Paper #2-3

U.S. OIL AND GAS ENVIRONMENTAL REGULATORY PROCESS OVERVIEW

Prepared by the Environmental & Regulatory Subgroup
of the
Operations & Environment Task Group

On September 15, 2011, The National Petroleum Council (NPC) in approving its report, *Prudent Development: Realizing the Potential of North America's Abundant Natural Gas and Oil Resources*, also approved the making available of certain materials used in the study process, including detailed, specific subject matter papers prepared or used by the study's Task Groups and/or Subgroups. These Topic and White Papers were working documents that were part of the analyses that led to development of the summary results presented in the report's Executive Summary and Chapters.

These Topic and White Papers represent the views and conclusions of the authors. The National Petroleum Council has not endorsed or approved the statements and conclusions contained in these documents, but approved the publication of these materials as part of the study process.

The NPC believes that these papers will be of interest to the readers of the report and will help them better understand the results. These materials are being made available in the interest of transparency.

The attached paper is one of 57 such working documents used in the study analyses. Also included is a roster of the Subgroup that developed or submitted this paper. Appendix C of the final NPC report provides a complete list of the 57 Topic and White Papers and an abstract for each. The full papers can be viewed and downloaded from the report section of the NPC website (www.npc.org).

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UNITED STATES OIL AND GAS ENVIRONMENTAL REGULATORY PROCESS OVERVIEW

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A. Federal Process

The Department of Interior Bureau of Land Management (BLM) leases minerals and manages oil and gas development activities on over 570 million acres of BLM and other federal lands. An additional 56 million acres of split estates also exist, in which private individuals or states own surface rights and the federal government owns the subsurface mineral right. The US Department of Agriculture (USDA) Forest Service identifies areas on national forest system lands where leases can be sold and will determine the appropriate lease stipulations necessary to protect surface resources. The Mineral Leasing Act of 1920 (30 U.S.C. § 181, et seq.), as amended, and the Mineral Leasing Act for Acquired Lands of 1947 (30 U.S.C. § 351, et seq.), as amended, define the BLM responsibility for leasing these Federal minerals and management of these oil and gas leases, in cooperation with other federal agencies or private surface owners where appropriate. Regulations governing the BLM's oil and gas leasing program are found at Title 43 of the Code of Federal Regulations in Parts 3000 and 3100.

The Federal Onshore Oil and Gas Leasing Reform Act of 1987 (30 U.S.C. § 181 et seq., which modified the Mineral Leasing Act of 1920) requires that all public lands available for oil and gas leasing be offered first by competitive leasing. The BLM may issue noncompetitive leases only after the agency has offered the lands competitively at an oral auction and not received a bid. This act also granted the USDA Forest Service the authority to make decisions and implement regulations concerning the leasing of public domain minerals on Forest System lands containing oil and gas. As a result, the BLM administers the lease but the USDA Forest Service has more direct involvement in the leasing process for lands it administers.

Royalties are paid on all oil and gas produced from Federal oil and gas leases. The Federal government shares royalties with state governments. Royalties on Federal oil and gas have been collected and disbursed by the Minerals Management Service, a duty that has recently been assigned to the new Office of Natural Resource Revenue.

Federal regulation of operations on Federal onshore oil and gas leases takes many forms. Federal authority can apply uniformly to all onshore operations through statutory provisions, regulations issued through formal rulemaking, onshore oil and gas orders and notices to lessees (NTLs) issued by BLM, and certain Headquarters Instruction Memoranda (IMs). Various BLM state or regional offices can also exercise authority that applies only to Federal leases or operations on those leases in particular regions, such as resource management plans (RMPs), NTLs that may issue from state or regional offices, and certain Instruction Memoranda. BLM also may impose site-specific obligations such as conditions of approval and lease stipulations.

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BLM's responsibilities for leasing and management of natural gas and oil development are components in a broader set of the agency's responsibilities for Federal lands. The BLM's mandate to manage federal lands for multiple use, as described in the Federal Land Policy and Management Act of 1976 (43 U.S.C. Chapter 35) or FLPMA , gives the agency responsibility for ensuring that no activity it authorizes – including leasing – unduly or unnecessarily degrades the lands in question. FLPMA reflects the intent of Congress to retain Federal control and possession over valuable lands and mineral resources held by the Federal government and not previously conveyed by deed or patent to private ownership. Under FLMPA, additional land and resource management authorities were established. FLPMA also effected changes in the organization and administration of BLM and Federal public lands, and modified a number of provisions on federal land withdrawals, land acquisitions and exchanges. Importantly, FLPMA established multiple use, sustained yield, and environmental protection as the guiding principles for BLM management of Federal public lands, and requires that BLM must take any action necessary to prevent unnecessary or undue degradation of the lands.

All actions authorized or approved by BLM, including BLM decisions relating to oil and natural gas leasing, and exploration and production operations on leases, must conform to existing approved RMPs for the BLM Field or District Office in question. BLM offices develop RMPs in accordance with FLPMA (43 U.S.C. §§ 1711-1712) to assure that public lands are managed under the principals of multiple use and sustained yield.

FLPMA and the Mineral Leasing Act provide that parcels in areas identified as open for leasing in a BLM District Resource Management Plan may be nominated for leasing. Anyone can *nominate* lands by sending a written expression of interest to the BLM State Office for the area where the lands are located. Nominated parcels are <u>not</u> automatically placed on sale. The BLM reviews each nomination to ensure that parcels are, in fact, available and that stipulations from the RMP are attached to ensure protection of all resources before the lease is placed on sale.

A RMP describes how the BLM will manage the specific area of public land over a period of time (generally 10 -15 years). RMPs establish goals and objectives for management of all resources within the area covered, and the management actions and allowable uses that will achieve these goals and objectives. RMPs guide future management actions and subsequent site-specific implementation decisions carried out by BLM Districts or Field Offices. BLM offices periodically evaluate RMPs to determine if management decisions contained within them remain current and adequate. In the event conditions change (such as the listing of a species in the area under the Endangered Species Act, or significant changes in use of the public lands involved) BLM may revise or amend the RMP to bring it into conformance with these changing conditions.

For significant land use planning decisions such as RMPs, as well as site-specific implementation (such as permit approvals required for activities on particular leases), BLM undertakes environmental review to meet its obligations under The National

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Environmental Policy Act of 1969 (NEPA) (42 U.S.C. § 4321 et seq., as amended). RMPs customarily require Environmental Impact Statement (EIS) level NEPA review, in conformity with the NEPA mandate that Federal agencies prepare a detailed statement of the effects of major Federal actions significantly affecting the quality of the human environment. RMPs are frequently the subject of litigation based on allegations of inadequate NEPA analysis. The BLM develops RMPs with the intent to use the best information available. The agency employs a collaborative approach, through which the BLM solicits input from other agencies (federal, state and local) and the public to identify appropriate uses and/or protective measures within the BLM's multiple use mandate governing the public lands. BLM planning regulations provide opportunities for extensive public involvement at specific points in the planning process.

BLM also issues various guidelines and policy statements to guide oil and gas development throughout the United States in an environmentally responsible manner. Through these guideline documents BLM also seeks to increase understanding of and compliance with current oil and gas laws and regulations.

One of the most important of these documents is the BLM "Gold Book", officially titled *Surface Operating Standards and Guidelines for Oil and Gas Exploration and Development* (2007). Now in its fourth edition, The Gold Book provides Federal lessees with guidance on compliance with BLM regulations, policies, guidelines, and Best Management Practices (BMPs) across each stage of lease exploration and development.

BLM has also published instructional memoranda (IM) and guidance documents covering exceptions, waivers and modifications of lease stipulations, terms and conditions for issuance of rights-of-way, describing the agency's program to encourage best management practices on Federal oil and gas leases, and operations on "split estate" lands with Federal mineral ownership and private ownership of the surface estate. There are also subject specific manuals for issues such as protection of visual resources and construction of roads. In addition, as a matter of policy, BLM allows States to impose requirements on onshore Federal oil and gas lease operations.

Several other statutes and regulations also affect oil and gas leasing and development on federal lands. For instance, the protection of resources that may be affected by oil and gas activity is governed by resource-specific laws, such as the Clean Air Act, the Clean Water Act, the Endangered Species Act and the National Historic Preservation Act. Federal environmental statutes also govern exploration and production operations for natural gas and oil on non-Federal lands.

Among the most important of these was NEPA, noted above, the Federal statute that established a national policy to promote enhancement of (and prevent damage to) the environment. The key requirement of NEPA affecting both Federal agency decisions relating to development of mineral resources on Federal lands, as well as agency approvals operators must obtain to develop their leases, is the requirement that

environmental impact statements (EISs) be prepared for all major federal agency actions that may be deemed to significantly affect the human environment.

The Clean Water Act (CWA) (33 U.S.C. § 1251 et seq.) governs the protection and maintenance of the chemical, physical, and biological integrity of the nation's waters. Acting under the CWA, EPA or state agencies with delegated authority protect water quality through development of water quality standards, permitting procedures to assure water quality (that can apply to exploration and production operations for oil and natural gas), programs to assess the quality and condition of surface water bodies such as lakes streams and rivers, and programs to control or to eliminate point and nonpoint pollution sources. The CWA established the National Pollutant Discharge Elimination System (NPDES) permitting process, which provides permit-driven regulation of pollutant limits. This applies to the discharge of produced water, and generally includes limits on volume (quantity) and concentration (quality). An NPDES permit may be issued to an individual facility, and the program also authorizes issuance of general permits, which apply to a class of similar facilities within a specific permit category.

Another key Federal environmental statute with increasing influence on exploration and production activities on federal public lands (and on such operations generally) is the Clean Air Act (CAA) (42 U.S.C. § 7401 et seq., as amended), enacted in 1970 to address air pollution in the United States. The act prescribes the measures that Federal agencies, state and local governments, and private entities must take in order to decrease air pollution in the country. As with the CWA, permits under this Act are issued by EPA, as well as by state government agencies to which EPA has delegated authority to issue permits.

The Endangered Species Act of 1973 (ESA) (7 U.S.C. § 136, 16 U.S.C. § 1531 et seq.) is intended to protect species identified as at risk from extinction, and their habitats, as a "consequence of economic growth and development untempered by adequate concern and conservation." Under the ESA, procedures are defined to identify and to “list” species deemed threatened or endangered with extinction due to any combination of factors, as well as for recovery plans and the designation of critical habitat for these species. The ESA also describes procedures for federal agencies to follow when taking actions that may jeopardize listed species, which can (and often does) include actions taken with respect to natural gas and oil development projects. The U.S. Fish and Wildlife Service has responsibility for protection of all terrestrial species and freshwater fish species. Actions under ESA to protect species found in the marine environment are administered by the National Oceanographic and Atmospheric Administration. Species that occur in both habitats (e.g. sea turtles and Atlantic sturgeon) are jointly managed.

The National Historic Preservation Act of 1966 (NHPA) (16 U.S.C. § 470 et seq.) is intended to preserve historical and archaeological sites in the United States. It is frequently described as the most far-reaching preservation legislation ever enacted. Among its many mandates is the requirement that Federal agencies evaluate the impact of

all federally funded or permitted projects on historic properties (buildings, archaeological sites, etc.) through a process known as Section 106 Review. The NHPA also created the National Register of Historic Places (NR), the list of National Historic Landmarks, and the State Historic Preservation Offices. Amendments adopted in 1992 increased protection for Native American preservation efforts. Under the NHPA, any federal agency whose actions or permit decisions could lead to adverse effects on historic resources, especially properties listed on the NR, must consider alternative plans for the action. If the project is believed to have no adverse effect on eligible historic resources, the applicable agency is required to document this. Alternatively, if an adverse effect is expected, the agency is required to work with the State Historic Preservation Office to ensure that all interested parties are given an opportunity to review the proposed work and provide comments.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 U.S.C. § 9601 et seq., as amended), also known as Superfund, provides broad federal authority to respond to releases or threatened releases of hazardous substances seen as presenting a risk to public health or to the environment. CERCLA established prohibitions and requirements concerning closed and abandoned hazardous waste sites, provided for liability of persons responsible for releases of hazardous waste at these sites, and established a trust, funded by a tax on the chemical and petroleum industries, to provide cleanup when no responsible party could be identified.

Over the past two decades, the number of federal onshore oil and gas leases BLM has issued, as well as the number of acres, has varied. Leasing activity was highest at the beginning of the period, with more than 9,000 leases and over 12 million acres leased in fiscal year 1988. Both the number of leases and area leased then fell sharply for several years, and in recent years the number has fluctuated between 2,000 and about 4,500 leases, and the area did not exceed 5 million acres leased.

B. Tribal

1. History and Overview

The United States has a unique legal relationship with Indian tribal governments as set forth in the constitution, treaties, statutes, executive orders and court decisions. Since the formation of the union, the United States has recognized Indian tribes as domestic dependent nations under its protection. The federal government has passed numerous statutes and issued many regulations that establish and promote a trust relationship with Indian tribes. Our country has recognized the right of Indian tribes to self-government. As domestic dependent nations, Indian tribes exercise inherent sovereign powers over their members and territory. The United States continues to work with Indian tribes on a government-to-government basis to address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights.

Two major Acts of Congress helped define the relationship between the Federal Government and Indian Tribes. The first was the Indian Citizenship Act of 1924 (codified at 8 U.S.C. § 1401(b)). Until 1924, most Native Americans were not citizens of the United Stated unless they served in the military, received allotments, or through special treaties or statutes. The act was seen as a response from the federal government to service during World War I, and to absorb Indians into the mainstream of American life. The second major act was the Indian Reorganization Act of 1934 (codified at 25 U.S.C. § 461, et seq.). This act addressed Indian lands and was intended to allow Indian Tribes to resurrect their culture and traditions lost to government expansion and encroachment years earlier.

Environmental program responsibility requires capability and significant resources among other things. Some Tribal governments may not find it practical or cost-effective to adopt all of the government programs. Tribes, due to program costs, maintenance and assistance costs, and availability of technical expertise, may choose to focus on certain high-priority activities. When, and if this occurs, the federal government will seek to directly implement the environmental and regulatory programs, as necessary. The federal government may also directly implement certain environmental and regulatory management programs where federal statutes preclude tribal eligibility.

In 1984, the Environmental Protection Agency (EPA) drafted and adopted its Policy for the Administration of Environmental Programs on Indian Reservations.[1] Several key provisions were stated in the policy, including that the EPA will recognize tribal governments as the primary parties for setting standards, making environmental policy decisions and managing programs for reservations, consistent with EPA standards and regulations. The EPA will also work with federally recognized tribes to encourage and

[1] Accessed April 2011 at http://www.epa.gov/tribal/pdf/indian-policy-84.pdf

assist them in assuming regulatory and program management responsibilities for reservation lands.

The Secretaries of the Interior and Agriculture have authority under various Federal and Mineral Leasing laws[2] to manage oil and gas operations. The Secretary of the Interior has delegated this authority to the Bureau of Land Management (BLM), which has issued onshore oil and gas operating regulations codified as part 3160 of title 43 of the Code of Federal Regulations. Section 3164.1 of 43 CFR states that all Onshore Oil and Gas Orders are binding on the operator(s) of Federal and Indian onshore oil and gas leases (other than those of the Osage Tribe).

2. EPA's Role as Regulator to Tribal Environmental Activities

EPA's role and work with the Tribes has evolved and been better defined since the adoption of the 1984 EPA Tribal Policy.[3] Congress has passed three environmental statutes that the EPA administers which authorize the "treatment of tribes in the same manner as states" (TAS). These include the Safe Water Drinking Act (SDWA), the Clean Water Act (CWA) and the Clean Air Act (CAA). In 2008, the EPA adopted an improvement to the TAS strategy in response to a 2005 Government Accountability Office (GAO) report which concluded that the EPA's lengthy review process of TAS applications and the frustrations of tribal applicants were not satisfactory.

For tribes to assume many of the EPA's regulatory programs, they usually must go through the TAS process and meet the following criteria:

- Tribe must be federally recognized
- Tribe must have or be able to exercise substantial governmental powers
- Tribe must have or have been delegated jurisdiction over the area in question
- Tribe must be reasonably expected to have the capability to effectively implement a program

Basically, once a tribe qualifies for one EPA program, it need only establish it has jurisdiction and capability for each subsequent program. If a tribe cannot establish capability, it must develop a plan for reaching capability over time.[4]

One of the more important tribe specific eligibility requirement criteria is if the functions to be authorized by the tribe are within the applicant tribe's jurisdiction. Tribes must

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[2] See definitions in section 1702, Federal Oil and Gas Royalty Management Act of 1982 (30 U.S.C. § 1701 et seq.).
[3] See, e.g., American Indian Environmental Office Tribal Portal, at http://www.epa.gov/tribal/; Tribal Compliance Assurance Center, at http://www.epa.gov/tribalcompliance/index.html; and Tribal Assumption of Federal Environmental Laws, at http://www.epa.gov/tribalcompliance/airresources/arregsdrill.html
[4] EPA Tribal Compliance Assurance Center, Tribal Assumption of Federal Environmental Laws. Accessed April 2011 at http://www.epa.gov/tribalcompliance/airresources/arregsdrill.html

demonstrate an appropriate level of jurisdiction over the areas to be regulated. According to provisions in federal Indian law, tribes generally have inherent sovereign authority to regulate both their members and land held in trust.

3. Bureau of Land Management: Onshore Oil and Gas Order Number 1: Onshore Oil and Gas Operations; Federal and Indian Oil and Gas Leases; Approval of Operations

The purpose of the BLM's Onshore Oil and Gas Order Number 1 (Onshore Order #1)[5] is to state the application requirements for the approval of all proposed oil and gas and service wells, certain subsequent well operations, and abandonment. This Order applies to all onshore leases of Federal and Indian oil and gas (other than those of the Osage Tribe). It also applies to Indian Mineral Development Act of 1982[6] agreements.

For Onshore Order #1, the term Indian Lands refers to any land or land interest of an Indian tribe or an Indian allottee held in trust by the United States or which is subject to a Federal restriction against alienation.

The BLM is responsible for processing the Applications for Permit to Drill (APD), Master Development Plans, and Sundry notices on Indian tribal and allotted oil and gas leases, and Indian Mineral Development Act mineral agreements. For application processing, the BLM considers the Bureau of Indian Affairs (BIA) to be the Surface Managing Agency. Operators are responsible for obtaining any special use permits from the BIA directly, or where applicable, from tribal offices.

On tribal or allotted lands, the lease operator must also contact the appropriate office of the BIA to make access arrangements with the Indian surface owner. If all of the Indian owners cannot be reached for consent, or there are so many owners that it would be impracticable to obtain consent, and the BIA finds that the issuance of the APD will cause no replicable harm, the BIA may approve the process. The BIA also has responsibility for approving Rights-of-Way on Indian Lands.

4. EPA Policy on Consultation and Coordination with Indian Tribes

On November 5, 2009, President Obama directed all federal agencies to develop plans to assure regular and meaningful consultation and collaboration with tribal officials. This was in accordance with Executive Order 13175 signed by President Clinton on November

[5] Bureau of Land Management, Onshore Oil and Gas Order Number 1, 72 Fed. Reg. 10,328 (2007). Accessed April 2011 at http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/Onshore_Order_no1.html
[6] Development of Tribal Mineral Resources, 25 U.S.C. §§ 2103-2108, may be cited as Indian Mineral Development Act of 1982.

6, 2000.[7] As of January, 2011, the EPA policy was still under review and an official policy had not been signed.[8]

Several key objectives are to be accomplished by this policy, including:

- establishing clear Agency standards for the consultation process, including defining the "what, when, and how" of consultation;
- designating individuals across the Agency responsible for serving as consultation points of contact, for both tribes and for EPA internally, to promote consistency and coordination of the consultation process; and
- establishing a management oversight and reporting structure that will help ensure accountability and transparency.

EPA proposed that the consultation consists of four phases: Identification, Notification, Input and Follow-up.

- *Identification Phase* is where the EPA identifies activities that may be suitable for consultation (see below). This phase should include how complex is the activity, how will it impact the tribes and identifying potential resources.
- *Notification Phase* has the EPA notifying the involved tribes of certain activities that may be appropriate for consultation. Notification includes adequate information for tribal officials to decide if continued consultation is necessary and the manner in which information will be communicated.
- *Input Phase* allows the tribes to provide the necessary information to the EPA on consultation matters. This phase can have many types of discussions including phone calls, meetings, etc., based on specific circumstances involved. There could be multiple rounds of consultation, especially if there are significant differences from the originally-proposed activity or as new issues arise.
- *Follow-up Phase* involves the feedback from the EPA to the tribes involved in the consultation to explain how the tribes' input was considered. Formal, written communication from senior EPA staff is required.

Following proposed, non-exclusive list of EPA activity categories provides a general framework from which to determine if consultation may be appropriate:

- Regulations or rules
- Policies, guidance documents, directives

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[7] Exec. Order No. 13175, 65 Fed. Reg. 67249, November 9, 2000. Accessed April 2011 at http://ceq.hss.doe.gov/nepa/regs/eos/eo13175.html

[8] Information available at EPA's Tribal Portal website, "Proposed Final Policy on Consultation and Coordination With Indian Tribes," Accessed April 2011 at http://www.epa.gov/tribal/consultation/consult-policy.htm

- Budget and priority planning development
- Legislative comments
- Permits
- Civil enforcement actions
- Emergency planning and response action
- State or tribal authorizations or delegations
- Where appropriate, EPA activities involving entry into Indian country to assess, sample, investigate, or remediate environmental conditions that may directly impact a tribe's lands, citizens, or natural resources
- International treaties and agreements

The suitable level of consultation is determined by past and current practices, adjustments made through this policy, the ongoing conversations between EPA and tribal governments, and EPA national, regional, and program offices policies and plans.