

## Interior Department and Forest Service Identify Burdens on Domestic Energy Development

***Report on the agencies' review of programs provides a roadmap to understanding which energy policies the Trump administration will revise.***

Several federal agencies have now issued reports responding to Executive Order (EO) 13783, [Promoting Energy Independence and Economic Growth](#). The directive, which President Trump signed on March 28, 2017, required departments and agencies to, within 180 days, issue a final report of all agency actions — including existing regulations, orders, guidance documents, and policies — that “potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.”<sup>1</sup> The actions outlined in the Department of the Interior’s extensive [Review of the Department of the Interior Actions that Potentially Burden Domestic Energy](#) report (DOI Burden Report) and the Forest Service’s [Final Report Pursuant to Executive Order 13783 on Promoting Energy Independence and Economic Growth](#) and appendices (Forest Service Burden Report), in particular, shed light on how the Trump administration plans to meet its energy and environmental goals. The two agencies manage land, subsurface rights, and offshore areas that produce more than 19% of the country’s energy — making them central to federal energy policy.

This *Client Alert* discusses some of the key agency actions that these two reports identify as burdens to US energy production as the new Administration pursues its goal of “energy dominance”, and how subsequent proposals may affect industry. By and large, a significant focus of the Administration’s attention and effort is on the oil and gas sector, both onshore and offshore, including continued attempts to reverse Obama-era regulations, decisions, and climate policy. Permit streamlining, less rigorous requirements for mitigation, and the increased development and use of categorical exclusions under the National Environmental Policy Act (NEPA) are also key themes in the agency recommendations. While the DOI Burden Report largely ignores the ongoing litigation that certain states and the environmental community have brought for many of the Administration’s actions taken to date, further litigation is likely as these stakeholders seek to stem the tide of “regulatory rollbacks.” This *Client Alert* focuses on the Bureau of Land Management (BLM), the Forest Service, and the US Fish and Wildlife Service (USFWS) findings and proposals, including currently open opportunities for public comment.

### Bureau of Land Management

BLM administers more than 245 million surface acres and in excess of 700 million acres of mineral interests onshore, giving the agency a very significant role in energy development in the United States. Many of the actions that the President’s EO requires fall within the BLM’s bailiwick, including the

proposed rescission of the Hydraulic Fracturing rule, attempts to delay and rescind the Methane and Waste Reduction rule<sup>2</sup>, and revoking former Interior Secretary Jewell's coal reforms. The DOI Burden Report contains few surprises — Obama-era policies related to oil and gas leasing reform, including Master Leasing Plans, are being rescinded. BLM is instead examining additional ways to streamline and enhance the leasing process, including potentially through regional leasing teams, while considering ways to expedite the lease reinstatement process by eliminating a policy requiring additional environmental review prior to reinstatement.<sup>3</sup> BLM is also reviewing whether stipulations included in leases, conditions of approval at the oil and gas application for permit to drill (APD) stage, and the current leasing protest process would burden energy development on public land.

Similarly, other policies designed to avoid use conflicts, such as those to minimize oil and gas impacts to the Greater Sage-Grouse, are under review as potential burdens on energy development.<sup>4</sup> In contrast to those policies, the “BLM will [instead] measure success by assessing changes in industry's interest in nominating acreage for competitive sale and developing existing leases in areas affected by the Greater Sage-grouse amendments to [Resource Management Plans] RMPs.”<sup>5</sup> The Department is also separately focused on re-evaluating the Greater Sage-Grouse RMP amendments, consistent with [Secretarial Order 3353 and the Review Team's report to the Secretary](#), and has opened a public scoping process on future plan amendments, which currently closes on November 27, 2017.<sup>6</sup> The BLM also cancelled its withdrawal application and the NEPA process for the proposed Greater Sage-Grouse Focal Area mineral withdrawal, and the associated segregation under the Federal Land Policy and Management Act (FLPMA) has now expired.<sup>7</sup>

NEPA reform and planning continue to take center stage, consistent with Secretarial Memorandum dated March 27, 2017, which requires the BLM to make “results oriented improvements to its land use planning and NEPA processes” in the wake of Congressional nullification of BLM's Planning 2.0 rule under the Congressional Review Act, and to “right-size” its environmental reviews. The DOI Burden Report outlines the outreach being conducted with various stakeholders, such as the Western Governors Association and the National Association of Counties, to streamline the planning and NEPA processes. A report to the Secretary is expected soon, which will likely include recommendations to update the BLM's Manuals and Handbooks, along with new proposed categorical exemptions. BLM guidance related to climate change analysis in NEPA documents has already been revoked, as discussed in more detail below.

The BLM has also embarked on a review of land use designations as part of its planning processes. Under the FLPMA, project-specific actions must be consistent with the governing RMPs. Thus, a land use designation in an RMP includes determinations on lands suitable for energy and other uses. The BLM's review identified more than 60 different designations, and the DOI Burdens Report highlights the use of Areas of Critical Environmental Concern (ACEC),<sup>8</sup> particularly in the last year of the Obama administration, as the type of designation that can lead to restrictions on the use of the land. The BLM is expected to update its policies on land use designations, and may remove existing designations altogether unless otherwise prohibited by law.

The DOI Burden Report notes that the BLM is also working to process coal lease applications and modifications expeditiously, and that the BLM is reviewing its existing policies with the intent to update or rescind them. As noted above, Obama-era work to comprehensively review the federal coal program has been halted.

Finally, with respect to mitigation, the BLM is undertaking several actions following President Trump's revocation in EO 13783 of Obama's Presidential Memorandum on mitigation, and Interior Secretary Zinke's subsequent direction in Secretarial Order 3349. The BLM is now reviewing and revising a number of its Manuals and Handbooks,<sup>9</sup> and it is also drafting new Instruction Memorandums (IMs) to provide

interim direction on mitigation practices, and in particular, compensatory mitigation. The Department withdrew Solicitor's Opinion M-37039, entitled "The Bureau of Land Management's Authority to Address Impacts of its Land Use Authorizations Through Mitigation," in June 2017. However, according to the DOI Burdens Report, the BLM's existing Mitigation Manual and Handbook will remain in use until an interim IM modifies, limits, or supersedes this guidance. Likewise, the BLM is reviewing policies related to the protection of National Monuments and National Conservation Areas, including existing policies to route right-of-ways outside of these designated area.<sup>10</sup> Instead, mitigation for compatible uses to offset impacts within these areas, as well as within or across Wild and Scenic River corridors and National Scenic and Historic Trails, would be allowed.<sup>11</sup>

## **US Department of Agriculture, Forest Service**

The Forest Service reviewed more than 70 agency actions, including regulations, policies, guidance, orders, and agreements with partner agencies, as well as programmatic analyses. The Forest Service's Burdens Report recommends that parts of 15 agency actions either be revised or rescinded to alleviate or eliminate burdens on domestic energy sources. While as a general matter, the BLM administers oil and gas leasing and down-hole permitting requirements, along with other subsurface mineral interests on National Forest System lands, the Forest Service administers surface access. Many of the Forest Service's proposed reforms relate to revising NEPA regulations and guidance, including by broadening categorical exclusions for energy development. Others include improving coordination with BLM on oil and gas, and issuing several geothermal recommendations.<sup>12</sup> Unlike the DOI Burden Report, the Forest Service report acknowledges that energy development applications on federal lands are tied to market forces and conditions, and that therefore, the agency cannot predict the potential for increased production or cost savings from implementing its recommendations.

## **US Fish and Wildlife Service**

The DOI Burden Report describes several key upcoming USFWS actions that cut across energy and other industrial activities, including proposals related to implementing the Endangered Species Act (ESA), the Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (BGEPA), and compensatory mitigation generally.<sup>13</sup> First, the DOI Burden Report identifies the time and expense of Section 7 consultation as "unnecessarily burdensome," noting that the FWS has the discretion to create efficiencies through targeted revision of the ESA regulations and/or guidance. Additionally, the DOI Burden Report states that DOI will build upon the Western Governors Association ESA initiative led by Wyoming Governor Mead, which reviewed ways to incentivize voluntary conservation and to elevate the role of States in species conservation, as a means of improving the ESA's efficacy.

The DOI Burden Report also recognizes the split in the federal courts of appeals on whether the MBTA imposes criminal liability for industrial activities that inadvertently result in the death of migratory birds. The Department suspended Solicitor's Opinion M-37041 issued in January 2017 entitled "Incidental Take Prohibited Under the Migratory Bird Treaty Act" and will likely develop new guidance or regulations to clarify the issue. Additionally, the USFWS intends to evaluate whether to develop a general permit for incidental take of eagles under the BGEPA, to cover activities with a low risk of take. Given the nature and complexity of these potential reforms, unsurprisingly, none of these reforms identify a proposed timeframe for implementation, and none are currently listed on OMB's updated Unified Agenda.

With respect to mitigation, the USFWS is reviewing several broad-ranging policies. The USFWS plans to re-evaluate its Mitigation Policy (revised in 2016) and ESA Compensatory Mitigation Policy (adopted in 2016), along with existing Interim Guidance on Implementing the Final ESA Compensatory Mitigation Policy. Key among the concerns is the use of a "net conservation benefit" standard, which some have argued exceeds statutory authority. In fact, shortly after the DOI issued its report, the USFWS issued a

notice in the Federal Register soliciting public comment on whether and how to revise these existing policies. The USFWS specifically asked for feedback on whether to retain or remove the “net conservation gain” standard as a mitigation planning goal.<sup>14</sup> Based upon the comments received, the USFWS will then decide next steps. If the USFWS revises the policies, it will also make conforming changes to the Interim Guidance. Comments are currently due on January 5, 2018.

## Climate Change

Again consistent with EO 13783, the DOI Burden Report explains that, on March 29, 2017, Secretary Zinke signed [Secretarial Order 3349](#), directing the Interior Department’s bureaus and offices to identify any actions related to Obama-era climate change policies and directives that they were currently developing or had already adopted. The DOI Burdens Report states that most of the bureaus did not identify existing requirements “relevant to climate that can potentially burden the development or uses of domestically produced energy resources.” However, the report explains that some bureaus have non-regulatory documents — such as handbooks, guidance, and memoranda — that the Department is still reviewing to “better understand their connection to other management, operations and guidance documents.”

In early January, one such bureau-level guidance memorandum was rescinded due to its potential impact on energy production and other business interests. The rescinded policy was the BLM’s January 12, 2017 Permanent Instruction Memorandum, which “transmitted the [Council on Environmental Quality] CEQ guidance on consideration of greenhouse gas (GHG) emissions and the effects of climate change in NEPA reviews, and provided general guidelines for calculating reasonably foreseeable direct and indirect GHG emissions of proposed actions.” The DOI Burdens Report explains that the BLM may nonetheless issue new guidance to its offices on how to calculate reasonably foreseeable direct and indirect GHG emissions of proposed and related actions. The BLM would use this guidance to calculate and consider the effects of climate change in NEPA review. Anyone involved in preparing NEPA documents that analyze projects with GHG impacts will likely want to follow related developments. In addition, in order to expedite analysis of reasonably foreseeable GHG emissions, the BLM is creating an Air Resources Toolkit that will calculate GHG and other air emissions associated with energy and mineral development.

## Conclusion

Taken in the aggregate, these different reports illustrate that the Administration is pursuing many ways to achieve the objectives of EO 13783 through the various federal agencies and departments that have oversight over federal lands. Stakeholders should continue to follow and, where possible, provide input on these developments as more details emerge. In the interim, interested parties have until November 27 to provide comments on BLM’s Greater Sage-Grouse RMP amendments and until January 5, 2018 on USFWS Mitigation Policies.

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## Endnotes

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- <sup>1</sup> Press Release, The White House, Presidential Executive Order on Promoting Energy Independence and Economic Growth (Mar. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1> [hereinafter “EO 13783”].
- <sup>2</sup> In contrast, while the DOI Burden Report notes that both the USFWS and the National Park Service have Federal and non-Federal oil and gas or mineral inholdings, and that both agencies manage lands through which energy infrastructure may pass, concrete discussion of the status of two oil and gas rules finalized by the USFWS and the National Park Service during the Obama administration are notably absent, notwithstanding the President Trump’s and Secretary Zinke’s direction to review and potentially revoke them.
- <sup>3</sup> These include: Instruction Memorandum (IM) 2010-117 (“Oil and Gas Leasing Reform – Land Use Planning and Lease Parcel Reviews”, IM 2013-101 (“Oil and Gas Leasing Reform – Master Leasing Plans (MLPs)”, and related revisions to BLM Handbooks); IM 2013-177 (“National Environmental Policy Act (NEPA) Compliance for Oil and Gas Lease Reinstatement Petitions”).
- <sup>4</sup> See IM 2016-140 “Implementation of Greater Sage-grouse Resource Management Plan Revisions or Amendments – Oil & Gas Leasing and Development Sequential Prioritization”.
- <sup>5</sup> DOI Burden Report at p. 12.
- <sup>6</sup> 82 Fed. Reg. 47248-49 (Oct. 11, 2017).
- <sup>7</sup> 82 Fed. Reg. 47248 (Oct. 11, 2017).
- <sup>8</sup> 43 U.S.C. section 1712.
- <sup>9</sup> These are: BLM Mitigation Manual MS-1794 and Handbook 1794-1.
- <sup>10</sup> See BLM Manual 6220.
- <sup>11</sup> See DOI Burden Report, pp. 36-38; see BLM Manual 6220 and BLM Manual 6280.
- <sup>12</sup> Forest Service Burden Report, Appendix B.
- <sup>13</sup> See DOI Burden Report, pp. 31-33; 38-41.
- <sup>14</sup> 82 Fed. Reg. 51382 (Nov. 6, 2017).