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Regulatory Review
Office of the Executive Secretariat and Regulatory Affairs
Department of the Interior
1849 C Street, NW., Mail Stop 7328
Washington, DC 20240

Re: Comments on improving DOI's regulations—Docket Number DOI- 2011-0001

Comments filed Electronically

The American Petroleum Institute (“API”) appreciates the opportunity to comment on the Department of Interior’s preliminary plan to review its existing significant regulations in response to the President’s Executive Order 13563 on improving regulation and regulatory review. API is a national trade association representing more than 470 member companies involved in all aspects of the oil and natural gas industry. Those members include producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers. API member companies are involved in the extraction of oil and natural gas resources, either as producers or service and support companies, on Federal public lands administered by the Bureau of Land Management (BLM) onshore, and on the Outer Continental Shelf (OCS) administered by the Bureau of Offshore Energy Management, Regulation and Enforcement (BOEMRE).

A. General Comments on Energy Policy

Energy is the lifeblood of a nation’s economy. If energy is abundant and reasonably priced, the economy will prosper. Unfortunately, this fact has become obscured, and even lost, at times in the policy debates in Washington. Energy sources take many years to develop – they cannot simply be turned “on” like a light switch.

For decades, our government has made choices which frequently failed to focus on providing for the challenge of developing energy supplies for the future. Even when government acted to favor development of domestic energy resources, such as with passage of the Outer Continental Shelf Lands Act Amendments of 1978 (43 USC 1331, et seq.), it has continued over time to add new and inconsistent statutory and regulatory burdens on the production of American energy and agencies have reinterpreted prior statutes to mean things very different from the intent of Congress at enactment. One example of such reinterpretation is contained in the Federal Register Notice to which this submittal responds. The only mention of “energy” in that notice is as follows and is located at the bottom of column (b) on page

76 FR 10526: “DOI is asking you to suggest how the Department can develop regulations to protect the environment, honor our trust obligations, manage public lands, protect endangered species, distribute and monitor water resources, and *promote clean energy independence in ways that will work best for the American people.*” Although the notice did not define “clean energy,” we infer from Executive Order 13563 referenced in the notice that all of the energy activities of the Department, clean or not, are encompassed within the request, including those that are sanctioned by the Department’s existing statutory mandates.

On March 19, 2011, while visiting Brazil, President Obama spoke of the benefits of recent discoveries of oil on the Brazilian outer continental shelf to the American economy. But the President’s encouragement of development of Brazilian energy resources failed to acknowledge that what makes sense for Brazil also makes sense for the United States. Like every other nation, we should be developing our own oil and natural gas resources. This is a simple matter of economics. Would we rather have the hundreds of thousands of new high paying oil and gas production jobs in the United States where the investment will turn over in our economy and build it on a broad base, or would we rather send the production investment and oil purchase dollars to Brazil to build its economy and create jobs there? There’s nothing wrong with purchasing and importing Brazilian oil, but we should not exchange reliance on supplies of oil from one foreign country to another because we’re prevented from producing our own.

According to the U.S. Energy Information Administration (EIA), oil, coal, and natural gas supply about 85 percent of America’s energy. The EIA also projects that between now and 2035 the total volumes of fossil fuels used in the United States will increase, not decrease, and that 78% of America’s energy will come from fossil fuels in 2035. As columnist Robert Samuelson said, “Unless we shut down the economy, we need fossil fuels.”

Over the next 25 years, the U.S. population is projected to increase from just over 300 million to almost 400 million people. The number of motor vehicles is projected to increase from 231 million to 297 million – overwhelmingly still being powered by liquid fuels. The American economy is projected to almost double in size. Fortunately, the concept of clean energy technology encompasses much more than renewable energy sources. Energy efficiencies such as more efficient appliances and motor vehicles; smarter use and more efficient transmission of electric power; more energy-efficient buildings; and many other efficiency and conservation measures will play a major role in *minimizing the increase in fossil fuels that will be needed to power a growing American economy.* Further, renewable sources of energy such as wind, solar and biomass are expected to provide 11 percent of America’s energy supply in 2035, up from 7 percent in 2009. Certainly, renewable and nuclear energy sources are very important parts of America’s future energy mix, but it is also very clear that for at least the next 50 years, and possibly much longer, a majority of America’s energy supply will come from fossil fuels. The rest of the world, just as the United States, will continue to rely upon fossil fuels for a majority of its energy for the foreseeable future.

As the EIA projections show, a clean energy agenda focused primarily on renewable energy sources will fail to meet both the energy and the environmental needs of the American people because for the foreseeable future, these sources will be unable to meet the needs of our economy. Again, it is a simple matter of economics. Without reasonably priced fuel and power, the self-employed farmer cannot produce

food. The private plant operator cannot fabricate machine tools, make furniture, or assemble auto parts. And the trucker cannot bring goods to the consumer -- all the basics like fresh fruit, cell phones and running shoes that an educated, and largely metropolitan population enjoys, and whose sales and purchases are necessary for the economy to flourish. The jobs we hold, the way of life we enjoy and the health of the economy on which we rely depend upon access to affordable energy supplies.

Our 14 trillion dollar national debt is rapidly rising and doesn't even include tens of trillions of dollars in unfunded liabilities such as Federal civil service pensions, Medicare, Social Security, and other entitlements. Ways must be found to pay for the national debt, in addition to reducing and then eliminating the annual budget deficit. A compelling way to pay the debt is to monetize the value of the in-ground fossil fuels located on public lands, both onshore and offshore, that are owned by the American people.

During his recent visit to Brazil, President Obama's said that Brazilian offshore oil reserves may be twice the entire US oil reserves. If this statement underrates our nation's resource endowment, it echoes what the American people often been told: that our oil and natural gas resources are insufficient, and that "we can't drill our way to energy self-sufficiency". However the recent Congressional Research Service Report for Congress (R40872), dated November 30, 2010, entitled "U.S. Fossil Fuel Resources: Terminology, Reporting, and Summary" found that the United States has more fossil fuels reserves (on a barrel of oil equivalent basis) than any other country in the world more than Russia, twice as much as China, three times more than Saudi Arabia, and more than twenty-three times more than Brazil. The United States is also the world's leader in technically recoverable undiscovered oil and natural gas, with 50% more than Saudi Arabia, more than four times that of Brazil, and twelve times that of China.

As large as these reserves and resources are, they still do not include the 83 to 128 billion barrels of oil stranded in older American oil fields that the National Energy Technology Laboratory Report (DOE/NETL-2010/1417) documented in 2010 could be produced using "best practices" and "next generation" technology enhanced oil recovery by sequestering CO₂. Nor do they include the 800 billion barrels of oil that the Rand Corporation has estimated can be recoverable from western oil shale. These resources depend on an adequate price and technology development to make them economic. History tells us that much of this currently "uncounted" resource endowment will be produced within the foreseeable future after the best of these resources are made available for production and the technology price curve bends down after initial production.

These vast reserves and resources will mean little more than lost opportunities to the American people if they are not made available for leasing, drilling, and production on reasonable terms. But if they were to be produced, they could make a huge difference to our national economy, to jobs and opportunities now and for our children, and to government revenues. For example, a recent study by ICF International has estimated that development of currently estimated reserves and undiscovered but technically recoverable oil and natural gas resources from could yield revenues to the Federal treasury of \$4.0 trillion. This sum does not include any up-front sums paid to obtain the leases, nor the tax revenues derived from the jobs that will be created to directly produce these resources, nor the indirect and induced economic impacts of producing these American energy resources owned by the American people.

In a world of rapidly growing demand for liquid fuels, American energy resources owned by the American people must be made available on a broad scale. Instead recent governmental actions have followed a pattern of delay and denial of access to these resources, including:

- Removal of the Atlantic and Eastern Gulf of Mexico from consideration for offshore leasing until 2017 at the earliest.
- The creation of a new “Wild Lands” category, which creates a new bureaucratic process for Federal public lands managed by BLM that will take additional domestic resources off the table and add further delays to the onshore leasing process.
- A decision to send commercial oil shale regulations back through the rulemaking process despite the fact that these regulations were finalized after months of extensive and open public comment, including the reports and recommendations of an 11-member task force.
- Repeated delays for the 2012-2017 offshore leasing plan. The process normally requires two and a half full years to finalize the plan. Most steps in the process have not yet begun, leaving serious doubt as to whether a program will be in place on July 1, 2012 when the current program ends.
- A failure to complete work on the environmental analysis that would allow companies to move forward with crucial federal seismic studies in the Atlantic. Applications to perform seismic work in the Atlantic have been pending for several years.
- A failure to move forward with energy projects in Alaska that exposes the Trans-Alaska Pipeline System to unnecessary supply vulnerabilities.
- A failure to issue onshore leases within the required 60-day timeline, thereby imposing a significant cost to successful bidders. The GAO has found that the administration failed to timely issue 91% of leases on federal land and that BLM has routinely held millions of dollars in industry payments without issuing the underlying lease. For instance, in May 2010, BLM was holding nearly \$100 million from unissued leases in Wyoming and Utah.
- A delay in the Administration’s decision on approval of the Keystone XL Pipeline pending further environmental review, potentially threatening our country’s energy security, keeping more than 10,000 union jobs directly related to the pipeline construction on the sidelines, and ignoring the potential for an estimated \$34 billion to U.S. GDP in 2015.

Development of domestic energy resources should not continue to face delay, restriction or prohibition. The nation needs a results-oriented focus if it expects to meet the national policy enacted in the Set America Free Act of 2005, Sections 1421-1424 of the Energy Policy Act of 2005. This Act provides for “a coordinated and comprehensive North American energy policy that will achieve energy self-sufficiency by 2025 within the three contiguous North American nation area of Canada, Mexico, and the United States.” Instead of making progress toward that goal, many recent policies of the United States will have us moving further away from it.

B. Onshore Oil and Gas

1. Introduction and Background:

Across industry, states and local communities, it is agreed that the Department of the Interior has over the past 20 years implemented a redundant and overly-cumbersome leasing process that if left unchecked, could create profound disincentives for the oil and gas industry working on Federal lands.

Over the past 10 years efforts have been made to improve the leasing process, including the implementation of statutory changes designed to streamline the process in EPACT05. Yet the progress that was slowly made through 2008 came to an abrupt halt in 2009. In 2010, BLM announced the implementation of additional regulatory policies that added three additional layers of regulation to exploration and development of oil and natural gas on public lands. Building upon that new regulatory momentum, in December 2010 the Secretary of the Interior announced the implementation of a new 'Wild Lands' policy for public lands. Ironically, just a few days later, the White House called upon industry seeking recommendations on ways to streamline the oil and gas leasing, exploration, and development processes on public lands.

These most recent regulations and restrictions announced in 2010 are in addition to the five current levels of regulation and analysis already in place. These five major regulatory requirements while quite cumbersome, already provide all the necessary mechanisms to protect the land and environment. These include:

1. The Land Use Planning process itself;
2. Project Environmental Impact Statements (EIS);
3. Environmental Assessments (EAs) for an individual wells (or small number of them);
4. Applications for Permits to Drill (APDs); and,
5. Compliance with all other environmental regulations *i.e.*, the Clean Air Act, Clean Water Act, Endangered Species Act, Marine Mammal Protection Act, etc.

Even for the smallest-scale project on public lands, the Department of the Interior routinely requires environmental assessments and interdisciplinary team reviews to ensure lease stipulation compliance. Unfortunately, the regulatory environment that has resulted from the accretion of rules, procedures and documentation requirements presents oil and natural gas operators with the prospect of far more Federal bureaucratic delay and litigation than exists for state or private lands. In recent years there has been a flight of investment capital from public lands administered by the Department to opportunities on private and state lands where projects can be more rapidly permitted, and where a return on investment can begin to be realized in a matter of a few months rather than years.

Industry now witnesses indefinite deferrals of leases while waiting for BLM to complete new or revised Resource Management Plans (RMPs), and then protracted delays from nomination to sale. Unfortunately, this will be further exacerbated by the uncertainties of the new Wild Lands policy, likely to present



operators in the Intermountain West with a new level of uncertainty while BLM inventories historically multiple use lands yet again for new “wilderness” areas.

Additionally, there are often indefinite delays to analysis of energy projects under the National Environmental Policy Act (NEPA). Over the past three years, NEPA approvals have come to a virtual standstill. From an environmental assessment (EA) in preparation for a nine well project that is now four years in the making, to an environmental impact statement (EIS) for a large-scale 1000 well project that has yet to be completed despite the passage of over seven years and counting, the Department of the Interior is making little to no progress toward timely approval of major environmental reviews. This is so despite agreement by companies proposing such projects to take extensive mitigation measures to respond to concerns regarding wildlife, air and water quality and cultural resources. Without the NEPA approvals, development simply cannot proceed on any project.

We have also witnessed a standstill in the permitting process itself. Currently, there is an average 206 day processing time for Applications for Permits to Drill (APD). However, that number is a low estimate, as it does not account for the full extent of the period from when an operator submits the application for approval until required wildlife, plant, and cultural surveys are completed and other unforeseen project specific issues are addressed that a BLM field office may require. Only at that point does the clock start to tick.

Taking those considerations into account, it is not unusual to see permit reviews taking longer than two years in some BLM field offices. Companies must be able to rely upon regulatory certainty to carry out their business plans to be able to invest and to create jobs. Clearly the process must be improved.

The result of this unwieldy and cumbersome process is a diminished interest in leasing Federal minerals and a resulting loss or deferral of revenues to the Federal government that are provided through bonus bids, and payments of lease rentals and royalties to the Federal treasury. The economic benefits to the economy of the nation and the region from the jobs, purchases and spending that accompany energy development are likewise deferred or lost altogether.

We do not ask for an elimination of environmental and review processes. We do however recognize that improvement can easily be made and therefore submit the following general recommendations to the Administration for consideration.

2. Recommendations:

- (a) Implement recommendations that have been made to the Department by the Office of Inspector General, or included in Quality Assurance Team reports and existing BLM recommendations for APD and NEPA process improvements – and assure follow-up accountability. For example:
 - Hold BLM State Directors and Field Office Managers accountable for timely and accurate processing of APDs;
 - Continue Quality Assurance Team (QAT) reviews of APD processing AND more aggressively set time frames and deadlines for implementing identified improvements;

- Ensure consistent use of OO#1 and the Gold Book nationwide and hold BLM Directors and Managers accountable for consistent implementation (The permitting process is hampered by lack of effective oversight, redundant and inefficient NEPA and cultural resource processes, and inconsistent policy interpretations and requirements);
- Implement flexible staffing approaches – to consider opportunities for agencies to “borrow” skilled NEPA staff from other agencies or to allow temporary transfers within agencies to offices in need of additional staff and/or skills, and expand use of MOUs for coordinated agency reviews of resource reports and concurrent comment periods;
- Expand/reinstate the use of categorical exclusions for proposed activities on Federal lands that do not individually or cumulatively present a significant impact to the environment; establish a 15-day timeframe for Sundry Notice approvals;
- Acknowledge that BMPs are voluntary and provide for discussions between BLM and project proponent to identify BMPs appropriate on a project-specific basis; and,
- Establish nationwide procedures for timely completion of NEPA analyses.

Additional suggested recommendations for administrative action:

(b) Identification of Lands Suitable for Oil and Natural Gas Leasing: Current Action –

On May 17, 2010 the Department of Interior issued Instruction Memorandum 2010-117: Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews Whereas the agency previously relied upon resource management plans (RMP) to make land use allocations and leasing decisions, BLM stated in its reform Instruction Memorandum that “*While an RMP may designate land as “open” to possible leasing, such a designation does not mandate leasing.*” Therefore, BLM must now prepare a site-specific environmental assessment (EA) on all nominated lease tracts before they are included in a lease sale notice to determine whether current land use decisions “adequately protect” important resource values.

In addition to preparing a site-specific leasing EA, BLM established four criteria designed to determine whether a Master Leasing Plan (MLP) and environmental impact statement (EIS) should be prepared. In such areas, MLPs will be prepared as an RMP amendment before leases are issued, will reconsider existing leasing decisions contained in RMPs and will be subject to public involvement through the NEPA process. In addition a fifth criterion has been added which would leave the option to prepare a MLP open to the discretion of the Federal land manager. In other words, the decision will not be made at the field or State level, but rather at the Washington D.C. Headquarters level.

BLM is now being required to identify new areas that should be subjected to a MLP analysis. These recommended MLP areas transcend BLM Field Office jurisdictional boundaries, are limited to the Rocky Mountain States, encompass currently leased areas with on-going development and have been purposely withheld from the public or industry. Coupled with the Wild Lands policy announced in December, 2010, this replaces the methodical approach described in FLPMA and implemented via the Resource Management Plan process with a new management approach that subjects future consideration of the energy resource potential of currently multiple use public lands to regulatory and policy uncertainty, on top of additional layers of analysis and regulation.

Bureaucratic delays initiate a cycle of anemic lease sales, cancelled sales, and indefinite lease deferrals. Delays in obtaining offset leases prevent production on existing leases and increase uncertainty for oil and gas producers in the Rockies. As noted, a result is that many producers are already electing to shift their capital investments away from development of resources on Federal lands and toward the shale gas plays on private lands or to opportunities overseas.

Recommendation –

Withdraw the actions initiated under IM 2010-117 and immediately re-institute previously established land use planning and leasing processes as outlined in Onshore Order #1 and NEPA, consistent with the statutory direction provided by the Federal Land Policy and Management Act (FLPMA).

(c) Management of Lands Deemed to Have Wilderness Attributes: Current Action –

In December 2010 Secretary of Interior Salazar issued Secretarial Order 3310 that requires BLM to protect lands with wilderness characteristics and establishes a new class of lands to be managed for preservation: "Wild Lands," a land designation not subject to Congressional approval. In addition to the 221 designated Wilderness Areas covering 8.7 million acres and the remaining 545 WSA's covering nearly 12.7 million acres in the Western States and Alaska, BLM must now assess how many of the 220 million acres of unclassified, multiple-use lands should be set aside from multiple-use via a Wild Lands classification. These reviews could be accomplished as part of the plan revision process or in a project proposal analysis required for all project approvals. Such reviews would apply to ALL uses of public lands, including oil and gas leasing and exploration projects, grazing permits, recreation permits, etc.

These new policies for undesignated lands heretofore managed for multiple use mean that BLM can unilaterally determine that an area is suitable for wilderness protection, and delay for years any development while the agency re-inventories the lands and updates land use plans. In the meantime, this Secretarial Order directs BLM to administer these areas as de facto wilderness, which prevents access to examine the resource potential on these lands and could prevent development of leases in the vicinity of these lands.

Recommendation-

Immediately revoke Secretarial Order 3310 and cease all activity related to the order. Administer BLM lands not currently designated as wilderness under FLPMA and the resource management planning process.

(d) Cultural Resource Assessment and Surveys: Current Action -

Cultural resource surveys are the single most identified cause for delay in APD and ROW approvals. The BLM requires operators to hire a "BLM approved and permitted archeologist" to do a Class III archeological survey as a requirement for approval of the APD. Upon completion of the report with recommendation, the BLM field office archeologist reviews the BLM approved archeologist report, and concurs with the findings. The BLM archeologist then forwards his recommendation to SHPO to

concur with the first and second archeologist's findings. This redundant review process can add up to 2-4 months to the APD approval process.

Recommendation -

In order to develop greater efficiencies and reduce permitting timeframes, the BLM approved and permitted Archeologist's Report should be sent to the BLM and SHPO archeologist for concurrent review and approval. Federal agencies and State Historic Preservation Offices (SHPOs) must streamline the archaeology report review process. Guidance for contract archeologists should be consistent and clear so that Cultural Resource (CR) reports can be reviewed and recorded expeditiously. In addition, consultation with Tribes could be improved by appointing a BLM cultural resource liaison officer with SHPO and affected tribes in each state. The liaison officer would work with each tribe's designated representative(s) to develop more effective consultation procedures for resolving cultural resource issues.

(e) Lease Stipulations and Conditions of Approval Restricting Surface Uses: Current Action -

Currently, Controlled Surface Use (CSU) stipulations and Conditions of approval (COA) are attached to leases and permits with a wide, non-specified timeframe and often with no state agency input. CSU's and COA's are typically issued for November through April to coincide with potential winter weather impacts, historic wildlife migration patterns, wildlife birthing times and other activities.

Recommendation-

- Rather than blanket restrictions and prohibitions, areas should be closed only when a science and risk-based analysis of weather conditions and wildlife utilization supports such closures.
- If wildlife is not present, and weather conditions do not justify a closure, the BLM should have the flexibility to authorize use.
- The BLM should require the State Wildlife Personnel to advise the BLM when those two criteria are present before considering closure of public lands to oil and gas operations.
- Winter range restrictions as Conditions of Approval (COA) should only be enforced when there are severe weather events and animals are present.

(f) Measures to Comply with the National Historic Preservation Act: Current Action –

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment. Instruction Memorandum No. 2010-117 directs that as part of the lease parcel review, NHPA lease stipulations must be attached to any lease parcel prior to a lease sale.

Recommendation -

Amend the National Historic Preservation Act or the Advisory Council regulations to clarify that compliance with the NHPA (including consultation with potentially affected Native American tribes) need not occur prior to the issuance of an oil and gas lease, but can be delayed until surface disturbing operations are proposed. In addition, DOI should consider collaborating with appropriate state

historical and cultural resource protection agencies to establish statewide multi-agency archaeological databases. The benefits of a joint agency database are significant due to cataloging of all cultural resource reports, including "no finds". Moreover, dynamic CR reports improve search efficiency by avoiding duplication of previously conducted surveys resulting in better allocation of resources for the SHPO and BLM. The lack of an archaeological database has been a continuing problem throughout the western states because inventory reports appear to be placed on a shelf and never consulted when new activities are proposed.

The DOI should consider making more efficient use of on-site surveys for qualified APDs. There are many non-controversial sites located in established fields that do not involve extensive dirt work. This can be determined from preliminary cross sections of the site from the applicant or by simply reviewing topographical quads and CR reports. By eliminating the need to survey every location, resources can be directed toward those sites where such surveys provide value to the cultural resource protection effort and the permit process for energy resource projects. This could assist in reducing the amount of staff time needed in the field and enhance better turnaround of APDs. Note: Some BLM offices hold several on-sites associated with one project.

(g) Use of Categorical Exclusions: Current Action –

On May 17, 2010 BLM issued Instruction Memorandum No. 2010-118, Energy Policy Act Section 390 Categorical Exclusion Policy Revision. The IM revised BLM's NEPA Handbook, H-1790-1, to:

- Provide amended instructions for using categorical exclusions (CX) 2 and 3 established by Section 390 of the Energy Policy Act of 2005 (P.L. 109-58).
- Require review of "extraordinary circumstances" in accordance with 43 CFR 46.205(c) and 43 CFR 46.215 for use of any of the Section 390 CXs.
- Ensure all actions approved through the use of a Section 390 CX are in conformance with the approved land use plan.
- Provide some general guidelines for ensuring compliance with NEPA.

In general the IM stated that CXs may only be used when:

- The location or well site or development field was adequately analyzed in an existing activity-level or project-specific Environmental Impact Statement (EIS) or Environmental Assessment (EA).
- A review for extraordinary circumstances is performed/considered. Extraordinary circumstances occur when individual actions that normally would be categorically excluded are of such a nature or degree that they warrant further environmental analysis before permitting.
- The development actions conform with the approved land use plan and are within the range of environmental effects analyzed in the land use plan and its associated NEPA documentation

The circumstances where categorical exclusions under Section 390 of the Energy Policy Act of 2005 may be used were designed to enable energy development in situations where the environmental impact is minor, in developed fields, and where drilling was analyzed in an appropriate NEPA

document as a reasonably foreseeable activity. The purpose of a categorical exclusion is to eliminate the need for unnecessary paperwork and effort under NEPA for categories of actions that normally do not warrant preparation of an environmental impact statement or environmental assessment.

In the case of BLM offices in the Intermountain West, the ability to approve certain projects using categorical exclusions where justified provides BLM and other Federal agencies the flexibility to direct the attention of staff toward those projects for which greater time and effort for environmental review is warranted. Thus, rather than spending time in the office on redundant paperwork, agency staff can spend more time in the field inspecting and monitoring operations, where commitments and practices described on paper can be validated, and where on-the-ground environmental protection can be assured. Categorical exclusions enable BLM to employ a balanced and cost-effective approach to managing the development of vital energy resources while still meeting its obligation to protect the environment.

The new CX guidance, including the IM, will make the use of CXs much more difficult and rare, especially in the current environment where BLM personnel have a propensity to move very slowly. In general this guidance will slow down approvals for oil and gas activities on Federal lands.

Recommendation-

Re-institute the use of categorical exclusions as established under Section 390 of the Energy Policy Act of 2005, with a requirement that BLM issue any finding that a project application is not entitled to a categorical exclusion, along with the grounds for such a finding, within 30 days of the submittal of the permit application for the project. Any finding of "Extraordinary Circumstances" invoked to disallow issuance of a categorical exclusion under Section 390 should depend upon the nature of possible impacts, if any, to a protected resource, *not* on the mere existence of the protected resource. This should include consideration of possible impacts or potential effects that are expected to remain after application of mitigation measures, if any, to the protected resource.

(h) Time Required to Process Permits for Oil and Natural Gas Operations: Current action –

The Bureau of Land Management (BLM) currently estimates a 206 day average processing time for permits. Depending on the field office, permits can take over 500 days for approval. Onshore Order #1, in accordance with 43 CFR Part 3160, establishes an approval time frame of 30 days for permit approval, "Upon initiation of the APD process, the authorized officer of BLM shall consult with any other involved SMA and with other appropriate interested parties, and shall take one of the following actions within 30 days of submittal: (1) approve the application as submitted or with appropriate modifications or stipulations; (2) return the application and advise the lessee or operator of the reasons for disapproval; or (3) advise the lessee or operator, either in writing or orally with subsequent written confirmation, of the reasons why final action will be delayed and the date such final action is expected."

Recommendation-

The BLM should enforce the regulation established by Onshore Order #1 and require field office personal to take action (either approve or deny) APDs and ROWs within 30 days when a NEPA

document or a Categorical Exclusion has already been approved. Instead of merely "encouraging" timely issuance of APDs, it is incumbent upon the agencies to institute measures that ensure timely issuance of permits. One way to accomplish this could be the establishment of performance goals *i.e.*, 90 percent of APDs must be completed with 30 days and incorporated into personnel review requirements. In addition, infill development wells that do not require exceptional environmental documentation for special resource values or are located on noncontroversial leases in established fields should be assigned a goal of 100 percent approval with 30 days.

(i) Other recommendations relating to APD approval timeframes:

- Staffing - The agencies must provide field offices with essential resources needed to accomplish the agencies' stated goals. Improved training and utilization of staff is essential. For instance, creation of APD/ROW teams that include all requisite resource specialists to process an application is a necessity, especially in offices with significant workloads. This would go a long way toward achieving timely permit issuance and meeting performance goals set for minerals and other resource managers. The APD/ROW teams would be under the supervision of one individual responsible for ensuring performance goals are met. Moreover, alternate team members must be designated to fill gaps when a team member is unavailable, due to travel, sickness or vacation.
- Staffing - State Offices should provide resource specialist assistance to Field Offices during times of increased activity (*i.e.* a labor pool any FO could call upon). State Office specialists would become more knowledgeable of the priorities in each office to help manage APD/ROW workloads and provide assistance for further streamlining and efficiency gains.
- Environmental Documentation Recommendation– Duplicate environmental documentation is a significant problem throughout the agencies and administrative determinations are currently underutilized by the agencies. It is becoming more commonplace for BLM to request industry to fund not only field development environmental analyses but also analyses for smaller projects (e.g. small coal bed methane exploratory projects). Whether BLM or industry funds environmental analyses, it is in the best interest of both parties to work together and focus on compliance with CEQ regulations at 43 CFR 1500-08.
- Environmental Documentation Recommendation -Adoption of a streamlined environmental assessment (EA) format is needed which could be accomplished through NEPA training. Currently, the agencies use an environmental impact statement (EIS) format for EAs which creates unnecessary delays. EAs need to be streamlined and avoid EIS level environmental analysis.
- Environmental Documentation Recommendation - Simplify and reduce the detail of the narrative on the affected environment (referencing the current applicable Resource Management Plan to the extent possible) and focus on the environmental consequences of the proposed action, including mitigation measures and other standards or guidelines. Eliminate the analysis of speculative situations or unachievable alternatives.
- Environmental Documentation Recommendation - Utilize sundry notices for successive wells on multiple-well pads.

(j) Procedures Governing Protests of Lease Sales and Related Matters: Current Action –

Pursuant to 43 CFR 4.450-2, an individual may file a protest regarding a lease parcel proposed for sale. A review of BLM's oil and natural gas lease sales in Colorado, New Mexico, Utah and Wyoming in 2007-09, by the Government Accountability Office, found that nearly three-quarters of the parcels were protested. The Bureau of Land Management's failure to keep detailed records about protests against its Federal land lease sales to energy companies makes it impossible to determine exactly how often the protests affected the eventual outcome. The NEPA process designed to allow public participation in the mineral leasing process is being abused and used as a tool to delay or stop oil and gas development of Federal land.

Recommendation-

Require that only persons whose legal rights will be directly and adversely affected by the challenged action, and who are within the zone of interest protected by each Act under which the challenge is brought, shall have standing to file any petition for judicial review of covered oil and natural gas activities. Require those parties who are protesting lease issuances to bond for any potential losses that would be incurred should the protests be overturned on frivolous grounds.

(k) Implementation of Adaptive Management: Current Action –

Adaptive Management is a resource management tool that the DOI is utilizing in developing RMP's, as guidance for lease stipulations and to address changing resource conditions. Instruction Memorandum 2010-117, states that "Adaptive Management" will be used to address "changing" resource conditions that require more restrictive stipulations to be implemented. Unfortunately the definition of adaptive management as interpreted by the BLM is causing further delay by slowing the RMP process, creating new and redundant stipulations.

Recommendation-

DOI should work with industry to identify adaptive management policies and principles that work and are science-based and consistent with FLPMA & MLA; BLM should consider defining "Adaptive Management" as follows:

"Adaptive Management" is a science-based approach to natural resource management wherein the effects of policies, plans and practices are monitored for the purpose of affecting future Federal management actions. Adaptive Management approaches should be used to test effectiveness of lease stipulations and conditions of approval, monitoring effects of land use plan and project implementation and then build on voluntary adoption of Best Management Practices."

(l) Additional Items relating to Land Use Planning and Leasing –

- Clearly define to all state and field offices what is BLM's authority on private land with underlying Federal minerals. BLM employees should be educated to the fact that BLM's authority is limited to Federal Acts and potential adverse impacts to immediately adjacent Federal lands and not private or state lands.
- NEPA documents should allow and encourage technology and ingenuity. In circumstances when well count numbers are reached in a project carried out under approval issued with reference to a

particular NEPA document but surface disturbance acreage limits described in that approval document have not been reached, project operations including additional drilling should be allowed to proceed during the preparation of a supplemental EIS, so long as approved surface disturbance acreage limits are not exceeded.

(m) Oil Shale and Oil Sands

In Section 369(b) of the Energy Policy Act of 2005 (PL 109-58), Congress declared that it is the policy of the United States that:

“(1) United States oil shale, tar sands, and other unconventional fuels are strategically important domestic resources that should be developed to reduce the growing dependence of the United States on politically and economically unstable sources of foreign oil imports;
(2) the development of oil shale, tar sands, and other strategic unconventional fuels, for research and commercial development, should be conducted in an environmentally sound manner, using practices that minimize impacts; and
(3) Development of those strategic unconventional fuels should occur, with an emphasis on sustainability, to benefit the United States while taking into account affected States and communities.”

Section 369 directed the Secretary of the Interior and the Secretary of Energy, along with the Secretary of Defense, to forthrightly pursue the development and commercialization of these resources and associated technologies in an environmentally responsible manner. However, a review of the actions taken by the Departments of Interior and Energy to implement Section 369 has yielded disappointing results. Today, more than five years after its enactment, only some of the requirements of the Act have been fulfilled, compliance schedules have slipped, and many requirements appear to have received little attention or have been blatantly ignored.

An oil shale research, development and demonstration (RD&D) leasing program was initiated following passage of the Energy Policy Act of 2005. Six lessees were selected in 2006, and five leases were granted in 2007, with the projects under these leases currently in various stages of development. However, in 2010 the Administration carried out a second round of leasing, but with modified terms that provided far less land area per RD&D lease, and reduced the area to be available for a RD&D lessee for preferential rights for future commercial-scale leasing. Notwithstanding this, as a result of the 2010 offer, 3 applications were received. The Department should complete the NEPA analysis required for issuance of the RD&D leases in an expeditious manner and award the leases.

In addition, subsection (d) of Section 369 requires the Secretary to consult with the Governors of States with significant oil shale and tar sands resources on public lands, representatives of local governments in such States, interested Indian tribes, and other interested persons, “to determine the level of support and interest in the States in the development of tar sands and oil shale resources”. There is no evidence that Secretary of the Interior has consulted with the Governors of affected states, local tribes or other “interested persons” as required by law. The Secretary has said issues

regarding energy and water use, lifecycle carbon emissions, environmental impacts, groundwater protection, and socio-economic impacts must be resolved before a leasing program could begin. Yet little is being done by the Department to address those questions or concerns. There has been little Federal interagency consultation or coordination as required by Subsection (i)(1)(C) of Section 369, outside the auspices of the Task Force or an ad hoc working group, both of which now appear to be dormant. The USGS recently updated estimates of oil shale resources in the Uintah, Piceance, and Green River Basins, but no comprehensive National Oil Shale and Tar Sands Assessment has been prepared as required by Subsection (m)(1)(A) of Section 369. Nor have the eastern Devonian or other “shale” resources been addressed in such an assessment as was directed by Congress.

Neither the Department of the Interior nor the Department of Energy have requested new funds or recommended appropriate reprogramming of existing funds to develop or implement the program activities that were specifically directed by Section 369 of the Act. Nor have the Departments adequately reported on the potential, progress, and challenges faced by government and industry to advance unconventional energy resource development.

Demonstration of the ability to carry out environmentally responsible development of domestic oil shale, tar sands, shale oil and gas resources, and other unconventional fossil energy resources should be a priority of the United States. The United States is endowed with more than 2 trillion tons of high quality oil shale. We have more than 60 billion barrels in oil sands and 100 billion barrels of other known heavy oil resources. And we have more than 80 billion barrels of oil that could be produced with carbon-dioxide enhanced oil recovery – making oil and sequestering carbon at the same time. The Task Force on Strategic Unconventional Fuels has told us that as much as 7.5 million barrels per day could soon be producible from these resources within 25 years. That’s nearly three-fourths of our current oil imports.

American ingenuity has the capability to develop and to implement technologies that will allow these resources to be produced in a safe and environmentally sound manner and converted to fuels that can meet the needs of our people and our economy. But the technologies to unlock the energy that is believed to exist within oil shale deposits will be of limited use if our policies effectively prohibit access to these strategic energy resources that are largely found beneath our Federal lands. The Energy Policy Act is clear that these resources be made available for leasing and for practical application of research and development to determine their full potential.

While we pursue new alternative fuels technologies, we cannot ignore the liquid fuels requirements or security imperatives of the United States. Despite measurable progress in alternative fuels and vehicles, the reality is that the Nation will continue to rely on liquid fossil fuels for decades to come. We owe it to ourselves and to our Nation to promote the clean, safe development of our domestic oil and gas resources, stimulating our economy and creating quality jobs rather than importing oil and exporting wealth and employment.

C. Offshore Oil and Gas

1. Introduction and Background:

In 1978, as part of the Outer Continental Shelf Lands Act Amendments of 1978 (OCSLA), Congress declared that “the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs.” 43 USC 1332(3). But Congress was not under any illusions that producing energy for America would be without significant impacts. In fact, Congress specifically mentioned that such would likely be the case (43 USC 1332(4)). The comprehensive, clear intent of the OCSLA of 1978 has become clouded by a confluence of regulations issued under the authority of other statutes from multiple agencies which has created significant uncertainty about energy production from the outer Continental Shelf. A number of changes are needed to other statutes in order for the OCSLA to function efficiently. Those changes are outside the scope of this document.

The April 2010 incident in the Gulf of Mexico has resulted in very significant changes to the DOI regulations applicable to OCS operations. Further regulatory changes are anticipated. The new regulations have not been in place for a sufficient period of time on which to form a comprehensive assessment of corrective changes. However, certain recommendations are currently warranted regarding the OCS program.

2. Recommendations

- (a) EP and APD Review Time Periods. The mandate of the United States Supreme Court in *Mobil Exploration and Producing Southeast, Inc., v. United States*, 530 U.S. 604 (2000) – that lessees are entitled to timely and fair consideration of submitted plan and permit requests, that such consideration was a ‘necessary reciprocal obligation,’ indeed, that any ‘contrary interpretation would render the bargain illusory’ – is not being fulfilled. For example, 30 CFR 250.231 related to exploration plans says that once a “proposed” EP (exploration plan) is received, the Regional Supervisor has 15 “working” days (3 weeks) to determine if the proposed EP is “deemed” submitted. If he finds deficiencies, then the EP is not “deemed” submitted until the deficiencies are corrected. The purpose of this is to provide the lessee with the information of all deficiencies needed to allow the EP to be approved or denied. In practice, this 15 working day period has become like a ping-pong game with, typically, one of the DOI staff teams telling the lessee of a few “deficiencies” but this response does not include the input of all DOI staff teams involved in reviewing the “proposed” EP. This leads to the lessee making the changes suggested and resubmitting, only to have another DOI staff team object at a later time to other parts of the proposed EP, and even to changes that the lessee made to the proposal based on the input of the earlier DOI staff team review. This process happens repeatedly for the same EP, and this is the same relative process for obtaining approval of Applications for Permits to Drill (APDs). While these processes have always involved a limited amount of back and forth between the lessee and the DOI, they have now been taken to extremes. Under the OCSLA, the EP must be acted upon within 30 calendar days of submittal, so this process of repeated review periods

prior to an EP being deemed "submitted" is now for all intents and purposes an amendment of the statute by administrative practice. This process should be restrained by the DOI leadership by ensuring that DOI staff provide a comprehensive review of any "deficiencies" in EPs, APDs, DOCs, and DPs when they are initially submitted for review. .

- (b) NEPA Categorical Exclusions. The Director of BOEMRE suspended the use of the NEPA categorical exclusion regulations pending further review. We believe this action is inconsistent with the NEPA guidance on categorical exclusions found in regulations promulgated by the White house Council on Environmental Quality (CEQ) at 40 C.F.R. Sections 1500.4, 1500.5, 1507.3 and 1508.4. First, the CEQ review of BOEMRE NEPA implementation did not find that the BOEMRE categorical exclusion provisions had been abused. Second, BOEMRE is not staffed, nor ever likely to be adequately staffed, to write an Environmental Assessment for each new EP. As stated earlier, Congress has mandated EP decisions within 30 calendar days after submittal. This has been the law for more than 30 years. Proper use of grid EAs tiered from area environmental impact statements (EISs) will provide the NEPA analysis necessary to make use of categorical exclusions for EPs and APDs in the Gulf of Mexico without unnecessarily extending the review time.
- (c) OCS Oil and Gas Leasing Program. As previously stated, the December 1, 2010, decision by Department of the Interior Secretary Salazar to reimpose an offshore oil and gas leasing moratorium for the entire Atlantic and Pacific Oceans, areas of the Gulf of Mexico, and areas offshore Alaska is the wrong decision to meet the nation's energy needs. The Secretary revoked his proposal of March 2010 to plan to have oil and gas lease sales in the Mid and South Atlantic and in the Eastern Gulf of Mexico in the next OCS oil and gas 5-Year Leasing Program for 2012-2017. He further indicated that he may not have any lease sales offshore Alaska in the new Program, based on new "scientific and environmental studies," among other things. Finally, he even indicated that lease sales might not be conducted in the Central and Western Gulf of Mexico in the next 5-Year Program.

Analysis. The leasing program statute, 43 USC 1344, (Section 18 of the OCSLA) requires the Secretary to have a 5-year leasing program that "will best meet national energy needs for the five-year period." See section 18 (a), particularly, "The Secretary, pursuant to procedures set for in subsections (c) and (d) of this section, shall prepare and periodically revise, and maintain an oil and gas leasing program to implement the policies of this Act."

Further, "Such leasing program shall be prepared and maintained in a manner consistent with the following principles:

(2) Timing and location of exploration, development, and production of oil and gas among the oil- and gas-bearing physiographic regions of the outer Continental Shelf shall be based on a consideration of --

(A) *existing information concerning the geographical, geological, and ecological characteristics of such regions*; [this means that the Secretary is not to go out and develop new information through studies, geophysical surveys, etc., he must use "existing information." For this reason, his stated reason for taking the Atlantic out of the program is not in accordance with the law. In the fact sheet issued with the Secretary's decision, DOI states: "Because the potential oil and gas resources in the Mid and South Atlantic are currently not well-known, Interior will move forward with an

environmental analysis for potential seismic studies in the Mid and South Atlantic OCS to support conventional and renewable energy planning. No lease sales will be scheduled in the Atlantic in the 2007-2012 program or in the 2012-2017 program."]

(B) *an equitable sharing* of developmental benefits and environmental risks among *the various regions*; [clearly the new program will not provide for an equitable sharing among the various regions.]"

While these are only 2 of 8 factors, the other 6 do not negate the importance of these 2, and in particular factor (A) mandates the use of "existing" information.

In the press release issued by DOI, the Secretary states clearly the criteria that he is using to determine the new 5-year leasing program, and they are not the criteria required by law. Secretary Salazar states, "*we have revised our initial March leasing strategy to focus and expend our critical resources on areas with leases that are currently active.*" Nowhere in Section 18 is that one of the criteria for creating a 5-year leasing program. In fact, factor (B) above, would say that new areas should be leased so that there would be an "equitable sharing among the various regions."

Further, Secretary Salazar, in the third paragraph of the press release, bases his decisions on the President's recent Executive Order on National Ocean Policy. This is not in accordance with the controlling statute – the OCSLA.

- (d) Regional OCS Permit Offices. The difficulties in obtaining timely decisions on OCS-related permits from multiple agencies, in both the Alaska and Gulf of Mexico Regions, have become extremely unreasonable. The Federal government has a contractual obligation for all of its agencies to act in a "timely" manner if they have authority over permits necessary for lessee enjoyment of OCS lease contract rights. Failure to ensure such timely action will likely expose the government to potential breach of contract claims. The Secretary should lead the effort to establish Regional OCS Permit Offices in which all applicable permitting agencies would be collocated with BOEMRE personnel to ensure timely coordination and processing of requested permits and other required approvals. This concept has been proven to be highly effective in coordinating the processing of onshore oil and gas permits.

Regulations and Regulatory NTLs. A Notice to Lessees (NTL) which establishes regulatory requirements should be subject to the notice and comment provisions of the Administrative Procedures Act. Further, it is very important that DOI not attempt to impose regulatory changes which are not in conformance with the commercial law of contracts which applies to existing OCS leases. The U.S. Supreme Court directly addressed this issue in *Mobil Exploration and Producing Southeast, Inc., v. United States*, 530 U.S. 604 (2000). The Court addressed the issue of Congress or an agency changing the laws and/or regulations applying to the leases after the leases were issued, finding that such new laws and most new regulations were not within the scope of the contracts. We recommend that BOEMRE staff conduct a regulatory analysis prior to issuing new regulatory NTLs and before publishing proposed rules to analyze whether any provisions of the NTL or proposed rule would violate existing lease terms.



Thank you for considering these comments.

Very truly yours,

A handwritten signature in dark ink, appearing to read "Erik Milito". The signature is stylized with a large initial "E" and "M".

Erik Milito
Group Director
Upstream and Industry Operations