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DIGGING INTO PERMIT BY RULE

The Future of Regulatory Reform is Already Here

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THE COUNCIL TO MODERNIZE GOVERNANCE

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Executive Summary

Concluding our series on reforming the federal permitting process, we argue that permit by rule (PBR) should be at the front of the line among competing alternatives for reforming the federal permitting process.

PBR has important common law features that reduce the amount of time economic actors must wait on government permission, while increasing their confidence in the clarity of rules for compliance. Coupled with the use of transparency technology and surety bonds, PBR can best protect the public from environmental harms through expedited enforcement, even while speeding economic progress. PBR is a tested regulatory regime, used in most states, and shows real promise in helping policymakers regulate the needs of a cleaner economy.

We conclude that PBR will improve both economic growth and compliance with environmental, safety, and health standards. And it will do so by making much more efficient use of government resources, focusing them on upfront analysis, ongoing evaluation, and punishment of bad actors.

A Spectrum of Reforms for Regulation by Permit

In previous CMG papers on reforming the federal permitting process, we have explored the underlying causes of why the system is broken,[2] shown that procedural reforms allowing greater economic activity need not undermine substantive regulatory

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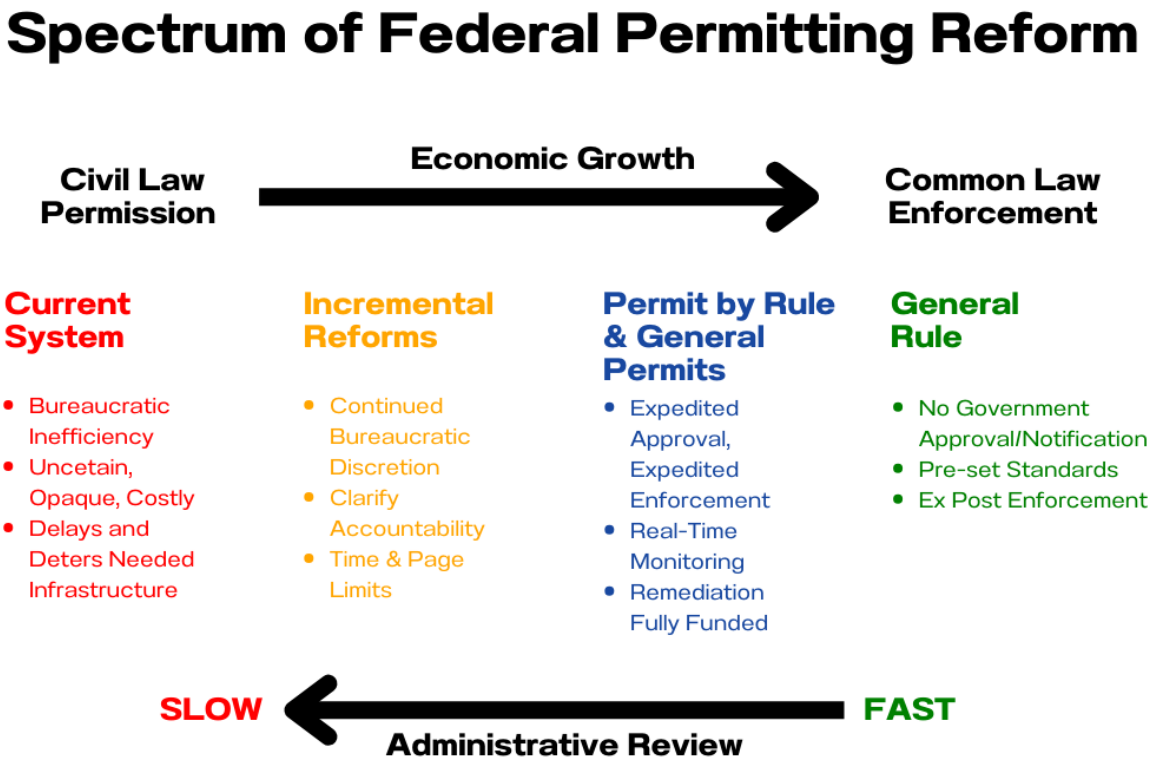
[2] Stephen Hollingshead and Curtis M. Schube, "Federal Permitting is Broken: Reform Should be Guided by Common Law Principles," Council to Modernize Governance, June 2023. https://modernizegovernance.org/wp-content/uploads/2023/07/Federal-Permitting-is-Broken.pdf

standards,[3] and explored principles of regulatory reform and the use of transparency technology and private utilities.[4]

Our guiding principle for regulatory reform is that we must a) reduce the economic and opportunity costs to private actors needing to wait on government bureaucracy, while b) protecting the public benefit of private sector compliance with public standards.

As we have argued, common law enforcement is more effective than civil law permission at achieving regulatory compliance at a lower economic cost. It is economic progress, after all, that ultimately brings relief to the material problems of the human situation. So economic freedom is fundamental to good regulation. We see the spectrum of regulatory approaches to federal permitting, from least to most freedom for private actors to create economic progress, as: the current system, incremental reforms, PBR, and general rules.



[3] Stephen Hollingshead and Curtis M. Schube, "Procedural Improvements Can Advance Substantive Standards: Sunset & Measure, Clarify Accountability, Focus on Real Harms," Council to Modernize Governance, July 2023. https://modernizegovernance.org/procedural-reforms-substantive-benefits.

[4] Stephen Hollingshead and Charles Dobbs, "Exploring New Models of Permitting and Regulation: Using New Technologies to Extend Common Law Principles for Better Administration of Property Rights," Council to Modernize Governance, August 2023. https://modernizegovernance.org/exploring-new-models-of-permitting-and-regulation.

Federal Regulation by Permit. There is a growing bipartisan consensus that the federal permitting process imposes unnecessarily high costs on the private economy for the benefits it achieves in compliance with public standards. Our first paper identified the underlying cause for this as the civil law culture that has replaced the common law culture in the federal bureaucracy and policy community. This civil law culture insists on prior permission over harm correction.[5] Progress away from the current baseline can be measured by lowering the amount of time that the private sector must wait for government decisions, and by improving adherence to public standards.

Incremental Reforms that Help. There have been several attempts to streamline the federal permitting process. The Obama/Biden FAST-41 reforms (particularly those that clarify accountability) and Trump administration efforts to clarify accountability and impose page and time limits on the bureaucracy have all met with some success.[6] But even the most effective of these have only led to small improvements in the time it takes for the private sector to get a decision from the government. While these efforts are laudable, more can be done to get government out of the way of economic activity while improving adherence to environmental and other public standards.

PBR. Permit by rule is a hybrid model, but a decisive return toward a common law enforcement approach. Here, government pre-sets the standards and conditions for a permit. An applicant entity has to certify its compliance by submitting documentation to the government. The government performs a review of the applicant's documentation to verify eligibility, then issues a permit. While it still requires regulated entities to apply for a permit, the government saves costs by clarifying that permits for similarly situated activities will be automatically granted when the government verifies an applicant complies with the pre-set standards. There is still administrative review before the activity can begin, but the process is greatly streamlined. Perhaps the biggest cost savings in terms of government time is frontloading the environmental or safety analyses of similarly situated cases so that similar activities may be permitted quickly. This hybrid approach retains many of the benefits of the current system but reduces its costs dramatically while prioritizing expedited enforcement once the economic activity is underway.

General Rule.[7] A full shift back toward common law governance is the general rule. Here, the government promulgates a specific standard, and anyone is permitted to carry

[5] Hollingshead and Schube, "Federal Permitting is Broken."
[6] Hollingshead and Schube, "Procedural Improvements Can Advance Substantive Standards."

[7] Many jurisdictions have what is called a "general permit" to mean something more similar to PBR. For example, the EPA's "general permit" requirements also provide pre-set defined standards. The applicant would only put the government on notice of its intent to begin a project, but the government would not have to grant the permit affirmatively. The project could commence after a sixty day waiting period after

out the activity so long as the standards are met. The government's ongoing role is to enforce against violations, *ex post*. This reform has the greatest economic benefits. And it serves to focus government resources on the most effective activities—refining and promulgating standards for similarly situated cases, and enforcing against the small minority of bad actors, leaving the majority of good economic actors free to create more economic goods.

For both the common law governance reform approaches, PBR and general rules, government can rely on rules and standards that have gained acceptance in mature industries, and government can exercise leadership in giving its imprimatur to the best standards and practices among them.

Advantages of PBR over a General Rule

While it may seem like a general rule is always better than a PBR, there are cases—like pollution–where *ex ante* permission seems better than *ex post* enforcement (because it is hard to identify which polluters made a violation, the damages are potentially large, and the polluter may not have the financial means to remediate the harm). In such cases, the economic cost of the administrative review of the permit application may be warranted—especially if the PBR program is well designed, including transparency technology and the use of private surety bonds and remediation processes.

By being a more incremental reform than a fully common law governance approach like a general rule, PBR may be more politically acceptable to policymakers. There are other advantages that PBR has over a general rule:

Certifications Perfect the Administrative Record. Because regulated entities must still apply for a permit, government is made aware of their existence and has the opportunity to create an administrative record showing that the regulated entity is aware of the standards it must adhere to. This speeds both the audit and enforcement functions of government, especially when transparency technology is employed.[8]

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the government is put on notice. 40 CFR § 49.156(e). Often, because they are so similar, this form of "general permit" is used synonymously with PBR, despite the nuanced difference that a PBR requires a government action of permission, while the "general permit" is automatically permitted after an allotted amount of time. However, for the purposes of this paper, we are using a different term, "general rule," to demonstrate the most purely common law form, that is, no government permitting process in any form. Only standard setting and *ex post* enforcement.

[8] Hollingshead and Dobbs, "Exploring New Models of Permitting and Regulation" 7.

Use of Private Insurance (Surety Bonds) to Protect the Public. One of the key advantages of PBR is that it allows government to require and audit the use of private surety bonds to protect the public from potential harms caused by regulated activities. Private insurance is better able to measure, and private investors to mitigate, the risks associated with potentially dangerous activities.

Government needs only to set the standard of compliance and outline a process for remediation in the event of a violation. Then, during the application process, it must audit the applicant's adherence to the requirements, including that it is similarly situated as the PBR requires, and that the entity is validly using any required transparency technology and financial instruments to protect the public.

Financial instruments used to protect the public must last as long as the projected risks of harm due to the activity. This may outlast the lifespan of individuals, private companies, and government administrations. While the Miscellaneous Receipts Act[9] limits the ability of federal agencies to receive and manage mitigation payments directly, the use of private trusts to receive bond proceeds and manage remediation is an effective way for regulators to use this tool.[10]

If a PBR regime were to use both a transparency pipeline (an automated real-time monitoring and reporting system) and surety bonds, it would be good for the government, the public, and the regulated entity.

For the government, the public is protected (among other things by the fact that investors are unlikely to risk a loss of principal without reasonable assurance that they can meet the standard), harms are identified in real time by transparency technology, and remediation of any violations is already funded by the surety bond.

For the regulated entity, downside risk is measured and mitigated (the permit provides safe harbor, a clear remediation process, and the surety bond that limits their costs). By mitigating regulatory and compliance uncertainty, PBR can lower underwriting and other investment costs. So more projects will be built (lowering the cost of services for consumers).

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[9] 31 U.S.C. § 3302(b).

[10] Martin Doyle *et. al.*, "Compensatory Mitigation on Federal Lands." Duke University-Nicholas Institute for Environmental Policy Solutions, 2020, 21. https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/26647/Compensatory-Mitigation-on-Federal-Lands_0.pdf

PBR is Already Here

As one of us has already documented in CMG's primer on PBR, the EPA and at least 38 states already use PBR in some form.[11] There is ample government experience to prove that PBR has and can be effective at streamlining the permitting process. Even states that may not identify their permitting or licensing method as PBR do in fact fall into that category. The PBR approach should be implemented more widely.

This step back toward the common law general rule should not surprise us, given our common law roots. Moreover, scholars have for centuries identified promulgation (making the law widely known) as a fundamental element of the rule of law—the essential operation of government.[12] For law to have moral force, it must be made known before it becomes binding. Governance, at its best, sets *clear standards* for compliance. In one sense, overly complicated or opaque rules will always fail the promulgation test. So we might use "clarity" in place of the scholastics' use of "promulgated." PBR and general rules both have the key benefit of focusing government resources on this essential activity—disseminating clear standards for compliance.

Examples of PBR Use Cases

We offer three environmental use cases to illustrate reform by PBR—one past, one ongoing, and one future. From groundwater management to bird safety regulation to nuclear battery manufacturing, PBR can provide needed efficiency and certainty to promote investment in healthy economic activity.

Southwestern States Managing Public Resources. Permissions to use groundwater in the Southwestern states span a spectrum from common law to statutory. The most specified by statute is Oregon, followed by Nevada, while the two most common law are California and Texas, with discretionary permitting regimes.[13]

[11] Curtis M. Schube, "Policy Primer: Permit by Rule," Council to Modernize Governance, May 2023. https://modernizegovernance.org/wp-content/uploads/2023/05/MG-PBR-Primer-13.pdf.

[12] "Law is an ordination of reason for the common good by one who has care for the community, and promulgated." Thomas Aquinas ST I-II, Q 90, A 4, as translated by Regan, Richard J. *Treatise on Law*. Hackett Publishing, 2000.

[13] Rebecca Nelson and Debra Perrone, "The Role of Permitting Regimes in Western United States Groundwater Management. Groundwater," National Groundwater Association, Oct. 12, 2016, 761-764. https://doi.org/10.1111/gwat.12467; "Groundwater in the West," Stanford-Water in the West, accessed Sept. 7, 2023. https://groundwater.stanford.edu/dashboard/compare.html.

Unsurprisingly, with their large populations, Californians and Texans use the largest volumes of groundwater in the region.[14]

Land subsidence can occur when groundwater is pumped out of certain areas.[15] Besides the threat to buildings and habitats above, the subsiding land can reduce the available storage space for groundwater below. A machine learning approach to mapping the extent of this problem shows that it appears mainly to coincide with agriculture, which may only increase with the demand for food production.[16]

The states of California and Texas need not betray their common law, decentralized traditions in order to respond to this new challenge of resource allocation and environmental stewardship. A prudent approach to conserve the storage capacity for groundwater would create a standard system of fees, in effect permitting by rule the withdrawal of water, rationing its use, and helping fund timely recharging of groundwater. All while taking into consideration the local values of its competing uses.[17]

The need for state-level adjudication and direction could be perceived when one region's depleted groundwater requires supplementation from another area's abundance.[18] On the other hand, local interests could work out agreements to sell an excess of groundwater in the north with a deficit in the south, building on the information generated by the preferences revealed by usage fees and insurance products designed to manage risks of businesses relying on water.

New Mexico's permitting process requires more than meets the eye on an initial impression of the regulatory regime. A groundwater restoration (Managed Aquifer Recharge) project case study in Albuquerque, where all falls under the purview of the New Mexico Office of the State Engineer, reports:

> Not including a few years during which the project was stalled, the total time from pursuing the demonstration project and receiving the final full-scale permit took approximately 6 years of cumulative work. This long time frame indicates that although

[14] "Which areas in the United States are most dependent on Groundwater," American Geosciences Institute, accessed Sept. 7, 2023. https://www.americangeosciences.org/critical-issues/faq/which-areas-united-states-are-most-dependent-groundwater.
[15] "Land Subsidence," United States Geological Survey, June 5, 2018. https://www.usgs.gov/special-topics/water-science-school/science/land-subsidence.
[16] Ryan G. Smith and Sayantan Majumdar, "Groundwater storage loss associated with land subsidence in Western United States mapped using machine learning," *Water Resources Research*, Advancing Earth and Space Science, June 5, 2020, 7. https://agupubs.onlinelibrary.wiley.com/doi/epdf/10.1029/2019WR026621.
[17] Dave Owen, "Law, land use, and groundwater recharge," *Stanford Law Review,* 73 (2021): 1163.
[18] Sarfaraz Alam *et. al.*, "Can managed aquifer recharge mitigate the groundwater overdraft in California's central valley?," *Water Resources Research* 56, no. 8 (2020): e2020WR027244.

> legal affirmation of the right to recharge and a clearly defined process of how to do so are important for enabling MAR, a burdensome and lengthy permitting process can slow the development of MAR projects in spite of apparent legal clarity….[19]

Next door from New Mexico, in Texas, groundwater recharge measures have been operating since the 1970s in San Antonio, through negotiations with private property owners, and taking into consideration different possible approaches.[20] This is in keeping with the philosophy of "permit by rule," although it is not explicitly labeled as such. Clear rules empower local creativity, discovery, and decision-making so necessary to protect the basic conditions for life.

Bringing Clarity to Federal Bird Law. Inconsistent and ambiguous application of the Migratory Bird Treaty Act (MBTA) of 1918 is undermining the rule of law, and chilling positive economic activity, including investments in wind and solar energy. PBR can be used to clarify applicant and agency responsibilities and avoid the societal cost of unnecessary litigation.[21]

The MBTA was written to protect bird populations suffering from depletion due to over-hunting. The Fish and Wildlife Service (FWS) at the Department of the Interior (DOI) has used the MBTA to regulate non-hunting activities that inadvertently lead to the deaths of birds (like wind and solar energy production). Ambiguity in the statute has led to opposing interpretations in judicial circuits that have yet to be resolved by the Supreme Court or Congress. The Trump administration published the Jorjani Memorandum to rescind FWS's use of MBTA authority to regulate the unintentional

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[19] Kathleen Miller, Madison Burson, and Michael Kiparsky. "An Urban Drought Reserve Enabled by State Groundwater Recharge Legislation: The Bear Canyon Recharge Project, Albuquerque, New Mexico." *Case Studies in the Environment* 5, no. 1 (2021): 1231702.

[20] Mark Hamilton and Jim Boenig, "Re-Conceptualizing the Edwards Aquifer Authority Recharge Program: Staff Recommendations to Optimize and protect the Edwards Aquifer," edwardsaquifer.org, 2017. https://www.edwardsaquifer.org/science_docs/re-conceptualizing-the-edwards-aquifer-authority-recharge-program-staff-recommendations-to-optimize-and-protect-the-edwards-aquifer/. Accessed 25 Aug. 2023.

[21] Costly litigation is not the way to rewrite environmental legislation. Private litigants frequently make Administrative Procedure Act (APA) challenges to agency decisions. See, for example, *Public Employees for Environmental Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Circuit, 2016). They also use diversity in agency approaches to justify judicial review of agency decisions. See *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 36–37, (D.C. Circuit, 2015). In order to avoid unnecessary judicial review that slows economic activity (which seems to be the purpose of much of this litigation) policymakers need to promulgate clear, consistent standards. The PBR and general rule models have the long-term advantage of minimizing risk of litigation (once, presumably, the new permit rule has been litigated).

killing of birds.[22] This led to a backlash from conservationists concerned about the preservation of bird populations.[23]

Whatever side you take in this dispute,[24] the ambiguous and inconsistent approach federal agencies have taken to impose liability on energy producers has reduced investments in energy production of all types, but particularly for wind and solar power.

Congress has allowed this situation to continue, possibly because it is politically volatile to try to balance the interests of conservationists with renewable energy producers.

However, the Biden administration's FWS is already championing moves toward a PBR/general permit approach in order to try to provide investors in solar and wind energy assurance that they will not be prosecuted for killing birds.[25] This approach has the essential advantage of reducing uncertainty for potential investors in renewable energy production. It will be interesting to see how this rule change is litigated and whether it is ultimately expanded to other types of energy development.

Regulatory Needs for the Future of High Tech Manufacturing. Looking farther ahead to the need for regulatory flexibility in clean energy production, the regulatory regime for nuclear power reactors is wholly inadequate to encompass emerging technologies in fission batteries. The goal of current research is to create safe, decentralized, economical, zero-emission small nuclear power plants—fission batteries.

The current regulatory structure, designed for large, much more dangerous, early fission reactors, cannot be made to work for a technology that would require potentially thousands or hundreds of thousands of site permits to be viable.

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[22] Department of Interior, Memorandum from Daniel H. Jorjani, Principal Deputy Solicitor General, U.S. Department of the Interior, to the Secretary, et al., December 22, 2017. https://www.doi.gov/sites/doi.gov/files/uploads/m-37050.pdf

[23] Michael C. Ledet, "A Farfetch'd Extension of Bird Law: Limiting Migratory Bird Treaty Act Challenges to Federal Land Use Permits," LSU Journal of Energy Law and Resources, 2 (2023): 6. https://digitalcommons.law.lsu.edu/jelr/vol11/iss2/6. Mr. Ledet's analysis is thorough and interesting, and he argues for the advantages of explicit permits and PBR. However, he is ultimately wrong to argue that a the correct construction of the statute is the one that protects birds best—he argues essentially that the statutory construction must include incidental takes because otherwise birds would be hurt (and the law was written to protect birds). This is the *argumentum ad consequentiam* fallacy. Just because our policy preferences include the desire to protect birds does not mean Congress has yet made a law against windmills killing birds. Congress still has a job to do.

[24] We are with Jorjani—Congress still has a job to do. For a fair construction of the statute, see especially, *Seattle Audubon Society v. Evans*, 952 F.2d 297 (9th Cir. 1991). However, in the absence of Congressional action to clarify the statute, the Biden administration's efforts to use a PBR approach to clarify a path for industry compliance will reduce the chilling effect on clean energy investment.

[25] Ledet, "A Farfetch'd Extension" 453.

A remarkable study by nuclear engineers at North Carolina State University documents this reality and, we are heartened to see, recommends a PBR approach to closing the gap. The authors articulate the need for a regulatory approach that takes this emerging, much safer technology into account, and offer PBR as an alternative regulatory structure, since it is widely used already for on-site power generation and other safety-guaranteed facilities.

> The long duration, on the order of multiple years, for site evaluation in the current licensing process would interfere with the multi-site deployment and expedient site transfer required by user needs.
>
> As a result, we conclude that the current site regulations and licensing process do not apply to the characteristics of fission batteries in terms of site restrictions and excessive time burdens for on-site evaluations….
>
> Therefore, considering the enhanced safety features of fission batteries, permit-by-rule would be a fast and reliable regulatory approach for achieving multi-site deployment and expedient site transfer by reducing the time for siting to a few days or weeks instead of several years within the current regulation.[26]

This example underscores the fact that advances in clean energy production are being discouraged by a sedimented regulatory apparatus that has not been nimble enough to recognize the significance of emerging technologies. The PBR and general rule approaches can ameliorate this problem by focusing government resources more efficiently on upfront safety analyses and after-the-fact remediation in cases of accident or non-compliance.

Conclusion

PBR is Economically Advantageous. By making a decisive return toward our common law heritage, PBR streamlines public administration and lowers the amount of time economic actors must wait for permission from government. It also gives those actors more certainty about the costs of compliance with public standards, which lowers financing costs.

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[26] DaeHo Lee and Mihai A. Diaconeasa, "Preliminary Siting, Operations, and Transportation Considerations for Licensing Fission Batteries in the United States" *Eng* 3, no. 3: (2022) 379-380. https://doi.org/10.3390/eng3030027

PBR is the Best Regulatory Reform Option for Many Environmental Cases. When a regulated activity has potentially large harms where the perpetrator may be difficult to identify or may not have the financial wherewithal to redress the harm, PBR coupled with the use of transparency technology and surety bonds can protect the public and ensure compliance with health and safety standards better than the current system.

PBR Moves Taxpayer Resources from Endless Analysis to Expedited Enforcement. By prioritizing agency resources on the enforcement of the substantive standards, the government can increase the public's confidence that their tax dollars are being used to protect their health and safety rather than deny needed economic activity.

PBR is a Tested Approach, Used by at Least 38 States and the EPA. Some form of PBR is in operation in most states. There is ample experience to show that the method can work. Also, because it is a step closer to the current system, it may be politically more feasible than, say, a general permit approach. PBR conserves government resources and focuses them on *ex ante* analysis and *ex post* evaluation and enforcement.

Therefore, we conclude that PBR should be at the forefront of efforts to reform the Federal permitting process.