COLORADO LAW
UNIVERSITY OF COLORADO BOULDER

Mark Squillace
Raphael J. Moses Professor of Natural Resources Law
Wolf Law Building | 401 UCB
Boulder, Colorado 80309-0401
303.492.1287 | 303.746-7831 cell
mark.squillace@colorado.edu

26 February 2023

Testimony of Professor Mark Squillace, University of Colorado Law School, before the Subcommittee on Energy and Mineral Resources, House Natural Resources Committee Hearing on H.R. 209 and H.R. ___ (TAP American Energy Act), 118th Cong., 1st Sess. 2023

The Honorable Pete Stauber
Chair, Subcommittee on Energy and Mineral Resources
House Natural Resources Committee
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Stauber:

Thank you for the opportunity to appear before the House Subcommittee on Energy and Mineral Resources to offer my views on the proposed "Permitting for Mining Needs Act of 2023," and the proposed "Transparency and Protection of American Energy Act of 2023." I am the Raphael J. Moses Professor of Natural Resources Law at the University of Colorado Law School. I teach and work primarily in the fields of environmental, natural resources, and water law and I have written extensively on all of these subjects. My professional experience with public lands issues runs deep. As a law student at the University of Utah College of Law, I worked in the Utah State Office of the Bureau of Land Management (BLM) as a land law examiner – a position that allowed me to review all manner of public lands activities and gain first-hand knowledge about the operation of our public land laws. Following law school, and before entering law teaching, I was hired into the Solicitor's Honor's Program at the U.S. Department of the Interior where I gained significant additional experience on public lands and mineral law issues. I took a leave from teaching and returned to the Solicitor's Office in 2000 as a Special Assistant to the Solicitor where I worked on a wide range of special projects involving public lands. All of this experience both inside and outside of government has helped to inform my understanding of public lands management and the issues surrounding mining and oil and gas development on public lands. Because the two bills currently before the Subcommittee address very different issues, I will take them up separately, beginning with the Permitting for Mining Needs Act.

I. The Permitting for Mining Needs Act: H.R. 209

H.R. 209. has some laudable goals. The transition away from fossil fuels and toward renewable energy requires an adequate supply of the critical minerals needed to produce the batteries, solar panels, and wind turbines that this transition demands. And manufacturers will need to gain access to those minerals in a timely manner. Proposed H.R. 209 appears to be designed, at least in part, to meet those important goals. Unfortunately, it does so in ways that unnecessarily undermine environmental values and the protection of our public lands.

Most worrisome, H.R. 209 proposes to change federal mining law for every kind of "locatable" mineral; i.e., those minerals not subject to lease or sale under current law. This would extend the streamlining provisions afforded "critical" minerals under the Infrastructure Investment and Jobs

Act to essentially all minerals that fall under the General Mining Law.[1] But only a very few locatable minerals, like cobalt, lithium, copper or rare earths, are important enough to warrant these advantages. According to the Government Accountability Office (GAO), the vast majority of approved mining plans for locatable minerals on public lands are for minerals that are in no way "critical" to the emerging economy.[2] More than half of the acreage is devoted to mining gold, which is primarily used for jewelry. Some 114 approved plans mine so-called "uncommon varieties" of widely occurring substances like stone, gravel, and clay. Surely the Congress has no need to streamline the process for approving mining plans for these minerals, especially when these operators take publicly-owned minerals off public lands for free. Yet that is exactly what HR 209 proposes to do.

Before addressing my more specific concerns with proposed H.R. 209, I want to acknowledge the potential benefits of promoting timely preparation of environmental documents. The NEPA process often drags out over a period of three years or more. When it takes too long, the staff overseeing the work are more likely to lose focus and some will likely leave for other jobs. This often triggers further delays. To be sure, delays can result, not only from agency failures, but also from the failure of the applicant to provide the agency with important information about their proposal. But agencies should adopt streamlining practices that help keep official on task and on schedule. Streamlining need not and should not mean avoiding or compromising compliance with environmental and other applicable laws. But streamlining strategies, such as those set out in the FAST Act, can help to ensure timely decisionmaking, especially if they are carried out in a flexible way that takes account for the complexity of the proposed action.

Nonetheless, while I support efforts to streamline the NEPA process I cannot support those aspects of the proposed legislation that undermine compliance with important federal laws and policies. As set forth below, several provisions in H.R. 209 would do just that.

A. Allowing Applicants to Prepare Environmental Documents Makes a Mockery of the Required Alterantives Analysis

Section 3(h)(3) of H.R. 209 authorizes the lead agency to adopt an environmental impact statement or environmental assessment that is prepared by or for a project applicant. That provision stands in direct conflict with Section 102(2)(C) of NEPA, which requires "a detailed statement [to be prepared] *by the responsible official*…."[3]. Requiring agency officials to prepare environmental documents is critical to the success of the law. In particular, it helps to ensure a fair and robust consideration of all reasonable alternatives to the proposed action as required by Section 102(2)(C)(iii) of NEPA.[4]

Consider, for example, a proposal to open a new copper mine. The project applicant is not likely interested in considering alternatives to mining such as recycling, or alternative locations for a proposed mine, or alternative mining methods. Yet NEPA requires agency officials to consider these and other reasonable options. Recycling in particular warrants careful consideration before new mining is approved, especially where such mining encroaches on our public lands. A recent

[1] 30 U.S. § 1607.

[2] See *Mining on Federal Lands*, **GAO-20-461R** (2020), available at, https://www.gao.gov/products/gao-20-461r; see also, *Federal Land Management*, GAO21299, available at, https://www.gao.gov/assets/gao-21-299.pdf.

[3] Emphasis added. 42 U.S.C. § 4332(2)(C).To be fair, the proposed law requires the document to fulfill the requirements of Section 102(2)(C) of NEPA but that provision seems to be intended to encompass the contents of the environmental document and not who prepares it. If it does indeed include the latter then it has no force and effect.

[4] See e.g., Natural Resources Defense Council v. Morton, 458 F.2d 827 (D.C. Cir. 1972).

study from the Institute for Sustainable Futures at the University of Technology Sydney found that "[e]ffective recycling of end of life batteries has the potential to reduce global demand by 2040 by 55% for copper...."[5] As the study further found, this creates "an opportunity to significantly reduce the demand for new mining."[6] Beyond battery recycling, recycling copper wire and electronics equipment could help further reduce the demand for virgin copper.

The European Union is a leader in the field of recycling. Its "Waste from Electrical and Electronic Equipment (WEEE)" program,[7] follows an Extended Producer Principle (EPR) that holds producers responsible for the collection, treatment, and monitoring of such equipment, including solar panels.[8] Adopting something akin to the WEEE program here in the United States could greatly increase metals recycling and go a long way toward providing manufacturers with the metals they need without new mining. To be sure, we may need some new mining to produce the minerals needed for a successful energy transition. But the smart move would be to focus first on recycling because it is likely a viable alternative to at least some mining proposals. Legislation that adopts an "extended producer principle" for American manufacturers, together with policies to maximize metals recycling should be our first priority. That would help minimize the loss of public lands to large-scale mining operations, while saving money and the environment.

Lithium mining offers another excellent example as to why agency officials must be tasked with preparing the alternatives analysis required by NEPA. Lithium has traditionally been produced in two fundamentally different ways – solar evaporation and hard rock mining. Solar evaporation requires pumping mineralized groundwater into large storage ponds. The water in these ponds evaporates, sometimes over the course of an entire year, creating lithium carbonate. This process requires substantial pumping and adversely impacts the water supply of local communities. It also results in substantial waste piles that are typically left untreated, thereby contaminating the land surface and limiting opportunities for future land uses. Lithium recovery rates using this method are also low – somewhere between 20 and 40%.[9]

A second lithium production method involves hard rock mining for spodumene, the mineral associated with lithium deposits. Lithium mines use traditional open-pit and underground mining methods, with all of their concomitant costs and environmental problems. Processing spodumene also requires large quantities of chemicals, and results in substantial waste rock that is typically disposed of in tailings ponds. This obviously poses additional risks to land, water resources, and local communities, and results in the further destruction of our public lands for private gain.

A promising alternative to these two traditional methods currently under development is called "direct lithium extraction (DLE)."[10] DLE is a brine extraction method that extracts lithium from geothermal waters, processes the brine to remove the lithium, and then returns more than 98% of the brine back to the groundwater reservoir, thereby avoiding water resource conflicts. The DLE method has many significant environmental and economic advantages over solar evaporation and traditional mining. Geothermal energy can be used to extract the brine, it can recover up to 99% of the lithium, and it has the potential to produce a higher grade of lithium

---

[5] Dominish, E., Florin, N., Wakefield-Rann, R., *Reducing New Mining for Electric Vehicle Battery Metals: Responsible Sourcing through Demand Reduction Strategies and Recycling* (2021).. The study also found that recycling could reduce the demand for lithium by 25% and for cobalt and nickel by 35%.

[6] Id.

[7] Waste from Electrical and Electronic Equipment (WEEE) (europa.eu)

[8] *Reducing New Mining* report at 47.

[9]

[10] Id. See also, Using Direct Lithium Extraction To Secure U.S. Supplies | News | NREL

that will sell at a premium. DLE is also a much faster process for producing lithium, is not dependent on weather, and has a much smaller environmental footprint.[11] The California Energy Commission recently estimated that the Salton Sea Known Geothermal Resource Area could produce as much 600,000 tons per year of lithium carbonate using the DLE method.[12] That is far more than is currently used in the United States. DLE is quite obviously a promising and reasonable alternative to the traditional methods of lithium extraction. Yet, only by insisting that the responsible agency prepare the EIS is this promising alternative likely to even be considered as an alternative to opening a conventional lithium mine.

For decades, the Council on Environmental Quality described the alternatives analysis as the "heart of the EIS." It is supposed to "present the environmental impacts of the proposal and the alterantives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public."[13] By allowing the project applicant to prepare the EIS for a major mining project, the proposed bill would cut the heart out of any NEPA document.

B. Allowing Operators to Develop Mining Claims without Any Discovery of Minerals Upends the General Mining Law and Unduly Threatens Public Lands

Calls to reform the General Mining Law of 1872 go back more than 100 years. To say that reforms are long overdue is a gross understatement. Most egregiously, mine operators on our public lands, most of which are based in foreign countries, are allowed to take these valuable public resources while paying nothing to the U.S. Treasury – no initial payment to acquire the rights, no royalties and no rental fees. Thus, if changes to the General Mining Law are going to be made, Congress should start by shifting public land mineral development to a leasing program that requires an upfront payment for the fair value of the minerals, with appropriate royalties for the minerals produced, and a performance bond that guarantees safe mining practices and proper reclamation once mining is completed. Even with such reforms, the historic practice of dumping massive quantities of mine tailings on our public lands is likely to continue, but the reform process would at least provide a vehicle for examining alternatives to this problematic practice.

A leasing program could also introduce an abandoned mined land fee, as was established under the Surface Mining Control and Reclamation Act,[14] to help pay for the cost of cleaning up the thousands of abandoned mines left behind by mine operators. These abandoned mines litter our western public lands and cleaning them up will be costly.[15] The mining industry is responsible for this problem and Congress should call upon them to help fix it.

---

[11] A Look At Direct Lithium Extraction ("DLE") And Some Of The DLE Lithium Companies | Seeking Alpha; see also, Direct Lithium Extraction | Cornish Lithium Ltd. available at, As Lithium Drilling Advances at the Salton Sea, Researchers Work Out the Details | News & Community | KCET. An animated diagram can be found here. Direct Lithium Extraction | Cornish Lithium Ltd. See also, https://www.nrcan.gc.ca/our-natural-resources/minerals-mining/minerals-metals-facts/nickel-facts/20519

[12] Ventura, S. et al., Selective Recovery of Lithium from Geothermal Brines. California Energy Commission. Publication Number: CEC500-2020-020. https://www.energy.ca.gov/sites/default/files/2021-05/CEC-500-2020-020.pdf; see also Dave Goodman, et al., *Salton Sea Geothermal Development Nontechnical Barriers to Entry – Analysis and Perspectives* (June 2022) available at, https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-32717.pdf

[13] 40 CFR § 1502.14 (2020)

[14] 30 U.S.C. § 1232.

[15] See, e.g., *Land Management Agencies Should Improve Reporting of Total Cleanup Costs*, GAO-23-105408 (2023).

Unfortunately, H.R. 209 fails to make even the tiniest effort to address these serious problems with the existing law. On the contrary, it exacerbates them.

First, Section 8 of HR 209 gives mining companies the legal "right to use, occupy, and conduct operations on public land" on payment of a small fee, and goes on to define operations to include "any" activity on public land that has any connection with mineral prospecting or development, including waste dumps, roads, and transmission lines. This eliminates the longstanding requirement of the Mining Law that such activities must be supported by a discovery of valuable minerals.

A "discovery" has been the hallmark of a valid mineral location since the General Mining Law was adopted in 1872. Under the traditional test for determining the validity of a mining claim, the government must find that "a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine."[16] In *United States v. Coleman*[17], the U.S. Supreme Court upheld what it described as a "logical complement" to the prudent person test by insisting that claimants show that the minerals they discovered could be marketed at a reasonable profit. The problem is that neither Interior nor the operator can know whether the located minerals can be marketed at a profit without knowing the costs of developing those minerals. As the Department subsequently found, those costs may include, among other things, the cost of acquiring an adequate water supply and any additional land that might be needed for the mining operations, the costs to finance the operation, labor costs, and the cost of complying with relevant federal, state, and local environmental laws, including, for example, the Clean Water Act, the Endangered Species Act, the National Historic Preservation Act.[18] Furthermore, FLPMA requires the BLM to "take any action necessary to prevent unnecessary and undue degradation of [our public] lands"[19] and this allows the agency to impose additional measures that may be appropriate for protecting our public lands. All of these legal requirements must be analyzed during the environmental impact assessment process, and until that is done, and the costs of compliance are determined, neither the government nor the operator can know whether the propped mining operation can be developed at a reasonable profit, and thus whether a valid discovery has been made.

The sponsors of H.R. 209 suggest that when an operator proposes to expend their resources to develop a mine they must have determined that they can make a sufficient profit to justify the operation, and thus can meet the test for a discovery. But that puts the cart before the horse. As suggested above, identifying the constraints that will be imposed on a mining operation should only happen after a robust environmental impact assessment process followed by a government decision as to whether to allow mining, and if so, under what conditions. In other words, developing a mineral property that might appear to valuable in the abstract may actually be unprofitable or only marginally profitable and insufficient to justify a discovery, after accounting for the true cost of developing the mine. Absent a discovery, the operator has no valid property interest and no right to mine.

A second massive problem with section 8 of H.R. 209 is that it appears to allow mining companies to use, free of charge, as much public land as they might claim to need to dispose of their waste rock and carry on all other activities that are ancillary to mining.. For all of its

[16] Castle v. Womble, 19 Land Dec. 455 (1894).
[17] 390 U.S. 599 (1968).
[18] United States v. Pittsburgh Pacific Co, 84 Int. Dec. 282 (1977).
[19] 43 U.S.C. § 1732(b).

problems, even the General Mining Law does not give a mineral locator carte blanche to use whatever public lands they might desire to facilitate mining. These are, after all, public lands that should be protected, to the fullest extent possible, for public use. HR 209 would make private mining of a vast array of substances the dominant use, capable of trumping all other uses, especially those uses enjoyed by the general public.

The consequences of this proposal are potentially alarming. While the mining industry focuses on critical minerals, the proposed language would allow operators who might claim any of the myriad minerals subject to the mining law, including, for example, uncommon varieties of limestone or building stone, and take as much public land for their mining operations as suits them. Our public lands would be overrun with people seeking to take advantage of this opportunity. Those of us who cherish public lands for their recreational, ecological, and aesthetic values would end up paying a huge price of this short-sighted policy.

By explicitly doing away with the bedrock discovery requirement of the General Mining Law, H.R. 209 would effectively gift our public lands to private, often foreign-owned, mining companies.[20] It would allow them to take as much of our public lands as they want for mineral development and for dumping their vast quantities of mine waste without any prospect that this land will ever be restored, and without paying a dime to the federal treasury. Anyone who cares about protecting our public lands for future generations should oppose this gift to the mining industry.

II. H.R. ___: The Transparency and Production of American Energy Act (TAP American Energy Act)

A. The TAP American Energy Act's Goals Are Incompatible with the Long-term Outlook for Oil and Gas

The war in Ukraine and the surge in demand for oil and gas that followed our recovery from the COVID-19 pandemic caused energy prices to spike and created an understandable effort to control oil and gas prices by increasing oil and gas supplies. OPEC's decision to take advantage of this situation and curtail production exacerbated this problem. The TAP American Energy Act is apparently intended to respond to the supply side of the problem by increasing domestic oil and gas production. Almost everything about this proposed legislation, however, would be counter-productive, especially when one considers the long-term outlook for oil and gas.

Like it or not the shift away from oil and gas will accelerate in future years. Within a decade or two, we will witness a rapid transformation of the transportation sector toward electrification. As a result, the demand for oil will plummet. Similarly, renewable energy will become an increasing staple of our domestic electricity supply putting downward pressure on natural gas prices. In the short term, the market will likely remain volatile, rising and falling in response to major events like war. But as time goes on and the pace of the transition accelerates, oil and supplies will likely outstrip demand and lead to price declines. Most of the players in the oil and gas industry understand this and have shied away from major new commitments to oil and gas development, especially those that will take years to develop. Government policy should reflect this understanding.

About a decade ago, some of us were urging the government to manage coal's decline in a responsible way so as to minimize the economic dislocations for workers and coal dependent

[20] See Multinational Mining Corporations Are Exploiting U.S. Taxpayers - Center for American Progress

communities.[21] Our pleas fell on deaf ears. What followed was a wave of bankruptcies from every major coal company that richly rewarded coal company executives for their mismanagement even as their employees and communities suffered severe losses.

While the parallels between coal and oil and gas development are not perfect the two industries are quite similar. Large companies with significant oil and gas assets face a serious risk of bankruptcy if they fail to anticipate and plan for the inevitable decline of that sector. Congress and the federal government could play an important role in managing the decline of the oil and gas industry in ways that will minimize economic dislocations, especially for workers and dependent communities. What Congress should be asking is how they can facilitate a just and orderly transition away from oil and gas and towards electric vehicles and renewable energy. By promoting more leasing and more oil and gas production at below market rates, the TAP American Energy Act seeks to do just the opposite and will lead us down the same path that faced the coal industry just a few short years ago.

B. Existing Federal Oil and Leases and Permits Far Exceed Current Demand

Currently, 37,496 federal oil and gas leases cover 26.6 million Federal onshore acres. Of that, 12.8 million acres are producing oil and gas from 96,100 wells. That leaves 53% or 13.8 million acres of public land under lease and not producing. The lack of production is not because the BLM has failed to issue drilling permits. More than 9,600 drilling permits have been issued for these lands and are not being used.[22] Leases that are not producing, some of which manage to go on for years, due to various extensions beyond the 10-year primary term, tie up our public lands, preventing their use for other purposes, including, for example, renewable energy.

Offshore leasing tells a similar story. Currently 12 million offshore acres are under lease but 55% of these leased lands are not currently producing oil and gas. To be sure, offshore leases can take longer to go from lease to production and the capital costs for developing these leases can be quite high. But it is not as if the industry is begging for new leases Indeed, just because the government "offers" more federal leases does not guarantee that this will lead to new leases being issued or more oil and gas being produced. The federal government "offers" many leases that receive no bids. During the four years of the Trump Administration, for example, Interior "offered" to lease 25 million acres onshore and 78 million acres offshore. Yet only about 10% of these lands ended up under lease.[23] The TAP American Energy Act also ignores the significant administrative burden on the BLM that results from having to offer too many leases that no one wants.

The recently enacted Inflation Reduction Act requires the federal government to offer at least 2 million acres of onshore acreage for lease and 60 million acres of offshore acreage before it can proceed with renewable energy development. It seems prudent to wait to see how these offers play out before insisting that even more acreage be offered for lease. Indeed, the rush to offer new leases and to issue more drilling permits seems wholly unnecessary in light of all of the existing acreage that is currently under lease and for which drilling permits have already been approved but that are not being developed.[24]

---

[21] See e.g., Managing coal's decline - WyoFile

[22] About Oil and Gas | Bureau of Land Management (blm.gov);Report on the Federal Oil and Gas Leasing Program (doi.gov)

[23] How much oil and gas comes from federal territory? – USAFacts

[24] About Oil and Gas | Bureau of Land Management (blm.gov); How much oil and gas comes from federal territory? – USAFacts

C. The TAP American Energy Act Would Deny the American Taxpayer a Fair Return Even as Oil Giants Post Record Profits

In 2022, Exxon post record profits of $55.7 billion. Shockingly, that is $6.3 million an hour![25] All of the majors posted similar record profits. These oil giants didn't "earn" these record profits because of clever management or good decisions. Their profits are due almost entirely to a rise in oil prices brought on by an unprovoked war by a Russian strongman and an oil cartel that decided to take advantage of this war. A reasonable congressional response to this situation might be to try to claw back some of these profits. Instead, the sponsors of the TAP American Energy Act appear to believe that it is better to add to the already overflowing oil company coffers while short-changing the American people through below market royalties and rental fees, and by reviving the much-criticized noncompetitive leasing program.[26] In a November, 2020 report, the GAO found that 98.8 percent of noncompetitive BLM oil and gas leases sold between 2003 and 2009 did not enter production during their 10-year primary term.[27]

The oil and gas industry already sits on almost 14 million acres of public land leases that are not being developed and that could be made available for other uses, including renewable energy development. Offering additional leases that are not likely to be developed, especially under the noncompetitive leasing program, is irresponsible and contrary to the public interest.

The oil and gas provisions of the TAP American Energy Act are trying to solve a problem that doesn't exist, and it would do so in ways that unnecessarily compromise our public lands. For all of the reasons set forth above, Congress should reject the provisions that seek to increase oil and gas leasing as provided in this proposed legislation.

D. The Automatic Suspension of Leases Following an Expression of Interest in an Adjacent Tract by a Lessee Invites Abuse

The Mineral Leasing Act allows the BLM to suspend an oil and gas lease "in the interest of conservation."[28] In a 2018 report, the GAO found that the BLM had suspended 2,750 oil and gas leases in 16 states, covering about 3.4 million acres of federally managed land.[29] Suspensions for 650 of those leases had lasted for more than 30 years. For 320 more, they lasted between 10 and 30 years. During lease suspensions, no revenues are collected. While there may have been good reasons for some of these suspensions, the GAO was rightly critical of the BLM for failing to set out the reasons for the suspensions. Moreover, the BLM has no process for periodically reviewing these suspensions and they likely go on for years without any review.

Lease suspensions have a significant potential for abuse, and the TAP Energy Act would exacerbate the problem by requiring the Secretary to approve a suspension within 15 days after receiving a request, whether or not that request has merit. Apparently, all the lessee must show is that it has an interest in leasing an adjacent tract. As the GAO found, lease suspensions can last for years and during the suspension period the government receives no revenue – no rental

---

[25] https://www.gov.ca.gov/2023/01/31/big-oil-made-record-2022-profits-while-fleecing-california-families/.

[26] See Oil and Gas: Onshore Competitive and Noncompetitive Lease Revenues, GAO-21-138,; see also, On Heels of BLM Oil and Gas Lease Sale, Chair Grijalva and Rep. Lowenthal Release GAO Report Showing Extent of Outdated Industry Giveaways, House Natural Resources Committee, December 14, 2020, describing the GAO report.

[27] Id.

[28] 30 U.S.C. § 209; see also 43 CFR § 3103.4-4.

[29] *Oil and Gas Lease Management: BLM Could Improve Oversight of Lease Suspensions with Better Data and Monitoring Procedures*, GAO-18-411 (2018), available at, https://www.gao.gov/products/gao-18-411.

payments nor royalties. Furthermore, the law makes no provision for periodically reviewing suspensions and for canceling them when appropriate.

If the government wants to allow suspensions it should do so transparently. A request should be made public, should be subject to public comment, and should be approved only after the BLM provides a written statement of reasons that explains why, through no fault of its own, the lessee is unable to develop the lease. Moreover, once granted, lease suspensions should be reviewed no less than every two years through a public process that ensures that the reasons for the suspension still hold true.

Lease suspensions allow the lessee to hold onto leases and tie up public lands for decades without paying rentals or royalties. Historically, these suspensions have been granted without public notice or review, and without any explanation of the reasons for the suspension. The TAP American Energy Act should fix these problems. Instead it proposes to make them worse.

E. The Proposed Changes to NEPA would Undermine the Law

NEPA has proved a useful scapegoat for those who complain about delays in decisionmaking. Yet the basic idea behind NEPA – that we should take a careful look at the potential consequences of a proposed action before moving forward – is hard to criticize. It is for that reason, that NEPA might very well be the most emulated American law ever written. Most developed countries follow a NEPA-like process and many state and local governments do so as well. To be sure, the NEPA process can bog down and lead to unnecessary delays, but the answer to this problem is not to gut the law, but to make smarter use of it. Unfortunately, the TAP American Energy Act proposes a number of changes to NEPA that would greatly undermine its effectiveness in promoting smarter and better government decisions.

First, Section 202 of the proposed law would codify the Trump era CEQ rules. Those rules have already been partially revised by the Biden Administration and further revisions are expected soon. But what ever one thinks about the merits of the competing versions of these rules, freezing them in place makes no sense. Climate change requires that the CEQ be nimble in responding to new circumstances as they arise. For example, the CEQ likely needs to consider building into its rules adaptive management criteria so that decisions that are impacted over time by changes on the ground can be adapted to reflect the new information. This will also require more careful monitoring so that changes can be detected in a timely fashion. Somewhat relatedly, the revised rules should include stronger mitigation language. Historically, agencies have had discretion as to whether to require mitigation measures as part of their decision. But when reasonable mitigation measures are available as determined by the agency during the NEPA process, those mitigation measures should be mandated. Finally, the Trump era rules make the same mistake as H.R. 209 in allowing a project applicant to prepare an environmental impact statement. For the reasons set forth in my comments on that proposal, such a provision should not be codified as proposed in this bill.

This review of the Trump era CEQ rules is in no way comprehensive and many other concerns might fairly be raised. But the broader point is that the CEQ needs flexibility to decide how best to implement NEPA's important mandates and it should not be subjected to the straight-jacket that would result from codification of the Trump era rules.

Section 205 of the proposed TAP American Energy Act raises a different problem. It provides for the reuse of previous EAs and EISs if the new proposed action is substantially the same as what was previously analyzed, and if the effects of the proposed action are substantially the same. But,

at a bare minimum, a new proposal will occur at a different location and it is almost inconceivable that the effects of an action at an entirely different location are going to be the same. Agencies would be wise to reuse the prior analysis of technologies and other information that is not dependent on a particular site, but it seems highly unlikely that they would ever be able to adopt wholesale a previous EA or EIS for a new project that was not the subject of an earlier analysis. Construing this language to allow the adoption of a previous assessment as proposed in Section 205 would violate the spirit if not the letter of NEPA.

Finally, Section 208 of the proposed TAP American Energy Act authorizes the Secretaries of Agriculture and Interior to accept and expend funds to expedite the processing of various energy-related actions and facilities. The law should make clear, however, that these funds should not be accepted from parties with an interest in the agency's decision. Rather, parties who are seeking permits should be charged reasonable fees for processing their permits as authorized by Section 304(a) of FLPMA.[30]

F. The Provisions Addressing Public Land Withdrawals in the TAP American Energy Act Handcuff the Land Use Planning Process

Proposed section 301 of the TAP American Energy Act imposes a significant burden on the Secretary of the Interior by denying him the authority to withdraw public lands, as authorized by Section 204 of FLPMA, until she has carried out various assessments and reported on those assessments to various House committees. Withdrawals are an important tool for ensuring that the certain public land values are protected from uses that would compromise them. Yet, section 301 would hobble the Secretary from using protective withdrawals when they might be needed.

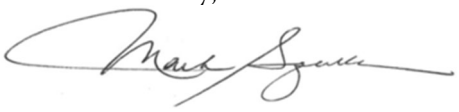
Section 301 further burdens the already cumbersome land use planning process by demanding a singular focus on minerals and seeking to skew planning in the direction of more mineral development, even if the agency has previously decided that certain lands are better suited to other uses. This arguably violates the multiple use, sustained yield mandates that both Interior and the Forest Service are required to follow, but it also handcuffs the ability of these agencies to make the critical choices about the appropriate uses that should allowed and should not allowed on particular tracts of public lands.

Finally, section 302(a) prohibits the President from "taking any action that would pause, restrict, or delay" the issuance of various leases, permits or approvals unless the land has been withdrawn. Similarly, section 302(b) broadly prohibits, with very limited exceptions, officials in the executive branch from rescinding leases, permits or claims for the extraction and production of any and all manner of minerals, locatable, leasable, or subject to sale under current law, or from taking other actions that could delay or restrict the issuance of new authorizations to produce such minerals. These limits on the executive violate a long tradition of entrusting the public lands agencies with the responsibility to follow a public process and to exercise their discretion in deciding how best to manage our public lands. For these reasons, the restrictions on Secretarial withdrawals under proposed section 301 and 302 should be rejected.

[30] 30 U.S.C. § 1734(a).

Thank you again for the opportunity to appear before the Committee today. I wish the Committee well as it seeks to address the important issues that surround mineral development on our nation's public lands.

Sincerely,



Mark Squillace