

## Center for Regulatory Effectiveness

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September 22, 2007

Desk Officer for the  
Department of the Interior  
Office of Information and Regulatory Affairs  
Office of Management and Budget  
New Executive Office Building  
725 17<sup>th</sup> Street, NW  
Washington, DC 20503

**Re: RIN 1004–AD90; Comments on New Information Collection Request, “Parts 3900–3930—Oil Shale Management—General.”**

Dear OMB:

The Center for Regulatory Effectiveness (CRE) appreciates this opportunity to comment on the Bureau of Land Management’s (BLM’s) Information Collection Request (ICR) accompanying their proposed rule on oil shale management.<sup>1</sup> CRE compliments BLM on their exhaustive analysis of PRA issues in developing the ICR. As a former OMB official who was substantively involved in implementation of the Paperwork Reduction Act of 1980, I respect and value the effort BLM put into their PRA submission, particularly with regard to detailing the paperwork mandates contained in the proposed rule.

CRE’s comments are written to assist OMB and BLM in achieving one the fundamental purposes of the PRA, ensuring “the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government.”<sup>2</sup>

In accordance with the PRA, CRE requests that OMB ensure that BLM develops a final rule that maximizes the utility and the public benefit of information collected in the lease application. Specifically, as detailed below, in order to comply with the utility, quality and benefit objectives of the PRA, BLM will need to select a Royalty Rate and Point of Royalty Determination option that maximizes the quality of key information collected in the lease application while adhering to the royalty determination and diligent development requirements of the Energy Policy Act of 2005 (EP Act).

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<sup>1</sup> 73 Fed. Reg 42926, *et seq.* July 23, 2008.

<sup>2</sup> 44 USC § 3501 (2).

## Principles for Determining Royalty Policy

In their Notice of Proposed Rulemaking (NPRM), BLM discusses requirements of the EP Act which guide their regulatory development process. Two of these constraints directly applicable to the royalty option decision, which lead to the maximizing the quality and public benefit of the information collected, are:

1. Encouraging Development. BLM noted that the EP Act “directs the agency to establish royalties and other payments for oil shale leases that shall – (1) Encourage development of the oil shale and tar sands resources” and ensure a fair return to the United States.<sup>3</sup> Thus, one principle for determining royalty policy is that the option chosen ensures the initial viability of shale development projects, *e.g.*, companies bid for leases and undertake the application process.
2. Sustaining Diligent Development. The NPRM explains that “the EP Act requires that the BLM establish work requirements and milestones to ensure diligent development of Federal oil shale leases.”<sup>4</sup> Thus, the second principle is that the royalty option needs to encourage “diligent development” of the leased lands which means the lessee fulfilling their investment and development activities on schedule.

BLM has recognized the importance of diligent development provisions of the EP Act and, after considering “many options” determined,

*that the milestones should be the series of steps necessary for the development of the oil shale. Defining milestones this way is logical because the steps are necessary to begin production and the BLM believes the requirement would encourage development.*<sup>5</sup>

Thus, BLM is explicitly recognizing that it is not enough to just encourage initiation of the development process but also for the agency to incorporate the “steps necessary for the development of the oil shale” into the diligence milestones to help “encourage development.”

Therefore, based on the EP Act, there are two selection principles that BLM needs to use as a filter when evaluating the royalty options discussed in the NPRM: 1) encouraging initial development; and 2) sustaining diligent development throughout the life of the project. **Moreover**, these two EP Act principles dovetail with the PRA’s requirement that BLM maximize the utility and public benefit of the lease information collected since initiating and sustaining predictable development is a prerequisite for minimizing uncertainty in the state and local impact projections.

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<sup>3</sup> 73 Fed. Reg 42930, July 23, 2008.

<sup>4</sup> Ibid., p. 42928.

<sup>5</sup> Ibid., p. 42942.

### **Sustaining Project Viability**

With respect to the PRA, the second principle guiding BLM's selection of a royalty option is the most important since, if the first principle of encouraging development is not adhered to, there will be few if any valid lease applications subject to the PRA.

The second principle, sustaining diligent development, applies to the royalty option decision as well as to the project milestones enumerated by BLM. Specifically, the royalty option selected must provide sufficient financial incentive to encourage sustained and predictable development activities even though the costs and risks associated with those activities are uncertain, as BLM has recognized, and the value of any oil produced is subject to substantial market fluctuations.

In establishing project milestones, BLM has recognized the importance of keeping project schedules on track. Changes in project development costs could, however, force changes in development progress. If the total costs to the lessee, including development costs and royalties, exceed expected revenues, the project becomes non-viable and may be delayed or even cancelled. Thus, the level of royalty payments will strongly influence the ability of lessees to remain on schedule in the face of recognized technological and economic uncertainties. The higher the royalties, the less likely it is that the lessee will be able to keep to the planned development schedule. Delays in development mean that the quality of the applicants' descriptions of community and state and local government impacts have been reduced.

Thus, royalty policies which raise the likelihood of development delays reduce the utility to BLM, local communities and to state and local governments of information collected in the application. Therefore, to adhere to the PRA's requirements for maximizing the utility and public benefit of information collected, the royalty option selected by BLM should be one that maximizes the likelihood of development and production being completed as planned.

While the above principle, which is founded on both the EP Act and the PRA, does not dictate selection any specific option, it does provide an analytic paradigm that BLM is compelled to use when selecting the royalty scheme adopted in the final rule.

In summation, BLM needs to analyze the range of potential royalty options in light of their need to encourage: 1) initial development of oil shale; and 2) sustained and predictable development of the shale.

### **BLM's Premature/Invalid Certification**

The paperwork package BLM sent to OMB contains a premature, and thus invalid, certification that the agency has complied with PRA requirements delineated in 44 USC 3506(c)(3). Specifically, the ICR submitted to OMB states, "On behalf of this Federal agency, I certify that the collection of information encompassed by this request complies with 5 CFR 1320.9 and the related provisions of 5 CFR 1320.8(b)(3)."<sup>6</sup>

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<sup>6</sup> Found at [http://www.reginfo.gov/public/do/PRAViewICR?ref\\_nbr=200806-1004-001](http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200806-1004-001).

The problem with the above certification is that 44 USC 3506(c)(3) requires that the agency “certify (and provide a record supporting such certification, **including public comments received by the agency**) that each collection of information submitted to the Director for review under section 3507—” [Emphasis added.]

In that the BLM’s certification was dated July 23, 2008, the date the NPRM and request for comment on the ICR was published, it is not possible for the certification to have included public comments. The importance of public comments as part of the certification record cannot be underestimated. It is the public comments which act as a check on the self-certification and potentially prevent the certification process from being a rubber stamp – a public role in the certification process itself is clearly what Congress intended since the law explicitly required that public comments not only be sent to OMB but be sent as part of the certification’s supporting record.

CRE recommends that OMB direct BLM to revise their certification – and supporting record – following the close of the comment period. The revised supporting record should clearly describe BLM’s plan for using the two above-discussed statutorily-derived principles governing the royalty option decision to ensure that the agency will maximize the utility and public benefit of the information collected.

### **Quality Information Essential For Protecting State and Local Governments**

State and local government planning decisions affected by potential shale development projects need to be based on project impact assessments that are as reliable as possible. Royalty rates are one of the key factors that will determine the reliability of those impact estimates that are included in the lease application.

The importance of royalty rates and point of royalty determination as a determinant of the commercial viability of shale projects are made clear in a Department of Energy report on shale resources. DOE explained that “The commercially successful production of oil from Alberta tar sand serves as a model for the potential development of US oil shale” and that “Recent incentives, including forgiveness of tar sand royalties until project payback is achieved, have stimulated more than \$65 billion in private investments to accelerate development and achieve industry-scale operations during this decade.”<sup>7</sup> Similarly, when the DOE report discusses shale development in Australia, the financial model for a commercial-scale project where the “costs for producing oil from shale are very competitive, even when compared to comparable-sized conventional off-shore projects in other parts of the world” is based on a royalty rate of 1.8% for shale compared with 12.5% for conventional oil.<sup>8</sup> The 1.8% Queensland (Australia) royalty rate cited by DOE for a commercially viable project stands in stark contrast to the 10% Australian shale royalty rate cited in the NPRM.<sup>9</sup>

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<sup>7</sup> Department of Energy, “Strategic Significance of America’s Oil Shale Resource, Volume II – Oil Shale Resources Technology and Economics,” March 2004, pp. 28-29.

<sup>8</sup> Ibid., p. 11.

<sup>9</sup> NPRM, p. 42931.

As the Congressional Research Service noted, the history of interest in oil shale development goes back to the early 20<sup>th</sup> century and there was renewed interest in the 1960s and 1970s. As CRS explains, however, the “federal program proved short-lived, and commercially backed oil shale projects ended in the early 1980s....”<sup>10</sup> If BLM is to avoid the problems of the past, with the associated negative impacts on state and local government planning, they need to set a royalty policy that allows potential lessees to maximize the reliability of their governmental impact assessments.

## Recommendations

1. **Demonstrate Compliance with EP Act and PRA.** Given the statutory requirements of the EP Act and the PRA, notify BLM that the record submitted to OMB with the final rule must demonstrate compliance with the royalty principles of encouraging and sustaining diligent development of lease sites.
2. **Revise ICR Certification.** Direct BLM to revise their ICR certification and supporting record, based on public comment received, to include their plan for using the royalty principles of encouraging and sustaining diligent development to maximize the utility and public benefit of the information collected.
3. **Publication of Compliance in Final Rule.** The Terms of Clearance for the ICR should specify that the record demonstrating BLM’s compliance with the royalty principles of encouraging and sustaining diligent development be included in the preamble to the final rule.

Sincerely,

/s/

Jim Tozzi

Member, Board of Advisors

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<sup>10</sup> CRS Report for Congress, “Oil Shale: History, Incentives, and Policy,” April 13, 2006., Summary.