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Hearing Entitled
Oversight of Litigation at EPA and FWS: Impacts on the U.S. Economy, States, Local Communities and the Environment
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Summary

- Innovation by the oil and natural gas industry has delivered significant environmental and economic benefits to the nation

- Rather than recognizing that environmental benefit and working with industry to encourage ongoing trends, the Administration has doubled down on costly command-and-control regulation that does not produce commensurate environmental benefit

- Regulatory overreach stifles job creation, reduces GDP, suppresses government tax revenue, and increases costs for consumers

- The regulatory overreach is driven by the environmental lobby working directly in the agencies and through litigation

- The sue-and-settle model takes policy making away from the public and puts it into the hands of one special interest driving an agenda to ultimately prevent the use of fossil fuels

- Since oil, natural gas and other fossil fuels are the basis of the modern lifestyle that keeps Americans healthy and safe while supporting the entire economy, overregulation is counterproductive to the interests of our entire society.

Any energy development–oil, natural gas, wind, solar, biofuels, and nuclear included–has environmental impacts. The key is to ensure that those impacts are minimized, and that risks to air, water, wildlife, the land and other resource values are properly reduced through appropriate, balanced regulation. I'm proud that my industry has responded to every legitimate environmental challenge and continues to innovate to develop energy that forms the basis of the economy and the modern American lifestyle while reducing environmental impact.

Western Energy Alliance represents over 450 companies engaged in all aspects of environmentally responsible exploration and production of oil and natural gas in the West. The Alliance represents independents, the majority of which are small businesses with an average of fifteen employees. We provide about a quarter of the nation's oil and natural gas production while disturbing only 0.07% of public land surface.

Environmental Benefits

The oil and natural gas industry has increased production dramatically while significantly reducing air emissions per unit of production. Increased natural gas production, while indeed producing emissions at the well site which are managed to health standards, leads to cleaner air overall by enabling increased natural gas electricity generation.[1]

Besides the direct air quality health benefits of reduced criteria pollutants from clean-burning natural gas, it has provided significant greenhouse gas emissions reductions. The Brookings Institution estimates that modern combined-cycle natural gas turbines cut 2.6 times more carbon-dioxide emissions than using wind, and four times as many emissions as solar.[2] The Environmental Protection Agency's (EPA) greenhouse gas inventory shows that the natural gas industry continues to reduce methane emissions, by 38% since 2005 even as production has climbed 26%,[3] while University of Texas and Environmental Defense Fund studies show leakage rates at upstream production sites at a mere 0.38%.[4]

The oil and natural gas industry has significantly reduced impact on the land through horizontal and directional drilling combined with advanced hydraulic fracturing techniques that enable the clustering of multiple wells on a single pad. These continual innovations over the last several years have dramatically shrunk the amount of surface disturbance per well and reduced fragmentation. In 2012, the disturbance reduction resulting from innovation in drilling technology may have approached 70% in Wyoming, for

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[1] For example, the Pennsylvania Department of Environmental Protection (DEP) finds that "Significantly, since 2008, when unconventional drilling across the state began quickly increasing, cumulative air contaminant emissions across the state have continued to decline." According to the DEP, the reductions represent "between $14 billion and $37 billion of annual public health benefit."

[2] *The Net Benefits of Low and No-Carbon Electricity Technologies*, Charles R. Frank Jr., Global Economy and Development at Brookings, Working Paper 73, May 2014.

[3] Energy in Depth summary of EPA Greenhouse Gas Inventory and Energy Information Administration (EIA) data, April 15, 2015.

4 *Methane Emissions from Process Equipment at Natural Gas Production Sites in the United States: Liquid Unloadings*, David T. Allen et al., December 9, 2014; *Methane Emissions from Process Equipment at Natural Gas Production Sites in the United States: Pneumatic Controllers*, David T. Allen et al., December 9, 2014.

example.[5] In addition, oil and natural gas supplies 63% of total American energy[6] while using just under 0.025% of total U.S. water use.[7]

These primary innovations are industry-driven by companies that are constantly looking for better ways to do things smarter and more efficiently to use less energy, water and other resources. There is a built in incentive for us to do so; greater efficiency has dramatically reduced the time required to drill and complete wells, resulting in cost savings that are passed on to consumers. Increased efficiency doesn't just help our bottom line–it delivers environmental benefits.

You might think that all our good work that bolsters the economy and creates jobs while protecting the environment would be applauded and supported by the Administration. We have tangibly benefitted the environment while being one of the few bright spots in an economy that has sputtered along for so many years. We have also reduced energy prices for consumers, saving households an estimated $1,100 this year from lower oil prices[8] and up to $725 annually from low natural gas prices.[9]

The American oil producer has put so much downward pressure on global oil prices that we have caused OPEC to fundamentally react, as Saudi Arabia scrambles to maintain market share. American oil and natural gas are a strategic asset that could be used to free Europe from Russian domination, if only export controls did not continue to impede our foreign policy interests. Since the price at the pump is a constant source of pressure for the President and other politicians, one might be forgiven for thinking that there might be some appreciation expressed from the Administration.

Regulatory Overreach

Quite the opposite is true. The Administration has been focused on an overwhelming number of new regulations that cumulatively extend far beyond reasonable regulatory oversight and into mechanisms for controlling and slowing oil and natural gas production in America. The regulatory overreach my industry is currently experiencing is probably only eclipsed by that against the coal industry, which has been labeled a war. The number of simultaneous regulations results from a politically motivated agenda, advanced by the environmental lobby either through the revolving door between environmental groups and the regulatory agencies or through litigation and the settlement process.

The staff report from Senator Vitter has detailed extensively the collusion between EPA and the unaccountable, nonproductive environmental lobby, so I will not cover that ground.[10] My testimony will instead focus on the impact to the oil and natural gas industry as one example of how productive

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[5] *Oil & Gas Impacts on Wyoming's Sage-Grouse: Summarizing the Past & Predicting the Foreseeable Future, 8 Human-Wildlife Interactions,* David H. Applegate & Nicholas L. Owens, 2014.
[6] *Primary Energy Consumption by Source,* EIA, 2014.
[7] *Total Water Use in the United States,* U.S. Geological Survey, 2005.
[8] "U.S. households could save $1,100 from falling gas prices," *Market Watch*, December 2, 2014.
[9] *How Cheap Natural Gas Benefits the Budgets of U.S. Households*, The Boston Consulting Group, February 3, 2014.
[10] *The Chain of Environmental Command: How a Club of Billionaires and Their Foundations Control the Environmental Movement and Obama's EPA,* U.S. Senate Committee on Environment and Public Works, Minority Staff Report, July 30, 2014.

businesses that are the job creators and the engines of our economy are prevented from helping the U.S. economy reach its full potential.

I cannot fully quantify the cumulative impact of all these regulations, since, with a four-person advocacy staff including myself, we can barely keep up with all the regulation. Last year we engaged in 35 regulatory processes and this year we have already filed 26 comments. However, others provide that perspective; the National Association of Manufacturers estimates that regulations cost the economy $2.028 trillion annually.[11]

We have been able to determine the cost of some specific regulation. For example, the BLM hydraulic fracturing rule would cost society $345 million annually.[12] The costs of the New Source Performance Standards and amendments to the National Emissions Standards for Hazardous Air Pollutants for the oil and natural gas sector finalized in 2012 outweigh the benefits by between $98 million and $174 million.[13] Depressed economic growth resulting from restrictions on the oil and natural gas industry ostensibly to protect the Greater Sage Grouse range from $2.435 billion to $4.847 billion, depending on how BLM and the Forest Service will implement restrictions through their land use planning documents and the ultimate listing decision by the U.S. Fish & Wildlife Service (FWS).[14] These are but three examples of the costs of the many regulatory processes affecting the oil and natural gas industry.

By the same token, the Administration can barely keep up as well as it tries to achieve all its regulatory goals before the clock runs out on January 20, 2017. The inevitable corners that are being cut in the regulatory process leave the agencies vulnerable to future lawsuits, but this time from industries that are appropriately using the courts as a last resort defense to protect themselves and the economic benefits they provide.

Government agencies like the Department of the Interior (DOI) and EPA are cutting corners by not providing the scientific support and data required by statute to properly justify new regulations and to show they deliver benefits commensurate with the cost. The agencies are also cutting corners by not following proper procedures. Procedures are not just mere technicalities, but are designed as a check on agencies to ensure they are serving the public.

The unexpected victory Western Energy Alliance and the Independent Petroleum Association of America have achieved in forestalling the implementation date of the Bureau of Land Management's (BLM) hydraulic fracturing rule is a case in point. After first winning a temporary delay from a June 24th implementation date, we were further granted more delay by BLM itself, which cannot yet provide the administrative record to the District Court. The record is a basic part of any rulemaking, and the disarray

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[11] *The Cost of Federal Regulation to the U.S. Economy, Manufacturing and Small Business*, A Report for the National Association of Manufacturers by W. Mark Crain and Nicole V. Crain, September 10, 2014.

[12] *Business Impact of Revised Completion Regulations*, John Dunham & Associates (JDA) analysis for Western Energy Alliance, July 22, 2013.

[13] *Cost Benefit Analysis of Proposed NSPS and Amendments to the NESHAPs for the Oil and Natural Gas Industry,* JDA analysis for Western Energy Alliance, October 10, 2012.

[14] *Final Analysis of the Impact of Greater Sage Grouse Restrictions on Oil and Natural Gas Development and Production*, JDA analysis for Western Energy Alliance, May 14, 2015.

indicates that BLM is overreaching as it tries to implement the fracking rule along with initiating new rulemaking on royalty rate increases, measurement, flaring and venting while simultaneously trying to finalize 68 Resource Management Plans and new mitigation and planning procedures. What's particularly illustrative is that BLM has already taken nearly five years on this rule. The planned new regulations are cumulatively larger and more complex, yet proposed rules have not even yet been released. It strains credulity to see how BLM can succeed with all these regulatory goals before the end of the Administration.

Environmental Group Litigation

Sue-and-Settle Analysis: 2011 ESA Settlements

Focusing on the topic of this hearing, how environmental litigation is driving regulation from the U.S. Fish & Wildlife Service (FWS) and EPA, I'll start with the most egregious example because it affects not just the oil and natural gas industry, but productive users of public and private lands across the United States: two settlement agreements related to hundreds of species listings under the Endangered Species Act (ESA).

Western Energy Alliance is today releasing an update to our Sue-and-Settle legal analysis, originally released in 2014,[15] which shows another year, another chance for environmental groups to overload FWS with listing petitions and lawsuits that divert resources away from actual species recovery and into litigation and bureaucratic process.[16]

In 2011, two serial litigants, WildEarth Guardians (WEG) and the Center for Biological Diversity (CBD) reached settlement agreements with DOI on a combined 878 species.[17] DOI's justification for entering into the closed-door settlement agreement that excluded the public, elected officials, states, localities, and other stakeholders was to limit future listing petitions and litigation. But DOI essentially handed over policymaking to two special interest groups and committed its resources to the priorities of these two groups. Ceding that much power to one special interest has placed a burden on the federal government, states, productive industries, and private landowners that is alarming. This hearing today is encouraging, as oversight is an important step toward wresting that power back from very narrowly focused unelected, unaccountable and unproductive interests.

The purpose of our legal analysis is to determine if DOI indeed met its goal; having allowed CBD and WEG to set the FWS listing agenda for six years, did it at least achieve a stipulation of the settlement, i.e., that the groups would not sue on the species named in the agreement? And would they stop overwhelming FWS with new petitions? In that sense, the settlements were a resounding failure.

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[15] *Sue-and-Settle Legal Analysis: The Department of the Interior's 2011 Settlement Agreement with Wild Earth Guardians and the Center for Biological Diversity*, Western Energy Alliance, September 29, 2014.
[16] *Sue-and-Settle Legal Analysis: The Department of the Interior's 2011 Settlement Agreement with Wild Earth Guardians and the Center for Biological Diversity*, Western Energy Alliance, August 4, 2015.
[17] *Stipulated Settlement Agreement in the U.S. District Court for the District of Columbia, WildEarth Guardians v. Salazar,* MDL Docket No. 2165, May 10, 2011. *Stipulated Settlement Agreement in the U.S. District Court for the District of Columbia, Center for Biological Diversity v. Salazar,* MDL Docket No. 2165, July 12, 2011

Using legal and FWS databases, Western Energy Alliance conducted an analysis of petitions and lawsuits filed since the huge settlements were reached in 2011 and discovered that:

- 53 petitions have been filed with FWS requesting listing or uplisting (from threatened to endangered) on 129 species. WEG and CBD are responsible for 38 (72%) of the petitions covering 113 (88%) of the species.

- Requests for species listings have climbed to an average of 31 per year, up from 20 prior to 2007. FWS is still struggling to deal with the dramatic increase in species petitions from 2007 to 2010, with 695 species in 2007, 56 in 2008, and 63 in 2009. In 2010, FWS received a single petition from CBD to list 404 species.

- With complete disregard for the spirit of the agreements, CBD delivered a large 53-species petition to FWS less than a year after the settlements were approved, prompting FWS Assistant Director for Endangered Species Gary Frazer to state, "We're disappointed that they filed another large, multi-species petition."

- 71 different plaintiffs have filed 43 lawsuits challenging FWS decisions on 107 different species. It's not surprising that more plaintiffs are resorting to legal action, since the settlements shut out policymakers and other stakeholders that are now left with few other options. Yet despite being handed policy privileges by FWS through closed-door negotiations, WEG and CBD remain the most prolific litigants, with 23 lawsuits (53%) involving 45 species (42%).

- 50 of those 107 species that are subjects of new lawsuits were already addressed in the settlement agreements of 2011, with CBD and WEG responsible for the lawsuits on 34 (68%) of those species. These radical environmental groups will not be satisfied unless all of their petitions result in endangered listings, whether or not such determinations are warranted.

Sue the government, get favorable settlement agreements, shut out the public, yet keep suing if 100% of your demands are not met. It's not a surprise when the goal is to "bring industrial civilization to its knees."[18] CBD's founders describe the ESA as "an incredible law where (sic) we can make people do whatever we want,"[19] and the Interior Department decided to go along with that agenda.

Western Energy Alliance supports legislation to limit the ability of groups to sue-and-settle behind closed doors without involvement of elected state, local and federal official, and to limit reimbursement under the Equal Access to Justice Act. The current FWS rulemaking on changes to the ESA petition process to prevent bulk petitions and involve state wildlife agencies is encouraging, as it is a sign that even the agency has had enough of the abuse of ESA, but we encourage Congress to codify it into statute along with other ESA reforms.

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[18] "A bare-knuckled trio goes after the Forest Service," *High Country News*, March 30, 1998.
[19] "No People Allowed: A Radical Environmental Group Attempts to Return the Southwest to the Wild," *The New Yorker*, November 22, 1999.

Sue-and Settle: EPA and the Clean Air Act

Likewise, EPA has allowed its agenda to be driven by the environmental lobby when it comes to oil, natural gas and many other human endeavors. While I could discuss regulatory proceedings that broadly affect states and many economic activities, like the Waters of the U.S. Rule, regional haze,[20] the ozone National Ambient Air Quality Standard (NAAQS) and others, I am going to limit my testimony to examples that just directly affect oil and natural gas.

In addition to settling with environmental groups to embark on additional regulation, EPA has settled away its statutory discretion to determine that new regulations are not appropriate. This goes beyond provisions in the Clean Air Act (CAA) that enable citizen lawsuits to enforce statutory deadlines and into setting new statutory standards by sidestepping Congress.[21] As of October 2014, there have been 88 sue-and-settle cases arising under the CAA, Clean Water Act (CWA) and ESA during the Obama Administration. Of these 88 cases, industry groups brought nine while environmental groups brought the remaining 79. Of those 79 cases, 61 were brought under the CAA.[22] I would like to highlight a few that directly affect my industry.

NSPS Subpart OOOO/NESHAP: In 2009, Wild Earth Guardians and the San Juan Citizens Alliance sued EPA alleging the agency's failure to meet CAA requirements to conduct New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP) review and revision requirements for the oil and natural gas production source category. The Clean Air Act requires EPA to conduct these reviews every eight years for a whole host of industry segments.[23] A consent decree was entered in 2010 requiring EPA to issue a proposed rule by July 28, 2011, with final action no later than February 28, 2012. Since promulgating the final rule on August 16, 2012, Western Energy Alliance members have incurred millions of dollars in compliance costs with more expected as EPA issues new rules targeting further reductions of volatile organic compounds and methane. While some concerns have been resolved through reconsideration, the Administration's promised methane rules for the oil and natural gas sector may be released as an extension of the rulemaking initiated as a result of sue-and-settle tactics.

EPA has claimed since that time that its hands are tied because it had indeed failed to meet the statutory deadline. But conducting a review does not mean the agency must implement extensive new regulations that lack adequate justification. Western Energy Alliance and other industry trades have filed several administrative and judicial review petitions in response to the impracticalities of the complex rules rushed in place to meet unrealistic deadlines imposed by a settlement. Given the green light, EPA

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[20] *Sue and Settle: Citizen Suit Settlements and Environmental Law*, Janette L. Ferguson and Laura Granier of Davis Graham & Stubbs LLP, pp. 3-5 provides a good summary of how environmental lawsuits led to the federal usurpation of State Implementation Plans of regional haze.

[21] *Id,* p. 5.

[22] "An Empirical Analysis of Sue and Settle In Environmental Litigation," Tyson, Ben, *Virginia Law Review*, Vol 100:1545 October 20, 2014.

[23] Clean Air Act § 111(b)(1)(B) (every 8 years), 112(d)(6) (as necessary, no less frequently than every 8 years), and 112(f)(2) (as necessary, no less frequently than every 8 years).

did not just meet its statutory obligations for review; it used the settlement as an excuse to overreach with very complex, expensive new requirements.

EPA made mandatory reduced emissions completions for natural gas wells, even though industry had developed the technology and was rapidly adopting it. But by making mandatory what companies were already doing, EPA added layers of record keeping and other red tape. Companies must now divert extensive resources away from productive activities that would otherwise grow the economy and create jobs into non-productive compliance.

Furthermore, this as an example of targeting one industry. The oil and natural gas has continually reduced emissions even as production climbs, through both regulatory compliance, technical innovation, and voluntary mitigation measures. However our success has been met by EPA with more red tape, more punitive enforcement actions, and more extensive data digging exercises that are expensive and extremely time consuming. EPA has the same CAA eight-year review requirement for 70 other sectors with NSPSs. As of October 2011, just 17 (24%) of those sectors had been revised within the eight-year review period. Such selective enforcement can become a source of cronyism, as favored industries or companies are left alone while others like oil, natural gas and coal are targeted.

In reality, we should be glad as a society that EPA cannot keep up with all its CAA mandates, as our economy would be even more constrained by regulation than it already is, and our workforce participation rate would be even lower than it has already sunk. However, the larger point to be made is that Congress should revisit some of the provisions of the CAA and other regulations that stifle economic growth. Through initial regulation focused on large environmental problems combined with the continual innovation of industries constantly innovating, air emissions have sunk 62% since 1980.[24] While more work needs to be done, command-and-control CAA mechanisms are not the most effective way to do so, especially when focused on smaller benefits at greater costs, such as the planned change to the ozone NAAQS. Congress should amend the CAA to make it more effective while reducing unproductive and ineffective red tape.

SSM SIP Call: The Sierra Club filed a petition for rulemaking on June 30, 2011, asking EPA to revise all State Implementation Plan (SIP) provisions where those SIPs contained affirmative defenses for monetary penalties associated with excess emissions during Startup, Shutdown, and Malfunction (SSM) events. Subsequent to this petition, the U.S. Court of Appeals for the D.C. Circuit upheld the Sierra Club's claims in its suit against EPA that SSM affirmative defense provisions violated the CAA even for malfunctions (not limited to just planned startup and shutdown events.) In May 2015, EPA issued a SIP call for 36 states to revise relevant portions of their SSM affirmative defense provisions contained in those SIPs, including for malfunction provisions. These SIP Calls have the potential to greatly impact Alliance members' existing and future operations, including through increased exposure to enforcement and potential increased penalties for unpreventable equipment breakdowns. The SIP calls force state environmental departments to expend their limited resources at the behest of one environmental group.

[24] *Air Quality Trends,* EPA, 2013.

There are signs that the agencies themselves have had enough of the overreach by environmental groups. Having unleashed the beast of overregulation, they are finding they do not have the resources or wherewithal to do everything required by their political and environmental masters. The agencies recognize that they do not have the resources to implement all the new requirements. The agencies will not have the manpower and resources to issue all the new permits required from a whole host of new regulations, which will continue to constrain job-creating activities throughout the economy. It is time to recognize that the balance between regulation and the economy has been fundamentally upset, and requires correction. Western Energy Alliance calls on Congress to help with that realignment.

It is not just a matter of one industry, the oil and natural gas industry. Since oil, natural gas and other fossil fuels are the basis of the modern lifestyle that keeps Americans healthy and safe while supporting the entire economy, agenda-driven overregulation is counterproductive to the interests of our entire society. Overregulating us will result in pain to all Americans in the form of higher energy prices, fewer jobs, and less economic opportunity.