CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
SENIOR VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

May 25, 2017

The Honorable Raul R. Labrador
Chairman
Subcommittee on Oversight and Investigations
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Mike Johnson
Vice-Chairman
Subcommittee on Oversight and Investigations
Committee on Natural Resources
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Labrador and Vice-Chairman Johnson:

The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

In response to your May 9, 2017, request to identify regulations or processes within the jurisdiction of the House of Representatives Committee on Natural Resources that have negatively impacted job creation or public health and safety, and for suggestions to improve or reform such regulations, including commenting on the federal permitting processes, high regulatory compliance costs or lack of meaningful engagement with federal regulatory entities, we submit the following comments.

I. Permit Streamlining

In your request letter you specifically seek information on the federal permitting process. On that topic it should be noted that for the last seven years the Chamber has focused, organized, and led a national coalition to eliminate the barriers to an efficient federal permitting process. Our voices were heard by Congress, including the House Committee on Natural Resources which led the passage of Fixing America's Surface Transportation Act, Pub. L. 114-94, title XLI, ("FAST – 41"), which provides for a transparent, coordinated, and time-limited review of all projects in the nation that exceed $200 million. It also provides a substantially reduced statute of limitations on lawsuits to stop the projects. FAST – 41 is currently being implemented with approximately 32 projects on its dashboard.

A. Introduction

In 2009, in the middle of the Great Recession, the Chamber initiated a study to answer similar questions concerning barriers to permitting. In 2010 it unveiled *Project No Project*, an initiative that assessed the broad range of energy projects that were being stalled, stopped, or outright killed nationwide due to "Not In My Back Yard" (NIMBY) activism, a broken permitting process, and a system that allowed limitless challenges by opponents of development. Results of the assessment are compiled onto the *Project No Project* website (http://www.projectnoproject.com.) This was the first-ever attempt to catalogue a wide array of energy projects being challenged nationwide.

Through *Project No Project*, the Chamber found consistent and usable information for 351 distinct projects, including 22 nuclear projects, 21 transmission projects, 38 gas and platform projects, 111 coal projects, and 140 renewable energy projects. We found that challenges to construction permits were at every level of government. Local impediments included zoning restrictions as well as traffic congestion and nuisance actions. The state level challenges were to conditions in the permit and concern over the adequacy of environmental reviews. At the federal level the challengers delayed the approval of permits by:

1. Using the citizen suit provisions in federal environmental statutes and related provisions for the award of attorney fees combined with claims of inadequate environmental impact statements under the National Environmental Protection Act ("NEPA");
2. Exploiting the absence of time limits on NEPA allowed challengers to continually raise questions on the sufficiency of the reviews; and
3. Effectively manipulating the fact that there was little coordination between state and federal efforts.

B. Citizen Suits Impact on Permits

Burdens and significant delays in securing permits occur well before the application for a permit is filed. For decades environmental groups have used citizen suit provisions in twenty environmental statutes to challenge all types of projects.[1] These advocacy groups stop many types of activities by asserting endangered species are on or near the property; that activity is in a Clean Air Act non-attainment zone; or that an environmental impact review is insufficient or

[1] *See* 15 U.S.C. § 2619 (Toxic Substances Control Act); 16 U.S.C. § 544m(b) (National Forests, Columbia River Gorge National Scenic Area); 16 U.S.C. § 1540(g) (Endangered Species Act); 30 U.S.C. § 1270 (Surface Mining Control and Reclamation Act); 30 U.S.C. § 1427 (Deep Seabed Hard Mineral Resources Act); 33 U.S.C. § 1365 (Clean Water Act); 33 U.S.C. § 1415(g) (Marine Protection, Research and Sanctuary Act); 33 U.S.C. § 1515 (Deepwater Port Act); 33 U.S.C. § 1910 (Act to Prevent Pollution form Ships); 42 U.S.C. § 300j-8 (Safe Drinking Water Act); 42 U.S.C. § 4911 (Noise Control Act); 42 U.S.C. § 6305 (Energy Conservation Program for Consumer Products); 42 U.S.C. § 6972 (Resource Conservation and Recovery Act); 42 U.S.C. § 7604 (Clean Air Act); 42 U.S.C. § 8435 (Powerplant and Industrial Fuel Use Act); 42 U.S.C. § 9124 (Ocean Thermal Energy Conservation Act); 42 U.S.C. § 9659 (Superfund Act); 42 U.S.C. § 11046 (Emergency Planning and Community Right-to-Know Act); 43 U.S.C. § 1349(a) (Outer Continental Shelf Lands Act); 49 U.S.C. § 60121 (Natural Gas Pipeline Safety Act).

permit conditions are not adequate for the project. These lawsuits can take years to resolve, and the delay not only impacts the ability to apply for a permit, but long delays can also impact financing of the project.

Many of these concerns were addressed by Congress in December 2015 with FAST – 41 through the establishment of strict time requirements, coordination between agencies and states, and the reduction of the statute of limitations from 6 years to 2.

The permit streamlining provisions of FAST-41 will bring greater efficiency, transparency, and accountability to the federal permitting review process. Its coverage is very broad, including infrastructure, energy, aviation, broadband, and manufacturing projects. Bringing better coordination and predictability to the permitting process should translate into job creation, economic growth, and new development. Some of the key provisions of FAST-41 include:

- Establishing a permitting timetable, including intermediate and final completion dates for covered projects, i.e. those over $200 million or subject to federal permitting review requirements so they will benefit from enhanced coordination;

- Designation of a Lead Agency to coordinate responsibilities among multiple agencies involved in project reviews to ensure that "the trains run on time";

- Providing for concurrent reviews by agencies, rather than sequential reviews;

- Allowing state-level environmental reviews to be used where the state has done a competent job, thereby avoiding needless duplication of state work by federal reviewers;

- Requiring that agencies involve themselves in the process early and comment early, avoiding eleventh-hour objections that can restart the entire review timetable;

- Establishing a reasonable process for determining the scope of project alternatives, so that the environmental review does not devolve into an endless quest to evaluate infeasible alternatives;

- Creating a searchable, online "dashboard" to track the status of projects during the environmental review and permitting process;

- Reducing the statute of limitations to challenge a project review from six years to two years; and

- Requiring courts, when addressing requests for injunctions to stop covered projects, to consider the potential negative impacts on job creation if the injunction is granted.

While there have been permit streamlining provisions for specific activities, this is the first time there has been any type of comprehensive structure that coordinates the environmental review process for large infrastructure projects throughout the nation, both public and private.

OMB, CEQ, and the other agencies involved have done a significant amount of quality work in the past fifteen months getting FAST-41 up and running.

Recommended Action: Currently the position of Executive Director of the Federal Permitting Improvement Council is vacant; it should be filled as soon as possible so the Council can continue its work at full speed.

Another concern that should be addressed is that the permit streamlining provisions of FAST – 41sunset in seven years. This time restriction was inserted in negotiations with the Senate based on a request by the House Natural Resources Committee. It should be eliminated.

II. Sue and Settle Consent Decrees

Over the past decade, the business community has expressed growing concern about interest groups using lawsuits against federal agencies and subsequent settlements approved by a judge as a "short cut" technique to influence agencies' regulatory agendas. These "sue and settle" agreements occur when an agency chooses not to defend lawsuits brought by activist groups, and the agency agrees to legally-binding, court-approved settlements negotiated behind closed doors—with no participation by other affected parties or the public.

Litigation against the Department of Interior ("DOI") under the Endangered Species Act represents a significant barrier to reducing regulatory burdens. During the first term of the Obama administration, environmental groups brought suit against DOI and DOI settled with the environmental groups by agreeing to undertake the demands in their complaints; i.e. initiate a rulemaking or consider specific species endangered or threatened. In one instance DOI agreed to consider the status of 720 species. DOI entered 19 such agreements (see attached list of agreements; this list, however, is only a partial list of such agreements).

While it less likely that the Trump administration will entertain sue and settle agreements with environmental groups, our most recent data for the years 2014- 2015 find there were 209 Notices of Intent to sue DOI and 34 new complaints filed. The data for 2016 will only increase totals.[2] The Chamber has filed a Freedom of Information Act ("FOIA") request seeking information on cases and settlements involving DOI with environmentalist groups.

Beginning in 2017 lawsuits filed by environmental groups may be the primary tool for imposing regulatory barriers on projects. For example, one environmental group alone has

[2]December 3, 2016, and January 23, 2017, Freedom of Information Act responses from Fish and Wildlife Service to the U.S. Chamber of Commerce requesting information on notices of intent to sue and complaints filed under the Endangered Species Act.

already filed sixteen lawsuits against the current administration, including the Department of Interior over issues such as wildlife in Idaho and pipelines.[3]

Agreeing to these sue and settle agreements imposes huge burdens on the agency. To illustrate, the director of FWS testified that, in FY 2011, FWS was allocated $20.9 million for endangered species listing and critical habitat designation; the agency spent more than 75% of this allocation ($15.8 million) taking the substantive actions required by court orders or settlement agreements resulting from litigation. In other words, sue and settle cases and other lawsuits are effectively driving the regulatory agenda of the Endangered Species Act program at FWS.

Recommended Action: DOI should defend against these lawsuits whenever the facts justify.

Congress should also pass the Sunshine for Regulatory Decrees and Settlements Act (H.R. 469, Sunshine for Regulations and Regulatory Decrees and Settlements Act of 2017 and S. 119, Sunshine for Regulatory Decrees and Settlements Act of 2017) to provide much needed transparency and accountability to federal agency settlements.

III. Endangered Species Act

On December 27, 2016, the Department of Interior issued the final Endangered Species Act Compensatory Mitigation Policy (81 Fed. Reg. 95316), which would require a shift from "project-by-project (impact on local area of project) to landscape scale (impact on surrounding areas) approaches to planning and implementing compensatory mitigation." The Chamber opposed this policy on several grounds, including U.S. Fish & Wildlife Service's lack of statutory authority and legal authority under the ESA to require and/or implement many of the policy provisions. On March 29, 2017, Secretary Zinke ordered DOI to reexamine its mitigation policies and practices. This ESA mitigation policy will be part of that reexamination.

On September 27, 2016, the Fish and Wildlife Service issued final regulations governing petitions for endangered and threatened wildlife and plants under the ESA (81 Fed. Reg. 66461). While some of these regulations bring needed reforms to the ESA petition process, there are still concerns that the petition process could be misused and abused by outside groups. For example, the proposed regulation focused only on the specific species. The final regulation changed the focus examining all species of its classification.

On February 11, 2016, the FWS issued final regulations expanding the definitions of "critical habitat" and "destruction or adverse modification" of critical habitat under the ESA. The final rules, which became effective on March 14, 2016, expand critical habitat designations to include areas in which a species no longer lives and areas in which a listed species may live in the future. Eighteen states filed a lawsuit in November 2016 challenging these critical habitat regulations.

[3]Trump Lawsuit Tracker, Center for Biological Diversity (last visited May 12, 2017 10:35 a.m.) *available at* http://www.biologicaldiversity.org/campaigns/trump_lawsuits/index.html.

Recommended Action: The FWS should avoid entering into settlement agreements on ESA species petitions. FWS should ensure that all petitions comply with its April 21, 2016, regulation concerning the information needed in the petition, while maintaining complete transparency, allowing for meaningful input from all stakeholders, including states and business and industry, and requiring sound science and data. Additionally, the new administration should proceed with its reexamination of the ESA mitigation policy, as ordered by Secretary Zinke. Finally, the new administration should take steps to withdraw the February 11, 2016, regulations expanding the definition of "critical habitat."

IV. Review of Mitigation Policies

On March 29, 2017, Secretary Zinke issued Secretarial Order 3349 regarding "American Energy Independence." In implementing President Trump's "Promoting Energy Independence and Economic Growth" executive order, Secretary Zinke calls for a reexamination of DOI mitigation policies and practices, as well as an identification of regulations, guidance, and other actions that burden or hamper development or utilization of domestic energy and natural resources.

Under SO 3349, DOI offices that are reconsidering Department Actions from the Mitigation Policy and Climate Change Policy reviews must submit draft or revised Department Actions within 90 days of the order. Additionally, within 35 days of the order, the Deputy Secretary must provide the Secretary with a plan to complete the review of all agency actions that potentially burden energy development.

The order also directs the Bureau of Land Management (BLM) to rescind the final rule addressing oil and gas fracking on federal lands and to review the final rule regarding methane venting and flaring.

Recommended Action: The Chamber supports the Secretary's order calling for a review of all DOI mitigation policies, as well as the directives to rescind the final BLM rule on oil and gas fracking on federal lands and to review the final BLM venting and flaring methane rule.

V. BLM Venting and Flaring Rule

Finalized by the Obama administration 10 days after the 2016 election, the Bureau of Land Management's venting and flaring regulation threatens to stifle energy production on federal lands by imposing unnecessary controls and restrictions on oil and natural gas production. Ostensibly designed to reduce methane waste from drilling activities, this rule is fraught with numerous problems that are expected to make energy development uneconomical in many areas. It exceeds BLM's statutory authority, is duplicative because energy production activities included in the rule are already regulated through state and federal rules, and fails to recognize that the sector has successfully reduced methane emissions voluntarily, even as energy production has grown substantially. Moreover, while the rule aims to rule aims to generate increased royalties through increased capture of methane waste, its overly stringent approach is likely to simply chase energy developers away, ironically reducing royalty revenues in the process. Adding to this irony is the fact that a history of BLM delays processing pipeline permits

has left many companies without viable transport options, thus forcing them to increase venting and flaring.

Recommended Action: The Chamber commends the Committee for its swift action in support of a Congressional Review Act legislative repeal of this regulation earlier this year, and strongly supports the Department of Interior's recently announced plan to undertake a comprehensive review of this regulation and repeal or modify it as appropriate. Accordingly, we support continued congressional oversight of and support for these executive branch efforts to ensure relief from the venting and flaring rule's overly burdensome requirements.

VI. Antiquities Act

Throughout its tenure, the Obama administration exercised its authority granted by the Antiquities Act of 1906 34 times to designate or expand National Monuments. Unlike the majority of previous designations, a significant number of the Obama administration's National Monument designations circumvented and/or ignored the input of stakeholders, local residents, and tribal, state, and local officials. In taking these actions, the Obama administration made millions of acres unavailable for ongoing commercial activities, including agricultural and energy development.

On April 26, 2017, President Trump issued an Executive Order on the Review of Designations under the Antiquities Act. Among other things, this order directs Secretary Zinke to review all designations or expansions of substantial size to determine whether proper outreach and consultation was made with state, tribal, and local officials, as well as stakeholders and the public consistent with the original objectives of the Antiquities Act.

Recommended Action: The Chamber supports Interior's review of monument designation/expansion in accordance with the Executive Order. It also appreciates the Committee's well-established oversight effort of U.S. offshore energy policies and regulations and encourage it to build upon the record already established to ascertain whether previous monument designations were deficient and lacking in adequate and proper consultation with state, tribal, and local officials or stakeholders and the public.

VII. Offshore Energy Development

The Outer Continental Shelf (OCS) continues to provide a cornerstone of U.S. energy production. However, at the conclusion of the Obama administration, some 94% of all federal OCS acreage was restricted from energy development. Not only was the recently finalized OCS Offshore Leasing Program covering 2017-2022 woefully inadequate for securing America's energy future, but several other regulatory actions also jeopardize energy security.

On April 8, 2017, President Trump Issued an Executive Order on Implementing an America-First Offshore Energy Strategy. Among other things, the EO directs Secretary Zinke to revisit the currently operating OCS Offshore Leasing Program with an eye towards adding new lease sales in the Atlantic, Arctic, and Gulf of Mexico, while not disrupting already-scheduled lease sales.

Additionally, the Executive Order directs the Secretary to reconsider the Financial Assurance Regulatory Review, the Well Control Rule, the Offshore Air Rule, the Arctic Drilling Rule, and barriers preventing geologic and geophysical seismic testing. These reviews are under way, and the business community eagerly anticipates positive changes this new direction in offshore energy production represents for the economy and energy security.

In July of 2010, President Obama issued an Executive Order establishing the National Ocean Policy. In spite of lacking congressional authorization for this regulatory encroachment, several agencies have taken steps to implement the order in subsequent years. This policy should be rescinded as it is neither warranted nor authorized and has the potential to cause significant harm to the economy and energy security.

Recommended Action: The Chamber strongly supports implementation of the Executive Order at the Departments of Interior and Commerce. It also commends the Committee for establishing an oversight record that demonstrates the inadequacies of previous offshore energy policy, which the Executive Order will remedy. We encourage the Committee to report legislation that expands revenue sharing to all states adjacent to federal energy production. We also encourage the Committee to allow current moratoria to expire, including for the Eastern Gulf of Mexico planning area. Finally, we encourage the Committee to report legislation that would remove the unnecessary burdens created by President Obama's Executive Order establishing the National Ocean Policy.

VIII. ONRR Valuation Rule

In July 2016, DOI's Office of Natural Resources Revenue (ONRR) imposed complex new requirements for calculating royalties on energy resources extracted from federal lands. Known as the Consolidated Federal Oil & Gas and Federal & Indian Coal Valuation Rule, the new requirements introduced significant uncertainty into royalty calculation processes. Perhaps most importantly, the rulemaking sets new limits on deductions and authorizes ONRR to challenge and unilaterally revaluate royalties in disputed instances. This legally questionable construct presents a significant compliance burden on all energy producers, particularly small businesses, and threatens to render many oil, gas, and coal energy projects uneconomical.

Recommended Action: The Chamber supports the Department of Interior's recently announced review of this regulation, as well as associated congressional oversight, to ensure it is appropriately modified to allow restoration of a royalty calculation system that is clear, simple, and fair.

IX. Navajo Generating Station

One of the largest coal plants in the country, Arizona's Navajo Generating Station (NGS) faces possible closure due to a combination of market and regulatory forces. The plant is unique because the Department of Interior is a 26% owner as a result of an historic agreement to provide water to Arizona's population centers, and also because local tribal economies are overwhelmingly dependent on the plant. While the challenges facing NGS are complex and numerous, burdensome requirements such as EPA "regional haze" regulations have imposed

several hundred million dollars of highly questionable compliance costs and contributed to a recent decision by project owners to slate the plant for retirement. However, efforts are underway to explore remedies that could result in reduced regulatory burdens and allow the plant—and the native populations highly dependent upon it—to remain open.

Recommended Action: Given the plant's unique circumstances and the federal government's partial ownership position, the Chamber encourages the Committee to support Department of Interior efforts to explore possible ways to extend the NGS lease and allow the plant and mine to remain in operation.

Thank you for the opportunity to provide information to your Subcommittee.

Sincerely,

Neil L. Bradley

Attachment