COLORADO LAW
UNIVERSITY OF COLORADO BOULDER

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

17 March 2023

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

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

Dear Chairman Stauber:

Thank you once again for the opportunity to offer testimony to the House Subcommittee on Energy and Mineral Resources on the proposed "Permitting for Mining Needs Act of 2023," and the proposed "Transparency and Protection of American Energy Act of 2023." I was asked to respond to four questions posed by Ranking Member Ocasio-Cortez. Set forth below are those questions and my answers:

Question: Section 214 of Rep. Westerman's H.R. __ "Transparency and Production of American Energy Act of 2023" allows only for the environmental analysis of the areas on and immediately adjacent to the lease plot under analysis, and excludes consideration of the downstream, indirect effects of oil and gas consumption. What are the public health and environmental implications of this section?

This section would preclude consideration of indirect and cumulative effects as currently required under the Council on Environmental Quality (CEQ) rules. Specifically, by limiting the environmental analysis to a single lease, as provided under the "Transparency and Production of American Energy Act of 2023", the analysis will deny the public as well as the agency decisionmakers important information about the indirect and cumulative effects of that lease. The CEQ rules rightly require consideration of direct, indirect, and cumulative effects associated with a proposed action.[1] As discussed in more detail below in response to Question2, an analysis of cumulative effects is especially important in the context of oil and gas development. A single oil and gas well might not contribute a significant amount of greenhouse gases or other air pollutants, but hundreds or thousands of leases located in discrete areas could pose significant consequences to the environment and public health.

In my home state of Colorado, the EPA recently determined that Front Range cities are "severely" out of compliance with the national ambient air quality standard for ozone.[2] Atmospheric ozone poses serious health risks, especially to the elderly and people who have

[1] 40 C.F.R. § 1508.1(1)-(3).

[2] The Clean Air Act establishes various levels of noncompliance with increasingly strict standards to bring the area into compliance. The levels are – (1) marginal; (2) moderate; (3) serious; (4) severe; and (5) extreme. See https://crsreports.congress.gov/product/pdf/RL/RL30853.

difficulty breathing, even at low concentrations.[3] Ozone is formed by a mixture of nitrous oxides, volatile organic compounds (VOCs), and sunlight. Oil and gas operations release significant amounts of nitrous oxides and VOCs, especially methane, which is a potent greenhouse gas. Recent data suggests that oil and gas operations on the Front Range are the chief culprit for increased ozone pollution in the region.[4] Oil and gas operations also release air toxics like benzene, ethylbenzene, and n-hexane.[5] A single lease might produce a relatively insignificant amount of these pollutants. But hundreds or thousands of leases in a discrete area can have devastating health consequences for people living near these facilities.[6] These cumulative impacts would simply be ignored if the TAP American Energy Act became law.

Question 2. *This legislation codifies the Trump administration's 2020 NEPA regulations that eliminate the cumulative impact analysis requirement. This requirement mandates that federal agencies consider other nearby pollution sources and the cumulative impact a proposed project or permit would have on a community when analyzing the environmental impact of said project. Why are cumulative impact analyses important, and what would be the consequences of eliminating this requirement?*

> The current Biden-era CEQ rules define "cumulative effects" as:
>
> effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. when measured alongside all of the past, present, and reasonably foreseeable future leases and other actions.[7]

Thus, when analyzing an individual action, like a single oil and gas lease, the CEQ rules require the decisionmaker to assess the cumulative impacts of all other leases and other actions that cause cumulative effects. So, for example, activities on public lands like grazing, oil and gas development, and renewable energy projects can impose cumulative impacts on wildlife species, including endangered and threatened species and candidate species like the Greater sage grouse. If we don't want to push the Greater sage grouse into a formal listing, with all of the consequences that that entails, we should be carefully evaluating the cumulative effects on that species, as well as other impacted species, from a wide range of activities. Likewise, many public lands activities release greenhouse gases (GHGs) and otherwise contribute to or are impacted by climate change. Looking at the cumulative effects of these activities will be extremely helpful in developing measures that can avoid, minimize or mitigate the adverse impacts from these activities. An important tool for measuring the social cost of GHGs (SC-GHG) would make it relatively easy for agency decisionmakers to ascertain the cumulative impact on society from past, present, and reasonably foreseeable future actions, when considering a permit application or proposal for an individual project. A draft report recently released by the EPA estimates that cost at about $190/ton of CO2. The public would benefit greatly from a transparent discussion of the cost of approving a new permit, when considered alongside other projects that release GHGs into the

[3] See Health Effects of Ozone Pollution | US EPA

[4] See Corrected ozone data estimate fracking and drilling produce more emissions than every Front Range vehicle | Colorado Public Radio (cpr.org). ("…[D]rilling and hydraulic fracturing … alone appeared likely to account for more ozone-causing emissions than all cars and trucks along the Front Range.")

[55] See Basic Information about Oil and Natural Gas Air Pollution Standards | US EPA

[6] See Study Explores Demographics of Communities Living Near Oil and Gas Wells | Environmental Defense Fund (edf.org)

[7] 40 CFR 1508.1(g)(3) (2021).

environment. That discussion will also will allow the decisionmaker to be better informed about the consequences of their decision.

Question 3. *In your written testimony, you criticized the proposal to restore noncompetitive oil and gas leasing on. public lands, which was eliminated in the Inflation Reduction Act. Can you elaborate more about your opposition to noncompetitive leasing?*

Noncompetitive leasing promotes speculation. Under the pre-Inflation Reduction Act (IRA) version of the Mineral Leasing Act, a party could obtain a lease on a parcel that received no bids during the competitive auction simply by paying a small filing fee and the first year's rental of $1.50/acre. In a report issued in 2020, the GAO found that 98.8 percent of these noncompetitive BLM oil and gas leases sold between 2003 and 2009 never produced oil and gas during their 10-year primary term.[8] Yet these leases tie up our public lands and are unavailable for other uses. Add to this the BLM's tendency to approve lease suspensions without public scrutiny and these leases can tie up our lands for several decades, while providing no return to the public. (When leases are suspended the obligation to pay rent is also suspended.) Most worrisome, is the fact that the TAP American Energy Act would apparently require the BLM to approve these suspensions within 15 days after they are requested just because the operator claims it would be in the interest of conservation. No inquiry, no public notice, and no periodic review of these suspension requests would be required.

The IRA wisely eliminated noncompetitive lease sales. It also set graduated rental rates that make speculation much more costly, and thus far less likely to happen. H.R. 209 would bring back the noncompetitive leasing program and restore the old, below market rental rates. That would be tragic.

4. *This legislation would allow the Secretary to accept funds from third parties to expedite the processing of energy-related activities. Can you expand on how this section could invite abuse and undermine NEPA?*

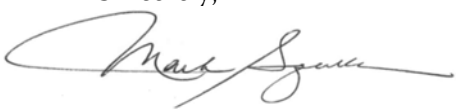
When third parties provide funding to expedite processing for energy-related facilities, they likely want the proposed project approved. Even if the money is not made contingent on a particular outcome, the agency will face substantial pressure to approve the project as desired by the funder. But government decisionmakers must approach a proposed action with an open mind and decide on the merits whether the proposal should be approved, approved with changes or rejected. Anything but straight up approval is harder if a third party has paid the bill. Moreover, this is entirely unnecessary.

Section 304 specifically authorizes the BLM to charge "reasonable filing and service fees and reasonable charges, and commissions with respect to applications and other documents relating to the public lands."[9] Thus, the BLM already has the authority to impose fees sufficient to cover the cost of processing applications. Unfortunately, it seems reluctant to use this authority to cover its full costs. If it were to do so it would not have the need to accept funding from third parties.

[8] Id.
[9] 43 U.S.C. 1734(a).

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

Sincerely,



Mark Squillace