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Collaboration Through NEPA: Achieving a Social License to Operate On Federal Public Lands

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Collaboration Through NEPA: Achieving a Social License to Operate On Federal Public Lands

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As demand and consumption of natural gas increases, so will drilling operations to extract the natural gas on federal public lands. Fueled by the shale gas revolution, natural gas drilling operations are now frequently taking place, not only in the highly documented urban settings, but also on federal public lands with high conservation value. The phenomenon of increased drilling in sensitive locations, both urban and remote, has sparked increased public opposition, requiring oil and gas producers to reconsider how they engage the public. Oil and gas producers have increasingly deployed the concept of a social license to operate to gain support from the public and the communities in which they operate. A social license to operate is a voluntary license granted by communities, obligating companies to go above and beyond the requirements of their legal license to operate. While natural gas developers have increasingly sought to achieve a social license to operate in urban settings, such as the Colorado Front Range, there has been little use of this approach by operators drilling on federal public land. We advocate for the use of increased collaboration with affected stakeholders and communities through the NEPA process as a means to achieve a social license to operate on federal public land.

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“The broadest paradox of the fracking debate lies in the allocation of costs and benefits. The local communities in proximity to the development experience the disturbances with immediacy and intensity. The principal benefits - national security, a cleaner-burning fossil fuel, heated homes, generated electricity, and profits to company owners and stockholders - are received in distant locals. This is an arrangement set up to maximize distrust and misunderstanding.”¹

1. Patty Limerick, *The Fractured Terrain of Oil and Gas Opposition*, HIGH COUNTRY NEWS, Feb. 22, 2016 (hereinafter “The Fractured Terrain”).

I. INTRODUCTION

In 2013 the authors conducted a study in Routt and Moffat Counties in northern Colorado at the request of the Shell Exploration and Production Company (Shell) to explore local stakeholder perceptions regarding oil and gas development.² The study involved interviews with representatives from various stakeholder groups, providing quantitative and qualitative data to explore the themes in the community discourse surrounding energy production in the region.³ We found five themes that defined the discourse, and not surprisingly, they ranged from very trusting to very distrusting of oil and gas companies and regulators.⁴ An important finding was that study participants were able to articulate a set of environmental, economic, and social conditions under which they would accept expanded oil and gas development in the area.⁵

This study illuminated the place-based aspirations and concerns that would have been raised if Shell had decided to expand its oil and gas operations in the area (which it did not). It also appeared that most conditions articulated by stakeholders were negotiable for Shell, and that most stakeholders were willing to negotiate with Shell.⁶ Had Shell continued with its proposed development, there would have been potential to use place-based collaborative approaches to optimize profits for the company while creating a social license to operate with the stakeholders and communities. A social license to operate is society's or a local community's acceptance or approval of a company's activities or operations.⁷

2. Jessica M. Clement & Elizabeth Spaulding, *The Prevailing Themes in the Oil and Gas Development Discourse Among Local Residents in Moffat and Routt Counties, Colorado*, 1 (2013), on file with Ruckelshaus Institute, University of Wyoming.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Brian F. Yates & Celesa L. Horvath, *Social License to Operate: How to Get it, and How to Keep it 1*, Pacific Energy Summit (Summit Working Papers, 2013), available at: http://www.nbr.org/downloads/pdfs/eta/PES_2013_summitpaper_Yates_Horvath.pdf.

When Shell sold its interests in the area, the authors continued to explore the extent to which collaborative approaches are used in oil and gas development in general, and in the United States specifically. We met with executives at Shell and the International Petroleum Industry Environmental Conservation Association (IPIECA) to discuss collaboration and a social license to operate. We also convened an Energy and Collaboration Summit, where we invited a panel of current and former energy executives to Jackson, Wyoming for a facilitated discussion on current practices and challenges related to collaborative decision making.⁸ During the discussion, we explored opportunities for new approaches to enhancing the achievement of a social license to operate in the energy sector in the western United States, particularly on public lands.⁹

The Shell study, the discussions with Shell and IPIECA, and the Energy and Collaboration Summit helped us understand that there are incentives and disincentives for companies to engage and collaborate with stakeholders and communities in order to seek a social license to operate. In the context of public lands, many of those incentives and disincentives are built into the federal regulatory process, and specifically into the National Environmental Policy Act (NEPA) process. Given that a typical oil and gas NEPA Environmental Impact Statement (EIS) takes an average of 4.4 years to complete, there has been understandable frustration with the time and expense of NEPA compliance, leading to calls for NEPA reform and/or streamlining the process.¹⁰ However, if a streamlined process results in litigation and a supplemental EIS is judicially ordered, an additional average of 2.3 years is added to the EIS completion timeline, adding additional expense and frustration.¹¹ If the NEPA process is streamlined, collaborative approaches to NEPA will be necessary to reduce the likelihood of litigation-driven EIS delay.¹²

While the previous literature on the emergence of a social license to operate in the United States has focused on private oil and gas

8. Energy & Collaboration Summit, Jackson, Wyoming, (Mar. 6, 2014) (unpublished conference report; on file with the author).

9. *Id.*

10. John Ruple & Mark Capone, *NEPA - Substantive Effectiveness Under a Procedural Mandate: Assessment of Oil and Gas EISs in the Mountain West*, 7 GEO. WASH. J. ENERGY & ENVTL. L. 39, 45 (2016).

11. *Id.*

12. *Id.*

developments, we are particularly interested in its application to federal public land oil and gas development projects as a means to reduce conflict and add value to all parties. In this article, we propose that NEPA provides a unique opportunity to incorporate greater collaboration into oil and gas projects in order to achieve a social license to operate. That unique opportunity exists because unlike development on private land, complying with NEPA requirements for oil and gas production on public lands provides companies with a defined structure from which to engage communities and stakeholders through a collaborative process. We begin in Section II by providing an overview of social license to operate including the emergence of its application in the U.S. oil and gas sector by discussing two case studies. In Section III we discuss how collaborative processes are synonymous with social license “ingredients.” In Section IV we discuss NEPA and how greater collaborative efforts can be incorporated into the NEPA process to achieve a social license. In Section V we discuss how to overcome barriers to collaboration in the NEPA process, specifically overcoming the hurdles posed by the Federal Advisory Committee Act. In Section VI we conclude by suggesting that by encouraging federal land agency personnel to incorporate more collaboration into the NEPA process, a variety of federal land project proponents (including coal, renewable, and timber) can leverage the legal license process to achieve a social license to operate.

II. SOCIAL LICENSE BACKGROUND

As noted above, a social license to operate generally confers community acceptance of a company’s operations and outlines “the demands on and expectations for a business enterprise that emerge from neighborhoods, environmental groups, community members, and other elements of the surrounding civil society.”¹³ A social license to operate is generally voluntary, often informal, and is granted by a community based on the opinions and views of stakeholders.

13. Neil Gunningham, et. al., *Social License and Environmental Protection: Why Businesses go Beyond Compliance*, 29 *LAW & SOC. INQUIRY* 307, 308 (2004), <http://scholarship.law.berkeley.edu/facpubs/675/>.

The term social license was first used during a 1997 World Bank meeting by Jim Cooney, a Canadian mining executive, who described the ability of communities to stop a mining project.¹⁴ The term was revisited and further developed in response to the United Nations Declaration on the Rights of Indigenous Peoples in 2006, requiring extractive industries operating in the territories of indigenous people to secure free, prior, and informed consent (FPIC) from those indigenous communities.¹⁵

While originally only applied in the mining sector, a social license to operate has begun to be applied to other energy sectors as well. A social license is a particularly powerful tool in the energy sector where it can be used as leverage against the demands of environmental advocacy groups, who act as watchdogs and de facto regulators.¹⁶ A few damaging encounters involving large energy corporations, environmental advocacy groups, and the public has “led to a broader corporate rethink” and more frequent application of a social license to operate in the energy sector.¹⁷ One such damaging encounter was Shell’s mid-1990’s miscalculation that the public would not object to the sinking of the Brent Spar, a 14,500 ton oil platform in the North Sea, because the necessary approvals from the UK government had been obtained.¹⁸ Much to Shell’s surprise, public opposition was significant, and protests against Shell were waged across Europe.¹⁹ Shell’s international reputation was substantially damaged and

14. Joel Gehman, Lianne M. Lefsrud, & Stewart Fast, *Social License to Operate: Legitimacy by Another Name?* 60 *NEW FRONTIERS*, 293, 294 (2017) (explaining that usage of the term social license to operate became widespread throughout the mining industry in 2002 but offering that the term is not a new concept and has long been understood “to play a vital function in society whereby social norms can precede and superseded legal rules.”). Jim Cooney, *Reflections on the 20th Anniversary of the Term ‘Social License,’* 35 *J. Energy & Nat. Resources* L.197 (2017) (offering his personal account of how his use of ‘social license’ occurred at the 1997 World Bank meeting).

15. Kathleen M. Wilburn & Ralph Wilburn, *Achieving Social License to Operate Using Stakeholder Theory*, 4 *J. OF INT’L BUS. ETHICS*, 3, 4 (2011).

16. Gunningham, *supra* note 13, at 337.

17. *Id.* at 309.

18. *Id.*

19. Jesper Grolin, *Corporate Legitimacy in Risk Society: The Case of Brent Spar*, 7 *BUS. STRATEGY AND THE ENV’T*, 213, 214 (1998).

its sales were significantly impacted.²⁰ In the end, Shell decided to dismantle and recycle the Brent Spar platform on land.²¹ Had a greater community outreach been undertaken, and a social license obtained in addition to governmental approval, perhaps Shell would not have taken such a hard hit.

In his book, *The Social License: How to Keep your Organization Legitimate*, John Morrison notes that fifty years ago

the resource [extraction] sector secured its license to operate at the discretion of the government, in fact, we still do. And that's called a legal license and permits and license are granted and we live up to the expectation and they are maintained. But in the world of globalization and in an increasing world of scrutiny and mobilization of local voices, if you don't have the broad-based support of local people for what you want to do, then you won't get your legal license.²²

Understanding that negative community impacts can “damage a company’s reputation, or result in loss of operation time and profits, and can put future investment opportunities at risk” major oil and gas extraction companies and their investors are increasingly recognizing that securing a social license to operate is a precondition to development.”²³

The process of obtaining a social license includes early and ongoing communication with communities, transparency and engagement in decision-making, and the establishment of effective conflict resolution mechanisms.²⁴ At its core, a social license to operate involves a significant

20. *Id.*

21. *Id.* at 215.

22. JOHN MORRISON, *THE SOCIAL LICENSE: HOW TO KEEP YOUR ORGANIZATION LEGITIMATE*, 159 (2014).

23. Emma Wilson, *What is the Social License to Operate? Local Perceptions of Oil and Gas Projects in Russia's Komi Republic and Sakhalin Island*, 3 *THE EXTRACTIVE INDUS. AND SOC'Y*, 73, 73 (2016).

24. Don C. Smith, Jessica Richards, & R.J. Colwell, *Where “Shale” We Go From Here: Opportunities and Challenges in Shale Plays Located Outside the United States*, 14-2 *ROCKY MT. MIN. L. FDN.* 14, 14-4 (2017) referencing Jason Prno

degree of meaningful dialogue between a company and the community in the planning and operation of the industrial activity. In that vein, a grant of a social license to operate by the public requires that the public understand what it is granting.²⁵ Complete and accurate public disclosure of the relevant information needed to fully evaluate the proposed development must be disclosed to the public so they can gain a shared understanding of the risks and benefits of the energy development project. That disclosure should include conversations about what is known, and what is not known, utilizing credible, sciences-based background information to inform the debate so that all sides can engage in a discussion based on facts, not opinions.²⁶

Once obtained, a social license is dynamic; its grant is impermanent and can be revoked when public perceptions and opinions change.²⁷ Pierre Lassonde, one of the most famous gold investors in the world, remarked during a speech to the Melbourne Mining Club in 2003, that a “social license to operate, much like a reputation, is first and foremost built on trust, which takes years to build, but can be lost in seconds.”²⁸ A social license is most commonly revoked based on “perceived risk or lack of benefits to stakeholders.”²⁹

A. A Social License to Operate vs. a Legal License to Operate

A social license to operate is not a legal license to operate, as it is not based on legal requirements, but rather on the degree to which a

& D. Scott Slocombe, *Exploring the Origins of “Social License to Operate” in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37 RES. POL’Y 346, 347 (2012).

25. Evan House, *Fractured Fairytales: The Failed Social License for Unconventional Oil and Gas*, 13 WYO. L. REV. 5, 54 (2013).

26. *Id.*

27. *Id.* at 51.

28. Pierre Lassonde, *What Shade of Green are You?*, Melbourne Mining Club, 5 (Aug. 8, 2003) available at: <http://www.melbourneminingclub.com/wp-content/uploads/2014/03/Pierre-Lassonde-8-August-2003.pdf>

29. Elizabeth Holly & Clark Mitcham, *The Pebble Mine Dialogue: A Case Study in Public Engagement and the Social License to Operate*, 47 RES. POL’Y, 18 (2016) (citing R.G. Boutilier, *Frequently Asked Questions About the Social License to Operate*, 32 Impact Assess. Proj. Apprais., 263-272 (2014)).

company and its activities meet the expectations of local communities, the wider society, and various constituent groups.³⁰ A legal license to operate on the other hand, is granted by a government body and includes the initial permission to do something, as well as ongoing compliance with existing applicable laws and regulations.³¹ However, a legal license to operate and a social license to operate are not completely distinct; instead, they necessarily complement and reinforce one another.³² However, a legal license framework must necessarily exist before a social license can be contemplated because a social license is an extension of a legal license.³³

As applied to the oil and gas industry, the legal license sets the formal framework for the energy company to obtain the right to use the land and/or extract the natural resources in exchange for compliance with environmental rules and regulations.³⁴ To the extent that the legal license does not encapsulate society's expectations, in places where exploration and production activities are controversial and disputed, oil and gas companies need to rely upon a social license to operate. In this context, a social license "describes the latitudes or freedom that society allows the business to use land and its resources without interference. Society expects more of businesses than that they just comply with the law."³⁵

Traditionally, corporations viewed compliance with governmental legislation as fulfilling both their legal requirements and their social obligations since governmental legislation was understood to be a measure of societal expectations.³⁶ Corporations were expected to go above and beyond compliance with legislation only if there was some financial self-

30. Gunningham, *supra* note 13, at 308.

31. Smith, Richards, & Colwell, *supra* note 24, at 14-3.

32. *Id.* at 14-2.

33. *Id.* at 14-4.

34. Brian J. Preston, *The Adequacy of the Law in Satisfying Society's Expectations for Major Projects*, INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE PAPER, 2 (Oct. 22, 2014).

35. *Id.*

36. Gunningham, *supra* note 13, at 308 (citing M. Wright, *Factors Motivating Proactive Health and Safety Management*, Contract Research Report prepared by Entec. U.K. Ltd. For the Health and Safety Executive London, Her Majesty's Stationery Office (1998)).

interest for doing so.³⁷ That has changed. Today, corporations understand that social obligations are no longer synonymous with legal obligations.³⁸ Instead, corporations now understand that hazards and harms that are not per se illegal today, may become so in the future leaving them open to both social and legal liability.³⁹

In reality, the demands by social licensors may be tougher than the demands imposed by legal license regulators.⁴⁰ Many companies fear enforcement for noncompliance with a legal license not for the penalty associated with it, but because enforcement actions generate negative publicity, impacting the company's reputation and perhaps its social license.⁴¹ It is also likely that failure to satisfy a social concern or establish a social license may result in tighter regulatory restrictions.⁴²

There are, however, limits on how far beyond compliance with a legal license companies are willing to go to satisfy a social license to operate.⁴³ Constraints or limits on the social license to operate include economic constraints, the reasonableness of the social licensors' demands, and the responsiveness of legal and political actors to enforce the social licensors' demands.⁴⁴ Ultimately, the impact on a company's economic bottom line is the key factor in determining how far beyond legal compliance a company will be willing to go.⁴⁵

37. *Id.* As an example, Gunningham noted that in the case of environmental protection, it was often more cost effective to reduce waste so corporations did so. However, over time the environment continued to be degraded so it was obvious the financial self-interest for reducing waste was not prevalent enough, thus there was a political demand for increased governmental regulation (legal coercion) to compel corporate environmental measures.

38. *Id.*

39. *Id.*

40. Smith, Richards, & Colwell, *supra* note 24, at 14-3 to 14-4.

41. *Id.* at 14-4.

42. Gunningham, *supra* note 13, at 331.

43. *Id.* at 332.

44. *Id.*

45. *Id.* at 336.

B. The Emergence of Social License Application in the United States Oil and Natural Gas Sector; Two Case Studies

While first applied in the oil and gas industry in the 20th century in the developing world, the developed world did not apply social license to operate until the 2010's, coinciding with the advent of unconventional oil and gas development.⁴⁶ Sparked by drilling technology advances, unconventional gas development, or the "shale gas revolution," has resulted in a dramatic increase in natural gas production in the United States.⁴⁷ New drilling and extraction technologies have enabled drilling operations to occur in more sensitive locations such as urban areas and on public lands with high conservation value.⁴⁸ Drilling in sensitive locations has sparked public and community opposition requiring natural gas developers to reconsider how they engage the public.⁴⁹ On this point, Alex Hohmann, a former manager of stakeholder relations for Anadarko has commented that the major reason fuel projects go undeveloped "is not for lack of a legal license, but for lack of growing, earning and maintaining a social license."⁵⁰

Despite its emergence, the adoption of social license practices has been slow to catch on in the natural gas context, resulting in limited examples to draw from, particularly in the federal public land context.⁵¹ We have selected two case studies to highlight the emerging application of a social license to operate in the U.S. oil and gas sector. The first case

46. Don C. Smith & Jessica M. Richards, *Social License to Operate: Hydraulic Fracturing-Related Challenges Facing the Oil & Gas Industry*, 1 OIL & GAS, NAT. RESOURCES & ENERGY J., 91, 97 (2015).

47. Monika Ehrman, *The Next Great Compromise: A Comprehensive Response to Opposition Against Shale Gas Development Using Hydraulic Fracturing in the United States*, 46 TEX. TECH L. REV. 423, 425 (2014).

48. See Aldo Svaldi, *Drilling and Development are on a Collision Course in Northeastern Colorado*, The Denver Post, Aug. 7, 2017; Brittany Patterson, *Can Zinke Squeeze More Oil From Public Lands?*, E&E News, July, 7 2017.

49. Smith & Richards, *supra* note 46, at 84.

50. *Id.* at 117 (citing interview by Stephanie Joyce with Alex Hohmann, Stakeholder Relations Manager for Anadarko Petroleum, *In Relationships 101: Oil and Gas Looks for a Social License to Operate*, WYOMING PUBLIC RADIO (Dec. 5, 2014), available at <https://insideenergy.org/2014/12/05/relationships-101-oil-and-gas-look-for-a-social-license-to-operate/>.)

51. *Id.* at 102.

study involves the utilization of memorandums of understanding (MOUs) to achieve a social license to address the deep tension involving the expansion of shale development on private land in and around expanding suburban development on Colorado's Front Range. The second case study involves the utilization of a formal negotiation process, as well as a bilateral private negotiation process, to achieve a social license to operate and develop a natural gas field on sensitive federal public lands in the Nine Mile Canyon-West Tavaputs Plateau area in Utah.

From the case studies we can draw two conclusions: (1) there exists an opportunity to add value to all parties when a social license to operate is achieved; and (2) while there appeared to be elements of cooperation among the parties in both case studies, the utilization of a purposive, principled collaborative process presents an opportunity to develop an even stronger social license to operate.

C. Urban Private Land Case Study –Shale Gas Development on the Colorado Front Range

Oil and gas development is not new to Colorado's Front Range, in fact, even the progressive community of Boulder, Colorado had an active oil field in its midst in the early 20th century.⁵² While oil and gas development has existed on the Front Range since the 1900s, the fracking boom of the 2000s brought oil and gas development into the backyards of simultaneously expanding Front Range communities and suburbs.⁵³ As a result, Colorado has found itself front and center in the public debate over regulation of hydraulic fracturing.⁵⁴ Patty Limerick, University of Colorado history professor and director of the Center for the American

52. Patty Limerick, *The Fractured Terrain of Oil and Gas Opposition*, High Country News, Feb. 22, 2016); See also Lucas Satterlee, *Clearing the Fog: A Historical Analysis of Environmental and Energy Law in Colorado*, 28 VILL. ENVTL. L.J. 1, 11 (2017) (describing the early energy production efforts in Colorado including a coal mine that began operations near Boulder, CO in 1859).

53. Austin Shaffer, Skylar Zillox, & Jessica Smith, *Memorandum of Understanding And the Social License to Operate in Colorado's Unconventional Energy Industry: A Study of Citizen Complaints*, 35 J. ENERGY NAT. RES. L., 69-70 (2016).

54. *Id.* at 70.

West, captured the sentiment of the conflict with this insightful comment: “the boom of activity in the planet's underworld has brought to the surface not only an abundance of hydrocarbons, but a deep reservoir of buried political and social tension.”⁵⁵

The pace and extent of the Front Range hydraulic fracturing boom alarmed many communities leading to passage of local government moratoria, bans on hydraulic fracturing, and proposed ballot measures restricting the use of hydraulic fracturing statewide.⁵⁶ The local government bans and moratoria were eventually found to be invalid and unenforceable by the Colorado Supreme Court.⁵⁷ Shortly thereafter, there were referendum attempts to place measures on the Colorado ballot that would restrict hydraulic fracturing statewide.⁵⁸ One of the proposed ballot measures would have prohibited oil and gas facilities from operating within 2,500 feet of homes or other occupied buildings, and another would have given more power to local governments to restrict fracking.⁵⁹ Both proposals failed for lack of sufficient signatures.⁶⁰ Despite the setbacks,

55. Limerick, *supra* note 52. In her article *The fractured terrain of oil and gas opposition*, Patty Limerick notes that this division into “two clearly defined and rigidly opposed cohorts” does not take into account the layers of complexity involved in the Front Range hydraulic fracturing debate. Limerick, *supra* note 52. That complexity comes from a number of sources including: (1) the “inaudible population” that represents the middle, (2) the factors of class, race and ethnicity that “converge in second concealed layer”, (3) a recognition that companies come in all different sizes and include principal players and subcontractors, (4) and that the term “opponents” can include everyone from a neighboring resident to an oil and gas wellsite to national environmental activists. *Id.*

56. See Shaffer et al., *supra* note 53, at 70 (hereinafter Shaffer).

57. *City of Fort Collins v. Colorado Oil*, 369 P.3d 586 (Colo. 2016) (the Colorado Supreme Court concluded that Fort Collin’s five-year moratorium on fracking and storage of fracking waste within the city to be preempted by state law and therefore invalid and unenforceable); *City of Longmont v. Colorado Oil and Gas*, 369 P.3d 573 (Colo. 2016) (The Colorado Supreme Court found the City of Longmont’s ban on fracking and the storage and disposal of fracking wastes within its city limits to be preempted by state law and therefore invalid and unenforceable).

58. Mark K. Matthew & Joey Bunch, *Colorado Anti-Fracking Measures Fail to Make Ballot; Possible Forgery Alleged*, *Denv. Post*, Aug. 29, 2016.

59. *Id.*

60. *Id.*

Front Range communities have continued to pass short-term moratoriums while they consider new regulations.⁶¹

In the midst of the ongoing conflict, oil and gas operators continue to drill in and adjacent to expanding communities along the Front Range. Many of those companies, wary of the “deep reservoir of buried political and social tension,”⁶² initiated efforts to achieve a social license from the Front Range communities in which they operate. One of the tools used by the oil and gas companies to achieve a social license along the Front Range is the development of MOUs with impacted communities.⁶³

One of the first such efforts was an MOU between Erie, Colorado, and two oil and gas companies developing in and around Erie.⁶⁴ At the time the MOU was negotiated, Erie had in place a drilling moratorium suspending oil and gas development within its jurisdiction until studies on air quality were conducted and the town could develop a method to work with oil and gas companies.⁶⁵ During the moratorium, the town of Erie and the two oil and gas companies negotiated and signed an MOU.⁶⁶ The signed MOU requires the oil and gas companies to attach a list of best practices, negotiated with Erie, to their drilling permits submitted to the Colorado Oil and Gas Conservation Commission.⁶⁷ After the MOU was signed, Erie lifted its moratorium and oil and gas activity in the area resumed.⁶⁸

In this instance, the two oil and gas companies were able to successfully achieve a social license through the process of negotiating and implementing an MOU that required them to employ community-negotiated best practices. The grant of a social license from the community resulted in the drilling moratorium being lifted with almost

61. The Associated Press, *Lafayette Warned Against Oil, Gas Drilling Moratorium*, The Denv. Post, Sept. 30, 2017.

62. Limerick, *supra* note 52.

63. See Univ. of Colorado, Database of MOUs, Oilandgasbmps.org, <http://www.oilandgasbmps.org/resources/MOU-databases.php> (last visited (April 18, 2018)). This database allows users to access the MOUs and to compare the best management practices contained within them.

64. Shaffer, *supra* note 53, at 70.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

non-existent public comment and criticism.⁶⁹ In this case study, litigation that would eventually befall other Front Range communities who enacted drilling moratoriums and bans was avoided, reducing conflict and saving time and money.⁷⁰ What we do not know is how collaborative the MOU negotiation process was. It is not clear whether City of Erie officials engaged one-on-one with community members to develop the list of best practices that accompanied the MOU. We can only surmise that city officials established sufficient levels of legitimacy, credibility, and trust among concerned Erie residents that not only earned the city a social license to negotiate on their behalf, but bestowed a social license to the oil and gas companies to operate.

Researchers from the Colorado School of Mine's Center for a Sustainable West have recently published two papers analyzing the impact of these types of MOUs on public opinion and citizen complaints.⁷¹ They found that MOUs can help shape community participation in the governance of oil and gas activity, namely by focusing community complaints to specific issues.⁷² This is likely because the MOU improves environmental performance, or there is at least a perception that it does.⁷³ The researchers also found that drilling encroachment was the strongest factor leading to complaints against oil and gas development.⁷⁴ Specifically, the proximity of wells to residential locations, not the rate of drilling activity, was the greatest predictor of the volume of complaints.⁷⁵

69. *Id.*

70. *Id.*

71. See Skylar Zilliox & Jessica M. Smith, *Supraregulatory Agreements and Unconventional Energy Development: Learning from Citizen Concerns, Enforceability and Participation in Colorado*, 4 THE EXTRACTIVE INDUS. AND SOC'Y 69 (2017); Shaffer, *supra* note 53, at 69.

72. Shaffer, *supra* note 53, at 84.

73. *Id.*

74. *Id.*

75. *Id.* The Researchers at the Colorado School of Mines found that noise was the leading cause for complaint among those impacted by suburban oil and gas development. *Id.* This led them to suggest that suburbanites affected by oil and gas activity are more interested in coexisting with industrial activity (i.e. they would like the noise to be reduced, but are agreeable with the other aspects of the activity). *Id.* This is in contrast to rural populations who have more strongly opposed oil and gas activity on the grounds that it changes people's relationship with the land. *Id.*

Ultimately, they concluded that the MOUs provided an opportunity for energy companies and communities to reconcile their expectations, generate a learning process about the energy industry, and the MOUs provide a mechanism for energy companies to listen to the communities closest to their operations.⁷⁶ In the researcher's opinion, the link that the MOUs provide between the energy companies and communities "allows for oil and gas operations to run more smoothly, with complaints being pointed toward issues that are not already being addressed by oil and gas companies."⁷⁷

This case study reveals that by engaging in a MOU negotiation process, both the oil and gas companies and the communities were able to gain more value than they would have without the process. The value gained by the companies was the lifting of the community drilling moratorium, and the value gained by the communities was the implementation of negotiated best practices that reduced the impact to the community from the oil and gas development. Neither parties' added value would have been achieved but the MOU negotiation process.

D. Federal Land Case Study: Nine Mile Canyon Case Study

The second case study is derived from a Rocky Mountain Mineral Law Foundation article authored by University of Utah law professor Robert Keiter and his student Kirstin Lindstrom entitled, "Lessons from Nine Mile Canyon: Achieving Consensus over Energy Development on Public Lands."⁷⁸ In this article, Keiter and Lindstrom provide insight on a controversial oil and gas development project that took place on Bureau of Land Management (BLM) land in Utah's energy-rich Uinta Basin.⁷⁹

In 2004, the Bill Barrett Corporation (BBC) sought permission from the BLM to drill 807 new oil and gas wells on 53,250 acres of federal public land anticipating a recovery of one trillion cubic feet of natural gas

76. *Id.* at 85.

77. *Id.*

78. Robert B. Keiter & Kirstin Lindstrom, *Lessons from Nine Mile Canyon: Achieving Consensus Over Energy Development on Public Lands*, 57 ROCKY MTN. MIN. L. INST., 3-1 (2011).

79. *Id.*

over the life of the project.⁸⁰ The majority of the drill sites were proposed to be located on the West Tavaputs Plateau with principal access to the drill sites via an improved road through Nine Mile Canyon.⁸¹ Activists opposed the project as it threatened Wilderness Study Areas on the West Tavaputs Plateau, significant Native American rock art sites, and other cultural resources in the Nine Mile Canyon.⁸²

Given the array and significance of economic, cultural, and environmental resources found in the Nine Mile Canyon-West Tavaputs Plateau region, numerous stakeholders were interested in the BLM's final decision.⁸³ The groups that had formally submitted comments on the proposed action included the Southern Utah Wilderness Alliance (SUWA), the National Trust for Historic Preservation (NTHP), several Native American tribes, other environmental and cultural groups, the State of Utah, and local government officials.⁸⁴

Because the proposed project was located on federal public land, NEPA was triggered, requiring the BLM to prepare an EIS to assess the impacts associated with the project.⁸⁵ As part of the EIS process, the BLM is required to provide the public with an opportunity to comment on the proposed development.⁸⁶ Because of the concern over cultural and wilderness resources, the BLM and BBC encountered "substantial

80. *Id.* at 3-9.

81. *Id.* (Prior to development, the Nine Mile Canyon road consisted of an unpaved dirt track. *Id.* at 3-8.).

82. *Id.* at 3-7 to 3-8 (Nine Mile Canyon is renowned for its Native American cultural resources including rock art, granaries, and other ancient objects. West Tavaputs Plateau contains several wilderness study areas (WSA) that are legally protected under FLPMA. *Id.* Activists were concerned that the proposed project—and the road traffic and dust it would generate—could irreparably harm the rock art sites in the Canyon. *Id.* Further, they were concerned that the development of new roads and drill sites on the Tavaputs Plateau would compromise the wilderness characteristics in the WSAs located there. *Id.* The initial proposal contemplated twenty well pads in designated WSAs and 218 well pads on lands with wilderness character. *Id.*).

83. *Id.* at 3-6.

84. *Id.* at 3-10.

85. *Id.* at 3-6.

86. 40 C.F.R. § 1503.1 (2017) (federal agencies are required to request comments from the public after preparing a draft environmental impact statement).

opposition” to the drilling proposal.⁸⁷ The project also triggered the National Historic Preservation Act (NHPA).⁸⁸ The NHPA implementing regulations require federal agencies to determine whether proposed projects cause any “adverse effects” and if so, initiate formal consultation with interested parties.⁸⁹

Out of concern for damage to cultural resources in Nine Mile Canyon, NTHP, SUWA and others concerned about the proposed project petitioned the BLM to be granted formal consultation party status under NHPA § 106.⁹⁰ After initially denying the request, the BLM eventually agreed to initiate a formal consultation process, invited a number of parties and employed a formal mediator to facilitate the meetings.⁹¹ Keiter and Lindstrom describe the formal NHPA § 106 consultation process as a transparent collaboration process that allows the parties to meet face-to-face with government officials to share their knowledge and concerns.⁹² The process included opportunities for site visits to examine the damaged rock art, making the problem less abstract and distant.⁹³ According to Keiter and Lindstrom, “the process helped the parties become better acquainted with one another and each other’s concerns, encouraged them to ignore their ideological differences, and enabled them to begin building some mutual trust.”⁹⁴ After a year-long process, the parties reached a programmatic agreement to protect the cultural resources in Nine Mile Canyon while allowing the natural gas project to proceed.⁹⁵ The agreement requires the parties to meet annually, includes provisions to address actions to be taken in the event of adverse impact to the rock art and a dispute resolution section.⁹⁶

87. Keiter, *supra* note 78, at 3-6.

88. *Id.* at 3-6.

89. *Id.*

90. *Id.* at 3-11.

91. *Id.* at 3-12.

92. *Id.* at 3-13.

93. *Id.*

94. *Id.*

95. *Id.* (Under the agreement, Bill Barrett Corporation's financial contributions were significant and included: funds for a Cultural Resource Monitoring Plan, new visitor interpretation sites, curation costs, cultural resource training for its personnel, and a consultant to research the potential impacts of dust on rock art.)

96. *Id.* at 3-14.

Despite an agreement addressing the concerns with Nine Mile Canyon, BBC still faced significant opposition to its proposal to drill West Tavaputs Plateau.⁹⁷ Having achieved success with the NHPA § 106 negotiations, BBC agreed to initiate private bilateral negotiations with SUWA, the main environmental group opposing development on the plateau.⁹⁸ After a six-month bilateral negotiation, BBC and SUWA reached a two-party agreement.⁹⁹ In order to protect wilderness qualities, BBC agreed to significantly scale back its development proposal and to utilize new directional drilling technologies that would enable it to drill from consolidated well pads.¹⁰⁰

Because the BLM retained final decision authority over the project, BBC and SUWA presented their agreement to the BLM.¹⁰¹ Further, because a draft EIS had already been issued, it was too late to include the terms of the agreement in the draft.¹⁰² However, the BLM found that the original range of alternatives considered in the draft EIS were broad enough to accommodate inclusion of the terms of the agreement into the final EIS.¹⁰³ The BLM incorporated most of the terms of the agreement into its final EIS and Record of Decision.¹⁰⁴ Simultaneously, the BBC and SUWA met with other stakeholders and urged them to support the agreement, which they ultimately did.¹⁰⁵

Keiter and Lindstrom offer the following lessons learned from BBC and SUWA Nine Mile Canyon and West Tavaputs Plateau negotiations:

97. *Id.* at 3-17 – 3-18.

98. *Id.* at 3-18.

99. *Id.*

100. *Id.* at 3-20. (The reductions agreed to by the BBC included a 66% reduction in the total operations area and an 88% reduction in new well pads. *Id.*)

101. *Id.* at 3-19. (The authors noted that the fact that the BLM was not part of the BBC-SUWA negotiation process actually facilitated the agreement because the parties were able to establish a “mutually trusting relationship and to address the issues candidly between themselves.” *Id.*)

102. *Id.* at 3-20.

103. *Id.* at 20.

104. *Id.* at 3-20.

105. *Id.* at 3-19.

- The NHPA § 106 requirements provided the framework for convening a multi-party collaboration process that resulted in a mutually agreeable agreement that both protected natural resources and allowed the natural gas development to proceed.¹⁰⁶ The structured NHPA § 106 process enabled parties to get to know one another, and thus, facilitated understanding and enabled the parties to overcome longstanding strained ideological differences and strained relationships.¹⁰⁷
- The project proponent's willingness to undertake and pay for the recommended mitigation measures helped the parties arrive at a solution.¹⁰⁸
- A NEPA EIS process that only accepts public comment through a one-way comment process, and does not include face-to-face negotiations in a structured setting, would not have assisted the parties in reaching this agreement.¹⁰⁹ The private bilateral negotiation model should be an available dispute resolution option pursued within the NEPA framework.¹¹⁰
- While it is easier to engage in a bilateral negotiation without the BLM present, the agency must be included at some point given its "legal responsibility for the broader public interest."¹¹¹
- To accommodate negotiated agreements between stakeholders, federal land managers should ensure NEPA documents include a broad range of alternatives. This is important for two reasons: (1) it ensures the agency has flexibility to incorporate agreements into its decision without having to issue a new draft EIS; and (2) it provides the structure from which parties can negotiate to

106. *Id.* at 3-15.

107. *Id.* at 3-16.

108. *Id.*

109. *Id.* at 3-15.

110. *Id.* at 3-22.

111. *Id.* at 3-21.

resolve their disputes without overstepping their limited role in the formal decision-making process.¹¹²

- The negotiating parties must be prepared to convince other nonparticipating parties to support the agreement as well as garner support from the federal agency decision-maker.¹¹³
- The BBC-SUWA agreement was a compromise, neither achieved its goal, but the parties were able to protect their interests and walked away with a more trusting relationship while creating more value than if they had not worked together.¹¹⁴

This case study exemplifies that both a formal NHPA § 106 collaborative process and private bilateral agreements can assist an oil and gas developer to achieve a social license to operate on federal public lands and can add value to all parties. In this instance, the added value to the BBC was reduction in opposition to the project that likely would have resulted in costly delays and litigation. The added value to the groups opposing the project included a reduction in the overall scope of the project and protection of critical resources. Neither parties added value would be achieved if the collaborative process and the bilateral agreement leading to the social license to operate had not been attempted.

III. THE PURSUIT OF SOCIAL LICENSE IS ESSENTIALLY A COLLABORATIVE PROCESS

There is no uniform approach to obtaining a social license because circumstances vary among development projects, geography, community characteristics and industry dependence, and stakeholder values and

112. *Id.* at 3-22 to 3-23. The authors explain that federal land managers should regard the drafting of NEPA alternatives as a potential tool for fostering dialogue, setting the parameters for inner-party negotiations, and promoting expeditious decision making by reducing the likelihood of post-negotiation NEPA delays.” *Id.* at 3-23.

113. *Id.* at 3-23.

114. *Id.*

concerns.¹¹⁵ However, social license “ingredients” and guidelines have been identified and developed by researchers and trade associations that define elements and processes that have several common characteristics.¹¹⁶ Notably, Denver University Law Professor Don Smith and Western State Colorado University co-author Jessica Richards have summarized the trade association guidelines, extracting the common factors or “ingredients” needed to obtain a social license.¹¹⁷

Among the social license ingredients identified by Smith and Richards, are elements critical to the support of meaningful dialogue around serious, potentially divisive issues. These elements include: trust, open communication, transparency, and accountability.¹¹⁸ Building trust is arguably the essential social license ingredient.¹¹⁹ Trust has been defined as “a common belief among a group of individuals that another group (1) will make good faith-efforts to behave in accordance with any commitments both explicit and implicit,” (2) will “be honest in whatever negotiations preceded such commitments,” and (3) will “not take excessive advantage of another even when the opportunity is available.”¹²⁰ Trust is achieved through open communication and community engagement. Community engagement is a two-way process of both giving and receiving information, which can take place through a number of channels from one-on-one communications with individual community

115. Smith, Richards, & Colwell, *supra* note 24, at 14-8.

116. See IPIECA, Oil and Gas Industry Guidance on Voluntary Sustainability Reporting – 2010 Update, Jan. 2011, IPIECA.org, <http://www.ipieca.org/publication/oil-and-gas-industry-guidancevoluntary-sustainability-reporting-2010-update> (last visited January 17, 2018); Jason Prno and D. Scott Slocombe, *Exploring the Origins of “Social License to Operate” in the Mining Sector: Perspectives from Governance and Sustainability Theories*, 37(3) RES. POL’Y, 346, 348-349 (2012).

117. Smith & Richards, *supra* note 46 at 111-133.

118. *Id.* at 112-121.

119. *Id.* at 112.

120. Ann Thomson and James Perry, *Collaboration Processes: Inside the Black Box*, PUB. ADMIN. REV., 20, 22 (Dec. 2016) (citing L.L. Cummings and Philip Bromiley, THE ORGANIZATIONAL TRUST INVENTORY 303 (Roderick M. Kramer and Tom R. Ryler (1996)).

stakeholders to public meetings and forums.¹²¹ Transparency on the part of an industry seeking social license requires full disclosure of steps being taken to minimize risks, acknowledgment of challenges and failures, and disclosure of clearly defined steps to continually improve operations.¹²² A company is accountable if it provides a clear signal to affected communities that attainment and maintenance of a social license is a top priority, such as ensuring adherence to social license principles through its compensation of executives, managers, employees, and subcontractors.¹²³

Other researchers link social license to trust and legitimacy. As Gehman et. al. cite in their paper on legitimacy in social license, two of the pioneering researchers on this topic, Susan Joyce and Ian Thompson, included in their definition of social license to operate three normative components: legitimacy, credibility and trust.¹²⁴ Joyce and Thompson define legitimacy as conforming to established legal, social, and cultural norms, both formal and informal.¹²⁵ They define credibility as “the quality of being believed—the capacity or power to elicit belief” and trust is the “willingness to be vulnerable to risk or loss through the actions of another.”¹²⁶ Joyce and Thompson differentiate between project acceptance and approval, arguing that legitimacy is necessary for acceptance, but credibility and trust are necessary for approval.¹²⁷

121. Am. Petroleum Inst., *Community Engagement Guidelines*, ANSI/API 1003 First Edition, (July 2014), http://www.api.org/~media/files/policy/exploration/100-3_e1.pdf. (last viewed January 17, 2018).

122. Smith & Richards “Social License to Operate,” *supra* note 46, at 118 (citing *Extracting the Facts: An Investor Guide to Disclosing Risks from Hydraulic Fracturing Operations*, Interfaith Center on Corporate Responsibility and Investor Environmental Health Network 3, <http://iehn.org/documents/frackguidance.pdf> (2011)).

123. *Id.* at 120–121.

124. JOEL GEHMAN, LIANNE M. LEFSRUD, AND STEWART FAST, SOCIAL LICENSE TO OPERATE: LEGITIMACY BY ANOTHER NAME?, 60(2) *Canadian Public Administration*, 293, 295 (2017).

125. Ian Thomson and Susan Joyce, *The Social License to Operate: What is it And Why Does it Seem So Difficult to Obtain? Presentation to the Prospectors and Developers Association of Canada Convention* (Mar. 2008), available at http://www.oncommonground.ca/wp/downloads/PDAC_2008_Social_Licence.pdf.

126. *Id.*

127. *Id.*

Smith and Richards also identify a number of procedural elements that contribute to social license, including methods for identifying stakeholders, broadening decision-making procedures, and establishing agreements and grievance procedures.¹²⁸ A stakeholder can be broadly defined as “[a]ny person, group or entity that has interest or concern in an organization and its activities.”¹²⁹ However, the typical context of social license is project-based, hence a more operable definition of a stakeholder is a person, group or entity that will be affected by a project or has a strong interest in it.¹³⁰ With respect to how stakeholders interact with companies, we can further refine the definition of stakeholders as “individuals acting both in their roles as citizens and as formal representatives of collective[ly] interested and affected parties.”¹³¹

In a conventional approach to oil and gas project planning and development, the company is a unitary decision-maker that proposes a development plan publically and then defends it against opposition.¹³² This approach has done little to help companies achieve a social license. Instead, Smith and Richards suggest broadening decision-making procedures and establishing agreements with communities by involving the community early in the project’s design phase.¹³³ Involving the community early on provides a voice to community concerns and community ownership, which in turn contributes toward the achievement of a social license by the company.¹³⁴ There are many ways to broaden decision-making procedures, but at a minimum, views of stakeholders must reach corporate decision-makers in a well-defined way and must be

128. Smith & Richards, *supra* note 46, at 121–125.

129. Am. Petroleum Inst., *supra* note 121, at vi.

130. U.S. Environmental Protection Agency Science Advisory Board, *Improved Science-Based Environmental Stakeholder Processes*, EPA-SAB-EC-COM-01-006), Yosemite.epa.gov, [https://yosemite.epa.gov/sab/sabproduct.nsf/42E4E3AF4DC15AB4852578650059DE8F/\\$File/eecm01006_report_appna-e.pdf](https://yosemite.epa.gov/sab/sabproduct.nsf/42E4E3AF4DC15AB4852578650059DE8F/$File/eecm01006_report_appna-e.pdf) (this definition is extrapolated from a discussion of stakeholder definition on pp. 6-7).

131. PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING 15 (Thomas Dietz and Paul C. Stern eds., 2008).

132. Smith & Richards, *supra* note 46, at 123.

133. *Id.* 123–124.

134. *Id.* 123–124 (citing Jim Kent & Kevin Preister, *Surging Industries in Global Energy: Creating a New Era in Community Engagement*, RIGHT OF WAY (July/Aug. 2013)).

taken into consideration.¹³⁵ Community involvement in company decisions may also extend to a company's grievance procedures. The establishment of community-based grievance mechanism or grievance procedure is a process, wholly or partially run by a company, that resolves community concerns or grievances.¹³⁶

At its core, social license to operate involves a significant degree of meaningful dialogue between the firm and the community in the planning and operation of the industrial activity. Dialogue in this context is face-to-face interaction with multiple stakeholders that encourages long-term relationships between industry and affected communities, and where the firm and affected stakeholders resolve their opposing interests in order to achieve their respective goals. This interaction with stakeholders is the essence of collaboration. An often-cited definition of collaboration is, "a process through which parties who see different aspects of a problem can constructively explore their differences and search for solutions that go beyond their own limited vision of what is possible."¹³⁷ Constructive exploration of differences between the firm and stakeholders creates the environment for the firm to establish the legitimacy, credibility, and trust necessary to obtain a social license to operate.

There is a rich and extensive literature on collaboration which is variously defined and described as, among other labels, collaborative problem solving, collaborative decision-making, collaborative governance, environmental conflict resolution, alternative dispute resolution, consensus building, and co-management. Collaboration as we define it here "involves informal but structured face-to-face interaction among representatives of stakeholder groups who hold different viewpoints. The goals are to promote early participation by the affected stakeholders; produce sensible and stable policies or decisions that have a strong, broad base of support; and reduce the likelihood of subsequent disagreements or legal challenges."¹³⁸

135. *Id.* at 123.

136. *Id.* at 122–123.

137. BARBARA GRAY, *COLLABORATING: FINDING COMMON GROUND FOR MULTIPARTY PROBLEMS* 5 (1998).

138. *PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION* 10 (Rosemary O'Leary, and Lisa Bingham eds., 2003).

Collaborative processes are differentiated from other forms of public involvement in the interaction's intensity, convening officials' goals, and stakeholders' implicit authority. The International Association of Public Participation (IAP2) places collaboration among a spectrum of public participation methods.¹³⁹ The public participation spectrum goes from least to most intense, moving from merely informing, to consulting, to involving, to collaborating, and finally, to empowering.¹⁴⁰ For example, the public participation goal of consulting is to "obtain public feedback on analysis, alternatives, and/or decisions."¹⁴¹ In this mode, officials preserve their authority and power but commit themselves to receiving input from participants. The stated purpose of most public hearings and many other public meetings is to provide such advice.¹⁴²

In contrast to less intensive forms of public involvement, the goal of collaboration according to IAP2, is to "partner with the public in each aspect of the decision including the development of alternatives and the identification of the preferred solution."¹⁴³ Collaborative processes are typically used to foster dialogue, clarify areas of agreement and disagreement, improve the information on which a decision is based, and resolve controversial issues in ways that all interests find acceptable.¹⁴⁴ They typically involve stakeholders in a mode of aggregating their preferences and bargaining to achieve their interests. In this mode, stakeholders know what they want, and the mode of decision-making aggregates their preferences — often mediated by the influence and power that they bring — into a social choice.¹⁴⁵ The exploration of interests and give-and-take of bargaining allows participants to find the best available options to advance their joint preferences.¹⁴⁶

139. Int'l Ass'n of Pub. Participation, *IAP2 Spectrum of Public Participation*, C.cymcdn.com, https://c.cymcdn.com/sites/www.iap2.org/resource/resmgr/files/iap-006_brochure_a3_internat.pdf.

140. *Id.*

141. *Id.*

142. Archon Fung, *Varieties of Participation in Complex Governance*, 66(S1) PUB. ADMIN. REV. 66, 69 (2006).

143. *Id.*

144. PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 138, at 10.

145. Fung, *supra* note 142, at 68.

146. *Id.*

Collaborative processes are founded on principled engagement, a term that is drawn from the work of Fisher and Ury in their classic book, *Getting to Yes*.¹⁴⁷ Principled engagement “means the use of processes that uphold core tenets of effective engagement. Included among these tenets are fair and civil discourse and open and inclusive communication that are informed by the perspectives and knowledge of all participants. Moreover, effective engagement typically requires balanced representation from all relevant and significant interests.”¹⁴⁸

Collaboration consists of processes and techniques that enable parties to jointly identify the issues to be resolved and reach agreement on a solution.¹⁴⁹ Practitioners and researchers generally agree on a set of principles or characteristics that collaborative processes share.¹⁵⁰ These are namely:

1. Participation is voluntary,¹⁵¹ and participants and sponsors are committed to participate in good faith with an open mindset to new perspectives.¹⁵²
2. Parties must be able to participate directly, be willing to use this strategy, and be able to select their own representatives.¹⁵³
3. All participants are fully informed of the purpose and objectives of the process, are engaged in defining and enforcing process protocols and ground rules, and seek agreement on how to share, test, and apply relevant information.¹⁵⁴

147. ROGER FISHER AND WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* (2011).

148. KIRK EMERSON AND TINA NABATCHI, *COLLABORATIVE GOVERNANCE REGIMES* 59 (2015).

149. *Getting to Yes*, *supra* note 147, at 15.

150. PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 139, at 6.

151. *Id.*

152. PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING, *supra* note 131, at 24.

153. *Id.*

154. *Id.*

4. Communication is open and accurate. Parties must be able to engage in full, open, and truthful exchange.¹⁵⁵
5. Parties must realize that they are interdependent. At the same time, any and all participants must have the option to withdraw and seek a resolution through other means.¹⁵⁶
6. Parties must agree to the outcome of the process¹⁵⁷ and commit to the implementation of agreements.¹⁵⁸

A typical collaborative process has three, well-defined stages, each containing a number of steps, tasks, or objectives.¹⁵⁹ In the pre-deliberation stage a sponsor or convener raises the possibility of collaboration and initiates the process. Before convening the parties, there is usually an attempt to assess the issues and identify potentially affected parties. Such an assessment helps the sponsor or convener develop a strategy for bringing the parties together and managing the collaborative process.

During the deliberation stage, parties gather and share information about the issues to be deliberated, and agree on methods for generating answers to relevant technical questions, or a path to follow, even if no technical consensus exists. They identify and share interests—reasons, needs, concerns, and motivations underlying participants' positions—rather than assert positions. Through the sharing of information and concerns, they converge on and define the problems to be resolved through their deliberations. Once the parties have clearly articulated the issues that need to be resolved and identified all parties' interests at the table, the next step is to find solutions that resolve the issues and satisfy the interests. In

155. HOWARD RAIFFA, *NEGOTIATION ANALYSIS: THE SCIENCE AND ART OF COLLABORATIVE DECISION MAKING*, 83 (2002).

156. PROMISE AND PERFORMANCE OF ENVIRONMENTAL CONFLICT RESOLUTION, *supra* note 139, at 6.

157. *Id.*

158. PUBLIC PARTICIPATION IN ENVIRONMENTAL ASSESSMENT AND DECISION MAKING, *supra* note 131, at 24.

159. LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE, CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* (1987) (outlining three major stages of the negotiation process including: pre-negotiation, negotiation, and post-negotiation. *Id.* Here, the term "negotiation" has been softened somewhat and reframed as "deliberation" in order to generalize to a range of collaborative decision-making processes.).

this stage, they work to brainstorm options that have the potential satisfy the interests of all parties. Using objective criteria to evaluate the options, parties converge on a set options or pathways that resolve the issues that divide them and reach an agreement on how to move forward.

The post-deliberation phase ensures implementation of the agreement. Areas of agreement are documented to ensure a common understanding of the participants' accord. At this stage the parties also ratify the agreement with their constituents. Parties garner support for the agreement from interest groups they represent as well as organizations that have a role in carrying it out. Each party follows its own internal procedures as it reviews and adopts the agreement or plan.

Firms that wish to operate in communities and landscapes where their actions are viewed negatively and their motives as illegitimate and untrustworthy may be best served by collaborating with community members and other affected parties. By initiating and sustaining a collaborative process that adheres to foundational principles and best practices, companies have the opportunity to produce operational decisions that have a strong, broad base of support, and can reduce the likelihood of subsequent disagreements or legal challenges. In other words, they can achieve a social license to operate.

IV. NEPA: A UNIQUE OPPORTUNITY TO INCLUDE COLLABORATION TO ACHIEVE A SOCIAL LICENSE ON PUBLIC LAND OIL AND GAS PROJECTS

Despite the opportunity to add value, social license to operate has seldom been utilized in federal public land oil and gas development projects. We speculate that this is because oil and gas operators perceive the legal license to operate on federal public lands, particularly compliance with NEPA, to equate to a social license to operate. In fact, this is more than a speculation. This point arose during our 2015 Energy & Collaboration Summit with energy executives in Jackson, Wyoming.¹⁶⁰ During that conversation, executives from oil and gas companies indicated that many federal land energy operators perceive compliance with the

160. Energy & Collaboration Summit, Jackson, Wyoming (Mar. 6, 2014) (unpublished conference report) (on file with the author).

NEPA process as inhibiting collaboration and preventing companies from going beyond compliance in order to work directly with affected communities and stakeholders to achieve a social license to operate.¹⁶¹ Citing the increased opposition to federal public land oil and gas projects, the participants indicated that engaging in a well-defined and structured collaborative process to achieve a social license offered greater value to the company than just complying with the required legal license processes (particularly NEPA).¹⁶²

Contrary to the Summit participants' perception, we argue that NEPA is not a barrier to greater incorporation of collaborative processes to achieve a social license. After a review of NEPA itself, the Council of Environmental Quality (CEQ) NEPA regulations, agency specific NEPA regulations and guidance, case law, and other potential federal agency procedural discretionary limits, we conclude that the NEPA process actually provides a unique opportunity to incorporate collaboration into federal public land oil and gas development projects in order to achieve a social license to operate. That unique opportunity exists because unlike development on private land, the legal license requirements of compliance with NEPA provides oil and gas companies with a defined structure from which to engage communities and stakeholders through a collaborative process in order to achieve a social license to operate.

A. *The NEPA Process Explained*¹⁶³

At the heart of NEPA is a mandate to all federal agencies to prepare a "detailed statement" for every "major Federal actions significantly affecting the quality of the human environment."¹⁶⁴ This "detailed statement" must include: the environmental impact of the

161. *Id.*

162. *Id.*

163. Portions of this section were originally published by the Rocky Mountain Mineral Law Foundation in the manual of the Special Institute on the National Environmental Policy Act of 2017. See Temple Stoellinger, "Having Your Voice Heard: How to Effectively Get the Agency's Attention in a NEPA Comment to Affect the Final Decision," National Environmental Policy Act 9-1, ROCKY MT. MIN. L. FDN. (2017).

164. 42 U.S.C. § 4332(c) (2018).

proposed action, adverse environmental effects that cannot be avoided, alternatives to the proposed action, the relationship between short-term uses of the environment and long-term productivity, and any irreversible and irretrievable commitments of resources.¹⁶⁵ Prior to preparing a “detailed statement,” the federal agency must consult with and obtain comments from “any Federal agency that has jurisdiction by law or special expertise with respect to any environmental impact involved.”¹⁶⁶

To find more specificity on the NEPA process, we must turn to the CEQ NEPA regulations. CEQ, established through NEPA,¹⁶⁷ was directed in 1977 by President Jimmy Carter to promulgate NEPA implementing regulations, binding on all agencies.¹⁶⁸ Those regulations, found at 40 C.F.R. §§ 1500-1508, were promulgated to inform federal agencies of what they must do to comply with the NEPA procedures.¹⁶⁹ The regulations require federal agencies to “identify and assess the reasonable alternatives to a proposed action that will avoid or minimize adverse effects of these action upon the quality of the human environment.”¹⁷⁰ Specifically, the CEQ regulations provide specific directions on when and how to prepare the NEPA required “detailed statement,” renamed in the CEQ regulations as an environmental impact

165. *Id.* § 4332(c)(i)-(v).

166. *Id.* § 4332(c).

167. *Id.* § 4342.

168. Relating to Protection and Enhancement of Environmental Quality, Exec. Order No. 11,991, 42 Fed. Reg. 26967 (May 24, 1977) (The Executive order directed the CEQ to issue regulations to Federal agencies that implemented the procedural provisions of NEPA. *Id.* Penn State University Law Professor Jamison Colburn has pointed to the fact that NEPA says nothing about CEQ enacting rules, instead the rules were enacted at the direction of President Jimmy Carter. Jamison E. Colburn, *Administering the National Environmental Policy Act*, 45 ENVTL. L. REP. 10287 (Apr. 2015) (referencing Exec Order No 11991). Meaning, it is not NEPA itself, but rather the president’s “constitutional powers that ground the very NEPA rules forming the basis of contemporary NEPA law.” *Id.* Professor Colburn notes that NEPA’s real goals “are no less than the remaking of American into a sustainable civilization” but it was the CEQ regulations that transformed NEPA into a procedural statute and set those procedures into law. *Id.* He suggests that had a pre-enforcement review petition on assertion of authority been viable, the conclusion might have been that CEQ had no power of its own to administer NEPA. *Id.* at 10296.).

169. 40 C.F.R. § 1500.1 (2017).

170. *Id.* § 1500.2.

statement (EIS).¹⁷¹ Most oil and gas projects on federal public lands are “major Federal actions significantly affecting the quality of the human environment,”¹⁷² and therefore, the federal agency tasked with approving the project must prepare an EIS.¹⁷³ EISs are prepared in the following stages: scoping, draft, final, and the agency’s decision documented in a Record of Decision (ROD).

The first stage of an EIS is known as “scoping.”¹⁷⁴ Scope is defined as “the range of actions, alternatives, and impacts to be considered in an environmental impact statement.”¹⁷⁵ During scoping, federal agencies are required to identify and invite participation of “[a]ffected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other *interested persons*.”¹⁷⁶ The agency may hold public meetings during the scoping process, but is not required to do so.¹⁷⁷ The scoping process is initiated when the agency files a notice of intent in the Federal Register.¹⁷⁸ The notice of intent must include: a description of the proposed action and possible alternatives, describe the agency’s proposed scoping process including whether, when, and where any scoping meetings will be held, and include contact information for a person in the agency who can answer questions about the proposed action and EIS.¹⁷⁹

The next step in the NEPA process is the completion of a draft EIS.¹⁸⁰ According to CEQ regulations, draft EISs “shall be prepared in accordance with the scope decided upon in the scoping process” and should include all of the analysis and information required to be contained in a final EIS.¹⁸¹ Draft EISs “shall provide full and fair discussion of

171. *Id.* §§ 1502.1–1502.25.

172. 42 U.S.C. § 4332(c) (2018).

173. 40 C.F.R. §§ 1508.11, 1501.4(e).

174. *Id.* § 1508.25.

175. *Id.* (The definition of scope also includes a list of actions, alternatives and impacts an agency can consider to determine the scope. *Id.*)

176. *Id.* § 1501.7(a)(1) (emphasis added) (While interested persons is not defined, we can assume it means interested members of the public. *Id.*).

177. *Id.* § 1501.7(b)(4).

178. *Id.* § 1501.7.

179. *Id.* § 1508.22 (definition of a notice of intent).

180. *Id.* § 1502.9.

181. 40 C.F.R. § 1502.9(a) (2017).

significant environmental impacts and shall inform the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.”¹⁸² Once a draft EIS is completed, a federal agency must request the comments of state and local agencies, Indian tribes, other federal agencies, the project applicant (if any), and the public.¹⁸³ Specifically, the agency must “affirmatively solicit comments from those persons or organizations who may be interested or affected.”¹⁸⁴ To accomplish the requirement, agencies must publish a Notice of Availability (NOA) in the Federal Register, informing the public that the draft is available and public comment on the draft is being accepted.¹⁸⁵ The public is then provided a minimum of 45 days to submit comments on the draft EIS.¹⁸⁶

Agencies must respond to comments received on the draft EIS and to “any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.”¹⁸⁷ Once the final EIS is completed, the agency must circulate the final in the same manner as it did the draft EIS.¹⁸⁸ Although agencies do not have to request comments on a final EIS, they may choose to do so.¹⁸⁹ It is important to note that the final EIS is not the final agency decision.¹⁹⁰ Instead, the final agency decision is rendered in a “record of decision” or ROD, which is prepared and signed after the agency issues the final EIS.¹⁹¹ In a ROD, agencies must state their decision regarding the proposed

182. *Id.* § 1502.1 (offering the purpose of an environmental impact statements. The primary purpose of an environmental impact statement, as prescribed in the regulation, is to “serve as an action forcing decision to ensure that the policies and goals defined in the Act [NEPA] are infused into the ongoing programs and actions of the Federal Government.” *Id.*).

183. *Id.* § 1503.1(a).

184. *Id.* § 1503.1(a)(4).

185. *Id.* § 1506.10(a).

186. *Id.* § 1506.10(c) (allowing for extending and reducing the comment period. *Id.*).

187. *Id.* § 1502.9(b).

188. *Id.* § 1502.19.

189. *Id.* § 1503.1(b).

190. *Id.* § 1505.2.

191. *Id.* (requiring that at the time of its decision, agencies are required to “prepare a concise public record of the decision.” *Id.*).

action, identify all alternatives considered in reaching the decision, and state whether all practical means to avoid or minimize environmental harm were adopted.¹⁹² When discussing the alternatives considered, the agency must discuss the factors relevant to its decision, including economic and technical considerations and the agency's statutory mission.¹⁹³

B. A Procedural Floor, Not a Procedural Ceiling

Procedural statutes like NEPA establish the procedural floor rather than the procedural ceiling and “typically leave agencies free to experiment with procedures that elaborate upon the statutory minimum.”¹⁹⁴ As long as an agency is not violating a provision of NEPA, how they implement the statute is up to the agency's discretion.

While the CEQ regulations do include specific requirements to seek public comment during specific touch points in the NEPA process, nothing in NEPA itself or the CEQ regulations preclude a federal agency from including more public involvement through collaboration during the NEPA process. Rather than providing a barrier, the requirement in CEQ regulation § 506.6 to “make diligent efforts to involve the public in *preparing and implementing* their NEPA procedures”¹⁹⁵ and to “solicit appropriate information from the public,”¹⁹⁶ arguably offers authority for federal agencies to incorporate more public involvement, including collaborative processes to achieve a social license.

In addition to considering the procedural floor established in NEPA and the CEQ regulations, we must also consider any procedural limitations the agencies implementing NEPA may have included for themselves. Two federal agencies that would be in a position to prepare an oil and gas NEPA document are the BLM and the United States Forest Service (Forest Service). Far from setting any procedural limits, the BLM and Forest Service specifically revised their NEPA regulations in 2008 to expressly include the opportunity to incorporate more collaboration into

192. *Id.*

193. *Id.*

194. Emily S. Bremer and Sharon B. Jacobs, *Agency Innovation in Vermont Yankee's White Space*, 32 J. OF LAND USE & ENVT'L LAW, 523, 535 (2017).

195. 40 C.F.R. § 1506.6(a) (2017) (emphasis added).

196. *Id.* § 1506.6(d).

their NEPA processes.¹⁹⁷ The BLM did so by including the following statement in its regulation on EIS content: “responsible official may collaborate with those persons or organizations that may be interested or affected to modify a proposed action and alternatives(s) under consideration prior to issuing a draft environmental impact statement.” Similarly, but more subtly, the Forest Service did so by including its revised regulation on EIS content that a “responsible official may modify the proposed action and alternative(s) under consideration prior to issuing a draft EIS.”¹⁹⁸

C. Incorporating Collaboration Into the NEPA Process

In October 2007, the President’s Council on Environmental Quality issued a handbook for NEPA practitioners on collaboration in NEPA.¹⁹⁹ The CEQ handbook identifies many opportunities for collaboration with interested stakeholders throughout a NEPA process. The handbook provides advice for how to collaborate across the different phases of the NEPA process including identification of the proposed action and its purpose and need, scoping, development of alternatives and a preferred alternative, identification of the affected environment and environmental consequences, and implementation and monitoring of the ROD.²⁰⁰ The only NEPA-related activities not open to collaboration are

197. See Forest Service National Environmental Policy Act Procedures Final Rule, 73 Fed. Reg. 43,084 (July 24, 2008) (The Forest Service NEPA regulations were revised in 2008 to “provide an environmental analysis process that better fits with modern thinking on decision making, collaboration, and adaptive management by describing a process for incremental alternative development and development of adaptive management alternatives.”); Department of the Interior Implementation of the NEPA Environmental Policy Act (NEPA) of 1969, 73 Fed. Reg. 126 (Jan. 2, 2008) (The DOI NEPA regulations were revised in part in 2008 to “allow for better integration of NEPA procedures and documentation into current Departmental decision-making processes, including collaboration and incremental decision-making.” *Id.*).

198. 36 C.F.R. § 220.5(e)(1) (2018).

199. *Collaboration in NEPA: A Handbook for NEPA Practitioners*, Council on Environmental Quality (2007) http://energy.gov/sites/prod/files/CEQ_Collaboration_in_NEPA_10-2007.pdf.

200. *Id.*

the final decision-making and issuance of the ROD or Finding of No Significant Impact for which a federal agency alone is responsible.²⁰¹

Federal agencies, including the Forest Service and BLM, have been exploring ways to make NEPA processes more equitable, effective, and efficient by incorporating collaborative approaches.²⁰² As noted above, both the BLM and the Forest Service revised their NEPA regulations in 2008 to clarify that NEPA alternatives may be modified through an incremental process.²⁰³ The revised language in both agencies' NEPA regulations was intended to support efforts to include incremental changes to alternatives that are generated through collaboration.²⁰⁴ Incorporating incremental changes into an EIS as the agency collaborates with various stakeholders during the NEPA process is known as iterative NEPA (iNEPA). iNEPA since it allows federal agencies to iteratively develop alternatives that meet as many stakeholder interests as possible.²⁰⁵

We argue that the BLM and/or Forest Service can utilize an iNEPA approach to incorporate stakeholder and community collaboration into the NEPA process in order to achieve a social license to operate for oil and gas developments on federal public land.

D. Application of iNEPA

The traditional approach to EIS development has generally been to inform and take feedback from the public during the scoping and draft document stages. In its environmental analysis, the agency outlines a series of potential alternative actions, including the "no action" alternative, analyzes each action in detail, and selects one alternative as the basis for its decision.²⁰⁶ Here, public engagement consists of a presentation of the purpose and need, already formulated by the agency, and a following draft

201. *Id.* at 4.

202. Jessica M. Clement, Iterative NEPA and Collaboration, Proceedings of the iNEPA Workshop, 5 (Feb. 10-11, 2014), (http://www.uwyo.edu/haub/_files/_docs/ruckelshaus/pubs/2015-inepa-report.pdf).

203. Forest Service National Environmental Policy Act Procedures Final Rule, 73 Fed. Reg. 43,084 (July 24, 2008); Dept. of the Interior Implementation of the NEPA Environmental Policy Act (NEPA) of 1969, 73 Fed. Reg. 126 (Jan. 2, 2008).

204. Iterative NEPA and Collaboration, *supra* note 202, at 7.

205. *Id.* at 6.

206. 40 C.F.R. § 1505.1(e) (2017).

document, to which the public can only respond, not engage. Because of this, the agency will often find itself dealing with serious distrust at best and extended court challenges at worst.

Rather than an agency merely taking public input and trying to balance interests in a series of alternatives, most of which will be discarded anyway, it can be more efficient for the agency to work with the public on a continuous basis to meet as many interests as possible. During this process, alternatives are created by all interests that outline location of oil and gas infrastructure, measures to mitigate or avoid impacts, monitoring methods, and other pertinent aspects of the operation. By engaging in a learning process where stakeholders identify the potential opportunities and problems related to the proposed project, and finding solutions for mutual gain that form the agency's (and the public's) preferred alternative, the agency and the project proponent can begin the process of establishing the legitimacy, credibility, and trust necessary for achieving a social license.

There are two approaches that an agency can take to include the public collaboratively in oil and gas decisions. The first is to engage stakeholders in advance of publishing the Notice of Intent and initiating the NEPA process. Such informal or "pre-NEPA" collaboration allows the agency to explore the purpose and need for the proposed project with stakeholders and generate alternatives that meet their interests. The potential outcome of pre-NEPA collaboration is that stakeholders can help to define the range of alternatives that are incorporated and analyzed in the draft environmental statement, and even help to define the preferred alternative prior to the development of the draft EIS.

The second approach is to formally build collaboration into the NEPA process through iNEPA in which the agency works with all interests in a systematic way, from conceptualizing the proposed action through generating the final NEPA document. iNEPA encourages agencies to adapt and modify proposals and alternatives by iteratively developing them with the public.²⁰⁷ While agencies are not required to incorporate collaboration into their iNEPA processes, iNEPA lends itself to being combined with an integrated and collaborative approach. It allows agencies to develop an EIS with stakeholders that includes a

207. *Id.* at 6.

preferred alternative that has been developed collaboratively.²⁰⁸ iNEPA is particularly applicable when the federal action triggering NEPA is both complex and contentious. In that instance, a collaborative approach that creates efficiency and trust will provide the most benefit to the agency, a project proponent, and stakeholders.

Efficiencies are created by iteratively working with the public to create alternatives that contain the ideas, knowledge, and buy-in of as many interests as possible.²⁰⁹ NEPA documents often are created to meet legal requirements and generate management alternatives that staff can handle.²¹⁰ But if public engagement is reduced to the minimum required under CEQ regulations and the process is perceived to be in opposition to what many interests want, the document may wind up being challenged anyway.²¹¹ The iNEPA approach allows agencies to be proactive and systematically include public deliberation into the planning process. Collaborating with the public and iteratively developing a preferred alternative that meets stakeholders' interests reduces the amount of time that would be required to analyze a series of alternatives that would not be used anyway. Additionally, including the public in meaningful deliberation and learning increases trust in the agency and ultimately social license into both the agency's actions and documentation.²¹²

It is eminently feasible for an agency and a proponent to work with the public to find solutions in a more efficient and inclusive manner under NEPA. Given an agency decision maker and staff who understand the opportunities iNEPA and other inclusive approaches provide, and the expertise on board to convene and guide a public process to the creation of alternatives that meet as many interests as possible, there is no reason not to start a project using this approach. An energy company could benefit from the creation of social license using iNEPA and can work with an agency to implement this approach.

208. *Id.*

209. *Id.* at 11.

210. Marc J. Stern et. al., *From the Office to the Field: Areas of Tension and Consensus in the Implementation of the National Environmental Policy Act Within the US Forest Service*, 91 J. OF ENV'T'L MGMT, 1350, 1351 (2010).

211. *Id.*

212. Jessica Western (Clement) & Michele Straube, *iNEPA, the iPhone of Environmental Impact Review, Makes NEPA more User-Friendly*, 30 A.B.A. SEC. OF THE ENV'T, ENERGY, AND RES., 41, (2015).

E. Using iNEPA to Foster Collaboration to Achieve a Social License to Operate

There are a few examples of how federal agencies have used iNEPA to iteratively and collaboratively meet as many interests as possible through a NEPA process. Examples include: the expansion of snowmobiling in California, the building of a large parking garage in Michigan, and the large-landscape scale restoration of aspen stands in Utah.²¹³ A more energy-specific example of iNEPA application that resulted in the achievement of a social license took place on the Uncompahgre Plateau in Colorado.²¹⁴ During the development of the Uncompahgre Plateau Collaborative Forest Landscape Restoration Project, the Forest Service and its constituents needed to find a way to fund the restoration of mule deer habitat in fire-suppressed ponderosa pine stands.²¹⁵ Among the public, the Forest Service found a great deal of support for biomass utilization as a way to fund restoration and support the local economy.²¹⁶ However, there were some interest groups that were concerned that conducting treatments to allow a biomass utilization operation to be financially viable would lead to more treatments than were necessary to restore the forest.²¹⁷ This polarization of opinions led the Forest Service to explore how they might develop a social license to operate to use forest biomass for energy development.²¹⁸

The Forest Service used an iterative and collaborative approach to reduce scientific uncertainty and to quantitatively identify the level of social acceptance for biomass harvesting and utilization.²¹⁹ While the collaborative approach took two years, once completed it enabled the

213. Iterative NEPA and Collaboration, *supra* note 202, at 14–16.

214. Jessica M. Western et. al., *Examining the Social Acceptability of Forest Biomass Harvesting and Utilization From Collaborative Forest Landscape Restoration: A Case Study From Western Colorado, USA*, J. OF FORESTRY (115 ed.) 6, 530 (2017).

215. *Id.* at 532.

216. *Id.* at 533.

217. *Id.* at 535.

218. *Id.* at 537.

219. *Id.* at 538.

Forest Service to quickly and without objection, develop an Environmental Assessment in six months.²²⁰ Using an iterative and collaborative approach, the agency managed to fulfill the need to restore the forest, improve wildlife habitat for mule deer, create a predictable supply of biomass with which a company could start building its operations, and create more jobs in the community.²²¹ By using this approach, the agency achieved a social license to operate and created far more value than just restoring a forest.²²²

Despite the existence of the iNEPA option, federal personnel often cling to their fear (or comfort)²²³ of adopting new approaches. Agency fear of utilizing their discretionary authority was discussed by J.B. Ruhl and Kyle Robisch in their recent article entitled “Agencies Running From Agency Discretion”.²²⁴ In the article, they note that while discretion has been defined as the “root source of administrative agency power and influence,” agencies have been reluctant to run with discretion and have instead run from it.²²⁵ They suggest that agencies run from their discretionary authority because of the “process baggage” or decision making prerequisites that comes with exercising discretion in the modern administrative state.²²⁶ The effect of process baggage not only has an “ossification” effect on federal agency use of discretionary decision making authority, it has also led agencies to claim a lack of discretionary authority.²²⁷

So why are federal agencies running from their discretionary authority to incorporate more collaboration into the NEPA process? In a 2013 master’s thesis, Colorado State Journalism and Technical Communication student Peggy Cochran Roberts addressed that very

220. *Id.* at 531.

221. *Id.*

222. In this instance it was the Forest Service desiring and achieving the social license, but in an oil and gas context it will be the project proponent, not the federal agency seeking the social license.

223. Stern, *supra* note 210, at 1351.

224. J.B. Ruhl & Kyle Robisch, *Agencies Running from Agency Discretion*, 58 WM. & MARY L. REV., 97, 102 (2016).

225. *Id.*

226. *Id.*

227. *Id.* at 102–103.

point.²²⁸ In her thesis, Roberts assessed the acceptance or rejection federal agency staff had toward implementing collaborative public participation techniques and explored the factors that either encouraged or discouraged their willingness to adopt collaboration techniques into NEPA decision-making processes.²²⁹ The factors she identified that contribute to agency staff willingness to adopt collaborative public participation techniques included: meeting regulatory requirements, agency culture, agency commitment, and the ability to measure success.²³⁰ The factors identified that discouraged implementation of collaborative techniques included: lack of staff education about collaboration techniques, cost, schedule, staff availability, and staff experience.²³¹

In addition to the factors Roberts identified, there are other factors to take into consideration. External to the agency, staff have experienced how some parties do not participate in collaboration and instead “wait in the wings” to file critical comments and/or litigate.²³² In other situations, because an agency did not use collaborative approaches, diverse interests worked together to design a consensus-derived alternative, only to find it rejected by the agency which increased frustration and lack of trust.²³³ Finally, extensive evidence exists that within the agency, decision makers and line officers often disqualify the quality of input from the public and object to collaborative approaches, thereby incurring opportunity costs and missing chances to find mutually agreed common sense solutions.²³⁴

As the collaborative process that leads to a social license to operate will be most beneficial to the oil and gas operator, what can operators do to encourage agencies to utilize an iNEPA approach? First, operators should become familiar with iNEPA and collaboration themselves. Second, the operator should advocate for agencies to use the iNEPA approach. Third, operators can assist the agencies in bolstering the

228. Peggy Cochran Roberts, *Factors Influencing Agency Staff's Willingness to Adopt Collaborative Public Participation Techniques in the NEPA Decision-Making Process 1* (2013) (unpublished M.S. thesis, Colorado State University), available at https://dspace.library.colostate.edu/bitstream/handle/10217/81075/Roberts_colostate_0053N_12088.pdf.

229. *Id.* at 3.

230. *Id.* at 26.

231. *Id.*

232. *Id.* at 33–34.

233. Western and Straube, *supra* note 212, at 41.

234. *Id.* at 41; Stern, *supra* note 210, at 1355.

capacity of stakeholders to participate in an iNEPA process by supporting outreach, training, information, blogs, and face-to-face opportunities can all be used to enhance this capacity. Finally, as the cost of collaborative approaches is sometimes considered a hindering factor, the company can agree to pay for the costs associated with the collaborative effort, including if necessary, costs of a trained facilitator to run the process.

V. THE FEDERAL ADVISORY COMMITTEE ACT, THE ELEPHANT IN THE ROOM

Despite the flexibility contained in NEPA, the CEQ NEPA regulations, and the agency's NEPA regulations (particularly the new iNEPA regulations) to incorporate public collaboration into NEPA processes in order to achieve a social license, there is a substantial federal legal limit to agency's ability to do so: The Federal Advisory Committee Act (FACA).²³⁵

FACA, passed in 1972 during the "good government" initiative of the 1970's, governs agency solicitation of policy advice from outside groups²³⁶ and is intended to ensure that citizen involvement in federal decisions is equitable and that individuals or groups do not have undue influence.²³⁷ Whenever a federal agency intends to "establish, control, or management a group that has at least one member who is not a federal, tribal, state or local government employee" the agency must comply with FACA.²³⁸ Compliance with FACA requires the federal agency to establish

235. 5 U.S.C. app. §§ 1–16 (2012).

236. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG., 451, 452-53 (1997) (explaining that FACA was passed "in part out of concern that some interests had come to enjoy unchecked and perhaps illicit access to federal executive decisionmakers.")

237. U.S. Forest Serv., *Key Principles and Practical Advice for Complying with the Federal Advisory Committee Act*, (Nov. 2, 2011), Fs.usda.gov, https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5203270.pdf.

238. U.S. BLM, *Bureau of Land Management National Policy for the Federal Advisory Committee Act: What BLM Staff Need to Know When Working with ADR-Based Collaborative Community Working Groups*, 1 (May 2005) Ntc.blm.gov, <https://www.ntc.blm.gov/krc/uploads/880/BLM%20Field%20Guide%20-%20Federal%20Advisory%20Committee%20Act%20-%202005-05-01.pdf>.

a federal advisory committee (FAC), a lengthy and time consuming process.²³⁹ A FAC is defined as:

any committee, board, commission, council, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , which is

(A) established by statute or reorganization plan,

or

(B) established or utilized by the President, or

(C) established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government . . .²⁴⁰

There are three apparent components to an advisory committee: (1) FACA only applies to a group (not individuals), (2) groups subject to the Act must be established by statute or utilized by the President or a federal agency, and (3) established groups must be utilized for the purpose

239. Melinda Harm Benson, *Integrating Adaptive Management and Oil and Gas Development: Existing Obstacles and Opportunities for Reform*, 36 ENVT. L. REP., 10962, 10970 (2009) (explaining that it took two years for a federal advisory committee to be approved for the Pinedale Anticline Working Group, and by that time, the group had lost both its momentum and its ability to keep pace with the oil and gas development for which they were tasked with monitoring and making adaptive management recommendations).

240. 5 U.S.C. app. § 3(2) (2012). In addition to complying with the requirements in FACA itself, Executive Order 12,838 further instructs federal agencies to reduce their reliance upon advisory committees by up to a third and to only create new advisory committees if “compelling considerations” so require. Termination and Limitation of Federal Advisory Committees, Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 12, 1993). Further, Executive Order 12,838’s implementing directive, Office of Management and Budget Circular A-135, “Management of Federal Advisory Committees,” instructs federal agencies to cap the number of advisory committees that each agency is allowed to maintain. U.S. O.M.B., Circular No. A-135, Management of Federal Advisory Committees (Oct. 5, 1994), Whitehouse.gov, https://www.whitehouse.gov/omb/circulars_a135. The BLM has also promulgated regulations instructing the formation and implementation of FACs. 43 C.F.R. §§ 1784.0-1 to 1784.6-2.

of providing “advice or recommendations” to the President or an agency. Once established, FACA requires that FACs:²⁴¹

- establish a written charter that explains the mission of the committee;²⁴²
- give timely notice of the committee meeting in the Federal Register;²⁴³
- have fair and balanced membership on the committee;²⁴⁴
- open committee meetings to the public, whenever possible;²⁴⁵
- have the sponsoring agency prepare minutes of the committee meetings;²⁴⁶
- provide public access to the information used by the committee;²⁴⁷
- grant the federal government the authority to convene and adjourn the meetings;²⁴⁸ and
- terminate within two years unless the committee is renewed or otherwise provided for by statute.²⁴⁹

In their article “Chilling Collaboration: the Federal Advisory Committee Act and Stakeholder Involvement in Environmental

241. This list is reproduced from one contained in the following: Thomas C. Beierle & Rebecca J. Long, *Chilling Collaboration: The Federal Advisory Committee Act and Stakeholder Involvement in Environmental Decisionmaking*, 29 ENV'T. L. REP., 10,399, 10,402 (1999).

242 U.S. General Services Administration, Federal Advisory Committee Charters (2017), available at: <https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/federal-advisory-committee-charters> (each advisory committee prepares and files a formal charter, accessible at <https://www.facadatabase.gov>, before the agency can meet or take any action).

243. 5 U.S.C. app. § 10(a)(2).

244. *Id.* at § 5(c).

245. *Id.* at § 10(a)(1).

246. *Id.* at § 10(c).

247. *Id.* at § 5.

248. *Id.* at § 10(f).

249. *Id.* at §14(b).

Decisionmaking”, Thomas C. Beierle and Rebecca J. Long discuss that while FACA’s requirements appear innocuous, they actually directly and indirectly discourage the use of collaborative processes and have become a significant barrier to stakeholder efforts.²⁵⁰ Beierle and Long offer three chilling effects FACA has on collaborative decision making: (1) the “law’s procedural barriers that deter public groups from forming FACA-charter committees;” (2) “administrative requirements that discourage agencies from establishing FACA chartered committees;” and (3) “ambiguity about the law’s requirements that creates fear among agencies of any type of collaboration, or even consultation, with entities not chartered under FACA.”²⁵¹ Discouragingly, they note that “taken together, these elements mean that, on the one hand, agencies and the public are discouraged from chartering advisory committees under FACA, while, on the other hand, government personnel are reluctant to collaborate or meet with stakeholders unless they are chartered as a FACA committee.”²⁵² They suggest that while “FACA-phobia” has its origins in law, it is also a behavioral phenomenon within agencies who have become too fearful of FACA and should be encouraged to be more bold.²⁵³ Their rationale for suggesting this is that punishment for violating FACA has not been that bad.²⁵⁴ Moreover, if agencies comply with the spirit and intent of FACA by conducting open and fair processes, there are likely no interests willing to bring a suit against the agency on FACA grounds.²⁵⁵ Further, even if aggrieved parties bring a suit, agencies are more likely to receive a favorable ruling by the courts because of the process used.²⁵⁶

250. Beierle & Long, *supra* note 241, at 10,403.

251. *Id.* 10,402–405.

252. *Id.* 10,403.

253. *Id.* at 10,410.

254. *Id.*

255. *Id.*

256. *Id.* referencing Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L. REV. AM. U., 111, 176 (1996).

A. *FACA Safe Cooperation; Four Options*

An agency's ability to incorporate collaboration in the NEPA process is certainly limited by FACA.²⁵⁷ In seeking to increase collaboration through a NEPA process, a federal agency cannot convene a group of stakeholders seeking to solicit their advice and recommendations without considering FACA's requirements. However, FACA does not prohibit agencies from collaborating.²⁵⁸ Federal agencies can still include more collaboration into their NEPA processes (iNEPA or traditional) while still complying with FACA.²⁵⁹ In an effort to encourage BLM employees to be less FACA-phobic, the BLM published a document in May 2005 entitled "Bureau of Land Management National Policy the Federal Advisory Committee Act: What BLM Staff Need to Know When Working with ADR-Based Collaborative Community Working Groups."²⁶⁰ In the document they acknowledge that when FACA was signed into law, collaborative community working groups were clearly not contemplated as these types of groups are a relatively new development in agency efforts.²⁶¹ While noting that collaborative efforts may likely trigger FACA, the guidance suggests that collaborative efforts can be designed and used in ways that do not trigger FACA.²⁶²

In fact, there are four ways to include collaboration into a NEPA process to achieve a social license to operate while maintaining compliance with FACA: (1) create a FAC in accordance with FACA and other applicable regulations; (2) convene open meetings where no collective advice or recommendations are offered by a group (individuals advice or recommendations are ok); (3) limit participation of a group to government entities only; or (4) have a non-federal organization convene and administer the consensus seeking group, with the federal agency participating as a fellow stakeholder in a technical resource capacity while retaining their federal decision-making capacity.²⁶³

257. Benson, *supra* note 239, at 10970.

258. Iterative NEPA and Collaboration, *supra* note 202, at 12.

259. *Id.*

260. U.S. BLM, *supra* note 238.

261. *Id.* at 1-2.

262. *Id.* at 2.

263. *Id.* at 13.

The major limitation of the first option is federal agency's reluctance given the onerous rules involved with compliance with FACA. In her article "Integrating Adaptive Management and Oil and Gas Development: Existing Obstacles and Opportunities for Reform," Melinda Harm Benson discusses FACA as an obstacle to public involvement and adaptive management efforts related to federal public land oil and gas development projects.²⁶⁴ She provides an example suing the Pinedale Anticline Working Group, a group of stakeholders tasked under the Pinedale Anticline Oil and Gas Exploration and Development Project Record of Decision, responsible for assisting the BLM in establishing and implementing an adaptive management for the Pinedale Anticline.²⁶⁵ The group waited two years for the establishment of a FAC and in the wait lost its momentum and its ability to keep pace with the oil and gas development.²⁶⁶ Benson notes that "while enacted with the best intentions, FACA has actually paved the way for restricted public involvement" because "the reality is that within federal agencies, FACA's requirements are viewed as onerous, and fear of running afoul of FACA's requirements is often used as an excuse to avoid engaging those outside government."²⁶⁷ She references a 1998 Government Accountability Office survey of federal agencies that found many instances where federal agencies decided not to obtain outside input because of fear of compliance with FACA.²⁶⁸

It is also important to point out that even if a FAC is requested there is no guarantee it will be approved by agency officials as the total number of FACs are limited. Executive Order 12,838, signed by President Clinton in 1993, instructs federal agencies to reduce their reliance upon advisory committees by up to a third and to create new advisory committees only if "compelling considerations" so require.²⁶⁹ Furthermore, the Office of Management and Budget's implementation of

264. Benson, *supra* note 239, at 10,970.

265. *Id.*

266. *Id.* at 10,967, 10,970.

267. *Id.* at 10,970.

268. *Id.* (citing U.S. GAO, Federal Advisory Committee Act: Views of Committee Members and Agencies on Federal Advisory Committee Issues 5 (July 9, 1998)).

269. Termination and Limitation of Federal Advisory Committees, Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 12, 1993).

the Executive Order instructs federal agencies to cap the number of advisory committees that each agency is allowed to maintain.²⁷⁰

While the requirements of FACA may make it too difficult in some instances for federal agencies to form a FAC, that is likely not the case in all instances. This is particularly true for major oil and gas projects where the volume of oil and gas resources measured against the environmental and social issues to overcome compel the use of a formalized collaborative process to achieve a social license. In those instances, the time and effort required to initiate a FAC may be worth the effort. The bottom line under option one is: if a federal agency chooses to create an official FAC in order to incorporate stakeholder collaboration into a NEPA process, it should be a strategic decision made well in advance to secure sufficient time to officially establish and charter the FAC.

Under the second option, a federal agency can convene a collaborative process by hosting a series of meetings that are open to all.²⁷¹ At the meetings, issues, interests, options, and final solutions are deliberated with the agency so long as the group does not render specific advice or recommendations to the agency as a group, whether by consensus majority or otherwise.²⁷² Instead, to avoid triggering FACA, the group should provide only information, while individual members of that group can provide specific recommendations and advice.²⁷³ Under this option, meetings should be well publicized and membership remain open to all.

The third option involves the federal agency convening a collaborative group, limiting members of the group to government

270. OMB, Circular No. A-135, Management of Federal Advisory Committees (Oct. 5, 1994), *available at*: https://www.whitehouse.gov/omb/circulars_a135. It has been suggested that Exec. Order 12,838 may, in fact, be in tension with the goal to promote more consensus-based decision-making, as any consensus-based decision-making initiatives may well trigger FACA and therefore require the creation of an advisory committee. Croley & Funk, *supra* note 236. This tension has been described as classic tension of government involving “principals favoring openness, participation, and accountability, on one hand, and those favoring administrative speed, efficiency, and sure-footedness, on the other.” *Id.*

271. U.S. BLM, *supra* note 238, at 4.

272. *Id.*

273. *Id.*

officials only. If the collaborative group includes participants that are solely federal, tribal, state and local government employees operating in their official capacities, then the group is exempt from the requirements of FACA.²⁷⁴

The final option is to have a non-federal organization convene and organize the consensus seeking group, with the federal agency participating as a fellow stakeholder while retaining their federal decision-making capacity. The non-federal convener could be the operator, as long as a third-party neutral designs and leads the collaborative process. The key point here is that the federal agency must not establish, manage, or control the group; instead, the agency's role should be limited to that of a group participant.²⁷⁵

In conclusion, while FACA is a significant limitation on an agency's procedural discretionary authority to incorporate more collaboration into the NEPA process toward achieving a social license, agencies are not without options. Agencies can either strategically comply with the requirements of FACA if appropriate, or they can avoid the burdens of FACA by convening non-advice offering groups, hosting collaborative groups of government officials only, or by having a third-party organization convene and organize a collaborative consensus seeking group. Ultimately, the benefits obtained by achieving a social license, specifically reducing the likelihood of litigation-drive delay, outweigh the burdens of complying with FACA.

VI. CONCLUSION

In recognition that oil and gas projects go undeveloped “not for lack of a legal license, but for lack of growing, earning and maintaining a social license,”²⁷⁶ U.S. oil and gas companies are increasingly employing social license efforts. Unfortunately, those efforts have not been as readily applied to oil and gas projects located on federal public lands. In order to

274. *Id.* at 3.

275. *Id.* at 4.

276. Smith & Richards, *supra* note 46, at 117, citing an article including an audio interview with Alex Hohmann, Stakeholder Relations Manager for Anadarko Petroleum. Stephanie Joyce, *Relationships 101: Oil and Gas Looks for a Social License to Operate*, InsideEnergy.org, <https://insideenergy.org/2014/12/05/relationships-101-oil-and-gas-look-for-a-social-license-to-operate/> (Dec. 5, 2014).

reduce conflict and avoid costly delays associated with litigation of public land oil and gas development projects, oil and gas operators should employ efforts to obtain a social license from the communities adjacent to the development and from other stakeholders.

As demonstrated, achieving a social license to operate, which involves a significant degree of meaningful dialogue between the energy company and the community, is in essence a collaborative process. By encouraging federal agencies to capitalize on recent efforts to include more collaboration into the NEPA process (specifically through the iterative NEPA or iNEPA), oil and gas companies can use the NEPA process to achieve a social license to operate. In doing so, oil and gas companies and agency personnel should be aware of the limitations incorporating more collaboration into the NEPA process imposed by FACA. However, the FACA limitations are not insurmountable, and we have offered four options to incorporate more collaboration into the NEPA process that are “FACA safe.”

Suggesting that federal agencies incorporate more collaboration into the NEPA process in order to enable project proponents to achieve a social license is certainly not limited to oil and gas operators. It is applicable to all federal land project proponents who anticipate community and/or stakeholder opposition to their projects including coal, renewables, and timber. By encouraging federal agencies to incorporate more collaboration into a NEPA process, federal land project proponents can utilize the legal license process to achieve a social license to operate.