

THE FUNCTIONAL EQUIVALENCE DOCTRINE: AN OPTION FOR REFORMING THE APPLICATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT TO FEDERAL MINING PERMITS & APPROVALS

The National Environmental Policy Act of 1969 (NEPA) establishes a procedural framework mandating that federal agencies consider the environmental impacts of their major actions that significantly affect the environment. Currently, such federal actions include the permitting and approval of various mining operations and activities.

Federal courts have developed the “functional equivalence doctrine,” which exempts federal agencies from complying with NEPA’s environmental review process provided that other “substantive and procedural standards ensure full and adequate consideration of environmental issues.”¹ In these cases, “formal compliance with NEPA is not necessary, [and] functional compliance is sufficient.”²

The functional equivalence standard is met when: (1) the substantive standard of the enabling legislation emphasizes the protection of the environment; (2) the procedural standards of the enabling legislation provide for full and thorough consideration of the environmental issues involved in the agency’s action, including opportunity for agency and public comment; and (3) the agency’s responsibilities are judicially reviewable. Under the functional equivalence doctrine, as long as an agency’s environmental assessment satisfies the primary goals of NEPA, duplicative NEPA regulatory hurdles can be avoided.

The federal courts have applied the functional equivalence doctrine almost exclusively to the Environmental Protection Agency (EPA),³ rationalizing that the agency, whose sole responsibility is the protection of the environment, has already completed an adequate environmental assessment independent of NEPA.⁴ In contrast, the federal courts have declined

¹ *Environmental Defense Fund v. EPA*, 489 F.2d 1247, 1257 (D.C. Cir. 1973).

² *Id.*

³ Notably, one federal court has applied the functional equivalence doctrine to the Federal Communications Commission (FCC) – an agency whose sole responsibility or mandate is not the protection of the environment. *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 94-95 (2nd Cir. 2000) (holding that the FCC functionally complied with NEPA in promulgating guidelines for human exposure to radio frequency radiation from FCC-regulated transmitters and facilities, as well as exempting certain classes of these facilities from routine environmental assessments).

In promulgating the guidelines, FCC considered the environmental impacts of its rulemaking, consulted with federal agencies with environmental expertise, and solicited public comment, all independently of a formal NEPA review. *Id.* (FCC’s final orders “functionally satisf[ied] the [Council on Environmental Quality’s] requirements for an [environmental assessment] and [finding of no significant impact] both in form and in substance.”). This ruling properly recognizes that EPA is not the only agency that engages in environmental reviews that are of the functional equivalence to NEPA. Yet, given the plethora of cases opposing such application of the doctrine to non-environmental agencies, this ruling will likely not force a change in the judiciary to exempt agencies from NEPA outside of EPA.

⁴ *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 n.130 (D.C. Cir. 1973) (“[W]e see little need in requiring a NEPA statement from an agency whose *raison d’etre* is the protection of the environment and whose decision . . . is necessarily infused with the environmental considerations so pertinent to Congress in designing the statutory framework.”)

to extend the doctrine to other agencies, such as the Bureau of Land Management (BLM) and the United States Forest Service (USFS), because their statutory directives are not strictly confined to protecting the environment, but require a balancing of environmental and economic concerns in managing the nation's natural resources.⁵

Yet, this refusal to extend the exemption to other agencies, such as BLM and the USFS, ignores the environmental permitting process these agencies currently comply with in the development of the nation's natural resources. These federal permits cover the same environmental concerns, such as impacts to air quality, water quality, wildlife, and land, as the NEPA review process they often trigger, leading to duplicative environmental analyses. In fact, no federal statute or regulation prohibits the application of the functional equivalence doctrine to non-environmental agencies, despite the reluctance of federal courts to do so.

Since NEPA's enactment, Congress has passed numerous laws that prescribe substantive goals and procedures to prevent or minimize adverse impacts to environmental resources. These laws and their corresponding regulations require agencies to analyze the possible environmental effects of projects prior to granting permits or authorizations for certain mining operations. For example, proposed exploration and mining operations are potentially subject to the following environmental permitting procedures before receiving federal approval:

ENVIRONMENTAL PERMITS, APPROVALS, AND PERFORMANCE STANDARDS POTENTIALLY APPLICABLE TO PROPOSED EXPLORATION AND MINING OPERATIONS

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976:

- ***In General*** – Permitting Authority for Hardrock Mining on Federal Lands.
- ***Environmental Standard*** (43 U.S.C.A. § 1732(b)) – Requires the Secretary of Interior to “take any action necessary to **prevent unnecessary or undue degradation** of the lands” in managing the public lands.
- ***Surface Management Regulations*** (43 C.F.R. Subpart 3809) – Establishes procedures and standards to ensure that “anyone intending to develop mineral resources on the public lands [] **prevent unnecessary or undue degradation of the land and reclaim disturbed land.**” 43 C.F.R. § 3809.1(a).

⁵ *Texas Committee on Natural Resources v. Bergland*, 573 F.2d 201, 208 (5th Cir. 1978) (refusing to apply functional equivalence to the USFS' failure to file an EIS under the National Forest Management Act); *Natural Resources Defense Council, Inc. v. Morton*, 388 F. Supp. 829, 833 (D.D.C. 1974) (refusing to apply functional equivalence to BLM's licensing of public lands for grazing under the Taylor Grazing Act).

FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 – CONTINUED:

- **Plan of Operations** – Required, except for “casual use” operations or mining operations that will cause a cumulative surface disturbance of 5 acres or less. 43 C.F.R. §§ 3809.10, 3809.11, 3809.21, 3809.31. The plan of operations “must demonstrate that the proposed operations would **not result in unnecessary or undue degradation of public lands.**”

Plan of Operations Must Include (43 C.F.R. § 3809.401):

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| 1. Water Management Plans | 5. Monitoring Plan |
| 2. Quality Assurance Plans | <i>Examples of Monitoring Programs:</i> |
| 3. Spill Contingency Plans | • Surface & Groundwater Quality & Quantity |
| 4. Reclamation Plans | • Air Quality |
| <i>Including Plans for:</i> | • Revegetation |
| • Regrading and Reshaping | • Wildlife Mortality |
| • Mine Reclamation | 6. Interim Management Plan |
| • Riparian Mitigation | 7. Reclamation Cost Estimate |
| • Wildlife Habitat Rehabilitation | |
| • Topsoil Handling | |
| • Revegetation | |
| • Isolation and control of acid-forming, toxic, or deleterious materials | |

Performance Standards Applicable to Plan of Operations (43 C.F.R. § 3809.420):

1. Land-use Plans
2. Mitigation Measures
3. Concurrent Reclamation
4. Compliance with all other laws
5. Specific Standards:
 - Air Quality
 - Water Quality
 - Disposal & Treatment of Solid Wastes
 - Fisheries, Wildlife, & Plant Habitat
 - Cultural Resources
 - Acid Forming, Toxic, or Other Deleterious Materials
 - Leaching Operations & Impoundments

- **Public Notice & Comment & Judicial Review** (43 C.F.R. §§ 3809.411(c) & 3809.800 – 3809.809) – BLM will publish a notice of the availability of the plan of operations in a local newspaper of local circulation and will accept public comment for at least 30 calendar days. A party adversely affected by a decision under these regulations may either (1) petition the State Director or appropriate BLM State Office to review the decision; or (2) directly appeal a BLM decision to the Office of Hearings and Appeals.

SURFACE MINING CONTROL AND RECLAMATION ACT:

- ***In General*** – Permitting authority for surface coal mining operations to **“assure that surface coal mining operations are so conducted as to protect the environment.”** 30 U.S.C.A. § 1202(d).
- ***Surface Coal Mining & Reclamation Permit*** (30 U.S.C.A. §§ 1256 – 1259) – Prior to engaging in or carrying out any surface coal mining on federal lands, a valid surface coal mining and reclamation permit must be obtained from OSM. SMCRA Regulations establish permit requirements for exploration that will remove more than 250 tons of coal or that will occur on lands designated as unsuitable for surface coal mining operations. 30 C.F.R. Part 772.

Permit Application – Statutory Requirements (30 U.S.C.A. § 1257(b), 1258, 1259, & 1260(c)):

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| <ol style="list-style-type: none">1. Information Requirements <p><i>Including:</i></p> <ul style="list-style-type: none">• Various maps showing land to be affected, including topographical maps and cross-section maps.• Name of the watershed and location of stream or tributary into which surface and pit drainage will be discharged.• A determination of the probable hydrologic consequences of mining and reclamation operations both on and off the mine site, including sufficient data for an assessment of probable cumulative impacts on the hydrology of the area. | <ol style="list-style-type: none">2. Reclamation Plan3. Insurance Certificate4. Blasting Plan5. Schedule of all notices of violations of SMCRA and air or water environmental protection laws received in connection with any surface coal mining operations within the three-year period prior to the date of the application.6. Performance Bond |
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Permit Requirements for Exploration (30 C.F.R. Part 772) – Includes Description of:

1. Cultural or Historical Resources
2. Archaeological Resources
3. Endangered & Threatened Species
4. Measures to Comply with Performance Standards
5. Various Maps of Areas of Proposed Exploration and Reclamation

Permit Application – Minimum Requirements for Information on Environmental Resources (30 C.F.R. Part 779):

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| <ol style="list-style-type: none">1. Cultural, Historic, & Archaeological Resources2. Climatological Information3. Vegetation Information | <ol style="list-style-type: none">4. Soil Resources Information5. Land Use Information6. Various Maps |
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SURFACE MINING CONTROL AND RECLAMATION ACT – CONTINUED:

Permit Application – Minimum Requirements for Reclamation and Operation Plan (30 C.F.R. Part 780):

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| 1. Information on Proposed Mining Operations & Existing Structures | • Description of Measures to Maximize the Use and Conservation of Coal Resources |
| 2. Blasting Plan & Monitoring System | • Measures to Seal or Manage Mine Openings |
| 3. Air Pollution Control Plan | • Description of steps to comply with Clean Air Act, Clean Water Act, and other applicable air and water quality laws and regulations and health and safety standards |
| 4. Fish & Wildlife Information | |
| 5. Reclamation Plan | |
| • Compliance with Environmental Performance Standards (<i>See</i> below) | 6. Hydrologic Information |
| • Estimate of Reclamation Cost and Timetable | 7. Geologic Information |
| • Plan for Backfilling, Soil Stabilization, Compacting, & Grading | 8. Land Use Information |
| • Plan for Removal, Storage, & Redistribution of Topsoil, Subsoil, and Other Material | 9. Siltation Structures, Impoundments, Banks, Dams, & Embankments |
| • Plan for Revegetation | 10. Protection of Publicly Owned Parks & Historic Places |
| | 11. Disposal of Excess Spoil |

➤ ***Environmental Performance Standards*** (30 U.S.C.A. §§ 1251 & 1265) – Any surface coal mining operations authorized on federal land must meet **all applicable environmental performance standards** provided in SMCRA and its implementing regulations. These standards are deemed necessary “to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.” 30 U.S.C.A. § 1201(d).

Environmental Performance Standards (30 C.F.R. Subpart 816 & 817):

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| 1. Casing and Sealing of Drilled Holes | 12. Coal Recovery |
| 2. Removal, Timing, Storage, & Redistribution of Topsoil & Subsoil | 13. Use of Explosives |
| 3. Ground-water & Surface-water Protection & Monitoring; Acid Drainage; Water Rights & Replacement | 14. Disposal of Excess Spoil |
| 4. Water Quality Standards & Effluent Limitations | 15. Coal Mine Waste |
| 5. Diversions | 16. Stabilization of Surface Areas |
| 6. Sediment Control Measures | 17. Protection of Fish, Wildlife and Related Environmental Values |
| 7. Siltation Structures | 18. Contemporaneous Reclamation |
| 8. Discharge Structures | 19. Backfilling and Grading |
| 9. Impoundments | 20. Revegetation |
| 10. Postmining Rehabilitation of Sedimentation Ponds, Diversions, Impoundments, and Treatment Facilities | 21. Cessation of Operations |
| 11. Stream Buffer Zones | 22. Postmining Land Use |

SURFACE MINING CONTROL AND RECLAMATION ACT – CONTINUED:

- **Public Notice & Comment & Judicial Review** – SMCRA provides citizens the opportunity to participate in rule making, permit approval, bond release, inspections, and enforcement.
1. **Rulemaking** – Public notice and comment is provided prior to the promulgation of rules implementing SMCRA. 30 U.S.C.A. §§ 1202(i) & 1251.
 2. **Permit Issuance** – Applicants for a surface coal mining and reclamation permit must file a copy of his application for public inspection with the recorder at the courthouse of the county or an approved public authority where the mining is proposed to occur. 30 U.S.C.A. § 1257(e). In addition, the applicant must also place an advertisement in a newspaper of general circulation in the locality of the proposed site at least once a week for four successive weeks notifying the public on the filing of the mine permit application and reclamation plan. 30 U.S.C.A. §§ 1257(b)(6) & 1263(a). Any person with an interest that may be adversely affected by a proposed operation may file written objections to a proposed or revised permit application and request an informal conference. 30 U.S.C.A. § 1263(b). The regulating agency is required to issue within 60 days after the informal conference a written decision with supporting reasons for its grant or denial of a permit application. 30 U.S.C.A. § 1264. The applicant or any interested person may request a hearing to review the reasons for the decision. 30 U.S.C.A. § 1264(c); 30 C.F.R. § 775.11.

FOREST SERVICE’S ORGANIC ACT OF 1897:

- **In General** – Permitting authority for mining activity on national forest lands to “regulate occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C.A. §§ 478 & 551.
- **Surface Management Regulations** (36 C.F.R. Part 228, Subpart A) – To ensure that mineral operations are “conducted so as to minimize adverse environmental impacts on National Forest System surface resources.” 36 C.F.R. § 228.1.
- **Plan of Operations** – Required if the District Ranger determines that mining operations will likely cause significant disturbance of surface resources. Limited exceptions apply, including prospecting and sampling that will not cause significant surface resource disturbance. 36 C.F.R. § 228.4(a).

Plan of Operations Must Include (36 C.F.R. §§ 228.4(c)):

1. Map of Proposed Area
2. Information on Proposed Operations
3. Measures to Meet Requirements for Environmental Protection
4. Bonds

Requirements for Environmental Protection (36 C.F.R. § 228.8):

1. Air Quality
2. Water Quality
3. Disposal and Treatment of Solid Wastes
4. Scenic Values
5. Fisheries and Wildlife Habitat
6. Roads
7. Reclamation
 - Erosion Control
 - Water Runoff Control
 - Isolation, Removal, or Control of Toxic Materials
 - Reshaping & Revegetation of Disturbed Areas
 - Rehabilitation of Fisheries & Wildlife Habitat

FOREST SERVICE'S ORGANIC ACT OF 1897 – CONTINUED:

- **Public Notice & Comment & Judicial Review** (36 C.F.R. §§ 228.6) – All non-confidential information and data submitted by an operator is available for public inspection at the Office of the District Ranger. 36 C.F.R. § 228.6. Appeal provisions for the general public are available in regards to NEPA decisions. 36 C.F.R. Part 215. Written decisions on mining plans of operation under 36 C.F.R. Part 228A may only be appealed by the applicant. 36 C.F.R. Part 251, Subpart C.

OTHER FEDERAL ENVIRONMENTAL STATUTES POTENTIALLY REQUIRING PERMITS OR APPROVALS:

- **Clean Air Act** (42 U.S.C. §§ 7401 – 7671q):
 1. Prevention of Significant Deterioration (PSD) Permit / New Source Review Pre -Construction Permits
 2. Title V Operating Permit
 3. State-Administered Minor Source Permitting Programs
 4. Nonattainment Permits
- **Clean Water Act** (33 U.S.C. §§ 1251 – 1387):
 1. Section 404 Dredge and Fill Permits
 2. Section 402 National Pollutant Discharge Elimination System Permits
 3. Section 401 Water Quality Certifications
 4. Nonpoint or Diffuse Source Permits or Approvals
 5. Groundwater Permits
- **Endangered Species Act** (16 U.S.C. §§ 1531 – 1544):
 1. Federal Endangered Species Act Consultation
 2. Biological Opinion
- **Safe Drinking Water Act** (42 U.S.C. §§ 300f – 300j-26):
 1. Underground Injection Control Permits

As illustrated above, the federal permitting process for mining operations independently includes environmental considerations and performance standards that are functionally equivalent to the NEPA review process. Accordingly, Congress should consider exempting federal agencies, such as BLM and USFS, from NEPA. When Congress enacted NEPA, the core goal was to force federal agencies to evaluate and minimize the environmental impacts of their actions and ensure public participation. Such an action-forcing statute is not necessary, however, when federal agencies complete the functional equivalent under their enabling legislation.

The mining regulatory programs established under the Federal Land Policy Management Act, the Surface Mining Control and Reclamation Act, and the Forest Service's Organic Act all provide environmental performance and reclamation standards that minimize and prevent environmental impacts from mining operations on federal lands. The breadth of environmental standards embedded in these permitting schemes assures that the responsible federal agencies consider the environmental impacts of granting permits for mining operations. Moreover, this permitting process is further supplemented by additional permit requirements under the major

environmental laws, including the Clean Air Act (CAA), Clean Water Act (CWA), Endangered Species Act, and Safe Drinking Water Act. Altogether, these laws and regulations provide the functional equivalent of a NEPA review by requiring full and thorough consideration, both substantively and procedurally, of the environmental issues involved in permitting mining operations, including opportunity for agency and public comment, as well as judicial review.

Given that the functional equivalent of a NEPA review occurs during the permitting of mining operations on federal lands, Congress should legislatively exempt these permitting processes from formal NEPA review. These exemptions should mirror those currently provided to the EPA in such statutes as the CWA and CAA.⁶ Alternatively, Congress should consider amending NEPA to include an exemption for the BLM and USFS when conducting functionally equivalent environmental reviews under the ir enabling legislation.

Overall, NEPA is no longer fulfilling its original intent and must be reformed. A legislative exemption founded on the functional equivalence doctrine is a sound solution for modernizing the NEPA review process. Such an exemption would streamline the permitting process by excluding duplicative and costly environmental reviews. Currently, mining operations on federal lands face a lengthy and unpredictable permitting process that discourages the capital investments required for mineral exploration and mine development. By excluding the BLM and USFS from performing a formal NEPA review, resources could be more efficiently and effectively focused to ensure the development of our nation's natural resources while still minimizing and preventing environmental impacts as originally intended under NEPA.

⁶ See *e.g.*, 33 U.S.C § 1371(c) (“ . . . no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.”).