RMMLF Special Institute on NEPA

NEPA Processes for Energy Projects: Unique Challenges and New Directions

David Lazerwitz and Matthew Bostick
Farella Braun +Martel LLP

I. Introduction

Energy projects have long played a fundamental role in the history and evolution of the National Environmental Policy Act ("NEPA"). From the Supreme Court's decision in *Kleppe v. Sierra Club*[1] to *Vermont Yankee Nuclear Power Corporation v. Natural Resources Defense Council*[2], energy resource and electrical generating facility projects form a crucial backdrop in the judicial interpretation and application of the statute and its implementing regulations. The basis for this is clear: energy-related projects form a substantial component of "major federal action[s]"[3] triggering NEPA review and thereby result in a vast body of NEPA compliance documents, regulations, guidelines and directives. While the relationship between NEPA and energy projects is not new, it does give rise to unique issues and challenges, and corresponding considerations in terms of NEPA compliance and processes. This paper addresses the relationship between NEPA and energy projects by identifying the unique issues and challenges posed by energy projects and discussing the specific NEPA processes, accommodations and proposals for addressing those issues and challenges.

II. NEPA Challenges and Processes for Energy Projects

The unique issues and challenges posed by energy-related projects are as diverse as the types of the projects requiring NEPA review. Such projects range from the large scale development of fossil fuel resources to the construction of power plants for generating electricity to the siting of transmission facilities for delivering electricity to demand centers. The NEPA "handle" for such projects typically arises from the location of such projects on or within the federal public lands or jurisdictional waters (*e.g.*, solar and wind development on lands administered by the Bureau of Land Management), required federal permitting for projects situated on state or private property (*e.g.*, Clean Water Act Section 402 or 404 compliance) or federal funding (*e.g.*, Department of Energy's loan guarantee program).

From among this vast subject matter, we have selected three issues to focus our discussion: (1) the demands posed by programmatic planning for the large-scale development of energy-related resources on the federal public lands with a particular focus on solar and wind resources; (2) the timing pressures associated with the need for expedited development of renewable energy resources; and (3) the phasing needs for projects where advanced exploration is needed prior to resource development as with oil and gas development.

---

[1] *Kleppe v. Sierra Club*, 427 U.S. 390 (1976) (arising from the development of coal reserves in the Northern Great Plains).

[2] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978) (addressing the proposed construction of a nuclear power plant along the Connecticut River).

[3] 42 U.S.C. § 4332(2)(C).

Please cite as: Lazerwitz, David J., and Bostick, Matthew E., "NEPA Processes for Energy Projects: Unique Challenges and New Directions," *National Environmental Policy Act*, Paper No. 11, Page No. ___ (Rocky Mt. Min. L. Fdn. 2010).

A. Programmatic Planning for Large-Scale Resource Development

1. The Challenges Posed by Developing Large-Scale Resources on the Federal Public Lands

The development of large-scale energy resources to support both non-renewable and renewable energy production poses unique planning challenges for federal agencies. At the outset, the identification of available resources and the process for authorizing the development of those resources often requires advance planning. In instances where the relevant resource is subject to an advanced leasing process – such as with the development of coal or oil and gas under the Mineral Leasing Act of 1920 ("MLA")[4] – broader planning through the use of a programmatic environmental impact statement ("PEIS") can provide tremendous benefit in identifying the relevant resource, selecting areas appropriate for development and adopting the procedures and mitigation measures to guide development.

In circumstances where development is governed by individual actions – such as through the use of rights-of-way under the Federal Land Policy Management Act[5] for solar and wind projects – the efficacy of programmatic planning may be more difficult to gauge given the time constraints and difficulties associated with preparing a PEIS while development is underway. Nonetheless, even in such circumstances, a PEIS may provide a valuable tool for agency planning by collecting existing information to formulate best management practices and mitigation measures, amending land use plans and guiding future development. Below we address the NEPA guidance regarding programmatic documents and explore recent efforts to develop programmatic documents to guide wind and solar development on the public lands.

2. NEPA Processes for Programmatic Level Analyses and Tiering

NEPA and its implementing regulations expressly recognize both the need to prepare programmatic NEPA documents in the appropriate circumstances and the ability to tier later documents to programmatic review. CEQ's regulations define "major Federal action[s]" as, among other things, "new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated or approved by federal agencies."[6] Such programs may include "a group of concerted actions to implement a specific policy or plan; [or] systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive."[7]

In attempting to synthesize these rather broad guidelines, the regulations suggest that agencies "may find it useful" to evaluate "broad actions" in three possible ways:

---

[4] 30 U.S.C. §§ 181, *et seq.*

[5] *See* Title V of FLPMA, 43 U.S.C. §§ 1761-71 (2009).

[6] 40 C.F.R. § 1508.18. *See also id.* at § 1502.4(b) (EISs "may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs").

[7] *Id.* at § 1508.18(b)(3).

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment.[8]

The case law interpreting NEPA's PEIS requirement is surprisingly limited and there are very few cases where courts have ordered agencies to complete PEISs. In fact, the cases demonstrate significant deference to agencies in determining whether a PEIS is necessary in the first instance.[9] Of course, agency discretion regarding whether to prepare a PEIS may be overridden by congressional directive, as occurred with the oil shale PEIS discussed in Section II.B below.

When utilized appropriately in terms of timing and scope, programmatic NEPA review can provide tremendous benefits to agencies to plan and guide large-scale energy resource development and to expedite the review process. Administrative agencies often use programmatic analyses to evaluate cumulative effects and to formulate best management practices and mitigation efforts comprehensively, thereby reducing the need to address these at the site-specific level. As provided under NEPA, site-specific actions can then tier to the programmatic level analysis or incorporate portions of that analysis by reference – thereby potentially expediting review, avoiding duplicative analyses and focusing the relevant environmental analysis to the relevant stage of project development.

3. The Solar and Wind Programmatic EISs

Numerous examples of programmatic planning exist in the energy field ranging from the evaluation of large scale leasing programs such as those for coal and oil and gas to efforts to guiding the development of renewable energy resources on the public lands. Today, both the Interior Department and DOE are focused on addressing programmatic planning for wind and solar project development. As a result, BLM has initiated and, in the case of wind energy, adopted an energy development program and accompanying Programmatic Environmental Impact Statement under NEPA.[10] The solar energy development program and PEIS, being

---

[8] *Id.* at § 1502.4(c).

[9] *See, e.g., Kleppe*, 427 U.S. at 412 (holding that DOI did not act arbitrary and capriciously in deciding not to prepare a regional PEIS coal development for its Northern Great Plains Resource Program following a national PEIS for coal development); *National Wildlife Fed'n v. Appalachian Reg'l Comm'n*, 677 F.2d 883, 888, 891 (D.C. Cir. 1981) (decision whether to prepare a PEIS is committed to agency discretion and should not be reversed "unless there were persuasive evidence that an agency acted arbitrarily in refusing to prepare a [PEIS]").

[10] *See* U.S. Dep't of the Interior, Bureau of Land Management, Record of Decision, Implementation of a Wind Energy Development Program and Associated Land Use Plan Amendments (Dec. 2005), approving Final

jointly prepared with the Department of Energy, is anticipated in draft in December 2010.[11] We provide an overview of both programmatic efforts below.

a. BLM's Wind Energy Development Program and PEIS

In 2003, BLM embarked upon a process to develop a wind energy development program and, in conjunction with that process, prepared a PEIS pursuant to NEPA and Programmatic Biological Assessment pursuant to the Endangered Species Act. The Wind PEIS identified and addressed three potential program alternatives, including the implementation of a wind energy development program on all BLM lands on which wind project development may be technically and economically viable under BLM's maximum potential development scenario. BLM selected its MPDS alternative.

A critical component of BLM's PEIS and program adoption is the development and incorporation of specific programmatic policies and BMPs. BLM's programmatic policies provide, at least initially, that the agency will not issue right-of-way grants for development in areas that are part of the National Landscape Conservation System (*e.g.*, Wilderness Areas) and Areas of Critical Environmental Concern, as well as areas where resource impacts cannot be mitigated or will conflict with existing or planned multiple use activities or land use plans.[12] These policies further provide that, to the extent possible, wind energy policies shall be developed in a manner that will not prevent other land uses, such as mineral extraction, livestock grazing and recreational use. For purposes of individual project NEPA compliance, BLM envisioned that some projects could proceed by tiered environmental assessment ("EA") tied to the PEIS – an action that could, in theory, streamline individual project NEPA compliance.

BLM's BMPs, which were incorporated into BLM's 2008 Wind Policy, are applicable to all wind energy activities on BLM-administered public lands. As explained by BLM, the BMPs "establish environmentally sound and economically feasible mechanisms to protect and enhance natural and cultural resources" and "identify the issues and concerns that need to be addressed by project-specific plans."[13] BMP examples include use of existing roads where possible, monitoring environmental and species conditions during construction, operation and decommissioning, configuration of equipment (such as wind turbines) to avoid landscape features known to attract raptors, integration of project features into the surrounding landscape and development of storm water management plans.

Programmatic Environmental Impact Statement on Wind Energy Development on BLM-Administered Lands in the Western United States [hereinafter collectively "Wind PEIS"].

[11] *See* U.S. Dep't of the Interior, Bureau of Land Management, Solar PEIS Schedule Update (Apr. 27, 2009), *available at* http://solareis.anl.gov/news/index.cfm.

[12] U.S. Dep't of the Interior, Bureau of Land Management, BLM Wind Energy Development Program Policies and Best Management Practices, Attachment A to Wind PEIS ROD, at A-2 (Dec. 2005). Of note, BLM later clarified the prohibition of wind project development in ACECs, explaining that ACECs "will not be universally excluded from wind energy site testing and monitoring or wind energy development but will be managed consistent with the management prescriptions for the individual ACEC." BLM 2008 Wind Policy at 10.

[13] *Id.*

In conjunction with issuing its ROD on the Wind PEIS, BLM amended 52 land use plans to incorporate the programmatic policies and BMPs.[14] In some instances, these amendments also incorporated the identification of specific areas where wind energy development would be excluded, but these amendments were not comprehensive and did not include the designation of the specific areas approved for wind energy development. For those land use plans not amended – which includes all of the plans for Arizona and California – BLM explained that these areas would be addressed in conjunction with ongoing or upcoming land use plan amendments.[15]

b. BLM's Solar Energy Development Program and PEIS

In May 2008, BLM and DOE announced the initiation of a process to develop a solar energy development program for utility-scale solar projects and conduct an accompanying PEIS.[16] The purpose of the proposed solar program closely tracks that of the wind energy development program and, while its outcome is yet unknown, many expect it will generally model the wind program. The program and PEIS aim to determine whether the agencies should develop and implement agency-specific programs that would establish environmental policies and mitigation strategies (*e.g.*, BMPs) for solar development on BLM-administered land in six western states, Arizona, California, Colorado, New Mexico, Nevada and Utah.[17] DOE is providing technical support for BLM's analysis and independently evaluating the development of its own program of environmental policies and mitigation strategies to apply to projects supported by DOE on federal, state and private lands.[18]

Much like the wind energy development program, the agencies' proposed action expects to identify BLM-administered land in the six state study area upon which solar project development is likely to occur over the next 20 years through a "reasonably foreseeable development" model. This analysis includes identifying those lands that may be environmentally suitable for solar energy development and, conversely, those areas to be excluded from such development. As a result, the proposed Solar PEIS scope excludes from consideration lands that BLM has previously identified as "environmental sensitive." BLM envisions thereafter amending the applicable land use plans to identify these areas and incorporate its environmental policies and mitigation strategies. Further, like the Wind PEIS, the agencies anticipate that the Solar PEIS will facilitate, but not replace, project specific environmental analysis through tiering to the PEIS.

Unlike the Wind PEIS, however, the agencies are considering whether the designation by BLM of additional electricity transmission corridors on BLM-administered lands is necessary to facilitate utility-scale solar energy development – a critical issue for project development which

---

[14] U.S. Dep't of the Interior, Bureau of Land Management, BLM Land Use Plan Amendments to Adopt the Wind Energy Development Program, Attachment B to Wind PEIS ROD (Dec. 2005).
[15] *Id.* at B-2.
[16] Notice of Intent to Prepare a Programmatic Environmental Impact Statement to Evaluate Solar Energy Development, Develop and Implement Agency-Specific Programs, Conduct Public Scoping Meetings, Amend Relevant Agency Land Use Plans, and Provide Notice of Proposed Planning Criteria, 73 Fed. Reg. 30908 (May 29, 2008).
[17] *Id.* at 30910.
[18] *Id.* By way of example, this would include projects financed by and through DOE's loan guarantee program.

implicates transmission corridor studies occurring at both the regional and state level.[19] In fact, on April 27, 2009, the agencies announced a schedule revision for issuance of the draft PEIS until the fall of 2009 to, among other things, await preliminary results of the Western Governors' Association's Western Renewable Energy Zone transmission study.[20]

During preparation of the draft PEIS, on June 30, 2009, BLM and DOE also announced the location of 24 "solar energy study areas" on BLM-administered lands for which the agencies will consider designating Solar Energy Zones ("SEZs") as part of the Solar PEIS process.[21] The agencies describe SEZs as "specific locations determined best suited for large scale production of solar energy," but it is not yet clear whether and, if so, how BLM will administer SEZs for solar development, which could include competitive or non-competitive procedures.[22] The solar energy study areas each encompass at least 2,000 acres of land, are situated near access roads and transmission routes, have slopes of less than five percent and exclude environmentally sensitive areas. In total, these areas encompass approximately 675,000 acres of BLM lands.[23]

Interestingly, of the 220-plus solar project applications pending on BLM land, only 35 of those applications are situated within the solar energy study areas.[24] Thus, the solar energy study areas being evaluated in the PEIS process – which could become SEZs – do not directly address the majority of pending solar project applications, many of which reflect executed PPAs with power purchasers, pending transmission interconnection requests and the investment of significant time and resources in project-related studies. Despite the announcement of the solar energy study areas, BLM will continue to process solar applications filed prior to June 30, 2009 both within and outside of these study areas and to accept new solar applications on lands outside of the study areas.[25] These applications will be subject to BLM's existing application procedures but, to the extent a project is not approved until after issuance of the PEIS Record of Decision ("ROD"), that project may be subject to mitigation requirements in the ROD.[26] Applications filed after June 30, 2009 on lands within the solar energy study areas will, however, not be

---

[19] At the regional level, the Western Governors' Association, in conjunction with DOE, is currently conducting a four phase study to identify "Western Renewable Energy Zones," which are those areas throughout the Western Interconnection grid that feature the potential for large-scale development of renewable resources in areas with strong resource availability and low environmental impacts, and to facilitate the development of high voltage transmission in these areas. *See* http://www.westgov.org/wga/initiatives/wrez. Several states are also conducting their own statewide transmission initiatives, led by California's Renewable Energy Transmission Initiative, which seeks to identify transmission projects to support renewable energy development, designate transmission corridors and facilitate transmission and generation project permitting. *See* http://www.energy.ca.gov/reti/background.html

[20] *See* Solar Energy Development Programmatic EIS Information Center, PEIS Schedule Update (Apr. 27, 2009), *available at* http://solareis.anl.gov/news/index.cfm#ScheduleUpdate.com

[21] U.S. Dep't of the Interior, Bureau of Land Management, Notice of Availability of Maps and Additional Public Scoping for Programmatic Environmental Impact Statement to Develop and Implement Agency-Specific Programs for Solar Energy Development; Bureau of Land Management Approach for Processing Existing and Future Solar Applications, 74 Fed. Reg. 31307 (June 30, 2009) [hereinafter "Solar Energy Study Area Notice"].

[22] *Id.* at 31308.

[23] *See* U.S. Dep't of the Interior, Bureau of Land Management, Q&As: BLM Solar Programmatic Environmental Impact Statement at 5 (June 29, 2009), *available at* http://www.doi.gov/news/09_News_Releases/SolarEnergyQA.pdf.

[24] *Id.* at 6.

[25] Solar Energy Study Area Notice at 31308, *supra* note 72.

[26] *Id.*

processed until after the ROD has been issued for the Solar PEIS.[27]

c. Remaining Issues for NEPA Compliance with Solar and Wind

Perhaps the most significant near-term issue facing solar and wind project development on the public lands is the uncertainty surrounding the NEPA process and timing. BLM's project application pipeline is substantial, and that pipeline continues to grow with, in particular, no large-scale solar projects approved as of this writing. Moreover, while BLM's PEIS processes seek to streamline project-specific NEPA compliance through tiered EAs, it is not clear that this is actually occurring in the wind project arena or will occur for solar projects that will almost certainly continue to require full EIS compliance. Thus, in contrast to MLA-based leasing programs where advanced planning is required, the efficacy of programmatic planning for non-leased resources such as wind and solar largely remains to be seen during the coming years.

B. Expedited Project Development and Streamlining NEPA Compliance

One of the primary issues emerging from repeated NEPA reform efforts addresses the need to streamline or expedite NEPA review, which, during its 40 years of existence, has become increasingly complicated and time consuming. Below we address the time pressures placed on NEPA review, particularly in the context of renewable energy development, and the corresponding statutory, regulatory and administrative processes to streamline NEPA compliance.

1. New Challenges Posed by Today's Energy Projects

a. The Boom in Renewable Energy and Transmission Projects

There is perhaps no other time in our history – let alone since the enactment of NEPA in 1970 – when the pressure to develop new energy resources has been greater. The combination of recently peaked fossil fuel prices, reductions in renewable technology costs and government initiatives to simultaneously curb greenhouse gas emissions and mandate renewable energy generation have resulted in unprecedented focus on the expedited development of renewable energy resources and the transmission capacity to deliver power from these resources. Today, 29 states and the District of Columbia impose "renewable energy standards" mandating that electrical utilities produce a certain percentage of their power from renewable resources by specific deadlines.[28] Congress has similarly stepped in with several directives to administrative agencies, best exemplified by the mandate in the Energy Policy Act of 2005 ("EPAct of 2005") for the Department of the Interior to install 10,000 MW of non-hydropower renewable energy projects on the public lands by 2015.[29]

b. Time and Administrative Constraints on Project Review

As a result of these private and public sector actions, federal public land management

---

[27] *Id.*

[28] *See* Federal Energy Regulatory Commission, Renewable & Energy Efficiency – Generation and Efficiency Standards, *available at* http://www.ferc.gov/market-oversight/othr-mkts/renew/othr-rnw-rps.pdf.

[29] Energy Policy Act of 2005, Pub. L. No. 109-058, § 211 (2005).

agencies such as the BLM and U.S. Forest Service ("USFS") and funding agencies such as the U.S. Department of Energy ("DOE") face an increasing backlog of applications to site, finance, construct and operate renewable energy-related projects. These projects principally focus on renewable energy technology manufacturing facilities and power development projects – all of which trigger some level of NEPA review. Moreover, the pressure to review these projects expeditiously is critical in light of DOE's loan guarantee programs, particularly its Section 1705 program funded through the American Reinvestment and Recovery Act ("ARRA"), which provides federal loan guarantees to secure financing for the construction of renewable energy and transmission projects but requires that such projects commence construction by September 30, 2011.[30]

c. Existing Time Delays Associated with NEPA Review

At the same time that federal agencies are addressing the rapid expansion in renewable energy applications, the complexity and time delays associated with NEPA review could not be greater. Faced with increasing levels of public comment and litigation, federal agencies increasingly produce EAs and EISs of extraordinary complexity and length, far exceeding CEQ's guidelines that EISs should normally be less than 150 pages[31] and EAs should be 10 to 15 pages in length.[32] Consequently, the time associated with NEPA review and compliance has vastly expanded. While CEQ advised in 1981 that the entire EIS process for "large complex energy projects" should require only 12 months,[33] a 2008 study concluded that the average EIS took federal agencies 3.4 years to complete.[34]

2. NEPA Processes for Streamlining Review

NEPA and its implementing regulations contain limited mechanisms to expedite agency review and compliance where appropriate. These processes are increasingly being supplemented by legislative and administrative agency initiatives specifically addressing energy projects. Both sets of processes are addressed below.

a. General Statutory and Regulatory Streamlining Provisions

NEPA's principal statutory and regulatory mechanisms for streamlining review arise from the level of review afforded a particular project. At the broader level, as discussed above, this involves the ability to prepare programmatic or broader-level EISs with subsequent site-specific documents, typically EAs, tiered to that EIS. Congress also possesses authority to exempt projects from or otherwise streamline the NEPA process for certain projects or a class of

---

[30] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §§ 1101, 1603 (2009) (establishing, among other things, a temporary program under Section 1705 of Title XVII of Energy Policy Act of 2005). The Section 1705 program provides $2.1 billion in appropriations to support $21 billion in loan guarantees. *See* DOE, Loan Guarantee Programs website, *available at* http://www.energy.gov/recovery/lgprogram.htm

[31] 40 C.F.R. § 1502.7.

[32] Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981) (hereinafter "Forty Questions Memorandum").

[33] Forty Questions Memorandum at 18037.

[34] Piet de Witt and Carole de Witt, How Long Does It Take to Prepare an Environmental Impact Statement," 10 Environmental Practice, Journal of the National Association of Environmental Professionals 164 (2008).

projects.[35] Although not specifically tied to renewable energy projects, Congress has required that projects funded under the ARRA be completed on "an expeditious basis" and "the shortest existing applicable process" under NEPA – a process which remains to be defined.[36]

Beyond the programmatic sequencing of review and specific statutory exemptions, NEPA and agency implementing regulations permit the use of categorical exclusions ("CEs"). CEQ regulations define a "categorical exclusion" as "a category of actions which do not individually or cumulatively have a significant effort on the human environment."[37] The regulations also provide that agency procedures adopting CEs shall provide for "extraordinary circumstances in which a normally excluded action may have a significant effect," and therefore require an EA or EIS.[38]

Existing CEs in the energy arena are typically directed at oil and gas exploration and development and include:

- BLM's approval of Notices of Intent to conduct geophysical exploration of oil, gas, or geothermal when no temporary or new road construction is proposed (516 Department Manual ("DM") 11.9B(6)).

- The Minerals Management Service's approval of offshore leases or unit exploration, development/production plan or a Development Operation Coordination Document in the central or western Gulf of Mexico except where enumerated conditions exist (516 DM 15.5C(10)).

- USFS's approval of a Surface Use Plan of Operations for oil and natural gas exploration and initial development activities, associated with or adjacent to a new oil and/or gas field or area, so long as the approval will not authorize activities in excess of enumerated size and types (36 C.F.R. § 220.6(e)(17)).

- DOE's approval of activities associated with certain energy conservation measures, bench-scale research and development and specified pilot and demonstration projects (10 C.F.R. Part 1021, Appendices A & B to Subpart D)).

In February 2010, in response to the expansion in the number, range and use of CEs, CEQ issued draft guidance elaborating on the process for establishing and applying new CEs, which will likely result in greater scrutiny on the creation and use of CEs in the future.[39] In addition, HR 3534, passed by the House of Representatives and now on the Senate calendar, would repeal certain EPAct categorical exemptions, including those under which the Deepwater Horizon rig was exempted from NEPA review. In light of the likely curtailment on the future

---

[35] *See* D. Mandelker, NEPA Law and Litigation, § 5.6 (2008) (statutory NEPA exemptions).
[36] American Recovery and Reinvestment Act of 2009, § 1609, Pub. L. No. 111-5 (2009) (mandating expeditious NEPA review for stimulus-funded projects).
[37] 40 C.F.R. § 1508.4.
[38] *Id.*
[39] *See* CEQ, Establishing and Applying Categorical Exclusions under the National Environmental Policy Act (Feb. 18, 2010), *available at* http://ceq.hss.doe.gov/nepa/regs/Categorical_Exclusion_Draft_NEPA_Guidance_FINAL_02182010.pdf.

use of CEs and the lack of existing CEs directly applicable to renewable energy development projects, it is unlikely that CEs will play a significant role in addressing the need to expedite review and development of renewable energy projects.

b. Recent Programs for Expediting Review for Energy Projects

Within the last five years, both Congress and administrative agencies have significantly increased efforts to address the streamlining of NEPA review for energy-related projects. These efforts range from specific statutory exemptions for certain types of projects to providing a priority or "fast track" focus to specific types of energy projects. Both levels of action hold significant promise in streamlining NEPA review and are already producing tangible results in the form of condensed timeframes for project approvals. Below we discuss examples of both types of approaches through the Energy Policy Act of 2005 ("EPAct of 2005") and the BLM's efforts focused on renewable energy projects on the federal public lands.

(i) The Energy Policy Act of 2005

The EPAct of 2005 established several different mechanisms specifically targeting the streamlining of NEPA review for energy projects. This included, among other provisions, the creation of a new oil shale leasing program with the goal of developing domestic oil shale, tar sands and other strategic unconventional fuels to reduce the country's dependence on foreign oil imports.[40] In an effort to expedite development of these resources, Congress directed the Secretary of Interior to prepare a PEIS and establish a commercial leasing program within 18 months of passage of the Act, and to publish final regulations implementing the program within 6 months of completion of the PEIS.[41] While the offering of an individual lease by BLM still requires NEPA compliance, BLM is able to expedite the review process through the cumulative review of multiple tracts of land through the PEIS and direct amendment of the applicable resource management plans for the relevant areas.[42] In this manner, large-scale, advanced programmatic planning was able to significantly reduce the development and environmental review process through effective use of tiering, a process which stands is marked contrast to the situation confronting solar and wind development, as discussed above.

(ii) BLM's Fast Tracking for Renewable Project Review

Beyond an express statutory exemption from NEPA compliance, there is no greater means to facilitate NEPA review than an administrative agency's own policies and procedures. In response to the time pressures placed on renewable energy project development, several agencies have placed increased emphasis and dedicated specific resources to facilitating expedited NEPA review. The BLM's efforts associated with fast-track review of renewable energy projects is one example which is bearing real results.

Commencing in 2007, Interior announced several initiates which have proven key to addressing its backlog of renewable energy project applications on the public lands. These include:

---

[40] *See* Energy Policy Act of 2005, Pub. L. No. 109-058, § 369 (2005) (codified at 42 U.S.C. § 15927).
[41] *See* 42 U.S.C. §§ 15927(d)(1)-(2).
[42] *See generally* BLM oil shale leasing regulations at 43 C.F.R. Part 3920.

- BLM instructional memoranda for solar and wind development reaffirm the EPAct's directive to develop 10,000 megawatts of non-hydropower renewable energy projects on the public lands by 2015 by expressly encouraging the development of wind and solar energy and, in the case of solar, providing that BLM will identify right-of-way applications for solar energy projects "as a high priority field office workload" and process applications in a timely manner.[43]

- The Secretary of the Interior established a Departmental Task Force on Energy and Climate Change, which makes the development, production and delivery of renewable energy one of the Interior Department's "highest priorities."[44] In an effort to begin to address the backlog of right-of-way applications and establish a more coordinated approach to process solar and wind project applications, Secretary Salazar also announced the opening of four new BLM Renewable Energy Coordination Offices and increased staff to support those offices.[45]

- BLM's creation of a "fast track" process to identify specific renewable energy project applications based on the advanced stage of permitting and to direct BLM resources to reviewing those projects in time for potential approval to meet ARRA funding deadlines. This process resulted in the designation of 14 solar, 7 wind, 3 geothermal and 7 transmission projects.[46]

BLM's prioritization of projects and dedication of resources to conducting environmental review is today producing tangible results. While most of the relevant projects are still undergoing review and await records of decision, several projects have proceeded from the announcement of the notice of intent to prepare an EIS to a published final EIS in approximately 14 months, which is a tremendous accomplishment in light of the new technology application and large-scale nature of these projects.[47] Analogous efforts are underway at DOE to facilitate expedited NEPA compliance where DOE serves as the lead agency for approval. In the end, these agency-directed efforts are likely to continue to result in the most significant advancement in streamlining NEPA review.

C. NEPA Review of Phased Projects

1. Large-Scale Development of Oil and Natural Gas Resources Is a Long-Term, Multi-Stage Process

Finding and producing oil and natural gas on the federal public lands or in federal

---

[43] *See* U.S. Dep't of the Interior, Bureau of Land Management, Solar Energy Development Policy, Instruction Memo. No. 2007-097 at 2-3 (Apr. 4, 2007); U.S. Dep't of the Interior, Bureau of Land Management, Wind Energy Development Policy, Instruction Memo. No. 2009-043 at 1 (Dec. 19, 2008).

[44] Secretary of the Interior, Order No. 3285, Renewable Energy Development by the Dep't of the Interior (March 11, 2009).

[45] Press Release, U.S. Dep't of the Interior, Secretary Salazar Pledges to Open Four Renewable Energy Permitting Offices, Create Renewable Energy Teams (May 5, 2009).

[46] Press Release, U.S. Dep't of the Interior, BLM Concentrating on Renewable Energy Projects that Could Meet Stimulus Funding Deadline (Dec. 29, 2009). A list of the projects identified for fast track review is located at http://www.blm.gov/wo/st/en/prog/energy/renewable_energy/fast-track_renewable.html.

[47] *See id.*

jurisdictional waters is a multi-stage endeavor, requiring preliminary land use planning by federal agencies and advanced exploration by oil and gas companies prior to drilling. In basic terms, the process involves at least four distinct phases: (1) land use planning, (2) leasing, (3) exploration, and (4) development and production – each of which might comprise one or more major federal actions triggering NEPA review.

A variety of federal laws establish procedures governing each phase of a project. Among them, FLPMA and the MLA require the following process for onshore oil and gas development on federal lands, as described in a recent Tenth Circuit opinion:

> First, BLM develops an area-wide resource management plan, specifying what areas will be open to development and the conditions placed on such development. 43 U.S.C. § 1712(a). Second, BLM may grant leases for the development of specific sites within an area, subject to the requirements of the plan. § 1712(e); *see also* 43 C.F.R. § 1610.5-3. Finally, after exploring the leased lands, a lessee may file an application for permit to drill ("APD'"), which requires BLM review and approval. 43 C.F.R. § 3162.3-1(c).[48]

The statute governing offshore oil and gas activities, the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1331 *et seq.*, likewise establishes "four distinct statutory stages to developing an offshore oil well: (1) formulation of a five year leasing plan by the Department of the Interior; (2) lease sales; (3) exploration by the lessees; (4) development and production. Each stage involves separate regulatory review . . . ."[49]

NEPA overlays these and other statutes "at all stages of the process"[50] governing oil and gas extraction, any of which might comprise a "major Federal action[] significantly affecting the quality of the human environment."[51] Further, at least one statute, OCSLA, expressly requires NEPA review at the lease sale stage and then again at the development and production stage.[52] That mandate does not foreclose the possibility of additional NEPA review at, *inter alia*, the exploration stage under OCSLA, as "NEPA also applies to each stage of its own force and effect."[53]

---

[48] *New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 689 n.1 (10th Cir. 2009).
[49] *Sec'y of the Interior v. Calif.*, 464 U.S. 312, 337 (1984).
[50] *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 977 (9th Cir. 2006).
[51] *See, e.g., N. Alaska Envtl. Ctr.*, 457 F.3d at 973 (considering adequacy under NEPA of EIS prepared by BLM for its plan to offer long-term oil and gas leases in Alaska's Northwest Planning Area); *Conner v. Burford*, 848 F.2d 1441, 1443 (9th Cir. 1988) (reviewing United States Forest Service sales of oil and gas leases for national forest land in Montana without preparing an EIS); *New Mexico ex rel. Richardson*, 565 F.3d at 689 (adequacy of EIS prepared by BLM for amendment to resource management plan governing possible oil and gas development on publicly owned land in New Mexico); *Village of False Pass v. Clark*, 733 F.2d 605, 607 (9th Cir. 1984) (adequacy of EIS for proposed sale of oil leases in the St. George Basin of the Bering Sea).
[52] 43 U.S.C. § 1346(a)(1) ("The Secretary shall conduct a study of any area or region included in any oil and gas lease sale or other lease in order to establish information needed for assessment and management of environmental impacts . . . ."); 43 U.S.C. § 1351(e)(1) ("At least once the Secretary shall declare the approval of a development and production plan in any area . . . to be a major Federal action.").
[53] *See Village of False Pass v. Clark*, 733 F.2d 605, 609 (9th Cir. 1984).

2. Uncertainty Presents Particular NEPA Problems for Phased Projects

Uncertainty is inherent in many oil and gas projects, which can involve speculative, capital-intensive, and, as was made clear in the Gulf last summer, risky exploration and development phases.[54] The time horizon for these projects may stretch three, five, or tens of years into the future and include multiple stages of environmental review. This presents particular NEPA problems where a planning, leasing or exploration stage NEPA analysis does not – and cannot – account for certain impacts to the environment because those impacts or not yet sufficiently likely or because the agency lacks sufficient information to assess them. In such circumstances, uncertainty in multi-stage projects bumps up against NEPA's mandate that all environmental analysis be conducted at "the earliest possible time,"[55] and environmental impacts assessed as soon as they are "reasonably foreseeable."[56]

At least one federal appeals court has acknowledged and allowed for uncertainty in an agency's NEPA analysis of phased projects. In a variety of circumstances the Ninth Circuit has followed the general approach that "staged development encourages staged consideration of uncertain environmental factors."[57]

a. Leasing Federal Land Does Not Necessarily Require an EIS if Preceded by Another Environmental Review

The Ninth Circuit requires that an EIS be prepared before any "irreversible and irretrievable commitment of resources" by a federal agency to a project.[58] Applying this standard, the court has held that no EIS is required for the sale of oil and gas leases on federal land where those leases restrict occupying or using the surface of the leased land without further specific approval.[59] In *Conner v. Burford*, the court likened acquiring such "no surface occupancy" leases to obtaining a right of first refusal for later development—an "exclusive right of development, *should* development be allowed"—but not amounting to "the go/no go point of commitment at which an EIS is required."[60] Because the government retained absolute authority to decide whether to eventually allow development of the leased lands, the lease sales themselves did not constitute "an irreversible commitment of resources requiring preparation of an EIS."[61]

b. Determining Whether Later, Site-Specific Analysis Can Wait Involves A Case-By-Case, Fact-Specific Inquiry

---

[54] The American Petroleum Institute has noted, "Companies can evaluate leases for several years only to determine that they do not contain oil or natural gas in commercial quantities. The road to bring the oil and natural gas to market – obtaining the lease, evaluation, and exploration and production – is a long and complicated one." Am. Petrol. Inst., *Facts About Non-Producing Leases*, *available at* http://www.api.org/policy/exploration/upload/Fact_Sheet_NonProducingLeases.pdf.

[55] 40 C.F.R. § 1501.2. *See also Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002) ("NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can reasonably be done.").

[56] 40 C.F.R. § 1502.22.

[57] *Village of False Pass*, 733 F.2d at 616.

[58] *Conner v. Buford*, 848 F.2d 1441, 1446 (9th Cir. 1988).

[59] *Id.* at 1444.

[60] *Id.* at 1447-48 (emphasis added).

[61] *Id.* at 1447.

In contrast, where the government cannot, after issuing a leasing plan, wholly forbid development on the federal lands designated in the plan, the Ninth Circuit has held that approval of the leasing program does represent an irretrievable commitment of resources.[62] In such cases an EIS is required and the focus shifts to whether the EIS sufficiently analyzed site specific impacts.

This was the case in *Northern Alaska Environmental Center v. Kempthorne*, a 2006 Ninth Circuit decision in which the court examined BLM's FEIS for a leasing program on federal land in Alaska, where at the time of the challenged NEPA review the agency "had no way of knowing what, if any, areas subsequent exploration would find most suitable for drilling."[63] Plaintiff environmental groups argued that the EIS was inadequate because it lacked site specific analysis for each location where drilling might occur following exploration.[64] The court noted the "chicken or egg conundrum" presented by the plaintiffs' approach: "The problem is that until the lessees do exploratory work, the government cannot know what sites will be deemed most suitable for exploratory drilling, much less for development . . . . [I]f plaintiffs' interpretation of its requirements were adopted, NEPA could never be satisfied in the circumstances of this case."[65]

The court affirmed the adequacy of the EIS for BLM's leasing plan, agreeing with the D.C. Circuit in *North Slope Borough v. Andrus*, 642 F.2d 589, 600 (D.C. Cir. 1980), that in multi-stage oil and gas projects "[t]he Secretary [of Interior] plainly cannot be expected or required to wait until the totality of environmental effects is known."[66] Rather, in determining the adequacy of environmental review in such cases, courts should be guided by the general principle that "when an agency complies in good faith with the requirements of NEPA and issues an EIS indicating that the agency has taken a hard look at the pertinent environmental questions, its decision should be afforded great deference."[67] Here, there was no basis to find that the EIS was arbitrary, capricious, or done in bad faith.[68] The potential environmental effects on each parcel in the planning area were not yet identifiable, and such analysis could wait until later permitting stages at which time the government would be required to conduct additional NEPA review.[69]

c. The Timing of NEPA Analysis of Future Uncertain Impacts is Similarly to be Determined on Case-By-Case Basis

---

[62] *N. Alaska Envtl. Ctr.*, 457 F.3d at 976.
[63] *Id.* at 974.
[64] *Id.* at 973.
[65] *Id.* at 976.
[66] *Id.* at 977.
[67] *Id.*
[68] *Id.*
[69] *Id.* The Tenth Circuit has expressly stated that there is no bright-line rule that dictates whether site-specific analysis of environmental impacts can wait until later stages of a project. *New Mexico ex rel. Richardson*, 565 F.3d at 717-18 ("Instead, the inquiry is necessarily contextual. Looking to the standards set out by regulation and by statute, assessment of all 'reasonably foreseeable' impacts must occur at the earliest practicable point, and must take place before an 'irretrievable commitment of resources' is made. Each of these inquiries is tied to the existing environmental circumstances, not to the formalities of agency procedures. Thus, applying them necessarily requires a fact-specific inquiry.").

In *Village of False Pass v. Clark*, the Alaskan Village of False Pass and plaintiff environmental organizations challenged BLM's FEIS for its proposed sale of oil leases in the St. George Basin of the Bering Sea.[70] Highlighting the high-risk, high-reward nature of oil exploration and development in that region, the court noted that the "[a]lthough the chances of discovering [large] commercial quantities of oil or gas are about 28% and 37% respectively, the oil companies bidding on St. George Basin leases are willing to spend almost a half-billion dollars for the right to investigate those chances on the specific parcels of [the lease sale area]."[71]

The *Village of False Pass* plaintiffs challenged the FEIS for the lease sale on grounds that, *inter alia*, it did not include a worst case analysis of a major oil spill in St. George Basin, as was then required by CEQ regulations under certain circumstances.[72] The court determined that the plaintiffs' argument was undermined by the statutory structure of OCSLA, in which "[e]ach stage involves separate regulatory review *that may, but need not*, conclude in the transfer to lease purchasers of rights to conduct additional activities on the [Outer Continental Shelf]."[73] It adopted the Fifth Circuit's statement that "the unavailability of information, even if it hinders NEPA's 'full disclosure' requirement, should not be permitted to halt all government action . . . . This is particularly true when information may become available at a later time and can still be used to influence the agency's decision."[74]

Here, the lease sale itself did not mandate activity that could, on its own, result in an oil spill.[75] Decisions following exploration of the lease sale area would result in improved information about the probability and location of a major spill available at the later stages of the OCSLA process "when, at least once," BLM would be required to prepare another EIS that could better assess the impact of a major spill.[76] Ruling "[w]ithin the staged structure of OCSLA and on the facts of this case," the court held that the FEIS lease sale complied with NEPA.[77]

3. The "Staged Consideration of Uncertain Environmental Factors" Will Continue to be Relevant as Climate Impacts Factor Into the Analysis

Phased oil and gas projects require staged NEPA analysis by federal agencies to account for uncertainty in projects' pre-production phases. Statutes such as OCSLA, as well as NEPA operating of its own force and effect, mandate multiple iterations of environmental analysis and preclude a single environmental review of a phased oil and gas project, no matter how carefully an agency tries to build in consideration of possible future environmental impacts.[78]

---

[70] 733 F.2d at 607.
[71] *Id.*
[72] *Id.* at 608.
[73] *Id.* (quoting *Sec'y of the Interior v. Calif.*, 464 U.S. at 337) (emphasis added). *But see League for Coastal Protection v. Norton*, 2005 WL 2176910, *5 (N.D. Cal. Aug. 31, 2005) (holding NEPA review of lease suspensions should have considered impacts of future exploration and development activity where "lessee had already made explicit plans to drill under at least one lease the very day the corresponding proposed suspension expires").
[74] *Id.* at 614 (quoting *Sierra Club v. Sigler*, 695 F.2d 957, 970 (5th Cir. 1983)).
[75] *Id.* at 616.
[76] *Id.*
[77] *Id.* at 617.
[78] *Compare Te Moak Tribe of Western Shoshone of Nevada v. United States Dept. of Interior*, 608 F.3d 592 (9th Cir., 2010) (because of mitigation measures incorporated in EA for expansion of phased gold exploration project,

The multi-stage nature of these projects and the agency procedures governing them also call for judicial review that is flexible and fact-specific. Because certain impacts are unidentifiable until after leasing or exploration, courts reviewing NEPA analysis of oil and gas projects cannot too strictly apply the admonition that "[r]easonable forecasting and speculation is . . . implicit in NEPA, and . . . agencies [cannot] shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry' . . . ."[79]

This approach will continue to be relevant as litigation and political decisions move federal agencies in the direction of considering climate change when conducting project reviews under NEPA. Two recent actions illustrate this trend.

First, in a recent EA assessing eight lease parcels nominated for oil and gas lease sales in Montana and South Dakota, BLM considered the greenhouse gas emissions and impacts to climate change from the lease sales.[80] The EA was completed under the terms of a settlement agreement between BLM and environmentalists, who had challenged BLM's earlier failure to consider fugitive methane emissions from oil and gas activities.[81] BLM concluded in the EA that it was impossible to link those emissions to specific impacts, but a BLM spokesperson was reported as stating that environmental assessments to review greenhouse gas impacts will become standard procedure for oil and gas lease sales as part of the Interior Department's recent oil and gas leasing reforms.[82] Industry officials have protested that at the leasing stage, at which point lease holders are not yet authorized to drill, there are *no* climate impacts, and that estimates of greenhouse gas emissions are speculative.[83]

Second, the White House Council of Environmental Quality has proposed guidance – expected to be finalized soon – requiring federal agencies to consider climate change when conducting project reviews under NEPA.[84] While the full effect of these developments on NEPA review of phased oil and gas projects is not yet clear, it does appear that climate impacts may increasingly factor into that analysis.

"the environmental consequences of approving only the first phase of the project versus all three phases [were] substantially similar").

[79] *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062 (9th Cir. 2002) (holding that BLM's NEPA analysis of certain environmental impacts arising from timber sales were inadequate).

[80] U.S. Dep't of the Interior, Bureau of Land Management, South Dakota Oil & Gas Leasing Environmental Assessment, Aug. 12, 2010, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/mt/blm_programs/energy/oil_and_gas/leasing/eas/2010.Par.45212.File.dat/SDFOLeasingEA.8.12.10.pdf

[81] Phil Taylor, E&E Publishing, Inc., *Drillers, enviros blast BLM's climate studies* (Sept. 16, 2010).

[82] *Id. See also* U.S. Dep't of Interior, Bureau of Land Mgmt., *Interior Finalizes Onshore Oil and Gas Leasing Reforms* (May 17, 2010), *available at* http://www.blm.gov/wo/st/en/info/newsroom/2010/may/NR_05_17_2010.html.

[83] Taylor, *Drillers, enviros blast BLM's climate studies.*

[84] White House Council on Environmental Quality, *New Proposed NEPA Guidance and Steps to Modernize and Reinvigorate NEPA*, *available at* http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.