Center for Regulatory Effectiveness
1601 Connecticut Avenue, N.W.
Washington, DC, 20009
Tel: (202) 265-2383 Fax: (202) 939-6969
secretary1@mbsdc.com www.TheCRE.com

REGULATORY REVIEW MEMORANDUM

To: Department of Energy

From: Jim Tozzi

Subject: Regulatory Burden Request for Information

Date: September 4, 2012

CC: Boris Bershteyn/Office of Information and Regulatory Affairs

This Memorandum serves as an Executive Summary of Center for Regulatory Effectiveness' (CRE's) attached comments highlighting four issues:

1. **DOE's Regulatory Coordination & Harmonization Responsibilities**;
2. **The Cumulative Costs of Regulations**;
3. **Retrospective Review of Regulations**; and
4. **Stakeholder Participation**.

DOE REGULATORY COORDINATION & HARMONIZATION RESPONSIBILITIES

Recognizing that prior to 1977, "responsibility for energy policy, regulation, and research, development and demonstration [was] fragmented in many departments and agencies and thus [did] not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs,"[1] Congress passed the Department of Energy Organization Act creating DOE.

Congress found that the "formulation and implementation of a national energy program require[d] the integration of major Federal energy functions into a single department in the executive branch,"[2] and thus it integrated all major Federal energy functions into DOE.

Despite the clear mission and objective of DOE, our national energy policy still remains fragmented across many agencies. It is now more important than ever that DOE coordinate energy regulations across the government by taking an active role in the OMB review of proposed regulations of all federal agencies which have an impact on the nation's energy programs.

1 42 USC § 7111 [Emphasis added]

2 *Id.*

Tasks

- DOE needs to coordinate and harmonize energy regulations across the government to minimize regulatory burden and maximize their benefits.

- Under its organic statute, DOE has the clear authority, and the duty, to review all energy related regulations issued by all federal agencies. Specifically, DOE is authorized to "achieve, through the Department, effective management of energy functions of the Federal Government, including consultation with the heads of other Federal departments and agencies in order to encourage them to establish and observe policies consistent with a coordinated energy policy."[3]

- The Bureau of Land Management's upcoming decision on whether to rescind their existing program allowing for the orderly exploration and development of oil shale is a decision that needs to benefit from DOE's national energy policy perspective. See CRE's Interactive Public Docket (IPD) devoted to this issue *available at* http://www.thecre.com/oil/.

- One precursor to the current OIRA regulatory review process, the Nixon Quality of Life program, consisted in large part of individual agencies providing OMB with their specialized expertise during OMB's review of an agency's regulations

Implementation

- The Secretary of Energy should issue a directive requiring DOE staff to develop a process which would result in its conducting a review, across all Federal agencies, of regulations that significantly affect energy production and/or conservation and that are presently under review by OMB pursuant to Executive Order 12886.

    - The Statements of Energy Effects required by Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" should inform DOE's analyses.

- DOE should appoint, from within its offices and agencies, a Department official in charge of a DOE Regulatory Coordination and Harmonization Program. The designated official would represent DOE's position during OMB review of proposed regulations which affect the nation's energy programs.

    - The designated official should give particular attention to ensuring interagency compliance with Executive Order 13212, as amended, "Actions To Expedite Energy-Related Projects," which states that "agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects...."

[3] 42 USC § 7112

- The Administrator of the Office of Information and Regulatory Affairs (OIRA) should establish a process which provides for the input of DOE views into its own review of agency regulations.

CUMULATIVE COSTS

The United States has long had a policy of analyzing the cumulative costs of regulations going back to when I first worked on the issue in the Nixon Administration. However, with the exception of the new initiative of the Obama Administration regarding cumulative costs, there have been no meaningful accomplishments.

Although analysis of cumulative regulatory costs has substantial historical antecedents, what is most importance from the perspective of the current DOE retrospective review exercise is that the Obama Administration has ordered agencies to consider the cumulative costs of regulation. In his Memorandum on the "*Cumulative Effects of Regulations*," OIRA Administrator Cass Sunstein directed the Heads of agencies to do the following:

> Consistent with Executive Order 13563, and to the extent permitted by law, agencies should take active steps to take account of the cumulative effects of new and existing rules and to identify opportunities to harmonize and streamline multiple rules. The goals of this effort should be to simplify requirements on the public and private sectors; to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations.

Tasks

- DOE should initiate a pilot project to assess the cumulative costs of regulations.

- The pilot project should include a review of the cumulative costs of the following regulations currently under development by DOE:

  - Implementation of Section 939A of Dodd-Frank regarding DOE "assessment of the credit-worthiness of a security or money market instrument;" and

  - Energy efficiency standards currently under development by DOE.

Implementation

- DOE should establish an intragency task force to assess the cumulative costs of regulations.

- DOE should provide "working drafts" to affected agencies for comment. For example, on the Dodd-Frank rule, the Securities and Exchange Commission and the Treasury Department should receive copies of the DOE cumulative cost analysis for their review and comment.

- DOE should publish its "working drafts" on a website and encourage public participation.

RETROSPECTIVE REVIEW OF REGULATIONS

The time has come for DOE to take its commitment to carrying out Executive Order 13563 to the next logical level by conducting the following tasks.

Tasks

- CRE is submitting four regulations for DOE to include in its retrospective review program. All four of the following regulations demonstrate why it is important for DOE to assume more responsibility to coordinate the national energy policy and streamline the regulatory process. The four regulations recommended by CRE for DOE review are:

    1. DOE – Transmission Infrastructure;

    2. BLM – Oil Shale PEIS;

    3. DOE and FERC – Liquefied Natural Gas Export Regulations; and

    4. SEC – Disclosures by Resource Extraction Issuers/Dodd-Frank Sec. 1054 (Form SD).

CRE's attached comments on the above regulations are aimed, in part, at demonstrating the need for streamlining the permitting process. Delays in permitting and duplication of effort by regulators and the regulated community increase economic burdens without any concurrent benefit.

All of CRE's work products are made available to the public for comment. We solicit comments on our analyses because the public vetting of our work will assist regulatory agencies in the evaluating the documents. To this end, this submission will be presented for public comment on our Retrospective Review of Regulations IPD *available at* http://www.thecre.com/forum2/.

Implementation

- DOE should designate a DOE official responsible for the retrospective review of regulations, which includes reviewing regulations issued by other agencies which affect energy production and conservation.

- The DOE should issue a Retrospective Review of Regulation Plan containing milestones and dates, as well as names and email addresses of the personnel responsible for the evaluation.

- DOE should publish on its Retrospective Regulatory Review website a Regulatory Review Report documenting DOE's progress in retrospective review of regulations and request public comments on the Report.

- To DOE's credit, it has implemented a number of the above steps but implementation should be strengthened. DOE's actions to date on engaging the public in the retrospective review exercise are superlative even though, the public has not fully reciprocated DOE's outreach efforts.

- OMB should include an assessment of the DOE's Regulatory Review Report in its annual Report to Congress on the Benefits and Costs of Federal Regulations. OMB should invite public comments on DOE's Retrospective Regulatory Review prior to preparing their analysis for the aforementioned report to Congress.

STAKEHOLDER PARTICIPATION

CRE applauds the extensive efforts by the DOE to engage all interested persons in a substantive dialog on energy regulation and retrospective review of regulations. DOE efforts are in accordance with President Obama's Executive Order on Improving Regulation and Regulatory Review as well with the Transparency, Collaboration and Participation precepts in his Open Government directive. In addition to issuing four Requests for Information (RFI) concerning the public's input on retrospective review, DOE has also created a website dedicated to the Department's Retrospective Review which contains all of the comments it has received for each of the RFIs.

CRE urges DOE to hold steadfast in its commitment to promoting transparency and engaging the public.

Tasks

- DOE must continue to engage the public on a more continuous basis and obtain more information from the public.
    - It is not the sole responsibility of DOE to encourage public involvement in the review of DOE's programs; to this end, DOE should encourage the use of non-federal mechanisms to increase public participation.

Implementation

- Develop a mechanism for incorporating the public's analyses contained in Interactive Public Dockets[4] (IPD) by providing links to the Interactive Public Dockets developed by private parties on DOE's Retrospective Review website

- A representative IPD for an energy-related issue is the Oil Shale IPD http://www.thecre.com/oil/.

- Solicit Non-Federal data for use in DOE's rulemaking process, just as HHS[5] has done.

The CRE appreciates the opportunity to participate in DOE's exemplary dedication to the Obama Administration's policy of reviewing and eliminating costly regulations.

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[4] http://en.wikipedia.org/wiki/Interactive_Public_Docket.

[5] See, page 7 of CRE's Comment to the National Ocean Council http://www.thecre.com/creipd/wp-content/uploads/2012/02/Comments-on-draft-implementation-plan-Center-for-Regulatory-Effectiveness-2-24.pdf.

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secretary1@mbsdc.com www.TheCRE.com

DOE'S CHARGE: CREATE A UNIFORM NATIONAL ENERGY POLICY:
CRE COMMENTS ON DOE'S RFI

I. DOE's Demonstrated Commitment to Retrospective Regulatory Review

The Center for Regulatory Effectiveness (CRE) appreciates this additional opportunity to provide the Department of Energy (DOE) with comments on the Department's Implementation of Executive Order 13563. CRE's appreciation of this opportunity is not mere rhetoric, DOE's work implementing the Order is exemplary. On this point, we note the extensive and ongoing outreach efforts the Department is undertaking to engage all interested persons in a substantive dialog on energy regulation, and retrospective review of regulation in accordance with President Obama's Executive Order on Improving Regulation and Regulatory Review.

Specific measures DOE has taken to ensure a thorough and transparent public dialog on implementing the Executive Order include:

- A Request for Information (RFI) published in the *Federal Register* on February 3, 2011;
- An extension of the RFI comment period on April 6, 2011;
- A Notice of Availability/Request for Comment on the Department's preliminary retrospective regulatory analysis plan on July 11, 2011;
- An RFI on December 5, 2011;
- An RFI on May 15, 2012;
- An RFI on August 8, 2012 that this letter and attached comments are in response to; and
- Establishment of a Retrospective Regulatory Review website which includes:
  - All comments received by the Department; and
  - An email contact "to identify to DOE - on a continuing basis - regulations that may be in need of review in the future."

While CRE applauds DOE for reviewing its current regulations to screen for costly inefficiencies, we strongly recommend that DOE take a more proactive role to review regulations across all federal agencies that have a major impact on the United States energy policy and energy development, which is outlined in Section II which details recommended regulatory process changes that would enable DOE to fulfill its founding principles set forth in the Department of Energy Organization Act. DOE should assume a greater role in coordinating national energy policy across all agencies by:

1. Participating in all major executive branch energy regulatory proceedings;

2. Analyzing cumulative costs of energy regulations;

3. Expanding its retrospective review of energy regulations; and

4. Increasing stakeholder participation.

Section II also announces an Interactive Public Docket (IPD) developed for the Retrospective Review of Regulations (http://www.thecre.com/forum2/) that can assist DOE in identifying burdensome regulations. Section III then analyzes specific energy regulations that impose substantial regulatory costs to the private sector and are all examples in which the nation would be served by having DOE coordinate the national energy policy among several agencies. Section IV provides answers to the specific questions DOE addressed to the public in the RFI. Section V provides CRE's recommendation and conclusion.

II. Recommended Regulatory Process Changes

DOE asks, in Question 7 of the RFI, whether there "are. . .regulatory processes" that could be altered to improve "achievement of regulatory objectives..." CRE interprets this question in both a narrow sense and a broader one. With respect to the narrow interpretation, we understand the question to refer only to those process changes that are consistent with the "Good Government" laws that regulate the regulators including the Data Quality Act (DQA), the Paperwork Reduction Act and Executive Order 13563.

In the broader sense, we understand DOE's question to solicit recommendations about any regulatory process changes within DOE's authority that would improve the Department's ability to achieve their policy objectives. Recommended process changes that would assist the Department are discussed below.

A. DOE Regulatory Coordination & Harmonization Responsibilities

Recognizing that prior to 1977, "responsibility for energy policy, regulation, and research, development and demonstration [was] fragmented in many departments and agencies and thus [did] not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs,"[6] Congress passed the Department of Energy Organization Act to create the Department of Energy DOE.

Congress found that the "formulation and implementation of a national energy program require[d] the integration of major Federal energy functions into a single department in the executive branch,"[7] and thus it integrated all major Federal energy functions into DOE.

Despite the clear mission and objective of DOE, the U.S. national energy policy still remains fragmented across many agencies. It is now more important than ever that DOE coordinate energy regulations across the government by taking an active role in the OMB review of proposed regulations of all federal agencies which have an impact on the nation's energy programs.

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6 42 USC § 7111 [Emphasis added]

7 *Id.*

Tasks

- DOE needs to coordinate and harmonize energy regulations across the government to minimize regulatory burden and maximize their benefits.

- Under its organic statute, DOE has the clear authority, and the duty, to review all energy related regulations issued by all federal agencies. Specifically, DOE is authorized to "achieve, through the Department, effective management of energy functions of the Federal Government, including consultation with the heads of other Federal departments and agencies in order to encourage them to establish and observe policies consistent with a coordinated energy policy."[8]

- The Bureau of Land Management's upcoming decision on whether to rescind their existing program allowing for the orderly exploration and development of oil shale is a decision that needs to benefit from DOE's national energy policy perspective. See CRE's Interactive Public Docket (IPD) devoted to this issue *available at* http://www.thecre.com/oil/.

- One precursor to the current OIRA regulatory review process, the Nixon Quality of Life program, consisted in large part of individual agencies providing OMB with their specialized expertise during OMB's review of an agency's regulations.

Implementation

- The Secretary of Energy should issue a directive requiring DOE staff to develop a process which would result in its conducting a review, across all Federal agencies, of regulations that significantly affect energy production and/or conservation and that are presently under review by OMB pursuant to Executive Order 12886.

    - The Statements of Energy Effects required by Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" should inform DOE analyses.

- DOE should appoint, from within its offices and agencies, a Department official in charge of a DOE Regulatory Coordination and Harmonization Program. The designated official would represent DOE's position during OMB review of proposed regulations which affect the nation's energy programs.

    - The designated official should give particular attention to ensuring interagency compliance with Executive Order 13212, as amended, "Actions To Expedite Energy-Related Projects," which states that "agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects...."

[8] 42 USC § 7112

- The Administrator of the Office of Information and Regulatory Affairs (OIRA) should establish a process, which provides for the input of DOE views into its own review of agency regulations.

B. Cumulative Costs

The United States has long had a policy of analyzing the cumulative costs of regulations.[9] However, with the exception of the new initiative of the Obama Administration regarding cumulative costs, there have been no meaningful accomplishments.

Although analysis of cumulative regulatory costs has substantial historical antecedents, what is most important from the perspective of the current DOE retrospective review exercise is that the Obama Administration has ordered agencies to consider the cumulative costs of regulation.

President Obama's Executive Order on Improving Regulation and Regulatory Review emphasizes the importance of cost-benefit analysis.[10] Specifically, the Order stated that it: "reaffirms the principles. . . established in Executive Order 12866" which stated that in each " agency shall tailor its regulations to impose the least burden on society...taking into account...the costs of cumulative regulations."[11]

In his Memorandum on the "*Cumulative Effects of Regulations*," OIRA Administrator Cass Sunstein directed the Heads of agencies to do the following:

> *Consistent with Executive Order 13563, and to the extent permitted by law,* ***agencies should take active steps to take account of the cumulative effects of new and existing rules*** *and to identify opportunities to harmonize and streamline multiple rules. The goals of this effort should be to simplify requirements on the public and private sectors; to ensure against unjustified, redundant, or excessive requirements; and ultimately to increase the net benefits of regulations.*

Tasks

- DOE should initiate a pilot project to assess the cumulative costs of regulations.

- The pilot project should include a review of the cumulative costs of the following regulations currently under development by DOE:

    - Implementation of Section 939A of Dodd-Frank regarding DOE "assessment of the credit-worthiness of a security or money market instrument;" and

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9 President Reagan's Executive Order 12866 directed that agencies take into account "the costs of cumulative regulations" when making regulatory decisions.

10 Executive Order 13563, "Improving Regulation and Regulatory Review", available at http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order

11 Executive Order 12866, "Regulatory Planning and Review," Sec. 1(b)(11).

- Intra-agency review of energy efficiency standards.

Implementation

- DOE should establish an intragency task force to assess the cumulative costs of regulations.
- DOE should provide "working drafts" to affected agencies for comment. For example, on the Dodd-Frank rule, the Securities and Exchange Commission and the Treasury Department should receive copies of the DOE cumulative cost analysis for their review and comment.
- DOE should publish its "working drafts" on a website and encourage public participation.

C. Retrospective Review of Regulations

DOE has demonstrated its commitment to President Obama's Executive Order 13563 requiring retrospective review and analysis of existing regulations by establishing a website dedicated to the retrospective review of regulations and by continuously engaging the public for input on ways to reduce DOE's regulatory costs. DOE should expand upon its current efforts. The time has come for DOE to take its commitment to carrying out Executive Order 13563 to the next logical level by conducting the following tasks.

Tasks

- CRE is submitting four regulations for DOE to include in its retrospective review program. All four of the following regulations demonstrate why it is important for DOE to assume more responsibility to coordinate the national energy policy and streamline the regulatory process. The four regulations recommended by CRE for DOE review are:

  1. DOE – Transmission Infrastructure;
  2. BLM – Oil Shale PEIS;
  3. DOE and FERC – Liquefied Natural Gas Export Regulations; and
  4. SEC – Disclosures by Resource Extraction Issuers/Dodd-Frank Sec. 1054 (Form SD).

CRE's attached comments on the above regulations are aimed, in part, at demonstrating the need for streamlining the permitting process. Delays in permitting and duplication of effort by regulators and the regulated community increase economic burdens without any concurrent benefit.

All of CRE's work products are made available to the public for comment. We solicit comments on our analyses because the public vetting of our work will assist regulatory agencies in the evaluating the documents. To this end, this submission will be presented for public comment on our Retrospective Review of Regulations IPD *available at* http://www.thecre.com/forum2/.

Implementation

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- The DOE should issue a Retrospective Review of Regulation Plan containing milestones and dates, as well as names and email addresses of the personnel responsible for the evaluation.

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- To DOE's credit, it has implemented a number of the above steps but implementation should be strengthened. DOE's actions to date on engaging the public in the retrospective review exercise are superlative even though, with several important exceptions, the public has not reciprocated DOE's outreach efforts.

- OMB should include an assessment of the DOE's Regulatory Review Report in its annual Report to Congress on the Benefits and Costs of Federal Regulations. OMB should invite public comments on DOE's Retrospective Regulatory Review prior to preparing their analysis for the aforementioned report to Congress.

D. Stakeholder Participation

CRE applauds the extensive efforts by the DOE to engage all interested persons in a substantive dialog on energy regulation and retrospective review of regulations. DOE efforts are in accordance with President Obama's Executive Order on Improving Regulation and Regulatory Review as well with the Transparency, Collaboration and Participation precepts in his Open Government directive. In addition to issuing four Requests for Information (RFI) concerning the public's input on retrospective review, DOE has also created a website dedicated to the Department's Retrospective Review which contains all of the comments it has received for each of the RFIs.

CRE urges DOE to hold steadfast in its commitment to promoting transparency and engaging the public.

Task

- DOE must continue to engage the public on a more continuous basis and obtain more information from the public.

    - It is not the sole responsibility of DOE to encourage public involvement in the review of DOE's programs; to this end, DOE should encourage the use of non-federal mechanisms to increase public participation.

Implementation

- Develop a mechanism for incorporating the public's analyses contained in Interactive Public Dockets[12] (IPD) by providing links to the Interactive Public Dockets developed by private parties on DOE's Retrospective Review website.

- A template IPD for an energy-related issue is the Oil Shale IPD, http://www.thecre.com/oil/.

- Solicit Non-Federal data for incorporation into DOE's rulemaking process, just as HHS[13] has done.

III. Unjustified Regulatory Burdens and Costs: Specific Regulations

As provided by Executive Order 13563, "Our regulatory system must...promo[e] economic growth, innovation, competiveness, and job creation. It must be based on the best available science…. It must take into account benefits and costs, both quantitative and qualitative."[14] The following regulations are ways in which DOE can "modernize our regulatory system and to reduce unjustified regulatory burdens and costs."[15]

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12 http://en.wikipedia.org/wiki/Interactive_Public_Docket.

13 The Department of Health and Human Services (HHS) set a beneficial precedent when they `issued an Information Collection Request (ICR) for the proposed project "Public Input to Nominate Non-Federal Health and Health Care Data Sets and Applications for Listing on Healthdata.gov." (76 Fed. Reg. 4904, January 27, 2011) In the notice HHS stated:

> "To broaden the type and amount of data available for these purposes, HHS is soliciting public input on nominations of non-Federal health and health data indicator datasets and applications using them to improve health and health data. For example, health indicator datasets representing surveys conducted by state government or private organizations may be considered as high-value datasets among researchers, applications developers, and others."

CRE encourages DOE to routinely request advice regarding relevant, DQA-compliant non-federal datasets as part of their contemplated regulatory process changes.

See also¸ page 7 of CRE's Comment to the National Ocean Council http://www.thecre.com/creipd/wp-content/uploads/2012/02/Comments-on-draft-implementation-plan-Center-for-Regulatory-Effectiveness-2-24.pdf

14 Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 21 2011) available at http://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf

15 Executive Order 13610, 77 Fed. Reg. 28469 (May 14 2012) available at http://www.gpo.gov/fdsys/pkg/FR-2012-05-14/pdf/2012-11798.pdf

A. DOE - Transmission Infrastructure[16]

The CRE applauds DOE for its leadership in implementing section 216(a) of the Federal Power Act (FPA), as amended by the Energy Policy Act of 2005 (EPACT2005).[17] Recognizing that the electrical transmission infrastructure is a vital component of the nation's electricity system, the EPACT2005 grants DOE substantial authority to modernize the interstate electric transmission facilities. Specifically, DOE is required to conduct a study of electrical transmission congestion and release a triennial report, which DOE successfully accomplished in 2006[18] and 2009.[19]

DOE also established two National Interest Electric Transmission Corridors. Though both of these National Electric Transmission Corridors were vacated by the Ninth Circuit in *California Wilderness Coalition v. U.S. Department of Energy*, the CRE encourages DOE to continue to pursue establishing National Electric Transmission Corridors.

FPA section 216(h) requires DOE to coordinate the federal authorization process for electric transmission projects. The Secretary of Energy is responsible for ensuring that once an application has been submitted, all federal permit decisions and environmental reviews are completed within one year or otherwise "*as soon as practicable*." DOE is also tasked with acting "as the lead agency for purposes of coordinating all applicable Federal authorizations and related environmental reviews" of transmission facilities.[20]

DOE has been implementing this responsibility through a rulemaking published on December 13, 2011.[21] Consistent with the Energy Policy Act of 2005's requirement that DOE act has the "lead agency" for "coordinating all Federal authorization and related environmental reviews," and consistent with this comment encouraging DOE to coordinate and review energy decisions by other agencies, DOE must be fully engaged by acting as the "Lead Agency" rather than "coordinating the selection of a Lead Agency."[22]

The efforts taken by DOE to implement its lead agency authority under the FPA section 216(h) is vital to streamlining the permitting process for new transmission facilities. The modernization and continued development of transmission infrastructure is vital to the United States economy, and the CRE supports DOE in its continued undertaking to implement its authority under the Energy Policy Act of 2005 to develop and modernize the transmission infrastructure. By including the transmission infrastructure program in its retrospective review program, DOE will be able to profit from the continuous advice of experts in the field.

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16 76 Fed. Reg 77432 (Dec. 13, 2011).

17 Energy Policy Act of 2005, P.L. 109–58, § 1221

18 Department of Energy, *National Electric Transmission Congestion Study*, December 2006, available at http://nietc.anl.gov/documents/docs/Congestion_Study_2006-9MB.pdf

19 Department of Energy, *National Electric Transmission Congestion Study*, December 2009, available at http://congestion09.anl.gov/documents/docs/Congestion_Study_2009.pdf

20 16 U.S.C. 791–828c

21 76 Fed. Reg 77432 (Dec. 13, 2011).

22 *Id.* at 77435 - 436.

B. BLM - Oil Shale PEIS[23]

BLM is currently revisiting decisions made in 2008 regarding the nation's oil shale development in Colorado, Utah, and Wyoming. The Government Accountability Office states, "The U.S. Geological Survey (USGS) estimates that the Green River Formation contains about 3 trillion barrels of oil, and about half of this may be recoverable, depending on available technology and economic conditions. **This is an amount about equal to the entire world's proven oil reserves**."[24]

Nevertheless, BLM is now proposing to reduce the amount of federal land available for oil shale development by 75%, with a 90% reduction in Colorado. BLM is seeking to effectively eliminate oil shale development in the United States without offering any compelling basis, except for a lawsuit[25] challenging their initial 2008 oil shale determinations.[26]

As a result of the lawsuit,[27] BLM entered into a settlement agreement with an Environmental NGO Coalition.[28] In the settlement agreement, BLM agreed to revisit within 120 days the decisions made in 2008 and to issue a new decision regarding the land allocated for oil shale development by January 15, 2013.[29]

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[23] BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, page E-1 (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfm

[24] Government Accountability Office, *ENERGY-WATER NEXUS A Better and Coordinated Understanding of Water Resources Could Help Mitigate the Impacts of Potential Oil Shale Development*, page 1 (October 2010) available at http://www.gao.gov/assets/320/311896.pdf (emphasis added).

[25] Legal complaint, *Colorado Environmental Coalition v. Salazar*, p. 31-32 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) [hereinafter *Environmental NGO Coalition Legal Complaint*].

[26] BLM justifies its choice to reevaluate the land use plans with the 2012 PEIS by stating, "As part of a settlement agreement entered into by the United States to resolve the lawsuit *and in light of new information that has emerged since the 2008 OSTS PEIS was prepared*, the BLM has decided to take a fresh look at the land allocations analyzed in the 2008 OSTS PEIS and to consider excluding certain lands from future leasing of oil shale and tar sands resources." BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, p ES-3 (2012), available at http://ostseis.anl.gov/documents/peis2012/index.cfm

[27] Legal complaint, *Colorado Environmental Coalition v. Salazar*, p. 31-32 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) [hereinafter *Environmental NGO Coalition Legal Complaint*].

[28] The plaintiffs in the lawsuit included: Colorado Environmental Coalition, Western Colorado Congress, Wilderness Workshop, Biodiversity Conservation Alliance, Southern Utah Wilderness Alliance, Red Rock Forests, Western Resource Advocates, National Wildlife Federation, Center For Biological Diversity, The Wilderness Society, Natural Resources Defense Council, Defenders Of Wildlife, and Sierra Club.

[29] Settlement Agreement, *Colorado Environmental Coalition v. Salazar*, pp 3-5 (civil action No. 1:09-cv-00085-jlk (D. Col. 2011) *[*hereinafter *Oil Shale Settlement Agreement]*.

The settlement also provided the precise alternatives that BLM would be, at a minimum, required to analyze.[30] Pursuant to the settlement agreement, BLM published a new PEIS in February 2012. In the 2012 PEIS,[31] BLM's preferred alternative for oil shale, Alternative 2b, would reduce the amount of land available for oil shale leasing from over 2,017,741 acres to 461,965 acres—greater than a seventy-five percent (75%) reduction in the land available. This would effectively eliminate oil shale production in the United State States.

Interestingly, BLM justified its 2008 decision by stating that:

> ***Rationale for Selection:*** Alternative B [the current land allocation] for oil shale was selected as the Proposed Plan Amendment based on: 1) its consistency with the requirements of the Energy Policy Act of 2005, 2) its balanced use and protection of resources, 3) the FPEIS's analysis of potential environmental impacts, and 4) the comments and recommendations from cooperating agencies and the public.
>
> Alternative B is structured to be consistent with the congressional mandate of the Energy Policy Act to emphasize the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing.[32]

Further, BLM specifically chose Alternative B in 2008 (the current oil shale land allocations), on the basis that there would be two additional levels of environmental analysis required before any oil shale could be produced commercially, see "A 'Hard Look' at the Environmental NGO Coalition's Comment on the Oil Shale PEIS" available here, http://thecre.com/pdf/CRE-Evaluation_of_NGO_Oil_Shale_Comments.pdf.

The 2008 oil shale Final PEIS was not the environmental analysis or final statement for oil shale development. Specifically, the land use plans developed in the 2008 PEIS were only the first of three steps in the decisionmaking process. The three steps are: (1) Land Use Planning; (2) Leasing; and (3) Project Development. This practice, referred to as tiering, is permitted under NEPA. In fact, the Council on Environmental Quality (CEQ) endorses this very practice in its NEPA regulations.

More specifically, CEQ regulations state, "Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review."[33]

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30 *Id*. at 3-4.

31 BLM, *Draft Programmatic Environmental Impact Statement and Possible Land Use Plan Amendments for Allocation of Oil Shale and Tar Sands Resources on Lands Administered by the Bureau of Land Management in Colorado, Utah, and Wyoming*, (2012) available at http://ostseis.anl.gov/documents/peis2012/index.cfm [hereinafter *2012 PEIS*]

32 Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 22 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf (emphasis added).

33 40 C.F.R. 1502.20

The 2008 Record of Decision, BLM also argued against the current 2012 Preferred Alternative (which was Alternative C in the 2008 PEIS):

> Alternative C was not selected as the Proposed Plan Amendment because the alternative would not make the ―most geologically prospective lands in Colorado, Utah and Wyoming as available for application for leasing. Thus it is not fully consistent with the mandate of the Energy Policy Act of 2005. Much of the most geologically prospective acreage would be excluded under Alternative C…In addition, this unreasonably fragments the area that would be available for application, resulting in parcels that are unlikely to be explored, leased, or developed. This could be an impediment to sound and rational development of the resource and can reduce the economic return to the public. If oil shale resources are by-passed because of the exclusions in Alternative C, that could also limit the benefits to the nation from exploitation of a domestic unconventional energy source.
>
> Selection of alternative C precipitously limits or restricts the decisionmaker's discretion to balance oil shale use and the protection of resources or resource values, in accordance with FLPMA's principal of ―multiple use.…*It would be premature to eliminate areas prior to site-specific analysis based on factors that are not known now, but that would be known at the leasing or operation permitting stages,* such as location, timing and type of oil shale technology, that may show that these resources could be adequately protected through mitigation. Unlike Alternative B, Alternative C does not give the decisionmaker the necessary discretion to optimize the recovery of energy resources, establish appropriate lease stipulations to mitigate anticipated impacts, or to fully protect a resource or resource value by choosing not to offer an area for lease.[34]

DOE only needs to look at BLM's own findings to conclude that the 2012 PEIS Preferred Alternative "is not fully consistent with the mandate of the Energy Policy Act of 2005."

As discussed above, DOE should play a more active role in energy decisions made by other agencies. In the case of the BLM PEIS on oil shale, DOE should ensure that any amendments to the resource management plans relating to oil shale should be based on sound science and not reactions to lawsuits filed by interested parties. This fragmented and arbitrary approach to energy policy does "not allow for the comprehensive, centralized focus necessary for effective coordination of energy supply and conservation programs," that DOE was created to establish.

Accordingly, DOE should expand its retrospective review to agency regulations and environmental decisions that have a major impact on US energy policy, such as BLM's Oil Shale PEIS.

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[34] Bureau of Land Management, *Record of Decision: Oil Shale and Tar Sands Resources Resource Management Plan Amendments*, page 22 November 17, 2008, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy.Par.23588.File.dat/OSTS_ROD.pdf (emphasis added).

C. DOE and FERC – Liquefied Natural Gas Export Regulations[35] [36]

A recent report by DOE's National Energy Technology Laboratory found that "Given the increase in shale gas production in the U.S., domestic natural gas prices are projected to remain low over the next few years due to supply growth that exceeds demand growth (EIA, 2012b). The relatively high levels of underground natural gas storage will also contribute to excess supply in the short term. As of April 2012, levels of U.S. natural gas in storage were relatively high, at 2.5 trillion cubic feet (Tcf). This storage volume is 51 percent higher than storage levels in April 2011."[37]

Given the huge surplus of natural gas in the US domestic market, natural gas currently costs $2.50 mBtu in the United States, whereas European prices are $16 mBtu and Asian prices are as high $16 mBtu. The natural gas bonanza provides the United States with enormous opportunities to increase exports and create jobs.

The current regulations that need to be streamlined to encourage LNG exports are the following:

1. Export Authorization from DOE;[38] and

2. FERC's Certificate of Public Convenience and Necessity for LNG facility construction.[39]

Both DOE's and FERC's regulation require lengthy applications processes that include trial-type hearings that can be initiated by any party seeking to intervene or protest the application. Already DOE provides a notice and comment period of 30 days for the public to comment on all applications received for LNG exports. The extensive intervention and protest procedures for both DOE and FERC subject an application to ancillary general public policy attacks, such as fracking, which is not the appropriate venue to address broad public policy issues.

Both DOE and FERC should streamline the authorization process to develop LNG export facilities and to approve the exports.

D. SEC – Payment Disclosures by Energy Extraction Companies[40]

On August 22, 2012, the Securities and Exchange Commission promulgated a final rule that requires energy companies to disclose all payments made to the United States Government and foreign governments for the purpose of the commercial development of oil, natural, gas, or minerals. The rule broadly defines commercial development of oil, natural gas, or minerals to include exploration,

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35 10 C.F.R. 590.100 – 505

36 18 C.F.R. 157.1 – 157.22

37 National Energy Technology Laboratory, *Role of Alternative Energy Sources: Natural Gas Technology Assessment*, June 30, 2012, available at http://www.netl.doe.gov/energy-analyses/pubs/NGTechAssess.pdf

38 10 C.F.R. 590.100 – 505.

39 18 C.F.R. 157.1 – 157.22

40 17 CFR Parts 204 and 249, available at http://www.sec.gov/rules/final/2012/34-67717.pdf

extraction, processing, and export, or the acquisition of a license. The rule also applies to any payment which exceeds $100,000.

Importantly, the new SEC rule requires energy companies to provide very detailed, commercially sensitive information. Specifically, energy companies must provide:

- Type and total amount of payments made for each project;
- Type and total amount of payments made to each government interactive format;
- Total amounts of the payments, by category;
- Currency used to make the payments;
- Financial period in which the payments were made;
- Business segment of the resource extraction issuer that made the payments;
- The government that received the payments, and the country in which the government is located; and
- The project of the resource extraction issuer to which the payments relate.

The SEC rule forces U.S. energy companies to release proprietary information that its foreign competitors can use against U.S. companies. Further, state-owned oil companies (such as Saudi Aramco, Gazprom (Russia), China National Petroleum Corp., National Iranian Oil Co., Petróleos de Venezuela, Petrobras (Brazil) and Petronas) will not be subject to these disclosure requirements. The SEC rule places U.S. energy companies at an enormous competitive disadvantage when competing with these foreign energy companies and will lead to lost contracts when developing foreign oil and gas resources.

This rule comes at a time when U.S. energy companies are seeking to utilize advanced U.S. developed extraction technologies and apply them to untapped foreign energy resources. However, this rule will significantly curb U.S. operations in countries with untapped resources, such as China, Angola, Qatar, and Cameroon.

It is vital for DOE to conduct a review of this regulation to analyze how it will affect U.S. energy companies and the inevitable U.S. jobs losses and lost revenue for U.S. companies that would be earned overseas and repatriated back into the U.S. economy.

IV. Response to DOE Questions in RFI

CRE responded above to DOE's Question 7 regarding recommended regulatory process changes. We provided answers to Question 7 first since it provides the groundwork for our responses to DOE's other questions that concern cost-benefit analysis, as detailed below.

Question 1. With respect to how DOE can best promote meaningful periodic reviews of its existing rules and how can it best identify those rules in need of improvement, CRE recommends that an ongoing retrospective review process be piggybacked on DOE's existing statutory obligation to conduct retrospective reviews contained in the Regulatory Flexibility Act at 5 USC 610.

More specifically, as part of the Department's mandatory publication "in the Federal Register [of] a list of the rules which have a significant economic impact on a substantial number of small entities, which are to be reviewed pursuant to this section during the succeeding twelve months" DOE should include a request in the Notice for the public to nominate rules in addition to those selected by DOE for review with a statement as to why the rule(s) should be reviewed.

Question 2. The primary factor DOE should use when selecting and prioritizing rules and information collections for review is cost-benefit analysis.

Questions 3-8. With respect to rules and information collections that are in need of revision or elimination, please see our rule-specific comments above.

Question 9. With respect to how the Department can best obtain accurate, objective information about the costs and benefits of regulations. DOE's question is, in large part, a statement seeking advice on how the Department can comply with the Data Quality Act in assessing the cost and benefits of regulations. CRE applauds the Department for asking this crucial regulatory review question. The answer is through the Data Quality Act (DQA).

The DQA contains a powerful mechanism for vetting assertions of data quality, the Request for Correction (RFC) process that authorizes affected members of the public to "seek and obtain" correction of information not meeting quality standards. DOE should leverage this process to vet assertions of data quality compliance or non-compliance by requesting public comments on RFCs that are submitted to the Department. By requesting public comments on data quality petitions, DOE will be taking advantage of the collective expertise of all interested stakeholders within the context of statutorily established procedures and standards.

CRE will support the discussion on data quality compliance by posting the petition, comments, and supporting materials on our Retrospective Review IPD (http://www.thecre.com/forum2/) to ensure that the issue receives thorough public discussion including allowing interested parties to comment on the petition and the comments submitted.

Question 10. No.

V. Conclusion & Recommendation

Conclusion

- DOE is on the cusp of seizing an historic opportunity to achieve its mandate of coordinating and harmonizing national energy policy through cost-benefit analysis and consideration of the cumulative costs of regulatory mandates.

Recommendation

- DOE carry through on the important work it has initiated through the retrospective review process ordered by President Obama by conducting the Tasks identified in these comments.