Award Winning

The Override

Every Landman Wants One!

Volume XIII, Issue II | January, 2021

Presidents Message

Randall Taylor, RPL
President
Taylor Land Service, Inc.

Hello fellow LAAPL members. As I write this column, we are on day two of Biden's presidency. He has already eliminated 57,000 energy jobs by revoking a permit for the Keystone XL Pipeline and putting a quick stop to oil development projects in the Arctic National Wildlife Refuge. To say he will do more to hurt our industry is a vast understatement, in my opinion.

The COVID-19 pandemic continues to wreak havoc on our economy, our industry, and our spirits in unmeasurable ways. I have been President of this organization since May of 2020, and the only person I have seen in person from LAAPL is Jessica Bradley when I went to her office to pick up our speaker gifts. And then we both had to wear masks due to her office building policy. This existence is no way to live life!

As hard as it is not to write a political column, I am going to cut things short and only offer words of encouragement:

- Don't watch or listen to the mainstream media
- Try to live each day to its fullest
- Find little things to enjoy, and try not to look at the big picture too often
- Enjoy your family and friends as much as possible
- Be grateful for what you do have
- Trust in your higher power that we will get through this

Please plan to attend our virtual meeting this Thursday, the 28th. Our speaker for the joint Landman/Geologist meeting, Lester Zitkus, President of AAPL, is a great guy. He has and will continue to do good things for AAPL. I'm sure his presentation will be very informative and enjoyable. Bye for now.

View from an oil platform somewhere at sea

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Meeting Luncheon Speaker

AAPL President Lester Zitkus, CPL - AAPL Update

AAPL President Lester Zitkus, CPL will give his AAPL update to the Los Angeles Association of Professional Landmen and the Los Angeles Basin Geological Society meeting. His update will cover some facts of AAPL's history. He plans to review the financial and professional benefits that come from being an AAPL member. He will also provide a high-level review of AAPL's efforts in the area of education, and discuss some of the strategic initiatives that AAPL is focusing on this fiscal year.

Prior to his role as current AAPL President, he has served on AAPL Board of Directors for several years and served three different terms on the AAPL Executive Committee, as 3rd

Luncheon Speaker continued on page 3

Opinionated Corner

Joe Munsey, RPL
Director
Publications/Newsletter Co-Chair
Southern California Gas Company

Happy New Year! Welcome back from the holidays – assuming all have shaken off the lethargic fog of making too much merry during the holidays. May all prospects produce hydrocarbons in paying quantities. For many years we have used variations of this introduction for our January issue – seems a bit petty under the current Covid-19 disaster and the new Washington administration's war on fossil fuels – more on that later.

Thought we would explore some irony of the oil and gas industry under the previous two administrations – Obama and Trump.

Rather well known – the Obama Administration was not friendly to the oil and gas industry. While the shale revolution was in full swing, and every environmental activist group threw all of its voodoo science against the shale producers, it was still full tilt boogie forward. The shale revolution skipped the real estate and mortgage meltdown the Obama Administration inherited. Oil was hitting $120+ bbl and gas hitting $14.00+ per mcf. At best, the Obama Administration could only nibble at the edges with its authority to affect public lands holding potential shale plays. Then the Obama Administration bragging rights heated up and the administration took full responsibility and ownership for all this oil and gas activity. The oil and gas industry succeeded despite the administration.

Rather well known – the Trump Administration was friendly to the oil and gas industry. Federal lands were being opened for exploration, and the Big Kahuna was finally available to drill up – ANWR. We had come a long way baby [cigarette advertising lingo]. Awash in production, oil and gas prices began the slithering, slipping slope and spiraling downward prices to that infamous day when oil traders handed the industry a deal they could not refuse. The world oil market traders informed the industry they would take the oil if the producers would pay them to take it away. Supposedly, there was no more storage capacity left to take on more oil. The administration took full responsibility and ownership for all this oil and gas activity happening in America. This time around, the oil and gas industry were not succeeding financially for a myriad of reasons best known to industry insiders.

Here's the irony between the Obama and Trump Administrations – under one administration which attempted to impede the industry it prospered wildly; under the other administration which supported the industry we were weakened by numerous factors, some out of our control and some within our control.

Rather well known – the Biden Administration is gearing up the green new energy deal and fossil fuels do not get to play in the sand box, or so they think. Initial prognostication, using tea leaves for some guidance, does not look promising. Sarah Downs, LAAPL Education Chair sent us a copy of The Secretary of the Interior Order No. 3396, dated January 20, 2021, in effect for at least 60 days. Section 3 (g) suspends any onshore or offshore fossil fuel authorization, which involves securing an oil and gas lease and other matters. Incidentally, Section 3 (c) prohibits the granting of rights of way and other rights. It is silent as to what types of rights of way – one assumes all the wind and solar farms ready to hook up to those planned transmission lines are dead in the water, no pun intended.

Illegitimi non carborundum and keep the faith.

Luncheon Speakeer
continued from page 1

Vice President, as Treasurer, and most recently as 1st Vice President. He has also served on the Board of Directors for AAPL's Education Foundation, and as the chair of the education committee, the finance committee, investment advisory committee and as assistant chair of the NAPE operators committee.

Lester graduated in 1987 from the University of Evansville with a BS in Mineral Land Management and a Business Administration Minor. Immediately following his graduation, he started working as a field contract landman for Equitable Resources in various states in the Appalachian Basin. In 1990, he was hired by Equitable (now "EQT") as a Supervisor of Title and Division Orders. During his nineteen plus years with EQT, he held the positions of Land Manager, Director of Land Affairs, and various Vice President positions over Land, Business Development, and Field Operations. In 2007 he left EQT and joined Chesapeake Energy Corporation where he served in the position of Vice President, Land for Chesapeake's Eastern Division. After six years at Chesapeake, in March of 2014 he joined Gulfport Energy Corporation where he currently serves as its Sr. Vice President of Land in its Oklahoma City, OK headquarters office.

Get Ready...Set.....Go!

(Nominations for LAAPL 2021 - 2022 Officers)

It is that time of the year to start considering a run for a LAAPL Chapter Officer for the 2021 – 2022 term. The following offices are open:

President[1]
Vice President
Treasurer
Secretary
LAAPL Local Director
LAAPL Local Director

[1]Per Section 7(3) the Vice President shall succeed to the office of the President after serving his or her term as Vice President and shall hold the office of President for the next twelve (12) months.

The Override is, and has been edited by Joe Munsey, RPL and published by Randall Taylor, RPL, since September of 2006.

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Taylor Land Service, Inc.
949-495-4372

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Joe Munsey, RPL
Southern California Gas Company
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Warren E&P, Inc.
562-800-0062

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Marcia Carlisle
The Termo Company
562-279-1957

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858-699-3353

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Mike Flores
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Chevron Pipeline & Power
858-699-3353

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Randall Taylor, RPL, Co-Chair

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Chip Hoover
Independent
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Allison Foster
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Education Chair
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Southern California Gas Company
714-841-7465

Legislative Affairs Chair
Mike Flores
Championship Strategies, Inc
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Golf Chair
Jason Downs, RPL
Chevron Pipeline & Power
858-699-3353

Nominations Chair
TBD

Chapter Board Meetings

Marcia Carlisle
The Termo Company
LAAPL Secretary

We encourage all members to attend our LAAPL Board Meetings which are typically held in the same room as the luncheon immediately after the meetings are adjourned.

The LAAPL Board of Directors and Committee Members held a virtual meeting on Thursday, November 19, 2020 led by President, Randall Taylor. The topics discussed at the meeting were as follows:

- Joe Munsey was appointed Vice President of LAAPL!
- Allison Foster reported that membership is down. We are encouraging more to renew and/or join our organization.
- Jason Downs reported that the 16th Annual LAAPL Mickelson Golf Classic was held on Thursday, October 29, 2020, at Sand Canyon Country Club, and was another major success- raising $1250.00 for the R.M. Pyles Boys Camp.
- Sarah Downs is assuming the role of Education Chair.
- Jason Downs is assuming the role of AAPL Director.

Scheduled LAAPL Luncheon Topics and Dates

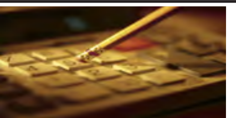
January 28, 2021
[4TH Thursday]
Annual Joint Meeting with
Los Angeles Basin Geological Society

AAPL President Lester Zitkus
Senior Vice President of Land,
Gulfport Energy Corporation
Oklahoma City, OK

March 18, 2021
Robert D. Coviello, Esq.
Coviello Mediation Services and ADR Services, Inc.
"Alternative Dispute Resolution, American Arbitration Association and Employment Litigation"

May 20, 2021
Michael Sherman, Esq. of
Mitchell Chadwick LLP

Officer Elections



Treasurer's Report

Jason Downs, RPL
Treasurer
Land Representative
Chevron Pipe Line and Power Company

As of 11/6/2020, the LAAPL account showed a balance of	$33,662.74
Deposits	$4,389.12
Total Checks, Withdrawals, Transfers	$4,769.50
Balance as of 1/16/2021	**$33,282.36**

New Members and Transfers

Allison Foster
Membership Chair

New Member Requests

Aaron Tanner, Berry Petroleum
Sarah Taylor, Stoel Rives

Changes

John Harris, Casso & Sparks LLP
Michael Sherman, see Page 5
Randall Taylor, see ad page 4

Welcome Back

JR (John) Billeaud, Berry Petroluem

LAAPL and LABGS Hold Annual Joint Luncheon

The Los Angeles Association of Professional Landmen and the Los Angeles Basin Geological Society will hold its joint luncheon in January – Virtually. Please note the date of the luncheon is the fourth Thursday of January.

When: Thursday, Jan 28th Time: 12:00
Cost: FREE

Meeting Place: https://global.gotomeeting.com/join/300060029

Speaker: AAPL President Lester Zitkus, Senior VP of Land, Gulfport Energy Corporation

Topic: "State of AAPL"
Contact: Joseph Landeros at landerosjd@gmail.com to register

Online at www.labgs.org.

Lawyers' Joke of the Month

Jack Quirk, Esq.
Bright and Brown

Note: This is not Jack's Joke of the Month – we failed to notify Jack of the need of his sought-after humor. We offer this from a worn book of lawyer's jokes. Apologies to Jack.

An Ohio man went to see a Cleveland lawyer and asked what his least expensive fee was.

"One hundred dollars for three questions."

"Isn't that an awful lot of money for three questions?" asked the man.

"Yes," said the lawyer. "What is your final question?"

Our Honorable Guests

November's luncheon was a successful Virtual LAAPL Chapter meeting.

Our presenters:

- Benjamin Holliday, Esq, The Energy Law Group

Our esteemed guests:

- Laura McAvoy
- Ralph Combs, The Termo Company
- Rick Finken
- Ashley Hallene, MacPherson Energy
- Fred Rappleye, West Coast Land
- B. Scott Manning, CMM, CPL

Randall Taylor, RPL
Petroleum Landman

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Renew and pay* online today!

http://www.laapl.com/2020-2021

*ALL MEMBERS WHO RENEW BEFORE FEBRUARY 1ST, 2021 WILL BE ENTERED IN A RANDOM DRAWING TO WIN ONE OF FOUR (4) SETS OF PREMIUM 'ROCKS' GLASSES, ETCHED WITH THE LAAPL LOGO

Renew your Active or Associate Membership today, to qualify for the limited-time LAAPL swag!

Thanks,
Allison

Allison Foster, RL
LAAPL Membership Chair
310.867.4076
a.foster.land@gmail.com

Mitchell Chadwick LLP is pleased to announce that Michael Sherman has joined their firm.

Michael Sherman helps clients buy, sell, lease and permit natural resources projects. He has extensive experience with California oil and gas matters, including preparing more than 75 title opinions and representing parties on the purchase and sale of oil and gas assets throughout California. His practice also focuses on land use, endangered species and environmental compliance issues.

Learn more about Michael's experience at www.mitchellchadwick.com.

Michael's new contact information: msherman@mitchellchadwick.com
Mitchell Chadwick LLP, 3001 Lava Ridge Ct., Suite 120, Roseville, CA 95661
Direct: (916) 462-8804

Mitchell Chadwick LLP is the premier natural resources boutique law firm in California. Our services include pre-transaction due diligence, mining, oil and gas, title opinions, natural resource leasing, regulatory enforcement defense, mitigation/conservation bank entitlements, conservation easements, and other environmental and land use entitlement issues.

LAAPL Education Report

January

Joint Operating Agreements 2 Day Seminar

Date: January 26-27th

Location: Houston, Tx.

AAPL RPL/CPL Certification Exam – Forth Worth

Date: January 29th

Location: Fort Worth, TX

February

Power Hour: Navigating Development and Cotenancy (Webinar)

Date: February 3, 2021

Location: Virtual

Credits 1.00 CEU

Field Landman Seminar – Midway, UT

Date: February 4, 2021

Location: Midway, UT.

Credits: 3.0 CEU; 1.00 CEU Ethics

Power Hour: Understanding and Researching Surface Rights (Webinar)

Date: February 10th

Location: Virtual

Credits: 1.00 CEU

Negotiations Webinar

Date February 16th

Location: Virtual

Credits: 1.00 CEU Ethics; 5.00 CEU

Power Hour: Buying Minerals in Producing Properties to Raise (NRI) (Webinar)

Date: February 17th

Location: Virtual

Credits: 1.00 CEU

2021 Virtual Appalachian Land Institute

Date: February 18th

Location: Virtual

Credits: 6.00 CEU; 1.00 CEU Ethics

AAPL RPL/CPL Certification Exam Review

Date: February 23-26th

Location: Oklahoma City, OK

Credits: 18.00 CEU; 1.00 CEU Ethics

Power Hour: Oil & Gas vs. Solar: Negotiating a Lease (Webinar)

Date: February 24th

Location: Virtual

Credits: 1.00 CEU

AAPL RPL/CPL Certification Exam – Forth Worth

Date: February 26th

Location: Forth Worth, TX

March

AAPL RPL/CPL Certification Exam – Forth Worth

Date: February 26th

Location: Forth Worth, TX

Power Hour: Managing Your Lease When Production Ceases (Webinar)

March 3rd

Location: Virtual

Credits: 1.00 CEU

Field Landman Seminar

Date: March 4th

Location: Corpus Christi, TX

AAPL RPL/CPL Certification Exam Review
March 9-12th
Location: Houston, TX.
Credits: 18.00 CEU; 1.00 CEU Ethics

Field Landman Seminar
Date: March 22nd
Location: Witchita, KS

AAPL RPL/CPL Certification Exam Review
Date: March 23-26th
Location Midland, TX.
Credits; 18.00 CEU; 1.0 CEU Ethics

AAPL RPL/CPL Certification Exam – Fort Worth
Date: March 26th
Location: Fort Worth, TX.

Surface Use and Access Seminar
Date: March 30th
Location: Witchita, KS.
Credits: 5.0 CEU; 1.00 CEU Ethics

Power Hour: Fast Closings and Delayed Due Diligence: Doing Oil and Gas Deals with Limited Access to County Records (Webinar)
Date: March 31st
Location: Virtual
Credits: 1.00 CEU

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Approaches to Pore Space Rights

California Carbon Capture and Storage Review Panel
TECHNICAL ADVISORY COMMITTEE REPORT

By Jerry R. Fish, Esq., Stoel Rives LLP, Primary Author &
Eric L. Martin, Esq., Partner, Stoel Rives LLP, Secondary Author

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Ed. Note: Carbon capture, or as it is referred to now, carbon sequestration, once again seems to be taken stage as part of reducing the carbon footprint. As such, we are re-publishing this article, which was originally published in September 2017, Volume X, Issue VIII. Mr. Fish has since retired from the firm, Mr. Martin continue to practice at the firm.

DISCLAIMER

Members of the Technical Advisory Committee for the California Carbon Capture and Storage Review Panel prepared this report. As such, it does not necessarily represent the views of the California Carbon Capture and Storage Review Panel, the Energy Commission, its employees, the California Air Resources Board, the California Public Utilities Commission, or the State of California. The Energy Commission, the State of California, its employees, contractors and subcontractors make no warrant, express or implied, and assume no legal liability for the information in this report; nor does any party represent that the uses of this information will not infringe upon privately owned rights. This report has not been approved or disapproved by the California Carbon Capture and Storage Review Panel or the Energy Commission nor has the Panel or Commission passed upon the accuracy or adequacy of the information in this report.

Carbon sequestration cannot occur absent the right to inject and store carbon dioxide (CO_2) in subsurface pore spaces.[1] Three general approaches for addressing this issue have evolved over the past few years. This issue paper briefly describes these approaches and identifies positives and negatives of each. These positives and negatives are not listed in any particular order.

Complete Private Property Approach

This approach recognizes that the right to use the pore space for the injection and sequestration of CO_2 is a property right that must be obtained.[2] If there is a single property owner, that owner owns the right to use the subsurface pore space, but if the mineral rights have been severed, then the owner of the mineral estate has the dominant right to use pore space as necessary to produce valuable minerals.[3] Consequently, the surface estate owner's use of pore space cannot interfere with the mineral estate, and injecting gases into unacquired pore space could constitute a trespass against both the surface and the mineral estate.[4]

Because it can be difficult to establish that a mineral estate has been exhausted (*i.e.*, there are no more minerals that can be produced), under this approach a carbon sequestration project may need to [5]

Case - O&G
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[1] *See generally* Jerry R. Fish and Thomas R. Wood, *Geologic Carbon Sequestration: Property Rights and Regulation*, 54 Rocky Mt. Min. L. Inst. 3-1 (2008).

[2] *See* Cal. Civ. Code § 829 ("The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.").

[3] The terms "surface estate" and "mineral estate" are commonly used in the context of severed property rights. However, these terms are misnomers, because the owner of the "surface estate" owns everything, including rights to use the subsurface, except for and subservient to the right to produce valuable minerals. In addition, the owner of the "mineral estate" has certain rights to use the surface in connection with the production of valuable minerals.

[4] *See Cassinos v. Union Oil Co.*, 18 Cal. Rptr. 2d 574 (Cal. App. 1993). Trespass could also result if injected gas causes brine to migrate into the pore space of another property that did not previously contain brine. For example, if displaced brine interfered with oil or gas production or fresh water aquifers, a cause of action for trespass could exist under *Cassinos*. *See also* footnote 7 below and accompanying text.

[5] If sequestration was to occur as part of a normal enhanced oil recovery project, property rights would not be required from the owner of the surface estate. However, if sequestration "credit" was to obtained, the operator of the enhanced oil recovery project would likely need to obtain property rights from the surface owner for post-injection monitoring. Furthermore, any regulations governing sequestration "credit" could well require that the operator obtain pore space rights from the owner of the surface estate to protect the sequestered carbon dioxide.

Tim Truwe, President

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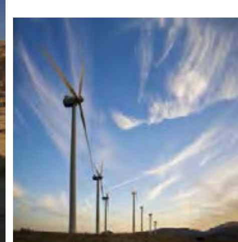

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obtain rights to use the pore space from the owners of both the surface estate and the mineral estate. This could be accomplished in a few different ways. First, a carbon sequestration project could obtain the necessary rights by means of negotiated agreements with the property owners, including any lessees of the mineral estate and any royalty owners. Second, if it had the power of eminent domain, a carbon sequestration project could condemn the rights. Third, if the requisite statutory authority existed, the state could unitize the rights within the targeted geologic structure.

a) **Positives:**

i) **Consistent with public perception of property rights.** The principle that ownership of property includes the right to control the use of that property is a fundamental concept in this country. Because this approach builds off this fundamental concept by requiring that the right to inject and sequester CO_2 underground be obtained from property owners, this approach does not require charting a new path for property rights. This makes acceptance and implementation less controversial.

ii) **Payment to property owners may lessen opposition to carbon sequestration and may help encourage development.** Development of the subsurface has economic benefits, such as revenues from produced oil or rent from stored natural gas. Property owners understand and expect that they will be compensated when someone else wants to use their land. This has been common practice throughout California's history (*e.g.*, from the mid-nineteenth century gold rush and the early twentieth century oil and gas boom to today's oil and gas production, natural gas storage, and wind farms). Because obtaining the requisite property rights—whether that be through negotiated agreements, unitization, or condemnation—will result in dollars in property owners' pockets, property owners may be more inclined to support this approach to carbon sequestration. Further, to the extent that such compensation is tied to actual sequestration (*e.g.*, an amount per ton of injected CO_2) rather than a one-time lump sum, a constituency of property owners will form that will want to see carbon sequestration happen.

iii) **IOGCC Model Statute.** Oil and gas regulators from across the country have recommended that carbon sequestration by treated like natural gas storage, and several states, such as Wyoming, Montana, and North Dakota, have enacted legislation following this recommendation. The legislatures in such states have directed that pore space belongs to the surface estate and provided mechanisms to unitize pore space within geologic structures. Consequently, property owners will be compensated for carbon sequestration that may occur beneath their property. In light of this, California property owners would likely be hostile to an alternative approach under which they may not receive any compensation.

iv) **Consistent with developing market for sequestration property rights.** Money is already being expended to acquire the right to inject and sequester CO_2 in pore space in other states, just as has been done for natural gas storage in California. This developing market relies on the traditional conception of property rights (*i.e.*, that property cannot be used without acquiring the right to do so from the property owner). Changing the law mid-stream would frustrate these earlier investments in carbon sequestration rights and potentially delay the implementation of actual carbon sequestration projects by these early movers.

v) **Ability to deal with holdouts through unitization.** The risk of holdouts is present whenever large parcels of land with fragmented ownership must be assembled for a development project. For public projects, this problem is often addressed by the government's power of eminent [6]

Case - O&G
continued on page 14

[6] Statutory or compulsory unitization is distinct from contractual or voluntary unitization, which relies upon unitization clauses that are often found within oil and gas leases. California's limited compulsory unitization statute is found at CAL. PUB. RES. CODE §§ 3630 *et seq.* Contractual unitization requires that the various leases contain compatible unitization clauses. Furthermore, contractual unitization only works if all of the lessees are willing to unitize; if not, contractual unitization is ineffective.

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domain. Secondary recovery, which typically involves injecting water to produce otherwise unrecoverable oil and gas, implicates this same risk of holdouts, because it almost always requires coordinating activities across properties owned by different parties. Many states have addressed this problem by creating a statutory process through which multiple properties can be brought together and operated as a single unit. Through such statutory unitization processes, a state agency allocates production to the various property owners within the unit on an equitable basis. If property owners elect not to participate, they cannot claim that the subsurface waterflooding constitutes a trespass.[7]

Wyoming, Montana, and North Dakota have addressed the risk of holdouts by applying the unitization concept to carbon sequestration. For example, under SB 498 in Montana, once a carbon sequestration project controls subsurface storage rights to 60% of the storage capacity in a proposed storage area, it can apply to unitize the storage area.

Unitization also has advantages over condemnation. The fair market value of condemned property is determined by what is taken rather than what is created.[8] Thus, property owners do not share in the upside of the project. In contrast, holders of unitized oil and gas leases continue to share in the upside. Similarly, carbon sequestration proceeds could be allocated to the owners of the storage rights within a unitized storage area, such that they have a stake in the financial upside of the project but are not liable for damages. This could make them more amenable to such a process, especially in light of the fact that their individual subsurface storage rights may be worth little in a condemnation proceeding.

b) Negatives:

i) **Transaction costs.** Obtaining property rights from private property owners, whether it be through negotiated agreements, unitization, or condemnation, will undoubtedly result in transaction costs, especially for commercial scale sequestration projects, which may require 100 to 200 square miles of pore space rights.[9] To the extent that geologic structures suitable for carbon sequestration are owned by multiple parties, which is almost certainly the case given the large size of these structures, transaction costs will increase. This inefficiency that could impede the implementation of carbon sequestration, especially in situations where ownership is highly fragmented, if unitization is not an option. However, because developers are currently acquiring sequestration rights in some states, notwithstanding fragmented ownership, the inefficiencies may not be significant.

ii) **Potential for holdouts.** Building upon the transaction costs associated with negotiated agreements, unless there is a way to address the risk of holdouts, the actual development of carbon sequestration project could be delayed or be more capital intensive. Unitization and

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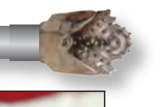
[7] *See, e.g.*, *Baumgartner v. Gulf Oil Corp.*, 168 N.W.2d 510, 516 (Neb 1969) (holding that “where a secondary recovery project has been authorized by the [Nebraska Oil and Gas Conservation C]ommission the operator is not liable for willful trespass to owners who refused to join the project when the injected recovery substance moves across lease lines,” because public policy seeks to avoid the waste of natural resources that would occur absent secondary recovery). As such, unitization could be useful for addressing issues related to brine displacement in saline formations as well. *See* footnote 4 above. *See also Alameda County Water District v. Niles Sand & Gravel Co.*, 112 Cal. Rptr. 846 (Cal. Ct. App. 1974) (holding that interference with gravel mining caused by migration of fresh water injected underground through a state-authorized aquifer storage and recovery project was not compensable).

[8] *See Pacific Gas & Elec. Co. v. Zuckerman*, 234 Cal. Rptr. 630, 637 (Cal. Ct. App. 1987).

[9] An optimal site for carbon sequestration would have a geologic structure that limits lateral expansion of the CO_2 plume and has multiple injection zones, which would decrease the size of the area for which pore space property rights are needed.



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eminent domain could both serve as mechanisms to deal with this risk, but both create additional problems. For example, the time saved by not having to buy out holdouts through a negotiated agreement could be consumed by litigation related to the unitization or condemnation. Further, unless these mechanisms allow carbon sequestration projects to use pore space pending an allocation/compensation decision (*e.g.*, a quick take provision), the timeline for actual implementation could still be quite long.[10]

iii) Increased operating costs. The need to compensate property owners for the use of pore space will increase the operational cost structure for carbon sequestration projects. This could mean that some percentage of potential carbon sequestration projects will not be economically viable. But the same could be said of wind or solar projects (*i.e.*, if access to land were free more projects would be viable).

iv) Continued uncertainty regarding ownership of pore space. Ownership of pore space is not typically set out in the deeds that split property into surface and mineral estates. Consequently, there is often uncertainty as to who has the right to use the pore spaces absent the presence of oil or gas. Those states that have addressed the pore space property right issue have created interpretive presumptions prior conveyances of property. For example, there is a rebuttable presumption under Wyoming's HB 89 that pore space is owned by the surface owner. This presumption, however, is not conclusive, which means that courts may still need to determine who owns the pore space for a particular property. Obtaining such determinations could delay the implementation of carbon sequestration projects.

c) Legislation Needed: This approach would require legislation that allocates ownership of pore space, defines ownership of injected CO_2, and allows for unitization and/or eminent domain to acquire pore space, including pore space owned by state and local governments.

Limited Private Property Approach

This approach tweaks the traditional concept of underground property rights from the oil and gas context. Instead of an absolute right to pore space, this approach is based on the idea that subsurface property rights are "contingent upon interference with reasonable and foreseeable use" of the property.[11] Consequently, so long as the sequestration of CO_2 would not interfere with such uses, a carbon sequestration project would not need to obtain the right to use pore space from property owners.

This approach is most prominently reflected in the CCS Reg Project's recently published model legislation. Under this model legislation, a carbon sequestration project could apply for a "pore space permit," which would convey the exclusive privilege to access and use identified pore space for carbon sequestration. Prior to issuing a pore space permit, the state environmental protection agency would conduct a proceeding in which holders of a "non-speculative economic interest" (*i.e.*, the ability to economically recover actual mineral resources or engage in other current or imminent subsurface activities that have substantial economic value) could participate. Anyone that did not participate in this proceeding would waive any and all subsurface property rights that might be affected by the proposed carbon sequestration project. If the injection and sequestration of CO_2 would cause actual and substantial damages to such an interest, then either (i) the project would be modified to avoid the damages, (ii) the carbon sequestration project would have to negotiate an agreement with the holder of the interest, or (iii) the state environmental protection agency could authorize condemnation of the interest.

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[10] Under CAL. CODE CIV. PRO. § 1255.410, a "quick take" in California requires at least 60 days, and if opposed the condemnor must demonstrate that "there is an overriding need" to possess the property now, "a substantial hardship" will occur if the quick take is denied, and that substantial hardship outweighs any hardship on the condemnee.

[11] *Chance v. BP Chemicals, Inc.*, 670 N.E.2d 985, 993 (Ohio 1996) (holding that migrating hazardous waste did not constitute a trespass).

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In summary, under this approach, unless a landowner could show current or imminent mineral or other subsurface activities with substantial economic value, the landowner would have no subsurface property rights and a carbon sequestration project could proceed simply by obtaining a pore space permit.[12] If such subsurface property rights were demonstrated to exist, then the carbon sequestration project would address these rights through means similar to those described under the Complete Private Property Approach (*e.g.*, negotiated agreements or condemnation).

a) Positives:

i) **Pore space permit not required.** Under the CCS Reg Project's model legislation, there is no requirement that a pore space permit be obtained. Consequently, developers who have already acquired carbon sequestration property rights would not be required to utilize this process.

ii) **Property rights adjudicated once and for all in a unified process.** By addressing property rights in an adjudicative proceeding prior to injection, carbon sequestration projects would have greater certainty regarding risk of legal liability. Further, by utilizing a unified process, carbon sequestration projects would avoid piecemeal litigation.

iii) **Application to saline formations.** Most property owners probably would not have current or imminent subsurface activities of substantial economic value in geological structures containing only saline formations. Because this approach eliminates private pore space property rights for this category of property owners, this approach could be advantageous for encouraging carbon sequestration in saline formations.

b) Negatives:

i) **Inconsistent with public perception of property rights.** Because this approach would be perceived as taking the pore space rights of many property owners (*e.g.*, those without current or imminent subsurface activities that have substantial economic value), enacting this approach may encounter strong public opposition. This inconsistency with the public perception of property rights may also prompt litigation that could delay implementation of projects utilizing this process.

ii) **Perceived lack of fairness.** One of the sticks in property owners' bundle of rights is the right to explore for valuable minerals. However, under this approach, owners whose property had not been explored, and thus did not have a non-speculative economic interest, would "waive" their pore space rights. This could readily be perceived as unfair, especially (1) as landowners often have neither the financial wherewithal nor the technical expertise themselves to explore for valuable minerals, (2) if other properties had been explored and valuable minerals had been found, and (3) in light of technological advances that make previously unrecoverable minerals recoverable (*e.g.*, horizontal drilling and fracturing now allow recovery from gas shales). Such property owners may view this as a process to avoid paying for their property rights and oppose its implementation.

iii) **Inconsistent with developing market for sequestration property rights.** It is unclear whether already obtained carbon sequestration property rights would be considered a non-speculative economic interest in the adjudicatory process. If not, existing sequestration easements and leases obtained by early movers could be worthless, which could delay actual implementation of sequestration projects (*e.g.*, rendering existing investment in carbon sequestration worthless could heighten the perceived risks of carbon sequestration investments, thereby making it more difficult to attract investors) and anger those property owners that thought they would be receiving remuneration for granting carbon sequestration rights.

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[12] The Kentucky legislature considered a bill with a similar approach this year. HB 491 would have declared geologic strata beneath 5,500 feet that does not contain either "recoverable or marketable" minerals or water that can be used for a beneficial purpose to be property of the state.

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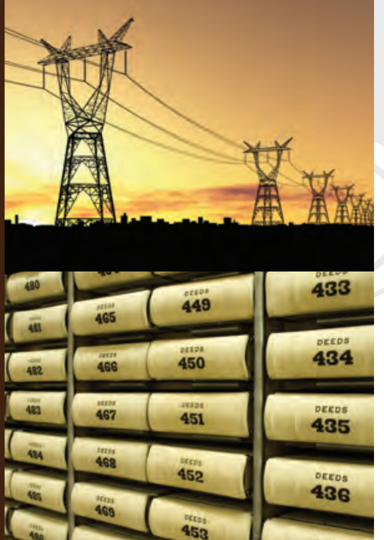

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iv) **Expertise of adjudicatory entity.** Subsurface property rights can be very complex. The adjudicatory entity would require not only the expertise to resolve these issues, but also the reputational wherewithal to support the legitimacy of its decisions in the public's eye. It may well be difficult for a state environmental protection agency, as under the CCS Reg's model legislation, to build such expertise for subsurface property right adjudications.

v) **Application to mineral rights.** Although surface owners may very well have no realistic expectation to use geological structures suitable for carbon sequestration, mineral estate owners undeniably have an expectation that they may explore the subsurface. The Limited Private Property Approach, however, only recognizes that right if there is the ability to economically recover actual mineral resources in the very near future. This creates a number of problems. First, the scope of what economically recoverable mineral resources changes with the price of the resource. More oil is economically recoverable when the price is at $80/barrel than at $40/barrel. Consequently, mineral rights would morph into a property right, the existence of which depends upon market conditions at a particular point in time. Second, knowledge regarding the existence of mineral resources is limited. A mineral estate owner may know that valuable minerals exist beneath a property but does not yet know whether they are economically recoverable. Similarly, an area's geology may suggest that valuable minerals exist underneath the surface, but until the subsurface is explored, no one knows whether that is really true. Third, as described above, what is recoverable can change in the future due to technological advances. Consequently, mineral owners' rights may be eliminated under this approach because the property has not yet been explored or the minerals are not economically recoverable under current market conditions or with current technology.[13] Mineral owners would almost certainly oppose this approach for these reasons.

In addition, this approach does not apply neatly to carbon sequestration that might occur in depleted oil and gas reservoirs. The mineral estate owners in that situation may still have non-speculative economic interests (*e.g.*, secondary recovery could be used to produce additional oil). Consequently, the carbon sequestration project would have to utilize the same Complete Private Property Approach's tools (*e.g.*, negotiated agreements and condemnation). This approach then may not do anything to substantially advance implementation of projects in these reservoirs, which may be the low-hanging fruit for carbon sequestration.

c) **Legislation Needed:** This approach would require legislation that establishes the process by which property rights are adjudicated, defines a "fair" threshold at which a property right to pore space is recognized (*e.g.*, "non-speculative economic interest" in the CCS Reg's model legislation), and allows for eminent domain of recognized pore space rights, including pore space containing minerals and pore space owned by state and local governments.

Public Resource Approach

Case law suggests that aquifer storage and recovery ("ASR") law could serve as a third approach at least for carbon sequestration in saline formations. In *Alameda County Water District v. Niles Sand & Gravel Co.* a gravel operator alleged that the flooding of his gravel pits that resulted from an ASR program constituted a taking because it interfered with subsurface rights and the business operations.[14] Recognizing that the regulation of the state's water resources was a constitutional exercise of the state's police power, the California Court of Appeals held that the water district's activities were a legitimate exercise of the police power and that the adverse effect on the gravel operator's use of its property was n[15]

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[13] It is also unclear what would happen if valuable minerals were discovered in the course of the sequestration project. Would these be the property of the state? The carbon sequestration project? The prior mineral estate owner?

[14] 112 Cal. Rptr. 846 (Cal. Ct. App. 1974).

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ot compensable. This line of reasoning is somewhat analogous to the rationale of preventing the waste of natural resources that underlies trespass cases involving secondary recovery in oil and gas fields.[16] To the extent that California under its police power can use saline formations and the geologic structures in which they occur for public purposes, legislation potentially could be enacted that authorizes the use of saline formations for carbon sequestration without infringing upon private subsurface property rights.

a) **Positives:**

  i) **Does not require acquisition of pore space rights.** Acquiring pore space rights, whether it be under the Complete Private Property Approach or the Limited Private Property Approach will take both time and money. In contrast, the Public Resource Approach eliminates the need to spend time and money acquiring pore space rights.

b) **Negatives:**

  i) **Uncertainty regarding utilizing police power to effect carbon sequestration in saline formations.** Western states, including California, have long recognized the value of fresh water and the need to protect it. This recognition underlies ASR jurisprudence. Similarly, there is plenty of legal support for statutory unitization and governmental authorization of secondary recovery operations in order to prevent the waste of oil and gas. In contrast, carbon sequestration is a new concept. Consequently, regardless of how laudable promoting carbon sequestration may be from a public policy perspective, there would be unavoidable legal uncertainty regarding the state's use of saline formations for carbon sequestration. The courts would have to resolve this issue, which could delay implementation of carbon sequestration projects.

  ii) **Application limited to saline formations.** Although saline formations may have the largest carbon sequestration capacity, some see depleted oil and gas reservoirs as the low-hanging fruit that could most readily be used for carbon sequestration. However, this approach is not applicable to such reservoirs, because injecting CO_2 would allow for the recovery of previously unrecoverable minerals. By being limited to saline formation, this approach may not help spur early carbon sequestration projects.

  iii) **Could require creation of public sequestration entity.** Reliance on the state's police power may necessitate that a public entity do the sequestration, just as a water district was conducting the ASR operation in *Alameda County Water District*.[17] One must consider how quickly a public entity could actually implement a carbon sequestration project in an era of uncertain public finances. Further, the potential for liability will accompany any public entity that is actually conducting injection and sequestration operations.

  iv) **Eliminates private sequestration rights in saline formations.** This approach, like the Limited Private Property Approach, could be perceived as taking the pore space rights of many property owners and could encounter public opposition for this reason. Further, this approach could wipe

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[15] *Id.* at 855. *See also Board of County Commissioners v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693, 707 (Colo. 2002) ("[B]y reason of Colorado's constitution, statutes, and case precedent, neither surface water, nor ground water, nor the use rights thereto, *nor the water-bearing capacity of natural formations belong to a landowner* as a stick in the property rights bundle.") (emphasis added)).

[16] *See, e.g., Railroad Com. of Texas v. Manziel*, 361 S.W.2d 560 (Tex. 1962) (holding that migrating water from secondary recovery operations authorized by Railroad Commission order in non-unitized field did not constitute a trespass on adjacent mineral estate because this would discourage secondary recovery). *See also* footnote 7 above.

[17] However, courts have upheld private entities' use of unappropriated pore space in the oil and gas context when that use is authorized by a public entity. *See, e.g.*, *Railroad Com. of Texas v. Manziel*, 361 S.W.2d 560 (Tex. 1962).

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out investments that private parties may have made in obtaining sequestration rights in saline formations, which could delay implementation of carbon sequestration projects.

c) **Legislation Needed:** This approach would require legislation that recognizes saline formations as public resources and authorizes a public agency to either conduct sequestration operations or permit private entities to conduct sequestration operations on the public's behalf.

Mr. Fish is retired and a known email to reach Mr. Fish is not available at this time.
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Case of the Month - Right of Way

NEPA Rules Rewrite: Initiation of the Environmental Impact Statement

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Washington, DC

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This is the second in a series of eAlerts on revisions to National Environmental Policy Act (NEPA) regulations published in the Federal Register on July 16, 2020, by the Council on Environmental Quality (CEQ). The CEQ's revised rules amend 40 CFR Parts 1500-1508. Nossaman attorneys Ed Kussy, Rob Thornton, Svend Brandt-Erichsen, Rebecca Hays Barho, Brooke Marcus Wahlberg, David Miller and Stephanie Clark are contributors for this series.

Previously, we provided an eAlert focused on changes the CEQ has made to the definitions section of the NEPA regulations. Today, we focus on changes the CEQ has made to the beginning of the NEPA process for an Environmental Impact Statement (EIS).

Rebecca Hays Barho, Esq.

Stephanie Clark, Esq.

The beginning of the NEPA process comes once an agency or applicant determines to take an action that requires federal funding or a federal approval. The official NEPA process is preceded by planning activities undertaken by the agency or applicant needed to formulate that action. For example, federally funded highway or transit projects must come from a state or metropolitan transportation planning process specified by law. The federal agency that is to make the approval or funding decision may decide on its own, on the basis of early studies or after preliminary consultation with other agencies whether to handle the action with a categorical exclusion (CE), an environmental assessment (EA) or an EIS. This basic process is retained by the new regulations, but with some significant changes we examine below.

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NEPA requires that federal agencies prepare a detailed statement for "major Federal actions significantly affecting the quality of the human environment." 42 USC § 4332(2)(C). As we described last week, under the old regulation, any federal action having significant environmental impacts was considered a major federal action. The new rule looks first at whether an action is a "major federal action" and then determines whether the impact is "significant." Thus, if an action is not a major federal action, or even a federal action, the magnitude of the environmental impact is not considered under NEPA.

Pulling the Trigger on NEPA Review: Is an Action a "Federal Action" or a "Major Federal Action"?

The term "major federal action" is now defined as "an activity or decision subject to [f]ederal control and responsibility" and specifically excludes seven categories of activities and decisions:

- o Those whose effects are located entirely outside the jurisdiction of the United States;
- o Those that are "non-discretionary" and made in accordance with the agency's statutory authority;
- o Those that do not result in "final agency action" as that term is understood under the Administrative Procedures Act or other statute requiring finality;
- o Judicial or administrative civil or criminal enforcement;
- o Funding assistance limited to general revenue sharing with no federal control over subsequent use of the funds;
- o Non-federal projects with "minimal" federal funding or involvement where "the agency does not exercise sufficient control and responsibility over the outcome of the project; and
- o Financial assistance where the federal agency does not exercise sufficient control and responsibility over the effects of such assistance.

The new definition of "major federal action" also provides four categories of actions that tend to meet the definition. These include:

- o Adoption of official policies;
- o Adoption of formal plans upon which future agency actions will be based;
- o Adoption of federal programs; and
- o Approval of specific projects, including those approved by permit or other decision, and federally-assisted activities.

Of particular interest is the category of non-federal projects with minimal federal funding or involvement where the agency does not exercise sufficient control and responsibility over the outcome of the project to turn that project into a "major federal action." It is these types of projects–activities undertaken by non-federal actors that seek or obtain federal permitting or funding–that often are subject to challenge by third parties on the basis that the associated NEPA review was inadequate. The preamble to the final regulations provides some context for when these types of activities should not be subject to NEPA review: there is no "practical reason for an agency to conduct a NEPA analysis" where an agency cannot "influence the outcome of its action to address the effects of the project." The CEQ notes that agencies may further

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define what does not constitute a major federal action for purposes of triggering NEPA.

Although many of the listed exclusions have been held exempt from NEPA by various court decisions, excluding actions with minimal federal involvement marks a departure. For example, in 2012, the transportation reauthorization legislation provided that a CE should be developed for small projects ($30 million or less) or projects with limited federal funding ($5 million). However, a CE is not an exemption from NEPA review and, under extraordinary circumstances, could ultimately result in an EA or EIS. Similarly, where federal authority over an action is limited, particularly where the federal action represents a small portion of a larger undertaking, the new regulations appear to contemplate that the small federal action may not be enough to trigger NEPA review. Especially as agencies use this provision to limit the kinds of actions subject to NEPA, legal challenges seem likely.

NEPA Applies: Now What?

Where NEPA applies, the next step is to determine what level of NEPA review is required. Largely, this determination is based on whether a given "major federal action" will "significantly impact the human environment." To assist in this determination, the CEQ has provided a test, now set forth under 40 C.F.R. § 1501.3. Specifically, the decision as to whether effects are "significant" will be viewed against the factors set forth under § 1501.3(b).

Procedures for Preparing an EIS

Scoping

The new regulations make two important changes to the scoping process. Scoping is the early coordination with state and local agencies and the public that helps identify the project purpose and need, the range of alternatives and the issues that will have to be addressed in the EIS.

The old regulations specifically required that the scoping process begin after the "notice of intent" (NOI) to prepare an EIS. The NOI was to include a description of the proposed action and possible alternatives and the scoping process, including possible meetings. Thus, this presupposes that a good deal of project planning preceded the start of the scoping process. The new regulations deal with this by expressly allowing the scoping process to begin before the issuance of the NOI and requiring its issuance only after there is a determination that the proposal is sufficiently developed to allow meaningful public comment and that an EIS is required. At that point, the NOI requires more detailed information than previously necessary, including the purpose and need, a preliminary description of alternatives, expected impacts, anticipated permits, a schedule for decision-making, a description of the scoping process to be used and a request for comments.

We think that the revisions to the scoping process make sense and more closely reflect what actually occurs. In some ways, the revised scoping process mirrors the process applicable to transportation projects, which requires the identification of and comment on the proposed purpose and need of the project and the range of alternatives before publication of the draft EIS. The new scoping process also fits better with the "planning and environment linkage" (PEL) efforts of the Federal Highway and Federal Transit Administration. This initiative more closely aligns the NEPA and transportation planning processes and encourages grantees to make greater and more explicit use of transportation planning "products" (or studies and analyses) in the NEPA process.

The effect of the scoping process, however, takes on a new form under the revised regulations. The new regulations now explicitly tie the scoping process to the exhaustion of administrative remedies. The newly-specific exhaustion requirement is different, not in that it exists, but in that it is spelled out in greater detail by the new regulations. A forthcoming piece in this series will discuss the likely impacts of this change in terms of litigation and other collateral effects of the CEQ changes. For the purposes of the beginning of the NEPA process, it is significant that the exhaustion requirement is spelled out in such detail because it emphasizes the need for commenters to submit detailed and specific comments in a complete and timely fashion starting at the very beginning of the NEPA review process.

Early Integration of the NEPA Process

One interesting change the new regulations make to the beginning of the EIS process (and to NEPA review generally) is seemingly small–replacing a "shall" to a "should". (40 CFR § 1501.2). The previous CEQ regulations explained that "[a]gencies shall integrate the NEPA process with other planning at the earliest possible

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time…" (emphasis added). This language was often quoted in NEPA litigation by project opponents, who would argue that the lead agency failed to begin the NEPA process when it should have.

As revised, the NEPA regulations now explain that "[a]gencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time…" (emphasis added). In essence, where federal agencies previously were unequivocally directed to integrate NEPA into the decision-making process at the earliest possible time, agencies now have been told that it is advisable, but not required, to do so. Instead, such early integration should occur when it is reasonable, but not necessarily at the "earliest possible" time. As a practical matter, the vast majority of agencies are likely to continue engaging in the NEPA process early in the decision-making process; however, this specific change may provide a more limited basis for potential challengers to argue that a lead agency failed to integrate the NEPA process as early as it should have.

Cooperating Agencies

The revised regulations expand upon the duties of cooperating agencies and clarify that a lead agency is to involve them at the earliest practicable (as opposed to possible) time. This generally reflects existing practice and underlines the intent of various NEPA regulatory revisions aimed at streamlining the NEPA process where multiple agency approvals are required. However, as with the prior regulations, this attempt to streamline approvals by multiple agencies retains the ability for a cooperating agency to assert that other program commitments prevent its involvement or involvement to the degree requested by the lead agency.

It is important to note that the involvement of cooperating agencies is critical for the successful achievement of the One Federal Decision initiative of Executive Order 13807. This is especially the case because of the more flexible adoption rules of the new regulations allowing a cooperating agency to adopt the completed EIS and simply issue its own Record of Decision (ROD).

Time Limits for Completion of an EIS

Finally, and as we will discuss in greater detail in future eAlerts, the revised regulations require that a ROD be signed no later than two years after the issuance of the NOI. This time limit may be extended at the discretion of the "Senior Agency Official" responsible for overseeing the NEPA process of the agency.

Final Thoughts

The new regulations improve the scoping process and make the commenting requirement more rigorous. Although not required, the new rules encourage agencies to integrate planning and NEPA processes, especially in light of the changes made to the scoping process and the timing of the NOI. The more rational adoption rules enhance the benefit cooperating agencies have from participating in the lead agency's NEPA process. The balance of the changes to the NEPA process reflect the intent of the CEQ to streamline NEPA review generally, including the EIS process. While the attempts to streamline the process may appear significant to the uninitiated, it is important to view these changes in context. For example, some of the revisions to the threshold determination as to whether NEPA applies remove specific considerations in favor of broad ones, seemingly with the intent to give agencies more discretion in their consideration of what does or does not warrant NEPA review or what does or does not warrant an EIS level of review. This lack of specificity could equally lend itself to ambiguity in a decision to either prepare or not prepare an EIS, and could similarly lend itself to litigation over whether an EIS should or should not have been prepared in the first place. Further complicating matters is the fact that there no longer will be thirty years of case law on the regulations to provide clarity for courts, agencies, project proponents or project opponents.

Stay tuned for the next installment in this series, which will cover changes to the use of Categorical Exclusions, Environmental Assessments and Findings of No Significant Impact.

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Mrs. Alford's Nitro Factory

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Astute businesswoman prospered in booming turn-of-century Pennsylvania oilfields.

In 1899, Mary Byron Alford, the "Only Woman in the World who Owns and Operates a Dynamite Factory," prospered in the midst of America's first billion-dollar oilfield. Mrs. Alford's nitroglycerin factory cooked 3,000 pounds of nitroglycerin every day.

Today, the Bradford oilfield in Pennsylvania and adjacent New York remains important to U.S. petroleum heritage for Alford's career and many other reasons, according to geologists and a nearby oil museum that educates tourists.

ONLY WOMAN IN THE WORLD WHO OWNS AND OPERATES A DYNAMITE FACTORY—HER STORY.

Penn-Brad Museum Historical Oil Well Park and Museum Director Sherri Schulze in 2005 exhibited a laminated (though wrinkled) page from a newspaper published in 1899. "This was done by a student many years ago," she said. "It was a school project done by one of Mrs. Alford's descendants."

"A light golden amber to a deep moss-green in color, the 'miracle molecule ' from the Bradford field is high in paraffin and considered one of the highest grade natural lubricant crude oils in the world," explains the Penn-Brad Oil Museum (and historical park).

In 1881, the Bradford field alone accounted for 83 percent of all the oil produced in the United States. "It is located about equidistant between the place where oil was first discovered in America and the famous Drake well," noted a 1929 abstract from the American Association of Petroleum Geologists.

With 85,000 acres of continuously productive territory from the Bradford sand, "its 25,000 producing wells and fifty-five years of productive history make it one of the most outstanding oil fields of the world."

Opened in 1971, an oil park near Bradford, Pennsylvania, included a 72-foot cable-tool rig (dismantled in 2020).
Photos by Bruce Wells.

In November 1899, the New York World newspaper featured the world-famous oilfield – and its nitroglycerin company run by a woman more than two decades before women won the right to vote. "It is an odd business for a woman to be in," said Mrs. Alford in the World's article, "but I know no reason why a woman who understands it cannot manage it as well as a man."

Unpainted Wood Buildings

Alford entered the explosive-making business in 1884 with her husband. Ten years later, as Mr. Alford's health began to fail, she took over company operations. By 1899, she had increased daily production to 3,000 pounds of nitroglycerin and 6,000 pounds of dynamite.

"She did most all of the business duties including; purchasing chemicals, pay roll, sales, billing and shipping, hands on visiting of the factory manufacturing," notes one historian (writing about the National Powder Company). "She was known to keep late nights working until midnight."

Demand was high since nitroglycerin detonations – "shooting" a well – increased a well's production from petroleum bearing formations. See Shooters – A "Fracking" History. Mrs. Alford's manufacturing plant consisted of 12 cheaply built and unpainted wood buildings located outside of Eldred, Pennsylvania. Brick buildings would have been prettier, she told the New York newspaper, but it would cost more to replace them.

"The owner of a nitroglycerin factory never knows beforehand when it is going to blow up or afterward why it did blow up," the article explained. "There is never anyone to explain how it happened."

In 1899, the manufacture of nitroglycerin was a primitive, cautious, temperature-sensitive churning of nitric and sulphuric acids with glycerin. Knowing the temperature was vital. "On the accuracy of the thermometer depend the lives of the employees," Mrs. Alford said.

“When the mixing is done, the liquid is the color of milk,” she added. “It is drawn off into a wooden tank in which there is eighteen inches of cold water. As the milky fluid strikes the water, red fumes light the surface and there is a sound like the hissing of geese.”

Illustration of women hand mixing nitroglycerin ingredients at a “Dynamitfabrik” in Isleten, Switzerland, circa 1880.

If successful, the nitroglycerin settled to the bottom of the wooden tank. Poured and readied for transport, an eight-quart can weighed 26 pounds and sold for $8 dollars. It was delivered by wagon – trains would not transport nitroglycerin for any price. Mrs. Alford maintained that if people were kind to nitroglycerin, they could live with it for a long time, despite her own close call. She lived with her husband and daughter only about 80-yards from their factory.

One evening, an employee may have absent-mindedly lit a match or otherwise erred. The factory and the Alford’s home were obliterated and the family buried under the debris. Neighbors dug them out to find they were not seriously injured. They rebuilt and started again. Mrs. Alford raised her daughter, Dessie, in the business.

“Dessie is my right bower,” she said. “I believe in bringing up a girl to work, even if it is not necessary from a financial point of view. Riches, if they fly away, do not work so much hardship for a girl who has been taught to work.”

The 19th century oilfield was a dangerous place — made even more dangerous by nitroglycerin. Despite the hazards, Mrs. Alford lived long and prospered. She died of natural causes in 1924 at the age of 77. Daughter Dessie followed in 1947 at 79.

A 2016 fall open house celebration at the Penn-Brad Oil Museum included Director Sherri Schulze explaining oilfield production equipment to young members of the Bradford Neighborhood of Girl Scouts (a group comprised of troops from the Bradford Area). Photo courtesy Wade Aiken, Bradford Era.

Today, surrounded by the Allegheny National Forest, Bradford is home to Zippo Manufacturing Company and the American Refining Group, the oldest continuously operating refinery in the United States. Advanced drilling technologies has led to producing natural gas from a 400-million-year-old rock formation, the Marcellus Shale.

Unfortunately, the Penn-Brad Oil Museum's derrick, erected in 1971, was removed in May 2020 because of safety concerns. The nonprofit museum would welcome donations to go towards rebuilding this petroleum history landmark.

The American Oil & Gas Historical Society preserves U.S. petroleum history. Become an AOGHS supporting member and help maintain this energy education website and expand historical research. For more information, contact bawells@aoghs.org.

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