

March 31, 2017

The Office of Policy and Strategic Planning
Department of Commerce
H.C. Hoover Building
Rm. 5863
1401 Constitution Ave. NW.
Washington, DC. 20230.

Re: Impact of Federal Regulations on Domestic Manufacturing
Docket Number: 170302221-7221-01

These comments are filed on behalf of the Independent Petroleum Association of America (IPAA), the American Association of Professional Landmen (AAPL), the Association of Energy Service Companies (AESCC), the Domestic Energy Producers Alliance (DEPA), the International Association of Drilling Contractors (IADC), the International Association of Geophysical Contractors (IAGC), the National Stripper Well Association (NSWA), the Petroleum Equipment & Services Association (PESA), and the following organizations:

Arkansas Independent Producers and Royalty Owners Association
California Independent Petroleum Association
Coalbed Methane Association of Alabama
Colorado Oil & Gas Association
East Texas Producers & Royalty Owners Association
Eastern Kansas Oil & Gas Association
Florida Independent Petroleum Association
Idaho Petroleum Council
Illinois Oil & Gas Association
Independent Oil & Gas Association of New York
Independent Oil & Gas Association of West Virginia
Independent Oil Producers' Agency
Independent Oil Producers Association Tri-State
Independent Petroleum Association of New Mexico
Indiana Oil & Gas Association
Kansas Independent Oil & Gas Association
Kentucky Oil & Gas Association
Louisiana Oil & Gas Association
Michigan Oil & Gas Association
Mississippi Independent Producers & Royalty Association
Montana Petroleum Association
National Association of Royalty Owners
Nebraska Independent Oil & Gas Association
New Mexico Oil & Gas Association

New York State Oil Producers Association
North Dakota Petroleum Council
Northern Montana Oil and Gas Association
Ohio Oil & Gas Association
Oklahoma Independent Petroleum Association
Panhandle Producers & Royalty Owners Association
Pennsylvania Independent Oil & Gas Association
Permian Basin Petroleum Association
Petroleum Association of Wyoming
Southeastern Ohio Oil & Gas Association
Tennessee Oil & Gas Association
Texas Alliance of Energy Producers
Texas Oil and Gas Association
Texas Independent Producers and Royalty Owners Association
Utah Petroleum Association
Virginia Oil and Gas Association
West Slope Colorado Oil & Gas Association
West Virginia Oil and Natural Gas Association
Western Energy Alliance

Collectively, these groups represent the thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. Independent producers drill about 90 percent of American oil and gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas.

In addition to the specific comments made herein, we support those comments submitted separately by the participants in these comments.

Scope of Solicitation

According to the Federal Register notice soliciting comments, “The Department of Commerce is soliciting comments from the public concerning Federal actions to streamline permitting and reduce regulatory burdens for domestic manufacturers.” However, the Federal Register notice then limits the scope of its solicitation for comments to “...private businesses located in the United States (and its territories) engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products, consistent with the 2017 North American Industry Classification System (NAICS) definition of Sector 31–33: Manufacturing.”

We believe this scope of the American industrial base is too narrow. For example, it would preclude consideration of the energy production industry that is essential to power American manufacturing and that provides feedstocks to petroleum refineries and petrochemical manufacturing. As a key component of energy production, oil and natural gas producers face both permitting issues and regulatory burdens – and in recent years have become a target for “Keep It in the Ground” activists whose objectives, if successful, would decimate American manufacturers.

Consequently, we are submitting these comments to illustrate the scope of challenges faced by the oil and natural gas production sector of the American industrial base.

Overview

Federal laws draw upon the Constitution for their framework but that framework in the context of their implementation can create adverse regulatory consequences. Federal laws strike balances between federal and state responsibilities, but those balances must be respected and sustained. Federal laws allow citizens to petition the government for action and, in some cases, to directly litigate against other citizens in federal court, but this process can be used to abuse the regulatory process. Federal laws empower action by the federal government, but government, with its essentially unlimited resources can threaten the rights of its citizens and compel actions beyond the scope of its laws through the use of its power. In evaluating the federal permitting role and streamlining actions, these issues must be considered as well.

American public deliberations are adversarial processes. The inherent nature of the country has been to expose governmental decisions to broad public debate and then provide for opportunities to challenge the final actions. Consequently, as these decisions have become more complex and society more divided on its objectives, litigation to challenge decisions has become more frequent and intense. The inevitability of litigation compels the regulatory development process to become longer, more detailed and costlier. It has also led the federal government to seek venues for action that avoid the formal Administrative Procedure Act – venues that can prevent open decision making.

The Trump Administration's decision to examine opportunities to streamline action and reduce unnecessary regulatory burdens is timely and appropriate. The comments that follow address a number of issues facing oil and natural gas exploration and production in the United States.

Avoiding the Administrative Procedure Act

The basic federal process to develop, revise or rescind regulations uses the Administrative Procedure Act (APA). The APA defines specific procedures related to how regulations are proposed, how comments are submitted, how comments are assessed, and how regulations are finalized. Each of these public processes builds a record that can be, and generally is, challenged in litigation on the final regulations. As costly and exasperating as this process and its inevitable litigation may be, it provides for all parties to participate and to assure that the final outcome is tested through a fair arbitration of the government's actions.

However, increasingly of the past years, the federal government has created and used mechanisms to avoid the APA and produce actions that serve as regulations. Two of these are the use of guidance to agencies and the issuance of administration policies without subjecting them to APA processes.

Guidance is a broad term and, in some cases, it is used in laws without a specific indication that it is intended to be subjected to the APA. Unfortunately, many federal agencies have interpreted Guidance as a process outside the APA but use it to provide detailed, prescriptively applied, interpretations of regulations. These detailed interpretations are effectively an expansion of the regulations because they will define how the agency will evaluate compliance and, therefore, what it will use to base federal enforcement actions. Many of these Guidance documents are not presented for public review prior to their implementation. But, regardless, Guidance has not been considered subject to the APA in legal challenges to its use.

Other uses of Guidance involve actions that compel state regulators to take specific actions while precluding challenges to the scope of the requirements. An example of this action results from

provisions in the Clean Air Act (CAA). More specifically, under the CAA, areas that fail to attain the National Ambient Air Quality Standards for ozone (ozone nonattainment areas) can be subject to Reasonably Available Control Measures (RACM). The CAA also provides that the Environmental Protection Agency (EPA) can create Control Techniques Guidelines (CTG) for industries emitting ozone precursors. If EPA creates a CTG, it must be considered as a RACM for purposes of State Implementation Plans (SIPs) in submissions to EPA. If a state fails to use the CTG, it must provide for equivalent emissions reductions as part of its RACM submission. In this instance, EPA essentially compels states to implement regulations through a Guidance document where the technology assessments can never be challenged at either the federal or state level.

Another method to avoid the APA process is the issuance of administration policies. These policy directives are sent to all federal agencies to use in their regulation development or permitting actions. Because they are administration policies, they are not subject to APA. Yet, they can effectively alter the regulatory actions of federal agencies. For example, the Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews issued by the Council on Environmental Quality (CEQ) in August 2016 provided direction to agencies that they should consider Greenhouse Gas (GHG) Emissions in National Environmental Policy Act (NEPA) reviews. It not only directed agencies to consider GHG but further asserts some details.

Specifically, it states:

For example, NEPA reviews for proposed resource extraction and development projects typically include the reasonably foreseeable effects of various phases in the process, such as clearing land for the project, building access roads, extraction, transport, refining, processing, using the resource, disassembly, disposal, and reclamation. Depending on the relationship between any of the phases, as well as the authority under which they may be carried out, agencies should use the analytical scope that best informs their decision making.

This subtly stated sentence opened the opportunity to vastly expand the scope of a NEPA analysis to a federal agency so inclined. Consequently, instead of a NEPA review of a small natural gas pipeline project addressing the direct impacts of that project on the environment, fossil fuel use opponents could try to press the agency to consider all of the implications of natural gas extraction to supply natural gas to the pipeline and all of the implications of natural gas use – in the United States and abroad – after its distribution by the pipeline. This vastly different NEPA scope was never subject to APA evaluation and potential challenge because the CEQ action was a change in administration policy.

The solution to these situations is by no means simple. Clearly, any administration needs to develop policies for its operations. And, clearly, agencies need to develop guidance to clarify complex issues that may not have been foreseen at the time that a regulation is published. But, the reality has been that administrations have used these options to essentially avoid the APA when it suited them. Fair and open governance is undermined when the agreed upon formal process is ignored. The March 28, 2017, Trump Administration Executive Order on Promoting Energy Independence and Economic Growth is an important step to reverse the abuse of Guidance and administration policy by prior administrations.

Federal Government Permitting Challenges

American oil and natural gas producers operate extensively on federally owned lands – onshore and offshore. Consequently, they must address obtain permits directly from the federal government – and during the past eight years these challenges have increased significantly.

Onshore

The Bureau of Land Management (BLM) primarily controls oil and natural gas extraction permitting on federal lands under the Federal Land Policy and Management Act (FLPMA).

Broadly, FLPMA begins its process by developing Resource Management Plans (RMPs) for land managed by BLM District Offices. These RMPs set the framework for the multiple use projects on BLM lands. Multiple use addresses the scope of projects in a given area that includes energy development, agriculture, recreation and other elements. RMPs must be created through the NEPA process to determine how development can be environmentally managed.

Once RMPs are developed, BLM can execute lease sales for areas where oil and natural gas extraction can occur under the conditions of the RMP. Companies bid for and can receive leases that allow them to extract oil and natural gas. To develop these leases, a company must submit an Application for Permit to Drill (APD) and receive permission from BLM.

Each of these actions opens opportunities to delay and prevent the development of American oil and natural gas resources. Fossil energy opponents have targeted every component and, over the past eight years, opportunities for development of onshore federal lands have diminished.

To improve the development of onshore federal lands, BLM needs to demonstrate that it supports its mission. Two key aspects will be a regulatory framework that encourages federal land development and a commitment to lease and permit production.

In the first case, BLM acted to develop a regulatory framework that inhibits interest in federal land production.

BLM promulgated new regulations that discourage drilling on federal lands. These regulations were created because of a political response to unjustified accusations that the existing drilling management action by BLM was insufficient, particularly with respect to the regulation of hydraulic fracturing. In reality, BLM had consistently relied on state regulatory programs to set drilling requirements, including fracturing, and this process effectively managed environmental drilling risks. By creating a duplicative but dysfunctional federal program, BLM chose to discourage federal land development.

Similarly, BLM created an air emissions regulatory program, thinly disguised as an effort to prevent venting and flaring of associated gas. This air regulatory program will fail to significantly reduce venting and flaring, but it will discourage new federal production and shut down existing production.

BLM raised federal royalty rates and, through the Office of Natural Resources Revenue (ONRR), the Department of Interior imposed costly and unjustified additional production costs that will thwart federal land production.

The March 28, 2017, Executive Order to initiate reconsideration of the BLM regulatory actions offers a significant opportunity to correct these flawed policy initiatives.

In the second case, BLM acted to delay or prevent new permitting. BLM slowed or cancelled lease sales, capitulating to Keep It in the Ground radicals. BLM approval rates for APDs dropped significantly, taking up to 300 plus days in some BLM field offices. And, BLM chose to voluntarily reject authority given to it in the Energy Policy Act of 2005 to utilize a series of Categorical Exclusions to the NEPA process designed to facilitate its decision-making process in selected minimal impact cases.

Offshore

Offshore oil and natural gas production is regulated by two Department of Interior bureaus since the dismemberment of the Minerals Management Service. These are the Bureau of Ocean Energy Management (BOEM) and the Bureau of Safety and Environmental Enforcement (BSEE). Actions and inactions by these agencies are inhibiting the development of America's offshore resources.

As required by the OCS Lands Act, in June 2014, the Obama Administration started the process to develop the 5-Year-Plan to cover years 2017 – 2022 with a request for information. A Draft Proposed Program (DPP) was released in January 2015, and a second DPP was released in March 2016. The Obama Administration made the decision to remove the Atlantic lease sale from the DPP. The DPP also includes a reduction of area available for lease in Alaska. In all, more than 80 percent of Federal offshore acreage is tied up from development.

In November 2016, the Department of Interior in conjunction with BOEM released the final 5-Year-Plan. The final plan further reduced the potential number of lease sales to 10 and also, in a political move, cut drilling in the Arctic by removing the Chukchi and Beaufort Seas from any lease sale. The final plan significantly binds the Trump Administration's ability to determine the future of offshore development without a re-start of the 5-year plan.

In addition to proscribing areas where offshore development can occur, BOEM also created financial regulatory constraints that threaten development in accessible areas. BOEM issued proposed guidance detailing the procedures it will use to determine a lessee's financial ability to carry out its obligations, primarily decommissioning for Outer Continental Shelf (OCS) facilities and providing additional monetary security. A year earlier in August 2014, BOEM issued an Advanced Notice of Proposed Rulemaking (ANPR) with 54 questions aimed at updating its regulations on Risk Management, Financial Assurances and Loss Prevention. These actions can force independent operators out of accessible areas because of the financial resource requirements in the new guidance.

Additionally, BOEM has acted in recent years to tie up more and more company capital in bonds the government does not need or use and other forms of surety. While there is a role for government-required surety to assure production facilities are removed, the era of diverting capital must end. In July 2016, BOEM issued final guidance on offshore bonding. Fortunately, that guidance is currently on hold because it is a one-size-fits-all approach to financial assurance that is unrealistic and not in the nation's best interest.

Finally, in April 2016, BOEM issued a proposed rule for clean air reporting and compliance. Industry submitted comments focusing on issues with measurement points and the methodology used by BOEM in the creation of this rule. There are many components of the proposed rule that are concerning, including BOEM's inclusion of mobile support craft in its proposed definition of facility and requiring information and modeling as part of submitted plans. In addition, there

was be a lack of “grandfathering in” with the requirement that lessees re-submit previously approved plans at least every ten years to verify compliance with BOEM’s current air quality regulations, including the new information gathering and reporting requirements. The stated purpose of the proposed Rule is to reduce emissions from offshore development that travel to land. However, studies have not found that offshore emissions affect onshore air quality to the level that would justify BOEM’s proposed actions.

BSEE regulations are similarly adversely affecting offshore development. In July 2016, BSEE requirements for Blowout Preventer Systems and Well Control became effective. Industry has made great strides since the Macondo spill to enhance safety measures and response protocols. However, many of the advances in safety and best practices were ignored in the rule. Further, the rule imposes provisions that, in some circumstances heighten safety risks and costs that potentially thwart future offshore development. Some of the most egregious parts of the draft rule are the drilling margin, casing and cementing, and the real-time monitoring requirements.

These actions to restrain or prohibit development of oil and natural gas resources underlying federal onshore and offshore lands must be reversed or the Administration’s energy and manufacturing objectives will fall short.

Endangered Species Act

The Endangered Species Act (ESA) deserves special mention. Enacted in 1973 and significantly modified only once in 1978, the ESA presents a clear example of good intentions run amok. General in nature and driven by litigation, the ESA now stands as a gridlock shelter for consent decrees that define the ESA agenda while marked by a stunning failure of the ESA’s fundamental objective – endangered species recovery. Now tasked with making decisions on whether to protect hundreds of species that it cannot accomplish, it bears the indignity that only 2 percent of the species the ESA has tried to protect have recovered.

Nevertheless, activity using ESA authority generates extensive actions that have the effect of defining land use decisions – including private land use – based solely on the potential implications on species that inhabit – or may inhabit – an area. A recent example serves to demonstrate the significant impacts of the ESA.

In June 2014, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) proposed three significant changes to their regulations and policies regarding critical habitat under the ESA. Following is a summary of each proposal:

- The first proposal would change the regulations to give FWS, among other things, vast new authority to designate areas as critical habitat that are not currently (and have never been) occupied by a listed species. FWS seeks this authority to deal with the changes in habitat that it anticipates will result from climate change.
- The second proposal would change the definition of “destruction or adverse modification.” Persons performing activities pursuant to a federal permit must assure that their activities will not be likely to result in the “destruction or adverse modification” of critical habitat. The proposed changes seek to clarify how “adverse modification” is to be determined. Unfortunately, the proposed changes fail to clarify the matter and, in fact, could result in a significant expansion of the habitat features that must be protected from “adverse modification.”

- The third proposal is a draft policy that purports to clarify how FWS will exercise its authority under section 4(b) (2) of the ESA to exclude certain areas from designation even though the areas may qualify for such designation. The ESA states that such exclusion is appropriate when the benefits of excluding an area outweigh the benefits of including the area. Unfortunately, the draft policy imposes a de facto moratorium on the exclusion of areas on federal lands, which is where the most significant conflicts over habitat use are likely to occur.

The final rules and the final policy went into effect in March 2016, and they presented very little change from the draft versions described above. These rules are excessively broad and concentrate too much authority in the agency.

The ESA is a failed law, but amending it will likely be impossible with current majorities in the Congress. However, unless common sense approaches are developed, including more involvement with state agencies, the ESA will continue to present a pervasive intrusion into normal land use decisions across the country. And, in doing so, it will limit options for American manufacturing either directly or by denying development of national energy resources.

Driving Decisions Through the Courts

Because federal laws – particularly environmental laws – provide avenues for citizens to petition for agency actions and for citizens to sue agencies for failure to act, these options can become a pathway to direct agency resources to issues that it otherwise would not prioritize. Or, in a more sinister context, it becomes a pathway to define the federal agency’s agenda through the lens of specific interest groups – sometime using sue-and-settle tactics to avoid open consideration of whether a specific issue should be a priority agenda.

In part, the federal laws themselves open opportunities for abuse. For example, many laws contain schedules for action to review past regulations, to consider whether revisions to regulations should be made, and to complete analyses. These schedules were written at a time when the process for action was far simpler and when the overall demand on agency resources was smaller and directed by agency leadership, not past litigation. Courts regularly view these schedules as mandatory responsibilities. And, as mandatory responsibilities, they are vulnerable to litigation to compel the agency to act. (Frequently, the costs of litigation to compel these mandatory actions are recoverable by the litigant thereby rewarding initiation of the litigation.) Because the agency has limited defenses against a failure to fulfill a mandatory duty, it frequently chooses to settle the case rather than spend resources in a fruitless defense.

Similarly, advocacy interests can petition an agency to act on a specific issue. If the agency fails to act or denies the petition, the advocate can file a legal action to compel the agency to act – hoping that the agency will settle the case rather than resist.

Rather than serving the Constitutional right to petition the government, these avenues have become a gateway for uncontrolled regulatory actions. Some examples follow.

In 2009, EPA was sued for failing to meet a mandatory requirement to review a New Source Performance Standard (NSPS) for oil and natural gas production facilities within eight years as required by the CAA. EPA entered into a Consent Decree to consider revisions to the NSPS. These were developed and promulgated in 2012 and have been in litigation since. This litigation arose because when EPA agreed to the schedule in its Consent Decree, the time allowed for

developing the regulation was so short that the agency could not do an effective assessment of the technology basis for all of the sources within the scope of the regulation.

In 2015, a group of environmental activists filed a notice of intent to sue EPA regarding alleged violations of its mandatory duties under the Resource Conservation and Recovery Act (RCRA) non-hazardous waste subtitle (Subtitle D) regarding the management of oil and natural gas production drilling wastes. In 2016, these groups filed litigation against EPA and later in 2016 completed a Consent Decree mandating action by EPA by May 2019. This frivolous action is part of a continuing effort by Keep It in the Ground environmentalists to thwart development of American oil and natural gas by seeking action under RCRA that EPA has concluded is unnecessary and inappropriate. In 1988, EPA concluded that RCRA's hazardous waste subtitle (Subtitle C) was inappropriate to regulate oil and natural gas production drilling wastes and – importantly – that states were managing it effectively. Despite years of EPA involvement with states on their oil and natural gas production wastes management programs and repeated failures by environmentalists to force EPA to reconsider its 1988 conclusions, this new effort is intended to use an obscure mandatory requirement that EPA must formally announce that states are effective regulators every 3 years. Because of this obscure provision, EPA must now devote resources to once again conclude that states are doing their job.

The ESA has become the sinkhole of sue-and-settle being used to drive the FWS ESA agenda. Increased litigation and duplicative regulations continue to detract from the real goal of the ESA. A September 2011 mega-settlement between the FWS and two prominent environmental groups, WildEarth Guardians and the Center for Biological Diversity, determined that over 250 candidate species must be reviewed for final listing as either threatened or endangered by 2016. Since then, both groups have repeatedly sued the agency to list more species and for failing to meet statutory deadlines – actions that further strain the agency from doing its job and limit economic development. In a recent report celebrating the mega-settlement, WildEarth Guardians pledged that “litigation will continue to be an important tool in Guardians’ work going forward as long as the Service continues to undermine the ESA.” Meanwhile, even former Obama Administration officials said the resource-strapped agency is in a “losing battle” with conservation groups as it is more cost effective for the Service to settle with the groups than to fight them in court. This losing battle results from the inevitable failure of FWS to make impossible judgments in the mandatory time limits imposed by the ESA and, then, being exposed to litigation that uses these mandatory requirements to compel another Consent Decree that cannot be met – while the federal government pays for the litigants’ actions.

Deference to Agency Expertise

Since the mid-1980s federal courts have given deference to federal agencies in disputes regarding interpretation of federal laws where congressional intent is imprecise – the *Chevron* doctrine. This deference provides agencies with enormous power because when Congress enacts laws that frame policies that then apply for decades forward like the CAA or the CWA, it cannot identify all of the future circumstances that may arise within its scope. Similarly, Congress can rarely agree on specific results in complex legislation where all of the facts are not available. Combining the *Chevron* doctrine with APA requirements that agency decisions will be sustained unless it acts arbitrarily or capriciously means that federal determinations on regulations will dominate. This deference is largely based on the perception that federal agencies are taking actions in the public interest and are a fair arbiter of the conflicting positions on issues.

But, if the agencies become political tools of a partisan position on an issue, the assumptions are false. And, the deference accorded to the agencies needs to be reconsidered. Over the past eight years, agencies have been far more positioned as advocates than fair arbiters.

A recent example relates to actions taken by the EPA in its decisions on NSPS regulations on oil and natural gas production facilities in 2016 under Subpart OOOOa. In proposing Subpart OOOOa, EPA included a highly controversial fugitive emissions requirement for leak detection and repair (LDAR) of emissions. It is controversial because it relies on costly techniques that are not validated as effective. It chose an approach that differs from state programs that similarly try to address fugitive emissions. It imposes not a capital cost for specific equipment but an enduring operating cost that applies for the life of the oil or natural gas well – a cost that remains the same while the inevitable decline in production occurs reducing its cost effectiveness over the life of the well. Consequently, these fugitive emissions requirements will shorten the life of the well and limit its production if they continue to be required as production drops.

When EPA proposed the NSPS, it provided that the requirement would not apply to low producing wells – less than 15 barrels/day or 90 mcf/d. When it finalized the regulation, the low producing well exclusion was removed.

In the proposal, EPA argued that the basis for the exclusion was its interpretation that these wells did not generate emissions comparable to larger wells; industry comments agreed. When it removed the exclusion, EPA argued that it had received information that these low producing wells had significant emissions. It based this conclusion on flawed material supplied by extreme Keep It in the Ground environmentalists that targeted low producing wells as a prime objective of EPA methane regulations. (Details are provided in Appendix 1.)

These events present significant issues. The first is what decision process was used to change the proposal. The second is what quality of data is needed to develop regulations and what entity should bear the burden.

Ferretting out the decision process in this instance from the murky tunnels in which it occurred is difficult. However, there are public aspects that provide some perspectives. When EPA developed the Subpart OOOOa NSPS, it had options. It could follow the path of Subpart OOOO, which was a volatile organic compound based regulation that also covered methane. Or, it could step into direct methane regulation. Environmental organizations immediately began pressing the Obama Administration “...to swiftly issue national standards directly aimed at cutting emissions of harmful, climate-disrupting methane pollution from oil and gas operations.” Their agenda was clear – “We applaud the climate commitments you have made to date. We urge you and your administration to build on this legacy by announcing enforceable national methane emissions standards for new and existing oil and gas sources this fall.”

Subsequently, these environmentalists submitted comments objecting to the low producing well provisions and introducing their specious “super-emitter” creation. Buried in the comments is a reference to its “scientific” report. When the final rule was announced, these groups emphasized the elimination of the low producing well provision as a key victory. Given the large number of comments, it is hard to believe that EPA would be so convinced by one highly questionable study that it should change its entire position at the same time that the sitting Administrator was explaining that “EPA’s learning this industry right now because it is not an industry we regulate. We’ve just gotten into regulation of this so there’s a lot of hundreds of thousands of small

sources and EPA does not generally have a relationship with this industry as we do other sectors that we've regulated for frankly decades. But we are learning.”

Moreover, when EPA chose to eliminate the low producing well provision, it changed the cost effectiveness determination for the regulations, but EPA did not reflect any change.

Alternatively, EPA could have subcategorized the NSPS to address specific issues faced by low producing wells, but it did not. Since this single study is the basis for EPA's action, it could have left the provision in and sought additional comments to determine whether it should address low producing wells differently, but it did not.

Consequently, one can only conclude that EPA's action was political, that it was driven not by the record or a full review the “scientific” report. That is, the decision was compelled by an outcome driven agenda – an action that calls into question the deference to agencies in the rulemaking process.

This brings the discussion to a question of how an agency should consider data presented in a comment period, where the burden falls to determine its accuracy. In developing an NSPS, the CAA puts the burden on EPA to determine the Best System of Emissions Reductions (BSER). This mandate implies that EPA bears a responsibility to collect and evaluate emissions reduction technologies, their cost and their effectiveness. EPA has the authority to subcategorize requirements based on factors that would be appropriate.

However, in the case of both Subpart OOOO and Subpart OOOOa, EPA never developed its own information. Instead, it relied on studies by others – none of which were done for the specific purpose of creating regulations.

This raises a more fundamental issue – the level of responsibility that EPA should bear in making its technology determinations. The Subpart OOOO and Subpart OOOOa examples are illustrative. Most of the Subpart OOOO requirements were based on technologies used in the voluntary Gas STAR program, as were some of the Subpart OOOOa requirements. Others, notably the fugitive emissions program, were not. Importantly, the Gas STAR technologies were selectively chosen by companies for individual projects. This self-selection is not the same as a BSER determination for all categories that were covered by Subpart OOOO or OOOOa.

Nevertheless, EPA chose to cobble together unconnected studies and the Gas STAR experiences to define BSER technologies while using wholly unrealistic economic assumptions to determine cost effectiveness. For the fugitive emissions program, it created a system that differed from all others, including those states that had programs, and imposed its program as a mandate that attaches to all wells drilled under the NSPS in perpetuity.

These actions do not square with the concept in the CAA of determining BSER. They fall far short of the process used in other environmental laws, like the Clean Water Act (CWA) Effluent Limitations Guidelines (ELG) process. If the nation must bear the costs of an NSPS, the process that develops BSER needs to be thoughtful and thorough, not the capricious approach used here.

Unfortunately, even a process as well formed as the ELG process can still fall short of its requirements if the political framework for decisions suppresses the statutory objectives. For example, the CWA standard for permitting under the ELG is Best Available Technology Economically Achievable (BATEA). This standard should produce a ELG based on water treatment. However, in its recent Unconventional Oil and Gas (UOG) Extraction ELG for pretreatment of discharges to Publicly Owned Treatment Works (POTW), EPA chose to prohibit

any discharges. This decision falls well short of the standards expected by the CWA. EPA should have set a technology requirement that met the BATEA test and, if it were too costly, UOG Extraction industries would have the option to consider other alternatives.

Fundamental processes to reach regulatory decisions have been twisted during the past Administration to produce political outcomes. Taken together, these examples of actions under the recent abusive development of CAA methane regulations and the CWA UOG Extraction ELG point to the need to examine the entire regulatory development process to assure that it will not be subject to political abuse or fall short of its statutory obligations. The March 28, 2017, Executive Order provides a pathway to address the abuses that occurred during the development of Subpart OOOOa, but the broader issues remain and should be addressed.

Abuse of Cost Effectiveness Calculations

A key component of regulatory development involves the determination of the costs and benefits of regulations. Clearly, any such process is an open invitation for abuse. Costs can be understated; benefits can be overstated. History indicates that both have been done to produce a result that falls within whatever target has been set.

Recently, one of the regulatory arenas where obvious abuse has occurred is the development of benefits to justify climate change related regulations. The most notable area of abuse is the creation of the Social Cost of Carbon, Nitrous Oxide and Methane. The generation of these costs were cloistered and obscure. The process did not allow for the openness needed to have any confidence in its application. And, in its use, agencies were able to apply it to conveniently adjust estimates when needed. The March 28, 2017, Executive Order eliminating Social Cost use was entirely appropriate to bring certainty and confidence to the regulatory review process.

Yet, other calculations – less visible, less obviously manipulated – were similarly abused in regulatory analyses. For example, in the justification for Subpart OOOOa, EPA based its recovered methane basis and its economic evaluations on natural gas prices that were wholly inaccurate. Specifically, EPA used a methane value of \$4.00/mcf. For a producer to receive \$4.00/mcf for its gas sales, the market price would have to be about \$5.33/mcf to account for royalties and fees. Currently, natural gas prices are ranging between about \$2.50/mcf and \$3.00/mcf, meaning that the producer would be getting between \$1.90/mcf and \$2.25/mcf. This significant overestimate of the value of natural gas roughly doubles the benefits of methane regulations without the imposition of Social Cost benefits. EPA never brought its cost effectiveness calculations into the realistic framework of actual natural gas prices. As EPA reconsiders regulation of oil and natural gas production facilities, this reality needs to be fully recognized.

State Delegation and Enforcement of Environmental Regulations

The major components of pivotal federal environment laws – the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act – rely on a federal/state balance. The primary federal roles are the creation for a national regulatory framework and support for state programs. The primary state roles are the permitting of facilities, the creation of state specific regulatory programs, and the management and enforcement of those permitting and regulatory programs. Congress envisioned this partnership because it recognized the historic role of state regulation, the inappropriateness of duplicative

federal actions, the inability to staff and fund a duplicate federal structure and the need to support and improve the effectiveness of state programs.

States have largely embraced the delegation or primacy structures under federal laws. They are the regulators closest to the emissions or discharges that must be managed. They have tailored their regulations to reflect the specific challenges in their areas. The success of the federal/state partnership is unquestionable, but it is not without challenges.

First, and foremost, is the financial burden delegation can impose on states. While states have defined programs and manage those authorized in their state laws, the acquisition of delegation adds tasks specifically driven by federal requirements – some driven by the federal laws, others driven by administrative requirements created by agencies. Congress recognized that delegation of responsibility includes a delegation of costs. It authorized state funding grants to absorb these costs. However, Congress has not effectively funded those grants. If the goal of delegation is to be achieved, funding will be essential.

Second, most of the delegation process was created in laws passed or modified in the 1970s and 1980s. Most of the state actions to obtain delegation occurred then. The delegation process is not a uniform one. States can seek and obtain partial delegation. Times change, and both the federal government and states need to assess whether additional delegation should be made.

Third, the federal government may have created barriers to delegation that it needs to tear down. Some of these may be legislative. Until the 1987 CWA amendments, EPA believed it did not have authority to divide delegation to different state agencies. Other barriers may be administrative determinations that need to be identified and revised.

Fourth, state regulatory programs differ by state, based on political structures within them. Not all states rely on a single environmental management agency. Some states have regional regulatory agencies within them. The state delegation process needs to have the flexibility to function within these structures. It should allow states to distribute responsibilities within their boundaries consistent with the state regulatory agency structures.

Fifth, the interface between state regulation and federal enforcement needs to be addressed and streamlined. Along with state delegation is a presumption of state enforcement and the need for federal enforcement authorities to work with states. However, a recent example under the CAA illustrates the abuse possible by federal agencies if they cherry pick opportunities to step into states. EPA's Office of Enforcement and Compliance Assurance used a gap in state delegation to initiate an aggressive enforcement play in North Dakota. While North Dakota had been delegated many federal programs, it had not sought delegation of the CAA NSPS permitting authority for oil and natural gas facilities. In 2012, the Subpart OOOO NSPS created new requirements for crude oil storage. EPA Enforcement chose to interpret these new requirements differently than industry had been previously informed. It then initiated a typical strategy – target a privately held or public company with limited resources, file an enforcement action with penalties that would bankrupt the company, negotiate a consent decree that requires company commitments that exceed those that the law can require, and use the consent decree to try to compel other operators to agree to a similar result. It is a common example of EPA Enforcement abusively using its power to seek actions beyond the regulatory authority of a federal environmental law. In this case, it was the gap in state delegation that allowed EPA to execute its strategy. But, it is an approach that fundamentally violates the concept of the federal/state partnership and should be prevented.

Federal Agency Staffing

A final observation on federal agency staffing is pertinent to any discussion of streamlining permitting and reducing regulatory burdens. Over the years, the growth in federal agency employment results in entirely appropriate questions about the size of agencies. There are many factors. Some relate to the laws that have been passed since agencies were first created; of necessity, agencies need more people to meet these new requirements.

Other growth resulted from aggressive efforts to federalize regulatory or enforcement authority. This staffing needs to be reined in and eliminated.

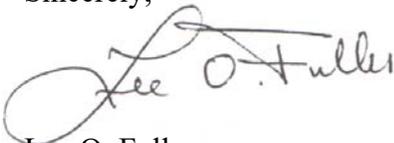
However, certain functions require effective staffing. For example, the BLM must have the staff to develop required RMPs, to lease access to its resources, and to process APDs in a timely manner. Permitting on federal land should not take longer than permitting on private lands under state regulatory programs. Several efforts have been made in the past to develop streamlining efforts to undertake these actions. These offer opportunities to learn from successes and from failures.

Additionally, and unfortunately, past litigation has compelled agencies to direct resources to comply with consent decrees or court decisions that cannot now be altered. Limited staffing in these areas will only serve to delay actions that otherwise need to be completed.

Conclusion

We appreciate the opportunity to submit comments to aid in regulatory reform and permit streamlining. If IPAA can provide additional information, please contact Lee Fuller at 202-857-4722 or lfuller@ipaa.org.

Sincerely,

A handwritten signature in black ink that reads "Lee O. Fuller". The signature is written in a cursive style with a large, looping initial "L".

Lee O. Fuller
Executive Vice President, IPAA

APPENDIX 1

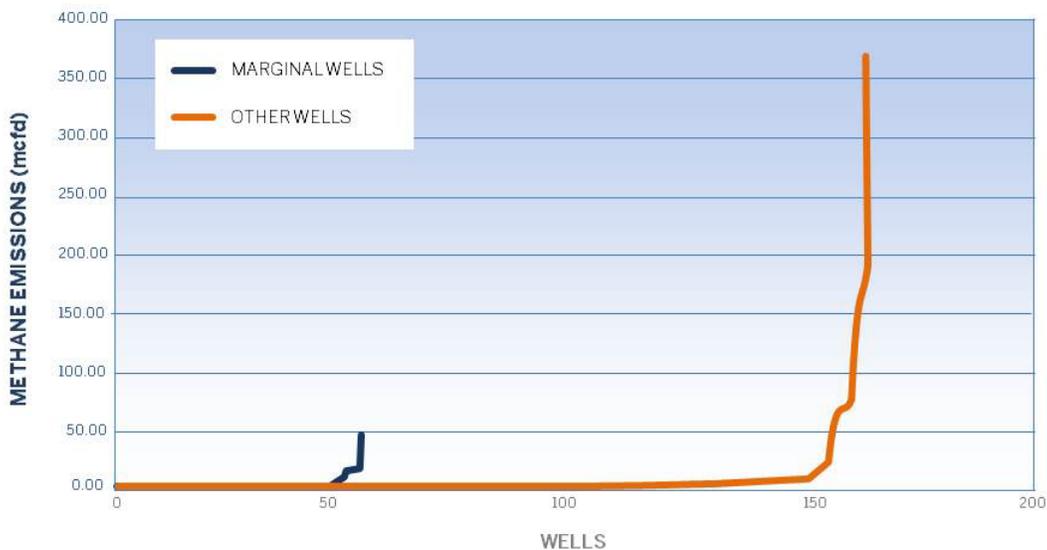
Manipulating Data to Create the Illusion That Low Producing Wells Are “Super-Emitters”

This document addresses data manipulation issues in the environmentalist study submitted to the rulemaking proposal for Subpart OOOOa to distort the role of low producing wells regarding methane emissions. This study was then characterized as the basis for removing the low producing well exclusion for the Subpart OOOOa fugitive emissions program initially proposed by the Environmental Protection Agency (EPA).

Background

Initially, it is important to understand that this study used data from a number of different studies to create its arguments. All of the underlying studies generated their data by driving vehicles with samplers downwind of production sites, hunting for methane plumes. None of them used samples taken on the production site. This creates two issues. First, it measures everything emitted at the site – fugitive emissions and permitted vents. Second, the data are collected over minutes – maybe over an hour – but not over a day. The data in the study are presented as if they were daily emissions but the studies merely scale up hourly estimates. Consequently, an emission that might occur for several hours, but not the full day, would be overstated.

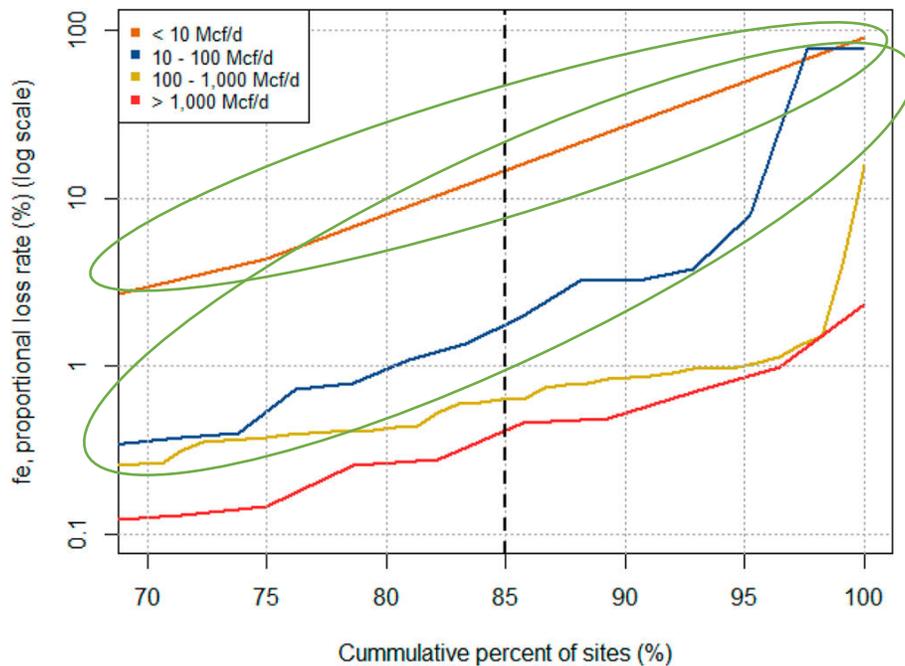
Before turning further to describe the submitted study, it is useful to look at the same data using a direct graph of emissions. In this graph, marginal wells are those with production volumes of 90 mcf/d or less.



This graph is consistent with information from other studies showing that a small portion of wells have an emission profile for some reason with high emissions and most wells have really low emissions. Importantly, it also clearly shows that marginal wells – low producing wells in the context of the regulation – have far smaller emissions. But, since this graph is using the same data as the study, it could also be overstating emissions because of scaling short term emissions to a daily amount.

With this background, turning to the presentation of the same material in the study demonstrates how it was manipulated.

Below is the graphic used to present the data. It would suggest that the worst emitting operations – the “super-emitters” – are the smallest wells (the orange line and the blue line, circled in green). Having directly plotted this data, the obvious issue is how such a result can occur.



It is a busy and confusing graph – it’s intended to be. The study uses data analysis tricks to create the appearance that marginal wells are “super-emitters”.

First, it shows emissions as a percentage of production rather than actual emissions. Thus, one mcf emitted out of ten mcf produced is 10 percent, but 50 mcf emitted out of 1000 mcf produced is 5 percent. As a result, it skews the perception of the data to imply that low producing wells are large emitters when they are not.

Second, its production volumes are really sales volumes, not the amount extracted from the wellhead. Consequently, a “proportional loss rate” of 50 percent would be the calculated loss divided by the volume sold. If the percentage of loss were calculated based on extracted volumes, the 50 percent “proportional loss rate” would drop to 33 percent because the loss would be added to the sales volume to obtain the extracted volume.

Third, it only shows data from the 70th percentile of information. This excludes all of the virtually zero emissions that dominate the data.

Fourth, it uses a logarithmic scale to present the data. One of the reasons to use logarithmic scales is to flatten curves to make them look more like straight lines.

These observations can be made without conducting an intense investigation of the study. They are obviously intended to contort data to create a specific result. Yet, with all the investigative power at EPA, with all of the research work EPA has conducted, EPA took this contrived study at face value to make its determination to remove the low producing well exclusion in the Subpart OOOOa regulations. That decision – particularly void of any opportunity for public review – should not be allowed to stand.