Subcommittee on Energy and Mineral Resources
Doug Lamborn, Chairman
Hearing Memorandum

May 17, 2016

To: All Energy and Mineral Resources Subcommittee Members

From: Majority Committee Staff — Michael Freeman, Kate MacGregor
Subcommittee on Energy and Mineral Resources (5-9297)

Hearing: Oversight hearing titled "*Examining Deficiencies in Transparency at the Department of the Interior"*

The Committee on Natural Resources, Subcommittee on Energy and Mineral Resources, will hold an oversight hearing to hear testimony on regulatory process concerns at Department of the Interior on **Thursday, May 19, 2016 at 9:00 A.M. in room 1324 Longworth House Office Building.**

Policy Overview

- Under longstanding law, in order for the American people, small businesses and other entities to be able to fully participate in the regulatory process as intended by the Administrative Procedures Act, federal agencies should be required to provide full and fair access to data, studies, reports, and other kinds of information used in the rulemaking process. Because the information is often complex and lengthy, the federal government must ensure adequate opportunities for the public to weigh in with these rulemakings.

- At the outset of the Obama Administration, the President issued a Memorandum in which he explicitly stated a commitment "to creating an unprecedented level of openness in Government," and that his Administration would "work together to ensure the public trust and establish a system of transparency, public participation, and collaboration."[1] The Department of the Interior (DOI) also issued a plan in early 2011, in which it pledged to make DOI regulations more efficient, less burdensome, more functional, more transparent, using the Internet to improve access and public participation; and more credible, by ensuring that decisions are based on sound science. [2]

[1] See: https://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-12.pdf
[2] See: https://www.whitehouse.gov/files/documents/2011-regulatory-action-plans/DepartmentoftheInteriorPreliminaryRegulatoryReformPlan.pdf

- Despite these pledges at the highest levels, serious concerns have been raised regarding the failure of certain subagencies within the DOI to provide such access to vital information used by those agencies. This hearing is intended to investigate these concerns and discuss possible reforms moving forward.

Witnesses Invited

Ms. Kathleen Sgamma
Vice-President of Government and Public Affairs
Western Energy Alliance
Denver, Colorado

Dr. Richard Belzer
Independent Consultant
Washington, D.C.
[Former Staff Economist, Office of Information and Regulatory Affairs,
White House Office of Management and Budget (1988-1998)]

Mr. Peter Seidel
American Chapter Chair & Board Member
International Association of Geophysical Contractors
Frederick, Maryland

Mr. Steven Heim (minority witness)
Managing Director
Boston Common Asset Management, LLC
Boston, Massachusetts

Background

In order for the American public to participate fully in the regulatory process, the public is entitled to have access to the information and methodologies that the regulatory agencies use in that process. The Office of Management and Budget (OMB) states in its guidelines that "if an agency is responsible for disseminating influential scientific, financial, or statistical information, agency guidelines shall include a high degree of transparency about data and methods…."[3] Unfortunately, this self-evident principle has not always been respected. Often, the data used to support agency actions are hidden from the public view, not subjected to peer-review, and protected by dubious copyright claims. The Committee is concerned that, without full and

[3] Office of Management and Budget, "Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication," 67 Fed. Reg. 8452, 8460 (February 22, 2002).

transparent access to the raw data used to defend agency actions, these actions cannot be fully understood, verified, engender confidence, or even be challenged when appropriate.

The recent proliferation of federal regulations issued by the Department of the Interior highlights the need for increased data transparency across all sub-agencies. Over the last few years, regulatory restrictions on federal land have put states, industry, and local communities and their citizens in a tough position. By pushing economic development way from federal lands, the Department of the Interior has reduced funding for schools, critical infrastructure, and police and fire departments across many states. Too often, the Department of the Interior ignores these costs and exaggerates the benefits of its regulatory actions. There is a process by which these rules can be challenged, but the process fails to achieve its purpose if agencies do not provide to the public the data used.

Recent Examples of Agency Actions' Lack of Transparency

Seismic Permitting in the Atlantic Outer Continental Shelf (OCS)

Seismic surveying has been safely conducted in the Gulf of Mexico for decades. However, with the expiration of the moratoria on offshore energy development in the Atlantic in 2008, the Bureau of Ocean Energy Management (BOEM) initiated a programmatic environmental impact statement (PEIS) under the National Environmental Policy Act (NEPA) to evaluate potential environmental impacts of seismic surveying in specific areas of the Atlantic OCS. As part of the PEIS process, BOEM was also required to consult with the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) under Section 7 of the Endangered Species Act.

BOEM's Final PEIS included methods that significantly departed from current operating practice in the Gulf of Mexico, lacking transparency to the scientific underpinnings of these new requirements. For instance, the PEIS requires a new 40-kilometer buffer zone between concurrent seismic vessels. BOEM cites the science supporting this decision as a study that suggests "in some circumstances"[4] that marine mammals can detect some seismic activities at long distances. The same document acknowledges that there is no evidence that the detection of the sound actually has an impact on the marine mammals.

Moreover, BOEM acknowledges "uncertainty of the effectiveness"[5] of a 40-kilometer buffer zone. Despite their own uncertainty, BOEM nevertheless published the final PEIS with this regulation, with additional requirements that will significantly restrict offshore seismic data

[4] Atlantic Geological and Geophysical (G&G) Activities Final PEIS; Bureau of Ocean Energy Management; p. 2-38.
[5] Record of Decision for Atlantic G&G Activities; Bureau of Ocean Energy Management; p. 6.

collection and extend the time required for seismic vessels to efficiently conduct a seismic survey.

Once the PEIS became final, BOEM was authorized to begin receiving and processing seismic permits – though permit applicants must also apply for and receive an incidental harassment authorization (IHA) from NMFS in order to receive a final seismic permit from BOEM. This process was halted last year when NMFS notified industry groups[6] that it planned to delay the issuance of IHAs based upon an unpublished study by scientists at Duke University. While eight seismic companies have pending permits before BOEM and NMFS, they were not able to ascertain scientific models used by the agency that will significantly influence the outcome of their applications.

BOEM and NMFS failed to disclose unpublished scientific models which influenced the timely review of permit applications, but they also included new regulatory requirements without providing any supporting data to demonstrate that these requirements will have measurable impact on the species. The same can be said of additional regulations that require operational shut-downs and ramp-up and ramp down procedures for certain marine species, despite the fact BOEM's own Chief Environmental Officer has found there is no evidence of "seismic activities adversely affecting marine animal populations or coastal communities."[7]

Stream Buffer Zone Rule

The Office of Surface Mining Reclamation and Enforcement's (OSMRE) rewrite of the Stream Protection Rule is another example of an Interior Department sub-agency's lack of transparency in the rulemaking process. In 2009, after more than 30 years of effective State implementation of the current Stream Buffer rules, OSMRE, citing "new science," began a rulemaking process to amend them.[8] Six years later, and at a cost of over $10 million, the proposed Stream Protection Rule[9] and Draft Environmental Impact Statement[10] were released. OSMRE's original comment period was just 60 days. Following multiple requests from Congress, States, and the public, OSMRE extended the period by 30 days for public comments. Given the proposed rule and Draft Environmental Impact Statement took more than six years for the agency to complete and that each document is over 1,200 pages, this is a woefully inadequate

[6] http://www.noia.org/wp-content/uploads/2015/12/API.IAGC_.NOIA-Letter-to-Agencies-Atlantic-IHA-Delays-FINAL-12.9.15.pdf
[7] http://www.boem.gov/BOEM-Science-Note-August-2014/
[8] Statement of Joseph Pizarchik, Director, Office of Surface Mining, Reclamation and Enforcement Before the House Subcommittee on Energy and Mineral Resources on the 2017 President's Budget Request. (March 23, 2016) Available at: http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=400088
[9] Stream Protection Rule, 80 Fed. Reg. 44436 (proposed July 27, 2015). Available at: https://www.federalregister.gov/articles/2015/07/27/2015-17308/stream-protection-rule
[10] Stream Protection Rule; Draft Environmental Impact Statement, 80 Fed. Reg. 42535 (July 17, 2015). Available at: https://www.federalregister.gov/articles/2015/07/17/2015-17307/stream-protection-rule-draft-environmental-impact-statement

timeframe for affected states, industry and the public to meaningfully review and submit comments.

In addition, the bibliographies for these OSMRE Stream Buffer documents contained thousands of citations for materials used to support the documents. When States requested the materials, OSMRE only partially complied. Copyright law was cited as their inability to provide access to the hundreds of studies, journal articles, and other materials used to justify the proposed rule. These studies, often paid by taxpayer-funded federal research grants, are in turn locked behind journal publishers' paywalls. The public must pay to view the research that they already paid for. In addition, several of the sources cited in the rule documents are no longer available for access. The "new science" that was used to justify this expansive rule is not transparent or accessible.

Greater Sage Grouse

One of the most contentious issues facing the West has been the federal land management strategy imposed by the Bureau of Land Management and the U.S. Forest Service to manage the Greater Sage Grouse. As a result of the Department of the Interior's actions, several states have filed suit challenging the manner in which these agencies developed and issued the land use plan amendments at the heart of the federal sage grouse management strategy.[11] Among the many legal challenges to these plans, states have argued the agencies violated NEPA by relying on studies that were not part of the draft EIS – and therefore, not available for review and comment by interested or affected parties.

Among the many significant concerns raised by the State of Idaho in its lawsuit is the use of a U.S. Geological Survey document containing recommendations relating to the size of "lek buffer zones."[12] These "lek buffer zones" would have serious consequences on economic development across Idaho and other western states. The State of Idaho argues that this study was not made available for review during the earlier stages of the NEPA process, and therefore, Idaho was not able to comment on the substance of the document. And this is just one of several of the reports and studies at issue in the Idaho lawsuit.

Similar issues have been raised by industry as well as other states and local governments.[13] The Committee believes that this sort of regulatory obfuscation is a serious matter and deserves Congressional oversight from Congress.

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[11] Brady McCombs, *Utah sues federal government over sage grouse plan*, Wash.Times, February 4, 2016, available at: http://www.washingtontimes.com/news/2016/feb/4/utah-sues-federal-government-over-sage-grouse-plan; Eric M. Johnson and Steve Gorman, *Idaho sues U.S. over sage grouse habitat restrictions*, Reuters, Sept 26, 2015, available at: http://www.reuters.com/article/us-usa-sagegrouse-idUSKCN0RQ03A20150926

[12] Sage grouse leks are areas used by male grouse to perform their mating dance.

[13] Amy Joi O'Donoghue, *Western energy producers sue over sage grouse* plams, Deseret News, May 12, 2016, available at: http://www.deseretnews.com/article/865654130/Western-energy-producers-sue-over-sage-grouse-plans.html

Conclusion

The notice and comment requirements of the Administrative Procedures Act are intended to be a check on the power of federal agencies to implement rules with the force of law. While the Obama Administration and the Department of the Interior have issued plans and executive orders claiming to improve transparency of the federal regulatory process, there are increasing examples of significant rules being issued that are based on science or data that is not made available to the very people or entities that they would regulate. If the ability to comment or otherwise participate in the rulemaking process is restricted, the fundamental fairness of the process is called into question.