Permitting Reform Priorities

January 2023

Meaningful permitting reforms that support American Energy production equitably across industries require Congress to update and clarify the provisions of multiple statutes, including the Energy Policy Act of 2005, the Mineral Leasing Act (MLA), the National Environmental Policy Act (NEPA), the Clean Water Act (CWA), and the Endangered Species Act (ESA).[i]

National Environmental Policy Act (NEPA) Reforms

1. Ensure Utilization of Congressionally Directed NEPA Efficiencies

Congress should ensure that the original intent of Section 390 of the Energy Policy Act of 2005 is realized by expressly directing that categorical exclusions be utilized for projects meeting the specified criteria, and strictly limit when an agency may decline their use. Congress specified that certain activities were to be excused from burdensome (or duplicative) NEPA requirements because they were determined to not have a significant effect on the human environment (e.g. drilling on existing well pads).[ii] In practice, BLM frequently declines to utilize these Congressionally directed efficiencies.

2. Enhance NEPA and Permitting Efficiencies for Drilling Permits Meeting Specified Conditions

Given the new Congressional direction for ensuring oil and gas lease sales are taking place, Congress should require BLM to conduct NEPA analyses *at the leasing stage* covering all relevant potential effects from reasonably anticipated oil and natural gas production activities. BLM should then be required to presume associated Authorizations for Permits to Drill (APDs) issued by rule with limited process, provided specified conditions are met, for example:

- No changes have occurred that would alter the NEPA analysis;
- The well to be drilled is located within an existing wellsite or field development;
- The well meets or exceeds recognized industry best practices and standards; and
- Exceptions to issuance by rule could be included for leased areas with cultural or historic significance if the activity is likely to jeopardize a protected species or critical habitat.

3. Mitigate Delay Caused by NEPA Litigation

Congress should change the standard for judicial review of NEPA determinations by amending NEPA to only allow courts to set aside agency determinations for reasons of abuse of discretion and/or allow agency determinations to stand if they are in substantial compliance with NEPA.

Congress should streamline judicial review of NEPA determinations by assigning a single federal Circuit Court of Appeals exclusive jurisdiction that encompasses an area with a significant federal land development, that typically manages a modest caseload, and resolves cases quicker.

Congress should enact a statute of limitations for NEPA lawsuits by requiring that challenges be filed within 60 days of the applicable final agency action, unless an earlier statute of time period is specified by another statute.[iii] Congress should also limit standing to challenge NEPA determinations by adopting modest, but clear, thresholds for parties to establish standing to challenge agency determinations under NEPA and associated agency actions.

4. Restore Process Provisions of the NEPA Modernization Act

Congress should establish enforceable timelines for NEPA reviews (two years for major projects, one year for lower-impact projects).

For example, if an agency does not complete its NEPA review on time, Congress could direct that the applicant would be permitted to initiate certain preliminary actions pursuant to the terms and conditions of a provisional permit-by-rule.

Congress should address the increasingly expansive scope of NEPA reviews by requiring that the "goals of the applicant" form the basis for the "purpose and need" statement and for conducting reasonable alternative reviews which are technically and economically practicable and feasible.

Congress should adopt a statutory requirement that agencies' consideration of "effects" must be consistent with the Supreme Court's "proximate cause" standard in *Public Citizen*. Consideration of effects should not allow for consideration of "speculative effects or impacts."

Congress should also clarify that agencies cannot use the estimates of the social cost of greenhouse gases (SC-GHG) in NEPA analyses. The SC-GHG is not appropriate for analyses in which the SC-GHG must be expressed as a single value or within a narrow range of values.

Congress should also prohibit agencies from basing NEPA reviews on proposed projects' potential indirect impacts on climate change, and expressly prohibit agencies from recommending or requiring that project proponents mitigate or compensate for their projects' potential indirect climate change impacts.

Leasing and Permitting Related Reforms

5. Clarify BLM's Limited Discretion to Defer Lease Sales

Congress should clarify that the MLA substantially limits BLM's authority to defer oil and natural gas lease sales and confirm that BLM must conduct lease sales at least quarterly. Congress should clarify that the MLA only allows BLM to cancel or suspend a specific lease sale if doing so would violate a clear statutory requirement or obligation.

- Any acreage that BLM intends to defer from lease sales shall be subject to notice and comment, transparently justified as necessary to comply with a specific statutory requirement, and subject to judicial review.
- BLM must provide stakeholders notice and an opportunity to comment on proposed cancelations and deferrals, and that lease sale cancelations and deferrals are final agency actions that are ripe for administrative appeal and judicial review.

6. Streamlining Permitting for Fee/Fee/Federal Lands

Congress should clarify that in circumstances where a well is located on non-Federal land overlying non-Federal minerals, but some portion of the wellbore enters and produces from the Federal mineral estate, any analyses or compliance obligations are limited to the scope of the federal action/undertaking the approval of the APD. Congress should also confirm that:

- BLM has no authority to enter fee lands without the surface owner's consent, and cannot use the inability to access as grounds to delay or unreasonably delay issuance of an APD;
- BLM has no authority to require a bond to protect the fee surface owner's interests; and,
- BLM's inspection and enforcement authority is limited to downhole operations and production accountability directly related to the production of federal minerals.

Congress should also clarify that a federal permit to drill for an oil and gas lease under the Mineral Leasing Act is not required when less than 10 percent of the minerals within the oil and gas drilling or spacing unit are minerals owned by the Federal Government; and the Federal Government does not own or lease the surface estate within the area directly impacted by the action.

7. Codify Tiered Bonding Requirements with Reasonable Updates

Congress should codify the currently tiered structure for well bonding *(*i.e., individual well, statewide, and nationwide), but make reasonable updates to the minimum bonding amounts in recognition that the intent is to mitigate risk while avoiding unnecessary over-bonding:

- $150,000 for individual wells;
- $500,000 for statewide bonds; and
- $2,000,000 for nationwide bonds.

8. Streamlining APD Permitting

To decrease unnecessary burdens on BLM resources and improve the administration of APD permitting, Congress should enact the following statutory provisions:

- Require BLM to develop regulations to allow APDs to be issued through provisional permitting (permitting-by-rule);
- Require that APDs be issued for a minimum of four years, instead of two years with the potential for a two-year extension, and automatically extend APD terms throughout the full duration of any litigation challenging the APD and BLM corrective action; and
- Declare that it is in the public interest for BLM to grant APD extension requests to address supply chain disruptions and increased demand for oil and natural gas resources.

Clean Water Act (CWA) Reforms

9. Reform Implementation of Section 401 of the CWA

Congress should modify statutory requirements of the CWA to address well-documented abuses of state Section 401 certification procedures to:

- Clarify that certifications are only needed when a federally licensed activity could result in a discharge from a point source to a "water of the United States"; and provide a reasonable standard for downstream considerations.
- Require reviews be completed within a reasonable period of time (i.e. within a year), and require decisions and conditions be based only on whether the discharge would impact specified state water quality standards.

10. Codify and Streamline Nationwide Permitting under CWA Section 404 (e)

Nationwide permits (NWPs) are a critical tool within the CWA's permitting paradigm for the efficient authorization of a variety of critical infrastructure projects. To better assure the long-term viability and consistent availability of NWP program, Congress should:

- Specifically require that each of the 59 NWPs identified in the Army Corps' 2021 Index of NWPs be continuously maintained and made available for widespread use for all the activities covered.
- Require establishment of a petition and rulemaking process under which NWPs for newly identified activities can be developed.
- Amend the Act to require that all NWPs be issued for a duration of no less than ten years.

Endangered Species Act (ESA) And Mitigation Reforms

11. Streamline ESA Section 7 Consultations

Congress should re-establish reform provisions that provided for a more consistent and efficient Section 7 consultation process, minimizing unnecessary delay and litigation, including, but not limited to:[iv]

- A statutory definition of "destruction or adverse modification" that would reduce the number of federal actions that would trigger Section 7 consultation requirements**.**
- Definition of "effect" as an impact that would not occur but for the agency action; require that the "effect" be foreseeable and reasonably certain to occur; and establish the environmental baseline from which to measure if an "effect" requires consultation.

- Clearly exclude from consultation requirements actions where the agency has no direct involvement or control; where the action would not appreciably change the conservation status or is not the proximate cause of risks to a listed species or its habitat.

12. Reform the ESA Section 10 Habitat Conservation Plan (HCP) And Incidental Take Permit Process
To promote and facilitate increased voluntary conservation efforts, Congress should amend ESA Section 10 to appropriately limit the scope of an intra-Service consultation under ESA for incidental take permits. Congress should also formalize and strengthen the "no surprises policy," in ESA Section 10 to allow for cost recovery agreements under which non-agency parties can reimburse FWS for services provided. Finally, Congress should amend ESA Section 10 to provide enhanced mechanisms for regional, habitat-specific, and state-driven HCPs.

13. Define "Habitat" and Provide Meaningful Guidelines on Excluding Areas from Critical Habitat
Congress should define "habitat" as "the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species." Congress should also amend ESA Section 4(b)(2) to provide more objective and judicially reviewable standards for excluding areas from critical habitat designations when the benefit of excluding those areas outweighs the benefit of including areas. This could be accomplished by incorporating into the ESA the revised approach the US Fish and Wildlife Service (FWS) finalized on Dec. 18, 2020 (now rescinded).

14. Proactively Address Administration Efforts to Mandate Compensatory Mitigation
Congress should clarify existing statutory limits on agencies' authority to recommend or require compensatory mitigation. In particular, Congress should clarify that mitigation is allowed (but not required) only under Section 404 of the CWA, Sections 7 and 10 of the ESA, and as part of the NEPA review process. Neither the Mineral Leasing Act or the Federal Land Policy and Management Act allow agencies to require or condition approvals on compensatory mitigation. In those narrow instances where agencies can allow operators to use compensatory mitigation, Congress should specify that mitigation must be proportional to presumed impacts, and expressly prohibit agencies from requiring compensatory mitigation for activities unlikely to adversely impact federal lands or protected species. Congress should also specify that agencies cannot require or recommend that project proponents mitigate or otherwise compensate for their proposed projects' potential indirect climate change impacts or other indirect impacts over which the project proponent has no control.

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[i] This document is intended as a summary; additional details on AXPC permitting priorities are available.
[ii] 2005 EPA at Sec. 390(b).
[iii] This is consistent with Sen. Capito bill/Amendment (5194).
[iv] Reforms finalized on August 27, 2019 and subsequently vacated/remanded by the US District Court for the Northern District of California (July 5, 2022).