

Alaska Oil and Gas Association



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Public Comments Processing
Attn: FWS-HQ-NWRS-2012-0086
Division of Policy and Directives Management
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
MS 2042-PDM
Arlington, VA 22203

RE: Comments on Proposed Revision to Regulations Governing Non-Federal Oil and Gas Development within the National Wildlife Refuge System

To Whom it May Concern:

Thank you for the opportunity to comment on the U.S. Fish and Wildlife Service's (USFWS) proposed revision to regulations governing non-Federal oil and gas operations within the National Wildlife Refuge System. The Alaska Oil and Gas Association (AOGA) is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry in Alaska for the benefit of all Alaskans. The members of the AOGA account for the majority of oil and gas exploration, development, production, transportation, and refining activities onshore and offshore in Alaska. AOGA's comments primarily relate to the Kenai National Wildlife Refuge (KNWR).

As an initial matter, it is important to recognize that regulatory schemes currently exist that provide environmental safeguards relating to non-Federal Oil and gas activity occurring in refuge areas. For the past two decades, proposed projects related to the KNWR were governed by Environmental Assessments and Environmental Impact Statements. Furthermore, the Alaska Oil and Gas Conservation Commission (AOGCC) also dictates a rigorous and thorough permitting process for drilling, testing, operations and production. The AOGCC regulates those activities regardless of surface or subsurface ownership, and regardless of whether the Bureau of Land Management (BLM) is involved. These established practices serve to ensure the integrity of the refuge in association with all non-

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Federal oil and gas related projects. Stated succinctly, the USFWS proposed revisions constitute unnecessary and redundant rule-making that will fail to result in any added environmental protection, while increasing the burden and uncertainty of oil and gas operations in Alaska. Previously, AOGA cautioned the USFWS to consider the unique issues related to the deliberate legislative balance of development within federal conservation units in Alaska National Interest Lands Conservation Act (ANILCA). In doing so, AOGA highlighted that the Alaska Native Claims Settlement Act (ANCSA) regional corporations are the primary class of resource owners with federal wildlife refuges in Alaska, and carefully negotiated guidelines already exist between the ANCSA regionals and the federal government. AOGA appreciates that the proposed revisions appear to take into account certain provision of ANILCA by ensuring that the process for authorizing access to non-Federal oil and gas properties in Alaska will continue to be controlled by 43 CFR part 36.

Several of the proposed requirements the USFWS is contemplating have, in other contexts, been implemented by the National Park Service (NPS), the Forest Service (FS), and the BLM. Given that natural and inherent differences associated with oil and gas production in this particular area, it would not be prudent for agencies that lack the requisite experience in this field and this area to author revisions to regulations, particularly without considering the myriad levels of regulations that already exist. Previously, AOGA encouraged the USFWS to seek oil and gas specific industry review and consultation in order to determine what, if any, regulations may be necessary, and the manner in which those regulations are implemented. It is not clear to AOGA that USFWS sought out such counsel, and the proposed revisions illustrate a failure to appreciate local expertise and practices.

In an effort to address the proposed regulation revisions in an efficient manner, AOGA's discussion will take each of the number issues in turn:

I. Service Authority and Neutrality

The USFWS contends that applicable statutes provide "the authority to regulate the exercise of non-Federal oil and gas rights located within refuge units." AOGA believes this purported authority is theoretical and has yet to be sanctioned by the courts. Even if one were to assume the legal authority does exist, there is another significant issue: the USFWS lacks fundamental alignment with operators and mineral owners regarding operations on or within refuge lands. Whereas the mission of the agency is to "conserve, protect and enhance" wildlife habitats, and the stated goal of the proposed regulation, inter alia, is to benefit of the surface estate and the resources for which it is entrusted. Such objectives cannot be obtained without compromising the dominant rights of the state and private mineral owners.

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As such, AOGA is understandably concerned that when conflicts invariably arise, the USFWS will defer to its own interests as opposed to those of the State and mineral owners. It is difficult to envision the manner in which these conflicting interests will ever be reconciled to the benefit of the latter. AOGA strongly believes that the mineral owner's rights to develop must be sufficiently protected and any proposed regulation revisions must account for the potential for implementation of conservation-based regulations to both frustrate and undermine development. Thus, the USFWS must account for what is practicable for a mineral rights' owner and give that concept proper weight in the regulatory scheme.

Finally, the USFWS purports that its “goal, reflected in [the] proposed rule, is to compliment State regulatory programs to the benefit of the surface estate and the resources for which we are entrusted, while not compromising the ability of operators to develop their resource.” Again, AOGA is skeptical that, given a lack of aligned interests, the USFWS will adhere to this stated goal. AOGA is understandably concerned that when conflicts invariably arise, the USFWS will defer to its interests as opposed to those of the State and mineral owners. It is difficult to envision the manner in which these conflicting interests will ever be reconciled to the benefit of the latter. AOGA strongly believes that the mineral owner's rights to develop must be sufficiently protected and any proposed regulation revisions must account for the potential for implementation to frustrate and undermine development. Thus, the USFWS must account for what is practicable for a mineral rights' owner and give that concept proper weight in the regulatory scheme.

II. Duplicative and Overreaching

As stated above, the USFWS claims that it endeavors to “compliment State regulatory programs” and “not compromise[] the ability of operators to develop their resource.” As AOGA highlighted in its previous comments, State regulations relating to oil and gas operations are robust and varied. Those regulations govern oil and gas exploration and development, well safety and integrity, air emissions, oil storage, emergency response, solid wastes, storm water runoff, water use, and water discharge. The breadth of local regulations are more than sufficient to ensure environmental protection, and the sufficiency effectively renders the USFWS regulations as unequivocally redundant. The USFWS appears to acknowledge the duplicative nature of the proposed regulations by stating that the Service would “assimilate non-conflicting State oil and gas rules so that our Law Enforcement officers can ensure compliance with those requirements.” However, AOGA is wary that the USFWS interpretation of relevant local regulations may differ from traditional practices and result in greater confusion and uncertainty for mineral rights' owners and oil and gas operators. AOGA would like to see USFWS articulate with greater clarity the exact manner in which it will “assimilate” local regulations, and how it will reconcile conflicting interpretations.

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AOGA advocates for allowing those local regulatory agencies to operate without interference from the USFWS. By way of example, AOGA suggests that the USFWS defer to the AOGCC to regulate and monitor well-plugging and abandonment procedures and permitting.¹ In that vein, proposed section 29.120(d) should account for the fact that the Alaska Division of Natural Resources issues Temporary Water Use Authorizations for surface water and groundwater that supplements general water rights.

AOGA also has concerns that the USFWS' proposed regulations relating to the requisite level of detail for operating permit applications, particularly those attempting to modify existing operations, will result in an unwarranted temporal and financial burden on operators. Of particular concern are those requirements mandating that an operator submit copies of all plans and permits required by local, State, and Federal agencies prior to USFWS operation authorization. AOGA believes that once a separate governing entity provides authorization that should be sufficient approval for an operator to begin the activities covered by that authorization. The added layers of bureaucracy proposed by the USFWS will only result in inefficiencies and not result in any greater environmental protections. As such, AOGA would advise against this process.

III. Infrastructure Removal and Reclamation

In section 29.32, the USFWS mandates that "all structures and equipment are removed when no longer necessary and the area restored to pre-operation conditions." AOGA would encourage the USFWS to consider that an operator is often best-suited to determine when equipment is no longer necessary. The USFWS appears to fail to account for the opportunity for on-site staging for reuse, which is a common practice that is essential to conduct cost-efficient oil and gas operations. AOGA asks that the USFWS consider that multi-year staging of equipment, structures, etc. should not be prohibited by the proposed regulations. Furthermore, AOGA cautions the USFWS that requirements to return to pre-operation conditions fails to account for the potential of introducing opportunities for habitat diversity, which might be of greater benefit to the local ecosystem. Additionally, AOGA encourages the USFWS to consider omitting section 29.117(b), as mandating prescriptive timelines regarding reclamation fails to account for the consultation that should occur with an operator on a case-by-case basis to ensure that infrastructure is actually of no further use. Finally, as alluded to above, AOGA believes that the USFWS

¹ See § § 29.180-29.181.

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should recognize that it is not in the best position to make determinations regarding what equipment is or is not necessary.²

IV. Access

Proposed section 29.42(b) would require “operators with a new oil and gas operation to obtain a temporary access permit to conduct reconnaissance surveys and/or an operations permit to conduct drilling or production within a refuge.” AOGA respectfully asks that the USFWS clarify that access afforded to the general public will not be denied to the mineral owner or oil and gas operator, even if that access is for reconnaissance surveys. AOGA believes this is an intuitive and reasonable proposition, particularly given the fact that the general public can traverse refuge lands – whether on foot, horse, snow machine, or other allowed transport.³

V. Operating Standards

As an initial matter, the USFWS endeavors to “set performance-based operating standards to allow operators the flexibility to design their proposed operation using the latest technological innovations with an overall objective of using technologically feasible, least-damaging methods that will best protect refuge.” AOGA is naturally concerned because the proposed regulations are silent as to what the performance based standards will actually be. As a result, AOGA requests that the USFWS provide greater clarity and detail regarding what it considers appropriate performance based standards. Additionally, AOGA suggests that the USFWS consider that solely focusing on a “least damaging” objective fails to offer any consideration for practicability of the proposed project from the mineral rights’ owner’s perspective. Furthermore, from a general perspective, AOGA reiterates that multiple local, state and federal agencies have existing regulations that address environmental protections relating to waste, spills, and air emission. These proposed regulations in those arenas offer greater burdens and costs that will result in no greater environmental protections.

Proposed § 29.111(a) provides that the USFWS “would ensure that either existing or newly created surface disturbance is kept to the minimum necessary for the safe conduct of operations.” AOGA submits that operators and existing regulators are better suited to make determinations regarding the breadth of surface disturbance necessary for safe operations.

² § § 29.119(b).

³ § § 29.70-29-73.

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Proposed § 29.111(b) would require "installation and maintenance of secondary containment for all equipment and facilities using or containing contaminating substances such as oil, brine, formation water, or well stimulation chemicals." AOGA recommends omitting this provision from the proposed regulations. The USFWS should defer to existing Federal (EPA's SPCC regulations) and state regulations (Title 18 Alaska Administrative Code Chapter 75) governing spill prevention for oil and other potential pollutants. Existing regulations are sufficiently protective. They also allow for needed flexibility in evaluating and determining the most appropriate equipment-specific spill prevention and containment methods. As written, this regulation mandates a one-size-fits-all spill prevention method (i.e., secondary containment) that is not universally appropriate. Leak detection devices, overfill alarms, and cathodic protection systems are at times more appropriate spill prevention mechanisms. This proposed regulation does not even take into consideration the volume of the potential pollutant or whether it is stored indoors or outside.

Proposed § 29.113(a) would require that operators "maintain a safe distance (i.e., 500 feet) from all waters to reduce the risk of contaminating those waters with oil and gas-related fluids." The USFWS allows for that distance to "increase or decrease depending on the situation." This requirement is simply not appropriate for Alaska Refuges, because over one third of Alaska's acreage is wetlands. Given that the USFWS appears to have envisioned modifications to this provision, AOGA would ask for an absolute exemption from this requirement for Alaska operations.

Proposed § 29.114(a) would require that operators "maintain their area of operations in a manner that avoids or minimizes the cause or spread of fire." AOGA asks that the USFWS allow for risk versus cost evaluations when determining the appropriate level of vegetation clearing aimed at fire prevention and protection.

Proposed § 29.115(a) would require that operators "reduce effects to night skies by minimizing light emissions from their operations." This requirement includes "using the minimum lighting necessary for site safety, and directing lights downward to minimize the effect on night skies." AOGA asks that the USFWS recognize that at times lighting that points downward is not adequately protective of workers, depending on the task and on the type of environment in which the facility is sited. Therefore, UFSWS should encourage downward lighting where it provides adequately protective illumination, but not mandate it.

VI. Proposed Operation Application Requirements

From a general perspective, AOGA believes that the proposed level of detail associated with the application process is overly cumbersome. By way of example, as it relates to reclamation, the USFWS proposes that an applicant provide "an itemized list of the

estimated costs that a third party would charge to complete reclamation” and a “description of the specific equipment, materials, methods, and schedule that will be used to meet the operating standard for reclamation.”⁴ AOGA suggests that it is imprudent to require this level of detail at a project’s inception, because reclamation approaches and technologies simply are not static. The USFWS should encourage operators to embrace new techniques and innovative approaches, which will surely be stifled by creating a regulatory scheme that stifles ingenuity and novel ideas. In that vein, the entire approach to the application process should be more malleable and adaptive. There is no reason for the USFWS to require detailed maps to scale when renderings are more than sufficient. When engineered drawings are not necessary to communicate road and pad construction expectations to contractors, the USFWS should not mandate a higher and unnecessary level of detail in the application process.

Finally, AOGA advocates for the USFWS to remove requirements related to Material Safety Data Sheets (MSDS) submissions. Nor does AOGA believe that routine maintenance or well-workover activities should be required as part of the permit authorization process.

VII. Plan of Operations Review Process and Paperwork Reduction

As stated previously, AOGA’s primary concerns are the significant delays and increased costs that will invariable result from the proposed regulations. Although many of the delays that will result from the proposed regulations are difficult to quantify, the USFWS can begin to address these temporal concerns by modifying the overt aspects of the regulations. To begin, AOGA urges the USFWS to omit from Section 29.100 the ability to extend the initial 30-day application review period. Doing so would both decrease delay and provide greater certainty to applicants. Similarly, the USFWS should limit the initial review of any proposed modifications to 15 days. Ultimately, it is the proposed 180-day formal review articulated in Section 29.104 that is the most problematic. A six-month period of review is simply unreasonable, particularly in Alaska where logistical and meteorological realities severely limit the length of construction seasons. Instead, AOGA would recommend that the USFWS limit the timeline for the formal review process to 30 days. Finally, although AOGA appreciates that the USFWS is soliciting information related to the reporting burdens associated with the proposed regulations, AOGA believes that the USFWS is dramatically underestimating the extent of those reporting burdens. More to the point, those burdens are difficult to justify provided that they are unlikely to result in any greater environmental protection than exists under the local, state, and federal regulations that already exist.

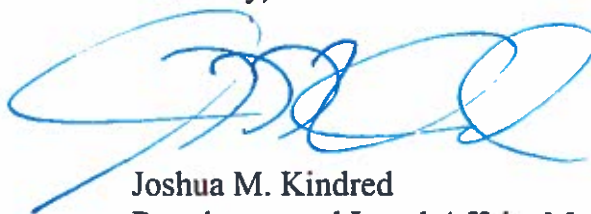
⁴ § § 29.94.

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VIII. Conclusion

Thank you again for the opportunity to comment and engage in further discourse as the USFWS considers potential revisions to its regulations. AOGA's members have a long history of partnership with state and federal agencies to help ensure that oil and gas operations do not adversely impact the environment in which we live and work, and we look forward to continuing this productive relationship into the future.

Sincerely,

A handwritten signature in blue ink, appearing to read 'J. Kindred', with a large, stylized flourish extending from the end of the signature.

Joshua M. Kindred
Regulatory and Legal Affairs Manager