "spent 5-1/2 hours before the House of Representatives Intelligence Committee in testimony marked by starkly partisan divides between the panel's majority Republicans and Democrats." The Washington Post (3/20, Phillips) similarly indicates that while "there was no smoking gun from either side's perspective...we did learn more about what the FBI is investigating and what Republicans and Democrats in Congress want to investigate."

NBC Nightly News (3/20, lead story, 4:20, Holt) led its broadcast by reporting, "Comey's appearance, along with NSA Director Admiral Mike Rogers," was "a tale of two hearings. For Democrats, it was all about Russia and the possible Trump campaign connection." Andrea Mitchell added that Republicans were intent on "avoiding the topic of Russia, instead going after the leaks of classified information, allegedly from current and former intelligence officials." On Fox News' Special Report (3/20), Catherine Herridge said that while House Intelligence Committee ranking Democrat Adam Schiff "drew connections between circumstantial evidence and media reports" on Paul Manafort, Roger Stone, Carter Page, and Moscow, Chairman Devin Nunes "pressed the FBI Director to investigate if Democrats crossed the line." Nunes: "They have ties to Russian intelligence services, Russian agents."

The New York Times (3/20, Shear) reports Republicans "acknowledged the inquiry," but "they shrugged off its implications and instead offered a coordinated effort to defend...Trump by demanding a focus on leaks to news organizations." The Washington Post (3/20, Nakashima, Demirjian, Barrett) explains that "information shared with the press has resulted in a series of stories since the election about the intelligence community's conclusion about Moscow's desire to see Trump win and about contacts Trump administration officials or close associates had with Russian officials." To the Daily Intelligencer (NY) (3/20, Kilgore), meanwhile, that line of GOP inquiry is "a coping mechanism for the drip-drip-drip of information and rumors about possibly treasonous activities among intimates of a Republican president: focus on the leaks, not what they reveal."

McClatchy (3/20, Schofield) reports Rep. Trey Gowdy, "who gained national fame for his role in...leading the Benghazi Committee investigation, raised the idea of espionage charges against reporters who'd written stories revealing that Trump National Security Adviser Michael Flynn had been recorded talking to Russian Ambassador Sergey Kislyak." The New York Post (3/20, Moore) quotes Gowdy as saying, "I thought that it was against the law to disseminate classified information. Is it?" Comey replied, "Yes, it is a serious crime, and it should be. ... Be assured we are going to take it very seriously."

The CBS Evening News (3/20, lead story, 3:35, Pelley) noted that Comey "declined to answer questions dozens of times," including Nunes' question of whether Comey has "any evidence that any current Trump White House or Administration official coordinated with the Russian intelligence services."

USA Today (3/20, Collins) reports Gowdy also asked Comey, "I'll just ask you, did you brief President Obama on any calls involving Michael Flynn?" Comey replied, "I'm not going to get [into] either that particular case, that matter, or any conversations I had involving the president. So I can't answer that question." Gowdy also "rattled down a list of people who had held high-ranking positions in the Obama administration and asked whether each would have had access to the 'unmasked' name," including "former director of national intelligence James Clapper, former CIA director John Brennan, former national security adviser Susan Rice, former White House adviser Ben Rhodes, former attorney general Loretta Lynch and former deputy attorney general Sally Yates."

Trump later tweeted (3/19), "FBI Director Comey refuses to deny he briefed President Obama on calls made by Michael Flynn to Russia."

Gowdy said on CNN's Anderson Cooper 360 (3/20) that leaks are "a moral issue at some level. The leaking of classified information or the leaking of information that was acquired through another crime is a criminal matter."

Charles Krauthammer said on Fox News' Special Report (3/20), "There's only one crime we know about. It was a crime of the unmasking and leaking of the Flynn name. Who did it, what happened, why? We don't know. That's the only crime that's been established. Democrats are pretending there are other crimes which nobody else has been able to vouch until now. If the President had not overshoot with this ridiculous charge about the wiretap, that would've been a major discussion and it might've dominated the discussion."

***Democrats Furious After Learning Russia Probe Began In July.*** The AP (3/20, Lemire, Gurman) reports that "Comey's testimony Monday that the bureau has been quietly investigating possible links between associates of...Trump and Russian officials since the summer enraged Democrats who already blame him for rattling the 2016 campaign's closing days." Politico (3/20, DeBenedetti) notes "former top officials for...Clinton's campaign vented their frustration with both...Comey and congressional Republicans on Monday as he testified on Capitol Hill."

***Rogers Dismisses British Intel Connection.*** The CBS Evening News (3/20, lead story, 3:35, Pelley) reported that Comey and NSA Director Rogers "testified there is no reason to believe Mr. Trump's accusation that he was wiretapped by President Obama." Scott Pelley added, "Another White House claim that British intelligence wiretapped Trump Tower on behalf of the United States was dismissed." The New York Times (3/20, Shane) quotes Rogers as saying, "I've seen nothing on the N.S.A. side that we engaged in any such activity, nor that anyone ever asked us to engage in such activity."

***FBI Probing "Far-Right" News Sites' Potential Role In Russian Operation.*** McClatchy (3/20, Stone, Gordon) reports "federal investigators are examining whether far-right news sites played any role last year in a Russian cyber operation that dramatically widened the reach of news stories – some fictional – that favored...Trump's presidential bid, two people familiar with the inquiry say." McClatchy adds that "operatives for Russia appear to have strategically timed the computer commands, known as 'bots,' to blitz social media with links to the pro-Trump stories at times when the billionaire businessman was on the defensive in his race against Democrat Hillary Clinton, these sources said."

***Burr Asks Roger Stone To Preserve Relevant Documents, Communications.*** Politico (3/20, Matishak) reports "pro-Trump provocateur Roger Stone repeatedly came up in Monday's opening hearing on alleged Russian interference in the 2016 election – but leading lawmakers have indicated they're still eager to hear from him directly." Stone "says he would be eager to comply." Politico adds that "Senate Intelligence Chairman Richard Burr said his panel has sent Stone a letter asking him to preserve relevant documents and communications, setting the right-wing agitator on a course to eventually come to Capitol Hill." Stone "confirmed he received the letter – which POLITICO first reported on over the weekend – in an email exchange with POLITICO on Monday."

***Ukraine Legislator Says Manafort Tried To Hide Payment From Pro-Russian Party.*** The New York Times (3/20, Kramer) reports that former Trump campaign chairman Paul Manafort appears to have received \$750,000 "from a pro-Russian party in Ukraine...funneled through an offshore account and disguised as payment for computers," according to documents released Monday by a Ukraine parliamentarian. Manafort, "who denied the latest allegations, has asserted" that the ledger showing the fund transfer is a forgery. Politico (3/20, Vogel, Meyer, Stern) reports that both US and Ukrainian officials want to question Manafort. Rep. Jim Himes (D-CT) said Manafort "'would certainly be at the top of my list to testify' before the House Intelligence Committee's ongoing investigation into Russian meddling into the 2016 presidential election."

***Fox News Pulls Napolitano Over Wiretap Claim.*** The Los Angeles Times (3/20, Battaglio) reports that Fox News has pulled judicial analyst Andrew Napolitano from the air "indefinitely amid the controversy over his unverified claims that British intelligence wiretapped Trump Tower at the behest of former President Obama." Napolitano, a former New Jersey Superior Court judge, argued last week that the UK's Government Communications Headquarters "'most likely' provided Obama with transcripts of Trump's recorded calls."

E.J. Montini of the Arizona Republic writes in USA Today (3/20), "So, now we know why President Donald Trump's lackeys tried to blame the British for wiretapping him. Misdirection. Diversion. ... Trump and his associates get away with stuff like this because they believe they don't have to play by the same set of rules they try to impose on others."

***Experts Say Russia May Have Underestimated Fallout Of Meddling.*** The Los Angeles Times (3/20, Simmons, Mirovalev) reports that Russian cybersecurity expert Andrei Soldatov said Monday that Russian cyberattacks targeting the 2016 US election "were as much about wanting to keep Hillary Clinton out of the White House as about proving to the world that the Kremlin was capable of pulling off this feat." But "several leading Russia experts" said that "Moscow may have miscalculated the fallout of its intrusion," not anticipating the force of US "blowback."

***NYTimes Calls For Independent Prosecutor; WSJournal Says Comey Revealed Little.*** The New York Times (3/20) calls Comey's testimony "a breathtaking admission" that "ought to mark a turning point in how inquiries into Russia's role in the election should be handled." The Times says the President's "brazen warning shots" via Twitter on Monday "do enormous damage to public confidence in the F.B.I.'s investigation," and that an independent prosecutor is needed. By contrast, the Wall Street Journal (3/20) says in an editorial that Comey revealed little that was new, and took a cautious, overly politic line.

The Chicago Tribune (3/20) says in an editorial that Comey "made progress in condensing the narrative," but that "won't put an end to the circus. There's too much politics and not enough facts. Comey made clear he wouldn't discuss details of an ongoing investigation – just acknowledging its existence is unusual enough."

***WPost, Milbank: House GOP Putting Party Before Country.*** The Washington Post (3/20) says in an editorial, "You'd think that all of this would be of surpassing concern for Republican members of Congress. ... Yet to listen to Republican members of the Intelligence Committee, the most pressing problem to arise from Russia's intervention and the FBI's investigation of it is that reports of contacts between Russia's ambassador" and then-NSA Michael Flynn were leaked. The Post says the Republicans "seem to be slavishly following the cues of the president."

Dana Milbank writes in his Washington Post (3/20) column, "Comey's testimony confirmed what was widely suspected. ... But instead of being shaken from complacency and uniting to make sure this never happens again, the Republican majority on the House Intelligence Committee mounted a reflexive defense of Trump." Milbank writes that if Chairman Devin Nunes "would consider



country before party, he'd recognize that the cloud isn't over Trump's White House; it's over all of us."

Eugene Robinson writes in his Washington Post (3/20) column, "It is bad enough to have to wonder whether Trump's narrow margin of victory might have resulted from a boost provided" by Russia. It is "much worse to think that anyone connected with the Trump campaign might have known about this interference by an adversarial foreign power and failed to sound the alarm – or, perhaps, even collaborated in the dark operation."

### **Trump Pitches GOP Healthcare Bill In Louisville, Doesn't Mention Comey Testimony.**

Media coverage of President Trump's speech in Louisville Monday night describes it as a campaign-style event during which Trump touched on a number of his signature issues before making the case for the Republican healthcare bill. Several reports highlight that Trump cast the healthcare vote as something that must be dealt with before he can address trade deals, tax cuts, and infrastructure. A number of stories focus on Sen. Rand Paul's continued opposition to the bill, and several point out that Trump did not mention FBI Director Comey's testimony Monday before the House Intelligence Committee.

The Lexington (KY) Herald-Leader (3/20, Desrochers) reports Trump "avoided" the news that "the FBI is investigating whether associates of his campaign coordinated with Russians during the election." The Herald-Leader says Trump did not mention Comey's testimony, "instead sticking to the familiar themes that the crowd of more than 18,000." LifeZette (3/20, Kirby) says that the speech, which "read like a greatest hits tape from the presidential campaign," was "notable for what it did not include – any mention of the politically charged House Intelligence Committee hearing earlier in the day."

The AP (3/20, Beam) says Kentucky has become "a battleground for the health care debate, with both sides holding it up as an example of the health law's promise and pitfalls." The Louisville (KY) Courier-Journal (3/20, Yetter) says Trump made "a campaign-style stop in Louisville Monday," during which he described the ACA as "'a catastrophe' drawing cheers in a state where it helped achieve one of the nation's sharpest drops among people without health insurance by expanding coverage to more than a half-million Kentuckians."

WKYT-TV Lexington, KY (3/20, 11:02 p.m. EDT) reported that Trump "repeated many of his campaign promises for rebuilding infrastructure, cutting taxes, and creating jobs," but "the big topic" was "healthcare and an upcoming vote in the House on the GOP plan to replace Obamacare." Trump: "Obamacare has been a complete and total catastrophe, and it's getting worse and worse by the day." WDRB-TV Louisville, KY (3/20, 10:01 p.m. EDT) reported that Trump addressed "a number of different promises he made during the campaign" and "did not mention healthcare until the end of his speech."

The New York Times (3/20, Landler) says that while Trump "promised to pass the Republican repeal of the Affordable Care Act," he "presented it largely as a necessity to finance tax cuts." The Washington Post (3/20, Wagner) similarly reports that Trump "sought Monday to bring a heightened urgency to

the task: Getting health care off the table, he told a raucous crowd here, will allow him to get on with renegotiating trade deals and cutting taxes." Earlier, "Trump made a similar pitch on trade deals, arguing that health care needs to be cleared from the agenda before he can start renegotiating deals he said have put the United States at a disadvantage."

Townhall (3/20, O'Brien) also highlights that Trump "said he fully intends to 'massively reduce' our taxes as he gets to work on tax reform. However, he can't do that until the new health care bill is done." To Politico (3/20, Goldmacher), Trump "is increasingly talking about health care like the vegetables of his agenda — the thing he must begrudgingly finish in order to get to what he really wants: tax cuts, trade deals and infrastructure." In Louisville, Trump "time and again framed the passage of a repeal and replacement plan for President Obama's namesake health care law as a necessary step to achieve the rest of his ambitious agenda."

The Lexington (KY) Herald-Leader (3/20, Desrochers) reports that Trump "pledged that the Republican replacement for the Affordable Care Act would pass the House of Representatives on Thursday, only hours after US Sen. Rand Paul told a group of Louisville businessmen that it would fail." Roll Call (3/20, Lesniewski) that while Trump is "cajoling Republicans to support the GOP health care legislation," he has yet to convince Paul, "who spent the day rallying opposition to the GOP plan, both in the Louisville area and back in Washington with his House colleagues."

WHAS-TV Louisville, KY (3/20, 11:01 p.m. EDT) reported that Paul, who has been "an outspoken opponent" of the bill, did not attend Trump's speech. Trump mentioned Paul "as he pushed an urgent call for cooperation." Trump: "Remember this – so true – I happen to like a lot a lot Senator Rand Paul. I do. ... And I look forward to working with him so we can get this bill passed in some form so that we can pass massive tax reform, which we can't do until this happens. So we've got to get this done before we can do the other. In other words we've got to know what this is before we can do the big tax cuts. We got to get it done." WAVE-TV Louisville, KY (3/20, 11:01 p.m. EDT) that Trump "spoke for an hour rallying his fans to common campaign messages. ... But his biggest sales pitch was for healthcare, which Vice President Mike Pence came to Louisville to tout, but Senator Rand Paul has heavily criticized." In an interview with WDRB-TV Louisville, KY (3/20, 10:01 p.m. EDT), Trump was asked what he is prepared to do to get Paul's support. Trump said that Paul "is speaking from the heart. But I think we have a bill that is going to be negotiated" and "in the end, we will have a fantastic bill. The alternative is Obamacare and Obamacare is killing Kentucky." On its website, WDRB-TV Louisville, KY (3/20, Smith) provides a transcript of the interview.

***Trump Says He Wants Provision To Allow Competitive Bidding On Drug Prices.*** Reuters (3/20) reports Trump told the crowd that "he wants to add a provision to the Republican healthcare plan that would lower prescription drug costs through a 'competitive bidding process.'" Trump said, "We're going to have a great competitive bidding process. Medicine prices will be coming way down. ... We're trying to add it to this bill and if we can't, we'll have it right after."

***Trump Cites Report Suggesting NFL Owners Not Signing Kaepernick Over Fear Of A Trump Tweet.*** [USA Today](#) (3/20, Joseph) reports that while speaking in Louisville, ex-San Francisco 49ers quarterback Colin Kaepernick's "NFL free agency surprisingly became a topic of" Trump's address. Of Kaepernick, Trump said "there was an article today that was reported that NFL owners don't want to pick him up because they don't want to get a nasty tweet from Donald Trump. You believe that? I just saw that. I said, 'If I remember that one, I'm gonna report it to the people of Kentucky because they like it when people actually stand for the American flag.' Right?" USA Today adds, "The [article](#) Trump seemed to be referencing originated from Bleacher Report on Friday," and included a quote from an unnamed "AFC general manager," who said that "some teams fear the backlash from fans after getting [Kaepernick]. They think there might be protests or [President Donald] Trump will tweet about the team."

### **Gorsuch Hearings Kick Off With Amiable Remarks And Invocation Of Garland.**

The Senate Judiciary Committee opened hearings on the nomination of Neil Gorsuch to the Supreme Court on Monday, and while reports say the first day – consisting of a statement from the nominee and remarks from committee members – was generally amiable, there were portents of tough questions to come today. Analyses agree that Gorsuch's confirmation is all but inevitable, but that Democrats – many of whom see the vacant seat as having been President Obama's to fill – will strike hard to score points where they can.

[ABC World News](#) (3/20, story 3, 2:15, Llamas) reported that Gorsuch received "a warm welcome" but "faces tough questioning ahead." ABC's Terry Moran: "Judge Neil Gorsuch [was] in the crosshairs today. But cool under fire, even having some fun. For the most part, though, Judge Gorsuch just had to sit and smile and listen to the senators' statements, Republicans praising him..." Sen. Mike Lee: "I know from my own personal experience that you are one of the best judges in the country." Moran: "...and Democrats challenging him, demanding to know if he could rule against President Trump, if the FBI probe into links between Russia and the Trump campaign comes before the court." The [CBS Evening News](#) (3/20, story 4, 2:05, Pelley) reported that "13 months and one presidential election after the death" of Justice Antonin Scalia, "the Senate opened confirmation hearings for his successor." Gorsuch: "You sometimes hear judges cynically described as politicians in robes seeking to enforce their own politics rather than striving to apply the law impartially. If I thought that were true, I would hang up the robe."

The [AP](#) (3/20, Sherman, Werner) reports that Gorsuch "pledged to be independent" and "sought to take the edge off Democratic complaints that he has favored the wealthy and powerful in more than 10 years as a federal judge." In his opening statement, he said, "My decisions have never reflected a judgment about the people before me, only my best judgment about the law and facts at issue in each particular case." [Reuters](#) (3/20, Hurley, Chung) also says that Gorsuch "emphasized the need for judicial independence."

The [New York Times](#) (3/20, Flegenheimer) says Gorsuch "reached often for

comity during a well-practiced 16-minute speech, insisting that he favored no party above the law and appearing to brace for attacks from critics who have said his rulings tilt toward corporate interests." The Times says the Monday hearing was "light on direct confrontation, [and] heavy on senatorial windiness." But "even some criticisms seemed to hint at the likelihood of Judge Gorsuch being seated, one way or another." Senate Minority Whip Durbin said, "You're going to have your hands full with this president. He's going to keep you busy."

In fact, much of the coverage dealt with the nominee's seemingly inevitable success. [Bloomberg Politics](#) (3/20, Litvan, Stohr) says Gorsuch "is a heavy favorite for confirmation given Republicans' 52-48 Senate majority," and Senate Judiciary Chairman Charles Grassley predicted on [CNN's The Lead](#) (3/20) that Gorsuch will get at least eight Democratic votes for cloture to clear the 60-vote threshold. [McClatchy](#) (3/20, Doyle, Wise) says there is "little talk" of a filibuster "among Senate Democratic leaders...who know they need to protect vulnerable members" in conservative states who are up for re-election in 2018.

The [Washington Post](#) (3/20, O'Keefe, Barnes) says Republicans "intend to move quickly" on confirming Gorsuch "so he could be on the court for its final round of oral arguments in late April." Adam Liptak of the [New York Times](#) (3/20) writes that the GOP "will have to move with exceptional speed," since the court "is scheduled to hear arguments in the term's remaining marquee case, the one concerning the separation of church and state," four weeks from tomorrow. Questioning of the nominee begins today, but a [Wall Street Journal](#) (3/20) editorial criticizes Democrats for asking in their Monday statements about how Gorsuch would vote on certain cases as being both inappropriate and impossible to answer without the specifics of each case.

While reports cast Gorsuch as a near-lock, some reports point out that Democrats remain angry over the Senate's inaction on President Obama's choice for the vacancy, Merrick Garland. [NBC Nightly News](#) (3/20, story 5, 1:35, Holt) reported, "Democrats are still seething after the GOP refused to hold hearings" on Garland. The [Wall Street Journal](#) (3/20, Bravin) reports that Judiciary Committee ranking Democrat Sen. Dianne Feinstein mentioned Garland at the top of her remarks, stating, "It was almost a year ago today that President Obama nominated Chief Judge Merrick Garland for this seat. ... I just want to say I'm deeply disappointed that it's under these circumstances that we begin."

[Roll Call](#) (3/20, Ruger) also highlights Feinstein's mention of Garland. The [New York Times](#) (3/20), also focusing on Garland, says in an editorial, "Here's a good question for Judge Neil Gorsuch, who sat before the Senate Judiciary Committee on Monday for the first day of his confirmation hearings to be a Supreme Court justice: Why are you here? There's only one honest answer: 'I shouldn't be.'"

Sarah Ball Teslik, formerly of the Council of Institutional Investors, writes in the [Wall Street Journal](#) (3/20) that two decades ago, Gorsuch's law firm helped to protect pensions, taking a case that others would not. The [Los Angeles Times](#) (3/20, Savage) and [Washington Times](#) (3/20, Swoyer) also have brief reports on the hearing.

## **Editorial Wrap-Up**

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## **New York Times.**

***"Comey's Haunting News On Trump And Russia."*** The New York Times (3/20) calls FBI Director Comey's congressional testimony "a breathtaking admission" that "ought to mark a turning point in how inquiries into Russia's role in the election should be handled." The Times says the President's "brazen warning shots" via Twitter on Monday "do enormous damage to public confidence in the F.B.I.'s investigation," and that an independent prosecutor is needed.

***"Neil Gorsuch Faces The Senate."*** The New York Times (3/20) says in an editorial, "Here's a good question for Judge Neil Gorsuch, who sat before the Senate Judiciary Committee on Monday for the first day of his confirmation hearings to be a Supreme Court justice: Why are you here? There's only one honest answer: 'I shouldn't be.'"

***UN Accepts Blame But Dodges The Bill In Haiti.*** In an editorial, the New York Times (3/21) writes that the UN "says it is terribly concerned about the cholera epidemic in Haiti and wishes to eliminate it," but "has not figured out when and how this is going to happen, and with what money." The Times calls on Secretary-General António Guterres "to use every bit of skill and good will to compel and cajole member nations and philanthropies to make the cholera campaign succeed — and with it, to settle the United Nations' moral debt to Haiti."

## **Washington Post.**

***"Republican Arguments Against Obamacare Are In A Death Spiral."*** A Washington Post (3/20) editorial calls the argument that "any system would be better than the 'collapsing' status quo," the "last rhetorical refuge for defenders of a shoddy GOP replacement plan." However, the Post says "a wide swath of independent experts see no real disaster." Republicans, the Post argues, have "painted a fictional account of total policy disaster in order to make their plan look good."

***"No, Republicans, The Real Story Is Not 'The Leaks.'"*** The Washington Post (3/20) says in an editorial that "to listen to Republican members of the Intelligence Committee, the most pressing problem to arise from Russia's intervention and the FBI's investigation of it is that reports of contacts between Russia's ambassador" and then-NSA Michael Flynn were leaked. The Post says the Republicans "seem to be slavishly following the cues of the president."

***"Don't Let The D.C. Council Handpick Development Deals."*** In an editorial, the Washington Post (3/20) writes DC Mayor Muriel E. Bowser's "decision to seek solicitations for four houses and two vacant lots in historic Anacostia" elicited controversy because the "decision is at odds with a measure passed last year by the D.C. Council directing the city to transfer the four properties to the L'Enfant Trust, a nonprofit that specializes in historic renovations." The Post adds, however, that "L'Enfant Trust had an opportunity to put in its own bid" but declined, and the DC Council "would be setting a terrible precedent" if it granted developers property simply because they asked. The Post asserts Bowser "is right to adhere to established rules for the disposal of city real estate" through

“an open, competitive bidding process.”

### **Wall Street Journal.**

**"Saving Private Health Insurance."** A [Wall Street Journal](#) (3/20) editorial praises the GOP bill's "stability fund," which it says will help people who vulnerable to premium spikes under the ACA.

**"Comey Doesn't Say Much."** The [Wall Street Journal](#) (3/20) says in an editorial that in his congressional testimony, FBI Director Comey revealed little that was new, and took a cautious, overly politic line.

**"Neil Gorsuch, How Would You Vote?"** A [Wall Street Journal](#) (3/20) editorial criticizes Democrats for asking in their Monday statements about how Supreme Court nominee Judge Neil Gorsuch would vote on certain cases as being both inappropriate and impossible to answer without the specifics of each case.

### **Big Picture**

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### **Headlines From Today's Front Pages.**

#### **Wall Street Journal:**

[Comey Confirms FBI Probe Of Trump-Russia Links](#)

[SoftBank Scraps \\$100 Million Investment In iPhone Rival](#)

[Shell's Titanic Bet: Can Deep-Water Drilling Be Done On The Cheap?](#)

[What's Attacking The Web? A Security Camera In A Colorado Laundromat](#)

#### **New York Times:**

[FBI Is Investigating Trump's Russia Ties, Comey Confirms](#)

[Trump's Weary Defenders Face Fresh Worries](#)

[Using Special Forces Against Terrorism, Trump Seeks To Avoid Big Ground Wars](#)

[House Republicans Turn To Upstate New York To Lure Votes For Health Bill](#)

[What Investigation? GOP Responds To FBI Inquiry By Changing Subject](#)

[David Rockefeller, Philanthropist And Head Of Chase Manhattan, Dies At 101](#)

[In New York, Bringing Broadband To Everyone By 2018](#)

#### **Washington Post:**

[Body Cameras Fail To Illuminate Teen's Death](#)

[FBI Is Investigating Trump-Russia Ties](#)

[Girl Flees Salvadoran Gang Violence Only To Find It In Md.](#)

[French Rightist Declares Victory National Front Gains In France](#)

[Gorsuch Faces Partisan Divide As Hearing Opens](#)

#### **Financial Times:**

[Comey Confirms FBI Probe Of Trump Links To Russia](#)

[May's Brexit Trigger Date Yields Initiative To EU27](#)

[Google Apologises To Advertisers For Extremist Videos](#)

#### **Washington Times:**

[FBI Confirms Investigation Into Trump Campaign Ties With Russia](#)

[Gorsuch Casts Himself As Mainstream Judge, Tries To Create Distance From Trump](#)

Tourism Thriving, Economy Expanding In North Carolina Despite Bathroom Bill Desertions

Homeland Security Singles Out 118 Sanctuary Jurisdictions That Thwart ICE  
Other Military Branches Now Face Scrutiny After Marines Nude Photo Scandal  
Iraq's Prime Minister Sees US "More Engaged" In Terror Fight

***Story Lineup From Last Night's Network News:***

**ABC:** House Intelligence Committee; House Intelligence Committee-Wiretapping; Confirmation Hearing-Gorsuch; North Korea-Missiles; Airline Security-Phones Banned; Manhunt-Student Abduction; Louisiana Police Trial; Baltimore Arsonist Caught; Eric Trump-Baby; Tom Brady Jersey Found.

**CBS:** House Intelligence Committee; House Intelligence Committee-White House Reaction; House Intelligence Committee-Adam Schiff; Confirmation Hearing-Gorsuch; Airline Security-Phones Banned; South Sudan Plane Crash; Colorado Wildfire; Nazi War Criminal-US; Tom Brady Jersey Found.

**NBC:** House Intelligence Committee; House Intelligence Committee-Russian Interference; House Intelligence Committee-President Trump Credibility; House Intelligence Committee-Analysis; Confirmation Hearing-Gorsuch; Airline Security-Phones Banned; Tom Brady Jersey Found.

***Network TV At A Glance:***

House Intelligence Committee – 28 minutes, 55 seconds

Confirmation Hearing-Gorsuch – 05 minutes, 55 seconds

Airline Security-Phones Banned – 04 minutes, 00 seconds

***Story Lineup From This Morning's Radio News Broadcasts:***

**ABC:** House Intelligence Committee-Comey Testimony; Confirmation Hearing-Gorsuch; Airline Security-Electronics Limitations; Healthcare Bill-Republican Amendments.

**CBS:** Airline Security-Electronics Limitations; House Intelligence Committee-Comey Testimony; House Intelligence Committee-Wiretapping Claims; President Trump-Kentucky Rally; Confirmation Hearing-Gorsuch; Severe Weather-Crops.

**NPR:** Healthcare Bill-Republican Amendments; House Intelligence Committee-Comey Testimony; Confirmation Hearing-Gorsuch; Airline Security-Electronics Limitations; Scottish Parliament-Independence Referendum; Former South Korean President-Apology.

**Washington Schedule**

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**Today's Events In Washington.**

**White House:**

PRESIDENT TRUMP — Gives the keynote speech at the 2017 National Republican Congressional Committee March Dinner.

VICE PRESIDENT PENCE — No public schedule announced.

**US Senate:** Senate Judiciary Committee continues nominations hearing for new U.S. Supreme Court justice – Nominations hearing considering Neil Gorsuch to be U.S. Supreme Court Associate Justice continues with the beginning of

questioning of the nominee \* Opening statements from Committee members and from Gorsuch were made yesterday, while testimony from outside legal experts is expected to follow the questioning of the nominee \* At the end of January, President Donald Trump named U.S. Court of Appeals for the Tenth Circuit Judge Gorsuch as his nominee to fill the vacancy left by last year's death of U.S. Supreme Court Associate Justice Antonin Scalia. Congressional Republicans previously refused to consider then-President Barack Obama's nominee Merrick Garland Location: U.S. Capitol, Washington, DC <http://judiciary.senate.gov/>

9:30 AM Senate Armed Services Committee hearing on U.S. policy in Europe – Hearing on 'U.S. Policy and Strategy in Europe', with testimony from Georgia Institute of Technology Sam Nunn School of International Affairs Distinguished Professor Gen. (Ret.) Philip Breedlove; Carnegie Endowment for International Peace President William Burns; and Atlantic Council Brent Scowcroft Center on International Security Distinguished Fellow Alexander Vershbow Location: Rm G50, Dirksen Senate Office Bldg, Washington, DC <http://armed-services.senate.gov/>

10:00 AM Senate HELP Committee first hearing on FDA user fee agreements – Hearing on 'FDA User Fee Agreements: Improving Medical Product Regulation and Innovation for Patients Part I', with testimony from Food and Drug Administration Center for Drug Evaluation and Research Director Janet Woodcock, Center for Biologics Evaluation and Research Director Dr Peter Marks, and Center for Devices and Radiological Health Director Jeffrey Shuren Location: Rm 430, Dirksen Senate Office Bldg, Washington, DC <http://help.senate.gov/>

10:00 AM Senate Natural Resources Committee hearing on improving and expanding infrastructure – Hearing on 'Opportunities to improve and expand infrastructure important to federal lands, recreation, water, and resources', with testimony from Pew Charitable Trusts Restore Americas Parks Campaign Director Marcia Argust; National Ski Areas Association Public Lands Committee Chairman Bob Bonar; Washington Trails Association Executive Director Jill Simmons; Virginia State Geologist David Spears; Colorado River District External Affairs Manager Chris Treese; and Novo Power President Brad Worsley Location: Rm 366, Dirksen Senate Office Bldg, Washington, DC [www.energy.senate.gov](http://www.energy.senate.gov)

10:30 AM Senate votes on nominated U.S. Sentencing Commission members – Senate convenes and, following a period of morning business, proceeds to an executive session for the en bloc consideration of the nominations of Charles Breyer and Danny Reeves to be U.S. Sentencing Commission members, followed by a vote Location: Washington, DC <http://www.senate.gov/>

2:30 PM Frank Abagnale testifies to Senate Commerce subcommittee on fighting scams – Consumer Protection, Product Safety, Insurance, and Data Security Subcommittee hearing on 'Staying A Step Ahead: Fighting Back Against Scams Used to Defraud Americans', with testimony from Abagnale & Associates consultant Frank Abagnale, Jr.; Federal Trade Commission Acting Chairman Maureen Ohlhausen, and Commissioner Terrell McSweeney; Ohio Attorney General Mike DeWine; and KWCH-12 Eyewitness News reporter Mike Schwanke Location: Rm 253, Russell Senate Office Bldg, Washington, DC



<http://commerce.senate.gov>

2:30 PM Bipartisan, bicameral Members of Congress mark atrocities in Syria – Senate Committee on Foreign Relations Chairman Bob Corker and Ranking Member Ben Cardin and House Committee on Foreign Affairs Chairman Ed Royce and Ranking Member Eliot Engel host 'Inside Syria's Torture Machine' commemorative event, with the U.S. Holocaust Memorial Museum, to 'recognize the atrocities and crimes against humanity suffered by Syrian civilians'. Other participants include USHMM Simon-Skjodt Center for the Prevention of Genocide Director Cameron Hudson, a Syrian torture survivor, and a Holocaust survivor  
Location: Rm 419, Dirksen Senate Office Bldg, Washington, DC

<http://foreign.senate.gov/>

2:30 PM Senate Aging Committee hearing on 'Raising Grandchildren in the Opioid Crisis and Beyond' – Hearing on 'Grandparents to the Rescue: Raising Grandchildren in the Opioid Crisis and Beyond', with witnesses grandparents Ann Sinsheimer and Marvin Sirbu (from Pittsburgh, by video); grandparent Linda James (from Rochester, NY, by video); and grandparent Belinda Howard (from Fort Walton, FL, by video); and in-person testimony from: Generations United Deputy Executive Director Jaia Peterson Lent; Virginia Tech University Marriage and Family Therapy Doctoral Program Director Megan Dolbin-MacNab; Adoptive & Foster Families of Maine and the Kinship Program Executive Director Bette Hoxie; and A Second Chance Founder, President and CEO Sharon McDaniel  
Location: Rm 562, Dirksen Senate Office Bldg, Washington, DC

<http://aging.senate.gov/>

**US House:** 10:00 AM House Education subcommittee hearing on improving federal student aid – Higher Education and Workforce Development Subcommittee hearing on 'Improving Federal Student Aid to Better Meet the Needs of Students' Location: Rm 2175, Rayburn House Office Bldg, Washington, DC <http://edworkforce.house.gov/> <https://twitter.com/EdWorkforce>

10:00 AM House Natural Resources subcommittee oversight hearing on domestically sourced raw materials for infrastructure projects – Energy and Mineral Resources Subcommittee oversight hearing on 'The Importance of Domestically Sourced Raw Materials for Infrastructure Projects' Location: Rm 1324, Longworth House Office Bldg, Washington, DC

<http://naturalresources.house.gov> <https://twitter.com/NatResources>

10:00 AM House Science and Technology subcommittee latest hearing on the NSF – Research and Technology Subcommittee hearing on 'National Science Foundation Part II: Future Opportunities and Challenges for Science', with testimony from NSF Acting COO Dr Joan Ferrini-Mundy; National Science Board Chair Dr Maria Zuber; Center for Open Science co-founder and CTO Dr Jeffrey Spies; and University of California-San Francisco Vice Chancellor for Science Policy and Strategy Dr Keith Yamamoto Location: Rm 2318, Rayburn House Office Bldg, Washington, DC <http://science.house.gov>

<https://twitter.com/HouseScience>

10:00 AM Madeleine Albright testifies to House Armed Services Committee on 'America's Role in the World' – Hearing on 'America's Role in the World', with testimony from former Secretary of State Madeleine Albright; and former

National Security Advisor Stephen Hadley Location: Rm 2118, Rayburn House Office Bldg, Washington, DC [www.armedservices.house.gov](http://www.armedservices.house.gov)  
<https://twitter.com/HASCRpublicans>

10:00 AM Hearing on '\$125 Billion in Savings Ignored: Review of DoD's Efficiency Study' Location: Rm 2154, Rayburn House Office Bldg, Washington, DC <http://oversight.house.gov/> <https://twitter.com/GOPoversight>

10:00 AM House Appropriations subcommittee hearing on NIH budget – Labor, Health and Human Services, Education, and Related Agencies Subcommittee 'Budget Hearing – National Institutes of Health', with testimony from NIH Director Dr Francis Collins, National Institute of Allergy and Infectious Diseases Director Dr Anthony Fauci, National Heart, Lung and Blood Institute Director Dr Gary Gibbons, National Institute of Mental Health Director Dr Joshua Gordon, National Cancer Institute Director Dr Doug Lowy, and National Institute on Drug Abuse Director Dr Nora Volkow Location: Rm 2358-C, Rayburn House Office Bldg, Washington, DC <http://appropriations.house.gov/>  
<https://twitter.com/HouseAppropsGOP>

10:00 AM Nutrition Subcommittee hearing on 'The Next Farm Bill: Nutrition Distribution Programs' Location: Rm 1300, Longworth House Office Bldg, Washington, DC <http://agriculture.house.gov/>

10:00 AM House Financial Services subcommittee hearing on Bureau of Consumer Financial Protection – Oversight and Investigations Subcommittee hearing on 'The Bureau of Consumer Financial Protection's Unconstitutional Design', with testimony from Gibson, Dunn & Crutcher partner Theodore Olson; University of Virginia School of Law Distinguished Professor Saikrishna Prakash; Hoover Institution Research Fellow Adam White; and Constitutional Accountability Center Chief Counsel Brianne Gorod Location: Rm 2128, Rayburn House Office Bldg, Washington, DC <http://financialservices.house.gov>  
<https://twitter.com/FinancialCmte>

10:00 AM Communications and Technology Subcommittee hearing on 'Broadband: Deploying America's 21st Century Infrastructure' Location: Rm 2322, Rayburn House Office Bldg, Washington, DC  
<http://energycommerce.house.gov/> <https://twitter.com/HouseCommerce>

10:00 AM Dem Rep. Alcee Hastings host briefing on protecting dogs and cats from human consumption in the U.S. – Democratic Rep. Alcee Hastings hosts Congressional briefing on protecting dogs and cats from human consumption in the U.S., with Animal Hope & Wellness Foundation Founder and CEO Marc Ching and Executive Director Valarie Ianniello, actress Shannen Doherty Location: Rm 2168, Rayburn House Office Bldg., Washington, DC [www.alceehastings.house.gov](http://www.alceehastings.house.gov) <https://twitter.com/RepHastingsFL>

10:00 AM House Transportation subcommittee roundtable on emerging railroad technologies – House Transportation and Infrastructure Committee Railroads, Pipelines, and Hazardous Materials Subcommittee roundtable on 'Emerging Railroad Technologies' Location: Rm 2167, Rayburn House Office Bldg, Washington, DC <http://transportation.house.gov/> <https://twitter.com/Transport>

10:15 AM House Commerce subcommittee hearing on fentanyl – Oversight and Investigations Subcommittee hearing on 'Fentanyl: The Next Wave of the

Opioid Crisis', with testimony from Immigration and Customs Enforcement Homeland Security Investigations Assistant Director of Homeland Security Investigative Programs Matthew Allen; Assistant Secretary of State for International Narcotics and Law Enforcement Affairs William Brownfield; Office of National Drug Control Policy Acting Deputy Director Kemp Chester; NIH National Institute on Drug Abuse Deputy Director Dr Wilson Compton; CDC National Center for Injury Prevention and Control Director Dr Debra Houry; and Drug Enforcement Administration Assistant Administrator for Diversion Control Louis Milione Location: Rm 2123, Rayburn House Office Bldg, Washington, DC <http://energycommerce.house.gov/> <https://twitter.com/HouseCommerce>

1:00 PM Tom Lantos Human Rights Commission hearing on 'Threats to Civil Society around the World' – Tom Lantos Human Rights Commission hearing on 'Threats to Civil Society around the World', discussing the range of threats to civil society world-wide, analyzing their impact on human rights and democracy globally, and offering policy recommendations for the Congress and the U.S. Govt. Witnesses are United Nations special rapporteur on the rights to freedom of peaceful assembly and of association Maina Kiai, Freedom House Vice President for Analysis Vanessa Tucker, Amnesty International USA Executive Director Margaret Huang, International Center for Not-for-Profit Law President and CEO Douglas Rutzen, and U.S. Institute of Peace Senior Policy Fellow Maria Stephan Location: Rm 2255, Rayburn House Office Bldg, Washington, DC <http://tlhrc.house.gov/> <https://twitter.com/TLHRCCommission>

1:00 PM House Judiciary Committee hearing on DoJ management and fiscal challenges – Hearing on 'Examining Systemic Management and Fiscal Challenges within the Department of Justice', with testimony from DoJ Inspector General Michael Horowitz; and Government Accountability Office Director of Homeland Security and Justice Issues Diana Maurer Location: Rm 2141, Rayburn House Office Bldg, Washington, DC <http://judiciary.house.gov/> <https://twitter.com/HouseJudiciary>

2:00 PM House Financial Services subcommittee hearing on 'Ending the De Novo Drought' – Financial Institutions and Consumer Credit Subcommittee hearing on 'Ending the De Novo Drought: Examining the Application Process for De Novo Financial Institutions', with testimony from FirstCapital Bank of Texas Chairman Ken Burgess (on behalf of American Bankers Association); Lutheran Federal Credit Union CEO Ken Krueger (on behalf of National Association of Federally-Insured Credit Unions); Kennedy Sutherland Managing Partner Patrick Kennedy (on behalf of Subchapter S Bank Association); and Center for American Progress Director of Housing Policy Sarah Edelman Location: Rm 2128, Rayburn House Office Bldg, Washington, DC <http://financialservices.house.gov> <https://twitter.com/FinancialCmte>

2:00 PM House Foreign Affairs subcommittee hearing on North Korea – Asia and the Pacific Subcommittee hearing on 'Pressuring North Korea: Evaluating Options', with testimony from Heritage Foundation Senior Research Fellow for Northeast Asia Bruce Klingner; and Tufts University Fletcher School of Law and Diplomacy Professor in Korean Studies Dr Sung-Yoon Lee Location: Rm 2172, Rayburn House Office Bldg, Washington, DC <http://www.hcfa.house.gov>

<https://twitter.com/HFACrepublicans>

2:00 PM Livestock and Foreign Agriculture Subcommittee hearing on 'The Next Farm Bill: Livestock Producer Perspectives' Location: Rm 1300, Longworth House Office Bldg, Washington, DC <http://agriculture.house.gov/>

2:00 PM House Veterans' Affairs subcommittee legislative hearing – Economic Opportunity Subcommittee legislative hearing on 'H.R. 1461, Veterans, Employees, and Taxpayers Protection Act of 2017' Location: Rm 334, Cannon House Office Bldg, Washington, DC <http://veterans.house.gov/>  
<https://twitter.com/HouseVetAffairs>

2:00 PM House Oversight subcommittee hearing on the Bureau of Safety and Environmental Enforcement – Interior, Energy, and Environment Subcommittee hearing on 'Examining GAO Findings on Deficiencies at the Bureau of Safety and Environmental Enforcement' Location: Rm 2154, Rayburn House Office Bldg, Washington, DC <http://oversight.house.gov/>  
<https://twitter.com/GOPoversight>

2:30 PM Bipartisan, bicameral Members of Congress mark atrocities in Syria – Senate Committee on Foreign Relations Chairman Bob Corker and Ranking Member Ben Cardin and House Committee on Foreign Affairs Chairman Ed Royce and Ranking Member Eliot Engel host 'Inside Syria's Torture Machine' commemorative event, with the U.S. Holocaust Memorial Museum, to 'recognize the atrocities and crimes against humanity suffered by Syrian civilians'. Other participants include USHMM Simon-Skjodt Center for the Prevention of Genocide Director Cameron Hudson, a Syrian torture survivor, and a Holocaust survivor Location: Rm 419, Dirksen Senate Office Bldg, Washington, DC  
<http://foreign.senate.gov/>

3:00 PM Tom Lantos Human Rights Commission briefing on ending violence against women in politics – Tom Lantos Human Rights Commission briefing on 'Ending Violence Against Women in Politics' – co-hosted by bipartisan Reps. Jan Schakowsky, Ann Wagner, Suzanne Bonamici, and Salud Carbajal – explaining 'the surprising prevalence and destructive impact of this little-known issue' and exploring ways the U.S. can contribute to preventing and mitigating violence against women in politics. Panelists are UN Women Leadership and Governance section chief (and former Spanish Member of Parliament) Begona Lasagabaster, former Malawian President Dr Joyce Banda, and Inter-Parliamentary Union Permanent Observer to the United Nations (and former Canadian Member of Parliament) Paddy Torsney \* Reps. Schakowsky, Bonamici, and Carbajal deliver opening remarks Location: SVC-215, U.S. Capitol, Washington, DC  
<http://tlhrc.house.gov/> <https://twitter.com/TLHRCCommission>

3:30 PM Military Personnel Subcommittee hearing on 'Social Media Policies of the Military Services' Location: Rm 2118, Rayburn House Office Bldg, Washington, DC [www.armedservices.house.gov](http://www.armedservices.house.gov)  
<https://twitter.com/HASCRpublicans>

**Other:** 10:00 AM Dem Rep. Adam Schiff speaks on 'protecting liberal democracy' at Brookings – Democratic Rep. Adam Schiff speaks on 'The role of Congress in protecting liberal democracy' at the Brookings Institution, discussing what can be done to protect liberal democracy domestically and internationally,

the role Congress can play in repelling illiberalism – whether it come from Moscow or Fifth Avenue – and engaging civil society in that effort, and how Congress should think about discharging their constitutional duties during this period of ‘uncertainty’ Location: Brookings Institution, 1775 Massachusetts Ave NW, Washington, DC [www.brookings.edu](http://www.brookings.edu) <https://twitter.com/BrookingsChina>

7:00 AM American Bankers Association Government Relations Summit continues – American Bankers Association Government Relations Summit continues, including briefings on legislative issues and working sessions with key regulatory officials. Day two speakers include Democratic Sen. Sherrod Brown, Republican Sen. Mike Rounds, Assistant to the Vice President and Chief Economist Mark Calabria, Fox News Sunday host Chris Wallace, American Bankers Association President and CEO Rob Nichols, and ABA Chairman Dorothy Savarese Location: Washington Marriott Marquis, Washington, DC <http://www.aba.com> <https://twitter.com/ABABankers>

8:00 AM VA Secretary Shulkin speaks at POLITICO ‘Outside In – Digital Health Pioneer’ event – POLITICO hosts ‘Outside In – Digital Health Pioneer: Lessons from the VA’, a conversation with Secretary of Veterans Affairs David Shulkin on the future of the VA and how the political debate over the department has ‘overshadowed ways in which it has been an innovator in patient care coordination and health technology’ Location: The Newseum, 555 Pennsylvania Ave, Washington, DC [www.politico.com](http://www.politico.com) <https://twitter.com/POLITICOEvents> #OutsideIn

8:30 AM New America / Arizona State University annual Future of War Conference – New America / Arizona State University third Future of War Conference. Speakers include U.S. Air Force Chief of Staff Gen. David Goldfein, U.S. Army Chief of Staff Gen. Mark Milley, former Iraq Ambassador to the U.S. Lukman Faily, former Deputy Assistant Secretary of Defense for Russia/Ukraine/Eurasia Dr Evelyn Parkas, Colombia Ambassador to the U.S. Amb. Juan Carlos Pinzon, and New America President and CEO Anne-Marie Slaughter Location: Ronald Reagan Bldg & International Trade Center, 1300 Pennsylvania Ave NW, Washington, DC <http://www.newamerica.org/> <https://twitter.com/NatSecNAF> #FutureofWar

1:30 PM CSIS discussion on Australian and Indonesian energy, security and diplomatic issues – ‘Australia and Indonesia: Energy, Resources, and Security at the Fulcrum of the Indo-Pacific’ Center for Strategic and International Studies discussion on the energy, resource, security and diplomatic issues they will face in the coming years. Speakers include Deputy Chief of Staff to Indonesian President Joko Widodo, Darmawan Prasodjo, Foreign Policy Community of Indonesia Founder Dino Patti Djalal, Perth USAsia Centre Energy Security Program Director Andrew Pickford, University of Western Australia Energy and Minerals Institute Director Mark Stickells, Perth USAsia Centre CEO Gordon Flake, and Embassy of Australia Political Counselor Paul Griffiths Location: CSIS, 1616 Rhode Island Ave., Washington, DC <http://www.csis.org> <https://twitter.com/CSIS>

**Last Laughs**

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## **Late Night Political Humor.**

*Jimmy Fallon:* "You guys, today is the first day of spring...I have to say, it's nice waking up to the birds tweeting instead of the President tweeting. It's nice."

*Jimmy Fallon:* "A man claims that this weekend, he snuck past Secret Service at Mar-a-Lago to take a selfie in President Trump's private study. But Trump is denying this, saying there's no way he'd ever have a study."

*Jimmy Fallon:* "This weekend was actually Trump's fifth visit to Mar-a-Lago in the eight weeks he's been President. And this is weird. Each night at dinner, he makes the staff dress up as a clock, a teapot, and candlestick to sing 'Be Our Guest.'"

*Jimmy Fallon:* "And I didn't know this, but this is true. Every time Trump goes to Florida, he leaves a little note on the door to the Oval Office saying that he's gone. Like, for instance, one note said, 'Be back in five days.' Another one said, 'Please water my plants and take Paul Ryan for a walk twice a day.'"

*Jimmy Kimmel:* "This morning, President Trump woke up, tweeted from the toilet, which means we get six more weeks of spring."

*Jimmy Kimmel:* "Director Comey also weighed in on Trump's claim that Obama wiretapped him at his office. That didn't go Trump's way either...Imagine working at Department of Justice, having the boss tell you, 'I have some tweets I need you to look into.' The FBI and Justice Department have no evidence to support Trump's story. That means Donald Trump really did just see something on Fox News, assumed it was true, and ran with it."

*Jimmy Kimmel:* "Trump's approval rating down to 37 percent. Bill Clinton had to do weird stuff with cigars to get it to 37 percent. Trump has the highest low approval rating of any President ever."

*Jimmy Kimmel:* "[Trump] met with Bill Gates today. It was an historic meeting. America's two worst haircuts in the Oval Office together for the first time. They reportedly talked about their shared commitment to finding and stopping disease outbreaks around the world. You know, that's great. But if Bill Gates wanted to do some good, he should have grabbed Trump's phone and locked him out of his Twitter account."

**Stephen Colbert:** "Trump is also eliminating the National Endowment for the Arts and the National Endowment for the Humanities. I'm not surprised. He's jealous of people who are well-endowed."

**Stephen Colbert:** "Plus, Trump's slashing the EPA's budget by 31 percent, and 'the Great Lakes Restoration Initiative,' which fights invasive species like the sea lamprey, could see its funding slashed by 97 percent. If you're not familiar with the sea lamprey, you might know it as the vicious, flesh-eating hell beast from your worst nightmares...Or as Steve Bannon calls it, 'my mentor.'"

**James Corden:** "Meanwhile, plans for the border wall continue. On Sunday, Fox News reported several requirements that the White House has issued for the wall. Now this is real. They said it must be 30 feet high, good-looking from the US side, and difficult to break through. Basically, the wall should be tall, but not fat or ugly. It's pretty much like Trump just updated the Miss Universe regulations and just made them about the wall, isn't it?"

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Christina Summers, FAC P/PM  
Program Analyst

On detail to the Office of the Assistant Secretary/Policy, Management & Budget  
202 208 4030 (Work)

Office of the Director  
Interior Business Center  
202-802-6174 (Cell) [christina\\_summers@ibc.doi.gov](mailto:christina_summers@ibc.doi.gov)  
US Department of the Interior  
Office of the Secretary  
[www.ibc.doi.gov](http://www.ibc.doi.gov)

Your Focus: Your Mission

Our Focus: You



**To:** Magallanes, Downey[downey\_magallanes@ios.doi.gov]  
**Cc:** Casey Hammond[casey\_hammond@ios.doi.gov]  
**From:** Carrie Domnitch  
**Sent:** 2017-03-21T09:55:17-04:00  
**Importance:** Normal  
**Subject:** RE: Bee  
**Received:** 2017-03-21T09:55:24-04:00

Thank you Downey, and great to see your name over there Casey! It's been a while but look forward to working with you on these issues.

The coalition is considering next steps perhaps the best thing would be for Casey to share your contact info (phone number, obviously have your email now) and I can share that with the coalition and we can be in touch.

Thank you both.

Carrie

---

Carrie M. Domnitch  
API

**From:** Magallanes, Downey [mailto:downey\_magallanes@ios.doi.gov]  
**Sent:** Tuesday, March 21, 2017 9:19 AM  
**To:** Carrie Domnitch  
**Cc:** Casey Hammond  
**Subject:** Bee

Carrie,

I know you are slammed with the venting and flaring rule, but wanted to follow up on the bee. Wanted to make sure I connected you with Casey who is in the FWA hallway. Please let us know if we should be engaging in outreach with the other petitioners on this and if you all want to set up a meeting.

Thanks, Downey

--

Downey Magallanes  
Office of the Secretary  
[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)  
202-501-0654 (desk)  
202-706-9199 (cell)

**To:** Hammond, Casey[casey\_hammond@ios.doi.gov]  
**Cc:** Magallanes, Downey[downey\_magallanes@ios.doi.gov]  
**From:** Carrie Domnitch  
**Sent:** 2017-03-21T13:33:51-04:00  
**Importance:** Normal  
**Subject:** RE: Bee  
**Received:** 2017-03-21T13:34:21-04:00

YES!! Did you go to her? I don't remember that at all. She actually "retired" and they moved down to N Myrtle Beach and then my husband and I started having kids so she made them move back up here and she actually started her own practice in Gainesville which is where she and my father-in-law settled.

Will be back in touch.

---

Carrie M. Domnitch  
API

**From:** Hammond, Casey [mailto:casey\_hammond@ios.doi.gov]  
**Sent:** Tuesday, March 21, 2017 1:28 PM  
**To:** Carrie Domnitch  
**Cc:** Magallanes, Downey  
**Subject:** Re: Bee

Hi Carrie,

It has been a long time. I hope things are going well. My number here is 208-4070. Looking forward to speaking with you. Was/Is your mother in law an optometrist in Burke?

Casey

On Tue, Mar 21, 2017 at 9:55 AM, Carrie Domnitch <[domnitchc@api.org](mailto:domnitchc@api.org)> wrote:  
Thank you Downey, and great to see your name over there Casey! It's been a while but look forward to working with you on these issues.  
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[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)  
202-501-0654 (desk)  
202-706-9199 (cell)

**To:** Hammond, Casey[casey\_hammond@ios.doi.gov]  
**From:** Carrie Domnitch  
**Sent:** 2017-03-21T14:20:23-04:00  
**Importance:** Normal  
**Subject:** RE: Bee  
**Received:** 2017-03-21T14:20:41-04:00

It's probably a haul but here's her new practice. <http://www.gheye.com/>

---

Carrie M. Domnitch  
API

**From:** Hammond, Casey [mailto:casey\_hammond@ios.doi.gov]  
**Sent:** Tuesday, March 21, 2017 2:14 PM  
**To:** Carrie Domnitch  
**Subject:** Re: Bee

I went to her years ago and I always remembered the connection. I wish she was still there because I just went back to that location a couple months ago and my rx needs more work. Maybe I need to get out to gainseville.

On Tue, Mar 21, 2017 at 1:33 PM, Carrie Domnitch <[domnitchc@api.org](mailto:domnitchc@api.org)> wrote:  
YES!! Did you go to her? I don't remember that at all. She actually "retired" and they moved down to N Myrtle Beach and then my husband and I started having kids so she made them move back up here and she actually started her own practice in Gainesville which is where she and my father-in-law settled.

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Thanks, Downey

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Downey Magallanes  
Office of the Secretary  
[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)  
202-501-0654 (desk)  
202-706-9199 (cell)

**To:** amanda\_kaster@ios.doi.gov[amanda\_kaster@ios.doi.gov]  
**From:** Alan Olson  
**Sent:** 2017-03-21T16:19:56-04:00  
**Importance:** Normal  
**Subject:** venting and flaring  
**Received:** 2017-03-21T16:20:06-04:00  
BLM venting flaring 1 - Petition for Review.pdf

Amanda,

I have attached Montana's petition for review on the BLM's venting and flaring rule to the Federal court in Wyoming. I think it gets to our point well.

Another I idea I would like to float by you on this issue as well as a potential budget consideration is the removal of BLM regulatory programs including permitting on production and drilling units that contain less than 51% Federal minerals. This can easily be done at the state level with existing programs.

Great Talking to you yesterday!

Thanks,  
Alan

**Alan Olson, Executive Director**  
**Montana Petroleum Association**  
PO Box 1186  
Helena, Montana 59624

Telephone;  
Office 406.442.7582  
Cell 406.320.1385

Email [alan@montanapetroleum.org](mailto:alan@montanapetroleum.org)  
Website [www.montanapetroleum.org](http://www.montanapetroleum.org)



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*Attorneys for Petitioner State of Montana*

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF WYOMING**

STATE OF WYOMING and STATE OF  
 MONTANA )

Petitioners, )

v. )

UNITED STATES DEPARTMENT OF )  
 THE INTERIOR; SALLY JEWELL, in her )  
 official capacity as Secretary of the Interior; )  
 UNITED STATES BUREAU OF LAND )  
 MANAGEMENT; and NEIL KORNZE, in )  
 his official capacity as Director of the )  
 Bureau of Land Management )

Respondents. )

Civil No. 16-CV-285-8

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**PETITION FOR REVIEW OF FINAL AGENCY ACTION**

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The State of Wyoming and the State of Montana petition the Court for review of the final agency action of the United States Department of the Interior, Interior Secretary Sally Jewell, the Bureau of Land Management, and Bureau Director Neil Kornze (collectively the Bureau) in promulgating the methane rule published in the Federal Register on November 18, 2016. *See Waste Prevention, Production Subject to Royalties, and Resource Conservation*. 81 Fed. Reg. 83008. (Nov. 18, 2016). The Bureau's rule is a blatant attempt by a land management agency to impose air quality regulations on existing oil and gas operations under the guise of waste prevention. Congress specifically delegated authority to regulate air pollution to the United States Environmental Protection Agency (EPA) and the states because they are in the best position to regulate air quality matters. The Bureau's rule conflicts with the Clean Air Act and unlawfully interferes with Wyoming and Montana air quality regulations. The Bureau does not have the authority, much less the agency expertise, to impose the air quality control requirements promulgated in the final rule.

1. This Court has jurisdiction over this Petition under 28 U.S.C. § 1331 because the claims presented arise under federal law.

2. Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(C) because Petitioner State of Wyoming resides within the District of Wyoming.

3. The promulgation of the methane rule is a final agency action subject to appellate review in this Court. 5 U.S.C. § 702; *see also Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994); U.S.D.C.L.R. 83.6(a)(1).

4. The Administrative Procedure Act requires courts to hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Additionally, the Administrative Procedure Act requires courts to

hold unlawful and set aside agency action found to be in excess of statutory jurisdiction, authority, or limitation, or short of statutory right. *Id.* § 706(2)(C).

5. “A federal agency is a creature of statute and derives its existence, authority and power from Congress alone. It has no constitutional or common law existence or authority outside that expressly conveyed to it by Congress. In the absence of authority, then, an administrative agency has none.” *Wyoming v. Dep’t. of the Interior*, No. 15-cv-043, 2016 WL 3509415, \*12 (D. Wyo. June 21, 2016) (citations omitted). The Bureau claims authority for the methane rule from general language found in the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701-1787 the Federal Oil and Gas Royalty Management Act (FOGRMA), 30 U.S.C. §§ 1701-1759, and the Mineral Leasing Act (MLA), 30 U.S.C. §§ 188-287. 81 Fed. Reg. at 83019. However, those statutes do not evidence any Congressional intent that the Bureau should develop and implement air quality regulations like those issued in the methane rule. Rather, the MLA and FOGRMA authorize the Bureau to oversee mineral leasing on federal land, including by assessing royalties and preventing the waste of federal mineral resources. 43 U.S.C. §§ 1701-1787; 30 U.S.C. §§ 1701-1759.

7. The Bureau’s rule assumes that every oil and gas operation on a federal lease emits nothing but federal minerals, as opposed to a mix of constituents that may or may not include federal minerals. It is arbitrary and capricious for the Bureau to categorize its total control of all emissions under the guise of “waste minimization.” Congress has not delegated authority to the Bureau to regulate emissions, much less emissions that are not federal minerals.

8. Even if some emissions do contain federal minerals, there is no difference between wasting the federal minerals through flaring and wasting them through venting. A distinction between flaring the federal minerals and venting the federal minerals, as described in this rule,

matters only for air quality regulation. MLA and FOGRMA do not authorize the Bureau to regulate air quality. The Bureau's attempt in the final rule to develop a complex flaring averaging system does not transform the act of burning air emissions into a "waste minimization" mechanism. 81 Fed. Reg. at 83037.

9. FLPMA authorizes the Bureau to ensure there is no undue degradation of public lands. 43 U.S.C. § 1732(b). In order to avoid undue degradation of the public lands from air pollution, the Bureau's surface management regulations require owners and operators to comply with state and federal air quality laws and regulations. 43 C.F.R. § 3809.420(b)(4).

10. State and federal air quality laws and regulations are developed under the Clean Air Act through a cooperative federalism system in which states and the EPA work together to control air pollution. 42 U.S.C. § 7401. The Clean Air Act does not give the Bureau authority to participate in this process.

11. The Bureau's final rule does not comport with the Administrative Procedure Act because it extends into jurisdictional territory Congress specifically carved out for the EPA and the states. 5 U.S.C. § 706(2)(C). In the Clean Air Act, Congress specifically delegated to the EPA the authority to control emissions from new and existing oil and gas production facilities. 42 U.S.C. § 7411. Thus, the EPA already regulates emissions of volatile organic compounds, sulfur dioxide, and methane from new and modified oil and gas production facilities. 40 C.F.R. §§ 60.5360-60.5430 and 60.5360a-60.5432a The Bureau's final rule attempts to step into the EPA's shoes to regulate existing facilities, even though the EPA is currently working on a rule to regulate existing facilities. Oil and Natural Gas Sector: Request for Information, Emerging Technologies. 81 Fed. Reg. 46670 (July 18, 2016).

12. The Bureau's final rule is arbitrary, capricious, and exceeds the Bureau's authority under FLPMA because the rules establish air quality control methods that conflict with those already established by the EPA and the states under the Clean Air Act. In doing so, the Bureau's final rule unlawfully interferes with Wyoming and Montana's air quality pollution control regimes and also unlawfully conflicts with Wyoming and Montana's state implementation plans. Both Wyoming and Montana regulate venting and flaring. *Rules Wyo. Oil and Gas Conserv. Comm'n*, ch. 3, § 39; *Rules Mont. Dep't Natural Res. and Conserv.*, ch. 36.22 §§ 1216-1221. Both Wyoming and Montana regulate air emissions from oil and gas production facilities through robust permitting processes that are incorporated into each state's federally enforceable State Implementation Plan. *Rules Wyo. Dep't of Envtl. Quality, Air Quality*, ch. 6, § 2; 40 C.F.R. § 52.2620, subpart ZZ; *Rules Mont. Dep't of Envtl. Quality, Air Quality*, ch. 17.8, §§ 1601-1606 and 1710-1713; 40 C.F.R. § 52.1370, subpart BB.

14. Finally, the Bureau's rule unlawfully attempts to take over regulation of state leases when state and federal tracts are combined through communitization agreements. 43 C.F.R. § 3217.11. This directly conflicts with the States' right to be the primary authority over state minerals. Whatever limited statutory authority Congress gave to the Bureau to regulate federal minerals, it did not authorize the Bureau to take over the regulation of state mineral leases from the states.

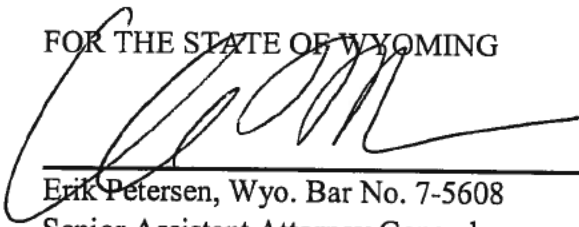
15. For these and other reasons that will be more fully detailed in the States' merits briefs, the Bureau's methane rule must be set aside.

Petitioners request that this Court:

- A. Declare that the Respondents, in promulgating the Bureau's methane rule, acted in excess of their statutory authority, 5 U.S.C. § 706(2)(A), 43 U.S.C. §§ 1701-87, 30 U.S.C. §§ 1701-1759, 30 U.S.C. §§ 188-287;
- B. Set aside and vacate the Bureau's methane rule;
- C. Enter other temporary, preliminary, or permanent injunctive relief as the Petitioners may hereafter specifically seek; and
- D. Grant Petitioners such additional relief as the Court deems just and proper to remedy Respondents' violations of law and protect Petitioners' interests.

Submitted this 18th day of November, 2016.

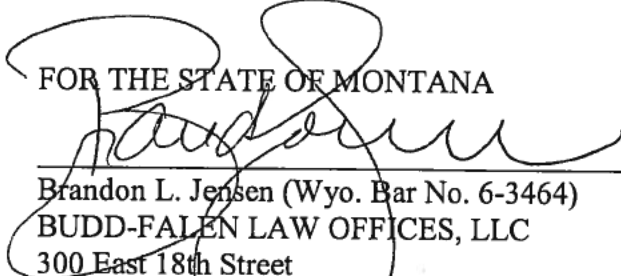
FOR THE STATE OF WYOMING



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*Attorneys for Petitioner State of Montana*

**To:** micah\_chambers@ios.doi.gov[micah\_chambers@ios.doi.gov]  
**From:** Gruman, Mark  
**Sent:** 2017-03-21T17:03:13-04:00  
**Importance:** Normal  
**Received:** 2017-03-21T17:04:10-04:00  
1703 - BisMan Chamber letter to HH on BLM Rule.pdf  
ATT00001.txt

March 21, 2017

Dear Senators Hoeven and Heitkamp:

On behalf of the Bismarck-Mandan Chamber of Commerce, I am writing to ask that you vote in support of the Congressional Review Act that will repeal the Obama administration's BLM Venting and Flaring Rule.

The development of the Bakken resource has benefited all businesses in our State, not just those directly associated with oil and gas development. The industry is consistently ranked across all data sources as the top employer in North Dakota, the most recently release numbers showing that the industry employs 73,000 North Dakotans, a figure representing 20 percent of private sector jobs and 30 percent of private sector wages.

The impact of these jobs flows throughout our communities and rules negatively affecting the oil and gas industry will cause a continuation of the impact of the industry's slowdown, just as a recovery has begun. Likewise, the tax base created by the industry has benefited the State of North Dakota, and its people and small businesses. Despite the downturn, the industry will pay \$3.2 billion in severance taxes in the 2017-2019 biennium:

- More than \$500 million and nearly \$240 million will be shared with local and tribal governments, respectively. These funds are vital for these entities; for instance, the taxes paid to the MHA nation total nearly \$44,000 per resident in the biennium
- \$300 million will be used in the state's general fund for current priorities
- \$2.1 billion will be saved to the state's many long-term funds, including nearly \$900 million in the Legacy Fund and \$132 million to each the Foundation Aid Stabilization Fund and the Common Schools Trust Fund, ensuring education funding for education through any future economic climate

As the voice of more than 1,400 local businesses, we continue to support the primary sector industries that funnel dollars into our community, and contribute to the success of our other residents such as main street businesses, builders, and other local entrepreneurs. We want a healthy environment and support reasonable regulations that protect it. However, this rule answers a problem already solved by the state government, does not create any meaningful benefit to the environment, and hinders energy development.

Thus, we strongly urge you to support the North Dakota energy industry, its workers, and our local businesses with a vote to repeal the Obama administration's BLM Venting and Flaring Rule.

Sincerely,



Scott Meske, President  
Bismarck Mandan Chamber of Commerce



Sent from my iPhone

**To:** micah\_chambers@ios.doi.gov[micah\_chambers@ios.doi.gov];  
amanda\_kaster@ios.doi.gov[amanda\_kaster@ios.doi.gov];  
'katharine\_macgregor@ios.doi.gov'[katharine\_macgregor@ios.doi.gov]  
**Cc:** Roberson, Kelly[Kelly.Roberson@mail.house.gov]  
**From:** Small, Jeff  
**Sent:** 2017-03-22T17:55:25-04:00  
**Importance:** Normal  
**Subject:** Timely Appropriations Questions  
**Received:** 2017-03-22T18:05:28-04:00  
[Actual language from fiscal year 2017 Interior bill on key policy matters.docx](#)  
[FY18 Interior and Environment Approps Ideas.docx](#)

Micah, Amanda and Kate,

We wanted to reach out as House Interior Appropriations requests are due on March 30<sup>th</sup>. There haven't been a lot of requests circulated by our members to date or Republicans in general so we are trying to get them going. We sent the below email this morning along with the second attachment that includes a bunch of ideas.

We held a briefing with Interior Appropriations staff last week. In the meeting staff made the comment that because of all the executive actions you all are taking, their negotiations and bills are going to be a lot easier, implying they are going to take a lot of our riders out of last year's bill.

My boss and several of our members have concerns with this approach. We are thrilled with all the actions the Administration is taking. However, our members believe we still need to submit a lot of these big ticket requests as litigation and/or future administrations could undermine these executive actions.

For instance, the WOTUS review could take a while to resolve. Further, while we know something is likely coming, there has been no action yet on the Social Cost of Carbon, Clean Power Plan, Coal Moratorium, ONRR Valuation rule etc.

Accordingly, many of our members believe we should seek to include these requests in the base appropriations bill, especially if they were in the bill last year.

Having said that, we wanted to coordinate with you all to ensure that by putting in/retaining some of these riders we don't mess things up on your end and prevent you from being able to do a rulemaking or rescind a bad Obama rule.

Anyway, the first attachment has most of the actual language that was in last year's Interior bill. Can you all review and let us know if the agency would recommend any tweaks to any of these provisions or if we should definitely not submit any of these again this year.

Your timely review and general feedback would be appreciated as we need to get the rest of these circulating so we can gather signatures and submit by the Appropriations deadline next Thursday.

Sincerely,

**Jeff Small**

*Executive Director | Congressional Western Caucus*

*Senior Advisor | Congressman Paul A. Gosar, D.D.S.*

Western Caucus Staff —

Attached are lots of member request ideas for the fiscal year 2018 Interior and Environment Appropriations bill.

The deadline for submissions for this bill is **3/30/17 COB**. Western Caucus recommends that you email your boss's final signed letters for this bill to other cosigning offices no later than **3/29/17 COB** to ensure all these offices submit them.

If your boss would like to lead any of the member request ideas, let Kelly or me know. We are happy to help write letters and short dear colleagues (See third attachment for a good example from last year). Please give deference to members that have led on issues previously. Members are encouraged to have any language requests drafted by leg. counsel. This is not necessary for programmatic requests.

Thank you to all of you that attended our Appropriations meeting last week with Darren Benjamin from the Interior Subcommittee Appropriations Staff. Darren referenced a CRS report which has a lot of good info about the Appropriations process (See second attachment). Darren's big take away was that if you are working on a member request or amendment and have questions, please call or email Appropriations staff. Please also call or email us if you have questions or if we can be helpful. Instructions for submitting these requests can be found [HERE](#).

Please also send us any Interior and Environment or Energy and Water member request letters your boss is circulating so we can help get cosigners. We will have several appropriations items blasts going out over the next couple weeks.

*We will be sending a similar Energy and Water Member Request Ideas email in the near future.*

**Jeff Small**

*Executive Director | Congressional Western Caucus*  
(202) 225-2315 main

## **Actual language from fiscal year 2017 Interior bill on key policy matters**

**SEC. 114. GREATER SAGE-GROUSE.** (a) None of the funds made available by this or any other Act may be used

(1) to review the status of or determine whether the greater sage-grouse is an endangered species or a threatened species pursuant to section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533), or to issue a regulation with respect thereto that applies to any State with a State management plan;

(2) to make, modify, or extend any withdrawal pursuant to section 204 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1714) within any Sagebrush Focal Area published in the Federal Register on September 24, 2015 (80 Fed. Reg. 57635 et seq.), in a manner inconsistent with a State management plan; or

(3) to implement, amend, or otherwise modify any Federal resource management plan applicable to Federal land in a State with a State management plan, in a manner inconsistent with such State management plan.

(b) For the purposes of this section

(1) the term “Federal resource management plan” means

(A) a land use plan prepared by the Bureau of Land Management for public lands pursuant to section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712); or

(B) a land and resource management plan prepared by the Forest Service for National Forest System lands pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);

(2) the term “greater sage-grouse” means the species *Centrocercus urophasianus* or the Columbia Basin distinct population segment of greater sage-grouse; and

(3) the term “State management plan” means a State-wide plan for the protection and recovery of greater sage-grouse that has been approved by the Governor of such State.

**SEC. 115. WATER CONVEYANCES.** None of the funds made available by this or any other Act may be used by the Secretary of the Interior to review, require approval of, or withhold approval for use of a right-of-way granted pursuant to the General Railroad Right-of-Way Act of 1875 (43 U.S.C. 934-939) if authorization of the use would have been considered under Department policy to be within the scope of a railroad’s authority as of the day before the effective date of the Department’s Solicitor’s Opinion M-37025, issued on November 4, 2011.

**SEC. 427. WATERS OF THE UNITED STATES.** None of the funds made available in this Act or any other Act for any fiscal year may be used to develop, adopt, implement, administer, or enforce any change to the regulations and guidance in effect on October 1, 2012, pertaining to the definition of waters under the jurisdiction of the Federal Water Pollution Control Act (33

## **Actual language from fiscal year 2017 Interior bill on key policy matters**

U.S.C. 1251, et seq.), including the provisions of the rules dated November 13, 1986, and August 25, 1993, relating to said jurisdiction, and the guidance documents dated January 15, 2003, and December 2, 2008, relating to said jurisdiction.

**SEC. 430. FINANCIAL ASSURANCE.** None of the funds made available by this Act may be used to develop, propose, finalize, implement, enforce, or administer any regulation that would establish new financial responsibility requirements pursuant to section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9608(b)).

**SEC. 431. GHG NSPS.** None of the funds made available by this Act shall be used to propose, finalize, implement, or enforce

(1) any standard of performance under section 111(b) of the Clean Air Act (42 U.S.C. 7411(b)) for any new fossil fuel-fired electricity utility generating unit if the Administrator of the Environmental Protection Agency's determination that a technology is adequately demonstrated includes consideration of one or more facilities for which assistance is provided (including any tax credit) under subtitle A of title IV of the Energy Policy Act of 2005 (42 U.S.C. 15961 et seq.) or section 48A of the Internal Revenue Code of 1986;

(2) any regulation or guidance under section 111(b) of the Clean Air Act (42 U.S.C. 7411(b)) establishing any standard of performance for emissions of any greenhouse gas from any modified or reconstructed source that is a fossil fuel-fired electric utility generating unit; or

(3) any regulation or guidance under section 111(d) of the Clean Air Act (42 U.S.C. 7411(d)) that applies to the emission of any greenhouse gas by an existing source that is a fossil fuel-fired electric utility generating unit.

**SEC. 436. SOCIAL COST OF CARBON.**

None of the funds made available by this or any other Act shall be used for the social cost of carbon (SCC) to be incorporated into any rulemaking or guidance document until a new Interagency Working Group (IWG) revises the estimates using the discount rates and the domestic-only limitation on benefits estimates in accordance with Executive Order No. 12866 and OMB Circular A-4 as of January 1, 2015: *Provided, That such IWG shall provide to the public all documents, models, and assumptions used in developing the SCC and solicit public comment prior to finalizing any revised estimates.*

**SEC. 439. METHANE EMISSIONS.** None of the funds made available by this Act shall be used to develop, propose, finalize, implement or enforce

(1) any rule or guideline to address methane emissions from sources in the oil and natural gas sector under Sections 111(b) or (d) of the Clean Air Act (42 U.S.C. 7411(b), 7411(d));

## **Actual language from fiscal year 2017 Interior bill on key policy matters**

(2) any rule changing the term “adjacent” for purposes of defining “stationary source” and “major source” as applied to the oil and gas sector under the Clean Air Act; and

(3) proposed Draft Control Techniques Guidelines for the Oil and Natural Gas Industry released September 18, 2015 (80 Fed. Reg. 56577).

### **SEC. 440. ROYALTY RATES.**

None of the funds made available by this Act may be used to implement any changes to royalty rates or product valuation regulations under Federal coal, oil, and gas leasing programs.

**SEC. 441. PROGRAM REVIEW.** (a) Termination. Secretarial Order 3338, issued by the Secretary of the Interior on January 15, 2016, shall have no force or effect on and after the earlier of

(1) September 30, 2017; or

(2) the date of publication of notice under subsection (b).

(b) PUBLICATION OF NOTICE. The Secretary of the Interior shall promptly publish notice of the completion of the Programmatic Environmental Impact Statement directed to be prepared under that order.

**SEC. 453.** None of the funds made available by this Act may be used to make a Presidential declaration by public proclamation of a national monument under chapter 3203 of title 54, United States Code in the counties of Coconino, Maricopa, Mohave and Yavapai in the State of Arizona, in the counties of Modoc and Siskiyou in the State of California, in the counties of Chaffee, Conejos, Dolores, Moffat, Montezuma, and Park in the State of Colorado, in the counties of Carson City, Churchill, Clark, Douglas, Elko, Eureka, Humboldt, Lander, Lincoln, Lyon, Nye, Pershing, Storey and Washoe in the State of Nevada, in the county of Otero in the State of New Mexico, in the counties of Jackson, Josephine and, Malheur in the State of Oregon, in the counties of Beaver, Carbon, Duchesne, Emery, Garfield, Iron, Juab, Kane, Millard, Piute, San Juan, Sanpete, Sevier, Tooele, Uintah, Washington, and Wayne in the State of Utah, or in the county of Penobscot in the State of Maine.

**SEC. 464.** None of the funds made available by this Act may be used to implement, administer, or enforce the draft technical report entitled “Protecting Aquatic Life from Effects of Hydrologic Alteration” published by the Environmental Protection Agency and the United States Geological Survey on March 1, 2016 (81 Fed. Reg. 10620).

**SEC. 466.** None of the funds made available by this Act may be used to implement, administer, or enforce the final rule entitled “Hydraulic Fracturing on Federal and Indian Lands” as published in the Federal Register on March 26, 2015 and March 30, 2015 (80 Fed. Reg. 16127 and 16577, respectively).

## **Actual language from fiscal year 2017 Interior bill on key policy matters**

**SEC. 468.** None of the funds made available by this Act may be used to finalize, implement, administer, or enforce the proposed rule entitled “Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings” published by the Environmental Protection Agency in the Federal Register on January 26, 2015 (80 Fed. Reg. 4156 et seq.), or any rule of the same substance.

**SEC. 470.** None of the funds made available by this Act may be used by the Administrator of the Environmental Protection Agency to issue any regulation under the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.) that applies to an animal feeding operation, including a concentrated animal feeding operation and a large concentrated animal feeding operation, as such terms are defined in section 122.23 of title 40, Code of Federal Regulations.

**SEC. 472.** None of the funds made available by this Act may be used by the Secretary of the Interior to implement, administer, or enforce any rule of the same substance as the proposed rule entitled “Oil and Gas and Sulphur Operations in the Outer Continental Shelf-Blowout Preventer Systems and Well Control” and published April 17, 2015 (80 Fed. Reg. 21504), the final rule issued by the Bureau of Safety and Environmental Enforcement with that title (Docket ID: BSEE-2015-0002; 15XE1700DX EEEE500000 EX1SF0000.DAQ000), or any rule of the same substance as such proposed or final rule.

**SEC. 475.** None of the funds made available by this Act may be used to implement or enforce the threatened species or endangered species listing of any plant or wildlife that has not undergone a review as required by section 4(c)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1533(c)(2) et seq.).

**SEC. 476.** None of the funds made available by this Act may be used to implement or enforce the threatened species listing of the Preble’s meadow jumping mouse under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

**SEC. 478.** None of the funds made available by this Act may be used to treat the New Mexico Meadow Jumping Mouse as an endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

**SEC. 480.** None of the funds made available by this Act may be used to finalize, implement, administer, or enforce the proposed rule entitled “Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act” published by the Environmental Protection Agency in the Federal Register on March 14, 2016 (81 Fed. Reg. 13638 et seq.).

**SEC. 487.** None of the funds made available by this Act may be used to finalize, implement, or enforce the proposed rule entitled “Oil and Gas and Sulphur Operations on the Outer Continental Shelf-Requirements for Exploratory Drilling on the Arctic Outer Continental Shelf” as published February 24, 2015 (80 Fed. Reg. 9916).

**SEC. 494.** None of the funds made available by this Act may be used to treat the Mexican wolf (*Canis lupus baileyi*) as an endangered species or threatened species under the Endangered

## **Actual language from fiscal year 2017 Interior bill on key policy matters**

Species Act of 1973 (16 U.S.C. 1531 et seq.) or to implement a recovery plan for such species that applies in any area outside the historic range of such species.

**SEC. 496.** None of the funds made available by this Act may be used to pay legal fees pursuant to a settlement in any case, in which the Federal Government is a party, that arises under

- (1) the Clean Air Act (42 U.S.C. 7401 et seq.);
- (2) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.); or
- (3) the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

**SEC. 499.** None of the funds made available by this Act may be used to declare a national monument under section 320301 of title 54, United States Code, in the exclusive economic zone of the United States established by Proclamation Numbered 5030, dated March 10, 1983.





**Fiscal Year 2018 Interior, Environment, and Related Agencies Appropriations Bill**  
*Member Request Ideas*

The bill will provide appropriations for the Department of Interior (including the Fish and Wildlife Service, the Bureau of Land Management, the National Park Service, the Indian Health Service, the Office of Surface Mining Reclamation and Enforcement, and the Bureau of Ocean Energy Management), the Environmental Protection Agency (EPA), the Forest Service, and a number of independent agencies such as the Smithsonian Institution, the Council on Environmental Quality, the Woodrow Wilson International Center for Scholars, the Eisenhower Commission, the Kennedy Center, the National Gallery of Art, and the National Endowments of the Arts and Humanities. Previous bills have also included significant levels of funding for the Payments In Lieu of Taxes (PILT) program and the Land and Water Conservation Fund.

**Potential Request Opportunities that were Included in Base Bill for FY2017**

- **Reissue litigation-blocked rules delisting the gray wolf in Wyoming and the Western Great Lakes.** A U.S. Appeals Court recently issued a favorable ruling but this delisting has been pending for more than a decade. (An appropriations letter was submitted last year by former Chairman Lummis.)
- **Protect private water rights in the federal permitting processes.** (An appropriations letter was submitted last year by Congressman Scott Tipton and 16 other members.) Congressman Scott Tipton is circulating the letter again this year.
- **Prohibit funds for any federal coal lease moratorium.** While an executive order to unwind could occur, Congress still needs to take action to provide certainty. (An appropriations letter was submitted last year by Congressman Ryan Zinke and 12 other members.) Section 441
- **Prohibit funds for new methane regulations from the EPA and BLM.** As the BLM Venting and Flaring CRA is still pending in the Senate, Congress still needs to take action. (An appropriations letter was submitted last year by Congressman Kevin Cramer and 41 other members to block both these regulations.) Section 439
- **Prohibit funds for the implementation of the Clean Power Plan.** While an executive order to unwind could occur and there is a temporary stay, Congress still needs to take action to provide certainty. (An appropriations letter was submitted last year by Congressman John Ratcliffe and 84 other members.) Section 431

- **Prohibit funds for implementing the Social Cost of Carbon rule.** While an executive order to unwind could occur, Congress still needs to take action to provide certainty. (An appropriations letter was submitted last year by Chairman Paul Gosar and 11 other members. Gosar also passed an amendment.) Section 436
- **Prohibit funds for expansion of the Clean Water Act, effectively blocking EPA's Waters of the United States (WOTUS) rule.** While an executive order to unwind has been issued and there is a temporary stay, Congress still needs to take action to provide certainty as the executive order review will take time and could be litigated. (An appropriations letter was submitted last year by Chairman Paul Gosar and 119 other bipartisan members.) Section 427
- **Request full-funding for the Payment In Lieu of Taxes (PILT) program.** (An appropriations letter was submitted last year by Chairman Paul Gosar and 79 other members.)
- **Prohibit funds for the Secretary of the Interior to review, require approval of, or withhold approval for use of a railroad right-of-way.** (An appropriations letter was submitted last year by Congressman Tom McClintock and 22 other members.) Section 115
- **Prohibit funds for the ONRR Valuation rule that would increase the royalty rates for coal, oil and gas on federal and tribal lands.** (An appropriations letter was submitted last year by Congressmen Steve Pearce, Ryan Zinke and seven other members.) While executive action is being pursued, Congress still needs to take action to provide certainty. Section 440
- **Prohibit funds to finalize the CERCLA rule.** While executive action is being pursued, Congress still needs to take action to provide certainty. Section 430
- **Request delay of the Obama Administration's EPA Ozone Rule.** (An appropriations letter was submitted last year by Rep. Olson and 27 members.) Congressman Pete Olson is circulating the letter again this year.
- **Include hunting, fishing, and recreational shooting access provision.** NRA request.
- **Include stewardship contract authorization provision.**
- **Include grazing permits extension provision.**
- **Prohibit funds to implement the Obama Administration's Arctic Rule.** Similar to Congressman Don Young's CRA bill, H.J. Res. 70. Section 487
- **Prohibit funds to implement to designate a National Marine Monument in federal waters through presidential proclamation.** Section 499
- **Request and redirect resources toward more effective wildland fire prevention and the Forest Service Hazardous Fuels Account.**

- **Request funds for State and Local Wildlife Conservation Programs** Congressmen Mike Thompson and Don Young are already circulating this letter again. More than 100 signers. Current deadline is March 24<sup>th</sup>.

### **Trump Priorities in Skinny Budget**

- **Request \$11.6 billion for DOI, a \$1.5 billion cut from the 2017 annualized CR level.**
- **Prohibit funds for the Green Climate Fund and other UN climate programs.**
- **Prohibit funds for the Clean Power Plan and other EPA climate programs.**
- **Cut EPA's enforcement budget by 20%.**
- **Prohibit funds for National Heritage Areas.**
- **Prohibit duplicative National Wildlife Refuge payments.**
- **Cut land acquisition funding by more than \$120 million from the 2017 annualized CR level.**
- **Redirect funding to the National Park Service's deferred maintenance projects.**
- **Request funding for the Payments in Lieu of Taxes program.**
- **Request \$1 billion for "safe, reliable, and efficient management of water resources throughout the Western United States."**

### **Potential Request Opportunities that Passed as an Amendment in FY2017**

- **Provision similar to Congressmen Gosar and Pearce's amendment for the Mexican wolf. (An appropriations letter was submitted last year by Chairman Gosar and five other members.) Section 494**
- **Provision similar to Congressman Stewart amendment on national monuments. Section 453**
- **Provision similar to Congressman Amodei's sage grouse management amendment. Section 114**

- Provision similar to Congressmen Stewart/Israel amendment for wild horse and burro management.
- Provision similar to Chairman Gosar’s amendment limiting funds for enforcing the EPA’s “Protecting Aquatic Life from Effects of Hydrologic Alteration” report. Section 464
- Provision similar to Congressman Newhouse’s amendment limiting funds by the EPA to issue or expand new regulations under the Resource Conservation and Recovery Act as it pertains to Animal Feeding Operations. Section 470
- Provision similar to Congressman Lamborn’s amendment prohibiting funds to enforce the listing of the Preble meadow jumping mouse. Section 476
- Provision similar to Forman Chairman Lummis’ amendment prohibiting funds to implement the EPA rule regarding in situ uranium production. Section 468
- Provision similar to Congressman Lamborn’s amendment prohibiting funds to list any species as endangered that has not undergone a full review as required by section 4(c)(2) of the Endangered Species Act. 475
- Provision similar to Congressman Lamborn’s amendment prohibiting funds to implement the “Hydraulic Fracturing on Federal and Indian Lands”. While the court case is being litigated, Congress still needs to take action to provide certainty. (An appropriations letter was submitted last year by former Chairman Cynthia Lummis and seven other members.) Section 466
- Provision similar to Congressman Weber’s amendment requiring the EPA to evaluate the economic impact of regulations on American jobs.
- Provision similar to Congressman Pompeo’s amendment prohibiting funds from being used to enforce the EPA’s proposed rule on Accidental Release Prevention Requirements: Risk Management Program under the Clean Air Act. Similar to Congressman Markwayne Mullin’s CRA bill, H.J. Res. 59. While executive action is being pursued, Congress still needs to take action to provide certainty. Section 480
- Provision similar to Rep. Jason Smith’s amendment restricting federal agency funds from being used to pay legal fees from any lawsuit that arises under the Clean Air Act, Clean Water Act, and the Endangered Species Act. Section 496

- **Provision similar to Rep. Lummis and Pearce’s amendment removing protections for the New Mexico Meadow Jumping Mouse. Section 478**
- **Provision similar to Rep. Boustany’s amendment prohibiting funds from being used to implement the Well Control Rule.** (An appropriations letter was also submitted last year by Rep. Graves and 25 members.) Section 472

### **Other Ideas:**

- **Prohibit funds for BLM Onshore Orders 3, 4, and 5.** (An appropriations letter was submitted last year by Congressmen Steve Pearce and Doug Lamborn as well as four other members.)
- **Request funds for the Bureau of Indian Education.** (An appropriations letter was submitted last year by Congressman Jeff Denham and 17 other members.)
- **Prohibit funds for the EPA to regulate the lead content of ammunition, ammunition components, or fishing tackle under the Toxic Substances Control Act.** NRA request.
- **Prohibit funds for ONRR’s Amendment to Civil Penalty Regulations.** Similar to Congressman Chris Stewart’s CRA bill, H.J. Res. 55.
- **Prohibit funds for USFWS’ Compensatory Mitigation Policy.** Similar to Congressman Newhouse’s CRA bill, H.J. Res. 60.
- **Prohibit funds for data utilized in ESA decisions that is not made publicly available.**
- **Prohibit funds for CEQ guidance on factoring climate into NEPA reviews.** While an executive order to unwind could occur, Congress still needs to take action to provide certainty.
- **Prohibit funds for the Greenhouse Gas Reporting Program.**
- **Prohibit funds for the Climate Resilience Fund.**
- **Prohibit funds for the Energy Star Program.**
- **Prohibit funds to pay attorney’s fees under “sue and settle” actions.**
- **Prohibit funds appropriated under the ESA from being used for designations of critical habitat.**

- **Request or redirect funding for recovery planning in order to secure firm recovery goals for species in order to trigger ESA delistings.**
- **Prohibit funds for the UN Intergovernmental Panel on Climate Change.**
- **Prohibit funds for surveillance cameras in national parks.**
- **Prohibit funds for EPA Environmental Education grants like “Crafting the Landscape.” This program squandered taxpayer money having kids play the video game Minecraft in order to become better stewards of the environment.**
- **Prohibit funds for EPA grants that “provide green job training in Puerto Rico.”**
- **Prohibit funds for EPA Beach Act grants.**
- **Require reporting on climate impacts of catastrophic wildfires.**
- **Require reporting on bird deaths caused by wind power.**
- **Require responsible state management of the Northern Spotted Owl.**
- **Reduce funds for the National Landscape Conservation System.**
- **Reduce funds for Public Lands Law Enforcement Agencies.**
- **Reduce funds for the National Gallery of Art.**
- **Reduce funds for the Diesel Emissions Reduction Act (DERA) grants.**
- **Reduce funds for the National Endowment for the Humanities.**

*Items presented are for informational purposes only and do not signify endorsement by the Congressional Western Caucus.*

**To:** micah\_chambers@ios.doi.gov[micah\_chambers@ios.doi.gov]  
**From:** Gruman, Mark  
**Sent:** 2017-03-23T07:46:07-04:00  
**Importance:** Normal  
**Subject:** Fwd: Morning Energy, presented by the American Fuel & Petrochemical Manufacturers: Cramer weighs in on 'risky' executive order delays — Budget talks delayed without executive nominees — Bishop irked at Senate over confirmation process  
**Received:** 2017-03-23T07:46:35-04:00

ICYMI - discussion below about the Congressman, Senator Heitkamp, and the BLM V and F CRA

Sent from my iPhone

Begin forwarded message:

**From:** POLITICO Pro Energy <[politicoemail@politicopro.com](mailto:politicoemail@politicopro.com)>  
**Date:** March 23, 2017 at 5:48:53 AM EDT  
**To:** <[mark.gruman@mail.house.gov](mailto:mark.gruman@mail.house.gov)>  
**Subject:** Morning Energy, presented by the American Fuel & Petrochemical Manufacturers: Cramer weighs in on 'risky' executive order delays — Budget talks delayed without executive nominees — Bishop irked at Senate over confirmation process  
**Reply-To:** POLITICO subscriptions <[reply-fe8c12747361057b72-630326\\_HTML-637925207-1376319-0@politicoemail.com](mailto:reply-fe8c12747361057b72-630326_HTML-637925207-1376319-0@politicoemail.com)>

By Anthony Adragna | 03/23/2017 05:44 AM EDT

*With help from Darius Dixon, Ben Wermund and Catherine Boudreau*

**TRUMP ENERGY ALLY SPEAKS:** Most of Washington's attention today will be on the House healthcare vote, but ME caught up with Rep. [Kevin Cramer](#), one of President Donald Trump's key energy advisers during the campaign, on everything from the forthcoming energy executive order to his 2018 plans.

**Where's the energy order?:** The North Dakota Republican said he wasn't sure why the executive order unwinding Obama-era energy regulations had been pushed back multiple times. But he said he hopes the White House puts it out before the D.C. Circuit rules on the Clean Power Plan, or it risks having its task made more difficult if the court upholds that marquee rule. "There's some discussion about how much to throw into it, how comprehensive it'll be, but, to be honest, I don't have any intel right now that helps," Cramer said of the pending order. "Extract the damn thing from the courts and get some part of it back to the EPA for fixing."

**Why he's open to staying in Paris:** Cramer said he was "impressed" with early signals from the Trump administration on the Paris climate agreement and thought the U.S. could stay in it by moderating what it was expected to achieve. "I can imagine that the State Department likes the diplomacy of us being in it," he told reporters. "I can imagine that just as Americans want the issue of emissions to be dealt with, so does the world. But I also think the world is relieved that they don't have a climate worshipper in the White House setting impossible goals."

**On basic climate science:** Attempting to undo the EPA's endangerment finding that carbon dioxide endangers human health and the environment would be a "noble cause," Cramer said, before adding the immediate urgency lay in addressing the Clean Power Plan. He added he thought EPA Administrator Scott Pruitt "might" go after that finding.

**Confidence on methane:** Cramer then told reporters there was "momentum" for a Congressional Review Act resolution nullifying a BLM rule aimed at curbing methane emissions on public lands but expressed incredulity that his home state colleague, Sen. Heidi Heitkamp, remained publicly undecided. "I want to be respectful of Sen. Heitkamp's independence but it's hard for me to imagine a North Dakota senator voting against a CRA that overturns a rule that's aimed right at our state," he said. That comes as 17 Hispanic groups, led by the Hispanic Access Foundation, sent a letter to senators Wednesday urging them to oppose a Congressional Review Act. Cramer predicted the ultimate vote would be close, pointing to Sen. Johnny Isakson's absence due to back surgery as "somewhat problematic."

**What about 2018?** Asked about whether he'd challenge Heitkamp next year, Cramer demurred: "I've not ruled it out, but I will be honest I'm not thinking about it either."

**IT'S THURSDAY!** I'm your host Anthony Adragna, and Van Ness Feldman's R. Scott Nuzum was the first to identify Reps. John Dingell and Ralph Hall as the last World War II veterans in Congress. For today: What is the only state bordered entirely on its East and West by rivers? Send your tips, energy gossip and comments to [aadragna@politico.com](mailto:aadragna@politico.com), or follow us on Twitter [@AnthonyAdragna](https://twitter.com/AnthonyAdragna), [@Morning\\_Energy](https://twitter.com/Morning_Energy) and [@POLITICOPro](https://twitter.com/POLITICOPro).

**EXXON CAN'T FIND 'TRACKER' EMAILS:** A year of emails from then-Exxon Mobil CEO Rex Tillerson's alias account cannot be found due to a technical glitch, the company disclosed in a court filing. "As a result of this unique issue, emails that might otherwise have been in the Wayne Tracker account between September 5, 2014, and September 16, 2015 were not available for review," the document said. A federal judge earlier Wednesday ordered the fossil fuel giant to attempt and recover any of the potentially lost emails by March 31 and report back to the court.

**YOU'RE UP, PERDUE!** Sonny Perdue finally has a chance today to try and convince



the Senate Agriculture Committee that he's the right guy to lead USDA today at 10 a.m. in Russell 325. In a 2014 National Review [article](#), Perdue criticized the mainstream media and "some on the left" for connecting climate change to weather events and said their arguments are "so obviously disconnected from reality." In 2007, Perdue also famously held a prayer service for rain amid a severe drought. These actions have raised questions about what Perdue would do with the work former Agriculture Secretary Tom Vilsack did to cut greenhouse gas emissions and help farmers and landowners prepare for and adapt to climate change. ME will also be on the lookout for chatter about biofuels and conservation matters.

### **RICK PERRY WEIGHS IN ON ... A STUDENT GOVERNMENT ELECTION:**

Trump's energy secretary is calling into question the election of Texas A&M University's first openly gay student body president. In an [op-ed](#) in the Houston Chronicle, Perry, one of A&M's most notable graduates, writes that he was first proud of his alma mater when he read the students had selected a gay president. "Unfortunately, a closer review appears to prove the opposite; and the Aggie administration and SGA (Student Government Association) owe us answers," Perry writes.

### **The energy secretary claims that the winner of the election actually finished second .**

But hours after the polls closed, anonymous complaints rolled in accusing the student who actually got the most votes in the election of voter intimidation. He was "immediately disqualified" without an investigation into whether the allegations were legitimate, Perry claims. The election "is being treated as a victory for 'diversity,'" Perry writes. "It is difficult to escape the perception that this quest for 'diversity' is the real reason the election outcome was overturned." The student who Perry has come out swinging for appears to be the son of Texas GOP fundraiser Alison McIntosh, the Texas Tribune's Patrick Svitek [points out](#).

**COAL MINER HEALTHCARE TACKLED:** Rep. [David McKinley](#) said Wednesday he "felt pretty good walking out" of a meeting with Trump that the president had already made a call to Republican leadership on securing health benefits for coal miners, Pro Labor's Mel Leonor [reports](#). McKinley's current approach shores up the United Mine Workers' health insurance fund, but skirts for the moment the issue of the UMW's multiemployer pension, which is tottering toward insolvency.

**\*\* A message from the American Fuel & Petrochemical Manufacturers:** More than 98 percent of U.S. consumer goods are transported to market by America's trucking fleet, with help from diesel fuel produced by American Fuel & Petrochemical Manufacturers. Learn how AFPM members are making our lives easier, healthier, safer and more productive at [www.afpm.org](http://www.afpm.org). At AFPM, we make progress. \*\*

**THE LONG APPROPRIATIONS WINDUP:** We're heading deeper into what would normally be fiscal 2018 appropriations territory, but lawmakers on Capitol Hill are finding themselves without dance partners from the executive branch. Rep.

Mike Simpson said he's getting a vibe of hesitation from the Energy Department and other agencies under his Appropriations subpanel's jurisdiction. Simpson said does not expect to hear from DOE until its full budget is out in May, after the White House asked agency heads to limit what they tell Congress before then. (Earlier this week, another Appropriations subcommittee abruptly cancelled hearings on the FY18 budget for health and education agencies.)

Simpson said he considered inviting DOE personnel to discuss their "vision" for the agency, but "I don't even think they want to be doing that until they have their budget." Like at other agencies, Perry is working with an empty bench at DOE. No one has been nominated for deputy secretary, and the same goes for two undersecretary posts and a raft of assistant secretaries. "I've spoken with Secretary Perry, [but] they can't really comment on the budget because they didn't really put the budget together," the energy and water subcommittee chairman told reporters Wednesday.

**BISHOP CHEESED OVER UNFILLED VACANCIES:** House Natural Resources Chairman Rob Bishop told ME he's irritated at how slowly the Senate has processed Trump's nominees, saying the backlog has delayed other White House picks. "If they would get through the ones that are still in the queue, I think the White House could actually come up with the new names faster," he said. It's worth noting that while other names have been floated for a number of Interior slots, none have been formally named. ENR Chairman Lisa Murkowski has also expressed desire for more nominees to consider.

**Budget hearing on hold:** Zinke's lack of political staff has delayed plans for a Natural Resources hearing on the president's budget request for Interior. "I would love to have a hearing," he said. "Who do I call up for a hearing?" Ranking member Raul Grijalva sent Bishop a letter Wednesday asking him to call Zinke to Capitol Hill for a hearing on the administration's proposed 12 percent Interior budget cut and other issues.

**EPA ALUMS BLAST BUDGET CUTS:** The Environmental Protection Network, a newly formed group of some 75 bipartisan former EPA staff, said in a report it understood the new administration would have different priorities for the agency but said the proposed 31 percent budget cut does not appear to be "based on any real analysis of changing needs," Pro's Alex Guillén reports. "The unavoidable consequences of the cuts would be more pollution that causes illness, death and dangerous changes to the earth's climate and ecosystems on which Americans and people around the world depend," it concludes.

**ENERGY SPENDING CHIEF RAILS ON TRANSMISSION FIRM:** Clean Line Energy Partners is clearly rubbing Sen. Lamar Alexander the wrong way. As chairman of the Senate HELP amid Obamacare repeal drama, and chair of the chamber's energy appropriations subpanel, the Tennessee Republican has plenty on his plate. But he made time late Wednesday afternoon for a floor speech to dissuade the Tennessee Valley Authority from signing a power purchase

agreement for wind power that would be carried on Clean Line's long-haul Oklahoma-to-Tennessee Plains & Eastern transmission project. "Congress has a responsibility to conduct oversight of TVA's decisions and also ensure that TVA is fulfilling its mission as defined by the TVA Act," Alexander said. "I don't know why either a board with three vacancies or a complete board with all of its members confirmed would even consider approving such a deal."

**CLIMATE SKEPTICS GATHER:** With an administration more open to their positions, the Heartland Institute kicks off its [annual climate change conference](#) today in Washington. The schedule touts an unannounced "special additional keynote" for breakfast. House Science Chairman [Lamar Smith](#) delivers his own keynote around 12:15 p.m., and ME hears "The Greatest Hoax" author Sen. [Jim Inhofe](#) has recorded a video message for attendees.

**JUMPING THE GUN?** Not waiting for the Trump administration's much-anticipated and delayed executive order, the governors of Washington, Oregon and California, along with the mayors of Seattle, Portland, San Francisco, Oakland and Los Angeles, issued a joint statement Wednesday defending EPA's Clean Power Plan. "Any attacks on the Clean Power Plan would move our nation in the wrong direction and put American prosperity at risk," they said. "We will assert our own 21<sup>st</sup> century leadership and chart a different course."

**BEES! BEES! BEES!** As bees around the world struggle with steep population declines, a legal loophole in a European Union moratorium on pesticides leaves the continent's honeybees facing a new threat, POLITICO Europe's Giulia Paravicini and Simon Marks [report](#). Documents granting countries permission to use the banned substances examined by POLITICO show that beating the ban is relatively easy, and green groups are accusing governments and big chemical companies of making a mockery of Europe's attempts to save its beleaguered pollinators.

**TAKE A GLANCE! RESETTING U.S. FOREST POLICY:** The Center for American Progress is out today with [a report](#) on how to "reboot" U.S. forest policy. "Put simply: Americans are getting fleeced by our current U.S. forest policy. It is time for policymakers to change their thinking," it says. Among the ideas mentioned would be shifting the responsibility for forest management to the Interior Department, an approach Zinke has previously floated.

**LET'S GO!** The Environmental Council of the States released [a compilation](#) of some \$14.7 billion in "ready to go" water and wastewater projects scattered across all 50 states and D.C. in 2017. Projects include everything from installing drinking water in some Alaskan homes for the first time to addressing sewer overflows in several coastal New York towns.

**WALL COVER:** Zinke tweeted pictures Wednesday of two new additions to his ever-expanding office: an [elk head](#) named Ron from his old House office and [Rosie the bison](#).

**LCV OPPOSES GORSUCH:** Count the League of Conservation Voters as among those formally opposing Neil Gorsuch's appointment to the Supreme Court. In [a letter](#) released Wednesday, the green group cited his stance on the Chevron doctrine and "demonstrated hostility" toward the regulatory power of federal agencies as particularly concerning.

**HAPPY ANNIVERSARY!** It's a big day today Business Council for Sustainable Energy today, as the group celebrates its 25th anniversary amid its annual Clean Energy Forum. Murkowski offers remarks at a congressional reception at 5:30 p.m. in Dirksen G-50.

**YOU'RE HIRED:** Two big ethanol companies Growth Energy and Poet LLC have hired Heather Podesta + Partners, LLC as Congress prepares to tackle possible changes to the Renewable Fuel Standard (h/t [POLITICO Influence](#)).

## QUICK HITS

Climate change is killing this remnant of the Ice Age. [CBS News](#).

Trump Won't Save Us From Climate Change. Maybe Surfers Will. [The Huffington Post](#).

Arctic's Winter Sea Ice Drops to Its Lowest Recorded Level. [The New York Times](#).

Oil drops to lowest since November as U.S. inventories swell. [Reuters](#).

South Portland asks pipeline company for data to back up tax abatement request. [Portland Press Herald](#).

In Coal Country, States Feel Emboldened to Cut Energy Efficiency. [Bloomberg](#).

## HAPPENING THURSDAY

9:00 a.m. [12th International Conference on Climate Change](#), Heartland Institute, Grand Hyatt Washington, 1000 H St NW, Washington

2:00 p.m. ["Expanding the Benefits of North American Energy Trade,"](#) Bipartisan Policy Center, 1225 I Street NW, Suite 1000

6:00 p.m. The Economic Club of Washington, D.C., holds a discussion with John Watson, CEO of the Chevron Corporation, JW Marriott Washington, D.C. Hotel, 1331 Pennsylvania Ave. NW, Grand Ballroom

## THAT'S ALL FOR ME!

**\*\* A message from the American Fuel & Petrochemical Manufacturers:** Providing the fuels used to transport almost 25 million children to school on nearly half-a-million buses each day and helping 85 percent of Americans commute to work by

automobile, American Fuel & Petrochemical Manufacturers are moving America forward. AFPM members own and operate refineries that produce the gasoline, diesel fuel, jet fuel, heating oil and other essential petroleum products that take our lives further. On a global scale, AFPM members have established the U.S. as a net exporter of refined petroleum products a role expected to continue to grow through the middle of the 21st century as U.S. refiners produce increasingly cleaner fuels that keep America moving efficiently and safely. Learn more about how the American Fuel & Petrochemical Manufacturers are making our lives easier, healthier, safer and more productive at [www.afpm.org](http://www.afpm.org). At AFPM, we make progress. \*\*

*To view online:*

<https://www.politicopro.com/tipsheets/morning-energy/2017/03/cramer-weighs-in-on-risky-executive-order-delays-021985>

## **Stories from POLITICO Pro**

### **Trump advisers want concessions for coal if U.S. stays in climate pact [Back](#)**

By Andrew Restuccia | 03/17/2017 06:00 PM EDT

Trump administration officials have told lobbyists and European diplomats that the U.S. won't stay in the nearly 200-nation Paris climate change agreement unless it can secure wins for the fossil fuel industry, according to three people familiar with the discussions.

In a series of recent conversations with industry groups and European officials, Trump advisers have said the White House decision on the Paris deal could hinge on international willingness to come up with a strategy to commercialize and deploy technologies that will reduce emissions from fossil fuels.

That may not sit well with Democrats and environmental groups, who have long argued against spending billions of dollars to reduce emissions from coal-fired power plants when the same money could help speed the transition to wind and solar power. But such a deal could avoid the enormous disruption that would result if the United States, the world's second-largest greenhouse gas emitter, walked away from the most comprehensive international agreement ever crafted on global warming.

Administration officials who want to stay in the 2015 Paris agreement believe that creating a future pathway for fuels like coal is the only way to win support from conservative and industry groups that want the U.S. to withdraw from the accord. And some fossil fuel supporters are beginning to come around, despite their overall skepticism toward the climate pact.

"If the world can't go on without us in the Paris accord that's a bit of an overstatement, but to illustrate my point then perhaps we ought to be in it," said Rep. [Kevin Cramer](#) (R-N.D.), a pro-oil lawmaker who advised the Trump campaign on

energy issues. "And if we have that much influence, perhaps we have enough influence to moderate it."

In recent weeks, administration officials have met with many of the country's major energy companies and trade groups. Those who have talked to the administration include representatives from the American Petroleum Institute, as well as the Independent Petroleum Association of America, ConocoPhillips and coal company Peabody Energy, among others, according to people familiar with the meetings.

A White House spokeswoman declined to comment, saying the administration did not yet have any announcements to make regarding the Paris agreement.

Whether the United States will pull out of the Paris agreement remains an open question in the White House, despite Trump's campaign pledge to pull out of the deal.

White House senior adviser Jared Kushner and Trump's daughter Ivanka are said to advocate staying in the agreement, and several Trump administration officials are pushing a plan that would have the U.S. remain in the pact while weakening former President Barack Obama's targets for reducing the nation's greenhouse gas emissions. Secretary of State Rex Tillerson is also said to support staying in the agreement, though much of the internal discussion about the issue has so far been among midlevel aides at the White House.

White House strategist Steve Bannon is seen as Trump World's biggest opponent of the Paris deal, but officials said he has not yet engaged on the issue at a granular level. Bannon and other opponents of the agreement could kill the simmering effort to stay in the Paris deal, making the ongoing conversations with diplomats and lobbyists moot.

Republicans and some Democrats have long advocated policies to support developing technology to capture carbon emissions from coal and other fossil fuels. And Cramer said the U.S. has leverage to "moderate" the Paris agreement by winning greater support for technology to slash emissions from coal.

"If you don't remove fuels, if you don't dismiss certain technologies, if you let the innovators work in a more open environment and we set realistic standards, they'll meet them," he said in an interview.

But so far, those methods to capture carbon from coal have proved to be expensive and difficult to commercialize on a wide scale.

Environmental activists are also likely to view the administration's discussions about Paris with deep suspicion, pointing to the president's vocal skepticism of climate science and his proposal to gut funding for climate programs at the Environmental Protection Agency and the State Department.

European officials say they are keeping an open mind about the administration's desire to

boost technology to reduce emissions from fossil fuels in part because they're eager to keep the United States in the Paris agreement. The European Commission favors carbon-capture technology, but, as in the United States, the technology has so far struggled to take off in Europe.

But Trump's efforts to undo Obama's climate policies, such as an executive order expected next week to begin the process of rewriting landmark regulations for power plants, worry many international officials.

Some foreign officials are already questioning the value of negotiating with United States to stay in Paris if Trump isn't committed to addressing climate change at home.

Maros Sefcovic, the European Commission's vice president for energy, met earlier this month in Washington with several Trump administration officials, including National Economic Council Director Gary Cohn; Kenneth Juster, an international economic affairs adviser to the president; and George David Banks, a White House adviser on international energy and environmental issues.

"They are looking at ways to bring the business aspects to the assessment of climate change policies, with an accent on technological advancement," Sefcovic told reporters after returning to Brussels, adding that technology to catch and store or use carbon emissions will probably be a priority for the U.S.

*Nick Juliano and Sara Stefanini contributed to this report.*

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## **POLITICO New York: Judge orders Exxon to comply with Schneiderman subpoena by March 31 [Back](#)**

By David Giambusso | 03/22/2017 03:14 PM EDT

A New York State Supreme Court judge has ordered ExxonMobil to respond to a subpoena from Attorney General Eric Schneiderman's office by March 31, after accusations from Schneiderman that Exxon had not been forthcoming in producing documents as part of a continuing investigation.

Schneiderman is investigating whether ExxonMobil committed fraud in relation to its knowledge of climate change and public reporting of its reserves.

Lawyers for the Schneiderman have accused Exxon of not preserving and producing numerous documents ordered under the subpoena, including emails written under the name "Wayne Tracker" an apparent alias for former Exxon CEO Rex Tillerson, who is now the U.S. Secretary of State.

Lawyers for Exxon, who have handed over troves of documents, insisted they have been and will continue to be forthcoming with documents as the discovery process

continues.

Judge Barry Ostrager set a March 31 deadline for a series of Exxon documents to be turned over to the AG. Schneiderman's office said it also wants sworn affidavits from records custodians that all of the pertinent documents have been disclosed. The judge set an April 10 deadline for the affidavits.

"If you can't come to some accommodation on a consensual basis, you'll come back here," Ostrager said.

*This whiteboard originally appeared on [POLITICO New York](#) on March 22, 2017.*

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**McKinley says miner health care bill has Trump's backing** [Back](#)

By Mel Leonor | 03/22/2017 06:05 PM EDT

Rep. [David McKinley](#) said today he believes "a call has already been made" by President Donald Trump to Republican leadership on securing health benefits for coal miners.

The West Virginia Republican told reporters that he spoke to Trump about the issue this morning and "felt pretty good walking out."

McKinley filed a bill Friday to shore up the United Mine Workers' health insurance fund for retired miners and their families, who risk losing coverage when a stop-gap measure expires in just over a month. The issue caught a snag last year over whether to shore up the UMW's multiemployer pension, which is tottering toward insolvency, as well.

McKinley's most recent bill skirts the pension problem, aligning with a proposal by Senate Majority Leader [Mitch McConnell](#). An earlier proposal from McKinley proposed shoring up pension funds as well, an approach favored by Sen. [Joe Manchin](#), a Democrat from West Virginia.

"Unfortunately we had to separate that. I'd rather it be combined," McKinley said. "But we'll take care of the first fight, and that's health care. People don't want to lose their health care."

After a meeting with McKinley Wednesday afternoon, United Mine Workers of America President Cecil Roberts said he accepted the piecemeal approach.

"We are addressing the most pressing issue. We have a little bit more time before we get to the other one," Robert said.

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**EPA alumni group slams proposed agency budget cuts** [Back](#)



By Alex Guillén | 03/22/2017 04:05 PM EDT

A newly formed group of former EPA employees today released a [report](#) criticizing the Trump administration's proposed cuts to the environmental agency in its "skinny budget."

The Environmental Protection Network, which describes itself as a bipartisan group with 75 members, said it understands different administrations have different priorities, but that the proposed 31 percent slashing of EPA's budget does not appear to be "based on any real analysis of changing needs."

Trump's EPA budget proposal "appears to be nothing less than a full-throttle attack on the principle underlying all U.S. environmental laws that protecting the health and environment of all Americans is a national priority," the report says.

It criticizes the administration for cutting funding to state environmental agencies while shifting more regulatory and enforcement responsibilities to them, as well as for cutting climate programs, scientific research, regional clean-up programs, environmental justice initiatives and other programs.

"The unavoidable consequences of the cuts would be more pollution that causes illness, death and dangerous changes to the earth's climate and ecosystems on which Americans and people around the world depend," the report concludes.

It was written by George Wyeth, a former EPA senior counsel now at the George Washington University Law School, and Nancy Ketcham-Colwill, a former adviser in the Office of General Counsel. Both were among the signers of an EPA alumni [letter](#) opposing EPA Administrator Scott Pruitt's nomination.

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**To:** Bloomgren, Megan[megan\_bloomgren@ios.doi.gov]  
**From:** Konkus, John  
**Sent:** 2017-03-23T17:05:32-04:00  
**Importance:** Normal  
**Subject:** RE: EO Next Week Coordination  
**Received:** 2017-03-23T17:09:43-04:00  
03 23 17 -- JK 5pm Media EI EO Rollout Plan (002).docx

Here's the template.

**From:** Bloomgren, Megan [mailto:megan\_bloomgren@ios.doi.gov]  
**Sent:** Thursday, March 23, 2017 3:31 PM  
**To:** Konkus, John <konkus.john@epa.gov>  
**Subject:** Re: EO Next Week Coordination

John, second to chat? Just want to ensure we're on the same page on materials.  
Thanks,  
Megan  
202-997-0753

On Wed, Mar 22, 2017 at 9:24 AM, Konkus, John <konkus.john@epa.gov> wrote:  
That works.

-----Original Message-----

**From:** Dorr, Kaelan K. EOP/WHO [mailto:(b) (6) .gov]  
**Sent:** Wednesday, March 22, 2017 9:09 AM  
**To:** Megan Bloomgren <megan\_bloomgren@ios.doi.gov>; Heather Swift  
<heather\_swift@ios.doi.gov>; Konkus, John <konkus.john@epa.gov>; Rateike, Bradley A.  
EOP/WHO (b)(6) Bradley Rateike .gov>  
**Subject:** EO Next Week Coordination

Hi all -

I know I've talked to everyone separately but I'd like to hop on the phone and coordinate comms strategy re: the potential EO signing on Monday sometime this afternoon if you're all available. Let me know what time works after 1:00pm and we can make it happen.

Kaelan Dorr  
Strategic Communications Advisor and Special Projects Manager (b)(6) Kaelan Dorr .gov  
(b) (5)

DRAFT



**ENVIRONMENTAL PROTECTION AGENCY  
OFFICE OF PUBLIC AFFAIRS ROLLOUT PLAN  
Energy Independence Executive Order**

*Draft as of March 23, 2017 at 5:00 P.M.*

DATES AND TIMES ARE SUBJECT TO CHANGE

**Thursday, March 23**

Submit op-ed, talking points, and social media for review.

**Friday, March 24**

Time TBD Call with WH Comms, EPA and Interior.

**Monday, March 27**

11:00 a.m. Send a Media Alert about the event with technical details for cameras and trucks to the national HQ news list that includes major national news outlets—including, Fox News, Fox Business, AP, NYT, CNN the major national networks ABC, NBC and CBS.

2:00 p.m. Administrator Pruitt interview with Breitbart News.

Hold afternoon/evening for Administrator Pruitt TV/radio.

**Tuesday, March 28**

8:00 a.m. Send the Media Alert again.

Time TBD Send the embargoed news release to reporters several hours ahead of the event to start writing.  
DRAFT Press Release

EPA to review the Clean Power Plan and other Obama-era rules

WASHINGTON D.C. – The Environmental Protection Agency (EPA) today took steps to immediately comply with President Donald Trump’s Executive Order signed this morning directing the Agency to

withdraw from, review and eventually rewrite the prior administration's regulations known as the Clean Power Plan.

EPA Administrator Scott Pruitt signed four notices today ensuring the President's actions were codified without delay. Among the notices signed by Administrator Pruitt was a notice withdrawing the Clean Power Plan followed by a notice of proposed rulemaking which starts the clock on the EPA rewriting the rule.

Additionally, Administrator Pruitt signed notices that EPA will begin reviewing the Obama-era rules on methane emissions from existing and new sources as well as signing a notice withdrawing federal plan and model trading rules.

"The American people deserve an EPA that works to protect both the environment and enables a growing economy," said Administrator Scott Pruitt. "President Trump has a clear vision to create jobs and his vision is completely compatible with a clean and healthy environment. By taking these actions today, the EPA is returning the Agency to its core mission of protecting public health while also being pro-energy independence."

Follow this link to review the documents signed by Administrator Pruitt: [LINK](#).

###

**Earned Media:** Hard pitch to national and local news media for Administrator Pruitt interviews.

**Compile "What they are saying" from all stakeholders**

**Send Op-eds to:**

National: Washington Post, Wall Street Journal, New York Times

Localized: Pittsburg Post-Gazette; Plain Dealer, Columbus Dispatch, The Dominion Post (Morgantown), The Morning Call (Allentown) Charleston Gazette-Mail, The Tribune-Democrat (Johnstown)

### **Stakeholder Outreach**

**Contact key stakeholder groups:** To make sure they are prepared to engage.

Ask stakeholders to send news releases and other media activities- Op-Eds, social media.

Reach out to ensure stakeholders have everything they need – keep track of their media activities: i.e.: sending news releases media interviews, social media and statements.

Start Collecting – Collect all media outreach and social media released by stakeholders, compiled them

into a report.

Day of the Event: Ensure that stakeholders have all materials needed from EPA.

Day 3 – Send thank you's to all stakeholder groups for their participation and "this Administrator looks forward to working with them again".

EPA will monitor and coordinate all stakeholder activities targeted to the event. Communicating with all involved by email, phone calls and text.

### **Surrogates/Third Party Activities**

National Mining Association: Will bring miners from coal country

US Chamber

American Coalition for Clean Coal Electricity (ACCCE)

API

US Chamber

National Association of Manufacturers: Will bring workers from manufacturing plants in the area

American Public Power Association

National Rural Electric Cooperative Association

American Gas Association

Utility Air Regulatory Group

All of the State Coal Associations: – Ky., W.Va., V.A, Ohio, Tenn., PA., Ala, Ind. And Ill.

State AG's – listed on petition – W.Va., Ky., Ohio & Ind.

### **Talking Points**

Restoring the Rule of Law, Federalism, and Economic Growth by Rescinding the EPA's "Clean Power Plan" and Related Rules

The Clean Power Plan has serious legal and policy flaws. For years energy producing states have argued that this plan is an overreach by EPA, interfering with the states' sovereign rights. As directed by this

Executive Order, EPA will act strictly within the governing law and the federalist framework of our Constitution to review the Clean Power Plan.

A bipartisan majority in the 114th Congress rejected the Clean Power Plan with EPA's New Source Performance Standards.

In February 2016, the Supreme Court took the unprecedented and unusual step to stay the implementation of Clean Power Plan. The stay is for good reason as the Clean Power Plan is being challenged by over 150 entities including 27 states, 24 trade associations, 37 rural electric co-ops, and 3 labor unions.

According to a study by the American Council for Capital Formation and the U.S. Chamber of Commerce, following Obama-era climate policies would cost 74,000 jobs in Michigan, 53,000 jobs in Missouri, 110,000 jobs in Ohio, and 140,000 jobs in Pennsylvania.

According to the American Coalition of Clean Coal Electricity, since 2010 431 coal fired electric generation units in 37 states have shut down or converted to non-coal because of EPA policies like the Clean Power Plan.

American power producers have done an incredible job using cutting edge ingenuity and technology to deliver clean power to American businesses and families. The public and private sectors should be proud of the progress made on this front. The American people have done their part. It's time for the federal government to do its part.

When it comes to environmental protection, we've got a lot to celebrate. According to EPA, since 1980 there's been a 65% reduction in the 6 principle pollutants under the National Ambient Air Quality Standards. This at the same time more Americans have used more energy and driven more cars, more miles.

Promoting and protecting a strong and healthy environment is among the lifeblood priorities for the government, and EPA is vital to that mission. Recently that mission has been obscured by the Agency seeking to expand its role beyond its Congressionally defined duties.

This Executive Order will help return EPA to its core mission.

We can and we will achieve clean air and clean water and we will also have strong economic growth and job creation at the same time. That is what the American people want and expect and that is we are going to deliver at EPA.

EPA will take steps to immediately comply with President Donald Trump's Executive Order. EPA Administrator Pruitt will sign four notices ensuing the President's actions were codified without delay.

Among the notices Administrator Pruitt will sign is a notice withdrawing the Clean Power Plan followed by a notice of proposed rulemaking which starts the clock on the EPA rewriting the rule.

Additionally, Administrator Pruitt will sign notices that EPA will begin reviewing the Obama-era rules on methane emissions from existing and new sources as well as signing a notice withdrawing federal plan and model trading rules.

#### Energy Jobs Facts from the U.S. Department of Energy

The Fuels sector now employs 1,082,745 workers, compared to last year's over 1.1 million jobs.

The Fuels sector declined by at least 8% in the last year. This loss of jobs was largely driven by declines in oil, gas, and coal employment.

467,648 jobs (100 percent in fuels) are associated with the mining and extraction of oil, gas, coal, and nuclear fuel stock.

While coal mining and other related employment is declining, it is important to note that the majority of U.S. electrical generation continues to come from fossil fuels (coal and natural gas) and that, under latest EIA modeling in the Annual Energy Outlook 2016, will continue to provide 53% of total U.S. electricity in 2040.<sup>18</sup>

#### Coal Export Facts from the U.S. Energy Information Agency

The United States remained a net exporter of coal in 2016, exporting 60.3 million short tons (MMst) and importing 9.8 MMst.

U.S. coal exports fell for the fourth consecutive year, down 13.7 MMst from 2015, with 2016 exports less than half of the record volume of coal exported in 2012 (125.7 MMst).

U.S. coal exports declined through most of 2016 despite mid-year increases in international coal prices.

#### **Social Media**

##### **ADMINISTRATOR FACEBOOK:**

This morning President Trump signed an executive order directing the U.S. Environmental Protection Agency to withdraw from, review and eventually rewrite, the Clean Power Plan. I have signed a notice of proposed rulemaking to get the clock started on this process!



LINK: PRESS RELEASE

LINK IMAGE: UPLOAD PHOTO OF EXECUTIVE ORDER OR FEDERAL REGISTRAR SIGNING

**ADMINISTRATOR TWITTER:**

Today @POTUS signed an executive order directing @EPA to withdraw from, review & rewrite the Clean Power Plan. [LINK TO PRESS RELEASE]

I have signed a notice of proposed rulemaking to get the clock started on the process of reviewing and rewriting the Clean Power Plan. [INCLUDE IMAGE OF THE FEDERAL REGISTRAR SIGNING]

**ADMINISTRATOR FACEBOOK:**

American power producers have done an incredible job using cutting edge ingenuity and technology to deliver clean power to American businesses and families. The American people have done their part on this front. Now, as the federal government, we're doing our part and restoring cooperative federalism.

LINK: PRESS RELEASE OR WEBSITE

**ADMINISTRATOR TWITTER:**

American power producers are using cutting edge technology to deliver clean power to businesses & families. [LINK: PRESS RELEASE OR WEBSITE]

**ADMINISTRATOR FACEBOOK:**

When it comes to environmental protection, we've got a lot to celebrate. Since 1980 there's been a 65% reduction in the 6 principle pollutants under the National Ambient Air Quality Standards. During this same time period, more Americans have used more energy and driven more cars, more miles.

**ADMINISTRATOR TWITTER:**

There's a lot to celebrate. Since '80 six principle air pollutants reduced while we've have used more energy & driven more cars, more miles.

**ADMINISTRATOR FACEBOOK:**

Promoting and protecting a strong and healthy environment is among the lifeblood priorities for the government, and EPA is vital to that mission. Our actions today are restoring the agency to its core mission.

LINK: PRESS RELEASE OR WEBSITE

**ADMINISTRATOR TWITTER:**

Protecting a strong & healthy environment is a lifeblood priority for government. Our actions are restoring the agency to its core mission.

**EPA FACEBOOK:**

We're taking steps to immediately comply with executive order President Trump signed this morning directing us to withdraw from, review and eventually rewrite, the Clean Power Plan.

LINK: PRESS RELEASE

**EPA TWITTER:**

We're taking steps to comply w/@POTUS' executive order directing us to withdraw, review & rewrite Clean Power Plan. [LINK TO PRESS RELEASE]

**EPA FACEBOOK:**

We're withdrawing federal plan and model trading rules as part of our actions to comply with the president's executive order to withdraw from the Clean Power Plan.

LINK: PRESS RELEASE OR WEBSITE

**EPA TWITTER:**

We're withdrawing federal plan & model trading rules as part of our actions to withdraw from the Clean Power Plan. [LINK TO PRESS RELEASE OR WEBSITE]

**EPA FACEBOOK:**

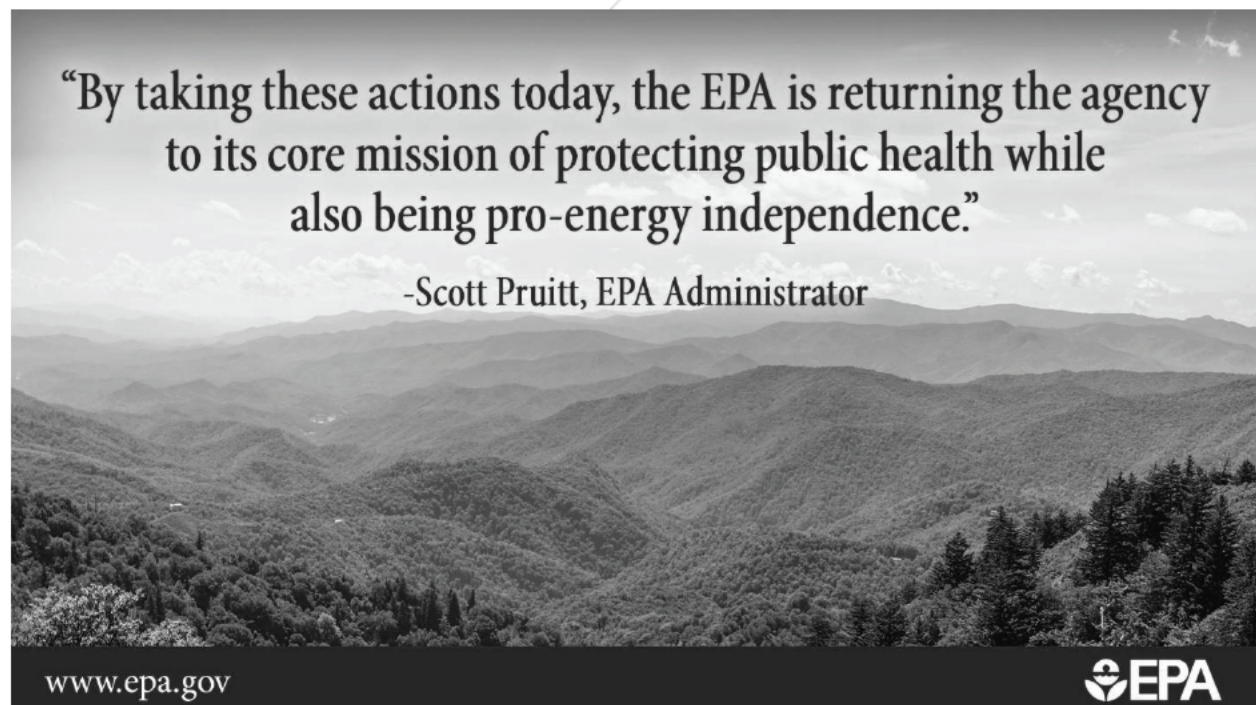
Today Administrator Pruitt signed notices to begin the process of reviewing rules on methane emissions from existing and new sources as part of our actions to withdraw from the Clean Power Plan and related rules.

LINK: PRESS RELEASE OR WEBSITE

**EPA TWITTER:**

Today @EPAScottPruitt signed notices to review rules on methane emissions from existing & new sources. [LINK TO PRESS RELEASE OR WEBSITE]

**GRAPHIC POST FOR MAIN EPA ACCOUNTS – ADMINISTRATOR QUOTE GRAPHIC:**



**EPA FACEBOOK:**

Today we're taking action to restore our agency to its core mission.

POST: ADMINISTRATOR QUOTE GRAPHIC

**EPA TWITTER:**

Today we're taking action to restore our agency to its core mission. [POST: ADMINISTRATOR QUOTE GRAPHIC]

**GRAPHIC POST FOR MAIN EPA ACCOUNTS – CHECKLIST GRAPHIC:**

**Adminstrator Pruitt is restoring EPA to its core mission by:**

- ✓ Reviewing Waters of the U.S. (WOTUS)
- ✓ Reviewing the Clean Power Plan (CPP)
- ✓ Reviewing rules on methane emissions

**EPA** #KeepingPromises [www.epa.gov](http://www.epa.gov)

**EPA FACEBOOK:**

Administrator Pruitt is keeping his promise to restore the agency to its core mission.

POST: CHECKLIST GRAPHIC

**EPA TWITTER:**

Administrator Pruitt is keeping his promise to restore the agency to its core mission. [POST: CHECKLIST GRAPHIC]

**EPA FACEBOOK:**

We can and we will achieve clean air and clean water and we will also have strong economic growth and job creation at the same time. That's what the American people want and expect, and that is we're going to deliver.

LINK: PRESS RELEASE OR WEBSITE

**EPA TWITTER:**

We can & will achieve clean air & water & have strong economic growth & job creation at the same time. [LINK: PRESS RELEASE OR WEBSITE]

NAM Pre-Event Press Release and Blog



**Press Release**

**For Immediate Release**

Contact:

Luke Popovich

(202) 463-2620

[ipopovich@nma.org](mailto:ipopovich@nma.org)

March 23, 2017

**NMA Applauds Executive Order Targeting the Costly Power Plan and the Coal Moratorium**

Prompt Action Can Save High-Wage Jobs and Strengthen Energy Independence

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WASHINGTON, D.C. – The National Mining Association (NMA) today applauded President Trump’s executive order on the costly Clean Power Plan (CPP) and the Department of the Interior moratorium on federal coal leasing.

The order begins the process to unwind the CPP, the Obama administration’s signature climate change regulation that was stayed by the Supreme Court one year ago. Lifting the federal coal

moratorium would remove the cloud over future investments in a coal region responsible for 40 percent of the U.S. coal supply.

“The clean power plan and the moratorium served the interests of political activists, not the American people,” said Hal Quinn, NMA president and CEO. “The president’s actions today help to restore common sense priorities and the important balance between costs and benefits that have been missing from federal regulatory policies.”

Quinn called the CPP “an unlawful attempt to radically transform the nation’s power grid, destroying valuable energy assets and leaving our economy more vulnerable to rising power prices—all for no discernible environmental benefit.”

EIA recently found that unplugging the CPP would preserve 240 million tons of annual coal production (*EIA AEO 2017*), saving 27,700 high-wage mining jobs and an additional 99,849 jobs throughout the supply chain, according to NMA estimates.

“The moratorium on federal coal leasing was entirely without merit and rested on politically contrived reasoning,” Quinn added. The moratorium was never about a fair return to the taxpayer, and all about capitulating to the demands of the “keep-it-in-the-ground” movement. By every metric, the federal coal leasing program is highly profitable to taxpayers with annual leasing revenues in 2015 double the amount received 12 years ago.

## **BACKGROUND ON OBAMA ERA RULES**

### Clean Power Plan

The CPP is an Obama Administration policy regulating carbon dioxide emissions from power plants. If implemented, the rule would transform the mix of electricity generation in nearly every state in the nation. In addition to the National Mining Association, 26 states, the utility industry, electric cooperatives; labor groups and industry associations including the U.S. Chamber of Commerce and National Association of Manufacturers challenged the rule.

Due to the extraordinary nature of the case and the threat of immediate economic harm posed by the rule, the Supreme Court issued a stay on Feb. 9, 2016, suspending any obligation by the

states to implement the rule before litigation is completed. The Supreme Court has never issued a stay of a government regulation before a lower court has heard the merits of the case.

### All Pain and No Gain

The CPP would be extremely costly while providing no significant environmental benefits. The Energy Information Administration recently forecast the CPP would force 53,000 Megawatts of coal generating capacity into retirement (*EIA AEO May 2017*) sending coal production down by 28 percent.

The CPP would harm the wider economy, including households and businesses. After implementation, the typical annual household electricity bills in 2020 would be more than a third higher than they were in 2012, or an estimated \$680 per family. More than 40 states would face double-digit increases in the cost of wholesale electricity, with the CPP increasing wholesale electricity prices by \$214 billion. The construction of replacement generating capacity would cost an additional \$64 billion. To view state-by-state impacts of the CPP, visit: <http://www.countoncoal.org/costly-power-plan/>.

### The Federal Coal Leasing Moratorium

The Obama leasing moratorium represented an abrupt about face from the Department of Interior's earlier rejection of the unfounded claims advanced by special interests that sought to deny the public the twin benefits of a source of low-cost electricity and revenues derived from coal mining. [A report](#) prepared by Norwest Corporation revealed that the Secretary of the Interior uncritically accepted incomplete and manipulated data from several advocacy organizations to suggest that federal coal producers pay below market royalties and fees. In fact, the report shows that federal coal producers are paying above-market royalty rates as well as bonus bids and other fees that are rarely, if ever, charged on private coal leases

### BLOG

#### **A Realistic Debate About Coal**

The unseemly haste to bury coal is taking a new tact. From *Axios* to *The Washington Post*, this week's conventional wisdom about coal is: Trump can't put king coal back on its throne. This is how coal's critics set up the quintessential straw man, then triumphantly knock it down. It's a staple of reporting: choose the weakest guy to beat up to avoid the fight you can't win.

The issue isn't whether Trump can help coal regain its glory any more than we can expect Jeff Bezos to restore the *Post's* Watergate stature. Even coal miners who know best were reluctant to take the president's campaign pledge literally. No one in the industry expects coal to reclaim its industrial-era

stature in the near future, let alone rehire every miner idled over the past decade. Not while the country is submerged in natural gas and power demand trails GDP growth.

The issue is whether Trump can help coal survive an eight-year regulatory onslaught and keep more capacity, more production and more jobs from becoming its victims. Can he rescue good jobs and energy diversity from irresponsible policies advanced by ideologues? This is the realistic debate worth having.

In this debate, however, the arguments of coal's critics aren't as effective. They say automation in today's coal industry means fewer man hours are required to mine each ton of coal, thus limiting the employment potential for even a revived coal industry. Brilliant. For what industry is this not true? By 2015, output per man hour for all U.S. manufacturing more than doubled from 1970.

Was the new Honda or Ford you drive today built with the same number of hourly workers that built your father's car? The U.S. auto industry in 2016 employed less than half the workers it did in 1970. And just because fewer workers are now required to assemble each car, would that justify government policies designed to kill the U.S. auto industry? By the way, where are all those *Washington Post* printers? Do on-line reporters know what typesetters are?

Any industry that hasn't used technology to improve productivity is an industry that would not exist today. The same technological advances that reduce the number of miners per ton of coal also reduce accidents and fatalities. Last year was the safest in the history of U.S. mining one of several record-breaking safety years in the past decade.

By holding President Trump to a rhetorical campaign promise, his critics more easily ignore the good he can do. Without regulations weighing heavily on coal utilization (e.g. Mercury and Air Toxics rule, Clean Power Plan) and production (e.g. the stream rule, waters of the U.S., retroactive vetoes of mine permits), a more efficient and sustainable industry is likely to emerge from competition with natural gas and subsidized renewable fuels.

Obviously, regulations like these inflicted great harm on the industry. If they didn't, the Obama administration would not have imposed them.

**To:** downey\_magallanes@ios.doi.gov[downey\_magallanes@ios.doi.gov]  
**From:** Eckman, Adam  
**Sent:** 2017-03-23T18:43:08-04:00  
**Importance:** Normal  
**Subject:** NMA Comments on OSM Stream Protection Rule Final.pdf  
**Received:** 2017-03-23T18:43:31-04:00  
[NMA Comments on OSM Stream Protection Rule Final.pdf](#)  
[ATT00001.txt](#)

Downey,

Thanks again for making time to discuss the 2016 biop. I've attached NMA's comments in response to the proposed SPR which includes a discussion regarding the limitations of FWS authority as it relates to SMCRA permits. As we discussed, these comments pertain to the proposed rule and the final did not directly include permit veto authority for FWS, but rather moved it to the 2016 biop. The pertinent section is on pages 52-58. Please let me know if you have any additional questions.

Adam





October 26, 2015

Office of Surface Mining Reclamation and Enforcement  
Administrative Record  
Room 252 SIB  
1951 Constitution Avenue NW  
Washington DC 20240

**Re: Proposed Stream Protection Rule, 80 Fed. Reg. 44,436 (July 27, 2015); Docket ID OSM-2010-0018**

## **I. Identity and Interest of the Commenters:**

The National Mining Association (NMA) submits the following comments on the Office of Surface Mining Reclamation and Enforcement's (OSM) proposed Stream Protection Rule (SPR). 80 Fed. Reg. 44,436 (July 27, 2015). NMA is a national trade association that includes the producers of most of the nation's coal, metals, industrial and agricultural minerals; the manufacturers of mining and mineral processing machinery, equipment and supplies; and the engineering and consulting firms, financial institutions and other firms serving the mining industry. NMA's members conduct surface and underground coal mining operations across the United States. These operations are permitted under the Surface Mining Reclamation and Enforcement Act's (SMCRA) regulatory framework and would be directly impacted by the changes and amendments to the over 475 existing rules as well as the new requirements included in the proposal.

NMA is also filing comments directly on the draft Environmental Impact Statement and Regulatory Impact Statement. Those submissions are directly incorporated into these comments and should be considered together with these comments in response to specific proposed revisions and amendments to existing rules.

## **II. Introduction/Summary of Comments**

### **A. Failure to Adequately Justify Rule**

As a threshold matter, OSM has failed to supply a reasoned analysis for its decision to change course from the rule if proposed in 2008 (2008 Rule), and pursue the significantly different rule the agency now proposes. In 2008, OSM proposed a narrower Stream Buffer Zone rule aimed at achieving a targeted set of objectives for steep slope coal mining in Appalachia.<sup>1</sup> In 2009 several environmental groups sued the Secretary of

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<sup>1</sup> See 73 Fed. Reg. 75814 (Dec. 12, 2008).

the Interior claiming that OSM failed to properly consult with the U.S. Fish and Wildlife Service (FWS) regarding the potential effects of the 2008 rule on listed threatened and endangered species under section 7(a)(2) of the Endangered Species Act (ESA).<sup>2</sup> As result of this litigation, then Secretary of the Interior Ken Salazar “confessed” error in promulgating the 2008 Rule and “determined that the OSM erred in failing to initiate consultation with the U.S. Fish and Wildlife Service under the ESA to evaluate possible effects of the SBZ Rule on threatened and endangered species.”<sup>3</sup> The Secretary sought vacatur of the rule on the basis of this confession, however, this was rejected by the court which agreed with NMA that vacatur based on such a confession without a ruling on the merits would bypass the rulemaking procedures of the Administrative Procedures Act.<sup>4</sup> This decision gave OSM the opportunity to properly consult with FWS on the impacts to species from the proposed rule, however, OSM elected not to do so. Instead, OSM began a new rulemaking, and embarked on a 6 year odyssey to justify a change in course that appears to remain driven by politics.

In 2009 OSM claimed that the new rule was necessary to meet the requirements of an interagency MOU between the Environmental Protection Agency, the U.S. Army Corps of Engineers, and OSM to address a narrow set of issues related to surface coal mining operations in Appalachian states.<sup>5</sup> This rationale has evaporated in the proposed rule where OSM states, without further explanation, that “Ultimately, we determined that development of a comprehensive, nationally applicable stream protection rule would be the most appropriate and effective method of achieving the purposes and requirements of SMCRA, as well as meeting the goals set forth in the MOU.”<sup>6</sup> 80 Fed. Reg. 44443. This baseless decision now brings to bear the hundreds of restrictions associated with this rule on operations in Wyoming, Colorado, Ohio, Indiana, Montana and every other mining state which was not the focus of the MOU, as well as underground mines.

In 2010 OSM admitted that its decision to pursue the current rulemaking was a political one from the outset, having “already decided to change the rule following the change in Administration on January 20, 2009.”<sup>7</sup>

In the preamble to the proposed rule OSM does little to retreat from its admission that the rule is politically motivated, and fails to provide a reasoned analysis for changing course from the 2008 rule. OSM briefly recites the history of the 2008 and its litigation and concludes that:

“After evaluating the comments that we received on the ANPRM, reexamining the 2008 rule, and reexamining practices in and outside

<sup>2</sup> See, *National Parks Conservation Association v. Jewell*, 62 F. Supp. 3d 7, 2014

<sup>3</sup> *National Parks Conservation Association v. Salazar*, 660 F. Supp. 2d 3, 4 (D.D.C. 2009).

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Memorandum of Understanding Among the U.S. Department of the Army, U.S. Department of the Interior, and U.S. Environmental Protection Agency, Implementing the Interagency Action Plan on Appalachian Surface Coal Mining*, (June 11, 2009).

<sup>6</sup> 80 Fed. Reg. 44436, at 44443 (July 27, 2015).

<sup>7</sup> 75 Fed. Reg. 44666, at 44667 (June 18, 2010).

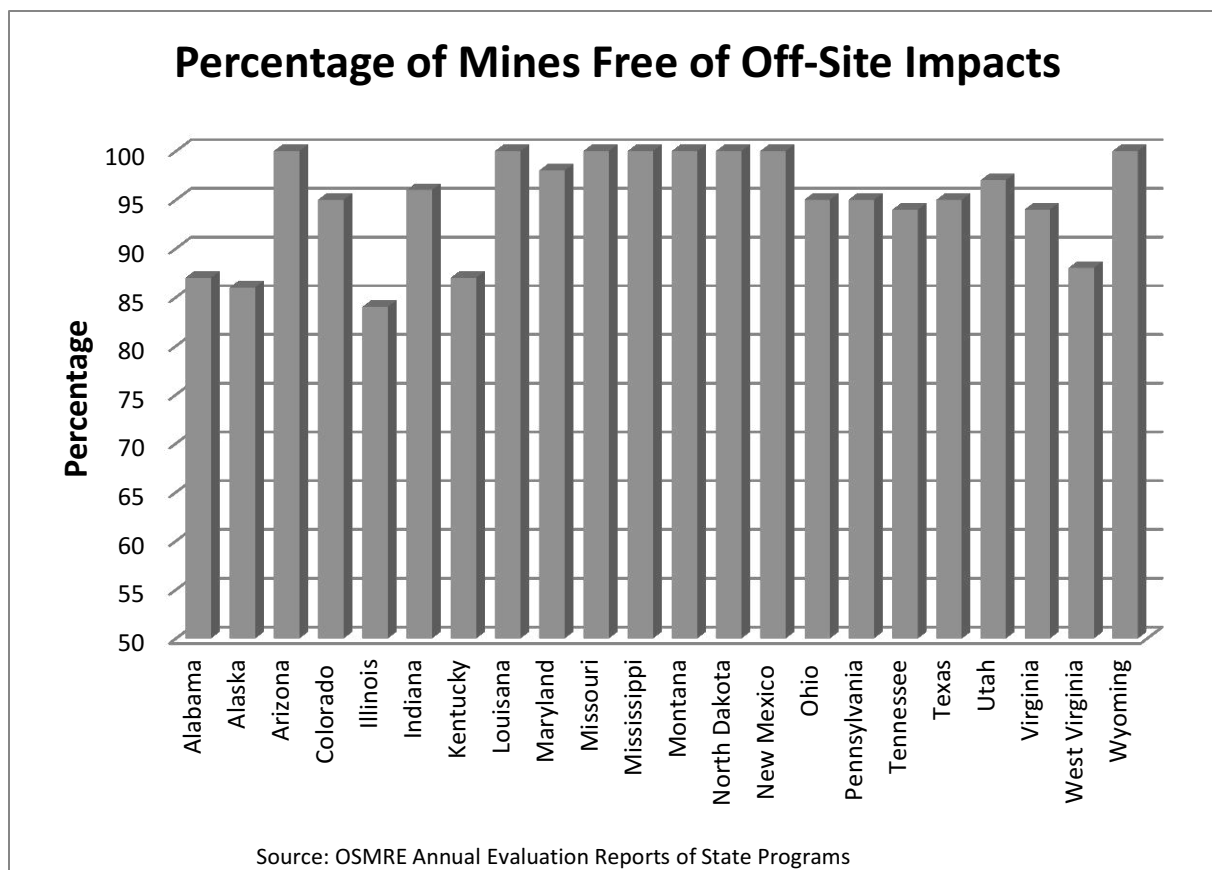
Appalachia, we determined that development of a comprehensive stream protection rule would be the most appropriate and effective method of better achieving the purposes and requirements of SMCRA as well as the goals set forth in the MOU and the ANPRM. Consequently, we are proposing a rule that would identify measures that mine operators and SMCRA regulatory authorities must take to prevent or minimize mining-related impacts on streams and fish, wildlife and related environmental values.

Thus, the scope of this proposed rule is broader than the scope of the 2008 rule, which focused primarily on excess spoil handling, coal mine waste disposal, and activities conducted in or near streams.”<sup>8</sup>

This remarkably brief rationale abandoning the 2008 rule is not explained in any greater detail in the proposed rule. After providing a series of incoherent purposes for the new rulemaking over the past six years, OSM arrives at perhaps the most vague and unsupportable of all— Namely that “primary purpose in proposed this rule is to strike a better balance between protection of the environment and agricultural productivity and the Nation’s needs for coal as an essential source of energy” based on the “our experience during the more than three decades since adoption of the existing regulations.” Contrary to this stated purpose, this has not been OSM’s “experience” in the more than three decades since the adoption of the existing regulations, rather, OSM’s experience is reflected in the Annual Evaluation Reports it prepares to evaluate the effectiveness of state regulatory programs in achieving the goals of SMCRA. These reports show, unequivocally, that OSM’s experience over the past three decades has been a continued trend in state programs working with operators to ensure reclamation success and avoidance of off-site impacts, nationwide. Last year, for example, OSM’s own evaluations show that 90 percent of operations were free of any offsite impacts. These include not only offsite impacts of the type the proposed rule purports to address, but any minor offsite impact of any kind.

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<sup>8</sup> 80 Fed. Reg. 44436, at 44450 (July 27, 2015).



These reports also routinely include highly positive narrative reviews of each state's SMCRA program. Now, OSM appears to abandon its documented experience with state regulators and refer to some other "experience" not reflected in any of OSM's documents or supported by any other source.

As the U.S. Supreme Court has held, while "the scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made."<sup>9</sup> Here, the facts found not only fail to support the choice made, they directly conflict with it. The court has also made clear that "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."<sup>10</sup> As these comments will show in greater

<sup>9</sup> *Motor Vehicle Manufacturers Association of the United States, Inc. Et. Al. v. State Farm Mutual Automobile Insurance Co. Et. Al.*, 463 U.S. 29, at 43 (June 1983). Citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

<sup>10</sup> *Id.*

detail, this rulemaking implicates each of these scenarios as OSM routinely exceeds its authority to pursue activities not entrusted to it by Congress and fails to consider its only annual evaluations and the experience of state regulators and the industry without providing any coherent rationale for the proposed rule. While agencies do have the authority to change course within the ambit of their own authorities and other applicable law, “an agency changing its course must supply a reasoned analysis.”<sup>11</sup> OSM has failed to do so for its proposed SPR, and as a result, must withdraw the rule as proposed.

## **B. SPR is Fundamentally Flawed**

The changes included in the proposed rule are inconsistent with the role of SMCRA as enacted by Congress, would conflict with or unnecessarily duplicate a number of federal and state programs already in place, and result in regulatory uncertainty so profound that it would devastate the coal mining industry on a nation-wide scale. All of this would occur without any identifiable benefit for the environment. Certain provisions of the proposed rule are so legally or technically infeasible as to make compliance impossible under any circumstances, and coal mining effectively illegal in the United States.

The proposed rule significantly redefines a multitude of central terms in SMCRA in a manner inconsistent with the statute. OSM characterizes many of these changes as “non-substantive editorial revisions,” however; this description grossly misrepresents the legal and practical effect that would result from the SPR’s proposed definitions.<sup>12</sup> Among the more egregious are; significant expansion of the term “adjacent areas” outside of mine permits which are subject to the rule’s restrictions; redefinition of the term “approximate original contour” in a manner that fundamentally and unfeasibly alters post mining land reclamation requirements; and a new proposed definition of “material damage to the hydrologic balance”— a SMCRA term which has not received a federal definition for the 38 year history of the program during which time state regulators have continuously improved prevention of offsite impacts. Nevertheless, OSM now seeks to define this term in a manner that would strip the states of their ability to conduct programs within their borders, taking into account the hydrologic conditions unique to their state. Instead, this new federal definition would impose a one-size-fits-all approach that will eviscerate the existing flexibility, and put in its place a framework that overlaps with existing requirements under the Clean Water Act (CWA) in a manner that is not authorized under SMCRA, will drive up costs considerably for operators, and provide no additional environmental benefit. The proposed rule would also add vague new terms such as “ecological function” which are poorly defined and would prove fertile ground for litigation. The rule’s importation of the Environmental Protection Agency’s (EPA) recently promulgated “Clean Water Rule” as it applies to ephemeral streams is also inappropriate in the context of SMCRA, and would have a crippling effect on the ability of coal operators to responsibly develop resources.

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<sup>11</sup> *Id.* at 42

<sup>12</sup> 80 Fed. Reg. 44466

The previously mentioned federal definition of “material damage to the hydrologic balance” tiers off into an unworkable structure that duplicates and conflicts with existing requirements under the CWA. OSM’s attempt to take over the regulation of water quality outside the permit area is not supported by any SMCRA authority, and in fact violates SMCRA’s express prohibition on doing exactly that. [See 30 U.S.C. 702...]. The poor execution of OSM’s effort to incorporate CWA elements into its proposed rule evidences a severe lack of understanding about CWA programs. It also shows why OSM is not the primary water quality regulator in the country and why Congress enacted SMCRA and the CWA to occupy different roles. The proposed framework would result in OSM second guessing and overriding state CWA permitting decisions—a task that is unnecessary and for which OSM is ill-suited. The outcome of this illegal supersession of existing CWA programs would be increased costs for operators as they struggle to comply with both programs, whipsawed between multiple agencies inconsistently occupying the same regulatory space. State regulatory agencies would suffer too as they try to manage the unmanageable requirements of the SPR at enormous cost to state budgets and staffing resources.

Continuing with OSM’s trend of interagency conflict and misapplication of statutory law, the proposed SPR includes a number of highly prohibitive restrictions related to wildlife species and habitat which are inconsistent with SMCRA and existing federal and state fish and wildlife programs. Specifically, OSM proposes to greatly expand the required analysis for threatened and endangered fish and wildlife protection and enhancement plans under SMCRA, but now expands that exercise to include species that haven’t even been listed yet, and have only been proposed for listing. With the rate at which serial litigation is resulting in species listing proposals, the footprint of these requirements will cover the United States and be brought to bear on nearly every mining operation nationwide, exceeding that which is called for under the Endangered Species Act (ESA) and with no identifiable species conservation and recovery benefits. Even worse, the proposed SPR seeks to vest the U.S. Fish and Wildlife Service with final authority over the issuance of SMCRA permits through de facto veto authority given to FWS for any protection and enhancement plan the Service deems unsatisfactory. This proposal is grounded neither in SMCRA nor the ESA and would violate both laws. It would also cede OSM and state regulatory authorities’ primary responsibility under SMCRA—the permitting of mine sites—to an agency not authorized or equipped to make those decisions. And, it would deny due process to applicants simply because the FWS need not take any action at all to exercise its veto authority.

In addition to the musical chairs OSM attempts to play with agency responsibility, the proposed SPR would put in place a host of changes to SMCRA’s reclamation programs that violate the terms of the statute, are inconsistent with court precedent, and are simply impossible to implement on the ground. Among these are restrictions on the use of bonds and financial assurance to cover post-mining reclamation responsibilities. Under the proposed rule the use of self-bonds would be significantly restricted if not made entirely unfeasible in most cases. Further, there is simply no explained basis to dictate that self-bonds are sufficient for some reclamation obligations and not others: an applicant either meets the self-bonding criteria or he doesn’t. Doing so would force

companies into a private market that doesn't exist to cover these obligations. Likewise, the prohibition of the use of bonds in favor of environmental trust funds for perpetual discharges is inconsistent with the SMCRA mandate to provide bonds to ensure reclamation. Further, SMCRA confers no authority for OSM to demand any type of financial guarantee once reclamation obligations have been met, and the ambiguous requirement to establish a trust fund that will guarantee a perpetual source of money to treat water in perpetuity is unachievable, and unreviewable by the courts. The result of the proposed bonding changes would be widespread bankruptcies, lost reserves, increased energy prices for consumers, and ironically, reduced reclamation success due to the unavailability of private insurers to cover reclamation efforts.

These fatal flaws reflect political motivations more than genuine regulatory needs. For these reasons, NMA strongly believes that the proposed rule should be withdrawn in its entirety.

### **III. History and Background of SMCRA**

#### **A. Legislative History**

In order to understand how the proposed SPR runs afoul of SMCRA and the appropriate role of OSM, a better understanding of the law, its regulatory framework, regulatory history and the litigation surrounding it is necessary.

In 1979, the first effort to implement the statute produced 150 pages of rules in the Federal Register to "flesh-out" the prescriptive statutory standards, and another 400 pages in the preamble to explain the regulations. This massive regulatory framework is eclipsed only by the proposed SPR in terms of length and explanatory materials, with a combined total of 2,139 pages between the proposed rule, its preamble, the draft environmental impact statement (EIS) and the regulatory impact analysis (RIA) for the proposed SPR.

#### **B. Cooperative Federalism under SMCRA**

SMCRA establishes a system of cooperative federalism under which SMCRA and its implementing regulations establish minimum national standards for regulating surface coal mining and reclamation activities and states are offered the ability to enact their own laws which are given exclusive jurisdiction, provided state laws meet or exceed the minimum national standards and are approved by the Secretary.<sup>13</sup> In enacting SMCRA, Congress recognized that "because of the diversity, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations...should rest with the states."<sup>14</sup> In order for a state program to be approved the state must pass a law that

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<sup>13</sup> 30 U.S.C. § 1253(a)

<sup>14</sup> *Pa. Fed'n of Sportsmen's Clubs, Inc. v. Hess*, 297 F.3d 310, 315 (3d Cir. 2002) citing 30 U.S.C. § 1201(f).

provides requirements that meet the minimum national standards and demonstrate that the state has the capability of enforcing its law.<sup>15</sup> If the Secretary is satisfied that a state program meets these requirements and approves the program, the state's laws and implementing regulations become operative for the regulation of surface coal mining in that state, and the state official administers the program, giving the state "exclusive jurisdiction over the regulation of surface coal mining" within its borders.<sup>16</sup> If the state fails to submit a program for review or if a submitted program is not approved by the Secretary, the federal program becomes applicable in that state and the Secretary is vested with exclusive jurisdiction for the regulation of coal mining and reclamation in that state.<sup>17</sup> As the 4<sup>th</sup> Circuit Court of Appeals summarized it in *Bragg v. West Virginia Coal Ass'n*:

"Thus, SMCRA provides for *either* State regulation of surface coal mining within its borders *or* federal regulation, but not both. The Act expressly provides that one or the other is exclusive, see 30 U.S.C. §§ 1253(a), 1254(a), with the exception that an approved State program is always subject to revocation when a State fails to enforce it, see *Id.* §§ 1553(a); 1271(b). Federal oversight of an approved State program is provided by the Secretary's obligation to inspect and monitor the operations of State programs. See *Id.* §§ 1267, 1271. Only if an approved State program is revoked, as provided in § 1271, however, does the federal program become operative regulation for surface coal mining in any State that has previously had its program approved. See *Id.* §§ 1254(a), 1271.

"In sum, because the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously. Thus, after a State enacts statutes and regulations become operative, and the federal law and regulations, while continuing to provide the "blueprint" against which to evaluate the State's program, "drop out" as operative provisions. They are reengaged only following the instigation of a § 1271 enforcement proceeding by the Secretary of the Interior."<sup>18</sup>

It is important to note that state SMCRA programs are not merely the adoption and enforcement of federal law and the federal SMCRA program. Once approved, it is state law that is being enforced.<sup>19</sup> As the U.S. Court of Appeals for the Third Circuit has explained; "there would be no reason to allow states to impose their own regulations if the regulations had to be the same as the federal Act and regulations."<sup>20</sup> Congress established this framework recognizing that a uniform federal standard would not be

<sup>15</sup> *Id.*

<sup>16</sup> *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) citing 30 U.S.C. § 1253(a), § 1252(e).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *Bragg*, 248 F.3d, 295 holding that "When a state's program have been approved by the Secretary of the Interior, we can look only to State law on matters involving the enforcement of minimum national standards."

<sup>20</sup> *Pennsylvania Coal Association v. Babbitt*, 63 F.3d 231, 238 (3d Cir. 1995).



workable given the significant differences in geology, topography, and other factors in areas subject to mining operations in various regions and states.<sup>21</sup> As these comments will discuss in further detail below, this important rationale for the basis of SMCRA is largely ignored in OSM's proposed SPR which would require states to adopt one-size-fits all regulations that are of the exact type Congress rejected in enacting SMCRA.

Within this framework primacy states are afforded considerable discretion in the interpretation and enforcement of their own programs. Remarkably, this proposal robs states of all discretion along with their vested authority to translate SMCRA's goals and performance standards in a manner that is suitable and relevant to the different conditions in their states. It is difficult to imagine a rulemaking more antithetical to the express findings and purpose of SMCRA.

Moreover, SMCRA requires that state programs avoid duplication and provide a process for coordinating the review and issuance of permits with other state and federal permit process applicable to the mining operations.<sup>22</sup> States have accomplished that in their current programs. This rule will unravel those measures and preclude states from maintaining that program requirement because this rule imposes conflicting and duplicative permitting and performance standards that cannot be reconciled with those under other laws administered by states and federal agencies.

As a threshold matter, any state with an approved state program would not be compelled to submit state program amendments to conform them to these rules in order to retain exclusive regulatory jurisdiction under SMCRA. States have already satisfied the Act's requirements to obtain exclusive regulatory authority under SMCRA section 503.<sup>23</sup> SMCRA has not been amended, nor has any court determined that any federal rules need to be changed to meet the requirements of SMCRA. All of the proposed revisions are based upon the agency's new viewpoint on how it wishes to implement SMCRA differently—but none of the changes are supported by any reasoning or record evidence the changes are compelled to satisfy the "minimum requirements of the Act," or for states to continue regulating operations "in accordance with the Act."<sup>24</sup>

Moreover, section 505(a) of SMCRA precludes any state law or regulation in effect prior to enactment of SMCRA, *or which may become effective thereafter*, from being superseded unless such State law or regulation is inconsistent with the provisions of [SMCRA].<sup>25</sup> No revision or amendment to the federal regulations in this proposal is based upon the existing federal regulations being inconsistent with SMCRA. Instead, they are merely revisions OSM offers to "strike a *better* balance" between the environment and the Nation's need for coal as an energy source. However, SMCRA says "strike a balance," and that balance was found in the existing state programs approved by the Secretary. At a minimum, the Secretary would need to find that

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<sup>21</sup> *Hess*, 297 F.3d at 316.

<sup>22</sup> 30 U.S.C. 1253 (a)(6).

<sup>23</sup> 30 U.S.C. 1253(a)(1)-(7).

<sup>24</sup> *Id.*

<sup>25</sup> 30 U.S.C. 1255(a).

existing state laws and regulations no longer meet and are inconsistent with the Act. Merely changing the regulations does not standing alone convert a state laws and regulations as inconsistent with or no longer meeting the requirements of SMCRA.

### **C. SMCRA’s Treatment of Streams and the Existing Stream Buffer Zone Rule**

The proposed rule takes a significant step backwards by presuming that prior ambiguities which have since been resolved call for a rulemaking that would unwind over 30 years of historic interpretation and court decisions defining the appropriate parameters of SMCRA’s role regarding streams. OSM states in the preamble to the proposed rule that “there has been considerable controversy over the proper interpretation of both the Clean Water Act and our 1983 rules as they apply to the placement of fill material in or near perennial and intermittent streams.”<sup>26</sup> The preamble then proceeds with the assumption that decades old disagreements have not received resolution from the courts and continue to affect state regulatory authorities. This is not the case.

Since its original promulgation over thirty years ago as a part of the initial program regulations, the stream buffer zone rule has been interpreted and applied as a best management practice for activities that were designed or planned to occur adjacent to, but not in or through, perennial or intermittent channels. Ephemeral streams are not covered under the existing rules and for reasons that will be made clear, this is consistent with the regulatory framework of SMCRA and its relationship to other existing laws, primarily the CWA. Mining and other related activities that were planned and designed to occur in those stream channels were approved and subject to other regulations requiring the best technology currently available for preventing, to the extent possible, the contribution of additional suspended solids to streamflow and runoff outside the permit area, and minimizing adverse impacts on related environmental values. These objectives were achieved primarily by using sediment ponds and siltation structures along with other practices to stabilize areas in order to minimize erosion during and after mining.

#### **a. Initial Program**

The stream buffer zone concept for perennial and intermittent streams was originally adopted as part of the 1977 initial program regulations. The purpose of the rule is to protect stream channels from abnormal erosion from nearby upslope mining activities.<sup>27</sup> Indeed, the language of the rule expressly contemplated that a buffer zone is not required or applicable when mining and reclamation activities are authorized by the regulatory authority through the stream:

“No land within 100 feet of an intermittent or perennial stream shall be disturbed by surface coal mining and reclamation operations unless the regulatory authority

<sup>26</sup> 80 Fed. Reg. 44448

<sup>27</sup> 42 Fed. Reg. 62,652 (Dec. 13, 1977).

specifically authorizes surface coal mining and reclamation operations *through* such a stream.”

30 C.F.R § 715.17(d)(3) (emphasis added).

The buffer zone rule was not intended to act as a *per se* prohibition on mining activities closer to, within, or through intermittent or perennial stream channels. Rather, like many other regulations implementing SMCRA, the rule sets forth certain requirements or conditions for proceeding with activities with the approval of the regulatory authority. For example, the initial program stream buffer zone rule is part of the stream channel diversion standards which require regulatory authority approval for diversions of intermittent and perennial streams within the permit area.<sup>28</sup> Moreover, the preceding paragraph clearly contemplates diversion of overland flows as a means to minimize erosion.<sup>29</sup> The language confirms this intent by using the phrase “through such a stream.” The context of the rule—as part of the stream channel diversions—also confirms that the rule applied to mining through the stream which would typically require diversion of those streams subject to the approval of the regulatory authority. As explained in the preamble, the stream buffer zone rule did not apply: “when mining in intermittent or perennial streams was approved by the regulatory authority.”<sup>30</sup> As the agency further explained, the rule was designed so “existing rights to mine coal as evidenced in approved permits will not be adversely affected.”<sup>31</sup>

The purpose and intent is clear from the 1977 rule that a stream buffer zone would only be maintained around intermittent and perennial streams for surface mining that was not approved to occur through those stream channels. It had no applicability to activities that were designed to occur in such stream channels. Those activities are governed by other regulations. For example, many other provisions of the initial regulatory program clearly contemplate that mining activities will occur adjacent to or in stream channels. These include: construction of excess spoil fills, § 715.15(a)-(d) (requiring underdrain systems along the natural drainage course when the disposal area contains natural watercourses such as streams); § 715.17(c)-(f) (temporary or permanent diversions of streams; sedimentation ponds and siltation structures located in streams); § 715.17(l) (stream fords, stream crossings and roads in inactive stream channels); and § 715.18 (construction of dams). As OSM correctly notes in this proposed clarification, the buffer zone rule was not applicable to these activities which are governed by the specific rules authorizing them.<sup>32</sup>

This intent is corroborated by reviewing the underground coal mining standards. The underground coal mining standards did not contain a stream buffer zone requirement because the mining was beneath the stream and not through the stream.<sup>33</sup> Surface

<sup>28</sup> See 30 C.F.R. § 717(d)(1).

<sup>29</sup> See 30 C.F.R. § 717(c).

<sup>30</sup> 42 Fed. Reg. 62,652 (Dec. 13, 1977).

<sup>31</sup> *Id.*

<sup>32</sup> 72 Fed. Reg. 48,892.

<sup>33</sup> See 30 C.F.R. § 717.17.

activities associated with underground coal mining operations nearby or in perennial and intermittent stream channels were governed by the general hydrologic protection standards and any specific standards related to that activity.

For surface mining nearby, but not through a perennial or intermittent stream, the rule provided a presumptive 100-foot buffer width on each side of the stream. However, even this directive is not absolute, and a modified zone may be established for the stream or portions of stream segments. The history of the rule discloses that the designated 100-foot width was chosen as a matter of administrative convenience for the agency, and not because the technical literature suggests a one-size-fits-all approach of a 100 foot minimum. According to OSM, the 100-foot requirement was chosen because “site-by-site determinations would be impractical and very difficult to enforce.”<sup>34</sup> While this reasoning may have been appropriate for the initial program when states issued permits under their pre-existing SMCRA programs and OSM independently enforced SMCRA’s initial program, those circumstances no longer exist, and therefore site-by-site determinations are most appropriate for permanent program permits issued by state regulatory authorities.

### **b. Permanent Program**

The permanent program version of the stream buffer zone rule § 816.57, adopted in 1979, reflects that same purpose and intent. As explained by OSM, the rule is one of several rules designed to implement the general performance standards to minimize disturbances to the prevailing hydrologic balance during and after mining by preventing, to the extent possible, additional contributions of suspended solids to stream flow or runoff outside the permit area.<sup>35</sup> OSM went on to explain that the buffer zone was one of several practices or methods that could be used alone or in combination with others, such as sedimentation ponds, to prevent sedimentation of streams by runoff from disturbed surface areas. The 1983 revisions also reflect this purpose and understanding of the rule as providing a method “in conjunction with sedimentation ponds and other measures, to prevent excessive sedimentation of streams by runoff from disturbed surface areas.”<sup>36</sup>

The 1979 environmental impact statement (EIS) accompanying the proposed permanent program discusses the stream buffer zone requirement in terms of “establishing an unmined, 100 foot wide buffer zone between the stream and mining operations.”<sup>37</sup> The 1979 EIS’s assessment of the benefits afforded from the rule speak almost exclusively in terms of mining closer to or through a stream and the impacts of the rule on coal recovery.<sup>38</sup> There is no mention in the EIS of applying the buffer zone requirement to activities designed to occur in these stream channels. Moreover, the

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<sup>34</sup> 42 Fed. Reg. 62,652.

<sup>35</sup> 44 Fed. Reg. 15,176 (March 13, 1979) citing 30 U.S.C. § 1265(b)(10)(B).

<sup>36</sup> 48 Fed. Reg. 30,312 (June 30, 1983).

<sup>37</sup> See Permanent Regulatory Program Implementing Section 501(b) of the Surface Mining Control and Reclamation Act of 1977, Final Environmental Impact Statement OSM-EIS-1 (Jan. 1979) at p. BIII-59 (emphasis added).

<sup>38</sup> *Id.*

discussion of the other rules that specifically address activities that may occur in stream channels do not mention the stream buffer zone rule at all. Take for example the discussion of the disposal of excess spoil, coal mine waste and impounding structures which do not mention a stream buffer zone requirement. Rather, the discussion of these standards all point to the design and construction requirements as addressing erosion and prevention of additional contributions of sediment to the hydrologic system.<sup>39</sup> In sum, the regulatory structure and history demonstrate that for activities designed to occur in the stream channel are governed by other regulations.

The statutory basis for the stream buffer zone rule, its context in the regulations and the agency's contemporaneous explanations all confirm that the purpose of the rule is to provide one of several best management practices or, in the words of SMCRA, best technology currently available for minimizing disturbance to the prevailing hydrologic balance from surface mining nearby certain streams. The purpose of the OSM stream buffer zone rule is confirmed by its underpinning in technical literature from which it was borrowed. A stream buffer zone or, as more widely referred to a vegetated buffer zone, is a vegetated area adjacent to a stream whose function is to serve as a sediment trap for erosion from upland areas, to stabilize stream banks against channel erosion, or to remove nutrients such as nitrates or phosphates before surface runoff enters the stream. Buffer zones are a best management practice used in connection with various land disturbing activities including residential and commercial construction, road building, oil and gas development, logging and agriculture. Of course, if the activity is designed to occur in the stream channel, then the buffer zone has no practical application and other methods and techniques are used to address downstream environmental impacts from those activities. These other techniques or methods include sedimentation ponds, diversions, check dams, mulching, matting, straw bales, filter fences and surface or slope shaping.

A review of the current literature finds that creation of vegetated buffers is but one of a portfolio of best management practices that may be used to control sediment at various types of construction sites, including mining, forestry, road and highway construction projects. See *U.S. Environmental Protection Agency, Erosion and Sediment Control, Surface Mining in the Eastern U.S.*, Oct. 1976; *U.S. Environmental Discharge Elimination System (NPDES) Stormwater Menu of BMPs* available at: <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm>; *Effects of Urbanization on Streamflow and Sediment Transport*, Geological Survey Professional Paper, Yorke & Herb, 1978; *Environmental Protection in Surface Mining of Coal*, U.S. Environmental Protection Agency, Grim and Hill 1974; U.S. Environmental Protection Agency, *Impact of Nearstream Vegetation and Stream Morphology on Water Quality and Stream Biota*, August 1977. The width of the buffer strip is determined by evaluating a number of site-specific factors, including but not limited to slope, vegetation, soils, depth to

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<sup>39</sup> *Id.* at BIII-61 (design, construction technique, shaping, terracing, and drainage systems requirements of those specific rules address the impacts on hydrologic balance).

impermeable layers, runoff sediment characteristics, rainfall and length of time the slope is left unreclaimed.<sup>40</sup>

A common theme in the literature is that buffer width is directly related to slope. Recognizing slope as a key factor, the U.S. Forest Service devised a formula or rule of thumb for recommended widths for filter strips for forest roads near streams. Starting with a strip of 25 feet wide on level land, the width of strip should increase 2 feet for each 1 percent increase in slope of the land between the road and the stream.<sup>41</sup> Applying this recommended formula to mining operations in steep slopes, defined as within the 20 percent range, suggests the 100 foot width may be unnecessarily wide even in the steepest sloped mining areas. The agency itself stated expressly in its 1979 preamble discussion that the 100 foot width of the zone was only a general rule. “It is the intent of the Office that the width of the zone may be increased or decreased when there is justification for doing so, according to the findings of the regulatory authority.”<sup>42</sup> In order for the final rule to reflect the technical literature for vegetated buffer zones and the regulatory history of the agency’s rule, both of which establish that width of the buffer zone is directly related to slope, topography and other site-specific factors, the rule should clearly provide the state regulatory authorities ample discretion to approve an alternative buffer zone proposed by the permittee.

### **c. Historic Interpretation and Application**

Since 1977, the regulatory program, including the stream buffer zone rule, has been administered to routinely authorize in permits various coal mining and reclamation activities through or in stream channels, including mining of coal, placement of excess spoil, placement of coal refuse piles, construction of coal slurry impoundments, placement of sedimentation ponds and other water control structures, stream fords and crossings. These and other activities are planned and approved to take place in or through stream channels in accordance with the regulations addressing the manner in which operations will minimize the disturbance to the prevailing hydrologic balance by preventing to the extent possible additional contributions of suspended solids to streamflow and runoff outside the permit area and otherwise minimize disturbances and impacts to fish, wildlife and environmental values. While these performance standards are met primarily through the requirement to pass all runoff from disturbed areas through sedimentation ponds or other siltation structures before leaving the permit area, they are fully advanced in the final restoration and reclamation of the land where these operations and activities take place.

This longstanding interpretation and application of the stream buffer zone rule is readily apparent from its overall context in the regulatory program as it relates to how coal mining operations are designed, approved and conducted to meet the statutory requirements of SMCRA §§ 515(b)(10) and 515(b)(24). These provisions include:

<sup>40</sup> See U.S. Environmental Protection Agency, National Pollutant Discharge Elimination System (NPDES) Stormwater Menu of BMPs available at: <http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index>.

<sup>41</sup> See Journal of Forestry, Trimble & Sartz, May 1957.

<sup>42</sup> See 44 Fed. Reg. 15,177 (March 13, 1979).

30 C.F.R. §780.21(f) (probable hydrologic consequences)  
 30 C.F.R. §780.21(g) (cumulative hydrologic impact analysis)  
 30 C.F.R. §780.21(h) (hydrologic reclamation plan)  
 30 C.F.R. § 816.41 (hydrologic balance protection)  
 30 C.F.R. § 816.42 (Water Quality)  
 30 C.F.R. § 816.43 (Diversion of Streams)  
 30 C.F.R. § 816.45 (Sediment Control)  
 30 C.F.R. § 816.47 (Hydrologic balance: discharge structures)  
 30 C.F.R. § 816.72 (Disposal of Excess Spoil in Valley Fills)  
 30 C.F.R. § 816.97 (Protection of Fish, Wildlife, & Related Environmental Values)  
 30 C.F.R. § 816.150 (location, design and construction of roads)  
 30 C.F.R. § 816.151(location, design and construction of primary roads and stream fords).

All of these rules expressly contemplate that mining and mining-related activities will be designed to occur in stream channels. When activities are not designed and approved to occur in or through a perennial or an intermittent stream channel, a buffer zone applies to such stream. The 100-foot width set forth in the rule is merely a presumptive distance that can be altered in the permit. If the rule were applied in a manner that presumptively prohibits activities that are planned and designed to occur in stream beds, then it would conflict with the statutory and regulatory provisions that recognize that various activities associated with coal mining inherently involve disturbing stream beds.<sup>43</sup> Our members' experience in operating under the initial and permanent regulatory programs discloses that the rule has not been construed by the federal or state agencies as a prohibition on conducting activities in perennial, intermittent or ephemeral stream channels. Rather, the rule has been administered to allow such activities with measures taken that, to the extent possible, prevent additional contributions of suspended solids to stream flow or runoff outside the permit area and minimize adverse impacts on downstream environmental resources.

Since SMCRA's enactment 38 years ago, the coal industry has invested billions of dollars in mines and associated infrastructure, produced almost 30 billion tons of coal, reclaimed well over 2.2 million acres of mined lands to productive uses, paid \$8 billion in AML fees to reclaim pre-SMCRA abandoned mines, paid billions of dollars in state severance taxes, employed hundreds of thousands of miners and supplied the fuel that generates more than half of the electricity in the nation. It is self-evident, and well-documented as well, that much of this investment and the attendant coal production would not have occurred had the stream buffer zone rule been interpreted and applied in the manner advocated by plaintiffs in the *Bragg v. Robertson* case discussed below.

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<sup>43</sup> See *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 876 (1991)(our cases have expressed a deep reluctance to interpret a provision so as to render superfluous other provisions in the same enactment).

## D. Litigation History of Prior Rules

The proper interpretation and application of the stream buffer zone rule was well-settled during the initial program, permanent program and approval of state programs until certain groups initiated litigation advancing an interpretation of the rule that was directly contrary to SMCRA's text and the longstanding understanding and application of the stream buffer zone rule. Courts and agency decisions have subsequently rejected that improper interpretation and removed the perceived ambiguity these groups worked to create.

An improper interpretation and application of the stream buffer zone rule is evident in the West Virginia district court opinion in *Bragg v. Robertson* in 1999.<sup>44</sup> There, the court agreed with the plaintiffs' view that the rule effectively barred construction of excess spoil fills in intermittent and perennial streams because regulatory authorities could not make the necessary findings related to water quantity and quality and adverse impacts on fish, wildlife and related environmental values *for the segment of the stream where the spoil fill is constructed*. The court rejected the state of West Virginia's interpretation that the necessary findings pertain to effects downstream from the fill, and concluded that no other statutory or regulatory provision "implicitly or explicitly contemplate such stream fill."<sup>45</sup>

Employing the *Bragg* court's interpretation and reasoning in applying the stream buffer zone rule would have effectively prohibited most activities integral to coal mining operations. For example, if, as the district court opined, the rule were to prohibit mining activities in any stream segment absent finding no adverse impacts in the segment of the stream where the activities were designed to occur, the surface mining of coal lying beneath those streams would be effectively banned notwithstanding the frequent use of stream diversions prior to mining through those stream segments.<sup>46</sup> The principal method for minimizing adverse off site impacts to streams and water quality through construction of sedimentation ponds or other siltation control structures would be banned inasmuch as those technologies must be deployed close to or in stream channels as the best technology currently available to meet the effluent limit guidelines for the downstream segments of the receiving stream.<sup>47</sup> The interpretation of the rule reflected in the *Bragg* decision would have also effectively prohibited: building of stream crossings and roads across such streams; culverts; construction of coal refuse disposal areas and impoundments necessary to operate coal preparation facilities; disposal of underground coal mine development waste; coal conveyor belts; and surface and groundwater monitoring.

<sup>44</sup> 72 F. Supp. 2d 642 (S.D. W. Va. 1999), *aff'd* in part and vacated in part, 248 F. 3d 275 (4th Cir. 2001).

<sup>45</sup> *Bragg*, 72 F. 2d at 652-53, 660.

<sup>46</sup> *See, e.g.*, 30 C.F.R. 816.43(b).

<sup>47</sup> *See, e.g.*, 30 C.F.R. § 816/817.46(c) (locating sedimentation ponds in streams authorized, but for perennial streams such location requires approval); H.R. Rep. No. 95-218, at 114-115, *reprinted in* 1977 U.S.C.C.A.N. 593, 647-648 (characterizing as best available technology the construction of sedimentation ponds in streams and tributaries).



The impacts of such an interpretation would cripple the coal mining industry and directly contravene SMCRA's purpose to assure that the coal supply essential to our Nation's energy requirements and social and economic well-being is provided.<sup>48</sup> Shortly after the district court decision in *Bragg*, miners were laid off or given WARN notices, and the Governor of West Virginia instructed all state agencies to start cutting their budgets and prepare for layoffs of state workers in anticipation of a substantial reduction in tax revenues. A Marshall University economic impact analysis forecasted unprecedented economic and social dislocation from the *Bragg* decision. The study found that the interpretation of the stream buffer zone rule provided for in *Bragg* would result in the loss of over ten thousand jobs and hundreds of million dollars in wages across West Virginia alone.<sup>49</sup> The loss of state and local revenues would exceed \$168 million annually.<sup>50</sup> Fortunately, the *Bragg* court stayed its decision pending appeal—and the successful appeal avoided the regional economic catastrophe forecasted to accompany implementation of the *Bragg* court's interpretation of the rule.

Agency studies confirm that the *Bragg* interpretation would have caused severe disruptions in coal mining across the Appalachian coal region. These studies indicate that in excess of 90 percent of the reserves in this region could not be mined under the *Bragg* court's interpretation of the stream buffer zone rule.<sup>51</sup> These impacts largely arise from the restrictions such an interpretation would pose for excess spoil fills. However, the *Bragg* interpretation would adversely affect reserves, operational design and the economics for all types of coal mining and ancillary activities (e.g., coal processing, handling and transportation) for all coal mining regions. And NMA members' evaluation of the application of the *Bragg* interpretation indicated that it would have posed severe constraints and economic consequences for their operations throughout the coal mining regions of the country. These constraints include: limitations on access and economic recoverability of coal reserves, design and operation of surface and underground mines, and the design and location of auxiliary operations, all of which may render certain operations uneconomical or shorten their mine life.

The *Bragg* court was categorically wrong in its interpretation. Indeed, as the 4th Circuit United States Court of Appeals has held "SMCRA does not prohibit the discharge of surface coal mining excess spoil in waters of the United States."<sup>52</sup> As for the *Bragg* court's view that no SMCRA provisions contemplate such activities, the appeals court cited several, including § 515(b)(22), as evincing a clear statutory intent "that excess spoil could and would be placed in waters of the United States."<sup>53</sup> And, with respect to the *Bragg* court's view that the stream buffer zone rule requires no adverse impacts in

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<sup>48</sup> 30 U.S.C. § 1202(f).

<sup>49</sup> Burton, Hicks and Kent, *The Fiscal Implications of Judicially Imposed Surface Mining Restrictions in West Virginia* (Feb. 2001).

<sup>50</sup> *Ibid.*

<sup>51</sup> See Sandberg, Doss, et al., "The Mountaintop EIS Technical Report," 3 (2000).

<sup>52</sup> *Kentuckians for the Commonwealth, Inc. v. Rivenburgh*, 317 F. 3d 425, 442 (4th Cir. 2003).

<sup>53</sup> *Id.* at 443

the portion of the stream where fill placement will occur, the appeals court construed § 515(b)(24) as “implying the placement of fill within waters of the United States.”<sup>54</sup>

In addition to the statutory and regulatory provisions discussed by the 4th Circuit in *Kentuckians for the Commonwealth* explicitly contemplating the placement of excess spoil in perennial and intermittent streams, (see, e.g., SMCRA § 515(b)(22), (24); 30 C.F.R. §§ 816/817.71-74), SMCRA and its implementing regulations are replete with requirements that either explicitly or implicitly contemplate other coal mining related activities in or nearby intermittent and perennial streams. Examples of the statutory provisions include:

§ 515(b)(4) (stabilize surface areas, including spoil piles to effectively control erosion and water pollution)

§ 515(b)(8) (creation of permanent water impoundments as part of reclamation activities)

§ 515 (b)(10) (construction, cleaning and removing temporary sedimentation ponds and structures from drainways after revegetation)

§ 515(b) (13)/ 516(b)(5) (design, location and construction of coal mine and solid waste piles used as dams or impoundments)

§ 515(f) (coal mine waste disposal design to insure that flood control structures are safe).

SMCRA is a detailed and prescriptive statute. As the agency explains in the preamble, SMCRA does not contain an express requirement for a stream buffer zone, let alone a prohibition on conducting operations nearby or in stream beds.<sup>55</sup> The preamble to the proposed rule correctly notes that the interpretation in *Rivenburgh* has been upheld and applied in subsequent litigation.<sup>56</sup> When Congress intended to prohibit activities absolutely or conditionally, it did so expressly in the text of the statute. For example, § 522(e) imposes both absolute and conditional prohibitions upon surface coal mining operations within or nearby certain areas. These prohibitions establish “buffer zones” around certain lands or features which apply absent valid existing rights or pre-existence of the mining operation. In some cases these prohibitions are conditional and operations may be conducted closer or in those areas upon obtaining waivers or determinations that allow them.<sup>57</sup> Accordingly, where in SMCRA Congress has included particular language in one section but not another, it is presumed that Congress has acted intentionally and purposefully.<sup>58</sup> Moreover, an earlier version of SMCRA that passed the House of Representatives in 1972 (H.R. 6482) included an express prohibition on mining within 100 feet of “any body of water, stream, pond or lake” with public use or access. This bill did not become law and that provision never reappeared in any subsequent version of SMCRA legislation including the bill that was enacted in

<sup>54</sup> *Id.*

<sup>55</sup> See 80 Fed. Reg. 44447.

<sup>56</sup> *Id.* at 44449.

<sup>57</sup> See, e.g., § 522(e)(2)-(5); § 515(b)(12).

<sup>58</sup> *National Wildlife Federation v. Hodel*, 839 F. 2d 694, 760 (D.C. Cir. 1988)(quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

1977. To construe a rule in a manner that effectively resurrects such a prohibition is no less ultra vires than promulgating a rule that expressly does so. Even the conditional extension of express prohibitions in the statute has been declared beyond the agency's rulemaking authority.<sup>59</sup>

The *Rivenburgh* decision upheld the longstanding interpretation and application of the rule as a best management practice for coal mining activities that are not designed and planned to occur in perennial and intermittent stream beds. OSM's acknowledgement of *Rivenburgh's* finality and its subsequent citation in later decisions contradicts the agency's suggestion that ambiguity remains which would call for clarification of issues surrounding stream buffers. Such an exercise is a waste of time and resources for OSM, as any other interpretation converts what is a precautionary principle related to the planning and conduct of operations in or nearby these streams into a de facto prohibition which would exceed any delegated rulemaking authority under SMCRA.

#### IV. SMCRA's Relationship to Other Laws— Section 702

The comprehensive scope of SMCRA does not provide OSM with the authority to regulate issues within the scope of other federal laws. Rather, Section 702 of SMCRA clarifies the law's subservience to other laws enacted to govern areas otherwise impacted by mining operations. This section states in part:

"Sec. 702. (a) Nothing in this Act shall be construed as superseding, amending, modifying, or repealing the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a), the National Environmental Policy Act of 1969 (42 U.S.C. 4321-47), or any of the following Acts or with any rule or regulation promulgated thereunder, including, *but not limited to*—

(1) The Federal Metal and Nonmetallic Mine Safety Act (30 U.S.C. 721 740).

(2) The Federal Coal Mine Health and Safety Act of 1969 (83 Stat. 742) [30 U.S.C. 801 et seq.].

**(3) The Federal Water Pollution Control Act (79 Stat. 903), as amended [33 U.S.C. 1251 et seq.], the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality.**

(4) The Clean Air Act, as amended [42 U.S.C. 7401 et seq.].

(5) The Solid Waste Disposal Act [42 U.S.C. 6901 et seq.].

(6) The Refuse Act of 1899 (33 U.S.C. 407).

(7) The Fish and Wildlife Coordination Act of 1934 (16 U.S.C. 661 666c).

(8) The Mineral Leasing Act of 1920, as amended (30 U.S.C. 181 et seq.)."<sup>60</sup>

<sup>59</sup> *In re: Surface Mining Regulation Litigation*, 627 F. 2d 1346, 1358-59 (D.C. Cir. 1980).

<sup>60</sup> 30 U.S.C. § 1292

The ten statutes listed in Section 702 of SMCRA are not exhaustive— the limitations placed on SMCRA’s authority by Section 702 apply to statutes not listed as well.<sup>61</sup> As such, to the extent that the SMCRA policy conflicts with another regulatory program such as the Clean Water Act or Clean Air Act, the SMCRA policy must give way.<sup>62</sup> In other words, issues within the scope of other federal environmental statutes are not within the purview of SMCRA regulators.

This relationship among laws was explained by the D.C. Circuit Court of Appeals in the *In Re Surface Mining Regulation Litigation* where the court emphasized both the text of SMCRA and the legislative history supporting it. Specifically, the court cited the bill report of the House Committee on Interior and Insular Affairs accompanying an early version of the law in 1975, stating:

“The EPA has been directed by the Congress to ensure the environmental well-being of the country. EPA has established water quality standards, air quality standards, and implementation and compliance requirements for the coal mining and processing industry, and issues permits to the industry to ensure appropriate pollution abatement and environmental protection. The committee concluded that because of the likeness of the EPA’s abatement programs and the procedures, standards, and other requirements of this bill, it is imperative that maximum coordination be required and that *any risk of duplication or conflict be minimized.*” (emphasis added).<sup>63</sup>

At issue in the *In Re Surface Mining* case was OSM’s attempt to establish effluent limitations and water quality standards for surface and underground mining , despite the fact that such limitations and standards are already established under the CWA.<sup>64</sup> Notably, the effluent limitations proposed by OSM lacked vital elements of the EPA’s regulatory framework, such as a variance mechanism under which effluent limits may be modified for particular mining operations upon a showing of good cause, an exemption from effluent limits of discharges attributable to abnormal runoff, especially snowmelt, and a “credit” in measuring discharges of suspended solids attributable to natural or other causes unconnected with mining operations.<sup>65</sup>

The Secretary attempted to justify this duplication as well as the omission of vital elements of EPA’s program, by arguing that SMCRA confers the authority to fill “regulatory gaps” left open by other programs with a more comprehensive regulatory regime, and that as long as SMCRA’s standard was at least as stringent as the EPA’s (and by extension any program enacted under another authority) it could be more stringent.<sup>66</sup> This rationale, however, which appears to be embedded throughout the

<sup>61</sup> *Indiana Coal Council v. Lujan*, 774 F. Supp. 1385, 1397 (D.D.C. 1991).

<sup>62</sup> *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1367 (D.C. Cir 1980).

<sup>63</sup> *Id.* at 1366, citing H.R.Rep.No.45, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 134 (1975).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *In Re Surface Mining Litigation*, 456 F. Supp. 1301, at 1314 (1978).

current proposed SPR, was summarily rejected by the court of appeals. Specifically, the court found that “where Congress intended in the [Surface Mining Control and Reclamation] Act that regulation be “at least as stringent as” some other requirement it explicitly used those terms, see Sections 710(c) & (d), (“all surface coal mining operations on Indian lands shall comply with requirements at least as stringent as...”) but section 702(a)(3) of the Surface Mining Act contains an absolute prohibition against “superseding, amending, modifying, or repealing” the Federal Water Pollution Control Act...Where the Secretary’s regulation of surface coal mining’s hydrologic impacts overlaps EPA’s, the Act expressly directs that the Federal Water Pollution Control Act and its regulatory framework are to control so as to afford consistent effluent standards nationwide.”<sup>67</sup>

Importantly, the court’s decision also clarified that the limitations placed on SMCRA regulators by Sec. 702 apply not only to those areas where the implementing agencies of other laws have chosen to regulate, but equally to those areas where they have chosen *not* to regulate. The court held that, “where the Federal Water Pollution Control Act and its underlying regulatory scheme are silent so as to constitute an “absence of regulation” or a “regulatory gap”, the Secretary may issue...regulations...so long as he is authorized to do so under the Surface Mining Act.”<sup>68</sup> *However, the court clarified that the decision not to regulate made by an agency otherwise authorized to do so, whether individually or programmatically, is an “element of regulation,” and is within the framework of discretion conferred on those agencies by Congress in the statutes listed in Sec. 702.*

In the case of OSM’s proposed effluent limitations, the court held that the omitted elements of EPA regulation did not constitute a “regulatory gap” which would allow OSM to promulgate more stringent regulations. Rather, the variances and exceptions were “substantive elements of regulation” under the CWA, not “gaps” in EPA’s statutory authority or administration, and the Secretary therefore could not alter regulatory elements by promulgating more stringent provisions.<sup>69</sup>

Notably, the court’s ruling makes sense from a practical perspective, as it upholds the clear intent of Congress to leave the decision to regulate or not regulate to those laws and agencies established by Congress specifically to do so and which are best suited to the task.

Simply stated, Section 702 asks; 1) does another agency/law have authority over the subject matter (regardless of the agency’s decision to actively regulate in that area)? And, 2) Does SMCRA confer independent authority to regulate the subject matter? Only if the answer to the first inquiry is no and the second is yes does SMCRA provide the authority to regulate. Many of the provisions of the proposed SPR fail this test and violate Section 702. The most prevalent of these concern the overlap, duplication, and conflict with existing requirements under the CWA.

<sup>67</sup> *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1367 (D.C. Cir 1980).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 1369.

## V. Clean Water Act Overview

### A. Introduction

While NMA notes that the preamble to the proposed rule includes a brief summary of certain provisions in the CWA, NMA believes that a more detailed explanation is warranted in light of the proposal's significant overlap with and supersession of CWA requirements in violation of Sec. 702 of SMCRA. In particular, NMA is concerned with the rule's misapplication of uses designated pursuant to CWA Secs. 101(a)(2) and 303(c), apparent misunderstanding of the development and enforcement of CWA water quality standards, and disregard of the CWA Sec. 404 permitting program.

### B. Water Quality Standards Overview

Water quality standards are applied to all waters covered under the CWA referred to as "waters of the U.S." or "WOTUS." They consist of designated uses for each waterbody, criteria necessary to protect those uses, and an anti-degradation policy to protect existing uses and high quality waters.

Once a waterbody has been assigned designated uses and the applicable water quality criteria necessary to ensure that those uses are being met, those standards are enforced through specific limitations in National Pollutant Discharge Elimination System (NPDES) permits. It is important to note that the reason water quality standards get enforced via specific limitations in NPDES permits pertains to the 1972 amendments to the CWA.

Prior to 1972, the Environmental Protection Agency (EPA) and the states had been attempting to improve water quality based solely on the health of a particular stream or waterbody. As such, it was difficult if not impossible for regulators to determine which discharges were responsible for degraded stream quality and how to stop it. The solution to that problem was the NPDES program, which allows EPA and the states to assign numeric and narrative criteria to waterbodies representing the water quality necessary to support that water's designated uses, and to then translate those criteria into enforceable permit limitations for each individual discharger. In other words, *EPA and the states found that directly enforcing stream health goals – such as designated uses – was unworkable, and major revisions to the CWA were made establishing the NPDES permitting program, which allowed permittees to understand their responsibilities under the Act and regulators to have a useful enforcement mechanism for water quality protection.*

It is also important to note that under the CWA water quality standards are not static concepts. Under CWA section 304(a), for example, EPA periodically publishes updated recommended water quality criteria, including aquatic life, biological and nutrient criteria, based on new scientific developments. Likewise, states are required to review their water quality standards every three years, and any revisions or new standards made by

states must be approved by EPA. If EPA determines that state standards do not meet the requirements of the CWA, EPA must promulgate federal standards.

### C. Designated Uses

Designated uses represent “water quality goals” for a specific waterbody they are “those uses specified in state or tribal water quality standards regulations for each water body or segment whether or not they are being attained.” 40 CFR 131.10 (emphasis added). EPA expects that states and tribes will consider all uses identified in CWA Secs. 101(a) and 303(c) (see below), and that designated uses will not provide for waste transport or waste assimilation, will be established through a public process, and will provide for the attainment or maintenance of water quality standards of downstream waters. Importantly, certain uses are automatically assigned to waterbodies under the CWA and can never be removed, while others may only be removed after a specific, in-depth showing is made.

Existing uses may never be removed from a waterbody. 40 CFR 131.10(h)(1). Existing uses are those uses that were actually attained at any time on or after Nov. 28, 1975, regardless of whether they are currently being attained. Because existing uses serve as a “floor” below which water quality should not drop, even if the existing use is not currently attainable and may likely never be attainable going forward, it nevertheless remains a designated use for purposes of the CWA. By way of example, even if a use such as cold water aquatic life has not been attained for over 20 years due to natural changes in water temperature, that use cannot be removed from a state’s water quality standards and that water must be listed as “impaired” for that use indefinitely.

Furthermore, pursuant to EPA’s recently finalized rule, “Water Quality Standards Regulatory Revisions,” under the CWA there is a presumption that the uses specified in CWA Sec. 101(a)(2) the propagation of fish, shellfish and wildlife and recreation in and on the water, i.e. “fishable/swimmable” are attainable unless a use attainability analysis (UAA) is done which justifies removing that use. 80 Fed. Reg. 51019 (Aug. 21, 2015).

A UAA is a “structured scientific assessment of the factors affecting the attainment of the use.” Those factors are found at 40 CFR 131.10(g), and include: (1) naturally occurring pollutant concentrations prevent the attainment of the use; (2) natural, ephemeral, intermittent or low flow conditions prevent the attainment of the use; (3) human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place (note this factor takes into account potential gains in water quality that can be made from best management practices, point and non-point source pollution controls, etc.); (4) dams, diversions or other types of hydrologic modifications preclude attainment of the use; (5) physical conditions related to natural features of the water body preclude attainment of aquatic life protection uses (e.g., the slope of the banks prevent a use); and (6) controls would result in substantial and widespread economic and social impact.

Thus, to remove a 101(a)(2) “fishable/swimmable” use, it must not be an “existing use,” a state or tribe must do a UAA showing that it cannot be attained via the 131.10(g) factors, and EPA must approve the removal as part of the state or tribe’s water quality standards package. Additionally, unless the state has demonstrated that all sub-categories of the use are unattainable, a state must adopt the use’s subcategories as the “highest attainable use,” defined as “a modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in 101(a)(2) and attainable based on the evaluation of the factors in 131.10(g) that preclude attainment of the use and any other information or analyses that were used to evaluate attainability.”

With respect to “non 101(a)(2) uses” i.e., those uses outlined in CWA Sec. 303(c)(2)(a), including public water supplies, agricultural use, industrial use, navigation and other purposes while states and tribes do not need to do a UAA to remove them, they do need to do a “use and value” demonstration consistent with CWA Sec. 303(c)(2)(A).

#### **D. Water Quality Criteria**

CWA Sec. 303(c)(1) requires states and tribes to adopt criteria into their water quality standards to protect designated uses. The term “criteria” is defined in EPA’s regulations at 40 CFR 131.3(b) as “elements of state/tribe water quality standards, expressed as constituent concentration levels or narrative statements, representing a quality of what that supports a particular use. When criteria are met, water quality will generally protect the designated use.” Importantly, while water quality criteria are derived to ensure that designated uses in a particular waterbody can be achieved, the criteria themselves do not have a direct effect until they are translated into enforceable limitations in NPDES permits.

40 CFR 131.11 requires states and tribes to develop criteria using sound scientific rationale based on sufficient parameters or constituents to protect the designated use, and to apply criteria to support the most sensitive use in waters with multiple use designations. States establish numeric criteria based on EPA’s 304(a) guidance (criteria developed by EPA based on the latest scientific knowledge) or other scientifically defensible methods. States and tribes may establish narrative criteria or criteria based on biomonitoring methods where numeric criteria cannot be established or to supplement numeric criteria. However, for “307(a)” toxics which include pollutants such as selenium, mercury, and zinc a state or tribe must provide a method of translating any narrative criterion into something numeric from which a permit writer can derive enforceable effluent limitations (40 CFR 131.11(a)(2)).

If a state or tribe fails to adopt adequately protective criteria, EPA is required to promulgate a new or revised standard necessary to meet the requirements of the CWA pursuant to CWA Sec. 303(c). The most common types of water quality criteria are aquatic life, biological, human health and recreational criteria, though there are other types of criteria such as sediment and nutrient criteria.



## 1. Aquatic Life Criteria

Aquatic life criteria represent the highest instream concentration of a toxicant to which organisms can be exposed for a period of time without causing an unacceptable adverse effect. These criteria protect aquatic animals (e.g., fish, invertebrates, crustaceans) and plants from acute and chronic exposure to a toxicant or condition, and protect a waterbody's ecosystem so that it retains its designated use(s) and remains "fishable/swimmable."<sup>70</sup> Aquatic life criteria must be based on certain minimum data requirements, use data from the most sensitive life stage to capture the most conservative value, and must be based on at least 8 organisms to get a minimum taxonomic spread for potential sensitivity. If at a specific site the sensitivities of a species differ from the larger data set or the physical or chemical characteristics of a site alter the toxicity of a pollutant, site-specific criteria are developed.

## 2. Biological Criteria

Biological criteria describe the desired biological condition of surface waters for a specific aquatic life designed use, and are based on the premise that the structure and function of an aquatic biological community within a specific type of waterbody provide critical information about the quality of surface waters. Biological criteria support biological integrity, which is defined as the capability of an aquatic ecosystem to support and maintain a balanced, integrated, adaptive community of organisms having a composition and diversity comparable to that of the natural habitats of the region. Most states have biological criteria for at least perennial streams, and according to EPA biological criteria strengthen water management programs by better assessing current and potential conditions and quantifying progress towards meeting aquatic life goals.

## 3. Human Health Criteria

Human health criteria are calculated to protect humans from the effects of pollutants both from ingestion of aquatic organisms in the water and from ingestion of water and organisms. They are effectively estimates of concentrations of pollutants in ambient water that are not likely to pose a significant risk to the exposed human population.

## E. Antidegradation

Antidegradation under the CWA provides protection for high-quality waters. Specifically, pursuant to 40 CFR 131.12, states and tribes must develop antidegradation

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<sup>70</sup> By way of example, EPA is currently working to finalize an updated recommended aquatic life water quality criterion for selenium in freshwater, which is based on concentrations in fish tissue as fish tissue-based selenium criteria are consistent with the latest scientific information regarding the toxicology of selenium to aquatic life. Docket ID No. EPA-HQ-OW-2004-0019 (Oct., 2015). NMA has been heavily engaged in this rulemaking, and has filed three sets of extensive scientific comments on the draft criterion, supporting EPA's overall approach but expressing concerns with certain data decisions and aspects of the proposal.

policies that protect existing in-stream uses for all WOTUS, high quality waters (i.e., waters whose water quality is better than the levels necessary to support the 101(a) goals of fishable/swimmable), and outstanding national resource waters (ONRWs).

As previously mentioned, states develop baseline protection for all WOTUS that include requirements regarding the protection of designated uses Tier 1 protection. States also must identify high quality waters and ONRWs Tier 2 and 3 waters, respectively where additional protections will also be granted. Notably, pursuant to EPA's recent Water Quality Standards Regulatory Revisions rule, waters must not be excluded from a Tier 2 designation based solely on the fact that water quality does not exceed levels necessary to support all of the 101(a)(2) fishable/swimmable uses.

For Tier 3 waters (ONRWs), no degradation of water quality is allowed except on a short term or temporary basis. In other words, no discharges are permitted that would cause any degradation of the current outstanding water quality except on a temporary basis.

With respect to Tier 2 waters, current high water quality may be lowered only if the state makes a finding that lowering the quality is "necessary to accommodate important economic or social development." 40 CFR 131.12(a)(2). To allow any discharges that, while still meeting all water quality standards, would nevertheless degrade the current high quality of the water, states must undergo an alternatives analysis. That analysis must involve public engagement and must evaluate a range of practicable alternatives that would prevent or lessen the degradation associated with the proposed activity, with "practicable" being defined as "technologically possible, able to be put into practice, and economically viable." If a less degrading practicable alternative is available, it must be selected for implementation before states may find that a lowering of water quality is necessary. Likewise, before allowing any degradation in Tier 2 waters, states must ensure that all point sources are achieving their highest statutory and regulatory requirements, and that all best management practices for non-point sources are being implemented.

## **F. Triennial Review**

Pursuant to Section 303 of the CWA, states are required to review their water quality standards every three years. Any revisions or new standards must be submitted to EPA for approval. In addition, CWA Sec. 303(c) authorizes EPA to promulgate federal standards whenever the Administrator determines that such standards are necessary to meet the requirements of the CWA.

## **G. ESA Considerations**

EPA's oversight authority under the CWA includes consideration of the impact of permitted discharges on endangered species. Notably, EPA consults with the Fish and Wildlife Service and National Marine Fisheries Service under Section 7 of the Endangered Species Act on EPA's promulgation and approval of water quality

standards under Sec. 303 of the CWA, development of recommended water quality criteria under Sec. 304(a), and approval of state NPDES permitting programs under Sec. 402(b) (or issuance of NPDES permits where states do not have primacy). As such, EPA works with the Services to ensure that all NPDES permits and water quality standards programs ensure that listed species and critical habitats are protected.

## **H. Impaired Waters, TMDLs, and Monitoring**

States and tribes are also required to identify any waters that, even with the implementation of technology-based effluent limitations, more stringent water quality-based effluent limitations, and other pollution control requirements, are still not meeting all applicable water quality standards. To develop these “impaired waters” or “303(d)” lists, states collect and evaluate monitoring data, use assessment methodologies and procedures to determine whether the waters are impaired, and develop a list of impaired waters every two years with public participation subject to EPA approval. States also develop an integrated report (“IR”) that consists of the 303(d) list, the “305(b) report” (lists the overall health of waters in the state) and the “314 report” (lists the health of lakes and reservoirs).

For waters identified on the 303(d) list, states must establish “total maximum daily loads” (“TMDLs”) for all pollutants preventing or expected to prevent attainment of water quality standards at a level necessary to attain and maintain all applicable narrative and numeric standards. 40 CFR 130.7. TMDLs are calculations of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards, and an allocation of that amount to all the pollutant’s sources, existing and future “waste load allocations” for point sources, “load allocations” for nonpoint sources.

Considerations when making allocation decisions include the source and controllability of the pollutant, regulatory authority to control the pollutant, cost, certainty of water quality impact on the receiving water, reasonable assurance that an allocation can be met, and stakeholder objectives. Notably, TMDLs are not self-implementing point source allocations are achieved through permit limits consistent with waste load allocations in NPDES permits,<sup>71</sup> and nonpoint source allocations are primarily implemented through state and local management programs. Over 68,255 TMDLs have been completed to date, and turbidity, total dissolved solids, metals and sediment are in the list of top 10 TMDL pollutants.

## **I. 401 Certification**

Under Sec. 401 of the CWA, no federal permit or license can be issued that may result in a discharge into WOTUS unless the state certifies that the discharge is consistent with standards and other water quality goals, or waives such certification. When

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<sup>71</sup> Note that these permit limits can include narrative limitations, as well as tools such as compliance schedules – discussed below – which provide NPDES permitting agencies with the flexibility to achieve the aspirational goals of TMDLs.

evaluating a 401 certification request, states should consider all potential water quality impacts, both direct and indirect, for the life of the proposed project. Before issuing a certification, the state should conclude that the permitted or licensed activity is consistent with: effluent limitations for conventional and non-conventional pollutants; water quality standards; new source performance standards; toxic pollutant limitations; and any other appropriate state requirements.

Where an activity would be consistent with all applicable standards and goals only if certain conditions are met, states can grant a certification with conditions, which then become terms of any issued license or permit. States may also deny 401 certification where no conditions would be adequate to ensure all goals are met, such as if threatened or endangered species will be impacted, habitat will be lost, or specific water quality standards will likely be violated.

It should be noted that courts have recognized that states may set minimum flow rates as an element of state water quality standards to protect designated uses, and include such limits in a 401 water quality certification. *PUD No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).

## **J. CWA Permitting**

As a general matter, any discharge of a pollutant from a point source into a WOTUS is illegal unless authorized by a CWA permit—generally a Sec. 402 NPDES permit for effluent discharges, or a Sec. 404 permit for discharges of dredge or fill material. Point sources are defined at 40 CFR 122.2 as “any discernible, confined, and discrete conveyance,” such as pipes, ditches, channels, conduits, containers etc. “Pollutant” is defined broadly, and includes “dredged spoil, solid waste, sewage, chemical wastes, biological materials, heat, rock, sand, dirt, industrial waste” etc. 40 CFR 122.2.

### **1. CWA Sec. 402 NPDES Permitting**

While EPA administers the NPDES program in some states, the vast majority of states (46 states and 1 territory) have primacy and run their own NPDES programs. NPDES permits can be either individual—covering a specific discharger—or general—covering a number of similar dischargers (such as the Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity). However, all NPDES permits must include all effluent limitations, both technology-based and water quality-based, monitoring and reporting requirements, and special conditions necessary to ensure that water quality standards are attained in the receiving water. In other words, limitations must be established in permits to control all pollutants or pollutant parameters that are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard. 40 CFR 122.44(d)(1)(i).

Technology-based effluent limitations establish performance-based levels of pollutant controls, and can be developed either nationally (e.g., effluent limitation guidelines for

coal mining, found at 40 CFR Part 434) or on a case-by-case basis. Water quality-based effluent limitations, on the other hand, involve the calculation of end-of-pipe limits necessary to ensure that water quality standards are being met in receiving waters. Specifically, water quality-based effluent limitations are developed by identifying applicable water quality standards, characterizing the effluent and the receiving water, and then determining the need for and calculating specific limitations. To characterize the effluent and receiving waters, NPDES permit writers identify any pollutants of concern and critical conditions of effluent and receiving waters via modeling. Critical conditions can include receiving water and effluent flow, background pollutant concentrations, effluent pollutant concentrations, and other receiving water characteristics (e.g., temperature, pH, reaction rates).

The NPDES process also contains a number of tools used by regulatory authorities to help ensure that water quality standards are achieved. For example, variances provide for time-limited uses and associated water quality criteria which allow for additional time to meet water quality standards when a particular designated use is not attainable in the short-term but may be attainable in the long-term. Site-specific criteria allow states to tailor standards to protect local conditions and key species they provide a mechanism by which states can adjust the criteria necessary to protect 101(a)(2) goals to be either more or less stringent than the national recommended criteria. Permit compliance schedules allow for additional time to take specific actions to meet an applicable water quality-based effluent limitation they are applied where time is needed to implement a series of interim actions to make progress towards meeting the final limitation. Finally, mixing zones provide, where appropriate, for a limited area or volume of water to exceed water quality criteria where initial dilution of discharges takes place.

40 CFR Part 122.62 lists 18 situations that provide sufficient cause for modification of an NPDES permit. Notably, modification can occur to incorporate any applicable CWA Sec. 307(a) toxic effluent standard or prohibition.

## **2. Section 402 Permit Shield Doctrine**

Importantly, with few exceptions, CWA Sec. 402(k) provides that compliance with an NPDES permit during its terms constitutes compliance with the CWA for purposes of enforcement proceedings. As such, Sec. 402(k) is often referred to as the “permit shield” provision.

As the U.S. Supreme Court has explained, the purpose of the permit shield provision is “to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate the question of whether their permits are sufficiently strict.” *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1997). In other words, the permit shield serves to give NPDES permits finality.

Notably, both EPA policy and court decisions have held that the permit shield is broader in scope than simply allowing a permittee to discharge those pollutants listed in their permits. Rather, the CWA prohibits only those discharges expressly limited in the

permit, provided that a permit holder complies with the express terms of the permit and the CWA's disclosure requirements, and that the permit holder did not make a discharge of a pollutant that was not within the reasonable contemplation of the permitting authority at the time the permit was granted. *Piney Run v. County Commissioners of Carroll County*, 268 F.3d 979 (9th Cir., 1995). In other words, permittees may rely on the informed decisions made by their CWA permitting authority with respect to what limitations are needed in their permit to ensure that any discharges do not cause or contribute to the violation of an applicable water quality standard.

### **3. Section 404 Permitting**

CWA Sec. 404 permits are issued for the discharge of dredged or fill material into WOTUS. While states can, as with the NPDES permitting process, have primacy to issue Sec. 404 permits, the U.S. Army Corps of Engineers administers the Sec. 404 program for all but two states.

As an initial matter, no discharge is permitted under Sec. 404 if a practicable alternative exists that is less damaging to the aquatic environment, or if the Nation's waters would be seriously degraded. To determine whether or not to issue a permit, the Corps issues a public notice, analyzes comments, and completes both an environmental and public interest review. All permit issuances are contingent upon the grant of a state 401 certification (in other words, no discharge permitted under Sec. 404 may cause or contribute to the violation of any downstream water quality standard or goal) and a coastal zone consistency determination. Furthermore, specifications of disposal sites are subject to EPA review and veto pursuant to Sec. 404(c) pursuant to Sec. 404(c), EPA is authorized to prohibit or restrict the use of a disposal site if EPA determines that the proposed discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

During the permitting process, the Corps undertakes an environmental review pursuant to CWA Sec. 404(b)(1) (the 404(b)(1) Guidelines), which mandates that there be no practicable alternatives with "practicable" being defined as capable of being done, taking into account cost, existing technology and logistics in light of the overall project purposes that there be no significant degradation, and that there be avoidance, minimization and compensation for impacts (sequencing). With respect to sequencing, proposed impacts must be avoided to the maximum extent practicable, and remaining unavoidable impacts must then be minimized and compensated for. The Corps also goes through a public interest review, taking into consideration the cumulative and individual impacts on such factors as economics, energy, aesthetics, general environmental concerns, and flood damage. Often, the Corps also completes reviews under the National Environmental Policy Act, National Historic Preservation Act and ESA.

Sec. 404 permits also contain conditions and requirements to mitigate for any unavoidable aquatic resource impacts. Pursuant to the Corps' 2008 Mitigation Rule,

mitigation plans must include 12 fundamental components: objectives; site selection criteria; site protection instruments (e.g., conservation easements); baseline information (for impact and compensation sites); credit determination methodology; a mitigation work plan; a maintenance plan; ecological performance standards; monitoring requirements; a long-term management plan; an adaptive management plan; and financial assurances.

## **VI. Conflict with Existing Requirements under the CWA**

### **A. Overview**

A number of central provisions in the proposed SPR directly address issues expressly covered under the CWA, such as stream use designation, water quality assessment, criteria development, and mitigation requirements. In particular, the sections of the proposal pertaining to material damage to the hydrologic balance, biological conditions, ecological functions, and mining through streams all require OSM and state SMCRA authorities to independently regulate multiple issues that are already thoroughly addressed under various CWA programs. These provisions clearly violate SMCRA Sec. 702's prohibition against superseding the CWA and its implementing regulations. Furthermore, they are outside the traditional scope of OSM's expertise, conflict with President Obama's Executive Order 13563 and sound science, and will lead to a conflicting and unworkable permitting regime not contemplated in either the CWA or SMCRA. OSM must remove these concepts from the proposed rule.

### **B. Major SPR Provisions of Concern**

#### **1. Material Damage to the Hydrologic Balance**

OSM's contentions concerning material damage to the hydrologic balance represent the crux of the conflict between the proposed rule and Sec. 702 of SMCRA.<sup>72</sup> The concept articulated in the proposal effectively mandates SMCRA agencies, subject to OSM oversight, to superimpose an impermissible regulatory regime over several well-established CWA programs. The legal, environmental, and practical implications of OSM's proposal are staggering, and can only be remedied by removing these sections of the proposed rule.

Under the proposed SPR, SMCRA authorities are directed to: (1) determine all reasonably foreseeable stream uses; (2) establish a correlation between index values and both CWA and SMCRA-developed uses to define a range of values required to support each use; (3) establish numerical material damage criteria for "parameters of concern"; and (4) eliminate impacts that would preclude a CWA or SMCRA-developed use regardless of the duration of the impairment. According to OSM, this is necessary because "in many cases, adverse impacts on water quality and the resulting change in

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<sup>72</sup> We note that the concept of material damage to the hydrologic balance also implicates concerns with respect to the ESA and SMCRA. These concerns are addressed in the sections below.

the biological condition of streams are the principal cause of material damage to the hydrologic balance outside the permit area as we proposed to define that term.”<sup>73</sup>

Notably, the preamble of the rule clarifies that “uses” under the proposal include “each designated use under...the CWA, *as well as any other existing or reasonably foreseeable uses.*”<sup>74</sup> Additionally, the preamble states that:

State water quality standards and associated water quality criteria provide a starting point for establishment of material damage criteria under SMCRA for surface waters, but they are not the endpoint. SMCRA material damage criteria must be no less stringent than CWA water quality standards and criteria in all cases, but, in some situations, they may need to be more stringent to protect unique uses or to comply with the ESA. In addition, the SMCRA regulatory authority may need to establish numerical material damage criteria for parameters of concern for which there are no numerical water quality standards or water quality criteria under the CWA.<sup>75</sup>

OSM further proposes to define “parameters of concern” as “the chemical or physical characteristics or properties of surface or groundwater that could be altered by mining activities in a manner that would adversely impact surface or groundwater quality or biological condition.”

As such, the proposed concept of material damage to the hydrologic balance requires SMCRA authorities to develop stream uses (including all “reasonably foreseeable” uses, as determined by the SMCRA authority) and water quality criteria, establish which pollutants may impact stream uses, and determine if more stringent criteria are needed than those imposed under the CWA. Importantly, OSM has made oral representations that the rule does not supersede the CWA, and that rather the intent of the rule is simply to ensure that state SMCRA authorities confer with state CWA agencies on water quality issues. However, the language in the proposal requiring the development of separate and additional uses and criteria under SMCRA when the SMCRA authority believes that CWA requirements are not stringent enough to protect water quality belies that contention.

Furthermore, even if the proposed SPR merely instructed SMCRA authorities to protect the stream uses and enforce the criteria developed pursuant to the CWA, the proposal would still run afoul of Sec. 702 and lead to an unworkable permitting regime. Sec. 521 of SMCRA requires state SMCRA programs to be approved by OSM. Therefore, any proposed rule requiring the enforcement of stream use goals and water quality standards, even if it did not require their separate development, would confer upon both the state SMCRA authority and OSM pursuant to their oversight requirements the authority and mandate - to independently determine CWA compliance. As explained in greater detail both above and below, such a regulatory scheme would not only violate

<sup>73</sup> 80 Fed. Reg. 44471 (July 27, 2015).

<sup>74</sup> 80 Fed. Reg. 44475 (July 27, 2015) (emphasis added).

<sup>75</sup> 80 Fed. Reg. 44475 (July 27, 2015).



SMCRA Sec. 702, it would also cause serious scientific and compliance issues, as it would require two separate agencies to interpret and enforce the same standards in potentially different ways.

Importantly, OSM provides no explanation for *how* it expects SMCRA regulatory authorities to make all of these determinations – the rule simply instructs them to do so. By contrast, the CWA provides multiple statutory mechanisms to achieve stream use goals and water quality standards, and EPA, the Corps, and the states have developed thousands of pages of regulations and guidance documents over the last 40 plus years of implementing those programs concerning how to do so. As previously noted, the NPDES program was developed after EPA and the states found that it was impossible to directly enforce stream health goals, such as designated uses. Under that program, CWA agencies – subject to EPA oversight – assign designated uses to all WOTUS, develop water quality criteria and antidegradation policies necessary to protect those uses, and translate those criteria and policies into enforceable discharge limits.

CWA designated uses represent “water quality goals” – they *always* include all existing uses (defined as any uses actually attained any time after Nov. 28, 1975) regardless of whether or not they are currently being attained, and they also include the propagation of fish, shellfish, and wildlife and recreation in and on the water unless very specific circumstances are met that would allow the removal of any of those uses, as well as other uses assigned by the states such as use for public water supply, agriculture, and industry.

Water quality criteria, which are subject to EPA approval, are adopted pursuant to CWA Sec. 303(c), developed according to EPA’s regulatory framework and guidance,<sup>76</sup> and based on either the criteria developed by EPA based on the latest scientific knowledge or on other sound scientific methods. They expressly include the criteria necessary to protect all in-stream aquatic animals and plants, the biological integrity of the stream, and human health, and the public – including NMA – is often heavily engaged in their scientific development. Antidegradation policies in place in all states provide even more protection to high quality waters, and waters not meeting all water quality standards are put on the 303(d) list and assigned specific TMDLs for all pollutants preventing or expected to prevent attainment of any standard.<sup>77</sup> States review their criteria and policies (their water quality standards package) every three years, and those packages – including any changes made or not made – are subject to EPA approval. EPA consults with the FWS and National Marine Fisheries Service under Sec. 7 of the ESA regarding EPA’s promulgation and approval of state water quality standards packages, development of recommended water quality criteria under Sec. 304(a), and approval of state NPDES permitting programs (or issuance of NPDES permits where states do not have primacy).

<sup>76</sup> See, e.g., Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses, EPA Office of Research and Development (1985) (outlining, for example, recommended scientific assumptions based on the particular material of concern and toxicity transfer and risk).

<sup>77</sup> As previously noted, over 68,255 TMDLs have been completed to date, and turbidity, total dissolved solids, metals and sediment are in the list of the top 10 TMDL pollutants.

With respect to permitting, under CWA Sec. 401 no federal permit or license, such as a Sec. 404 dredge and fill permit, can be issued that may result in a discharge into a WOTUS unless the state certifies that the discharge is consistent with all standards and other water quality goals. Under the Sec. 402 NPDES program, all permits are required to contain all effluent limitations both technology-based and water quality-based monitoring and reporting requirements, and special conditions necessary to ensure that all water quality standards are attained in the receiving water. In other words, NPDES permits are required to strictly control all pollutants or pollutant parameters that are or may be discharged at a level that will cause, have the reasonable potential to cause, or contribute to an excursion above any water quality standard.<sup>78</sup> The CWA also provides regulatory authorities with a number of tools to use in NPDES permits to provide the requisite flexibility to help ensure that water quality standards are achieved, including variances, site-specific criteria, mixing zones, and compliance schedules.

In short, every water quality-based aspect of the proposed rule's concept of material damage to the hydrologic balance is already comprehensively addressed by the well-established CWA water quality standards and NPDES permitting programs. Despite OSM's preamble contentions that stricter requirements may be necessary to protect stream health and comply with the ESA, the CWA and its implementing regulations unequivocally show that this is not the case there are no "regulatory gaps" with respect to stream use designation, water quality criteria development, ESA compliance, and permit limits in the CWA for OSM to fill, and OSM's potential disagreement with decisions made under the CWA does not create such a gap. Both the plain language of SMCRA Sec. 702, as well as the *In Re Surface Mining* decision, clearly prohibit such action on the part of OSM.

A thorough understanding of the CWA also makes clear that OSM's attempt to directly enforce stream use goals by defining material damage to the hydrologic balance outside the permit area as "any adverse impact from surface coal mining and reclamation operations or from underground mining activities...on the quality of surface water that would preclude any designated use...or any existing or reasonable foreseeable use" is unworkable. Such language harkens back to the CWA's pre-1972 statutory scheme, as it makes it a direct violation of SMCRA to "preclude any use" without providing explanation for how exactly a use under SMCRA is precluded. OSM undoubtedly did not include such information because, unlike in the CWA, there are no mechanisms in SMCRA that were expressly created to address that issue, nor does SMCRA authorize OSM to create them. While multiple statutory and regulatory sections of the CWA establish exactly how stream uses, water quality criteria, and technology- and water quality-based permit limitations must be established, including requirements concerning public involvement and scientific rigor as well as allowance of permitting tools to provide for flexibility, SMCRA is noticeably silent on those issues, and the proposal simply instructs SMCRA agencies to do it, presumably as they see fit. In addition to the permitting considerations discussed in greater detail below, this simply does not make

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<sup>78</sup> 40 CFR 122.44(d)(1)(i).

sense in terms of ensuring that the best available science is applied in the development and attainment of water quality standards. OSM cannot redefine those long-established CWA processes in the context of coal mining under SMCRA.

OSM notes in the preamble of the proposal that “the existing definition of hydrologic balance mentions water quality, but focuses on water quantity, water flow and movement, water storage, and changes in the physical state of water” OSM must do the same in any revisions to that language.

## 2. Biologic Condition

OSM proposes to define the term “biological condition” as “a measure of the ecological health of a stream or segment of a stream as determined by the type, diversity, distribution, abundance, and physiological state of aquatic organisms and communities found in the stream or stream segment.” In the proposal, OSM would require application of a multimetric biological assessment and taxonomic assessment protocol to determine biological condition. According to OSM, this is necessary to collect “baseline information” to “determine whether the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area,” as well as whether “the operation has been and is being conducted to minimize adverse impacts on fish, wildlife, and related environmental values.” As OSM points out, while the information “may be available” from CWA agencies, “those agencies generally do not assess the cumulative loading of substances legally discharged into the receiving stream until the stream becomes impaired.”

As an initial matter, OSM’s assumption with respect to state assessments is wrong. Most states have, in fact, developed, consistent with state rulemaking procedures, tools for measuring the biological condition of streams. These tools are developed using best available science and published for notice and comment. Once finalized, they are used to assess overall water quality condition and underlie certain decisions, including whether a reasonable assurance exists that a discharge will not cause stream impairment. Biological monitoring data is often required as part of any discharge permit that may be authorized. The Corps also requires the use of similar tools to assess the function of streams that could be impacted by any mining-related activities as a result of discharges to WOTUS.<sup>79</sup> However, it is important to note that these biological indices contain inherent variability, and therefore only provide estimates of stream health. For this reason, CWA authorities utilize them for assessment and monitoring purposes, but not for direct enforcement. The proposed rule, on the other hand, seeks to improperly use them to define critical prohibitory standards.

Furthermore, as explained in detail above, the CWA provides numerous mechanisms by which implementing agencies - state and federal - ensure the ecological health of streams, including the type, diversity, distribution, abundance and physiological state of aquatic organisms and communities. The propagation of fish, shellfish and wildlife is a

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<sup>79</sup> 33 CFR 320.

presumed use for all waters covered under the CWA, and aquatic life and biological criteria among others are expressly designed to protect in-stream organisms and the biological integrity of surface waters. The CWA also requires states to collect and evaluate monitoring data and use assessment methodologies to identify any impaired waters (303(d) lists are developed every two years and subject to public participation and EPA approval), as well as to develop an integrated report that includes the 303(d) list, the “305(b) report” (which lists the overall health of waters in the state) and the “314 report” (which lists the health of lakes and reservoirs).

By requiring a separate measure of the biological condition of surface waters under SMCRA, the proposal therefore runs afoul of SMCRA Sec. 702’s mandate that nothing in the act “supersede, amend, modify or repeal” the CWA. Again, there is no “regulatory gap” in the CWA concerning the protection of the biological condition of streams indeed, the very purpose of the CWA is to “**restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.**”

Additionally, as with the material damage to the hydrologic balance concept, OSM has provided no information or analysis with respect to how the proposed requirements will be implemented, either by industry or the regulatory authorities. EPA and the scientific community have recognized that biological assessment tools are not one-size-fits-all. Many states have developed specific tools tailored to regional differences, which the proposed rule, EIS, and RIA all fail to recognize. Development of such tools is also expensive and open to public criticism and legal challenge. There is no indication in the rule that OSM has considered these implementation challenges.

Notably, OSM states that there are three reasons for requiring biological condition of stream data with permit applications: (1) lack of baseline information on the biological condition of streams makes determining whether the project was designed to prevent material damage to the hydrological balance outside the permit area problematic; (2) lack of baseline data creates impediments to determining whether the project is designed to minimize impacts of fish, wildlife and related environmental values; (3) CHIA not possible if don’t have this data.<sup>80</sup>

However, even if such information is not readily available, if OSM and state SMCRA authorities determine that it is necessary to assess the impacts of mining, they can ask for it at any time. As articulated in the comments submitted by NMA member companies, such requests have been made recently and the requisite information has been provided. That this information has never before been universally requested highlights the fact that it is not always necessary to assess hydrologic impacts or to prepare CHIAs. Indeed, it is telling that OSM fails to cite even a single example of a deficiency identified during its oversight reviews of state permit approvals or CHIA preparation over the 35 year life of the regulatory program, let alone a deficiency that would support imposition of this new requirement. This provision is therefore both

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<sup>80</sup> 80 Fed. Reg 44436, at 44469 (July 27, 2015).

unnecessary and in conflict with the requirements of the CWA and its implementing regulations.

### 3. Ecological Function

The proposal requires permittees to restore the ecological function of any mined-through segments of perennial and intermittent streams, and includes in the definition of “ecological function” physical parameters, biological parameters, and consideration of physical and biological interactions as nutrients and energy are collected and transferred down the stream continuum. As OSM explains, “we propose to define this term as including the role that the stream plays in dissipating energy and transporting water, sediment, organic matter, and nutrients downstream [as well as] the ability of the stream ecosystem to retain and transform inorganic materials needed for biological processes into organic forms and to oxidize those organic molecules back into elemental forms [and finally] the role that the stream plays in the life cycles of plants, insects, amphibians, reptiles, fish, birds, and mammals.” According to OSM, this proposed definition is “based upon a functional assessment guidebook that the U.S. Army Corps of Engineers developed for ephemeral and intermittent streams in central Appalachia.”<sup>81</sup>

The proposal also requires reclamation plans to include a timetable “for restoration of the ecological function of all reconstructed perennial and intermittent stream segments, either in their original location or as permanent stream-channel diversions,”<sup>82</sup> and states that “if you propose to mine through a perennial or intermittent stream, the reclamation plan must explain in detail how and when you will restore both the form and the ecological function of the stream segment, either in its original location or as a permanent stream-channel diversion.”<sup>83</sup>

However, any mining-through of a stream covered by the CWA including perennial, intermittent, and ephemeral streams (i.e., all streams covered under the proposed SPR) requires a CWA Sec. 404 permit and a corresponding state 401 water quality certification. Sec. 401 mandates that no discharge permitted under Sec. 404 cause or contribute to the violation of any downstream water quality standard or goal. Additionally, the CWA Sec. 404 regulations require that proposed impacts, if permitted after the requisite environmental and public interest reviews, be avoided to the maximum extent practicable, and that remaining unavoidable impacts be minimized and compensated for. As such, there is no “gap” in the CWA with respect to ecological function in the context of mined-through streams.

Furthermore, in making determinations concerning mitigation requirements including on-site stream restoration the Corps takes into consideration multiple factors, including objectives, site selection criteria, site protection instruments, baseline information, ecological performance standards, adaptive management plans,

<sup>81</sup> 80 Fed. Reg. 44470.

<sup>82</sup> Proposed Sec. 780.12(b)(7).

<sup>83</sup> Proposed Sec. 780.12(h).

maintenance and monitoring plans, and financial assurances. Also of note is the fact that the specification of a disposal site in this case a mined-through area is subject to EPA review and veto pursuant to Sec. 404(c). Under that provision, EPA is authorized to prohibit or restrict the use of a disposal site if EPA determines that the proposed discharge will have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas.

By requiring the restoration of ecological function in the manner proposed, therefore, the rule causes potential conflicts with the Sec. 404 program in violation of SMCRA Sec. 702. The Corps, with EPA and state input, determines if a certain activity is permissible and, if there are unavoidable impacts to streams, how those impacts will be mitigated. OSM's proposed requirements concerning restoration of ecological function impermissibly bypass that regime, and create potentially conflicting mitigation requirements that are not necessarily based on the best available science and on-site information.

#### **4. Mining Through Streams**

Under the proposal, OSM would require, among other things: (1) a 100 ft buffer on each side of any stream proposed to be mined through; (2) that post-mining drainage patterns be restored to pre-mining condition, including ephemeral streams; (3) that there be separate bonding for restoring the ecological function of streams; (4) permanent offsets for any impacts of fill material on fish, wildlife and related environmental values within the footprint of the structure; and (5) the monitoring and inspection of stormwater discharge data to evaluate the effectiveness of surface-water runoff control practices.

As an initial matter, OSM proposes to redefine "ephemeral stream" consistent with the definition adopted by the U.S. Army Corps of Engineers in Part F of the 2012 reissuance of nationwide permits under CWA Section 404.<sup>84</sup> Under the CWA, an ephemeral stream is defined by the presence of a bed, banks, and ordinary high water mark, regardless of amount or duration of flow. Additionally, an area can also be considered an ephemeral "stream" under the CWA even if there are no current physical indicators of a bed, banks, and ordinary high water mark. By contrast, the existing SMCRA regulations define ephemeral streams as streams with a channel bottom that are always above the water table and which flow in response to precipitation in the immediate watershed or in response to snow and ice melt.<sup>85</sup> In light of the goals of SMCRA, which again do not focus on downstream water quality, the current SMCRA regulations provide a more appropriate definition, and OSM should not change that definition in the SPR. This is particularly so in light of the 100 foot buffer zone requirements, as such zones do not even exist in naturally occurring ephemeral streams as they are defined in the CWA, especially in the arid West.

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<sup>84</sup> 80 Fed. Reg. 44470.

<sup>85</sup> 30 CFR 701.5.

Additionally, the proposed requirements concerning mining through streams, like the proposed concept of ecological function, directly conflict with the Sec. 404 program, as well as the CWA stormwater permitting program. Specifically, the Sec. 404 program directly addresses offsetting and mitigating impacts of mining through streams and contains bonding requirements. The Sec. 402 stormwater program also requires a host of on-site technology-based best management practices and monitoring for any discharges of industrial stormwater. Indeed, NMA had extensive engagement with EPA recently concerning coal mining stormwater requirements. As such, again, there are no “gaps” in these areas for SMCRA to fill—they are comprehensively covered under the CWA, and OSM may not create a conflicting regulatory regime in the SPR.

### **C. Environmental and Practical Considerations**

Congress did not fail to address water quality and stream use concerns—rather, Congress addressed them thoroughly in the context of the CWA, which has been implemented by EPA, the Corps, and states for the past 40 years. As explained above, the procedures outlined in the CWA and its implementing regulations ensure that water quality standards are developed using the best available science with public involvement, that discharges to waters meet strict technical and water quality-based standards, that permit issuers have the flexibility needed to ensure water quality goals are met, and that stream use goals are achieved. SMCRA has no such provisions, and OSM and state SMCRA agencies do not have the expertise that the CWA implementing agencies do with respect to water quality. Executive Order 13563 requires regulations to be “based on the best available science,” “promote predictability and reduce uncertainty,” and “identify and use the least burdensome tools for achieving regulatory ends.” EPA, the Corps, and the states are clearly in the best position to protect water quality. OSM should not take away that authority through the SPR.

Furthermore, the proposed SPR requires two separate federal agencies to regulate the exact same issues in two different ways. This will inevitably lead to the very conflicts SMCRA Sec. 702 was designed to prevent, and to coal operators being subject to different standards than all other dischargers in a watershed. It is unclear how OSM intends to develop separate standards and judge compliance in light of SMCRA’s silence on these issues, as well as the fact that all other discharges into a given watershed will be regulated by different standards.

Finally, the proposed SPR would eviscerate the protections afforded to permittees under CWA Sec. 402(k)’s permit shield. As explained above, Section 402(k) “shields” permittees from liability for discharges of pollutants—including those listed in their permit *as well as those not listed in their permit*—provided that they are following the requirements of their NPDES permit and properly disclosed information to the permitting authority at the time the NPDES permit was granted. The purpose of that provision is to allow permittees—including coal mining operators—to rely on the decisions made by their CWA authority with respect to what actions are needed to protect water quality.

However, under the proposed rule, CWA NPDES permits would no longer provide the standard by which coal companies can judge environmental compliance with respect to water quality. Therefore, the proposed SPR eliminates the protections afforded by Sec. 402(k), as coal operators could have liability under SMCRA for the very point source discharges deemed lawful under the CWA and protected by Sec. 402(k). In other words, OSM is implying that Sec. 402(k) of the CWA allows every discharger in the United States to rely on their CWA authority to tell them what point source discharges are permissible with respect to water quality *except* coal mining operations.

On the same score, the proposal would also preclude the use of permitting tools, such as compliance schedules and variances, included in the CWA and applied by CWA agencies to help ensure that water quality standards are achieved. While the CWA expressly allows for such tools, SMCRA does not, nor does the proposed language in the SPR provide for such tools. As such, again, while a discharge might be allowed under the CWA pursuant to, for example, a mixing zone or compliance schedule, under the separate SMCRA assessment of the discharge it may well be impermissible, and coal operators could therefore not utilize the CWA tool because of the SMCRA liability that would ensue.

#### **D. Conclusion**

Pursuant to SMCRA Sec. 702, SMCRA does not confer the authority to regulate where the CWA already provides to its implementing agencies the authority to regulate. In the CWA, Congress assigned to EPA, the Corps, and state implementing agencies the goal of “restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters,” as well as the statutory provisions necessary to achieve those goals. In SMCRA, on the other hand, Congress included the unambiguous caveat of Sec. 702, and, subject to that caveat, instructed OSM to “prevent material damage to the hydrologic balance” and referenced water quality primarily in the context of handling materials at a mine site to ensure downstream water quality standards will not be violated (e.g., preventing toxic-producing deposits from coming into contact with water).

Congress therefore expressly mandated that EPA, the Corps, and states with primacy subject to EPA oversight, protect water quality. Congress did not make an exception for coal mining – it did not say that, in the case of coal mining, SMCRA agencies should determine appropriate water quality standards. Rather, Sec. 702 conveys just the opposite. OSM simply cannot grant itself the authority to determine the appropriate water quality and biological condition of streams – such authority would very clearly “supersede, amend, modify or repeal” the CWA and must be removed from the proposed rule.

#### **V. Other Definitions ( Proposed 30 CFR 701.5):**

In addition to conflict with the CWA stemming from the proposed definition of “material damage to the hydrologic balance outside the permit area,” the proposed SPR fundamentally alters a number of other existing definitions to key SMCRA terms and



proposes new definitions to terms previously undefined by SMCRA. As a general matter, state SMCRA regulatory authorities have shown their ability to consistently and continually improve the efficiency and effectiveness of their programs under the existing definitions. Year after year offsite impacts are decreased across the country as the current definitions under SMCRA have been tested and adapted to by states to reach very effective results. Altering these terms now in the manner suggested by OSM would jeopardize the progress made by states under the current framework and undermine the regulatory certainty provided by the current, well-understood definitions.

The proposed definitions introduce grave uncertainty and rob states of the ability to effectively implement their programs and provide regulatory certainty to operators. Congress did not intend for OSM to impose national definitions for every word or standard used in the law. Quite the contrary in fact. OSM's proposed definitions undermine the carefully crafted balance struck by Congress in establishing SMCRA's cooperative federalism system. Many of the terms used in SMCRA, particularly the requirement to prevent material damage to the hydrologic balance, were left undefined under both the law and its implementing regulations in recognition of and in order to preserve states' ability to adapt and apply SMCRA's performance standards to the vast "diversity in terrain, biologic, chemical and other physical conditions."<sup>86</sup> There are many aspects of SMCRA which cannot effectively function under nationwide definitions of terminology and would run directly counter to the purpose of the provisions which OSM now seeks define.

In many cases, OSM has not offered a reasoned explanation for revising existing and adding new definitions. Much of the explanation supplied in the proposal is anecdotal, subjective and provides no reasoned basis in the face of 30 years of successful regulation by primacy states and a sustained national trend of continuous improvement of environmental performance by coal mine operations. For these reasons, as explained in greater detail below, OSM must retain the current definition of SMCRA terms and allow the states to continue the successful trend in effective regulation and reclamation.

### **A. Adjacent Area**

Under the current definition, the term "adjacent area" "means the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or *reasonably could be expected* to be adversely impacted by proposed mining operations" (emphasis added).<sup>87</sup> This definition establishes a more likely than not standard and encompasses those activities which are likely to cause adverse impacts. The proposed definition vastly changes this standard by defining adjacent area as "the area outside the proposed or actual permit area within which there is a *reasonable possibility* of adverse impacts from surface coal mining

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<sup>86</sup> 30 U.S.C 1201(f).

<sup>87</sup> 30 C.F.R. 701.5

operations or underground mining activities...”<sup>88</sup> The preamble to the proposed rules describes this change as broadening the definition of “adjacent area” to “ensure that it includes all areas outside the proposed or actual permit area within which there is a reasonable possibility of adverse impacts from surface coal mining operations or underground mining activities, as applicable.”<sup>89</sup>

The preamble goes on to complain that; “The existing definition limits the adjacent area to areas where adverse impacts could reasonably be expected to occur and, for underground mining, to areas where subsidence is probable. Those limits are too restrictive because they effectively limit baseline data collection and monitoring to the area in which adverse impacts are almost certain to occur. If impacts occur outside that area, there will be no baseline data against which to evaluate those impacts.”<sup>90</sup> This explanation fails to accurately characterize the breadth of the existing language and the consequences of the change made by the language OSM has selected. The current standard includes areas where impacts are *reasonably expected* to occur, and is not limited, as OSM incorrectly suggests, where they are *almost certain* to occur.

This characterization is directly at odds with the text of the rule and the legal standard created by it. OSM is correct, however, that its proposed language would significantly broaden the scope of the term. By inserting the word “possibility” OSM abandons the reasonable and objective more-likely-than-not standard currently in place in favor of an any-possibility-at-all framework. Under this definition, any area for which a reasonable argument can be made that adverse impacts are *possible*, however remote that possibility may be, would be considered an adjacent area and subject to all the restrictions associated with this term. In practical application, it would shift the burden to the operator to show that there is no reasonable possibility whatsoever that adverse impacts would occur to areas outside the permit area— something that is almost impossible to prove in most circumstances. Nowhere in SMCRA is authority provided to OSM to impose such a burden of proof on operators.

The proposed changes to the definition of “adjacent area” rest solely on the agency’s incorrect view that an ambiguity exists in the statute. The informational requirements of Sections 507 and 508 of SMCRA pertaining to the treatment of adjacent areas in permit applications and mine plans are well-settled and unambiguous.<sup>91</sup> The U.S. District Court for the District of Columbia ruled in *In Re Surface Mining Regulation Litigation* that: “these sections require hydrologic information both on and off the mine site. In addition, Section 508(a)(1) requires information extending over the estimated life of the mining operation. But the myriad of informational requirements delineated in Section 507 and 508 consistently refer only to the specific land mined or immediate permit area. The court can only draw the conclusion that Congress articulated, with specificity, those instances in which information outside the permit areas was necessary.”<sup>92</sup>

<sup>88</sup> 80 Fed. Reg. 44436, at 44586 (July 27, 2015).

<sup>89</sup> *Id.* at 44467.

<sup>90</sup> *Id.*

<sup>91</sup> *In Re Surface Mining Regulation Litigation I.*, No. 79-1144, slip op. at 35 (D.D.C. Feb. 26, 1980).

<sup>92</sup> *Id.*

OSM's proposed definition of "adjacent area" violates this precedent and the text of SMCRA by expanding the areas to be included to any which could possibly be impacted by surface or underground mining activities. This is ultra vires and OSM must retract this proposed change.

OSM also invites comment on whether the definition should prescribe a minimum size for the adjacent area for surface-water resources and, if so, how that minimum size should be determined.<sup>93</sup> OSM's question readily discloses that the proposed change has no limiting principle. In the preamble, OSM speaks only to a desire to expand the area for monitoring. It completely avoids discussing the root difference between the terms "possibility" and "probability." "Possibility" is an abstract. "Probability" quantifies or measures the likelihood of an occurrence—it is substantiated, reasonable and credible. Using "possibilities" would convey an open-ended inquiry on the imaginable without any limiting principle for the likelihood of occurrence.

Because the current definition accurately captures the purpose and intent of SMCRA, provides a limiting principle, is effective in its implementation, and because Sections 507 and 508 of SMCRA are unambiguous with respect to the scope of adjacent areas under SMCRA, OSM should must retain the current definition for adjacent areas.

## **B. Approximate Original Contour**

The proposed revision of the term "approximate original contour" is unlawful and imposes an unachievable standard. The proposed insertion of the term "any" before "mining" is an unlawful attempt to amend the statute. The proposed limitation for measuring compliance of restoring AOC to land within the permit area is also unlawful and counter to the historic interpretation and application of AOC. It would also be impossible to achieve. OSM's explanation for this new interpretation is also plainly wrong—nothing in the statutory text suggests what OSM reads into it—quite the opposite. Finally, the revised definition unlawfully deletes the reference in the statutory definition to permanent water impoundments. OSM provides no explanation for this change. In sum, all of these changes appear to be driven by some purpose of resurrecting long resolved interpretations and mining practices without any attempt to explain why they are needed or how they improve mine reclamation. The only explanations are unpersuasive attempts in regulatory history revisionism.

OSM proposes to substantively alter the definition of this term, and by extension, the requirements for meeting approximate original contour standards under SMCRA. Under the existing rule, operators must reclaim land to closely resemble the general surface configuration of the land prior to mining.<sup>94</sup> This definition is logical and is consistent with SMCRA, which makes explicit in the term itself that the standard is "approximate" and not "exact." As recent as 2014, courts have upheld the view that approximate original

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<sup>93</sup> 80 Fed. Reg. at 44468.

<sup>94</sup> 30 CFR 701.5

contour requires reclamation based on the topography prior to the current mining operation, rather than prior to *any* mining. In fact, the revised definition being proposed by OSM which requires reclamation prior to any mining was rejected last year in administrative court.<sup>95</sup> In finding that AOC requires reclamation to conditions prior to the current mining operation, not any mining operation; the court stated that “an overview of the entire regulatory scheme for reclamation surface coal mines lends support... to the position that AOC may be based on the topography prior to the current mining operation, rather than prior to any pre-SMCRA mining.”<sup>96</sup>

The preamble to the proposed rule explains the proposed definition by citing the wrong provision and rule under SMCRA and the Code of Federal Regulations. Specifically, OSM states that the insertion of “any” is consistent with Section 515(b)(2) of SMCRA. Yet, the statute has a specific definition of AOC and it cannot be amended by implication. It is the definition of AOC that informs the meaning of the performance standards in Sections 515(b)(2) and (b)(3), and not the other way as OSM incorrectly suggests. OSM then relies on the 1980 *In Re Surface Mining Regulation Litigation* decision of the U.S. District Court for the District of Columbia to support this change. However, the decision in question addressed Section 515(b)(2) pertains to post mining land use, not AOC. The AOC performance standard is found in Section 515(b)(3) which and does not require restoration of land to its condition prior to any mining. Similarly, the District Court decision cited deals with post mining land use, not AOC.

Finally, if AOC meant what OSM suggests by adding “any” before “mining,” this would preclude remining since it is technically and economically impossible to restore AOC to a an area mined prior to SMCRA. This would be an odd result since it would imply to Congress an intent to prevent the reclamation of abandoned mine land through remining. In fact, it is well known that remining has restored more AMLs than the entire \$8 billion spent to date from industry’s AML fees. OSM does not examine or explain why this result is consistent with congressional intent or good policy.

As the Department of the Interior Office of Hearings and Appeals recently explained; “...reclamation could restore an equal or higher land use than existed prior to any mining, while the resulting topography more closely resembles the AMLs or pre-current mining surface configuration than the “virgin” topography (the “pre-premined” surface...)”. This reasoning underscores the relationship between post mining land use under Section 515(b)(2) and AOC under Section 515(b)(3)—two completely separate and distinct SMCRA requirements. AOC deals with the configuration of the surface and its topographical contours. The requirement to reclaim land to AOC requires that operators recreate an approximation of the contours that existed prior to the mining operation in question. Land use, by contrast, deals with the suitability of the land for other uses moving forward. Specifically, that the land be capable of supporting any uses it could have supported prior to any mining, or “higher” uses. Achieving this standard does not require that the land be made to reflect the physical contours present prior to

<sup>95</sup> *Farrell-Cooper Mining Company v. Office of Surface Mining Reclamation and Enforcement*, U.S. Dept. of Interior Office of Hearings and Appeals, DV-2012-1-R at 26 (2014).

<sup>96</sup> *Id.*

any mining operation. In practice, such a standard would be unreachable in many if not most cases. How can an operator be expected to know what the contour of the land was prior to their mining operation, and the operation of untold miners before them, when they had nothing to do with the site and may not have even been in business? This requirement is simply untenable, and Congress's choice not to require it is clear in the text of the statute. Section 515(b)(2) establishing post mining land use requirements specifically includes the word "any" before mining while this term is absent from Section 515(b)(3) establishing AOC requirements. Congress's use of the term "any" in the post mining land use context and omission of the term in the AOC context in Section 515(b)(3) further clarifies that Congress knew how to establish this standard when it intended to.<sup>97</sup>

Finally, requiring that AOC reclamation restore lands to their condition prior to any mining would have adverse public policy ramifications that run counter to SMCRA's goal of mitigating environmental effects. The Office of Hearings and Appeals noted these unintended consequences by citing the opinion of the state regulator in that case. Specifically, the state program director stated that OSM's interpretation would discourage operators from mining in previously mined sites, thus eliminating the opportunity to reclaim dangerous highwalls and achieving premining land uses.<sup>98</sup>

The proposed addition of the phrase "within the permit area" is equally unlawful and contrary to the longstanding interpretation of the Act. The determination of whether a mined area has been restored to AOC is judged on the basis of the configuration of the surrounding area—not in the confined manner OSM now attempts to impose. Context is important, and that is what the definition provides in referencing the "reclaimed area . . . blends into and compliments the drainage pattern of the surrounding area." This has long been reflected in the regulations, their application, interpretation and OSM's Directive INE-26.

OSM does not explain how technically a reclaimed area can be successfully judged to resemble the general configuration of the smaller permit area given the swell or bulking factors of spoils that are backfilled into the mined area. As OSM is aware, these swell factors vary substantially and that has been the guiding principle in applying the AOC definition in a flexible manner to account for the diversity in terrain and physical conditions. The consequence of OSM's proposal will be permit applicants constructing more excess spoil fills since attempting to put spoils with swell factors back into the mined area will preclude the operator from meeting OSM's new and unattainable AOC definition. OSM again fails to provide any explanation for the need for this change or how it will improve the environment and not impose either a technically or economically infeasible requirement. Instead, we are provided another attempt of regulatory legerdemain to change the law and sua sponte revise the regulatory history on this subject.

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<sup>97</sup> See *Id.* at 27.

<sup>98</sup> *Id.* at 25.

The requirements of SMCRA with respect to AOC area clear and the existing definition reflects the standards of Section 515(b)(3). It is inappropriate for OSM to attempt to re-litigate through regulation an interpretation of SMCRA which has been rejected in court, would be unreachable by operators, and would have negative implications for successful land reclamation. For these reasons OSM must retain the existing definition of AOC.

### C. Cumulative Impact Area

The definition of “cumulative impact area” denotes the extent of the area that must be included in the regulatory agency’s assessment of the probable cumulative impact of all anticipated mining on hydrology. OSM proposes to expand the existing definition, which requires consideration of impacts from the proposed operation that may interact with the impacts of all anticipated mining on surface and ground water systems. Currently, “anticipated mining” includes the entire projected life of the project through bond release. As such, the existing definition of “cumulative impact area” is “the area within which the proposed or actual operation may interact with the impacts of all existing and anticipated surface and underground coal mining, including impacts after bond release.”<sup>99</sup> The proposal suggests a HUC-12 watershed is an appropriate “minimum” size of the cumulative impact area that must be reviewed. *Id.* For operations that span ridgeline or other watershed boundaries, OSM proposes that the cumulative impact area must include the HUC-12 watershed on each side of the ridgeline or other watershed boundary. *Id.* NMA notes that a HUC-12 watershed is between 10,000 and 40,000 acres, or approximately 15-63 square miles.

SMCRA requires a permit application to include a determination of the probable hydrologic consequences of mining and reclamation operations, as well as sufficient data for the regulatory authority to make an assessment regarding the cumulative impacts of all anticipated mining in the area on hydrology. However, under SMCRA this determination is not required until such time as hydrologic information on the general area is available from an appropriate Federal or State agency. SMCRA Section 507(b)(11). Section 510(b)(3) further requires that no permit be issued until such a determination has been made by the regulatory agency.

The language of the statute is therefore clear that the scope of the required analysis is limited to the “general area” in which impacts from the proposed project could reasonably intercept or add to impacts from other mining that can reasonably be anticipated to occur within the same area. The purpose of the analysis is to avoid over-burdening the hydrologic system within the area. This is a very site-specific inquiry that depends on the topography, geology, and hydrology of the area and what type of mining will occur. The existing regulatory language is appropriately based on an analysis that focuses the agency’s resources on areas where an interaction between the hydrologic impacts from the proposed operation and the impacts of all other anticipated mining could reasonably occur. (CITE CFR Section). OSM’s proposal to use a HUC-12, an

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<sup>99</sup> *Id.*

area between 10,000 and 40,000 acres, as a minimum area where hydrologic impacts might occur goes well beyond the “general area” Congress directed.

Historically, OSM has interpreted Section 507(b)(11) to require data for the “mine site and surrounding areas.” See 48 *Fed. Reg.* 43956, 43957 (Sept. 26, 1983). An area that extends 15 to 63 square miles can hardly be considered the “surrounding area.” OSM has also historically recognized that there are mining operations where hydrologic impacts are negligible or are dissipated before reaching points in the system where they are additive to hydrologic impacts of other surface mining operations. See, *Guidelines for Preparation of a Cumulative Hydrologic Impact Assessment (CHIA)*, Department of the Interior, Office of Surface Mining, December 1985. State regulatory agencies are best suited to make determinations about the extent of the impact assessment that should be required for each project, and these decisions will vary widely based on the location of the project(s) and the nature of the area.

Notably, this is not the first time OSM has proposed to prescribe a minimum scope for the cumulative impact analysis. In 1983, OSM proposed a similar approach, using “surface and ground-water basins” to delineate minimum boundaries.<sup>100</sup> However, based on public comments, the agency rejected such a prescriptive approach. OSM should do the same here.

OSM’s proposal that information on impacts that would occur after final bond release is beyond the agency’s authority. SMCRA, Section 507(b)(9)(11) is clear that the required information must be available from Federal and State agencies. Once a mining operation obtains bond release, all reclamation requirements of the Act must be fully met and no Federal or State agency retains any jurisdiction over the operation. As such, there will be no post bond-release information available. Therefore, this provision of the proposed rule runs afoul of the statute.

The proposal also inexplicably expands the definition of “anticipated mining” to include any operation for which a permit application has been submitted under the CWA. The purpose of the cumulative impact analysis is to assess impacts to the hydrology within the area of anticipated mining. However, mining operations obtain permits under the CWA for a number of activities that are not themselves mining, such as building construction. Furthermore, impacts to waters and streams must be extensively assessed prior to the issuance of any CWA permit. As such, effects on water resources for all activities requiring a CWA permit are already addressed by the CWA regulatory authority. By including operations that have applied for a CWA permit within the definition of anticipated mining, OSM’s proposal duplicates and supersedes the CWA in violation of Section 702 of SMCRA.

The proposal also requires that underground mines include all contiguous coal reserves adjacent to an existing or proposed underground mine that are owned or controlled by the applicant. This represents a significant, unnecessary and impractical expansion of

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<sup>100</sup> See, 48 *Fed. Reg.* 43956, 43957 (Sept. 26, 1983)

the cumulative impact assessment requirements under SMCRA. OSM is aware that mine planning is subject to many factors, including quality of the reserves, access, and demand. The requirement that an applicant must include information on all underground coal reserves owned or controlled is a tremendous burden, and the information that would be provided would be speculative. OSM addressed this issue in its response to comments associated with the existing regulations, stating that “the language of the proposed definition could have been read to require consideration of operations for which there was no plan for the mine and for which projected impacts were highly speculative.” 48 *Fed. Reg.* 43959. At that time, OSM chose to focus the analysis on non-speculative operations, defined as “those which reasonably can be evaluated in interaction with the impacts of the proposed operation and [not including] those operations that are merely possible or speculative for which the regulatory authority has no information on which to base its assessment.” *Id.* Mine planning is typically done on a 5-10 year horizon, but much can change in the interim. OSM should revise the definition for anticipated mining operation to include only those operations that are within the general area of the proposed mine where OSM has received a permit application such that the agency may use the data in the application to conduct a meaningful assessment.

#### **D. Groundwater**

OSM proposes to revise the existing definition of “groundwater” to include subsurface water in both regional and perched aquifers. 80 *Fed. Reg.* 44471. This is problematic, as perched aquifers are ubiquitous in glacial sediments and are often removed by surface coal mining operations. *Id.* Under the existing regulations, these aquifers do not need to be restored unless it is determined there is material damage to the hydrologic balance outside the permit area. *Id.* However, under OSM’s proposed definition of “material damage to the hydrologic balance,” mining through perched aquifers would be considered “impacts to groundwater,” despite the fact that OSM recognizes that this is commonly done in the course of mining and typically does not require restoration. In other words, under OSM’s revised definitions of material damage to the hydrologic balance and groundwater, it is likely that these benign impacts will be inappropriately presumed to constitute “material damage to the hydrologic balance.”

#### **E. Material damage to the hydrologic balance outside the permit area**

##### **1. Disregard for Regional Diversity**

OSM proposes to establish a federal definition for “material damage to the hydrologic balance outside the permit area” for the first time in the 38 year history of the SMCRA program. One of the primary reasons why Congress vested primary governmental responsibility for developing regulations for surface coal mining operations with the States rather than OSM under SMCRA was recognition of the diversity in terrain, climate, biologic, chemical, and other physical conditions around the country.<sup>101</sup> OSM

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<sup>101</sup> See U.S.C. § 1201(f).



ignores this carefully crafted balance by proposing a federal definition of material damage to the hydrologic balance outside the permit area which is duplicative with existing law and requirements under the CWA, exceeds OSM's authority under SMCRA, would cause immense uncertainty and additional regulatory burden for operators, and imposes millions in unfunded mandates on state regulators, all without any identifiable benefit to the hydrologic balance OSM purports to protect.

OSM acknowledges the inconsistency of a federal definition with the purpose and structure of SMCRA related to regional diversity, but fails to explain its decision to disregard the agency's inconsistency in developing their new definition. In the preamble OSM notes that "several commenters on a proposed rule on hydrology and geology on June 25, 1982 (47 FR 27712), requested that we add a definition of material damage to the hydrologic balance outside the permit area to our regulations. However, the preamble to the final rule that we adopted in response to that proposed rule explains that we declined the requests for a definition because the gauges for measuring material damage may vary from area to area and from operation to operation."<sup>102</sup> The preamble to the proposed rule goes on to state that "In the 30 years since we published that preamble, very few states have adopted a definition or established programmatic criteria for material damage to the hydrologic outside the permit area. Therefore, adoption of a federal definition of material damage to the hydrologic balance outside the permit area is both necessary and appropriate to ensure effective and consistent application of that term."<sup>103</sup>

This justification is incorrect and inconsistent with OSM's own findings. First, contrary to OSM's statement, according to OSM's annual evaluation reports states routinely ensure that there are no offsite impacts from surface and underground mining operations within their borders meeting SMCRA's requirements with respect to avoiding impacts the hydrologic balance. To suggest that these states have not adopted adequate criteria for ensuring compliance is false and is directly at odds with OSM's own findings. Second, OSM's conclusion, even if it were correct, does nothing to explain why a federal definition is now deemed appropriate given nothing has changed with respect to the reality that varying gauges for measuring material damage from area to area and operation to operation, is site-specific as OSM has recognized and respected for the past 30 years. OSM has not provided an adequate rationale for why the proposed change is needed. On the contrary, OSM provided a very sound justification for not creating a nationwide definition years ago, and, based on the lack of any problems cited by OSM, this same rationale is just as applicable today. Furthermore, the adoption of a rigid federal standard, particularly the one proposed in the SPR, would likely reduce regulatory authorities' ability to prevent material damage by eliminating regional flexibility and adaptability to do just that.

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<sup>102</sup> 80 Fed. Reg. 44436 at 44473 (July 25, 2015).

<sup>103</sup> *Id.*

## 2. Conflict with the Endangered Species Act

In addition to running afoul of the CWA, the proposed definition of material damage to the hydrologic balance outside the permit area also exceeds and conflicts with existing requirements under the ESA, and therefore violates Section 702 of SMCRA.

Specifically, the definition includes adverse impacts which would “impact threatened or endangered species, or have an adverse effect on designated critical habitat, outside the permit area in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 et seq.”<sup>104</sup> The preamble to the proposed rule explains this addition by stating that “this provision is intended to ensure compliance with both the Endangered Species Act and the fish and wildlife protection and enhancement provisions of sections 515(b)(24) and 516(b)(11) of SMCRA.”<sup>105</sup> Significantly, OSM must already comply with the ESA with respect to avoidance of take and consultation related to incidental take under Section 7 of the ESA. Nothing in this definition can add or detract from those requirements so to include this standard as a part of the definition of material damage to the hydrologic balance conflates the different requirements within SMCRA and ESA in a manner that is confusing and, at best needlessly duplicative and at worst, conflicting in the sense that it establishes two different arbiters of when such impacts have occurred (FWS and OSM/state RAs).

The proposed definition also exceeds the authority established Section 515(b)(24) and 516(b)(11) and is impermissible under the law. Specifically, both sections of SMCRA require OSM to establish standards that “to the extent possible, using the best technology currently available, *minimize disturbances and adverse impacts* of the operation on fish, wildlife, and related environmental values...” (emphasis added).<sup>106</sup> Significantly, these SMCRA requirements call for the *minimization* of these impacts using the best technology currently available. They do not call for the complete avoidance of any impacts. However, by attaching these requirements to the definition of a SMCRA term that requires *the prevention* of material damage to the hydrologic balance to the hydrologic balance outside the permit area, this proposed definition could be construed to require the prevention, rather than the minimization, of disturbances and adverse impacts to fish, wildlife, and related environmental values.

As mentioned previously, operations must already comply with the ESA, which prohibits jeopardy to the continued existence of listed species or the unauthorized take of species.<sup>107</sup> Both of these standards set a higher threshold than OSM’s nebulous reference to “impacts” to listed threatened and endangered species under proposed subsection (a) of the definition to material damage to the hydrologic balance outside the permit area. Because SMCRA cannot supersede the ESA by requiring greater restrictions than that which is established under the ESA, the most likely interpretation of this definition would violate Section 702 of SMCRA. In the preamble to the proposed

<sup>104</sup> *Id.* at 44588.

<sup>105</sup> *Id.* at 44475.

<sup>106</sup> See. 30 U.S.C. § 1266(b)(11)

<sup>107</sup> See. 16 U.S.C. 1532(a)(2) and 1538(a)(1)(A).

rule OSM invites comment on this language and the alternative language which would read “that would jeopardize the continued existence of threatened or endangered species, or result in destruction or adverse modification of designated critical habitat outside the permit area in violation of the Endangered Species Act.”<sup>108</sup> For the above reasons, this alternative language is significantly preferable to the proposed language because it mirrors, rather than exceeds and violates, the standard set forth in the ESA. However, if this alternative is selected OSM should make clear that the arbiter of whether such action violates the ESA is FWS, not OSM. OSM may not independently make ESA violation determinations.

## **F. Reclamation**

Under the current regulations, the term “reclamation” “means those actions taken to restore mined land as required by this chapter to a postmining land use approved by the regulatory authority.”<sup>109</sup> The proposed definition for this term makes significant revisions that would expand jurisdiction beyond the disturbed area to include any discharges that are, in the judgment of OSM, hydrologically connected to either the mined area or the operation.<sup>110</sup> Contrary to the current definition which appropriately includes all actions taken to restore land required under the program, the proposed definition is duplicative with other portions of the regulatory framework and exceeds agency authority in other areas. Portions of the proposed definition relating to the need to support post mining land use and the need to “meet all other requirements of the permit and regulatory program that pertain to restoration of the site” are duplicative with the portions of the regulatory framework that cover that subject matter, and are therefore unnecessary in the definition. The latter portion of the definition would convert a SMCRA definition into an operative regulatory provision by assuming hydrologic connectivity and applying all requirements related to reclamation to those waters. This would vastly expand the inclusion of waters covered under the definition in a manner that is both beyond OSM’s authority under SMCRA and inconsistent with the best available science. NMA recommends retention of the existing definition of “reclamation” under the SMCRA regulations.

## **G. Reclamation Plan**

The proposed rule prohibits mining unless the RA finds that the proposed activity would not “result in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral.” Page 19 of the DEIS states that the preferred alternative “would allow mining through any type of stream” provided the applicant demonstrate that “the hydrological form and ecological function of the affected stream segment could and would be restored using the techniques in the proposed reclamation plan.” These statements will effectively eliminate any mining that would directly impact the headwaters (or source) of an intermittent or perennial stream,

<sup>108</sup> 80 Fed. Reg. 44436, at 44475 (July 27, 2015).

<sup>109</sup> 30 CFR 701.5

<sup>110</sup> 80 Fed. Reg. 44436 at 44458 (July 27, 2015).

the upper limits of which have been shown to be extremely high in Appalachian watersheds. Additionally, the language is highly restrictive and does not recognize longitudinal variations in transition points (ephemeral to intermittent, intermittent to perennial, etc.) and that operations may propose impacts at or near these transition points.

#### **H. Applicability—Termination of Jurisdiction (700.11(d))**

The proposed addition of the terms “intentional or unintentional” before misrepresentation is unnecessary. The existing provision uses the term “misrepresentation” a term whose plain meaning conveys an assertion that is not in accord with the known facts. The preceding terms in the existing sentence “fraud or collusion” confirm the term misrepresentation meant assertion or manifestation not in accord with the facts. The example included in the proposed revision is contrary to the termination of jurisdiction rule. The mere discovery sometime later of a discharge requiring treatment does not in itself equate to a misrepresentation of the facts at the time the bond release was applied for or granted. In fact, the termination of jurisdiction rule unequivocally stated that the occurrence of an event “after final bond release which may have adverse environmental consequences is not automatically a basis for a regulatory authority to disturb an administratively final decision to release a bond and to terminate regulatory jurisdiction.” As the agency explained in the 1988 rulemaking, whether reclamation was successfully completed, “are factual questions dependent upon particular circumstances.”<sup>111</sup> Indeed, an acid mine drainage seep was the very example mentioned as not automatically requiring reassertion of jurisdiction. The agency must delete the language in the proposal suggesting it would be. OSM also asks whether coal exploration sites should be included. Please note that all coal exploration conducted on Federal lands is not subject to SMCRA and therefore not within OSM’s jurisdiction.<sup>112</sup>

#### **VI. Endangered Species Act Restrictions**

Similar to OSM’s duplication and attempted usurpation of existing CWA programs, the proposed SPR also conflicts with the ESA. Several provisions would significantly expand the existing procedures related to fish and wildlife under the current program resulting in tremendous cost for operators and states as well as both OSM and the FWS. Many of these proposed requirements, findings, and procedures exceed SMCRA authority and go beyond that which is required under the ESA in violation of Section 702 of SMCRA. From a policy perspective, these complicated new requirements are puzzling given the existing protections for species under the current program and the ESA itself. Ultimately, these provisions establish a structure in which FWS, in the vast majority of cases, would be the final arbiter of whether or not a SMCRA permit may be issued. As explained in greater detail below, this is illegal for a number of reasons and would have disastrous effects on the mining industry and states. NMA recommends that

<sup>111</sup> 53 FR 44346, 44361 (Nov. 2, 1988).

<sup>112</sup> 30 U.S.C. 1262(e) (coal exploration on Federal lands governed by Federal Coal Leasing Act Amendments).

OSM retain the existing framework with respect to fish, wildlife and related environmental values.

### **A. Permit Findings and Performance Standards Related to ESA Exceed SMCRA Authority and ESA**

Proposed Sec. 773.15 sets out the proposed rule's requirements for findings that the regulatory authority must make before approving a permit application for a surface or underground mining operation. Among these findings at 773.15(j) is a required finding that "the operation is not likely to jeopardize the continued existence of species listed or proposed for listing as threatened or endangered under the Endangered Species Act of 1973...or result in destruction or adverse modification of designated critical habitat under that law." (emphasis added).<sup>113</sup> In contrast to the current finding which requires that "the operation would not affect the continued existence of endangered or threatened species or result in destruction or adverse modification of their critical habitats, as determined under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.)," the proposed rule extends this finding to include species proposed for listing. Similarly, the proposed performance standards at Sections 816.97 and 817.97 for surface mines and underground mines respectively, deviate from existing standards which are consistent with the ESA's jeopardy and adverse modification standards by applying only to listed threatened and endangered species. The proposed sections state that "you may not conduct any surface [or underground] mining activity that is likely to jeopardize the continued existence of threatened or endangered species listed by the Secretary or proposed for listing by the Secretary or that is likely to result in the destruction or adverse modification of designated critical habitat in violation of the Endangered Species Act of 1973, 16 U.S.C. 1531 et eq." (emphasis added).<sup>114</sup>

Here, as is the case with all ESA related restrictions promulgated under SMCRA, OSM may only require compliance with existing law.<sup>115</sup> SMCRA does not provide independent authority to establish threatened and endangered species programs. The current regulations acknowledge the proper role for OSM and include findings and performance standards which mirror that which is necessary under the ESA. By expanding application to species proposed for listing in these sections, OSM attempts to impose a restriction based on the ESA where neither the ESA nor SMCRA provide authority for this restriction. Specifically, the ESA's provisions related to the prevention of jeopardy to species and destruction or adverse modification of habitat apply only to species listed as threatened or endangered, not for species propose to be listed.<sup>116</sup>

OSM attempts to justify this expansion by citing Section 7(a)(4) of the ESA. The preamble to the SPR states that "[t]he proposed change is consistent with Section 7(a)(4) of the Endangered Species Act, which provides that "[e]ach Federal agency

<sup>113</sup> 80 Fed. Reg. 44436 at 44589 (July 27, 2015).

<sup>114</sup> *Id.* at 44665, 44690.

<sup>115</sup> See, *Indiana Coal Council v. Lujan*, 774 F. Supp. 1385, 1397 (D.D.C. 1991).

<sup>116</sup> See 16 U.S.C. § 1538(a)(1)

shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.”<sup>117</sup> This citation is misplaced, however, because Section 7(a)(4) pertains to the informal conference duty between federal agencies and the FWS for agency actions likely to cause jeopardy to species proposed for listing or destruction or adverse modification of proposed species habitat. This section carries no prohibitive effect whatsoever and cannot form the basis of an outright prohibition on activity for potential effects to species proposed for listing or to proposed species habitat. The proper characterization of ESA’s treatment of species proposed for listing was recently made by FWS in the Northern Long Eared Bat Interim Conference and Planning Guidance where FWS explained, “Action agencies are not prohibited from unauthorized taking or jeopardizing the continued existence of a proposed species until the species becomes listed.”<sup>118</sup>

Despite OSM’s admission in the preamble that “[t]he conferencing requirement of section 7(a)(4) of the Endangered Species Act is not the same as the consultation requirement for threatened and endangered species under Section 7(a)(2) of the Endangered Species Act,”<sup>119</sup> OSM ascribes a prohibitive effect to the conferencing requirement that exceeds even that which is established by the formal consultation requirement of section 7(a)(2). Specifically, by placing an outright prohibition on mining activity that could impact species for which a threatened or endangered listing determination has not been made, OSM gives greater prohibitive effect to the conferencing requirement of section 7(a)(4) than section 7(a)(2) which requires consultation to ensure that agency actions are not likely to jeopardize the continued existence of any endangered or threatened species or result in adverse modification of critical habitat, unless the agency action has been granted exemption under Section 7(h). Promulgating greater restrictions for species which have not yet been evaluated for listing than those that have makes no sense and contravenes the purpose of the ESA.

By placing an outright prohibition on mining activity that could impact species for which a threatened or endangered listing determination has not been made, the proposed inclusion of species proposed to be listed is also inconsistent with Section 515(b)(24) of SMCRA which requires operators “to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.” This section focuses on the minimization of impacts to species where practicable, consistent with current law under the ESA. OSM is not authorized to exceed this standard by basing a prohibition on an ESA restriction that does not exist, nor does SMCRA provide OSM the authority to issue regulations more stringent than that which is required under the ESA. OSM’s proposed inclusion of species proposed

<sup>117</sup> 80 Fed. Reg. 44436, at 44479 (July 27, 2015).

<sup>118</sup> U.S. Fish and Wildlife Service, *Northern Long Eared Bat Interim Conference and Planning Guidance*, (Jan. 6, 2014) at 7.

<sup>119</sup> *Id.* 44565.

to be listed violates Section 702 of SMCRA which prohibits SMCRA authority from modifying, amending, or superseding other federal laws. OSM may not require that state regulatory authorities make such a finding nor may OSM withhold a permit on the basis of this proposed finding.

In addition to the clear legal insufficiencies in the proposed rule related to fish, wildlife, and related environmental values, the proposed treatment of species proposed for listing and their habitat poses significant practical and administrative problems.

Requiring a finding that a proposed permit will not “impact” species proposed for listing puts operators and states in the position of evaluating potential effects to species on which the FWS has not yet made a determination, and for which no standards for protection and conservation have yet been established. As a result, it would be nearly impossible for an operator to show that the proposed project would not “impact” a species proposed for listing because the operator would lack any benchmarks against which to measure mitigation efforts.

### **B. The FWS Veto Authority: Proposed Permitting Requirements 30 CFR 779.20 and 783.20**

Proposed sections 779.20 and 783.20 for surface and underground mining operations respectively, would require that a “permit application must include information on fish and wildlife resources for the proposed permit and adjacent areas. The adjacent area must include all lands and waters likely to be affected by the proposed operation.” As previously discussed in the definitions section of these comments OSM proposes to expand the definition of “adjacent areas” to include all areas outside the proposed or actual permit area within which there is a reasonable *possibility* of adverse impacts from surface coal mining operations or underground mining activities.”<sup>120</sup> As discussed in the definitions section of these comments, this proposed definition of adjacent area places the burden on operators to show that there is no reasonable possibility of adverse impacts in order to exclude that area from the definition. Because the fish and wildlife resources that must be included in a permit application include information relevant to both listed species and species proposed for listing, the provision effectively asks for a host of new information related to listed and proposed species for any area both within the permit boundary and any area where there is some reasonable (regardless of how remote) possibility of adverse impacts from surface mining or underground mining. This would effectively expand the scope of fish and wildlife resources that must be reported many orders of magnitude, potentially expanding the applicable area where such information must be gathered to several miles around a given proposed permit area.

Proposed Sections 779.20(d)(1)(i)/783.20(d)(1)(i) depart from the existing rules by requiring the regulatory authority to provide the site-specific resource information mentioned above to the FWS whenever that information includes species listed as threatened or endangered under the ESA, critical habitat designated under the ESA, or species *proposed* for listing as threatened or endangered under the ESA. Under the

<sup>120</sup> See 80 Fed. Reg. 44436 at 44593, 44614 (July 27, 2015).

same Sections, if the regulatory authority does not agree with recommendations provided to it by the FWS with respect to listed threatened and endangered species, the proposed rule establishes a dispute resolution process to appeal the decision of the Service, “through the chain of command of the regulatory authority, the Service, and OSMRE for resolution.”<sup>121</sup> This “process” is negated however in the subsection immediately following where proposed 30 CFR 779.20(d)(2)(iv) states that the “regulatory authority may not approve the permit application until...the regulatory authority receives written documentation from the Service that all issues have been resolved.”<sup>122</sup>

At Sections 780.16 and 784.16 for surface and underground mines respectively, the proposed rule considerably alters the current requirements related to an applicant’s fish and wildlife protection and enhancement plan specific to the resources identified under Section 779.20. Contrary to the existing rules which are well tailored to meet the individual circumstances of each mine site, the proposed rule includes a number of specific measures and the presumption that they must be met, regardless of feasibility to specific operations or relevance to specific species potentially impacted.<sup>123</sup> These include the establishment of a 100 foot buffer between surface mining activity and streams and reestablishment of native forests both within and outside of the permit area. Like the resources identified under Section 779.20, the protection and enhancement plan under Section 780.16 must also be submitted to FWS for its approval and the SMCRA permit cannot be granted until FWS makes the final decision.

This written documentation of approval required of the FWS before a protection and enhancement plan can be accepted— and a SMCRA permit granted— amounts to FWS veto authority for any permit where the FWS does not approve of all recommendations made in the protection and enhancement plan related to listed threatened and endangered species. Even if FWS approves a plan, if the Service fails or chooses not to issue a written documentation of such approval there is no legal mechanism in the proposed SPR to compel written approval, and thus the permit application could not be approved. Likewise, nothing in the ESA would compel such an approval as the proposed framework is an OSM creation, based on a false reading of SMCRA authority, and wholly separate from any authority or obligation of the FWS stemming from the ESA.

To give some perspective on scope, this veto authority would apply to all mining operations that fall within the habitat range for the Northern Long Eared Bat, which covers most of the eastern and central United States, effectively giving the FWS final authority to disapprove of any mining operation in the Appalachian and Interior regions. In the West, the host of listed species habitat ranges that checkerboard the Rocky Mountains would similarly place FWS in the driver’s seat with respect to SMCRA permit approval and disapproval.

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<sup>121</sup> *Id.* at 44593, 44614.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 44599, 44620.



This raises a host of legal and practical problems which require the removal of these portions of the proposed rule. SMCRA vests OSM and state regulatory authorities with exclusive jurisdiction over the approval and issuance of SMCRA permits. This authority cannot be ceded to FWS by means of an interagency conference created by an OSM regulation. To do so not only exceeds any authority provided to OSM in SMCRA, it runs counter to Congress's purpose in enacting SMCRA in the first place— to establish a nationwide program governing coal mining operations administered by the Department of the Interior through OSM.<sup>124</sup> SMCRA specifically provides that OSM or the state regulator, whichever holds exclusive jurisdiction in the state at issue, has the sole authority to “order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto.”<sup>125</sup> Requiring the FWS to provide written documentation of approval of all issues related to listed threatened and endangered species relevant to fish and wildlife resources information and fish and wildlife protection and enhancement plans before a SMCRA permit can be issued takes final permit authority away from OSM and state regulators and places it squarely in the hands of FWS. The “process” for dispute resolution related to these elements is an appeals process in name and appearance only. The final arbiter of whether any issues between an RA and FWS have been resolved is FWS itself, as no other authority, either within the DOI or the courts, is required to provide written documentation of resolution other than FWS.

The fish and wildlife framework of the SPR would put FWS in a position to extract endless concessions from states and operators related to fish and wildlife resource information and protection and enhancement measures taken. These requirements imposed by FWS would eclipse that which is called for under the ESA, because the threshold is considerably lower—a mere potential “impact” to listed species rather than jeopardy to continued existence or take. NMA anticipates that this provision would cause significant permit delay and in many cases, the abandonment of mining operations due to the inability to meet unfeasibly high requests. Due to the illegality of the proposed changes at Sections 779.20 and 783.20, NMA recommends that OSM retain the existing treatment of fish and wildlife resources and related environmental values which comports with both SMCRA authority and the ESA.

### **C. Site-Specific Resource Information Requirement exceeds SMCRA authority and is Impracticable**

Sec. 779.20(c)(1) requires that “when circumstances exist, the site-specific resource information must include a description of the effects of future state or private activities that are reasonably certain to occur within the proposed permit and adjacent areas.”<sup>126</sup> Mine operators are in no legitimate position to know or opine about potential or likely activities on the land by third party entities. OSM's stated reason for requiring such

<sup>124</sup> See, 30 U.S.C. § 1202

<sup>125</sup> See *Id.* at § 1211, See also *Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 289 (4th Cir. 2001) citing 30 U.S.C. § 1253(a), § 1252(e).

<sup>126</sup> 80 Fed. Reg. 44436 at 44593 (July 27, 2015).

information is to assist the FWS meet its responsibilities to protect endangered species.<sup>127</sup> While FWS might have responsibility for land activities that occur after final bond release, that does not create an obligation for the mine operator, nor can the operator be required to be involved or assist the FWS in meeting its future responsibilities.

## VII. Bonding and Financial Assurance

Part 800 of the SPR significantly mischaracterizes SMCRA's requirements for posting bonds to cover mining reclamation imposes several restrictions on the use of bonds and other financial assurance which exceed SMCRA or are otherwise inconsistent with SMCRA's requirements. Furthermore, these restrictions would have significant impacts on the ability of operators to meet their financial obligations with respect to reclamation. Taken together, these new policies would make many mining operations financially unfeasible resulting in significant amounts of stranded reserves, lost jobs, and increased electric rates due to decreased production.

### A. Restrictions on Types of Bonds Eligible for Use

#### 1. Alternative Bonding Systems

Proposed Section 800.9(d) prohibits the use of alternative bonding systems to cover a number of reclamation activities including; "1) Restoration of the ecological function of a stream under §§ 780.28 and 816.57 or §§ 784.28 and 817.57 of this chapter. 2)(i) treatment of long-term discharges that come into existence after the effective date of paragraph (d) of this section, unless, upon discovery of the discharge, the permittee contributes an amount sufficient to cover all costs that the regulatory authority estimates that the alternative bonding system will incur to treat the discharge for as long as the discharge requires active or passive treatment to meet Clean Water Act standards or the water quality requirements of this chapter."<sup>128</sup> These restrictions will cover a great deal of mining operations that would otherwise be eligible, and elect to use alternative bonding systems. Both of these restrictions are justified in the preamble as necessary due to the inability of alternative bonding systems to meet the needs of restoration of the ecological function of a stream or to cover the longer term obligations associated with discharge treatment. Neither justification is rooted in SMCRA or in past experience with state alternative bonding systems. OSM claims that such restrictions are necessary to remain consistent with Section 519 of SMCRA governing bond release, and determines when the regulatory authority may terminate jurisdiction over the operation.<sup>129</sup> However, section 509(b)-(c) of SMCRA states that "the Secretary may approve as part of a State or Federal program an alternative system that will achieve the objectives and purposes of the bonding program pursuant to this section" and that "whether an alternative bonding system is appropriate and accepted is governed by

<sup>127</sup> *Id.* at 44495

<sup>128</sup> *Id.* at 44639.

<sup>129</sup> *Id.* at 44534.

Section 509 of SMCRA which states that the amount of each performance bond and its sufficiency to meet the topographical, geologic, hydrologic, and revegetation needs of the site “shall be determined by the regulatory authority.”<sup>130</sup> This section vests the authority regarding the adequacy of bonding mechanisms to meet hydrological requirements, such as stream restoration, with state regulatory authorities if the state has achieved primacy, not OSM. OSM may not remove the discretion given to states through a rulemaking which fails to explain exactly why the named alternative bonding systems are inadequate to meet the identified obligations, other than the general assertion that as a matter of belief they are not.

The alleged inadequacy of alternative bonding systems is not supported by recent state analyses of current bonding systems. Specifically, in 2010 state regulators conducted a survey examining the use of bonds and alternative bonding systems in their states and the adequacy of these mechanisms to meet the requirements of SMCRA and cover the reclamation work necessary. No deficiencies with respect to alternative bonding systems were identified that would support the general notion that these systems cannot be used to cover stream restoration or long term discharge. Furthermore, removal of alternative bonding systems from the suite of available financial tools to bond projects would impose great financial strain on the operators and state that rely on them, forcing those operators with alternative systems to meet their obligations through other means which may or may not be feasible. If another form of bond cannot be achieved, those reclamation activities currently covered or those otherwise eligible for coverage under the current regulations by an alternative bonding system, could risk losing their ability to finance reclamation. This is a very negative result for both the operator and the environment. NMA recommends removal of this section and retention of the existing regulations which allow for the use of alternative bonding systems where deemed sufficient by the appropriate regulatory authority.

## **2. Restrictions on Self-Bonds are Inconsistent with SMCRA and Ignore Financial Capacity Issues**

The SPR at section 800.12(e) states that “the regulatory authority may accept only a surety bond, a collateral bond, or a combination thereof to guarantee restoration of the ecological function of a stream under §§ 780.28(c), 784.28(c), 816.57(b), and 817.57(b) of this chapter.”<sup>131</sup> Absent from this list are self-bonds, which are excluded under the rationale that, “A self-bond is not an appropriate mechanism to guarantee restoration of a stream’s ecological function because of the risk that the company may cease to exist during the time required to accomplish that restoration. In addition, a self-bond does not require that the permittee file financial instruments or collateral with the regulatory authority, nor is there any third party obligated to complete the reclamation or pay the amount of the bond if the permittee defaults on reclamation obligations.”<sup>132</sup> This explanation and the prohibition on the use of self-bonds to cover reclamation with

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<sup>130</sup> 30 U.S.C. § 1259

<sup>131</sup> *Id.* at 44640

<sup>132</sup> *Id.* at 44535-44536.

respect to mining through streams and long term discharges is inconsistent with SMCRA's governing of self-bonds. Under SMCRA, either an entity qualifies for self-bonding based on established criteria or it does not.<sup>133</sup> As mentioned in the previous section of these comments, Section 509 of SMCRA leaves to state regulatory authorities whether or not to allow self-bonds. While these regulatory authorities have the discretion to prohibit their use if they choose, OSM is not authorized to remove this option from the number of financial tools otherwise available to cover reclamation obligations in a given state.

The impacts of this prohibition when taken together with the rule's proposed inclusion of ephemeral streams as defined under EPA's WOTUS standard quickly metastasize. While most western mining operations previous did not trigger the restrictions of the existing Stream Buffer Zone rule which covers only mining through perennial and intermittent streams, western mining operations frequently impact ephemeral streams which are numerous across arid western landscapes. The inability to use self-bonds to cover reclamation of these ephemeral streams would force western operators into the private market to securing financing through alternate means.

NMA is concerned that there is currently insufficient capacity to meet this financial assurance portion of the SPR. OSM failed to address this issue in their Economic Studies of the Regulatory Impact Analysis (RIA) of the proposed rule. In fact, there is no mention of Financial Assurance Capacity in the RIA for the proposed SPR. To illustrate the potential lack of alternative financial options to cover reclamation obligations in all coal developing regions, in 2009 OSM requested that Kentucky examine the adequacy of its reclamation bonding program. OSM asserted that Kentucky was not adequately bonding active operations to ensure that reclamation would be completed in the event that an operator failed to complete its reclamation plan. Operators examined that adequacy and found some simple solutions to address OSM's concerns.

In 2009 it was clear that the future posed challenges for the industry. Operators in Kentucky tried to minimize impending financial impacts to ensure that they did not inadvertently create additional financial burdens on the coal industry. Unfortunately, capacity in the surety marketplace was a limiting factor in examining remaining solutions. In 2009, the total capacity for the U.S. coal industry was estimated at \$6.5 Billion with approximately \$5.0 billion already utilized. That total capacity was also based upon the value of the 2009 coal industry which was producing coal at very near record levels. Since 2009, the industry has seen an approximately a 35% decrease in coal production which has affected the net worth of the coal industry and the corresponding financial capacity. In addition, manmade and natural disasters have affected the availability of these instruments in recent history (i.e., 9/11, Hurricane Katrina, Bankruptcies of Kmart/Enron/Tyco, etc.) which just emphasizes the sensitivities of these markets.

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<sup>133</sup> 30 U.S.C. § 1259

If financial assurance capacity is unavailable, the coal industry's only recourse will be cash or collateral bonds which will place greater pressure on coal industry financials. Also, this will affect the industry's ability to expand and modernize operations to meet tomorrow's challenges with little or no environmental benefit.

## **VIII. Comments on Specific Provisions**

The following comment sections focus on areas of significant concern to NMA members. Given the length of the proposed rule and its accompanying EIS and RIA, the 90 day time frame to review and comment on this near-complete program overhaul is insufficient to adequately comment on each individual provision which could materially harm NMA member interests. Although NMA, its members, elected officials, and the general public have repeatedly requested a comment period of 180 days, this has not been provided. As such, NMA expresses concern with the entirety of the proposed rule and reserves the right to raise or challenge any issues in the proposed rule at a later date.

The following section consists of NMA's comments on various provisions of the proposed SPR which are either not authorized by SMCRA, inconsistent with other portions of SMCRA or other proposed provisions of the SPR, or violate or attempt to supersede other existing laws. This list is not exhaustive and NMA has concerns with the framework of the proposed rule in its totality.

### **A. Re-assertion of Jurisdiction:**

At section 700.11(d)(3) OSM proposes to modify the term "misrepresentation of material fact" by specifying that such misrepresentation can be intentional or unintentional. OSM is apparently relying on a court decision that suggests the intent of SMCRA is that final bond release is contingent upon completion of all reclamation obligations, and if it is later discovered that all reclamation obligations were in fact not met at the time of final bond release, then jurisdiction should be reasserted, regardless of whether the misrepresentation that all reclamation was complete was intentional or not. In this proposed rule OSM is taking the "intentional or unintentional" concept and applying it in a new context not considered by the court, by claiming that misrepresentation of a material fact "includes the discovery of a discharge requiring treatment of mining-related parameters of concern..." The proposal ignores the notion that reclamation is to be judged against the standards applicable at the time of bond release. Certainly, the control of discharges under the CWA has evolved with experience and new science: effluent limitations are periodically updated in states' triennial reviews. However, under the CWA such changes are applied prospectively. In this proposed rule, OSM inappropriately claims authority to exceed CWA effluent limitations and impose effluent limitations in instances where the CWA authority has determined that none are needed. In this "reassertion of jurisdiction" proposal, OSM further claims that when it makes such a determination that some, possibly new, "parameter of concern" is discovered after final bond release, jurisdiction must be reasserted regardless of whether such discharge met applicable requirements at the time of bond release. The retroactive application of

new requirements is not appropriate. OSM has no authority to require treatment for any so-called “parameter of concern” not requiring treatment under the CWA. OSM has no authority to reassert jurisdiction for new water treatment requirements that were not required under the CWA and applicable to the mine operator at the time of bond release.

## **B. Unauthorized Restrictions on Renewal, Revision, Transfer, Assignment, PART 774**

### **1. Lack of Authority Under SMCRA**

Proposed Section 774.15 (b) states that; “(2) At a minimum, your application must include the following information— (vii) An analysis of the monitoring results under §§ 816.35 through 816.37 or §§ 817.35 through 817.37 of this chapter and an evaluation of the accuracy and adequacy of the determination of the probable hydrologic consequences of mining prepared under § 780.20 or § 784.20 of this chapter. (viii) An update of the determination of the probable hydrologic consequences of mining prepared under § 780.20 or § 784.20 of this chapter, if needed, or documentation that the findings in the existing determination are still valid.” This proposed criteria for the renewal of a permit is inconsistent with and exceeds the authority in SMCRA. SMCRA states, “(1) Any valid permit issued pursuant to this Act shall carry with it the right of successive renewal upon expiration with respect to areas within the boundaries of the existing permit. The holders of the permit may apply for renewal and such renewal shall be issued (provided that on application for renewal the burden shall be on the opponents of renewal)...” SMCRA enumerates the circumstances that can preclude the renewal of a permit, including that “the terms and conditions of the existing permit are not being satisfactorily met.” However, OSM cannot shift the burden of establishing that such condition is being met, as it attempts to do in this proposal, to the operator.

## **C. Minimum Permit Requirements Beyond SMCRA Authority**

### **1. Vegetation Information**

Proposed Section 779.19 states, “What information on vegetation must I include in my permit application? (a) You must identify, describe, and map— (1) Existing vegetation types and plant communities on the proposed permit and adjacent areas and within any proposed reference areas.” SMCRA requires certain information, including vegetation, for “...lands subject to surface coal mining operations over the estimated life of those operations...” However, there is no authority in SMCRA to require vegetation information on adjacent areas, nor does the preamble discuss any reason why such information is needed. SMCRA is clear that reclamation is to be judged against the land use and productivity of the mine area, not the surrounding area.

### **2. Land Use and Productivity**

Proposed Section 779.22 requires the permit application to include a statement of “the condition, capability, and productivity of the land within the proposed permit area, including—(2) A description of the historic uses of the land” and “(3) The productivity of the proposed permit area before mining for fish and wildlife.” This is a significant departure from existing Section 779.22, which includes a five-year timeframe for reporting historic use. As OSM explains in the preamble, by removing this timeframe the proposed change requires an applicant to report all historic land uses going back in time in perpetuity. Such a requirement presents an impossible task, and a standard unreviewable by any court. OSM states as reason for eliminating the 5-year timeframe is that “this timeframe has sometimes proven difficult to determine with precision,” so how can OSM conclude that looking back in time forever will somehow be less difficult? OSM mistakenly believes that knowing all historic uses will assist in evaluation of land use capability, but there is no correlation between historic land use and land use capability. In its alleged attempt to establish a standard that can be proven with greater precision, OSM proposes a standard which cannot be proven at all.

Subsection 3 in this section is also unworkable and without authority. Fish and wildlife productivity is not contemplated by SMCRA, and the preamble gives no indication regarding how such “productivity” is to be measured.

### **3. Cultural and Historic Sites**

779.17 OSM states its authority for requiring information on cultural, historic and archeological resources listed or eligible for listing on the National Register within the permit and adjacent areas can be found at SMCRA 507(b)(13), 508 (a) (10) & (14), and 522(e). Of these, only 507(b)(13) requires that a map of known archeological sites be provided. 522(a)(3)(B) requires states to determine lands unsuitable for mining where mining operations could result in significant damage to important historic, cultural, scientific, esthetic values and natural systems. It should be clarified that the extent of authority under SMCRA is limited. OSM’s responsibility under the NHPA is also limited by the extent of federal control and responsibility - in this case, it is the approval or funding of the state program.

#### **D. Minimum Requirements for Operation and Reclamation Plans Beyond SMCRA Authority**

##### **1. Reclamation Timetable**

Section 780.12(b) would require a reclamation timetable for the completion of each major step in the reclamation process including, but not limited to— 3) Restoration of the form of all perennial and intermittent stream segments through which you mine.... 7) Restoration of the ecological function of all reconstructed perennial and intermittent stream segments...” Restoration of form and function, and demonstrating vegetation success are not major steps in the reclamation process; they are the measure of success of the major steps of the reclamation process including backfilling, grading, soil redistribution and seeding. Once those major steps are properly completed, Mother

Nature and time alone will dictate when form and function are restored, and when reestablishment of vegetation can be demonstrated. For example, the ability to demonstrate success of proper soil preparation and planting can be hindered by drought. The preamble suggests that failure to meet the timetable is an enforceable offense, which is a significant change from current practice. While contemporaneous reclamation has always been enforceable, achieving the outcomes of reclamation have only dictated eligibility for bond release.

## **2. Reclamation Cost Estimate**

Proposed Section 780.12(c) states that “The reclamation plan must contain a detailed estimate of the cost of reclamation, including both direct and indirect costs, of those elements of the proposed operations that are required to be covered by a performance bond under part 800 of this chapter, with supporting calculations for the estimates. You must use current standardized construction cost estimation methods and equipment cost guides to prepare this estimate.” It is unreasonable to require operators to conform their reclamation cost estimation methods, or to include indirect costs since those are largely irrelevant to bond amount calculations. While cost estimates of industry serve as a good indicator of reclamation cost, bond amounts are ultimately determined by the RA, taking into consideration the complexity of their bonding program, and based on their estimated cost for a third party to complete reclamation.

## **3. Soil Handling Plan**

Proposed Section 780.12(c) states “The reclamation plan must include a plan and schedule for removal, storage, and redistribution of topsoil, subsoil, and other material to be used as a final growing medium in accordance with § 816.22 of this chapter. It also must include a plan and schedule for removal, storage, and redistribution or other use of organic matter in accordance with § 816.22(f) of this chapter. (ii) The plan submitted under paragraph (e)(1)(i) of this section must require that the B horizon, C horizon, and other underlying strata, or portions thereof, be removed and segregated, stockpiled, and redistributed to achieve the optimal rooting depths required to restore pre mining land use capability or to comply with the vegetation requirements of §§ 816.111 and 816.116 of this chapter.”

Requiring the storage and redistribution of organic matter is beyond the authority of SMCRA, which specifically requires only the removal and replacement of topsoil. OSM argues that saving and replacing organic material, including root balls, treetops, etc. facilitates the establishment of preexisting species needed to restore land use capability. However, as OSM points out in the existing regulations, vegetative cover has nothing to do with land use capability. Land use capability is not the same as land use, and there are few land uses that will benefit from the reestablishment of such species. Any post mining agriculture land use will be hindered by the introduction of such organic litter: hay land and pastureland will be contaminated with noxious weeds. The very weeds and shrubs that farmers typically work tirelessly to eliminate will choke row crops. And it should be obvious that commercial and industrial land uses will



receive no benefit. Even a land use of wildlife can be better achieved with selective planting of trees, shrubs, grass and legumes that are favored by the target wildlife. From a more practical standpoint, the removal and storage of root balls, treetops and other organic litter will be difficult and require a fleet of equipment not typically used at mine sites for soil handling: most likely it will require the use of dozers, loaders and trucks. The excess handling will lead to increased soil compaction. Typical revegetation equipment and farm equipment is ill suited to operate on land littered with tree stumps, root balls and tree tops, all to accomplish something that will hinder the approved post mining land use. Further, the storage and replacement of woody and un-decomposed organic material will actually hinder plant growth, since bacteria responsible for decomposition zap nutrients essential to plant growth from the soil. That is the reason people use mulch to keep weeds from growing in their landscaping beds. The notion that all organic litter be salvaged and redistributed is also in direct conflict with OSM 's proposed revegetation requirement at proposed 816.11(d)(2) which requires the use of "suitable mulch free of weed and noxious plant seeds..." Why would OSM prohibit the use of mulch that has weed and noxious plant seeds in one section, but mandate in another section the use of organic litter that has literally tons of weed and noxious seeds per acre in it?

SMCRA requires the restoration of land use capabilities, and specifies how that is to be accomplished. SMCRA specifies the topsoil removal and replacement requirements. For non-prime farmland, SMCRA requires topsoil to be removed and redistributed; for prime farmland, SMCRA requires that the A and B-horizons be segregated and replaced. This proposal requires that all topsoil and subsoil (A, B and C horizons, and other underlying strata) to a depth of one to two meters be removed and replaced at ALL sites, nationwide, regardless of actual land use, a requirement that clearly exceeds the SMCRA requirement. To avoid the specific, plain language of SMCRA, OSM is relying on the more general requirement to restore land use capabilities. OSM assumes that all lands are capable of supporting forests, and that many other types of vegetation will benefit from greater growth medium. In essence OSM is saying that SMCRA requires restoration of land use capability, but OSM disagrees with how congress decided to accomplish that. Congress expressly labeled the "B" horizon as the root zone, and required it to be saved and redistributed only where prime farmland exists. While OSM claims to rely on science for its proposal, they conveniently ignore the fact that operators have been successfully restoring land use capability and meeting yield requirements for decades, even according to OSM's own oversight reports. Further, the notion that topsoil replacement is dictated by OSM's desire to achieve optimal rooting depths to accommodate all native plant species to support all land use capabilities, is simply not supported by SMCRA or science. The simple reality is that even Mother Nature has not provided optimal rooting depths for all plant species. Had she done so, we would lack the very diversity OSM seeks to achieve. While SMCRA requires restoration of land use capability, this proposed rule confuses land use capability with land use, and land use with productivity: it dictates that soil replacement be designed to not only support land use capability, but that it be designed to support the highest productivity possible for those land uses. The rule ignores that the approved post mining land use likely requires something entirely different. It ignores the fact that productivity

for the same land use varies from place to place. For example, with all other soil characteristics being equal, soil depth alone may well dictate that one area is more productive than another for some particular agriculture crop, but that doesn't mean that they both don't achieve the same land use. Congress certainly recognized this reality, which is why it also imposed productivity requirements that compare pre mining and post reclamation productivity on a site by site basis.

OSM's improper proposal to require land use restoration to the highest possible productivity levels leads to further improper requirements for topsoil substitution by dictating that substitute material "provide a rooting depth that is superior to the existing topsoil and subsoil."

Further, Section 515(b)(5) of SMCRA provides, "if topsoil is of insufficient quantity or of poor quality for sustaining vegetation, or if other strata can be shown to be more suitable for vegetation requirements, then the operator shall remove, segregate, and preserve in a like manner such other strata..." OSM has misconstrued both provisions of this section. First, OSM ignores the term "more suitable" and proposes instead a requirement that the "best overburden materials available" be used. To enforce this "best available" standard, OSM's proposal requires an operator to do "A comparison and analysis of the thickness, total depth, texture, percent coarse fragments, pH, thermal toxicity, and areal extent of the different kinds of soil horizons and overburden materials available within the proposed permit area, based upon a statistically valid sampling procedure." Such an analysis of all possible substitute material is unwarranted and cost prohibitive: it could well include analysis of 10's or 100's of different strata at numerous locations over the aerial extent of the permit, rather than simply demonstrating that one of the more promising candidate substitute materials is "more suitable." While the cost of chemical and physical testing proposed to obtain permitting approval of the use of alternate material is substantial and unwarranted, OSM proposal doesn't stop there. For no justifiable or explained reasons, OSM is proposing that the substitute material be tested for a second time during the removal process, and a third time during the redistribution process, essentially tripling an already cost prohibitive testing protocol.

Second, in the case where an operator is proposing a substitute material because the existing topsoil is of insufficient quantity, OSM's proposal requires that in addition to the substitute material, "the [reclamation] plan must require that all available existing topsoil and favorable subsoil, regardless of the amount, be removed, stored, and redistributed as part of the final growing medium." Such requirement seems to demand that the topsoil, regardless of the quality in comparison to the substitute material, must still be used. The requirement to also use topsoil when a substitute material is approved is in direct conflict with Section 515 (b)(6), which requires an operator to "restore the topsoil or the best available subsoil which is best able to support vegetation." The SMCRA word "or" clearly means one or the other, but not both as OSM is proposing.

The required demonstrations by the operator and the findings by the regulatory authority required by part (ii) of this provision are also meaningless with respect to quality of soil or substitute material. All the verbiage about "best" material to support land use

capability and vegetation is not feasible in practical application. The qualitative characteristics of soil to support vegetation and land use are many. Soil structure, texture, scores of various nutrients, and many other characteristics are all important for vegetation, and various plant species each desire different environments to thrive, including the chemical and physical characteristics of soil. Any soil or substitute material may be excellent regarding one characteristic, but less so regarding another. A comparison soil may be better regarding some characteristics, but inferior regarding others. So, which one is best? Even if some matrix could be developed (which it cannot) to determine which is “best,” it still could only be used in the context of a particular plant species because different plants species have different needs. This reality also puts an additional spotlight on the fallacy in this proposed rule that land can be reclaimed to achieve optimal productivity of all land uses.

Not only does the proposed rule require the salvage and replacement of soil material not authorized by SMCRA, it requires the segregation of those materials at all times at all sites. As noted above, SMCRA expressly requires the segregation of the A and B soil horizons on prime farmland soils only. In addition to the substantial cost increase of removing, storing and replacing several feet of additional material, the requirement will lead to excessive compaction. While the compaction problem can be somewhat corrected by mechanical means, the excessive handling of material will also destroy the soil structure which only time can heal. From a practical standpoint, this proposed rule create a soil handling issue in parts of the country with multiple distinct soil horizons. It would also slow topsoil placement and complicate direct placement, since each horizon is to be handled separately. The proposed rule also incorrectly assumes that all soil horizons are conducive to plant growth: that is simply not always the case as evidenced at some western mines where the subsoil and C horizons are simply not very good.

#### **4. Revegetation Requirements**

The revegetation requirements in the proposed rule, almost in their entirety, are convoluted, inconsistent with SMCRA, internally inconsistent, and based on a flawed premise that all reclaimed land should be restored to some mystical natural state where Mother Nature can provide for natural succession of native species. While such a goal is admirable for naturalist, it is simply inconsistent with the SMCRA requirement to reclaim land to its historical use, or a higher or better use. For example, the reclamation plan requirement at (g)(xi)(2) provides ...”the species and planting rates and arrangements selected as part of the revegetation plan must be designed to create a diverse, effective, permanent vegetative cover that is consistent with the native vegetative communities described in your permit application...” This section ignores the vegetation requirements needed to achieve the post mining land use. The provision allows the regulatory authority to provide an exemption only for temporary cover and intensive agricultural use. In reality, the requirement is inconsistent with, or disadvantages to almost every possible post mining land use with the possible exception of undeveloped, unmanaged land. The requirement is inconsistent with (g)(v) which requires an applicant to describe “The species that you will plant and the seeding and stocking rates and planting arrangements that you will use to achieve or

complement the post mining land use...” Section (g)(v) properly focuses on achieving the approved post mining land use. Rarely can the most productive land use be accomplished by planting the native species that exist prior to mining and in the surrounding area. Nor are the best species used to achieve the approved post mining land use always self-regenerating. Alfalfa for example which is great for hay production must be periodically replanted as part of good husbandry practice. A land use of forestry for hardwood or pulp is likely inconsistent with pre-mining forest cover. Section (x)(i)(3)(v) requires that vegetation “Be capable of self-regeneration and natural succession.” It is unclear what it is meant by the requirement that a plant species be capable of natural succession. Plants either self-generate or they fade away, over time. As they fade away they are replaced by more complete species that is, natural succession takes place. Management of any land use includes measures to avoid natural succession. Once land is no longer managed, natural succession will occur. It seems, in the proposed rule, OSM is operating on the assumption that management of the approved land use will eventually cease, so OSM is attempting to “jump start” the natural succession by requiring the planting of native species capable of self-regeneration and natural succession, regardless of whether those species are consistent with achieving the most productive land use possible. As previously addressed, it appears the concerns with proposed re-vegetation requirements stem from confusion over the ill-defined requirement to restore land use capability rather than a focus on achieving the approved post mining land use with equal or higher productivity, and the ill-conceived notion that SMCRA mandates enhancement of fish, wildlife and related environmental values, even at the expense of achieving the approved post mining land use.

The proposed rule also improperly dictates, “A professional forester or ecologist must develop and certify all revegetation plans that include the establishment of trees and shrubs. These plans must include site-specific planting prescriptions for canopy trees, understory trees and shrubs, and herbaceous ground cover compatible with establishment of those trees and shrubs.” Congress clearly considered under what circumstances the certification of a qualified professional should be required, and when it is not necessary. For example, SMCRA requires that a registered engineer must design certain embankments. If Congress thought re-vegetation plans required such certification, it would have said so. Further, there is little meaning to the term “professional forester or ecologist.” Does that term mean someone with a college degree in forestry, whether they practice in that field or not. Does it mean someone who practices in forestry or ecology, regardless of his or her education? There is no certification program for foresters or ecologists. Such a requirement will necessitate the need for consulting foresters and ecologists to review plans, adding additional cost to industry and state regulators.

## **5. Baseline Information on Hydrology, Geology, and Aquatic Biology**

Section 780.19 proposes the collection of massive, detailed additional baseline information to be included in the permit application on the hydrology, geology, and aquatic biology of the proposed permit and adjacent areas. As previously discussed,

OSM has proposed a greatly expanded definition of adjacent area to include not only the area likely impacted by mining, but any area possibly impacted by mining, all areas with a possible hydrologic connection, and all nearby lands where the applicant holds coal reserves. Essentially, the baseline information requirements are a list of all conceivable information with little discussion about need or authority to require such information. As the Court of Appeals ruled in the “In re” litigation, OSM does not have unfettered authority to require baseline information on an expanded view of adjacent areas. Rather, SMCRA substantially limits the collection of baseline data to the proposed mining area.

The proposal also mandates that the RA corroborate the baseline data through an independent third party at the operator’s expense. Such a requirement is unwarranted and not authorized by SMCRA.

Significantly, the proposed rule at 780.19 (k) dictates that any permit with “substantially inaccurate” baseline information such as a missing chemical analysis, whether material or not, is void from the date of issuance. There is no basis whatsoever in SMCRA that gives OSM the authority to declare that a permit is “void” by operation of law, much less to do so without due process. The proposed rule calls for the collection and analysis of hundreds or thousands of bits of data and information. Much of the required data and information is vaguely defined. For example, paragraph (a) of 780.19 specifies, “Your permit application must include information on the hydrology, geology, and aquatic biology of the proposed permit and adjacent areas in sufficient detail to assist in...Determining the probable hydrologic consequences...Determining the nature and extent of both the hydrologic reclamation plan ... and the monitoring plans...Determining whether reclamation...can be accomplished...Preparing the cumulative hydrologic impact assessment...including an evaluation of whether the proposed operation has been designed to prevent material damage to the hydrologic balance...” And even though 780.19 prescribes various specific bits of data and information regarding the surface and ground water hydrology, geology, and aquatic biology, each of these sections is preceded with the phrase “at a minimum.”

In the preamble to 780.19, OSM defines “substantially inaccurate” as including something as simple as a missing chemical analysis. OSM applies this definition regardless of whether or not the “substantially inaccurate” data or information results in a problem or violation. In essence, if anything happens, or could possibly happen, at a mine site that is different than what was predicted based on the information provided, then the application information is “substantially inaccurate.” It is inevitable that circumstances will arise, and claims will be made that some piece of information or data was missing, even if it was inadvertent, and even if it is not material. This proposal would render the permit void, retroactively, by operation of law, if in the opinion of OSM or the regulatory authority, or some court, there is a piece of missing information or data, even if it resulted in no harm or violation. The retroactive nullification of a permit would subject the mining company, and its owners, officers and controllers to numerous criminal, civil, and regulatory penalties. It would force the closure of the mine and dictate that the permitting process start anew. More likely it would dictate the

permanent closure of the mine. The reality is that if there is a claim of deliberate withholding or falsification of some relevant data or information, those claims can be dealt with through legal remedies already in place. Likewise, if there is some inadvertent error or missing piece of data or information that leads to a problem or violation at the mine, there are ample regulatory remedies already available to correct the problem, ranging from ceasing operations to amending the permit, or otherwise abating the violation. So under the current program, remedies, commensurate with the problem can be initiated, all subject to due process. This proposed rule skips the due process and goes straight to the nuclear option with likely catastrophic consequences.

This proposed provision also “stands on its head” the concept of state primacy. OSM’s limited oversight in a primacy state includes the ability to take an enforcement action only after completing the ten-day notice process with the state, and then only if the state’s response is arbitrary. The sole exception is in the circumstance of imminent harm, which by regulatory definition includes mining without a valid permit. Anytime OSM believes there is a missing piece of data or information, or that data or information is otherwise substantially inaccurate, OSM is authorized, if not actually required, to cease mining operations without any involvement by the state. Certainly, this outcome is not the consequence OSM intends.

## **6. Probable Hydrologic Consequences**

PHC determinations in the proposed rule must be based on an analysis of expanded baseline hydrologic, geologic, biological, and other information. While SMCRA requires a permit application to contain “a determination of the probable hydrologic consequences, the proposed rule mysteriously requires the applicant to make numerous, specific “findings” regarding probable hydrologic consequences. It is the regulatory authority, not the applicant that SMCRA holds responsible to consider the information and analysis provided by the applicant, along with other information about other activities in the area, to make a finding on the cumulative impact. The provision impermissibly shifts the burden from RAs to operators in violation of SMCRA.

One of the required findings, and significant additions to the PHC process is the gathering and analysis of biological information. As discussed in more detail elsewhere, the requirement to gather and analyze biological information is not authorized under 507 (b) of SMCRA. The determination of the probable hydrologic consequences of the mining and reclamation operations must only be evaluated “with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems...” The plain meaning of “hydrologic regime” deals with the movement and distribution of water. 30 U.S.C. § 1257(b)(11). No definition includes an element of biology. Further, the biological condition of streams is addressed under the CWA. The CWA provides the mechanisms for the evaluation and protection of the biological condition of streams. OSM’s intent to reinvent CWA programs and criteria is in violation of Section 702 of SMCRA.

## **E. Additional SMCRA Implications of PHC and CHIA**

OSM's preamble and proposed rule regarding PHCs and CHIAs reveal additional findings that are obscure in 773.15 that must be made before a permit can be issued. Specifically, the proposal prohibits the conversion of any stream segment, no matter how small, and without regard to duration in time, from perennial or intermittent stream to intermittent or ephemeral stream, respectively. Such a restriction is inconsistent with clear provisions in SMCRA to the contrary. SMCRA 515 (b) (10) requires an operator to "minimize the disturbances to the prevailing hydrologic balance at the mine- site and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation..." In the case of alluvial valley floors, Congress expressly provided a greater level of protection by prohibiting material damage to the quantity or quality of water in surface or underground water systems that supply these valley floors. So, it is evident that Congress clearly recognized and allowed for some disturbance to the hydrologic balance. OSM cannot simply reduce the word "minimize" out of existence by applying it to ever smaller stream segments until it finds a small enough segment to claim the impact to that small segment is not minimal. SMCRA was clearly designed to protect the "prevailing" hydrologic balance.

Further, SMCRA 515 (b) 10 (D) expressly states one of the ways an operator can minimize the disturbance to the hydrologic balance is by "restoring recharge capacity of the mined area to approximate pre mining conditions." As OSM states, groundwater is a source of base flow in intermittent and perennial streams. Congress clearly recognized and accepted the impact mining could have on groundwater. So, OSM's position that even a temporary loss or reduction in flow is inconsistent with Congressional intent, and is simply wrong. The impact of OSM's position is significant: it would preclude all mining where the coal is below an aquifer that serves as a significant source of flow to a stream.

## **F. Post Mining Land Use**

The proposed revisions at 780.24 to the post mining land use regulations are troubling in a number of ways. The proposal draws a distinction between "alternative post mining land uses" and "higher or better land uses." The proposal imposes additional requirements for higher or better land uses, but the difference between alternative uses and higher or better uses is unclear in the proposal. OSM is not changing the definition of land uses in current 701.5, as discussed in the preamble to that rule. In relevant part, OSM states that the land use categories in the definition are not hierarchical. So, no one land use is "higher or better" than another. That preamble defines "higher or better uses" as meaning "post mining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the pre-mining land uses." The land use categories in 701.5 are all inclusive there are no other possible land use categories. Any one of those land uses may be considered a higher or better use if it has "a higher economic value or nonmonetary benefit to the landowner or the community than the pre mining land uses." Yet, OSM's proposal treats the two terms as applying to different land uses. The proposal states at 780.24 (a) (6) "If you propose to

restore the proposed permit area or a portion thereof to a condition capable of supporting a higher or better use or uses rather than to a condition capable of supporting the uses that the land could support before any mining...” [Emphasis added]. In reality there is no “rather than,” there is only a land use that may or may not be higher or better based wholly on a subjective determination that the use has a “higher economic value or nonmonetary benefit to the landowner or the community than the pre-mining land uses.” Who gets to decide? The landowner? The community? The RA? OSM? After all, any two of these entities can legitimately disagree about the nonmonetary benefit. As currently proposed, the regulation is unenforceable. It is also unnecessary to draw such a distinction. SMCRA requires land be restored to its pre-mining use, or an alternative use with consent of the landowner as long as that alternative use is consistent with local land use policies.

The requirement at 780.24 (b) (2) (i) requiring the regulatory authority to “[consult] with the landowner or the land management agency having jurisdiction over the lands to which the use would apply” is also vague and unnecessary. The proposal gives no inkling about what the RA is supposed to consult about. The only thing the RA needs to know from the landowner is that he has consented to the land use change, and current regulations already dictate that such consent be provided in writing.

Section 780.24 (a) (6) (ii) requires the applicant to “Disclose any monetary compensation, item of value, or other consideration that you or your agent provided or expect to provide to the landowner in exchange for the landowner’s agreement to a post mining land use that differs from the pre mining use.” Such a demand is unwarranted and improper: OSM has no authority or reason to interfere with or demand disclosure of private contractual matters. It is foolish for OSM to assume that it can interfere with or deny a change in land use solely on the basis of OSM’s opinion that the landowner’s consent was not “pure of heart.” Further, OSM’s rationale for this proposal to insure “operations are conducted as to protect the environment,” is nonsensical. Prying into the motives for a landowner’s consent does nothing to protect the environment: such protection comes from compliance with applicable reclamation requirements. One of the purposes of SMCRA is to assure the protection of the rights of surface landowners.<sup>134</sup> This revision proposes to persecute—not protect—they. One of the directives in Executive Order 13563 is to maintain flexibility and freedom of choice. OSM proposes to take away choices of landowners. SMCRA’s text and history repeatedly demonstrate statutory intent to not interfere with private property rights or transactions.<sup>135</sup> Now OSM invites itself into the middle of such transactions. The proposal lacks any legal basis and any sense or legitimate purpose. It must be deleted

Proposed 780.28 (b)(3) regarding “Postmining riparian corridor requirements for perennial, intermittent, and ephemeral streams” are also in direct conflict with the land use provisions SMCRA. Proposed 780.28 (b)(3)(i) states, “If you propose to conduct an activity identified in paragraph (b)(1) of this section, you must propose to establish a

<sup>134</sup> 30 U.S.C. 1202(a)(2).

<sup>135</sup> See, e.g., 30 U.S.C. 1260(b)(6).



riparian corridor at least 100 feet wide on each side of the stream as part of the reclamation process following the completion of mining activities within that corridor.” SMCRA is clear that surface mine lands must be reclaimed to the pre mine land use. SMCRA provides for an alternative post mining land use only with the consent of the landowner. The requirement to restore land to its pre mine land use applies to each segment of a permit: if half of the land is crop land and half of the land is pasture land before mining, then the post mining land use after reclamation must be half crop land and half pasture land. However, section (ii) requires all lands within the corridor to be planted with “species adapted to and suitable for planting in riparian zones.” Or, “For areas that are forested at the time of application or that would revert to forest under conditions of natural succession, you must use native trees and shrubs...” It is noteworthy that the vast majority of lands being mined will revert to forests under conditions of natural succession. While these “riparian zones” may be compatible with adjacent land uses, the footprint of the zone itself is a different land use. The proposed requirement dictates that some percentage of the land be converted to undeveloped or forestry land use, even though that land use is likely different from pre mining land uses. Further, the landowner approval requirement is violated. The amount of land this provision dictates be converted to an alternative land use should not be underestimated. The riparian corridor requirements apply to perennial intermittent, and ephemeral streams, so the 200-foot wide corridor could cover a substantial portion of the reclaimed area.

### **G. Requirements for Permits and Permit Processing: Part 773**

§ 773.5(a) “To avoid duplication, each regulatory program must provide for the coordination of review of permit applications and issuance of permits for surface coal mining operations with the federal and state agencies responsible for permitting and related actions under the following laws and their implementing regulations: (1) The Clean Water Act, (33 U.S.C. 1251 *et seq.*)” According to OSM, they are adding the CWA to the list of laws for which coordination is required under both state and federal regulatory programs because “almost all surface coal mining operations require CWA permits.” OSM also correctly points out that Section 702 (a) of SMCRA provides, “nothing in this Act shall be construed as superseding, amending, modifying, or repealing” the CWA, any rule or regulation adopted under the CWA, or any state laws enacted pursuant to the CWA. NMA notes the conflict between OSM’s acknowledgement here regarding duplication with and supersession of the CWA and its proposals elsewhere in the rule.

773.15 (e)(1) “Assessment of probable cumulative impacts of all anticipated coal mining on the hydrologic balance in the cumulative impact area.” This section, which proposes the use of a HUC 12 watershed, will require an analysis of all anticipated coal mining (for life of mine through post bond release) for any adverse impacts on quality or quantity of surface or groundwater, or on the biological condition of a perennial or intermittent stream that would preclude any existing designated use or any reasonably foreseeable use of surface water or groundwater outside the permit area and on ESA species and habitat. As previously stated in these comments, this section as it pertains

to point-source impacts to surface water violates Section 702 of SMCRA by superseding the CWA, which not only addresses adverse impacts to surface water, designated uses, and the biological condition of streams, but also takes endangered species into consideration.

773.15(e)(2) “Determine the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area.” See definitions section for CWA issues concerning definition of “material damage to the hydrologic balance outside the permit area.” This definition unequivocally violates SMCRA Sec. 702. Additionally, this section implicates the concerns addressed in the CWA context by the NPDES permitting program by directly tying “material damage” to the preclusion of a designated use without a defined interim process for establishing criteria and individual permit limits based on those criteria.

773.15(e)(3) Incorporate numeric criteria for defining material damage on a site-specific basis for each parameter of concern into the CHIA. This requirement directly conflicts with the CWA in violation of SMCRA Sec. 702. Additionally, OSM does not have a process for establishing numeric criteria on a site-specific basis (or to establish “parameters of concern”), as such activity is not covered under SMCRA but is rather within the purview of the CWA water quality standards program.

773.15(n)(1) “Demonstrate that the operation has been designed to prevent the formation of discharges with levels of parameters of concern that would require long-term treatment after mining has been completed.” SMCRA does not regulate the discharge of pollutants into surface waters. As such, SMCRA does not contemplate permit denial simply because a mining operation will require a long-term CWA discharge permit. Additionally, as explained above, SMCRA does not provide a mechanism for establishing “parameters of concern,” and such action by OSM would directly conflict with the CWA water quality standards program. This regulatory section is therefore both duplicative and in violation of SMCRA Sec. 702.

773.15(n)(2) “Demonstrate that there is no credible evidence that the design of the proposed operation will not work as intended to prevent the formation of discharges with levels of parameters of concern that would require long-term treatment after mining has been completed.” In addition to the CWA overlap concerns related above, NMA is also concerned with the “no credible evidence” standard articulated in this provision. In addition to inviting arbitrary application, this provision also creates a standard that is close to if not impossible to meet. Even if there is overwhelming evidence developed over years of study that an operation will not require long-term treatment, under the proposed standard if so much as one NGO study exists that might refute that overwhelming evidence, the SMCRA authority cannot permit the operation. This is not an appropriate or permissible legal standard.

OSM is improperly attempting to adopt and incorporate by reference a flawed policy document<sup>136</sup> that is at odds with the statutory provisions. That document improperly construes SMCRA as requiring the prevention of acid mine drainage (AMD) formation. The legislative history and text of SMCRA clearly show that Congress knew AMD formation was inevitable, but put in place reasonable standards so operators would strive to minimize its formation as well as its long term impact. Treatment as a mitigation measure is expressly mentioned in the statute several times and OSM cannot by regulation bar those measures as acceptable for satisfying the permit application requirements as well as the applicable performance standards.

773.17(e): There is no provision of SMCRA that authorizes the proposed requirement that a permittee notify the regulatory authority or other state or federal agency of “any adverse impact” as a result of noncompliance with any term or condition of a permit. Moreover, this provision is so vague it defies any guiding or limiting principle for its application and providing adequate notice on what it means and what triggers the obligation. Moreover, the reasoning offered to support this provision is not compelling or logical. OSM explains that it would allow the regulatory authority to take any necessary step to “minimize the impacts of noncompliance.” Permittees are responsible for taking steps to minimize impacts of their operations—not the agencies—unless of course OSM intends for them to assume responsibility for any purported noncompliance. Many terms and conditions have no connection to any possible environmental harm or public safety risk. Are these included in the scope of this new obligation? OSM cites Section 102(a) of SMCRA as support for this provision. If a general purpose of a statute could supply authority then there would be little reason or purpose for Congress to flesh out specific requirements in the balance of the statute. OSM’s citation to Section 102(a) is a frank admission that if the statute operated that way it would amount to an unconstitutional delegation of legislative authority to an agency given the lack of any intelligible principle to guide its implementation. Congress knows how to impose such an obligation on the regulated parties. Indeed it did so explicitly in another law passed the same year applicable to coal mines. Section 103(j) of the Federal Mine Safety and Health Act of 1977 expressly requires operators to contact the Secretary of Labor when an accident occurs. Congressional silence in SMCRA—enacted the same year—is audible in informing that no self-reporting requirement is authorized here. Perhaps this type of provision would have some merit if the statute did not already provide for minimum amount of regular inspections annually by the regulatory authority. Presumably if this provision is adopted, it would provide ample reason to legislatively adjust SMCRA to lower or eliminate the minimum number of inspections since the regulatory program turned the law into a self-reporting framework.

773.17(h): “You must obtain all necessary authorizations, certifications, and permits in accordance with requirements under the CWA before conducting any activities that require authorization or certification under those provisions of the CWA.” This

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<sup>136</sup> Hydrologic Balance Protection: Policy Goals and Objectives on Correcting, Preventing, and Controlling Acid/Toxic Mine Drainage (March 31, 1997).

requirement is clearly unnecessary if you need a permit to perform an activity under the CWA, the CWA outlines that requirement. There is no need for OSM to point that out in the SMCRA context, and NMA reiterates that SMCRA regulatory authorities are not responsible for CWA enforcement. All operators have an independent obligation to comply with the CWA any failure to do so is handled by the provisions of the CWA.

Additionally, if disputes arise regarding whether a CWA permit is necessary, or whether a permit has been issued appropriately or is in place and effective, the CWA regulatory authority, and possibly a court of law, make the determination as to whether the applicant has obtained the requisite “authorizations, certifications, and permits...” This is not OSM’s role. Yet the proposed rule will wrongly put OSM and state mining regulatory authorities in a position of determining whether the mining permit applicant has met the requirements of these other agencies. This provision is therefore yet another of many examples in this proposal that improperly attempt to assume the duties of other state or federal agencies under other laws. This is not minimizing duplication or encouraging coordination—it is plain and simple duplication that conflicts with Section 702 and the Executive Order 13563 on Improving Regulation.

#### **H. Revision, Renewal, Transfer, Assignment, or Sale: Part 774**

Part 774 adds new requirements that diminish the statutory right to permit renewal. State SMCRA authorities must independently decide whether such information is needed on a case-by-case basis. The additional burden of requiring the updates is unnecessary and should be deleted. Additionally, to the extent that these requirements address pollutants in surface waters, they are duplicative of CWA requirements, including those pertaining to Reasonable Potential Analyses (RPAs), and therefore violate Sec. 702 of SMCRA. This is just adding more paperwork burdens and expense without explaining how it will improve outcomes. OSM does not explain why an inflexible federal mandate is necessary or better than the current rules that would allow a state to request such an update on a case by case basis. For example, if a company started mining a year before its permit expired, why is an update necessary?

#### **I. Sampling and Groundwater Data**

777.13 All sampling and analyses of groundwater and surface water performed to meet the requirements of this subchapter must be conducted according to the methodology in [the CWA].” This revision begs the question about why OSM is duplicating what is already required in terms of sampling and monitoring. Section 702 bars that and section 201(12) directs OSM to avoid such duplication. Moreover, to the extent that OSM is requiring SMCRA regulatory authorities to separately determine if sampling required under both the CWA and SMCRA is done in accordance with the requirements of the CWA, this is impermissible under Section 702 of SMCRA.

#### **J. Fish and Wildlife**

779.20- Requiring the Fish and Wildlife Service to provide written approval before state issues a permit violates the exclusive authority of primacy states under SMCRA. OSM is authorizing FWS to exercise a de facto veto over state permit applications. Nothing in SMCRA, or any other federal law for that matter, supports this provision. FWS, like other agencies who are given the opportunity to comment on applications, slow walk or miss the deadlines. The proper provision that OSM should insert is that the FWS waives its opportunity to comment or consult if it misses applicable deadlines under the state program. It should also be made clear that under no circumstances may FWS require a standard which exceeds that which is established by the ESA.

### **K. Restoration of Ecological Function**

780.12(b)(7) Requires that a reclamation plan include a timetable for “restoration of the ecological function of all reconstructed perennial and intermittent stream segments, either in their original location or as permanent stream-channel diversions.” As previously explained, CWA Section 404 permits, which include mitigation requirements that address restoration of ecological function, are required for any filling of streams at a mine site. Because these activities are already covered pursuant to the CWA Sec. 404 permitting program, OSM cannot require separate, potentially conflicting timetables for such work under the SPR.

Likewise, 780.12(h) states that “if you propose to mine through a perennial or intermittent stream, the reclamation plan must explain in detail how and when you will restore both the form and the ecological function of the stream segment, either in its original location or as a permanent stream-channel diversion.” Again, the U.S. Army Corps of Engineers addresses these requirements when an operator applies for the needed CWA Sec. 404 permit to mine through a stream. SMCRA Sec. 702 precludes OSM from superseding that program.

780.12(g)(3)-(6)—This provision presumes native species are always the best option when in fact they are not for a variety of reasons. In many states, non-native species will be deployed but they are suitable or better for the post mining land use, for example wildlife.

### **L. Mining Through Stream Segments**

780.16(c)(7)(ii) “Minimize the length of the stream segments mined through.” Again, this requirement is duplicative of the Section 404 permitting program and is impermissible under SMCRA Sec. 702.

780.16(d) — SMCRA does not authorize the regulatory authority to take or interfere with landowners’ property rights. The proposed requirement for permanent easements does exactly that by preventing them from utilizing their property in a specific manner after bond release. Moreover, there is nothing in SMCRA that expressly or impliedly authorize regulatory authorities from requiring easements in exchange for a permit.

SMCRA was intended to protect the rights of surface owners—not interfere with how they exercise those rights and use their property.

780.16(e)—SMCRA does not authorize the proposed requirement that a Protection Enhancement Plan for fish and wildlife that are not listed as threatened and endangered, or proposed for listing under the Endangered Species Act. This is outside the scope of the ESA. Also there are no FWS guidelines for PEPs for species that are not proposed for listing or listed. States have their own fish and wildlife agencies that work with the state regulatory authorities to reduce mining impacts on fish and wildlife.

### **M. Baseline Information**

780.19(b)(6) Sampling requirements for a minimum of 12 consecutive months struck down need only analysis from data collected over a shorter period or extrapolated from existing data. See *In re Surface Mining*.

780.19(2)(iii) OSM did not provide a rational basis for expanding the list of parameters for which monitoring is needed.

780.19(4)(B)(ii)-(iv) same limit on 12-month sampling for seasonal variation applies

780.19(6) Mapping and assessment of all streams, including ephemeral streams, within and outside the permit area will be onerous. Where discharges from mining or mining through streams will occur, CWA permits will be required, including jurisdictional determinations, making this requirement duplicative.

780.19(6)(d) Additional information- requirement that applicants must sample discharges from previous coal mining operations lacks a rational basis and is beyond SMCRA.

780.19(e)(1) Biological condition information As it pertains to surface water, this section clearly violates Sec. 702 of SMCRA. Specifically, it requires the following things in conflict with the CWA: (1) biological information for all perennial and intermittent streams that would receive discharges from the proposed operation (if they are going to receive a discharge, such discharges and the biological health of the receiving streams are already covered under the NPDES or 404 program), (2) a representative sample of ephemeral streams within both the proposed permit area and adjacent area that would receive discharges (see above), (3) use of a multimetric bioassessment protocol modified as necessary to meet specific requirements, including being based on an appropriate array of aquatic organisms and a correlation of index values to the capability of the stream to support designated or reasonably foreseeable uses (see above). The CWA provides the regulatory authority for these requirements, not SMCRA, and as such they should not be required by the SPR.

780.19(j) Corroboration of baseline data- Applications must be verified under oath pursuant to 777.11(c). OSM has not articulated a rational basis for this additional requirement.

780.19(k): OSM's "Permit Nullification" proposal is an unauthorized punitive provision that lacks any statutory support. Moreover the agency fails to provide even a suggestion—let alone a reasoned explanation—of the problem it is attempting to address. SMCRA expressly addresses the sole circumstances for permit revocation. Section 521(a)(4) provides for the suspension or revocation of a permit for a pattern of violations. Even that provision includes constitutionally minimum protections of: (1) advance notice through a show cause order; (2) an opportunity to respond; and (3) clear criteria setting forth the offending behavior (unwarranted or willful conduct) that may lead to this extreme sanction. Nothing in the Act remotely suggests that the power to revoke a permit extends to the circumstances set forth in the proposal. Moreover, the circumstances are poorly defined and unlimited. Merely suggesting in the preamble that there is no intent to apply this provision to minor omissions" does not adequately close the inherent vagueness gap with the proposed language. OSM opines that the sanction is necessary to avoid or minimize the environmental harm that could result from initiation or continuation of an operation under such circumstances.

The problem with this reasoning is that the provision does not even require any connection between the inaccurate baseline information and harm—it merely presumes harm without a sufficient foundation. Much lower sanctions and penalties are authorized under section 521 of SMCRA for actual violations on the ground that are causing harm. And at least those provisions offer due process in the form of notice a hearing and a decision with reasons. None of that exists in this proposal. It is simple a summary action premised on an *ipse dixit* reasoning that some level of inaccurate information was relied upon for the permit issuance *and* its inaccuracy will cause environmental harm--two unsubstantiated presumptions. Nor is there any indication that OSM considered alternative means for addressing the "unexplained" problem. Section 511 authorizes the regulatory authority to request a permit revision from a permittee. To the extent there is any real "problem" that needs to be addressed, that process is more suitable and provides the permittee with some form of due process. No changes are needed to the regulations to use it now—this is the process state regulatory authorities have deployed to address legitimate concerns with permits that have been issued. There is simply no compelling basis for OSM's to establish a flawed and serious sanction that lacks even the basic elements of due process. This provision will create and increase regulatory risk for companies making substantial capital investments.

## **N. PHC Determinations**

780.20 OSM's requirements concerning the determination of the probable hydrologic consequences of a proposed operation (PHC determination), as they apply to surface water quality impacts from point source discharges, effectively replace the RPA of the CWA and as such violate Section 702 of SMCRA. Furthermore, the documentation of water quantity is problematic due to issues with stream flow modeling.

## O. CHIA Requirements

780.21(a)(6) Requires criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis to be expressed in numeric terms for each parameter of concern and incorporated into the SMCRA permit, taking into consideration the biological requirements of any ESA species present in the area and identifying specific monitoring points. The proposed rule further states that the SMCRA regulatory authority may establish different criteria for subareas within the cumulative impact area when appropriate.

As previously stated in detail, to the extent that these requirements deal with surface water quality impacts, they violate Sec. 702 of SMCRA. Furthermore, from a practical standpoint, it is important to note that neither SMCRA nor the proposed SPR provide any information with respect to how numeric criteria would be developed or how parameters of concern would be determined, except to imply that both would be unilaterally performed by the SMCRA regulatory authority in violation of SMCRA Sec. 702.

780.21(a)(8)(i) Requires that the CHIA include a finding that during all phases of mining and reclamation, at all times of year, variations in streamflow and groundwater availability, as well as variations in parameters of concern in discharges to surface and groundwater, will not: (1) convert any perennial or intermittent stream to an ephemeral stream or convert a perennial stream to an intermittent stream; (2) exceed applicable water quality standards in any stream located outside the permit area; (3) disrupt or preclude any existing or reasonably foreseeable use of surface water outside the permit area or any CWA designated use; and (4) disrupt or preclude any existing or reasonably foreseeable use of groundwater outside the permit area. Again, to the extent that creates requirements with respect to issues already addressed in the CWA water quality standards, 402 or 404 programs, or the 401 state water quality certification process, it violates Section 702 of SMCRA.

780.21(a)(8)(ii) Requires that operations be designed to ensure that neither the mining operation nor the final configuration of the reclaimed area will result in changes in the size or frequency of peak flows from precipitation events or thaws that would cause an increase in damage from flooding, when compared with premining conditions.

(c) 780.21(c)(2)(i) CHIA reevaluation must include review of all water monitoring data from the existing operation and all other coal mining operations within the cumulative impact area. Any significant permit revision will trigger a review of monitoring data for all mines in the cumulative impact area which could be defined to include the entire watershed. This substantially changes the SMCRA right of renewal.



## **P. 780.22 Information in the hydrologic reclamation plan and alternative water sources**

This section requires hydrologic reclamation plans to, among other things, include preventative or remedial measures for any potential adverse hydrologic consequences identified in the PHC, minimize disturbances to the hydrologic balance within the proposed permit and adjacent areas, prevent material damage to the hydrologic balance outside the proposed permit area, meet applicable water quality laws and regulations, and provide water-treatment facilities when needed. As outlined in the CWA Overview section of these comments, the CWA Sec. 402 and 404 permitting programs already address all of these issues with respect to any surface water discharges to WOTUS. Additionally, as explained above, OSM's definition of "material damage to the hydrologic balance" infringes upon nearly all aspects of the CWA water quality standards program. As such, this section violates Section 702 of SMCRA, as its requirements supersede the CWA.

## **Q. 780.23 Groundwater monitoring and biological condition of streams**

780.23(a)(iv)(B) requires determination of impacts of the operation on biological condition of streams. See above re: how this violates SMCRA Sec. 702.

780.23(a)(2)(i) requires that plans provide for monitoring of parameters that could be affected by the operation, including any parameters of local significance as determined by the SMCRA regulatory authority. See above re: how this violates SMCRA Sec. 702.

780.23(b) This section clearly violates SMCRA Sec. 702 by superseding the CWA by: (1) requiring a determination of impacts to the hydrologic balance as defined by OSM; (2) determining the impacts of the operation to the biological condition of streams as defined by OSM; (3) including the problematic definition of material damage to the hydrologic balance outside the permit area; (4) requiring application of CWA effluent limitation guidelines; (5) including the requirements of the NPDES and 404 permitting programs; and (6) allowing the SMCRA authority to require additional monitoring for CWA-related discharges.

780.23(c) This section again requires the use of a multimetric bioassessment protocol in violation of SMCRA Sec. 702.

## **R. Additional Requirements for Mining through or Adjacent to Streams**

780.28 is an unlawful backdoor extension of the stream buffer zone performance standard in 816.57 to perennial streams.<sup>137</sup> OSM has essentially taken a best management practice for operating near streams and converted it into a rigorous

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<sup>137</sup> Our comments here apply with equal force to the counterpart standards for underground coal mines but with even greater force since the proposed revisions for 784.28 make no attempt to accommodate the distinct differences between surface and underground mines as required in SMCRA Section 516(a) & (d).

permitting and design standard that also dictates long term land uses. As we mentioned earlier in these comments, SMCRA does not even contain a buffer zone requirement. The regulatory history reflects that it was simply intended as a temporary best management practice when disturbing areas nearby perennial and intermittent streams to minimize erosion and sediment loading. In fact the history shows that the width of the buffer zone would be adjusted lower or higher depending upon the slope of topography that could affect sediment run off from land disturbance.

OSM now proposes to convert all of this into permanent one-size-fits all restoration requirements even when a riparian zones of the size mandated (100 feet) do not exist to before mining. These revisions are unnatural, unachievable and unlawful. OSM does not bother to explain why given the vast diversity in physical conditions and mining techniques across the nation how a basic best management practice admits to a nationwide design standard that goes beyond the original reach of the former rule and prescribes detailed designs and outcomes that do not afford any flexibility given varying physical conditions, terrain and other valid considerations.<sup>138</sup> There is simply nothing offered to inform of the reasons for the agency making such a drastic change.

780.28(b)(2)(ii) prohibits mining in or through perennial, intermittent, or ephemeral stream if it would result in conversion of the stream segment from intermittent to ephemeral, from perennial to intermittent, or from perennial to ephemeral. SMCRA contemplates, and its legislative history supports, mining in and through streams. As a consequence, certain stream segments will change in terms of being perennial, intermittent or perennial when the area is reclaimed. SMCRA expressly contemplates this result and it cannot be prohibited by regulation. Additionally, for all WOTUS - including ephemeral streams these requirements appear to ignore the fact that mining operators would need a 404 permit.

780.28(b)(3) Requires 100 ft buffer on each side of any stream, perennial, intermittent, and ephemeral, that you propose to mine in or through or within 100 ft of a perennial, intermittent, or ephemeral stream.

780.28 (C)(c) additional requirements for mining through streams and stream diversions: (1) requires post-mining drainage pattern be restored to pre-mining condition, including ephemeral streams this is likely impossible, and with respect to ephemeral streams which will likely have re-established already naturally; (2)(iii) demonstration that no reasonable alternative exists is contrary to the Act - this requirement is also duplicative of and in conflict with the CWA Section 404 program, which requires avoidance, minimization, and mitigation of impacts, as well as a 404(b)(1) alternatives analysis.

780.28(C)(c)(2)(iv)(B) requires a separate bond for cost of restoring ecological function of the stream—again, this is duplicative with the mitigation and potential bond required by CWA Section 404.

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<sup>138</sup> *National Wildlife Federation v. Hodel*, 839 F. 2d 694 (D.C. Cir. 1988).

780.28(C)(c)(2)(v)(B) hydraulic capacity of temporary and permanent diversions must be at least equal to the unmodified stream channel immediately upstream but no greater than the downstream capacity.

780.28(C)(c)(2)(iv) fish and wildlife enhancement plan must include measures that would fully and permanently offset any long-term adverse impacts that the fill, refuse pile, or coal mine waste impoundment would have on fish, wildlife, and related environmental values within the footprint of the structure. Undefined “related environmental values” creates a duplicative mitigation requirement if these structures are to be built in waters, CWA Section 404 permits will address the alternatives analysis and mitigation OSM proposes to also require under SMCRA again, no rational basis has been provided for why such duplication is needed.

780.28(e) standards for meeting ecological function criteria. Again, this is part of the CWA Section 404 program and such success criteria may be incorporated into the 404 permit as enforceable conditions and dealt with re: downstream water quality standards 401 certification.

780.29(b) requires monitoring and inspection of stormwater discharge data to evaluate the effectiveness of the surface-water runoff control practices. However, pursuant to the CWA stormwater program, stormwater at mine sites is already carefully controlled via multiple best management practices, technology requirements, erosion and sediment control practices, buffer zones etc. This requirement therefore potentially conflicts with and is duplicative of CWA requirements.

## **R. Part 816 Performance Standards**

Many of these requirements violate SMCRA Sec. 702 by superseding and conflicting with CWA requirements. Specifically:

816.34 Requirements regarding material damage to the hydrologic balance, installation of water-treatment facilities etc. are, as explained in detail above, in violation of SMCRA Sec. 702

816.36 OSM should remove the reference to NPDES permitting contained in this section nothing in the SPR alters what is required for compliance under the CWA, and that provision is therefore unnecessary

816.38 The requirement that a permittee “treat or otherwise neutralize acid-forming and toxic-forming materials” could potentially conflict with CWA wastewater treatment requirements. Additionally, OSM’s requirements concerning water pollution, adverse impacts to the biological condition of streams, or other environmental damage, to the extent that they apply to surface water quality impacts, also potentially conflict with CWA requirements.

816.42 This entire section discusses CWA requirements. It is unnecessary and should be removed.

816.57 Again, CWA requirements should be removed from this section, and all requirements regarding the regulation of point source discharges to surface waters are in violation of SMCRA Sec. 702.

## **IX. Technical, Feasibility, and Other Issues with Specific Provisions**

The following section of comments highlights issues with the practical application of specific provisions of the proposed SPR at mine sites with respect to operational impacts. The focus of this section is to explain how certain provisions of the proposed rule would add costs, delay, and unreachable standards on the ground. The legal deficiencies with these provisions have been covered in greater detail in previous sections. OSM's proposed rule contains same or similar requirements that appear in multiple sections of the proposed regulation, including the permitting requirements and performance standards sections for surface mining, deep mining and other mining activities. While NMA's comments may reference only a specific regulation, they are intended to apply to any same or similar provisions that appear elsewhere in the proposed rule.

### **701.5 Definitions – Material Damage to the Hydrologic Balance:**

As previously mentioned, the proposed definition of material damage to the hydrologic balance outside the permit area is tied to adverse impacts on the quantity and quality of surface water and groundwater or the biological condition of a perennial or intermittent stream that either, 1) precludes a CWA designated use or an existing or "reasonably foreseeable" use of surface water or groundwater or, 2) impacts threatened or endangered species or has an adverse effect on designated critical habitat.

This is problematic because in many cases, the designated uses for streams are not being met and are not achievable for a variety of reasons. Complete information is often not available at the time of designation. As a result, it would be impractical to hold operators to a standard which is not currently being met and may be impossible to meet.

OSM's reliance on designated uses also ties the material damage determination to water quality standards, which are periodically updated in triennial reviews. An operator may meet standards when the mine application is approved, but the standards may change while the mine is active or after it is closed. As water quality standards become more stringent, it remains unclear how this will impact sites that have achieved bond release (See section 700.11(d)(3)).

Furthermore, Use Attainability Analysis procedures will become more important to the mining industry. In many cases UAAs will need to be conducted to accurately identify the designated uses of a stream (e.g. primary vs. secondary contact, chronic aquatic life

vs. limited (acute) aquatic life). There will also be instances where site-specific standards may need to be developed in addition to the UAAs.

The costs of developing these UAAs and site-specific standards are high. The state will sometimes undertake UAAs on a broad scale but more often individual companies will have to take on the financial burden. Costs often range in the hundreds of thousands of dollars for a single UAA.

**773.15: (e)(3): the Proposed rule adds requirement to include “permit criteria defining material damage to the hydrologic balance outside the permit area on a site-specific basis, expressed in numerical terms for each parameter.”**

Off-site parameters of concern may be out of the permittee’s control but the permittee would still be accountable for meeting the limits. Straight pipes, farming, livestock, municipal sources, prelaw mines, ambient conditions, etc. will all influence water quality downstream from a mine. Separating effects on water quality and biology will not always be clear or possible. Requiring coal companies to research or be responsible for issues caused by others is an unfair and unreasonable burden.

**773.7(b)(2): The revised rule provides terms in subsections (i) through (v) which give the regulatory authority potentially unlimited flexibility or justification to delay a permit decision.**

OSM proposes to significantly revise this regulation. Although OSM states in the preamble<sup>139</sup> that the rule is being restructured to "improve clarity", the actual effect is quite the opposite. By 1) rewriting and expanding the rule, 2) taking statutory language, modifying it ever so slightly, and inserting it into the rule, and 3) adding a new factor the regulatory authority must consider, actually makes the rule less clear. OSM states that the rule is also being rewritten to "eliminate a grammatical error in the existing language", but does not describe the error being corrected, nor is any error apparent in the existing rule.

Although OSM states that "there are no substantive revisions to this paragraph", they are talking only about paragraph (a), but fail to address the substantive changes in their newly added paragraph (b). The seemingly minor changes add language that provides an excuse for the regulatory agency to delay permit approvals - although the first four criteria to be considered in the timing for permit approval (at §773.7(2)(i)-(iv)) are basically a reiteration of factors listed in SMCRA § 514(b), there are a few very subtle changes that are significant. These include considering the time needed for proper investigation of the site as written in SMCRA vs the proposed regulation which requires consideration of the time needed for proper investigationss (plural) of the site. This implies an expanded amount or number of investigations may be needed, not just one. Also, SMCRA says to consider "whether or not written objection to the application has been filed", whereas the rule requires consideration of "whether there are any written

<sup>139</sup> 80 FR 44478

objections on file", but these may or may not be related "to the application" to be a consideration for timeliness of approval.

Finally, OSM is adding a consideration not found in SMCRA in determining the amount of time allowed to review a permit, regulatory authorities may consider the amount of "time required for coordination" with other agencies. This is especially important, because in other sections of the revised rules OSM is broadly expanding these interagency coordination requirements from the existing rule, to the point of requiring concurrence with other agencies before permit issuance (e.g., see new requirements at § 780.16(e)). This expanded coordination requirement will delay permit approvals, and the proposed new language at § 773.7 (b) allows regulatory authorities to take advantage of the new permit approval delays created by OSM's proposed rules.

In sum, the proposed changes provide OSM and regulatory authorities additional excuses, not provided for in SMCRA, for delaying permit approvals.

We recommend that the existing rule not be changed.

### **777.11(a)(3): E-Filing**

The proposed rule at 777.11(a)(3) would require applications to be filed in an electronic format prescribed by regulatory authority. "E-Permitting" to be mandated will require major changes in State programs with great expense in time and money for both the RA and permittee. When finally implemented it may facilitate ease of transfer of application documents avoiding extensive copying and mailing costs. However, more likely the RA will require hard copies and copies for public record in addition to the e-filing. The reality will be a system requiring both hard copies and E-Copies. The current strains on both the industry and state regulators make compliance and timing with this requirement problematic. Among potential practical problems are; how to handle large map files, PE and LPG certifications, verification of submittals, and how to handle changes to the document. SMCRA confers exclusive jurisdiction to primacy states to implement approved regulatory programs. As the courts have explained, OSM has no role in permitting. Certainly, OSM has no role in prescribing the format of permit applications: that should be left to the discretion of the states.

### **777.13(a)(1): Data Collection**

Section 777.13(a)(1) of the SPR imposes a requirement for the submission of "metadata" and expands requirements on technical data to include quality assurance and quality control procedures, results of those procedures, and field sampling sheets for water samples collected from wells. Proposed Sections 777.13(b)(c) and (d) add further requirements and stipulation on collection of data, methodology and use of models. These proposed provisions would require further complicated analysis, would result in increased cost and time expenditure, additional training, and risk of non-compliance and subjective approval by the RA or OSM.

## **Part 777.13: Field Data Requirements**

The submission of field sampling sheets for groundwater wells which identify the presence of any well screens as well as the depth at which the sample was taken, does not enhance the review process. Applicants already provide boring logs and well construction diagrams which include information concerning the depth of the well screens for all monitoring wells included as a part of the permit application. Descriptions of the sampling methodology for all groundwater samples are included in detail within the hydrogeology sections of the SMCRA permit application. Recording the depth at which the sample is collected is not applicable to all accepted groundwater sampling methods and does not need to be reported for the reviewer to better interpret the results. The static water level collected prior to any purging should be considered sufficient for understanding whether the well screen was fully saturated or not on the sample date.

### **777.13(a): Laboratory Requirements**

The request at proposed Section 777.13(a) for the results of the QA/QC procedures that the laboratory utilizes is vague and does not include the relevant information necessary to determine the level of QA/QC that will be required. Most certified laboratories are already providing information on the QA/QC procedures being utilized, which typically include a case narrative (which includes parameters analyzed, methods used, holding times met, etc.), chain of custody documentation, summary of results and the most basic level of QA/QC information, such as if dilutions were necessary or there were issues with the matrix spike. However, if this rule is implying that level IV data package with method blank summary, matrix spike/matrix spike duplicate recovery analysis, lab standard summary, interference check, ICP/MS tuning, calibration, internal standards summary information, and the instruments raw data printouts for all samples, standards, and QC samples are necessary, there will be significant cost added to the permittee. For example, assuming a site with 10 monitoring wells and 10 surface water points, it would cost approximately \$200 dollars per suite of samples to have a level IV QA/QC data package generated. Considering the practicality of visiting all locations in a single day and holding times it is unlikely that less than two suites of samples be submitted per month during the baseline sample period. Assuming you could meet the new drought criteria then you could expect an additional \$400 per event resulting in a minimum of increase of \$4800. Further assuming this is required for the life of the mine, quarterly monitoring, and that the mine is active for 10 years and meets bond release in approximately 7 years, the total cost from the level IV package alone is \$54,400 (Active Mining: \$32,000; Reclamation: \$22,400)

In addition the request for electronic submitted data to include the identification of any data transformations would require significant effort due to the limited number of labs that perform this work throughout the country. These transfers are typically identified by the laboratory through the use of flags within the final lab report. Since these flags are generated by the labs themselves it is unlikely that any of the labs will use exactly the same flag code. Assuming OSM will want these to be standardized for their review it will

likely result in operators requesting that labs start using the operator's code and then go through independent testing with the labs to ensure the new codes are being incorporated into the operator's database correctly. Operators would also have to update their database formats to only allow certain values to be uploaded and then test that this is working accurately. Finally, operators may also have to update output file reports to make sure that they are all reporting correctly which would require another significant round of testing and verification. The time, cost, and effort required for this is beyond what is reasonable for the information gained.

Finally, we find it ironic and disturbing that the information OSM is requiring here for water sampling and analysis far exceeds that required by agencies empowered to be responsible for water regulation under the Clean Water Act, namely EPA and state water regulatory agencies. Why does OSM feel compelled to have all this additional information when they are not even the agency authorized to oversee water quality regulation?

### **777.13(a): Use of Models**

While the use of site-specific data is encouraged for the data inputs of the models it is important to note that detailed characterization of all necessary input parameters may not be feasible. It is often very costly to conduct all of the necessary characterization tests for every input value and in many instances site conditions can make it unsafe to attempt to collect the data and or may be too difficult to ensure the accuracy of the measured values. Models are often utilized to help resolve these uncertainties by conducting multiple simulations, utilizing best scientific and professional judgment, and providing a detailed sensitivity analysis. Requiring that every parameter is represented by a detailed site specific measurement would essentially eliminate the use of a powerful tool that can help to further understand potential environmental impacts from mining.

Furthermore, the onus of helping resolve limited data sets to help improve the accuracy of models should be placed not only on the permittee but also on the State and Federal Agencies. There are significant data gaps that need to be addressed for these types of models for all regions of the US and the agencies should be evaluating these and making the results publicly available not only to help the regulatory branch of the agencies validate the accuracy of site specific data collected but to further refine ranges of values that may be difficult or extremely costly for applicants to obtain. Many of the SMCRA authority offices do not currently have the expertise to evaluate models. The extensive use of models will be a very large cost to regulators and operators.

It is interesting to note that OSM has an aversion to the use of models to characterize baseline hydrologic conditions, but also seeks to use a model to develop a quantitative standard to evaluate ecological form and function through the use of a multimetric bioassessment protocol to create an index value for bond release of streams at



780.19(e)(1). OSM must explain why a model is acceptable in one aspect but not another.

#### **774.15(b)(2)(vii): Requirement for renewal applications amended to include submittal of water quality monitoring analysis to support PHC**

For permit renewals this will require significant time and expense to provide the newly required information and analysis along with the duplicate information required by CWA authorities. The burden will be passed to the permittee to complete an evaluation where previously it has been the regulatory authority's responsibility to draft a short PHC finding at renewal. The RA will have to review this as well and make certain findings. NMA believes that the current process is sufficient and has produced good results as demonstrated by OSM's annual reports on state performance. Additional monitoring and reports do not improve water quality if the current monitoring and analysis are already sufficient.

#### **780.12(d): Required Use of Contour Maps**

Proposed Section 780.12(d) states that "the reclamation plan must contain a plan for backfilling the mined area, compacting the backfill, and grading the disturbed area, with contour maps..." The use of contour maps for proposed post mining topography can be very limiting as mining conditions sometimes require adjustments to the reclamation area. Typical cross-sections have worked best in many areas, and are preferable to a rigid requirement that contour maps be provided. This decision should be left to state regulatory authorities. The reclamation timetable includes some standard requirements such as backfilling, grading, topsoiling, and seeding. However, the proposed timetable must also include an estimate for when revegetation success will be demonstrated and when bond release applications will be submitted, which involves some degree of speculation on the part of the operator. Many factors including the market, geology, contracts, and changes in regulations influence how mining progresses. This addition will require constant updates during mid-term and 5-year renewals. This adds cost to both industry and the RA while providing no significant benefit. This is a significant issue that does not incorporate the flexibility needed for an operation like reclamation.

#### **779.19 (a)-(c): Re-Vegetation Requirements**

These proposed provisions would create a mandatory requirement for pre-mine vegetation mapping and classification. It also requires discussion of plant communities which would exist under natural succession. Using the Midwest as an example, landscapes are dominated by row agriculture since settlement and will continue to be for the foreseeable future. Describing the potential final successional plant community for these areas serves no useful purpose. The post-mine land use plan would dictate cover and planting for reclamation. Using the National Vegetation Classification

Standard will increase the time and the cost of preparing permit applications. NMA suggests that the requirement for detailed mapping be left to RA discretion.

Section 779.20 specifies a requirement for “site specific resource information” related to threatened and endangered species and critical habitats. 779.20(d) of the rule provides for FWS veto authority, as discussed earlier, with respect to permit applications should a disagreement arise between the state regulatory authority and the USFWS involving threatened or endangered species or critical habitat designated under law. This section is expected to result in significant delays and permit rejections due to the history of FWS objections to permits and the very different and often contrary mission of FWS relative to RAs.

#### **779.21 (f) Catch-all clause for addition collection of information**

This section requires the submission of “Any other information that the regulatory authority finds necessary to determine land use capability and to prepare the reclamation plan.” This is an open ended requirement that could be interpreted in many ways with unknown consequences. Due to the vague nature of this requirement NMA recommends that it be removed from the proposed rule.

#### **779.22 Historical Land Use**

779.22(a) calls for a description of historical land use prior to mining on previously mined areas, specifically, “historical uses of the land without a time limitation and without limitation to the single use preceding the permit application.” This should be limited to a practical review and limited under most circumstances to the preceding land use. Mining operations should be treated the same fairness afforded to others. Mines should not be held liable for perceived or real environmental issues or deficits that they were not individually responsible for.

#### **779.22(b)(3): Fish and Wildlife Productivity Information**

This section requires an analysis of pre-mine productivity for fish and wildlife. It is unclear what the analysis would entail and what metrics and historical documentation would be necessary. This provision is highly vague and cannot be implemented without additional detail.

#### **780.12: CWA/CAA Compliance Provisions**

This proposed section requires the reclamation plan to describe steps that will be taken to comply with the CWA and CAA. This requirement is very open ended and could be interpreted to include a wide array of issues not previously addressed under the reclamation plan.

For mining operations that intend to mine through or divert numerous intermittent or perennial streams, requirements to plan the timing of mining and restoration of form and function of intermittent and perennial streams will be difficult. Again, because of the changing dynamics of the mining process, this will be difficult to predict, will constantly change as the mine plan changes, will likely require updating as sampling results are received and assessed, and does not add any real benefit. Compliance with the plan will entail filing a large volume of reports which will not likely be effectively used by the regulatory authority to objectively determine performance standard success.

Operators currently provide information from the CWA Sec. 404 application with respect to the stream restoration plan. Included are the types of instream structures that will be constructed in the form of typical details which supports the restoration of ecological function as well as brief discussion on the functions each structure provides.

Information is also provided on how the regional curve will be used to restore the form of each stream and typical sections of the various stream types (Rosgen “A”, “B”, “C”, and “E” channel types) that may be incorporated with their specific form variables based on the slope of the stream are included. Specific information on each stream cannot be provided early in the permitting process due to many factors that must be considered: land use restrictions (i.e. prime farmland/forested acreage requirements), changes in watershed, multiple land owners, and swell of overburden to name a few).

Providing detailed reclamation plans for each segment of stream will involve a huge expansion of the current plans provided which are deemed sufficient for purposes of CWA Secs 404 and 401. These agencies are the “experts” on streams and have CWA authority. As an alternative the 404 permit should be referenced.

The reclamation cost estimate must include elements of the operation covered by a performance bond under part 800. This must now include a cost guaranteeing restoration of a stream’s ecological function on intermittent and perennial streams (see 800.14(b)(2)). This element is going to be difficult to estimate considering the ambiguity of the ecological function criteria and the fact that there is little history on which to base it. For example, if a permittee constructs a postmining stream, but fails to restore the “ecological function” according to the regulatory authority, and bond is forfeited, what specifically is this bond money to be used for? Assuming earthwork is completed, revegetation work is done, and any required additional features have been replaced. There is physically nothing left to do, except wait for nature to take its course. OSM must describe exactly what is covered by this bond that is separate from other reclamation bonding, and what forfeited money would be used for specifically. The bonding of stream restoration will likely be over-estimated due to these uncertainties.

### **780.12(d)(1): Backfilling and Grading Plan**

Paragraph d(1) of this section is unclear with respect to how an RA would evaluate whether or not compaction is limited to the minimum necessary level to achieve stability requirements unless additional compaction is needed to minimize infiltration and leaching. This is completely impractical and would be nearly impossible to monitor in the field. The ambiguity of this requirement makes it very difficult to determine what kind of cost the applicant would incur. The applicant would also be required to provide cross-sections, models, and or contour maps showing the drainage pattern and surface contours so the agencies could better determine if the proposed plan is being satisfied in the field. There must be allowance for some variability. Also, it is unclear whether new requirements to compact spoil around acid material in pits will be applicable to overburden where acid base accounting demonstrate alkaline overburden will neutralize all acid material. Additionally, it is impractical and unrealistic to expect operators to completely encapsulate sodic spoils commonly found at surface coal mines in the West. Disposal of acid material at the base of the pit would put material below water table and eliminate exposure to oxygen. This is referenced in the rule but should be clearly allowed and encouraged.

### **780.12(e): Soil Handling Plan**

The soil handling plan must include a plan for removal of all soils required for growth medium. There is no defined limit to the depths of soil to be utilized for growth medium as there was in the previous rule. All horizons needed for growth medium are required to be saved for replacement. In some regions soil is typically removed to a greater depth than required by the current rule. However, this could now become an issue if the amount of soil required is increased beyond what has historically been replaced to achieve the post-mining land use and meet revegetation standards. This could lead to the need to stockpile substantially larger volumes of soil. There would be added cost because the soils have to be segregated by horizon. Now soils removed below the required depth are typically combined and mixed. Keeping the soil horizons separated on all areas will increase soil handling cost and the complexity of the soil. This has proven to be the case for NMA members that have been required to segregate prime farmlands topsoil and subsoil and stockpile it separately from other soils.

The soil handling plan has to segregate topsoil and the B and C horizons. Some western soils do not contain multiple soil horizons. Generally topsoil is stripped as one unit down to unsuitable materials (bedrock or unsuitable soils). Other western mines generally strip topsoil down to the subsoil material, which is considered unsuitable. Although the unsuitable material in many cases is likely the C horizon, because it is unsuitable quality it should not need to be segregated. This proposed rule creates a soil handling issue in parts of the country with multiple distinct soil horizons. It would also

slow topsoil placement and complicate direct placement, since each horizon is to be handled separately.

A plan for organic material storage and use will be difficult to implement. Long term storage of tree roots and logs can cause deterioration and result in the material being of limited use.

Segregating the organic material for storage would be costly and complex if that is what is implied by this rule. Placing the organic material in temporary redistribution areas as outlined in 816.22 to prevent deterioration would cause final reclamation costs to triple as the material would have to be moved three times and increase disturbance due to additional storage sites. If the organic material is not used for stream structures and is not used immediately, storage would be impractical. For example, in some parts of the country piles of brush, dead trees and rootballs are considered garbage, and cannot be stored because they can become a public nuisance. Such trash piles house rats and other pests that carry disease and their control requires the immediate removal of these trash piles. Furthermore, it is unlikely that this material could be shredded because of the presence of rocks in root balls. The rule should be amended to allow practical exceptions.

#### **780.12(j): Plan for Disposal of Non-coal Waste Material**

Not allowing final impoundments would result in tens of millions of dollars in excess cost in the many areas of the country where final pit water impoundments have historically been an asset to the local community for recreation and wildlife. Many times the spoil generated by the initial cuts of a mining area are located at the farthest point from the final pit location. The initial mining areas can be permanently reclaimed years before the final cut is reached where the excess spoil would be needed for total backfill. Increased storage of spoil under this scenario may increase water quality degradation. If this is not what OSM intended, the language should be clarified.

The process of restoring streams to their original elevations, and enhancing the flood plain widths in their approximate original locations has increased the generation of additional spoil and elevations of spoil in the graded reclamation areas. Restoring wetlands at grade can also result in the generation of additional spoil because spoil has to be relocated to keep wetland elevations low in the reclaimed area. This rule will increase the need for additional spoil storage and increase mining cost to the point where many areas will not be practical to mine. Furthermore, many of these backfilling requirements are not feasible or necessary in regions outside of Appalachia.

### **780.12(g): Revegetation Plan**

The first major change to the revegetation plan section involves the permanent vegetation cover selected. The vegetation selected must be native to the area, have the same seasonal characteristics of growth as surrounding vegetation, be capable of self-generation and natural succession, be compatible with plant and animal species in the area, etc. Most mines already plant native species to a degree but sometimes other species are used to increase quality, quantity and speed of cover. This requirement will likely result in conflicts with other agencies and may degrade reclamation resulting in slow or lesser quality reclamation.

The second major change is for establishment of trees or shrubs. Any mine establishing trees or shrubs must have a professional forester or ecologist develop and certify all applicable revegetation plans. This could add additional cost to mines that do not have staff specialized in forestry. Additional changes are that the revegetation plan now requires more specifics such as site preparation techniques to minimize compaction, fertilizer application timing, and measures taken to avoid establishment of invasive species. Structures not in use by the end of the revegetation period must be removed per the proposed rule. This is a problem for buildings that are left to be sold.

The coal resource conservation plan is now being tied to maintaining the environmental integrity of the site. The criteria is unclear as to how this could be used to exclude certain coal resources or strata from extraction in the event that doing so would compromise the “environmental integrity”.

Consistency with Land Use Plans and Landowner Plans: Disclosing compensation to land owners for agreements to change a PMLU from pre-mining land uses should not be public record. This type of disclosure should remain a private matter between the agreeing parties. This could lead to increased cost and result in land owners promoting land use changes to acquire compensation.

### **780.13 Mapping and Plan Requirements**

This section adds specific requirements some of which are currently provided. The section requires “Each feature and facility to be constructed to protect or enhance fish, wildlife, and related environmental values” be depicted on a map or plan. In an initial permit application it is essentially a guess where features will be constructed. It would seem more practical to require the coordinated development of a site specific fish and wildlife habitat plan with assistance and technical guidance from the state fish and wildlife departments later in the reclamation process.

## 780.16 : Fish and Wildlife Protection and Enhancement Plan

Timing operations to minimize disruption of critical life cycle events is unclear as a requirement and could conflict with other requirements, for example to retain forest cover and other vegetation as long as possible. For species that use the forest canopy or shrubs during specific times of the year for reproduction (e.g. bats, sage grouse, etc.) our operations generally time vegetation clearing to avoid these periods, regardless of whether we are “retaining the forest and vegetation cover as long as possible”. Additionally, it would not be practical to shut down pit operations while non-endangered species are breeding or giving birth.

The buffer width must be measured horizontally on a line perpendicular to the stream beginning at the bankfull elevation or, if there are no discernible banks, the centerline of the active channel. Issues could arise on a very sinuous stream and it is unclear if the buffers must be surveyed and demarcated on a map to exactly maintain the 100 foot requirement.

Furthermore, establishing a vegetative corridor at least 100 feet wide along the banks of streams that lacked a buffer of this nature before mining is not feasible. It is unclear if this includes intermittent and perennial streams that were not impacted and lacked riparian buffers in the permit area. A cause of concern would be streams governed by local government agencies known as regulated drains which are maintained (i.e. cleaned out as needed to maintain capacity). The agency dictates that no riparian buffer can be planted or preserved as in (ix) with a conservation easement.

This provision concerning funding to cover long-term operation and maintenance costs that watershed organizations incur in treating long-term post-mining discharges from previous mining operations is also problematic. If this means pre-law mines, operators already do this through the tax paid to Abandoned Mine Lands (AML). Aside from the AML tax mine operators cannot be held liable for issues they did not individually create.

The rule also mandates a periodic evaluation of operations impact on fish and wildlife, but is unclear as to how this would be accomplished. The requirement is subjective and could be misinterpreted or used to require alteration of the operations plan.

If a perennial or intermittent stream is to be mined through, there is a requirement to minimize the time disrupting those habitats, the length of the stream segment to be mined through, and the amount of riparian habitat disturbed. In most cases this is not feasible in practice because if a stream is to be mined through the length of the pit will be the amount of the stream segment mined through. The length of the disturbed stream segment cannot be minimized in most instances.

Many of enhancement measures listed in this section are problematic. Examples of enhancement measures that will increase cost include permanently fencing livestock from streams, establishing conservation easements or deed restrictions on riparian areas, providing funding to cover long-term operation and maintenance costs, implementing measures to eliminate pre-existing sources of water pollution, and reclaiming previously mined areas outside of the area we propose to disturb, and enhancing other offsite areas not associated with mining. These examples are not required to be implemented, but will likely trigger additional requests and requirements from regulatory agencies (e.g. USFWS) during permit reviews. Some of these measures are already implemented through the CWA Sec. 404 permit or 401 state water quality certification process. Multiple agencies with overlapping requirements will result conflicting requirements. Additionally, many of these measures are a matter of property rights for landowners or constitute making mine operators responsible for the issues of others. The requirement for bonding offsite enhancement areas does not make sense as those areas are not disturbed by mining.

There is a more rigorous review of the fish and wildlife plan required by FWS (and State agencies), making these requirements duplicative and unnecessary. The proposed rule also requires additional enhancement measures in the event that the disturbance of native vegetation communities or intermittent and perennial streams is going to be “long-term”. The temporal disturbance issue has been brought up during mitigation discussions before and agencies generally use this as leverage to require additional enhancements. Over the life of a stream or landform, the time of mining disturbance is extremely small. Because “long-term” is a subjective determination, it should either be removed from the regulation or determined by an acceptable protocol of debits and credits. Subjective requirements to make up for temporal loss destroys regulatory certainty.

The use of contour maps for proposed post mining topography can be very limiting as developing mining conditions sometimes require adjustments to the reclamation areas. Typical cross-sections have worked well.

#### **780.19 Paragraph (b)(1) – General Requirements**

Operators currently provide sufficient data to evaluate seasonal variations in water quantity and quality as well as groundwater usage within the proposed permit and adjacent areas.

#### **780.19(b)(2) Seasonal Characteristics of Underground Mine Pool**

Seasonal characterization of adjacent underground mine pool hydrology is an unnecessary exercise in most areas unless the applicant is proposing to mine within 200 ft of the mine pool itself. Over the last couple of decades there have been several



evaluations of the potential for seepage through coal barrier pillars adjacent to underground mine pools that have developed empirical methods for determining the applicable barrier pillar widths (Pennsylvania Mine Inspectors Formula, Ash and Eaton Impoundment Formula, Old English Barrier Pillar Method). The methods treat the barrier pillars as water-impoundment dams and are and are utilized to ensure little to no seepage will be observed within the active mine void. Furthermore, MSHA has incorporated a standard mining perimeter of 200 ft from the abandoned works unless additional characterization and mining detail is submitted to show that the mine can safely access areas closer than this boundary. It is also common that in regions where the coal unit does not outcrop nearby that the season fluctuation within the mine pool will be very limited in scope and the requirement to measure the water level monthly is unwarranted. Additionally it is common that drilling a piezometer into old works with an unknown level of inundation poses a significant safety hazard due to the potential for elevated levels of methane that may be present in the mine void. Therefore in regions where old mine voids are located in coal units buried at significant depths where seepage across the coal barrier is known to be limited, the requirement to conduct detailed characterization of potential underground mine pools should be unnecessary.

#### **780.19(b)(4) Expansion of groundwater quality parameters**

The increase in minimum groundwater quality parameters is extensive and will result in a significant increase in baseline (and during mining and reclamation) analytical costs. While we understand the importance of characterizing the pre-mine water quality it is unclear what value is gained by requiring monthly monitoring of all these parameters. This is especially onerous for the water bearing bedrock units in areas like the Illinois Basin where groundwater is generally moving only a few feet per year and water quality changes are more likely to be related to sampling variability than seasonal variation. Current baseline and ongoing groundwater quality monitoring focusses on indicator parameters (pH, TDS, Acidity, Alkalinity, Hardness, Iron, Manganese, Sulfate, and Chloride) that will provide indications of any water quality influences from our mining activities.

The addition of major ions, selenium, ammonia, nitrogen and the other trace elements are not needed for every sample. Trace elements are typically not an issue if the indicator parameters are within their allowed range. That is why the original parameters were chosen. If there is reason to add parameters the RA can currently require whatever they feel is appropriate. As an alternative major ions could be added for 2 of the baseline samples and then added again if indicator parameters indicated a change. Trace elements could be treated the same way.

Baseline monitoring is conducted bimonthly and provides sufficient detail for the seasonal influence in shallow unconsolidated and upper bedrock units (when near

significant faulting and recharge zones) while also keeping monitoring costs at a more realistic price point. Assuming 10 wells are installed at a new mine then the analytical costs (\$95 per sample from our contracted lab) for the current analyte list at a bimonthly frequency would be \$5700. Monitoring 10 wells for the proposed analyte list (\$426 per sample from our contracted lab) at the proposed monthly frequency would be \$51,120. This is an order of magnitude difference and unrealistic when considering the value of the information gained.

Historically, groundwater quality monitoring has been focused on water quality indicator parameters including TDS, sulfate, chloride, and iron that provide an early warning of potential groundwater quality degradation. Chloride and sulfate are both very soluble and chemically stable at the pH levels normally encountered in natural waters and thus are excellent indicator parameters. This reduced suite relative to what is being proposed and has provided accurate information in relation to this. Groundwater requirements show that total iron and total manganese are required parameters. While these are traditional parameters of concern at coal mining sites, it does not make sense to require metals analyses in total form. There are potential sources of sediment and bacteria in groundwater wells that will give an unrealistic picture of iron and manganese concentrations in groundwater and also negatively affect ion balance calculations

Groundwater requirements to sample baseline for a minimum of twelve months to ensure that seasonal variability is observed is unnecessary. Seasonal variations can be observed using a quarterly sampling frequency. Quarterly sampling would also significantly reduce costs. In the impermeable formations that coal seams are generally located in, bedrock groundwater quality does not change quickly and even seasonal variations are typically small. Alluvial groundwater quality shows larger seasonal fluctuations, but again quarterly sampling is sufficient to accurately characterize those variations. In either event, sampling for one year still only provides a snapshot of the water quality. Interpretation of data during mining can be used to expand what is considered the “baseline” water quality dataset. Just because mining has begun, does not mean that all wells are immediately impacted. Data from upgradient wells and even lateral or downgradient bedrock wells in low permeability materials can still be used to determine baseline quality after the mining has started. The dataset will need to be verified that the mining operation is not contributing to the changes that are observed (e.g. using knowledge of groundwater gradients and flow velocities).

Several studies have shown that in natural waters concentrations of TDS can be used as a surrogate for specific conductance (Wood, 1976; Hem, 1985; Lloyd and Heathcote, 1985). Considering the request for measurement of both TDS and specific conductance is for groundwater sampling in which waters are expected to be of natural origin it should not be necessary to analyze both analytes. While this may seem to be only a

small cost to the applicant the increased number of baseline samples requested in this rule combined with the number of locations being monitored begins to add up. Our laboratory charges \$11 for TDS or SpC. If the applicant was monitoring 10 wells then the extra cost for the 12 months would be \$1320 for the initial 12 month baseline.

Extrapolating this out to include the quarterly sampling requirement over the life of one of our typical Midwest Mines (10 yrs active mining; 7 yrs of Reclamation) and the applicant will have spent approximately \$9000 to monitor a parameter that that is inherently similar to one already being analyzed.

### **780.19(b)(5) : Groundwater Quantity Measurements**

Groundwater requirements include sampling the depth to groundwater in each coal seam to be mined. First, it is unclear what the purpose of sampling the groundwater depth in the coal seams is. There are many mines that have between 5 and 7 coal seams that have multiple splits. The formations that contain the coal have a low permeability and are not an “aquifer” in the traditional sense. While water is found in these formations occasionally, it is not always continuous and requiring wells in each coal seam would likely result in numerous dry wells. Furthermore, due to the splits in the coal seams, determining which coal seam you are monitoring in each mining location would also be difficult.

Water bearing strata is not defined and could be interpreted to mean every stratum with the potential to yield water and could mean yields that are well below 1 GPM. In the Midwest you may have 5 thin sandstone units above the base coal. All of them with low permeability. This would be highly problematic for operators to attempt to monitor in many areas.

### **780.19(b)(6) Sampling Requirements**

This provision requires the establishment of monitoring wells or equivalent points at sufficient locations within the proposed permit and adjacent areas to determine groundwater quality, quantity, and movement in each aquifer above or immediately below the lowest coal seam to be mined. At a minimum for each aquifer, you must locate monitoring points. The use the term aquifer in this section is contradictory to the previous use of the term water bearing stratum.

Also this requirement indicates that we must establish monitoring points in each aquifer both within the permit and in adjacent areas. This is not feasible unless there are residential wells screened within the units adjacent to the permit. The operators does not control the property in this scenario and could not install monitoring wells in this area. This requirement should be removed.

**780.19(b)(6): Well Placement**

Proposed paragraph b(6)i(a) requires upgradient and downgradient wells in all water bearing zones. The requirement for instillation of an upgradient well in each water bearing zone will result in a significant additional cost to many operations, especially when considering that water bearing units are poorly defined in this rule and could be interpreted in a very unfavorable way based on the vague language within this rule. This will be especially onerous for new mines where previous coal mining is not located in the area and it is unlikely that there would be upgradient influence on coal mining related water quality parameters. Furthermore, because of the size of many mining operations and the normal spatial variations in water quality typically observed across the site the use of an upgradient wells for water quality statistical analyses is usually unwarranted and the statistical analysis is conducted intrawell. Therefore, these upgradient wells result in nothing more than significant long-term costs with no real value to the regulator or permittee.

The typical cost to install a 200 ft bedrock well in the Midwest is \$7000. Assuming the well is monitored for this rules proposed parameters (\$426 per sample) at the proposed monthly frequency during the one year baseline period and then quarterly while the mine is active for 10 years and is under reclamation for 7 years (typical for the Midwest), then the total monitoring cost for just this well would be \$34,000. Adding the instillation cost, and assuming that the well remains undamaged over the course of its life, the total cost is approximately \$41,000. This is a lot of money for water quality data with little to no value.

**780.19(b)(6)(ii) Monthly Baseline Characterization for 12 Months**

Baseline monitoring at a monthly frequency is an unnecessary and costly requirement. Bimonthly sampling is sufficient to observe the seasonal influence in the various water bearing units Seasonal variations are typically small in many areas where recharge zones are located miles from the permit and groundwater is typically only moving inches to few feet per year. Little value is gained from increasing the monitoring frequency in these situations.

**780.19(b)(6)(iv) Extension of Baseline Sampling**

Paragraph b(6)iv requires extension of baseline sampling until 12 consecutive months without severe drought or abnormally high precipitation. Review of the Palmer Drought Severity Index (<http://www.ncdc.noaa.gov/temp-and-precip/drought/historical-palmers/>) for the period of January 2010 July 2015 indicates that for our Illinois Basin facilities the maximum time period between periods with severe drought (<-3.0) and or abnormally high precipitation (>3.0) never exceeded a period of 10 months. This suggests that the applicant could be collecting monthly baseline sample data for

approximately 5 years without ever meeting the proposed 12 consecutive months without severe drought or abnormally high precipitation. This is an unrealistic burden that could greatly delay potential projects and unnecessarily drive up costs. Review of current Midwest Operations lab costs suggests that the lab analysis for each baseline sample would be approximately \$350, the total over the January 2010 – July 2015 sample period would equate to \$19250 per location. Assuming a minimum of 10 locations (which would be on the low end) the cost for lab analysis alone would be \$192,500. This is an unreasonably high cost for baseline water quality analysis and would render many projects economically unfeasible.

A review of the southwest states indicate that they have been in drought for a number of years. Over the past five year period (2011 – present) Arizona and the New Mexico mines have had a PDSI value of less than -3 four out of five years. As proposed the rule would have required a new mine to “restart” baseline monitoring to continue throughout the five year period. Instead, the regulation should recommend using these types of indices when interpreting the data, but should not subject mine operations to additional requirements just because the weather is not working out.

It should also be noted that while seasonal influences are well defined in shallow unconsolidated wells, the seasonal influence on water quality observed in the deeper unconsolidated material and bedrock wells are generally very minimal and the monthly sampling requirement is unnecessary. Additionally, it should be noted that several of the parameters that have been added to the groundwater monitoring list can be greatly influenced by other anthropogenic sources and it is likely that if increasing trends were discovered during mining additional groundwater sampling would need to be conducted to verify their source. Therefore, for many of the new parameters comparison against background data is not likely to be much of a protection to the applicant and the analysis is more realistically a wasted additional cost.

#### **780.19(c)(2): Expanded Baseline Parameters**

Paragraph c(2) expands the list of baseline parameters and proposes that the applicant also include any parameters with effluent guidelines established by the NPDES Program. Under the proposal operators would be obligated to produce 12 months of sample data for a new parameter that could not be anticipated. This is likely impossible. In some states, like Illinois, the individual permit allows for more flexibility in adding parameters to the permit and the SMCRA permit has to be deemed complete and be under technical review before the Illinois CWA authority will review the proposed NPDES permit (or modifications to existing permit). Recently, one operator had a new parameter added to their permit after an appeal ruling. In that case, the requirement OSM has proposed could have potentially resulted in an additional 12 month delay for

the permittee to obtain SMCRA permit approval resulting in significant delay and financial strain while waiting for the completion of the monitoring period.

### **780.19(c)(3)(i)(a): Baseline Information on Season Flow Variation**

Under this proposed paragraph the applicant must provide baseline information on seasonal flow variations and peak-flow magnitude, and frequency for all perennial, intermittent, and ephemeral streams and other surface water discharges within the proposed permit and adjacent areas. NMA contends that this requirement places an unrealistic burden on industry to characterize baseline surface water discharge at the proposed facility. Considering the unpredictable nature of the weather and likely scheduling and personnel availability it would be impossible to accurately measure the peak flow magnitude and frequency of all perennial, intermittent, and ephemeral stream discharges within the proposed permit area without continuous monitoring equipment. In many regions operations are located in areas with dense drainage networks that include a significant number of ephemeral drainage channels that feed intermittent and perennial streams. In order to accurately measure flows within these channels an operator would be deploying a large number of pressure transducers to evaluate fluctuations of the water level within the stream. In order to calculate discharge the streams cross sectional area would need to be surveyed and every single monitoring location would need to have a rating curve derived for it. This would require that the applicant send personnel into the field under various conditions in order to accurately measure flow velocity and water level within the stream under various conditions. To properly develop the rating curve each site would need to be visited approximately 10 times throughout the year. Many of these locations would likely be in isolated and or difficult areas to access which result in additional time in the field. Assuming 25 monitoring locations, the cost for equipment alone would be \$14250 (\$500 per pressure transducer, equipment housing ~ \$20, and \$2250 Flow Meter). A low end estimate for the cost for the field work associated within installing the equipment and surveying the channel (~2.5 hrs per location at \$80 per hr: \$5000), downloading the pressure transducer data and collecting 10 velocity measurements throughout the year (~1 hr per visit times 10 visits at \$80 per hr: \$20,000) would be approximately \$25,000. Someone would then need to process the collected data (assuming 2 hrs per location times 10 visits at \$80 hr: \$40,000). The grand total for just the field and data analysis would be approximately \$65,000. Even on the conservative side this is an unrealistic cost for the value gained.

If operators are required to produce baseline flow information for all perennial, intermittent, and ephemeral streams within and adjacent to permit areas, delineations would need to be conducted outside of the permit area on properties that may potentially be hostile. Example: 7,000 acre permit area - it is assumed that an

additional 10% of the permit area needs to be delineated outside of the permit which is 700 acres. The average cost for a field crew to evaluate and perform any delineation is ~ \$50 per acre. An estimate for the additional delineations would be approximately \$35,000.

When evaluating the seasonal flow variations and peak-flow magnitude, and frequency for all perennial, intermittent, and ephemeral streams, this can become problematic in headwater settings. On a recent amendment, 1,301 individual stream assessments were conducted. An assessment was performed each time the stream segment experienced a change either in land use setting, stream type, or flow regime. If each segment is to be monitored utilizing the costs shown above, the cost for the equipment would be approximately \$683,025 and cost for field work would be approximately \$3,382,600. This would represent a large mine in the Midwest.

#### **780.19(c)(3)(ii): Flow Measurements**

The language in this paragraph is contradictory to the language provided under Paragraph C(3)(i) and suggests other measurements can be used as long as they are repeatable and maintain some level of precision. It is unclear if flow would only need to be measured once per month via the float method as long as an operator could meet the requirements of Paragraph C(3)(i). It is also unclear if OSM is prohibiting discharge measurement methods that are accepted by other agencies. This section needs to be further clarified.

#### **780.19(c)(4)(i): Monitoring Locations**

This paragraph establishes the number of monitoring locations to accurately determine quality and quantity of streams in area. Once again, this language is contradictory to the stream quantity measurement requirements provided in Paragraph C(3)(I).

#### **780.19(c)(4)(ii): Baseline Stream Samples**

Paragraph (C(4)(ii) requires baseline stream samples required to be collected monthly for 12 months. In some areas streams only flow at certain times of the year. It should be made clear that “no flows” are acceptable if 12 months becomes the standard.

780.12(C)(4)(iv) : Extension of baseline sampling until 12 consecutive months without severe drought or abnormally high precipitation. Review of the Palmer Drought Severity Index(<http://www.ncdc.noaa.gov/temp-and-precip/drought/historical-palmers/>) for the period of January 2010 July 2015 indicates that for our Illinois Basin facilities the maximum time period between periods with severe drought (<-3.0) and or abnormally high precipitation (>3.0) never exceeded a period of 10 months. This suggests that the applicant could be collecting monthly baseline sample data for approximately 5 years

without ever meeting the proposed 12 consecutive months without severe drought or abnormally high precipitation. This is an unrealistic burden that could greatly delay potential projects and unnecessarily drive up costs. Review of our current Midwest Operations lab costs suggests that the lab analysis for each baseline sample would be approximately \$350, the total over the January 2010 – July 2015 sample period would equate to \$19250 per location. Assuming a minimum of 10 locations (which would be on the low end) the cost for lab analysis alone would be \$192,500. This is an outrageously high cost for baseline water quality analysis.

Additionally, it is impossible to incorporate all possible ranges of surface water quality and peak flow magnitude within a single 12 month period due to variability of weather patterns and changes in rain intensity which directly influence flow characteristics and water quality. It should be noted that several of the parameters that have been added to the surface water monitoring list can be greatly influenced by other anthropogenic sources and it is likely that if increasing trends were discovered during mining additional sampling would need to be conducted to verify their source. Therefore, for many of the new parameters comparison against background data is not likely to be much of a protection to the applicant and the analysis is no more than a wasted additional cost.

#### **780.19(d): Additional information for discharges from previous coal mines**

OSM fails to explain the need and purpose for specifically requesting a special one-time analysis of low baseflow season discharges from previous mining operations within the proposed permit and adjacent operations. If former mine discharge is located within the permit area than the discharge will be sampled as a part of the baseline monitoring program. If the location is adjacent to the permit area and the discharge is entering the same receiving stream that the permittee will be discharging to then the water quality will be picked up in the receiving streams baseline monitoring. Furthermore, any mine that was active since the inception of SMCRA should already have water quality data available to the regulatory agency. Any mine that has been fully reclaimed was only granted so through the SMCRA and NPDES program and thus the water quality must have been meeting all applicable water quality standards prior to final bond release. Current operations cannot be responsible for past operations other than through the AML fee.

After requiring monthly baseline sampling at all stream locations it is unclear how a single sample under low baseflow season discharges should be considered as the absolute value for discharges from reclaimed mine areas.

#### **780.19(e): Biological Conditions for Streams**

This proposed rule includes the following requirements:



“(1) Except as provided in paragraph (h) of this section, your permit application must include an assessment of the biological condition of—

- (i) Each perennial and intermittent stream within the proposed permit area.
- (ii) Each perennial and intermittent stream within the adjacent area that would receive discharges from the proposed operation.
- (iii) A representative sample of ephemeral streams within both the proposed permit area and the adjacent area that would receive discharges from the proposed operation.”

In many areas it is unrealistic to assess all intermittent and perennial streams and therefore representative streams are selected. The stream selected for sampling reflects the expected biological attributes of the surrounding streams in the geographic area. Representative sites are chosen to represent the land use type and watershed in the proposed permit area. Since it may not be possible to adequately monitor each water-body, bio-assessment programs collect data from a representative sample of water-bodies in a target population (EPA CALM, 2002). CALM, which stands for Consolidated Assessment and Listing Methodology - Toward a Compendium of Best Practices is a framework on how to document how water quality data and information is collected and used for environmental decision making.

Therefore, for the biological reports, a census is not taken on every stream in the permit. This would be expensive, time-consuming, and resource intensive. Judgmental (targeted) survey of the streams is conducted in which specific streams are selected that are representative of the various land uses, stream types, and general conditions within the study area (i.e. permit area).

Typically fish and macros are not tested at the same time to avoid disturbing the stream and the samples. A typical tester can perform 6 to 8 samples a day. For a large Midwest project, out of 1,301 stream segments, 329 of them were classified as intermittent and perennial. An approximate cost per macro sampling is ~\$700 and fish sampling is ~\$600. The sampling cost would be approximately \$427,700 with the work requiring almost 22 weeks without overtime or weekends if each stream had to be visited twice, once for macros and once for fish. Official sampling times for macros is from July to November and for fish is from June to October.

A major issue when requiring assessment of each perennial and intermittent stream is the presence of water. The rule is unclear on what occurs if there is no water or if a return is still required after rainfall. This would increase the costs significantly per sample. This estimate assumes one trip and water is present.

**780.19(h): Exception for operations that avoid streams.**

This standard is impossible to meet.

#### **780.19(l): Coordination with Clean Water Act Agencies**

OSM should work to decrease permitting delays by eliminating the portions of the proposal that are duplicative of CWA requirements.

#### **780.19(j): Corroboration of Baseline Data**

Considering the increased cost of baseline monitoring, site characterization, and operating costs proposed throughout this rule, it is requested that the notation of the applicant paying for an outside third party contractor to review the sampling methodology be stricken from this section. The regulatory agency should be made available to conduct this assessment and should not need to contract with other entities at the applicant's expense to complete their tasks for them.

#### **780.19(a)(5)(iv): Diversion Impacts**

This proposal includes a requirement for findings regarding the impact of any diversion of surface or subsurface flows to underground mine workings, or any changes in the watershed size as a result of post mining surface configuration would have on availability of surface water and groundwater. This is an open-ended requirement that needs to be clarified. Evaluations of impacts starting at first order streams would be incredibly cumbersome and time consuming.

#### **780.19(b)(5): PHC Data**

Under this paragraph the RA must require additional data if the PHC determination indicates that the operation may result in adverse impacts to the hydrologic balance within or outside of the proposed permit area. It is unclear how this could be avoided within the permit based on this rule's definition of material damage to the hydrologic balance. Water quantity within the overburden units within the permit unit will be reduced during mining. It is unclear if this is considered an adverse impact under this provision. This rule does not provide an adequate explanation as to how much additional data would be required to satisfy the regulatory agencies concern. This incredibly vague language either needs to be clarified or stricken from the rule.

The language regarding adverse impacts to the biological conditions of perennial or intermittent streams within the permit or in adjacent areas is vague and could easily be interpreted in a manner that would make compliance impossible. It is unclear how at least some adverse impacts to the physical and biological conditions of a perennial or intermittent stream could be avoided onsite when the stream lengths on site are being mined through and the water is being routed around the pit until the stream length is restored. This proposed requirement is also inconsistent with the SMCR provision

which only requires that the operation be designed to “minimize” impacts to the hydrologic balance within the permit area

### **780.19(c)(1): Subsequent PHC Determinations**

Under this paragraph the applicant must prepare a new or updated PHC whenever there is a permit revision. The proposed new requirements for PHC determinations will require significantly more detail than operators have previously provided. The level of site characterization will increase significantly from both a time and cost stand point for operations, without adding significant beneficial information for the RA. Permit revisions are required for numerous reasons, many of which have no bearing on hydrologic issues. This requirement inappropriately dictates the retroactive application of new PHC and CHIA requirements to permits that were issued and operated before the new requirements are implemented, with potentially significant adverse impact to ongoing operations. A new or updated PHC should only be required if there is a compelling reason to do so.

### **780.21: CHIA**

This provision requires the establishment, and incorporation into the permit, of numeric limits for parameters of concern determined necessary to prevent material damage to the hydrologic balance, which OSM essentially defines as an adverse impact to stream use. Appropriate numeric and narrative limits necessary to protect stream use are determined and established through the NPDES permitting program under the CWA. Section 702 of SMCRA precludes OSM from establishing numeric limits for parameters of concern, even on a permit-by-permit basis. While OSM may disagree with determinations made under the CWA about what parameters must be controlled to protect stream use, OSM cannot supersede those determinations.

### **780.23: Groundwater Monitoring Plan**

This provision requires that the groundwater-monitoring plan include monitoring any aquifers above and immediately below the lowest coal seam to be mined. This language is vague. If it is intended to mean that each strata in a water bearing zone must be monitored separately, both upgradient and downgradient of the mine, this requirement will necessitate a very large number of additional wells. Current monitoring generally screens across the formation as a whole, since most of these strata are not individually viable sources of water. Domestic wells are built the same way.

The groundwater-monitoring plan also includes a requirement to install spoil wells. The preamble recognizes that water quality will be altered within the mine permit area and indicates the regulation is aimed at protecting the hydrologic balance outside of the permit area. Altered spoil water quality data does not necessarily indicate off site

impacts to the hydrologic balance. Furthermore, in areas of the arid west, spoil material can take decades to resaturate to pre-mine levels.

The Surface Water Monitoring Plan requires monitoring of point sources. This unnecessarily duplicate NPDES permit monitoring, is costly for operators and impractical for regulators. The provision also attempts to provide authority for the RA to increase the frequency of sampling for both the SMCRA and NPDES sample points. It is certainly a problem if the SMCRA authority dictates what is in the NPDES permit, the locations of monitoring and monitoring frequency requirements. This reduces certainty for the applicant and will result in time delaying disputes.

Biological monitoring is already required by CWA Sec. 404 permits in many areas. In some western areas biomonitoring is not required because of the arid climate and lack of water. Added biomonitoring would result in added costs for no real benefit. The Corps regulates when biomonitoring is appropriate. If it determines that biomonitoring is not needed at a site, OSM is not free to then require it. Doing so violates SMCRA 702 (a).

Even if, arguendo, such monitoring is authorized by SMCRA, the proposal is problematic. In the proposal, monitoring is required annually at a minimum and must be conducted on stream segments both within and adjacent to the permit area. This requirement does not consider the cost, time, or value of the data that is being requested. For example, in the Midwest, many operations are located in the headwaters of several stream segments. Surface mining is not static and often times the active mining is only occurring in a single watershed at any given time. Since baseline biologic monitoring has already been conducted for all intermittent and perennial streams in the permit area, it does not make sense to require additional biologic monitoring in streams within watersheds where mining has yet to occur. The acquired data from these points does not provide any value to the permittee or regulatory agency and only results in excess cost to the permittee. A typical macroinvertebrate assessment costs approximately \$700 and a fish survey is approximately \$600. If there are 50 assessment points within the permit area then the applicant is spending approximately \$65,000 per year. That's a large amount of money to spend on bio assessments of primarily unaffected areas that have already been characterized prior to mining

Furthermore it is unclear why any stream within the surface mine permit boundary should require monitoring of the biologic community until the stream had been replaced. This rule clearly states that material damage to the hydrologic balance is only applicable in areas adjacent to the mine, not areas within the permit itself and while it encourages the minimization of hydrologic balance impacts within the permit it acknowledges that there is no way to completely prevent them when surface mining. This is why the Corp

does not require biologic monitoring within the permit area until the stream segment has been replaced.

#### **780.24: Post Mining Land Use**

This section proposes that post-mine land use cannot cause the total volume of flow from the reclaimed area to vary in a way that precludes existing or reasonably foreseeable uses of surface water or groundwater. This may be infeasible in the southwest for permanent impoundments that do not discharge. Even though the immediate downstream reaches are ephemeral, this could be interpreted to mean that post-mine impoundments that do not discharge are precluding the downstream reaches from their designated use.

#### **780.25: Sediment and Refuse Basins**

This section blurs the distinction between typical sediment structures and structures that meet MSHA criteria, and imposes unreasonable evaluation and design criteria on the former. For example, it makes no sense to require geotechnical evaluation including consideration of subsidence on a sediment structure designed to typically contain little or no water. Costs associated with geotechnical drilling for a sediment basin would be considerably higher than current costs. OSM has cited no evidence or basis to support the requirement that structures not meeting MSHA criteria should be subjected to “gold standard” geotechnical evaluation.

#### **780.28: Applicability to Ephemeral Streams**

The proposed rule includes a requirement for establishment of riparian corridors along perennial, intermittent and ephemeral streams. As previously discussed, this provision, as proposed, supersedes the CWA and is inconsistent with land use provisions of SMCRA. Even if, *arguendo*, such a requirement is authorized, it remains problematic. The regulation specifically requires the corridor be reforested if the area was forest, or would revert to forest under natural succession. Meeting this requirement could be extremely expensive, especially for some western mines. Reclaiming forested buffers along all ephemeral streams would increase costs due to tree purchases and the increased time spent reclaiming the streams. Additionally, CWA Sec. 404 permits typically do not require the return of all ephemeral streams post-mine. A 100 ft buffer on each side of the stream does not consider the variations in stream flow regimes. CWA Sec. 404 permits require buffers on all mitigation ranging from 25 - 150 ft on each side of the stream, depending on the characteristics of the stream. For example, a 25 foot buffer is required on ephemeral streams. The proposal also does not consider the location of the ephemeral streams or the actual orientation of headwater ephemeral streams where watershed breaks may fall within 100' of each side of the stream

channel. Any requirement for riparian corridors must consider that natural variation does not meet one size fits all requirements.

The provision also prohibits mining and reclamation activity that may result in conversion of the stream flow regime. As noted previously, this is an impossible requirement to meet, and would effectively prevent most coal mining in the United States.

The rule requires the use of native species, which can sometimes result in longer restoration times and muted success as compared to other successful species. This requirement conflicts with Corps' requirements for require non-native species that improve the reclamation success. This requirement will in many cases do more harm than good.

The requirement for restoration of pre-mine drainage patterns, unless otherwise approved, will place significant and onerous constraint on post-mine grade plans. The effective result of the requirement will be to change the SMCRA requirement to restore land to "approximate original contour," to a regulatory requirement to restore land to "exact original contour." The requirement doesn't account for "real world" mining considerations such as dropped off final cuts or initial cut development, or spoil swell factors. The Corps does not require the return of all ephemeral streams and allows leeway in the postmining drainage pattern. Demonstration that stream restoration plans will restore "form and ecological function" will supersede the CWA. Supplemental bond may be required before permit issuance for streams not yet impacted. Superseding requirements typically result in conflict between the agencies and delay for the operator.

The proposal dictates that diversions in place greater than 2 years must adhere to design techniques that would restore premining characteristics. This requirement is wasteful and nonsensical. Temporary ditches should require temporary designs. The life of a temporary ditch is not always predictable from the outset. The NPDES requirements will remain the same in either case, protecting downstream waters. The requirement would be most problematic for establishment of long-term drainage control in terms of planning and layout cost, extra construction time, expense, and maintenance. The additional disturbance of using natural forms for temporary ditches will result in added and un-necessary negative environmental impact.

Further complicating this issue is the rule's requirement for a detailed finding in the permit approval that the permit meets all the stream disturbance and restoration requirements. It is not clear what goes into this determination. It is also unclear what amount of added planning, evaluation, designs, and guarantees the permittee will need to include in the permit to obtain a favorable finding. OSM cannot impose requirements that supersede those of the Corps, and then expect the resulting conflict be resolved

through better coordination during the permitting process. If OSM implements any requirements at all, it should itself first coordinate with the Corps in the development of complimentary requirements.

An additional problem with the proposed design of diversions is the requirement that the hydraulic capacity can be no greater than the capacity of the unmodified stream channel downstream of the diversion, and no less than the capacity of the unmodified stream channel upstream of the diversion. The regulation goes on to require that the design be able to pass the 10-year 6-hour precipitation event for a temporary diversion and the 100-year 6-hour event for a permanent diversion. Only through a remarkable coincidence could geographic conditions be such that all three of these design requirements can be met. The hydraulic capacity for a 100-year 6 hour event is fixed, and only through sheer luck will that capacity be more than upstream capacity and less than downstream capacity.

The SPR includes selective placement of low permeability materials in the backfill or fill and associated channels to create the aquitards necessary to reestablish perennial or intermittent stream. This requirement could be difficult to impossible in many circumstances including lack of available soil/subsoil, rooting depth issues, lack of available aquitard material, and changed permeability due to mining. Restoring a stream to function is certainly possible. Returning it to exact pre-mine conditions is certainly impossible.

Engineers must certify designs for all stream channels to be restored after the completion of mining. It is unclear what the engineer is expected to certify. The restoration of streams requires far more than just engineering. If imposed at all, the requirement should be clear that only the engineering aspect of stream channel restoration is subject to engineering certification.

Under the Corps' program only permanent streams with watersheds over 640 acres need to be certified. This requirement is excessive and costly and adds nothing since both the ACOE and SMCRA authority constantly inspect the reclamation of these streams.

### **780.29: Surface Water Runoff Control Plan**

The plan seeks to evaluate peak discharge during mining and reclamation compared to pre-mining. The requirement states that the monitoring and inspection program must evaluate the effectiveness of the surface water runoff control practices and must contain a minimum density of one monitoring point per watershed discharge point. The need for the requirement is doubtful and unsupported, and the requirements are ambiguous but certainly dictate an entirely new monitoring program at a significant cost of time, money and instrumentation. First, it is unclear if this requirement can be met by monitoring the

NPDES discharge points and surface water monitoring points previously described or if this is requiring additional monitoring points within the drainage and diversion channels onsite.

The rule requires an explanation of how an applicant will handle runoff to prevent peak discharges during mining and after reclamation from exceeding the peak discharge observed during baseline. Current and proposed SMCRA regulations govern how an operator must handle nearly every facet of characteristics considered in the standard peak rate of runoff formula. The regulations prescribe reclamation contours, soil reconstruction, vegetative cover, compaction of subsoil materials, and other characteristics that dictate peak rate of runoff. Further, those characteristics change over the course of the mining and reclamation. Any requirement that suggests that peak rate of runoff can't change during the course of mining and reclamation cannot typically be met without diverting water through some feature that serves as a flood control structure. Additionally, this requirement makes little sense because it is requiring the permittee to compare the "during mining or reclamation period peak flow" to the "maximum peak flow recorded during the 12 month baseline period" that may have received the same rainfall total but not the same rainfall intensity, which could have major implications on the peak-flow maximum. A more practical and cheaper method would be to compare the observed peak flow during mining to a model derived peak flow value for the same rain event. This runoff comparison appears to be the only reason for the requirement to measure peak flow during the background-monitoring period. Since the background data is unlikely to be representative of the maximum peak flow observed during future runoff events then there is no reason to conduct the continuous monitoring and the standard flow measurement methods should be suitable.

The rule also requires runoff monitoring and inspection program to evaluate the effectiveness of the runoff control practices and must have a point density of no less than one location per watershed discharge point. This rule is implying that OSM wants continuous discharge data. As previously stated in 780.19, the cost to install, monitor, and process the data from these gaging stations is very high considering the limited value that is derived from this information.

While this provision applies nationwide, it appears to be focused on addressing perceived problems in Appalachia.

### **780.35 Final Cuts**

The proposed rule does not allow final cut impoundments if they result in excess spoil. First, SMCRA is explicit in its requirements authorizing final cut impoundments. OSM cannot by regulation create an additional requirement that must be met. OSM further attempts to limit the size of final cut impoundments to no more than needed to support



the approved post mining land use. Such a requirement is nonsensical: if the post mining land use of an impoundment is “fish and wildlife,” how large of an impoundment is too large to facilitate that use?

The rule is applicable to valley fills, but interpretation of excess spoil as it may pertain to, for example, a Midwest initial cut spoil disposal area could potentially raise those spoil fills to similar level of scrutiny, at great expense. Some would interpret this section to prohibit development of final cut impoundments or place coal combustion residue in the backfill if it would create excess spoil. The correct interpretation is that the AOC variance section allows for blending box cut spoil but the language should be written to avoid alternate interpretations. Not allowing final cut impoundments would result in tens of millions of dollars in excess cost in the Midwest and other areas where final pit water impoundments have historically been an asset to the local community for recreation and wildlife. Many times the spoil generated by the initial cuts of a mining area are located at the farthest point from the final pit location. The initial mining areas can be permanently reclaimed years before the final cut is reached where the excess spoil would be needed for total backfill. To temporarily store the excess spoil for many years until needed would mean additional disruption to an otherwise permanently reclaimed area. Roads would need to be maintained to the storage areas. The amount of carbon emissions from diesel equipment used to haul the enormous amount of spoil to the final cut would be enormous. This section should be clarified or removed.

#### **784.13: Requirements for Maps**

The rule combines existing 30 CFR 784.23(b)(1) and (13), and requires maps to included timing sequence of mining operations, and designation of features to protect and enhance fish and wildlife and related environmental values. This change will result in the expense of additional time and effort during permitting and may pose compliance issues if permitting changes are not made to accommodate inevitable minor changes in operations or reclamation activities. It is unreasonable to require so much detail in a dynamic operation.

#### **784.19(b)(2): Underground Mine Pool Evaluation**

See surface mine discussion. It will prove costly in terms of drilling, but also potentially hazardous to drill into old works and establish a connection to abandoned gassy or flooded works. Also, it is subjective regarding needed detail, and costly in terms of monitoring wells.

#### **784.19(b)(6): Groundwater Sampling Requirements**

This provision would require the establishment of monitoring wells, or equivalent points within proposed permit and adjacent areas to determine groundwater quality, quantity,

and movement of groundwater in each aquifer above or immediately below the coal seam to be mine. This rule defines adjacent mine areas for underground mines as any area above the underground mining area (shadow area) and within the angle of draw.

If this monitoring requirement is implemented as written, it could require the permittee to establish a monitoring network across the entirety of the shadow area. Not only would it be expensive to install and monitor, but the applicant would have to obtain property rights for the well installations in areas that that would not normally require property control. This would be incredibly costly and difficult to obtain. OSM should consider not requiring monitoring the shadow area if subsidence is not planned. Where it is planned, consider monitoring the shadow area on an incremental basis. Six months to one year ahead of mining would be more than adequate. This limitation will avoid monitoring areas that may ultimately not be undermined as a result of operational changes.

#### **784.19b(6)(C): Samples**

Samples must be collected from a representative number of ephemeral streams within the proposed permit area. Ephemeral streams are precipitation derived and do not receive baseflow. This requirement does not make sense in relation to groundwater monitoring and appears to be an inadvertent error that should be removed from this section.

#### **784.19c(3)(i)(A): Surface Water Quantity**

This paragraph requires baseline information on peak flow and seasonal variations in perennial, intermittent, and ephemeral streams. This requirement places an unrealistic burden on industry to characterize baseline surface water discharge at the proposed facility. Considering the unpredictable nature of the weather and likely scheduling and personnel availability it would be impossible to accurately measure the peak flow magnitude and frequency of all perennial, intermittent, and ephemeral stream discharges within the proposed permit area without continuous monitoring equipment. Operations are often located in areas with dense drainage networks that include a significant number of ephemeral drainage channels that feed intermittent and perennial streams. In order to accurately measure flows within these channels you would be deploying a large number of pressure transducers to evaluate fluctuations of the water level within the stream. In order to calculate discharge the streams cross sectional area would need to be surveyed and every single monitoring location would need to have a rating curve derived for it. This would require that the applicant send personnel into the field under various conditions in order to accurately measure flow velocity and water level within the stream under various conditions. To properly develop the rating curve each site would need to be visited approximately 10 times throughout the year. Many of these locations would likely be in isolated and or difficult areas to access which result in

additional time in the field. Assuming 25 monitoring locations, the cost for equipment alone would be \$14,250 (\$500 per pressure transducer, equipment housing ~ \$20, and \$2,250 Flow Meter). A low end estimate for the cost for the field work associated with installing the equipment and surveying the channel (~2.5 hrs per location at \$80 per hr: \$5,000), downloading the pressure transducer data and collecting 10 velocity measurements throughout the year (~1 hr per visit times 10 visits at \$80 per hr: \$20,000) would be approximately \$25,000. Someone would then need to process the collected data (assuming 2 hours per location times 10 visits at \$80 hr: \$40,000). The grand total for just the field and data analysis would be approximately \$65,000. Even on the conservative side this is an unrealistic cost for the value gained. The data request is likely requested due to flooding that may occur in steep slope areas. If that is the case, the data request should be targeted to those areas. We are not aware of flooding issues in other regions.

#### **784.19c(3)(D): Seepage**

This provision requires seepage run sampling determinations if operators plan to deploy longwall mining beneath perennial or intermittent streams, or employ other full extraction mining methods beneath these types of streams. This requires that a detailed analysis of the gaining and losing portions of the perennial or intermittent stream be evaluated prior to mining. This would be an intensive study that would require gauging stations located upstream of the permit, downstream of the permit, at the confluence of any tributaries draining into the stream and in each reach between those tributaries. Measurements would need to be over the course of a full year to evaluate seasonal influence. Any changes in the watershed would have to be fully documented while the monitoring was ongoing.

Using a small Midwest mine as an example, an operator would need to install 8 gauging stations, survey cross-sections at each spot, and develop rating curves. The operator would then need to install piezometers on each bank next to the station to evaluate the location of the water table. The equipment for the 9 gauging stations alone would be \$6930 (\$500 per pressure transducer, equipment housing ~ \$20, and \$2250 Flow Meter). A low end estimate for the cost for the field work associated within installing the equipment and surveying the channel (~2.5 hours per location at \$80 per hour: \$1800), downloading the pressure transducer data and collecting 10 velocity measurements throughout the year (~1 hr per visit times 10 visits at \$80 per hour: \$7200) would be approximately \$15,930. Someone would then need to process the collected data (assuming 2 hours per location times 10 visits at \$80 hours: \$14,400). The grand total for just the field and data analysis would be approximately \$65,000. Even on the conservative side this is an unrealistic cost for the value gained, especially considering that true impacts should be observable upon occurrence.

#### **784.19c(4)(C)(iv): Seasonal variations**

Review of the Palmer Drought Severity Index (<http://www.ncdc.noaa.gov/temp-and-precip/drought/historical-palmers/>) for the period of January 2010 July 2015 for the Illinois Basin, the maximum time period between periods with severe drought (<-3.0) and or abnormally high precipitation (>3.0) never exceeded a period of 10 months. This suggests that the applicant could be collecting monthly baseline sample data for approximately 5 years without ever meeting the proposed 12 consecutive months without severe drought or abnormally high precipitation. This is an unrealistic burden that could greatly delay potential projects and unnecessarily drive up costs.

#### **784.19c(6): Stream Assessments and Biological Conditions Assessments.**

These are the same requirements as seen in the surface mine section above. However the important thing to note is that they are now identifying adjacent areas as any area above the underground coal mine (shadow area) and area within a reasonable angle of draw of the underground mine void. This is a significant change from the existing regulations, which only required detailed stream characterization within, and adjacent to, the surface affects area. In the Midwest, a reasonable estimate for the presence of stream channels in a shadow area is approximately 60 linear feet of stream per acre. Using a moderately sized Midwest UG mine (16,489.44 acres) as an example, there would be an estimated 989,366 linear feet (187.4 miles) of stream within the shadow area. The stream characterization and biological assessments would be expensive, time-consuming, and resource intensive, which is why surface mines in the Midwest select representative perennial and intermittent streams for the biologic census and stream channel characterization per the Consolidated Assessment and Listing Methodology (CALM) (EPA CALM, 2002).

In order to limit disturbance to the stream ecology fish and macro sampling is typically done during at separate times. A typical consultant can perform around 6 to 8 samples a day. Assuming an approximately 390' stream length per measured segment there would be 2,536 stream segments with approximately 65% of the streams encountered being ephemeral. This suggests that 1,649 segments would be ephemeral streams requiring only a stream characterization and 887 would be perennial or intermittent which would require both a stream characterization and biological assessments.

An approximate cost per ephemeral stream segment is \$35 and can be completed in approximately 30 minutes (conservative), macro sampling plus the stream assessment is ~\$700 and can be completed in an hour, and fish sampling is ~\$600 and takes approximately one hour. With this in mind, the sampling cost for just the baseline stream assessment and bio characterization of this facility would be approximately \$1,210,815 with the work requiring almost 46.5 weeks of effort.

This proposal would represent significant costs to the permittee, particularly when room and pillar mining with no planned subsidence is being proposed and the majority of the shadow area streams are located in watersheds that have no chance of being impacted by the permit's surface facilities. Facilities with no planned subsidence should not be subject to this requirement. Facilities with planned subsidence should be allowed to do monitoring incrementally. This would avoid incurring costs for areas that may not get mined.

**784.19(c)(6)(d): One time baseflow measurement for discharges from previous coal mining operations:**

Requiring a special one-time analysis of low baseflow seasonal discharges from previous mining operations within the proposed permit and adjacent operations is unnecessary. If former mine discharge is located within the permit area than the discharge will be sampled as a part of the baseline monitoring program. If the location is adjacent to the permit area and the discharge is entering the same receiving stream that the permittee will be discharging to, then the water quality will be picked up in the receiving streams baseline monitoring. Furthermore, any mine that was active since the inception of SMCRA should already have water quality data available to the regulatory agency. Any mine that has been fully reclaimed was only granted so through the SMCRA and NPDES program and thus the water quality must have been meeting all applicable water quality standards prior to final bond release.

Additionally, after requiring monthly baseline sampling at all stream locations it is unclear how a single sample under low baseflow season discharges should be considered as the absolute value for discharges from reclaimed mine areas. It does not seem necessary to measure water quality from mines in adjacent areas when the water quality impacts (if any) would be observed in the surface-monitoring plan.

**Part 784.19c(6)(f)(1.4): Geologic Information**

This provisions requires a description of the composition of the base of each perennial and intermittent stream within and adjacent to the proposed permit area, together with the prediction of how that base would respond to subsidence of strata overlying the proposed underground mine working and how subsidence would impact flow. For underground mines with no planned subsidence this is an unnecessary exercise that will result in significant costs to the permittee. This once again requires stream assessments within the shadow area that would be very costly. A brief discussion of the potential for the stream basal elevation to drop down in the area of subsidence and the likely down cutting that would occur as a result of it should be a sufficient answer, particularly when any potential subsidence would be very localized, and because it is impossible to predict the extent of down cutting and potential bank erosion without

knowledge of the actual drop in elevation. Additionally, any subsidence would be quickly repaired avoiding any lasting effects to the stream.

**Part 784.19(c)(6)(j): Corroboration of baseline data**

Considering the increased cost of baseline monitoring, site characterization, and operating costs proposed throughout this rule, it is requested that the notation of the applicant paying for an outside third party contractor to review the sampling methodology be stricken from this section. There can be no explanation for this requirement other than lack of trust in the integrity or competency of the applicant a position that lacks any basis..

**784.19(e): Biological assessments now to be required on streams in permit area**

Multimetric assessment methods approved by state must be used if OSM finds them acceptable. Bioassessments are currently required for CWA 404 permits. This duplication will result in delays and conflicting requirements. As previously discussed, this requirement is not authorized by SMCRA, and is in conflict with Section 702(a) of SMCRA.

**784.20a(5)(vi): Diversion of Surface or Subsurface Flows**

This provision requires findings about the impact any diversion of surface or subsurface flows to underground mine workings, or any changes in the watershed size as a result of post mining surface configuration, would have on availability of surface water and groundwater. This provision is ambiguous: “any” diversion can be broadly interpreted. Even evaluations of impacts starting at first order streams would be incredibly cumbersome and time consuming.

**Part 784.20(a)(7): Underground Mine Flooding**

This provision requires an analysis of whether the underground mine working will flood after mine closure and if so, a statement and explanation. It is not clear what level of detail is required. Although it is expected that all mine voids will eventually fill with water, predicting the time to fill the void is an incredibly difficult thing to do prior to mining. Seepage into the mine void is highly variable and is dependent on the geologic structures encountered throughout the mine void. Often seepage is related to small scale geologic features that would be very difficult to identify in the standard drilling densities employed by any mine prior to mining (joint orientation). Additionally, it is difficult to anticipate how normal mine activities such as roof bolting (with its varying bolt lengths and stabilizing methods) may impact seepage rates, even with a reasonable knowledge of the thickness of the overlying low permeable units separating the mine void from the closest water bearing unit. This difficulty is further exacerbated by the

large size of underground mines, the variability of overlying strata, and the potential of sealing panels at various times throughout the operation.

This requirement once again attempts to look at mining as a static environment and fails to comprehend the complexity that is associated with an operation that requires dynamic responses to the conditions encountered.

Accurate responses to the details requested in this section will be difficult to provide. Certain information cannot be fully understood until the operation has started.

Modelling may be required to predict highest potentiometric surface of the mine pool after closure.. Aside from the cost of the modelling, this requirement would necessitate additional piezometers be installed to verify the potentiometric surface in the coal unit and potentially the confining units above and below the coal. A typical well install at 250' depth is about \$8,000. Assuming three units need to be monitored at a single location for the entire proposed mining area, the total cost would be in the range of \$20,000 to \$24,000 (depending on stepping off or mobilizing to new location for each piezometer). However it is important to note that this rule leaves the data requirement up for interpretation and thus the state agencies could require multiple nested wells throughout the operation for an even greater increased cost. Regardless of one nest or one per every 300 acres, this is a significant cost for information that is unnecessary for some areas considering the long distance from the mine void to a discharge zone.

This section appears to refer to groundwater flow from the mine to base flow of a drainage. Trying to determine when the water in the mine pool would eventually discharge to the surface without detailed regional modeling and data would be somewhat speculative. Modelling would be quite expensive for not much gain because the permeability of bedrock will typically result in groundwater velocities ranging from inches to feet per year resulting in attenuation over a very long period of time.

The predicted quality of the mine pool is not relevant if the potential discharge point is going to be miles away and the attenuation time would be exponentially large. Additionally, the variability of the roof and floor material would be too large to accurately predict an expected water quality for the entire mine void.

#### **Part 784.20(b)(1): Supplemental Information for PHC**

Under this provision, the RA must require the applicant to submit supplemental information for PHC if "If the operation may result in adverse impacts to the hydrologic balance within or outside of the proposed permit area." It is unclear how the regulatory agency could definitively rule that the proposed operation would never have the potential to cause an adverse impact to the hydrologic balance. This is an unrealistic requirement that leaves the applicant open to continually collecting additional data

without ever completely satisfying the regulatory agency. This also does not provide an adequate explanation as to how much additional data could be required to satisfy the regulatory agencies concern. This incredibly vague language needs to be stricken from the rule.

The section also states, “Adverse impacts may occur to the biological conditions of perennial or intermittent streams within the permit or in adjacent areas.” This language is vague and could easily be interpreted in a manner that would make it impossible for the applicant to meet. It is unclear how, even under a room and pillar mine design with no proposed subsidence, that there is not a minor potential chance for subsidence to occur. It is unclear how collecting additional data could ever completely relieve this potential concern and thus leaves the applicant with potential for being a perpetual state of data collection and cost with no benefit. This language needs to be stricken from the rule.

The rule states, “Acid forming or toxic forming material is present that may result in contamination of either groundwater or surface water supply.” Once again the use of “may” leaves this rule open to an interpretation that may never be satisfied. This language needs to be removed.

#### **Part 784.20(b)(2)(c): Subsequent Review of PHC Determinations**

The applicant must prepare a new or updated PHC whenever there is a permit revision and the regulatory authority review finds that revisions to the PHC are needed. The PHC will require significantly more detail than previously provided. Potentially reopening these for updates or rewrites during every permit revision will be time consuming, wasteful, and costly for both the operator and the regulator. The language should require an update if there is a compelling reason to do so, not in this arbitrary manner.

#### **784.21(b)(8)i(A)-(D)(iii): Prohibition on Stream Conversion**

Conversion of intermittent or perennial stream flow regime is not allowed under the proposed rule. As discussed above, conversion of flow regimes for streams cannot be completely avoided. “Reasonably foreseeable uses” is an undefined term that may result in litigation. The rule is requiring findings that are not possible to make. Mining can be accomplished without materially damaging the environment and will likely enhance it in the long term if reclamation is properly conducted. As with all human activity there will be some changes of a mostly temporary nature. The language in this rule must clearly acknowledge this fact.

#### **784.22b(iv)(A): Monitoring Point-Source Discharges**



This section requires the monitoring network to include monitoring of point-source discharges. This is covered by the NPDES program and should not be incorporated as a requirement into this rule.

#### **784.22b(iv)(C): Monitoring Upgradient and Downgradient**

This provision requires monitoring locations both upgradient and downgradient of the proposed operation, at a distance sufficiently close to the underground mine workings to detect changes as the operation progresses. The plan must include a schedule and map for moving these sites as the underground workings advance. Furthermore, operators must be able to determine impacts of the operation to the hydrologic balance and biologic conditions, and prevent material damage to hydrologic balance. For most underground mines it does not make sense to require water quantity/quality and biologic monitoring of surface water bodies over the shadow area. Due to the depth of the coal seam to be mined and the significant distance to discharge zones of these units there is little to no chance that mines will have impacted the water quality of streams within the shadow areas. The only way to truly evaluate impacts from mining would be through observations of water quantity. However, due to the large number of factors that can contribute to changes in stream flow within a watershed, the only change that could truly be attributed to the mining operation would be reductions of water quantity via localized subsidence. These would be evident from visual observations and would not require the significant cost associated with laboratory analysis and biologic monitoring.

Surface water monitoring will continue to remain in effect around the perimeter of the surface effects area. However biologic monitoring should not be considered as part of the long term monitoring plan. The permittee is required to monitor the receiving streams water quality and to monitor discharges from the surface effects area via the NPDES program. Aquatic life water quality criteria are designed to protect the most sensitive species. Thus, if the water quality standards are being met then there is no reason to require additional biologic monitoring in the same streams.

#### **784.22(c): Biologic Condition Monitoring**

This paragraph requires that biologic condition monitoring be adequate to evaluate the impacts of mining operation on the biologic condition of streams, and to determine in a timely manner whether corrective action is needed to prevent the operation from causing material damage to the hydrologic balance. It is unclear how biological condition monitoring could determine in a “timely” manner if corrective actions are necessary to prevent material damage to the hydrologic balance. This type of monitoring can only be conducted during certain times of the year and also must be spaced appropriately as not to degrade the existing population of macroinvertebrates and fish in the stream. Furthermore, changes in species densities are expected to occur

annually based on natural variations and other anthropogenic impacts (tree removal within stream corridor, farming, livestock, irrigation, unusual high flow events, etc.) to the watershed. It is unlikely that observed variation could be used to identify a problem attributable to the mining operation without also evaluating all other activities in the watershed. This is precisely why amended the CWA and created the NPDES program decades ago.

### **784.23(iii) Schedule and Map for Relocating Sites**

Proposed 784.23a(iii)A requires that for each aquifer above or below the coal unit to be mined, a groundwater monitoring program must be established. The plan must include a schedule and map for relocating these sites as the underground mining advances. Such monitoring would be very costly and time consuming if this provision requires more than residential well sampling. Residential well sampling serves this purpose now in many areas.

### **784.23(iii)(c) Well Placement Requirement**

Proposed 784.23a(iii) C requires that at least one monitoring well be located in the mine pool after mine closure. The proposal does not indicate the purpose of the well, or how long the well is to remain. It is unsafe to leave a well without someone being responsible for its continued integrity and safety, and a mine operator cannot retain responsibility in perpetuity.

**Proposed 784.24(a)(6)(ii)** is identical to the permit requirements under 780.24, and we offer the same objection.

**Proposed 816.34(a)** specifies that operators must protect groundwater quality using the best technology currently available (BTCA) to handle materials and runoff to prevent formation of acid or toxic mine drainage. At most mining operations, the implementation of BMPs is sufficient to prevent formation of acid / toxic drainage. It is unclear why this new language for BTCA is being proposed. Has BTCA been defined for groundwater protection and if so, what additional measures does it include?

**Proposed 816.34(d)** dictates that hydraulic structure inspections must be conducted, and a report filed within 2 days of a designated precipitation event. This requirement imposes additional cost and burdens with little environmental benefit, and is problematic in several ways.

First, this requirement refers to the hydraulic structures specified in 780.29, which does not contain requirements for any specific structure types. Does this inspection requirement include culverts, diversions, sediment ponds (of what size and/or design), sumps, etc.? The structure types included need to be more specific.

Second, the designated precipitation event in arid areas is designated by the regulatory authority. There is no instruction on how it is designated. If it is comparable to the two-year recurrence interval for non-arid areas, it may require much more frequent inspections than originally intended. Such events can happen frequently, especially in areas of the arid-west where annual precipitation patterns consist predominantly of winter snowfall and isolated summer monsoon storms.

Third, all structures are designed to withstand certain precipitation events. Sediment ponds are generally designed to a minimum of the 10-year event, culverts are typically designed to a 2-year event, diversions are designed to a 10-year event, etc. There is no reason to expect a failure of those structures during event of smaller magnitude.

Fourth, in areas of the west where the intense precipitation events during the summer monsoons are isolated spatially, this will likely require installation of numerous precipitation gauges. These gauges will need setup with real-time monitoring, so that the 48-hour reporting requirement can be met. This will increase costs to setup real-time precipitation gauge networks across the sites.

Lastly, sediment ponds structures are already inspected on a quarterly or annual basis by a Professional Engineer and reported to the regulatory authority. Structural deficiencies discovered and corrective actions taken are included in the reports. Additionally, inspections by the regulatory agencies nearly always include inspections of hydraulic structures.

### **816.38(a)**

Under proposed 816.38(a), there is a requirement to cover the material below the lowest coal seam with a layer of compacted material two orders of magnitude lower than surrounding spoil. In most cases the bottom of the pit will be below the water table once recharge occurs making this effort unnecessary. This will also result in increased cost due to the compaction requirements (increased equipment hours) for the bottom layer of spoil. It may also create a safety issue as a result of a potential for the compacted layer to move.

Encapsulating refuse within compacted spoil in the backfill could slow the reclamation progress and lead to storing toxic material on the surface until the compaction has been completed for the base of the storage area. Rain could fill compacted storage areas and require pumping and water treatment that would not be necessary if the material would be covered immediately below the spoil surface. How will the compaction process be verified? If regulators are required to verify compaction this would greatly increase the work load on inspectors and slow the process even more. This rule may increase the time needed for reclamation and result in refuse being exposed on the surface for longer periods of time. This could ultimately cause more issues with water treatment.

This issue is typically dealt with by designating an elevation limit for refuse in the backfill that will ensure it stays below the water table.

This part also requires that exposed coal seams be covered with compacted material. Most of the lowest coal seams would be below ground water level making compacting and covering toxic material below the coal seam unnecessary. The material would not be exposed for oxidation. This requirement is addressed in existing regulations under 816.102(f), but existing regulations only require that the coal seam be covered, not with compacted material. Again, there is no reason to cover coal seams with compacted layers if the coal seams are not acid-forming or will be beneath the water table. Furthermore, covering these coal seams will require operators to work adjacent to the highwall, which present numerous safety concerns.

In the current mining process, acid-forming strata are identified and a weighted mean approach is used to show that although those strata are present, the overburden column as a whole is alkaline. This acid base accounting approach has been successfully applied for decades. Is this approach still allowed? If selective handling is required for minor strata, the compaction requirements for the material surrounding the acid-forming / toxic material will increase cost and will be difficult to comply with in practice.

### **816.57: Restoration of Form and Function**

Revised rule at 816.57 is extensively modified. Section (b)(2) requires restoration of form and function and will implement standards for stream restoration currently part of the CWA 404 permit requirements. Performance standards and compliance will be measured both on the 404 permit and SMCRA permit, each requiring somewhat different standards, confounding compliance. This problem is one of the reasons SMCRA prohibits OSM from superseding the CWA.

Proposed 816.57 (b)(2)(iii) specify, "Performance bond calculations for the operation must include a specific line item for restoration of the ecological function." As previously discussed, restoration of stream function is an outcome expected from proper reclamation. Completing such reclamation is already accounted for in bond calculations. It is unclear how additional bond to guarantee such an outcome. Essentially, OSM is impermissibly trying to use bonds as a form of insurance. Thus, bond cost will be increased for Stream Restoration liability. The increase will likely be in the hundreds of thousands of dollars in additional bond liability. The proposal requires demonstration of full restoration of the hydrological form of the stream segment before qualifying for Phase I bond release, presenting a major hurdle to Phase 1 bond release in an already stressed bond market. The state regulators at this time do not have the

trained staff to enforce or administer biological function standards. The task will fall to paid consultants with the cost passed on to the permittee.

Many streams encountered in mining operations are classified as degraded stream segments. The new rule improperly requires the permittee to implement enhancement measures. In some cases conditions leading to the degraded classification may be beyond the permittees control to resolve or enhance, such as upstream pollution from agricultural runoff.

Proposed 816.57 would prohibit construction of sediment basins in a stream, or use an intermittent stream to convey affected area drainage, despite the fact that under certain conditions and subject to permitting requirements such constructs are permissible under the CWA. The later condition is especially problematic as existing drainages regularly carry affected area runoff to basins in the downstream watershed. It is difficult to conceive of how this rule would allow normal drainage control practices to proceed. The effect will be to require construction of many additional drainage control diversions and additional sediment basins with associated costs multiplied. Further, this restriction all but prohibits the only mechanism an operator has to comply with the newly proposed requirement to control peak rate of runoff. Prohibiting the use of drainages for sediment pond construction will require more diversions and sediment ponds to be constructed across the site, resulting in additional environmental impacts. The segment of intermittent the stream would then be left without a source of runoff denying water to that segment of the stream. All regions currently have sediment pond structures located in intermittent streams. The rule would require that literally thousands of ponds currently in intermittent be removed from existing mines at renewal. This would create a tremendous disturbance for no environmental benefit. This requirement is unworkable.

Interestingly, an exemption for valley fills is written in to the rule under 816.57 (c)(3) for placement of sediment basins in streams. This exemption is a strong indicator that OSM has no basis in SMCRA to prohibit construction of basins in a stream.

The rule would prohibit “end-dumping”. This would seem to be applicable to valley fill situations but as written, it precludes end-dumping for disposal of all excess spoil, unnecessarily adding tremendous cost to many mining operations.

### **816.105: Spoil Placement**

Proposed 816.105 would require that excess spoil be placed on top of the existing mine out area. This will greatly increase the spoil elevation in many areas if “blending” is not allowed. This provision conflicts with AOC requirements, which mandate such blending. Under the proposal, blending appears to be allowed where AOC variance are authorized. The language on blending should be improved to provide clarity.

**817.57: Functional Restoration Criteria**

Proposed 817.57 specifies that a stream flowing through a restored stream channel or a stream channel diversion must meet the functional restoration criteria established by the regulatory authority under 784.28(e)1 of this chapter: Section 784.28 states that, “the regulatory authority must establish objective standards for determining when the ecological function of a restored or permanently diverted perennial or intermittent stream has been restored.” Essentially, no standards have been established and making this is very subjective requirement. Coal mining is a capital-intensive business and operators need to understand costs prior to submitting an application.

**VII. Conclusion**

Thank you for considering these comments. Should you have any questions please feel free to contact Adam Eckman, Associate General Counsel for the National Mining Association at [aeckman@nma.org](mailto:aeckman@nma.org), (202) 463-2643.

Sincerely,



Adam Eckman  
Associate General Counsel  
National Mining Association



**To:** Mashburn, Lori[lori\_mashburn@ios.doi.gov]  
**From:** Tim Doyle  
**Sent:** 2017-03-24T09:42:54-04:00  
**Importance:** Normal  
**Subject:** RE: Tim Doyle's Resume per David Bernhardt  
**Received:** 2017-03-24T09:43:04-04:00

Hi Lori,

I am practicing the lost art of using a tickler file to circle back with you on our conversation. I hope all is going well.

In case you didn't see it, the hyper link below is a project I have been working on regarding BLM's Methane Rule and the Congressional Review Act.

[ACCF launches campaign against BLM's Methane Rule](#)

Let me know if there is anything else I can provide for you.

Have a good weekend!

Regards,

Tim

**From:** Mashburn, Lori [mailto:lori\_mashburn@ios.doi.gov]  
**Sent:** Friday, March 10, 2017 3:14 PM  
**To:** Tim Doyle <TDoyle@accf.org>  
**Subject:** Re: Tim Doyle's Resume per David Bernhardt

Running a few behind. Does 3:30 work?

Lori K. Mashburn  
White House Liaison  
Department of the Interior  
202.208.1694

On Mon, Feb 6, 2017 at 8:28 AM, Tim Doyle <[TDoyle@accf.org](mailto:TDoyle@accf.org)> wrote:  
Hi Lori,

I am forwarding you a copy of my resume per David Bernhardt. He suggested that you would be the best person to send it to. I'd be happy to discuss, but realize you are likely getting inundated with resumes.

Let me know when you get a minute.

Regards,

Tim



**Tim Doyle**

**Vice President of Policy & General Counsel**

American Council for Capital Formation (ACCF)

ACCF Center for Policy Research

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**Cc:** douglas.s.chin@hawaii.gov[douglas.s.chin@hawaii.gov]; Karen White (Karen.white@cwagweb.org)[Karen.white@cwagweb.org]; Chris Coppin (ccoppin@cwagweb.org)[ccoppin@cwagweb.org]  
**From:** Fox, Tim  
**Sent:** 2017-03-24T13:44:05-04:00  
**Importance:** Normal  
**Subject:** FW: CWAG Transition Paper  
**Received:** 2017-03-24T13:46:21-04:00  
[Final CWAG 2017 Transition Paper.docx](#)

Scott

The Conference of Western Attorneys General (CWAG) asked that I forward the attached transition paper to you for Secretary Zinke and his administration. CWAG is one of four regional sections of the National Association of Attorneys General (NAAG). Like NAAG, CWAG is made up of both Democrat and Republican attorneys general.

Due to the geographical location of our states in the west, CWAG attorneys general work frequently with the Department of the Interior and its various divisions and bureaus. In addition, as you know, all of the western states have significant federal lands and property within their borders. As a consequence, CWAG has historically had very good communications with the Secretary of the Interior.

Each time there has been a new President, and consequently a new Secretary of the Interior, CWAG has prepared a transition paper to inform the Secretary of the Interior and the new Administration in the White House about current issues, projects, and topics of importance or concern to our states. The transition papers are a collective effort that reflect the bi-partisan nature of CWAG. Individual state attorneys general may independently reach out to the Department of the Interior from time to time to express additional or slightly difference issues, or to express differing opinions. However, the attached transition paper reflects a general consensus among a majority of the CWAG attorneys general.

CWAG asks that Secretary Zinke receive a copy of the attached transition paper. In addition, feel free to distribute copies to anyone else at DOI that should receive a copy.

On a related note, if Secretary Zinke accepts the invitation to attend the NAAG summer meeting at Big Sky on June 20-22, I believe that CWAG will be requesting a 30 to 60 minute audience with him while he is there. (FYI- CWAG will also be hosting golfing at the Yellowstone Club on Sunday, June 18<sup>th</sup>, a guided fly fishing trip on the Madison River on Monday, June 19<sup>th</sup>, and a dinner at Moonlight Basin Lodge on Monday evening, June 19<sup>th</sup>).

CWAG attorneys general typically meet with the Secretary at their February meeting each year in Washington, DC, but that was not possible this year because the Senate had yet to confirm Secretary Zinke. I believe that the current CWAG chairman, Hawaii Attorney General Doug Chin, will be sending a formal request for a meeting with Secretary Zinke at Big Sky sometime soon, and I expect that he will also invite Secretary Zinke to participate in the June 18<sup>th</sup> golfing, and the June 19<sup>th</sup> fly fishing trip and dinner.

Thank you for your assistance. Please let me know if you have any questions.

Tim

Cc: Karen White (CWAG Executive Director); Attorney General Doug Chin (CWAG Chair); Chris Coppin (CWAG Legal Director)

*Tim Fox*  
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**From:** Chris Coppin [mailto:[ccoppin@cwagweb.org](mailto:ccoppin@cwagweb.org)]  
**Sent:** Friday, March 24, 2017 10:36 AM  
**To:** Fox, Tim <[TimFox@mt.gov](mailto:TimFox@mt.gov)>; James, Julie <[JulieJames@mt.gov](mailto:JulieJames@mt.gov)>  
**Cc:** Karen White <[karen.white@cwagweb.org](mailto:karen.white@cwagweb.org)>; douglas.s.chin@hawaii.gov; Wisch, Joshua A <[Joshua.A.Wisch@hawaii.gov](mailto:Joshua.A.Wisch@hawaii.gov)>  
**Subject:** CWAG Transition Paper

Dear General Fox:

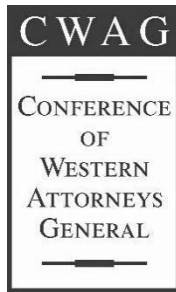
A sufficient number of CWAG states have approved the final CWAG transition paper to have it placed on CWAG letterhead. See attached. Since 90% of the concerns apply to the Department of the Interior, would you mind sending this to your Interior contacts to bring to the Secretary's attention? The non Interior item concerns the Waters of the United States rule, which is an EPA related issue. We will transmit the paper to EPA separately.

Thank you for your assistance with this request.

Respectfully,

Chris Coppin  
Legal Director CWAG  
1300 I Street Suite 1340  
Sacramento, CA 95814  
505 589 5101 (cell)  
817 615 9335 (fax)  
[Ccoppin@cwagweb.org](mailto:Ccoppin@cwagweb.org)





**BRIEFING PAPER FOR THE ADMINISTRATION OF  
PRESIDENT DONALD J. TRUMP**

**BY THE CONFERENCE OF WESTERN ATTORNEYS GENERAL**

**Douglas Chin**  
**Chair, Conference of Western Attorneys General**  
**Attorney General of the State of Hawaii**

**Chris Coppin**  
**Legal Director**  
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**1300 I Street**  
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B. Endangered Species Act

C. Public Lands

D. Water Law

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## **I. INTRODUCTION: OVERARCHING PRINCIPLES OF FEDERALISM**

The Conference of Western Attorneys General (CWAG) is a bipartisan group comprised of the chief legal officers of 15 western states and the three Pacific Island jurisdictions. CWAG focuses on areas of common concern: public lands, minerals, water, wildlife, environmental protection and Indian law. In each of these policy areas, the overlapping responsibilities shared by state and federal regulators give rise to tensions. As a conference, we believe these tensions can be alleviated by a federal administration that commits to upholding the principles of federalism.

Federalism is one of the cornerstones of our constitutional system of government. The Founding Fathers established a Constitution that delegated limited powers to the national government, while all other sovereign powers were reserved to the states. This arrangement is explicitly articulated in the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The result is a federal system of dual sovereignty; state governments were not mere administrative departments of the central government, but sovereigns who retained great dignity.

Federalism restrains governmental excess by establishing rival sovereigns that compete against each other, with each sovereign jealous to prevent the undue aggrandizement and concentration of power by the other. This rivalry preserves liberty. In *The Federalist*, No. 51, James Madison describes how these checks and balances function:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the right of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The tremendous wisdom of Madison's insight is that the principle of federalism preserves liberty both ways. Whether tyrannical impulses emanate from state governments or the national government, the American system of federalism ensures that a sovereign will be incentivized to intervene on behalf of the people.

In this federal system of dual sovereignty, state governments are better equipped to make many decisions by the simple fact that they are closer to the ground. This superiority is no reflection of

any failure of virtue in federal decision makers, but merely a consequence of distance. Compared to the national government, states are more accountable and responsive to their constituents and are better able to make public policy tailored to their unique circumstances.

The western states believe that further efforts are needed to ensure that the national government respects the sovereign powers and responsibilities of the states. The federal government's vast land holdings and water claims in the western states and its trust responsibility for Indian tribes raise special federalism concerns. CWAG trusts that the administration will recognize the western states' need to regulate state resources for the maximum benefit of their citizens. This need is especially evident in the areas of water, public lands, minerals, and environmental protection. A brief discussion of specific issues and recommended actions is included below.

When the many federal and state interests in public resources coincide or collide, the western states encourage the administration to consult and cooperate with state and local governments. This can be accomplished through negotiations, agreements and understandings that reflect a genuine understanding and respect for the states' important and sovereign interests. A brief discussion of specific issues and recommended actions relative to tribal-state relations is also included below.

We note that a number of these issues do not directly affect some CWAG members, such as, Hawaii, Guam, American Samoa, or the Northern Mariana Islands. In addition, the State of Washington does not join in this document.

## **II. DISCUSSION AND RECOMMENDATIONS**

### **A. FEDERALISM**

#### **1. Support State-Federal Collaborative Law Enforcement Efforts**

The CWAG Alliance Partnership is an international rule of law program supported by the state Attorneys General's Offices (AGOs) of 42 U.S. states and jurisdictions. The CWAG Alliance Partnership promotes collaboration among state Attorneys General from participating countries; supports greater efficiency and transparency in criminal, civil and commercial judicial systems; and provides training programs that promote the effective investigation and prosecution of transnational criminal activity.

During the past decade of fostering institutional relationships with state AGOs in Mexico, the CWAG Alliance Partnership has generated robust support from every state-level jurisdiction in Mexico, as well as the federal AGO. This collaborative partnership, funded by the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL), encourages successful prosecutions of trans-border crime and enhanced communication and collaboration with our counterparts in Mexico. Activities include programs to combat transnational crime at the state level, regular communications to strengthen information exchanges among involved AGOs, and



training and consulting programs to support Mexican AGOs in their transition to an oral, adversarial criminal justice system.

CWAG Alliance Partnership programs have also brought together public and private sector partners together to promote the rule of law, combat corruption and support uniform enforcement of laws in various countries, including El Salvador, Cuba, Rwanda and South Africa.

**Recommendation: Continue to support collaborative law enforcement efforts by states and the federal government, such as the CWAG Alliance Partnership.**

## **2. Commit to a Continuing Dialogue With CWAG**

The CWAG members have traditionally met with the Secretary of the Department of the Interior at the conclusion of the winter meeting of the National Association of Attorneys General in Washington, DC. This meeting is invaluable because of Interior's work in the areas of great importance to the western states, such as water, public lands, Native Americans and fish and wildlife.

**Recommendation: That the Secretary of the Department of the Interior meet with CWAG members in the offices of the Secretary of the Department of the Interior to discuss important federal-state issues of common interest.**

## **B. ENDANGERED SPECIES ACT**

Many of the most difficult and intractable environmental conflicts in the western states involve those species listed as threatened or endangered under the auspices of the Endangered Species Act ("ESA"). The ESA, like other federal environmental programs, envisioned an active partnership between the federal agencies and states.

**Recommendation: Ensure federal agencies value and foster a cooperative state-federal approach to species protection.**

## **C. PUBLIC LANDS**

The western states urge the administration to adopt and implement cooperative policies that incorporate reasonable administrative measures to facilitate the recognition of valid, existing R.S. 2477 rights-of-way for roads across federal land. States have adopted and codified such policies to protect and preserve R.S. 2477 rights-of-way and have sought for years to obtain recognition of these rights-of-way from the agencies that manage federal land, primarily the Department of the Interior (DOI) and Bureau of Land Management (BLM). It is important to understand that states seek only to preserve existing rights-of-way that were created prior to the 1976 repeal of R.S. 2477, over 40 years ago. In *Southern Utah Wilderness Alliance v. Bureau of Land Management*, 425 F.3d 735 (10th Cir. 2005), the Tenth Circuit Court of Appeals issued a landmark opinion regarding R.S. 2477 rights-of-way. The opinion confirms long-standing legal precedent establishing that

R.S. 2477 grants were self-executing and do not require judicial recognition to be valid. The relevant federal agencies should establish guidelines to be followed nationwide and noting that state and local offices of the BLM should apply long established principles of state law governing the creation of rights of way.<sup>1</sup>

**Recommendation: Ensure that state and local offices of federal land management agencies fully implement this policy and work cooperatively with western states and counties to employ reasonable administrative measures to recognize valid, existing R.S. 2477 rights-of-way, where needed.**

## **D. WATER LAW**

### **1. Respect for State Sovereignty Over Water**

Federal agencies should recognize Congress' policy of deference to state regulation of water.

**Recommendation: That any regulations, policies, or laws adopted by federal agencies should respect state sovereignty over water. Since Congress has the authority to reserve water, federal agencies should be reticent to pursue federal reserved water rights in the absence of an express reservation of water by Congress. Instead, federal agencies should be directed to pursue water rights in accordance with state law.**

### **2. Waters of the United States**

On June 29, 2015, the Environmental Protection Agency and the United States Corps of Engineers published a final rule that provides a new definition of “waters of the United States” as this term is used in the Clean Water Act (CWA). The definition of waters of the United States (WOTUS) determines the scope of the regulatory programs under the CWA, and for several reasons has a significant impact on states, particularly arid western states. First, the definition of WOTUS affects the Clean Water Act programs that states implement. Most states have been authorized to implement the permitting program under the CWA in lieu of the Environmental Protection Agency. This program requires permits for any point sources that discharge pollutants to WOTUS. 33 U.S.C. §1342. In addition, states are directed under the CWA to develop water quality standards that define the uses to be made of WOTUS within a particular state, and criteria to protect those uses. States are required to identify those waters that fail to meet water quality standards and for such waters, develop plans to ensure their restoration. 33 U.S.C. §1313. Thus, the definition of WOTUS directly affects the scope of the water quality programs implemented by states under the CWA.

---

<sup>1</sup> “North Dakota concurs but separately states that the North Dakota Supreme Court has recognized for over 100 years that R.S.2477 rights-of-way or section lines are, as a matter of law, public highways in North Dakota.”

Second, the definition of WOTUS impacts the scope of water resources that states regulate under independent state authority. The new definition, to the extent it broadens the scope of WOTUS, allows regulation under the CWA of water resources that have traditionally been within the scope of state, rather than federal, jurisdiction.

The new rule was challenged in a number of lawsuits, and was stayed by the 6th Circuit Court of Appeals on August 27, 2015.

**Recommendation: The western states are split on whether the new definition of WOTUS is valid under the CWA. The States of California, Hawaii, Oregon and Washington support the new definition. The remaining eleven western states oppose the new definition and would request that the administration withdraw the new WOTUS definition, and direct the EPA to work with the states to develop a more workable definition of the WOTUS.**

## E. INDIAN LAW

### General Areas of Concern

#### 1. Communication and Information Sharing

The unique relationship between tribes, the federal government and the states makes open communication among all three governments essential. Shutting out states eliminates opportunities to craft approaches and solutions workable for all, damages relationships that states have spent decades fostering with tribes, and forces states into a defensive, conflict-oriented posture.

**Recommendation: The CWAG states strongly urge the incoming administration to involve states at the earliest possible time and to the maximum extent practicable when considering issues that affect states and their relationships with Indian tribes.**

#### 2. Definition and Clarity of Federal Responsibilities to Tribes

When a federal agency cites the “trust responsibility” as the basis for a federal action that affects the interests of others, it is essential that the authority under which the federal agency purports to act be made clear.

A generalized trust responsibility to Indian tribes is not, by itself, authority to act. Any specific obligations the federal government may owe to Indian tribes are “governed by statute.” *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 165 (2011) (“The trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law, and in fulfilling its statutory duties, the Government acts not as a private trustee but pursuant to its sovereign interest in the execution of federal law.”) The actions and decisions of federal agencies

and officials should be grounded in statute, not individualized perceptions of what may be in a tribe's interest.

The ambiguities in federal laws enacted for the benefit of Indians are construed based on a presumed federal intent to benefit Indians. But that canon of construction should not override statutory language and other evidence of legislative intent. *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). The trust responsibility does not necessarily permit a reading of an unambiguous enactment or the insertion of words or language which Congress did not enact. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 15-16 (2001).

**Recommendation: Federal agencies acting under what they perceive to be their trust responsibility ought to identify the federal statute they are implementing or interpreting. When adopting a position adverse to and potentially damaging to the interests of the states, federal agencies should clearly identify the authority under which they act.**

### **3. Supporting all Government-To-Government Relationships**

Western states work hard to build government-to-government relationships with tribes in those states. Building and maintaining those relationships requires time, effort, trust, and communication. The CWAG states support the federal executive's efforts to strengthen and maintain governmental relationships with tribes, through Tribal Nations Conferences and other federal/tribal forums. We are all in this together, and federal agencies should respect and support state/tribal relationships.

**Recommendation: In establishing the federal/tribal relationship, the federal government must encourage the relationships that tribes have with the states and the local governments with whom they live and interact on a daily basis.**

## **Specific Areas of Concern**

### **1. Indian Reserved Water Rights**

"[T]he history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *California v. United States*, 438 U.S. 645, 653 (1978). Deference to state regulation of water does not mean Congress lacks the power to preempt state law, but, rather, it illustrates the limited scope of federal regulation of water. The implied reserved water rights doctrine is a narrow exception to the federal policy of deference to state water law. Under this rule of statutory construction, in instances where Congress does not consider whether to reserve water, a court may find that it reserved, by implication, enough water to fulfill the primary purposes of land withdrawn from the public domain. Essential to such a finding is evidence of congressional or executive intent to reserve water for the reserved lands. The constitutional power to create a federal reserved water right rests with Congress, not with executive agencies or the judiciary.

Assertions of Congressionally implied water rights for Native American Tribes have had a dramatic and widespread impact, particularly on the western states. And unfortunately such assertions have been made by federal agencies, seemingly without regard for the role that Congress and these agencies must play in resolving the disputes they create. The settlement of Indian reserved water rights litigation remains a top priority for many western states and tribes. Currently, legislation is pending before Congress to approve three settlements, and nineteen settlement teams are working to resolve other pending claims.

**Recommendation: That the relevant federal agencies: (1) support settlement of tribal claims through negotiation, and (2) lobby for the necessary resources and funds to implement settlement of Indian reserved water rights.**

## **2. Law Enforcement in Indian Country**

In many western states, Indian country areas are high crime areas with the least amount of law enforcement resources. Adequate law enforcement services can only be provided if the several jurisdictions with criminal jurisdiction in Indian Country can work together and if the United States provides adequate funding, training, and support for federal and tribal law enforcement and court systems. Federal agencies should encourage efforts of state and tribal governments to work together to provide adequate law enforcement.

Cross-jurisdictional and cross-deputization agreements among state, tribal, federal, and local governments can and should supplement the jurisdiction that each sovereign exercises. Under 28 U.S.C. §2804, state and local law enforcement officials may receive special law enforcement commissions to enforce federal law within Indian country under certain conditions. Some states have laws that permit Indian tribal law enforcement officials to enforce state law within Indian country under certain conditions. Some tribes have entered into cross-deputization agreements with local or state law enforcement agencies.

**Recommendation: That the Administration commit to support cross-jurisdictional agreements and federal programs must be funded to empower the federal government and Indian tribes to provide meaningful due process in criminal procedures and adequate law enforcement services.**

## **3. Fee-to-Trust Process under Section 5 of the Indian Reorganization Act (25 U.S.C. § 465)**

Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior to acquire land and take title to the land in trust for an Indian tribe. Section 5 contains no limits, standards, or guidelines on the exercise of the Secretary's power which essentially leaves states and local governments without a forum to raise concerns. Today, a common scenario is that a tribe buys land and conveys it to the United States to be held in trust. Such conveyances significantly alter the jurisdictional landscape including criminal, civil regulatory, and taxing authority of state, local, and tribal governments.

In recent years, more than 500,000 acres of land into trust for the benefit of tribes. CWAG members do not necessarily oppose that objective but CWAG members often do not receive notice of pending fee-to-trust applications. At one time, the BIA notified state Attorneys General in accordance with 25 C.F.R. §§ 151.10 and 151.11, but many CWAG members no longer receive such notices, though local governments may receive them.

**Recommendation: State Attorneys General need to know about fee-to-trust applications so that they can respond when contacted by local government. The BIA should resume consistently sending notices of fee-to-trust applications to state Attorneys General.**

#### **4. The Compact Negotiation Process Under the Indian Gaming Regulatory Act**

The Indian Gaming Regulatory Act (IGRA) recognizes states' legitimate efforts to address "the public interest, public safety, criminality, [and] financial integrity" in negotiating gaming compacts with tribes (see, e.g., 25 U.S.C. § 2710(d)(7)(B)(iii)(I)).

The U.S. Supreme Court held in 1996 that Congress lacked the authority to abrogate states' sovereign immunity in IGRA. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). Most states have not waived sovereign immunity to suits under IGRA. The prior administration implemented a regulation that allowed the federal government to determine whether a state has negotiated in bad faith and determined that, where it makes such a finding, it may impose class III gaming upon a state through such procedures as the Secretary may adopt. 25 C.F.R. Part 291. Although in *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), the court found the Secretary lacked authority to do that, the Secretary has continued to pursue that authority. The Secretary's position is also at issue in *New Mexico v. Department of the Interior*, 10th Circuit Court of Appeals, No. 14 2222.

**Recommendation: At this time, the Fifth Circuit is the only circuit to rule on this issue. Several CWAG states believe the Fifth Circuit's rationale in the majority and concurring opinions in *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007), which invalidated the class III gaming procedures in 25 C.F.R. Part 291, correctly state the law. Rather than attempt to continue enforcement of 25 C.F.R. Part 291 in other circuits, the administration is encouraged to instead work with the tribes and states to amend the IGRA to resolve any disputes.**

#### **5. Taxation in Indian Country**

Whether a state can impose a tax in Indian country depends on where the tax is imposed and on whom (tribal member or non-member). State taxes directed at activities or property of tribes or tribal members within Indian country are generally preempted. Conversely, state taxes directed at transactions or property of non-Indians within Indian country are presumptively valid. Determining which government(s) have taxing authority in Indian country requires careful attention to: where the taxable transaction occurs, the nature of the tax what is being taxed and who bears the legal incidence of the tax; whether the on-reservation activity is centered in a direct commercial relationship between the taxpayer and the tribe or tribal member; the nature of any applicable federal statutes; and the governmental services provided to the taxpayer by the

respective governments. These inquiries are designed to help align the taxing authority with the government most closely associated with the generation of the value being taxed and with the governmental services being provided to the taxpayer.

**Recommendation: That the administration adhere to the case law adopted by the United States Supreme Court regarding state taxation of non-Indians in Indian country. See *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989).**





**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Bernstein, Ryan (Hoeven)  
**Sent:** 2017-03-28T10:21:34-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T10:21:42-04:00

Micah,

You can confirm us attending. Also, do you know if methane will be included in the orders? Are we giving up on a CRA for it?

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Monday, March 27, 2017 6:27 PM  
**To:** Bernstein, Ryan (Hoeven) <Ryan\_Bernstein@hoeven.senate.gov>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Thank you. Hopefully we'll have more specifics for attendees tomorrow than the blurb I just sent you. Appreciate you working with us last minute. If you'll be at the signing tomorrow, I might see you there.

On Mon, Mar 27, 2017 at 6:25 PM, Bernstein, Ryan (Hoeven)  
<[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:  
We will likely make this work.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Monday, March 27, 2017 6:04 PM  
**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>  
**Subject:** Fwd: Wednesday Morning Secretarial Orders

Ryan. Thanks for chatting. We'd be looking at a Sec. Orders Signing Wednesday morning at 10-1030 am. We're focusing on reestablishing the Royalty Policy Committee, Federal Coal Moratorium, Fracking rule and other Oil/Gas on Federal Land issues along with Compensatory Mitigation for pipelines.

If he can attend, we'd appreciate it. We'd ask for the Senator and two staff max.

--

Micah Chambers  
Special Assistant / Acting Director

Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Bernstein, Ryan (Hoeven)  
**Sent:** 2017-03-28T10:25:59-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T10:26:18-04:00

Thanks.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 10:24 AM  
**To:** Bernstein, Ryan (Hoeven) <Ryan\_Bernstein@hoeven.senate.gov>  
**Subject:** Re: Wednesday Morning Secretarial Orders

My understanding is that CRA is still in play. It was just mentioned in the call that venting/flaring was on the table in the EO. That would be new as of this morning, so we certainly still prefer a CRA and it's not in our list of Secretarial orders for tomorrow.

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Ryan Bernstein  
U.S. Senator John Hoeven

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Special Assistant / Acting Director  
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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Pearce, Sarah (Portman)[Sarah\_Pearce@portman.senate.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-03-28T10:28:28-04:00  
**Importance:** Normal  
**Subject:** RE: Venting and Flaring ideas  
**Received:** 2017-03-28T10:28:37-04:00

Hey Micah you have time for a quick call this morning? My direct is (b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 21, 2017 4:44 PM  
**To:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Cc:** Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov>  
**Subject:** Re: Venting and Flaring ideas

Thanks for sending this over.

On Mon, Mar 20, 2017 at 5:32 PM, Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov> wrote:  
Micah - see below for the ideas I mentioned. Let us know if you have any questions.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Patrick Orth <(b) (6)>  
Date: 3/20/17 5:29 PM (GMT-05:00)  
To: "Orth, Patrick (Portman)" <patrick\_orth@portman.senate.gov>  
Subject: Venting and Flaring ideas

Micah - thanks for taking the time today.

Below is a matrix of some of the ideas I offered this afternoon. I've been told that these changes could be made quickly by means of a "Notice to Lessees" that supersedes the 1974 era NTL 4A.

Here is a link to the EIA blog post on how North Dakota's flaring rules using flaring targets. EIA describes how flaring rules have helped to sharply curtail the practice of flaring gas in North Dakota: <https://www.eia.gov/todayinenergy/detail.php?id=26632>

Here's an article about Colorado that has EDF praising their regulations as a standard for the country: <https://www.scientificamerican.com/article/colorado-first-state-to-limit-methane-pollution-from-oil-and-gas-wells/>

Here's a factsheet about the regulation: [https://www.colorado.gov/pacific/sites/default/files/AP\\_Regulation-3-6-7-](https://www.colorado.gov/pacific/sites/default/files/AP_Regulation-3-6-7-)

[FactSheet.pdf](#) Page 3 has a table that shows the tiered inspection schedules for existing marginal wells that I was talking about. As you'll see LDAR surveys are only required for the first inspection and then depending on the leakage they are not required to do LDAR surveys again. If BLM is willing to keep any of the rule on existing wells I think this would be a change that industry and EDF could support.

Finally, attached is slide deck that the BLM used in their initial public outreach on Venting & Flaring back in May 2014. As you will see, their initial proposals are basically what I suggested as 'rational middle ground' solutions.

Let me know if you have any questions and thanks again.

Pat

<b>Well Development Phase</b>	<b>Current Practice under NTL-4a</b>	<b>Practice Under November 2016 BLM Rule</b>	<b>Middle Ground</b>
<b>Venting &amp; Flaring during Well Completion</b> (Casing & Cementing, Perforation, Fracturing usually 7-10 days)	Venting & Flaring is royalty-free with BLM approval.	If there is no pipeline in place, flared volumes are subject caps stated below.	Royalty could be charged in order to incentivize waste-reduction.
<b>Venting &amp; Flaring during Initial Production Test</b> (1 <sup>st</sup> 30 days or 1 <sup>st</sup> 50,000 mcf of production)	Vented/flared gas is royalty-free for 1st 30 days or 1st 50 MMCF of production whichever comes first.	If there is no pipeline in place, flared volumes are subject caps stated below.	Require operator to be on site during all tests; limit performance tests to the time needed to validate performance. Charge royalty to incentivize waste-reduction.

<p><b>Flaring with Gas Conservation Plan</b>  (BLM allowed operators to flare gas for up to 1 year if they had a Gas Conservation Plan typically a plan to build a gas pipeline that would be active after 1 year.</p>	<p>BLM required permit applications to explain the specific economic and technical reasons for the flaring, including estimates of total flared volumes and ultimate production expected from wells</p>	<p>Total “flaring allowable” volumes are imposed. These phase down from 2018-2025 from 5,400 Mcf/per well to 750 Mcf/per well, on average across operations in a state.</p>	<p>Flaring is authorized only during the time it takes to construct a pipeline.  Restrict number of extensions allowed for approval of flaring.</p>
<p><b>Flaring during “Force Majeure” Events</b> (Pipeline maintenance, pressure relief, safety)</p>	<p>Royalty is not charged for vented/flared volumes during Force Majeure events.</p>	<p>Royalty is charged during Force Majeure events BLM deems should have been predictable. Also certain flared volumes contribute to the cap above.</p>	<p>Royalty may be charged for flared volumes associated with maintenance events, but these events would not contribute to a ‘cap’ on flared volumes.</p>

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** heather\_swift@ios.doi.gov[heather\_swift@ios.doi.gov]  
**From:** Chris Knight  
**Sent:** 2017-03-28T10:42:35-04:00  
**Importance:** Normal  
**Subject:** Zinke comments today  
**Received:** 2017-03-28T10:42:47-04:00

Heather,

Secretary Zinke today on Morning Joe said it was his position that it is a “waste to vent methane” and then goes on to say it should be easier to get pipelines built to transport natural gas (to avoid venting). That to me suggests that Zinke might support the BLM methane rule, but he’s kind of giving mixed signals. Can you say at this point whether Zinke supports the existing methane rule, or does he want to change it?

ZINKE: Well, we're going to do it right. Again, it is better to produce energy here under reasonable regulations. As an example, the methane rule. Everyone should realize that my position on methane is this is a waste to vent methane, but we also have to have the collection systems in place to make sure we can either inject it or use that methane. But when you can't build a pipeline, you can't build collection systems, then what you do is end up isolating assets. So we as a country -- all the above energy policy is prudent. We can do it right. We need to hold industry accountable but also jobs matter and there's a social cost of not having jobs in this country.

Thanks,  
Chris

Chris Knight  
Reporter  
202-349-2876



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**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Newman, Jennifer (Hoeven)[Jennifer\_Newman@hoeven.senate.gov]  
**From:** Bernstein, Ryan (Hoeven)  
**Sent:** 2017-03-28T11:13:29-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T11:13:37-04:00

Looping in Jen. She can provide you the names and then she can get the logistical details from you.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 11:08 AM  
**To:** Bernstein, Ryan (Hoeven) <Ryan\_Bernstein@hoeven.senate.gov>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Ryan. If you can send the names of the staff that will be coming with the Senator by 3 pm it'd be appreciated. Thanks again.

Micah

On Tue, Mar 28, 2017 at 10:25 AM, Bernstein, Ryan (Hoeven)  
<[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:  
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U.S. Senator John Hoeven

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**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>  
**Subject:** Fwd: Wednesday Morning Secretarial Orders

Ryan. Thanks for chatting. We'd be looking at a Sec. Orders Signing Wednesday morning at 10-1030 am. We're focusing on reestablishing the Royalty Policy Committee, Federal Coal Moratorium, Fracking rule and other Oil/Gas on Federal Land issues along with Compensatory Mitigation for pipelines.

If he can attend, we'd appreciate it. We'd ask for the Senator and two staff max.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Special Assistant / Acting Director

Office of Congressional & Legislative Affairs

Office of the Secretary of the Interior

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Newman, Jennifer (Hoeven)  
**Sent:** 2017-03-28T11:22:17-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T11:22:38-04:00

Micah,

Shawn Affolter and the Senator will attend tomorrow morning. Will there be parking?

Thanks,

**Jen Newman**

Senator John Hoeven (R-ND)

338 Russell Senate Office Building | (202) 224-2551 | [www.hoeven.senate.gov](http://www.hoeven.senate.gov)



---

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**Sent:** Tuesday, March 28, 2017 11:13 AM  
**To:** Chambers, Micah <micah\_chambers@ios.doi.gov>  
**Cc:** Newman, Jennifer (Hoeven) <Jennifer\_Newman@hoeven.senate.gov>  
**Subject:** RE: Wednesday Morning Secretarial Orders

Looping in Jen. She can provide you the names and then she can get the logistical details from you.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [[mailto:micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Tuesday, March 28, 2017 11:08 AM  
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Ryan. If you can send the names of the staff that will be coming with the Senator by 3 pm it'd be appreciated. Thanks again.

Micah

On Tue, Mar 28, 2017 at 10:25 AM, Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:  
Thanks.

Ryan Bernstein  
U.S. Senator John Hoeven

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**Subject:** Re: Wednesday Morning Secretarial Orders

My understanding is that CRA is still in play. It was just mentioned in the call that venting/flaring was on the table in the EO. That would be new as of this morning, so we certainly still prefer a CRA and it's not in our list of Secretarial orders for tomorrow.

On Tue, Mar 28, 2017 at 10:21 AM, Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:

Micah,

You can confirm us attending. Also, do you know if methane will be included in the orders? Are we giving up on a CRA for it?

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Monday, March 27, 2017 6:27 PM  
**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Thank you. Hopefully we'll have more specifics for attendees tomorrow than the blurb I just sent you. Appreciate you working with us last minute. If you'll be at the signing tomorrow, I might see you there.

On Mon, Mar 27, 2017 at 6:25 PM, Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:

We will likely make this work.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

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Ryan. Thanks for chatting. We'd be looking at a Sec. Orders Signing Wednesday morning at 10-1030 am. We're focusing on reestablishing the Royalty Policy Committee, Federal Coal Moratorium, Fracking rule and other Oil/Gas on Federal Land issues along with Compensatory Mitigation for pipelines.

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior











**To:** amanda\_kaster@ios.doi.gov[amanda\_kaster@ios.doi.gov];  
micah\_chambers@ios.doi.gov[micah\_chambers@ios.doi.gov]  
**From:** Small, Jeff  
**Sent:** 2017-03-28T14:34:31-04:00  
**Importance:** Normal  
**Subject:** RE: DOI Secretarial Order Wednesday 10am  
**Received:** 2017-03-28T14:40:05-04:00  
[Congressional Western Caucus Membership 115th with new membership asterisk.docx](#)

Amanda,

Thank you for the call yesterday. Rep. Gosar would love to attend tomorrow and we have on his schedule.

Can you send us updated details when you have it?

Also, can he bring one or two other Caucus Members?

We are open to anyone from the attached list but would be great if my boss or I could extend an invite to one or two other folks.

Sincerely,

**Jeff Small**

*Executive Director | Congressional Western Caucus  
Senior Advisor | Congressman Paul A. Gosar, D.D.S.  
2057 Rayburn HOB | Washington, DC 20515  
(202) 225-2315 main  
[jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov)*



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**From:** Foti, Leslie  
**Sent:** Tuesday, March 28, 2017 2:21 PM  
**To:** Small, Jeff  
**Cc:** Pearson, Trevor; Van Flein, Tom; Roberson, Kelly  
**Subject:** RE: DOI Secretarial Order Wednesday 10am

I will add it please send me more details when you have them.

***Leslie Rath Foti***  
Director of Scheduling & Administration

---

**From:** Small, Jeff  
**Sent:** Monday, March 27, 2017 5:25 PM  
**To:** Foti, Leslie  
**Cc:** Pearson, Trevor; Van Flein, Tom; Roberson, Kelly  
**Subject:** DOI Secretarial Order Wednesday 10am

Leslie,

DOI just called and wanted to see if the boss could attend a Secretarial Order Wednesday at 10am at the Department of Interior.

They will have more details soon but will be a follow-up to the below executive order we are expecting from the Trump administration tomorrow.

Would highly recommend he attend and skip OGR.

**Jeff Small**

*Executive Director | Congressional Western Caucus*

*Senior Advisor | Congressman Paul A. Gosar, D.D.S.*

2057 Rayburn HOB | Washington, DC 20515

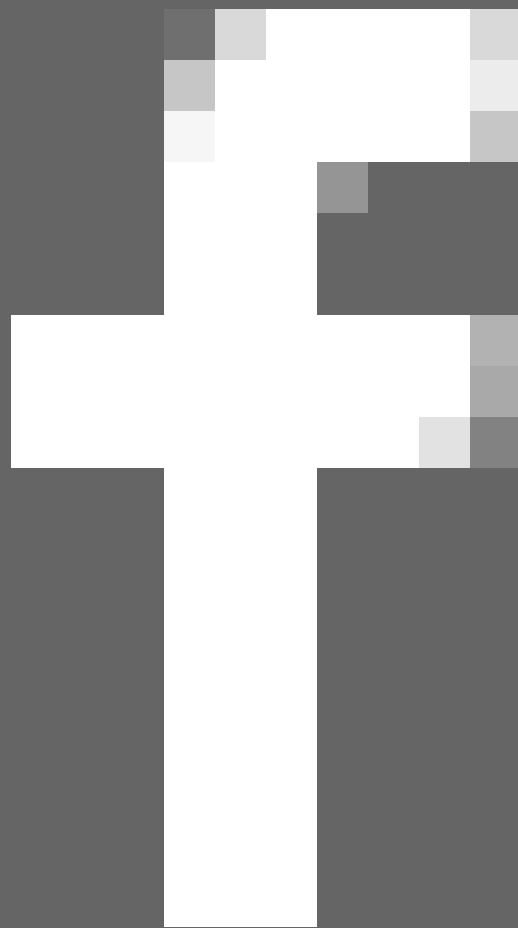
(202) 225-2315 main

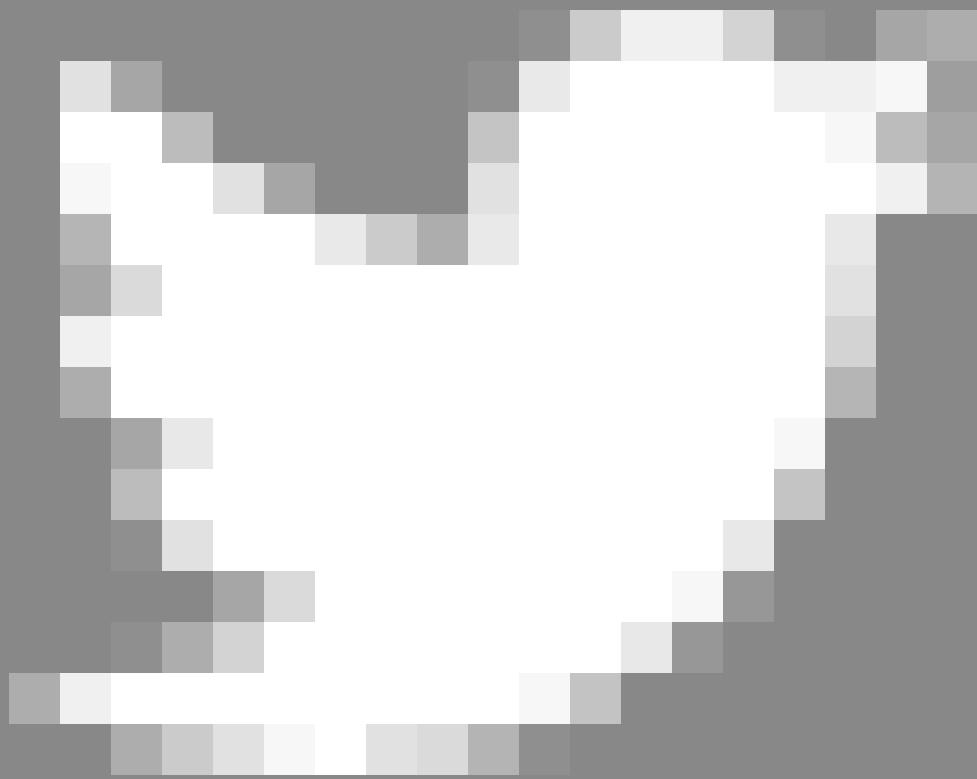
[jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov)



**1) We expect an Executive Order from the White House on Tuesday, March 28, regarding:**

- Rescinding the Social Cost of Carbon Directives
- Rescinding the CEQ guidance on factoring climate into NEPA reviews
- Review and Rescind the Clean Power Plan
- Review and Rescind the EPA and BLMs methane rules
- Rescinding the Coal Lease Moratorium
- Rescinding other climate change executive orders from the Obama Administration









### **Congressional Western Caucus Membership, 115<sup>th</sup> Congress**

1. Ralph Abraham (LA 05)\*
2. Mark Amodei (NV 02)
3. Brian Babin (TX 36)\*
4. Don Bacon (NE 02)\*
5. Andy Biggs (AZ 05)\*
6. Rob Bishop (UT 01)
7. Jim Bridenstine (OK 01)\*
8. Ken Buck (CO 04)
9. Michael Burgess (TX 26)
10. Ken Calvert (CA 42)\*
11. Jason Chaffetz (UT 03)
12. Liz Cheney (WY At Large)\*
13. Mike Coffman (CO 06)
14. Doug Collins (GA 09)
15. Mike Conaway (TX 11)
16. Paul Cook (CA 08)\*
17. Kevin Cramer (ND At Large)
18. Rick Crawford (AR 01)\*
19. John Culberson (TX 07)\*
20. Jeff Denham (CA 10)
21. Jeff Duncan (SC 03)
22. Tom Emmer (MN 06)\*
23. Blake Farenthold (TX 27)\*
24. Bill Flores (TX 17)\*
25. Trent Franks (AZ 02)
26. Louie Gohmert (TX 01)\*
27. Paul Gosar (AZ 04)
28. Garret Graves (LA 06)
29. Jamie Herrera Beutler (WA 03)\*
30. Jody Hice (GA 10)\*
31. Duncan Hunter (CA 50)\*
32. Lynn Jenkins (KS 02)
33. Walter Jones (NC 03)
34. Mike Kelly (PA 03)
35. Steve King (IA 04)\*
36. Raul Labrador (ID 01)
37. Doug LaMalfa (CA 01)
38. Doug Lamborn (CO 05)
39. Mia Love (UT 04)
40. Roger Marshall (KS 01)\*
41. Kevin McCarthy (CA 23)
42. Tom McClintock (CA 04)
43. Cathy McMorris Rodgers (WA 05)
44. Martha McSally (AZ 02)\*
45. Markwayne Mullin (OK 02)
46. Dan Newhouse (WA 04)
47. Kristi Noem (SD At Large)
48. Steve Pearce (NM 02)
49. Aumua Amata Radewagen (AS AL)\*
50. Tom Reed (NY 23)
51. Dennis Ross (FL 15)
52. Paul Ryan (WI 01)\*
53. Steve Scalise (LA 01)\*
54. Kurt Schrader (OR 05)\*
55. David Schweikert (AZ 06)
56. Pete Sessions (TX 32)\*
57. Mike Simpson (ID 02)
58. Adrian Smith (NE 03)
59. Jason Smith (MO 08)\*
60. Lamar Smith (TX 21)
61. Chris Stewart (UT 02)
62. Glenn Thompson (PA 05)
63. Scott Tipton (CO 03)
64. David Valadao (CA 21)
65. Greg Walden (OR 02)
66. Mimi Walters (CA 45)
67. Randy Weber (TX 14)
68. Bruce Westerman (AR 04)
69. Don Young (AK At Large)

\*Indicates new Western Caucus Member in the 115<sup>th</sup> Congress

THE  
WORLD

THE  
WORLD

**To:** Interior\_Press@ios.doi.gov[Interior\_Press@ios.doi.gov]  
**Cc:** Megan Bloomgren (megan\_bloomgren@ios.doi.gov)[megan\_bloomgren@ios.doi.gov]  
**From:** Day, Jim  
**Sent:** 2017-03-28T15:07:39-04:00  
**Importance:** Normal  
**Subject:** Media request on executive orders  
**Received:** 2017-03-28T15:08:41-04:00

Hello,

I don't see the executive orders affecting Interior on the White House or your website yet could you pass them along, please? (Coal moratorium, methane, fracking, any others...).

Thanks for your help as I race against my deadline, 4:30 pm EDT.

Jim

Jim Day  
Oil and gas reporter  
IHS The Energy Daily  
[Jim.Day@ihs.com](mailto:Jim.Day@ihs.com)  
202-572-0516

**To:** Interior\_Press@ios.doi.gov[Interior\_Press@ios.doi.gov]  
**Cc:** Megan Bloomgren (megan\_bloomgren@ios.doi.gov)[megan\_bloomgren@ios.doi.gov]  
**From:** Day, Jim  
**Sent:** 2017-03-28T15:59:56-04:00  
**Importance:** Normal  
**Subject:** RE: Media request on executive orders  
**Received:** 2017-03-28T16:01:37-04:00

Hello again,

Haven't heard back from you on the request to see the executive orders yet. If for whatever reason you can't release them, could Interior at least tell me which finalized rules the orders direct you to review, please? (As referenced in you press release here moratorium and three other rules). I understand it covers venting and flaring, fracking rule, not sure which other...?

Thanks, hope to hear from you. Deadline 4:30 pm EDT, getting tight.

Jim

<https://www.doi.gov/pressreleases/secretary-zinke-statement-support-president-trumps-american-energy-executive-order>

Jim Day  
Oil and gas reporter  
IHS The Energy Daily  
[Jim.Day@ihs.com](mailto:Jim.Day@ihs.com)  
202-572-0516

---

**From:** Day, Jim  
**Sent:** Tuesday, March 28, 2017 3:08 PM  
**To:** 'Interior\_Press@ios.doi.gov'  
**Cc:** Megan Bloomgren (megan\_bloomgren@ios.doi.gov)  
**Subject:** Media request on executive orders

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**Cc:** Megan Bloomgren (megan\_bloomgren@ios.doi.gov)[megan\_bloomgren@ios.doi.gov]  
**From:** Day, Jim  
**Sent:** 2017-03-28T16:04:51-04:00  
**Importance:** Normal  
**Subject:** Just got it RE: Media request on executive orders  
**Received:** 2017-03-28T16:05:50-04:00

All right, I just got the orders, don't need to track them down.

Jim Day  
Oil and gas reporter  
IHS The Energy Daily  
[Jim.Day@ihs.com](mailto:Jim.Day@ihs.com)  
202-572-0516

---

**From:** Day, Jim  
**Sent:** Tuesday, March 28, 2017 4:00 PM  
**To:** 'Interior\_Press@ios.doi.gov'  
**Cc:** Megan Bloomgren (megan\_bloomgren@ios.doi.gov)  
**Subject:** RE: Media request on executive orders

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202-572-0516

**To:** 'Chambers, Micah'[micah\_chambers@ios.doi.gov]  
**From:** Newman, Jennifer (Hoeven)  
**Sent:** 2017-03-28T16:07:48-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T16:07:52-04:00

If he could park there, it would be much appreciated. He drives himself, which could cause him to be late if he can't find a spot.

Thank you!

**Jen Newman**

Senator John Hoeven (R-ND)

338 Russell Senate Office Building | (202) 224-2551 | [www.hoeven.senate.gov](http://www.hoeven.senate.gov)



**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 3:32 PM  
**To:** Newman, Jennifer (Hoeven) <Jennifer\_Newman@hoeven.senate.gov>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Jen. I'm sorry, I thought I sent this to you.

Parking will be an issue. Half our garage is under construction right now and it requires extra coordination to get it through security. If it's a necessity to being on time though, let us know and we'll try to sort it out.

Location: 1849 C St, NW

Timing

Arrive NLT 9:45AM Members/Senators arrive at the C Street Entrance

Greeted by: Wadi, Caroline (TBD), Micah or Amanda

10:00AM Hard Start Signing Ceremony Begins

Garage parking isn't available except under certain circumstances.

On Tue, Mar 28, 2017 at 11:22 AM, Newman, Jennifer (Hoeven)

<[Jennifer\\_Newman@hoeven.senate.gov](mailto:Jennifer_Newman@hoeven.senate.gov)> wrote:

Micah,

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U.S. Senator John Hoeven

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Thanks.

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U.S. Senator John Hoeven

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Ryan Bernstein



U.S. Senator John Hoeven

(b) (5)

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We will likely make this work.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Monday, March 27, 2017 6:04 PM  
**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>  
**Subject:** Fwd: Wednesday Morning Secretarial Orders

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior









**To:** Swift, Heather[heather\_swift@ios.doi.gov]  
**From:** Ryan Ullman  
**Sent:** 2017-03-28T16:13:18-04:00  
**Importance:** Normal  
**Subject:** RE: Today: Conference call on POTUS energy executive order  
**Received:** 2017-03-28T16:16:02-04:00  
[Energy Independence EO.PDF](#)

Here you go.

**From:** Swift, Heather [mailto:heather\_swift@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 3:32 PM  
**To:** Ryan Ullman <rullman@ipaa.org>  
**Subject:** Re: Today: Conference call on POTUS energy executive order

waiting with baited breath

-

Heather Swift  
Department of the Interior  
@DOIPressSec  
[Heather\\_Swift@ios.doi.gov](mailto:Heather_Swift@ios.doi.gov) | [Interior\\_Press@ios.doi.gov](mailto:Interior_Press@ios.doi.gov)

On Tue, Mar 28, 2017 at 3:29 PM, Ryan Ullman <[rullman@ipaa.org](mailto:rullman@ipaa.org)> wrote:  
Heather,

Do you have a copy of the EO you can share?

Thanks.

**From:** Swift, Heather [mailto:heather\_swift@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 9:23 AM  
**To:** Megan Bloomgren <[megan\\_bloomgren@ios.doi.gov](mailto:megan_bloomgren@ios.doi.gov)>  
**Subject:** Today: Conference call on POTUS energy executive order

Happy Tuesday! Heather Swift here from Secretary Zinke's press shop. Today White House Communications and Cabinet Communications will host an **off-the-record** briefing call in regards to today's American energy executive order at **11:30 AM EST.**

If you plan on calling in, please use the link below to RSVP and you will be sent an individual dial-in. We look forward to speaking to you then!

<http://ems6.intellor.com?do=register&t=2&p=601557>

If you have a couple minutes, check out Secretary Zinke's segment on Mornings with Maria <http://video.foxbusiness.com/v/5375929609001/?#sp=show-clips>

-

Heather Swift

Department of the Interior

@DOIPressSec

Heather\_Swift@ios.doi.gov | Interior\_Press@ios.doi.gov



EXECUTIVE ORDER

PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the

Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer reviewed science and economics.

Sec. 2. Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources. (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, "burden" means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the

President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or

publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. Rescission of Certain Energy and Climate Related Presidential and Regulatory Actions. (a) The following

Presidential actions are hereby revoked:

(i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);

(ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);

(iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and

(iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

(i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and

(ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and

the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 *Fed. Reg.* 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions. (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b) (i) and (b) (ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding the rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b) (iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 *Fed. Reg.* 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 *Fed. Reg.* 64509 (October 23, 2015); and

(iii) The proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 *Fed. Reg.* 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues," which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the

completion of the administrative actions described in subsection (a) of this section.

Sec. 5. Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis. (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

- (i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);
- (ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);
- (iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);
- (iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);
- (v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016); and
- (vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations,

including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A 4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost benefit analysis.

Sec. 6. Federal Land Coal Leasing Moratorium. The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. Review of Regulations Related to United States Oil and Gas Development. (a) The Administrator shall review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 *Fed. Reg.* 35824 (June 3, 2016), and any other rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those rules and guidance, as appropriate and consistent with law.

(b) The Secretary of the Interior shall review the following final rules, and any other rules and guidance issued



pursuant to them, for consistency with the policy set forth in section 1 of this order and shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those rules and guidance, as appropriate and consistent with law:

(i) The final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 *Fed. Reg.* 16128 (March 26, 2015);

(ii) The final rule entitled "General Provisions and Non Federal Oil and Gas Rights," 81 *Fed. Reg.* 77972 (November 4, 2016);

(iii) The final rule entitled "Management of Non Federal Oil and Gas Rights," 81 *Fed. Reg.* 79948 (November 14, 2016); and

(iv) The final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," 81 *Fed. Reg.* 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

THE WHITE HOUSE,

March 28, 2017.

**To:** Swift, Heather[heather\_swift@ios.doi.gov]; Megan Bloomgren (megan\_bloomgren@ios.doi.gov)[megan\_bloomgren@ios.doi.gov]  
**Cc:** Interior press office (interior\_press@ios.doi.gov)[interior\_press@ios.doi.gov]  
**From:** Day, Jim  
**Sent:** 2017-03-28T16:13:56-04:00  
**Importance:** Normal  
**Subject:** Here it is, just got it.W: Presidential Executive Order on Promoting Energy Independence and Economic Growth  
**Received:** 2017-03-28T16:15:47-04:00

Here you go, folks, it just came across to our office... If there's anything else, please pass along.

Jim

Jim Day  
Oil and gas reporter  
IHS The Energy Daily  
[Jim.Day@ihs.com](mailto:Jim.Day@ihs.com)  
202-572-0516

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**From:** White House Press Office [<mailto:whitehouse-noreply@messages.whitehouse.gov>]  
**Sent:** Tuesday, March 28, 2017 4:02 PM  
**To:** Holly, Chris  
**Subject:** Presidential Executive Order on Promoting Energy Independence and Economic Growth

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THE WHITE HOUSE  
Office of the Press Secretary  
FOR IMMEDIATE RELEASE  
March 28, 2017

EXECUTIVE ORDER

PROMOTING ENERGY INDEPENDENCE AND ECONOMIC GROWTH

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Policy. (a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

(b) It is further in the national interest to ensure that the Nation's

electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer reviewed science and economics.

Sec. 2. Immediate Review of All Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources. (a) The heads of agencies shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review shall not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth in section 1 of this order.

(b) For purposes of this order, "burden" means to unnecessarily obstruct, delay, curtail, or otherwise impose significant costs on the siting, permitting, production, utilization, transmission, or delivery of energy resources.

(c) Within 45 days of the date of this order, the head of each agency with agency actions described in subsection (a) of this section shall develop and submit to the Director of the Office of Management and Budget (OMB Director) a plan to carry out the review required by subsection (a) of this section. The plans shall also be sent to the Vice President, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality. The head of any agency who determines that such agency does not have agency actions described in subsection (a) of this section shall submit to the OMB Director a written statement to that effect and, absent a determination by the OMB Director that such agency does have agency actions described in subsection (a) of this section, shall have no further responsibilities under this section.

(d) Within 120 days of the date of this order, the head of each agency

shall submit a draft final report detailing the agency actions described in subsection (a) of this section to the Vice President, the OMB Director, the Assistant to the President for Economic Policy, the Assistant to the President for Domestic Policy, and the Chair of the Council on Environmental Quality.

The report shall include specific recommendations that, to the extent permitted by law, could alleviate or eliminate aspects of agency actions that burden domestic energy production.

(e) The report shall be finalized within 180 days of the date of this order, unless the OMB Director, in consultation with the other officials who receive the draft final reports, extends that deadline.

(f) The OMB Director, in consultation with the Assistant to the President for Economic Policy, shall be responsible for coordinating the recommended actions included in the agency final reports within the Executive Office of the President.

(g) With respect to any agency action for which specific recommendations are made in a final report pursuant to subsection (e) of this section, the head of the relevant agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding, those actions, as appropriate and consistent with law. Agencies shall endeavor to coordinate such regulatory reforms with their activities undertaken in compliance with Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

Sec. 3. Rescission of Certain Energy and Climate Related Presidential and Regulatory Actions.

(a) The following Presidential actions are hereby revoked:

- (i) Executive Order 13653 of November 1, 2013 (Preparing the United States for the Impacts of Climate Change);
- (ii) The Presidential Memorandum of June 25, 2013 (Power Sector Carbon Pollution Standards);
- (iii) The Presidential Memorandum of November 3, 2015 (Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment); and
- (iv) The Presidential Memorandum of September 21, 2016 (Climate Change and National Security).

(b) The following reports shall be rescinded:

- (i) The Report of the Executive Office of the President of June 2013 (The President's Climate Action Plan); and
- (ii) The Report of the Executive Office of the President of March 2014 (Climate Action Plan Strategy to Reduce Methane Emissions).

(c) The Council on Environmental Quality shall rescind its final

guidance entitled "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," which is referred to in "Notice of Availability," 81 *Fed. Reg.* 51866 (August 5, 2016).

(d) The heads of all agencies shall identify existing agency actions related to or arising from the Presidential actions listed in subsection (a) of this section, the reports listed in subsection (b) of this section, or the final guidance listed in subsection (c) of this section. Each agency shall, as soon as practicable, suspend, revise, or rescind, or publish for notice and comment proposed rules suspending, revising, or rescinding any such actions, as appropriate and consistent with law and with the policies set forth in section 1 of this order.

Sec. 4. Review of the Environmental Protection Agency's "Clean Power Plan" and Related Rules and Agency Actions. (a) The Administrator of the Environmental Protection Agency (Administrator) shall immediately take all steps necessary to review the final rules set forth in subsections (b)(i) and (b)(ii) of this section, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules. In addition, the Administrator shall immediately take all steps necessary to review the proposed rule set forth in subsection (b)(iii) of this section, and, if appropriate, shall, as soon as practicable, determine whether to revise or withdraw the proposed rule.

(b) This section applies to the following final or proposed rules:

(i) The final rule entitled "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," 80 *Fed. Reg.* 64661 (October 23, 2015) (Clean Power Plan);

(ii) The final rule entitled "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units," 80 *Fed. Reg.* 64509 (October 23, 2015); and

(iii) The proposed rule entitled "Federal Plan Requirements for Greenhouse Gas Emissions From Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations; Proposed Rule," 80 *Fed. Reg.* 64966 (October 23, 2015).

(c) The Administrator shall review and, if appropriate, as soon as practicable, take lawful action to suspend, revise, or rescind, as appropriate and consistent with law, the "Legal Memorandum Accompanying Clean Power Plan for Certain Issues," which was published in conjunction with the Clean Power Plan.

(d) The Administrator shall promptly notify the Attorney General of any actions taken by the Administrator pursuant to this order related to the rules identified in subsection (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, pending the completion of the administrative actions described in subsection (a) of this section.

Sec. 5. Review of Estimates of the Social Cost of Carbon, Nitrous Oxide, and Methane for Regulatory Impact Analysis. (a) In order to ensure sound regulatory decision making, it is essential that agencies use estimates of costs and benefits in their regulatory analyses that are based on the best available science and economics.

(b) The Interagency Working Group on Social Cost of Greenhouse Gases (IWG), which was convened by the Council of Economic Advisers and the OMB Director, shall be disbanded, and the following documents issued by the IWG shall be withdrawn as no longer representative of governmental policy:

- (i) Technical Support Document: Social Cost of Carbon for Regulatory Impact Analysis Under Executive Order 12866 (February 2010);
- (ii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (May 2013);
- (iii) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (November 2013);
- (iv) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (July 2015);
- (v) Addendum to the Technical Support Document for Social Cost of Carbon: Application of the Methodology to Estimate the Social Cost of Methane and the Social Cost of Nitrous Oxide (August 2016);  
and
- (vi) Technical Update of the Social Cost of Carbon for Regulatory Impact Analysis (August 2016).

(c) Effective immediately, when monetizing the value of changes in greenhouse gas emissions resulting from regulations, including with respect to the consideration of domestic versus international impacts and the consideration of appropriate discount rates, agencies shall ensure, to the extent permitted by law, that any such estimates are consistent with the guidance contained in OMB Circular A 4 of September 17, 2003 (Regulatory Analysis), which was issued after peer review and public comment and has been widely accepted for more than a decade as embodying the best practices for conducting regulatory cost benefit analysis.

Sec. 6. Federal Land Coal Leasing Moratorium. The Secretary of the Interior shall take all steps necessary and appropriate to amend or withdraw Secretary's Order 3338 dated January 15, 2016 (Discretionary Programmatic Environmental Impact Statement (PEIS) to Modernize the Federal Coal Program), and to lift any and all moratoria on Federal land coal leasing activities related to Order 3338. The Secretary shall commence Federal coal leasing activities consistent with all applicable laws and regulations.

Sec. 7. Review of Regulations Related to United States Oil and Gas Development. (a) The Administrator shall review the final rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," 81 *Fed. Reg.* 35824 (June 3, 2016), and any rules and guidance issued pursuant to it, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules.

(b) The Secretary of the Interior shall review the following final rules, and any rules and guidance issued pursuant to them, for consistency with the policy set forth in section 1 of this order and, if appropriate, shall, as soon as practicable, suspend, revise, or rescind the guidance, or publish for notice and comment proposed rules suspending, revising, or rescinding those rules:

(i) The final rule entitled "Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands," 80 *Fed. Reg.* 16128 (March 26, 2015);

(ii) The final rule entitled "General Provisions and Non Federal Oil and Gas Rights," 81 *Fed. Reg.* 77972 (November 4, 2016);

(iii) The final rule entitled "Management of Non-Federal Oil and Gas Rights," 81 *Fed. Reg.* 79948 (November 14, 2016); and

(iv) The final rule entitled "Waste Prevention, Production Subject to Royalties, and Resource Conservation," 81 *Fed. Reg.* 83008 (November 18, 2016).

(c) The Administrator or the Secretary of the Interior, as applicable, shall promptly notify the Attorney General of any actions taken by them related to the rules identified in subsections (a) and (b) of this section so that the Attorney General may, as appropriate, provide notice of this order and any such action to any court with jurisdiction over pending litigation related to those rules, and may, in his discretion, request that the court stay the litigation or otherwise delay further litigation, or seek other appropriate relief consistent with this order, until the completion of the administrative actions described in subsections (a) and (b) of this section.

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or



agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

DONALD J. TRUMP

THE WHITE HOUSE,  
March 28, 2017.

# # #

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**To:** 'Chambers, Micah'[micah\_chambers@ios.doi.gov]  
**From:** Newman, Jennifer (Hoeven)  
**Sent:** 2017-03-28T16:28:43-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T16:28:52-04:00

Chevrolet, Suburban, (b)(6) and Senator Hoeven will drive himself. Shawn Affolter will accompany him in the car.

Thanks!

**Jen Newman**

Senator John Hoeven (R-ND)

338 Russell Senate Office Building | (202) 224-2551 | [www.hoeven.senate.gov](http://www.hoeven.senate.gov)



**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 4:26 PM  
**To:** Newman, Jennifer (Hoeven) <Jennifer\_Newman@hoeven.senate.gov>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Let me see what we can do. I know I will need the Make, Model, Year, Color, Plates and Driver's info asap, cause it has to be submitted to security before COB.

On Tue, Mar 28, 2017 at 4:07 PM, Newman, Jennifer (Hoeven) <Jennifer\_Newman@hoeven.senate.gov> wrote:

If he could park there, it would be much appreciated. He drives himself, which could cause him to be late if he can't find a spot.

Thank you!

**Jen Newman**

Senator John Hoeven (R-ND)

338 Russell Senate Office Building | (202) 224-2551 | [www.hoeven.senate.gov](http://www.hoeven.senate.gov)



**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 3:32 PM  
**To:** Newman, Jennifer (Hoeven) <Jennifer\_Newman@hoeven.senate.gov>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Jen. I'm sorry, I thought I sent this to you.

Parking will be an issue. Half our garage is under construction right now and it requires extra coordination to get it through security. If it's a necessity to being on time though, let us know and we'll try to sort it out.

Location: 1849 C St, NW

Timing

Arrive NLT 9:45AM Members/Senators arrive at the C Street Entrance  
Greeted by: Wadi, Caroline (TBD), Micah or Amanda

10:00AM Hard Start Signing Ceremony Begins

Garage parking isn't available except under certain circumstances.

On Tue, Mar 28, 2017 at 11:22 AM, Newman, Jennifer (Hoeven)  
<[Jennifer\\_Newman@hoeven.senate.gov](mailto:Jennifer_Newman@hoeven.senate.gov)> wrote:

Micah,

Shawn Affolter and the Senator will attend tomorrow morning. Will there be parking?

Thanks,

**Jen Newman**

Senator John Hoeven (R-ND)

338 Russell Senate Office Building | (202) 224-2551 | [www.hoeven.senate.gov](http://www.hoeven.senate.gov)



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**From:** Bernstein, Ryan (Hoeven)

**Sent:** Tuesday, March 28, 2017 11:13 AM

**To:** Chambers, Micah <[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)>

**Cc:** Newman, Jennifer (Hoeven) <[Jennifer\\_Newman@hoeven.senate.gov](mailto:Jennifer_Newman@hoeven.senate.gov)>

**Subject:** RE: Wednesday Morning Secretarial Orders

Looping in Jen. She can provide you the names and then she can get the logistical details from you.

Ryan Bernstein

U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [[mailto:micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]

**Sent:** Tuesday, March 28, 2017 11:08 AM

**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>

**Subject:** Re: Wednesday Morning Secretarial Orders

Ryan. If you can send the names of the staff that will be coming with the Senator by 3 pm it'd be appreciated. Thanks again.

Micah

On Tue, Mar 28, 2017 at 10:25 AM, Bernstein, Ryan (Hoeven)

<[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:

Thanks.

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Tuesday, March 28, 2017 10:24 AM  
**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>  
**Subject:** Re: Wednesday Morning Secretarial Orders

My understanding is that CRA is still in play. It was just mentioned in the call that venting/flaring was on the table in the EO. That would be new as of this morning, so we certainly still prefer a CRA and it's not in our list of Secretarial orders for tomorrow.

On Tue, Mar 28, 2017 at 10:21 AM, Bernstein, Ryan (Hoeven)  
<[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)> wrote:

Micah,

You can confirm us attending. Also, do you know if methane will be included in the orders? Are we giving up on a CRA for it?

Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

**From:** Chambers, Micah [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
**Sent:** Monday, March 27, 2017 6:27 PM  
**To:** Bernstein, Ryan (Hoeven) <[Ryan\\_Bernstein@hoeven.senate.gov](mailto:Ryan_Bernstein@hoeven.senate.gov)>  
**Subject:** Re: Wednesday Morning Secretarial Orders

Thank you. Hopefully we'll have more specifics for attendees tomorrow than the blurb I just sent you. Appreciate you working with us last minute. If you'll be at the signing tomorrow, I might see you there.

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Ryan Bernstein  
U.S. Senator John Hoeven

(b) (5)

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Ryan. Thanks for chatting. We'd be looking at a Sec. Orders Signing Wednesday morning at 10-1030 am. We're focusing on reestablishing the Royalty Policy Committee, Federal

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**To:** 'Chambers, Micah'[micah\_chambers@ios.doi.gov]  
**From:** Newman, Jennifer (Hoeven)  
**Sent:** 2017-03-28T16:29:24-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T16:29:32-04:00

Also, the plates are from (b)(6)

**Jen Newman**

Senator John Hoeven (R-ND)  
338 Russell Senate Office Building | (202) 224-2551 | [www.hoeven.senate.gov](http://www.hoeven.senate.gov)



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Chevrolet, Suburban, (b)(6) and Senator Hoeven will drive himself. Shawn Affolter will accompany him in the car.

Thanks!

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Jen. I'm sorry, I thought I sent this to you.

Parking will be an issue. Half our garage is under construction right now and it requires extra coordination to get it through security. If it's a necessity to being on time though, let us know and we'll try to sort it out.

Location: 1849 C St, NW

Timing

Arrive NLT 9:45AM Members/Senators arrive at the C Street Entrance  
Greeted by: Wadi, Caroline (TBD), Micah or Amanda

10:00AM Hard Start Signing Ceremony Begins

Garage parking isn't available except under certain circumstances.

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Ryan Bernstein  
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(b) (5)

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Ryan. If you can send the names of the staff that will be coming with the Senator by 3 pm it'd be appreciated. Thanks again.

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U.S. Senator John Hoeven  
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Micah,  
You can confirm us attending. Also, do you know if methane will be included in the orders? Are we giving up on a CRA for it?

Ryan Bernstein  
U.S. Senator John Hoeven  
(b) (5)

**From:** Chambers, Micah [mailto:[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)]  
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**To:** 'Kaster, Amanda'[amanda\_kaster@ios.doi.gov]  
**From:** Small, Jeff  
**Sent:** 2017-03-28T16:52:58-04:00  
**Importance:** Normal  
**Subject:** RE: DOI Secretarial Order Wednesday 10am  
**Received:** 2017-03-28T16:53:16-04:00

You bet. 6-8272.

**From:** Kaster, Amanda [mailto:amanda\_kaster@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 4:52 PM  
**To:** Small, Jeff  
**Subject:** Re: DOI Secretarial Order Wednesday 10am

Do you have a minute to chat?

On Tue, Mar 28, 2017 at 2:34 PM, Small, Jeff <[Jeff.Small@mail.house.gov](mailto:Jeff.Small@mail.house.gov)> wrote:  
Amanda,

Thank you for the call yesterday. Rep. Gosar would love to attend tomorrow and we have on his schedule.

Can you send us updated details when you have it?

Also, can he bring one or two other Caucus Members?

We are open to anyone from the attached list but would be great if my boss or I could extend an invite to one or two other folks.

Sincerely,

**Jeff Small**

*Executive Director | Congressional Western Caucus  
Senior Advisor | Congressman Paul A. Gosar, D.D.S.  
2057 Rayburn HOB | Washington, DC 20515  
(202) 225-2315 main  
[jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov)*



---

**From:** Foti, Leslie  
**Sent:** Tuesday, March 28, 2017 2:21 PM  
**To:** Small, Jeff  
**Cc:** Pearson, Trevor; Van Flein, Tom; Roberson, Kelly  
**Subject:** RE: DOI Secretarial Order Wednesday 10am

I will add it please send me more details when you have them.

**Leslie Rath Foti**  
Director of Scheduling & Administration

---

**From:** Small, Jeff  
**Sent:** Monday, March 27, 2017 5:25 PM  
**To:** Foti, Leslie  
**Cc:** Pearson, Trevor; Van Flein, Tom; Roberson, Kelly  
**Subject:** DOI Secretarial Order Wednesday 10am

Leslie,

DOI just called and wanted to see if the boss could attend a Secretarial Order Wednesday at 10am at the Department of Interior.

They will have more details soon but will be a follow-up to the below executive order we are expecting from the Trump administration tomorrow.

Would highly recommend he attend and skip OGR.

**Jeff Small**

*Executive Director | Congressional Western Caucus*  
*Senior Advisor | Congressman Paul A. Gosar, D.D.S.*  
2057 Rayburn HOB | Washington, DC 20515  
(202) 225-2315 main  
[jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov)



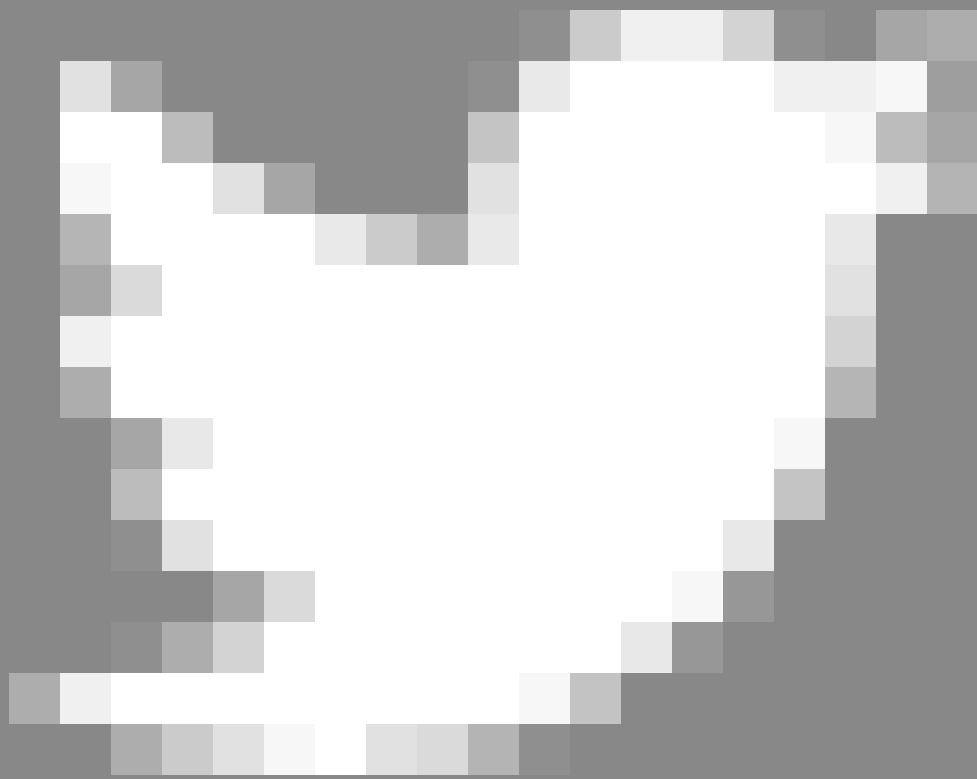
1) We expect an Executive Order from the White House on Tuesday, March 28, regarding:

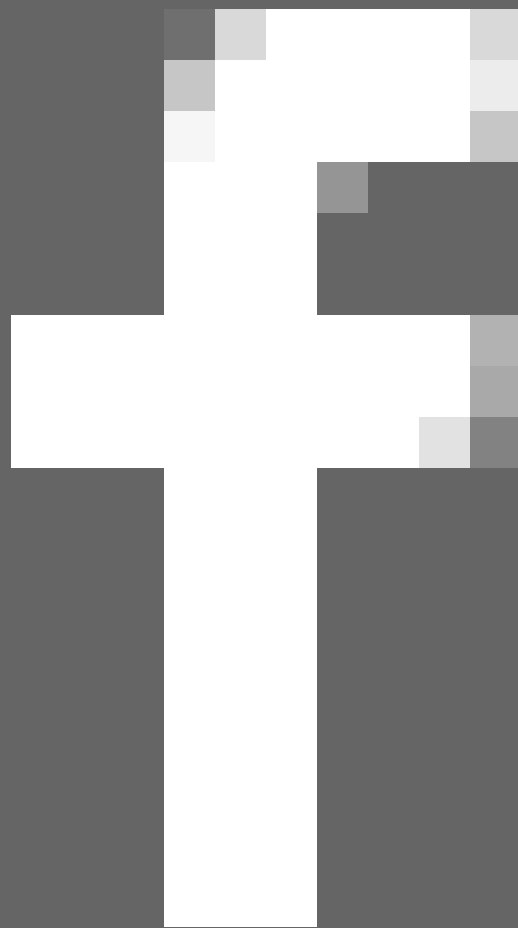
- Rescinding the Social Cost of Carbon Directives
- Rescinding the CEQ guidance on factoring climate into NEPA reviews
- Review and Rescind the Clean Power Plan
- Review and Rescind the EPA and BLMs methane rules
- Rescinding the Coal Lease Moratorium
- Rescinding other climate change executive orders from the Obama Administration

--

Amanda Kaster Averill  
Special Assistant

Office of Congressional and Legislative Affairs  
U.S. Department of the Interior  
(202) 208 3337  
[amanda\\_kaster@ios.doi.gov](mailto:amanda_kaster@ios.doi.gov)







THE  
WORLD

THE  
WORLD

**To:** 'Chambers, Micah'[micah\_chambers@ios.doi.gov]  
**From:** Newman, Jennifer (Hoeven)  
**Sent:** 2017-03-28T17:14:03-04:00  
**Importance:** Normal  
**Subject:** RE: Wednesday Morning Secretarial Orders  
**Received:** 2017-03-28T17:14:12-04:00

Wonderful, thanks!

**Jen Newman**

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I've forwarded it on. I will confirm by the end of the night if parking is set up. along with the directions.

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**Sent:** Monday, March 27, 2017 6:04 PM  
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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior











**To:** downey\_magallanes@ios.doi.gov[downey\_magallanes@ios.doi.gov]  
**From:** Matt Wise  
**Sent:** 2017-03-28T20:42:11-04:00  
**Importance:** Normal  
**Subject:** BLM Methane Rule?  
**Received:** 2017-03-28T20:42:19-04:00

Are you working this issue?

Matthew Wise  
Crossroads Strategies, LLC  
800 North Capitol Street NW  
Suite 800  
Washington, DC 20002  
Cell: (202) 360-9857  
[mwise@crshq.com](mailto:mwise@crshq.com)

**To:** Downey Magallanes[downey\_magallanes@ios.doi.gov]  
**From:** Matt Wise  
**Sent:** 2017-03-28T21:00:52-04:00  
**Importance:** Normal  
**Subject:** Re: BLM Methane Rule?  
**Received:** 2017-03-28T21:01:00-04:00

Nothing of substance yet. That said, I have a client that did polling on the issue. Can I send that to you?

Matthew Wise  
Crossroads Strategies, LLC  
800 North Capitol Street NW  
Suite 800  
Washington, DC 20002  
Cell: [\(202\) 360-9857](tel:(202)360-9857)  
[mwise@crshq.com](mailto:mwise@crshq.com)

On Mar 28, 2017, at 8:53 PM, Downey Magallanes <[downey\\_magallanes@ios.doi.gov](mailto:downey_magallanes@ios.doi.gov)> wrote:

Sort of. Happy to talk

Sent from my iPhone

On Mar 28, 2017, at 8:42 PM, Matt Wise <[mwise@crshq.com](mailto:mwise@crshq.com)> wrote:

Are you working this issue?

Matthew Wise  
Crossroads Strategies, LLC  
800 North Capitol Street NW  
Suite 800  
Washington, DC 20002  
Cell: [\(202\) 360-9857](tel:(202)360-9857)  
[mwise@crshq.com](mailto:mwise@crshq.com)

**To:** Amanda Kaster (amanda\_kaster@ios.doi.gov)[amanda\_kaster@ios.doi.gov]; Micah Chambers (micah\_chambers@ios.doi.gov)[micah\_chambers@ios.doi.gov]  
**From:** Marino Thacker, Meghan (Daines)  
**Sent:** 2017-03-29T07:57:01-04:00  
**Importance:** Normal  
**Subject:** FW: Bloomberg: U.S. Review to Weigh Higher Royalties for Energy on Federal Land  
**Received:** 2017-03-29T07:57:05-04:00

What is this 2 year review?

---

**Subject:** Bloomberg: U.S. Review to Weigh Higher Royalties for Energy on Federal Land

**NOTE:** *Zinke pushed a similar idea while serving in the House of Representatives alongside Senator Steve Daines, a fellow Republican from Montana.*

### **U.S. Review to Weigh Higher Royalties for Energy on Federal Land**

Bloomberg

<https://www.bloomberg.com/politics/articles/2017-03-29/u-s-review-to-weigh-higher-royalties-for-energy-on-federal-land>

U.S. Interior Secretary Ryan Zinke is kick starting a process that could lead to companies paying higher royalties for oil, gas and other energy resources they extract from federal land.

The two year review, to be formally authorized Wednesday, is designed to determine whether Americans are getting a fair return for those natural resources, he said in an interview.

"We're going to re evaluate royalty rates across the board," Zinke said, stressing that the analysis will touch on the price developers pay for generating renewable power as well as unearthing fossil fuels. His approach is rooted in the idea that "what we do on public lands is in the best interest of the taxpayer. I want to make sure the taxpayer gets value out of it," Zinke said.

The move will coincide with action by Zinke to resume selling new leases to mine coal from federal land, following a directive issued by President Donald Trump on Tuesday. Zinke will revoke an order from his predecessor that halted those sales in January 2015 and end a broad environmental review of the coal leasing program that the Obama administration launched at the same time.

That environmental assessment was designed to evaluate ways to modernize how the U.S. sells coal on federal land including whether it should happen in the first place. The Obama administration issued a blueprint for possible changes in January, such as tacking a carbon fee onto coal leases to account for climate change and requiring payments into a fund that could help out of work miners.

## Years of Analysis

Zinke said that with at least two more years of analysis to go, that process would take too long and be too costly and is an unnecessary formality for making any potential improvements to the coal leasing program. Proposed coal leases already go through separate tailored environmental reviews, he said.

Conservationists have argued those discrete assessments of individual sales aren't sufficient to solve various problems with the current coal program, including how to guarantee the reclamation of old sites, boost competition and ensure taxpayers get a fair return.

The new advisory committee, focused on just one of those concerns, could recommend a suite of changes. Zinke said he would not prejudge the outcome, which could include recommendations for lower or higher royalty rates as well as other modifications.

## Previous Effort

When former Interior Secretary Ken Salazar raised the prospect of higher royalty rates for onshore oil and gas development, energy companies cried foul. Industry trade groups said a hike in rates would discourage developers from drilling on federal land. Across the board changes were never adopted, though a Bureau of Land Management regulation imposed last year gives the agency the discretion to boost rates in some cases. That measure, which chiefly aims to reduce the venting and flaring of natural gas on federal land, is the target of repeal legislation in Congress.

In the long run, Zinke said, energy companies will be more interested in bidding on territory and maybe pay a higher price if they have better chances of development, as the Interior Department reviews Obama era regulations, including mandates on the hydraulic fracturing process used to stimulate the production of oil and gas.

"We think that by reducing some of this uncertainty, at least on the regulatory environment, that we will be able to get a better price point for that," Zinke said. "The taxpayer wins, and the industry will win by having a clearer choice based on market conditions whether they should go forward and invest or not."

## Committee Membership

The group Zinke is set to authorize Wednesday will have as many as 28 members representing Indian tribes, states that contain federal lands with significant energy development, public interest groups, academia and other stakeholders. Zinke said it will exclude members who have dealings with the Interior Department to avoid potential ethical conflicts.

Zinke pushed a similar idea while serving in the House of Representatives alongside Senator Steve Daines, a fellow Republican from Montana.

While Zinke emphasized that he isn't prejudging the outcome of the committee's review, it follows a series of reports suggesting the U.S. isn't getting a fair return for oil and gas extracted from its public lands. The Government Accountability Office has blamed Interior Department regulations that fix the royalty rate at 12.5 percent of the value of oil and gas pulled from onshore federal territory generally lower than the amount charged by Wyoming, New Mexico, Colorado, Utah and other Western states.

That 12.5 percent rate for onshore production hasn't been updated in nearly a century, though the administration of former President George W. Bush boosted the royalty charged for offshore oil and gas development to 18.75 percent.

'Studied to Death'

The nonpartisan Congressional Budget Office estimated last year that the federal government would net an extra \$200 million in income if onshore oil and gas royalties also were increased to 18.75 percent.

"This is an area that has already been studied to death and could be fixed immediately by bringing royalty rates more in line with what states and private landowners charge," said Matt Lee Ashley, a senior fellow with the Center for American Progress. "There is hardly a need for yet another committee, but hopefully Secretary Zinke is serious about being fair to taxpayers, doesn't just stack the deck with oil industry allies and takes some action within months not years."

The Interior Department generally would have to propose and adopt new rules to revise royalties for wind and solar production as well as oil, gas and coal development. Zinke said he would follow up on the committee's eventual recommendations "and put rules forth that are appropriate."

Zinke stressed safeguards are necessary.

"As a lifetime conservationist, and one who loves Teddy Roosevelt, industry does not regulate themselves," he said. "And our public land is for the benefit and enjoyment of the people with a big emphasis on benefit."



**To:** 'katharine\_macgregor@ios.doi.gov'[katharine\_macgregor@ios.doi.gov];  
kathleen\_benedetto@ios.doi.gov[kathleen\_benedetto@ios.doi.gov]  
**From:** Small, Jeff  
**Sent:** 2017-03-29T09:16:15-04:00  
**Importance:** Normal  
**Subject:** Timely Sage Grouse Approps Language Request  
**Received:** 2017-03-29T09:18:29-04:00  
[Sage Grouse Dear Colleague and Letter.docx](#)  
[CRS Sage Grouse Report.pdf](#)

Hi Kate and Kathy,

Hope you are doing well.

No one was leading a Sage Grouse Appropriations request this year. Chairman Gosar thought we really need to do one and since no one else would, he decided to take the lead.

Here is our current short summary:

**FY18 Approps: Western Caucus Chairman Gosar seeks signers for language request to reverse overly restrictive Resource Management Plan Amendments (RMPs) and Land and Resource Management Plan (LRMPs) amendments under the guise of protecting Sage Grouse. DEADLINE NOON WEDNESDAY, MARCH 29.**

**Current Signers:** Rob Bishop, Gosar, Pearce, Tipton, Yoho

The Department of Interior under the Obama Administration found in 2015 that a listing of the Sage Grouse under the Endangered Species Act (ESA) was not warranted. However, the agency unilaterally chose to implement a de facto listing through overly restrictive Resource Management Plan (RMPs) Amendments and Land and Resource Management Plan (LRMPs) Amendments. These RMPs and LRMPs are in many cases as restrictive as a critical habitat designation would be under an ESA listing. These amendments were not warranted and sought to prevent responsible mineral production and other activities across 11 Western states. The Obama Administration also sought to withdraw 10 million acres of the bird's habitat from future mining activity. Congress must act to prevent severe economic losses to the U.S. economy and to ensure military readiness on affected military ranges is not compromised.

**Please contact Jeff Small at [Jeff.Small@mail.house.gov](mailto:Jeff.Small@mail.house.gov) to sign.**

Draft letter and longer dear colleague are attached.

Here is the actual language that was included in last fiscal year's engrossed Interior Approps bill as a result of Mr. Amodei's amendment. We have been working with Amodei and Chairman Bishop's staff on this request this year. We have this language from last fiscal year in the draft letter currently. However, Jason in Amodei's office correctly pointed out that we needed to update this language since the ROD's were issued as well as the RMPs and LRMPs after last year's language.

*(a) None of the funds made available by this or any other Act may be used*

*(1) to review the status of or determine whether the greater sage-grouse is an endangered species or a threatened species pursuant to section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533), or to issue a regulation with respect thereto that applies to any State with a State management plan;*

*(2) to make or extend any withdrawal pursuant to section 204 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1714) within any Sagebrush Focal Area published in the Federal Register on September 24, 2015 (80 Fed. Reg. 57635 et seq.), in a manner inconsistent with a State management plan; or*

*(3) to implement, amend, or otherwise modify any Federal resource management plan applicable to Federal land in a State with a State management plan, in a manner inconsistent with such State management plan.*

*(b) For the purposes of this section*

*(1) the term “Federal resource management plan” means*

*(A) a land use plan prepared by the Bureau of Land Management for public lands pursuant to section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712); or*

*(B) a land and resource management plan prepared by the Forest Service for National Forest System lands pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);*

*(2) the term “greater sage-grouse” means the species *Centrocercus urophasianus* or the Columbia Basin distinct population segment of greater sage-grouse; and*

*(3) the term “State management plan” means a State-wide plan for the protection and recovery of greater sage-grouse that has been approved by the Governor of such State.*

We are under as tight timeframe as this letter needs to be submitted to the Approps Committee tomorrow.

Can you all possibly help update the actual language request that we are trying to get into the base bill to reflect the ROD's that were issued as well as the RMPs and LRMPs after last year's language? Also open to doing something about the mineral withdraw.

My direct is 202-226-8272 if you have questions.

Let me know if you would.

Sincerely,

**Jeff Small**

*Executive Director | Congressional Western Caucus  
Senior Advisor | Congressman Paul A. Gosar, D.D.S.*

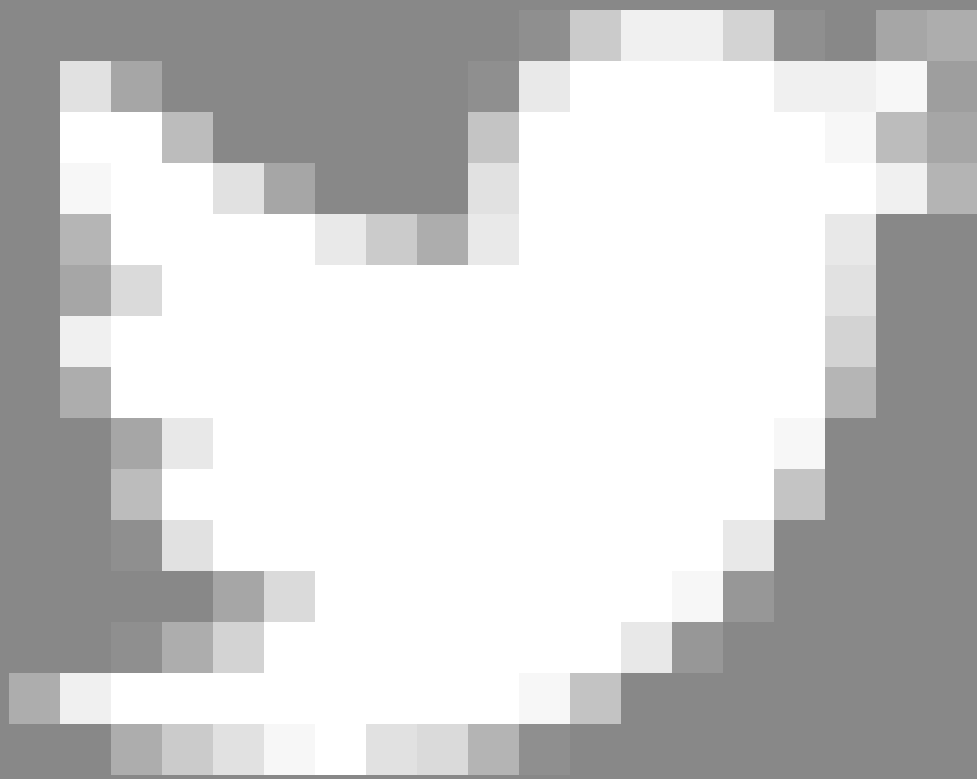
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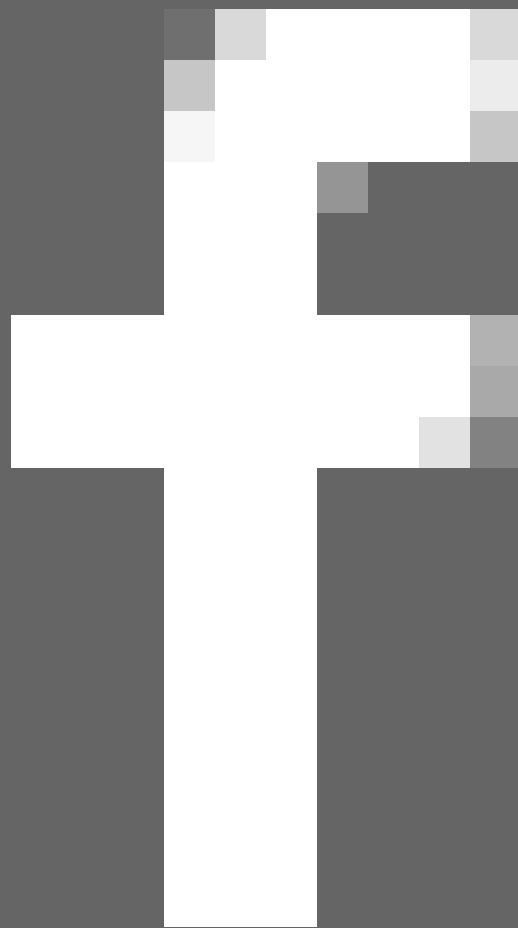
(202) 225-2315 main

[jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov)









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## Support a viable State-Based Approach for Sage Grouse Recovery Efforts

**\*\*THIS IS A LANGUAGE REQUEST\*\***

**Members are required to submit the request online.**  
***Deadline to sign on is NOON on Wednesday, March 29.***

Dear Colleague:

The Department of Interior under the Obama Administration found in 2015 that a listing of the Sage Grouse under the Endangered Species Act (ESA) was not warranted. However, the agency unilaterally chose to implement a de facto listing through overly restrictive Resource Management Plan (RMPs) Amendments and Land and Resource Management Plan (LRMPs) Amendments. These RMPs and LRMPs are in many cases as restrictive as a critical habitat designation would be under an ESA listing. These misguided amendments were not warranted and sought to prevent responsible mineral production and other activities across 11 Western states.

The Obama Administration also sought to withdraw 10 million acres of the bird's habitat from future mining activity. The Obama Administration's scheme to use the Sage Grouse as an excuse to shut down virtually all development on large swaths of public lands in the West, particularly oil, gas, and mineral development, has resulted in devastating impacts for local economies. These unlawful amendments are already having a negative impact for our nation's energy and natural resource independence. Congress must act to prevent severe economic losses to the U.S. economy and to ensure military readiness on affected military ranges is not compromised.

This language request is identical to Section 114 of the engrossed version of H.R. 5538 that passed the House last Congress. We must retain this important provision.

The text of the letter is below. Please contact Jeff Small at [jeff.small@mail.house.gov](mailto:jeff.small@mail.house.gov) if your boss would like to lead or sign this letter. Instructions will be sent along with the final signed letter for submitting this request.

Sincerely,

Paul A. Gosar, D.D.S  
Member of Congress

March XX, 2017

The Honorable Ken Calvert  
Chairman  
Committee on Appropriations  
Subcommittee on Interior, Environment, and  
Related Agencies  
U.S. House of Representatives

2007 Rayburn HOB  
Washington, DC 20515  
The Honorable Betty McCollum  
Ranking Member  
Committee on Appropriations

Subcommittee on Interior, Environment, and  
Related Agencies  
U.S. House of Representatives

1016 Longworth HOB  
Washington, DC 20515

Dear Chairman Calvert and Ranking Member McCollum:

As you begin crafting the Fiscal Year 2018 Interior, Environment, and Related Agencies Appropriations bill, we encourage the subcommittee to reject the Obama Administration's unilateral actions on the Greater Sage Grouse.

The Department of Interior under the Obama Administration found in 2015 that a listing of the Sage Grouse under the Endangered Species Act (ESA) was not warranted. However, the agency unilaterally chose to implement a de facto listing through overly restrictive Resource Management Plan (RMPs) Amendments and Land and Resource Management Plan (LRMPs) Amendments. These RMPs and LRMPs are in many cases as restrictive as a critical habitat designation would be under an ESA listing. These misguided amendments were not warranted and sought to prevent responsible mineral production and other activities across 11 Western states.

The Obama Administration also sought to withdraw 10 million acres of the bird's habitat from future mining activity. The Obama Administration's scheme to use the Sage Grouse as an excuse to shut down virtually all development on large swaths of public lands in the West, particularly oil, gas, and mineral development, has resulted in devastating impacts for local economies. These unlawful amendments are already having a negative impact for our nation's energy and natural resource independence.

To make matter worse, the Greater Sage Grouse is not endangered. The population is greater today than it has been in recent years thanks to the concerned efforts of several states which implemented at their own expense comprehensive Sage Grouse recovery plans. The Obama restrictions defy commonsense. Further, they are inconsistent with Greater Sage Grouse conservation planning efforts at the state and local level.

Congress must act to prevent severe economic losses to the U.S. economy and to ensure military readiness on affected military ranges is not compromised.

Section 114 of the engrossed version of the FY 2017 Interior, Environment and Related Agencies Appropriations bill contained language which aimed to block this report. Accordingly, we ask that you include language similar to the following again this fiscal year:

*(a) None of the funds made available by this or any other Act may be used*

*(1) to review the status of or determine whether the greater sage-grouse is an endangered species or a threatened species pursuant to section 4 of the Endangered Species Act of 1973 (16 U.S.C. 1533), or to issue a regulation with respect thereto that applies to any State with a State management plan;*

*(2) to make or extend any withdrawal pursuant to section 204 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1714) within any Sagebrush Focal Area*



*published in the Federal Register on September 24, 2015 (80 Fed. Reg. 57635 et seq.), in a manner inconsistent with a State management plan; or*

*(3) to implement, amend, or otherwise modify any Federal resource management plan applicable to Federal land in a State with a State management plan, in a manner inconsistent with such State management plan.*

*(b) For the purposes of this section*

*(1) the term “Federal resource management plan” means*

*(A) a land use plan prepared by the Bureau of Land Management for public lands pursuant to section 202 of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1712); or*

*(B) a land and resource management plan prepared by the Forest Service for National Forest System lands pursuant to section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604);*

*(2) the term “greater sage-grouse” means the species *Centrocercus urophasianus* or the Columbia Basin distinct population segment of greater sage-grouse; and*

*(3) the term “State management plan” means a State-wide plan for the protection and recovery of greater sage-grouse that has been approved by the Governor of such State.*

We thank you for your consideration of this request, and for your leadership on the committee.

Sincerely,



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# **Sage-Grouse Conservation: Background and Issues**

**M. Lynne Corn**

Specialist in Natural Resources Policy

**Katie Hoover**

Specialist in Natural Resources Policy

**Carol Hardy Vincent**

Specialist in Natural Resources Policy

August 15, 2016

**Congressional Research Service**

7-5700

[www.crs.gov](http://www.crs.gov)

R44592

## Summary

The greater sage-grouse (*Centrocercus urophasianus*) is a squat, feathered, chicken-like bird that is currently found in 11 western states. For more than 25 years, there has been considerable controversy concerning whether to list sage-grouse for protection under the Endangered Species Act (ESA; P.L. 93-205).

On October 2, 2015, the Fish and Wildlife Service (FWS, Department of the Interior) published its decision not to list the greater sage-grouse as threatened or endangered under ESA. Under the act, one of the factors that can lead to a listing is the inadequacy of existing regulatory mechanisms. However, FWS concluded that existing regulatory mechanisms for lands under federal, tribal, state, or local control were adequate to avoid the need to list the species. Before the listing decision, federal, state, and local governments, as well as other stakeholders in the states where sage-grouse are still found had undertaken extensive efforts to develop conservation plans, monitoring, and other actions to obviate the need for listing sage-grouse. These efforts included collaboration across levels of government, action plans by state governments, voluntary federal programs to assist private landowners in conserving sage-grouse habitat, and revisions in the land management plans of federal agencies.

To be considered adequate regulatory mechanisms, various courts held that these efforts had to meet certain tests. Prior court cases meant that FWS had to determine, in order to reach its conclusion not to list the species, that the regulatory mechanisms of these various levels of government were (1) in effect at the time, (2) not discretionary, and (3) adequate to avoid the need to list the species.

After FWS decided not to list sage-grouse, it fell to other federal agencies and other levels of government to carry out the commitments that had served to avoid listing. All 11 states have plans and programs to address the varying threats to the species in each state. For private lands, the Natural Resources Conservation Service (NRCS, Department of Agriculture) has led voluntary conservation efforts. NRCS uses existing federal conservation programs to help farmers and ranchers benefit sage-grouse.

On federal lands, the Bureau of Land Management (BLM, Department of the Interior) and the Forest Service (FS, Department of Agriculture) have had the greatest role in conserving sage-grouse because more than half of the bird's remaining habitat is found on BLM and FS lands. In September 2015, after a review process including public notice and comment, the two agencies signed records of decision amending 98 land and resource management plans covering the range of the sage-grouse. Lands identified as the most valuable habitat will be given the highest level of protection. The plans have three goals: (1) to improve sage-grouse habitat condition; (2) to minimize new or additional surface disturbance; and (3) to reduce the threat of rangeland fire to sage-grouse and sage-grouse habitat.

Controversy after the FWS decision has focused particularly on the revised land management and conservation strictures adopted on federal lands. The amended plans are proving controversial with various industries, including energy developers, which argue that the development restrictions on high-value habitat under the plans are placing a burden on their activities that is as restrictive as a decision to list the species.

A number of bills and amendments have been introduced in the 114<sup>th</sup> Congress to address aspects of sage-grouse conservation on specific lands. A common theme in the bills and amendments is a greater role for states in species conservation, with varying amounts of state preemption of federal land management plans. Some measures would provide exemptions from judicial review.

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## Introduction

There has been controversy for more than 25 years concerning whether to list sage-grouse for protection under the Endangered Species Act (ESA).<sup>1</sup> As with many controversies over rare species, a theme in the sage-grouse controversy is the use of dwindling resources by both humans and sage-grouse—in this case, broad, unfragmented expanses of sagebrush lands. Loss of habitat is the most common factor leading to species' decline.<sup>2</sup> Sagebrush habitat in the western United States is diminishing and becoming fragmented due to energy development, infrastructure, agricultural conversion, wildfire, invasive plants, and other factors.<sup>3</sup> Although the total remaining sagebrush habitat is vast, its fragmentation is problematic for sage-grouse, which need large treeless areas to discourage the roosting of avian predators and to permit travel between breeding and nesting sites. Thus, fences, roads, drilling rigs, and utility poles can produce a substantial change in available sagebrush habitat, even when the actual surface disturbance is minimal.

The sage-grouse (*Centrocercus urophasianus*) is found in 11 western states. The species first appeared as a candidate for listing under ESA in 1991,<sup>4</sup> and its subsequent history with regard to the act has included various petitions, missed deadlines, and lawsuits. Multiple petitions were filed under ESA to ask the Fish and Wildlife Service (FWS, Department of the Interior) to protect the sage-grouse. (See “Chronology of Petitions and FWS Sage-Grouse Action,” below.)

Most recently, on September 22, 2015, FWS announced its decision not to list the sage-grouse under ESA, based on the adequacy of existing regulatory mechanisms to protect the species. Some have praised the decision as affording the proper protection through state, local, and private conservation efforts. Others have opposed the decision for varying reasons, including assertions that the existing regulatory mechanisms are not sufficiently protective or that the regulatory mechanisms result in excessive restrictions on land uses. (See “Implementation and Other Issues,” below.)

<sup>1</sup> Endangered Species Act (ESA; P.L. 93 205, 87 Stat. 884; 16 U.S.C. §§1531 et seq.). For background on ESA, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by M. Lynne Corn. This report uses the term *sage grouse*, rather than the nearly equally common *sage grouse*, because the hyphen is used in documents and databases of the Fish and Wildlife Service (FWS) Endangered Species Program. Exceptions are made for quoted material using the alternative form. When the term *sage grouse* is used in the remainder of the report, it is understood to mean greater sage grouse (the focus of this report), unless otherwise specified. Moreover, at times various distinct population segments and subspecies of *C. urophasianus* have been proposed, both for taxonomic recognition and for protection under ESA, but that recognition has not been upheld. (See CRS Report R40865, *Sage Grouse and the Endangered Species Act (ESA)*, by M. Lynne Corn.) In addition, a related species called the Gunnison sage grouse (*Centrocercus minimus*), found in parts of Colorado and Utah, was listed as threatened in 2014.

<sup>2</sup> Estimating population levels of widely scattered animals is exceedingly difficult. In the case of sage grouse, estimates are usually based on models rating number, size, and distribution of breeding areas to extrapolate total population sizes. More critically, available data show clear downward trends, though the extent of decline varies in time and from area to area. See “Sage Grouse Breeding and Biology,” and “Threats to Sage Grouse Habitat,” below.

<sup>3</sup> For an analysis of these and other factors affecting sage grouse populations, see FWS, “Endangered and Threatened Wildlife and Plants: 12 Month Finding on a Petition to List Greater Sage Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species,” 80 *Federal Register* 59858 59941, October 2, 2015.

<sup>4</sup> Technically, only a portion of the species was considered at that time. See FWS, “Endangered and Threatened Wildlife and Plants; Animal Candidate Review for Listing as Endangered and Threatened Species,” 56 *Federal Register* 58804 58836, November 21, 1991.

## Sage-Grouse Breeding and Biology

The sage-grouse is a squat, feathered, chicken-like bird, grayish with a black belly and spiked tail feathers; it is highly prized by hunters. (See **Figure 1**.) Sage-grouse have one of the lowest reproductive rates of any North American game bird. Because of this, “its populations are not able to recover from low numbers as quickly as many other upland game bird species.”<sup>5</sup>

A particular issue has been conservation of the locations where male sage-grouse gather in the spring year after year—areas called *leks*. The leks are found in open sagebrush areas, usually on broad ridges or valley floors where visibility is excellent and noise will travel well. There, the males strut, raise and lower their wings, fan their tail feathers, and make loud booming noises with the aid of bright yellow inflatable air sacs in their necks. Under optimal conditions, these sounds carry for hundreds of yards. Dozens or even hundreds of males attract the attention of resident females, who survey the offerings of the displaying males, make their choices, and mate. Once mating has occurred, females leave the lek to nest, sometimes at a distance of several miles.<sup>6</sup> Females raise their offspring alone, without help from males. Due to the importance of leks in the breeding cycle, maintenance and protection of traditional lek areas are key concerns for species conservation.

## Threats to Sage-Grouse Habitat

The sage-grouse is vulnerable to multiple interrelated changes in its habitat. The construction of a road in sagebrush habitat, for example, may have diverse effects. Sage-grouse hens may hesitate to cross a road with their chicks. A road can also provide ingress for invasive species such as cheatgrass, which is the primary invasive species threat to sagebrush habitat. The plant tends to appear after an area has been grazed or when roads are developed. The nonnative grass spreads quickly, is disliked as forage by grazing mammals and sage-grouse, and burns more readily than native plants. Moreover, the fire threat posed by cheatgrass could be exacerbated by pervasive drought and climate change. Both the number of fires and the total area burned in sage-grouse habitat have increased in the last 100 years.<sup>7</sup> This example illustrates the links among a range of threats to sage-grouse.

Additionally, certain types of development, such as coal-bed methane production and oil wells, introduce standing pools of water into an environment where none existed previously. These pools provide habitat for mosquitoes, and mosquitoes can carry the West Nile Virus. According to the U.S. Geological Survey, the federal agency responsible for tracking wildlife disease, the West Nile Virus is always fatal for the sage-grouse. By 2006, West Nile Virus had been reported among sage-grouse in every state of the sage-grouse’s range except for Washington.<sup>8</sup>

<sup>5</sup> Western Watersheds Project v. Dyer, 2009 WL 484438, \*5 (D. Idaho February 26, 2009).

<sup>6</sup> Female sage grouse typically travel 0.8 miles to 3.2 miles to nest after mating (FWS, “Endangered and Threatened Wildlife and Plants: 12 Month Finding on a Petition to List Greater Sage Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species,” 80 *Federal Register* 59887, October 2, 2015), but some have been documented to travel more than 13 miles to their nest site after mating. (See FWS, “Endangered and Threatened Wildlife and Plants; Final Listing Determination for the Gunnison Sage Grouse as Threatened or Endangered; Final Rule,” 71 *Federal Register* 19956, April 18, 2006.)

<sup>7</sup> See “Altered Fire Cycle” in FWS, “Endangered and Threatened Wildlife and Plants: 12 Month Finding on a Petition to List Greater Sage Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species,” 80 *Federal Register* 59896 59897, October 2, 2015.

<sup>8</sup> U.S. Geological Survey, “West Nile Virus in Greater Sage Grouse,” Wildlife Health Bulletin #06 08, November 6, (continued...)

The various threats cited above also sum to form a larger threat: fragmentation of the sagebrush landscape. Although much of the West is still dominated by sagebrush, much of this habitat is no longer intact. As a result, such areas have become unsuitable for successful breeding. Moreover, because habitats are becoming fragmented, sage-grouse populations are becoming genetically isolated, leaving them more vulnerable. Habitat fragmentation, along with lek protection, is a key concern in species conservation.

According to a team assembled by FWS to study the sage-grouse, habitat fragmentation is severely affecting the viability of the species:

The primary threat to greater sage grouse is fragmentation. Large expanses of intact sagebrush habitat are necessary to maintain viable sage grouse populations. Only two areas in the 11-state range currently provide such expanses and both are already heavily fragmented and are projected to experience additional significant fragmentation in the foreseeable future. Dramatic population declines and local extirpations have already occurred and future fragmentation and habitat degradation is expected to result in remnant, isolated, and dysfunctional populations of greater sage grouse that are in danger of extinction in the foreseeable future.<sup>9</sup>

The sage-grouse was once abundant in 16 western states. Its current range includes portions of 11 states: California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, South Dakota, Utah, Wyoming, and Washington.<sup>10</sup> Multiple sources point to a severe decline in the number of sage-grouse; FWS estimates that sage-grouse population numbers may have declined between 69% and 99% from historic to more recent times.<sup>11</sup> FWS also cites data from the Western States Sage and Columbia Sharp-Tailed Grouse Technical Committee, which estimated the decline between historic times and 1999 to have been about 86%.<sup>12</sup>

The increasing threats and declining sage-grouse populations eventually led to eight proposals to list the species or portions of the species under ESA. (See “Chronology of Petitions and FWS Sage-Grouse Action,” below.) In making its decision, FWS was required to consider the general requirements for listing a species (see “How Does ESA Work?” below) and the minimum requirements for conservation agreements to be considered adequate to avoid listing. The specific decision not to list the sage-grouse is discussed below in “Why Did FWS Decide Not to List Sage-Grouse?”

---

(...continued)

2006, at [http://www.nwhc.usgs.gov/publications/wildlife\\_health\\_bulletins/WHB\\_06\\_08.jsp](http://www.nwhc.usgs.gov/publications/wildlife_health_bulletins/WHB_06_08.jsp).

<sup>9</sup> As quoted in *Western Watersheds Project v. U.S. Fish and Wildlife Service*, No. 4:10 CV 229, \*14 (D. Idaho February 2, 2012).

<sup>10</sup> The sage grouse is no longer found in Arizona, Kansas, Nebraska, New Mexico, or Oklahoma, or in the Canadian province of British Columbia.

<sup>11</sup> FWS, “Endangered and Threatened Wildlife and Plants; 90 day Finding and Commencement of Status Review for a Petition To List the Western Sage Grouse in Washington as Threatened or Endangered,” 65 *Federal Register* 51578, August 24, 2000. (Reference is to range wide statistics.) FWS further states, “Little substantiated information is available regarding the historic abundance of sage grouse throughout their range. However, within the literature, the general consensus is that considerable declines have occurred from historic population levels, and much of the overall decline occurred from the late 1800s to the mid 1900s....” (p. 51580.)

<sup>12</sup> FWS, “Endangered and Threatened Wildlife and Plants; 90 day Finding for Petitions To List the Greater Sage grouse as Threatened or Endangered,” 69 *Federal Register* 21486, April 21, 2004.

**Figure I. Male Sage-Grouse: Lek Display**



**Source:** U.S. Fish and Wildlife Service. Photo available at [https://www.flickr.com/photos/usfws\\_pacificsw/6948199942/](https://www.flickr.com/photos/usfws_pacificsw/6948199942/). Used under license <https://creativecommons.org/licenses/by/2.0/>.

## How Does ESA Work?

ESA is intended to protect plants and animals from becoming extinct. It authorizes creating a list of protected species, either *endangered* (defined as being in danger of extinction) or *threatened* (defined as likely to become endangered in the foreseeable future).<sup>13</sup> ESA prohibits taking these species, with limited exceptions. In addition, it prohibits federal agencies from jeopardizing the continued existence of listed species and from destroying or adversely modifying listed species' designated critical habitats.

FWS is the federal agency that manages most species under ESA.<sup>14</sup> The Secretary of the Interior, acting through FWS, is charged with deciding whether to list a species. ESA specifies that a listing decision is to be based on five criteria:

<sup>13</sup> 16 U.S.C. §§1532(6), 1532(20). This section is intended to be a brief overview of ESA. For a more detailed analysis of the act, see CRS Report RL31654, *The Endangered Species Act: A Primer*, by M. Lynne Corn.

<sup>14</sup> The National Marine Fisheries Service (Department of Commerce) supervises most marine mammals and oceanic species.



1. The present or threatened destruction, modification, or curtailment of a species' habitat or range.
2. Overutilization for commercial, recreational, scientific, or educational purposes.
3. Disease or predation.
4. Inadequacy of existing regulatory mechanisms.
5. Other natural or man-made factors affecting a species' continued existence.<sup>15</sup>

In making a listing determination, FWS is charged with relying “solely on the basis of the best scientific and commercial data available.”<sup>16</sup>

FWS may list a species independently, or citizens may petition the agency to make a listing. When a petition is filed, certain deadlines are imposed by statute. FWS must determine and publish a decision in the *Federal Register* within 90 days of the filing of the petition on whether the petition presents substantial evidence in support of a listing.<sup>17</sup> Within 12 months of filing the petition, FWS must publish a notice on whether listing is warranted.<sup>18</sup> A final decision must be made one year after the 12-month notice.<sup>19</sup> FWS has the option of publishing a determination at the time of a 12-month finding that a listing is “warranted but precluded” due to limited FWS resources.<sup>20</sup> If the adequacy of existing regulatory mechanisms provides the rationale not to list a species, those mechanisms must meet certain criteria, described below.

## How Do Different Types of Conservation Agreements Qualify to Avoid Listing?

Under a candidate conservation agreement with assurances (CCAA), FWS provides incentives to nonfederal property owners to carry out voluntary conservation measures that may help to make listing unnecessary. In return, the property owner receives a permit “containing assurances that if they engage in certain conservation actions for the species included in the CCAA, the owner will not be required to implement additional measures beyond those in the CCAA.”<sup>21</sup> Moreover, there will be no additional obligations imposed if the species is listed later, unless the owner agrees. Courts have looked at three criteria in determining the adequacy of existing regulatory mechanisms:

1. Courts have found that *voluntary* actions are not *regulatory*; the protections must be enforceable.
2. Courts define *adequate* as sufficient to keep populations at a level such that listing will not prove necessary.
3. *Existing* means the plans for protection must be in place and are not future or speculative.

<sup>15</sup> 16 U.S.C. §1533(a)(1). (Between the fourth and fifth criteria, neither *and* nor *or* appears; in the case of sage grouse, it appears that the adequacy of existing regulatory mechanisms was the focus, because the mechanisms addressed other threats.)

<sup>16</sup> 16 U.S.C. §1533(b)(1)(A).

<sup>17</sup> 16 U.S.C. §1533(b)(3)(A).

<sup>18</sup> 16 U.S.C. §1533(b)(3)(B).

<sup>19</sup> 16 U.S.C. §1533(b)(6)(A).

<sup>20</sup> 16 U.S.C. §1533(b)(3)(B)(iii).

<sup>21</sup> FWS, “Candidate Conservation Agreements,” fact sheet, March 2011, at <https://www.fws.gov/endangered/esa-library/pdf/CCAs.pdf>.

Regarding the first criterion, no court has deemed a voluntary state action as a *regulatory* action sufficient to avoid federal listing. Even the Ninth Circuit, which found there were adequate regulatory measures to remove the grizzly bear from the threatened species list, expressly ignored the state voluntary actions: “For the purposes of the [existing adequate regulatory mechanisms] determination, however, we need not, and do not consider those [state] measures, some or all of which may not be binding.”<sup>22</sup>

The second criterion is whether the measures are *adequate*—that is, sufficient to keep populations at a level such that listing will not prove necessary. Courts have typically looked at the types of measures being taken, in addition to the size of areas being protected, as a way of finding adequacy.

For example, in the case of listing steelhead trout, the Northern District of California found that the state protection plans of Oregon and California for this species were voluntary and thus did not count as a regulatory measure. The court also found that a federal plan for protecting the species would cover only 64% of habitat, which was not enough to prevent species’ further decline.<sup>23</sup> Therefore, the regulatory measure affecting federal habitat was not adequate to prevent the need for listing. By contrast, in the previously cited case on grizzly bears, the Ninth Circuit held that a plan that would have the force of law on federal lands but would be voluntary on other lands was adequate to protect the grizzly bear because federal lands constituted 98% of the grizzly’s primary conservation area.<sup>24</sup>

The third criterion is that the regulatory mechanisms be in place—*existing*—and not future or speculative. One court said it would not consider a new agreement to be an adequate regulatory mechanism and would require a conservation agreement to have a record of two years to be sufficient.<sup>25</sup>

## Chronology of Petitions and FWS Sage-Grouse Action<sup>26</sup>

This section provides a brief chronology of major sage-grouse protection actions, beginning with petitions filed in 1999 to list the sage-grouse for protection under ESA and ending with the FWS decision in 2015 not to list the species. Major events are listed below and followed by discussion.

- Between 1999 and 2005, eight petitions were filed to protect sage-grouse in all or portions of the species’ range. Some petitions were rejected because they were not considered substantive enough to be eligible. In 2004, FWS found that three of the petitions (received from 2002 to 2003) were substantive—that is, the petitions presented substantial evidence in support of the listing.<sup>27</sup>

<sup>22</sup> Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1032 (9<sup>th</sup> Cir. 2011).

<sup>23</sup> Federation of Fly Fishers v. Daley, 131 F. Supp. 2d 1158 (N.D. Cal. 2000). The measures did not include a CCAA.

<sup>24</sup> Greater Yellowstone Coalition, Inc. v. Servheen, 665 F.3d 1015, 1021 (9<sup>th</sup> Cir. 2011).

<sup>25</sup> Save Our Springs v. Babbitt, 27 F. Supp. 2d 739 (W.D. Texas 1997).

<sup>26</sup> For a more comprehensive history of actions discussed in this section, see FWS, “Endangered and Threatened Wildlife and Plants; 12 Month Finding on a Petition to List Greater Sage Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species Proposed Rule,” 80 *Federal Register* 59858–59860, October 2, 2015.

<sup>27</sup> FWS, “Endangered and Threatened Wildlife and Plants; 90 day Finding for Petitions To List the Greater Sage grouse as Threatened or Endangered,” 69 *Federal Register* 21486, April 21, 2004.

- In 2005, FWS determined that listing was not warranted.<sup>28</sup> This determination was challenged, questioning the scientific basis for the decision not to list the species. In a 2007 court decision, the District Court for the District of Idaho held that the Deputy Assistant Secretary of the Department of the Interior wrongfully interfered with the listing decision and that FWS did not use the best science as required by ESA.<sup>29</sup> The case was remanded to the agency, and in 2008 FWS issued a notice of status review for the species.<sup>30</sup>
- In 2010, FWS found that “that the inadequacy of existing regulatory mechanisms is a significant threat to the greater sage-grouse now and in the foreseeable future” and announced that “listing the greater sage-grouse (rangeland) is warranted, but precluded by higher priority listing actions. We will develop a proposed rule to list the greater sage-grouse as our priorities allow.”<sup>31</sup> FWS assigned the species a listing priority number of 8 (out of 12, with 1 being the highest priority).
- In a separate court settlement in 2011, FWS agreed to make a decision on whether to list the sage-grouse by the end of FY2015.<sup>32</sup> A plaintiff not involved in that settlement sued, arguing that FWS was not making expeditious progress in listing the species, as required under ESA,<sup>33</sup> but the court held otherwise.<sup>34</sup> That plaintiff, Western Watersheds Project, had sued to force listing of the sage-grouse prior to the compromise deadline, but the court held that “despite troubling aspects of the FWS decision process,” the warranted but precluded finding was not arbitrary or capricious.<sup>35</sup>
- As part of a court-ordered settlement agreement concerning prior decisions on sage-grouse,<sup>36</sup> FWS filed a work plan in 2011 that committed either to publish proposed rules to list the species or to find that listing was not warranted for sage-grouse by September 30, 2015.
- On December 16, 2014, the President signed the Consolidated and Further Appropriations Act, 2015,<sup>37</sup> which included a provision to prohibit funding to issue a proposed rule for sage-grouse before September 30, 2015.
- On September 22, 2015, FWS announced its decision not to list the sage-grouse under ESA, based on the adequacy of existing regulatory mechanisms to protect

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<sup>28</sup> FWS, “Endangered and Threatened Wildlife and Plants; 12 Month Finding for Petitions To List the Greater Sage Grouse as Threatened or Endangered; Proposed Rule,” 70 *Federal Register* 2243 2282, January 12, 2005.

<sup>29</sup> *Western Watersheds Project v. Fish and Wildlife Service*, 535 F. Supp. 2d 1173 (D. Idaho 2007).

<sup>30</sup> FWS, “Endangered and Threatened Wildlife and Plants; Initiation of Status Review for the Greater Sage Grouse (*Centrocercus urophasianus*) as Threatened or Endangered,” 73 *Federal Register* 10218 10219, February 26, 2008.

<sup>31</sup> FWS, “Endangered and Threatened Wildlife and Plants; 12 Month Findings for Petitions to List the Greater Sage Grouse (*Centrocercus urophasianus*) as Threatened or Endangered; Proposed Rule,” 75 *Federal Register* 13909 14014, March 23, 2010.

<sup>32</sup> *In Re: Endangered Species Act Section 4 Deadline Litigation*, No. 10 377 (D.D.C. July 12, 2011).

<sup>33</sup> 16 U.S.C. §1533(b)(3)(B)(iii)(II).

<sup>34</sup> *Western Watersheds Project v. U.S. Fish and Wildlife Service*, No. 4:10 CV 229 (D. Idaho September 26, 2012).

<sup>35</sup> *Ibid.* at \*7 (D. Idaho February 2, 2012).

<sup>36</sup> *In Re: Endangered Species Act Section 4 Deadline Litigation*, No. 10 377 (D.D.C. July 12, 2011).

<sup>37</sup> P.L. 113 235.

the species. This decision was published in the *Federal Register* on October 2, 2015.<sup>38</sup>

## Why Did FWS Decide Not to List Sage-Grouse?

In response to the 2010 FWS finding that sage-grouse warranted ESA listing, federal, state, and private landowners undertook many and varied actions to conserve the species and prevent listing. Secretary of the Interior Sally Jewell later referred to the federal, state, and private collaborative actions to preserve sage-grouse as the most comprehensive conservation effort in the nation's history.<sup>39</sup> As a result, in September 2015, FWS concluded that sage-grouse met the ESA standard of having adequate existing regulatory mechanisms, at several levels. These collaborative, governmental, and nongovernmental efforts are discussed below.

### Collaborative Mechanisms to Protect Sage-Grouse

Many efforts involved multiple agencies and landowners. In 2011, several federal agencies signed a memorandum of understanding to coordinate and cooperate in management of sage-grouse habitat.<sup>40</sup> Also in 2011, Wyoming Governor Matt Mead and then-secretary of the Interior Ken Salazar cohosted a meeting to coordinate a multistate effort to protect sage-grouse across land ownerships. As a result of the meeting, two entities were established: a Sage-Grouse Task Force, chaired by the governor of Wyoming, governor of Colorado, and director of the Bureau of Land Management (BLM), and a Conservation Objectives Team (COT), consisting of FWS and state representatives. The COT team issued a report setting out objectives for the conservation and survival of the sage-grouse.<sup>41</sup> FWS Director Dan Ashe indicated that the report was not only for his use in making decisions regarding the sage-grouse but also for guiding other federal land management agencies, state sage-grouse teams, and others in conserving the species.<sup>42</sup>

### State and Private Actions

Many western states were concerned about the prospect of listing the sage-grouse on the grounds that listing might affect land use through potential restrictions on energy development, grazing, urban development, and other activities. In particular, states were concerned that listing would affect management of BLM and FS lands, where economic uses such as mining, fossil and alternative fuel development, grazing, hunting, fishing, and outdoor recreation may all be important to local and regional economies.

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<sup>38</sup> FWS, "Endangered and Threatened Wildlife and Plants; 12 Month Finding on a Petition to List Greater Sage Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species Proposed Rule," 80 *Federal Register* 59858 59942, October 2, 2015.

<sup>39</sup> Department of the Interior (DOI), "Historic Conservation Campaign Protects Greater Sage Grouse," press release, September 22, 2015, at [https://www.fws.gov/news/ShowNews.cfm?ID=F5B7455D\\_0824\\_997C\\_47667F8ABBFFBA86](https://www.fws.gov/news/ShowNews.cfm?ID=F5B7455D_0824_997C_47667F8ABBFFBA86).

<sup>40</sup> "Interagency Agreement Between the United States Department of Agriculture Natural Resources Conservation Service, and the USDA Forest Service, and the United States Department of the Interior Bureau of Land Management and the Fish and Wildlife Service," Forest Service (FS) Agreement Number: 11 IA 11132400 104, 2011, at [http://www.blm.gov/style/medialib/blm/wo/Planning and Renewable Resources/fish\\_wildlife\\_and/sage\\_grouse.Par.6386.File.dat/MOU%20on%20Greater%20Sage Grouse.pdf](http://www.blm.gov/style/medialib/blm/wo/Planning%20and%20Renewable%20Resources/fish_wildlife_and/sage_grouse.Par.6386.File.dat/MOU%20on%20Greater%20Sage%20Grouse.pdf).

<sup>41</sup> FWS, *Greater Sage grouse Conservation Objectives Team Final Report*, March 2013, [http://www.fws.gov/greatersagegrouse/documents/COT Report with Dear Interested Reader Letter.pdf](http://www.fws.gov/greatersagegrouse/documents/COT_Report_with_Dear_Interested_Reader_Letter.pdf).

<sup>42</sup> *Ibid.*, see preface (p. ii).

To avoid potential adverse impacts on these sectors, states took diverse steps to conserve the species and to avoid a listing. For example, the Western Association of Fish and Wildlife Agencies (WAFWA) developed guidelines for best practices to assist states in managing sage-grouse habitat; WAFWA also signed memoranda of understanding with federal agencies.<sup>43</sup> Some states acted to protect sage-grouse and its habitat to avoid further reductions in numbers.<sup>44</sup> California, Colorado, Idaho, Montana, Nevada, and Wyoming all issued conservation plans whose measures varied but included bag limits;<sup>45</sup> where, when, and whether hunting was allowed; control of nonnative predators; limits on placement of utility lines; vegetative treatments to reduce invading juniper trees; habitat restoration after energy development; and other actions.<sup>46</sup>

For private lands, the Natural Resources Conservation Service (NRCS, U.S. Department of Agriculture) has led voluntary conservation efforts through its Sage-Grouse Initiative (SGI), which began in 2010.<sup>47</sup> The SGI uses existing federal conservation programs, namely the Environmental Quality Incentives Program (EQIP) and the Agricultural Conservation Easement Program (ACEP), to provide technical and financial assistance to help farmers and ranchers accelerate installation of conservation practices beneficial to sage-grouse. Examples of approved conservation practices include implementing grazing systems to improve cover for birds, removing invasive conifers from grasslands to improve habitat and increase forage for livestock, and marking or moving fences near breeding sites to reduce bird collisions. The initiative is

<sup>43</sup> John W. Connelly et al., “Guidelines to Manage Sage Grouse Populations and Their Habitats,” *Wildlife Society Bulletin*, vol. 28, no. 4 (2000), pp. 967–985.

<sup>44</sup> Washington lists the sage grouse as a threatened species (Wash. Admin. Code §232 12 011) but also includes the species in its list of game birds (Wash. Admin. Code §232 12 004).

<sup>45</sup> A bag limit is a limit on the number of birds that may be taken by a hunter during a hunting season. Limits may specify different limits on male or female sage grouse.

<sup>46</sup> California and Nevada: Nevada Department of Wildlife, *Greater Sage Grouse Conservation Plan for Nevada and Eastern California*, June 30, 2004, at <http://www.ndow.org/wild/conservation/sg/plan/SGPlan063004.pdf>.

Colorado: Colorado Parks and Wildlife, *Colorado Greater Sage Grouse Conservation Plan*, January 2008, at <http://cpw.state.co.us/learn/Pages/GreaterSagegrouseConservationPlan2.aspx>.

Idaho: Idaho Fish and Game, *Conservation Plan for the Greater Sage grouse in Idaho*, July 2006, at <http://fishandgame.idaho.gov/public/wildlife/sageGrouse/conservPlan.pdf>.

Montana: Montana Fish, Wildlife, & Parks, *Management Plan and Conservation Strategies for Sage Grouse in Montana Final*, February 2005, at <http://fwp.mt.gov/fishAndWildlife/management/sageGrouse/mgmtPlan.html>.

Nevada: Nevada Department of Wildlife, “Sage Grouse Conservation Plans” (variously divided, with most recent portion dated 2012), at [http://www.ndow.org/Nevada\\_Wildlife/Sage\\_Grouse/Conservation\\_Plans/](http://www.ndow.org/Nevada_Wildlife/Sage_Grouse/Conservation_Plans/).

North Dakota: North Dakota Game and Fish Department, *Management Plan and Conservation Strategies for Greater Sage Grouse in North Dakota*, 2014, at <https://gf.nd.gov/publications/535>.

Oregon: SageCon Partnership, *Oregon Sage Grouse Action Plan*, 2015, at <http://oregonexplorer.info/content/oregon-sage-grouse-action-plan?topic=203&ptopic=179>.

South Dakota: South Dakota Wildlife Division, Department of Game, Fish, and Parks, *Greater Sage Grouse Management Plan South Dakota, 2008–2017*, at [http://gfp.sd.gov/wildlife/docs/sage\\_grouse\\_management\\_plan.pdf](http://gfp.sd.gov/wildlife/docs/sage_grouse_management_plan.pdf).

Utah: Utah Division of Wildlife Resources, *Conservation Plan for Greater Sage Grouse in Utah*, 2013, at [http://wildlife.utah.gov/uplandgame/sage\\_grouse/pdf/greater\\_sage\\_grouse\\_plan.pdf](http://wildlife.utah.gov/uplandgame/sage_grouse/pdf/greater_sage_grouse_plan.pdf).

Washington: Washington Department of Fish and Wildlife, Wildlife Program, *Sage Grouse Conservation in Washington: 2013*, at <http://wdfw.wa.gov/publications/01602/wdfw01602.pdf>.

Wyoming: State of Wyoming, Office of the Governor, Executive Order 2010 4, “Sage-Grouse Core Area Protection,” 2010, at [http://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs142p2\\_026366.pdf](http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs142p2_026366.pdf).

<sup>47</sup> For additional information on the Sage Grouse Initiative (SGI), see U.S. Department of Agriculture (USDA). Natural Resources Conservation Service (NRCS), “Sage Grouse Initiative,” at <http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/initiatives/?cid=steldevb1027671>.

offered in the 11 western states with areas of high sage-grouse populations.<sup>48</sup> Between FY2010 and FY2015, NRCS through the SGI obligated more than \$296 million through 1,289 contracts on more than 5 million acres. In August 2015, NRCS expanded the initiative (referred to as *SGI 2.0*), committing approximately \$211 million through FY2018 to bring the total to more than 8 million acres conserved.<sup>49</sup>

SGI is part of a larger Working Lands for Wildlife (WLFW) initiative at NRCS.<sup>50</sup> In addition to financial and technical assistance, the WLFW initiative ensures that participating producers who continue to maintain NRCS conservation practices to benefit the targeted species will be considered compliant with ESA for periods as long as 30 years, even if the species is subsequently listed under ESA.<sup>51</sup>

## BLM and FS Sage-Grouse Strategy and Conservation Plans<sup>52</sup>

An estimated 271,604 square miles of sage-grouse habitat remain; of this total, two federal agencies manage more than half: BLM manages 45%, and FS manages 6%.<sup>53</sup> In response to the FWS 2010 finding that sage-grouse warranted ESA listing, BLM and FS began a coordinated and cooperative effort to develop and implement a joint conservation strategy to “protect, enhance, and restore sage-grouse and its habitat and to provide sufficient regulatory certainty” to warrant FWS not listing the species.<sup>54</sup> In 2011, both agencies published a notice of intent to prepare environmental impact statements (EISs) to incorporate sage-grouse conservation measures into the agencies’ land and resource management plans across the range of the species.<sup>55</sup> The final COT report, mentioned above, other research efforts,<sup>56</sup> WAFWA, state conservation plans, and conservation activities on private lands all contributed to the development of the federal conservation strategy.

<sup>48</sup> A map illustrating the SGI boundary is at [http://www.nrcs.usda.gov/Internet/FSE\\_MEDIA/nrcsdev11\\_023999.png](http://www.nrcs.usda.gov/Internet/FSE_MEDIA/nrcsdev11_023999.png).

<sup>49</sup> USDA, NRCS, *Sage Grouse Initiative 2.0*, Investment Strategy, FY2015 FY2018, August 2015, at [http://www.nrcs.usda.gov/wps/PA\\_NRCSConsumption/download?cid=nrcseprd391816&ext=pdf](http://www.nrcs.usda.gov/wps/PA_NRCSConsumption/download?cid=nrcseprd391816&ext=pdf).

<sup>50</sup> Seven species are eligible under the Working Lands for Wildlife (WLFW) initiative: lesser prairie chicken, New England cottontail, southwestern willow flycatcher, greater sage grouse, gopher tortoise, bog turtle, and golden winged warbler. For additional information, see USDA, NRCS, “Working Lands for Wildlife,” at <http://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/initiatives/?cid=stelprdb1046975>.

<sup>51</sup> Conservation practices under the WLFW were developed in partnership by NRCS and FWS. Landowners who voluntarily enroll in WLFW and carry out recommended conservation practices will be allowed to obtain incidental take permits valid through July 30, 2040. See USDA and FWS, Working Lands for Wildlife Greater Sage Grouse, “ESA Predictability: Frequently Asked Questions,” August 2014, at [http://www.nrcs.usda.gov/wps/PA\\_NRCSConsumption/download?cid=nrcseprd334450&ext=pdf](http://www.nrcs.usda.gov/wps/PA_NRCSConsumption/download?cid=nrcseprd334450&ext=pdf).

<sup>52</sup> This section was prepared by Carol Hardy Vincent and Katie Hoover. For additional information on Bureau of Land Management (BLM) activities pertaining to sage grouse, contact Carol Hardy Vincent at [chvincent@crs.loc.gov](mailto:chvincent@crs.loc.gov) or 7 8651. For additional information on Forest Service (FS) activities pertaining to sage grouse, contact Katie Hoover at [khoover@crs.loc.gov](mailto:khoover@crs.loc.gov) or 7 9008.

<sup>53</sup> FWS, “Endangered and Threatened Wildlife and plants; 12 Month Finding on a Petition to List Greater Sage Grouse (*Centrocercus urophasianus*) as an Endangered or Threatened Species; Proposed Rule,” 80 *Federal Register* 59866, October 2, 2015. Table 2. Other federal agencies (including the National Park Service) manage 2% of remaining sage grouse habitat, tribes manage 3%, states manage 5%, and private owners manage 39%.

<sup>54</sup> FS, *Greater Sage grouse Record of Decision for Idaho and Southwest Montana, Nevada, and Utah*, September 2015, p. 12, at [http://www.fs.fed.us/sites/default/files/great\\_basinROD\\_package.pdf](http://www.fs.fed.us/sites/default/files/great_basinROD_package.pdf).

<sup>55</sup> BLM, “Notice of Intent to Prepare Environmental Impact Statements and Supplemental Environmental Impact Statements to Incorporate Greater Sage Grouse Conservation Measures into Land Use Plans and Land Management Plans,” 76 *Federal Register* 77008 77011, December 9, 2011.

<sup>56</sup> For example, U.S. Geological Survey, *Conservation Buffer Distance Estimates for GRS G A Review*, 2014.

In 2013, BLM and FS released for public comment and review draft EISs to amend 98 land and resource management plans covering the range of the sage-grouse in 10 states.<sup>57</sup> The final EISs were published in May 2015, and the records of decision were signed in September 2015.<sup>58</sup> These plans establish management goals, objectives, and direction for sage-grouse habitat and conservation on FS and BLM lands but do not require specific on-the-ground activities. However, any FS or BLM project or on-the-ground activity planned within these areas must comply with the management direction established by the plans.

The plans build on the multitiered approach identified by WAFWA and state conservation plans and establish different land allocations, with different land management prescriptions, based on habitat conditions. Lands identified as the most valuable habitat will be afforded the highest levels of protection, whereas other lands may permit more flexible management and resource development. The land allocations are identified as follows:

- Priority Habitat Management Areas (PHMAs): Lands identified as having the highest habitat value for maintaining sustainable sage-grouse populations.
  - Sagebrush Focal Areas (SFAs): Subsets of PHMAs, these lands were identified as having the highest densities of sage-grouse and other criteria important for the persistence of the species. These areas include the highest protections from new surface disturbances, such as mining activities, to protect sensitive habitats.
- General Habitat Management Areas (GHMAs): Lands that are seasonal or year-round habitat outside of PHMA where some special management would apply to sustain sage-grouse populations.<sup>59</sup>

The FS and BLM plans are based on three objectives for conserving and protecting sage-grouse habitat as identified by the final COT report: improve habitat condition, minimize new or additional surface disturbance, and reduce the threat of rangeland fire to sage-grouse and sagebrush habitat.<sup>60</sup> Each of these objectives is briefly summarized below.

### **Improve Sage-Grouse Habitat Condition**

The plans seek to enhance sage-grouse habitat through varied means. One such means pertains to mitigation by avoiding, minimizing, and compensating for impacts of development. Another relates to consideration for sage-grouse habitat management during the permitting and monitoring processes for livestock grazing, for example. A third involves monitoring and evaluation of

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<sup>57</sup> The 10 states are California, Colorado, Idaho, Montana, Nevada, North Dakota, Oregon, Utah, South Dakota, and Wyoming. Washington was not included in the BLM FS planning effort because sage grouse habitat in that state is primarily located on state and private lands, according to BLM. See the BLM's sage grouse website, Frequently Asked Questions, under "How many states are involved in the greater sage grouse conservation effort?" at [http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently asked questions.html](http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently%20asked%20questions.html).

<sup>58</sup> The records of decision, together with other documents and resources related to sage grouse conservation on federal, state, and private lands, are on the Documents and Resources page of the BLM website at [http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents and resources.html](http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents%20and%20resources.html).

<sup>59</sup> This description of the layered management approach is drawn in part from BLM's sage grouse website, Frequently Asked Questions, under "How do the plans achieve conservation?" at [http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently asked questions.html](http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently%20asked%20questions.html).

<sup>60</sup> BLM and FS, "Fact Sheet: BLM, USFS Greater Sage Grouse Conservation Effort," September 22, 2015, at [http://www.fs.fed.us/sites/default/files/fact sheet greater sage grouse.pdf](http://www.fs.fed.us/sites/default/files/fact%20sheet%20greater%20sage%20grouse.pdf). The discussion that follows is drawn from this fact sheet.

population changes, habitat condition, and mitigation efforts. A fourth provides for adjustment of plans to correct for declines in population or habitat.

### Minimize Surface Disturbances

The plans describe several strategies to minimize surface disturbances in sage-grouse habitat, including capping surface disturbances at different levels for different habitat areas. One strategy involves reducing surface disturbances from mineral and energy resource uses, such as locating renewable energy and other projects outside of priority habitat areas. As part of that strategy, the Secretary of the Interior has proposed to withdraw from location and entry under the U.S. mining laws approximately 10 million acres of BLM and National Forest System land in specified sage-grouse habitat in six states,<sup>61</sup> subject to valid existing rights.<sup>62</sup> During the ongoing segregation period, which can last up to two years while the Secretary decides whether to make the withdrawal, the location and entry of new mining claims in these areas are prohibited. During the segregation, BLM is coordinating the National Environmental Policy Act (NEPA) process, including conducting environmental surveys and analyses and inviting public input on the proposed withdrawal.<sup>63</sup>

### Reduce Wildfire Threat

The COT report identified fire, and the post-fire spread of invasive grasses, as one of the most immediate threats to sage-grouse habitat. The FS and BLM plans provide guidance and strategies to address this threat, including positioning wildland fire management resources to maximize response capacity, managing vegetation to reduce fire risk, and promoting the post-fire restoration of native grassland species.<sup>64</sup>

### Conflicting Views on BLM and FS Plans

The BLM and FS plans have received both support and opposition. Supporters have commended the collaborative process that generated the protections on federal and other lands. Some conservationists and others have praised the plans as containing the necessary safeguards for sage-grouse to recover. However, other environmental organizations have objected to the plans as not protective enough of sensitive sage-grouse habitat and called for an ESA listing or more stringent conservation provisions in the plans. Some states, industries, and others have argued that

<sup>61</sup> Provisions of the Federal Land Policy and Management Act (codified at 43 U.S.C. §1714) authorize the Secretary of the Interior to withdraw lands. The provisions define withdrawal as “withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program; or transferring jurisdiction over an area of Federal land....” (43 U.S.C. §1702(j)). Except in emergency situations, the Secretary is authorized to withdraw lands outside the Department of the Interior only with the consent of the head of the agency or department (43 U.S.C. §1714(i)).

<sup>62</sup> BLM, “Notice of Proposed Withdrawal; Sagebrush Focal Areas; Idaho, Montana, Nevada, Oregon, Utah, and Wyoming and Notice of Intent to Prepare an Environmental Impact Statement,” 80 *Federal Register* 57635 57637, September 24, 2015. A correction notice was subsequently issued, See 80 *Federal Register* 63583, October 20, 2015.

<sup>63</sup> National Environmental Policy Act (NEPA; 42 U.S.C. §§4321 4347). This and other information on the proposed withdrawal is contained in BLM, Documents and Resources, “Withdrawal Order Fact Sheet,” at [http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents\\_and\\_resources.html](http://www.blm.gov/wo/st/en/prog/more/sagegrouse/documents_and_resources.html).

<sup>64</sup> For more information, see DOI, *Rangeland Fire Prevention, Management, and Restoration*, Secretarial Order No. 3336, January 5, 2015, and DOI, *Implementation Plan for Secretarial Order 3336*, January 30, 2015, at [https://www.forestsandrangelands.gov/rangeland/documents/ImplementationPlan\\_SecretarialOrder3336.pdf](https://www.forestsandrangelands.gov/rangeland/documents/ImplementationPlan_SecretarialOrder3336.pdf).



the plans could unnecessarily restrict uses of federal land, including energy and mineral development, livestock grazing, hunting, and recreation. Other questions have centered on whether the federal government or states should take the lead in conserving the sage-grouse. Some states that had adopted conservation plans disputed the need for federal plans or opposed provisions of those plans as in conflict with their own. Some critics questioned whether the plans were based on adequate science.

More broadly, other concerns have been raised about the overall protection afforded through federal, state, and local efforts. These efforts eliminated only the ESA listing per se, because they formed the basis for the FWS decision not to list the species. However, some conflated an FWS decision not to list with the opportunity to avoid strong conservation measures. For such individuals, the FWS decision seemed like a “bait and switch” because the effects of the federal, state, and local efforts seemed similar to effects that would have been expected from an ESA listing.<sup>65</sup>

## Implementation and Other Issues

Although controversy over sage-grouse conservation began decades ago with the question of whether the species was depleted enough to need protection, the current debate has turned to the validity of the FWS decision not to list the species and the impacts of the protections that avoided ESA listing, especially the revised BLM and FS land management plans. Among the issues that have been raised by various parties are the following:

- the efficacy of state management and whether management of federal lands for sage-grouse conservation should be made subordinate to state management;
- the variation among states in protecting the species from recurring threats, and in some cases the failure to limit activities that pose the greatest risk in a given state, such as energy development in Wyoming or geothermal development in Nevada;
- whether restrictions on grazing will be implemented soon enough to reduce nest trampling from cattle;
- whether the decision not to list the species was predicated on the best available science;
- whether federal land management plans to protect sage-grouse habitat disregard the mandates of BLM and FS for multiple use and sustained yield; and
- whether any relaxation of land management plans in a manner to favor economic development might increase the possibility that FWS would revisit its decision not to list the species.

For these and other reasons, states and interest groups have filed lawsuits. In addition, a number of bills have been introduced in the 114<sup>th</sup> Congress to address aspects of sage-grouse conservation on specific lands.<sup>66</sup> Provisions in various bills overlap considerably but include

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<sup>65</sup> For example, see “The Sage Grouse Switcheroo,” *Wall Street Journal*, September 27, 2015.

<sup>66</sup> These bills include H.R. 1793/S. 468; H.R. 1997/S. 1036, H.R. 4739; H.R. 4909 (§2864)/S. 2943 (§2864); H.R. 5538 (§114)/S. 3068 (§115); S. 2132 (§119); and P.L. 114 113 (Division G, §117). In some cases, certain versions of these bills may lack provisions on sage grouse.

- preventing delay of a future listing of the species (e.g., H.R. 4739; H.R. 4909 (§2864)/S. 2943 (§2864));
- exempting certain vegetative management practices designed to benefit sage-grouse from the NEPA (e.g., H.R. 1793 / S. 468);
- allowing states to develop their own sage-grouse management plans (e.g., H.R. 1997/S. 1036);
- allowing state preemption of federal land management plans regarding sage-grouse (e.g., H.R. 1997/S. 1036);
- reversing prior land withdrawals made to protect sage-grouse (e.g., H.R. 4739; H.R. 4909 (§2864)/S. 2943 (§2864)); and
- exempting sage-grouse provisions from judicial review (e.g., H.R. 4739).

## **Author Contact Information**

M. Lynne Corn  
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Carol Hardy Vincent  
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chvincent@crs.loc.gov, 7-8651

Katie Hoover  
Specialist in Natural Resources Policy  
khoover@crs.loc.gov, 7-9008

## **Acknowledgments**

Kristina Alexander, former CRS legislative attorney, contributed to an earlier version of this report.

**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Amanda Kaster[amanda\_kaster@ios.doi.gov]; Caroline Boulton[caroline\_boulton@ios.doi.gov]; Small, Jeff[Jeff.Small@mail.house.gov]  
**From:** Roberson, Kelly  
**Sent:** 2017-03-29T09:34:04-04:00  
**Importance:** Normal  
**Subject:** Re: Zinke Signing Ceremony - 3.28.17  
**Received:** 2017-03-29T09:34:14-04:00

Hi guys-

We're en route to you. You might have heard there was an altercation with Capitol police. We were right in the middle of it and are headed your way now.

Apologies for our delay,  
Kelly

Please excuse any typos - Siri has a mind of her own

On Mar 29, 2017, at 9:30 AM, Chambers, Micah <[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)> wrote:

Talking Points for Today's Signing. This is meant to craft your individual office press releases, please do not share. Draft Press Release to follow shortly. See you all soon.

Note: We will not have order numbers until AFTER the orders are signed and processed by exec sec.

**SO #TBD: Repealing the 2016 Coal Moratorium - Ending the PEIS**

Rescind SO 3338 signed by Sally Jewell and direct BLM to process lease applications

Federal coal leasing is important to the U.S. economy and roughly 40% of U.S. coal is produced on federal lands.

The Department determined the public interest not served by halting leases for several years and that the PEIS is not needed to improve the program.

Note: In 2013, both the OIG and the GAO audited BLM's coal leasing program. Between The OIG and GAO there were 21 recommendations made to improve transparency in the leasing program to ensure that the American taxpayer was receiving a fair return from the coal program. BLM has addressed all 21 recommendations and works closely with the Office of Valuation Services to ensure that bonus bids are calculated appropriately. In addition, the Federal Royalty Policy Committee has been reestablished.

Mining companies are held accountable and expected to comply with strict environmental standards and present reclamation plans. Every year the "best of" reclaimed mine lands are highlighted by the Office of Surface Mining and Reclamation and Enforcement.

**Charter Signed: Establish Royalty Policy Committee**

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#### Membership

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Following the bold executive order signed by President Trump yesterday, Secretarial Order XXXX, "American Energy Independence," takes numerous steps to unleash the power of American energy on public lands.

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- Launches a review of all climate change policies within the department
- Launches a review of the National Parks Service and Fish and Wildlife Service oil and gas regulations
- Launches a review of Bureau of Land Management's venting & flaring (methane) rule
- Confirms that Bureau of Land Management is withdrawing the hydraulic fracking rule

On Tue, Mar 28, 2017 at 6:32 PM, Chambers, Micah <[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)> wrote:

All.

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- Withdrawing previous Secretary's Orders on Mitigation and oil & gas prohibitions.
- Announcing the reestablishing of the Royal Policy Committee.

**Press:** YES

**Industry:** YES

**POC:** Caroline Boulton 202.706.9300 / Micah Chambers 202.706.9093 / Amanda Kaster  
Averill 202.230.9508

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

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Special Assistant / Acting Director  
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**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**Cc:** Hayes, Colin (Energy)[Colin\_Hayes@energy.senate.gov]; Hughes, Brian (Energy)[Brian\_Hughes@energy.senate.gov]  
**From:** Daimler-Nothdurft, Kristen (Murkowski)  
**Sent:** 2017-03-29T09:34:29-04:00  
**Importance:** Normal  
**Subject:** RE: Zinke Signing Ceremony - 3.28.17  
**Received:** 2017-03-29T09:34:48-04:00

Murkowski on the way

Kristen Daimler Nothdurft  
Executive Assistant/Scheduler  
Office of Senator Lisa Murkowski  
Hart Senate Office Building, room 522  
Washington, DC 20510  
202-224-6665 phone  
202-224-4349 scheduling fax

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Wednesday, March 29, 2017 9:29 AM  
**To:** Micah Chambers <micah\_chambers@ios.doi.gov>  
**Cc:** Amanda Kaster <amanda\_kaster@ios.doi.gov>; Caroline Boulton <caroline\_boulton@ios.doi.gov>  
**Subject:** Re: Zinke Signing Ceremony - 3.28.17

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**POC:** Caroline Boulton 202.706.9300 / Micah Chambers 202.706.9093 / Amanda Kaster Averill 202.230.9508

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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior



**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Ahern, Kara  
**Sent:** 2017-03-29T09:36:50-04:00  
**Importance:** Normal  
**Subject:** Re: Zinke Signing Ceremony - 3.28.17  
**Received:** 2017-03-29T09:36:58-04:00

Just leaving hill now. Won't get there until 950.

Sent from my iPhone

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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

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Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Downey Magallanes[downey\_magallanes@ios.doi.gov]  
**From:** Tanner, John (Hatch)  
**Sent:** 2017-03-29T09:45:17-04:00  
**Importance:** Normal  
**Subject:** FW: CRS Follow-Up on National Monument Request  
**Received:** 2017-03-29T09:45:30-04:00  
[AZ Gov Hull - news articles.PDF](#)  
[ATT00001.htm](#)  
[Canyons of the Ancients.pdf](#)  
[ATT00002.htm](#)  
[Upper Missouri River Breaks.pdf](#)  
[ATT00003.htm](#)  
[Grand Staircase-Escalante - 1.pdf](#)  
[ATT00004.htm](#)  
[Grand Staircase-Escalante - 2.pdf](#)  
[ATT00005.htm](#)

---

**From:** Ed Cox <[Ed\\_Cox@hatch.senate.gov](mailto:Ed_Cox@hatch.senate.gov)>  
**Date:** Tuesday, March 28, 2017 at 7:41 PM  
**To:** John Tanner <[John\\_Tanner@hatch.senate.gov](mailto:John_Tanner@hatch.senate.gov)>  
**Subject:** Fwd: CRS Follow Up on National Monument Request

Sent from my iPhone

Begin forwarded message:

**From:** "Hanson, Laura" <[LHANSON@crs.loc.gov](mailto:LHANSON@crs.loc.gov)>  
**Date:** March 28, 2017 at 6:12:19 PM EDT  
**To:** "'ed\_cox@hatch.senate.gov'" <[ed\\_cox@hatch.senate.gov](mailto:ed_cox@hatch.senate.gov)>  
**Cc:** "Hardy-Vincent, Carol" <[CHVINCENT@crs.loc.gov](mailto:CHVINCENT@crs.loc.gov)>, "Gomez, Lena" <[LAGOMEZ@crs.loc.gov](mailto:LAGOMEZ@crs.loc.gov)>  
**Subject:** FW: CRS Follow-Up on National Monument Request

Hi Ed,

This email responds to your request for statements made by governors about national monument designations with areas over 100k acres. Please see the table below and the accompanying attachments for the statements that we were able to identify. We searched subscription news databases, including Nexis and Factiva, as well as state and general websites.

Note that we couldn't find a statement for every monument designation. For those statements that we did identify, some statements appear to support the designation, while others appear to oppose the designation. We didn't identify any statements by CA governors on designations, but did find some statements made by the CA Secretary of Natural Resources. Some of the attached PDFs include more than one monument (relevant portions have been highlighted).

## Statements Made by Governors or Other State Officials on Selected National Monument Designations

State	Monument	Date	Acres	Governor / Time in Office	Notes
Arizona	Grand Canyon-Parashant	01/11/2000	1,014,000	Hull, Jane Dee (Sept 5, 1997-Jan 6, 2003)	See attached PDF.
	Ironwood Forest	06/09/2000	128,917		
	Sonoran Desert	01/17/2001	486,149		
	Vermilion Cliffs	11/09/2000	293,000		
California	Carrizo Plain	01/17/2001	204,107	Davis, Gray (Jan 4, 1999-Nov 17, 2003)	No statements identified.
	Giant Sequoia	04/15/2000	327,769		
	Berryessa Snow Mountain	07/10/2015	330,780	Brown, Jerry (Jan 3, 2011-)	<a href="#">CA Sec. Laird statement on Berryessa</a> <a href="#">CA Sec. Laird statement on Mojave Trails and Sand to Snow</a> No San Gabriel Mountains statements identified
	Mojave Trails	02/12/2016	1,600,000		
	San Gabriel Mountains	10/10/2014	346,177		
	Sand to Snow	02/12/2016	154,000		
Colorado	Canyons of the Ancients	06/09/2000	164,000	Owens, Bill (Jan 12, 1999-Jan 9, 2007)	See attached PDF.
Hawaii - Alaska - California	World War II Valor in the Pacific	12/05/2008	4,038,400	HI - Lingle, Linda (Dec 2, 2002-Dec 6, 2010)	No statements identified.

				AK - Palin, Sarah (Dec 4, 2006-Jul 26, 2009) CA - Schwarzenegger, Arnold (Nov 17, 2003-Jan 3, 2011)	
Montana	Upper Missouri River Breaks	01/17/2001	377,346	Martz, Judy (Jan 1, 2001-Jan 3, 2005)	See attached PDF.
Nevada	Basin and Range	07/10/2015	704,000	Sandoval, Brian (Jan 3, 2011-)	<a href="#">Governor statement on Basin and Range</a> <a href="#">Governor</a>
	Gold Butte	12/28/2016	296,937		
New Mexico	Organ Mountains-Desert Peaks	05/21/2014	496,330	Martinez, Susana (Jan 1, 2011-)	<del>News article:</del> <del>Governor</del> did not respond to request for comment on OMDP; No Rio Grande del
	Rio Grande del Norte	03/25/2013	242,555		
Utah	Grand Staircase-Escalante	09/18/1996	1,700,000	Leavitt, Mike (Jan 4, 1993-Nov 5, 2003)	<del>State</del> <del>statements</del> identified.
	Bears Ears	12/28/2016	1,350,000	Herbert, Gary (Aug 11, 2009-)	<a href="#">Governor statement on Bears Ears</a>
Washington	Hanford Reach	06/09/2000	195,000	Locke, Gary (Jan 15, 1997-Jan 12, 2005)	<a href="#">News article:</a> Governor position on Hanford Reach.

Please let us know if you have any questions or if you need further assistance.

Thanks,  
Laura

**Laura Hanson**  
Senior Research Librarian  
Congressional Research Service  
Library of Congress  
(202) 707-7072 | [lhanson@crs.loc.gov](mailto:lhanson@crs.loc.gov)

*This information is intended only for the congressional addressee or other individual to whom it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of this information is only at the discretion of the intended recipient. If you received this in error, please contact the sender and delete the material from any computer. The foregoing has not been cleared by CRS review and is not for attribution. This response is provided to help in time-limited situations.*

---

**From:** Cox, Ed (Hatch) [[mailto:Ed\\_Cox@hatch.senate.gov](mailto:Ed_Cox@hatch.senate.gov)]  
**Sent:** Tuesday, March 28, 2017 9:28 AM  
**To:** Hardy-Vincent, Carol  
**Cc:** Mages, Lisa  
**Subject:** Re: CRS Follow-Up on National Monument Request

Over 100k acres is just fine. Keep me posted! I think this is a great plan.

---

**From:** Carol Hardy-Vincent <[CHVINCENT@crs.loc.gov](mailto:CHVINCENT@crs.loc.gov)>  
**Date:** Monday, March 27, 2017 at 7:50 PM  
**To:** "Cox, Ed (Hatch)" <[Ed\\_Cox@hatch.senate.gov](mailto:Ed_Cox@hatch.senate.gov)>  
**Cc:** "Mages, Lisa" <[LMAGES@crs.loc.gov](mailto:LMAGES@crs.loc.gov)>  
**Subject:** CRS Follow-Up on National Monument Request

Hello Ed. This email is a follow-up to our phone conversation this morning on your request for information on state support of presidentially proclaimed national monuments since 1995. It conveys additional information on the CRS approach to researching this question, following consultation with CRS colleagues. First, we are researching post-1995 monuments that exceed 100,000 acres, a size larger than we discussed (10,000 acres). The larger size was chosen to reduce the number of eligible monuments in the interest of expediting this research. We have identified 20 monuments in excess of 100,000 acres, listed below by state. Second, this list excludes marine national monuments, as generally not affiliated with a particular state. Third, we are seeking expressions of support/opposition by state governors at the time of monument designation, and in a short period thereafter. We may undertake research on support/opposition by state legislatures if possible under your deadline. You had stated a preference for information by COB today, but we were not able to complete the research by this deadline. This is because the information is not aggregated in one place, thus requiring 19 separate searches. You had also stated that it would

nevertheless be helpful to receive information by COB Tuesday, and we are endeavoring to provide information by that time. In the meantime, please do not hesitate to let us know if you have questions. I am copying Lisa Mages, manager of the librarian section that is conducting the research to respond to your question.

#### Arizona

Grand Canyon-Parashant; 01/11/2000; 1,014,000 acres  
Ironwood Forest; 06/09/2000; 128,917 acres  
Sonoran Desert; 01/17/2001; 486,149 acres  
Vermilion Cliffs; 11/09/2000; 293,000 acres

#### California

Berryessa Snow Mountain; 07/10/2015; 330,780 acres  
Carrizo Plain; 01/17/2001; 204,107 acres  
Giant Sequoia; 04/15,2000; 327,769 acres  
Mojave Trails; 02/12/2016; 1,600,000 acres  
San Gabriel Mountains; 10/10/2014; 346,177 acres  
Sand to Snow; 02/12/2016; 154,000 acres

#### Colorado

Canyons of the Ancients; 06/09/2000; 164,000 acres

#### Hawaii (also Alaska and California)

World War II Valor in the Pacific; 12/05/2008; 4,038,400 acres

#### Montana

Upper Missouri River Breaks; 01/17/2001; 377,346 acres

#### Nevada

Basin and Range; 07/10/2015; 704,000 acres  
Gold Butte; 12/28/2016; 296,937 acres

#### New Mexico

Oregon Mountains-Desert Peaks; 05/21/2014; 496,330 acres  
Rio Grande del Norte; 03/25/2013; 242,555 acres

#### Utah

Grand Staircase-Escalante; 09/18/1996; 1,700,000 acres  
Bears Ears; 12/28/2016; 1,350,000 acres

#### Washington

Hanford Reach; 06/09/2000; 195,000 acres

With Best Regards,  
Carol Hardy Vincent  
Congressional Research Service  
7-8651



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Federal News Service

APRIL 29, 1997, TUESDAY

**PREPARED STATEMENT OF  
MICHAEL O. LEAVITT  
GOVERNOR, UTAH  
BEFORE THE HOUSE  
RESOURCES COMMITTEE  
SUBCOMMITTEE ON NATIONAL  
PARKS, FORESTS AND LANDS**

**SECTION:** IN THE NEWS

**LENGTH:** 2357 words

Thank you for allowing me the opportunity to speak to you today about the recently designated Grand Staircase - Escalante National Monument in Southern Utah.

The protection of public lands in the State of Utah is a familiar issue. The federal government administers more than 65% of the land in the State, and we are continually pursuing new and better ways to work with the federal government in the planning and administration of these lands. We have worked hard to build relationships, forge partnerships, and lay the groundwork for interagency cooperation unmatched by other public lands states. For these reasons, the chain of events surrounding the establishment of the Grand Staircase - Escalante National Monument have caused me great concern, and created a greater distrust of governmental processes by many people in the State of Utah.

On September 18, 1996, President Clinton invoked a provision of the 1906 Antiquities Act to designate 1.7 million acres in southern Utah as the Grand Staircase - Escalante National Monument. The first reports of this that I, or any other elected official in the State of Utah, had received were from a story in the Washington Post only 9 days prior to Mr. Clinton's public proclamation.

I would like to share with you a day-by-day account, from my perspective, of the events leading up to President Clinton's announcement:

Monday, September 9, 1996: Upon reading of the

new National Monument in the Washington Post, I placed a call to Secretary of the Interior Bruce Babbitt. I asked Secretary Babbitt about the article in the Post and was told that Interior was not involved and that I should call the White House.

When I called the White House, I spoke with Director of Intergovernmental Affairs, Marcia Hales. She had seen the story and told me that they weren't certain where it came from. She committed to get back to me relative to how serious the proposal was.

Wednesday, September 11, 1996: Two days later, Ms. Hales reported that a monument was being discussed but "no decision had been made." I asked, "what is the timing on this?" "That's what we are trying to decide," she replied. I asked Ms. Hales for an appointment with the President Clinton or his Chief of Staff, Leon Panetta. Later that week an appointment was confirmed with Mr. Panetta for the following Tuesday.

Friday, September 13, 1996: My office became aware through the news media that an important environmental announcement was planned by the President at the Grand Canyon the following week. Preparations were being made by environmental organizations to transport groups from Utah. When we inquired directly of the Administration about the time, place and subject of an event they were not willing to even confirm the event would occur. Local governments in Utah were becoming more and more concerned. On two other occasions during the week I had conversations with Mr. Babbitt or his office. They continued to indicate that they had no information, insisting that this matter was being handled by the White House. When we called the White House we were referred to the Interior Department.

Late Friday afternoon, Secretary Babbitt called an emergency meeting in his office for the next day, Saturday. The Congressional delegation was invited. I was not able to attend the meeting, but the fact that meetings were being called on a weekend added to the sense of inevitability. However, we were still being told that "no decision had been made."

Monday, September 16, 1996: The weekend was a

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blur of phone calls, and meetings with local officials. Despite the fact that buses were being organized to take Utahans to Arizona for the announcement, the Governor's office could still not get confirmation of where or what the official announcement would be. I traveled to Washington for my meeting with Mr. Panetta. Tuesday, September 17, 1996: Tuesday afternoon, I met with Mr. Panetta. I was told that Mr. Panetta had the responsibility of making a recommendation to the President. Mr. Panetta said that he had set aside the afternoon to prepare that recommendation. Kathleen McGinty, Chair of the President's Council on Environmental Quality, Marcia Hale, Director of Intergovernmental Affairs and another member of the white house staff.

My presentation focused on the problems caused by this complete abandonment of public process. I explained that it was our desire to protect the spectacular lands of this region but that this was the wrong way to go about it. I detailed for them a proposal ironically called, Canyons of the Escalante: A National EcoRegion that resulted from an intergovernmental public planning process I initiated three years earlier to protect the area. This concept was developed by state, local and federal land managers working together for over a year. It would have provided flexibility and yet gave even more stringent protection for the most pristine areas. I also spent a considerable amount of time discussing our school trust lands. Mr. Panetta asked me to explain the status of those lands.

Prior to our discussion he was unaware of their existence or the importance they hold to the school children of our state.

Our meeting lasted just under an hour. Mr. Panetta told me that this was the first time he had been able to focus on this issue. He reiterated that he would make a recommendation to the President that afternoon. To Mr. Panetta's credit, he was very thoughtful in the questions he asked. He told me that he didn't like making decisions in a vacuum like this. At the conclusion of the presentation, Mr. Panetta said, "you make a very compelling case." To which I replied, "If this is compelling to you, then before the President sets aside part a piece of land equal to Rhode Island, Delaware and Washington, D.C. combined, he needs to hear the same information, directly from the Governor of the State." I was told Mr. Clinton was campaigning in Illinois and Michigan, but he would call me later in the evening.

Wednesday, September 18, 1996: At 1:58 a.m., my telephone rang, it was the President. The President told me that he was just then beginning to review this matter. I restated in short form the material I

discussed with Mr. Panetta.

The call lasted for nearly 30 minutes. At 2:30 a.m. we were both very tired. I offered to write a memo that the President could read when he woke in the morning. He asked that I write the memo. I sat at the desk in my room and prepared a handwritten two plus page memo to the President. It was faxed to him at 4:00 a.m. that morning. The memo, told the President that if a monument was going to be created he should create a commission that included state and local government officials to recommend boundaries and to solve a number of management questions. I told him that it should work toward a policy that protects the land, preserves the assets and maintains the integrity of the public process. I knew the local government leaders in this area would welcome such a process. At 7:30 a.m. I spoke with Mr. Panetta. He had reviewed the memo that was written for the President and again indicated he felt my ideas had merit. He said he would be reviewing the matter again with the President. Later in the morning Mr. Panetta called to inform me that the monument would be announced. He detailed the conditions of the action, which gratefully, incorporated some of my suggestions on water, wildlife access and a planning process with local and state participation.

At 2 p.m. Eastern time, President Clinton stood on the north rim of the Grand Canyon to announce the creation of the Grand Staircase- Escalante National Monument, a 1.7 million acre expanse in Utah's Garfield and Kane counties. No member of Congress, local official or the Governor were ever consulted, nor was the public. As the Governor, I had not seen a map, read the proclamation or for that matter even been invited. This is not about courtesy, it is about process and public trust. A major land decision, the biggest in the last two decades, was being made. Obviously, this is not the way public land decisions should, nor were ever intended to be made.

In 1976 this nation made an important public policy decision. Congress passed landmark legislation in the Federal Land Policy and Management Act (FLPMA), requiring great deliberation and careful process in determining how public lands would be used. That act, and other related legislation, contains protections for states and local communities. It is the policy of my administration to assure that our state is not denied those protections. We will defend Utah's interest against abuses of our existing protections and we will seek additional protections where they are currently

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inadequate.

The President's use of the Antiquities Act to create the monument was a clear example of inadequate protection. Our system of government was constructed to prevent one person from having that much power without checks or balances from another source. This law was originally intended to provide emergency power to protect Indian ruins and other matters of historic importance. Over the past ninety years the federal courts have allowed a gradual expansion of the powers. The President's recent proclamation was a classic demonstration of why the founders of this nation divided power. Power unchecked is power abused. Utah and other states need protection from further abuses of the 1906 Antiquities Act. My administration will join other states in support of appropriate amendments. Land preservation decisions must consider the relationship between the land and the local economy. The State of Utah intends to intensify our efforts in assisting in the promotion of new economic opportunities for the region and will challenge the national government to be responsive to the needs that its actions in Southern Utah have created. Historically, whenever the federal government has determined that a local interest is subordinate to the national interest, then some form of federal assistance is provided. We should all focus on developing real economic opportunities for rural Utah counties in order to build a more diversified and sustainable economy.

There are many issues surrounding the creation of this monument apart from the designation process. One of the most controversial and most complicated are the school trust lands located within the boundaries of the monument. Approximately 176,000 acres of school trust lands were included within the monument.

The school trust lands are managed by the Utah School and Institutional Trust Lands Administration, an independent state agency. The Trust Lands Administration is governed directly by a separate Board of Trustees, and is required to optimize the value of the lands for both the short and long term.

The Chairman of the Board of Trustees will testify later today and will give more details. However, I want to emphasize that not only did the declaration of the monument possibly affect the use and value of the trust lands in the long term, but also that several sources of revenue from the lands, including an imminent multi-million dollar deal involving coal, have been eliminated as a result of the declaration.

The Board of Trustees, the Trust Lands Administration and myself are united in protecting the value of the trust lands within the monument and

in protecting the purposes of the trust. We will work together to see that either the lands can be used for their purpose as the national economy permits or that other federal assets will be available as compensation for the trust lands.

I appreciate the President's remarks concerning the trust lands at the time he signed the declaration and appreciate his decision to resolve any reasonable differences in value in favor of the school children as part of any land exchange proposal. However, I must express some healthy skepticism about the efficiency of the federal exchange or compensation process and the ability to bring such processes to conclusion at all. The problem of school trust lands within federal reservations like the monument is both an old problem and a constantly recurring one. Currently, Trust Lands and the federal government are negotiating several different exchange packages, including the statutorily authorized process mentioned by the President in his remarks (P.L. 103-93). These exchange processes are complex, heavily laden with federal rule-driven procedures and very costly to the trust. The Trust Lands Administration estimates that an exchange process for the monument lands, similar to that in P.L. 103-93, could cost 5 to 10 million dollars; a cost which, in all fairness, should be covered by the federal government.

I would hope that we can learn from past experience and begin to take advantage of new ideas or approaches which are more expeditious, yet fair to both parties. The Trust Lands Administration intends to propose solutions for the trust lands within the monument in the near future. I will ask Congress to give these proposals serious consideration and to consider appropriating funds to the Trust Lands Administration to offset any costs resulting from the declaration of the monument.

The State of Utah is committed to being a full partner in the planning process for the Grand Staircase - Escalante National Monument. Promises were made by both President Clinton and Secretary Babbitt which ensured the State a prominent role in the plan development and implementation process. The State of Utah intends to take full advantage of those commitments and has, in fact, already appointed five members of the planning team who will represent the State and its issues and concerns. We have every intention of being active participants in the process and committing the necessary resources to see that the Grand Staircase - Escalante National Monument best meets the needs of the citizens of the State of Utah. We intend to use every mechanism available to ensure that the federal government keeps its commitments to this

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## Mont. may sit tight on exchange of lands

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WASHINGTON -- As private landowners clamor to have their property removed from the Upper Missouri River Breaks National Monument, the state of Montana is in no hurry to yank its land from the controversial new monument.

The House Resources Committee approved a bill Wednesday that would remove 81,000 acres of privately owned land from the monument and redraw its boundaries. The bill, introduced by Rep. Dennis Rehberg, R-Mont., says nothing about the 39,000 acres of land in the monument that belongs to the Montana Division of School Trust Lands.

President Clinton created the 377,000-acre monument shortly before leaving office. Although Gov. Judy Martz has been one of the monument's loudest critics, she hasn't asked Congress or the federal government to have the state's lands removed from its boundaries.

That's a position the state land board would have to take, and it has not yet discussed the issue, said Todd O'Hair, Martz's natural resource policy adviser. The state land board is made up of three Democrats and two Republicans -- the governor, attorney general, auditor, secretary of state and superintendent of public instruction. The board's job is to manage the state's 5.1 million acres of trust lands in a way that generates the most money for the state's schools.

"It's a very controversial issue, and a lot of time these issues have a tendency to fall along party lines," O'Hair said. "If Congressman Rehberg can get the legislation through for the private landowners, that will be good."

The state will gain more financially by leaving the land in the monument, for now, and then trading it for other federal land later, said Janine Blaeloch, a Seattle-based critic of federal land exchange programs. That's because the Bureau of Land Management has a history of giving away the store when it exchanges its land for state lands in national monuments and wilderness areas, especially when development is mentioned, she said.

"The state is going to make out like crazy," said Blaeloch, director of the Western Land Exchange Project. "Montana must be rubbing their hands knowing they own this valuable historic land. All they have to do is threaten to build a road, and everybody will go nuts."

The BLM would not be interested in doing a land exchange with the state if its lands are removed from the monument's boundaries, Monument Manager Gary Slagel said.

"We can't enlarge the monument; only Congress can," Slagel said.

The state of Utah is making a ton of money off BLM lands it received in exchange for a lot of low-value land it owned in the Grand Staircase-Escalante National Monument, Blaeloch said.

In 1999, Utah received 200,000 acres of BLM land, which included the Ferron Coalbed Methane Trend in central Utah, plus \$50 million cash. In exchange, the federal government received 177,000 acres of state land in the national monument plus an additional 200,000 acres of state lands that were scattered around wilderness areas, national forests, parks and reservations in Utah.

Before the exchange, Utah received about \$100,000 a year off the land it owned in the national monument. Since the exchange, it has earned \$10 million off the land it received from the BLM on its coal-bed methane leases, according to the Utah Trust Lands' Web site. Within two years, Utah expects to receive \$10 million a year for 20 years on this land with residual revenues continuing for a century.

Dave Hebertson, spokesman for Utah Trust Lands, said the state gave up very valuable coal deposits in the national monument. The coal is low in sulfur and would be easy to mine. Even though it's in a national monument, he predicted that it will be mined someday, "five days after the hot tubs in California go cold."

"(The exchange) has been very lucrative for us," Hebertson said. "It's really wrong to believe the federal government got hoodwinked.

"They're smart people. They drove as hard a bargain as anyone."

BLM spokeswoman Celia Boddington said her agency does a good job of appraising lands involved in exchanges, and that taxpayers get good value for lands they get in exchange. BLM appraisers are licensed and certified and follow professional standards, she said. In Las Vegas, where the BLM has congressional authority to auction its lands rather than exchange them, the agency's appraised values come in very close to the actual selling prices, she said.

"Clearly, it's a very different market in Las Vegas, but if we can get it right in Las Vegas, we can get it right in most places," Boddington said.

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Features

**Montana's Missouri Breaks: Undaunted Stewards**

By Clint Peck Senior Editor

2,573 words

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The area is known simply as "the breaks." It's a rugged, remote slice of north-central Montana cradling the upper reaches of the Missouri River as it zig zags through the badlands. By most assessments, the breaks have changed little since Lewis and Clark ventured into this frontier nearly 200 years ago.

By design, their journey (see sidebar on page 19) opened a growing country's eyes to the vast potential this and other places in the West held for American expansion.

Over the decades, scores of ranching families have grown into the fabric of the breaks. They have stewarded the land, water and wildlife -- working with government land managers assigned to oversee the public resources that characterize the area. For nearly 20 years though, there's been an undercurrent of resentment over the designation of a 149-mile stretch of the Missouri River as "Wild and Scenic."

Public interest in the breaks intensified after publication of historian Stephen Ambrose's book "Undaunted Courage" -- one of the more popular chronicles of the Lewis and Clark expedition. Then in 1999, Interior Secretary Bruce Babbitt floated through the river breaks with Ambrose, Montana Sen. Max Baucus and a cadre of environmental activists. There was no question Babbitt wanted the area preserved.

So last January, President Clinton, using his powers under the U.S. Antiquities Act, created the Upper Missouri River Breaks National Monument.

Now, this designation and attention to the Lewis and Clark expedition's upcoming bicentennial is haunting people and communities that have become dependent on the resources in and around the breaks. Comprised mainly of land managed by the Bureau of Land Management (BLM), the nearly half-million-acre monument also includes 40,000 acres of state land and 81,000 acres of privately owned land. It's estimated that ranchers graze nearly 10,000 head of cattle on land they own and/or lease within the monument boundaries.

So Where's My Hug?

"There's no question that, in time, this designation is going to affect our grazing uses as well as the value of our ranches," says rancher Matt Knox, Winifred, MT. He and his wife Karla feel their lives will change in what is now designated as national monument area.

"It happened when we got the Wild and Scenic designation, and it will happen again," Matt Knox says. "We think it's the next step in phasing out ranching in this area."

The Knoxs have demonstrated that grazing systems on both their private land and leased allotments have helped protect the environment. But, they now feel they'll be held to a higher standard with the monument.

Wendy Whitehorn, Dutton, MT, is a member of Friends of the Missouri Breaks Monument. She emphasizes that the vast majority of land in the monument is public land, and the designation will not affect ranchers' private property.

"The BLM will continue to manage the public land as it always has," Whitehorn says. "And, the public has every right to know what is happening on public land."

Knox, though, gets a little tired of people telling him what a great thing monument status will be for ranchers.

"We'll see more interference into our lifestyles. It won't happen overnight -- but it will happen," he says. "They say there's good 'karma' coming with this designation. And, they think we'll all have a big group hug when it's finished -- well that's just not going to happen."

In Neon Lights

While the Knoxs look down the road at long-term threats to the livestock business, they and others are also keeping an eye on what monument status means in the short run. And they shake their heads at what Clinton and Babbitt thought they were accomplishing.

"This remote location retains unspoiled, natural settings that form a backdrop for outstanding recreational and cultural tourism opportunities," stated Babbitt after his trip down the river. He noted the "remote location offers opportunities for solitude not commonly found today."

"Babbitt effectively built a giant neon sign saying the breaks are 'open for business' -- so to speak," says outdoor enthusiast Ron Poertner of Winifred. He's a retired military officer with family ties in central Montana.

He says Babbitt supported his arguments for monument designation by predicting as many as 2,000 people/day would float portions of the breaks during the height of the Lewis and Clark bicentennial set to begin in 2003.

"Monument designation is a death wish for the preservation of the breaks," Poertner explains. "Now there is potential for resource damage in the breaks."

Whitehorn says this is exactly the reason for monument status.

"We all believe the monument needs to stay intact," she says. "We're not thrilled about seeing millions of visitors, but we need to be prepared for them when they come." She says monument designation is the best way to prepare for the inevitable attention to the breaks.

Whitehorn explains that monument status gives the BLM "line-item" budgets for the breaks. And funding will come in time to for monument managers to plan ahead.

Poertner believes ranchers should be given more credit for preserving the breaks -- and not be penalized for living there. He says ranchers have the most to lose with monument designation.

"I just can't see what the upside is here. You can't tell me traditional uses won't be affected," Poertner says. "This country is in better shape than it's ever been because these ranchers have figured out how to live here. They certainly can't do it by abusing the land."

Promises, Promises...

Last winter the Bush administration, through Interior Secretary Gale Norton, promised to assess the impact of monument designation. Norton criticized Clinton and Babbitt for fostering conflict and hardship -- instead of environmental stewardship.

"They didn't work with local property owners, elected officials and other people whose lives were affected," Norton said in a March 2001 statement. "We're committed to building on the principle of respect for property rights."

Whitehorn argues, though, that there was an extensive public process that occurred prior to designation.

"The BLM held many public hearings and took hundreds of comments," she explains. "Babbitt gave our congressional delegation a chance to come up with their own plan to protect the breaks. They didn't do it."

Nevertheless, Norton looked for alternatives to undo what she called an "11th-hour action by the Clinton administration." She sent letters last summer asking Montana Gov. Judy Martz and other local officials for input into monument boundaries and an interim management plan. Martz appointed a task force charged with soliciting input on those two points.

But with the events of Sept. 11, national priorities changed. Attention to things like monument designations eroded. Some believe it's a convenient excuse to sidestep controversy and cop-out on the issue.

"I think the secretary reneged on her earlier commitment -- saying she really doesn't have the authority to make these changes," says Steve Pilcher, executive secretary of the Montana Stockgrowers Association. "I think it's

unfortunate Secretary Norton put Gov. Martz and a lot of other Montanans through all that agony -- and let me tell you, the arguments were very brutal."

Others think Martz could have been more insistent with Norton. There was consensus during one task force meeting that the governor failed to give her full support to task force recommendations.

"From the very beginning she had steadfastly opposed monument designation," adds Pilcher. "Personally, I'm surprised she's taking the secretary's change in direction as well as she is."

#### A Legislative Approach?

So, with executive branch attention to the breaks shut down -- monument opponents are looking into the legislative arena for help.

Even as early as July, legislation (H.R. 2114, the National Monument Fairness Act) was drafted recognizing there was virtually no time for opposing sides to negotiate a compromise over monument land use or boundaries. But, H.R. 2114 was also shelved after Sept. 11.

Now it appears the ranchers' best hope for relief is legislation that would exclude private property from the monument boundaries. With Gov. Martz's blessing, Rep. Denny Rehberg (R-MT) says he'll draft legislation removing private land from monument boundaries.

Whitehorn is not sure this legislation is necessary, though. She says access to private property and traditional grazing uses are already protected by Clinton's proclamation.

"I don't know what the purpose would be to take the private property out of the monument," she says, adding that no one is telling anyone what can or cannot be done with private property.

"We want to keep those guys on the land," Whitehorn explains. "The proclamation and the Interim Management Plan both state that grazing can continue."

#### Welcome To The Breaks

Some ranchers aren't so sure about Rehberg's legislation -- but for different reasons. They feel it only scratches the surface of the problems they're facing.

"There's a lot spelled out in the monument resolution and the Antiquities Act that really bothers us," says Knox. "It just leaves too much room for interpretation. These things will come back to haunt us."

Wording of particular concern is over water rights. Monument status assures, "a quantity of water... sufficient to fulfill the purposes for which this monument is established."

"That's a Trojan Horse for government water rights," says Poertner. "Who's going to decide how much water is needed from the river's tributaries 'for the purposes' of the monument?"

Consideration for species thought to be potentials for the Endangered Species list -- like sage grouse and prairie dogs -- also concerns ranchers. They fear perching and nesting habitat for many species of falcons, eagles, hawks and shore birds could become the next spotted owl issue.

The coulees and breaks contain archeological and historical sites, from teepee rings and remnants of historic trails to abandoned homesteads. Warning has already been given by the BLM to all "unauthorized" persons not to injure, destroy or remove any feature of the monument.

#### An Old Story

"Monument designation changes the way the government looks at all the animals, features and all uses in the breaks," says Karla Knox. "We just can't say where they will draw the line."

For example, predator control will be left in the hands of the monument manager. And a "transportation plan," including road closures or travel restrictions, will be implemented by the BLM to protect the "objects" identified in the monument proclamation.

And Poertner says the designation opens the door for more government land grabs.

"The proclamation states that lands within the proposed monument not owned by the government shall be reserved as a part of the monument upon acquisition of title by the U.S.," he says.

But, the BLM has no hidden agenda for the private lands within this boundary, says Dave Mari, Lewistown, MT, field manager for the BLM. However, he says if a willing landowner approaches the BLM about an acquisition, easement or an exchange, the BLM would manage the acquired lands just as other public land within the monument.

Poertner doesn't buy it. And he wonders aloud why, with all the local opposition to monument designation, so much land had to be set aside.

"I just can't see why they need so much land," he says. "There's just more to this than meets the eye."

Whitehorn says there's tremendous public support for the monument, and boundaries were carefully drawn.

"Several opinion polls showed support for the monument. All the major Montana newspapers and some of the smaller ones came out in support of the monument," she points out. "So, how can the designation be 'haunting' Montana?"

For Pilcher, it's the fear of the unwritten.

"It isn't the changes implemented today that the people fear as much as the 'vehicle' monument designation provides for future changes," explains Pilcher. "The agencies and their supporters are smart enough not to make dramatic changes immediately, as the backlash would be overwhelming. It's an old story to say there will be no change."

But, the proclamation clearly states that the designation applies only to public land, emphasizes Mari.

Knox isn't being swayed by what he thinks are hollow promises.

"Everyone is telling us this is something we're going to have to live with," he concludes. "I don't know about that -- I guess we'll see. If it is, it's a tough pill to swallow."

#### The History Of "The Breaks"

On April 30, 1803, a single pen stroke by President Thomas Jefferson doubled the geographical area of the U.S.

Napoleon Bonaparte, preparing for another war with England, had announced he'd sell the port of New Orleans to the U.S. if Jefferson would also take the entire 820,000-square-mile Louisiana Territory for \$15 million or about 3 cents/acre.

While New Orleans was strategically important to Jefferson, he viewed westward expansion equally key to the future of the young country. He convinced Congress the commercial and agricultural possibilities of the region were crucial to the nation's growth.

First, the Louisiana Purchase had to be explored and charted. On July 5, 1803, the president's aide, Meriwether Lewis, left Washington, D.C., to begin assembling an expedition to survey the headwaters of the Missouri River and to search for a waterway connecting it with the Pacific Ocean.

Over the next four years, Lewis and his friend William Clark would lead the Corps of Discovery. They explored lands and rivers and experienced peoples previously enigmatic to 19th Century Americans. They spent three weeks -- May 24 through June 13, 1805 -- exploring what is now the Upper Missouri National Wild and Scenic River. Today, this portion is considered to be the premier component of the Lewis and Clark National Historic Trail.

Earlier depictions of the land and creatures in the West had often come from the imaginations of people who had never been there. Many reports told of Western terrain spotted with unicorns, woolly mastodons, seven-foot-tall beavers, Peruvian llamas and blue-eyed, Welsh-speaking Indians.

Lewis and Clark dispelled many of those myths and made numerous assessments of the region's potential.

Of the Missouri Breaks, or "badlands," Captain Clark wrote: "This country may with propriety, I think, be termed the Deserts of America, as I do not conceive any part can ever be settled, as it is deficient in water, timber, and too steep to be tilled." History has shown, of course, that Clark was only partly correct in his appraisal of the region's agrarian potential.

But, he knew that as a route of Western expansion, the Missouri River would have few equals. The fur trade era stimulated the first extensive use of the river as an avenue of transportation. Then, steamboats began braving the treacherous Missouri in 1859, arriving just in time to supply the gold camps in southwest Montana and northern Idaho. Supplies unloaded in Fort Benton, MT, were freighted as far west as Washington and north to Canada's Northwest Territories.

The railroad reached Fort Benton in 1887. The last commercial steamboat arrived there in 1890. By then, the buffalo had disappeared from the Plains -- replaced by livestock. Fort Benton changed from a river port to an agricultural supply center, and homesteaders began arriving in large numbers around 1910.

Document beef000020020516dy110000u

ANews

**Montana panel backs smaller monument**

Associated Press

177 words

19 August 2001

The Milwaukee Journal Sentinel

MLWK

Final

14

English

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A task force appointed by Republican Gov. Judy Martz has recommended scaling back the size of the Upper Missouri River Breaks National Monument, established by then President Bill Clinton.

The panel recommended shrinking the 497,000-acre monument by more than 80% by removing 81,000 acres of private property and a significant chunk of public land. The move was praised by landowners but condemned by environmentalists.

"It basically just makes the monument (status) meaningless," said Mark Good, field organizer for the Montana Wilderness Association.

National monument status protects areas from new natural gas leases and mining but keeps existing rights. Off-road vehicle travel also is forbidden.

Document MLWK000020100320dx8j02210

**Search Summary**

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1.	Court upholds Clinton creation of 7 monuments, 3 in Arizona <i>Arizona Daily Star (Tucson)</i> , October 19, 2002 Saturday, TUCSON/REGION; Pg. B8, (660 words), Howard Fischer, Capitol Media Services
2.	Arizona has much at stake when Interior Secretary makes decisions <i>The Associated Press State &amp; Local Wire, State and Regional</i> , (575 words), By GIOVANNA DELL'ORTO, Associated Press Writer
3.	Hull wants to alter new monuments <i>Arizona Daily Star (Tucson)</i> , May 22, 2001 Tuesday, NEWS; Pg. A4, (830 words), Tony Davis
4.	The Washington Post Clinton Creates, Expands Four National Monuments; Arizona Officials Complain About Federal Government Controls on Use of Land in Western States, Charles Babington, Washington Post Staff Writer, January 12, 2000, Wednesday, Final Edition, A SECTION; Pg. A03, (875 words)
5.	GOP TELLS CLINTON TO BUTTE OUT OF NATIONAL MONUMENTS <i>Congressional Quarterly Daily Monitor</i> , January 7, 2000, (639 words), Mary Dalrymple, CQ Staff Writer
6.	WESTERN LAWMAKERS WARY OF CLINTON PLAN ON MONUMENTS <i>Congressional Quarterly Daily Monitor</i> , December 14, 1999, (601 words), Suzanne Dougherty, CQ Staff Writer

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Arizona Daily Star (Tucson)

October 19, 2002 Saturday  
Final Edition

## Court upholds Clinton creation of 7 monuments, 3 in Arizona

**BYLINE:** Howard Fischer, Capitol Media Services

**SECTION:** TUCSON/REGION; Pg. B8

**LENGTH:** 660 words

Former President Clinton did not exceed his legal authority in creating a host of new national monuments in Arizona and elsewhere in the West, a federal appeals court ruled Friday.

In a unanimous decision, the District of Columbia Circuit Court of Appeals threw out two separate challenges to Clinton's actions. The judges said the president has broad authority under the law.

Among the monuments that were challenged was the Ironwood Forest National Monument, about 25 miles northwest of Tucson. Ironwood has one of the richest stands of Ironwood trees in the Sonoran Desert and has several mountain ranges including the Silver Bell, Waterman and Sawtooth, according to the Arizona Bureau of Land Management Web site.

Friday's rulings say that those who want to challenge presidential proclamations to create national monuments have a difficult legal burden.

Friday's ruling provides no relief to Gov. Jane Hull, who objected to Clinton's creation of the Arizona monuments and has been working to redraw the boundaries and lift some restrictions.

Clinton created 18 national monuments and expanded two others before leaving office.

Mountain States Legal Foundation challenged six of them, including the Desert Sonoran National Monument southwest of Phoenix, Ironwood and the

Grand Canyon-Parashant National Monument in northwest Arizona. Attorneys for the Denver-based organization charged that the proclamations exceeded any legal authority Congress gave the president.

A separate lawsuit was filed by Tulare County, Calif., challenging the creation of the Sequoia National Forest in south-central California.

At the heart of the dispute is the Antiquities Act, approved by Congress in 1906. That law allows the president "in his discretion" to declare "historic landmarks; and other objects of historic or scientific interest; situated upon (federal) lands; to be national monuments." The statute also requires the monuments to be the "smallest area compatible with the proper care and management of the objects to be protected."

Mountain States attorneys said Congress intended only to preserve ruins, artifacts and other man-made objects situated on public lands, with only minimal acreage included in the monuments.

The three Arizona monuments constitute more than 2 million acres.

Judge Judith Rogers said Clinton's actions appear to meet all legal conditions.

"Each proclamation identifies particular objects or sites of historic or scientific interest and recites grounds for the designation," she wrote. For example, Rogers said, the proclamation for Ironwood Forest states it holds "abundant rock sites and other archeological objects of scientific interest."

Rogers also rejected arguments that the proclamations must include a certain level of detail.

"No such requirement exists," she wrote. Rogers also said the president is entitled to ecosystems and scenic vistas in the list of things that qualify land for

Court upholds Clinton creation of 7 monuments, 3 in Arizona Arizona Daily Star (Tucson) October 19, 2002  
Saturday

protection.

The judge also rejected arguments that too much land was included in the monuments. Rogers said that, in both cases, the challengers made only general assertions without spelling out which lands they believed were inappropriate for inclusion.

Last year Hull wrote to Interior Secretary Gale Norton, seeking a change in the boundaries of the new national monuments Clinton created.

The governor said she was not trying to repeal the proclamations nor even reduce the size of the monuments. She said, though, the boundaries threaten future use of rights of way for roads and power lines as well as tie up a potential \$100 million in mineral rights.

Hull also wants permission for certain activities

within monument boundaries, including chaining or burning of vegetation for wildlife management, research or ecological restoration. She has proposed giving the state the authority to manage wildlife within the monuments.

Nick Simonetta, a spokesman for the state Land Department, said negotiations have been ongoing with the Bush administration.

**LOAD-DATE:** June 6, 2007

**LANGUAGE:** ENGLISH

**PUBLICATION-TYPE:** Newspaper

**JOURNAL-CODE:** TUCS

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The Associated Press State & Local Wire

August 7, 2001, Tuesday, BC cycle

## Arizona has much at stake when Interior Secretary makes decisions

**BYLINE:** By GIOVANNA DELL'ORTO, Associated Press Writer

**SECTION:** State and Regional

**LENGTH:** 575 words

**DATELINE:** PHOENIX

Environmentalists have a list of issues they plan to spotlight Wednesday when U.S. Interior Secretary Gale Norton visits Arizona.

Norton plans to tour a forest health rehabilitation project near Flagstaff and dedicate a new section of trail at the Grand Canyon. She will be in Phoenix Thursday to meet state water officials.

The Sierra Club in Phoenix and other groups said Tuesday they want Norton to take a stand on the new national monuments that former President Bill Clinton created in Arizona.

The Bush administration has suggested it might scale back the more than 3 million acres that Clinton put under protection to explore public lands for energy resources. In March, Norton, whose agency oversees the National Park Service, asked officials from several states to suggest boundary and other changes to the new national monuments.

Environmentalists, however, worry that might open the door to logging, mining and development on lands where even power lines should not be placed, said Phoenix Sierra Club spokesman Rob Smith.

Three out of four Arizonans support the monuments, according to a poll released Tuesday by the Behavior Research Center. The poll was commissioned by the Sierra Club and other environmental groups. It surveyed 602 registered voters last month and had a margin of error is 4.1

percent.

Gov. Jane Hull, however, suggested that some boundaries should be redrawn.

In an April letter to Norton, Hull said the monuments created problems with energy transmission, cut into the state's long-term water supply, prohibited essential roads and diminished the use of thousand of acres of private property.

"National monuments are a great opportunity, not a problem," Smith countered on Tuesday.

The five monuments, covering nearly 2 million acres, are: Grand Canyon Parashant, on the canyon's northern rim; Agua Fria, off I-17 near Black Canyon City; Ironwood Forest, near Tucson; Sonoran Desert, west of Phoenix; Vermilion Cliffs, near Lake Powell.

Public land management is also within Norton's discretion and some environmentalists have pledged to protest various thinning and burning treatments employed in a forest experiment near Flagstaff.

Proponents of the Fort Valley Restoration Project say the forest needs some thinning because years of wildfire suppression have left it too prone to large fires. Critics, including the Southwest Forest Alliance, argue that the project only amounts to extensive logging.

"It causes such a drastic reduction in the number of trees that the current ecosystem is being sacrificed," said Southwest Forest Alliance spokesman Brian Nowicki.

Norton also has a say on Arizona wildlife because she oversees the U.S. Fish & Wildlife Service, which is involved in determining where development should be restricted to protect endangered or threatened species.

Last month, a federal appeals court directed Norton to reconsider her decision not to list the flat-tailed

Arizona has much at stake when Interior Secretary makes decisions The Associated Press State & Local  
Wire August 7, 2001, Tuesday, BC cycle

horned lizard for protection as a threatened species.  
Its habitat is in southwestern Arizona.

Ecological Restoration Institute:  
<http://www.eri.nau.edu/gpnar.htm>

Norton and Hull also will discuss negotiations with  
tribes about water rights, Hull's spokeswoman  
Francie Noyes said.

Sierra Club: <http://www.sierraclub.org/>  
Southwest Forest Alliance: <http://www.swfa.org>

On the Net:

**LOAD-DATE:** August 8, 2001

Interior Secretary: <http://www.doi.gov/>

**LANGUAGE:** ENGLISH

National Park  
<http://www.nps.gov/parks.html>

Service:

**GRAPHIC:** AP Photos UTSG501 and PN102

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Arizona Daily Star (Tucson)

May 22, 2001 Tuesday

## Hull wants to alter new monuments

**BYLINE:** Tony Davis

**SECTION:** NEWS; Pg. A4

**LENGTH:** 830 words

Republican Gov. Jane Hull has asked the Bush administration to redraw the boundaries of Arizona's five newest national monuments and to delay both the Sonoran Desert Conservation Plan and the federal pygmy owl recovery plan.

Pima County supervisors and environmentalists contend that the governor's actions are escalating conflicts between the state and county over growth and the environment.

While the governor says she wants the state to have more say over these plans, county supervisors say they've given the state many chances to cooperate with them.

"We've always had an open door. Maybe it wasn't always the most welcome, but it's unfortunate to try to circumvent local government rather than to try to deal directly with the people who are working and voting here," Republican Supervisor Ray Carroll said.

Last month the governor wrote separate letters to Interior Secretary and fellow Republican Gale Norton asking for:

\* New boundaries for the Ironwood Forest National Monument and four other monuments that ex-President Bill Clinton and former Interior Secretary Bruce Babbitt approved for the state before Clinton left office on Jan. 20.

Hull also proposed that the Interior Department allow certain kinds of vegetation disturbance such

as chaining or burning that's needed to maintain wildlife management, research and ecological restoration on the monuments. Her proposal would give Arizona authority to manage the monuments' wildlife and require that the state Game and Fish Department sign off on road closures, travel restrictions and other transportation plans for the monuments.

\* A delay in decisions on Pima County's million-acre Desert Conservation Plan and the new owl recovery plan. She asked the Interior Department to provide an "appropriate state role" in shaping them.

Norton's office didn't reply Monday to questions about the governor's letters. Her department must approve the county's conservation plan and is currently reviewing the owl recovery plan, now more than 2 1/2 years behind its federally required release date. The plan would bring 175,000 acres of private and state-owned land under federal development limits to protect the endangered bird.

Hull wrote that she wasn't trying to repeal or downsize the monuments but did want to change their boundaries. The Ironwood Monument threatens future use of up to 14 rights of way for roads or power lines and up to \$100 million in mineral rights, Hull wrote.

"We have monuments with boundaries that do not protect the best of the terrain, do not give due consideration to wildlife management, do not allow vital energy transmission to cross into regions of the state, prohibit essential roads, create uncertainty in the state's long-term water supply and diminish the use of thousands of acres of private property," Hull's April 6 letter said.

The Ironwood monument spans the Silver Bell, Waterman and Roskrige mountains north of the Avra Valley. The Sonoran Desert National Monument covers a rugged, hilly area 30 miles southwest of Phoenix. The Vermilion Cliffs Monument contains the Paria Plateau and Paria River Canyon in Northern Arizona. The Grand

Hull wants to alter new monuments Arizona Daily Star (Tucson) May 22, 2001 Tuesday

Canyon-Parashant Monument lies on the Shivwits Plateau near the Canyon's North Rim. The Agua Fria monument, 40 miles north of Phoenix, includes an extensive area of Indian ruins dating back to 1250 to 1450.

Julie Sherman, a Sierra Club activist in Phoenix, said the various monument areas have long been considered for protection and pointed out that Ironwood and two of the other new monuments will be "much more permissive" than typical national monuments. Existing grazing, hunting, road and trail use, and existing mineral leases will be protected, she said.

"We don't understand her concerns that they can't be used," Sherman said.

Francie Noyes, Hull's press secretary, said the governor's staff has recently tried to improve communications with Pima County by holding a meeting with two county supervisors.

"The fact is that state agencies already, by statute and the constitution, have these responsibilities," Noyes said. "We simply want to be able to do our jobs."

Environmentalists and county officials said that state officials have had plenty of opportunities to participate. Officials from two state agencies sit on

two committees involved in advising the federal government on drafting the pygmy owl recovery plan.

"What Hull really wants is veto power over anything to do with protecting the pygmy owl and the Sonoran Desert," said Kieran Suckling, science director of the environmentalist Center for Biological Diversity.

Democratic Supervisors Raul Grijalva and Sharon Bronson and Republican Carroll disagreed with the governor's stance. Grijalva said the conservation plan is fighting one hurdle after another: "It's not only private interests that will be a bone of contention: We now have the state with Hull's access to the Interior Department that makes it a much bigger issue."

\* Contact Tony Davis at 807-7790 or at [verdin@azstarnet.com](mailto:verdin@azstarnet.com)

**LOAD-DATE:** June 6, 2007

**LANGUAGE:** ENGLISH

**PUBLICATION-TYPE:** Newspaper

**JOURNAL-CODE:** TUCS

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# The Washington Post

## washingtonpost.com

The Washington Post

January 12, 2000, Wednesday, Final Edition

### Clinton Creates, Expands Four National Monuments; Arizona Officials Complain About Federal Government Controls on Use of Land in Western States

Charles Babington, Washington Post Staff Writer

**SECTION:** A SECTION; Pg. A03

**LENGTH:** 875 words

**DATELINE:** GRAND CANYON NATIONAL PARK, Ariz., Jan. 11

With this panoramic canyon as a backdrop, President Clinton today vigorously defended his decision to broaden federal protections for more than a million acres in the West as necessary to preserve scenic areas for generations to come.

After touring the Grand Canyon's northern rim by helicopter, the president signed documents creating two new national monuments in Arizona and one in California, and expanding an existing monument in California. Then, speaking to a few hundred supporters at Hopi Point on the south rim, he repeatedly invoked the name of Theodore Roosevelt, the president who gave federal protection to the Grand Canyon on this date in 1908.

He noted that Roosevelt used the federal Antiquities Act to protect the canyon, the same law that several other presidents have invoked and the one Clinton

used today to create the new monuments.

"This is not about locking lands up; it is about freeing them from the pressures of development and the threat of sprawl, for all Americans, for all time," said Clinton, who wore a leather jacket in the clear but chilly and breezy late morning. Addressing a frequent criticism, Clinton said local authorities and residents will have a voice in the uses of the lands, which generally will allow for recreation such as hiking and fishing but will limit amenities such as roads.

"In managing the new monuments," he said, "we will continue to work closely with the local communities to ensure that their views are heard and their interests are respected."

Several Arizona Republicans, including Gov. Jane Hull, declined to join Clinton today, complaining that the federal government uses too heavy a hand in western states in controlling the rights to mining, grazing, road-building and water use. Today's ceremonies, and the criticisms by those who did not attend, are but the latest example of long-running tensions regarding the extent to which this part of the country should be protected and controlled by politicians who see it only on occasional vacations.

In many ways, today's debate centers more on process and pride than on any likelihood that the newly declared monuments would fall prey to development. Nearly all the land in question is already federally owned, and the White House said existing mining and water rights "will be maintained." But no new mining claims will be allowed, and "the current prohibition on off-road vehicles will be made permanent" at the two new Arizona monuments, according to the White House.



Clinton Creates, Expands Four National Monuments; Arizona Officials Complain About Federal Government Controls on Use of Land in Western States The Washington Post January 12, 2000, Wednesday, Final Edition

Hull and other Arizona Republicans have been careful to criticize Clinton's procedures without attacking the notion of preserving scenic lands.

"The governor is not opposed to protecting this land," said Hull's press secretary, Francie Noyes. "She's disappointed that the people of Arizona were completely bypassed in making this decision." She said Hull is not "trying to protect business interests" because few business enterprises are practical in the rugged and remote areas in question.

Speaking with reporters before his speech, Clinton said administration officials consulted closely with local citizens and officials before making his decision. "We've tried to be, and will always be, sensitive to the concerns and the legitimate interests of local people, but I think we've done a good job with this," he said.

He also pointed to a recent statewide poll that found most Arizona voters support federal protection of scenic or historic sites. Still marked by vast open and arid tracts, Arizona nonetheless has gained 1.3 million new residents in the past decade, creating pressures for new developments and sprawl. Only 17 percent of Arizona land is privately owned. The federal government owns 42 percent, the state owns 13 percent, and Indian reservations cover the remaining 28 percent.

Clinton's actions added 7,900 acres to the Pinnacles National Monument south of San Jose. He also created these three monuments:

\* Grand Canyon-Parashant National Monument, more than a million acres on the northern rim of the Grand Canyon.

\* Agua Fria National Monument, a 71,100-acre site 40 miles north of Phoenix. It includes rock pueblos that were inhabited centuries ago.

\* California Coastal National Monument, which comprises thousands of islands, rocks and reefs

along 840 miles of California coast.

Clinton was joined today by Interior Secretary Bruce Babbitt, a former Arizona governor who long has championed expanding the zone of protection around the Grand Canyon. Speaking before the president, Babbitt said Clinton "has written a full, final chapter to the protection of this canyon."

#### Protected Land

President Clinton today declared three new national monuments and expanded a fourth.

##### 1. Coastal National Monument

Thousands of small islands, reefs and rocks off the California Coast.

##### 2. Pinnacles National Monument

To be expanded.

##### 3. Grand Canyon-Parashant National Monument

1,500 square miles of desert.

##### 4. Agua Fria National Monument

71,000 acres filled with Indian ruins.

SOURCE: White House Council on Environmental Quality

President Clinton, with hiker Ann Weiler Walka, speaks at Grand Canyon, Ariz., after signing proclamations creating national monuments.

**LOAD-DATE:** January 12, 2000

**LANGUAGE:** ENGLISH

**GRAPHIC:** IG,,TWP; MAP,,TWP

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Congressional Quarterly Daily Monitor

January 7, 2000

## **GOP TELLS CLINTON TO BUTTE OUT OF NATIONAL MONUMENTS**

**BYLINE:** Mary Dalrymple, CQ Staff Writer

**LENGTH:** 639 words

Amid expectations that President Clinton will establish three new national monuments and expand one during a visit to the Grand Canyon on Tuesday, Arizona Republicans have already begun to express their irritation.

"They have not even told us what the areas are, what the boundaries are, what the limits will be. It's basically a decree," said Sen. Jon Kyl, R-Ariz.

Interior Secretary Bruce Babbitt recommended last month that Clinton establish two new monuments in Arizona -- a million-acre Grand Canyon Parashant National Monument north of Grand Canyon National Park to protect remote canyons and buttes; and a 71,000-acre Agua Fria National Monument to protect prehistoric American Indian ruins.

In addition, Babbitt proposed a new California Coastal National Monument, incorporating thousands of small islands, rocks and reefs that serve as a wildlife habitat, and expanding the Pinnacles National Monument south of San Jose by 8,000 acres. The federal government already owns the land that would be protected, but the new designation would block mining, grazing, hunting and commercial development.

Arizona Republicans objected to the creation of new national monuments, saying the Clinton administration should work with state officials and local citizens to carve out new protected lands.

"There have not been public hearings," Kyl said. "There have been a couple of meetings where there was no transcript, with an informal exchange of ideas."

The expected announcement also faces opposition from Arizona's Republican governor, Jane Dee Hull.

"The governor does not like it when Washington dictates to the state of Arizona," said spokeswoman Fancie Noyes.

In particular, the governor and lawmakers prefer using legislation to protect land north of the Grand Canyon. Sens. Kyl and John McCain, R-Ariz., have drawn up a bill (S 1560) that would set aside 380,000 acres of land in a proposed Shivwits Plateau National Conservation Area, considerably less than Babbitt's proposed million-acre park.

On Friday, the state's Republican congressional delegation and Hull sent Clinton a letter asking him to forgo the declaration.

"Once again, we are writing to ask you to refrain from this unilateral action and instead work with us to develop a solution reflecting the wishes of the people of Arizona," they wrote.

Other Republicans suggested that the declaration could be timed to boost Vice President Al Gore's presidential candidacy.

"These lands are our sacred trust and should not be used for election-year politicking or personal legacies," said Utah Republican James V. Hansen, chairman of the House Resources Subcommittee on National Parks and Public Lands.

The president has the power to designate new national monuments under the 1906 Antiquities Act. Clinton provoked Western Republicans after he used the law to create the 1.7 million-acre Grand Staircase-Escalante National Monument in southern Utah in 1996.

In response, Hansen authored legislation that would amend the 1906 law to require the federal government to consult with local officials and hold public hearings before establishing new monuments.

GOP TELLS CLINTON TO BUTTE OUT OF NATIONAL MONUMENTS Congressional Quarterly Daily  
Monitor January 7, 2000

The House passed the bill (HR 1487) in September, and the Senate Energy and Natural Resources Committee approved it in October but has not yet reported it to the Senate.

After Babbitt's December recommendations to establish more national monuments, panel chairman Frank H. Murkowski, R-Alaska, said he would revisit the issue as soon as Congress reconvened. He suggested the committee might add new provisions to the bill requiring the federal government to draft environmental impact statements for all proposed new monuments.

Source: CQ Daily Monitor

Round-the-clock coverage of news from Capitol Hill.

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**LOAD-DATE:** April 15, 2002

**LANGUAGE:** ENGLISH

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Congressional Quarterly Daily Monitor

December 14, 1999

## WESTERN LAWMAKERS WARY OF CLINTON PLAN ON MONUMENTS

**BYLINE:** Suzanne Dougherty, CQ Staff Writer

**LENGTH:** 601 words

With President Clinton's announcement Tuesday that three new national monuments could be designated within the next year, Western Republicans are on the warpath.

Heading the charge is the congressional delegation from Arizona, which would be home to two of the new monuments. A spokeswoman for Republican Bob Stump, who represents the district where the monuments would be located, said the delegation is writing the president to urge him to hold off on the designations.

"Artificial time constraints do not make good policy. There are no urgent threats to the area that we can't take the time to go through a public comment period and spend the necessary time to work with people who have an interest in the areas," said Lisa Atkins, Stump's chief of staff.

Recommendations submitted to President Clinton by Interior Secretary Bruce Babbitt would create national monuments in Arizona and California, and expand another in California. Clinton indicated in a speech on Tuesday that he will probably act on the recommendations within a year.

Babbitt proposed designating 1 million acres along the north rim of the Grand Canyon as the Grand Canyon-Parashant National Monument; 71,100 acres of federal land north of Phoenix as the Agua Fria National Monument; thousands of small federally owned islands, reefs and rocks along the California Coast as the Coastal National Monument; and adding 8,000 acres to the Pinnacles National Monument near San Jose, Calif.

Arizona Gov. Jane Dee Hull, R, is displeased with the recommendations of Babbitt, a former Arizona governor. While some of the parcels fit the federal government's criteria for land preservation, a governor's spokesman said other areas are not threatened.

"The governor believes that the federal government is coming in and running roughshod over the process without any input from the public," said Scott Celley, the governor's assistant.

Clinton has come under fire for his use of the powers granted to him under the little-used 1906 Antiquities Act. The law allows the president to unilaterally set aside threatened federal lands as national monuments.

Critics say the monument designation has become a political tool with little accountability, citing Clinton's September 1996 designation of 1.8 million acres in southern Utah as the Grand Staircase-Escalante National Monument.

Environmental groups praised the possible designations and urged the administration to do more to protect the environment. "Bravo to the administration for making some national monuments, but that is not going to take away from the fact that they have not addressed some of the major environmental problems we are facing today," said Mark Whiteis-Helm, a spokesman for Friends of the Earth.

Legislation that would allow more public participation in monument designations has strong support from Western lawmakers. One measure (HR 1487) introduced by Utah Republican James V. Hansen was passed by the House in September and approved by the Senate Energy and Natural Resources Committee on Oct. 20.

In light of the president's announcement Tuesday, however, Senate Energy Chairman Frank H. Murkowski, R-Alaska, indicated that he would take another look at the legislation before reporting it out of the committee. "Early in the next session, the

WESTERN LAWMAKERS WARY OF CLINTON PLAN ON MONUMENTS Congressional Quarterly Daily  
Monitor December 14, 1999

committee will probably take the bill up again in an effort to strengthen the provisions," said Tina Kreisher, the committee's press secretary.

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**LOAD-DATE:** April 15, 2002

Source: CQ Daily Monitor  
Round-the-clock coverage of news from Capitol Hill.

**LANGUAGE:** ENGLISH

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The Denver Post

July 12, 2000 Wednesday 2D EDITION

## Owens axes federal land swap Cites Clinton's high-handed tactics in creating national monuments

**BYLINE:** By Mike Soraghan, Denver Post  
Washington Bureau,

**SECTION:** DENVER & THE WEST; Pg. B-01

**LENGTH:** 731 words

WASHINGTON - Gov. Bill Owens, angered by what he considers the high-handed tactics of President Clinton in his drive for a 'lands legacy,' has called off a land swap involving 180,000 acres in 20 counties.

Owens' top lieutenant for public lands, Department of Natural Resources head Greg Walcher, put the kibosh on the swap that state and federal managers had been working on for more than six months.

The Owens administration said that Clinton and Interior Secretary Bruce Babbitt created the Canyons of the Ancients National Monument in southwest Colorado without regard for what local residents thought of it.

And Owens is worried that Clinton will do the same thing in northwest Colorado near Craig. Some environmental groups have proposed creating a Vermillion National Monument there.

'We're concerned that they're kind of having their way with us without any consent or any public input,' said Susan Wadhams, spokeswoman for Walcher.

Officials with the state Land Board and the U.S. Bureau of Land Management had been working on the massive exchange.

State officials say Babbitt had suggested the swap to streamline ownership, eliminating 'inholdings' on each other's lands.

The land that would have been exchanged is scattered across the state, but much of it is in northwest Colorado, Grand County and the San Luis Valley. It didn't involve land in the new Canyons monument or the proposed Vermillion.

But after Clinton designated Canyon of the Ancients in June, Walcher sent a memo to the Land Board saying the administration did not want to proceed with the land bartering. A spokesman for Owens said the governor has not been directly involved in the land swap, but wholeheartedly approves of what Walcher is doing.

'We don't want to deal with someone who's not dealing with the public,' Susan Wadhams said.

That's fine with Babbitt, according to his spokeswoman.

'The Bureau of Land Management is continuing to do technical work on this proposal,' said Stephanie Hanna of the Department of the Interior. 'It will continue to work with the state at whatever pace the state chooses.'

It was to have been done as a 'legislative land exchange,' which bypasses some of the usual federal appraisal procedures by having a member of Congress get it passed.

Some environmentalists have bitterly fought such deals in other states, saying they're a bad deal for federal taxpayers. They say that state land boards in the West, which manage their land to raise money for schools, usually get a sweetheart deal. So they're surprised to see a state blocking such a swap.

'I can't understand why Owens would oppose it,' said Janine Blaeloch, director of the Western Land Exchange Project. 'The states are making out so well.'

Owens axes federal land swap Cites Clinton's high-handed tactics in creating national monuments The Denver Post July 12, 2000 Wednesday

A General Accounting Office report critical of such land exchanges, including some in Colorado, is expected to be released next week in Washington.

But in Colorado, environmentalists support land exchanges as a way to separate state land, which generally must be managed to raise the most money for schools, from federal land, which can be used purely for conservation purposes. Pam Eaton, the Denver-based regional director for the Wilderness Society, expressed some disappointment that Owens is stopping the swap.

'It's unfortunate that this process would be scuttled for political reasons,' Eaton said. 'These exchanges can be very productive.'

In his drive to create a federal lands legacy before he leaves office in January, Clinton has designated eight new monuments this year.

Monument status can restrict mining and oil and

gas exploration at a site, along with other activities, depending on how the government's management plan is drafted.

Owens says he fears that Clinton will create another monument, Vermillion, in northwestern Colorado near Craig and Dinosaur National Monument, because the National Wildlife Federation and other environmental groups have proposed it to Babbitt. But Babbitt has expressed no support for the proposal.

Owens also showed his dislike for Clinton's tactics by pulling together nine other Republican governors in the West to demand that the administration seek public input before creating any new monuments.

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# Deseret News

## GOVERNOR SAYS UTAH WON'T SUE OVER MONUMENT

By Lucinda Dillon, Staff Writer

749 words

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Deseret News

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English

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Utah will not sue the federal government over President Clinton's designation of the Grand Staircase-Escalante National Monument, Gov. Mike Leavitt said Thursday at his monthly press conference.

Leavitt used the taped KUED event to reinforce his outlook for Utah's wilderness and to tell how he expects to pay for an enormous transportation project that will take place during the next several years.

State highway improvements scheduled in the next decade will cost more than \$3.5 billion, and gasoline taxes must increase by 1 cent per gallon each year during the next 10 years to help pay the bill, Leavitt said.

The state has 20 years of road and highway improvements ahead, and people are going to disagree over how to pay the costs.

"Is this going to be without pain legislatively? No. Will we get it done? Yes," he said. The \$3.5 billion price tag is much more than the roughly \$2 billion figure Leavitt has used in recent months.

Gas-tax hikes will provide \$500 million toward the project during the next 10 years. Utahns now pay a 19-cent tax on each gallon of gas they buy.

Although Leavitt said he endorses a long-term approach in which gas-tax increases are aligned with inflation, some lawmakers don't want to phase-in the gas tax over several years. There may be a move to implement it all at once when lawmakers convene in January, he said.

As he outlined sources of the \$3.5 billion, Leavitt defended accusations by Democratic gubernatorial opponent Jim Bradley and other candidates who say he's done little to plan for or deal with the insufficient infrastructure along the Wasatch Front.

A billboard purchased by the Utah Democratic Party alongside I-15 about 3900 South tells southbound drivers their traffic jam is brought to them by 20 years of Republican leadership.

But Leavitt points out that lawmakers last year set aside nearly \$100 million in general-fund cash - on top of normal highway funding. Similar amounts are built into the base of future budgets for the next 10 years.

"That money, about \$1 billion over the course of 10 years, will be added to another \$1 billion already dedicated to transportation needs over the next 10 years. Much of that money comes from the federal government.

The remainder of the money comes from the gasoline tax, \$500 million in anticipated additional federal money, \$300 million to \$500 million culled from reduced administration and waste and roughly \$500 million in bonds.

But Leavitt acknowledges that none of the \$1 billion in resources is guaranteed. "I'm probably being optimistic about the amount of new federal money," he said.

Federal funds will make up a substantially lower amount than previously believed. "It's a new world," Leavitt said. The federal funds just aren't available.

Leavitt said his "Growth Summit" last December helped lay groundwork for deliberations about transportation projects. For example, all parties were able to agree on changes that allowed a nine-year transportation plan to be streamlined to 4 1/2 years, he said.

He hopes the same kind of cooperation can be applied to the wilderness issue.

The process by which President Clinton dedicated 1.7 million acres to the monument was inadequate and political, Leavitt told reporters. "But it's time to turn our attention away from what happened in the past and toward what happens in the future."

Instead, Leavitt wants Utah to help create a vision for the monument. "This is not entirely negative," he told reporters.

Those who govern Utah's land - county officials, residents, environmentalists and state leaders - all must come together to decide which parts and how much of the state's land will stay wild.

Leavitt supports a mixed use for the monument: some protected wilderness, where visitors stations and roads aren't allowed; some traditional national monument areas and some land designated for multiple use.

During the news conference, he also hammered a plan by Interior Secretary Bruce Babbitt to reinventory Utah's lands. Officials say the reinventory is based on a new criteria for what constitutes wilderness, which doesn't conform to existing federal law. The criteria only applies to Utah lands.

It is "illogical" that Babbitt is using special criteria for Utah, he said. "There is a disturbing pattern of executive branch using unique means of distributing power in Utah," he said.

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# Deseret News

## LEAVITT HOPES GOOD WILL EMERGE FROM BAD MONUMENT DEAL

By Jerry Spangler, Staff Writer

738 words

27 September 1996

Deseret News

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English

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In a twist on the adage, "when life gives you lemons, make lemonade," Gov. Mike Leavitt is hoping something positive will come from the truckload of political lemons dumped on the state by President Bill Clinton's designation of the 1.7 million-acre GrandStaircase-Escalante National Monument.

"My desire now is to try and assess the impact of what has occurred and then find ways to make the very best possible outcome from this," Leavitt said Thursday during his monthly KUED news conference. "We now need to take what's been dealt us and do the best we can to turn to the future."

Leavitt confirmed that Clinton specifically promised him that state and local governments would have a meaningful role in the development of management plans for the new monument. If that participation is, in fact, meaningful then the state would even be willing to contribute resources to the management plan, which is expected to take three years to complete.

The governor downplayed the possibility of a lawsuit against the federal government over the national monument designation, saying the state should "evaluate for awhile" the potential impacts of the designation.

That does not preclude the possibility of a lawsuit, he said, adding he first wants to meet with legislative leaders and school trust lands officials about the prospects.

The governor's comments came eight days after Clinton used the Grand Canyon as a backdrop for the Grand Staircase-Escalante National Monument announcement. The move was seen by Western states leaders as election-year pandering to environmental interests and a political swipe at conservative lawmakers who have attempted to stymie Secretary of the Interior Bruce Babbitt's conservation agenda.

The move was also targeted at stopping the development of a coal mine in the Kaiparowits Plateau, a region considered to hold the nation's largest untapped coal reserves.

The national monument designation does not categorically exclude coal mining. But it does impose a more rigorous standard by which that development could occur. "It is clear where the administration is headed," Leavitt said.

Leavitt flew to Washington, D.C., the day before the announcement to convince Clinton's staff that the state was also interested in protecting the region, but there were other ways to protect the Kaiparowits from unwanted development. The "sad part," he said, is that "everyone could have come out feeling a lot better" about the monument designation.

But Leavitt said it was clear within the first 10 or 15 minutes that the decision to designate the monument had already been made without comment or discussions with Utah officials.

"I've made a lot of statements and I think strong statements about how wrong I think it was for the president to proceed the way he did. He got his photo-op, but we are left with decades of policy to untangle."

The issue now is whether Clinton will fulfill his promise that school trust lands will be traded for other lands or resources. The monument designation effectively isolates approximately 200,000 acres of trust lands, which were given to the state at the time of statehood for the support of public schools. The state has another 200,000 acres of trust lands isolated inside other national parks, national forests and Indian reservations.

Leavitt acknowledged there was a lot of political symbolism in how Clinton designated the monument, including the fact the president made the announcement in Arizona, the fact that Utah officials were not invited and the fact Clinton consulted with Colorado Gov. Roy Romer but not with Leavitt. It is obvious, he added, that all of Utah's elected officials have little influence with the White House.

Leavitt used the press conference to reiterate his endorsement of Republican attorney general candidate Scott Burns, who is challenging Democratic incumbent Jan Graham. Burns has made it an issue that if he is elected he would sue the federal government over the national monument designation.

On the issue of transportation, Leavitt said Utah motorists should see a slight gasoline tax increase to help fund the renovation of I-15. That increase, which Leavitt prefers to refer to as "indexing for inflation," would amount to less than a penny per gallon to begin with.

That tax increase has been part of the governor's transportation finance package all along, he said.

Document dn00000020011014ds9r00kga

**Utah Gov. Considers Legal Challenge To National Monument**

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27 September 1996

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Capital Markets Report

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English

(Copyright (c) 1996, Dow Jones & Company, Inc.)

SALT LAKE CITY (Dow Jones)--Utah Gov. Mike Leavitt isn't ruling out a legal challenge to President Clinton's creation of a new national monument in the southern part of the state.

"We now need to take what's been dealt us and do the best we can to turn to the future," Leavitt said on Thursday at his monthly KUED-TV news conference. "That doesn't preclude us from challenging parts of this action based on what I think to be the misuse of executive power."

Leavitt was referring to Clinton's use of the 90-year-old Antiquities Act to declare the monument without congressional approval. The president designated the 1.7-million-acre Grand Staircase-Escalante National Monument last week during a campaign stop at the Grand Canyon.

The election-year move effectively blocks development of part of America's largest known coal reserve by Dutch-based Andalex Resources, Inc. And it forces the state to trade out 200,000 acres of trust lands that could have earned coal royalties for public schools.

In the next few weeks, Leavitt plans to talk to legislative leaders, school trust lands officials, southern Utah communities and the U.S. Interior Department before making a decision on any legal action.

"My desire now is to try and assess the impact of what has occurred and then to find ways to make the very best possible outcome from this."

Right now, Leavitt said, it is impossible to know what effect the designation will have, including whether Andalex will be allowed to mine the area or what kind of return Utah schools will get for their lands.

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Nation-World

## **MAKING OF A MONUMENT; The Present; What Led to Clinton's Grand Staircase Decision?; Monument Decision Tied To Insiders**

JIM WOOLF THE SALT LAKE TRIBUNE

973 words

22 September 1996

The Salt Lake Tribune

SLTR

A1

English

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Utah Gov. Mike Leavitt claims national environmental groups were behind President Clinton's decision to create the 1.7 million-acre Grand Staircase-Escalante National Monument.

"This was packaged outside of government and taken to the White House. I know that to be true," says the governor. "It was confirmed to me by several people as we went through this process at the White House."

But Western environmental leaders deny any involvement in the monument deliberations, and there is strong evidence the idea came directly from the White House's Council on Environmental Quality (CEQ) -- Clinton's inner circle of environmental advisers.

Tom Jensen, CEQ's associate director for natural resources, is intimately familiar with the Escalante area and the battle over the Kaiparowits Plateau's coal. Before working for Clinton, Jensen was a well-known environmental attorney who worked as a senior Senate staffer on natural-resources issues and served as executive director of the Flagstaff, Ariz.-based Grand Canyon Trust. The trust's area of interest is the Colorado Plateau.

And CEQ Director Kathleen McGinty visited Utah about two years ago to hike the Kaiparowits and see firsthand some of the areas that wilderness advocates want included in their 5.7 million-acre proposal. She has been involved in behind-the-scenes discussions on the wilderness issue.

Jensen and McGinty "have asked us at various points about a national monument," said Mike Matz, executive director of the Southern Utah Wilderness Alliance (SUWA).

But he said SUWA has been focused on the wilderness debate and did not know the administration was giving serious consideration to the monument idea until The Washington Post ran a story Sept. 7 saying Clinton was preparing to create it.

SUWA never was consulted on the size or management of the monument, Matz said.

"They have done a stupendous job," said Matz of McGinty's and Jensen's efforts to persuade Clinton to create the monument.

All calls to McGinty and Jensen were referred to a CEQ spokesman who said the monument was a Clinton administration initiative and it would be wrong to focus on one or two individuals.

Another probable advocate for the monument within the administration was Harold Ickes, Clinton's deputy chief of staff. Ickes' father, also named Harold, was President Franklin D. Roosevelt's interior secretary in 1936 when he advocated the creation of a 4.5 million-acre Escalante National Monument.

Much of the land Ickes wanted to protect in the 1930s already has been incorporated into Canyonlands and Capitol Reef national parks and Glen Canyon National Recreation Area. But the core of Ickes' vision -- the Escalante River canyon -- had no special protection until this week.

"I'm sorry he never got a chance to see his dream become a reality, but I'm very glad that his son and namesake is my deputy chief of staff and is here today," Clinton said proudly at a Grand Canyon ceremony Wednesday before creating the monument.

An administration source, who asked not to be identified, said "it was at least a couple of months ago" when Clinton first asked for a "legal and scientific analysis of a monument option."

It was just an information request at the time, and staffers did not know whether the president would follow through on the idea.

The Interior Department prepared the requested analysis, but nothing happened while the campaign staff was preoccupied with such things as the Democratic National Convention and Clinton's train trip through the Midwest. Then, suddenly, the president showed a renewed interest in the idea, said the source.

Tom Robinson, director of conservation policy for the Grand Canyon Trust, said he heard that campaign officials included the monument idea in opinion polls and found it was "one of the most popular things the administration could do."

Robinson stressed that his group was not consulted about the monument proposal and had heard only rumors about it before the story in The Post. "It was definitely not our initiative," he said.

Sen. Bob Bennett, R-Utah, offered this analysis of the president's decision-making process during a recent news conference:

"I've had folks within the administration tell me that the primary drive behind doing this came from Dick Morris, who looked at his polls and said you need to shore up your environmental credentials. What better way to do it than to create a splashy new national monument or national park? And then they told the Interior Department to come up with something we can create. . . . I think the decision was made months ago."

Morris is the former Clinton campaign adviser who resigned when a tabloid published reports of his long-term relationship with a prostitute.

But the administration source put a different spin on Clinton's decision.

He said the president was tired of simply blocking the "anti-environmental" initiatives coming out of the Republican-dominated Congress and wanted to advance his own policy objectives. Creation of the monument allowed him to make progress toward a long-term goal of protecting more public land in southern Utah.

Greg Gibson/The Associated Press Utah Rep. Jim Hansen contends 14 trees were cut down for this photo, but Grand Canyon National Park employees deny it. See story on Page C-1. Al Hartmann/The Salt Lake Tribune Western writers fear a backlash from the creation of the Grand Staircase-Escalante National Monument, and Gov. Mike Leavitt urged miners to "turn to the future" as mining opponents celebrated in southern Utah. See stories on C-1 and C-2. Jump pg A13: Al Hartmann/The Salt Lake Tribune Clinton's contentious national monument includes southern Utah's Escalante River Canyon.

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## NEWS

### Utah officials up in arms about the new monument

547 words

21 September 1996

The Arizona Daily Star

TUCS

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English

(Copyright 1996)

Associated Press

SALT LAKE CITY (AP) - From senators and congressmen to a state attorney general candidate, foes of a 1.7 million-acre southern Utah national monument are gathering their forces.

Meantime, Conoco Inc. issued a statement late yesterday calling on the White House to work with the company to "develop a plan where prudent oil and gas development of the area can coexist with . . . environmental protection and preservation ideals."

In a statement issued from Midland, Texas, by Bob Irelan, regional manager for exploration and development, Conoco estimated up to 5 billion or more barrels of untapped oil could be in the monument area, already known for its huge coal reserves.

Conoco, in partnership with Rangeland Petroleum, is involved in exploratory leasing and drilling in and near the designated monument site, Irelan said.

At a news conference earlier yesterday, Republican Utah Attorney General candidate Scott Burns said if elected, he would go to court to fight creation of the new Grand Staircase-Escalante National Monument.

President Clinton invoked his authority under the federal Antiquities Act in making the monument declaration Wednesday, but Burns believes there's room in the statute to challenge the decision.

"It is my belief that the Antiquities Act can be interpreted to require the smallest amount of land compatible with other interests, and 1.7 million acres is the biggest land grab in the lower 48 states," he said.

Sens. Orrin Hatch and Bob Bennett, R-Utah, supported Burns' call for a lawsuit. The two lawmakers also co-chair Burns' campaign to unseat Democratic Utah Attorney General Jan Graham.

Hatch has said he feels Clinton may have violated environmental laws passed in the 1970s by not obtaining more public comment and studies before acting.

Hatch and Bennett said numerous options for legislation are also under review in the Senate to ensure, as Hatch said, "that the Antiquities Act is not abused again."

Thursday, Rep. Jim Hansen, R-Utah, introduced a bill seeking to ensure that any future monuments would be no larger than 5,000 acres. Congress is not expected to act on it before adjournment, but Hansen said he would reintroduce it next year.

Locally, political candidates were nudging Graham toward a lawsuit.

In a letter to Graham, Rep. Grant Protzman, D-North Ogden, said Clinton's designation of the monument was a "terrible manifestation of unrighteous dominion on the part of the federal government."

He wants Graham to see if the state or school officials can sue to recover lost trust lands revenue.

In a statement Thursday, Gov. Michael O. Leavitt said the president had the legal power to designate the monument but now is obligated to have meaningful talks with Utahns as he carries out the plan.

Protzman said it may be a long shot to sue, "but I think it has better potential than letting the federal government fix this out of the goodness of their hearts."

Only once, in 1944, has Congress tried to rescind a presidential proclamation, after Franklin Roosevelt declared Wyoming's Grand Teton Mountains a national monument.

Roosevelt vetoed the congressional action. In 1950, Congress authorized Grand Teton as a national park but forbade any future president to name any more national monuments in Wyoming.

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Nation-World

## Taking Swipes at Clinton, Utahns Vow to Fight Back

LAURIE SULLIVAN MADDOX THE SALT LAKE TRIBUNE

1,246 words

19 September 1996

The Salt Lake Tribune

SLTR

A5

English

(Copyright 1996)

President Clinton's establishment of the Grand Staircase-Escalante National Monument in southern Utah was met with blistering denunciations from the state's governor and congressional representatives.

"In all my 20 years in the U.S. Senate, I have never seen a clearer example of the arrogance of federal power," GOP Sen. Orrin Hatch fumed at a delegation news conference held just after the president's announcement Wednesday.

"Indeed, this is the mother of all land grabs."

Democratic Rep. Bill Orton, walking a tightrope between comradeship with his Democratic president and the concerns of constituents, called the action a "monumental blunder -- pun intended."

Government figures from other Western states joined the Utahns in a show of support. Sen. Conrad Burns, R-Mont., described Clinton's designation as the act of a "tyrant," while Sen. Larry Craig, R-Idaho, labeled it a "phenomenal misuse of power."

The solidarity was not accidental, Hatch said, since other states with public-land issues to be settled now may find themselves affected by a unilateral decision that bypasses the public debate required by federal laws such as the National Environmental Policy Act.

"What should be made clear to everyone in a state with public land is that if they can do this to Utah, they can do it to you," Hatch warned.

As the rebukes flew, the Utah politicians also were looking for ways to undo the executive order creating the largest monument in the lower 48 states.

There was uncertainty about whether Congress has the authority to rescind Clinton's directive, which was made under the 1906 Antiquities Act.

Some congressional offices said lawmakers could not revoke the executive order, although a future president could. But Hatch said since it was Congress that established the law giving the president the power, it also could take away that power. The option will be studied further, Hatch said.

Otherwise, the delegation was discussing three more likely possibilities: a lawsuit filed by Kane and Garfield counties challenging the way the decision was made; congressional action to cut off Interior Department funding for the monument; and legislation that would narrow the sweep of the Antiquities Act.

Orton said he anticipated all three responses -- sooner than later.

Indeed, Craig intended to file legislation today that would "prevent President Clinton and {Interior Secretary} Bruce Babbitt from doing to Idaho and other states what it did to Utah. No more midnight land grabs."

The bill would require that the public and Congress be involved and give approval before such an administrative act could take effect, Craig said.

Rep. Jim Hansen, R-Utah -- who would handle companion legislation in the House as head of the House Subcommittee on National Parks, Forests and Lands -- is looking at ways to circumvent the president using the appropriations process.

In Democratic circles, Clinton's move was seen as a shrewd way to bolster his environmental standing and give the nation a warm fuzzy while taking heat from a small state that probably will not vote for him anyway.

From other vantage points, it was characterized as a blatant political ploy carried out on a beautiful stage: the sweeping panorama of the Grand Canyon with orchestra music playing in the background.

Some also saw it as ruthless.

Talk among the Utah delegation was that administration officials had acknowledged the move may cost Democrats their only House seat in the state -- Orton's -- but that they considered him expendable.

Orton acknowledged that the administration did him no favors by keeping him in the dark -- along with the rest of the state -- until just a week ago.

But he said the president phoned him at 1:45 a.m. Wednesday to consult on the matter and that seven important concerns were brainstormed by the two.

As outlined in Clinton's speech, those included:

- The president's commitment that the Bureau of Land Management, rather than the National Park Service, will manage the monument.

- Hunting, fishing, hiking, camping and grazing will continue.

- The federal government will not pre-empt or reserve water rights.

- Monument boundaries will exclude all developed areas, state-park lands and timber and forest lands.

- School-trust lands contained within the boundaries would be swapped for holdings of comparable value, or the government will compensate the difference.

- Communities in the area would not be frozen out of the decision-making. A three-year process of public hearings was announced to develop a management plan.

- Coal leases for the Kaiparowits would not be terminated and the environmental-impact statement for the Andalex Resources mine would continue -- although Clinton expressed his personal desire that Andalex trade the leases.

Given those concessions, Orton said, the president is left with a "hollow monument" motivated purely by political considerations.

Asked if he trusted the president to honor the commitments, Orton replied, "What choice do I have?"

"He's the president. He has the statutory authority to do this. I can either try to work with him and make my constituents' interests known and ensure that my constituents are involved, or I can just get mad and pick up my marbles and go home and yell at him. I don't think that resolves the problem."

For Orton and the rest of the delegation, the hardest aspects to swallow were the school-trust-lands issue and the shadowy move to terminate the coal mine.

GOP Sen. Bob Bennett griped that the designation will lock up the nation's largest reserve of clean, environmentally beneficial coal -- and potential revenues it would bring Utah schoolchildren through the 200,000 acres of trust lands located within the monument.

"The president is asking us to trust him that Utah's schoolchildren will be made whole. Is he prepared to approve \$1 billion in federal funding? . . . Of course he isn't."

Republican Rep. Enid Greene charged that the president "doesn't know or doesn't care that there aren't sufficient coal leases in other areas" to swap for the Andalex holdings.

But what Utahns object to most, she said, is the "autocratic process" by which Clinton sidestepped the Federal Land Policy and Management Act, the National Environmental Policy Act, the state's elected representatives and its people.

GOP Gov. Mike Leavitt, the only state leader from southern Utah, said he grew up one mountain over from the new monument and loves the land.

But as an outspoken advocate of a more equitable federal-state balance of power, the governor was incensed about the executive branch's imposition of its will on the state with no public debate.

"I would just say to the president of the United States, 'You chose to ignore a high public trust with the almost unilateral power that you were granted through the course of this act, power that was not intended by the founders of this nation.'

"From this point forward he has a higher standard of duty to deal in fairness with those of us in the state who have been disadvantaged by his lack of concern. The state will step forward, we'll follow the process at this point, but it is up to him and to his administration to make this right."

Al Hartmann/The Salt Lake Tribune Hikers make their way down a canyon south of Kodachrome Basin State Park. The spot is at the western end of the newly designated Grand Staircase-Escalante National Monument.

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# Deseret News

## CLINTON MAKES IT OFFICIAL: MONUMENT NOW A REALITY

By Lee Davidson and Jerry Spangler, Staff Writers

1,297 words

18 September 1996

Deseret News

DN

A1

English

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GRAND CANYON -- Despite repeated pleas - including some in the middle of the night - from Utah officials to defer it, President Clinton announced plans Wednesday for a vast new Grand Staircase-Escalante National Monument in southern Utah's Kane County.

The only surprise in the announcement was the change in name. As proposed in the past several days, the monument would have been named Canyons of the Escalante.

Clinton's action was purely political, Utah leaders say.

Clinton, who has not set foot in the state since he finished third in Utah in the 1992 presidential race, announced the creation of the new monument from south of Utah's border - at the Grand Canyon. Aides said that site was chosen because it has facilities needed to hold a press conference.

"I think it's pretty clear this is a straight political move on the part of the Clinton administration. It will be a good photo op in the middle of a presidential campaign, and they'll worry about the real impact later," said Utah GOP Sen. Bob Bennett said.

"The fact that it happens on the eve of an election cannot be ignored," said Utah Gov. Mike Leavitt.

Even Democratic Rep. Bill Orton, in whose district the monument lies, said, "This is more a political issue than a policy issue."

Actor Robert Redford, author Terry Tempest Williams and former Utah first lady Norma Matheson were the only Utahns on stage with President Clinton. Redford, who has fought for years to protect Utah lands and specifically the Kaiparowits Plateau, made a speech. Williams gave a reading.

Democrats Jim Bradley and Ross Anderson, both currently candidates for office in Utah, were in the audience at the Grand Canyon gathering, which drew thousands of people, many sporting "5.7 Wild" buttons.

The buttons refer to an environmentalist-backed proposal that 5.7 million acres of southern Utah be designated wilderness.

Redford told the Deseret News that the region belongs to all Americans, not "in the pockets of politicians." He called the 1.8 million-acre designation better than no monument at all. The designation "puts it right where it belongs," Redford said.

Is there a sense of satisfaction now that the area has protection?

"It will be when I hear the final results," Redford said before the event began.

Orton and Bennett conceded the administration promised several steps to address local concerns. That came after Orton and Leavitt had personal phone calls with Clinton in the middle of the night Wednesday.

But, Bennett said, this is essentially a "trust us" kind of offer from the administration, "and I would continue to be critical until we got everything nailed down."

And despite the concessions, Orton said, "Let me make clear that I still oppose it. I think it is a monument to political blunders and is unwise, unneeded and premature."

Among the steps Clinton promised are:

- An ongoing environmental impact statement on a proposal by Andalex Resources to mine coal on the Kaiparowits Plateau will continue, and if a way is found to environmentally mine and transport coal, it will be allowed.
- To protect Utah schools from loss of mineral revenues on 200,000 acres of school trust lands with coal that may be surrounded by the monument, he also promised to either trade them for other federal coal leases or ask Congress to find another direct funding mechanism in exchange value of the lands.

Bennett said those two proposals taken together show him ``they don't intend to let Andalex proceed." He adds that he told White House chief of staff Leon Panetta that ``no other comparable coal reserves exist anywhere in the country, and he replied, `I'm beginning to find that out.' "

- The administration will establish a three-year process of public hearings to identify and define management processes for the national monument.

Bennett complained, ``In other words, they've turned the process completely backward. . . . They declare first and look for facts afterward."

- The U.S. Bureau of Land Management will continue to manage the area, not the National Park Service.

Some local residents view the park service as heavy-handed. Orton said, ``It makes sense to use the people who already know the areas." It would be the first national monument overseen by the BLM.

- Hunting, fishing and grazing will continue under existing laws.
- Water rights will remain under state law, and the monument ``should not affect any water-rights issues at all," Orton said.
- The boundaries will specifically exclude any developed areas such as towns in the area. Orton said it will also exclude all forested lands and state parks.

However, Orton said if it is to proceed, the steps taken by the administration mean ``we've gotten about as good as we could get."

Not all Utahns were unhappy with the president's decision. Democratic candidates Jim Bradley, who's running for governor, and Ross Anderson, a candidate in the 2nd Congressional District, were expected to join Clinton in the Grand Canyon in support of the new national monument.

And environmental groups that have long sought federal protection for the region, including the Southern Utah Wilderness Alliance, also praised the proposal. Even actor and Utah resident Robert Redford was expected to be by the president's side at the announcement.

Despite everything, Orton said when he looked at the proposal, it essentially amounted to the national conservation area idea he had been promoting - except that his would have had a public process to decide boundaries.

Leavitt also had pushed Clinton and Panetta in meetings and phone calls to consider his idea of managing ecosystems regardless of political boundaries and to have more local input on management plans, which was one of the concessions won.

Still, Utah officials made it clear they were unhappy with the process leading to the announcement, including making it in Arizona and not Utah.

Utah members also didn't like a quote reported in the press from White House press secretary Mike McCurry, who said that when it came to opponents of the monument, ``We've gone to great lengths to try to take their views into consideration."

Utah officials begged to differ, noting they had not been given specifics on any plans until the last second, had little input and had been misled as late as last week by the White House, which then said repeatedly it had no imminent plans for the monument.

Orton said the White House told him that Utahns had been consulted so late because "environmental counselors urged the president to take this step as part of the campaign," but that had not been communicated to the administration's land managers - and caused delays in speaking to Utahns.

"It's extremely frustrating, but that's politics," Orton said.

Rep. Jim Hansen, R-Utah, complained the administration has insisted that congressional Republicans follow lengthy study and hearing processes on public-lands issues they pursue - for example, delaying for more public input a relatively small 1,320-acre land trade for Snowbasin ski resort "even though we've been talking about it for 10 years."

But Hansen complained the administration had no public input and little consultation from Utah officials on a monument that may include a whopping 2 million acres - or almost 4 percent of all land in Utah.

And Hansen added, "No one's seen a map. I doubt there is a map" of the proposal.

Orton also said White House officials were surprised at his figures on how economically devastating the monument could be to southern Utah and said they were surprised to learn its coal reserves are "the largest untapped energy resource left in the continental United States."

Document dn00000020011014ds9i00js4

### Search Summary

Text	"grand staircase*escalante" AND leavitt
Date	01/01/1996 to 12/31/1996
Source	All Sources
Author	All Authors
Company	All Companies
Subject	All Subjects
Industry	All Industries
Region	All Regions
Language	English
Results Found	80
Timestamp	28 March 2017 15:21







**To:** 'Chambers, Micah'[micah\_chambers@ios.doi.gov]  
**From:** MacGregor, Robert  
**Sent:** 2017-03-29T11:50:20-04:00  
**Importance:** Normal  
**Subject:** RE: Zinke Signing Ceremony - 3.28.17  
**Received:** 2017-03-29T11:50:38-04:00

Thanks for this Micah just wanted to confirm that venting and flaring and the hf rule were in the final order that was signed. Just wanted to clarify before we send out our release.

Thanks again,

Rob

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Wednesday, March 29, 2017 9:29 AM  
**To:** Micah Chambers  
**Cc:** Amanda Kaster; Caroline Boulton  
**Subject:** Re: Zinke Signing Ceremony - 3.28.17

Talking Points for Today's Signing. This is meant to craft your individual office press releases, please do not share. Draft Press Release to follow shortly. See you all soon.

Note: We will not have order numbers until AFTER the orders are signed and processed by exec sec.

**SO #TBD: Repealing the 2016 Coal Moratorium - Ending the PEIS**

Rescind SO 3338 signed by Sally Jewell and direct BLM to process lease applications

Federal coal leasing is important to the U.S. economy and roughly 40% of U.S. coal is produced on federal lands.

The Department determined the public interest not served by halting leases for several years and that the PEIS is not needed to improve the program.

Note: In 2013, both the OIG and the GAO audited BLM's coal leasing program. Between The OIG and GAO there were 21 recommendations made to improve transparency in the leasing program to ensure that the American taxpayer was receiving a fair return from the coal program. BLM has addressed all 21 recommendations and works closely with the Office of Valuation Services to ensure that bonus bids are calculated appropriately. In addition, the Federal Royalty Policy Committee has been reestablished.

Mining companies are held accountable and expected to comply with strict environmental standards and present reclamation plans. Every year

the "best of" reclaimed mine lands are highlighted by the Office of Surface Mining and Reclamation and Enforcement.

### **Charter Signed: Establish Royalty Policy Committee**

Secretary Zinke is committed to ensuring state, local and tribal governments have a say in energy development within their borders and that taxpayers are getting a fair return on investment. To that end, he is establishing a new Royalty Policy Committee to include renewable energy in addition to mineral resources.

The primary goal is to ensure public continues to receive the full value of all energy produced on federal lands. The Secretary will seek their input on how we determine fair market value, collect revenues and how future policies could impact revenue collection.

#### **Membership**

- The charter would establish a 28 member committee to provide the Secretary with advice
- No member may have financial interest/business with us
- Members will be both federal and non federal partners. They will hail from energy producing states, tribes, the energy industry, academia/interest groups
- Each member will serve a two year term

### **Signed SO #TBD: American Energy Independence**

Following the bold executive order signed by President Trump yesterday, Secretarial Order XXXX, "American Energy Independence," takes numerous steps to unleash the power of American energy on public lands.

- Revokes Secretarial Order 3330 regarding Compensatory Mitigation and launches a review of the program
- Launches a review of all climate change policies within the department
- Launches a review of the National Parks Service and Fish and Wildlife Service oil and gas regulations
- Launches a review of Bureau of Land Management's venting & flaring (methane) rule
- Confirms that Bureau of Land Management is withdrawing the hydraulic fracking rule

On Tue, Mar 28, 2017 at 6:32 PM, Chambers, Micah <[micah\\_chambers@ios.doi.gov](mailto:micah_chambers@ios.doi.gov)> wrote:  
All.

Thank you for being willing to attend tomorrow's ceremony, especially with such short notice. Details are all below. A press release/top line summary will be released tomorrow morning prior to the event.

**Time:** Arrive NLT 945 (preferably closer to 930) for a hard start time of 10 am. Some members have to leave by 1020 so we need to start on time.

**Location:** Dept. of Interior / 1849 C. St. NW / DOI has two entrances, come to C Street Entrance

**Arrival:** Members and RSVP'd staff will be on Security list at C Street entrance. You will be greeted in lobby by DOI Staff and escorted up to the Secretary's office for the ceremony

**You will need photo ID**

**Topline Issues:** the Secretary will sign several Secretarial Orders to reflect POTUS action on energy. These include:

- Lifting the Federal Coal Leasing Moratorium.
- Withdrawing previous Secretary's Orders on Mitigation and oil & gas prohibitions.
- Announcing the reestablishing of the Royal Policy Committee.

**Press:** YES

**Industry:** YES

**POC:** Caroline Boulton 202.706.9300 / Micah Chambers 202.706.9093 / Amanda Kaster Averill 202.230.9508

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** heather\_swift@ios.doi.gov[heather\_swift@ios.doi.gov]  
**From:** The White House  
**Sent:** 2017-03-29T13:02:07-04:00  
**Importance:** Normal  
**Subject:** Your 1600 Daily  
**Received:** 2017-03-29T13:02:14-04:00

Everything White House for 3/29/2017. |

## **WHITE HOUSE MEMO**

President Donald J. Trump is taking action to address the opioid epidemic that is decimating families and communities around our nation. In keeping with the President's campaign promises, the Trump administration is stopping the drugs from flowing across the border, and today the President is hosting a listening session on drug and opioid abuse.

### **MORNING:**

- **11:00AM:** President Trump hosts an Opioid and Drug Abuse Listening Session

### **AFTERNOON:**

- **3:45PM:** President Trump visits the Women's Empowerment Panel

## **FROM PRESIDENT TRUMP**

Retweet

Retweet

## **OVAL OFFICE HIGHLIGHTS**

President Trump signs an Executive Order Promoting Energy Independence and Economic Growth.

[Read the Executive Order](#)

[Read Remarks](#)

[President Trump's Energy Independence Policy.](#)

[Read More](#)

[President Trump leads a listening session with the Fraternal Order of Police.](#)

[Read Remarks](#)

[Watch Video](#)

[Readout of the President's Call with the Chancellor of Germany.](#)

[Read More](#)

[Readout of the President's Call with the Prime Minister of India.](#)

[Read More](#)

## **WHITE HOUSE UPDATES**

### **Photo of the Day:**

[President Donald J. Trump signs an Executive Order Promoting Energy Independence at the Environmental Protection Agency Headquarters. \(Official White House Photo by Jonathan Gallegos\).](#)

[View Photo](#)

## **PRESS ROOM**

[Watch yesterday's press briefing with Sean Spicer:](#)

[Read Transcript](#)

## **NEWS REPORTS**

- *CNBC*: "Americans haven't been this confident about job market since 2001"

[Read More](#)

- *Daily Caller*: "Trump Signs Sweeping Order To Dismantle Obama Climate Policies, Promote 'Energy Independence'"

[Read More](#)

- *The Washington Times*: "White House declares 'the war on coal is over' as Trump begins unraveling Obama's climate agenda"

[Read More](#)

[Privacy Policy](#) [Contact the White House](#)

[Unsubscribe](#)



**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-03-29T13:49:50-04:00  
**Importance:** Normal  
**Subject:** RE: Venting and Flaring ideas  
**Received:** 2017-03-29T13:50:10-04:00

You have another second to talk this afternoon?

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 10:46 AM  
**To:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Cc:** Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov>  
**Subject:** Re: Venting and Flaring ideas

Just called your direct. Got voicemail

On Tue, Mar 28, 2017 at 10:28 AM, Orth, Patrick (Portman)  
<patrick\_orth@portman.senate.gov> wrote:

Hey Micah you have time for a quick call this morning? My direct is (b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 21, 2017 4:44 PM  
**To:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Cc:** Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov>  
**Subject:** Re: Venting and Flaring ideas

Thanks for sending this over.

On Mon, Mar 20, 2017 at 5:32 PM, Orth, Patrick (Portman)  
<patrick\_orth@portman.senate.gov> wrote:

Micah - see below for the ideas I mentioned. Let us know if you have any questions.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

**From:** Patrick Orth <(b) (6)>  
**Date:** 3/20/17 5:29 PM (GMT-05:00)  
**To:** "Orth, Patrick (Portman)" <patrick\_orth@portman.senate.gov>  
**Subject:** Venting and Flaring ideas

Micah - thanks for taking the time today.

Below is a matrix of some of the ideas I offered this afternoon. I've been told that these changes could be made quickly by means of a "Notice to Lessees" that supersedes the 1974 era NTL 4A.

Here is a link to the EIA blog post on how North Dakota's flaring rules using flaring targets. EIA describes how flaring rules have helped to sharply curtail the practice of flaring gas in North

Dakota: <https://www.eia.gov/todayinenergy/detail.php?id=26632>

Here's an article about Colorado that has EDF praising their regulations as a standard for the country: <https://www.scientificamerican.com/article/colorado-first-state-to-limit-methane-pollution-from-oil-and-gas-wells/>

Here's a factsheet about the regulation: [https://www.colorado.gov/pacific/sites/default/files/AP\\_Regulation-3-6-7-FactSheet.pdf](https://www.colorado.gov/pacific/sites/default/files/AP_Regulation-3-6-7-FactSheet.pdf) Page 3 has a table that shows the tiered inspection schedules for existing marginal wells that I was talking about. As you'll see LDAR surveys are only required for the first inspection and then depending on the leakage they are not required to do LDAR surveys again. If BLM is willing to keep any of the rule on existing wells I think this would be a change that industry and EDF could support.

Finally, attached is slide deck that the BLM used in their initial public outreach on Venting & Flaring back in May 2014. As you will see, their initial proposals are basically what I suggested as 'rational middle ground' solutions.

Let me know if you have any questions and thanks again.

Pat

<b>Well Development Phase</b>	<b>Current Practice under NTL-4a</b>	<b>Practice Under November 2016 BLM Rule</b>	<b>Middle Ground</b>
<b>Venting &amp; Flaring during Well Completion</b> (Casing & Cementing, Perforation, Fracturing usually 7-10 days)	Venting & Flaring is royalty-free with BLM approval.	If there is no pipeline in place, flared volumes are subject caps stated below.	Royalty could be charged in order to incentivize waste-reduction.
<b>Venting &amp; Flaring during Initial Production Test</b> (1 <sup>st</sup> )	Vented/flared gas is royalty-	If there is no pipeline in place, flared	Require operator to be on site

30 days or 1 <sup>st</sup> 50,000 mcf of production)	free for 1st 30 days or 1st 50 MMCF of production whichever comes first.	volumes are subject caps stated below.	during all tests; limit performance tests to the time needed to validate performance. Charge royalty to incentivize waste-reduction.
<b>Flaring with Gas Conservation Plan</b> (BLM allowed operators to flare gas for up to 1 year if they had a Gas Conservation Plan typically a plan to build a gas pipeline that would be active after 1 year.	BLM required permit applications to explain the specific economic and technical reasons for the flaring, including estimates of total flared volumes and ultimate production expected from wells	Total “flaring allowable” volumes are imposed. These phase down from 2018-2025 from 5,400 Mcf/per well to 750 Mcf/per well, on average across operations in a state.	Flaring is authorized only during the time it takes to construct a pipeline. Restrict number of extensions allowed for approval of flaring.
<b>Flaring during “Force Majeure” Events</b> (Pipeline maintenance, pressure relief, safety)	Royalty is not charged for vented/flared volumes during Force Majeure events.	Royalty is charged during Force Majeure events BLM deems should have been predictable. Also certain flared volumes contribute to the cap above.	Royalty may be charged for flared volumes associated with maintenance events, but these events would not contribute to a ‘cap’ on flared volumes.

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs

Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Swift, Heather[heather\_swift@ios.doi.gov]  
**Cc:** interior\_press@ios.doi.gov[interior\_press@ios.doi.gov]  
**From:** Learn, Josh  
**Sent:** 2017-03-29T14:01:28-04:00  
**Importance:** Normal  
**Subject:** Re: Two year review process  
**Received:** 2017-03-29T14:02:02-04:00

Thanks Heather! Can I get on your press release list for future releases? Seems I'm not getting them currently.

Best,

--

Joshua Learn  
Reporter, Coal  
S&P Global Market Intelligence  
S&P Global  
[703 373 0660](tel:7033730660)  
[Josh.Learn@spglobal.com](mailto:Josh.Learn@spglobal.com)

---

**From:** Swift, Heather <heather\_swift@ios.doi.gov>  
**Sent:** Wednesday, March 29, 2017 1:14:58 PM  
**To:** Learn, Josh  
**Cc:** interior\_press@ios.doi.gov  
**Subject:** Re: Two year review process

Here you go --- we are about to send the press release

### **Interior Secretary Zinke Takes Immediate Action to Advance American Energy Independence**

(WASHINGTON) March 29, 2017 Today, Department of the Interior (Department) Secretary Ryan Zinke signed two secretarial orders to advance American energy independence. The Secretary's orders foster responsible development of coal, oil, gas, and renewable energy on federal and Tribal lands and initiate review of agency actions directed by President Trump's executive order entitled "Promoting Energy Independence and Economic Growth." Secretary Zinke also signed a charter establishing a Royalty Policy Committee to ensure the public receives the full value of natural resources produced from federal lands. In signing the historic actions on energy independence, Secretary Zinke was joined by Members of Congress from western states and other stakeholders.

"Today I took action to sign a series of directives that put America on track to achieve the President's vision for energy independence and bringing jobs back to communities across the country" said Secretary Zinke. "American energy powers our national and local economies. But for too many local communities, energy on public lands has been more of a missed opportunity and has failed to include local consultation and partnership. Today's orders allow for Americans to benefit from safe and environmentally responsible development on federal lands and put America on track for energy

independence."

[Secretarial Order 3348](#) overturns the 2016 moratorium on all new coal leases on federal land and ends the programmatic environmental impacts statement that was set to be completed no sooner than 2019. Based upon the Department's review of Secretary's Order 3338, the order notes that, "the public interest is not served by halting the federal coal program for an extended time, nor is a PEIS required to consider potential improvements to the program." The order notes that the federal coal leasing program supplies approximately 40 percent of the coal produced in the United States that is of critical importance to the U.S. economy.

[Secretarial Order 3349](#) implements review of agency actions directed by the President's Executive Order signed yesterday on energy independence. It also directs a reexamination of the mitigation and climate change policies and guidance across the Department of the Interior in order to better balance conservation strategies and policies with the equally legitimate need of creating jobs for hardworking American families. In particular, the order sets a timetable for review of agency actions that may hamper responsible energy development and reconsideration of regulations related to U.S. oil and natural gas development.

In an effort to ensure the public continues to receive the full value of natural resources produced on federal lands, Secretary Zinke also signed a charter establishing a [Royalty Policy Committee](#) to provide regular advice to the Secretary on the fair market value of and collection of revenues from Federal and Indian mineral and energy leases, include renewable energy sources. The Committee may also advise on the potential impacts of proposed policies and regulations related to revenue collection from such development, including whether a need exists for regulatory reform. The group will be made up of up to 28 local, Tribal, state and other stakeholders and will serve as an advisory role only. Secretary Zinke added that, "It's important that taxpayers get the full value of traditional and renewable energy produced on public lands and that we ensure companies conduct environmental reviews under NEPA and have reclamation plans."

Secretary Zinke issued the following statement regarding the President's executive order on energy independence:

"American energy production benefits the economy, the environment, and national security. First, it's better for the environment that the U.S. produces energy. Thanks to advancements in drilling and mining technology, we can responsibly develop our energy resources and return the land to equal or better quality than it was before. I've spent a lot of time in the Middle East, and I can tell you with 100 percent certainty it is better to develop our energy here under reasonable regulations and export it to our allies, rather than have it produced overseas under little or no regulations. Second, energy production is an absolute boon to the economy, supporting more than 6.4 million jobs and supplying affordable power for manufacturing, home heating, and transportation needs. In many communities coal jobs are the only jobs. Former Chairman Old Coyote of the Crow Tribe in my home state of Montana said it best, 'there are no jobs like coal jobs.' I hope to return those jobs to the Crow people. And lastly, achieving American energy independence will strengthen our national security by reducing our reliance on foreign oil and allowing us to assist our allies with their energy needs. As a military commander, I saw how the power of the American economy and American energy defeated our adversaries around the world. We can do it again to keep Americans safe."

-

Heather Swift

Department of the Interior

[@DOIPressSec](#)

[Heather\\_Swift@ios.doi.gov](mailto:Heather_Swift@ios.doi.gov) | [Interior\\_Press@ios.doi.gov](mailto:Interior_Press@ios.doi.gov)

On Wed, Mar 29, 2017 at 1:14 PM, Learn, Josh <[Josh.Learn@spglobal.com](mailto:Josh.Learn@spglobal.com)> wrote:

Also, do you have an actual copy of Zinke's order to lift the moratorium on federal coal leases?

Thanks!

--

Joshua Learn  
Reporter, Coal  
S&P Global Market Intelligence  
S&P Global  
703 373 0660  
Josh.Learn@spglobal.com

---

**From:** Learn, Josh  
**Sent:** Wednesday, March 29, 2017 1:12:41 PM  
**To:** interior\_press@ios.doi.gov  
**Subject:** Two year review process

Hello,

I'm writing a piece on Sec. Zinke's recent call and noticed he didn't mention the two year review of royalties on leases mentioned in Bloomberg:

<https://www.bloomberg.com/politics/articles/2017-03-29/u-s-review-to-weigh-higher-royalties-for-energy-on-federal-land>

Is there a press release, or any other details on this review around? I can't find anything in the press releases of the DOI.

Thanks and best,

--

Joshua Learn  
Reporter, Coal  
S&P Global Market Intelligence  
S&P Global  
703 373 0660  
Josh.Learn@spglobal.com

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The information contained in this message is intended only for the recipient, and may be a confidential attorney client communication or may otherwise be privileged and confidential and protected from disclosure. If the reader of this message is not the intended recipient, or an employee or agent responsible for delivering this message to the intended recipient, please be aware that any dissemination or copying of this communication is strictly prohibited. If you have received this communication in error, please immediately notify us by replying to the message and deleting it from your computer. S&P Global Inc. reserves the right, subject to applicable local law, to monitor, review and process the content of any electronic message or information sent to or from S&P Global Inc. e mail addresses without informing the sender or recipient of the message. By sending electronic message or information to S&P Global Inc. e mail addresses you, as the sender, are consenting to S&P Global Inc. processing any of your personal data therein.



**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Orth, Patrick (Portman)  
**Sent:** 2017-03-29T14:03:57-04:00  
**Importance:** Normal  
**Subject:** RE: Venting and Flaring ideas  
**Received:** 2017-03-29T14:04:25-04:00

I am, thank you. My direct is best (b) (5)

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Wednesday, March 29, 2017 1:55 PM  
**To:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Subject:** Re: Venting and Flaring ideas

Sure. You free at 3?

On Wed, Mar 29, 2017 at 1:49 PM, Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov> wrote:  
You have another second to talk this afternoon?

**From:** Chambers, Micah [mailto:micah\_chambers@ios.doi.gov]  
**Sent:** Tuesday, March 28, 2017 10:46 AM  
**To:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Cc:** Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov>  
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**Sent:** Tuesday, March 21, 2017 4:44 PM  
**To:** Orth, Patrick (Portman) <patrick\_orth@portman.senate.gov>  
**Cc:** Pearce, Sarah (Portman) <Sarah\_Pearce@portman.senate.gov>  
**Subject:** Re: Venting and Flaring ideas

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Micah - see below for the ideas I mentioned. Let us know if you have any questions.

Sent from my Verizon, Samsung Galaxy smartphone

----- Original message -----

From: Patrick Orth <(b) (6)>  
Date: 3/20/17 5:29 PM (GMT-05:00)  
To: "Orth, Patrick (Portman)" <patrick\_orth@portman.senate.gov>  
Subject: Venting and Flaring ideas

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Dakota: <https://www.eia.gov/todayinenergy/detail.php?id=26632>

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Here's a factsheet about the regulation: [https://www.colorado.gov/pacific/sites/default/files/AP\\_Regulation-3-6-7-FactSheet.pdf](https://www.colorado.gov/pacific/sites/default/files/AP_Regulation-3-6-7-FactSheet.pdf) Page 3 has a table that shows the tiered inspection schedules for existing marginal wells that I was talking about. As you'll see LDAR surveys are only required for the first inspection and then depending on the leakage they are not required to do LDAR surveys again. If BLM is willing to keep any of the rule on existing wells I think this would be a change that industry and EDF could support.

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Let me know if you have any questions and thanks again.

Pat

<b>Well Development Phase</b>	<b>Current Practice under NTL-4a</b>	<b>Practice Under November 2016 BLM</b>	<b>Middle Ground</b>
---------------------------------------	--	---	--------------------------

		<b>Rule</b>	
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<b>Flaring with Gas Conservation Plan</b> (BLM allowed operators to flare gas for up to 1 year if they had a Gas Conservation Plan typically a plan to build a gas pipeline that would be active after 1 year.	BLM required permit applications to explain the specific economic and technical reasons for the flaring, including estimates of total flared volumes and ultimate production expected from wells	Total “flaring allowable” volumes are imposed. These phase down from 2018-2025 from 5,400 Mcf/per well to 750 Mcf/per well, on average across operations in a state.	Flaring is authorized only during the time it takes to construct a pipeline. Restrict number of extensions allowed for approval of flaring.
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		the cap above.	contribute to a 'cap' on flared volumes.
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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

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Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

--

Micah Chambers  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior

**To:** Macgregor, Katharine[katharine\_macgregor@ios.doi.gov]  
**From:** Robert Moran  
**Sent:** 2017-03-29T16:20:07-04:00  
**Importance:** Normal  
**Subject:** RE: [EXTERNAL] Re: Hey  
**Received:** 2017-03-29T16:20:24-04:00  
[NaturalGasFinal.pdf](#)

I know you are running non-stop, but wanted to share this with you. It is a 2004 report that the DOE Argonne National Lab prepared. Figure you have seen it but in case not --

*“This report identifies and describes more than 30 environmental policy and regulatory impediments to domestic natural gas production. For each constraint, the source and type of impact are presented, and when the data exist, the amount of gas affected is also presented. This information can help decision makers develop and support policies that eliminate or reduce the impacts of such constraints, help set priorities for regulatory reviews, and target research and development efforts to help the nation meet its natural gas demands.”*

This admin document never really got the play it deserved due to other issues driving the public’s attention at the time – also interesting to see that many of the challenges then are the same ones now.

Hope all is good

Bob

---

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Bob

---

## **Bob Moran**

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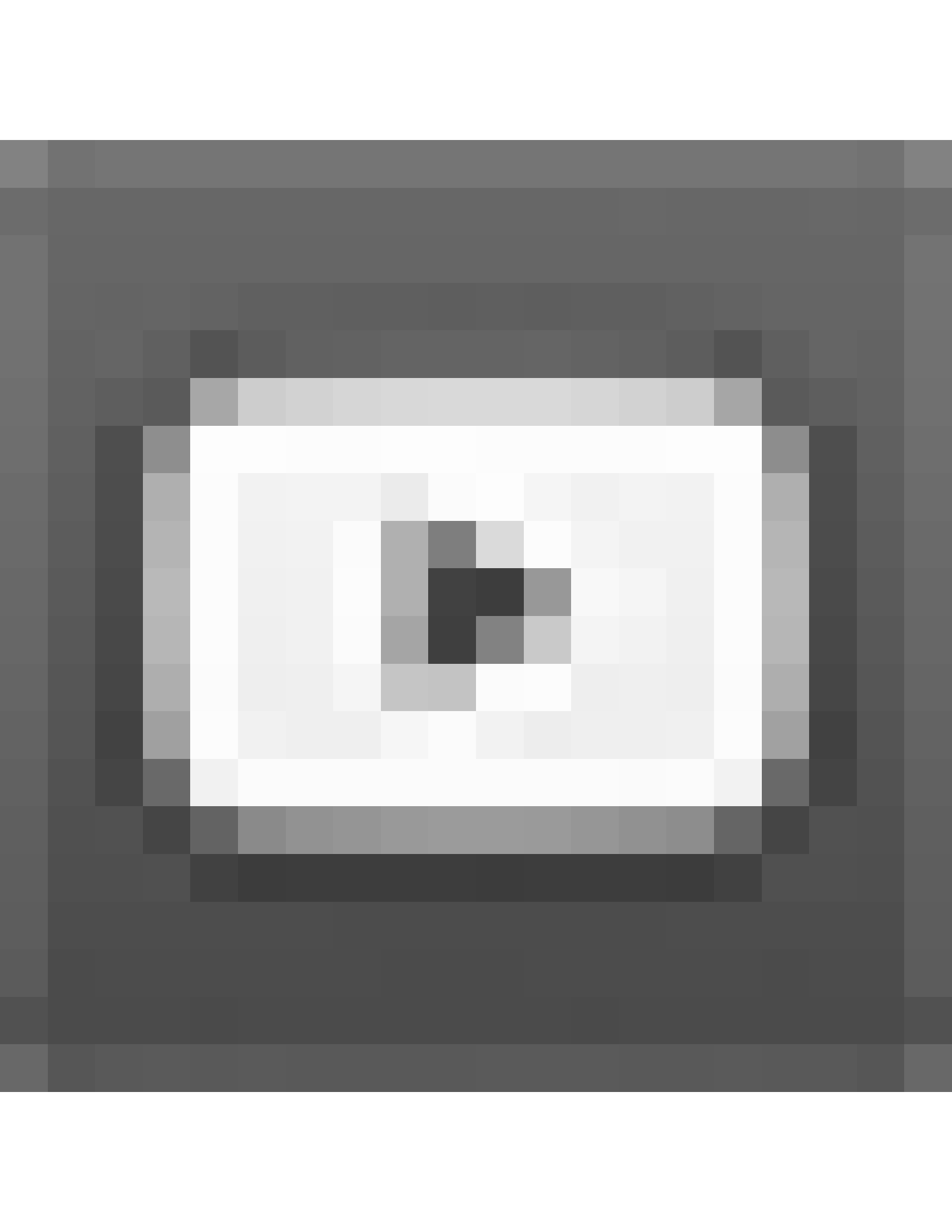
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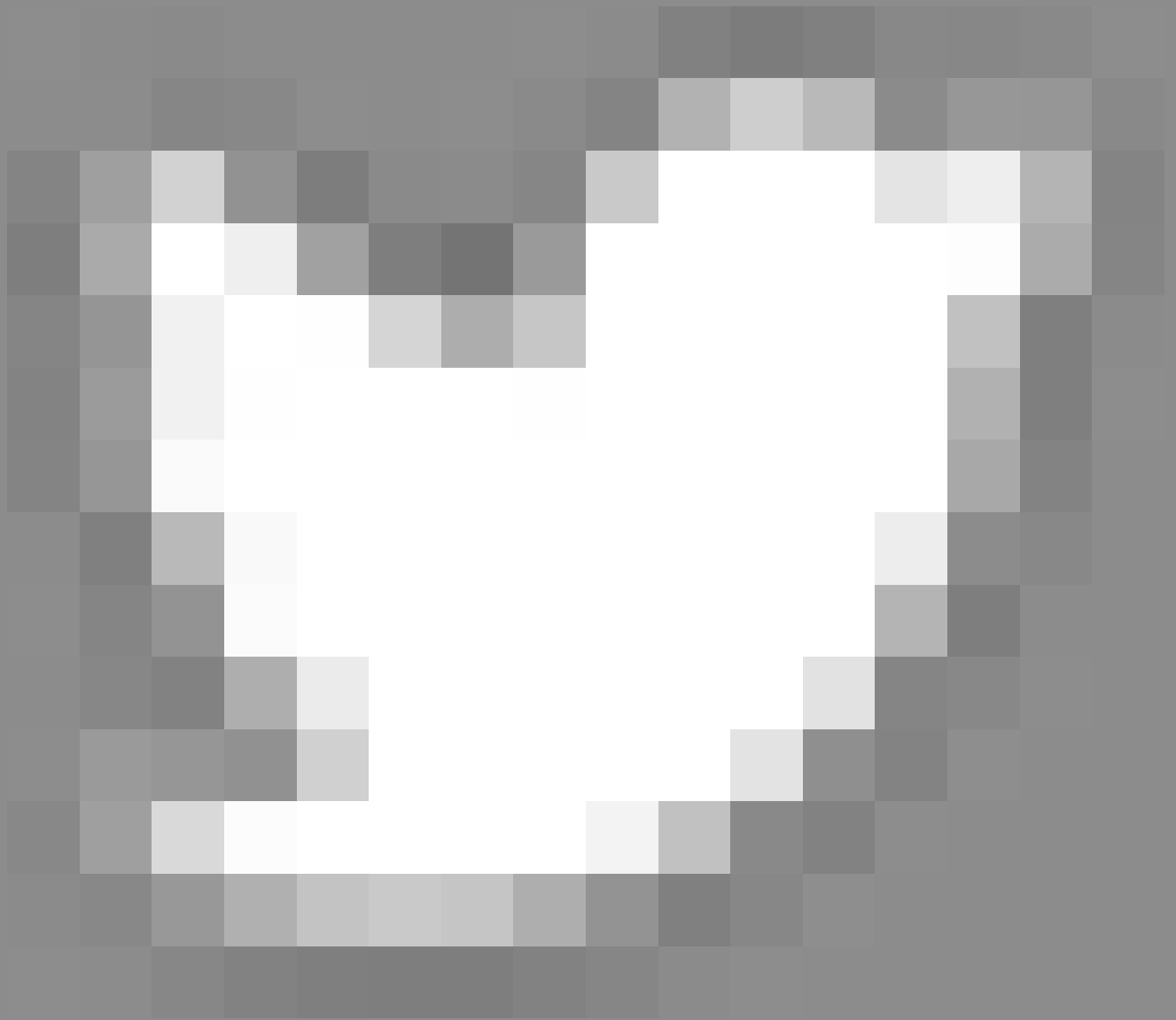
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# **Environmental Policy and Regulatory Constraints to Natural Gas Production**

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**Environmental Assessment Division  
Argonne National Laboratory**

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# **Environmental Policy and Regulatory Constraints to Natural Gas Production**

---

by Deborah Elcock

Environmental Assessment Division  
Argonne National Laboratory, 955 L'Enfant Plaza, S.W., Washington, D.C., 20024

December 2004

Work sponsored by U.S. Department of Energy,  
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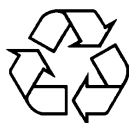
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## NOTATION

The following is a list of the acronyms and abbreviations (including units of measure) used in this report. Acronyms and abbreviations used only in tables may be defined only in those tables.

### ACRONYMS AND ABBREVIATIONS

AGA	American Gas Association
APD	application and approval of permit to drill
API	American Petroleum Institute
BART	best available retrofit technology
BLM	Bureau of Land Management
CAA	Clean Air Act
CBM	coal bed methane
CEQ	Council on Environmental Quality
CFR	<i>Code of Federal Regulations</i>
CMP	coastal management program
COE	U.S. Army Corps of Engineers
CROMERRR	Cross-Media Electronic Reporting and Record-Keeping Rule
CSU	controlled surface use
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
3-D	three-dimensional
DEN	<i>Daily Environment Report</i>
DOE	U.S. Department of Energy
DOI	U.S. Department of the Interior
DOT	U.S. Department of Transportation
E&P	exploration and production
EA	environmental assessment
EFH	essential fish habitat
EIA	Energy Information Administration
EIS	environmental impact statement
EPA	U.S. Environmental Protection Agency
EPCA	Energy Policy and Conservation Act
ESA	Endangered Species Act of 1973
FERC	Federal Energy Regulatory Commission
FLPMA	Federal Land Policy and Management Act of 1976
FR	<i>Federal Register</i>



FS	USDA Forest Service
FWPCA	Federal Water Pollution Control Act
FY	fiscal year
GCVTC	Grand Canyon Visibility Transport Commission
HAP	hazardous air pollutant
H.B.	House Bill
HCA	high consequence area
H.R.	House Resolution
INGAA	Interstate Natural Gas Association of America
IOGCC	Interstate Oil and Gas Compact Commission
IPAA	Independent Petroleum Association of America
IRA	inventoried roadless area
LEAF	Legal Environmental Assistance Foundation
MACT	maximum achievable control technology
MDEQ	Montana Department of Environmental Quality
MEPA	Montana Environmental Protection Act
MMS	Minerals Management Service
NAAQS	National Ambient Air Quality Standards
NAPSR	National Association of Pipeline Safety Representatives
NEP	National Energy Policy
NEPA	National Environmental Policy Act of 1969
NFS	National Forest System
NHPA	National Historic Preservation Act
NMFS	National Marine Fisheries Service
NO <sub>x</sub>	nitrogen oxides
NOAA	National Oceanic and Atmospheric Administration
NPC	National Petroleum Council
NPDES	National Pollutant Discharge Elimination System
NSO	no surface occupancy
NWP	nationwide permit
OCS	Outer Continental Shelf
OCSLA	Outer Continental Shelf Lands Act
OMB	Office of Management and Budget
OPS	Office of Pipeline Safety
PM	particulate matter
PM <sub>2.5</sub>	particulate matter with a mean aerodynamic diameter of 2.5 μm or less
POD	Plan of Development and Production
POE	Plan of Exploration

PSD	Prevention of Significant Deterioration
Pub. L.	Public Law
R&D	research and development
RMP	Resource Management Plan
ROD	Record of Decision
ROW	right-of-way
RSPA	Research and Special Programs Administration
SIP	State Implementation Plan
SO <sub>2</sub>	sulfur dioxide
SOS	Special Ocean Site
SPCC	Spill Prevention Control and Countermeasures Plan
SWANCC	Solid Waste Agency of Northern Cook County
TL	timing limitation
TMDL	total maximum daily load
TPH	total petroleum hydrocarbons
UIC	underground injection control
USC	<i>United States Code</i>
USDA	U.S. Department of Agriculture
USFWS	U.S. Fish and Wildlife Service
USGS	U.S. Geological Survey
WRAP	Western Regional Air Partnership
WSA	Wilderness Study Area

## UNITS OF MEASURE

dB(a)	A-weighted decibel(s)		
ft	foot(feet)	mg	milligram(s)
ft <sup>3</sup>	cubic foot (feet)	MMCF	million cubic feet
gal	gallon(s)	mi	mile(s)
hp	horsepower	MW	megawatt(s)
kg	kilogram(s)	s	second(s)
lb	pound(s)	TCF	trillion cubic feet
m <sup>3</sup>	cubic meter(s)	µg	microgram(s)
MCF	thousand cubic feet	µm	micrometer(s)



# ENVIRONMENTAL POLICY AND REGULATORY CONSTRAINTS TO NATURAL GAS PRODUCTION

by

Deborah Elcock

## ABSTRACT

For the foreseeable future, most of the demand for natural gas in the United States will be met with domestic resources. Impediments, or constraints, to developing, producing, and delivering these resources can lead to price increases or supply disruptions. Previous analyses have identified lack of access to natural gas resources on federal lands as such an impediment. However, various other environmental constraints, including laws, regulations, and implementation procedures, can limit natural gas development and production on both federal and private lands. This report identifies and describes more than 30 environmental policy and regulatory impediments to domestic natural gas production. For each constraint, the source and type of impact are presented, and when the data exist, the amount of gas affected is also presented. This information can help decision makers develop and support policies that eliminate or reduce the impacts of such constraints, help set priorities for regulatory reviews, and target research and development efforts to help the nation meet its natural gas demands.

## 1 INTRODUCTION

U.S. demand for natural gas is expected to continue into the future. Further, the U.S. Department of Energy's (DOE's) Energy Information Administration (EIA) has forecast that U.S. annual natural gas consumption will increase from 23 trillion cubic feet (TCF) in 2000 to 35 TCF in 2025 (EIA 2003). The factors driving this demand continue to mount. Foreign oil price instability related to tensions in the Middle East and Latin America could further shift demand from oil to less costly and domestically produced natural gas. Air pollution regulations favor the burning of clean natural gas over coal; while coal is more abundant, its use is of greater environmental concern. Energy price spikes and brownouts, such as those that occurred in California in 2001, could occur again if the delicate supply-demand balance is disrupted. Weather patterns can further increase demand.

In 1999, the National Petroleum Council (NPC) reported that the demand for natural gas was growing and that the resource base was adequate to meet this demand; however, certain factors needed to be addressed to realize the full potential for natural gas use in the United States (NPC 1999). In 2001, the National Energy Policy Development Group (NEPDG), established by the President to develop a plan to help the private and public sectors promote dependable,

affordable, and environmentally sound energy for the future, presented its National Energy Policy (NEPDG 2001). The NEP recommendations included investigating several areas that could be limiting domestic natural gas production. The potential for a near-term natural gas shortage prompted a June 26, 2003, Natural Gas Summit, designed to give the Secretary of Energy and other DOE officials information on the ramifications and potential resolutions of short-term challenges to the natural gas industry. In September 2003, the NPC released an update to its 1999 study (NPC 2003). In the update, the NPC reports that government policies encourage the use of natural gas but fail to address the need for additional natural gas supplies. The 2003 report states that a status quo approach to these conflicting policies will result in undesirable impacts to consumers and the economy. A key issue raised but not fully explored in these efforts was how environmental and regulatory policy constraints, which were developed to meet national environmental protection goals, can, at the same time, limit natural gas exploration and production (E&P) and transportation. Recent studies have examined limitations to accessing natural gas, particularly in the Rocky Mountain region, but even after the gas is accessed, numerous additional environmental policy and regulatory constraints can affect production and delivery to consumers.

The purpose of this Phase I study is to identify specific existing and potential environmental policy and regulatory constraints on E&P, transportation, storage, and distribution of natural gas needed to meet projected demands. It is designed to provide DOE with information on potential constraints to increased natural gas supply and development in both the long and short terms so that the Department can develop, propose, and support policies that eliminate or reduce negative impacts of such constraints, or issues, while continuing to support the goals of environmental protection. It can also aid in setting priorities for regulatory reviews and for research and development (R&D) efforts.<sup>1</sup> A possible future Phase II study would identify potential short-, mid-, and long-term strategies for mitigating these environmental policy and regulatory constraints.

## 1.1 SCOPE

The scope of this study is limited to traditional natural gas (or gas). It does not address liquefied natural gas or methane hydrates, nor does it describe constraints to increased use of other fuels such as coal. The importance of economic constraints and safety issues is acknowledged, but only environmental policy and regulatory impediments are addressed. Constraints are identified for the E&P and transportation phases, not end use. The focus is on existing, national-level constraints, although important state requirements and overlaps with state jurisdictions are included, as are regulations that are being considered or developed that could impede natural gas production.

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<sup>1</sup> The data collection and analyses for this Phase I study were conducted between 2001 and 2003. Since then, some of the details regarding individual constraints may have changed. For example, it is possible that the development status of certain regulations may have changed from proposed to final, or that certain agencies may have taken actions intended to mitigate identified constraints. The current status of individual constraints should be verified prior to using them for decision making.

## 1.2 METHODOLOGY

The 1999 NPC study and the NEP were used as departure points for the current study.<sup>2</sup> The NPC highlighted access to natural gas resources as a critical factor for meeting projected demand. It did not address environmental constraints beyond access, but it did recommend assessing the impact of existing and proposed environmental regulations on the natural gas supply. The NEP also contains several recommended study areas related to natural gas production. These include the role of expediting permits, the examination of land status and lease stipulation impediments to gas leasing, the requirements for siting energy facilities in the coastal zone and the Outer Continental Shelf (OCS), and the regulatory process for permitting interstate natural gas pipeline projects. This study reviews and updates the access issues as presented by the NPC and investigates issues raised in the NEP. In addition, it identifies and describes more than 30 additional environmental policy and regulatory constraints to natural gas production and delivery.

To identify and assess environmental policy and regulatory constraints, existing studies were reviewed, and detailed issue investigations were conducted by examining existing and proposed statutes. Information published on proposed and final rules in the *Federal Register* was assessed, and issues were discussed with trade associations and industry and with state and federal government officials. Comments on proposed regulations and congressional testimony on issues and legislation that could affect natural gas production were reviewed. Information was also obtained from meetings on environmental policy relevant to natural gas conducted by the U.S. Commission on Ocean Policy, the Interstate Oil and Gas Compact Commission (IOGCC), the Minerals Management Service (MMS), the National Oceanic and Atmospheric Administration (NOAA), the Integrated Petroleum Environmental Consortium, the U.S. Environmental Protection Agency (EPA), and others.

Once potential policy and regulatory constraints were identified, an attempt was made to determine the nature of the impact and the amount of gas that each constraint could affect. It was determined that a given constraint could affect the natural gas supply in one or more of the following ways: (1) make natural gas resources unavailable; (2) delay E&P or transportation; or (3) increase costs to the extent that some operators might stop operations, particularly if subjected to multiple costly regulations. To estimate the amount of gas a given constraint could affect, existing resource estimates were used. These estimates were reported in units of TCF and prepared by organizations such as the NPC, EIA, MMS, the U.S. Geological Survey (USGS), and an interagency group that studied U.S. oil and gas resources in five western basins (DOI, USDA, and DOE 2003). No attempt was made to develop independent estimates for amounts of gas that could be affected by the constraints, nor was an attempt made to normalize the estimates by year or form of estimate (e.g., technically recoverable, economically recoverable). As a result, these estimates can provide an indication of the order of magnitude of impact, but they should not be used to make direct comparisons among the various constraints. Some gas supplies are

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<sup>2</sup> The conclusions of the 2003 NPC report are consistent with those of the 1999 report; that is, action is required to address the need for additional natural gas supplies. Also consistent with the 1999 report, the 2003 report acknowledges the importance of environmental policy and regulatory issues but does not address them in detail.

constrained by more than one factor. Therefore, the estimates are not additive, and eliminating one constraint may leave the gas supply affected by one or more other constraints.

### **1.3 ORGANIZATION**

The remainder of the report consists of four chapters. Chapter 2 provides very brief summaries of the environmental policy and regulatory constraints, organized by type of impact. Chapter 3 provides more detail on each of the constraints and includes a discussion of the issue, the source of the constraint (e.g., statute, regulation, implementation), the lead player(s) (e.g., Bureau of Land Management [BLM], EPA), and the development phase affected by the constraint (e.g., E&P, transportation). Chapter 4 presents conclusions, and Chapter 5 provides a list of references cited in this report.

## 2 ISSUE SUMMARIES

A regulatory constraint can impact natural gas by any one or any combination of the following:

- Restricting access to the gas, thereby making it unavailable for E&P;
- Delaying E&P or transportation; or
- Increasing costs, which could delay production, increase economic limits resulting in earlier well abandonment, and cause operators to leave the market, thereby reducing the gas supply in the short term and possibly increasing consumer costs in the long term.

This section describes various environmental policy and regulatory constraints in terms of these impacts. First are issues that may limit access to gas supplies. These include the following:

- Coastal Zone Management Act (CZMA) consistency provisions,
- Endangered Species Act of 1973 (ESA) requirements,
- U.S. Department of Agriculture (USDA) Forest Service (FS) restrictions,
- Outdated BLM land use plans,
- Lease stipulations,
- Monument designations,
- OCS moratoria,
- Permit restrictions,
- Bans on drilling in the Great Lakes,
- The “Roadless Rule,” and
- Wilderness Area designations.

Issues likely to produce delays include the following:

- Coal bed methane (CBM)-produced water and potential regulations to manage such water,



- Drilling permit delays,
- Essential fish habitat (EFH) regulations,
- Fracturing operations and the possibility of future rules that could limit this practice,
- Changes in nationwide permits (NWP) issued by the U.S. Army Corps of Engineers (COE),
- National Environmental Policy Act of 1969 (NEPA) requirements,
- Pipeline certification issues,
- Pipeline safety regulations, and
- Wetlands mitigation issues.

Existing and potential issues likely to increase costs include the following:

- Regulations for cooling-water intake structures at offshore extraction facilities,
- Electronic reporting requirements,
- Lack of incentives to go beyond compliance,
- State waste disposal regulations,
- Maximum achievable control technology (MACT) rules,
- Mercury discharge regulations,
- Nitrogen oxides (NO<sub>x</sub>) requirements,
- Noise regulations,
- Nonroad diesel regulations,
- Ocean discharge criteria,
- Particulate matter (PM) regulations,
- Pipeline gathering definitions,
- Regional haze rule,

- Spill prevention and control and countermeasures regulations,
- Standards for closing wells,
- Storm water construction permits, and
- Total maximum daily load (TMDL) regulations.

The following paragraphs summarize these environmental policy and regulatory constraints and include, where available, an estimate of the amount of gas potentially affected. No priorities have been assigned to these issues, and no inferences regarding priorities should be made from the order in which they are presented. Chapter 3 provides greater detail on each of these issues.

## **2.1 ISSUES LIKELY TO LIMIT ACCESS**

### **2.1.1 Coastal Zone Management Act Consistency Provisions**

The CZMA requires that each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone must be undertaken in a manner consistent “to the maximum extent practicable” with the enforcement policies of approved state coastal management programs (CMPs). Nonfederal applicants for federal licenses or permits must comply with state CMP enforcement policies. Federal approvals may not be granted until the state concurs, or, if the state objects, until the Secretary of the Department of Commerce, on appeal by the applicant, overrides the state’s CMP objections. These provisions have caused duplications and costly delays to federal leasing and production activities. Also, once a lease has been obtained, the CZMA can still limit or prevent exploration, development, and production for that lease. (See related issue, OCS Moratoria West Coast.)

**TCF Affected:** 362.2

### **2.1.2 Endangered Species Act**

The ESA can limit access to gas resources and cause delays in permitting on both federal and private lands. Court-interpreted definitions have expanded the scope of what is considered a “take” under the ESA to include habitat modification, such as clearing or similar development that occurs with natural gas E&P. Similarly, the U.S. Fish and Wildlife Service (USFWS), an implementing agency for the ESA, often treats sensitive species as requiring the same or similar protections as species that are actually listed as endangered or threatened.

**TCF Affected:** Not estimated.

### 2.1.3 Forest Service Restrictions

FS restrictions contained in Records of Decision (RODs) for development of natural gas resources in three areas—Beaverhead National Forest, Helena National Forest, and Lewis and Clark National Forest—are limiting the ability to access and produce natural gas.

**TCF Affected:** 10 to 30

### 2.1.4 Outdated BLM Land Use Plans

The Federal Land Policy and Management Act of 1976 (FLPMA) established land use planning requirements on federal lands, and *United States Code*, Title 43, Section 1701 (43 USC 1701) states that it is the policy of the United States to manage public lands under the principles of multiple use and sustained yield. Land use plans and planning decisions provide the basis for every land action undertaken by the BLM, but many have been prepared without considering natural gas resource potential. If a land use plan is out of date with respect to anticipating the cumulative impacts of gas development, substantial delays in the permitting of new wells can occur as a new environmental analysis (typically an environmental assessment [EA] or environmental impact statement [EIS]) is completed and the plan updated. Today, many land use plans need to be updated to recognize the use of the land for natural gas development before additional development can occur.

**TCF Affected:** 120.3

### 2.1.5 Lease Stipulations

Two categories of restrictions limit access to onshore public lands. Some lands, such as Wilderness Areas and areas with specific geological attributes or unique or significant natural or cultural resources, are completely off limits because of statutory, Executive Order, or other administrative requirements. Other lands, while technically available for development, are subject to stipulations imposed by the BLM or the FS to implement statutory or regulatory requirements. Some of these stipulations, which can affect large geographic areas, can prevent development without providing obvious commensurate environmental benefits (Rubin 2001). Combinations of individual stipulations applied to the same area can effectively prevent access to key natural gas resources (Russell 2000). The EIA has estimated that federal lease stipulations increase development costs by 6% and add 2 years to development schedules (EIA 2001b). Operators report a growth in stipulations and note that when land managers impose a stipulation in one area, there is a tendency to impose the same stipulation in surrounding areas (Martin 1997).

**TCF Affected:** 108

### **2.1.6 Monument Designations**

The Antiquities Act of 1906 allows the President, at his discretion, to declare by public proclamation, historic landmarks and historic and prehistoric structures owned or controlled by the government of the United States. Between 1996 and 2001, the Administration, under the authority of the Antiquities Act, designated 19 new national monuments and expanded 3 others. The 22 designations collectively cover about 5.6 million acres of federal land, much of which may contain natural gas resources; however, this land is off limits to development.

**TCF Affected: 1**

### **2.1.7 OCS Moratoria — Atlantic Ocean**

Moratoria deny access to broad areas of natural gas reserves and resources. Major natural resources have been discovered off the Canadian Coast, and this resource potential could extend southward. The moratoria were implemented primarily because of past oil spills; however, they also constrain natural gas E&P.

**TCF Affected: 28.0**

### **2.1.8 OCS Moratoria — Eastern Gulf of Mexico**

Moratoria covering most of the eastern part of the Gulf of Mexico deny access to broad areas of natural gas reserves and resources. They were implemented primarily because of past oil spills; however, they also constrain natural gas E&P.

**TCF Affected: 11.3**

### **2.1.9 OCS Moratoria — West Coast**

Moratoria deny access to broad areas of natural gas reserves and resources. They were implemented primarily because of past oil spills; however, they also constrain natural gas E&P. On the West Coast, recent legal action has also limited production on existing leases.

**TCF Affected: 18.9**

### **2.1.10 Permit Restrictions**

Once leasing access has been obtained and a permit to drill has been issued, restrictions in the permit may be so severe that access is effectively prohibited. These federal and state restrictions can be site- or BLM- or FS-Office-specific.

**TCF Affected: 86.6**

### **2.1.11 Bans on Great Lakes Drilling**

Recently enacted state and federal temporary and permanent drilling bans in the Great Lakes have effectively stopped exploration and new production of natural gas in the Great Lakes.

**TCF Affected: 1.1**

### **2.1.12 Roadless Rule**

On January 12, 2001, the USDA's FS promulgated a rule that prohibits road construction in inventoried roadless areas (IRAs) on National Forest System (NFS) lands. These areas compose about one-third of the NFS, or about 58.5 million acres. The Roadless Rule denies access to approximately 11 TCF of potential natural gas resources in the Rocky Mountain region. The rule has been subject to numerous lawsuits and may be revised to allow for an assessment of impacts and the ability to build roads on a more local, forest-by-forest level.

**TCF Affected: 11**

### **2.1.13 Wilderness Areas**

The FLPMA charged the BLM with identifying and managing lands as potential Wilderness Areas. As required by law, the BLM completed the inventory in 1991 and submitted its recommendations to the President, who endorsed and submitted them to Congress. However, of the roughly 26.5 million acres identified as Wilderness Study Areas (WSAs), Congress has yet to make decisions on 16.3 million acres. In addition, since 1991, some western states, for example, Colorado and Utah, have "reinventoried" potential Wilderness Areas, adding more acres to those that are managed as, although not officially designated as, WSAs. Until Congress acts, all of these areas both Wilderness Areas and Wilderness Study Areas will continue to be off limits to gas (and oil) leasing, even though they may contain substantial resources.

**TCF Affected: 9**

### **2.1.14 Ocean Policy**

The U.S. Commission on Ocean Policy, established under the Oceans Act of 2000, is charged with developing recommendations to submit to the President on a coordinated and comprehensive national policy for oceans and coastal areas. Draft recommendations include the establishment of an Ocean Policy Framework and expanded authorities to address the use of ocean and coastal resources. It is too early to estimate the impacts of such broad

recommendations and their implementation on offshore natural gas exploration, production, and development.

**TCF Affected:** Not estimated.

## **2.2 ISSUES LIKELY TO PRODUCE DELAYS**

### **2.2.1 CBM-Produced Water Management**

Regulations are being written to address the potential impacts of discharging or disposing of produced water generated during CBM exploration, production, and development. There are significant unknowns regarding the actual impacts of produced water, and many of the regulations may be costly to implement, resulting in delayed or reduced production.

**TCF Affected:** 74

### **2.2.2 Drilling Permits**

Once the BLM has issued a gas lease on federal land, no drilling can occur until the BLM issues a permit to drill. In the gas-rich basins of the Rocky Mountain region, backlogs for permits to drill and right-of-ways (ROWs) are growing. Many Resource Management Plans (RMPs) are outdated, and revisions, which often require additional environmental analyses, are required before gas leasing or development can occur. Insufficient staffing, combined with the number of plans needing updating and the recent increase in permit applications spurred by gas price increases, compounds the delays. Citizens' suits also contribute to permitting delays. These delays will be particularly important for CBM.

**TCF Affected:** 311.2

### **2.2.3 Essential Fish Habitat**

EFH regulations issued in 2002 require assessments and consultations that can duplicate the environmental requirements of other federal agencies. This duplication can delay leasing or permitting decisions, because federal agencies undertaking activities that could adversely affect EFH (e.g., permitting) must prepare EFH assessments, undertake consultation with the National Marine Fisheries Service (NMFS), and, in some cases, implement mitigation strategies that could add further costs and delays.

**TCF Affected:** 174.5

### **2.2.4 Fracturing Operations**

Hydraulic fracturing is a process producers use to increase the flow of natural gas (and oil) from rocks whose natural permeability does not allow the gas to reach the well bore at sufficient rates. It is commonly used to release methane from coal beds, where the gas is held in the rock by hydraulic pressure. During fracturing, a fluid (usually a water-sand mixture) is pumped into the reservoir to split the rock and create drainage pathways. Typically, it is a one-time practice. The NPC estimates that 60 to 80% of all the wells drilled in the next decade to meet natural gas demand will require fracturing. The practice is controversial, with environmentalists arguing that it needs more regulation. Federal or increased state regulation could delay gas production or make it uneconomical, thereby reducing the amount available at reasonable prices (Stewart 2001).

**TCF Affected:** 293

### **2.2.5 Nationwide Permits**

Section 404 of the Clean Water Act (CWA) requires that any activities that result in the discharge of dredged or fill material into waters of the United States (which include most wetlands) must be approved via a permit issued by the COE. Obtaining an individual permit can take a year or more (Bleichfeld et al. 2001). To reduce the burden caused by permitting many small, inconsequential projects, the COE has established nearly 40 general, or NWP, for categories of activities that will have minimal adverse effects on the environment. The processing time for activities approved under a general permit averages about 14 days (Copeland 1999). Recent regulatory changes have limited the activities covered by NWPs, meaning that more gas-related activities will require individual permits. Also, recent court cases and other actions have resulted in changes to the definitions of wetlands, meaning that the scope of activities and areas requiring a permit have been in a state of flux, which has led to additional delays caused by conflicting definitional interpretations.

**TCF Affected:** Not estimated.

### **2.2.6 NEPA Integration and Lawsuits**

NEPA requires federal agencies to evaluate the human and environmental impacts of federal activities and projects, including leasing and other activities on federal lands. Various levels of jurisdiction and decision making under the law often produce unnecessary project delays. Also, NEPA-related lawsuits can lead to the preparation of “appeal-proof” documentation, which can further delay project review and approval.

**TCF Affected:** 464.5

### **2.2.7 Pipeline Certification**

According to the Interstate Natural Gas Association of America (INGAA), about 200 major new pipeline construction projects (valued at about \$2.5 billion per year) will be required over the next 10 years to support projected natural gas demands. The lead time to obtain permission to build new pipeline facilities can be lengthy. The Federal Energy Regulatory Commission (FERC) must approve all new pipelines and expansions to existing interstate pipelines. The process requires approvals from numerous federal, state, and local agencies that have little incentive to work together to approve applications in a timely manner (INGAA 2001). For interstate pipelines, the INGAA estimates that it takes an average of 4 years to obtain approvals to construct a new natural gas pipeline.

**TCF Affected:** 23.3

### **2.2.8 Pipeline Safety (Integrity Management)**

Recent natural gas pipeline incidents involving loss of life and property, a perceived lack of effectiveness on the part of the federal agency charged with implementing statutory mandates regarding pipeline safety, and the realization that increased gas demands can only be met with increased pipeline capacity have contributed to increased natural gas pipeline safety requirements. Federal-level safety, or integrity management, standards for natural gas transmission pipelines are being written that could increase costs and result in temporary supply disruptions. In addition, states can issue regulations more stringent than the federal regulations for intrastate pipelines.

**TCF Affected:** Not estimated.

### **2.2.9 Wetlands Mitigation**

Recent COE regulations and guidance for mitigating impacts to wetlands have taken a watershed approach, which allows case-specific exemptions to the one-for-one mitigation-to-impact requirement and expands options for conducting mitigation. Environmental opposition may result in a review and rethinking of these revisions, which could increase the time and money associated with obtaining permits and implementing strategies to mitigate impacts to wetlands caused by natural gas E&P, development, transportation, and construction activities.

**TCF Affected:** Not estimated.



## **2.3 ISSUES LIKELY TO INCREASE COSTS**

### **2.3.1 Cooling-Water Intake Structures**

Section 316(b) of the CWA requires that cooling-water intake structures reflect the best technology available for minimizing adverse environmental impacts. The EPA is developing national regulations to implement these requirements. It has issued final Phase I regulations for new power plants and manufacturing facilities and final Phase II regulations for existing power plants. The EPA published proposed Phase III regulations for existing manufacturing facilities, including oil and gas extraction facilities, and for new offshore oil and gas extraction facilities in November 2004. Final Phase III regulations must be published by June 2006. The impacts of the final 316(b) Phase III regulations on oil and gas production are not known at this time.

**TCF Affected:** Not estimated.

### **2.3.2 Electronic Reporting and Record-Keeping Requirements**

On August 31, 2001, the EPA published its proposed Cross-Media Electronic Reporting and Record-Keeping Rule (CROMERRR), which describes conditions under which the EPA would “allow” submission of electronic documents and maintenance of electronic records to satisfy federal EPA reporting and record-keeping requirements. The rule is touted as voluntary, but any entity that reports or maintains records electronically would have to follow certain requirements, which could include installation of costly new systems incompatible with current electronic data management systems. The American Petroleum Institute (API) estimated that the financial impact of the proposed rule on the petroleum industry was comparable to what the industry spent on Y2K, or about \$1 billion.

**TCF Affected:** Not estimated.

### **2.3.3 Lack of Incentives to Go beyond Compliance**

Permitting and regulatory processes generally lack incentives for companies to provide environmental protection beyond standard operating practices. Proposals that would provide environmental protections beyond legal requirements and proposals that could provide equal protection at lower costs have been rejected by local, state, and federal authorities. Such rejections constrain environmental progress and preclude opportunities to reduce costs. They can also discourage natural gas operators who may otherwise be willing to take voluntary action in the E&P areas, where additional regulations, expected in response to increased activity and attendant environmental impact, would add to the workload of already burdened regulatory staff, further exacerbating production delays.

**TCF Affected:** 86.6

### **2.3.4 Louisiana E&P Waste Disposal Regulations**

Amendments to the State of Louisiana's E&P waste storage and disposal rules passed on November 20, 2001, may increase costs and delay natural gas E&P schedules in the state. Louisiana is the first state to adopt such regulations, and because many oil and gas states follow Louisiana's lead, the requirements may set precedents for other states, with attendant costs for natural gas E&P operations.

**TCF Affected:** Not estimated.

### **2.3.5 Maximum Achievable Control Technology**

MACT rules regulate emissions of hazardous air pollutants (HAPs) from stationary and mobile sources. Final MACT rules exist for oil and gas production facilities and for natural gas transmission and storage facilities. Recently, the EPA signed final MACT rules for turbines, process heaters, and reciprocating internal combustion engines, which may affect gas operations. Compliance with these rules, for example, a 95% reduction in emissions at major sources, could impact the economics of natural gas operations.

**TCF Affected:** Not estimated.

### **2.3.6 Mercury Discharge Regulations**

Discharges of mercury-containing drilling muds from gas (and oil) drilling operations in the Gulf of Mexico have generated concern that such mercury may convert to toxic methylmercury, which can accumulate in the food chain and poison fish. Such concerns may expand to other onshore and offshore geographical areas, leading to strengthened or new mercury regulations.

**TCF Affected:** Not estimated.

### **2.3.7 NO<sub>x</sub> Prevention of Significant Deterioration Increment Consumption**

An increasingly important air quality issue that can affect natural gas production in the West is the potential for new regulations to limit NO<sub>x</sub> emissions. The Air Quality Act limits emissions in Prevention of Significant Deterioration (PSD) areas, most of which exist in the West, where the number of combustion sources that create such emissions is growing. Many of these combustion sources are from oil and gas drilling, and particularly CBM drilling, which is expected to increase significantly over the next few years.

**TCF Affected:** Not estimated.

### **2.3.8 Noise Regulations**

As E&P and transportation of natural gas increase in response to increased demand, the number of drilling rigs, processing plants, and pipelines will also increase. These increases will require additional equipment, particularly compressors and drills, both of which generate high levels of noise. To date, most drilling and producing operations and pipelines have been located away from population centers, so that noise has not been a major issue. However, as thousands of wells are drilled (particularly for CBM in the West) and as new pipelines are built, noise is expected to become an issue that could lead to regulation, and subsequently higher operating and transportation costs. Noise also affects wildlife, and its effect on otherwise quiet areas will continue to be a subject of concern and potential regulation.

**TCF Affected:** Not estimated.

### **2.3.9 Nonroad Diesel Rule**

Section 213(a) of the Clean Air Act (CAA) requires that the EPA regulate emissions of nonroad engines and equipment. The EPA has issued some nonroad diesel emission standards and plans to issue more, with a new proposal in the spring of 2003 and final rules by the summer of 2004. Nonroad diesel engines are used in natural gas E&P and in gas processing operations. Increased costs of these engines because of stricter emissions controls, when added to other environmental costs, could affect some operations and limit gas development.

**TCF Affected:** Not estimated.

### **2.3.10 Ocean Discharge Criteria**

Proposed amendments to existing rules implementing the ocean protection provisions of Section 403 of the CWA would strengthen existing ocean discharge criteria. These criteria must be considered in the issuance of individual or general National Pollutant Discharge Elimination System (NPDES) permits for offshore facilities. The proposal would designate “Healthy Ocean Waters” (waters beyond 3 mi offshore), and these waters would be protected by both a narrative statement of water quality and pollutant-specific numeric criteria and would be subject to an antidegradation policy. The proposal would also establish “Special Ocean Sites (SOSs),” where new and significantly expanded discharges would be prohibited.

**TCF Affected:** Not estimated.

### **2.3.11 Particulate Matter Regulations**

In 1997, the EPA promulgated National Ambient Air Quality Standards (NAAQS) for fine particulate matter (PM<sub>2.5</sub>, particulate matter with a mean aerodynamic diameter of 2.5 μm or less). The EPA is considering updating that standard, and some states are implementing stricter

regulations. Many diesel-powered engines used at CBM production sites emit PM, and if those emissions were further restricted, more costly new, alternative, or refitted power sources might be required. Depending on the type of regulation, limits on particulate emissions from diesel and gasoline engines could slow the development of CBM.

**TCF Affected:** 7.2

### **2.3.12 Pipeline Gathering Line Definition**

The Pipeline Safety Act of 1992 requires the U.S. Department of Transportation (DOT) to define the term “gathering line” and to consider the merits of revising pipeline safety regulations for such lines. The issue is complex, and the current definition, adopted in 1970, lacks clarity. The definition could require more lines and facilities to become subject to the federal gas pipeline regulations, which could be costly for small operators and could affect upstream gas flows.

**TCF Affected:** Not estimated.

### **2.3.13 Regional Haze Rule**

In July 1999, the EPA promulgated final regional haze regulations for protecting visibility in national parks and Wilderness Areas. These rules require states to establish goals for improving visibility in these areas and to develop long-term strategies for reducing emissions of air pollutants that cause visibility impairment (e.g., sulfur dioxide [SO<sub>2</sub>], NO<sub>x</sub>, and particulates). The goal is to reduce visibility impairment in these areas to natural levels by 2065.

**TCF Affected:** Not estimated.

### **2.3.14 Spill Prevention Control and Countermeasures**

On July 17, 2002, the EPA issued a final rule that amended the spill prevention, control, and countermeasures requirements originally promulgated in 1974 under the EPA’s Oil Pollution Prevention regulations in the *Code of Federal Regulations*, Title 40, Part 112 (40 CFR Part 112). While the expanded scope and relatively short compliance deadlines of the new rule would primarily affect oil production and operations, natural gas drilling and production operations would also be affected, potentially causing some small operators to leave the business, and limiting the ability to rework some existing properties to extract additional gas resources.

**TCF Affected:** Not estimated.

### 2.3.15 Standards for Decommissioning or Closing Wells

As gas production from a producing well diminishes or becomes uneconomical, the well must be decommissioned or closed according to the regulations set forth by the appropriate state environmental regulatory agency or oil and gas commission. Typically, these regulations specify contaminant-specific concentrations that cannot be exceeded after closure is complete. These concentrations can vary from state to state, and they are usually set on the basis of technology, background concentration, or other non-risk-based measures. Thus, they can be overly protective and costly to implement, without providing significant gains in environmental or human-health protection.

**TCF Affected:** Not estimated.

### 2.3.16 Storm Water Construction Permits

The EPA has proposed extending the deadline for obtaining storm water permits under the CWA by 2 years, from March 10, 2003, to March 10, 2005, to determine the appropriate NPDES requirements, if any, for constructing oil and gas E&P facilities of 1 to 5 acres. If all oil and gas and E&P facilities of 1 to 5 acres were required to obtain such permits, as originally proposed in 1999, the costs and delays to oil and gas production could reduce the number of wells drilled and the amount of gas produced.

**TCF Affected:** 5.75 per year

### 2.3.17 TMDL Regulations Targeting Oil and Gas Wells

Gas (and oil) wells may be targeted for TMDL limits because large point sources are already regulated, and technical and political factors argue against imposing limits on large nonpoint sources such as agricultural lands. Also, proposed changes to the TMDL rule could limit the use of nationwide construction permits under Section 404 of the CWA.

**TCF Affected:** Not estimated.

### 3 ISSUE DISCUSSIONS

This section provides additional detail and discussion for the environmental policy and regulatory constraints summarized in Chapter 2. For each issue, the following information, where available, is presented:

- *Summary.* Brief summary of the issue.
- *Source of constraint.* The constraint can arise from statutes; regulations written to implement a statute; Executive Orders; or from agency implementation of the regulation, statute, or order.
- *Impact.* The impact of the constraint can be one or more of the following: lack of access (unavailability of gas), delays, or increased costs.
- *Phase.* The constraint can affect one or more of the following phases of the natural gas production cycle: exploration, production, or transportation.
- *Category.* The constraint can affect one or more categories of activity, including access, leasing, permitting, and operations.
- *Estimated affected natural gas resources.* Estimates of the amount of gas affected by the constraint, in TCF, were derived from information collected by other sources, such as the USGS and the MMS.
- *Estimate type.* Because not all estimates are reported in the same terms, the type of estimate is identified. Most frequently, the estimates are reported as technically recoverable resources; however, sometimes estimates are reported as economically recoverable amounts or in other terms used by the organization preparing the estimates.
- *Estimate date.* The date of the estimate of the TCF affected.
- *Estimate reference.* The source of the TCF affected estimate.
- *Estimate comments.* Notes that help explain the TCF estimates.
- *Statutory/regulatory citation.* The specific source of the constraint, which can include specific statutes, regulations, proposed regulations, Presidential Memos, etc.
- *Lead player(s).* The agency or other player that has control over the constraint can include various federal regulatory agencies (e.g., EPA, BLM, COE), states, the President, or Congress.

- *Issue discussion.* A discussion of the nature of the constraint, how it evolved, its status, and other information relevant to understanding the constraint. The discussion includes references.

Table 1 lists each constraint, grouped by source of constraint, and identifies lead player(s), category(ies), and production cycle phase(s). Table 2 lists the constraints, grouped by type of impact, and indicates the estimated TCF affected, and the estimate type, date, and reference. Many of these issues have multiple impacts; to prevent duplication in presentation, constraints are grouped according to the impact deemed to be the most significant. The data for each constraint are stored in a Microsoft® Access database to facilitate updating and sorting according to various criteria.

**TABLE 1 Environmental Regulatory Constraints, by Source of Constraint<sup>a</sup>**

Source of Constraint	Constraint	Lead Player	Category	Phase
Statutory/ regulatory/agency implementation	CZMA consistency provisions	NOAA	Access, leasing, permitting	E&P, transportation
Statutory	Bans on Great Lakes drilling	COE, states	Access, leasing	E&P
	Wilderness Areas	BLM	Access	Exploration
Regulatory	CBM produced water management	EPA, states	Permitting	Production
	Cooling water intake structures	EPA	Permitting	Production
	Electronic reporting and record keeping requirements	EPA	Operations	Production
	Fracturing operations	EPA, states	Operations	Production
	Lack of incentives to go beyond compliance	BLM	Permitting	Production
	Louisiana E&P Waste Disposal Regulations	State	Operations	Production
	MACT rules	EPA	Operations	Production, transportation
	Mercury discharge regulations	EPA	Permitting	E&P
	Nationwide permits	COE	Permitting	Production, transportation
	NEPA integration and lawsuits	States, BLM, FERC	Access, leasing, permitting	E&P, transportation
	NO <sub>x</sub> PSD increment consumption	EPA, states	Permitting	Production
Noise regulations	States, local governments, BLM	Operations	Production, transportation	

**TABLE 1 (Cont.)**

Source of Constraint	Constraint		Lead Player	Category	Phase
Regulatory (Cont.)	Nonroad Diesel Rule		EPA	Operations	E&P
	Ocean discharge criteria		EPA	Permitting	Production
	Particulate matter regulations		EPA, states	Permitting	Production
	Pipeline gathering line definition		OPS	Operations	Production, transportation
	Pipeline safety (integrity management)		OPS	Operations	Transportation
	Regional haze rule		States, EPA	Operations	Production
	Roadless Rule		FS	Access	Exploration
	Spill prevention control and countermeasures		EPA	Permitting	Production
	Standards for decommissioning or closing wells		States	Operations	Production
	Storm water construction permits		EPA	Permitting	E&P
	TMDL regulations targeting oil and gas wells		EPA	Permitting	E&P
	Wetlands mitigation		COE, states	Permitting, operations	Production, transportation
Presidential, statutory	OCS Moratoria	Atlantic Ocean	President, Congress	Access, leasing	E&P
	OCS Moratoria	Eastern Gulf of Mexico	President, Congress	Access, leasing	E&P
	OCS Moratoria	West Coast	President, Congress	Access, leasing	E&P
Presidential	Monument designations		President	Access	Exploration
	Ocean policy		President, Congress	Access, leasing, permitting, operations	E&P, transportation
Agency implementation	Drilling permits		BLM	Permitting	Production
	ESA		USFWS	Access, leasing, permitting, operations	E&P
	Essential fish habitat		NMFS	Permitting	E&P, transportation
	Forest Service restrictions		FS	Access	Production



**TABLE 1 (Cont.)**

Source of Constraint	Constraint	Lead Player	Category	Phase
Agency implementation (Cont.)	Outdated BLM land use plans	BLM	Leasing, permitting	E&P
	Lease stipulations	BLM, FS	Leasing	Production
	Permit restrictions	BLM	Access	E&P
	Pipeline certification	FERC, others	Permitting	Transportation

<sup>a</sup> BLM = Bureau of Land Management; CBM = coal bed methane; CZMA = Coastal Zone Management Act; COE = U.S. Army Corps of Engineers; E&P = exploration and production; EPA = U.S. Environmental Protection Agency; ESA = Endangered Species Act; FERC = Federal Energy Regulatory Commission; FS = USDA Forest Service; MACT = maximum achievable control technology; NEPA = National Environmental Policy Act of 1969; NMFS = National Marine Fisheries Service; NOAA = National Oceanic and Atmospheric Administration; NO<sub>x</sub> = nitrogen oxides; OCS = Outer Continental Shelf; OPS = Office of Pipeline Safety; PSD = Prevention of Significant Deterioration; TMDL = total maximum daily load; USFWS = U.S. Fish and Wildlife Service.

**TABLE 2 Environmental Regulatory Constraints and Estimated Amounts of Gas Affected<sup>a</sup>**

Issue Impact	Constraint	TCF Affected	TCF Type	TCF Date	TCF Reference
Unavailable gas, delay, cost	Ocean policy	Not estimated	NA	NA	NA
	Lease stipulations	108	Undeveloped gas resources	01/1998	NPC (1999)
Unavailable gas, delay	CZMA consistency provisions	362.2	Undiscovered conventionally recoverable resources	01/1999	MMS (2000)
	ESA	Not estimated	NA	NA	NA
	Outdated BLM land use plans	120.3	Technically recoverable	01/2003	DOI (2003)
Unavailable gas	Forest Service restrictions	10 30	Natural gas resources	01/2001	Fisher (2001)
	Monument designations	1	Technically recoverable	01/1995	Wilderness Society (2002)
	OCS Moratoria Atlantic Ocean	28.0	Technically recoverable	01/2000	EIA (2001b)
	OCS Moratoria of Mexico	Eastern Gulf 11.3	Technically recoverable	01/2000	EIA (2001b)

**TABLE 2 (Cont.)**

Issue Impact	Issue	TCF Affected	TCF Type	TCF Date	TCF Reference
Unavailable gas (Cont.)	OCS Moratoria West Coast	18.9	Technically recoverable	01/2000	EIA (2001b)
	Permit restrictions	86.6	Technically recoverable	01/2003	DOI (2003)
	Bans on Great Lakes drilling	1.1	Possible and probable reserves	09/2001	Shirley (2001)
	Roadless Rule	11	Technically recoverable	11/2000	Eppink (2000)
	Wilderness Areas	9	Technically recoverable	01/2003	DOI (2003)
Delay, cost	CBM produced water management	74	Technically recoverable	01/1998	NPC (1999)
	Fracturing operations	293	Unproved technically recoverable	01/2000	EIA (2001b)
	Pipeline safety (integrity management)	Not estimated	NA	NA	NA
	Wetlands mitigation	Not estimated	NA	NA	NA
Delay	Drilling permits	311.2	Assessed additional resources	01/1998	NPC (1999)
	Essential fish habitat	174.5	Technically recoverable	01/2000	EIA (2001b)
	Nationwide permits	Not estimated	NA	NA	NA
	NEPA integration and lawsuits	464.5	Technically recoverable	01/2000	EIA (2001a)
	Pipeline certification	23.3	Annual gas consumption	01/2003	EIA (2003)
Cost	Cooling water intake structures	Not estimated	NA	NA	NA
	Electronic reporting and record keeping requirements	Not estimated	NA	NA	NA
	Lack of incentives to go beyond compliance	86.6	Technically recoverable	01/2003	DOI (2003)
	Louisiana E&P waste disposal regulations	Not estimated	NA	NA	NA
	MACT rules	Not estimated	NA	NA	NA
	Mercury discharge regulations	Not estimated	NA	NA	NA

**TABLE 2 (Cont.)**

Issue Impact	Issue	TCF Affected	TCF Type	TCF Date	TCF Reference
Cost (Cont.)	NO <sub>x</sub> PSD increment consumption	Not estimated	NA	NA	NA
	Noise regulations	Not estimated	NA	NA	NA
	Nonroad Diesel Rule	Not estimated	NA	NA	NA
	Ocean discharge criteria	Not estimated	NA	NA	NA
	Particulate matter regulations	7.2	Technically recoverable	01/1995	Whitney (2001)
	Pipeline gathering line definition	Not estimated	NA	NA	NA
	Regional haze rule	Not estimated	NA	NA	NA
	Spill prevention control and countermeasures	Not estimated	NA	NA	NA
	Standards for decommissioning or closing wells	Not estimated	NA	NA	NA
	Storm water construction permits	5.75 per year	Economically recoverable	09/2002	Texas Alliance of Energy Producers (2003)
TMDL regulations targeting oil and gas wells	Not estimated	NA	NA	NA	

<sup>a</sup> Abbreviations: BLM = Bureau of Land Management; CBM = coal bed methane; CZMA = Coastal Zone Management Act; E&P = exploration and production; DOI = U.S. Department of the Interior; EIA = Energy Information Administration; ESA = Endangered Species Act; MACT = maximum achievable control technology; MMS = Minerals Management Service; NA = not applicable; NEPA = National Environmental Policy Act of 1969; NO<sub>x</sub> = nitrogen oxides; NPC = National Petroleum Council; OCS = Outer Continental Shelf; PSD = Prevention of Significant Deterioration; TCF = trillion cubic feet; TMDL = total maximum daily load.

### 3.1 ISSUES LIKELY TO LIMIT ACCESS

#### 3.1.1 Coastal Zone Management Act Consistency Provisions

**Summary:** The CZMA requires that each federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone must be undertaken in a manner consistent “to the maximum extent practicable” with the enforcement policies of approved state CMPs. Nonfederal applicants for federal licenses or permits must comply with

state CMP enforcement policies. Federal approvals may not be granted until the state concurs, or, if the state objects, until the Secretary of the Department of Commerce, on appeal by the applicant, overrides the state's CMP objections. These provisions have caused duplications and costly delays to federal leasing and production activities. Also, once a lease has been obtained, the CZMA can still limit/prevent exploration, development, and production for that lease. (See related issue, OCS Moratoria West Coast.)

**Source of Constraint:** Statutory, regulatory, agency implementation

**Impact:** Unavailable gas, delay

**Phase:** E&P, transportation

**Category:** Access, leasing, permitting

**Estimated affected natural gas resources (TCF):** 362.2

**Estimate type:** Undiscovered conventionally recoverable resources

**Estimate date:** 01/1999      **Estimate reference:** MMS (2000)

**Estimate comments:** This estimate is MMS's mean estimate for all OCS areas. The low estimate is 292.1 TCF, and the high estimate is 468.6 TCF. The breakdown for mean estimates is as follows: Alaska, 122.6; Atlantic, 28.0; Gulf of Mexico, 192.7; Pacific, 18.9. Note that the specific example of OCS Lease Sale 181 in Florida prevented drilling for an estimated 1.45 TCF because of the downsizing of the lease area in July 2001.

**Statutory/regulatory citation:** CZMA (Section 307, 16 USC 1456); CZMA Federal Consistency Regulations, Final Rule, *Federal Register*, Volume 65, page 77124 (65 FR 77124), December 8, 2000, and Proposed Rule (68 FR 34851), June 11, 2003

**Lead player:** NOAA

**Issue discussion:** The CZMA created a national program to encourage states to manage and balance competing uses of, and impacts on, coastal resources. The oil and gas industry suggests that over the years, the law has been used to stall or halt offshore development by using loosely worded passages in the law that require a "seemingly endless loop of permit approvals" (Fry 2001). A coastal state with a federally approved CMP can block or delay offshore E&P plans by claiming that the federal lessee's activity will have some effect on resources in the coastal zone. If the lessee's activity will have an effect, the activity must be consistent with the state's CMP. The coastal zone itself generally extends only 3 mi offshore, except for the Gulf of Mexico off Texas and Florida, where it extends 9 mi. However, the "effects test" can extend a state's reach to greater distances.

The MMS issues OCS mineral leases under the authority of the Outer Continental Shelf Lands Act (OCSLA; 43 USC 1331 et seq). Under the OCSLA, an OCS lessee prepares a Plan of

Exploration (POE) as part of the exploration stage of lease activity. If recoverable resources are found, the lessee may then submit to the MMS a Plan of Development and Production (POD) to continue on to the production stage. In filing either plan, the OCSLA stipulates that the OCS lessee will certify that its activities will be consistent with the CMP of any affected state that has such an approved program. (43 USC 1340(c) addresses applying CZMA certification requirements to POEs; 43 USC 1351(h) addresses applying the requirement to PODs.)

Under the CZMA consistency provisions, a federal agency is prohibited from granting any further permits to conduct activities under a POE or POD unless the state has concurred that such activities are consistent with its approved CMP. If the state does not concur, the lessee faces considerable delay in appeal before the Secretary of Commerce, which can “override” the state’s objection. In recent years, a number of states, including North Carolina, California, and Florida, have used their consistency determination authorities to limit oil and gas leasing, exploration, and development. The Secretary of Commerce has upheld certain controversial state CZMA objections, thus thwarting further OCS development. Even in instances where the Secretary has overridden the state’s objection, appeals involving OCS activity have taken from 16 months to 4 years from the state’s initial objection to the final override decision (Wyman 2001).

Chief risks associated with current CZMA implementation include escalating compliance costs resulting from unexpected interpretations of vague policies in state CMPs, delays caused by lengthy appeals before the Department of Commerce, and the risk of losing lease rights without compensation when a state authority changes a plan requirement (Young 2001). Existing challenges take an average of 2 years to review (Inside EPA 2001c). A 1996 amendment to the CZMA, adding 16 USC Section 1465 (appeals to the Secretary), was designed to expedite the override decision-making process. But lengthy agency commenting continues to draw out appeals (Wyman 2001).

Other issues include the policy of allowing states to conduct consistency reviews of activities outside their own geographic boundaries; delays caused by lack of coordination among federal agencies in processing permits for OCS activities, and delays involving separate state consistency reviews for those permits; state requirements for multiple information requests with the related use of “lack of information” to deny consistency certifications; and lengthy appeals processes, exacerbated by overlong agency commenting and by the Department of Commerce’s requirement that the decision-making period not begin until after the Administrative Record is “closed” (Wyman 2001).

**OCS Lease Sale 181.** An example of how the CZMA can restrict drilling and production of natural gas is OCS Lease Sale 181. Federal OCS Lease Sale 181, in the Eastern Gulf of Mexico Planning Area, off the coast of Florida, was scheduled for December 2001. In the early to mid-1990s, the MMS had comprehensive consultations with Alabama, Florida, and other coastal states about leasing in the eastern Gulf of Mexico. Both Alabama and Florida expressed concerns and requested that the leasing not occur within certain distances of their shores (15 mi for Alabama and 100 mi for Florida.) MMS designed Lease Sale 181 to meet these criteria and placed it on the current 5-year schedule. Subsequently, Congress ratified the MMS decision through the appropriations process. (The lease area is not subject to the OCS moratorium.) Industry then began to accumulate seismic data, review geological trends, and conduct

preliminary engineering studies in anticipation of the sale. Florida tried to block the sale on environmental grounds, even though the lease sale had existing infrastructure that could be used with a minimum amount of turnaround time. The lease was also near one of the most rapidly growing population areas in the United States, and many argued that the streamlined development of Lease Sale 181's gas resources could prevent energy supply and delivery disruptions in the area (Fry 2001).

On June 21, 2001, the U.S. House of Representatives approved an amendment to House Resolution (H.R.) 2217, the Interior Appropriations bill that bars the spending of funds to execute a final lease agreement for oil or gas in Area 181 before April 1, 2002, effectively blocking the sale of Lease 181. On July 2, 2001, the Bush Administration announced that Secretary of the Interior, Gale Norton, would seek to allow drilling on 1.47 million acres (256 leases) of Lease Sale 181, about one-fourth of the original acreage of 5.9 million acres (1,033 leases) first proposed for leasing by the Clinton Administration in 1997. The revised area is estimated to contain 1.25 TCF of natural gas, whereas the original site holds an estimated 2.7 TCF (Ferullo 2001a).

The original sale area also contained acreage near infrastructure and in moderate water depths, allowing for 1- to 2-year projects. The revised sale area is farther from existing infrastructure and in ultra-deepwater depths, requiring projects with cycle times of 4 to 10 years. The revised sale area eliminates all acreage in less than 6,500-ft depths, with most of the available acreage in depths greater than 7,000 ft. Thus, the sale is an ultra-deepwater sale, where state-of-the-art development tools are required. There may be limited equipment to drill and produce in these waters in the near term (Young 2001).

The lease sale for the modified OCS Lease Sale 181 was conducted in December 2001. Ninety-five of the 256 available leases were sold, and the remaining leases in the scaled-back OCS 181 lease will be auctioned as part of the 2002 2007 5-year plan (MMS 2002a). These auctions, which will cover about 0.8 million acres, are scheduled to occur in December 2003 (Lease Sale 189) and March 2005 (Lease Sale 197). Both are currently in the NEPA process. A draft EIS was issued in November 2002, and a final EIS is expected in June 2003. Consistency determinations will be made roughly 5 months before each sale has been prepared (MMS 2002b). Drilling in areas sold in the December 2001 reduced area could begin within 2 to 10 years, but the remaining 4.4 million acres (1.45 TCF) of the original OCS Lease 181 would not become available for leasing until at least 2007.

**Destin Dome.** The Destin Dome area is another example where the CZMA functioned to prohibit drilling. Between 1984 and 1989, the MMS sold drilling rights to 11 parts of the Destin Dome area for about \$20 million. However, Florida rejected the development and production plan submitted by the lessees, saying that the plan would not be consistent with the state's CMP. Neither the EPA nor the NOAA would issue the permits required for drilling; each argued that it needed clearance from the other before it could issue its own permit (Inside EPA 2001b). The oil company lessees appealed to the Department of Commerce to overturn Florida's objections, but action was never taken. On May 29, 2002, the President announced that the U.S. Department of the Interior (DOI) would pay \$115 million to buy back the Destin Dome oil and gas leases to settle the legal dispute and appease state and local officials who objected to energy exploration in

the state. The settlement covered the costs for leasing, exploration, and gas in the ground that they would be unable to sell. The estimated amount of these resources varies from 0.7 TCF (DOI estimate) to 2.6 TCF (DOE estimate) (Ferguson 2002). A representative of the Natural Gas Supply Association stated that the Destin Dome area is one of the largest fields in the Gulf of Mexico.

**Regulatory issues.** Recent changes made to the implementing regulations could limit or delay gas (and oil) exploration and development. On December 8, 2000, the NOAA published final rules revising the regulations implementing the federal consistency provisions of the CZMA. (The regulations had been in place since 1979, and the NOAA needed to update them to reflect changes made to the federal consistency provisions in Section 307 resulting from the Coastal Zone Protection Act of 1996 and the Coastal Zone Act Reauthorization Amendments of 1990.) Sections 930.120 through 930.131 of 15 CFR describe the procedures for appeals to the Secretary of Commerce for reviews of consistency decisions related to national security interests. Before the changes, 15 CFR 930.121 required that a successful appeal must include the specific finding that “[t]he challenged activity furthers one of the national objectives or purposes of the [CZMA].” However, the new CZMA rules have added the requirement that the challenged activity must further the national interest requirements in a “significant or substantial” manner. According to testimony before the House Resources Committee, Subcommittee on Fisheries Conservation, Wildlife, and Oceans, this change to the “national interest” criterion could have substantial detrimental impacts. The preamble to the December 8, 2000 rule cites examples of activities that significantly or substantially further the national interest as the siting of energy facilities or OCS oil and gas development (DOC 2000).

While these examples give OCS lessees some comfort regarding the new criterion’s application to OCS development, they do not provide the same level of comfort for exploration. The distinction is significant, as demonstrated by recent override decisions by the Secretary of Commerce. For example, the Secretary’s POE and NPDES permit override decisions in a North Carolina leasing project, the Manteo project, specifically found, contrary to longstanding Secretarial precedent, that the drilling of an exploration well in an important frontier OCS area would only provide a “minimal contribution” to the national interest. Emphasizing that the Manteo POE had indicated that there was a 10% chance of actually finding mineral reserves (which, in the industry, is a solid chance for even conservative decision making), the Secretary found that the supposedly small chance of exploratory success diminished the Manteo project’s contribution to the national interest. Therefore, it is possible that the Secretary of Commerce could use the new override criterion to reject the importance of OCS exploratory activity in frontier areas (Wyman 2001).

The December 8 rule also provided for the review and preclusion of a federal action (e.g., a leasing or permitting decision) based on a state’s objection, even if that state was not the one in which the activity would occur. According to 15 CFR 930.151, states can object to an activity on the basis of any “reasonably foreseeable” direct or indirect effect resulting from a federal action occurring in the state or on any coastal use or resource of another state that has a federally approved management plan.

One of the recommendations of the NEPDG in its National Energy Policy of May 2001 was for the Department of Interior and Commerce to “re-examine the current federal legal and policy regime (statutes, regulations, and Executive Orders) to determine if changes are needed regarding energy-related activities and the siting of energy facilities in the coastal zone and on the Outer Continental Shelf” (NEPDG 2001). On June 11, 2003, the NOAA published a proposed rule to address these CZMA-related recommendations. The proposal seeks to clarify some sections of and provide greater transparency and predictability to the federal consistency regulations (NOAA 2003).

### 3.1.2 Endangered Species Act

**Summary:** The ESA can limit access to gas resources and cause delays in permitting on both federal and private lands. Court-interpreted definitions have expanded the scope of what is considered a “take” under the ESA to include habitat modification, such as clearing or similar development, which often occurs with natural gas E&P. Similarly, the USFWS, an implementing agency for the ESA, often treats sensitive species as requiring the same or similar protections as species that are actually listed as endangered or threatened.

**Source of Constraint:** Agency implementation

**Impact:** Unavailable gas, delay

**Phase:** E&P

**Category:** Access, leasing, permitting, operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** ESA (16 USC 1531 et seq.)

**Lead player:** USFWS

**Issue discussion:** Under the ESA, the USFWS or the NMFS lists certain plant and animal species as endangered or threatened, depending on their assessed risk of extinction. The ESA prohibits the “take” of an endangered species. The definition of take, which includes, among other things, harming, harassing, or pursuing, has been interpreted broadly. For example, in 1995, the Supreme Court determined that significant habitat modification, which could include clearing or development, was a reasonable interpretation of the term “harm.” Once a species is listed, the USFWS is to designate critical habitat for that species, and federal agencies must avoid “adverse modification” to these areas. Section 7 of the ESA requires any federal actions that may affect a listed species to ensure that those actions are “not likely to jeopardize the continued existence” of any endangered or threatened species, nor to adversely modify critical habitat. Federal agencies must consult with the Secretary of Interior or Commerce for such actions, and if the Secretary finds that an action would jeopardize a listed species, he or she must



suggest alternatives. Until the consultation process is completed, agencies are limited in what they may approve.

The designation of critical habitat can have significant cost and schedule impacts on gas development. For example, in comments on the July 2002 rule designating critical habitat for wintering piping plovers, one petroleum company estimated that the critical habitat designation could cause natural gas project delays resulting from Section 7 consultations of 6 months to 2 years. It also estimated that the net present value cost of the designation over 30 years would be \$261 million to \$979 million to the local economy (USFWS 2001).

Failure to conduct Section 7 consultations can lead to legal action. In November 2001, for example, environmental groups sued the FS and the BLM for issuing leases encompassing grizzly bear habitat in the Shoshone National Forest without conducting formal consultation with the USFWS regarding the impacts of such leasing on the habitat (DEN 2001).

Although critical habitat issues are important, the broad interpretation of the law by its implementing agencies means that the mere listing of a species can have nearly as much of an impact as a critical habitat designation. A Congressional Research Study found that “as a practical matter, critical habitat has not been designated for many listed species because the USFWS regards listing as providing the bulk of species protection, while critical habitat adds only a marginal increment” (Buck and Corn 2001). In February 2002, the USFWS proposed listing three species of snails and one species of amphipod as endangered in the Roswell Basin of Southeastern New Mexico. The proposal noted that oil and gas extraction activities in the area were potential threats to these species and that stipulations on permits to drill may be necessary to protect aquatic habitat from contamination or degradation (USFWS 2002).

The Cooperating Industries Forum has also reported a tendency among BLM and FS land managers to apply the same stringent standards that apply to listed species to “watch,” “candidate,” or “sensitive” species. Substantial acreage can be set aside for wildlife species that are considered sensitive, and, therefore, given the same status as listed species, delaying projects for months. Also, drilling operations can be delayed to allow surveys to be conducted during narrow windows in the spring or summer when plants are in bloom (DuVall 1997).

The BLM has acknowledged that ESA consultations can delay the permitting process. On April 25, 2001, Peter Culp, Assistant Director of Minerals, Realty, and Resource Protection at the BLM, noted that although the BLM is coordinating with other federal agencies, there is room for much improvement. ESA consultations and similar coordination issues can cause the BLM to miss the 30-day processing time applications to drill (Culp 2001).

ESA requirements can potentially affect all gas resources in lands that are designated critical habitat or where listed or even sensitive species are present.

### 3.1.3 Forest Service Restrictions

**Summary:** Forest Service restrictions contained in RODs for development of natural gas resources in three areas Beaverhead National Forest, Helena National Forest, and Lewis and Clark National Forest are limiting the ability to access and produce natural gas.

**Source of Constraint:** Agency implementation

**Impact:** Unavailable gas

**Phase:** Production

**Category:** Access

**Estimated affected natural gas resources (TCF):** 10 to 30

**Estimate type:** Natural gas resources

**Estimate date:** 01/2001      **Estimate reference:** Fisher (2001)

**Estimate comments:** 10 to 30 TCF in three national forests (Beaverhead, Helena, and Lewis and Clark)

**Statutory/regulatory citation:** National Forest Management Act; Forest Service Plans

**Lead player:** FS

**Issue discussion:** RODs issued by the FS have restricted access to potentially rich natural gas areas in the NFS. Combined, three recent decisions cover 5,009,453 acres of national forest. Of these, 3,738,095 acres (75%) are legally available, but only 440,600 acres (94% of which are in the Beaverhead National Forest) are available with standard lease terms. In testimony presented to the House Resources Committee in 2001, the Montana Petroleum Association indicated that the combined decisions have potentially cost 10 to 30 TCF in natural gas production. The statement also reported that the FS's decision to disallow further oil and gas exploration on the Rocky Mountain Front was based "primarily on the will of the people (Fisher 2001). The three decisions and their impacts are highlighted below.

- In 1996, the FS issued a ROD for the EIS for the Beaverhead National Forest. Of the 1,636,900 total acres, 76% are administratively available. However, of these, 22% have no surface occupancy (NSO) restrictions, 35% have controlled surface use (CSU) or timing limitations (TLs), and the remainder (19% of the total) have BLM standard lease terms (Fisher 2001).
- In 1997, a ROD was issued for 1,862,453 acres in the Rocky Mountain Division and the Jefferson Division of the Lewis and Clark National Forest. Of the 67% that are administratively available, none are available with

standard lease terms. The administratively available lands have the following designations: no lease offered (19.1%), NSO (19.5%), CSU (21.1%), CSU/TL (7.3%) (Fisher 2001).

- In 1998, a ROD was issued for the Helena National Forest covering roughly 997,700 acres. Of these, 85.52% were found to be administratively available; however, of these, only 2.48% (24,700 acres) are available with standard lease terms. The remainder are designated as follows: 185,100 acres (18.6%), discretionary unavailable; 384,700 acres (38.6%) NSO; and 258,700 acres (25.9%) CSU/TL (Fisher 2001).

The greatest concern for the industry following these FS decisions is the perceived threat to resource development and basic access, particularly the no-lease decision in the Lewis and Clark Forest (Fisher 2001). According to the FS, the Rocky Mountain Division of the Lewis and Clark Forest in the Montana Thrust Belt has the potential to contain a minimum of 2 and up to 11 TCF of gas. The Montana Thrust Belt is rated third in the country for potential conventional gas reserves and second for potential deep gas reserves. Montana's overthrust province may hold 20 TCF or more of CBM, but is currently inaccessible because of recent FS decisions (Fisher 2001). Independent producers testifying at another House Resources Committee hearing stated that under the current circumstances and attitudes of the government, these reserves would not be explored and produced. There have been no FS leases in Montana since 1981. Under the preferred alternative for the Lewis and Clark Forest in the draft EIS, the area would remain open for leasing. These leases, however, would be so severely restricted in stipulations, including NSO, that for all practical purposes the 1.2 million acres have been taken out of play (Nance 1997). In July 2002, the chairman of the Independent Petroleum Association of America (IPAA) testified before the House Resources Committee that the forest manager for the Lewis and Clark National Forest concluded that natural gas development was inconsistent with the development of the forest because it violated "a sense of place" and prohibited new leasing. There is no administrative mechanism to appeal such a judgment despite there being no such basis for denying the use of this multiple use federal land. Court action to overturn the decision failed because the courts concluded that the decision was within the discretion of the forest manager (True 2002).

A similar concern came to fruition in Wyoming in the recently released Preferred Alternative for the Bridger-Teton Forest. The FS decision to adopt a "no lease" policy (even after a 10-year process to prepare the Bridger-Teton Land and RMP) disregards the science and planning that underlie the document. This decision places another 370,000 acres in a "de facto" wilderness classification and more resources off limits (Fisher 2001).

### 3.1.4 Outdated BLM Land Use Plans

**Summary:** The FLPMA established land use planning requirements on federal lands, and 43 USC 1701(a)(7) states that it is the policy of the United States to manage public lands under the principles of multiple use and sustained yield. Land use plans and planning decisions provide the basis for every land action undertaken by the BLM, but many have been prepared without

considering natural gas resource potential. If the land use plan is out of date with respect to anticipating the cumulative impacts of gas development, substantial delays in the permitting of new wells can occur as a new environmental analysis (typically an EA or EIS) is completed and the plan updated. Today, many land use plans need to be updated to recognize the use of the land for natural gas development before additional development can occur.

**Source of Constraint:** Agency implementation

**Impact:** Unavailable gas, delay

**Phase:** E&P

**Category:** Leasing, permitting

**Estimated affected natural gas resources (TCF):** 120.3

**Estimate type:** Technically recoverable

**Estimate date:** 01/2003      **Estimate reference:** DOI (2003)

**Estimate comments:** Theoretically, gas under all BLM lands that are not yet leased or are leased but do not have permits to drill would be affected. These lands include potentially significant CBM resources. Estimates were calculated by subtracting currently leased acreage from total BLM acreage in Colorado, Montana, New Mexico, Utah, and Wyoming, and multiplying by the average TCF per acre derived from DOI (2003), p. xv, Table ES-1.

**Statutory/regulatory citation:** FLPMA (43 USC 1701, et seq.)

**Lead player:** BLM

**Issue discussion:** BLM has been preparing land use plans since the 1960s. In 2000, the BLM had 162 plans covering nearly 264 million acres of public lands and 758 million acres of mineral estate (BLM 2000). Some of the BLM's land use plans are current, but others date to the mid-1970s and do not meet the requirements of current BLM program requirements. Plans were developed to guide management for a 10- to 20-year period (Colorado BLM 2001), and they did not forecast the dramatic and accelerated changes that are now occurring in the West. Thus, the average life span (or period of usefulness) of these plans has diminished to 7 years. In the Powder River Basin in northeastern Wyoming, for example, the land use plan has been updated twice in the past 2 years and is currently being updated for a third time (Smith 2001). In the Buffalo, Wyoming, Field Office, thousands of permits are not being accepted by the BLM because of limitations of the RMPs for the area. This is because the reasonably foreseeable development estimates of future development failed to recognize the interest in developing CBM (Rubin 2001).

Most plans need updating to reflect current conditions and statutory requirements; they must also be adaptable to changing conditions and demands. The BLM's land use plans (RMPs)

take about 3 years to complete. The process whereby land managers rewrite or amend land use plans has become cumbersome and detailed, resulting in marked delays in decision making; in addition, the time to rewrite or amend an RMP has increased from about 1 year to an average of 3 years (Smith 2001). Funding for land use planning has compounded the problem. From a typical budget of \$10 million in the early 1990s, the planning budget reached a historic low of \$6.6 million in 2000. The planning organization of the BLM is being rebuilt to handle the workload of eliminating the backlog and preventing future backlogs. In 2001, the BLM's planning budget increased to \$25.8 million, and budget increases have followed in every year since; in 2004, \$48 million was appropriated for land use planning.

### 3.1.5 Lease Stipulations

**Summary:** Two categories of restrictions limit access to onshore public lands. Some lands, such as Wilderness Areas and areas with specific geological attributes or unique or significant natural or cultural resources, are completely off limits because of statutory, Executive Order, or other administrative requirements. Other lands, while technically available for development, are subject to stipulations imposed by the BLM or the FS to implement statutory or regulatory requirements. Some of these stipulations, which can affect large geographic areas, can prevent development without providing obvious commensurate environmental benefit (Rubin 2001). Combinations of individual stipulations applied to the same area can effectively prevent access to key natural gas resources (Russell 2000). The EIA has estimated that federal lease stipulations increase development costs by 6% and add 2 years to development schedules (EIA 2001b). Operators report a growth in stipulations and note that when land managers impose a stipulation in one area, there is a tendency to impose the same stipulation in surrounding areas (Martin 1997).

**Source of Constraint:** Agency implementation

**Impact:** Unavailable gas, delay, cost

**Phase:** Production

**Category:** Leasing

**Estimated affected natural gas resources (TCF):** 108

**Estimate type:** Undeveloped gas resources

**Estimate date:** 01/1998      **Estimate reference:** NPC (1999)

**Estimate comments:** The affected 108 TCF consist of proven reserves and unproven resources on public lands available for leasing but governed by nonstandard lease stipulations in the Rocky Mountain states. This represents nearly one-third of the total 340 TCF of unproven resources in the area. An additional 29 TCF in national parks, national monuments, and Wilderness Areas are completely unavailable for development, and about 203 TCF are subject to standard lease terms

(NPC 1999). The Energy Policy and Conservation Act (EPCA) Report (DOI, USDA, and DOE 2003) presented results on the nature and extent of leasing restrictions in five specific areas within the Rocky Mountain region. It concluded that of the 138.5 TCF of technically recoverable resources on federal lands in the five areas, 36.0 TCF were subject to nonstandard leasing restrictions, 86.6 were subject to standard leasing stipulations, and 15.9 were completely unavailable for leasing.

**Statutory/regulatory citation:** FLPMA, Resource Management

**Lead players:** BLM, FS

**Issue discussion:** Lease stipulations are derived from RMPs (BLM) and Forest Plans (FS). Categories of lease stipulations imposed on federal lands include the following:

- “Standard stipulations” or “standard lease terms.” These are provisions within standard federal oil and gas leases regarding the conduct of operations or conditions of approval given at the permitting stage. These include prohibitions against surface occupancy within 500 ft of surface water and or riparian areas; on slopes exceeding 25% gradient; construction when soil is saturated; or within 1/4 mi of an occupied dwelling. These are generally applied to all BLM oil and gas leases.
- “Seasonal” or other “Special” stipulations. These prohibit mineral exploration and/or development activities for specific periods, in, for example, sage-grouse nesting areas, hawk nesting areas, or calving habitat for wild ungulate species. These are often imposed at the request of state wildlife officials or the USFWS to protect sensitive species.
- NSO leases prohibit operations directly on the surface overlaying a leased federal tract to protect some other resource that may be in conflict with surface oil and gas operations, for example, underground mining operations, archeological sites, caves, steep slopes, campsites, or important wildlife habitat. These leases may be accessed from another location via directional drilling.

The following examples illustrate the severity and impact of lease stipulations.

*Short drilling windows.* The layering of wildlife protection and other environmental restrictions in part of the year limits periods in which drilling can occur. Deep wells that require more time to drill than the allowed drilling window will either not be drilled, or must be drilled in inefficient phases over more than 1 year (Hackett 2001).

*Impact of restrictions.* The NPC estimates that 137 TCF of natural gas resources under federal lands in the Rocky Mountains are either off limits to exploration or heavily restricted. This amount, which does not include the 11 TCF placed off limits by the FS Roadless Rule, is 48% of the natural gas resources on federal land in this region. Independent oil and gas

producers, who drill more than 85% of the wells in the United States and produce nearly two-thirds of America's natural gas, resist doing business on many federal lands because of the lack of access, uncertainty of permits, and costly regulations (Nance 1997). Surveys conducted by the IPAA indicate that independents are not increasing their activities on federal lands even though government reports, supported by private and industry studies, indicate that one of the last frontiers for unexplored onshore oil and gas reserves lies beneath public lands.

*Onerous restrictions over large areas.* In testimony before the House Committee on Resources Subcommittee on Energy and Mineral Resources on April 25, 2001, Mark Murphy, representing the IPAA and the National Stripper Well Association, stated that federal land managers generally impose excessively onerous restrictions on large geographic areas. He cited an example of a BLM-imposed moratorium on operations on 380,000 acres of land in southeastern New Mexico from April through June to avoid disruptions to prairie chicken mating, referred to as the "booming" season. After industry insisted on a scientific study of the issue, the BLM indicated that it may reduce the area to 196,000 acres. Mr. Murphy stated that industry does not object to reasonable restrictions in areas where species are "truly being affected" by its activities; industry does object; however, to "unfounded restrictions on overly broad geographic areas" (Murphy 2001).

*Lack of agency guidance/authority of individual land managers.* The decisions of a single individual within a land management office can cost thousands or millions of dollars and lead to supply disruptions. As reported in April 25, 2001 testimony, federal land managers have not been given clear instructions for considering the impacts of their actions on energy development. Each land manager must assign his or her own value to the importance of energy development on a case-by-case basis, and the effect of such decisions on energy supply is not necessarily considered. Mixed messages and a lack of accountability have led to a focus on the process of land management practices, with limited regard for their outcome (Stanley 2001). In Southwestern Lea County, New Mexico, for example, a local BLM geologist is requiring operators to set an additional 700 to 800 ft of surface casing (which is estimated to cost an additional \$30,000 to \$40,000 per well) to protect water zones in the area. However, there is no proof that such zones exist, and the New Mexico regulatory agency charged with protecting groundwater has neither stated a similar concern nor proposed modifying its long-standing surface casing requirements (Murphy 2001).

### **3.1.6 Monument Designations**

**Summary:** The Antiquities Act of 1906 allows the President, at his discretion, to declare by public proclamation, historic landmarks and historic and prehistoric structures owned or controlled by the government of the United States. Between 1996 and 2001, the Administration, under the authority of the Antiquities Act, designated 19 new national monuments and expanded 3 others. The 22 designations collectively cover about 5.6 million acres of federal land, much of which may contain natural gas resources; this land, however, is off limits to development.

**Source of Constraint:** Presidential

**Impact:** Unavailable gas

**Phase:** Exploration

**Category:** Access

**Estimated affected natural gas resources (TCF):** 1

**Estimate type:** Technically recoverable

**Estimate date:** 01/1995      **Estimate reference:** Wilderness Society (2002)

**Estimate comments:** The Wilderness Society estimates that the amount of economically recoverable gas in five selected national monuments, based on USGS low- and high-price scenarios for gas, is 0.27 to 0.42 TCF, representing 21 to 42% of the technically recoverable gas in these national monuments.

**Statutory/regulatory citation:** Antiquities Act of 1906 (16 USC 431, et seq.)

**Lead player:** President

**Issue discussion:** The USGS estimates that of the 22 national monuments designated or expanded, 5 have significant hydrocarbon potential. These are the California Coastal National Monument, Canyons of the Ancients National Monument in Colorado, Carrizo Plain National Monument in California, Hanaford Reach National Monument in Washington, and Upper Missouri River Breaks National Monument in Montana (Lorenzetti 2001). Although the national monument designation only prohibits new leases and does not affect existing leases, operators are concerned that the designations will nonetheless affect existing leases. For example, according to testimony presented to the House Committee on Resources on March 7, 2001, the newly designated Canyons of the Ancients National Monument in southwestern Colorado encompasses McElmo Dome, a significant source of natural gas used for advanced oil and gas recovery in Colorado, New Mexico, and Texas. Of the 183,000 acres within the monument's boundary, nearly 155,000 have active federal leases, 141,000 of which are held by production or are included in four federal production units. When the monument was designated, the BLM proposed stringent surface use restrictions on 79,000 acres, including a NSO stipulation. Oil and gas companies are concerned that given "BLM's predilection for restricting access," the RMP to be developed for the monument will create even more uncertainty for production (Stanley 2001).

The designation also provides an avenue for legislative restrictions. For example, in June 2001, the House passed a DOI spending bill that banned drilling in national monuments.

As with other blanket bans to leasing access, the monument designations do not consider the ability of natural gas operators to apply technologies and drilling practices that minimize harm to the environment or that land managers could designate specific areas in which drilling should be banned, as opposed to banning leasing of all covered areas. Some observers note that



the designations have locked up large areas, when, according to the Antiquities Act, the smallest amount of acreage possible should have been designated.

### 3.1.7 OCS Moratoria — Atlantic Ocean

**Summary:** Moratoria deny access to broad areas of natural gas reserves and resources. Major natural resources have been discovered off the Canadian Coast, and this resource potential could extend southward. The moratoria were implemented primarily because of past oil spills; however, they also constrain natural gas E&P.

**Source of Constraint:** Presidential, statutory

**Impact:** Unavailable gas

**Phase:** E&P

**Category:** Access, leasing

**Estimated affected natural gas resources (TCF):** 28.0

**Estimate type:** Technically recoverable

**Estimate date:** 01/2000      **Estimate reference:** EIA (2001b)

**Estimate comments:** Estimates are for undiscovered technically recoverable resources. The EIA notes that the estimates come from the MMS's *Outer Continental Shelf Petroleum Assessment, 2000*, and are mean estimates with values adjusted to reflect 1999 new field discoveries.

**Statutory/regulatory citation:** OCSLA (43 USC 1331, et seq.); Presidential Memo (06/12/1998)

**Lead players:** President, Congress

**Issue discussion:** In June 1990, President George H.W. Bush, acting under the authority of the OCSLA (43 USC 1341(a)), issued a directive to withdraw three general areas from new leasing and development until the year 2000. These areas included the West Coast, the southeastern coast of Florida, and the North Atlantic Coast. In August 1992, President Bush issued a memorandum to the Secretary of the Interior confirming his 1990 directive as implemented in the 5-year OCS Oil and Gas Program for 1992–1997. These regions of the OCS were included in President Clinton's broader 1998 Executive Order forbidding leasing of most of the OCS in the contiguous United States until 2012. That order prohibits the Secretary of the Interior from leasing off the East and West Coasts, in the North Aleutian Basin in Alaska, and in most of the eastern Gulf of Mexico prior to June 30, 2012.

Even assuming that application of advanced technology results in substantial increases in natural gas production, it is difficult to see how future U.S. demand for natural gas will be met without production from OCS areas currently under moratoria. One of the more promising frontier areas is the North Atlantic OCS. Major discoveries have been made off the coast of Canada at Sable Island and Panuke. The former is now in production. The estimated undiscovered natural gas potential off the east coast of Canada is 63 TCF. This gas play may continue south into U.S. waters. OCS oil production has impacts that gas production does not, and the Atlantic resources are viewed primarily as gas (not oil). Advances in technology and knowledge have changed the baseline used to deny access to OCS lands. Innovative technologies have revolutionized the means of finding and producing natural gas so that disturbances to the environment are minimal and temporary. For example, three-dimensional (3-D) seismic processes that analyze geological structures with greater precision and directional and horizontal drilling technologies that allow a variety of productive reservoirs to be accessed from one location mean that more gas can be produced with fewer wells. A 1999 DOE report, *Environmental Benefits of Advanced Oil and Gas Exploration and Production Technology*, states that "...innovative E&P approaches are making a difference to the environment. With advanced technologies, the oil and gas industry can pinpoint resources more accurately, extract them more efficiently and with less surface disturbance, minimize associated wastes, and, ultimately, restore sites to original or better condition....[The industry] has integrated an environmental ethic into its business and culture and operations...[and] has come to recognize that high environmental standards and responsible development are good business..." (DOE 1999).

The TCF estimates are based on little or no historical exploration and could be greater if exploration were allowed. The NPC (1999) estimated that as of January 1, 1998, 31 TCF were affected by the moratoria.

### **3.1.8 OCS Moratoria — Eastern Gulf of Mexico**

**Summary:** Moratoria covering most of the eastern part of the Gulf of Mexico deny access to broad areas of natural gas reserves and resources. They were implemented primarily because of past oil spills; however, they also constrain natural gas E&P.

**Source of Constraint:** Presidential, statutory

**Impact:** Unavailable gas

**Phase:** E&P

**Category:** Access, leasing

**Estimated affected natural gas resources (TCF):** 11.3

**Estimate type:** Technically recoverable

**Estimate date:** 01/2000      **Estimate reference:** EIA (2001b)

**Estimate comments:** Estimates are for undiscovered technically recoverable resources and assume that OCS Lease Sale 181 (estimated to contain 1 TCF) occurs. If OSC Lease Sale 181 is not fully leased, the restricted estimate would be 12.3 TCF. The EIA notes that the estimates come from the MMS's *Outer Continental Shelf Petroleum Assessment, 2000*, and are mean estimates with values adjusted to reflect 1999 new field discoveries.

**Statutory/regulatory citation:** Presidential memos, directives

**Lead players:** President, Congress

**Issue discussion:** In June 1990, President George H.W. Bush, acting under the authority of the OCSLA (43 USC 1341(a)) issued a directive to withdraw three general areas from new leasing and development until the year 2000. These areas included the southeastern coast of Florida. In August 1992, President Bush issued a memorandum to the Secretary of the Interior confirming his 1990 directive as implemented in the 5-year OCS Oil and Gas Program for 1992-1997. These regions of the OCS were included in President Clinton's broader 1998 Executive Order forbidding leasing of most of the OCS in the contiguous United States until 2012. That order prohibits the Secretary of the Interior from leasing, among other areas, most of the eastern Gulf of Mexico prior to June 30, 2012.

Analyses conducted by the NPC, EIA, and Gas Research Institute (GRI) project that natural gas demand will increase from 21 TCF in 1998 to 30 to 32 TCF by 2015. To meet projected 2015 demand, the NPC analysis envisions that the Gulf of Mexico will produce about 8 TCF of natural gas in 2015, a 33% increase from current production. However, on March 15, 2001, an MMS representative testified before the House Subcommittee on Energy and Mineral Resources that the Service had serious concerns regarding the ability of the Gulf of Mexico to meet this projected growth rate. Data recently published by the MMS indicate an optimistic natural gas production for the Gulf peaking in 2002 at about 5.2 TCF (Condit 2001). Even assuming that application of advanced technology results in substantial increases in natural gas production, it is difficult to see how future U.S. demand for natural gas will be met without production from OCS areas currently under moratoria.

OCS oil production has impacts that gas production does not, and the Eastern Gulf resources are viewed primarily as gas (not oil). Advances in technology and knowledge have changed the baseline used to deny access to OCS lands. The API states that technology has revolutionized how natural gas is found and produced, resulting in minimal and temporary disturbances to the environment. "We can produce more gas with fewer wells thanks to 3-D seismic processes that analyze geological structures with greater precision and directional and horizontal drilling technology that allows a variety of productive reservoirs to be accessed from one location" (API 2000). DOE's 1999 report states that "...innovative E&P approaches are making a difference to the environment. With advanced technologies, the oil and gas industry can pinpoint resources more accurately, extract them more efficiently and with less surface disturbance, minimize associated wastes, and, ultimately, restore sites to original or better condition...[The industry] has integrated an environmental ethic into its business and culture and operations...[and] has come to recognize that high environmental standards and responsible development are good business...." (DOE 1999).

On May 16, 2001, U.S. representatives from Florida and California introduced resolutions to oppose any new offshore drilling in areas currently under development moratoria. Also on May 16, 2001, Representative Lois Capps (D-CA) reintroduced the Coastal States Protection Act, which would place a federal moratorium on new offshore oil development along coasts where existing state moratoria are in effect (Najor 2001).

The 1999 NPC study reports affected TCF estimates due to moratoria to be 24 TCF or roughly one-half of the estimated 49 TCF of undiscovered technically recoverable resources, which include proven reserves (6 TCF) and unproven resources (43 TCF). The EIA estimate of 11.3 TCF is as of 2000 and assumes that the estimated 1 TCF in Lease Sale 181 would be accessible. If Lease Sale 181 is not allowed, the total TCF affected by moratoria in the eastern gulf would be 12.3 TCF.

The TCF estimates are based on little or no historical exploration and could be greater if exploration was allowed. In the western and central Gulf of Mexico areas, estimates have significantly increased after exploration (Young 2001).

Estimated total undiscovered, technically recoverable natural gas resources as of January 1, 2000, in the entire lower 48 OCS consists of 233.7 TCF. The currently inaccessible portion of the total amounts to 58.2 TCF, with 18.9 TCF in the Pacific, 28.0 TCF in the Atlantic, and 11.3 TCF in the eastern Gulf of Mexico. The remaining 175.5 TCF of fully accessible lower 48 OCS resources are located almost entirely in the western and central Gulf of Mexico, with 1 TCF in the eastern Gulf of Mexico (EIA 2001b).

### **3.1.9 OCS Moratoria — West Coast**

**Summary:** Moratoria deny access to broad areas of natural gas reserves and resources. They were implemented primarily because of past oil spills; however, they also constrain natural gas E&P. On the West Coast, recent legal action has also limited production on existing leases.

**Source of Constraint:** Presidential, statutory

**Impact:** Unavailable gas

**Phase:** E&P

**Category:** Access, leasing

**Estimated affected natural gas resources (TCF):** 18.9

**Estimate type:** Technically recoverable

**Estimate date:** 01/2000      **Estimate reference:** EIA (2001b)

**Estimate comments:** Estimates are for undiscovered technically recoverable resources. The EIA notes that the estimates come from the MMS's *Outer Continental Shelf Petroleum Assessment, 2000*, and are mean estimates with values adjusted to reflect 1999 new field discoveries.

**Statutory/regulatory citation:** OCSLA, Presidential Memo (06/12/1998)

**Lead players:** President, Congress

**Issue discussion:** The OCSLA specifies the conditions under which the Secretary of the Interior, through the MMS, grants the rights to explore for, develop, and produce oil and gas. It issues leases every 5 years, and over the years, the MMS has extended the life of the 5-year leases by granting "suspensions" to their termination dates. Moratoria were first enacted in the fiscal year (FY) 1982 Interior Department Appropriations Act (Pub. L. 97-100) for leasing off central and northern California. In June 1990, President George H.W. Bush, acting under the authority of the OCSLA (43 USC 1331, et seq.), issued a directive to withdraw three general areas from new leasing and development until the year 2000. These areas included the West Coast, the southeastern coast of Florida, and the North Atlantic Coast. In August 1992, President Bush issued a memorandum to the Secretary of the Interior confirming his 1990 directive as implemented in the 5-year OCS Oil and Gas Program for 1992-1997. These regions of the OCS were included in President Clinton's broader 1998 executive order forbidding leasing of most of the OCS in the contiguous United States until 2012. That order prohibits the Secretary of Interior from leasing off the East and West Coasts, in the North Aleutian Basin in Alaska, and in most of the eastern Gulf of Mexico prior to June 30, 2012.

In addition to the moratorium on E&P, recent legal actions have limited production on existing federal oil and gas leases off the coast of California. Between 1968 and 1984, the MMS issued 36 leases off the central coast for exploration of new deposits of gas (and oil). Valued at \$1.25 billion, the leases are estimated to contain about 0.5 TCF of gas (and a billion barrels of crude oil). Not subject to the OCS leasing ban Congress includes annually in the Interior appropriations bill, these are the only leases along the entire West Coast that could be developed until 2012, when the leasing moratoria expire. In November 1999, as they were about to expire, the Clinton administration granted "suspensions" to extend the leases. The orders accompanying the extension required the oil and gas companies to complete, and allowed the state to review, studies before drilling could occur. However, the State of California sued, arguing that the leases were outdated because of stricter state laws and that the state had a right under NEPA and the CZMA to review the leases for consistency with state laws, and that the review should be at the beginning of the process, not at the end.

In June 2001, the U.S. District Court for the Northern District of California ruled in favor of the state. It said that the DOI illegally extended the leases because it did not give the state the opportunity to determine if development of the leases was consistent with the California CMP and ordered the leases terminated pending an environmental impact study. In the summer of 2002, the Bush administration appealed the district court's decision, arguing that extending a lease was not the same as issuing it, and therefore did not require the same level of state involvement. In December 2002, a three-judge appellate court panel denied the appeal. It stated that because the leases were issued prior to the 1990 amendments to the CZMA, that they had

never been reviewed by the state; it also affirmed the lower court's finding that the MMS violated NEPA because it failed to consider the environmental impacts of developing the leases. In January 2002, the DOI challenged the ruling. In May 2002, after the Bush administration announced that the government was paying oil companies to drop drilling plans in the Destin Dome area of the Gulf of Mexico, California officials urged the administration to retire the California leases in a similar way (Whetzel 2002a). On June 7, the Secretary of the Interior rejected the request, explaining that the situations were different and that litigation was underway (Whetzel 2002b). The FY 2003 DOI appropriations bill includes language that would ban drilling on the 36 leases as well (Holly 2002).

Even assuming that application of advanced technology results in substantial increases in natural gas production, it is difficult to see how future U.S. demand for natural gas will be met without production from OCS areas currently under moratoria, such as the Southern California planning area.

The TCF estimates are based on little or no historical exploration and could be greater if exploration were allowed. In the western and central Gulf of Mexico areas, estimates have significantly increased after exploration (Young 2001).

### **3.1.10 Permit Restrictions**

**Summary:** Once leasing access has been obtained and a permit to drill has been issued, restrictions in the permit may be so severe that access is effectively prohibited. These federal and state restrictions can be site- or BLM- or FS-Office-specific.

**Source of Constraint:** Agency implementation

**Impact:** Unavailable gas

**Phase:** E&P

**Category:** Access

**Estimated affected natural gas resources (TCF):** 86.6

**Estimate type:** Technically recoverable

**Estimate date:** 01/2003      **Estimate reference:** DOI, USDA, and DOE (2003)

**Estimate comments:** Estimated to be the amount of gas in areas inventoried and reported by the interagency study of oil and gas resources in five U.S. basins that are available for lease under standard lease terms (DOI, USDA, and DOE 2003, p. 3-5). This is an estimate; the Interagency EPCA study does not address restrictions after a permit has been issued.

**Statutory/regulatory citation:** FLPMA

**Lead player:** BLM

**Issue discussion:** Permitting constraints that can limit development include overlying habitat management plans that prevent production and restrictions over unnecessarily large geographic areas that are not based on science. For example, the BLM imposed a moratorium on operations on 380,000 acres in Southeastern New Mexico from April through June of each year to avoid disrupting the prairie chicken mating season. Citing a lack of scientific evidence that field operations disrupt the mating season, industry requested a scientific study of the issue. Because of the study, the BLM is considering reducing the acreage subject to the moratorium to 196,000 acres. In another example, a local New Mexico operator had begun leasing and exploration near Roswell, New Mexico, in the 1980s, obtained permits to drill, and began producing in 1997. The operator then requested, and 11 months later obtained, drilling permits for additional confirmation wells; however, the BLM conditioned the approval with onerous stipulations, which meant that the approval to produce was not granted. Similarly, although planning documents deem certain lands as accessible, in reality they are not, because of restrictions, such as a requirement to use horizontal or directional drilling for depths for which such drilling is physically impossible. Also, BLM geologists can, without scientific proof that drilling may contaminate water zones, determine that operators must set hundreds of additional feet of surface casing and at an estimated incremental cost of \$30,000 to \$40,000 per well (Murphy 2001).

**3.1.11 Bans on Great Lakes Drilling**

**Summary:** Recently enacted state and federal temporary and permanent drilling bans in the Great Lakes have effectively stopped exploration and new production of natural gas in the Great Lakes.

**Source of Constraint:** Statutory

**Impact:** Unavailable gas

**Phase:** E&P

**Category:** Access, leasing

**Estimated affected natural gas resources (TCF):** 1.1

**Estimate type:** Possible and probable reserves

**Estimate date:** 09/2001      **Estimate reference:** Shirley (2001)

**Estimate comments:** Consists of 0.4 TCF possible and 0.6 TCF probable reserves in Ohio's portion of Lake Erie alone (Shirley 2001).

**Statutory/regulatory citation:** The Energy and Water Development Appropriations Act, 2002 (H.R. 2311) (Pub. L. 107-66); Michigan H.B. 5118, 2002

**Lead players:** COE, states

**Issue discussion:** None of the Great Lakes states allow drilling from offshore rigs on the water. Ontario, Canada, however, allows directional drilling under the Great Lakes and has about 500 natural gas wells on the bottom of Lake Erie. While it prohibits offshore drilling, Michigan is the only state in the United States that has leased directionally drilled wells under the Great Lakes. Between 1979 and 1997, 13 oil and gas wells were drilled directionally; 7 of these wells are producing and have safe operating records. In 1997, public opposition arose when a company proposed to drill three new wells. At the governor's request, a suspension of drilling was issued and the Michigan Environmental Science Board reviewed the issue. It reported that environmental risks associated with directional drilling were minimal and did not recommend banning drilling under the lakes. Rather, it recommended certain restrictions such as a 1,500-ft setback from the shoreline, and prohibiting wells in sensitive coastal environments. The Michigan Department of Natural Resources implemented the regulations, and in July, the governor recommended lifting the ban on directional drilling. In September 2001, the state lifted the 4-year suspension and began to move forward on four lease sales for directional drilling. A Michigan Senator (Debbie Stabenow) tried to convince state officials to ban future oil and gas drilling. In early 2002, both houses of the Michigan state legislature passed H.B. 5118, which prohibits new slant drilling beneath the Great Lakes except in cases of a state energy emergency. The governor opposed the bill, but it became law without his signature on April 5, 2002. Ms. Stabenow also introduced federal legislation to amend the Energy and Water Appropriations Bill of 2002, to include a 2-year ban on drilling in the Great Lakes (Taylor 2002).

In October, both houses passed the bill, with the amendment, and on November 12, 2002, the President signed the legislation. The Energy and Water Development Appropriations Act, 2002 (H.R. 2311) (107 Pub. L. 66), implements a 2-year drilling ban until September 30, 2003, in the Great Lakes. The ban includes both directional and offshore drilling. It also instructs the COE to conduct and submit to Congress a study that examines the known and potential environmental effects of oil and gas drilling activity in the Great Lakes. At the conclusion of the study, Congress could extend the moratorium or lift it if the analysis shows that oil and gas could be extracted from the Great Lakes without endangering the freshwater supplies or compromising the lakes' importance to the economic well-being of the region and the nation (National Driller 2001).

An official from the Michigan Department of Environmental Quality notes that under Michigan law, the leases issued to date have provided \$15 million, which the state uses to buy and maintain parks; if the drilling ban were lifted, an additional \$100 million in state revenues for these purposes would be generated (Heartland Institute 2001). Drilling bans may be implemented without acknowledgment of the safety of existing offshore producing wells in Michigan (Greenwire 2001).



### 3.1.12 Roadless Rule

**Summary:** On January 12, 2001, the FS promulgated a rule that prohibits road construction in IRAs on NFS lands. These areas compose about one-third of the NFS, or about 58.5 million acres (FS 2001). The Roadless Rule denies access to approximately 11 TCF of potential natural gas resources in the Rocky Mountain region. The rule has been subject to numerous lawsuits and may be revised to allow for assessment of impacts and the ability to build roads on a more local, forest-by-forest level.

**Source of Constraint:** Regulatory

**Impact:** Unavailable gas

**Phase:** Exploration

**Category:** Access

**Estimated affected natural gas resources (TCF):** 11

**Estimate type:** Technically recoverable

**Estimate date:** 11/2000      **Estimate reference:** Eppink (2000)

**Estimate comments:** Within the IRAs, natural gas resources are concentrated in four provinces/basins: the Uinta/Piceance (3.9 TCF), the Wyoming Thrust Belt (3.2 TCF), Southwestern Wyoming (2.0 TCF), and the Montana Thrust Belt (1.6 TCF). The range of total resources affected by the Roadless Rule is 3.5 to 23.1 TCF.

**Statutory/regulatory citation:** 66 FR 3244, January 12, 2001, Final Rule and ROD, Special Areas; Roadless Area Conservation

**Lead player:** FS

**Issue discussion:** Multiple-use federal lands, such as FS lands, contain unexplored, as yet, nonproducing gas resources that will be important for meeting projected natural gas demands. Although the Roadless Rule does not affect existing leases, it will prevent expansion of existing leases and exploration and development of new leases on FS lands that require road construction or reconstruction in IRAs (Phillips 2001). According to a study prepared for DOE, the Roadless Rule will prevent access for E&P of an estimated 3.5 to 23.1 TCF of yet undiscovered gas in the FS's IRAs (Eppink 2000). Of the mean estimate of 11 TCF underlying roadless areas, 1.9 TCF are under no access lands, 2.4 TCF are under access-restricted lands, and 7.0 TCF are under lands with standard lease terms. As a result, implementation of the Roadless Rule would add 9.4 TCF to that considered to be "no access" in the 1999 NPC study (Eppink 2000) and raise the NPC's estimates at 29 TCF for natural gas resources closed to development to 38 TCF (NPC 1999). The rule, which covers all IRAs with a "one-size fits all" approach, ignores requirements of The National Forest Management Act for the FS to manage the NFS areas

outside designated Wilderness Areas with full consideration of resource values. (The FLPMA has the same requirements for BLM-managed lands.) The rule also appears to ignore the fact that prior to leasing, an EA or EIS must be conducted that will consider the impacts of any required road building on the environment. According to the API, because of the distribution of the natural gas resources within the Rocky Mountain region, access to roughly 83% of the affected gas resources could have been preserved by a reduction of less than 0.5% in the roadless acreage (Rubin 2001).

In February 2001, the Bush Administration reviewed the rule and allowed it to proceed, with the goal of revising it later to consider local needs and access issues. The rule was to become effective on May 12, 2001. On May 4, 2001, the USDA announced that it would examine whether it would amend the rule, since it was intended as a temporary ban on building new roads within the 58.5 million acres until the FS developed revisions based on local, forest-by-forest input. On May 10, 2001, a federal judge in Idaho issued an injunction blocking the rule, stating that it violated NEPA, did not allow for sufficient public participation, and would harm local economies. Environmental groups appealed the decision to the Ninth Circuit Court. On July 10, 2001, the FS announced that it was reopening the rule for public comment. On December 12, 2002, a three-judge panel of the Ninth Circuit Court found that the Idaho judge erred when granting the injunction, and it remanded the case for trial on whether the rule violates NEPA or the Administrative Procedure Act. With the injunction lifted, the Roadless Rule went into effect, and nine lawsuits in seven other states proceeded (Ferullo 2002). On June 9, 2003, the FS announced that it would propose a rule allowing state governors to seek exceptions to the Roadless Rule for “exceptional circumstances,” which would include road-building activities to protect human health and safety, wildfire protection and habitat restoration, maintenance of dams and other existing facilities, and to make technical corrections to boundary adjustments. The rule is expected to be proposed in the fall of 2003 and made final by the end of 2003 (Ferullo 2003).

### **3.1.13 Wilderness Areas**

**Summary:** Under the FLPMA, the BLM was charged with identifying and managing lands as potential Wilderness Areas. As required by the law, the BLM completed the inventory in 1991 and submitted its recommendations to the President, who endorsed and submitted them to Congress. However, of the roughly 26.5 million acres identified as WSAs, Congress has yet to make decisions on 16.3 million acres. In addition, since 1991, some western states, for example, Colorado and Utah, have “reinventoried” potential Wilderness Areas, adding more acres to those that are managed as, although not officially designated as, WSAs. Until Congress acts, all of these areas both Wilderness Areas and WSAs will continue to be off limits to gas (and oil) leasing, even though they may contain substantial resources.

**Source of Constraint:** Statutory

**Impact:** Unavailable gas

**Phase:** Exploration

**Category:** Access

**Estimated affected natural gas resources (TCF):** 9

**Estimate type:** Technically recoverable

**Estimate date:** 01/2003      **Estimate reference:** DOI (2003)

**Estimate comments:** The estimate is for five Rocky Mountain areas studied in the EPCA report (DOI, USDA, and DOE 2003) and includes TCF unavailable for leasing because of national park, national monument, or wilderness designation. (The EPCA report does not break out TCF unavailable due to Wilderness Area designations. The estimate does not include TCF in WSAs, which are treated as Wilderness Areas, pending final designation.)

**Statutory/regulatory citation:** FLPMA (16 USC 1712 and 1782); Wilderness Act of 1964 (16 USC 1131, et seq.)

**Lead player:** BLM

**Issue discussion:** The Wilderness Act of 1964 established a National Wilderness Preservation System to protect wilderness lands for future use and enjoyment and preserve their wilderness character. The Wilderness Act required that the National Park Service, the FS, and the USFWS determine the number of acres under their respective jurisdictions that met the wilderness criteria, also defined in the act. The agencies were required to recommend to Congress those areas believed to be appropriate for wilderness designation. Until Congress acted to either designate a WSA as a Wilderness Area or allow it to revert to its prior status, the agencies were to manage and protect the wilderness character of those lands, which put them off limits for leasing. In 1976, Congress passed the FLPMA, which, among other things, extended the Wilderness Area designation process to the BLM. Under the law, the BLM had 15 years to conduct its inventory and make its recommendations to Congress. Between 1977 and 1980, the BLM identified more than 700 WSAs covering roughly 26.5 million acres. These areas were placed under BLM's Interim Management Policy to be managed to protect their wilderness values pending final action by Congress (Hatfield 2002). Between 1980 and 1991, the BLM studied its WSAs and in 1991, transmitted its recommendation to the President, which was that 9.7 million acres of BLM-managed public lands in 330 units were suitable for inclusion in the National Wilderness Preservation System. (Subsequent congressional actions reduced the remaining acreage recommended as suitable to approximately 6.5 million acres.) The President endorsed the recommendations and submitted them to Congress. However, Congress has yet to act on 16.3 million of the WSA acres, thereby preventing them from being leased.

In addition, the BLM has "reinventoried" lands in Utah and Colorado for additional Wilderness Areas. In Utah, the BLM identified 800,000 acres as WSAs by 1980. Appeals by environmentalists to the DOI Board of Land Appeals led the BLM to declare 3.2 million acres in Utah as WSAs, of which the BLM recommended 1.9 million acres for Congress to designate as Wilderness Areas. In 1986, a citizen-based study recommended 5.7 million acres to be designated as wilderness in Utah. In 1996, the Secretary of the Interior, at the behest of the Chair

of the House Subcommittee on National Parks and Public Lands, ordered the BLM to verify these findings (Utah Wilderness Coalition 2000). In February 1999, the BLM released its results, which found that 5.8 million acres met the criteria. Since then, a subsequent citizens' reinventory identified an additional 2.6 million acres that were on lands not reviewed by the BLM. If the BLM offers leases on any of the 2.6 million acres in the new citizens' inventory, the Southern Utah Wilderness Alliance has vowed to continue protesting every lease offered within the proposal (McHarg and Thomas 1999).

In Colorado, the BLM also identified 800,000 acres as WSAs, and in 1991, recommended that Congress designate 388,000 acres as wilderness. In 1994, citizens' groups released a Citizens' Wilderness Proposal that recommended 1.3 million acres of BLM lands for wilderness designation. The BLM agreed to stop issuing oil and gas leases in citizen-proposed areas pending further review, and in 1996, agreed that 120,000 acres within the citizen-proposed areas possessed wilderness values. In 1999, citizens began to identify additional lands and added 300,000 more acres. The Sierra Club and others have advocated designating and reinventorying additional lands in Wyoming as wilderness lands (Tipton 1997).

Oil companies and state and federal lawmakers have challenged the legality of the BLM conducting reinventories on lands already surveyed under the FLPMA; the lack of public involvement in these citizens' surveys; and the treatment of the citizen-proposed lands as WSAs, which denies access to gas resources. In 2002, Representative C.L. Otter (R-ID) introduced a bill (H.R. 4620) that would accelerate the wilderness designation process by requiring the release of WSAs after 10 years, or when the Secretary of the Interior or Agriculture determines them as not being suitable.

### **3.1.14 Ocean Policy**

**Summary:** The U.S. Commission on Ocean Policy, established under the Oceans Act of 2000, is charged with developing recommendations to submit to the President on a coordinated and comprehensive national policy for oceans and coastal areas. Preliminary recommendations include the establishment of an ocean policy framework and expanded authorities to address the use and stewardship of ocean and coastal resources. It is too early to estimate the impacts of the new policy and its ramifications on offshore natural gas E&P, but the development and implementation of specific recommendations will be important to follow.

**Source of Constraint:** Presidential

**Impact:** Unavailable gas, delay, cost (possible)

**Phase:** E&P, transportation

**Category:** Access, leasing, permitting, operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** Oceans Act of 2000 (33 USC 857-19)

**Lead players:** President, Congress

**Issue discussion:** Congress passed the Oceans Act of 2000 on July 25, 2000, and the President signed it into law on August 7, 2000. The law established a commission, which, in coordination with the states, a scientific advisory panel, and the public, is required to establish findings and develop a National Oceans Report that makes recommendations to the President and Congress on ocean and coastal issues and on a coordinated and comprehensive national ocean policy. The President is to respond to these recommendations in a “National Ocean Policy” to be submitted to Congress. The report is to assess the cumulative effect of federal laws; examine the supply and demand for ocean and coastal resources; review the relationships between federal, state, and local governments and the private sector and the effectiveness of existing federal interagency policy coordination; and recommend modifications to federal laws and/or federal agency structures.

The commission held its first meeting in September 2001, and subsequently heard from 440 presenters in 10 cities over 11 months. After completing its fact-finding phase in October 2002, it entered its deliberative phase, which will continue into early 2003. At the November 2002 meeting, the commission discussed various policy options to address key issues associated with developing a comprehensive and coordinated national ocean policy. Some of the options discussed may have significant impacts for natural gas development in the offshore and coastal areas. For example, the draft options report listed a number of guiding principles that include, among others, sustainability, participatory governance (all stakeholders are an integral part of the decision-making process), ecosystem-based management, and the precautionary approach. The precautionary approach requires that where threat of serious or irreversible damage exists, the lack of full scientific certainty should not be used as a reason for postponing action to prevent environmental degradation. The draft also noted the importance of habitat protection and restoration, encouraging greater use of land conservancies in coastal management, and the need to reverse trends in biodiversity reduction (Ocean Commission 2002).

Because the ocean policy has not yet been established, no TCF estimates can be made. However, the policy could affect both offshore and coastal natural gas production.

## **3.2 ISSUES LIKELY TO PRODUCE DELAYS**

### **3.2.1 CBM-Produced Water Management**

**Summary:** Regulations are being written to address the potential impacts of discharging or disposing of produced water generated during CBM production. There are significant unknowns regarding the actual impacts of produced water, and many of the regulations may be costly to implement, resulting in delayed or reduced production.

**Source of Constraint:** Regulatory

**Impact:** Delay, cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 74

**Estimate type:** Technically recoverable

**Estimate date:** 01/1998      **Estimate reference:** NPC (1999)

**Estimate comments:** Could affect all CBM resources. The estimate is from the 1999 NPC study and includes all technically recoverable resources in the lower 48 states.

**Statutory/regulatory citation:** Federal Water Pollution Control Act (FWPCA) (33 USC 1251, et seq.), generally known as the Clean Water Act (CWA); state regulations

**Lead players:** EPA, states

**Issue discussion:** Large volumes of CBM-produced water are pumped to the surface to release gas trapped in coal seams. This produced water is discharged to the land surface and to surface water, stored in evaporation ponds, used for stock or wildlife watering, reinfiltated, injected back into the aquifer, or treated for various uses. CBM-produced water can affect the receiving environment. For example, because it can contain concentrations of chemicals higher than those of the receiving waters, it can lead to soils becoming dispersed, less permeable, and more prone to erosion. Also, high levels of soil salinity can reduce crop yields, and hydrologic changes resulting from CBM operations may adversely affect fisheries. The USFWS has expressed concern that CBM-produced water can contain selenium levels that are toxic to birds and fish (Baltz 2002a). However, the cumulative effects of CBM-produced water on fisheries, crops, and other environmental resources, and the factors that influence those effects, are not well understood.

Regulations exist and are being developed to address the potential problems associated with CBM-produced water. For example, in the Powder River Basin Controlled Groundwater Area, CBM operators must follow standards for drilling, completing, testing, and production of CBM wells adopted by the Board of Oil and Gas Conservation. The Montana Department of Environmental Quality (MDEQ) has prepared a General Discharge Permit for CBM-Produced Water, the purpose of which is to authorize discharges of CBM-produced water to specially constructed impoundments (holding ponds) for the specific beneficial use of livestock or wildlife watering. (Irrigation of agricultural fields or rangeland with CBM-produced water is not considered a beneficial use.) Applicants must submit chemical analyses of more than 20 constituents in the proposed discharge, monitor the produced water for various parameters, and cease discharging if impoundment waters exceed upper bound criteria.

Montana currently approves CBM production on a well-specific basis using a narrative standard aimed at protecting public health and safety. However, the one permit issued has been the subject of three lawsuits (Beattie 2002). The MDEQ states that current CBM drilling practices likely produce water with a salinity level “well above almost all” current levels in the four rivers that traverse Montana’s portion of the Powder River Basin. Thus, the department has new numeric limits that are likely to be stricter than current controls. Implementing any of the proposed numeric caps could directly impact the number of CBM wells approved not only in Montana, but also in the upstream areas of Wyoming, where most of the CBM activity is located. The draft EIS for the Wyoming portion of the Powder River Basin projected that 50,000 wells would be developed in the Wyoming portion of the basin by 2010. Montana expects to receive applications for 20,000 wells in the near future, and regulators say they need firm, across-the-board limits.

Wyoming, which also uses narrative standards, has also begun discussing the development of numeric standards for pollutants discharged to surface water to address concerns of nearby states whose waters may be affected by CBM-produced water discharges (Compton 2001).

The EPA has not promulgated national-level effluent limit guidelines under the CWA specifically for CBM operations; EPA Region 8, however, has started to develop effluent limitations that represent the Best Available Technology Economically Achievable for CBM-produced waters. This information could form the basis for other states as they establish NPDES permits. The Rocky Mountain states, where the bulk of the near-term CBM drilling activity is projected to occur, have been delegated the authority to write their own NPDES permits under the CWA.

Individual permits and decision documents also contain environmental requirements intended to mitigate potential impacts. For example, RODs can specify that CBM-produced water must be treated or stored to ensure that pollutant constituents in rivers will not be elevated beyond current baseline levels at the state line. RODs could also require dispersal of CBM-produced water in the upper reaches of drainages via the installation of stock tanks or transport of the produced water to distant discharge points to avoid sensitive soils, agricultural areas, or areas of potential accelerated erosion.

There are numerous unknowns about the effects of produced water, and developing such regulations requires a sound understanding of the science, transport and fate mechanisms, and interactions among various constituents that may not be available to state regulators. Many of these requirements may increase costs to the point that the pace of development could be slowed and the amount of production reduced. Also, as the number of applications increases (the NPC forecasts that a significant portion of the natural gas demand will be met by CBM), the backlog of applications will slow production. One CBM expert testified before a House Committee investigating CBM development that the severe restrictions being faced for discharge permits have caused operators to reduce the drilling pace. In some areas it takes 4 to 6 months to obtain permits, and it is estimated that more than 1,000 currently drilled wells are waiting for NPDES permits. These wells could represent more than 250 MMCF of gas per day in production (George 2001).

### 3.2.2 Drilling Permits

**Summary:** Once the BLM has issued a gas lease on federal land, no drilling can occur until the BLM issues a permit to drill. In the gas-rich basins of the Rocky Mountain region, backlogs for permits to drill and ROWs are growing. Many RMPs are outdated, and revisions, which often require additional environmental analyses, are required before gas leasing or development can occur. Insufficient staffing, combined with the number of plans needing updating and the recent increase in permit applications spurred by gas price increases, compounds the delays. Citizens' suits also contribute to permitting delays. These delays will be particularly important for CBM.

**Source of Constraint:** Agency implementation

**Impact:** Delay

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 311.2

**Estimate type:** Assessed additional resources

**Estimate date:** 01/1998      **Estimate reference:** NPC (1999)

**Estimate comments:** Rocky Mountain region resources that can be leased. According to the 1999 NPC report, there are 340.5 TCF in the Rocky Mountain region; of this, 29.3 TCF are unavailable because no access is allowed. The remaining 203.3 TCF are subject to standard lease terms or are "high-cost" resources (108 TCF). Note that the amount could be higher, since drilling permit delays can also apply in non-Rocky Mountain states, such as Ohio.

**Statutory/regulatory citation:** FLPMA; State (Montana Environmental Protection Act [MEPA])

**Lead player:** BLM

**Issue discussion:** The BLM uses a staged decision-making process to accommodate the speculative and costly nature of gas (and oil) exploration and development. The stages generally include (1) determination of lands available for leasing (after evaluation using the BLM's multiple-use planning process according to procedures outlined by NEPA and FLPMA); (2) authorization for leasing on specific lands; (3) application and approval of permit to drill (APD); and (4) analysis of field development, if oil and gas are discovered. The BLM is required to process the APD within a 30- or 35-day period or advise the applicant of the reasons for the delay or disapproval. The Assistant Director of the BLM's Minerals, Realty, and Resource Protection Division suggests that the BLM meets the 30-day standard about 25% of the time, and the average is likely around 60 to 120 days (Culp 2001). (For operations on NFS lands, the BLM must obtain the consent of the FS before approving APDs.) Because most of the area available



for development has limited access for only 6 months of the year, a 1-month delay may result in a 1-year delay before wells can be drilled and natural gas is produced (Watford 2001). Companies exploring for natural gas on a southwestern Wyoming federal lease have very short windows in which to drill wells because of surface use and seasonal restrictions. If the BLM has not processed the permits in time to meet the window of opportunity, the company will have to release the drilling rig they have contracted and wait another year before drilling (Stanley 2001).

Recent Public Lands Advocacy and IPAA surveys found that APDs are delayed by up to 7 months when no additional environmental analysis is needed, and can take several years to approve when such analysis is required. Applications for ROWs are also delayed, causing supply bottlenecks, where gathering lines and pipelines cannot be installed (Smith 2001). The time required for well permitting and drilling on private land is 3 months, while the time required for well permitting and drilling on federal land ranges from 1 to 3 years (Stanley 2001).

Permitting backlogs have slowed supply to market in most of the active Rocky Mountain basins (e.g., Green River, Uinta, Powder, Piceance, San Juan, Williston) (Smith 2001). An internal 1996 BLM study identified factors contributing to delays in processing APDs that included the following: conflicting priorities, poor understanding of national APD priorities, conflicting resource demands, unclear directives or guidance, insufficient agency resources, and poor or inadequate BLM and FS planning documents. (See related issue, outdated BLM land use plans.)

BLM staffing has not kept pace with increased leasing activity in the West. The fluid mineral program staff has shrunk from 1,800 employees in the mid-1980s to 695 in 2001 (Smith 2001). In the Rawlins, Wyoming, BLM Field Office, thousands of applications for permits to drill await action because of manpower shortages (Rubin 2001). A related issue is that staffing reflects field office priorities, and many may not be focused on energy; state offices have little influence over the field offices (Smith 2001). The FS may have worse staffing problems than the BLM. It takes the FS a minimum of 6 months to permit a single well, as opposed to 30 to 45 days for the BLM (Stanley 2001).

Lack of coordination between state and federal agencies and within federal agencies also contributes to delays. It is difficult to reconcile the missions of various agencies when some are multiple-use land management agencies (BLM, FS) and others are single-purpose agencies (EPA, USFWS) whose focus is not on balancing multiple uses on public lands. Also, other agencies (USGS, DOE) have information on energy trends, which, if shared with the other agencies, could help land managers plan for future development activity (Smith 2001). The BLM has manuals for land use planning and processing APDs, but different interpretations occur among the various field offices (Culp 2001). In the Monongahela National Forest in West Virginia, for example, inconsistency in the directives given by FS specialists in the preparation of an EA caused 10 revisions over a 2-year period. Some revised drafts duplicated previous drafts that had been rejected by FS personnel (Hackett 2001). In the Wayne National Forest in Ohio, a small oil and gas producer applied for a permit from the BLM to drill a development well on a federal lease tract in February 2000. Since then, the producer has waited while the FS has conducted an EA to account for new information, if any, regarding endangered species and the relationship of that information to the Forest Plan. The producer already operates

two other wells on the property, and continuous operations have existed in the area since 1860. While waiting for the federal process to issue a permit, the requisite permits issued by the State of Ohio have been issued and expired (Stewart 2001).

Citizens' suits can also contribute to permitting delays. Opponents to projects often use environmental laws to delay or block permits. For example, in Montana, citizen advocates and agency officials can challenge a permit under the MEPA's EIS requirements clause. Inappropriate use of MEPA adds an extra level of authority to block permits, when its only purpose is to provide requirements for EIS preparation (Inside EPA 2001a).

Timely permitting of gas wells on federal lands is critical because long-term sustainable gas production can only be achieved through the orderly development of frontier areas such as those in the Rockies. Improved permitting processes are needed for industry to meet the growing demand (Smith 2001).

### 3.2.3 Essential Fish Habitat

**Summary:** EFH regulations issued in 2002 require assessments and consultations that can duplicate the environmental requirements of other federal agencies. This duplication can delay leasing or permitting decisions, because federal agencies undertaking activities that could adversely affect EFH (e.g., permitting) must prepare EFH assessments; undertake consultation with the NMFS; and, in some cases, implement mitigation strategies that could add further costs and delays.

**Source of Constraint:** Agency implementation

**Impact:** Delay

**Phase:** E&P, transportation

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 174.5

**Estimate type:** Technically recoverable

**Estimate date:** 01/2000      **Estimate reference:** EIA (2001b)

**Estimate comments:** The Entire Gulf of Mexico is considered an EFH; it is conceivable that all the gas in this area could be subject to permitting delays. The EIA estimated, using the MMS's *Outer Continental Shelf Petroleum Assessment, 2000*, that the western gulf holds 74.2 TCF and that the central gulf holds 100.3 TCF. These areas are not restricted by leasing moratoria and are thus theoretically accessible, but would be subject to the NMFS regulations that could limit actual E&P.

**Statutory/regulatory citation:** 67 FR 2343-2383, January 17, 2002, Final Rule, codified at 50 CFR Part 600; Magnuson-Stevens Fishery Conservation and Management Act (16 USC 1801 et seq., as reauthorized on October 11, 1996)

**Lead player:** NMFS

**Issue discussion:** The Magnuson-Stevens Fishery Conservation and Management Act of 1976 provided a national framework for conserving and managing U.S. fishery resources. The 1996 amendments, known as the Sustainable Fisheries Act, added provisions, which, among other things, require fishery management plans to identify as EFH those areas that fish need for their basic life functions. EFH regulations, which are implemented by the NMFS, are intended to promote the protection, conservation, and enhancement of EFH. These regulations require assessments and consultations that can duplicate the environmental requirements of other agencies, including the COE, the EPA, and the MMS. This duplication can lead to costly delays in leasing or permitting decisions because federal agencies undertaking activities that could adversely affect EFH (e.g., permitting) must prepare EFH assessments; undertake consultation with the NMFS; and, in some cases, implement mitigation strategies that could add further costs and delays. The implementing legislation calls for consultations and coordination but does not require the written assessments and conservation recommendations called for by the regulations. Agency coordination activities required by the regulations can divert federal agency staff from normal permitting and operational duties. Also, disagreements between the NMFS and another agency will require time to settle, and potential mitigation costs can further delay leasing and permitting decisions.

The act established eight fishery management councils and required them to “describe and identify essential fish habitat” and “encourage the conservation and enhancement of such habitat.” The law requires the Secretary of Commerce to establish requirements to assist councils in identifying EFH and to coordinate with and provide information to other federal agencies to further and enhance the conservation of fisheries.

The NMFS, within the NOAA within the Department of Commerce, issued final regulations to implement these provisions in January 2002. The NMFS regulations are controversial. Development entailed 5 separate public comment periods, 20 public meetings and workshops, and receipt of about 3,300 written comments. The regulations tend to go beyond the act’s requirements. For example, the regulations require fishery councils to interpret information collected for determining EFH in “a risk-averse fashion to ensure adequate areas are identified as EFH for managed species.” This approach is not based on science and does not consider economic, social, and perhaps other environmental issues, meaning that cost-effective decisions are not assured. Further, it can lead to the establishment of so many EFHs that those truly needing protection may not be addressed. EFH include essentially the entire Gulf of Mexico, adjacent wetlands, and inland areas along waterways.

The regulations also require a consultation process on any EFH that could be adversely affected by federal agency actions. Agency actions can include permitting, leasing, renewals, reviews, and emergency actions. The consultation process is similar to that required for the ESA; once it is determined that an agency action may adversely affect EFH, consultation is mandatory.

The consultation process requires that the federal agency prepare a written EFH assessment and that the NMFS provide conservation recommendations. Such recommendations can include measures to avoid, minimize, mitigate, or otherwise offset adverse effects on EFH. For example, the NMFS could recommend not drilling during certain months when winter flounder are spawning and eggs are developing. The interaction of multiple stipulations could significantly shorten the drilling windows in some areas. Federal agencies must also prepare written responses to the conservation recommendations provided by the NMFS. The regulations allow the NMFS to request additional time to review federal agency actions that are contrary to NMFS recommendations. In many cases, there is significant overlap between EFHs and areas covered by other environmental programs that regulate the natural gas industry, including the COE's wetlands programs, CMP requirements, and MMS and EPA impact assessment requirements. Often individual agencies, including the NMFS, have consultation privileges on the regulatory activities of other agencies, for example, on COE Section 404 wetlands permits. States also have their own regulatory programs that overlap with the EFH consultation requirements. The additional federal agency and NMFS requirements for EFH may unnecessarily burden oil and gas leasing and permitting activities, which are already heavily regulated in the Gulf of Mexico and other offshore areas. Leases could be delayed, denied, or otherwise restrict natural gas production in the Gulf.

### **3.2.4 Fracturing Operations**

**Summary:** Hydraulic fracturing is a process producers use to increase the flow of natural gas (and oil) from rocks whose natural permeability does not allow the gas to reach the wellbore at sufficient rates. It is commonly used to release methane from coal beds, where the gas is held in the rock by hydraulic pressure. During fracturing, a fluid (usually a water-sand mixture) is pumped into the reservoir to split the rock and create drainage pathways. Typically, it is a one-time practice. The NPC estimates that 60 to 80% of all the wells drilled in the next decade to meet natural gas demand will require fracturing. The practice is controversial, with environmentalists arguing that it needs more regulation. Federal or increased state regulation could delay gas production or make it uneconomical, thereby reducing the amount available at reasonable prices (Stewart 2001).

**Source of Constraint:** Regulatory

**Impact:** Delay, cost

**Phase:** Production

**Category:** Operations

**Estimated affected natural gas resources (TCF):** 293

**Estimate type:** Unproved technically recoverable

**Estimate date:** 01/2000      **Estimate reference:** EIA (2001b)

**Estimate comments:** The Rocky Mountain region contains approximately 293 TCF of unproved technically recoverable natural gas resources. Most of these resources, however, need to be subjected to a significant degree of stimulation (e.g., hydraulic fracturing). The estimate has not been adjusted to reflect the resources that are inaccessible due to access restrictions. According to the EIA, 202 TCF are accessible in the Rocky Mountain region, with lease stipulations or under standard lease terms.

**Statutory/regulatory citation:** Safe Drinking Water Act (SDWA), Underground Injection Program

**Lead players:** EPA, states

**Issue discussion:** When Congress enacted the SDWA in 1974, the states had already developed extensive underground injection control (UIC) programs to manage liquid wastes from oil and gas operations and the reinjection of produced water. In 1980, recognizing that a federal program could not provide the flexibility needed to deal with varying circumstances in different states, and that the existing state programs were well structured, Congress modified the SDWA, giving primacy to the state programs. In 1994, the Legal Environmental Assistance Foundation (LEAF), arguing that the fracturing fluid interacted with groundwater supplies and contaminated nearby drinking water sources, sued the EPA to regulate hydraulic fracturing for CBM development under the UIC program. The EPA rejected LEAF's claim, arguing that Congress never intended UIC to cover hydraulic fracturing. LEAF appealed to the 11th Circuit Court. In 1997, the 11th Circuit Court found that the plain language of the statute could include hydraulic fracturing as underground injection, and that hydraulic fracturing of coal beds in Alabama must be regulated under the SDWA as underground injection. The EPA then required Alabama to develop a UIC regulation, which the state subsequently did. In 1999, the EPA approved the revisions. According to the IOGCC, the mandated changes have increased costs to the state by about \$300,000 per year, and the requirement that operators use federally certified drinking water for fracturing has significantly increased their costs (IOGCC 2001a). (Such water must be purchased and trucked to the well development operations [Stewart 2001].) LEAF then filed a second case, arguing that the EPA violated SDWA requirements when it approved Alabama's UIC program. LEAF stated that the EPA should have required the State of Alabama to regulate hydraulic fracturing under Section 1422 of the SDWA, a provision with strict requirements, rather than allowing the state to regulate the process under the more flexible Section 1425 (Inside EPA 2002b). The court decision prompted the EPA to conduct a nationwide study of the impacts of hydraulic fracturing on underground sources of drinking water. Although the EPA was under no legal requirement to issue a national standard for hydraulic fracturing, it planned to use the results of the study to determine if it should do so.

On December 21, 2002, the 11th Circuit Court, in the second LEAF case, held that (1) the EPA's decision to use the approval route under Section 1425 was based on a permissible construction of the statute; (2) the EPA's decision to classify hydraulic fracturing of coal beds to produce methane as a "Class II-like underground injection activity" was inconsistent with the EPA's well classification scheme; and (3) the Alabama UIC program regulating hydraulic fracturing of coal beds complied with the requirements of the SDWA. The court remanded the case to the EPA to determine if Alabama's revised UIC program complied with the requirements

for Class II wells. LEAF then petitioned for a rehearing by the full 11th Circuit Court, arguing that the court did not adequately enforce a statutory requirement that all applicants seeking to inject underground fluids as part of the hydraulic fracturing process must first prove that their processes will not affect human health (Inside EPA 2002a). In March 2001, the 11th Circuit Court denied LEAF's petition for a rehearing. On June 12, 2002, LEAF petitioned its case to the Supreme Court; on October 21, 2002, however, the Supreme Court declined to hear the challenge.

In 2004, LEAF filed a petition directing the EPA to determine immediately whether Alabama's revised UIC program complied with the requirements for Class II wells. The EPA argued that the petition should be denied in light of the Agency's reasonable progress and schedule toward reaching a final determination.

In June 2004, the EPA published the final version of its hydraulic fracturing study (EPA 2004a). During its study, the EPA reviewed more than 200 peer-reviewed publications, interviewed roughly 50 state and local government agency employees, and communicated with about 40 citizens concerned that CBM production had affected their drinking water wells. The EPA also searched for confirmed incidents of drinking water well damage. After reviewing this information, the EPA concluded that the injection of hydraulic fracturing fluids into CBM wells poses little or no threat to underground sources of drinking water and does not warrant additional study. On July 15, 2004, the EPA published a notice in the *Federal Register* announcing its final determination that "the hydraulic fracturing portion of the state's [Alabama] UIC program relating to coalbed methane production, which was approved under Section 1425 of the SDWA, complies with the requirements for Class II wells within the context of Section 1425's approval criteria" (EPA 2004b).

The controversy over the regulation of hydraulic fracturing continues, and it is possible that additional suits over the fracturing issue could be filed in federal courts. Because of the "plain language" finding of the original LEAF case, these subsequent suits could lead to federally imposed regulations in those states where such cases are filed (Stewart 2001). Regulations that would require the use of drinking water as the fluid could increase the price of gas and thereby reduce supply (Russell 2000).

### 3.2.5 Nationwide Permits

**Summary:** Section 404 of the CWA requires that any activities that result in the discharge of dredged or fill material into waters of the United States (which include most wetlands) must be approved via a permit issued by the COE. Obtaining an individual permit can take 1 year or more (Bleichfeld et al. 2001). To reduce the burden caused by permitting many small, inconsequential projects, the COE has established nearly 40 general, or NWP, for categories of activities that will have minimal adverse effects on the environment. The processing time for activities approved under a general permit averages about 14 days (Copeland 1999). Recent regulatory changes have limited the activities covered by NWPs, meaning that more gas-related activities will require individual permits. Also, recent court cases and other actions have resulted in changes to the definitions of wetlands; thus the scope of activities and areas requiring a permit

has been in a state of flux, leading to additional delays caused by conflicting definitional interpretations.

**Source of Constraint:** Regulatory

**Impact:** Delay

**Phase:** Production, transportation

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CWA (Section 404, 33 USC 1344); 33 CFR Part 330

**Lead player:** COE

**Issue discussion:** Two key issues have the potential to increase the number of permits and the permitting times required to gain approval to develop natural-gas-related projects (e.g., drilling platforms, pipelines) in wetlands. The first is the recent elimination of NWP 26, and the second is the definition of water bodies that will require permits. NWP 26 was a general permit established by the COE in 1977 that authorized discharges in headwaters or isolated waters (nontidal waters with a flow rate of less than 5 ft<sup>3</sup>/s, or nontidal waters that are neither part of nor adjacent to a surface water system). Headwaters and isolated waters can be difficult to identify as wetlands because they may be dry for much of the year or lack the types of vegetation commonly associated with wetlands. Unlike other NWPs, NWP 26 did not restrict nor authorize specific activities, such as minor dredging or bank stabilization. Instead, it authorized discharges to certain types of waters on the basis of acreage and lack of hydrologic connection to navigable waters. Environmental groups had long been concerned that NWP 26 was overly broad, subject to abuse by applicants through segmenting of projects, and responsible for large amounts of unmonitored wetland losses. Industry groups viewed NWP 26 as an important mechanism for minimizing regulatory burdens on small businesses and other permit applicants, and as a means of limiting development delays and associated costs.

On March 9, 2001, the COE issued final regulations that included the elimination of NWP 26 (COE 2000). The rules “replaced” NWP 26 with five new NWPs. However, many activities formerly authorized by NWP 26 are not covered by any of the new or existing permits, so that individual permits must now be obtained. (NWP 26 permits composed between one-quarter and one-third of all NWPs authorized annually, and 90% of all NWP 26 actions involved areas of less than 3 acres (Copeland 1999). On August 9, 2001, the COE issued a proposal to reissue all existing NWPs, general conditions, and definitions, with some modifications (COE 2001). On January 15, 2002, the COE issued its final rule, which incorporated the more than 2,000 comments it received in response to the proposal (COE 2002). The five new NWPs established in the final rule to replace NWP 26 cover only a limited portion of the range of activities formerly covered by NWP 26. The most broadly applicable new permit was NWP 39. This permit authorizes many of the activities previously authorized by NWP 26. It

authorizes fills for the construction or expansion of certain building foundations or pads, but specifically excludes oil and gas wells from coverage. The final rules also made substantial changes to NWP 12 (utility crossings, including pipelines), subjecting such crossings to new size, notice, and geographical restrictions. These changes lowered the threshold for NWP approvals from 3 acres to 1/2 acre, reduced the preconstruction notification and mitigation threshold for NWP activities from 3/10 to 1/10 of 1 acre, and limited the use of NWPs within floodplains and in critical waters. Because of these changes, projects that would have previously qualified for approval under an NWP are now subject to the more time-consuming and costly individual permit process.

In addition to these complex and restrictive new NWP limits and conditions, the 35 COE District Offices are preparing supplemental regional conditions that will be imposed on various NWPs in states and regions. Gas operations in different regions or states, will thus be required to comply with varying regional NWP conditions applicable to each region. Estimates of the additional costs to comply with the new restrictions range from \$32 million to \$300 million per year (Miller 2001). In addition, the delays are expected to be significant, as the COE is required to process many more individual permits. The COE's cost analysis of the proposal to issue five new and modify six existing NWPs to replace NWP 26, estimated that the number of individual permit applications would increase by 4,656 annually (50% over current amount), the direct compliance costs to the regulated community would increase by about \$48 million annually, and the time to process the permits would increase by three to four times (Institute for Water Resources 2000). The analysis did not estimate indirect costs.

The second issue, the definition of federal water bodies, is significant because the COE definition determines what activities will require a permit. It can lead to prohibitions on activities that pose a threat to the water bodies or to permit conditions that require a permittee to undertake projects to mitigate environmental damage. On October 11, 2001, a COE district office expanded its definition of water bodies that fall under the jurisdiction of its NWP program when it stated that a nearby streambed that fills with water only in certain times of the year would now come under the review of the COE. This definition could force all COE district offices to accept additional streambeds, as under federal jurisdiction, thereby significantly expanding the scope of areas requiring permits. This action came after the U.S. Supreme Court ruled in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* to limit the COE's authority to regulate isolated wetlands. This ruling has required the COE and the EPA to redefine what constitutes a water of the United States that comes under federal control. The discussion of the Spill Prevention Control and Countermeasures constraint (Section 3.3.14) contains more information on the definition of waters of the United States.

Changes to the NWP system and to the definition of waters requiring permits would delay gas production and distribution from facilities in wetlands that require permits; amounts of potentially affected TCF were not estimated.



### 3.2.6 NEPA Integration and Lawsuits

**Summary:** NEPA requires federal agencies to evaluate the human and environmental impacts of federal activities and projects, including leasing and other activities on federal lands. Various levels of jurisdiction and decision making under the law often produce unnecessary project delays. Also, NEPA-related lawsuits can lead to the preparation of “appeal-proof” documentation, which can further delay project review and approval.

**Source of Constraint:** Regulatory

**Impact:** Delay

**Phase:** E&P, transportation

**Category:** Access, leasing, permitting

**Estimated affected natural gas resources (TCF):** 464.5

**Estimate type:** Technically recoverable

**Estimate date:** 01/2000      **Estimate reference:** EIA (2001a)

**Estimate comments:** All natural gas resources will theoretically go through at least one NEPA review, and most, if not all, will go through a pipeline that requires a NEPA assessment. This TCF estimate is for all accessible, technically recoverable onshore and offshore resources.

**Statutory/regulatory citation:** NEPA (42 USC 4321 et seq.); ESA; state; local

**Lead players:** States, BLM, FERC

**Issue discussion:** NEPA integration concerns often relate not so much to the law itself, but to federal agency implementation of the law. Delays and inefficient expenditures of resources and capital often result from the following:

- Inadequate integration of NEPA compliance with other federal, state, and local permitting requirements, particularly ESA and National Historic Preservation Act (NHPA) requirements;
- Overlapping and inconsistent federal, state, and local permitting and mitigation requirements;
- Inadequate communication and coordination among participating agencies and the use of inconsistent procedures and data elements across responsible agencies;

- Lack of clarity in the roles and responsibilities of participating agencies;
- Decisions made on the basis of data that are not accurate, objective, or relevant;
- Duplicate environmental documentation;
- Limited use of categorical exclusions even when previous analyses would cover such exclusions; and
- NEPA-related lawsuits and the threat of additional suits, which can lead agencies to prepare lengthy, time-consuming, and costly EISs and EAs that go beyond the basic requirements.

In announcing an interagency agreement to improve coordination and cooperation on the permitting of natural gas transmission pipelines, the Chairman of the Council on Environmental Quality (CEQ) stated in October 2002, that one of the largest constraints to expanding the use of clean-burning natural gas relates to production and pipeline constraints. For pipeline projects, FERC is required to certify construction and operation of interstate natural gas pipelines, and numerous agencies can be involved in the review process.

For many pipeline projects, the various federal, state, and local compliance efforts are completed independently, leading to inconsistent conclusions and requirements, schedule and cost delays, and inefficiencies. For example, NHPA or ESA compliance assessments may require the use of one pipeline routing, while the NEPA compliance assessment could require a different routing. Even though CEQ regulations require timely coordination by federal agencies in dealing with interagency issues (40 CFR 1501.6) and avoiding duplication in tribal, state, county, and local procedures (40 CFR 1506.2), duplication and lack of coordination often occur. CEQ regulations require integration of analyses required by other laws into a single analysis (CEQ 1997). Although all interested parties are to become involved early and remain involved until solutions are found, sometimes such coordination does not occur.

Agencies have different (and conflicting) timetables, requirements, and statutory missions. For example, according to testimony provided by Wyoming Governor Jim Geringer, the BLM had been developing an EA for an additional 2,500 permits for CBM wells in Wyoming's Powder River Basin. Following its approved procedures, the BLM had completed its work and given assurances to leaseholders that the additional permits would be available by March 1, 2001. At the last moment, the USFWS reported that it had not completed its required assessment of impacts and would delay the issuance of permits. The lack of coordination and cooperation between two divisions within the single Department (of Interior) delays access to much-needed natural gas supplies. "Federal activity is primarily focused on process rather than results, and there is no accountability for improper decisions" (Geringer 2001).

Litigation associated with NEPA implementation has resulted in allowing the courts to determine the intent of NEPA and requirements for compliance. Environmental and other groups and individuals have accused federal agencies of failing to comply with NEPA requirements by

issuing leases and other approvals without proper NEPA review. To respond to or avoid challenges to their NEPA activities, federal agencies have gone beyond statutory NEPA requirements and prepared “appeal-proof” EISs and EAs. These, in turn, require time-consuming, overly broad studies, inventories, and analyses, which result in lengthy, cumbersome documents that require lengthy review periods, further delaying the NEPA process (Moseley 2002). “The move toward immunizing decisions from challenges and away from gathering scientific evidence on which to base a decision is beginning to erode the utility of the NEPA process” (Hopkins 2002).

An example of such a lawsuit is *Southern Utah Wilderness Alliance v. Norton*, December 6, 2001. In this case, the National Resources Defense Council and the Southern Utah Wilderness Alliance filed suit in the U.S. District Court for the District of Columbia charging that the BLM failed to conduct critical EAs before issuing 12 leases (in September 2001) that cover 10,500 acres in Utah’s Redrock Canyon region. The lawsuit alleged that the BLM failed to fully evaluate and disclose the impacts of the leases and asked the court to force the BLM to conduct an environmental review and rescind the leases until the study was completed. The environmental groups said that the BLM’s determination of NEPA adequacy was flawed; they conceded, however, that prior to actual drilling, the BLM requires more extensive environmental impact analyses (Ferullo 2001b; Beattie 2001). The plaintiffs stated that they plan to challenge BLM activities in other regions, such as Wyoming’s Red Desert-Bridger Teton National Forest that may also be in violation of environmental laws (Beattie 2001).

A more recent case could further increase the pressure for additional study as a part of NEPA compliance. On October 15, 2002, the DOI’s Board of Land Appeals upheld an April 26, 2002, ruling that the BLM erred in issuing three CBM permits for Wyoming without conducting sufficient NEPA analysis. The April ruling found that the sale of the three leases was illegal because the BLM failed to update a 17-year-old EIS that authorized continued gas and oil development in lands near Buffalo, Wyoming. The board said that although the Buffalo RMP and EIS addressed general oil and gas exploration, production, and development, it did not specifically address CBM extraction and development. The affirmation of the April ruling could be used to challenge existing and pending CBM leases in the Powder River Basin, as those leases were granted under the same Buffalo RMP/EIS (Baltz 2002c).

### **3.2.7 Pipeline Certification**

**Summary:** According to the Interstate Natural Gas Association of America (INGAA), about 200 major new pipeline construction projects (valued at about \$2.5 billion per year) will be required over the next 10 years to support projected natural gas demands. The lead time to obtain permission to build new pipeline facilities can be lengthy. FERC must approve all new and expansions to existing interstate pipelines. The process requires approvals from numerous federal, state, and local agencies that have little incentive to work together to approve applications in a timely manner (INGAA 2001). For interstate pipelines, INGAA estimates that it takes an average of 4 years to obtain approvals to construct a new natural gas pipeline.

**Source of Constraint:** Agency implementation

**Impact:** Delay

**Phase:** Transportation

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 23.3

**Estimate type:** Annual gas consumption

**Estimate date:** 01/2003      **Estimate reference:** EIA (2003)

**Estimate comments:** All projected natural gas not already in system. Projected annual increases in consumption over the next 10 years; assumes gas consumed goes through pipelines.

**Statutory/regulatory citation:** Natural Gas Act of 1938 (15 USC 717); NEPA (42 USC 4321, et seq.)

**Lead players:** FERC, others

**Issue discussion:** The interstate pipeline approval process involves numerous agencies. FERC is usually the lead agency because it must approve interstate pipeline projects under the Natural Gas Act. FERC must determine (under NEPA) whether an EA or a full EIS is necessary. FERC must also evaluate the effect of the proposed project on cultural and historic properties and on threatened and endangered species. The COE issues permits for major water crossings under the CWA, Section 404. The USFWS may need to issue a “biological opinion” and a statement on incidental takes of protected species under the ESA, Section 7. The EPA evaluates projected air emissions. State agencies are responsible for issuing erosion and sediment permits, hydrostatic test water acquisition and discharge permits, and for approving stream and river crossings, threatened and endangered species preservation, air emissions, and noise. Local agencies must approve building and road crossing permits.

In most cases, the approval steps include the following: (1) the applicant gathers and submits information to the agency; (2) the agency performs a preliminary assessment of the project and may seek comment from other government entities and the public; (3) the agency issues a final analysis; and (4) the agency considers the analysis in making its decision on whether to issue a permit (or certificate). A study by the INGAA Foundation found that both pipeline applicants and agency reviewers experience problems coordinating the environmental permitting process. The study found that federal agencies often have inconsistent information on the project review process, possibly arising from the different personnel interfacing with the applicant (INGAA 1999). A related issue pertains to the handling of plan modifications subsequent to the approval of the EA or EIS. After EA or EIS approvals, unexpected field conditions or opportunities to further reduce impacts and costs can require that the plans be modified. Often, in such situations, the pipeline company, the FERC-designated environmental

coordinator, and the cooperating agencies reach an on-scene agreement. However, without the clear authority to approve a change in plans, field personnel may decide to implement a less desirable option, if such an option would require no further approvals (INGAA 1999). Interstate pipeline operators believe the environmental regulatory review of new pipeline proposals should be streamlined and coordinated to reduce the excessive delays now experienced and to facilitate permitting for new pipeline projects. There has been some activity at the federal level to expedite certification and permitting, but much of the problem is at the state and local levels, where reviews and approvals must also occur (AGA 2000).

The majority of individual permits required for infrastructure expansion are state and local. Although state and local regulations are necessary and add oversight, only a few states effectively coordinate the natural gas pipeline permitting process, and state and local regulatory activities can add months or years to the time required to build a pipeline. Also, state and local regulations sometimes overlap, as do requirements across different state agencies (IOGCC/NARUC 2001).

The NPC report projects a need for more than 38,000 mi of new transmission lines and 263,000 mi of new distribution lines to meet future natural gas demands. These increases will exacerbate existing pipeline permitting delays (NPC 1999).

### **3.2.8 Pipeline Safety (Integrity Management)**

**Summary:** Recent natural gas pipeline incidents involving loss of life and property, a perceived lack of effectiveness on the part of the federal agency charged with implementing statutory mandates regarding pipeline safety, and the realization that increased gas demands can only be met with increased pipeline capacity have contributed to increased natural gas pipeline safety requirements. Federal-level safety, or integrity management, standards for natural gas transmission pipelines are being written that could increase costs and result in temporary supply disruptions. In addition, states can issue regulations more stringent than the federal regulations for intrastate pipelines.

**Source of Constraint:** Regulatory

**Impact:** Delay, cost

**Phase:** Transportation

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** The Pipeline Safety Improvement Act of 2002 (H.R. 3609); 49 USC 60101, et seq., “High Consequence Areas for Gas Transmission Pipelines,” Final Rule (67 FR 50824), August 6, 2002; “Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines),” Final Rule (68 FR 69778), December 15, 2003

**Lead players:** DOT, Research and Special Programs Administration (RSPA), Office of Pipeline Safety (OPS)

**Issue discussion:** INGAA estimates that by 2015, nearly 50,000 mi of new transmission lines will need to be built to meet the projected demands for natural gas in the United States. Currently, there are about 180,000 such miles (Boss 2002). Over the past 7 years, the OPS has investigated cost-effective ways of improving the safety, security, and reliability of natural gas pipelines, and over the past 3 years, Congress has been trying to reauthorize existing pipeline safety legislation and further increase the safety of pipelines. The OPS has undertaken a two-part rulemaking procedure that (1) defines high consequence areas (HCAs), or areas where the consequence of a gas pipeline accident could cause considerable harm to people or property, and (2) sets requirements to improve the integrity of interstate gas transmission pipelines located in these HCAs. On August 6, 2002, the OPS issued the final HCA rule.

On November 15, 2002, Congress passed the Pipeline Safety Improvement Act (H.R. 3609), and on December 17, 2002, President Bush signed the legislation. Among other things, the new law (49 USC 60109) mandates safety inspections for pipelines in HCAs to prevent leaks and ruptures within the next 10 years and reinspections within 7 years, stiffens penalties for violations, increases state oversight, and establishes a permit streamlining program. It uses a risk-based approach to target more problematic pipelines for inspection within the first 5 years. On December 15, 2003, the OPS issued final integrity management regulations for gas transmission lines in HCAs (DOT 2003).

Both the legislation and the rule contain prescriptive requirements, the implementation of which could increase prices, or even cause supply or delivery problems. Specific areas of concern include the following: the new law allows the DOT to require operators to take corrective action, including repairing and replacing equipment, if there is a potential safety-related condition (Section 7). While much of the bill uses risk as a criterion for action, this provision gives the Secretary much more latitude in what can be required of operators. The law also requires the DOT to study and report to Congress on preserving environmental resources with regard to pipeline ROWs to determine ways to address and prevent hazards and risks to the public, pipeline workers, and the environment, and to address how to best preserve environmental resources in conjunction with maintaining ROWs (Section 11).

The inspection schedules in the rule are tight, and the need for smaller operators to implement new inspection programs could delay delivery if finite resources are directed toward such implementation and away from delivery. Making lines piggable, conducting the actual tests and retests, and addressing needed repairs will remove pipelines from service for periods ranging from a few days for an inline inspection test, to 30 days or more for installing necessary fittings and pipe modifications. The lack of flexibility in integrity management requirements and the “one-size fits all approach” for all pipelines regardless of size may preclude the use of more cost-effective integrity management measures that would limit supply disruptions. Projected natural gas demand increases, which will add strain to the systems, can be expected to exacerbate the effects of inspection-induced delays.

Potentially all gas that goes through interstate transmission lines located in HCAs could be affected by the pipeline safety requirements. However, no specific estimates of the amounts of gas affected are available.

### 3.2.9 Wetlands Mitigation

**Summary:** Recent COE regulation and guidance for mitigating impacts to wetlands has taken a watershed approach, which allows case-specific exemptions to the one-for-one mitigation-to-impact requirement and expands options for conducting mitigation. Environmental opposition may result in a review and rethinking of these revisions, which could increase the time and money associated with obtaining permits and implementing strategies to mitigate impacts to wetlands caused by natural gas E&P, development, transportation, and construction activities.

**Source of Constraint:** Regulatory

**Impact:** Delay, cost

**Phase:** Production, transportation

**Category:** Permitting, operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CWA (Section 404, 33 USC 1344); 67 FR 2020, January 15, 2002; U.S. Corps of Engineers Regulatory Guidance Letter 01-1, October 31, 2001

**Lead players:** COE, states

**Issue discussion:** Section 404(a) of the CWA (FWPCA, 33 USC 1344(a)) authorizes the COE to issue permits regulating the discharge of dredged or fill material into the waters of the United States, including wetlands. Typically, the permit requires mitigation to offset the impacts. A June 2001 National Academy of Sciences Report criticized the COE's mitigation approach, citing failures of mitigation projects and other problems. On October 31, 2001, the COE issued Guidance Letter 01-1 to improve mitigation conditions required in COE permits. The guidance adopts a watershed management approach that includes provisions for compensatory mitigation such as off-site mitigation and case-by-case exceptions to a one-for-one functional replacement. The guidance is designed to improve mitigation consistency across districts. On January 15, 2002, the COE modified its General Condition 19, which addresses mitigation for NWPs, or general permits. This modification also takes a watershed approach, and although it adheres to the "no-net-loss" of wetlands policy by requiring a one-for-one mitigation for wetlands impacts at the district level, exceptions can be made on a case-specific basis. A variety of mitigation approaches, including mitigation banking, are allowed. Environmentalists, the EPA, and the USFWS have raised concerns about the revisions; some view these revised mitigation policies as moving away from the "no-net-loss" policy and as loosening the standards. Legal action may be taken against the COE, with the argument that the COE has insufficient data to make a

determination that the programs revisions will result in a minimal impact on the environment (Inside EPA 2002c).

Natural gas production and transportation may be facilitated by the COE's revisions to mitigation policies, since they allow for case-by-case exceptions to the one-for-one mitigation requirements and since they expand the actions that qualify for compensatory mitigation. Attempts to retract the provisions or to have states implement more stringent legislation and regulations could cause delays to projects or increased costs for more costly mitigation approaches. Wetlands issues, regulations, and policies are constantly undergoing discussion and review by Congress, the COE, environmental groups, and others. Wetlands-related actions stemming from these discussions could delay access to natural gas or increase costs of obtaining the gas. Estimates of the number of potentially affected TCF are not available, but gas at any exploration, production, or transportation facility that needs a wetlands permit could be affected.

### **3.3 ISSUES LIKELY TO INCREASE COSTS**

#### **3.3.1 Cooling-Water Intake Structures**

**Summary:** Section 316(b) of the CWA requires that cooling-water intake structures reflect the best technology available for minimizing adverse environmental impacts. The EPA is developing national regulations to implement these requirements. It has issued final Phase I and II regulations for existing power plants and for new power plants and manufacturing facilities. The EPA published proposed Phase III regulations for existing manufacturing facilities, including oil and gas extraction facilities, and for new offshore oil and gas extraction facilities in November 2004. Final Phase III regulations must be published by June 2006. Impacts of the final 316(b) Phase III regulations on oil and gas production are not known at this time.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CWA, Section 316(b); 69 FR 68444-68565, November 24, 2004

**Lead player:** EPA

**Issue discussion:** For several years, the 316(b) requirements have been implemented on a site-by-site basis, without federal standards. Following settlement of a lawsuit, the EPA is now developing national regulations in three phases: Phase I for new facilities, Phase II for existing



electric utilities that use large amounts of cooling water, and Phase III for electric utilities using smaller amounts of cooling water and other industries, which include existing and new offshore and coastal oil and gas extraction facilities. These extraction facilities typically use cooling systems for their engines and brakes.

Entities affected by the 316(b) rules use cooling-water intake structures to withdraw water for cooling purposes and have, or are required to have, a NPDES permit issued under Section 402 of the CWA (33 USC 1342). The regulations apply to the intake of water and not the discharge. Major goals of the regulations are to minimize impingement, which occurs when fish and other aquatic life are trapped against cooling-water intake screens, and entrainment, which occurs when aquatic organisms, eggs, and larvae are drawn into a cooling system through the heat exchanger and then pumped back out. Cooling water intake requirements are performance standards implemented through NPDES permits, which are based on the best technology available to minimize impingement and entrainment.

The EPA published proposed “Phase I” regulations for cooling-water intake structures at certain new industrial facilities on July 20, 2000, and final Phase I regulations on November 9, 2001. It published proposed “Phase II” regulations for approximately 550 existing electric power generating plants on February 28, 2002, and final Phase II regulations on July 9, 2004. It published proposed “Phase III” regulations for certain existing industrial facilities, including oil and gas extraction facilities, and for new offshore oil and gas extraction facilities on November 24, 2004. The EPA must publish final Phase III rules by June 1, 2006.

Preliminary EPA information indicated that about 200 offshore oil and gas platforms and mobile drilling units could be subject to the Phase III regulations (EPA 2002c). The EPA estimated that the final Phase I regulations for new electricity-generating facilities would affect 121 facilities to be built over the next 10 years and cost about \$48 million per year (EPA 2001a). The U.S. Coast Guard estimated that retrofits for drill ships and semisubmersibles that use “seachests” as the cooling-water intake structure could cost approximately \$8 million to \$10 million and require several weeks to months for dry-docking operations. The Independent Association of Drilling Contractors reported that the cost of converting a jack-up modular offshore drilling unit from sea water cooling to closed-loop air cooling is roughly \$1.2 million and requires a six-month lead time to obtain the required equipment (EPA 2001b). Impacts to the scheduling of offshore drilling rigs, such as the downtime needed for retrofitting, could adversely affect the availability of natural gas to consumers.

The proposed Phase III requirements published in November (EPA 2004g) would apply to existing facilities that withdraw more than 50 million gal/day of water; existing facilities that withdraw less than 50 million gal/day would continue to be subject to 316(b) permit conditions established on a case-by-case, best professional judgment basis. Because few, if any, existing offshore oil and gas extraction facilities withdraw more than 50 million gal/day, compliance with the proposed rule is not expected to generate significant impacts for existing facilities. However, the proposed Phase III regulations also establish requirements for new offshore oil and gas extraction facilities. (The EPA had specifically excluded these facilities from the scope of the Phase I new facility regulations so that it could collect additional data on them.) According to the proposed rule, new offshore and coastal oil and gas extraction facilities with cooling-water intake

structures that have a design intake flow of greater than 2 million gal/day to withdraw from waters of the United States would be subject to the rule's requirements. Impacts of the proposed rule and of the eventual final rule on new oil and gas offshore extraction facilities are not known.

### **3.3.2 Electronic Reporting and Record-Keeping Requirements**

**Summary:** On August 31, 2001, the EPA's Office of Environmental Information published its proposed CROMERRR, which describes conditions under which the EPA would "allow" submission of electronic documents and maintenance of electronic records to satisfy federal EPA reporting and record-keeping requirements (EPA 2001f). The rule is touted as voluntary, but any entity that reports or maintains records electronically would have to follow certain requirements, which could require the installation of costly new systems incompatible with current electronic data management systems. The API estimated that the financial impact of the proposed rule on the petroleum industry alone would be comparable to what the industry spent on Y2K about \$1 billion.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** 66 FR 46162, August 31, 2001

**Lead player:** EPA

**Issue discussion:** The EPA's apparent intent in proposing this rule was to remove existing regulatory obstacles to electronic reporting and record keeping across EPA programs to comply with the requirements of the Paperwork Reduction Act by the deadline of October 2003. However, the proposal, as written, goes beyond those requirements and is burdensome. The proposal would impose mandatory, extensive, and difficult-to-implement requirements on essentially all environmental records at all facilities subject to environmental regulation. The EPA received more than 180 comments on the proposal, most of which were directed toward the record-keeping requirements, finding them to be overly burdensome, not voluntary, and too prescriptive. For example, a given facility may have dozens of different data collection systems that would have to be evaluated and set up to meet the CROMERRR criteria. As of June 2002, the EPA was considering decoupling the record-keeping portions of the rule from the reporting portions, thus allowing for timely compliance with the Paperwork Reduction Act for reporting, but postponing the record-keeping portions to a later date.

The rule would probably be most costly for small producers. Although it would not directly affect gas production, it could be an additional economic burden that some, especially small, operators could not afford. Added to other regulatory burdens, this rule could put some small operators at risk.

### **3.3.3 Lack of Incentives to Go beyond Compliance**

**Summary:** Permitting and regulatory processes generally lack incentives for companies to provide environmental protection beyond standard operating practices. Proposals that would provide environmental protection beyond legal requirements and proposals that could provide equal protection at lower costs have been rejected by local, state, and federal authorities. Such rejections constrain environmental progress and preclude opportunities to reduce costs. They can also discourage natural gas operators who may otherwise be willing to take voluntary action in the E&P areas, where additional regulations, expected in response to increased activity and attendant environmental impact, will add to the workload of already burdened regulatory staff, further exacerbating production delays.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 86.6

**Estimate type:** Technically recoverable

**Estimate date:** 01/2003      **Estimate reference:** DOI (2003)

**Estimate comments:** Estimated to be the amount of gas in EPCA I areas that are available for lease under standard lease terms. This estimate is based on the assumption that the lack of incentives applies to any federal land. It could also apply to state and private lands and could apply in other areas in addition to the Rocky Mountain region.

**Statutory/regulatory citation:** FLPMA; Mineral Leasing Act (30 USC 209)

**Lead player:** BLM

**Issue discussion:** Operators have suggested mitigation approaches regarding habitat protection, but they are typically not allowed because of “department policy” (Watford 2001). An example of a missed opportunity for going beyond compliance was described to the House Resources Subcommittee on Energy and Minerals on April 25, 2001, by the president of Ultra Petroleum Corporation, an independent E&P company with core operations in Wyoming. Ultra Petroleum

had proposed such an approach during the preparation of an EIS for gas drilling operations in the Pinedale Anticline in Wyoming. In this case, discussions with the BLM and the Wyoming State Game and Fish Department indicated that some of the greatest benefits to the affected wildlife would come from protecting habitat in areas away from the proposed project area (i.e., other critical wintering areas or riparian areas that had a high probability of being subdivided and therefore of having a greater adverse impact on the species than oil and gas development). Ultra offered to establish an “off-site” mitigation fund whereby the BLM and the State of Wyoming could spend industry dollars, on a per-well-drilled basis, to mitigate impacts to affected species in the locations that would render the greatest environmental protection for the dollars spent, even if those locations were outside the project boundary. However, the BLM stated that a DOI solicitor’s opinion and department policy prohibited any off-site mitigation, regardless of the potential environmental benefit (Watford 2001).

In another example, on the basis of information produced during the NEPA process, which showed that reducing disturbance to the surface and the habitat was one of the best ways to minimize the significant impacts from operations, Ultra analyzed the option of drilling several wells directionally from the same pad. Because the cost of directional drilling is significantly higher than that of drilling a traditional well bore, Ultra sought a legal interpretation to determine if royalty rate reductions could be applied for the voluntary use of directional drilling. According to the Mineral Leasing Act (30 USC Section 209), the Secretary of the Interior is authorized to grant reductions in production royalties as follows: “The Secretary of the Interior, for the purpose of encouraging the greatest recovery of . . . oil, gas . . . and in the interest of conservation of natural resources is authorized to . . . reduce the rental, or minimum royalty on an entire leasehold, or on any tract or portion thereof segregated for royalty purposes, whenever in his judgment it is necessary to do so in order to promote development, or whenever in his judgment the leases cannot be successfully operated under the terms therein provided.” The BLM responded, however, that the DOI solicitor had issued an opinion prohibiting the department’s ability to utilize an ecoroyalty relief program as an incentive for such environmental protection. “It appears that capitalizing on or creating incentives in the marketplace or within the bureaucracy to better ease or quicken the NEPA process is grossly neglected by the Federal Government and that valuable opportunities for improvement are foregone” (Watford 2001).

### **3.3.4 Louisiana E&P Waste Disposal Regulations**

**Summary:** Amendments to the State of Louisiana’s E&P waste storage and disposal rules passed on November 20, 2001 may increase costs and delay natural gas E&P schedules in the state. Louisiana is the first state to adopt such regulations, and because many oil and gas states follow Louisiana’s lead, the requirements may set precedents for other states, with attendant costs for natural gas E&P operations.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** Louisiana Statewide Order No. 29-B, AC 43:XIX, Subpart 1, Chapter 5 (501 et seq.)

**Lead player:** State

**Issue discussion:** On November 20, 2001, a new rule, Statewide Order No. 29-B, took effect in Louisiana. The rule responds to citizen complaints since 1984 in Grand Bois, Louisiana, where a local land-treatment facility handled gas plant wastes that allegedly caused health and pollution problems. Among other things, the amendments require generators to characterize the E&P wastes they generate, set maximum permissible limits on the benzene concentration in gas plant wastes, and increase the sizes of buffer zones near waste facilities. The rules result from a comprehensive waste evaluation and health risk analysis of oil field wastes managed at commercial facilities. Waste generators are responsible for proper handling and transportation of E&P waste taken off site for storage, treatment, or disposal. The fiscal and economic impact statement accompanying the proposed rule estimated impacts to the regulated community of \$940,000 or higher for costs to dispose of gas plant wastes. Comments on the proposed rule indicated that the costs would be much higher on the order of \$5 million to commercial facilities and that the provisions for design criteria for commercial facilities (Section 509 A) would be “virtually impossible to comply with and could cause the closure of many facilities.” Other comments suggested that the one-time costs, per disposal company, for such items as injection wells, retention basins, and levees, would be \$6,600,000; operating costs and lost revenue were estimated at \$1,600,000 per year (Louisiana Docket IMD-01-11-2001). Presumably, these costs would be passed along to the natural gas operators. A requirement that an independent consultant or laboratory (third party) perform the sampling would also add to operator costs. Whether the impacts would be enough to limit production, particularly for smaller operators, is not known.

Risk-based regulations can lead to rules that are generally fair and science-based, because they tend to reflect actual events and consider both the degree of hazard as well as the likelihood of the hazard occurring. In contrast, some regulations reflect only the hazard or potential for hazard without considering the likelihood of the hazard occurring. However, the benefits of using a risk-based approach can be lost if the assumptions are overly conservative and if the risk assessment assumes these overly conservative assumptions in all cases. A risk-based evaluation of E&P wastes was used to develop the new Louisiana rules. However, some commenters noted that the series of overly conservative assumptions used in developing the rules could never occur in actual operations, and that taken together, they not only compound the conservatism of the results but can set an improper precedent for developing other risk-based regulations.

The new rules also require public notification requirements for routine operational changes, which could delay production with little if any environmental benefit. For example, the

newly adopted revisions require that any application to recomplete a Class II commercial disposal well into a new disposal zone must be advertised in the legal ad section of the official state journal and in the official parish journal where the facility is located. According to comments filed on the proposed rule, recompletion of an existing injection well into a new disposal zone typically becomes necessary based on something discovered during a well workover. The public notice provision will require that the operator dismiss the workover rig from the site, submit the application, and advertise as required. Since there is no defined public comment period, the length of time allotted for comments is unknown. At a minimum, it would likely be 15 days, during which time the well would be shut in and the rig moved off site. If the application is approved after the allotted public comment period, the rig must be remobilized and the well reworked. Before the new rules were implemented, the procedure had been to handle the application administratively, with relatively little delay. The final rule retained the public notification requirement citing federal EPA requirements.

The E&P waste disposal regulation could affect all gas produced in the State of Louisiana. Although it would not prohibit or limit access, it could increase production costs. Combined with other regulatory actions that could increase costs, the rule could reduce the incentive for some producers to continue or start operations.

### **3.3.5 Maximum Achievable Control Technology (MACT)**

**Summary:** MACT rules regulate emissions of HAPs from stationary and mobile sources. Final MACT rules exist for oil and gas production facilities and for natural gas transmission and storage facilities. Recently, the EPA has signed final MACT rules for turbines, process heaters, and reciprocating internal combustion engines, which may affect gas operations. Compliance with these rules, for example, a 95% reduction in emissions at major sources, could impact the economics of natural gas operations.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production, transportation

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CAA (Section 112(d), 42 USC 7412 (d)); Final MACT rules

**Lead player:** EPA

**Issue discussion:** The EPA has estimated relatively small economic and energy impacts associated with implementation of the production, transmission, and storage rules. However, the potential impacts of additional MACT regulations on future natural gas and CBM operations are

uncertain. The sources affected by the recently signed MACT rules – turbines, process heaters, and reciprocating internal combustion engines – are used in natural gas production and transmission. The degree of impact depends, to a large degree, on whether sources are considered major or not. A major source is defined as any stationary source or group of stationary sources located within a contiguous area and under common control with the potential to emit 10 tons per year or more of any HAP, or 25 tons per year or more of any combination of HAPs. To determine whether a gas production facility is a major source, HAP emissions from combustion turbines, reciprocating internal combustion engines, glycol dehydrators, and tanks that have the potential for flash emissions will be aggregated (EPA 2002a).

Although combustion turbines and reciprocating internal combustion engines are efficient combustion devices, products of incomplete combustion form HAPs, including formaldehyde. Combustion turbines are used at compressor stations, and internal combustion engines are necessary for producing and processing natural gas and transporting it to market. A large turbine or reciprocating internal combustion engine could emit about 10 tons per year of combined HAPs, with formaldehyde accounting for about half of the HAP emissions. Combustion turbines are used to maintain pressure in gas pipelines, and the EPA estimates that there are about 8,000 existing turbines in the United States, ranging in size from 1 to 200 MW (1 MW equals about 1,200 hp). The EPA estimates that about 20% of the existing and new turbines will be located at major sites. In addition to adding controls, covered sources would be required to monitor HAP emissions.

On June 15, 2004, the EPA issued final MACT standards for reciprocating internal combustion engines (EPA 2004c). These rules are expected to affect natural gas transmission, natural gas production, and natural gas liquids production. On February 26, 2004, the EPA signed final MACT rules for process heaters and boilers (not yet published). These rules apply to, among other sectors, natural gas extraction operations. On March 5, 2004, the EPA issued final MACT standards for stationary combustion turbines (EPA 2004d). Among other activities, these rules will affect natural gas transmission, natural gas production, and natural gas liquids production.

Because the EPA rules only apply to major sources, they are not expected to affect small producers, who typically are the most susceptible to economic impact (i.e., they may have to close operations). However, as more gas is produced and shipped, the size of the affected sources may increase, bringing more of them under control. Also, the HAP requirements in some states, such as Oklahoma, are more stringent than the federal requirements. Some state minor source requirements can burden small operators who lack the personnel and expertise to determine compliance with a state's air emission requirements and must hire consultants to make these determinations. While the MACT rules are not expected to prevent gas from being produced or shipped, they could increase costs.

### **3.3.6 Mercury Discharge Regulations**

**Summary:** Discharges of mercury-containing drilling muds from gas (and oil) drilling operations in the Gulf of Mexico have generated concern that such mercury may convert to toxic

methylmercury, which can accumulate in the food chain and poison fish. Such concerns may expand to other onshore and offshore geographical areas, leading to strengthened or new mercury regulations.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** E&P

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** NPDES permits, possible new federal or state regulations, federal interagency task force

**Lead player:** EPA

**Issue discussion:** Recent newspaper articles in Mobile, Alabama, and New Orleans, Louisiana, have cited studies by the MMS suggesting that oil and gas rigs in the Gulf “amount to islands of intense mercury contamination,” which could spread to fish attracted to drilling rigs for feeding (Rains 2002). The articles state that the contamination results from the discharge of barite-containing muds used to cool and lubricate drill bits during initial exploration, rather than from ongoing operations. Barite often has high mercury concentrations. When certain microscopic organisms ingest mercury, methylmercury, a potent neurotoxin, is formed. The article reports that hundreds of thousands of pounds of mercury could have been released around the 4,000 rigs drilled in the Gulf over the past several decades. Federal regulations require a permit for the discharge of all barite-containing drilling muds in U.S. waters. These permitted discharges must contain less than 1 part per million (ppm) of mercury, and no discharges are allowed within 3 mi of the shore. According to the articles, however, more than 1,000 lb of mercury could still be legally discharged from the 1,200 new wells projected to be drilled annually.

The IOGCC notes that while the articles are aimed at off-shore Gulf of Mexico drilling platforms, it “may be only a small step” to make such claims about other regional offshore or onshore oil and gas operations (Carl 2002).

The MMS responded to the articles, stating that it provided misinformation and that studies supported by the MMS, EPA, and DOE have demonstrated that mercury around drilling platforms does not result in mercury levels in marine organisms living near the platforms that are greater than those for marine organisms living far from the platforms (Querques 2002).

In May 2002, the White House announced the formation of an interagency federal task force to determine whether mercury discharges in the Gulf and other areas pose a threat. EPA regional sources stated that the EPA could change its permitting regulations for discharges if



further study indicates that mercury is being converted to methylmercury. The State of California is also pursuing additional regulations, with legislation introduced to launch a state task force to evaluate the effects of mercury from drilling rigs (Superfund Report 2002).

Regulations could affect gas from wells that are drilled using mercury-containing muds or that produce mercury-containing cuttings. The regulations could potentially affect any new wells drilled in the Gulf of Mexico, and perhaps in other onshore and offshore areas. Additional regulations that would require the hauling of the drilling muds to shore or the use of alternative formulations could significantly increase drilling costs, with the possibility that the increased costs could limit natural gas drilling operations.

### **3.3.7 NO<sub>x</sub> Prevention of Significant Deterioration Increment Consumption**

**Summary:** An increasingly important air quality issue that can affect natural gas production in the West is the potential for new regulations to limit NO<sub>x</sub> emissions. The Air Quality Act limits emissions in PSD areas, most of which exist in the West, where the number of combustion sources that create such emissions is growing. Many of these combustion sources are from oil and gas drilling, and particularly CBM drilling, which is expected to increase significantly over the next few years.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CAA, PSD Regulations (40 CFR 51.166 and 52.21)

**Lead players:** EPA, states

**Issue discussion:** State and NAAQS set upper limits for specific air pollutant concentrations, including NO<sub>x</sub>. The New Source Review PSD program is designed to limit the incremental increase of specific air pollution concentrations (e.g., NO<sub>x</sub>) above a legally defined baseline level, depending on the classification of the location. Class I areas have more stringent limits than Class II and Class III areas. Western governors and state environmental agencies have recognized that the increased growth of combustion sources in their states is leading to increased emissions of criteria air pollutants. Many are concerned that growing releases of NO<sub>x</sub> associated with increased drilling operations could affect state compliance with the PSD NO<sub>x</sub> increment, even though most individual sources alone would be too small to trigger the PSD increment. The Wyoming Air Quality Division is “processing thousands of permits for compressor engines, and there is no end in sight” (Easton and McVehil 2001). To determine how much of the NO<sub>x</sub>

increment is being used, the Wyoming Department of Environmental Quality is conducting a large-scale study of emission sources in the Powder River Basin, including oil and gas development in addition to the more traditional NO<sub>x</sub> sources of mining and mineral processing. Because the state already requires Best Available Control Technology in permits for all but insignificant sources, a finding that suggests a high consumption of the NO<sub>x</sub> increment could mean much more aggressive source control. If the Wyoming study indicates excessive increment consumption, the EPA is likely to dictate the next steps, which could include limits on combustion sources or lower emission limits. These requirements would slow the rate of natural gas development in those states where the PSD limits are being met (Easton and McVehil 2001).

At a meeting of the Western Governors' Association, the cochair of the Western Regional Air Partnership (WRAP) Program stated that NO<sub>x</sub> emissions will most likely be the next major area of concern, and other participants noted the importance of assessing nonutility sources (e.g., oil and gas producers) (Baltz 2002b). (WRAP is an organization of 13 states, 9 tribes, and 3 federal agencies established to address air quality issues in the western states.)

The West is not the only area for which NO<sub>x</sub> emissions from natural gas operations are of concern. In 1988, a gas pipeline company installed four new engines at a compressor station in Illinois. In 1996, a state environmental inspection discovered that the engines were emitting NO<sub>x</sub> at levels that triggered control requirements under the PSD program and fined the company \$1.0 million. (The state environmental agency had proposed a \$2.2 million penalty for the violation, but the pollution control board lowered it [Bologna 2001].)

As E&P drilling increases and as more pipelines are built to move the gas, the need to maintain low levels of NO<sub>x</sub> emissions could limit the production and delivery of gas. Also, the process for developing new E&P and pipeline operations can be expected to lengthen as more sources apply for permits.

Potentially all new gas being developed, produced, or transported in PSD areas could be affected by NO<sub>x</sub> limitations, but neither the specific PSD areas nor the TCF resources within them have been estimated.

### **3.3.8 Noise Regulations**

**Summary:** As E&P and transportation of natural gas increase in response to increased demand, the number of drilling rigs, processing plants, and pipelines will also increase. These increases will require additional equipment, particularly compressors and drilling equipment, both of which generate high levels of noise. To date, most drilling and producing operations and pipelines have been located away from population centers, so that noise has not been a major issue. However, as thousands of wells are drilled (particularly for CBM in the West) and as new pipelines are built, noise is expected to become an issue that could lead to regulation and subsequently higher operating and transportation costs. Noise also affects wildlife, and its effect on otherwise quiet areas will continue to be a subject of concern and potential regulation.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production, transportation

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** County ordinances, proposed state legislation

**Lead players:** States, local governments, BLM

**Issue discussion:** Noise from gas operations, particularly compressors at pipelines and increasingly from CBM operations, has generated concern and action by local residents. Some areas have implemented regulations or introduced legislation to limit noise and others may follow, especially as the numbers of wells and pipelines increases. This emerging issue is most likely to be the subject of local or site-specific regulations that may prove costly, as operators are required to develop quieter equipment or increase the use of muffling techniques.

Pipeline compressor stations contain three to four compressors. Noise from this equipment can be heard up to 5 mi away. Anecdotal evidence indicates that pipeline compressors can disrupt nearby residents' lifestyles, leading to cease-and-desist orders being filed against pipeline companies and proposed regulations to limit noise. Members of the State of Wyoming's Coal Bed Methane Coordination Coalition, which consists of five counties and two conservation districts in Wyoming where CBM development is occurring, state that they would consider supporting noise regulations for pipeline compressors (Billings Gazette 2001). In Michigan, legislation has been introduced to reduce noise and nighttime nuisance by allowing counties to adopt ordinances that regulate hours during which gas, oil, brine, or any other substance can be transported to or from a gas (or oil) well (Stoneman 1995). The State of Arkansas is holding hearings on compressor noise and is studying the impact of compressor noise on the environment.

During CBM development, short-term noise impacts (2 to 5 days) result from drilling operations (rig operation, trucks, and other equipment). As development continues, additional compressor sites are required. These compressors are generally powered by large natural gas engines capable of producing high-decibel noise levels. The following examples illustrate the types of noise restrictions that can be expected in the future. Certain Colorado counties have compressor noise regulations that include installing mufflers, additional sound insulation or berms to prevent noise pollution, and location restrictions (Morrison 2002). Residents in other counties have begun circulating petitions requesting action to require controls to reduce noise from compressor stations. Noise regulations may be adapted not only to reduce impacts on humans, but also on wildlife. The ROD for the Hanna Draw Coal Bed Methane Exploration Project in Wyoming states that the BLM may require noise levels to be no greater than 10 dB(A) above background levels at greater sage-grouse leks. It also states that the BLM may require compressor engines to be enclosed in a building and located at least 600 ft from sensitive receptors or sensitive resource areas (BLM 2002).

Noise abatement regulations could increase costs to the point where prices are affected. It is also possible that schedules could be delayed if noise-sensitive habitat areas must be located as part of the permitting process. Noise regulations could potentially affect all new CBM wells and pipeline operations.

### 3.3.9 Nonroad Diesel Rule

**Summary:** Section 213(a) of the CAA requires that the EPA regulate emissions of nonroad engines and equipment. The EPA has issued some nonroad diesel emission standards and plans to issue more, with a new proposal in the spring of 2003 and final rules by the summer of 2004. Nonroad diesel engines are used in natural gas E&P and in gas processing operations. Increased costs of these engines because of stricter emissions controls, when added to other environmental costs, could affect some operations and limit gas development.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** E&P

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CAA (Section 213 (a), 42 USC 7547(a)); Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, Final Rule (69 FR 38957), June 29, 2004

**Lead player:** EPA

**Issue discussion:** Until relatively recently, emissions from nonroad diesel engines have not been regulated. On October 23, 1998, the EPA issued final emission standards for nonroad compression ignition (diesel) engines for engines over 50 hp (EPA 1998). In the preamble to that rule, the EPA stated that pursuant to the CAA, the agency was undertaking a technology review to determine whether more stringent standards are now feasible and to promulgate such standards if the findings are positive. The technology review will reassess the standards for NO<sub>x</sub> and hydrocarbons and will set the next phase of PM standards for engines rated at 50 to 750 hp. In June 2002, the EPA announced that it would work closely with the Office of Management and Budget (OMB) and other experts and interested stakeholders in developing a nonroad diesel rule that could go beyond the requirements finalized in 1998 (Najor 2002).

In June 2002, the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials issued a report that found that nonroad engines represent one-third of the motor vehicle industry's fine particulate inventory. The report, *The Dangers of the Dirtiest Diesels: The Health and Welfare Impacts of Nonroad Heavy-Duty*

*Diesel Engines and Fuels* (Walsh 2002), also found that the disparity between onroad and nonroad PM emissions will grow as vehicles and engines comply with the EPA's recently adopted onroad heavy-duty diesel engines and fuel rules, which are to be phased in during 2006 to 2007. On September 3, 2002, the EPA released a report, *Health Assessment Document of Diesel Engine Exhaust* (EPA 2002b), which is the first comprehensive review of the potential health effects from ambient exposure to diesel engine exhaust. The study, which took 10 years to complete, is intended to be used as a tool in evaluating regulatory needs under the CAA. The report concluded that diesel exhaust contains large quantities of NO<sub>x</sub>, SO<sub>2</sub>, HAPs, and PM, and that the health impacts from these air pollutants include increased potential for lung cancer and exacerbated allergies and asthma symptoms.

On May 23, 2003, the EPA proposed to control emissions of air pollutants for nonroad diesel engines (EPA 2003a). The rule would apply to new diesel engines used in most types of construction and industrial equipment, including oil and gas field machinery and equipment. It would require such engines to be equipped with state-of-the-art emission control systems that would reduce PM emissions by 90% and NO<sub>x</sub> emissions by 95%. Implementation would be phased in between 2008 and 2014. The rule is aimed at the manufacturers of nonroad diesel engines, but since it may result in increased costs for new engines and diesel engines are widely used in onshore and offshore E&P operations, it could lead to increased costs for the industry. Those costs, in combination with other increased costs and demands, could result in supply availability problems, especially for small producers. The EPA issued a final rule in 2004 (EPA 2004e).

The nonroad diesel engine rule could affect E&P for offshore and onshore wells using new diesel-powered engines; the number of TCF affected (by increased costs) was not estimated.

### **3.3.10 Ocean Discharge Criteria**

**Summary:** Proposed amendments to existing rules implementing the ocean protection provisions of Section 403 of the CWA would strengthen existing ocean discharge criteria. These criteria must be considered in the issuance of individual or general NPDES permits for offshore facilities. The proposal would designate "Healthy Ocean Waters" (waters beyond 3 mi offshore), and these waters would be protected by both a narrative statement of water quality and pollutant-specific numeric criteria and would be subject to an antidegradation policy. The rule would also establish SOSs, where new and significantly expanded discharges would be prohibited.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** Prepublication Proposed Rule (EPA 2001d); Executive Order 13158; CWA (Section 403, 33 USC 1343), Ocean Discharge Criteria

**Lead player:** EPA

**Issue discussion:** Under the CWA, point-source discharges to waters of the United States must have a NPDES permit. The NPDES permit requires compliance with technology- and water-quality-based treatment standards. In addition, discharges to the territorial seas and beyond must comply with Section 403 of the CWA and meet additional requirements intended to ensure that sensitive ecological communities are protected.

In 1980, the EPA developed Ocean Discharge Guidelines (40 CFR Part 125, Subpart M [45 FR 65942], October 3, 1980), which specify the factors (ecological, social, and economic) for permit writers to consider when evaluating the impact of a discharge on the marine environment.

On May 26, 2000, then President Clinton issued Executive Order 13158, “Marine Protected Areas,” which, among other things, required the EPA to “expeditiously propose new science-based regulations, as necessary, to ensure appropriate levels of protection for the marine environment.”

On January 19, 2001, then EPA Administrator Carol Browner signed the prepublication version of the proposed rule to amend existing regulations implementing Section 403 of the CWA, the ocean discharge criteria (EPA 2001d). On January 20, the EPA withdrew the proposal from the *Federal Register* to give the new EPA Administrator an opportunity to review it. The proposal would establish baseline water quality standards for ocean waters beyond 3 mi offshore, designated as “Healthy Ocean Waters.” Healthy ocean waters would be protected by both a narrative statement of water quality and pollutant-specific numeric criteria. Discharge permits for these waters issued or reissued after the effective date would need to comply with new water quality standards and an antidegradation policy. The rule would strengthen permit requirements to discharge to any ocean waters by requiring permit requesters to consider alternative disposal sites, and would require that no discharge permit be issued unless sufficient information exists to evaluate the impacts of the proposed discharge. The rule would also establish a new class of waters, SOSs, considered to be of outstanding value and within which new discharges and significant expansions (20% or greater increase in loadings) of existing discharges would generally be prohibited. The rule identifies four such areas and establishes a process for identifying and establishing additional SOSs. The rule would apply to any facility or activity where there is a discharge of a pollutant from a point source into ocean waters that is, facilities that have or need an NPDES permit. It would apply both to individual permits and to general permits controlling discharges from oil and gas exploration, development, and production operations. The EPA estimates that 2,761 entities are covered under oil and gas general permits (EPA 2001d).

Ocean discharge requirements could have significant cost and schedule impacts on natural gas exploration and development projects. It is possible that some permits for offshore facilities could be denied. Amounts of potentially affected natural gas cannot be estimated until the EPA discusses or proposes actual requirements. The EPA has been “tweaking” the proposal and plans to send a revised proposal to OMB for review by the end of February 2002. OMB will have a 90-day review period. The May 2003 Regulatory Agenda indicated that the EPA had withdrawn the rule and plans no further action (EPA 2003b).

### **3.3.11 Particulate Matter Regulations**

**Summary:** In 1997, the EPA promulgated NAAQS for fine particulate matter (PM<sub>2.5</sub>). The EPA is considering updating that standard, and some states are implementing stricter regulations. Many diesel-powered engines used at CBM production sites emit PM, and if those emissions were further restricted, more costly new, alternative, or refitted power sources might be required. Depending on the type of regulation, limits on particulate emissions from diesel and gasoline engines could slow the development of CBM.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 7.2

**Estimate type:** Technically recoverable

**Estimate date:** 01/1995      **Estimate reference:** Whitney (2001)

**Estimate comments:** The estimate is for technically recoverable CBM in the Rocky Mountain region. Any regulations that require the use of equipment and technologies to prevent exceeding NAAQS particulate standards could limit production in this area.

**Statutory/regulatory citation:** CAA; NAAQS; state regulations

**Lead players:** EPA, states

**Issue discussion:** PM consists of solid particles and liquid droplets found in the air. Particulates less than 2.5 µm in diameter (PM<sub>2.5</sub>) are referred to as “fine” particles, and sources include fuel combustion from motor vehicles, power generation, and industrial facilities. They can also be formed when combustion gases are chemically transformed into particles. Particulates larger than 2.5 µm in diameter are referred to as coarse particulates. Sources of coarse particulates include

wind-blown dust, vehicles traveling on unpaved roads, materials handling, and crushing and grinding operations.

Nonattainment areas are geographic areas that do not meet the NAAQS for one or more of the criteria air pollutants, including particulates. As CBM and other natural gas resources are developed, the potential for increased particulate emissions grows, and with it the potential to push areas into nonattainment status, which could result in limiting emissions sources. Increased natural gas development and particularly CBM development, in areas not served by existing infrastructures, often leads to greater use of diesel-powered generators, new road construction, and new pipeline construction, all of which increase the generation of particulates and can affect visibility. Wyoming and Montana may begin regulating sources to prevent areas from becoming nonattainment, and such regulations could limit natural gas resource development in the Rocky Mountain region (Easton and McVehil 2001).

In 1997, the EPA added two new PM<sub>2.5</sub> standards: 15 µg/m<sup>3</sup> for the annual standard and 65 µg/m<sup>3</sup> for the 24-hour standard, which is designed to allow for unusual occasional daily spikes. The EPA is collecting data on PM<sub>2.5</sub> concentrations and is expected to designate areas that do not meet the new PM<sub>2.5</sub> standards as nonattainment. It may also propose new standards that may be more stringent than the existing standards, because new research indicates that there is no threshold below which serious health effects are not seen; measurable health impacts have occurred at concentrations as low as 2 µg/m<sup>3</sup>. New standards are not expected before the spring of 2004, as the criteria document for PM is being revised and must undergo additional review before standards can be set.

Even without the EPA standard, states can issue standards that may affect natural gas production. For example, the Wyoming Department of Environmental Quality is investigating diesel-powered generators used during CBM production. The state recently became aware that about 300 portable diesel generators are used in drilling, and the emissions from so many generators could exceed state or federal standards. It is likely, that with increased CBM development, the number of such generators, along with the particulate emissions they release, is likely to increase. In June 2002, the California Air Resources Board approved a new annual average limit of 12 µg/m<sup>3</sup> for PM<sub>2.5</sub> (3 µg/m<sup>3</sup> lower than the federal standard) and new standards for PM.

### **3.3.12 Pipeline Gathering Line Definition**

**Summary:** The Pipeline Safety Act of 1992 requires the DOT to define the term “gathering line” and to consider the merits of revising pipeline safety regulations for such lines. The issue is complex, and the current definition, adopted in 1970, lacks clarity. The definition could require more lines and facilities to become subject to the federal gas pipeline regulations, which could be costly for small operators and could affect upstream gas flows.

**Source of Constraint:** Regulatory

**Impact:** Cost



**Phase:** Production, transportation

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** Pipeline Safety Act of 1992 (1996 Amendments) (49 USC 601)

**Lead player:** OPS

**Issue discussion:** Since 1974, the DOT's OPS has been working to clarify the definition of a gas "gathering line" to distinguish it from a transmission line and a distribution line, as the various lines are subject to different jurisdictions and regulatory requirements, with gathering lines being subject to less stringent requirements. In 1970, a definition was adopted as part of the Natural Gas Pipeline Safety Act of 1968. In 1974 and 1991, the OPS proposed rules to revise and clarify this definition, since it was interpreted inconsistently. In the 1996 amendments to the Pipeline Safety Act of 1992, Congress directed the DOT to define the term gathering line. In March 1999, the DOT issued a request for public input on whether and how to modify the definition of a gas gathering line and the regulatory status of such lines. The DOT was to have issued a new proposal for the definition by December 2002, but as of this writing, the original 1970 definition remains in effect.

The number and nature of lines included in the definition will affect the number of facilities that will be subject to federal pipeline safety standards. These standards are being developed for interstate transmission lines and will require risk analysis, periodic inspections and reinspections, and corrective action where necessary. These regulations may be very costly for small lines in remote areas where there are few risks of human injury from pipeline incidents. Expanding the requirements to rural gathering lines will likely impact marginal wells, because the increased compliance costs will be passed on to marginal well operators through pipeline gathering costs. These increased costs could lead to the plugging and abandonment of a significant number of these wells. Meeting nationwide construction and operating specifications may also be difficult in some cases where gathering lines are used. For example, in comments to the RSPA on the 1991 proposed gathering line definition, one association explained that its gathering lines were constructed to a safe, but different, standard from that required for transmission lines. It referred to the fact that at the request of the FS, many of the gathering lines in Ohio are plastic and were laid above ground to minimize environmental impact on the forest areas.

One definition of a gathering line suggested to the OPS was developed by the National Association of Pipeline Safety Representatives (NAPSR). The API has estimated that the NAPSR definition would reclassify 197,000 mi of existing rural gathering lines as transmission pipelines and could cost the industry \$630 million in implementation costs and \$105 million annually for compliance. An alternative definition, suggested by a coalition of several pipeline organizations, including the API, the Gas Processors Association, the IPAA, and the Appalachian Producer Organizations, is based on the function performed by the pipeline

(Simpson 1999). The OPS is currently evaluating data and information for development of the gathering line definition.

The regulation could affect a significant portion of gas gathering lines and result in increased costs or delays for gas in these lines. The amount of gas that could be affected was not estimated.

### **3.3.13 Regional Haze Rule**

**Summary:** In July 1999, the EPA promulgated final regional haze regulations for protecting visibility in national parks and Wilderness Areas. These rules require states to establish goals for improving visibility in these areas and to develop long-term strategies for reducing emissions of air pollutants that cause visibility impairment (e.g., SO<sub>2</sub>, NO<sub>x</sub>, and particulates). The goal is to reduce visibility impairment in these areas to natural levels by 2065.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CAA (Sections 169A and 169B 42 USC 7491 and 7492); 64 FR 35713, July 1, 1999

**Lead players:** States, EPA

**Issue discussion:** The CAA enacted goals for visibility in many areas, and the 1977 CAA Amendments established the following national goal for visibility: to prevent any future and remedy any existing impairment of visibility that results from man-made pollution in mandatory Class I federal areas. (Class I areas include 156 specific national parks, Wilderness Areas, national memorial parks, and international parks.) The amendments also required that the EPA issue regulations to assure “reasonable progress” toward meeting the national goal. According to the EPA’s July 1999 regional haze rule, states must develop new State Implementation Plans (SIPs) to reduce emissions contributing to regional haze, to improve visibility during significant haze pollution episodes, and to protect against degradation even on relatively clean days. SIPs are to require either the installation and operation of best available retrofit technology (BART) for certain sources, or alternative emission reduction programs. States must submit SIPs by 2008, although exact deadlines vary (depending on attainment status for particulates and whether the state is participating in a multistate regional planning effort). Subsequent SIP revisions are required in 2018 and every 10 years thereafter. With each revision, the state is to set new progress goals and strategies (EPA 1999d).

The CAA of 1977 also required the EPA to establish a Visibility Transport Commission for areas affecting the visibility of the Grand Canyon National Park. In 1991, the EPA established the Grand Canyon Visibility Transport Commission (GCVTC), and in 1996, the GCVTC issued a report containing recommendations for protecting visibility at 16 Class I areas on the Colorado Plateau. In its 1999 rule, the EPA allowed the nine transport region states to adopt the national rules promulgated by the EPA or those based on the work of the GCVTC, as well as additional requirements outlined in the rule. These requirements include quantitative emission reduction milestones for SO<sub>2</sub> (EPA 1999a). However, concerns exist regarding the models being used to set these milestones. Similar issues may exist for other regional and state planning bodies. As a result, there are significant concerns about how the states will actually implement the EPA rules, and natural gas operations are likely to be among the sources to which these new requirements will apply.

In general, the national regulations focus on BART, or retrofit technologies, while the GCVTC approach focuses on market trading. States must decide by 2003 which approach they will take. It is unclear at this point which approach would have a greater impact, but both are expected to significantly affect natural gas operations.

The principal man-made sources likely to be subject to emissions reductions are large manufacturing facilities, electric utilities, and mobile sources. However, for western states, where such sources are relatively few, other sources such as natural gas and CBM operations are likely to be targeted. Haze-forming pollutants can travel large distances, and states with no Class I areas are required to consider the effects of their emissions on Class I areas in other states. However, because the prevailing wind direction is from the West, it is not likely that emission reductions in the East would affect visibility impairment in the West, where natural gas production is projected to increase, further increasing the likelihood that emissions from natural gas operations will be targeted for emissions reductions (IOGCC 2001b).

Also, although the primary target is SO<sub>2</sub>, if the milestones cannot be reached by reducing SO<sub>2</sub> emissions alone, states must look to other haze-forming pollutants such as NO<sub>x</sub> and PM. NO<sub>x</sub> in particular is emitted in large quantities from compressor stations and gas processing plants.

In February 2002, industry plaintiffs sued the EPA in the U.S. Court of Appeals for the District of Columbia, arguing that the EPA overreached its authority in issuing the haze regulations. On May 24, 2002, the Court found that the rule's BART provisions were inconsistent with the CAA. It said that the CAA requires states to consider the degree to which visibility will be improved when deciding whether a particular source should install BART controls, but that the rule does not allow states to consider visibility in forcing BART controls. As a result, the court is requiring that the EPA redraft the BART provisions, which used a "group approach" that would have required all sources in a geographical area to have controls rather than allowing states to determine BART requirements on an individual source basis. Nonetheless, the court affirmed the overall regional haze program. Because BART requirements pertain mostly to larger sources built before 1977, the remand is not likely to have a significant impact on natural gas operations. Indeed, if these sources are not required to implement BART,

greater emissions reductions may have to come from other sources, such as natural gas (Doman 2002).

In February 2002, the EPA released a congressionally mandated report on visibility improvements in Class I areas (required every 5 years) that found little progress in visibility improvement. Environmental groups are using this information to urge strong aggressive action to control regional haze (EPA 2001c).

On May 22, 2003, the EPA issued a final rule implementing the WRAP, which applies to nine western states and is intended to reduce SO<sub>2</sub> emissions by more than 40% from 1990 levels. The WRAP plan, or WRAP annex, uses a “nonregulatory” approach, in which participating states would implement measures to reduce SO<sub>2</sub> in order to meet annual milestones (EPA 2003c).

This issue could have significant cost impacts on natural gas operations in the West, possibly limiting production in some areas. Depending on how the states write their implementation plans, potentially large amounts of gas in the West could be at risk.

### **3.3.14 Spill Prevention Control and Countermeasures**

**Summary:** On July 17, 2002, the EPA issued a final rule that amended the spill prevention, control, and countermeasures requirements, originally promulgated in 1974 under the EPA’s Oil Pollution Prevention regulations at 40 CFR Part 112. While the expanded scope and relatively short compliance deadlines of the new rule will primarily affect oil production and operations, natural gas drilling and production operations will also be affected, potentially causing some small operators to leave the business and limiting the ability to rework some existing properties to extract additional gas resources.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** Production

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CWA (Section 311, 33 USC 1321); 40 CFR 112; 67 FR 47042, July 17, 2002; 69 FR 48794, August 11, 2004

**Lead player:** EPA

**Issue discussion:** The July 17, 2002, rule, which applies to onshore and offshore gas E&P facilities, required amended Spill Prevention Control and Countermeasures (SPCC) plans to be

in place by February 17, 2003, and new plans to be in place by August 17, 2003 (EPA 2002d). An SPCC plan is required if a facility could cause a release of oil that would reach navigable waters. According to the IPAA, the terms “navigable waters” and “facility” are confusing to many E&P operators (IPAA 2003).

Some of the reported uncertainty stems from a series of judicial decisions relative to the definitional reach of the term “navigable waters.” In 2001, the U.S. Supreme Court, in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), overturned the COE’s assertion of federal jurisdiction over certain isolated wetlands based on the presence of migratory birds. The Court held that the provision of the CWA that requires those who discharge fill material into navigable waters to obtain a permit from the COE does not extend to isolated, abandoned sand and gravel pits with seasonal ponds that provide migratory bird habitats. Chief Justice Rehnquist explained that “[t]he term ‘navigable’ has...the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.” Subsequent decisions at the circuit court level suggest conflicting approaches. The Court of Appeals for the Fourth Circuit and the Court of Appeals for the Sixth Circuit affirmed CWA jurisdiction over drainage ditches, intermittent tributaries, and isolated wetlands that have any type of surface water connection to regulated “navigable waters,” no matter how attenuated *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003); *United States v. Rapanos*, 339, F.3d 447 (6th Cir. 2003); *Newdunn Associates v. Army Corps of Engineers*, 344 F.3d 407 (4th Cir. 2003). The Court of Appeals for the Fifth Circuit, on the other hand, in cases involving the definition of navigable waters under the Oil Pollution Act, ruled that the SWANCC decision reigned in the historic expansion of the COE’s jurisdiction *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *In re Needham*, 354 F.3d 340 (5th Cir. 2003). Because the U.S. Supreme Court has declined petitions to review the decisions by the Fourth and Sixth Circuits, some practitioners suggest that the COE will likely continue asserting jurisdiction over wetlands and other nonnavigable water bodies that are geographically remote from navigable surface waters but that have some hydrologic connection to those waters through man-made ditches, culverts, and various types of seasonal or intermittent drainages.

On January 15, 2003, the EPA and the COE issued a joint memorandum to provide clarifying guidance regarding the SWANCC decision and to address several of the legal issues that had surfaced since SWANCC (COE and EPA 2003). However, consistent application of that guidance has been questioned (Fuller 2003).

Also on January 15, the EPA and the COE issued an advance notice of proposed rulemaking on the regulatory definition of “Waters of the United States” (COE and EPA 2003). The intent of these agencies was to develop proposed regulations that would “further the public interest by clarifying what waters are subject to CWA jurisdiction and affording full protection to these waters through an appropriate focus of federal and state resources consistent with the CWA.” After receiving more than 125,000 comments on the advance notice, the EPA and the COE announced on December 16, 2003, that they would not pursue the rulemaking.

The uncertainty over the regulatory definition of navigable waters, questions about the guidance, and the conflicting court decisions can affect SPCC plans and any other regulations

that are triggered by actions that affect navigable waters. These include NWP's under the dredge and fill program, storm water construction permits under the NPDES program, and TMDL requirements under water quality standards and implementation plans.

Interpretation of the term "facility" is also a concern with the SPCC rule. According to the IPAA, the EPA estimates that roughly 144,000 oil and gas upstream operations would require SPCC plans. Most producers, however, believe that the SPCC definition of a facility would capture most of the estimated 870,000 producing oil and gas wells in the United States. The IPAA estimates that about 635,000 of these producing wells are stripper wells, which are highly vulnerable to the impact of excessive regulatory costs. It suggests that many of these wells could be shut down if the new SPCC plan requirements are too costly.

Other issues of potential concern to gas E&P operations include the following:

*Consideration of costs.* Although past interpretations of the SPCC plan requirement allowed operators to consider costs in determining the practicability of meeting the new requirements, the new regulation states that it is not appropriate to allow an owner or operator to consider costs in determining whether the secondary containment requirements can be satisfied. At \$25.00 per barrel, the average marginal well, which produces 15 barrels per day or less, grosses about \$20,000 annually and incurs operating costs of about \$17,400. With estimated SPCC plan costs ranging from \$5,000 to \$20,000, the economic viability of marginal wells becomes of concern (IPAA 2003).

*Produced water.* According to the new rule, if produced water exhibits an oil sheen, it will be treated as oil and, therefore, included in the threshold to determine if an SPCC plan is required. An SPCC plan is required if more than 1,320 gallons of oil could reasonably be expected to be discharged from the facility to navigable waters. Independent gas operators suggest that even if compliance costs were as low as \$3,000 per plan, this requirement could put some small operators out of business (Holliday 2003).

*Newly purchased properties.* The rule contains no provision that would allow an operator to buy an existing property and prepare a plan if one is not already in place. An existing property cannot be sold without an SPCC plan after a certain date. As a result, the ability to sell (and buy) oil- and gas-producing properties without existing SPCC plans will diminish, thereby limiting the amount of land acquired by many small independent operators for the purposes of extracting additional gas. The amount of gas for which access is denied by this provision is not known. However, it is estimated that thousands of properties are traded among small independent producers who have developed techniques to increase production at existing properties. Although the new rule may not significantly impact the number of new wells drilled (because the incremental cost of preparing a plan will not be great relative to the overall exploration and drilling costs), in cases where additional wells may be drilled to extract marginal gas from existing fields, the additional cost of preparing an SPCC plan may be enough to preclude the drilling of such wells.

On August 11, 2004, the EPA published a notice in the *Federal Register* extending the compliance date for amended SPCC plans to be in place to February 17, 2006, and stating that new plans be in place by August 18, 2006 (EPA 2004f).

### **3.3.15 Standards for Decommissioning or Closing Wells**

**Summary:** As gas production from a producing well diminishes or becomes uneconomical, the well must be decommissioned or closed according to the regulations set forth by the appropriate state environmental regulatory agency or oil and gas commission. Typically, these regulations specify contaminant-specific concentrations that cannot be exceeded after closure is complete. These concentrations can vary from state to state, and they are usually set on the basis of technology, background concentration, or other nonrisk-based measures. Thus, they can be overly protective and costly to implement, without providing significant gains in environmental or human-health protection.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** E&P

**Category:** Operations

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** State regulations

**Lead player:** States

**Issue discussion:** An estimated 400,000 to 600,000 E&P sites exist in the United States, many of which have been operating for 50 to 100 years. During their operations, hydrocarbons, inorganic salts, and drilling fluid constituents may have entered the surface and subsurface soils and groundwater at or near the sites. States generally set contaminant concentration limits for the different media. However, the lack of data on the risks of these contaminants often means that cleanup levels are set on the basis of available technologies, background concentrations, or other measures. As a result, they can often be set lower (more restrictive and costly to meet) than necessary to protect human health and the environment. For example, some states, such as Colorado, Louisiana, and Michigan, set standards for total petroleum hydrocarbons (TPH) in soil at 10,000 mg/kg, while other states, such as Wyoming, have levels as low as 250 mg/kg. Innovative methodologies for determining the risks associated with TPH indicate that TPH action levels of 1,000 mg/kg or less are overly conservative and should be reevaluated (Nakles et al. 1998). Similar studies may indicate similar results for other contaminants. Such findings suggest that the overly conservative, non-risk-based levels should be revised to consider land use and other risk factors to prevent unnecessarily costly remediation efforts that provide no significant environmental benefit. Risk-based concentrations will consider such factors as size

and location of operations (upstream operations can be small scale and remote, thereby posing lower risks than downstream operations that are closer to human population centers) and characteristics of the condensates (lighter hydrocarbons are present upstream, with the heavier hydrocarbons more likely to be found downstream). By using state-of-the-art approaches for risk assessment of contaminants at E&P closure sites, decommissioning standards can be developed that will provide for well closure in a cost-effective manner that results in acceptable risks to human health and the environment. Non-science-based closure requirements alone will likely have little impact on natural gas exploration, production, or transportation. However, for operators at the margin, additional costs because of such requirements, especially if combined with other requirements, could cause certain operators to cease production, thereby reducing the amount of gas produced, or ultimately increasing the price of that gas.

Decommissioning standards indirectly affect industry if such requirements are too strict, some smaller operations may drop out.

### **3.3.16 Storm Water Construction Permits**

**Summary:** The EPA has proposed extending the deadline for obtaining storm water permits under the CWA by 2 years, from March 10, 2003, to March 10, 2005, to determine the appropriate NPDES requirements, if any, for constructing oil and gas E&P facilities of 1 to 5 acres. If all oil and gas E&P facilities of 1 to 5 acres were required to obtain such permits, as originally proposed in 1999, the costs and delays to oil and gas production could reduce the number of wells drilled and the amount of gas produced.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** E&P

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** 5.75 per year

**Estimate type:** Economically recoverable

**Estimate date:** 09/2002      **Estimate reference:** Texas Alliance of Energy Producers (2003)

**Estimate comments:** The EPA states that there are 30,000 oil and gas well starts per year, but does not distinguish between gas and oil. At 15,773,600 MCF per day, the annual delayed production would be  $5.75 \times 10^9$  MCF, or 5.75 TCF.

**Statutory/regulatory citation:** CWA Section 402 (p) (33 USC 1342(p)); 40 CFR 122.26

**Lead player:** EPA



**Issue discussion:** Section 402(p) of the CWA directed the EPA to develop a phased approach for regulating storm water discharges under the NPDES program. In November 1990, the EPA published a final regulation for Phase I of this program, which established permit application requirements for “storm water discharges associated with industrial activity.” Under 40 CFR 122.26(b)(14)(x), construction activities that disturb 5 acres of land and greater are considered “industrial activity.” On December 8, 1999, the EPA published final regulations (EPA 1999b) for Phase II of the storm water program, which covers sites disturbing between 1 acre and 5 acres (40 CFR 122.26(b)(15)(i)). The rule requires that discharges from these sources have permits by March 10, 2003 (40 CFR 122.26(e)(8)).

NPDES permitting authorities are to use existing Phase I permits to guide their development of Phase II permits. As such, expected requirements from applicants would include a Notice of Intent, a storm water pollution prevention plan with appropriate best management practices to minimize discharge of pollutants from the site, and a Notice of Termination. Because gas (and oil) E&P facilities are generally less than 5 acres, they have not been required to obtain storm water construction permits in the past; the Phase II rules would require such facilities to obtain the permits. NPDES permitting authorities can waive the requirements for operators of small construction activities if the site has (EPA-defined) low predicted rainfall potential or if the EPA determines that pollution load allocations are not needed to protect water quality. The EPA acknowledges, however, that many sites would be unable to take advantage of these waivers.

The Texas Independent Producers and Royalty Owners Association (TIPRO) estimates that an average NPDES permit would require at least 6 months to obtain and would include an ESA determination, an NHPA determination, and a site-specific storm water pollution prevention plan (TIPRO 2002). The Texas Alliance of Energy Producers states that most independent producers measure drilling plans in days rather than months, and that many smaller companies will find the new procedures so frustrating and time-consuming that they will not drill many of the wells they had planned (Texas Alliance of Energy Producers 2003). The Alliance also estimates that in the first year of implementation, U.S. natural gas production would decline by 15,773,600 MCF per day, and the number of gas (and oil) wells drilled would decrease to 25,034 from 38,527 in 2001, or by more than a third (Mills 2002). It further states that virtually all drilling sites are larger than 1 acre but smaller than 5 acres, and, therefore, all future drilling locations would be subject to the storm water regulations. The Alliance also estimated that the rules would result in a 70% reduction in drilling for independents and 40% for major companies. The dramatic decline for independents is because “Independents have had their staffs cut to the bone,” do not have specialists that know the “ins and outs” of acquiring a federal permit, and will have to hire consultants to prepare the permit applications, which will increase costs and significantly delay the time before drilling can occur (Texas Alliance of Energy Producers 2003).

In addition to the immediate issues associated with obtaining storm water permits, there is a debate over whether construction activities at oil and gas E&P sites are covered by the exemption in CWA (33 *United States Code Annotated* [USCA] Section 1342(1)(2)), which states that no permit shall be required “for discharges of storm water runoff from mining operations or oil and gas exploration, production, processing, or treatment operations or transmission facilities, composed entirely of flows which are from conveyances . . . used for collecting and conveying precipitation runoff. . . .” Industry maintains that there is no definition or language in the act that

suggests construction activities should be considered separate from the terms exploration and/or production or in the regulations to support the EPA's position that such terms should be narrowly construed (Briggs 2002).

On March 10, 2003, the EPA extended the storm water permit deadline for oil and gas construction activity that disturbs 1 to 5 acres from March 10, 2003, to March 10, 2005. The EPA granted this extension at least in part because of information submitted by DOE and industry that said that each year about 30,000 oil and gas sites could be subject to the regulations (Bruninga 2003). Acknowledging the differences between the nature of construction at oil and gas sites and at residential and commercial property development sites, the EPA plans to determine whether these differences are significant enough to warrant different regulations for oil and gas sites. During the extension period, the EPA plans to analyze and better evaluate the impact of the permit requirements on the oil and gas industry. It will identify appropriate best management practices for preventing contamination of storm water runoff resulting from construction associated with oil and gas exploration, production, processing, or treatment operations or transmission facilities, and assess the applicability of the exemption in the CWA to construction associated with these activities (EPA 2003d). The results of the analysis will help determine the extent to which oil and gas facilities will have to comply with the potentially costly and time-consuming requirements for obtaining storm water permits.

### **3.3.17 TMDL Regulations Targeting Oil and Gas Wells**

**Summary:** Gas (and oil) wells may be targeted for TMDL limits because large point sources are already regulated, and technical and political factors argue against imposing limits on large nonpoint sources such as agricultural lands. Also, proposed changes to the TMDL rule could limit the use of nationwide construction permits under Section 404 of the CWA.

**Source of Constraint:** Regulatory

**Impact:** Cost

**Phase:** E&P

**Category:** Permitting

**Estimated affected natural gas resources (TCF):** Not estimated.

**Statutory/regulatory citation:** CWA Section 303(d) (33 USC 1313(d)); 40 CFR Part 9; 65 FR 43587 (July 13, 2000)

**Lead player:** EPA

**Issue discussion:** Although the EPA's point-source control program for water pollution has been successful, nonpoint source control has been elusive. The EPA's TMDL program is an effort to address nonpoint-source pollution of water bodies. Section 303(d) of the CWA requires states,

territories, and authorized tribes to identify (list) waters that are not meeting water quality standards and to establish pollutant budgets (TMDLs) to restore those waters. A TMDL is the sum of the allowable loads of a single pollutant from all contributing point and nonpoint sources to a given stream segment. The calculation must include a margin of safety to ensure that the water body can be used for its designated purposes. The calculation must also account for seasonal variation in water quality. If a state, territory, or authorized tribal submission is inadequate, the EPA must identify the waters and establish the TMDL. Once a TMDL has been established, the state, territory, or tribe must allocate the TMDL to individual sources.

The gas (and oil) industry may be vulnerable to TMDL allocations. The reason is that for a typical stream, large point sources are likely to be sufficiently controlled, but agricultural and forest nonpoint source control will likely be deferred until technically and politically acceptable control strategies are developed. Thus, small, nonpoint sources, for example, gas (and oil) wells, could become targets, because the construction work they require can generate runoff, even when managed properly (Stewart 2001).

Potential changes to the existing rule could also impact natural gas operations. In August 1999, the EPA proposed changes to the TMDL, and on July 13, 2000, the EPA promulgated a final TMDL rule after considering more than 34,000 comments (EPA 2000). Several parties have since challenged the rule in court. On July 16, 2001, the EPA asked the District of Columbia Circuit Court to hold action for 18 months to allow the agency to review and revise the rule (Woods 2001). On October 12, 2001, the District Court agreed. On October 18, the EPA announced that the effective date for the revisions to the TMDL program published on July 13, 2000, would be April 30, 2003 (EPA 2001e). The effective date had been October 31, 2001. The delay will allow the EPA to incorporate recommendations made by the National Research Council into the TMDLs. In addition, the rule revises the date on which the next list of impaired waters is to be submitted from April 1, 2002, to October 1, 2002. The states and the EPA continue to develop TMDLs under the original rules issued in 1992. As of November 2002, more than 22,000 impaired waters had been reported, and 6,644 TMDLs had been approved nationwide.

According to the American Gas Association (AGA 2000), changes to the existing (1992) TMDL rules proposed in 2000 would have, among other things, expanded the scope of impaired waters by including waters impaired for “unknown causes” (EPA 1999c). Nearly 2000 state CWA 303(d) lists include impaired waters for which the parameter of concern is “unknown.” Many listings with unknown causes may be based on limited observations, faulty assumptions, or outdated information. Expanding the lists could result in increased costs and schedule delays for construction permits for gas utility and pipeline crossings required under Section 404 of the CWA. This is because utilities typically use NWP to obtain streamlined approvals for gas pipeline installation and maintenance projects. The COE proposed changes to the rules for NWPs (COE 1999), which state that under proposed General Condition 26, a project affecting a listed “impaired water” will not qualify for an NWP without an explanation of how the project (excluding mitigation) would not further impair the water body. This condition would apply to NWP 12, which provides streamlined permitting for utility line projects. The COE acknowledges that given the number of waters already listed as impaired, the new condition will “substantially reduce” the availability of NWP 12. Expanding the list to include waters impaired for unknown

causes will further reduce the availability of NWP 12, because it would be impossible to explain how a project may or may not contribute to impairment due to unknown causes.

One industry source reported that although his company had met all the requirements for an NWP (which is less costly and time-consuming than an individual permit), the COE denied the NWP, stating that an individual permit was needed to address “the new antidegradation water quality requirements” (SWS Forum 2001).



## 4 CONCLUSIONS

Numerous environmental policy and regulatory constraints currently affect natural gas E&P and transportation. Additional constraints may accrue as more environmental regulations are written. The constraints take several forms, including individual laws and regulations that directly affect natural gas access or production. They also include presidential policies and actions taken by implementing agencies. As environmental issues surface, additional regulations are written, and many may potentially constrain domestic natural gas production. The amounts of gas affected by denying or limiting access, delaying permits or production, and increasing costs can be significant. Where constraints overlap, small operators may cease operations, leading to possible further delays and reductions in marginal gas production.

### 4.1 LEGISLATIVE AND REGULATORY CONSTRAINTS

Specific laws, such as the CZMA, whose consistency provisions can allow states to effectively prohibit development already approved by federal entities, and the ESA, whose court-interpreted definitions extend protected areas, can limit development on both private and federal lands. The Antiquities Act allows the President to designate national monuments on which no exploration or production may occur, even if the lands they overlie contain known natural gas resources. EFH regulations, whose requirements can duplicate those of other federal regulations, can delay leasing or permitting decisions, and the Roadless Rule, which prohibits road construction in roughly one-third (58.5 million acres) of the NFS, denies access to an estimated 11 TCF in the Rocky Mountain region.

### 4.2 AGENCY ACTIONS

Once Congress passes a law and the responsible agencies have written the implementing regulations, local enforcement agencies can, through their own policies and procedures, delay or prohibit gas production. Federal land management agencies, such as the BLM and the FS, control development on their respective lands through land use planning documents. If these documents do not specifically provide for oil and gas drilling, the agencies can prohibit such drilling until the plans are updated, adding months or years to the time before extraction from a leased site can begin. Similarly, when granting drilling permits, the land management agencies can impose stipulations, which, when added together at a given site, can narrow or effectively close the window of opportunity to drill. Compounding these problems are requirements to gain approval from other federal, state, and local agencies before a permit can be issued. As the number of permit applications grows, the ability to coordinate among the various agencies in a timely fashion diminishes, further increasing delays. This concern is particularly important for interstate natural gas pipelines, which are critical for transporting gas to users. FERC grants certifications to build new pipelines, but only after it has received approval from other federal, state, and local agencies that have environmental jurisdiction.

### **4.3 LEGAL CONSTRAINTS**

The legal system can compound environmental regulatory constraints. When issues cannot be resolved among participating agencies, or when special-interest groups challenge a gas-related activity, legal action can delay projects for months or years. For example, the tendency for organizations to sue over EISs has led agencies to prepare “appeal-proof documentation,” which further delays the approval process.

### **4.4 CONGRESSIONAL AND PRESIDENTIAL ACTIONS**

Typically, laws are developed after congressional debate, and regulations require a prescribed notice and comment period. However, at times, Congress and the President can impose constraints that may not follow the formal procedures designed to allow for the expressing of concerns by all interested parties. These initiatives can significantly decrease access to natural gas. For example, Congress has enacted and presidents have extended offshore drilling moratoria. These actions not only deny the extraction of natural gas, but also deny federal agencies and others the ability to determine the extent of the resources in waters off the coasts of most of the United States. Recently enacted congressional bans on drilling in the Great Lakes and lack of congressional action to determine the status of WSAs precludes the extraction and production of gas in these areas.

### **4.5 NEW ENVIRONMENTAL REGULATORY CONSTRAINTS**

A number of environmental rules are currently under development, and the potential impacts of these rules require active monitoring. For example, the EPA’s “nonroad diesel engine” rule could increase costs for new engines used in natural gas E&P to ensure that they meet the required emissions reductions. The EPA is also writing regional haze rules designed to protect visibility in national parks and Wilderness Areas, which could apply to drilling and production equipment and affect the ability to produce natural gas in a timely and cost-effective manner. The OPS within the DOT is writing rules to ensure “integrity management,” or structural safety of gas transmission lines. The implementation of these rules could disrupt supplies as companies are forced to meet certain inspection deadlines using specific technologies that may not be available when needed. The EPA may require oil and gas E&P facilities covering 1 to 5 acres to obtain storm water permits under the CWA.

State and federal agencies are determining whether and how to address emerging environmental issues, many of which could affect or limit cost-effective production of natural gas. For example, the U.S. Commission on Ocean Policy, established under the Oceans Act of 2000, has developed recommendations that could include new policies and authorities to address the development of ocean resources, potentially including natural gas. Other issues are closer to regulation. For example, some states have written rules to address potential impacts of discharging produced water from CBM operations to the environment. Others may follow, and such actions could severely restrict development of this source of gas, which many believe to be a significant future contributor to the nation’s energy supply. A related issue is the use of

hydraulic fracturing to increase the flow of gas, particularly CBM gas. This practice has been the subject of regulatory and legal action, and further regulatory activity can be expected. Other environmental regulations with potentially significant impacts on natural gas development include regulations for minimizing adverse environmental impacts from cooling-water intake structures at offshore oil and gas platforms; mercury regulations that could affect the use and discharge of mercury-containing drilling muds; and regulations to reduce noise generated by engines, drills, and compressors used in natural gas E&P and transportation.

Some of these constraints can have significant impacts on natural gas production on an individual basis. Others, taken alone, may not have as great an impact, but when combined with other regulations or policies, could be so costly or produce so many delays that many small, independent operators may leave the business. Whether the gas produced by these independents would then be extracted by other, larger firms, at an increased cost to them, or whether the gas would not be produced until prices increased sufficiently to warrant reentry into the market is not known. However, mitigation approaches should be developed to address not only the major impediments, such as access restrictions, but also to address the other regulations and implementing practices so that the ability to extract and distribute the gas to users in a cost-effective and environmentally protective fashion can be maintained, if not increased.





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Take a look at the Earthjustice attorney's quote. Highlighted below.

## METHANE

### What Trump's order means for CRA, litigation on BLM rule

[Pamela King](#) and [Ellen M. Gilmer](#), E&E News reporters

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Efforts to repeal the Bureau of Land Management's methane rule under the **Congressional Review Act** are not dead following President Trump's "energy independence" executive order, the American Council for Capital Formation said yesterday.

As the CRA resolution stalled in the Senate, ACCF this month launched a campaign to strike from the books BLM's regulation curbing natural gas venting, flaring and leakage from production sites on public lands. If the upper chamber were to vote in support of the CRA resolution, the Methane and Waste Prevention Rule would quickly disappear, along with any possibility that BLM would reintroduce a substantially similar regulation.

Trump's direction to the Interior Department to suspend, revise or rescind four rules, including the methane rule, is a much lengthier process, ACCF said.

"Unraveling the methane rule at the agency level would require months of staff work and would undoubtedly face vigorous legal challenges from environmental groups, which could delay its repeal for up to two years," ACCF wrote in a statement yesterday. "On the other hand, Senate passage of a disapproval resolution under the CRA — something the House has already accomplished — would be quick and efficient, saving the agency both time and resources."

In a legal sense, rescinding a rule under the CRA is a far cleaner process, said Mark Barron, a partner at the law firm BakerHostetler.

"If they get 51 votes to repeal the regulation, then the regulation goes away, and that's the end of it," he said.

The order did little to move the needle, particularly with respect to the methane rule's future, Barron said.

"It was already widely known that the Trump Administration did not support the venting and flaring rule and I think most folks anticipated that, if the CRA did not pass, BLM would move to rescind the rule through the regulatory process," he wrote in an email to E&E News. "The debate since the election has never been whether the rule would be discarded, but whether it would be discarded quickly and easily in Congress or through the time consuming and expensive process of administrative rulemaking (and subsequent litigation). The Executive Order doesn't do anything to change that analysis."

Hogan Lovells attorney Hilary Tompkins, the former solicitor for President Obama's Interior, read the executive order as a change in strategy.



"It does provide an alternative approach, and I think they were reading the tea leaves in Congress and the Senate on that CRA, and they've kicked it back to the executive branch to find an alternative approach," she said.

A revised rule could keep the elements of the regulation that strengthen BLM's royalty collection process, said Ryan Alexander, president of Taxpayers for Common Sense.

"That's much more productive than CRA," she said.

Environmental lawyers saw a silver lining in the White House's direction. Groups that opposed CRA repeal have asked BLM to tweak the rule, rather than allowing Congress to eliminate it.

"The fact that this executive order shows that President Trump himself wants the Bureau of Land Management to use a scalpel to change the methane waste prevention rule is yet another sign that the oil and gas lobbyists who are asking Congress to use a sledgehammer to get rid of the rule using the Congressional Review Act are just too extreme," said Joel Minor, an Earthjustice attorney representing environmental intervenors in litigation over the methane rule.

The regulation went through years of comment and technical review and is therefore deserving of a more thorough examination before it is killed, said Erik Schlenker-Goodrich, executive director of the Western Environmental Law Center.

"The current administration might not like it, but it does have the authority to go through a new rulemaking process," he said.

A window of opportunity to pass the CRA resolution through the Senate could open up after the chamber votes on Supreme Court justice nominee Neil Gorsuch, ACCF said.

The Senate has until the week of May 8 to nullify the rule with a simple majority vote, the group said.

## **In the courtroom**

This week's executive order creates a wave of uncertainty for litigation over the methane rule.

Industry groups and states challenged the regulation immediately after BLM finalized it last year. The U.S. District Court for the District of Wyoming declined their request to freeze the rule, and it took effect in January, gradually phasing in compliance requirements.

Environmental defenders of the rule are now monitoring the court docket to see if the Justice Department seeks to pause the case. DOJ lawyers have already asked courts to pause proceedings in litigation over U.S. EPA's Clean Power Plan and BLM's hydraulic fracturing rule, which were also targeted by the executive order. As in those cases, environmental lawyers have vowed to oppose any attempt to halt the methane litigation.

"We don't see any reason to put the litigation on hold until there is a firm and final decision revoking the rule from the Bureau of Land Management, and that will require notice-and-comment rulemaking, and that's a process that is likely to take far longer than resolving the litigation in court," Minor said.

Earthjustice and other environmental groups will argue that the issues in the litigation must be resolved to inform Interior's reconsideration of the rule, as challengers contend that the methane rule is essentially an air quality regulation that falls on EPA's and states' turf. Minor noted that

BLM "at least in theory needs to know what it has legal authority to do before it takes action."

Tompkins, the former Interior solicitor, said it's "a big question mark" whether the district court would agree with environmental groups and allow litigation to move forward in either the methane case or the fracking case.

"I think the court will want to know: Is this an issue that could likely be capable of repetition and recur?" she said. "Or are we truly mooted out all the issues in these cases? It's really going to depend on the vantage point of those judges."

Courts have previously allowed environmental intervenors to continue pressing litigation after the federal government has retreated in some cases, including litigation over the Clinton administration's "roadless rule" and an enforcement case against Duke Energy Corp. initiated by the Clinton administration just before George W. Bush took office.

Another wrinkle from Trump's executive order is its erasure of the Obama administration's metric for weighing the "social cost" of greenhouse gases. The social cost of methane was incorporated into the cost-benefit analysis for the methane rule and faced deep skepticism from the federal judge handling the case (*Energywire*, Jan. 17).

Minor said the new administration's rejection of the metric should not affect legal arguments surrounding the rule.

"The fact that the executive order effectively rescinds the use of the social cost of methane in the future doesn't retroactively change the use of the social cost of methane in the past," he said. "An agency's regulation has to stand based on the record and the decision that the agency made when it issued the rule, not post hoc developments that perhaps the agency changed its mind about something."

Legal briefs in the case are due in April and May.

And as Interior moves forward with a rulemaking process to reconsider the rule, supporters of increased regulation are also preparing for new opportunities to hold the agency accountable along the way and challenge a final decision if needed. Minor noted that any attempt to weaken the Obama administration's effort to prevent methane waste "could well be grounds for litigation over that choice."

"They are going to have to provide a robust rebuttal of all the vast administrative record that exists for [the methane and fracking rules]," Tompkins said. "There was extensive public comment, analysis and research, and if the new administration is going to rescind or significantly change those Interior regulations and policies, they're going to have to provide a counterpoint to why and address all those issues in the records that support the prior administration's actions."

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Senate Environment and Public Works Committee  
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**To:** Chambers, Micah[micah\_chambers@ios.doi.gov]  
**From:** Prandoni, Chris (Lee)  
**Sent:** 2017-03-30T13:34:04-04:00  
**Importance:** Normal  
**Subject:** Re: Event 3/29: Can President Trump Revoke or Reduce National Monument Designations?  
**Received:** 2017-03-30T13:34:15-04:00  
[Presidential Authority to Revoke or Reduce National Monument Designations.pdf](#)

Hey Micah,

Thanks for checking in! The event was awesome; standing room only. We had to turn people away. Very interesting discussion since we found a speaker to oppose Yoo and Gaziano.

Here's a link: [https://www.youtube.com/watch?v=Ic\\_voqhS2ho&feature=youtu.be](https://www.youtube.com/watch?v=Ic_voqhS2ho&feature=youtu.be).

I also attached the report if you find yourself with a few min to spare ha!

Chris

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**From:** "Chambers, Micah" <micah\_chambers@ios.doi.gov>  
**Date:** Thursday, March 30, 2017 at 12:14 PM  
**To:** Chris Prandoni <chris\_prandoni@lee.senate.gov>  
**Subject:** Re: FW: Event 3/29: Can President Trump Revoke or Reduce National Monument Designations?

Chris. Just wanted to see how this event went. We ended up having a secretarial order ceremony here yesterday and I couldn't leave, but am still interested in the results of this. Thanks

On Fri, Mar 24, 2017 at 11:36 AM, Prandoni, Chris (Lee) <Chris\_Prandoni@lee.senate.gov> wrote:

Hey Micah,

Here is info for the event. Thanks for your interest!

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**From:** Chris Prandoni <chris\_prandoni@lee.senate.gov>  
**Date:** Thursday, March 23, 2017 at 1:38 PM  
**To:** Chris Prandoni <chris\_prandoni@lee.senate.gov>  
**Subject:** Event 3/29: Can President Trump Revoke or Reduce National Monument Designations?

Friends,

Hope to see you all next week. It should be fun!

*Senator Mike Lee Cordially Invites You to Attend a Program on*

# **Presidential Authority to Revoke or Reduce National Monument Designations**

**Wednesday, March 29, 2017**

4:00 – 5:00 p.m.

Dirksen Senate Office Building, Room 366

Reception to follow sponsored by the Pacific Legal Foundation  
and American Enterprise Institute with Honorary Co-host Sen. Lee

*This is a widely attended event*

*Opening Remarks:*

**U.S. Senator Mike Lee (R-UT)**

**House Natural Resources Committee Chair Rob Bishop (R-UT)**

*Panel Discussion on the Release of their New AEI Paper:*

**John Yoo**

Emanuel S. Heller Professor, University of California Berkeley School of Law

Visiting Scholar, American Enterprise Institute

**Todd Gaziano**

Senior Fellow in Constitutional Law & Executive Director of Pacific Legal Foundation's DC Center

President Obama set the record for the number of national monument proclamations he issued and the millions of acres of public lands he designated for such monuments. A few weeks before he left office, President Obama used the Antiquities Act of 1906 again to proclaim 1.35 million acres in Utah and 300,000 acres in Nevada to be new national monuments. White House officials claimed that both actions were “permanent” because there was no express authority to reverse them. In a new AEI paper to be released on March 29, Yoo and Gaziano argue that such claims of permanence get the constitutional principles and legal presumptions exactly backwards. The text, history, and executive practice under the Antiquities Act, as well as foundational constitutional principles, provides for presidential discretion in the creation and revocation of national monuments. Moreover, his discretion to significantly change monument boundaries, including substantial reductions in a monument’s size, is strongly supported by the text of the Act, its legislative history and purposes, and unbroken presidential practice going back to the early years of the act’s history. In support of these conclusions, the new AEI paper makes news by questioning a 1938 Attorney General opinion with new insights into an 1862 AG opinion and by revealing new historical research not covered in prior scholarship on the Antiquities Act. Please join us to ask your questions.

**RSVP to Collin Callahan at [CBC@pacificlegal.org](mailto:CBC@pacificlegal.org) or call (703) 647-2112.**

Following the event, please join us for a reception to continue the conversation.

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**Micah Chambers**  
Special Assistant / Acting Director  
Office of Congressional & Legislative Affairs  
Office of the Secretary of the Interior



# Presidential Authority to Revoke or Reduce National Monument Designations

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**JOHN YOO AND TODD GAZIANO**

MARCH 2017

A M E R I C A N   E N T E R P R I S E   I N S T I T U T E

# Executive Summary

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The Antiquities Act of 1906 grants the president the power to designate national monuments in order to protect archeological sites, historic and prehistoric structures, and historic landmarks, such as battlegrounds. We are confident that, pursuant to this power to designate, a president has the corresponding power to revoke prior national monument designations, although there is no controlling judicial authority on this question. Based on the text of the act, historical practice, and constitutional principles, we have even more confidence that he can reduce the size of prior designations that cover vast areas of land and ocean habitat, although his power of reduction may in some instances be related to his implicit power of revocation.

An attorney general opinion in 1938 concluded that the statutory power granted to the president to create national monuments does not include the power to revoke prior designations. The opinion has been cited a few times in government documents, including by the solicitor of the Interior Department in 1947 (although for a different proposition) and in legal commentary, but the courts have never relied on it. We think this opinion is poorly reasoned; misconstrued a prior opinion, which came to the opposite result; and is inconsistent with constitutional, statutory, and case law governing the president's exercise of analogous grants of power. Based on a more careful legal analysis, we believe that a general discretionary revocation power exists.

Apart from a general discretionary power to revoke monuments that were lawfully designated, we think the president has the constitutional power to declare

invalid prior monuments if they were illegal from their inception. In the first instance, there is no reason why a president should give effect to an illegal act of his predecessor pending a judicial ruling. Beyond this, we think the president may also have a limited power to revoke individual monument designations based on earlier factual error or changed circumstances, even if he does not possess a general discretionary revocation power.

In addition to the above powers, almost all commentators concede that some boundary adjustments can be made to monument designations, and many have been made over the years. In 2005, the Supreme Court of the United States implicitly recognized that such adjustments can be made. The only serious question is over their scope. No court has ruled on this question. Some commenters claim this is because no president has attempted to significantly reduce the size of an existing monument, but that is simply inaccurate. In the act's early years alone, some monuments were reduced by half or more.

Regardless of past practice, arguments that limit the president's authority to significantly reduce prior designations are largely conclusory—and based on the erroneous premise that the president lacks authority to revoke monuments—or driven by a selective reading of the act's purpose rather than its text. We believe a president's discretion to change monument boundaries is without limit, but even if that is not so, his power to significantly change monument boundaries is at its height if the original designation was unreasonably large under the facts as they existed then or based on changed circumstances.

# Presidential Authority to Revoke or Reduce National Monument Designations

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BY JOHN YOO AND TODD GAZIANO

As he left the Oval Office, President Barack Obama tried to exempt his environmental policies from the effects of the November 2016 elections. Five days before Christmas, the White House announced the withdrawal of millions of acres of Atlantic and Arctic territory from petroleum development. Obama continued his midnight orders by proclaiming 1.35 million acres in Utah and 300,000 acres in Nevada to be new national monuments. White House officials claimed that both types of actions were “permanent” because there was no express authority to reverse them. But that gets the constitutional principles and legal presumptions exactly backward. All the ex-president will prove is the fleeting nature of executive power.

These actions, like many others taken by the Obama administration, will remain vulnerable to reversal by President Donald Trump. In our constitutional system, no policy can long endure without the cooperation of both the executive and legislative branches. Under Article I of the Constitution, only Congress can enact domestic statutes with any degree of permanence. And because of the Constitution’s separation of powers, no policy will survive for long without securing and retaining a consensus well beyond a simple majority. Our nation’s most enduring policies—antitrust, Social Security, and civil rights—emerged as the product of compromise and deliberation between the political parties.

President Obama’s refusal to compromise with his political opponents will guarantee that his achievements will have all the lasting significance of Shelley’s King Ozymandias.<sup>1</sup> The president’s only substantial

legislative victories, Obamacare and Dodd-Frank, never gained bipartisan input or broad support. Trump executive appointees can begin unraveling both laws with executive actions, with legislation to significantly alter them to follow. President Obama’s refusal to yield an inch to Republicans intensified their opposition over many years and created a powerful electoral consensus to reverse these alleged reforms. The coming fight over public lands shows, in microcosm, the constitutional dynamics that render Obama’s legacy so hollow.

## Background on Antiquities Act National Monument Designations

The original motive for the Antiquities Act of 1906 was to protect ancient and prehistoric American Indian archeological sites on federal lands in the southwest from looting. The Antiquities Act was passed during the same month (June 1906) as the act creating Mesa Verde National Park, and the problems that arose in protecting the Mesa Verde ruins inform the Antiquities Act’s central focus. In a report to the secretary of the interior, Smithsonian Institution archeologist Jesse Walter Fewkes described vandalism at Mesa Verde’s Cliff Palace:

Parties of “curio seekers” camped on the ruin for several winters, and it is reported that many hundred specimens there have been carried down the mesa and sold to private individuals. Some of these objects



are now in museums, but many are forever lost to science. In order to secure this valuable archaeological material, walls were broken down . . . often simply to let light into the darker rooms; floors were invariably opened and buried kivas mutilated. To facilitate this work and get rid of the dust, great openings were broken through the five walls which form the front of the ruin. Beams were used for firewood to so great an extent that not a single roof now remains. This work of destruction, added to that resulting from erosion due to rain, left Cliff Palace in a sad condition.<sup>2</sup>

The legislative history of the Antiquities Act on the Department of Interior website provides additional historical detail,<sup>3</sup> but the act's text confirms that its primary purpose was to "preserve the works of man."<sup>4</sup> Section 1 of the original act made it a crime to "appropriate, excavate, injure, or destroy any historic or prehistoric object of antiquity" on federal land without permission. Section 3 provided for permits for the examination of "ruins, the excavation of archeological sites, and the gathering of object of antiquity upon" federal land. Section 4 provided the authority to the relevant department secretaries who managed federal land to issue uniform regulations to carry out the act's provisions. Section 2, which allows for the designation of national monuments and the reservation of such federal land as is necessary to protect the objects at issue, also focuses primarily on "historic and prehistoric *structures*, and other *objects* of historic or scientific interest" (emphasis added).

The addition of only two words, "historic landmarks," in that sequence in Section 2 (see below) denotes something broader than preserving human artifacts. In prior proposals to protect antiquities, the Department of Interior had sought authority for scenic monuments and additional national parks, but Congress repeatedly rejected that authority.<sup>5</sup> Congress was annoyed by large forest designations and guarded its authority over western lands jealously.<sup>6</sup> Yet the final language has been used and abused for such purposes, or effectively for such purposes—since the official designation of national parks is still left to Congress.

As previously mentioned, Section 2 of the Antiquities Act not only allows protection for small areas around human archeological sites but also authorizes the president:

in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and maintenance of the objects to be protected.

There are three steps to land being reserved and protected under the Antiquities Act, the first two of which are delineated in the section above. First, the monument must be declared for a protective purpose upon lands owned or controlled by the United States. Second, a reservation of certain parcels of land that constitute a "part thereof" may be made, but such parcels of land may not exceed what is necessary to protect the "objects" at issue. And third, the president may specify certain restrictions or other protections that apply to the land thus reserved for the monument in the initial proclamation, or the relevant department secretary who has responsibility to manage the monument may issue regulations consistent with such protections.<sup>7</sup>

Although the act's final language covered more than antiquities, and there is evidence that small scenic landmarks were contemplated, the statute's title, drafting history, and historical context may still be valuable to presidents who want to follow the text and spirit of the original law. For example, earlier and contemporaneous bills for the same purpose limited monument designation to 320 or 640 acres.<sup>8</sup> The final bill replaced that with the (now seemingly open-ended) requirement that such monuments "shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," but that was added to provide flexibility for special situations and not to allow a million-acre designation. Such

background also helps illuminate earlier presidential abuses, whether such abuses rise to the level of a statutory violation or are just garden-variety political acts that offend individual due process rights and separation of powers principles.

Besides Mesa Verde National Park, only a handful of other national parks existed in 1906. Congress did not create the National Park Service to manage them until 1916. The Grand Canyon, for example, was not a national park in 1906 and was open to mining claims and other federal program leases.

President Theodore Roosevelt initially used his new Antiquities Act authority to protect some relatively small landmarks (e.g., Devils Tower) and Native American ruins (e.g., El Morro and Montezuma Castle), but his abuses were not long in coming. In 1908, he proclaimed the Grand Canyon National Monument, reserving more than 808,000 acres for its protection. Although later Congresses converted some national monuments covering large geological formations into national parks, including the Grand Canyon National Park in 1919, the Congress that enacted the Antiquities Act did not intend monuments of that size to be established by presidential designation.

Nevertheless, the Supreme Court relied on the validity of the 1908 reservation that created the Grand Canyon National Monument in rejecting a private mining claim in *Cameron v. United States*.<sup>9</sup> There is no indication that the size of the original monument designation was at issue, perhaps because Congress had recently converted the monument into a national park. Yet the Supreme Court also has considered issues relating to two other large monuments or former monuments.<sup>10</sup> While the original monuments' sizes were not challenged in any of these cases, it is unclear whether the courts will invalidate large geological monument designations due to their size alone.<sup>11</sup>

Even so, the Antiquities Act's primary motivation and historical context is still legally relevant to refute the arguments of those who would limit a president's revocation power based on a selective and misleading statement about its purpose. Moreover, other interpretive questions remain open, such as the meaning of the textual requirement that the lands being reserved

under the monument designations are "owned or controlled" by the United States.

Three of the most important Indian lands where prehistoric artifacts might be looted were not even states in 1906; Arizona, New Mexico, and Oklahoma were then federal territories. Hawaii was only recently annexed and organized as a territory, and Alaska was still a sparsely settled American "district" after the gold rushes of the 1890s—not yet an official federal territory. These were areas of exclusive federal ownership *and* control.

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## The Congress that enacted the Antiquities Act did not intend monuments of [such massive] size to be established by presidential designation.

Other areas of the West that included early national monument designations were owned by the national government, so an issue of control short of ownership was not at play in any of those designations. That may be relevant to the type of control Congress intended as a predicate to the exercise of authority under the Antiquities Act. (See later discussion regarding marine areas, especially those not owned by the United States and subject to limited regulation or control.)

### A General Discretionary Power to Revoke Prior Designations

Attorney General Homer Cummings advised President Franklin Roosevelt in 1938 that he lacked the authority to revoke President Calvin Coolidge's

designation of the Castle Pinckney National Monument because he concluded that no power existed to revoke a prior monument designation.<sup>12</sup> Although the opinion has been cited in some later government documents<sup>13</sup> and by legal commentators, no court has ruled on the president's revocation power or cited the opinion, in part because no president has attempted to revoke a prior designation. In all events, the 1938 attorney general opinion is poorly reasoned, and we think it is erroneous as a matter of law.

The attorney general was first authorized to issue legal opinions to the president under the Judiciary Act of 1789, now codified at 28 U.S.C. §§ 511-513, and to other agency heads by that act and other delegations of authority from the president. Attorney general opinions, and those that now are issued by the Department of Justice (DOJ) Office of Legal Counsel (OLC), are binding on executive branch agencies. In contrast, a president is free to disregard them—especially if he concludes that his oath to take care that the laws are faithfully executed conflicts with such an opinion.

Nevertheless, prudence dictates that the next president request that his own attorney general reexamine such opinion, perhaps with the assistance of OLC, which became an independent division of the DOJ in 1951 and is commissioned to provide serious legal analysis on such matters. The existence of Cummings' 1938 published opinion is an internal hurdle that any administration should address, preferably with another published opinion, either affirming, qualifying, or overruling Cummings' advice.

In 1938, Cummings addressed the question of whether the secretary of the interior could abolish the Castle Pinckney National Monument in Charleston, South Carolina, and transfer the land to the War Department. Under the Antiquities Act, President Coolidge had formed the monument in 1924 from a US fort that had existed in the Charleston harbor since the early 19th century. As Cummings observed, the Antiquities Act contained no clear textual authorization to “abolish” national monuments. “If the President has such authority, therefore, it exists by implication.”<sup>14</sup>

Cummings concluded that without clear authorization from Congress, President Roosevelt could

not reverse the designation of Castle Pinckney as a national monument. In a brief opinion, he relied on two grounds. First, he believed Attorney General Edward Bates had settled the issue in an 1862 opinion that found that the president could not return a military reservation to the pool of general public lands available for sale. Second, he compared the Antiquities Act to other federal laws governing temporary withdrawals of federal land or forests, which explicitly provide for presidential modification of past designations. In addressing past practice, which he conceded supported a right to reduce the size of national monuments, Cummings argued that “it does not follow from power so to confine that area that he has the power to abolish a monument entirely.”<sup>15</sup>

We believe the 1938 opinion is wrong in some obvious respects and too cursory to be persuasive, even if its errors were excised. One major flaw is Cummings' misreading of Bates' opinion,<sup>16</sup> 44 years before the enactment of the Antiquities Act. Bates' opinion discusses whether an administration in the 1840s could rescind a military reservation in Illinois for which Congress had appropriated money and on which a fort had been constructed. He found that the statute delegating to the president the power to designate land for military purposes did not include a power to withdraw the designation. Bates seemed to believe that delegated power, once used, could not be activated to reverse the decision—that the president had effectively exhausted the delegation of power. “A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can.”<sup>17</sup>

But the original 1862 opinion contains many factual and legal distinctions that Cummings does not address. For example, Bates states that he is interpreting military reservation authority under “early acts of Congress” and an “act of 1809,” which provided appropriations for constructing forts “for the protection of the northern and western frontiers.” Perhaps most importantly, the 1862 opinion acknowledges that the

military reservation itself could be abandoned by the War Department, which is the equivalent of revoking a land reservation under the Antiquities Act. It also relies on the fact that in 1858, Congress had specifically repealed any statutes that authorized the sale or transfer of military sites to the public. Of course, no such express statutory prohibition on the presidential withdrawal of national monument status exists in the Antiquities Act.

Instead, Bates' opinion focuses on whether an abandoned military reservation and its buildings would be subject to "entry or preemption by settlers." This refers to the Preemption Act of 1841, which allowed squatters on federal land during the 1840s and 1850s to secure title to it at a low price (preempting a general public sale) if they also worked it for a number of years.<sup>18</sup> To conclude that squatters could not simply enter the military reservation and secure title to it "by preemption," Bates' opinion relies on a combination of factors that are distinguishable from revoking a monument designation under the Antiquities Act, including: the unnamed "early acts of Congress," which authorized its initial selection as a military reservation; the 1809 appropriation for military forts on the frontier; that Fort Armstrong had been constructed and occupied for more than two decades; that its buildings were still in good order; that other laws governed the sale of abandoned military property; and more recent acts of Congress relating to the particular piece of property, which assumed it was not subject to preemption by settlers.

Cummings did not acknowledge these and other potential distinctions. Bates found that separate laws governed the management and disposal of military property from the homesteading or preemption laws that had populated Kansas and Nebraska. It is not surprising that interpreting different statutes yields different results, but even so, Bates conceded that an improved military reservation could be abandoned and sold, just not pursuant to the Preemption Act of 1841. Cummings mistakenly read the 1862 opinion for the proposition that once land is reserved under any act of Congress, that reservation can never be rescinded.

In contrast to the question Bates addressed, revoking a monument designation under the Antiquities

Act would not change the federal ownership of the land at issue. For this and other reasons, the portion of the 1862 opinion that Cummings quoted is especially questionable as applied to land reservations under the Antiquities Act. The quoted language also contains several inapt analogies and question-begging propositions of law.

For example, Cummings quotes the proposition that the "power to execute a trust, even discretionarily, *by no means* implies the further power to undo it when it has been completed" (emphasis supplied). The italicized phrase is misleading. Not every grant of a power to create something must include the power to abolish it, but many do. Special circumstances might make revoking certain acts impossible, or that power might be withheld, but a presumption of revocability is often implied if the grant is silent.<sup>19</sup>

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## Not every grant of a power to create something must include the power to abolish it, but many do.

Indeed, reliance on trust law should have led to the opposite conclusion, at least under the Antiquities Act. Under general trust principles, at least in the 20th and 21st centuries, the power to create a trust includes the power to revoke it when the settler retains an interest in it, unless the trust is expressly irrevocable under the original grant of authority.<sup>20</sup> If a court applied trust law principles to the Antiquities Act, we think it would conclude that the president retains an interest in the monument designations he or a predecessor creates, including that he has the duty to manage them, issue and enforce regulations to protect them, and adjust their borders from time to time with subsequent presidential proclamations. Moreover, the broader principle of trust law is that

the party creating the trust has the power to decide whether it is revocable; the discretionary nature of the president's power under the Antiquities Act and certain textual cues suggest Congress did not intend to make all monument reservations permanent.

Cummings' reliance on Bates' constitutional-statutory analysis fares no better than his reliance on trust law. It is true that a president has no general constitutional authority to manage federal land, although he may have some limited powers as commander in chief or under other statutory grants of authority. That, however, does not answer whether Congress' grant of authority in "early acts of Congress" or the Antiquities Act of 1906 to make reservations includes the power to rescind or revoke them. Indeed, Bates conceded that military reservations could be abandoned; he just believed the land would not be subject to "preemption by settlers." In the context of the Antiquities Act that Cummings was supposed to interpret, a president could rescind or amend the parcels of land reserved for a given monument without repealing the underlying monument designation. There is no evidence that Congress intended to withhold either revocation power in the Antiquities Act, let alone both of them.

Bates' final constitutional-statutory proposition is equally circular as applied to the Antiquities Act. He asserts that reading the unnamed "early acts of Congress" and especially the 1809 appropriation to allow "preemption by settlers" would effect a repeal of the underlying laws: "To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will." That presidents cannot unilaterally repeal statutes does not answer whether Congress included the power both to make and revoke reservations in the original grant of authority under the Antiquities Act.

Cummings' only attempt at an original argument starts and ends with one of the Antiquities Act's purposes: "to preserve . . . objects of national significance for the inspiration and benefit of the people of the United States." Cummings then immediately concludes, in *ipse dixit* fashion (without making a coherent argument), that: "For the reasons stated above, I am of the opinion that the President is without

authority" to issue a proclamation revoking the Castle Pinckney National Monument.

Such casual reliance on one of the act's purposes, and one that was not set forth in the act itself, adds nothing of weight, since it does not explain why revoking the monument at issue was inconsistent with that general purpose of preserving objects of national significance. What if the president determined, for example, that no objects of national significance remained at a given site?

Cummings also does not fairly consider other purposes. If a textual ambiguity justified a resort to legislative materials, the full record would show that the act's primary purpose was to provide a power to the president to prevent the destruction and looting of artifacts until they were excavated and safeguarded or until Congress could consider long-term measures regarding the site. This more complete statement of purposes highlights that the passage of time matters and that a later president could reasonably conclude that Congress declined the opportunity to legislate on the land or objects in an earlier monument designation or that they were now safeguarded, such as by excavation and display in a museum.

A proper analysis of the revocation power under the Antiquities Act would also consider other grants of authority to the president in the Constitution and other statutes and how the courts and constitutional practice have treated them. Cummings made no effort to do that in 1938, and the range of presidential action the courts have upheld, even under older delegations dating to the post-Civil War era, is now more muscular than in early-20th-century jurisprudence.

Although our research is limited on analogous delegations, we believe the general principle would prevail that the authority to execute a discretionary government power usually includes the power to revoke it—unless the original grant expressly limits the power of revocation. One particularly relevant statutory example is the executive's power to issue regulations pursuant to statutory authority. When Congress gives an agency the discretionary authority to issue regulations, it is presumed to also have the authority to repeal them.<sup>21</sup> This is especially true when the regulation has shown to be contrary to the

purposes underlying the statute.<sup>22</sup> Section 4 of the Antiquities Act grants three department secretaries the power to publish “from time to time uniform rules and regulations for the purpose of carrying out this Act.” Although Congress did not expressly state that the officials can repeal or significantly alter their regulations once they are published “from time to time,” that is presumed by law. The broader power of revocation by the president should also be presumed.

Constitutional law axioms are even more relevant in undermining Cummings’ view. A basic principle of the Constitution is that a branch of government can reverse its earlier actions using the same process originally used. Thus, Article I, Section 7, of the Constitution describes only the process for enacting a federal law. A statute must pass through both bicameralism (approval of both Houses of Congress) and presentment (presidential approval). But the Constitution describes no process for repealing a statute.

Under the Obama administration’s logic, Congress could not repeal previous statutes because of the Constitution’s silence. Since the adoption of the Constitution, however, our governmental practice is that Congress may eliminate an existing statute simply by enacting a new measure through bicameralism and presentment. While passage of an earlier law may make its repeal politically difficult, due to the need to assemble majorities in both Houses and presidential agreement, no Congress can bind later Congresses from using their legislative power as they choose.

This principle applies to all three branches of the federal government. The Supreme Court effectively repeals past opinions simply by overruling the earlier case, as most famously occurred in *Brown v. Board of Education*,<sup>23</sup> which overruled *Plessy v. Ferguson*.<sup>24</sup> While the Court may follow past precedent out of *stare decisis*, it also employs the same procedure to reverse the holding of past cases, as Congress does to reverse an earlier statute. Both a precedent and its subsequent overruling decision require only a simple majority of the justices. No Supreme Court can bind future Supreme Courts.

This rule also applies to the Constitution as a whole. In Article V, the Constitution creates an additional process for amending its own text, which

requires two-thirds approval by the House and the Senate and then the agreement of three-quarters of the states. Without this additional option in Article V, the Constitution would require the same or a similar process for its amendment as for its enactment, which would have impractically required a new constitutional convention. Reinforcing our point, the framers decided to set out explicit mechanisms for repealing part of the original constitutional text when they wanted to provide a means that did not mirror the original enacting process.

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## No president can bind future presidents in the use of their constitutional authorities.

The same principle applies to the constitutional amendments themselves. The Constitution contains no provision for undoing a constitutional amendment. Instead, the nation has used constitutional amendments to repeal previous constitutional amendments. The 21st Amendment repealed Prohibition, which had been enacted by the 18th Amendment. When the Constitution is silent about a method for repeal, it is assumed that we are to use the same process as that of enactment.

The executive branch operates under the same rule. No president can bind future presidents in the use of their constitutional authorities. Presidents commonly issue executive orders reversing, modifying, or even extending the executive orders of past presidents, and no court has ever questioned that authority, even when it is used to implement statutorily delegated powers. Good examples include the successive executive orders Presidents Ford, Carter, Reagan, Clinton, George W. Bush, and Obama used to specify how the congressionally mandated rulemaking process would be conducted and reviewed in the executive branch.<sup>25</sup> It would be quite an anomaly to

identify an executive directive or presidential proclamation that a subsequent president could not revoke.

Presidents also regularly add or remove executive branch officers appointed to White House committees or even the cabinet. They have created and eliminated whole offices in the Executive Office of the President. They have increased or reduced the use of cost-benefit analysis in regulatory decisions. In fact, when the Constitution deviates from this lawmaking symmetry, it explicitly does so in the text and in a manner that makes repeal easier than the first affirmative act.

The most famous example is the president's removal power. In Anglo-American constitutional history, the executive power traditionally included the power both to hire and fire subordinate executive officials. The Constitution altered the appointment process. Under Article II, Section 2, the president can nominate and, with the Senate's advice and consent, appoint high executive branch officers, judges, and ambassadors. The Constitution, however, did not explicitly address removing an officer.

In *Myers v. United States*,<sup>26</sup> the Supreme Court found that the Constitution implicitly retained the traditional rule that a president could unilaterally undo an appointment without the Senate's approval. In revoking an official's commission that was issued after Senate confirmation, the president is more clearly negating a specific, deliberative, and official Senate act. By contrast, revoking a predecessor's individual monument designation does not negate anything in particular that Congress approved.

A similar dynamic applies to the Treaty Clause. Under Article II, Section 2, of the Constitution, the president can make treaties subject to the advice and consent of the Senate. Again, the Constitution does not explicitly address terminating a treaty. But as a four-justice plurality of the Supreme Court and the US Court of Appeals for the DC Circuit have found, the president retains the traditional executive authority to unilaterally terminate treaties.<sup>27</sup> Past presidents and Senates cannot bind future presidents to treaties, just as they cannot prevent future presidents from removing executive branch officials.

Although the power to unilaterally abrogate a treaty flows from a grant of constitutional authority

to the president to manage foreign relations, Congress is also constitutionally prohibited from delegating a statutory power to the president and then micromanaging the discretion granted.<sup>28</sup> Thus, even if the Antiquities Act attempted to prevent later presidents from using its authority to reverse an earlier monument designation, that would raise serious constitutional questions.

At a minimum, a thorough and up-to-date analysis of both constitutional principles and statutory examples should be performed before Cummings' opinion is followed.

### **A Limited Power to Revoke Certain National Monuments or Declare Others Invalid**

Even if every monument designation cannot be revoked as a matter of presidential discretion, and we still question such limitation, authority might still exist to abolish some designations based on an earlier factual error, changed circumstances, or an original statutory violation. In short, three determinations, two factual and one legal, may provide strong grounds for certain monument revocations or invalidations.

**New Factual Determinations.** First, if the president concludes that the original designation was mistaken, perhaps because of an archeological fraud, historical error, or improved or updated scientific analysis, the predicate for original designation would be undermined. It would be hard to argue that Congress intended that every curiosity deemed scientifically interesting to a president 100 years ago (the once popular but now discredited and racist branch of human craniology/phrenology comes to mind) forever must remain a valid source of scientific interest and protection. It might be more controversial for a president to determine that a geological monument designation thought to be rare and scientifically interesting by an earlier president is not all that worthy of protection as a monument, but limiting such reevaluation would elevate certain determinations (or

privilege geological claims) over others in a manner that would be hard to logically sustain.

Second, as explained above, the act also was intended to provide authority to preserve artifacts that might otherwise be looted. Even assuming the original designation was proper, if the relevant artifacts were excavated and removed and are now on display in a museum off-site, how can it be said that the reserved parcels are currently the “smallest areas compatible with the proper care and management of the objects to be protected”? If any of these changes of fact or scientific interest justify revocation, then the general argument against revocation would be on shaky grounds, and discretionary revocations at will would be a more plausible interpretation of the act.

**Problems of Size.** A presidential determination that the original designation was illegally or inappropriately large is a special case. It may provide a sound predicate for declaring a designation to be invalid in some cases or for significantly reducing the monument’s size in others. The president might be presented with an issue analogous to a severability determination regarding such monuments. If there is no reasonable way to reduce a reservation’s size and maintain a meaningful monument, rescinding or declaring invalidity may be more appropriate. In all events, a review of controversies over the size of national monuments highlights three distinct periods of use and abuse, the last of which contains the most breathtakingly large monument designations.

Between 1906 and 1943, most monument reservations were smaller than 5,000 acres, and many of them actually protected antiquities. Yet there also were several large monument reservations or expansions during that period, mostly for scenic or geological formations.

President F. Roosevelt’s designation of Jackson Hole National Monument in 1943 was the catalyst for two reforms, only one of which was made permanent. Wyoming congressmen were strongly opposed to the 210,950-acre Jackson Hole monument and reservation and secured a bill to overturn it, but President Roosevelt vetoed it. In 1950, Congress made Grand Teton National Park out of most of the land from the Jackson

Hole monument and added the southern portion of the former monument to the National Elk Refuge. That law also amended the Antiquities Act, forbidding further use of it to expand or establish a national monument in Wyoming without express congressional authorization.<sup>29</sup> Note that the proviso enacted in 1950 does not prohibit the president from reducing the size of the monument reservation in Wyoming.

For 35 years after the congressional dispute over the Jackson Hole National Monument, presidents were quite temperate in their use of the Antiquities Act. Except for a couple of proclamations of large tracts by President Johnson, the period between 1943 and 1978 contained no especially vast monument reservations, and some presidents even reduced the size of older monuments. Eisenhower’s combined proclamations under the act caused a net reduction in total acreage devoted to national monuments. President Nixon issued no Antiquities Act proclamations whatsoever.

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA), which prevents a secretary of interior from withdrawing more than 5,000 acres of federal land without congressional approval. The FLPMA did not alter the president’s authority under the Antiquities Act, perhaps because presidential abuses had abated. Although one ambiguous sentence of one House committee report has been mistakenly read to provide otherwise, the plain text of the FLPMA and settled canons of construction establish that the president’s authority under the Antiquities Act was not affected by a provision that limited the secretary of interior’s authority regarding similar land withdrawals.<sup>30</sup>

Unfortunately, presidential abuses under the Antiquities Act expanded significantly after 1978, especially by Presidents Carter, Clinton, and Obama. Until a few months ago, President Carter held the record for the most extensive monument reservations, with nine designations that were larger than a million acres and two larger than 10 million acres. Carter’s designation of more than 56 million acres of monument reservations in Alaska on a single day led to the most recent amendment to the Antiquities Act.



The Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, was enacted by Congress and signed by President Carter on December 2, 1980, after his election loss to Reagan and the impending loss of Democratic Party control in the Senate. The ANILCA settled many long-standing issues and land disputes, and it made many Alaska-specific changes to laws governing federal land management, including requiring congressional approval for national monuments in Alaska larger than 5,000 acres.<sup>31</sup> Whether this congressional reaction made an impression on them or for other reasons, Presidents Reagan and George H. W. Bush both issued no proclamations under the Antiquities Act.

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## Several of President Obama’s proclamations were also in the teeth of strong congressional opposition and undermined pending congressional legislation.

Nevertheless, President Clinton broke new ground with the number of monument designations per term,<sup>32</sup> many of which were larger than 100,000 acres and two of which were larger than one million acres.<sup>33</sup> He also proclaimed a questionable new type of monument on the high seas. President George W. Bush issued fewer than half as many monument designations as Clinton, and some were relatively small. Yet, President George W. Bush made a few large monument designations, including a questionable designation along the Pacific Ocean’s Marianas Trench.<sup>34</sup>

President Barack Obama broke both Clinton’s record number of monument proclamations per term and Carter’s record for the total acres withdrawn.

Among his 34 proclamations,<sup>35</sup> Obama enlarged the Papahānaumokuākea Marine National Monument by approximately 283.4 million acres,<sup>36</sup> enlarged the Pacific Remote Islands Marine National Monument by approximately 261.3 million acres,<sup>37</sup> and created the Northeast Canyons and Seamounts Marine National Monument, which covers approximately 3.1 million acres.<sup>38</sup>

Several of President Obama’s proclamations were also in the teeth of strong congressional opposition and undermined pending congressional legislation. For example, on December 28, 2016, he created the 1.35 million-acre Bears Ears National Monument in southern Utah and the 300,000-acre Gold Butte National Monument in Nevada. Both designations were opposed by state officials and GOP congressional leaders, including the unanimous congressional delegation from Utah, which was willing to compromise on a smaller monument in Utah that permitted reasonable public uses of the area. The protective impact of the Bears Ears National Monument is particularly dubious since it is supposed to protect isolated Native American sites. It is unclear, for example, how the agency officials will protect those sites any differently after the monument designation than they might have before.

A designation smaller than 5,000 acres may still be too large (relative to some objects being protected) or politically abusive if the designation is for a questionable purpose, for example, to interfere with congressional deliberations over a compromise land-use arrangement or to regulate fishing that is not otherwise authorized. But reservations larger than 5,000 acres merit special review out of respect for Congress’ traditional authority to establish federal land policy, especially if there was no “emergency” necessitating the monument designation without congressional action or if congressional leaders had expressed serious opposition to the monument designation.

If a president makes a credible determination, based on the facts and a reasonable interpretation of the act, that some former monuments are illegally large relative to the original “object” supposedly being protected, he could declare that the initial designation was void, especially if there is no easy way to make it lawful by severing discrete parcels of land.

That is distinct from his power to “revoke” those he thinks were originally lawful, and it would stem from his constitutional authority to take care that the laws are faithfully executed. Even so, a president trying to insulate such a decision should invoke both his constitutional authority to declare the prior designation void and his authority under the act to revoke the designation if it were legal. If he uses both sources of authority, he should issue a proclamation to exercise his authority under the Antiquities Act.

## Judicial Review

Someone would have to establish standing to sue to overturn a later declaration of invalidity or a revocation, and that might be quite difficult in many cases. Standing has been a hurdle for many challenging monument designations that impaired grazing, timber, mining, or other rights to use the reserved land.<sup>39</sup> It might be even more difficult for a party to establish a sufficient and particularized injury that resulted from a monument revocation that restores land to public use.

If standing is established, challengers would have to satisfy different burdens, depending on the nature of their claims. A challenge to the president’s legal authority to establish a particular monument, perhaps because the land in question is not owned or controlled by the United States,<sup>40</sup> is an issue of law that ought to be decided without deference to either party. A legal challenge to the president’s authority to ever revoke any prior monument under the act would probably be decided in a similar manner.

Someone challenging the president’s discretionary determinations under the act would likely have to show an abuse of discretion—and to do so without an administrative record. And it is possible, absent proof of corruption, legal violation, or a failure of process, that certain factual determinations are committed to the president’s discretion by law and are not subject to judicial review.<sup>41</sup> That standard might apply to presidential determinations that justify a reduction in the size of existing monuments, which is discussed further below.

## Special Questions Regarding Marine Monument Designations

The Supreme Court has upheld or discussed the application of the act to the submerged lands of two different monuments along the coast and inland waterways,<sup>42</sup> but some issues regarding these kinds of monuments still remain open, and recent marine monument designations on the high seas raise new questions.

The submerged lands under inland waterways and territorial seas at issue in the two cases mentioned above were owned by the United States when the monuments were designated. That is not true with the areas associated with certain high-sea designations by Presidents Clinton, George W. Bush, and Obama. President Obama’s most recent purported designation of the Northeast Canyons and Seamounts Marine National Monument is located approximately 130 miles off Cape Cod. This approximately 3.14 million-acre monument is in the United States’ Exclusive Economic Zone (EEZ), but under domestic and international law, America does not own it. The Pacific Legal Foundation recently filed suit on behalf of a coalition of New England fishing organizations challenging the legality of the most recent marine monument, which is the first lawsuit of its kind.<sup>43</sup>

There are two problems with the designation of marine monuments far from shore under the Antiquities Act. First, the submerged land at issue is not the type of land that the United States could have owned or controlled in 1906. The modern EEZ is not only vastly wider than the “territorial waters” of 1906 but also a qualitatively different type of property interest than the United States may have acquired or controlled in an earlier era.<sup>44</sup> The United States had a sovereign interest in the submerged land near its coast and its territorial waters (whether that was then three miles from the coast and is now 12 miles), which justifies sovereign military and economic controls; it could not have and still does not have such a sovereign interest in the area beyond its territorial waters.<sup>45</sup> Relatedly, even current domestic and international law permits only limited regulation or control of the marine and wind resources in the EEZ outside our

territorial waters, and thus, it does not constitute the type of federal government “control” of the relevant land that is required under the Antiquities Act.

In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*,<sup>46</sup> the Fifth Circuit held that the Antiquities Act does not extend beyond the territorial sea, despite subsequent legislation authorizing federal regulation beyond it. Although the Fifth Circuit acknowledged that the federal government’s role in regulating beyond the territorial seas had expanded since 1906, including through the adoption of the Outer Continental Shelf Lands Act,<sup>47</sup> none of that conveyed the degree of control that the federal government enjoyed on federally owned lands or federally controlled territories in 1906.<sup>48</sup>

When President Clinton proposed to designate the first marine monument beyond American territorial waters, he received some surprising pushback from the Departments of Interior and Commerce, which submitted a joint memorandum to OLC asserting that the EEZ is not “owned or controlled by the Federal Government.” OLC ultimately disagreed but acknowledged that it was a “closer question” than earlier disputes over the president’s designation authority.<sup>49</sup>

We believe that the OLC opinion is flimsy and that the attorney general or White House counsel should request a reconsideration of it as well. The Clinton-era OLC opinion argues that the EEZ is sufficiently controlled by the federal government because recent presidents have consistently asserted *some* regulatory authority over the area and the United States has greater regulatory authority than any foreign government.<sup>50</sup> Of course, the same is true of many areas that are unquestionably *not* “owned or controlled by the Federal Government.”

Private lands in the United States, for instance, are subject to federal regulation under the Commerce Clause, and no other nation can claim an authority to regulate them. But this does not mean the president has the authority to unilaterally designate privately owned lands as a monument. The Antiquities Act confirms this, stating that the president can receive privately owned lands to include them in a monument, but only through the owner’s voluntary

relinquishment of them.<sup>51</sup> The OLC opinion cannot be squared with this.

It also asserts that the EEZ is sufficiently controlled by the federal government because it has the authority to protect threatened or endangered species found there.<sup>52</sup> Yet the same could be said of any privately owned land under the Endangered Species Act.<sup>53</sup>

The OLC opinion has other problems, but its main defect is the failure to effectively grapple with the federal government’s limited power to regulate in the EEZ. Rather than address whether this affects the president’s ability to designate a monument in this area, the opinion instead argues that the regulations imposed within the monument are limited by the customary international law that otherwise applies. However, that cannot be squared with the Antiquities Act. In 1906, land owned or controlled by the federal government described federally owned land and federal territories in which the federal government had almost no limits on its authority and could exercise its full police power. Consistent with that, the Antiquities Act *requires* monuments to be regulated as necessary to effectuate the statute’s purposes. For these reasons, we think the OLC opinion in 2000 is erroneous.

Finally, even if the Antiquities Act does allow monument designations in international submerged lands in the United States’ EEZ, such designations might be valid only for the seabed itself and for the purpose of seabed protection. If so, that would provide additional authority to revoke designations that are primarily designed to protect sea life in international waters and remove other restrictions in ocean habitat, even if they are above seabed features that might be the subject of protection. To be clear, other authority exists to regulate fishing and other activity in the oceans, but it is questionable whether the Antiquities Act provides such authority.

The act’s text provides strong support for limiting monuments to landmarks and objects on the land and further limits reservations relating to such monuments to parcels “of land.” In particular, the act provides authority for monument designations of only “landmarks, historic and prehistoric *structures*, and other *objects* of historic or scientific interest that are

situated *upon the land*,” and when such monuments are designated, the president may then “reserve as part thereof parcels of *land*” for protection (emphasis supplied). There may be some ancillary power to regulate the air above a monument or some activity in the sea above a marine monument (see discussion of *Cappaert v. United States* below), but it is doubtful that the ocean itself and its living denizens can be designated as part of the monument. It is equally doubtful that a reservation of land can encompass the water column as a matter of presidential discretion under the Antiquities Act.

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## The act’s text provides strong support for limiting monuments to landmarks and objects on the land and further limits reservations relating to such monuments to parcels “of land.”

In *Cappaert*, the Supreme Court upheld some authority to regulate the immediate watershed outside a monument if that is necessary to protect geologic structures and endangered wildlife in the monument grounds, but its holding was based on other federal law governing reserved water rights.<sup>54</sup> The Court did mention the endangered fish that swim in the unmoving pool of the monument at issue, but that reference does not seem necessary to its holding that appurtenant water outside the monument was reserved. The facts of that case are distinguishable in other ways from the unbounded ocean and the

unthreatened fish, mammals, and other sea creatures that swim in and out of it.

*Yates v. United States*<sup>55</sup> supports one such distinction. If a “fish” is not a “tangible object” within the meaning of Sarbanes-Oxley law because it is not like the other listed things that should be protected from shredding,<sup>56</sup> then it is even less likely that the ocean and its sea life are objects analogous to “structures” and “landmarks” that are “situated upon the land” within the meaning of the Antiquities Act. And even if the ocean and its sea life are “objects” that could be part of a monument, the Antiquities Act’s second step permits the reservation of only the “part thereof” that are “parcels of land” necessary to protect them.

Accordingly, if the ocean and its sea life cannot be designated as part of a monument, or if no reservation “of land” can include them, then their regulation must rely on some other principle of law (analogous to the federal law regarding reserved water rights) and perhaps on proof that such regulation is necessary to protect the landmark, structure, or other objects of historic or scientific interest at issue in the actual monument, such as the seamounts and underwater valleys or mountains. For these reasons, the president should be free to lift erroneous fishing restrictions that are in place solely by reason of a marine monument designation.

### The Power to Reduce the Scope of a Reservation Pursuant to a Monument Designation

Almost all commentators, including past opinions from the attorney general and the solicitor of interior, agree that monument boundary adjustments are permissible.<sup>57</sup> Environmentalists often seek large expansions of existing monuments. As a result, several presidents have added vast additional reservations to existing national monuments, including three by President Obama that added millions of acres to them. Many presidents have made other boundary adjustments, including some modest to large reductions, and the Supreme Court has cited some of these

changes in describing the monuments at issue, implicitly assuming they were valid.

If large additions of land have been deemed necessary to protect certain objects, it is doubtful the president could not determine that some large reductions are reasonable or necessary to satisfy the “smallest area” requirement of the act. Modern technology might even help justify a reduction, for example, if smaller boundaries may now be more effectively monitored and protected.

Yet several commentators claim that the question of whether the president could affect significant reductions remains open.<sup>58</sup> No court has ruled on the scope of downward boundary adjustments. Several commentators assert that the absence of judicial authority is because no president has attempted a significant reduction in the land reserved for a monument, but that is not true. According to the National Park Service:

- President Eisenhower reduced the reservation for the Great Sand Dunes National Monument by 25 percent. (He reduced the original 35,528-acre monument by a net 8,920 acres.)<sup>59</sup>
- President Truman diminished the reservation for Santa Rosa Island National Monument by almost half. (The original 9,500-acre reservation by F. Roosevelt was diminished by 4,700 acres.)<sup>60</sup>
- Presidents Taft, Wilson, and Coolidge collectively reduced the reservation for Mount Olympus by almost half, the largest by President Wilson in 1915 (cutting 313,280 acres from the original 639,200-acre monument).<sup>61</sup>
- The largest percentage reduction was by President Taft in 1912 to his own prior reservation in 1909 for the Navajo National Monument. (His elimination of 320 acres from the original 360-acre reservation was an 89 percent reduction.)<sup>62</sup>

There are many other reductions or adjustments to monument boundaries, but the above reductions are significant by any measure.

It is surprising that some scholars who claim expertise in this area have accepted and repeated the mistaken assertion that no substantial reductions have been made. More importantly, their position that significant reductions might be prohibited is based on a selective reading of the act’s purposes and personal policy arguments instead of the text, and it is often built on the premise that authority to repeal or rescind a prior designation does not exist, including an uncritical reliance on Attorney General Cummings’ questionable opinion in 1938. Under this reading of the Antiquities Act, monuments may be significantly enlarged by later presidents but never significantly reduced absent an act of Congress.

For many of the same reasons that we reject a limitation on the president’s revocation power, we also question limitations on his power to substantially reduce the size of existing monument reservations. Moreover, we think there are additional reasons why the president has broad authority to alter the parcels of land reserved under existing monument designations, including logical inferences from textual provisions and the varied reasons prior presidents have given for boundary reductions that do not suggest clear limitations.

One textual command supporting boundary adjustments is that the act requires reservations to be “in all cases . . . confined to the smallest area compatible with the proper care and management of the objects to be protected.” There is no temporal limit to this requirement, and some presidential proclamations adjusting the boundaries of existing monuments recognize a continuing duty to review and comply with it. Even if boundary adjustments to date had all been somewhat minor, which is not the case, it is hard to read into the text a limiting principle that allows large additions but not large reductions.

Another textual hook is the discretionary nature of the president’s authority under the Antiquities Act. The relevant language in Section 2 states that it is “in his discretion” whether to declare the national monument. It then states that he “*may* reserve as part thereof parcels of land” to protect the objects at issue (emphasis added). The parcels must, as noted above, be confined to the smallest *area* compatible with the

protective purpose, but it is still up to the president's discretion which precise parcels to designate. Apart from reducing the overall size, the next president may determine that a given monument with a patchwork of private inholdings is better protected by concentrating the monument within the federal land that the government owns and controls.<sup>63</sup> There is nothing in the act that privileges the original designation and regulations over a later presidential determination.

Moreover, there are more fundamental questions about how best to manage and protect federal property near national monuments with available resources. The belief that increasing federal regulation is always the best means of protecting something is more ideologically than empirically based, especially when it excludes all other options. Cooperation with state authorities and private property owners who own adjoining land often promotes better land-use decisions, including better protections for such properties. Such consultation and multiparty agreements tend to increase support for the resulting decisions and increase fundamental fairness, since some prior designations have walled in private lands and restricted the reasonable use of such private property.

The evidence surrounding many recent monument designations also suggests that some of the largest geological and scenic monuments were not motivated exclusively or even primarily by a desire to protect an "object" of historic or scientific interest as much as to lock up natural resources from development and use—regardless of how limited or temporary the surface disturbances would be. Such actions not only create economic hardship for local communities and injustice to those who may have reasonably depended on the timber, grazing, or mineral resources, but they may actually be counterproductive to the ecological and environmental interests that past presidents claimed to protect. For example, prohibiting fishing in vast grounds in the Atlantic or Pacific Oceans where fishermen have engaged in sustainable practices forces more concentrated activity in other areas that may trigger unsustainable impacts.

Such large monument reserves also contribute to an estimated \$13.5 to \$20 billion maintenance backlog

on Department of Interior land-management responsibilities<sup>64</sup>—and deny the federal government any reasonable return on land-use fees and leases. "Limited resources" was the primary justification for several of President Obama's executive actions that redirected enforcement resources from broader narcotics and immigration enforcement policies to those Obama designated as more important narcotics and immigration priorities. A more careful accounting of federal land policy might lead a president to conclude that some vast monument reserves, under the Antiquities Act and other acts, diffuse attention and resources from higher priorities and contribute to environmental degradation, soil erosion, and other forms of mismanagement of federal property.

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## **Prohibiting fishing in vast grounds in the Atlantic or Pacific Oceans where fishermen have engaged in sustainable practices forces more concentrated activity in other areas that may trigger unsustainable impacts.**

Apart from all that, increasing public use of vast tracts of federal land should be sufficient grounds for reducing certain prior monument reservations. The facts that underlie one Supreme Court case may prove instructive in defining possible grounds for monument reductions.

In *Alaska v. United States*,<sup>65</sup> the Supreme Court affirmed its special master's recommendation regarding the federal versus state ownership of certain

submerged lands underwater near Alaska's southeast coast. Some of the land in dispute was under Glacier Bay, which is now a national park. Glacier Bay was first reserved as a national monument by President Coolidge's proclamation in 1925 and later enlarged by President F. Roosevelt's proclamation in 1939, both pursuant to the Antiquities Act. In describing the relevant lands in question, the Court also noted that President Eisenhower "slightly altered" the monument's boundaries in 1955.

The Supreme Court accepted without discussion that the addition by Roosevelt and the "altered" boundaries by Eisenhower were valid. The monument was made part of the Glacier Bay National Park by an act of Congress in 1980, but since the status of the land in 1959 (when Alaska was made a state) was the critical focus of its analysis, the national park act was not particularly relevant to that determination. The Court did not discuss the Eisenhower proclamation further, but that proclamation reduced the size of the Glacier Bay National Monument in three ways without any land swaps or additions to counter those reductions. More importantly, the grounds Eisenhower provided for that reduction are historically interesting and legally relevant.

In Proclamation 3089 on March 31, 1955,<sup>66</sup> Eisenhower reduced the size of Glacier Bay National Monument for three different reasons. One ground was that some lands "including several homesteads which were patented prior to the enlargement of the monument [by Roosevelt] are suitable for a limited type of agriculture use and are no longer necessary for the proper care and management of the object of scientific interest on the lands within the monument." Although Proclamation 3089 provides no further explanation of this exclusion, it is fair to read it as concluding that the original inclusion of this land was mistaken and, perhaps as important, that the lands were *no longer* necessary for the proper care of the objects of scientific interest in the monument.

The second reduction in the size of Glacier Bay National Monument was based squarely on Eisenhower's conclusion that such lands should have been included in Tongass National Forest instead

of the national monument in 1939, when Roosevelt enlarged it, "and such lands are suitable for national-forest purposes." Eisenhower determined that the earlier inclusion of these lands in the monument was in error, since their exclusion from the forest was "erroneous." He did not specifically declare that they were "no longer necessary" to the proper care of the objects of scientific interest in the Glacier Bay National Monument, but he must have concluded they were never necessary to be included or that the mistaken inclusion in 1939 was sufficient to exclude them in 1955.

The third reduction (the first mentioned in the proclamation) was because certain lands are "now being used as an airfield for national-defense purposes and are no longer *suitable* for national-monument purposes" (emphasis supplied). How land reserved in a national monument became a military airfield is not explained. In some respects, this may be the most interesting exclusion of all. Whether the earlier use of the land for an airfield was legal or not, Eisenhower asserted the authority to declare a higher government purpose for federal land that was part of a national monument and, by proclamation, to remove it from the national monument reservation. Note also that Eisenhower states that the airfield land was no longer *suitable* for inclusion in the national monument *because it was an airfield*, not that the land was otherwise unsuitable for inclusion in the monument. Would the same reasoning apply if it were not yet an airfield?

And while Eisenhower's total reductions in the size of Glacier Bay National Monument were not great relative to the monument's overall size, they were not trivial either. According to the National Park Service, the reductions total more than 4,100 acres of submerged land and 24,900 acres of other land.<sup>67</sup> Most national monuments before 1955 were not 29,000 acres, so the reductions were large in an absolute sense. Moreover, some of President Eisenhower's other monument reductions constituted a larger proportion of the original size of the monument (e.g., Great Sand Dunes), and earlier presidential reductions were even greater, as discussed above.

Attempts to argue from the act's broad purposes that significant reductions would not be authorized are as conclusory as Cummings' analysis of the revocation issue. Reasoning from selective, broad protective purposes can always yield the desired result. We reach the opposite conclusion based on the text discussed above and consideration of all the act's purposes, the original compromises the act incorporated, and separation of powers principles.

Subsequent congressional land-management statutes do not change the Antiquities Act, but they cut sharply against the policy argument that the act's use is necessary to promptly secure land that is otherwise prone to looting or harmful development. Indeed, these more recent laws provide the same or superior protection without undermining Congress' primary role in federal land-use decisions. Of special note, the secretary of interior now has statutory authority to make emergency withdrawals of federal land with few limitations (and none relating to size), including land not under his department's jurisdiction, which expire no later than three years after they are withdrawn.<sup>68</sup>

Thus, one cannot truthfully defend the president's power to lock up land from reasonable public uses in perpetuity as an "emergency" measure to stop imminent harm, no matter how often some make this claim. Yet monument declarations do have one powerful, immediate effect: They stop or inhibit ongoing congressional debate and potential compromise over the land at issue—which is often the unstated goal. Congress has withdrawn many federal lands for heightened protection, but its background law and representative principles balance the interests of multiple stakeholders. Defenders of Antiquities Act abuse regularly implore the president to preempt or interfere with Congress' deliberations. Even so, they cannot reasonably argue that presidential authority under the act can work only in one direction and that the interest of the states and other citizens cannot be reconsidered.

Returning to the text of the act, we have previously noted that it would have to be tortured extensively to yield a manageable standard that allows permissible "minor" boundary changes and large "additions"

but forbids "significant" reductions. Eisenhower's Proclamation 3089, and perhaps others, proves that reductions have been recognized as valid even without further additions or other "enhancements" based on later presidential determinations. It was enough for a president to declare that certain lands: (1) were mistakenly included in the original designation, (2) are no longer necessary to be included, or (3) serve some higher federal purpose.

If the president can revoke prior monuments altogether, there is no strong argument that he lacks a lesser power to significantly reduce the land withdrawn for one. But even if the president lacks the power to revoke a monument, past practice includes proclamations that reduced some monuments to a fraction of their current size, such as President Taft's 89 percent reduction of the Navajo Nation Monument. Moreover, we think the courts are more likely to uphold significant reductions if the president could credibly include in his determination that the original designation was inappropriately large relative to the object to be protected or has become so with changed circumstances.

It would bolster his position if the president includes any existing site-specific justifications for reducing the particular monument's land reservation. For example, a president might issue a proclamation determining that limited resources prevent proper management of the largest national monuments, that other authority now exists for the excluded parcels to be regulated and managed (including perhaps a management plan for them), that changed technology or other changed circumstances allow a smaller area to be designated to protect the objects in question, or that other changed circumstances warrant such reductions.

The president's authority to significantly reduce the size of an existing monument would be less certain if the Supreme Court or other appellate court ruled that he lacked a general discretionary authority to revoke prior monument designations. But even then, we think the president would retain the authority, if not the duty, to reduce the size of existing monuments that were unreasonably large relative to the objects being preserved—or have become illegally



large with changed circumstances. And such determinations should be entitled to the same or similar respect as the original reservations.

As with a complete revocation, someone would have to establish standing to sue to overturn a proclamation reducing the size of a monument, and that might be difficult in many cases. And even if standing is established, we think the challenger would have a significant burden to prove in order to prevail. If the challenge were based on a factual determination, such a challenger might have to prove an abuse of discretion to overcome the president's more recent determinations under the act, or the courts might hold that some determinations under the act are textually committed to the president's absolute discretion (absent corruption or a procedural failure) and not subject to judicial review.

### **The Power to Modify a Monuments' Management Conditions and Restrictions**

In addition to revoking a monument or significantly altering its boundaries, a president could change some of the restrictions on management grounds if he determines that it still properly protects the "objects" of scientific or historic interest. Accordingly, a president could "transfer the management of a monument from one agency to another; expand, authorize, or prohibit uses such as mining or grazing; or allow new rights-of-way across the lands."<sup>69</sup> Recent monument proclamations tend to contain more detailed management plans than earlier proclamations,<sup>70</sup> which relied on the statutory authority of the agency secretary delegated to oversee the monument to issue regulations for managing it.<sup>71</sup>

Restrictions or allowances set forth in the original proclamation would need to be changed by a subsequent proclamation, unless the proclamation delegated that authority to the relevant agency official. Although the FLPMA limits the power of the secretary of interior to modify or revoke an actual monument designation or the land withdrawn, it does not change the secretary's power under the Antiquities

Act to alter the monument's management plan when that is consistent with the underlying proclamation.

There should be no doubt that the president can modify land-use restrictions. As early as 1936, President Franklin Roosevelt issued a proclamation expressly making the restrictions on Katmai National Monument "subject to valid claims under the public-land laws . . . existing when the proclamations were issued and since maintained."<sup>72</sup> And nothing in the act's text limits the president's authority to change restrictions or uses for the land withdrawn.

Nevertheless, those who believe revocation is not permissible also raise questions about the "scope of this authority . . . to the extent that greatly reducing a monument's restrictions or expanding its uses can be analogized to effectively abolishing the monument."<sup>73</sup> That is not an inconsistent argument, but it is based almost entirely on the flawed premise that presidents are prohibited from revoking or significantly reducing the land withdrawn for any prior monument.

### **Conclusion**

We have argued that the president retains a general discretionary power to revoke prior monument designations pursuant to the Antiquities Act. It is a general principle of government that the authority to execute a discretionary power includes the authority to reverse the exercise of that power. This power is at its height when prior designations were made illegally or in contravention of the act's mandate that designations be reasonable in size.

Moreover, the purpose of the act supports the president in his ability to respond to new factual determinations or changes in circumstance that require modification of a monument's boundaries. The plain language of the act, its legislative purpose, and the practice of past presidents all support this conclusion. Most importantly, it is compelled by the constitutional principle of separation of powers. If presidents choose not to protect their policies through Congress' bicameral process, they leave those policies vulnerable to their successors by constitutional design.

## About the Authors

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to overturn a marine monument in *Massachusetts Lobstermen's Association v. Ross*.

## Acknowledgments

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Cover image: Valley of the Gods in Bears Ears National Monument, Bureau of Land Management, Creative Commons. Photo by Bob Wick, BLM, <https://www.flickr.com/photos/mypubliclands/31136248533>.

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# Notes

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1. Percy Shelley's 1818 poem "Ozymandias" is about the ruins of an ancient kingdom, whose stern but long dead ruler declared it would last forever and make men tremble in despair. All that remains in modern times is a wrecked statue of the king, his boastful claim on its pedestal, and sand all around. For the text and history of the poem, see *Economist*, "The Real Ozymandias: King of Kings," December 18, 2013, [http://www.economist.com/news/christmas\\_specials/21591740\\_enthusiasms\\_rivalries\\_fads\\_and\\_fashions\\_lie\\_behind\\_shelleys\\_best\\_known\\_poetry\\_and\\_rulers\\_vainly\\_asserting\\_the\\_permanence\\_of\\_their\\_works\\_however\\_are\\_more\\_timeless](http://www.economist.com/news/christmas_specials/21591740_enthusiasms_rivalries_fads_and_fashions_lie_behind_shelleys_best_known_poetry_and_rulers_vainly_asserting_the_permanence_of_their_works_however_are_more_timeless).

2. US Department of Interior, Rept. to Secretary of the Interior for Fiscal Year Ended June 30, 1909, 486-87.

3. Ronald F. Lee, "The Antiquities Act, 1900-1906," in *The Story of the Antiquities Act* (National Park Service, March 15, 2016), [https://www.nps.gov/archeology/pubs/lee/Lee\\_CH6.htm](https://www.nps.gov/archeology/pubs/lee/Lee_CH6.htm).

4. See Pub. L. 59-209, 34 Stat. 225 (June 8, 1906), now codified at 54 U.S.C. §§ 320301-03.

5. See Lee, "The Antiquities Act, 1900-1906," discussing Congress' refusal in the period before the Antiquities Act to pass five bills that sought to grant the secretary of the interior broad authority for designating national parks.

6. *Ibid.* ("The reluctance of the members of the Public Lands Committee, most of them western public lands states, to grant general authority to the Executive Branch to create new national parks is understandable in the light of their past experience with the timber reservations act of 1891.")

7. Although the National Park Service currently manages most existing national monuments, other units of the Department of Interior (the Bureau of Land Management and the US Fish and Wildlife Service) manage or comanage others. See list of national monuments and their corresponding management agencies at National Parks Conservation Association, "Monuments Protected Under the Antiquities Act," January 13, 2017, [https://www.npca.org/resources/2658\\_monuments\\_protected\\_under\\_the\\_antiquities\\_act#sm.00000pyorl7d8qfp5wxkeb7uvkeow](https://www.npca.org/resources/2658_monuments_protected_under_the_antiquities_act#sm.00000pyorl7d8qfp5wxkeb7uvkeow). The original act contemplated that the Departments of Agriculture and Defense (then War) might also manage or relinquish land for national monuments and specified that the secretaries of interior, agriculture, and war had authority to jointly issue uniform regulations for managing national monuments. In recent decades, presidents have given responsibility to the National Oceanic and Atmospheric Administration (in the Department of Commerce) to manage or comanage marine monuments, and the US Forest Service (in the Department of Agriculture) manages or comanages certain other recent monuments.

8. See Lee, "The Antiquities Act, 1900-1906."

9. 252 U.S. 450 (1920).

10. See *United States v. California*, 436 U.S. 32 (1978); and *Alaska v. United States*, 545 U.S. 75 (2005), discussed in the section titled "Special Questions Regarding Marine Monument Designations."

11. See *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to the 327,769 acre Giant Sequoia National Monument as not constituting "the smallest areas compatible with proper care and management" of the objects being protected). Although the Supreme Court has not ruled expressly on a challenge to the excessive size of a monument, the courts have deferred to many presidential determinations under the act, and challengers may have to show an abuse of discretion to prevail on a size based claim. See discussion of judicial review in the section titled "Judicial Review." Nevertheless, *Tulare County* may be distinguishable in future challenges since the court held that the challengers failed to establish a factual basis for their claim, not that such a claim was barred. Consider one justification President Obama provided for creating the recent Bears Ears National Monument (see the section titled "Problems of Size"), which Utah officials have already said they will challenge: that it contains several ancient archeological sites. Although the proclamation also cited the area's cultural, geological, and historical significance, it is unclear how isolated archeological sites are better protected after a massive 1.35 million acre monument designation that incorporates all of them than before the designation, especially when the same two federal agencies (the US Forest Service and the Bureau of Land Management) will each manage the same areas after the designation as before it.

12. Proposed Abolishment of Castle Pinkney Nat'l Monument, 39 Op. Att'y Gen. 185 (1938).

13. The solicitor of interior cited the opinion in 1947 but for a different proposition, namely that the president can alter the boundaries of a national monument. See “National Monuments,” *Interior Decisions* 60 (1947): 9.

14. 39 Op. Att’y Gen. 186.

15. *Ibid.*, 188.

16. Rock Island Military Reservation, 10 Op. Att’y Gen. 359 (1862).

17. *Ibid.*, 364.

18. The Homestead Act of 1862 revised this law, significantly reducing the number of “preemption” claims. But Bates was addressing the rights of settlers who may have occupied the former military property before 1862.

19. See Uniform Trust Code: Revocation or Amendment of Revocable Trust § 602(a) (2010) (“Unless the terms of a trust expressly provide that the trust is irrevocable”).

20. See Restatement (Third) of Trusts: Power of Settlor to Revoke or Modify § 63 (2003).

21. See, e.g., *Commonwealth of Pa. v. Lynn*, 501 F.2d 848, 855 56 (D.C. Cir. 1974).

22. See *ibid.*

23. 347 U.S. 483 (1954)

24. 163 U.S. 537 (1896).

25. Exec. Orders Nos. 11821, 39 F.R. 41501 (1974) (Ford); 12044, 43 F.R. 12661 (1978) (Carter); 12291, 46 F.R. 13193 (1981) (Reagan); 12866, 58 F.R. 51735 (1993) (Clinton); 13258, 67 F.R. 9385 (2002), and 13422, 72 F.R. 2763 (2007) (G. W. Bush); and 13497, 74 F.R. 6113 (2009) (Obama).

26. 272 U.S. 52 (1926).

27. See *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), vacated by *Goldwater v. Carter*, 444 U.S. 996 (1979); and *Kucinich v. Bush*, 236 F. Supp. 2d 1 (D.D.C. 2002).

28. See *INS v. Chadha*, 462 U.S. 919 (1983).

29. 64 Stat. 849 (1950), codified at 54 U.S.C. § 320201(d) (“No extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress”).

30. The FLPMA expressly limits agency officials’ authority to “modify or revoke” national monuments created by the president under the Antiquities Act or other monuments created by Congress, but that simply confirms the natural reading of the Antiquities Act, which grants authority to the president alone to specify the parcels of land withdrawn for any monument created pursuant to the act. It should not be read to raise doubts about the president’s authority to modify or revoke national monuments, as two Congressional Research Service reports (R44687 and RS20647) have suggested. FLPMA §204(j), 43 U.S.C. § 1714(j) provides:

The Secretary shall not make, modify, or revoke any withdrawal created by Act of Congress; make a withdrawal which can be made only by Act of Congress; *modify or revoke any withdrawal creating national monuments under [the Antiquities Act]*; or modify, or revoke any withdrawal which added lands to the National Wildlife Refuge System prior to October 21, 1976, or which thereafter adds lands to that System under the terms of this Act. (emphasis supplied)

This restriction on the secretary’s power creates no inference that Congress modified the president’s authority in the Antiquities Act, and repeals by implication are strongly disfavored even if such an inference existed. The opposite reading of the text is much stronger, i.e., that Congress knew how to write express limitations and that it would have listed the president if its restriction on the secretary of interior’s power was intended to bind the president. The lone sentence in a House report cited for the contrary view is, at best, itself ambiguous, but even unambiguous legislative history material is irrelevant when the statutory text is clear.

31. See 16 U.S.C. § 3213.

32. President Obama’s 34 designations also overtook the previous record set by President Franklin Roosevelt, with 32 monument proclamations. See Juliet Eilperin and Brady Dennis, “Obama Names Five New National Monuments, Including Southern Civil Rights Sites,” *Washington Post*, January 12, 2017, [https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e\\_story.html](https://www.washingtonpost.com/national/health-science/obama-names-five-new-national-monuments-including-southern-civil-rights-sites/2017/01/12/7f5ce78c-d907-11e6-9a36-1d296534b31e_story.html). All presidents since 1906 have issued such proclamations except Presidents Nixon, Reagan, and George H. W. Bush. National Park Service, “National

Monuments Designated by Presidents 1906-2009,” [https://www.nps.gov/parkhistory/hisnps/NPSHistory/national\\_monuments.pdf](https://www.nps.gov/parkhistory/hisnps/NPSHistory/national_monuments.pdf). According to the National Parks Conservation Association, 157 monuments have been created under the Antiquities Act. See National Parks Conservation Association, “Monuments Protected Under the Antiquities Act.” A few have been abolished by Congress. See National Park Service, “About ‘Abolished’ Monuments,” March 15, 2016, <https://www.nps.gov/archeology/sites/antiquities/abolished.htm>. And the land constituting Papago Saguaro National Monument was conveyed to the state of Arizona for public purposes. See 54 U.S.C.A. § 320301 note, citing Pub. L. 92, 71st Cong., Apr. 7, 1930, c. 107, 46 Stat. 142.

33. See Albert C. Lin, “Clinton’s National Monuments: A Democrat’s Undemocratic Acts?,” *Ecology Law Quarterly* 29 (2002): 718-19.

34. Bryan Walsh, “President Bush’s Last Act of Greenness,” *Time*, January 6, 2009, <http://content.time.com/time/health/article/0,8599,1869917,00.html> (noting that President Bush will have “protected more ocean than anyone else in the world”).

35. Eilperin and Dennis, “Obama Names Five New National Monuments”; and Dana Varinsky, “Here’s Every Piece of Land Obama Has Put Under Protection During His Presidency,” *Business Insider*, January 16, 2017, <http://www.businessinsider.com/every-piece-of-land-obama-has-protected-2017-1/#cascade-siskiyou-national-monument-1>.

36. Papahānaumokuākea.gov, “President Announces Expansion of Papahānaumokuākea,” <http://www.papahanaumokuakea.gov/news/expansion-announcement.html>.

37. Bryan C. Howard, “US Creates Largest Protected Area in the World, 3x Larger Than California,” *National Geographic*, September 26, 2014, <http://news.nationalgeographic.com/news/2014/09/140924-pacific-remote-islands-marine-monument-expansion-conservation/>.

38. The White House, Office of the Press Secretary, “Fact Sheet: President Obama to Continue Global Leadership in Combatting Climate Change and Protecting Our Ocean by Creating the First Marine National Monument in the Atlantic Ocean,” September 15, 2016, <https://obamawhitehouse.archives.gov/the-press-office/2016/09/15/fact-sheet-president-obama-continue-global-leadership-combatting-climate>. See also the later section discussing unique problems with monument designations of submerged land under the high seas and a citation to Pacific Legal Foundation’s recent lawsuit challenging the legality of the Northeast Canyons and Seamounts Marine National Monument.

39. See *Utah Assoc. of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004) (cataloguing cases).

40. See the section titled “Special Questions Regarding Marine Monument Designations” for discussion of legal issues related to questionable marine monuments on the high seas.

41. See *Mountain States Legal Foundation v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (discussing judicial review to challenge presidential designations under the Antiquities Act and applying an unclear but deferential standard of review to factual determinations under the act); and *Tulare County v. Bush*, 306 F.3d 1138, 1142 (D.C. Cir. 2001) (rejecting a challenge to the Giant Sequoia National Monument as not constituting “the smallest areas compatible with proper care and management” of the objects being protected).

42. See *United States v. California*, 436 U.S. 32 (1978); and *Alaska v. United States*, 545 U.S. 75 (2005).

43. Complaint, *Massachusetts Lobstermen’s Association, et al. v. Ross, et al.*, No. 1:17 cv 00406, (D.D.C. Mar. 7, 2017), 2017 WL 897829. The complaint is available at <https://www.pacificlegal.org/document.doc?id=2499+>. The authors both have affiliations with Pacific Legal Foundation. Todd Gaziano is the executive director of its DC Center and is one of the attorneys for the plaintiffs in the case. John Yoo recently joined the board of Pacific Legal Foundation.

44. See also Joseph Briggett, comment, “An Ocean of Executive Authority: Courts Should Limit the President’s Antiquities Act Power to Designate Monuments in the Outer Continental Shelf,” *Tulane Environmental Law Journal* 22 (2009): 403.

45. See Restatement (Third) of Foreign Relations Law § 514 cmt. C.

46. 569 F.2d 330 (5th Cir. 1978).

47. 43 U.S.C. § 1331 et seq.

48. See *Treasure Salvors*, 569 F.2d at 337-340.

49. See Randolph D. Moss, Mem. Op. for the Solicitor, Dep’t of the Interior; General Counsel, Nat’l Oceanic and Atmospheric Admin.; and General Counsel, Council on Environmental Quality (Sept. 15, 2000), [https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op\\_olc\\_vo24\\_p0183.pdf](https://www.justice.gov/sites/default/files/olc/opinions/2000/09/31/op_olc_vo24_p0183.pdf).

50. See *ibid.*, 196.

51. See 54 U.S.C. § 320301.
52. See Moss, Mem. Op. for the Solicitor, Dep't of the Interior, 197.
53. But see *People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Serv.*, 57 F. Supp. 3d 1337 (D. Utah 2014).
54. See *Cappaert v. United States*, 426 U.S. 128 (1976) (“when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation”).
55. 135 S. Ct. 1074 (2015).
56. *Ibid.*
57. See National Monuments, 60 Interior Dec. 9 (1947), citing A. G. Cummings, 39 Op. Att’y Gen. 185 (1938).
58. Compare those who suggest there may be limitations on the president’s authority to revoke or significantly reduce past monument reservations, Mark Squillace, “The Monumental Legacy of the Antiquities Act of 1906,” *Georgia Law Review* 37 (2003): 473, 488; Lin, “Clinton’s National Monuments,” 707, 713; and Sanjay Ranchod, note, “The Clinton National Monuments: Protecting Ecosystems with the Antiquities Act,” *Harvard Environmental Law Review* 25 (2001): 535, 552, with those who simply note that the issue remains open, Alexandra Wyatt, *Antiquities Act: Scope of Authority for Modification of National Monuments*, Congressional Research Service, November 14, 2016, 5, [http://www.law.indiana.edu/publicland/files/national\\_monuments\\_modifications\\_CRS.pdf](http://www.law.indiana.edu/publicland/files/national_monuments_modifications_CRS.pdf); Kelly Y. Fanizzo, “Separation of Powers and Federal Land Management: Enforcing the Direction of the President Under the Antiquities Act,” *Environmental Law* 40 (2010): 765, 822; Roberto Iraola, “Proclamations, National Monuments, and the Scope of Judicial Review Under the Antiquities Act of 1906,” *William & Mary Environmental Law & Policy Review* 29 (2004): 159; Scott Y. Nishimoto, “President Clinton’s Designation of the Grand Canyon Parashnat National Monument: Using Statutory Interpretation Models to Determine the Proper Application of the Antiquities Act,” *Journal of Environmental Law and Litigation* 17 (2002): 51, 54; Pamela Baldwin, *Authority of a President to Modify or Eliminate a National Monument*, Congressional Research Service, August 3, 2000, 3; and James R. Rasband, “The Future of the Antiquities Act,” *Journal of Land, Resources & Environmental Law* 21 (2001): 619, 626.
59. Michael M. Geary, “Chapter 5: Monumental Dunes,” in *Sea of Sand: A History of the Great Sand Dunes National Park and Preserve* (Norman, OK: University of Oklahoma Press, 2016).
60. President Harry S. Truman, Proclamation No. 2659 Eliminating Certain Lands from the Santa Rosa Island National Monument and Reserving Them for the Use of the War Department for Military Purposes (Aug. 13, 1945), <http://www.presidency.ucsb.edu/ws/index.php?pid=87038>.
61. Gail H. E. Evans, “Appendix A: A Chronology of the Public Domain,” in *Historic Resource Study* (National Park Service, 1983), [https://www.nps.gov/parkhistory/online\\_books/olym/hrs/appa.htm](https://www.nps.gov/parkhistory/online_books/olym/hrs/appa.htm).
62. Hal K. Rothman, “Chapter 2: Founding Navajo National Monument,” in *Navajo National Monument: A Place and Its People: An Administrative History* (National Park Service, 1991), [https://www.nps.gov/parkhistory/online\\_books/nava/adhi/adhize.htm](https://www.nps.gov/parkhistory/online_books/nava/adhi/adhize.htm).
63. See, e.g., *Wilkerson v. Dept. of the Interior*, 634 F. Supp. 1265 (D. Col. 1986), holding that the United States could not completely restrict travel on a preexisting right of way through a national monument.
64. Hearing before the Subcomm. on the Interior, Environment, and Related Agencies of the H. Committee on Appropriations, (2001) (statement of Anu K. Mittal and Frank Rusco), <http://www.gao.gov/assets/130/125531.pdf>.
65. 545 U.S. 75 (2005).
66. President Dwight D. Eisenhower, Proclamation No. 3089 Excluding Certain Lands from the Glacier Bay National Monument and Adding a Portion Thereof to the Tongass National Forest (Mar. 31, 1955), <http://www.presidency.ucsb.edu/ws/?pid=107264>.
67. Theodore Catton, “Chapter VII: Private Interests and A Second Boundary,” in *Land Reborn: A History of Administration and Visitor Use in Glacier Bay National Park and Preserve* (Anchorage, AL: National Park Service, 1995), [https://www.nps.gov/parkhistory/online\\_books/glba/adhi/chap7.htm](https://www.nps.gov/parkhistory/online_books/glba/adhi/chap7.htm).
68. 43 U.S.C. §§ 1714(e) and 1714(i).
69. Wyatt, *Antiquities Act*, 5. The Supreme Court has recognized the president’s power to shift responsibility to manage the land withdrawn in the initial proclamation declaring the monument from one agency to another, *California v. United States*, 436 U.S. 32, 40 (1978), and there is no reason to think the president cannot shift that responsibility again in subsequent proclamations.

70. Compare President Barack Obama, Proclamation No. 9496 (Sept. 21, 2016), [https://www.gpo.gov/fdsys/pkg/DCPD\\_201600596/pdf/DCPD\\_201600596.pdf](https://www.gpo.gov/fdsys/pkg/DCPD_201600596/pdf/DCPD_201600596.pdf), with President Franklin D. Roosevelt, Proclamation No. 1950 (April 24, 1931), reprinted in US Department of the Interior, Proposed Katmai National Park, Alaska: Final Environmental Statement 527 (1974).

71. See 54 U.S.C. 320302 (“The Secretary, the Secretary of Agriculture, and the Secretary of the Army shall make and publish uniform regulations for the purpose of carrying out this chapter”).

72. President Franklin D. Roosevelt, Proclamation No. 2177 (1936).

73. Wyatt, *Antiquities Act*, 5.

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## **Trump to unveil \$1 trillion infrastructure plan this year, says transportation Secretary Chao**

**By Reuters:** U.S. Transportation Secretary Elaine Chao said the Trump administration would unveil a \$1 trillion infrastructure plan later this year, but she did not offer details of funding for projects.

Chao said at an event at the department's headquarters that the infrastructure initiative would include "a strategic, targeted program of investment valued at \$1 trillion over 10 years. The proposal will cover more than transportation infrastructure, it will include energy, water and potentially broadband and veterans hospitals as well."

Chao's comments were the most detailed timetable from the administration about its plans to unveil a plan to modernize U.S. roads, bridges, airports, electrical grid and water systems. Chao said the administration plans to offer incentives for public-private partnerships rather than simply fund improvements ...

### **Infrastructure special report: \$1 trillion up for grabs**

**By Kyle Feldscher:** It's one of the most popular pieces of legislation in Washington despite, or perhaps because of, the fact that it does not exist.

President Trump's \$1 trillion infrastructure proposal piqued the interest of opponents and allies alike last month during his joint address to Congress, just as it did following his election win in November. But it's been more than four months since Trump won the presidency and more than two months since he took the oath of office, and despite the potential popularity of an infrastructure bill, no one seems to know what the White House



plans to do.

Analysts, lobbyists and congressional aides told the Washington Examiner that any massive infrastructure bill won't happen right away. While the defeat of the GOP's healthcare bill on Friday could allow the infrastructure package to be developed sooner than previously thought, it's widely believed that tax reform is next up on the docket for Trump and Congress. Infrastructure, meanwhile, is considered a possible olive branch between warring faction in Congress, but as of yet no specifics have been developed ...

### **Arctic drilling ban is antithesis of respecting market forces**

**By Oliver Williams:** A recent opinion in these pages, Market Argues Against Arctic Ocean Oil Development, claims that "it is curious that some Republicans are pushing to develop natural resources that the market does not need". The gist of the piece is that in a \$50-a-barrel price environment, the Trump Administration should respect market forces and not overturn President Obama's moratorium on offshore Arctic energy.

That argument, of course, relies on a piece of linguistic sleight of hand to support its central premise. The crucial point is that Alaska's Congressional delegation and other Republicans are not pushing to develop resources, they are arguing for the option to develop them; in other words to let the market - and not Presidential fiat - decide whether Arctic waters have the potential to be developed ...

### **The potential of self-driving cars**

**By U.S. Rep. Bob Latta:** Every year on our nation's roadways, more than 35,000 people tragically lose their lives due to traffic accidents—a large number of them caused by distracted driving.

With so many traffic fatalities resulting from human error, we have to ask ourselves if there is a better way. American innovation may have the answer to this problem — in the form of self-driving cars.

While it may seem like science fiction, the reality is that technological breakthroughs have allowed for deployment of these cars to be right around the corner.

Recently, I chaired a hearing of the Digital Commerce and Consumer Protection Subcommittee where my colleagues and I listened to industry leaders testify about the possibilities of their self-driving vehicles. The takeaway was clear: the heavy hand of government can't obstruct the development of such vital, life-saving technology. While there is no doubt that safety parameters will be needed, we should be leaving the innovating to the innovators ...

### **Proceed with the pipelines. They're a better way to transport oil.**

**By Chicago Tribune Editorial Board:** The Keystone XL pipeline, which would stretch over 1,200 miles and cost \$8 billion, is a big project that has faced many hurdles. One of those was removed Friday when President Donald Trump gave the go-ahead for its construction.

Unfortunately, it's also a big symbol for those who want to phase out the use of fossil fuels as soon as possible. That's a shame, because the pipeline will make little if any difference in the amount of greenhouse gases going into the atmosphere. Environmental groups would do better to save their ammunition to fight more consequential changes the administration is expected to pursue, such as rolling back federal regulations to limit coal burning and methane emissions.

President Barack Obama blocked construction of Keystone in 2015, claiming it would aggravate global warming and undercut American leadership on the issue. But a State Department review in 2013 found the effects would be minimal [...](#)

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