

U.S. House of Representatives
Committee on Oversight and Government Reform
Darrell Issa (CA-49), Chairman



RISE ENERGY COSTS:
AN INTENTIONAL RESULT OF GOVERNMENT ACTION

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Findings

1. Key Obama Administration figures have expressed a belief that Americans should pay more for energy – a pattern of actions shows the Administration is, in fact, pursuing an agenda to raise the price Americans pay for energy.

President Obama, Energy Secretary Chu and others have stated that American consumers should pay more for energy, including electricity and gasoline. From a political perspective, increasing the price of energy (by whatever means) helps them make the case for “green” energy. Even beyond the effort to raise energy prices through “cap and trade” legislation that Congress rejected, a pattern of increased enforcement, regulatory delay and new hurdles can be seen across numerous agencies and approval processes. The result of this government action is less production, higher costs for producers, and more expensive energy.

2. While the Administration touts nascent “green” energy technologies, U.S. domestic energy resources are currently the largest on earth—greater than Saudi Arabia, China and Canada combined.

New developments in drilling and extraction technology have dramatically expanded the amount of total recoverable reserves of oil and natural gas. Much of this, however, may be put off-limits by the government.

3. Still trying to capitalize on domestic energy resources, U.S. firms are nevertheless investing billions of dollars to tap newly recoverable resources in California, Texas, Colorado and North Dakota, among others.

By 2015, fields in these areas could yield more daily oil than the Gulf of Mexico produces today, boosting domestic production by 20-40 percent and increasing our energy independence if government action does not severely restrict development and yields.

4. Recent Administration action has already led to significant cost and regulatory barriers that have limited domestic production of oil.

Even before the Gulf oil spill, the Department of the Interior had undertaken significant steps to restrict access to much of the energy resources located in the outer continental shelf: Alaska, the Gulf of Mexico, and along the Atlantic and Pacific coasts.

5. Other agencies have stepped up their efforts to indirectly curtail energy production through environmental regulations.

The U.S. Fish and Wildlife Service has proposed placing the dunes sagebrush lizard that lives in New Mexico and Texas on the Endangered Species list—designation that would severely restrict production activity in a resource-rich part of Texas.

6. EPA has collaborated with environmental groups to target independent energy producers for environmental concerns not related to their operations.

In an email message reviewed by the Committee, environmental advocates and EPA's Texas-based regional director exchanged celebratory accolades for efforts that create barriers to energy production. One exchange concluded: "Yee haw! Hats off to the new Sheriff and his deputies!"

7. President Obama's proposal to increase taxes on the energy industry will cost American jobs and hamper economic recovery.

Independent operators are responsible for 95 percent of domestic oil and gas wells and they currently invest 150% of their domestic cash flow back into future projects development. Tax increases proposed by President Obama, some of which would be transferred to "green" energy producers, would cost energy producing firms a combined \$12 billion in the first year.

8. Some green energy sources the Administration is promoting at the expense of expanded domestic oil, gas, and coal supplies create unintended environmental, security and economic consequences.

Green energy technology like batteries, turbines, hybrid power systems and similar technologies require "rare earth" commodities. China has a "near monopoly" on this market controlling between 95-100 percent of the market. Further, China derives 71 percent of its own energy needs from coal. Ethanol, for example, also requires large amounts of corn to deliver fuel. "[T]he entire U.S. corn crop would supply only 3.7 percent of our auto and truck transport needs while using 300 million acres of U.S. cropland."

INTRODUCTION

In his 2010 State of the Union address, President Obama declared, “the nation that leads the clean energy economy will be the nation that leads the global economy...America must be that nation.”¹ Yet today, more than 80% of the United States’ primary energy comes from carbon-based resources that cannot easily, cheaply, or quickly be replaced.² Even so, the Administration is aggressively suppressing the use of carbon-based energy sources in the United States. To do so, it is pursuing a broad array of measures to block carbon-based energy extraction, to tax, and to otherwise increase the costs of its use, and to subsidize wherever possible the development and use of so-called “clean energy.” The economic and geopolitical implications of such a policy, if it is successful, are not good for the United States. It will make the United States poorer and more susceptible to the pressures of countries that now control a large share of the world’s oil—countries, which for the most part, do not share America’s goals or ideals.

The Obama Administration has advanced an agenda that discourages development of domestic carbon-based energy resources. Administration actions include the threat of new federal regulation of hydraulic fracturing, withdrawal of federal lands, both on and offshore, from energy production, increasingly burdensome requirements for oil shale research and development leases, and a de facto moratorium on drilling permits. This strategy has added to permitting delays, created additional layers of review, and prolonged study periods. In addition, other laws such as the Endangered Species Act and the Clean Air Act have been used to further suppress domestic oil and gas production, leading to higher gasoline prices and growing dependence on foreign oil. The Administration has also proposed a series of discriminatory tax increases targeting oil and gas producers in order to subsidize its favorite industry: so-called “clean energy” (primarily wind and solar).

The Administration’s bias against carbon-based fuels should come as no surprise. The President ran on an agenda that anticipated higher energy costs:

Under my plan of a cap-and-trade system, electricity rates would necessarily skyrocket. ... Coal-powered plants, you know, natural gas, you name it, whatever the plants were, whatever the industry was, they would have to retrofit their operations. That will cost money.³

Some of his key cabinet officials have expressed similar views. Prior to his confirmation as Secretary of Energy, Steven Chu, then director of the Department of Energy's Lawrence Berkeley National Lab, advocated raising gas taxes--and therefore prices--to encourage the sale

¹ President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 27, 2010) *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>.

² Energy Information Administration, *Energy in Brief*, “What are the major sources and users of energy in the United States?” (Updated: Oct. 28, 2010) *available at* http://www.eia.doe.gov/energy_in_brief/major_energy_sources_and_users.cfm

³ Deroy Murdock, *Obama Declares War on Coal*, NAT’L REVIEW (Nov. 3, 2008) Original source: audio/video of Obama’s appearance before the San Francisco Chronicle’s editorial board in Jan. 2008.

of more-efficient cars: “[s]omehow we have to figure out how to boost the price of gasoline to the levels in Europe.”⁴

This report will examine specific Obama Administration policies targeting oil and gas production from both a regional and national perspective. Additionally, it will take a close look at the regional and local impacts of the growing web of laws, regulations, policies and tactics aimed at suppressing the development and production of domestic, carbon-based energy reserves that the President has labeled “yesterday’s energy.”⁵

President Obama’s policy bias against fossil fuels

The Obama Administration is promoting a clean energy agenda at the expense of domestic oil and gas production. Administration officials, including the President, have publicly stated that increasing domestic oil and gas production is important to stabilize gasoline prices. However, a review of their actions reveals a systemic effort to prevent, obstruct, stall, and discourage development of carbon-based resources. This strategy is articulated by Secretary Geithner and is observable in actions by Administrator Jackson and Secretary Salazar. Unfortunately for Americans struggling with higher gas prices, Administration rhetoric will provide no relief. However, the Administration’s actions can inflict more pain.

In March 2009, Treasury Secretary Timothy Geithner explained to Senator John Cornyn (R-Texas) that the Obama Administration planned to increase taxes on domestic oil and gas producers even though this policy will decrease domestic oil production and increase America’s dependence on foreign oil and gas:

Senator, as you know, and I think it's clear in the proposal, we don't believe it makes sense to significantly subsidize the production and use of sources of energy that are dramatically going to add to our climate change imperative.

... But as I said, the overall objective is not to be providing ongoing subsidies to forms of energy production that are going to add to this critical long-term imperative of climate change.
(emphasis added)

...And I think this is a reasonable policy, given the overall objective of again making sure we're not providing artificial

⁴ Neil King Jr. and Stephen Power, *Times Tough for Energy Overhaul*, WALL STREET J. (Dec. 12, 2008), available at <http://online.wsj.com/article/SB122904040307499791.html>.

⁵ President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 25, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

incentives, to produce and use energy that's going to make our broader climate-change imperatives worse.⁶ (emphasis added)

Translation: in order to achieve the President's vision of a carbon free economy, the production and development of fossil fuels would be punished.

Phase One: Cap-and-Trade

Since his first day in office President Obama has worked to advance his “green energy agenda.” This agenda was originally manifested in the Presidents cap-and-trade scheme, which was summarily rejected by Congress. Cap-and-trade legislation, “a combination of energy taxes and carbon controls”⁷ failed to garner enough support to pass both houses of Congress. “Realistically, the cap-and-trade bills in the House and the Senate are going nowhere,” said Senator Lindsey Graham (R-SC), who was trying to fashion a bipartisan package of climate and energy measures. “They’re not business-friendly enough, and they don’t lead to meaningful energy independence. . . . What is dead is some massive cap-and-trade system that regulates carbon in a fashion that drives up energy costs.”⁸ Some view the massive failure of cap-and trade as the impetus for the President’s renewed focus on clean energy: “cap and trade by another name.”⁹ Failing to pass cap-and-trade, the Administration turned to regulation to do what it couldn’t via Congress. Namely, EPA issued the controversial endangerment finding for CO₂ and other greenhouse gases (GHGs). This finding put in motion the onerous mechanisms of the Clean Air Act which imposes enormous costs on consumers of carbon-based fuel.

Before EPA issued the Endangerment Finding for Greenhouse Gasses under the Clean Air Act (CAA), the White House and the agency had been warned by economists, legislators, and their own advisors that the GHG regulations would impose a high cost on the economy via higher energy prices and increased uncertainty. Former Energy and Commerce Chairman Dingell famously stated in April 2008 that regulating GHGs under the CAA would result in a “glorious mess”¹⁰ that would wreak havoc on the economy. In March 2009, then-Ranking Member Issa warned EPA that, . . . the immediate result of issuing an endangerment finding is that thousands of American small businesses, already struggling in one of the toughest economic [climates] our generation has ever seen, will be thrown into a sea of legal uncertainty, further depressing their ability to stay viable.¹¹ Bottom line: the Administration knew that the implementation of EPA’s GHG regulations would have a large economic impact. During consideration of cap-and-trade legislation, a top White House economic official warned that, “if you don’t pass this [cap-and-trade] legislation then...the EPA is going to have to regulate in this area. And it is not going to

⁶ *The President’s Fiscal Year 2010 Budget Proposal, Part One: Hearing Before S. Comm. on Finance*, 111th Cong. (2009).

⁷ Iain Murray and William Yeatman, *Cap and Trade*, NAT’L REVIEW ONLINE, March 12, 2010.

⁸ John M. Broder and Clifford Krauss, *Advocates of Climate Bills Scale Down Their Goals*, NEW YORK TIMES, Jan. 26, 2010.

⁹ Kimberley A. Strassel, *Cap and Trade Returns from the Grave*, WALL STREET J. ONLINE, Jan. 28, 2011, available at http://online.wsj.com/article_email/SB10001424052748703893104576108501552298070-1MyQjAxMTAxMDIwODEyNDgyWj.html.

¹⁰ *A Glorious Mess*, WALL STREET J. (Apr. 12, 2008).

¹¹ Letter from the Hon. Darrell E. Issa, Ranking Member, Oversight Committee to the Hon. Lisa P. Jackson, Administrator, U.S. EPA (Jan. 13, 2010).

be able to regulate in a market-based way, so it's going to have to regulate in a command-and-control way, which will probably generate even more uncertainty."¹²

Phase Two: Promote “New Energy;” Discourage “Yesterday’s Energy”

The Administration remains steadfast in its efforts to force a shift from oil and gas to so-called “clean energy.” In its recent report on energy policy,¹³ the Administration pays lip service to the proposition that America needs to expand domestic oil and gas production, but offers no serious plan to accomplish the expansion. Instead, it promotes “clean energy” policies that would decrease domestic oil and gas production, ignoring the evidence that such policies would contribute to higher gasoline prices and increase America’s dependence on foreign oil, as well as contribute to the further loss of American jobs. In his 2011 State of the Union address, the President stated “none of us can predict with certainty what the next big industry will be or where the new jobs will come from,” yet only a few moments later he predicted that the next big industry will be clean energy: “. . . clean energy breakthroughs will only translate into clean energy jobs if businesses know there will be a market for what they’re selling. So tonight, I challenge you to join me in setting a new goal: By 2035, 80 percent of America’s electricity will come from clean energy sources.”¹⁴

The President’s push for clean energy tomorrow comes at the expense of affordable energy today. The United States has an abundance of carbon-based fuels; yet, restricted use will artificially and unnecessarily raise the cost of energy for U.S. consumers. America’s combined energy resources are the largest on earth. They eclipse Saudi Arabia (3rd), China (4th) and Canada (6th) combined – and that’s without including America’s shale oil deposits.¹⁵ U.S. proven reserves of oil total 19.1 billion barrels, reserves of natural gas total 244.7 trillion cubic feet, and natural gas liquids reserves of 9.3 billion barrels.¹⁶ “That’s enough oil to maintain America’s current rates of production and replace imports from the Persian Gulf for more than 50 years.”¹⁷ Undiscovered technically recoverable oil in the United States is 145.5 billion barrels, and undiscovered technically recoverable natural gas is 1,162.7 trillion cubic feet.¹⁸

Alternative Energy: Is it Really Green?

Converting from a carbon-based economy towards “greener” energy would be costly in more ways than one. “In its headlong rush to go ‘green,’ the United States may simply be trading reliance on one type of import for reliance on another.”¹⁹ To convert to clean energy the United

¹² Jonah Goldberg, *Dirty Moves Behind Pitch for Cleaner Air*, BOSTON HERALD (Dec. 13, 2009).

¹³ *Blueprint for a Secure Energy Future* (Mar. 30, 2011), available at http://www.whitehouse.gov/sites/default/files/blueprint_secure_energy_future.pdf.

¹⁴ President Barack Obama, Remarks by the President in the State of the Union Address (Jan. 25, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/01/25/remarks-president-state-union-address>.

¹⁵ Peter C. Glover, *U.S. Has Earth’s Largest Energy Resources*, ENERGY TRIBUNE (Mar. 24, 2011), available at <http://www.energytribune.com/articles.cfm/6933/US-Has-Earths-Largest-Energy-Resources>.

¹⁶ Gene Whitney, et al, *U.S. Fossil Fuel Resources: Terminology, Reporting, and Summary*, CRS REPORT TO CONGRESS, Nov. 30, 2010.

¹⁷ Press Release, U.S. Senate Committee on Environment and Public Works, *Government Report: America’s Combined Energy Resources Largest on Earth* (Mar. 11, 2011).

¹⁸ *Id.*

¹⁹ Robert Bryce, *POWER HUNGRY* (Public Affairs) (2010).

States “will need rare earth commodities produced by the Chinese as well as lithium mined by a handful of foreign countries.”²⁰ China has a near-monopoly on rare earths, controlling between 95-100 percent of the elements essential to most clean energy technologies including wind turbines, hybrid cars, solar panels, computers, and batteries.²¹ Instead of importing foreign oil from multiple countries, adopting clean energy technologies would require the United States to become reliant on the Chinese to provide these essential elements.

Besides all the other problems with becoming dependent on China for the sole supply of rare earth elements necessary to increase America’s use of so-called clean energy, increasing the demand for these elements would only add to China’s coal and oil consumption. China is the world’s second largest energy consumer. Coal supplied the vast majority (71 percent) of China’s total energy consumption of 85 quadrillion British thermal units (Btu) in 2008. Oil is the second-largest source, accounting for 19 percent of the country’s total energy consumption. While China has made an effort to diversify its energy supplies, new sources of renewable energy account for only 4.2 percent of China’s energy consumption.²² EIA estimates that China’s absolute coal consumption should nearly double to 112 quadrillion Btu by 2020.²³ The logic of using more carbon-based fuels in China to create more clean energy in the United States is flawed. CO₂ is highly diffuse in the atmosphere such that emissions in China impact the United States as much as emissions originating in California. It is also a fallacy that a conversion to clean energy would create new jobs in the United States. In addition to the jobs that will be lost in the oil and gas production industry to subsidize the Obama Administration’s conversion to so-called clean energy, “China’s near-monopoly control of the green elements likely means that more of the new manufacturing jobs related to “green” energy products will be created in China, not the United States.”²⁴

In addition to solar and wind, biofuels intended to reduce or replace U.S. gasoline consumption are already costing taxpayers and are not a long-term practical solution²⁵ for replacing carbon-based fuels. Total agriculture-based biofuels production accounted for only about 5% of total U.S. transportation fuel consumption (on a gasoline-equivalent basis) in 2010. Federal biofuels policies have had costs, including unintended market and environmental consequences and large federal outlays (estimated at over \$7 billion in 2010).²⁶ In a 2010 study, the Congressional Budget Office estimated “taxpayers incur a cost of \$1.78 for replacing 125,000 Btus of energy supplied by petroleum fuels with 125,000 Btus supplied by ethanol.”²⁷ This year, the corn-ethanol sector will produce about 13.8 billion gallons of ethanol, the energy equivalent of about 9.1 billion gallons of gasoline . . . the domestic-drilling sector provides about

²⁰ *Id.*

²¹ *Id.*

²² Energy Information Administration, Country Analysis Briefs: China (Nov. 2010), *available at* <http://www.eia.doe.gov/EMEU/cabs/China/pdf>.

²³ *Id.*

²⁴ *Id.*

²⁵ James Jordan and James Powell, *The False Hope of Biofuels*, WASHINGTON POST, July 2, 2006.

²⁶ Randy Schnepf, *Agriculture-Based Biofuels: Overviews and Emerging Issues*, CRS REPORT FOR CONGRESS, Jan. 11, 2011.

²⁷ USING BIOFUEL TAX CREDITS TO ACHIEVE ENERGY AND ENVIRONMENTAL POLICY GOALS, A CBO Study (July 2010)

36 times as much energy to the U.S. economy.²⁸ Thus the entire U.S. corn crop would supply only 3.7 percent of our auto and truck transport demands. Using the entire 300 million acres of U.S. cropland for corn-based ethanol production would meet only about 15 percent of the demand.²⁹ Tim Searchinger, a research scholar at Princeton University's Woodrow Wilson School, says that biofuels don't make much sense because it "takes a huge amount of land to produce a modest amount of energy." The key issue, says Searchinger, is scale. He points out that even if we used "every piece of wood on the planet, every piece of grass eaten by livestock, and all food crops, that much biomass could only provide about 30 percent of the world's total energy needs."³⁰

Regardless, the Obama Administration continues to emphasize unaffordable clean energy policies at the expense of domestic carbon-based resources. A recent post on the White House blog summarizes the President's position.³¹ The post and the accompanying graphic³² demonstrate that the Obama Administration's true position with domestic oil and gas production is to increase that industry's taxes in order to provide subsidies for clean energy including electric cars and public transportation.³³

²⁸ Robert Bryce, *Obama's Happy Talk on Energy*, NATL. REVIEW (May 10, 2011).

²⁹ *Id.*

³⁰ Robert Bryce, *Biofuel Delusions*, COUNTERPUNCH (Dec. 31, 2010).

³¹ The President on Jobs & Gas Prices, White House blog (May 6, 2011) *available at* <http://www.whitehouse.gov/blog/2011/05/06/president-jobs-gas-prices-read-his-remarks-download-graphic>.

³² http://www.whitehouse.gov/sites/default/files/gas_graphic_blogsize.jpg

³³ The White House blogger encouraged everyone to "check it out below, or download it, print it, send it to your family, or hang it on your wall to add a splash of color."

Quick Facts
THE OBAMA ENERGY AGENDA & GAS PRICES



Source: The President on Jobs & Gas Prices, White House blog (May 6, 2011) available at <http://www.whitehouse.gov/blog/2011/05/06/president-jobs-gas-prices-read-his-remarks-download-graphic>.

Punitive Tax Increases

The Obama Administration wants to tax American oil and gas production to subsidize its clean energy agenda. Higher taxes will disproportionately and negatively impact American job creators in the independent oil and gas production market. Over the long run it will decrease domestic production and make the United States more vulnerable to world events.

In its FY2012 budget, the Obama Administration requests over \$60 billion in direct tax and fee increases (over ten years) on American energy production. Some of the most substantial energy tax and fee proposals in the President's FY 2012 budget include:³⁴

- Repeal Domestic Manufacturing Tax Deduction for oil and natural gas (\$18.2 billion)
- Repeal expensing for intangible drilling costs (\$12.4 billion)
- Repeal percentage depletion for oil and natural gas wells (\$11.2 billion)
- Repeal percentage depletion tax on oil, gas and mineral properties (\$4.9 billion for corporations, \$890 million for individuals)

The Administration plans to use these tax increases to subsidize and promote the electric vehicle industry and other clean energy projects. Jack Lew, director of the Office of Management and Budget, describes the Obama Administration's philosophy behind the tax increases requested in the FY2012 budget:

To invest in the industries and jobs of tomorrow, we invest \$148 billion overall in research and development. And this supports our goal of putting a million electric vehicles on the road by 2015, doubling our share of electricity from clean energy by 2035, and reducing energy use in buildings by 20 percent by 2020.

In part, we pay for this by eliminating 12 tax breaks that now go to oil, gas and coal companies, which will raise \$46 billion over 10 years.³⁵ (emphasis added)

The Administration characterizes the deductions and credits slated for elimination as "tax preferences," or "oil and gas subsidies" that are costly to U.S. taxpayers and do little to either provide incentives for increased production or reduce prices to consumers.³⁶ The President refers to them as "special" and "unwarranted"³⁷ "giveaways."³⁸ This characterization is inaccurate: the vast majority of these deductions and credits are widely available to all manufacturers. For example, the President's proposal to eliminate the expensing of intangible drilling costs would single out the oil and gas industry for discriminatory tax treatment. Intangible drilling costs

³⁴ Press Release, U.S. House of Representatives, Committee on Natural Resources, *Budget Watch* (Feb. 14, 2011), available at <http://naturalresources.house.gov/News/DocumentSingle.aspx?DocumentID=225077>.

³⁵ Jack Lew, Office of Management and Budget, White House Press Briefing, (Feb. 14, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/02/14/press-briefing-omb-director-jack-lew-and-cea-chairman-austan-goolsbee-bu>.

³⁶ FY2012 federal budget request, Terminations, Reductions, and Savings, Dept. of Energy, p. 52.

³⁷ Letter from President Barack Obama to Rep. John Boehner, Rep. Nancy Pelosi, Senator Harry Reid, and Senator Mitch McConnell (April 26, 2011) (on file with author).

³⁸ Press Release, White House, Weekly Address, *Taxpayer Subsidies for Oil Companies are Neither Right, nor Smart, and They Should End* (Apr. 30, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/04/30/weekly-address-taxpayer-subsidies-oil-companies-are-neither-right-nor-sm>.

(IDCs) are non-salvageable items that can be expensed in the year that they were incurred.³⁹ This tax treatment applies equally to shoe salesman as it applies to the oil and gas industry. For example, if a shoe salesman buys a shoe for \$10 and sells it for \$20, he doesn't depreciate the shoe over 7 years, he expenses it. Similarly, there are a host of temporary, non-salvageable items called IDCs that some oil and gas companies can expense such as drilling services, mud, cement, testing services, things that are done before a well is completed and producing any oil or gas.⁴⁰

Moreover, the oil and gas industry receives \$2.8 billion in targeted tax incentives, less than 3 percent of all incentives, and far less than its smaller rivals in energy production, the renewable energy sector which receives \$11.3 billion.⁴¹ The non-profit Tax Foundation questions why the Administration is penalizing the oil and gas industry by attempting to repeal tax deductions that are widely available to many other manufacturing sectors and warns that other manufacturing sectors may soon be penalized as well if they fall out of favor with the Administration:

Why, suddenly, should companies that produce t-shirts, hamburgers, toys, software, or rap music be qualified to receive the tax benefit but oil companies should not be? According to the explanation in Treasury's Green Book, environmental politics account for this distortion of sound tax and economic policy. The President promised during the G-20 Summit in Pittsburgh, to "phase out subsidies for fossil fuels so that the United States can transition to a 21st century energy economy."⁴² (emphasis added)

Former Democratic Congressman Harold Ford, Jr., also questions the need for tax increases and why the Administration wrongly labels tax credits as subsidies:

Why, when gas prices are climbing, would any elected official call for new taxes on energy? And characterizing legitimate tax credits as "subsidies" or "loopholes" only distracts from substantive treatment of these issues. Lawmakers misrepresent the facts when they call the manufacturing deduction known as Section 199—passed by Congress in 2004 to spur domestic job growth—a "subsidy" for oil and gas firms. The truth is that all U.S. manufacturers, from software producers to filmmakers and coffee roasters, are eligible for this deduction.⁴³ (emphasis added)

³⁹ *Pathways to Energy Independence: Hydraulic Fracturing and Other New Technologies: Field Hearing before H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (statement of Rock Zierman, CEO, California Independent Petroleum Association, available at http://oversight.house.gov/images/stories/Testimony/5-6-11_Zierman_Testimony.pdf).

⁴⁰ *Id.*

⁴¹ Sean A. Hodge, *Putting Corporate Tax "Loopholes" in Perspective*, TAX FOUNDATION SPECIAL REPORT (Aug. 2010) (No. 184).

⁴² *Id.*

⁴³ Harold Ford, Jr., *Washington vs. Energy Security*, WALL STREET J., May 11, 2011.

Many of these proposed tax changes, including repealing the expensing of intangible drilling costs, have the effect of removing incentives available only to non-integrated companies (also referred to as “independents”).⁴⁴ Independent oil producers—those who get oil and natural gas out of the ground and do not refine, transport, market, or have retail sales of petroleum products—develop 95 percent of domestic oil and gas wells.⁴⁵ Independents produce 68 percent of domestic oil and produce 82 percent of domestic natural gas.⁴⁶ While integrated companies (i.e. Chevron, Shell, BP) with vastly more capital may survive these tax increases in the short run, the independents will essentially be killed⁴⁷ and good jobs will be lost.

For those lucky enough to survive, eliminating tax credits and deductions for independents will certainly decrease capital investment and thus domestic exploration and production. Independents currently invest 150% of their domestic cash flow back into development.⁴⁸ In 2010, upstream independents are estimated to have spent \$62.6 billion on capital expenditures (capex).⁴⁹ This translates to the creation of six direct and 33 total upstream jobs for every \$1 million dollars of capex. In value added terms, every \$1 million dollars of capital expenditure results in \$2.4 million of direct and \$5.1 million of overall contribution to GDP.⁵⁰ In terms of taxes, every \$1 million dollars of capex results in \$1.1 million of total tax revenue generated in the upstream sector.⁵¹ According to Rock Zierman of California Independent Petroleum Producers, “only independent producers can fully expense IDC on American production. Therefore, if you eliminate IDC expensing, there would be less capital available in the current year to reinvest in new drilling operations. This equals less production, period.”⁵² Even though the entire domestic natural gas and oil sector claimed only \$2 billion in deductions in 2010, independent producers could lose as much as \$12 billion in the first year after this deduction was repealed.⁵³ Devon Energy, an independent producer in Oklahoma, estimates that eliminating IDC expensing could cost it \$1 billion in the first year. “That would equate to our complete drilling program in the Barnett Shale. . . . That looks to us like it's a totally wrongheaded policy that would penalize companies that are most efficient at producing resources that power the nation.”⁵⁴ Higher taxes equal less investment and more dependence on

⁴⁴ Robert Pirog, CONGRESSIONAL RESEARCH SERVICE, OIL AND NATURAL GAS INDUSTRY TAX ISSUES IN THE FY2012 BUDGET PROPOSAL (Mar. 3, 2011).

⁴⁵ Independent Petroleum Association of America, *Fact Sheet: Increasing Taxes on America's Independent Natural Gas and Oil* (2011), available at http://www.ipaa.org/news/docs/Tax_Issue_Talking_Points_02-2011.pdf.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ IHS GLOBAL INSIGHT (USA) INC., THE ECONOMIC CONTRIBUTION OF THE ONSHORE INDEPENDENT OIL AND NATURAL GAS PRODUCERS TO THE U.S. ECONOMY (April 2011), available at <http://www.ipaa.org/news/docs/IHSFinalReport.pdf>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Pathways to Energy Independence: Hydraulic Fracturing and Other New Technologies: Field Hearing before H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (statement of Rock Zierman, Chief Executive Officer, California Independent Petroleum Association), available at http://oversight.house.gov/images/stories/Testimony/5-6-11_Zierman_Testimony.pdf.

⁵³ Telephone Interview with Chip Minty, Devon Energy (May 11, 2011).

⁵⁴ *Pathways to Energy Independence: Hydraulic Fracturing and Other New Technologies: Field Hearing before H. Comm. on Oversight and Government Reform*, 112th Cong. (2011) (statement of William A. Whitsitt, Executive Vice President, Devon Energy), available at http://oversight.house.gov/images/stories/Testimony/5-6-11_Whitsitt_Testimony_FINAL.pdf

foreign sources of oil. Less capital investment will lead to more dependence on foreign oil.

Repealing these tax credits and deductions will not only decrease capital investment and domestic exploration and production, but it will also eliminate good-paying jobs. The exploration and production portion of the industry employs about 500,000 workers at a wage rate over 50 percent higher than the average of all manufacturing.⁵⁵ With unemployment rising to 9% in April 2011,⁵⁶ America needs to create more jobs, not eliminate existing jobs by increasing taxes to subsidize clean energy technologies that are not capable of filling the void:

Annually raising taxes on the industry by billions of dollars would reduce investment in American oil and natural gas development, cost thousands of U.S. jobs, and, over time, reduce both energy production and the taxes and royalties generated from it. It would also increase imports. We wouldn't reduce the deficit, and necessary government investments could be adversely affected. Those advocating tax increases, therefore, would be cutting off their nose to spite their face. Those who want more revenue should work to increase access to available U.S. oil and natural gas reserves, which have a long-term government revenue potential approaching \$2 trillion. That could reduce the deficit and help finance critical government programs without raising energy costs and reducing supplies.⁵⁷

While removal of these tax credits and deductions may be appropriate in conjunction with broad-based tax reform that reduces net tax rates, eliminates unnecessary burdens on job creators, and simplifies tax compliance, simply removing these provisions without tax relief elsewhere would have the effect of discouraging oil and gas exploration and development even more. Far from seeking tax code simplification, or even additional revenues to reduce our deficits, the Administration is quite openly seeking ways of paying for the subsidies it would like to provide to “green energy” while at the same time making carbon-based energy more expensive.

Unfair tax treatment is just one piece of evidence in a two-year pattern of Administration policies that discriminate against oil and gas development in the United States. This discrimination hurts not only the energy independence of the country but local economies across the nation. The remainder of this report will provide examples of some of those policies in each of five geographic regions most likely to feel the repercussions: Appalachia, the Rocky Mountains, the Gulf, Alaska, and Texas.

⁵⁵ Independent Petroleum Association of America, *Fact Sheet: Increasing Taxes on America's Independent Natural Gas and Oil* (2011), available at http://www.ipaa.org/news/docs/Tax_Issue_Talking_Points_02-2011.pdf.

⁵⁶ BUREAU OF LABOR STATISTICS, EMPLOYMENT SITUATION SUMMARY (May 6, 2011).

⁵⁷ Press Release, American Petroleum Institute, *Joint Committee study ignores harm of raising taxes* (May 13, 2011), available at <http://www.api.org/Newsroom/jcomm-ignores-harm.cfm>.

I. APPALACHIAN REGION

The shale gas reserves of Appalachia are a game changer for the future of American energy security. The United States has 2,552 trillion cubic feet (TCf) of potential natural gas resources, enough to last 110 years at current usage rates. Almost one-third of these resources are from shale gas -- considered uneconomical to extract until just a few years ago.⁵⁸ Newly recoverable shale reserves, both oil and gas, have revitalized the oil and gas industry in Appalachia and across the United States -- from North Dakota to south Texas to California. The Marcellus Shale formation lies below many of the Appalachian states and extends up to New York. In 2002, the U.S. Geological Survey estimated the Marcellus held 1.9 TCF of natural gas.⁵⁹ In 2009, the Department of Energy estimated the Marcellus holds 262 TCF of recoverable natural gas.⁶⁰

The key to unlocking these additional reserves is a new application of a proven technology called hydraulic fracturing ("fracking"). Fracking has the potential to reposition America from a country beholden to the Middle East for energy to a nation that has used ingenuity to utilize domestic resource exhaustion, but the Administration is threatening to kill the technology with unnecessary federal regulation. Advancements in fracking, coupled with the ability to drill horizontally, allow producers to access more gas with fewer wells. After drilling vertically downward to a shale formation, the producer can turn the drill bit and drill horizontally through the formation. After drilling, a mixture of water, sand, and chemicals can be injected into the well to open up small cracks within the shale formation to allow the gas to travel to the well. The Energy Information Administration says that "without horizontal drilling and hydraulic fracturing, shale gas production would not be economically feasible because the natural gas would not flow from the formation at high enough rates to justify the cost of drilling."⁶¹ Fracking and horizontal drilling also reduce the environmental footprint necessary to tap this natural gas.⁶²

The combination of fracking with horizontal drilling is making shale oil recoverable as well, greatly increasing our recoverable oil reserves around the country. The Bakken Shale in North Dakota is a stunning example. As a result of horizontal drilling, coupled with fracking, Bakken production increased from less than 3,000 bbl/d in 2005 to over 230,000 bbl/d in 2010. The Bakken's share of total North Dakota oil production rose from 3% to 75% over those five years.⁶³ Thanks in part to fracking, unemployment in North Dakota is now the lowest in the country -- just 3.8%.⁶⁴

North Dakota is not alone. Companies are investing billions of dollars to tap into oil deposits in Colorado, Texas, California, Oklahoma, and Louisiana as well. By 2015, these fields

⁵⁸ Energy Information Administration, *What is shale gas and why is it important?* (Apr. 4, 2011), available at http://www.eia.doe.gov/energy_in_brief/about_shale_gas.cfm.

⁵⁹ NATIONAL PARK SERVICE, POTENTIAL DEVELOPMENT OF THE NATURAL GAS RESOURCES IN THE MARCELLUS SHALE 2 (Dec. 2008).

⁶⁰ DEPARTMENT OF ENERGY, MODERN SHALE GAS DEVELOPMENT IN THE UNITED STATES: A PRIMER (April 2009).

⁶¹ *Id.*

⁶² Press Release, America's Natural Gas Alliance, *Safe, Responsible Drilling*, available at <http://www.anga.us/media/41084/safe%20responsible%20drilling.pdf>.

⁶³ *Id.*

⁶⁴ Jonathan Fahey, *New Drilling Method Opens vast oil fields in US*, THE ASSOC. PRESS (Feb 9, 2011).

could yield as much as 2 million barrels of oil per day – more than the Gulf of Mexico produces today -- boosting domestic oil production by 20 to 40%.⁶⁵ According to Credit Suisse, development of these fields could reduce oil imports by 60% by 2020.⁶⁶

Despite the success of fracking, federal agencies appear to be in a race to see which one can regulate it first. The Department of Interior announced last November that it will consider regulating fracking on federal lands.⁶⁷ The EPA, which concluded seven years ago that fracking "poses little or no threat" to drinking water supplies,⁶⁸ is revisiting the issue. Having found no evidence that fracking chemicals reach drinking water, EPA now wants to study the entire lifecycle of the water used. In addition, DOE has convened a study group to review the fracking process. In a written statement, DOE Secretary Steven Chu stated, "I am looking forward to hearing from this diverse, respected group of experts on best practices for safe and responsible natural gas production."⁶⁹ Although the study groups members are certainly highly respected, a survey of their biographies indicates none has recent industry experience with the advancements in the technology.⁷⁰

As Chairman Fred Upton of the Energy and Commerce Committee pointed out,⁷¹ the duplicative efforts of DOI, DOE, and EPA run contrary to the Administration's pledge to eliminate government waste and streamline processes. It mirrors the President's favorite example of the headache caused by agency jurisdiction, "The Interior Department is in charge of salmon while they're in fresh water, but the Commerce Department handles them when they're in saltwater. I hear it gets even more complicated once they're smoked."⁷² Federal regulation by EPA, DOE, and DOI would cause needless delay and uncertainty along with multiple additional layers of red tape. Ultimately, federal intervention will chill investment and decrease energy independence.

Additional regulation of fracking is unnecessary because, as EPA Administrator Lisa Jackson pointed out, fracking is not an unregulated activity.⁷³ Quite the opposite - the states, not the federal government, have always regulated the process and have done so with a solid track record. Officials in state after state have gone on the record to say that fracking has not caused

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Ben Geman, *Interior mulls policy on disclosure of gas 'fracking' fluids*, THE HILL E² WIRE (Nov. 30, 2010).

⁶⁸ ENVIRONMENTAL PROTECTION AGENCY, EVALUATION OF IMPACTS TO UNDERGROUND SOURCES OF DRINKING WATER BY HYDRAULIC FRACTURING OF COALBED METHANE RESERVOIRS STUDY (2004), available at http://water.epa.gov/type/groundwater/uic/class2/hydraulicfracturing/wells_coalbedmethanestudy.cfm.

⁶⁹ Press Release, Department of Energy, Secretary Chu Tasks Environmental, *Industry and State Leaders to Recommend Best Practices for Safe, Responsible Development of America's Onshore Natural Gas Resources* (May 5, 2011).

⁷⁰ *Id.*

⁷¹ Press Release, House Energy and Commerce Committee, *Administration's Inefficiencies Exposed: Plans for Yet Another Study on Fracking Wastes Federal Funds on Duplicative* (May 5, 2011).

⁷² Colin Sullivan, *STATE OF THE UNION: Obama quip on salmon oversight fails to amuse Earthjustice*, E & E DAILY, Jan. 26, 2011.

⁷³ *Oversight Hearing on Public Health and Drinking Water Issues: Hearing before S. Comm. on Environment & Public Works*, 112th Cong. (2011) (testimony of Lisa Jackson, Administrator, U.S. Environmental Protection Agency), available at:

http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=c8713cf7-802a-23ad-4d51-bd8e2c8a7bd3&Witness_ID=d9783076-0a81-4f6a-895a-c34d7f21cc4d.

any problems and any reports to the contrary are inaccurate.⁷⁴ As evidence, consider the following examples:

- David Neslin, Director of the Colorado Oil and Gas Conservation Commission: “There has been no verified instance of harm to groundwater caused by hydraulic fracturing.”⁷⁵
- Jennifer Means, Pennsylvania Dept. of Environmental Protection: “So far it has not been our experience that the fracking process has caused any water-supply issues.”⁷⁶
- James Welsh, Commissioner of Conservation, Louisiana Dept. of Natural Resources: “The Louisiana Office of Conservation is unaware of any instance of harm to groundwater in the State of Louisiana caused by the practice of hydraulic fracturing.”⁷⁷
- Harold Fitch, Director of the Office of Geological Survey, Michigan Department of Environmental Quality: “Hydraulic fracturing has been utilized extensively for many years in Michigan, in both deep formations and in the relatively shallow Antrim Shale formation. There are about 9,900 Antrim⁷⁸ wells in Michigan producing natural gas at depths of 500 to 2000 feet. Hydraulic fracturing has been used in virtually every Antrim well. There is no indication that hydraulic fracturing has ever caused damage to ground water or other resources in Michigan.”⁷⁹

The Obama Administration itself has even conceded that it has no evidence of fracking ever contaminating groundwater.⁸⁰ Nevertheless, fracking has become a political football.

Those opposed to fracking have twisted the results of recent scientific studies to support their argument. The most recent example is a study published by Duke University researchers entitled, “Research and Policy Recommendations for Hydraulic Fracturing and Shale-Gas Extraction” which supposedly “shows one downside of fracking.”⁸¹ A close examination of the

⁷⁴ Lee Fuller, *March Madness: Small Group in Congress Renews Efforts That Could Cost Jobs, Undercut American Energy Security*, ENERGY IN DEPTH, Mar. 17, 2011.

⁷⁵ INTERSTATE OIL AND GAS COMPACT COMMISSION, REGULATORY STATEMENTS ON HYDRAULIC FRACTURING SUBMITTED BY THE STATES, June 2009, available at <http://www.iogcc.state.ok.us/Websites/iogcc/Images/2009StateRegulatoryStatementsonHydraulic%20Fracturing.pdf>

⁷⁶ Dennis J. O’Malley, *Gas drilling forum offers hope, dispels myths*, TIMES TRIBUNE, Oct. 20, 2010, available at <http://thetimes-tribune.com/news/gas-drilling-forum-offers-hope-dispels-myths-1.1051387>.

⁷⁷ INTERSTATE OIL AND GAS COMPACT COMMISSION, REGULATORY STATEMENTS ON HYDRAULIC FRACTURING SUBMITTED BY THE STATES (June 2009), available at <http://www.iogcc.state.ok.us/Websites/iogcc/Images/2009StateRegulatoryStatementsonHydraulic%20Fracturing.pd>.

⁷⁸ The Antrim Shale is a formation in the Michigan Basin.

⁷⁹ *Id.*

⁸⁰ *Federal Drinking Water Programs: Hearing Before the Environment and Public Works Committee*, 111th Cong (2009) (testimony of Peter Silva, Assist. Admin. For Water), see also, Press Release, U.S. Senate Committee on Environment and Public Works (Dec. 8, 2009), available at http://epw.senate.gov/public/index.cfm?FuseAction=Minority.PressReleases&ContentRecord_id=70289be8-802a-23ad-479d-ca2d6f6b36cd&Region_id=&Issue_id=

⁸¹ Robert B. Jackson et al, *Research and Policy Recommendations for Hydraulic Fracturing and Shale-Gas Extraction*, Duke University Center on Global Change (May 2011) available at

research, however, reveals that the study does not in any way support the conclusion that fracking is responsible for the contamination of the ground water tested by the researchers. In fact, the author concedes that, “the study found no evidence of contamination from hydraulic fracturing fluids or saline produced waters.”⁸² Moreover, in an interview with Bloomberg TV Today on May 10, 2011, Robert Jackson, one of the primary authors of the study, stated clearly that the study “should not be taken as proof that the process [hydraulic fracturing] is dangerous.”

Interestingly, despite the Administration’s concerns about the safety of fracking here in the United States, it promotes the technology abroad. The State Department has a program called the Global Shale Gas Initiative which started “in April 2010 in order to help countries seeking to utilize their unconventional natural gas resources to identify and develop them safely and economically.”⁸³ While threatening to make production of the resources here at home uneconomical, the Administration hypocritically encourages others to seize the fracking revolution as a path to energy independence.

II. GULF OF MEXICO

Regulations relating to Outer Continental Shelf (OCS) drilling are promulgated under the Outer Continental Shelf Lands Act (OCSLA). It is the basis for most federal regulation affecting exploration and drilling in the waters off the U.S. coast.⁸⁴ OCSLA establishes broad five-year planning periods for offshore leasing across the OCS, as well as other processes for leasing, development, and production of natural resources. The Bureau of Ocean Energy Management, Regulation, and Enforcement (BOEMRE), formerly known as the Minerals Management Service (MMS), administers this Act.

For nearly 30 years, the vast majority of U.S. waters were under a federal moratorium, which prohibited exploration and development of much of the OCS. In the summer of 2008, gas prices rose to over \$150 a barrel, and the price at the pump exceeded \$4 a gallon, creating immense pressure to open up new domestic sources of oil. In response, President Bush and a Democratically controlled Congress allowed a legislative moratorium to expire on September 30, 2008.⁸⁵ This opened 500 million additional acres for new energy production that contain an estimated 14 billion barrels of oil and 55 trillion cubic feet of natural gas.⁸⁶ However, the promise of expanded access to the OCS and the accompanying increase in domestic supplies of energy was short lived.

http://nicholasinstitute.duke.edu/climate/policydesign/researchandpolicyrecommendationsforhydraulic-fracturingandshale2010gasextraction/at_download/paper.

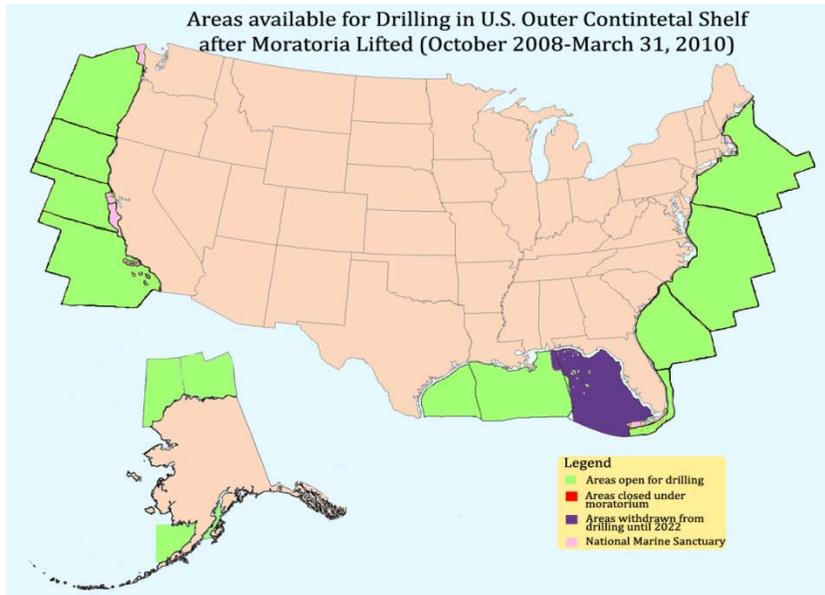
⁸² *Id.*

⁸³ GLOBAL SHALE GAS INITIATIVE, U.S. DEPARTMENT OF STATE, (last visited May 20, 2011) *available at* <http://www.state.gov/s/ciea/gsgi/index.htm>

⁸⁴ 43 U.S.C. § 1331 et seq.

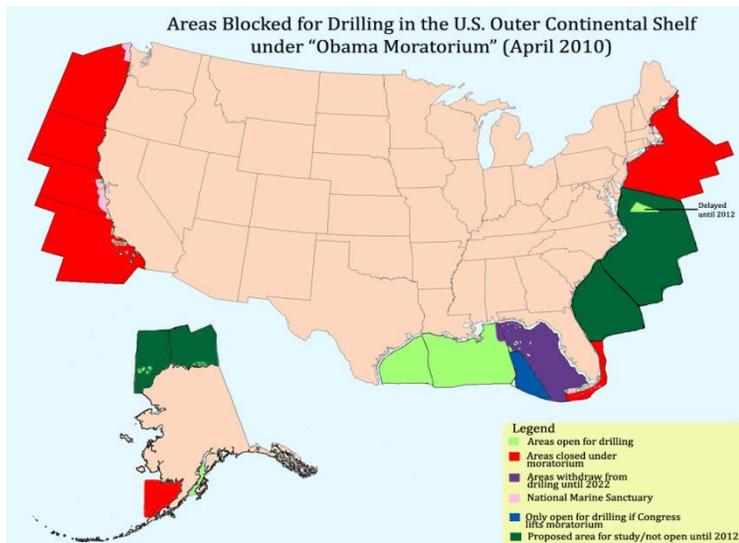
⁸⁵ CURRY L. HAGERTY, OUTER CONTINENTAL SHELF MORATORIUM ON OIL AND GAS DEVELOPMENT 7 (CRS 2011).

⁸⁶ Press Release, U.S. House of Representatives Committee on Natural Resources, *The New Obama Plan Has Americans Seeing Red*, (Dec. 1, 2010)



Source: Press Release, U.S. House of Representatives Committee on Natural Resources, *The New Obama Plan Has Americans Seeing Red*, (Dec. 1, 2010)

On March 31, 2010, President Obama announced a revised plan for the exploration and development of oil reserves in U.S. waters.⁸⁷ While White House officials framed the changes as a way to reduce U.S. reliance on foreign oil and create jobs, in reality, it was a significant retraction from the 2008 decision to lift the moratorium. Under the Obama plan, the majority of the areas open for drilling were once again closed, cutting off access to all of the Pacific Coast, the Northeastern Atlantic and Bristol Bay in Alaska, which put 13.14 billion barrels of oil and 41.49 trillion cubic feet of natural gas back under lock and key.⁸⁸



⁸⁷ *Id.*

⁸⁸ *Id.*

Source: Press Release, U.S. House of Representatives Committee on Natural Resources, *The New Obama Plan Has Americans Seeing Red*, (Dec. 1, 2010)

Tragedy in the Gulf

Within weeks of the President's announcement, an explosion aboard the *Deepwater Horizon* on April 20, 2010, further changed the course of events for offshore development. A series of human and system failures on the part of BP p.l.c. and their subcontractors made the created a devastating reality for the people on the Gulf Coast.⁸⁹ As the post incident investigations revealed, a series of avoidable errors, sometimes as basic as changing the batteries on a back up device, or observing red flags, such as the unsafe escalation of pressure readings, could have prevented the ecologic disaster and the spilling of 4.1 million barrels of oil into the Gulf of Mexico.⁹⁰

Gulf Moratorium

In the aftermath of the explosion aboard the *Deepwater Horizon*, Department of Interior Secretary Ken Salazar twice ordered a six month moratorium on deepwater drilling in U.S. waters.⁹¹ The Secretary's orders effectively banned much of the economic activity that sustains the Gulf states, particularly Louisiana. At that time, many residents of Louisiana expressed their fear that the moratorium had the potential to inflict more pain on the region than the spill itself, and it was imposed over the vehement objections of local leaders and their constituents.⁹² Moreover, Department of Interior executed this sweeping decision without consulting with safety experts on the wisdom of imposing an outright ban on all drilling activity in the Gulf, and without conducting an economic analysis of the impact his decision would have on the economy and the nation.⁹³

First Moratorium

On June 15, 2010, President Obama announced a far reaching six-month moratorium on nearly all drilling in the Gulf.⁹⁴ The moratorium applied to new drilling in water depths greater

⁸⁹ NATIONAL COMMISSION ON BP DEEPWATER HORIZON OIL SPILL AND OFFSHORE DRILLING REPORT TO THE PRESIDENT: THE GULF OIL DISASTER AND THE FUTURE OF OFFSHORE DRILLING 155-22 (Jan. 2011), *available at* <http://www.oilspillcommission.gov/sites/default/files/documents/FinalReportChapter4.pdf>.

⁹⁰ DEEPWATER HORIZON ACCIDENT INVESTIGATION REPORT 21-29 (2010), *available at* http://www.bp.com/liveassets/bp_internet/globalbp/globalbp_uk_english/incident_response/STAGING/local_assets/downloads_pdfs/Deepwater_Horizon_Accident_Investigation_Report.pdf.

⁹¹ *Costing American Jobs, Increasing Energy Prices*, U.S. House Committee on Natural Resources, *available at* <http://naturalresources.house.gov/Issues/Issue/?IssueID=15410>.

⁹² RANKING MEMBER DARRELL ISSA, OVERSIGHT & GOV'T REFORM COMM., HOW THE WHITE HOUSE PUBLIC RELATIONS CAMPAIGN ON THE OIL SPILL IS HARMING THE ACTUAL CLEANUP 12-14 (2010), *available at* http://oversight.house.gov/images/stories/Reports/7-1-10_OGR_Report_-_How_the_White_House_Public_Relations_Campaign_on_the_Oil_Spill_is_Harming_the_Actual_Clean-up.pdf.

⁹³ *The Economic Effects of the Offshore Drilling Moratorium*, S. Comm. On Small Business, 111th Cong (2010) (testimony of the Honorable Rebecca M. Blank, Under Secretary for U.S. Economic Affairs, Department of Commerce).

⁹⁴ Remarks by the President to the Nation on the BP Oil Spill, June 15, 2010, *available at* <http://www.whitehouse.gov/the-press-office/remarks-president-nation-bp-oil-spill>.

than 500 feet, and suspended drilling on 33 wells currently under construction.⁹⁵ The President's action is based on a recommendation from Secretary Salazar, contained in a May 27, 2010, report on "Increased Safety Measures for Energy Development on the Outer Continental Shelf."⁹⁶ According to a report issued by the Inspector General for the Department of Interior, the Secretary's recommendation to impose a moratorium was not peer reviewed and was not supported by the scientists and industry experts who had otherwise been cooperating with the Administration.⁹⁷

The moratorium was immediately challenged by providers of support services to offshore oil and gas operations, who argued the decision to impose a moratorium was arbitrary and capricious.⁹⁸ On June 22, 2010, a federal court ruled that the plaintiffs were likely to succeed on their claim and preliminarily enjoined enforcement of the suspension.⁹⁹ This decision was affirmed by the 5th Circuit Court of Appeals.¹⁰⁰

In the order blocking the Department of Interior from enforcing the moratorium, Judge Feldman specifically cited his belief that the Department actively sought to distort the opinions and advice of "five of the National Academy experts and three of the other experts," which publically stated that they do not agree with the six month moratorium on drilling, because the moratorium actually increases the risk of an oil spill once drilling is resumed.¹⁰¹ Moreover, the Judge pointed to the adverse economic impact of a broad based moratorium, stating that:

"It is only a matter of time before more business and jobs and livelihoods will be lost. The defendants trivialize such losses by characterizing them as merely a small percentage of the drilling rigs affected, but it does not follow that this will somehow reduce the convincing harm suffered. The effect on employment, jobs, loss of domestic energy supplies caused by the moratorium as the plaintiffs (and other suppliers, and the rigs themselves) lose business, and the movement of the rigs to other sites around the world will clearly ripple throughout the economy in this region."¹⁰²

Second Moratorium

Despite the judicial decision to invalidate the original moratorium, Secretary Salazar announced a nearly identical moratorium on July 12, 2010. Billed as "a temporary pause on deepwater drilling to provide time to implement safety reforms,"¹⁰³ the second moratorium

⁹⁵ Memorandum from Upstream Insight on Moratorium Halts US Deepwater Drilling For Six Months (June 3, 2010).

⁹⁶ DEPT. OF INTERIOR, INCREASED SAFETY MEASURES FOR ENERGY DEVELOPMENT ON THE OUTER CONTINENTAL SHELF, May 27, 2010.

⁹⁷ OFFICE OF THE INSPECTOR GENERAL, DEPT. OF INTERIOR, FEDERAL MORATORIUM ON DEEPWATER DRILLING (2010).

⁹⁸ *Hornbeck Offshore Services v. Salazar*, No. 10-1663 (E.D.La, 2010).

⁹⁹ *Id.*

¹⁰⁰ *Hornbeck Offshore Services v. Salazar*, No. 10-30585 (5th Cir., 2011).

¹⁰¹ *Hornbeck Offshore Services v. Salazar*, No. 10-1663 (E.D.La, 2010).

¹⁰² *Id.* at 22.

¹⁰³ Press Release, Department of the Interior, *Sec. Salazar Issues New Suspensions to Guide Safe Pause on Deepwater Drilling* (July 12, 2010), available at <http://www.doi.gov/news/doinews/Secretary-Salazar-Issues-New-Suspensions-to-Guide-Safe-Pause-on-Deepwater-Drilling.cfm>.

appears to merely be a post hoc rationalization of the original moratorium. The new moratorium did nothing to address the economic concerns of the community or the safety concerns raised by experts. In fact, a *New York Times* editorial stated that the second ban is “as strong as the first ban.”¹⁰⁴ According to Dan Juneau, President of the Louisiana Association of Business and Industry:

“[The new moratorium] seems to be geared toward rigs with blowout preventers which everyone in the deep waters have and many in the shallow waters do as well. It is a reaffirmation that the Obama administration is going to keep things shut down, in spite of the 5th Circuit’s ruling.”¹⁰⁵

It appears that the economic impact of the moratorium was never considered by the Administration. A decision memorandum authored by BOEMRE Director Michael Bromwich to Secretary Salazar states that “economic effects may be considered in determining the scope of any suspension of drilling activity.”¹⁰⁶ However, according to testimony of Rebecca M. Blank, Under Secretary for U.S. Economic Affairs at the Department of Commerce, the Administration never once conducted a study of the economic impact the moratorium would have on the Gulf Coast economy and on oil production.¹⁰⁷ Charlotte Randolph, President of Lafourche Parish in Thibodaux, Louisiana, expressed her concern to Committee staff that “nine out of her top ten” taxpayers are employed in the oil and gas industry, which will be directly impacted by the moratorium.¹⁰⁸ In Louisiana coastal communities such as Houma, Morgan City and Lafayette, one out of every three jobs is related to the oil and gas industry; these jobs are now in jeopardy along with the \$12.7 billion in total wages earned by employees working in the Gulf Coast oil and gas industry. Their unemployment would result in decreased tax receipts and additional budget restrictions for a Parish that is already experiencing a very lean year.¹⁰⁹ According to an analysis performed by the Gulf Economic Survival Team, Louisiana and its Parishes stand to lose \$150 million to \$700 million in state and local sales tax revenue due to the moratorium, thereby negatively impacting all government services, from police and fire protection, to schools and hospitals.¹¹⁰

Former Democratic Senator Bob Graham and William K. Reilly, who were appointed to head the President’s Commission to investigate the BP oil spill, have expressed criticism over the nature and duration of the moratorium. After hearing testimony from a variety of local

¹⁰⁴ Editorial, *A New, and Necessary, Moratorium*, NY TIMES, July 13, 2010, available at <http://www.nytimes.com/2010/07/14/opinion/14wed1.html>.

¹⁰⁵ Email from Dan Juneau, President, La Assoc. of Bus. & Indus. to Committee Staff (July 15, 2010).

¹⁰⁶ Memorandum from Director Bromwich on Options Regarding the Suspension of Certain Offshore Permitting and Drilling Activities on the Outer Continental Shelf (July 10, 2010).

¹⁰⁷ *The Economic Effects of the Offshore Drilling Moratorium*, S. Comm. On Small Business, 111th Cong (2010) (testimony of the Honorable Rebecca M. Blank, Under Secretary for U.S. Economic Affairs, Department of Commerce).

¹⁰⁸ Interview with Charlotte Randolph, President, Lafourche Parish, in Thibodaux, LA (June 15, 2010).

¹⁰⁹ *Id.*

¹¹⁰ Louisiana Mid-Continent Oil & Gas Association, *Impacts of President Obama’s Order Halting Work on 33 Exploratory Wells in the Deepwater Gulf of Mexico* (May 28, 2010) available at <http://www.gulfeconomicssurvival.org/facts-and-figures>.

officials, Mr. Reilly stated that, “It’s not clear to me why it should take so long.”¹¹¹ Former Senator Graham echoed these concerns, reportedly saying that the moratorium was a burden on the economic life of the Gulf Coast.¹¹² He said the federal government has had nearly three months to inspect the rigs in the Gulf and wondered why it was taking so long to determine whether they can safely restart operations.¹¹³

The Permittorium

Secretary Salazar announced the end of the moratorium on October 13, 2010. According to many in the industry, this declaration provided little relief. The moratorium in the Gulf of Mexico was replaced by a “permittorium” – whereby drilling activity remained at a standstill not by operation of law – but because of inaction on the part of BOEMRE. Prior to the disaster, Mineral Management Service (MMS) processed and issued permits to drill in two weeks.¹¹⁴ However, not a single deepwater permit was issued by BOEMRE until U.S. District Judge Martin Feldman ordered the agency to take action on five permits by March 19, 2011, and by March 31, 2011, on two additional permits.¹¹⁵

On February 28, 2011, BOEMRE finally issued the first deepwater drilling permit since the explosion aboard the *Deepwater Horizon*.¹¹⁶ The permit was issued to Noble Energy, and allows them to resume drilling which they had started before April 20, 2010. Specifically, the permit allows Noble Energy to drill a by-pass well in Mississippi Canyon Block 519, approximately 70 miles south east of Venice, La. An operator drills a bypass well in order to drill around a mechanical problem in the original hole to the original target from the existing wellbore. In this case, Noble Energy will be drilling around the plugs set in the original well when drilling was suspended in order to complete the long delayed project.

Since February, BOEMRE has approved 13 additional deepwater permits – 11 of which simply allow operations to resume on a previously approved well. Only one permit has been issued for a well that had not been previously approved.¹¹⁷ On May 10, 2011, Judge Feldman issued an additional order requiring BOEMRE to act on six additional applications within 30 days. In his decision, Judge Feldman determined that, “the government has presented no credible assurances that the permitting process will return to one marked by predictability and certainty.”¹¹⁸ (emphasis added) He went on to say that “Processing a scant few applications is at

¹¹¹ John M. Broder, *Offshore Drilling: To Pause or Not to Pause*, NYTIMES, July 13, 2010, available at <http://green.blogs.nytimes.com/2010/07/13/offshore-drilling-to-pause-or-not-to-pause/>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Mary Romano, Peter Blumberg, *U.S. Appeals for Delay in 30-Day Order on Drill Permits*, BLOOMBERG BUSINESS WEEK, March 13, 2011.

¹¹⁵ *EnSCO Offshore Co., et. al. v Kenneth Lee “Ken” Salazar*, 2011 WL 692029 (E.D. La. 2011).

¹¹⁶ Press Release, Bureau of Ocean Energy Management, Regulation and Enforcement, *BOEMRE Approves First Deepwater Drilling Permit To Meet Important New Safety Standards in Gulf of Mexico* (Feb. 28, 2011), available at <http://www.boemre.gov/ooc/press/2011/press0228.htm>.

¹¹⁷ Status of Drilling Permits & Plans Subject to Enhanced Safety and Environmental Requirements in the Gulf of Mexico, Bureau of Ocean Energy Management, Regulation and Enforcement (last visited May 19, 2011), available at http://www.gomr.boemre.gov/homepg/offshore/safety/well_permits.html.

¹¹⁸ *EnSCO Offshore Co., et. al. v Kenneth Lee “Ken” Salazar*, 2011 WL 692029 (E.D. La. 2011).

best a tactical ploy in a real world setting.”¹¹⁹ Moreover, it has severe implications for the future productivity of the region. It generally takes five to ten years once a permit is issued to bring the oil to market.¹²⁰

In addition to the immediate impact on the residents of the Gulf Coast, the year long pause in drilling operations will probably mean a decline in domestic output of crude oil according to analysts.¹²¹ Deep-water drilling in the Gulf accounts for about 1.25 million barrels of oil a day – or about one-quarter of America's domestic crude oil production. The Gulf contribution is expected to drop by about 180,000 barrels a day, in 2011, according to the U.S. Energy Information Administration.¹²²

Regulations Following the Spill

As a result of the BP Oil Spill, BOEMRE promulgated a series of regulations that coincided with the entire reorganization of the agency from the former MMS. These reforms are some of the most aggressive changes to offshore oil and gas production in U.S. history and range from new rules covering safety, oversight, and environmental protection for permitting, drilling, and development processes for oil and gas operations. In some cases, these new regulations apply to both offshore operations themselves as well as the businesses that deal directly with offshore rigs – many of which are small businesses. The regulated community, state officials, and even BOEMRE staff have raised concerns about the feasibility and practicality of these new regulations. After *Deepwater Horizon*, it is clear that a new, safer system is necessary for drilling in the Gulf of Mexico; however, the focus of any regulatory changes must be on continuing safe drilling in the Gulf. The latest regulations promulgated by BOEMRE do not appear to promote this goal of drilling and instead create a significant amount of uncertainty and confusion within the offshore oil and gas community.

Archaeological Requirements on Operators

One of the most perplexing regulations promulgated by BOEMRE is the requirement that operators perform an Archaeological Assessment Report as part of National Environmental Policy Act analysis and in conjunction with the National Historic Preservation Act.¹²³ Under this new rule, any permitting applications that will propose bottom-disturbing activities require analysis of data and information about the potential existence of archaeological resources and the affect that proposed operations will have on these shipwrecks.¹²⁴

¹¹⁹ *Id.*

¹²⁰ Ayesha Rascoe, *U.S. Set to 'Reopen' Offshore Drilling Sector; 'Significant Permits'; Upward Pressure on Oil Prices the Impetus*, National Post's Financial Post & FP Investing, March 3, 2011, available at <http://www.nationalpost.com/todays-paper/setto+reopen+offshore+drilling+sector/4375547/story.html>.

¹²¹ Mark Guarino, *Stricter Deep-Water Drilling Regulations Mean Gulf Coast Waters Are Likely to Yield Less Oil this Year; Energy Firms May Shift Attention Abroad*, CHRISTIAN SCIENCE MONITOR (Jan. 11, 2011).

¹²² *Id.*

¹²³ Gulf of Mexico Archaeological Information, Bureau of Ocean Energy Management, Regulation and Enforcement (last visited May 20, 2011), available at <http://www.gomr.boemre.gov/homepg/regulate/environ/archaeological/introduction.html>.

¹²⁴ *Id.*

The application of this rule requires that operators literally become underwater archaeologists, entering a field where they have little experience. Operators must conduct ocean floor analyses with specialized equipment to determine if anomalies are shipwrecks with the potential to be impacted by exploration or drilling.¹²⁵ Furthermore, operators will be required to employ an underwater archaeologist to assist in the analysis of this data and to provide BOEMRE with survey data. When asked about how to implement this new rule, and more specifically if operators would need to hire an underwater archaeologist, BOEMRE representatives responded that they would have to make this hire and that the profession was not uncommon.¹²⁶ The archaeological assessment requirements are a prime example of the seemingly absurd and arbitrary nature of the new regulations placed on offshore drilling operations.

“Should-to-Must” Requirements

A new Workplace Safety Rule is another BOEMRE regulation intended to improve safety practices for offshore drilling operations. Unfortunately, its implementation has proven to be challenging in practice. This regulation requires that operators develop and maintain a Safety and Environmental Management System (SEMS).¹²⁷ A SEMS is a “comprehensive management program for indentifying, addressing and managing operational safety hazards and impacts, with the goal of promoting both human safety and environmental protection.”¹²⁸ In addition, the Workplace Safety Rule makes mandatory the practices in the American Petroleum Institute’s (API) Recommended Practice 75 (API RP 75).¹²⁹ The API RP 75 is a collection of best practices created by API as suggestions for operators to implement. BOEMRE issued a direct final rule, without the public’s input, making all aspects of the API guidance mandatory. The recommendations vary depending on the type of operation. They were not designed to be mandatory directives, and certainly not designed to be executed simultaneously. This fact was seemingly lost on BOEMRE, as the agency carelessly changed all “should” instructions to “must.”

After industry and affected states voiced strong objections based on the purpose and feasibility of the regulations, BOEMRE initiated a guidance document entitled “Supplemental Information Regarding Approval Requirements for Activities that Involve the Use of a Subsea Blowout Preventer (BOP) or a Surface BOP on a Floating Facility,” with the goal of displacing fear of the careless “should-to-must” change. In the guidance document, BOEMRE recognized that the incorporation of the API documents required that any “should” would be interpreted as “must” for purposes of the Code of Federal Regulations.¹³⁰ BOEMRE has indicated that it recognizes that some degree of flexibility is important for the feasible implementation of the API

¹²⁵ *Id.*

¹²⁶ Bureau of Ocean Energy Management, Regulation and Enforcement Industry Workshop (March 23, 2011).

¹²⁷ Bureau of Ocean Energy Management, Regulation and Enforcement,

Fact Sheet on the Workplace Safety Rule On Safety and Environmental Management Systems (SEMS), available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=45791>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Supplemental Information Regarding Approval Requirements for Activities that Involve the Use of a Subsea Blowout Preventer (BOP) or a Surface BOP on a Floating Facility, Bureau of Ocean Energy, Management, Regulation and Enforcement (last visited May 20, 2011), available at <http://www.boemre.gov/ooc/pdfs/DeepwaterGuidanceSupplement.pdf>.

incorporated documents.¹³¹ To this end, BOEMRE is willing to consider, based on agency approval, other practices that may accomplish similar goals as those contained in the API document.¹³² Despite these changes, uncertainty remains regarding the “should” to “must” regulations because the guidance document does not go far enough in relieving the burden of implementing regulations whose original intentions were merely industry-wide best practices. Due to the vague nature of the guidance document, the drilling community’s uncertainty is augmented because of concerns about whether in application BOEMRE will actually back off the “should-to-must” requirement.

A concern of small business involves the implementation of SEMS Workplace Rules. BOEMRE recognizes in its Workplace Safety Rule Fact Sheet that many large operators have already established SEMS programs; however, it does not mention the smaller operators or those businesses who work closely with operators. Small businesses that have contact with operators’ rigs will also be required to establish their own SEMS programs at the request of the large operators.¹³³ Small businesses are not situated to perform the same level of SEMS analysis that large-multinational corporations can – many of these small businesses that service large operators may be forced out of business if they cannot implement a SEMS program.¹³⁴ BOEMRE has not addressed the concerns of small business owners who work closely with large operators on the SEMS issue.

Industry Strives to Make Drilling Safer

The explosion aboard the Deepwater Horizon and the confusion in the subsequent days and months clearly demonstrated that MMS and BP had failed to adhere to rigorous safety standards. Moreover, there is agreement that changes needed to be made to the flawed system that allowed the disaster to occur. However, evidence suggests the regulations promulgated by BOEMRE do not promote the revitalization of a safe oil and gas industry in the Gulf; instead, they hinder production even when operators have made significant strides to become safer. For example, the oil industry made a substantial investment in safety by creating a rapid-response system to prevent another disaster like the BP Oil Spill.¹³⁵ BOEMRE’s regulations do not appear to take this into account.

In July 2010, in order to quell concerns regarding the safety of deepwater drilling, four of the largest oil companies, Exxon-Mobil, Shell, Chevron, and Conoco Phillips, committed \$1 billion to create a rapid-response system to deal with future potential oil spills.¹³⁶ This rapid response system includes the creation of modular containment equipment that would be available for use and could contain spills as deep as 10,000 feet and capture up to 100,000 barrels of oil a day.¹³⁷ A nonprofit organization known as the Marine Well Containment Company operates and maintains the emergency capability mechanism. Industry executives feel that this measure is

¹³¹ *Id.*

¹³² *Id.*

¹³³ *The Workplace Safety Rule on Safety and Environmental Management Systems (SEMS)*, Bureau of Ocean Energy Management, Regulation and Enforcement, available at <http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&PageID=45791>.

¹³⁴ Interview with Lori Davis, President, Rig Chem (March 24, 2011).

¹³⁵ Jad Mouawad, *3 Oil Firms Commit \$1 Billion for Gulf Rapid-Response Plan*, N.Y. TIMES, Jul. 21, 2010.

¹³⁶ *Id.*

¹³⁷ *Id.*

sufficient to respond to the impact of any future blowout or spill that may affect the Gulf region, and it will restore the government and the citizens' confidence in the oil industry to operate with the proper safety precautions in place.¹³⁸ This unsolicited action demonstrates the industry's commitment to operate responsibly. However, BOEMRE's policies do not recognize the necessary and important contributions that industry has made.

III. ALASKA

Alaska holds enormous oil and gas resources for the United States and development of those resources is critical for U.S. energy independence. A National Energy Technology Laboratory study estimates that this region has the potential for the exploration and development of as much as 28 billion barrels of economically recoverable oil and 125 trillion cubic feet of economically recoverable gas through 2050.¹³⁹

An independent assessment of the potential for development of Alaska's Beaufort and Chukchi Sea OCS found that sufficient oil could be produced to completely eliminate the need for imports from one of the United States' largest foreign suppliers.¹⁴⁰ Average production from the OCS for the next 40 years could be 700,000 barrels per day, with a maximum of 1.45 million per day in 2030. In perspective, 700,000 barrels is more than the amount of oil the United States imported from Iraq (506,000 bbl/day) and Russia (137,000 bbl/day) combined in 2010.¹⁴¹ Saudi Arabia, Mexico, Venezuela, and Nigeria each exported approximately one million barrels or less to the United States.¹⁴²

Despite the enormous oil and gas potential, production in Alaska has steeply declined over the past few decades. In 1988, oil and natural gas liquid from Alaska's North Slope constituted 25 percent of total domestic production, 2.2 million barrels per day.¹⁴³ By 2007, production had dropped to 720,000 barrels per day, representing only 14 percent of domestic production.¹⁴⁴ The current Administration is largely to blame for Alaska's continued stagnation. Alaska Democratic Senator Mark Begich described the situation as "regulatory 'whack a mole' for developers in Alaska" as he introduced a bill intended to streamline offshore oil and gas development. "Each time we have one mole beat down, another one pops up and derails the progress. But this isn't a game. It's about the future of Alaska and the energy security of our country."¹⁴⁵

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *The American Energy Initiative: Jobs and Energy Permitting Act: Hearing before the H. Comm. On Energy and Commerce, 112th Cong. (2011) (statement of David Lawrence, Executive Vice President, Shell), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/041311/Lawrence.pdf>.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ S. 843, 112th Cong. § (2011).

Moratorium Confusion

The BP spill in the Gulf of Mexico has created great uncertainty for companies seeking to drill thousands of miles away in Alaska. Prior to the spill, the Administration made statements supportive of further exploitation of oil and gas resources in the Arctic Outer Continental Shelf as well as elsewhere offshore.¹⁴⁶ After the spill, however, Secretary Salazar announced a 30-day review of offshore safety and put a hold on new permits until the review was completed. Soon after that, Interior announced a six-month moratorium on all deepwater drilling and suspended Shell's proposed drilling in the Beaufort and Chukchi seas, and imposed additional other restrictions on drilling and leasing in other regions.¹⁴⁷ All of these policy changes have created new uncertainties.

The moratorium on deepwater drilling, announced on June 15, 2010, and discussed in the previous section, did not specifically refer to Alaska. Yet this moratorium, and the subsequent moratorium, imposed on July 12, 2010, created significant uncertainty for companies attempting to drill in Alaskan waters. The second moratorium also did not mention Alaska, but a fair reading of the order appeared to prohibit the work Shell had planned for the Beaufort and Chukchi seas. The state of Alaska responded by suing Interior for violating the Outer Continental Shelf Lands Act and the Administrative Procedure Act.¹⁴⁸ In late November 2010, after the July moratorium had been lifted, the Department filed a motion explaining that the original moratorium did not cover Alaska and attributing permitting delays to "cautious" regulators.¹⁴⁹

\$3 billion and Still No Permit

The moratorium confusion following the BP oil spill was only the latest in a long series of delays for Shell's Alaskan project. Shell has been ready to commence exploring for oil and gas in the Alaskan OCS for four years. The company expects to create 54,700 jobs per year, generating \$145 billion in payroll income, and \$193 billion in government revenue by 2057 – all while reducing U.S. dependence on foreign oil.¹⁵⁰ Unfortunately for the American people, none of this has come to fruition because after five years, EPA still has not issued several of the 35 permits Shell needs to drill even a single exploratory well.¹⁵¹

Shell has spent more than \$3 billion on leases, environmental analyses, and permitting so far with no return on their investment.¹⁵² The company holds 137 leases in the Beaufort Sea and 275 leases in the Chukchi Sea.¹⁵³ The federal government received \$2.2 billion in bonus bids for Shell's leases in the Chukchi Sea alone.¹⁵⁴ Initially, Shell planned to begin drilling in 2007 in the Beaufort Sea, just north and east of the North Slope and the Trans-Alaska Pipeline and

¹⁴⁶ President Obama, Remarks on Energy Security at Andrews Air Force Base (Mar. 31, 2010).

¹⁴⁷ Eric Lidji, *Alaska Offshore Special Report*, PETROLEUM NEWS (January 21, 2011).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Potential National-Level Benefits of Alaska OCS Development*, Northern Economics (February 2011), available at <http://www.northerneconomics.com/pdfs/ShellOCS/National%20Effects%20Report%20FINAL.pdf>.

¹⁵¹ *Id.*

¹⁵² Tim Bradner, *Shell expands Arctic exploration plans*, ALASKA J. OF COMMERCE, (May 6, 2011).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

associated infrastructure.¹⁵⁵ Because of regulatory and legal challenges, its schedule slipped to 2010, and then 2011, and now 2012.

One of the principal obstacles to drilling is EPA's failure to issue an air pollution permit for the project. Since most new offshore drilling has occurred in the Gulf of Mexico under Interior jurisdiction, EPA has little experience with offshore permitting. That inexperience seems to be amounting to incompetence. Alaska Senator Lisa Murkowski testified before the House Energy and Commerce Committee, "If EPA cannot demonstrate some competency ... then EPA should not expect to keep its authority for long."¹⁵⁶ After years of studying the issue, EPA granted an air permit last summer only to have it remanded by the EPA's Environmental Appeals Board in January for not adequately reviewing the potential health effects on people living on shore.¹⁵⁷ The closest village, located 70 miles from the proposed drill site and occupying one square mile, is home to 245 people. EPA Administrator Lisa Jackson told the Senate Energy Committee, "I believe that the analysis will clearly show that there is no public health concern here."¹⁵⁸ Shell continues to wait for the rest of EPA to conclude what its Administrator already has.

National Petroleum Reserve Goes Unused

On May 14, 2011, during his Weekly Address, President Obama announced that he intended to direct Secretary Salazar to conduct annual lease sales in Alaska's National Petroleum Reserve (NPR-A).¹⁵⁹ Given ConocoPhillips' experience so far trying to utilize a lease it already has in the NPR-A, those new leases may be worthless.

Despite nearly three million acres of the NPR-A already under lease, no one has yet to drill a single commercial well.¹⁶⁰ ConocoPhillips is trying to be the first with a project it says will produce up to 18,000 barrels of oil per day.¹⁶¹ In February 2010, the Army Corps of Engineers rejected the company's plan to access the NPR-A by building a bridge over the Colville River, saying that drilling underneath the river and airlifting supplies would cause less environmental harm. The Corps finally decided to reconsider their earlier decision in December 2010, citing "additional evidence" not available at the time of the initial decision and talks with Native Alaskans.¹⁶² Conoco Phillips is still waiting on the Corps to issue a final decision.

¹⁵⁵ *Id.*

¹⁵⁶ *The American Energy Initiative: Jobs and Energy Permitting Act: Hearing before the H. Comm. On Energy and Commerce*, 112th Cong. (2011) (statement of Senator Lisa Murkowski), available at <http://republicans.energycommerce.house.gov/Media/file/Hearings/Energy/041311/Murkowski.pdf>.

¹⁵⁷ Final Decision to Issue and OCS/PSD Permit to Shell Offshore Inc., for Exploration Drilling Operations in the Beaufort Sea, (last visited May 20, 2011) available at <http://yosemite.epa.gov/R10/airpage.nsf/Permits/beaufortap/>.

¹⁵⁸ *Id.*

¹⁵⁹ Press Release, White House, *Weekly Address: President Obama Announces New Plans to Increase Responsible Domestic Oil Production* (May 14, 2011).

¹⁶⁰ Phil Taylor, *Alaska lawmakers seek swift U.S. reconsideration of petroleum reserve drilling*, GREENWIRE (Dec. 14, 2010).

¹⁶¹ Phil Taylor, *Alaska pols say petroleum reserve leases must be coupled with permits*, ENVIRONMENT & ENERGY DAILY (May 18, 2011).

¹⁶² Letter from David Hayes, Deputy Secretary, Department of the Interior, to Col. Reinhard Koenig, Army Corps of Engineers Alaska District (May 3, 2011). (on file with author)

A “curious” twist in the quest to develop NPR-A is the related action of other agencies. EPA and the U.S. Fish and Wildlife Service both designated the Colville River Delta as an “Aquatic Resource of National Significance,” a decision they made without notice and comment, but one that potentially has great consequences.¹⁶³ Sen. Murkowski’s spokesman called the move “capricious and done only to interfere with development.”¹⁶⁴

Polar Bears

There may be an even greater obstacle to oil production ahead of Shell and the other companies looking to produce oil and gas in Alaska. What the state and the industry reportedly fear the most is uncertainty related to the protection of the polar bear.¹⁶⁵ In 2008, the U.S. Fish and Wildlife Service (FWS), within Interior, decided to list the polar bear as a threatened species under the Endangered Species Act. That decision could greatly impact the future of oil and gas extraction in Arctic waters because of its broad ramifications.

The first concern is the reason for the polar bear’s inclusion on the list¹⁶⁶ – according to FWS, global climate change was causing a loss of sea ice, the polar bear’s habitat. On this basis, Interior could potentially have restricted any project, anywhere, by arguing that the project contributed to greenhouse gas emissions and, therefore, degraded the polar bear’s habitat. Fortunately, Interior did acknowledge this concern and modified regulations to specify that projects’ greenhouse gas emissions could not be linked to endangered species.

To protect the polar bears, in October 2009, FWS instead proposed a critical habitat for the polar bear covering more than 200,000 square miles of land and water.¹⁶⁷ This was later reduced once FWS recognized that Air Force bases and a few other manmade structures and communities would not be an appropriate habitat to protect.¹⁶⁸ The polar bear’s proposed critical habitat overlaps with a substantial part of the federal acreage already under lease in Alaska’s Arctic waters. FWS has yet to determine exactly how they will act to protect the “critical habitat area.”

All of this has provoked numerous lawsuits, from both sides of the issue. Alaska has sued over the critical habitat designation because of the enormous economic impacts to the state, which it estimates to be in the hundreds of millions over just the next 15 years.¹⁶⁹ In its cost analysis, FWS only considered consultation costs and inaccurately concluded that the designation would only cost the state about \$669,000 over 29 years.¹⁷⁰ Some members of

¹⁶³ Andrew Jensen, *Pebble next target for EPA Environmental Justice unit?*, ALASKA J. OF COMMERCE (Feb.18, 2011).

¹⁶⁴ *Id.*

¹⁶⁵ Eric Lidji, *Alaska Offshore Special Report*, PETROLEUM NEWS, Jan. 21, 2011.

¹⁶⁶ Endangered Species Program, U.S. Fish & Wildlife Service, (last visited May 20, 2011), *available at* <http://www.fws.gov/endangered/index.html>.

¹⁶⁷ *Id.*

¹⁶⁸ U.S. Fish & Wildlife Service Polar Bear Information (last visited May 18, 2011), *available at* <http://www.fws.gov/home/feature/2008/polarbear012308/polarbearspromo.html>.

¹⁶⁹ Press Release, Office of Governor Sean Parnell, *State Announces Intent to Sue*, (Dec. 21, 2010), *available at* <http://gov.alaska.gov/parnell/press-room/full-press-release.html?pr=5603>.

¹⁷⁰ *Id.*

Congress have also tried to reverse the decision by proposing legislation that would delist the polar bear, but the bill would not prevent Interior from adding other Arctic species to the list.¹⁷¹

IV. ROCKY MOUNTAIN REGION

The Rocky Mountain region has some of the richest resources in the entire country. Domestic production in this region, primarily on federal public lands, accounts for 11 percent of the nation's natural gas supply and five percent of its oil.¹⁷²

Exploration and production in the Rocky Mountain Region is complicated by the vast federal presence, primarily in the form of land ownership. The federal government owns roughly 650 million acres of land in the United States – which equates to more than a quarter of the country's landmass.¹⁷³ These lands are primarily located in 12 western states. In the west, the federal government owns more than 50% of the land area.¹⁷⁴ By contrast, in the District of Columbia, established by the Constitution as a federal city, the federal government owns only 25% of the total acreage.¹⁷⁵

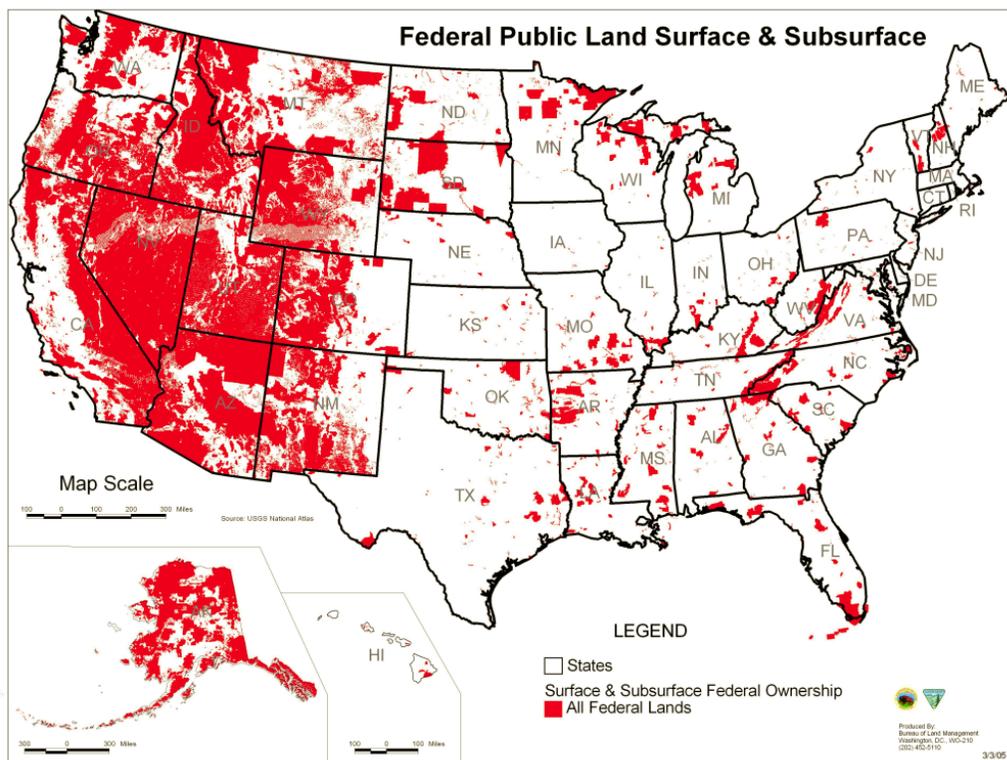
¹⁷¹ H.R. 39, 112th Cong. § (2011).

¹⁷² Oil and Gas, U.S. Department of the Interior Bureau of Land Management (last visited May 16, 2011), available at http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas.html.

¹⁷³ Carol Hardy Vincent, *Federal Land Ownership: Current Acquisition and Disposal Authorities*, CRS REPORT TO CONGRESS (Dec. 16, 2010).

¹⁷⁴ *Id.*

¹⁷⁵ Ross W. Gorte et al, *Federal Land Management Agencies: Background on Land Resources and Management*, CRS REPORT TO CONGRESS (Feb. 9, 2009).



Source: Bureau of Land Management

Federal land is owned by taxpayers. Therefore, taxpayers must be compensated for its use. Federal and state treasuries benefit from the development of resources on Western lands. Unfortunately for the American people, the Administration has all but refused this potential revenue stream. Between 2008 and 2010, revenue from onshore federal royalties, rents, and bonuses has decreased 33%, from \$4.2 billion to \$2.8 billion. In 2008, there were 2,416 new oil and natural gas leases issued¹⁷⁶ on BLM land spanning 2.6 million acres.¹⁷⁷ In 2010, the number of new leases issued dropped nearly 50% to 1,308¹⁷⁸ and acres leased dropped to 1.3 million.¹⁷⁹ Combined with 2009, these acreage numbers are the lowest in over two decades.

Taxpayers would never know about this policy shift based on White House rhetoric. In a blog post at whitehouse.gov, the Administration writes “oil production last year rose to its highest level since 2003.”¹⁸⁰ The blog post fails to explain that the vast majority of increased production is occurring on private lands, not public. For example, North Dakota alone produced

¹⁷⁶ Bureau of Land Management (last visited May 19, 2011) available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/oil__gas_statistics.Par.32507.File.dat/chart_2009_03.pdf.

¹⁷⁷ Bureau of Land Management (last visited May 19, 2011) available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS__REALTY__AND_RESOURCE_PROTECTION_/energy/oil__gas_statistics.Par.24284.File.dat/chart_2009_04.pdf.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Expanding Safe and Responsible Energy Production*, White House blog, March 8, 2011, available at <http://www.whitehouse.gov/blog/2011/03/08/expanding-safe-and-responsible-energy-production>

almost 120 million barrels of oil in 2010, compared to just over 20 million in 2003.¹⁸¹ The majority of North Dakota's production is on private land.

A slew of Obama Administration policies are to blame for the decreased production on federal land. The Department of Interior or EPA cause delays at each stage of the process.

Deferred Leases

In order to drill on federal land, the producer must first obtain a lease. Companies make significant investments just to determine which parcels of land they want to lease.¹⁸² The government then considers whether to lease those parcels that are nominated by the companies. Parcels may not be offered for lease for a variety of reasons, but this Administration is using some techniques of questionable legality. One of these techniques is the deferral of lease parcels. Established law dictates that leases be made available if authorized by resource management plans, which are developed with input from the public and the state.¹⁸³ If BLM desired to change the policies on which the resource management plans were based, an amendment to the plan is required. Rather than follow the established process, giving the public an opportunity for notice and comment, BLM has unilaterally instituted an additional level of planning and an opportunity to prevent leasing.¹⁸⁴

The result has been the deferral of lease parcels and the loss of jobs and revenue. Ewing Exploration, a small business with six employees, provides an example of how this policy hurts local communities.¹⁸⁵ Ewing invested a total of \$3.5 million to explore the leases it purchased between 2005 and 2010 and nominated the additional ten parcels of federal land it need to fill out its drilling block. The company planned to develop 24 wells. One day before the sale, those ten parcels were withdrawn from the sale because they had to be “reprocessed in conformance with the new leasing reform process.”¹⁸⁶ Now, those parcels will not be available until February 2012, a sixteen month delay. This delay has real economic consequences. Ewing's investors are receiving no return on their \$3.5 million investment – and may not be as willing to risk their money on public lands in the future. The deferral is also delaying payments of \$2.7 million per month in federal royalties and \$1.3 million per month in state taxes and royalties once the land is fully developed.

Unissued and Withdrawn Leases

Having the lease actually be put up for sale and winning the bid is just the beginning. The Department of Interior holds hostage millions of dollars in unissued leases.¹⁸⁷ When a company

¹⁸¹ North Dakota Industrial Commission Department of Mineral Resources (last visited May 20, 2011), *available at* <https://www.dmr.nd.gov/oilgas/stats/stateoilchart.pdf>.

¹⁸² Internal Revenue Service (last visited May 20, 2011) *available at* http://www.irs.gov/irm/part4/irm_04-041-001.html.

¹⁸³ Adam Vann, *Energy Projects on Federal Lands: Leasing and Authorization*, CRS REPORT FOR CONGRESS (September 8, 2009).

¹⁸⁴ *Id.*

¹⁸⁵ Western Energy Alliance Washington D.C. Call-Up Briefing Book (April 2011), *available at* http://westernenergyalliance.org/wp-content/uploads/2011/04/Briefing-Book_Final.pdf.

¹⁸⁶ *Id.*

¹⁸⁷ Western Energy Alliance, *Top Ten Ways the Federal Government Is Preventing Onshore Oil and Natural Gas Production* (Mar. 30, 2011).

wins a bid, it pays the federal government the amount it bid, which is called the bonus. Yet, the government does not necessarily issue the lease in return for the bonus, as the terms of the Mineral Leasing Act require it to do within sixty days. It is as if a new tenant signed a lease for an apartment, paid the owner a deposit, and was not given a key on the date designated for move-in. A Government Accountability Office report found that the Bureau of Land Management (BLM) failed to issue leases within this allotted time over 91% of the time from FY2007 through FY2009.¹⁸⁸

Successful bidders also risk cancellation of their valid leases. In February 2009, the Interior Secretary withdrew 77 of the leases sold at the 2008 Utah lease sale because BLM had deviated "in important respects" from its normal oil and gas leasing procedures.¹⁸⁹ Secretary Salazar told reporters at the time of the announcement, "The policy positions of the department over the last eight years have really been driven out of the White House, and we're looking at many of those decisions."¹⁹⁰ Yet the Secretary's decision to withdraw 77 Utah leases was made without any consultation with the Utah BLM office.

Neither an independent investigation nor the federal courts upheld the Secretary's claims. The Department's Inspector General concluded that "no evidence to support the allegation that undue pressure was exerted on BLM personnel to complete the RMPs before the December 2008 sale or to include previously deferred parcels in the lease sale prior to the change in Administration."¹⁹¹ While the investigation noted that the BLM "contributed to the perception that the sale was rushed prior to a change in White House administration," mere perception would not justify terminating contract rights. Over a year and a half later, a federal district judge issued a decision that confirmed that Secretary Salazar was outside of his legal authority to withdraw the parcels.¹⁹² The Department of Interior later prevailed based on a technicality. The judge determined that the plaintiffs filed their complaint too late.¹⁹³

In January 2011, the Department of Interior did it again. The Forest Service decided to withdraw leases it sold and issued, in 2005 and 2006, in the Bridger-Teton National Forest in Wyoming.¹⁹⁴ Relatively new legislation, the Wyoming Range Legacy Act of 2009, prohibits future lease sales in this region but explicitly protects the rights of those with existing leases. Likely recognizing its actions were on shaky legal ground, the Department of Interior has since decided to reconsider this decision.¹⁹⁵

¹⁸⁸ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, ONSHORE OIL AND GAS: BLM'S MANAGEMENT OF PUBLIC PROTESTS TO ITS LEASE SALES NEEDS IMPROVEMENT (July 2010).

¹⁸⁹ *BLM Review of 77 Oil and Gas Lease Parcels Offered in BLM-Utah's December 2008 Lease Sale* (Oct. 7, 2009) available at http://www.doi.gov/documents/BLM_Utah77LeaseParcelReport.pdf.

¹⁹⁰ Juliet Epstein, *Salazar Voids Drilling Leases On Public Lands in Utah*, WASHINGTON POST, Feb. 5, 2009.

¹⁹¹ U.S. DEPARTMENT OF THE INTERIOR OFFICE OF THE INSPECTOR GENERAL, INVESTIGATIVE REPORT: BLM UTAH LEASE Sale (2009).

¹⁹² *Impact Energy Res., LLC v. Salazar*, 2010 U.S. Dist. LEXIS 91095 (D. Utah 2010).

¹⁹³ *Id.*

¹⁹⁴ Press Release, U.S. Department of Agriculture Forest Service, *Bridger-Teton Forest releases final Supplemental Environmental Impact Statement and Record of Decision on Wyoming Range Oil and Gas Leases* (Jan. 25, 2011).

¹⁹⁵ Press Release, U.S. Department of Agriculture Forest Service, *Bridger-Teton Forest Supervisor Withdraws Decision on Wyoming Range Leases* (May 5, 2011).

Even if the Department of Interior issues the lease, the successful bidder may not receive what it bargained for. In many cases, especially in Wyoming where BLM has actually issued leases, new restrictions are added to the leases that were not specified at the time of sale.¹⁹⁶ The severity of these restrictions, also referred to as stipulations, vary. Some, such as preventing drilling during the breeding season of a certain species, are fairly standard in the industry. Others, such as “No Surface Occupancy” which prohibits any surface disturbance on the lease, are so severe that they may render the lease worthless to the producer. Returning to the apartment analogy, these after-the-fact stipulations are akin to a tenant signing an apartment lease, carefully reading the contract to ensure there are no pet restrictions, paying a deposit, and then being told on move-in day that her dog will not be allowed in the building. The owner would essentially have changed the terms of the contract, just like the Department of Interior does when it adds stipulations.

NEPA Analyses and Project Approval Delays

The Administration claims that oil and gas producers are hoarding leases on federal lands because they are using less than one-third of existing leases.¹⁹⁷ This criticism is grossly misleading because the Administration itself is often preventing the leaseholder from drilling on currently leased land. After a company wins a bid, pays the bonus, and is issued the lease, it must submit a project proposal to the Department of Interior, and an environmental analysis in accordance with the National Environmental Policy Act (NEPA) must be performed. The government does not bear the burden of performing this analysis; rather, the project proposer pays an agreed upon third party contractor to perform it.¹⁹⁸ Regardless, the NEPA analysis is taking years to complete, with some projects facing indefinite delays. Small Environmental Assessments regularly require four years, while the more involved Environmental Impact Statements easily take seven years.¹⁹⁹ White House Council on Environmental Quality guidance states these analyses should not take more than three months and twelve months, respectively. NEPA analyses often take more time than the guidance directs, but this Administration appears to be abusing the process. Environmental Impact Statements required just over three years to complete between 1994 and 2005; now the average EIS completion time is just under six years.²⁰⁰ Projects in the West, for a variety of excuses, face even longer delays with no end in sight.²⁰¹

Wild Lands Policy

One of the most controversial techniques to delay project approval is the newly invented “wild lands” designation. Secretary Salazar issued an order last December directing BLM to

¹⁹⁶ Press Release, Western Energy Alliance, *Top Ten Ways the Federal Government is Preventing Onshore Oil and Natural Gas Production*, (March 2011), available at <http://westernenergyalliance.org/wp-content/uploads/2011/03/Western-Energy-Alliance-IPAMS-Position-Paper-Top-10-Ways-Onshore-Production-is-Being-Prevented.pdf>.

¹⁹⁷ Exploration and Production (Upstream), American Petroleum Institute, (last visited May 20, 2011), available at <http://www.api.org/aboutoilgas/sectors/explore/index.cfm>.

¹⁹⁸ National Environmental Policy Act (last visited May 20, 2011), available at <http://www.epa.gov/compliance/nepa/index.html>.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

redo a recently completed inventory of federal lands that took years to complete the first time around, diverting BLM's already limited resources.²⁰² Under the Secretary's new policy, the Department of Interior unilaterally determines that an area should be designated as wild lands and considered for wilderness protection. Under the 1964 Wilderness Act, "wilderness" is a designation that can only be made by Congress. To be considered "wilderness," the law says the land (1) must be at least 5000 contiguous acres in size unless a smaller area can be practicably preserved and used in an unimpaired condition, (2) have an appearance of naturalness, and (3) have either outstanding opportunities for solitude or primitive and unconfined recreation.²⁰³ But under the new policy, BLM treats any land it decides to designate as "wild land" as "de facto wilderness," preventing productive uses of the land such as grazing, oil and gas extraction, and motorized recreation – and sidestepping Congress. In some cases, environmentalists have attempted to convince Congress to designate certain lands as "wilderness" for decades, but Congress has consistently and repeatedly declined.²⁰⁴

Some of the lands already designated as "wild lands" may confuse the novice nature-lover. It is not uncommon to find roads, active and inactive wells, agricultural improvements, and even air strips on proposed wild lands.²⁰⁵ If lands visibly subject to multiple uses in the past still possess wilderness characteristics, then it must not be necessary to lock those lands away entirely in order to maintain wilderness characteristics. Locking away public lands is also in contradiction to the Federal Land Policy and Management Act of 1976.²⁰⁶ FLPMA directs the BLM to manage public lands "on the basis of multiple use and sustained yield."²⁰⁷ The wild lands policy permits neither. BLM Director Robert Abbey told Congress that he "believe[s] in, and [is] dedicated to, the BLM's multiple-use mission."²⁰⁸ He also stated that any claims that the new wild lands policy has put a halt to new project and is preventing important economic activity in local communities is false.²⁰⁹ Companies facing indefinite delays after investing millions of dollars likely disagree. Now, with the stroke of a pen, Secretary Salazar has granted "wild land" designations and effectively instituted an end-run around Congress.

EPA's Contribution to NEPA Delays

EPA is also responsible for delays at the project approval stage. A couple of examples best illustrate the effect of EPA's pressure on land managers conducting NEPA analyses. In one case, involving a large project of 1,250 wells in Wyoming, EPA inexplicably changed the type of air study it required. The companies involved in the EIS for the large project had already spent

²⁰² Press Release, U.S. Department of the Interior, Salazar, *Abbey Restore Protections for America's Wild Lands* (Dec. 23, 2010), available at <http://www.doi.gov/news/pressreleases/Salazar-Abbey-Restore-Protections-for-Americas-Wild-Lands.cfm>.

²⁰³ Wilderness Act of 1964 (16 U.S.C. 1131-1136, 78 Stat. 890)

²⁰⁴ H.R. 1925, 111th Cong. § (2009).

²⁰⁵ Letter from Public Lands Advocacy to Ken Salazar, Secretary, Department of the Interior (January 31, 2011) (on file with author).

²⁰⁶ Federal Land Policy and Management Act, Bureau of Land Management (last visited May 20, 2011) available at <http://www.blm.gov/flpma/>.

²⁰⁷ *Id.*

²⁰⁸ *The Impact of the Administration's Wild Lands Order on Jobs and Economic Growth: Hearing before the H. Comm. on Natural Resources*, 112th Cong. (2011) Statement of Robert Abbey, Director, Bureau of Land Management)

²⁰⁹ *Id.*

\$2.5 million based on prior guidance from EPA.²¹⁰ In a second case, EPA asked a small business operating in Utah, Gasco Energy, to complete three rounds of air modeling for its 1,500 well project. EPA changed its request three times as to what type of air study it required, which resulted in years of delay and hundreds of thousands of dollars in unnecessary expenses.²¹¹ EPA made these requests despite Gasco Energy agreeing to controls and other mitigation measures above and beyond those the law requires.²¹²

Permitting Delays and Complications

The Department of Interior's next opportunity to delay production on the land is the permitting process. After receiving project approval, the producer may file an Application for Permit to Drill (APD).²¹³ Under the Energy Policy Act of 2005, BLM has thirty days to process an APD. However, by its own conservative estimate, BLM averages 206 days to process a permit.²¹⁴ In some BLM field offices, permits can take over two years.²¹⁵

Even after a permit is issued, the company that applied for it may not be able to use it. In some cases there may be stipulation periods after the permit is issued. Some permits may be tied up in lawsuits. For others, the permit process might have taken so long that the land is now subject to new planning restrictions that prohibit development. One example of this occurred in the Powder River Basin. Years after applications were submitted, 2,400 permits were released at one time. By then, many companies had abandoned their plans, in part because of changes in the cost of natural gas and in part because of new restrictions associated with sage grouse and produced water. The uncertainty in the process results in companies taking their business elsewhere.²¹⁶

V. TEXAS

As oil and gas producers grow more and more frustrated with the obstacles to drilling on federal land out West, they look to private land in Texas. Texas leads the nation in the production of oil and natural gas. Texas produced 447,076 thousand barrels of crude oil²¹⁷ and 7,403,720 million cubic feet of natural gas in 2008. In comparison, Alaska produced 249,874 thousand barrels of crude oil and 398,442 million cubic feet of natural gas in the same year.²¹⁸ Texas also has more proved oil reserves (5,496,000 thousand barrels compared to 4,007,000 thousand in the Gulf, and 3,556,000 thousand in Alaska in 2009) and more wet natural gas

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ Energy Policy Act of 2005: Section by Section, Bureau of Land Management, (last visited May 20, 2011) available at http://www.blm.gov/wo/st/en/prog/energy/epca_chart.html.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Powder River Basin Resource Council (last visited May 20, 2011) available at <http://www.powderriverbasin.org/>

²¹⁷ U.S. Energy Information Administration, State Energy Data 2008: Production, available at http://www.eia.doe.gov/emeu/states/sep_prod/P6/PDF/P6_TX.pdf.

²¹⁸ U.S. Energy Information Administration, State Energy Data 2008: Production, available at http://www.eia.doe.gov/emeu/states/sep_prod/P6/PDF/P6_ak.pdf.

proven reserves (85,034 billion cubic feet compared to 12,116 billion cubic feet in the Gulf and 9,183 cubic feet in Alaska) than either the Gulf or Alaska.²¹⁹

Texas has weathered the recession better than most states,²²⁰ due in no small part to a booming oil and gas production, and the state is fighting to keep EPA from interfering with its success. Under Obama, EPA put a spotlight on the state, seemingly assuming that a profitable oil and gas industry is an indication of insufficient regulation.

Last June, the EPA decided to strike down the “flex permit” system Texas has used since 1996, rejecting Texas-issued air-quality permits for refiners and other industrial plants.²²¹ Then, in December, EPA sent Texas regulators a letter saying it had “no choice” but to seize control of permitting in the state.²²²

EPA Oversteps Texas Regulator

Another high profile example of the EPA overstepping Texas regulators based on false claims of urgency came last December. The issue began when a landowner filed a complaint with the Texas Railroad Commission (RRC), the state oil and gas regulator, on August 6, 2010, stating that methane had contaminated water wells.²²³ The RRC commenced a full investigation into the source of the methane within days of the complaint. Over the next several months, the RRC – with full cooperation from Range, the company that owned gas production wells nearby – collected samples, performed tests, and conducted interviews. The investigation found that homeowners in the area had reported gas in their water for decades. Chemical fingerprinting of the gas in the well indicated that it did not come from Range’s wells but from a shallow gas formation where wells were drilled in the early 1980s.²²⁴ After finishing its investigation in March 2011, the RRC officially concluded that Range did not cause the water well contamination and that it likely came from the shallow gas formation.²²⁵

EPA, on the other hand, raced to issue an emergency order in December 2010, assuming the culpability of Range without the benefit of all the facts. EPA did not allow the RRC to finish its investigation,²²⁶ did not discuss the results of independent EPA sampling with the RRC as the

²¹⁹ U.S. Energy Information Administration, U.S. Crude Oil, Natural Gas, and Natural Gas Liquids Proved Reserves, 2009, *available at* http://www.eia.doe.gov/oil_gas/natural_gas/data_publications/crude_oil_natural_gas_reserves/cr.html.

²²⁰ Texas Economy at Glance, Bureau of Labor Statistics, *available at* <http://www.bls.gov/eag/eag.tx.htm>.

²²¹ Press Release, U.S. Environmental Protection Agency, *EPA Disapproves Texas Flexible Air Permit Program* (June 30, 2010).

²²² *A Focus on Texas’ Economy, Energy Prices and Jobs: Field Hearing before the H. Comm. on Energy and Commerce, Subcomm. on Energy and Power*, 112th Cong. (2011) (statement of Greg Abbott, Attorney General, State of Texas)

²²³ Press Release, Railroad Commission of Texas, *Railroad Commission’s Active, Ongoing Investigation of Parker County Water Well Complaint* (Dec. 7, 2010), *available at* <http://www.rrc.state.tx.us/pressreleases/2010/120810.php>.

²²⁴ *Id.*

²²⁵ Press Release, Railroad Commission of Texas, *Railroad Commissioners Find Range Resources’ Natural Gas Not Source in Parker County Water Wells* (March 22, 2011), *available at* <http://www.rrc.state.tx.us/pressreleases/2011/032211.php>.

²²⁶ Press Release, Environmental Protection Agency, *EPA Issues an Imminent and Substantial Endangerment Order to Protect Drinking Water in Southern Parker County* (Dec. 7, 2010), *available at*

organizations had planned,²²⁷ and did not give Range an opportunity to present important objective facts.²²⁸ The Order directed Range to provide drinking water to the residents and to begin taking actions to correct the problem within 48 hours. The Order imposed costly requirements on Range, yet EPA has been unable to provide data indicating Range production activities contributed to the contamination of the wells. In addition to the cost of its voluntary cooperation with the Texas RRC, Range is incurring significant expenses defending itself – between \$1.5 million to \$1.75 million so far.²²⁹ Such an act was unprecedented in Texas.

The Committee has reviewed documents indicating that this action was coordinated with local environmental activists. EPA Regional Administrator Al Armendariz wrote in an email to his friends at the Environmental Defense Fund and Public Citizen just before issuing the press release, “We’re about to make a lot of news [...] [T]ime to Tivo Channel 8.”²³⁰ He went on, “Thank you both for helping to educate me on the public's perspective of these issues.” “Yee haw! Hats off to the new Sheriff and his deputies!” one activist replied.²³¹

After issuing the emergency order, EPA shifted rapidly into spin mode, exaggerating the circumstances and misrepresenting the work already conducted by the RRC. “I believe we’ve got two people whose houses could explode. So we’ve got to move,” the Administrator told the *Dallas Morning News*,²³² attempting to justify his declaration of an “imminent and substantial endangerment to a public drinking water aquifer through methane contamination” from Range’s “fracked” production well.²³³ In reality, the emergency basis was false. As the findings of fact attached to the order stated, the threat to the homes had already been evaluated, and one of the water wells had been disconnected from the home months earlier.

EPA also played into environmental rhetoric by highlighting that Range utilized hydraulic fracturing to produce natural gas. The Order did not allege the gas was a consequence of hydraulic fracturing, and EPA technical staff admitted that hydraulic fracturing in the Barnett Shale deep below the well could not be the cause of the gas occurring in the water wells.²³⁴ Despite the well contamination having no connection to hydraulic fracturing, EPA included in their press release announcing the emergency order, “EPA believes that natural gas plays a key

<http://yosemite.epa.gov/opa/admpress.nsf/e8f4ff7f7970934e8525735900400c2e/713f73b4bdceb126852577f3002cb6fb!OpenDocument>.

²²⁷ In late October, EPA collected samples as well. EPA shared these results with RRC staff in late November and requested a meeting to discuss them, but on Dec. 1, 2010, the meeting was postponed. See Press Release, Environmental Protection Agency, *EPA Issues an Imminent and Substantial Endangerment Order to Protect Drinking Water in Southern Parker County* (December 7, 2010).

²²⁸ Environmental Protection Agency, Findings and Emergency Order, Docket No. SDWA-06-2011-1208 (Dec. 7, 2010).

²²⁹ Jack Z. Smith, *Range Resources calls EPA conclusions 'sheer guesswork'*, STAR-TELEGRAM, May 2, 2010.

²³⁰ Mike Soraghan, *Texas EPA Official's E-Mails Show Federal-State Tension Over Sanctions on Natural Gas Drilling*, NEW YORK TIMES (Feb. 11, 2011), available at <http://www.nytimes.com/gwire/2011/02/11/11greenwire-texas-epa-officials-e-mails-show-federal-state-63373.html>. (e-mails available at http://www.eenews.net/assets/2011/02/11/document_gw_03.pdf).

²³¹ *Id.*

²³² Randy Lee Loftis, *EPA: 2 Parker County homes at risk of explosion after gas from 'fracked' well contaminates aquifer*, DALLAS MORNING NEWS, Dec. 9, 2010.

²³³ *Id.*

²³⁴ Letter from Mark D. Whitley, Senior Vice President, Range Resources Corp. to Dr. Alfredo Armendariz, EPA Regional Administrator (Dec. 27, 2010).

role in our nation’s clean energy future and the process known as hydraulic fracturing is one way of accessing that vital resource. However, we want to make sure natural gas development is safe.”²³⁵ Possibly not so coincidentally, Range is also a very active driller in the Marcellus Shale of Pennsylvania.

EPA has refused to cooperate with either the Range or the RRC to resolve the dispute. In January, the RRC held an open hearing to receive expert testimony on the issue. Several experts explained flaws in EPA’s methodology, explaining that deep Barnett Shale had very low levels of nitrogen compared to the shallow Strawn formation.²³⁶ Nitrogen, therefore, was the distinguishing fingerprint. If the well had high levels of nitrogen, then the contamination was not coming from the Barnett Shale where Range had drilled. EPA had failed to conduct this analysis, but RRC took the time to do it. EPA declined to participate in the open hearing. Some critics joked that “EPA had better things to do – like asking the Department of Justice to impose a \$16,500-a-day fine on the company for failing to comply with an order that EPA itself has neither the interest nor ability to defend or explain in an open forum.”²³⁷

One Texas Railroad Commissioner called EPA’s action “Washington politics of the worst kind. The EPA’s act is nothing more than grandstanding in an effort to interject the federal government into Texas business. The Railroad Commission has been on top of this issue from Day 1. We will continue to take all necessary action to protect Texas lakes, rivers and aquifers. Texans have no interest in Washington doing for Texas what it did for Louisiana fishermen.”²³⁸

DOI Threatens Texas with “Endangered” Lizard

The Fish and Wildlife Service (part of the Department of the Interior) has also found the Texas oil and gas industry to be an imminent threat, not to people but to lizards. The Fish and Wildlife Service has proposed placing the dunes sagebrush lizard that lives in New Mexico and west Texas on the Endangered Species List.²³⁹ Endangered Species status would allow the Fish and Wildlife Service to limit oil and gas production in the Permian Basin of west Texas – which currently produces nearly 20% of the country’s crude oil.²⁴⁰ Thousands of acres could potentially be taken out of production as a result of the rule, without an economic analysis ever being performed.²⁴¹

How the Fish and Wildlife Service would use the lizard to stop oil and gas production is not a secret. According to the official notice in the Federal Register: “We believe the following actions may jeopardize this species, and therefore [the Fish and Wildlife Service] would seek to conference with [the Bureau for Land Management] and [NRCS] on these actions: The lease of land for oil and gas drilling, Applications to drill, Applications for infrastructure through dunes (including, but not limited to pipelines and power lines), [Off-Highway Vehicle] activities,

²³⁵ *Id.*

²³⁶ *EPA MIA in Austin*, ENERGY IN DEPTH (Jan. 20, 2011), available at <http://www.energyindepth.org/2011/01/epa-mia-in-austin/>.

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Dunes Sagebrush Lizard, U.S. Fish & Wildlife Services (last visited May 20, 2011) available at <http://www.fws.gov/southwest/es/DSL.html>.

²⁴⁰ Susan Montoya Bryan, *Small lizard sparks big debate in NM, Texas*, BLOOMBERG BUSINESSWEEK, Apr. 28, 2011.

²⁴¹ *Id.*

Seismic exploration, Continued oil and gas operations (release of pollution and routine maintenance)....”²⁴²

The Fish and Wildlife Service would devastate the local oil and gas industry based on limited data. Locals say the government used a flawed methodology when it estimated the lizard population – it did not spend enough time looking for the lizards and did not know how to find them.²⁴³ Regardless, the Fish and Wildlife Service has alternatives to declaring the lizard endangered. For example, voluntary conservation agreements between the federal government and landowners, like those successfully implemented in New Mexico, would help preserve the lizard’s habitat while allowing production to continue.²⁴⁴ According to the president of the Permian Basin Petroleum Association, “The best way [to protect the lizard] is for land owners and industry actually on the ground where the lizards are, who know how to protect the lizard, to be in charge instead of the feds putting up ‘Do Not Enter’ signs on every gatepost.”²⁴⁵ The public comment period closed on May 16, accordingly, the rule will most likely be issued by the end of the year.

CONCLUSION

In his 2010 State of the Union address, President Obama declared: “the nation that leads the clean energy economy will be the nation that leads the global economy...America must be that nation.”²⁴⁶ Despite the fact that more than 80 percent of U.S. energy needs are met with carbon-based fuels that cannot be easily, cheaply or quickly replaced, the Obama Administration has been aggressively suppressing the utilization of these carbon-based fuels.

A pattern of evidence, as well as statements from before President Obama and Secretary of Energy Chu took office about the need for Americans to pay higher energy costs, raise alarming concerns about the existence of a campaign, across government agencies. This campaign aims to block carbon-based energy extraction, to tax it, and to otherwise increase its cost of use. The effort is occurring simultaneously with calls to heavily subsidize the development and use of “green energy.”

While some may argue that there are benefits of having Americans pay more for gasoline, more for electricity, and more for home heating, the surreptitious implementation of such an agenda without public discussion or announcement appears highly inappropriate and contrary to the Administration’s promises of transparency.

²⁴² Endangered and Threatened Wildlife and Plants; 12-Month Finding on a Petition To List the Sonoran Population of the Desert Tortoise as Endangered or Threatened, 75 Fed. Reg. 78094 (proposed Dec. 14, 2010).

²⁴³ *Id.*

²⁴⁴ Press Release, U.S. Department of the Interior, *New Conservation Effort Benefits Rare Species in Southeastern New Mexico* (Dec. 8, 2008), available at http://www.doi.gov/archive/news/08_News_Releases/120808.html.

²⁴⁵ *Mella McEwen*, Could a Three-inch Lizard Collapse the West Texas Oil Industry?, Midland Reporter-Telegram (April 23, 2011) available at http://www.mywesttexas.com/mobile/article_e7f32d45-fab8-5025-afa9-26a00d768910.html.

²⁴⁶ *Id.*

What President Obama failed to accomplish through the so-called “cap and trade” program, his administration is attempting to accomplish through regulatory roadblocks, energy tax increases, and other targeted efforts to prohibit development of domestic energy resources. This includes actions at the Bureau of Ocean Energy Management, Bureau of Land Management, and U.S. Fish and Wildlife Service that have raised barriers to limit exploration and development of domestic energy resources. This includes moratoriums on offshore oil drilling, blockage/delay of onshore oil and gas leases, and even efforts to list certain lizard species on the endangered list at the expense of 20 percent of the Texas crude oil market, alone.

Thanks to advances in new technology, the U.S. energy industry has the opportunity to experience a renaissance by extracting resource deposits not even known to exist a generation ago. The opportunity to increase domestic oil production by as much as 40% in the next five years is at hand. Congress and the Obama Administration should herald this development, reducing barriers and streamlining processes so these firms can ramp up activity and production in an effort to achieve energy independence. Doing so would stabilize our sources of energy, create well-paying job opportunities for American workers, and improve our standing in the global marketplace by removing the volatile supply chains that currently impact our energy prices and availability.

The ability to utilize our nation’s rich natural resources may, however, be out of reach if the Obama Administration continues efforts to hinder domestic development of carbon based energy sources in an attempt to ignite a green energy revolution. While there are clearly needs and opportunities for green energy development, premature implementation of such technologies will come at the price of a premium over more affordable sources of energy. An effort to intentionally raise the costs of traditional energy sources is a dangerous strategy that will harm economic recovery and job growth. If past statements of key administration officials are indeed reflections of the policies they are pursuing, this strategy is playing a quiet but significant role in the higher energy prices Americans are currently paying.

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