



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington, D.C. 20240



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To: Assistant Secretary for Fish and Wildlife and Parks

From: Acting Director *James W. Kunz*

Subject: Response to the deliverable Section 5.c. (iv) of Secretary's Order 3349 – "American Energy Independence"

I. Introduction

In 1960, the U.S. Fish and Wildlife Service (Service) first promulgated regulations to govern the exercise of non-Federal mineral rights on lands and waters in the National Wildlife Refuge System (NWRS). These regulations lacked a specific consistent process for providing operators access and use of refuge surface to conduct operations while also minimizing impacts to refuge resources and uses. Reports from the Government Accountability Office (2003 and 2007) and the Office of Inspector General (2015) identified these deficiencies in the Service management of non-Federal oil and gas operations and recommended promulgating regulations to clarify and improve the process. In 2013, the Service began a rulemaking effort to resolve these deficiencies that culminated in the finalization of the oil and gas rule (Rule) entitled, "Management of Non-Federal Oil and Gas Rights," 81 Fed. Reg. 79948 (Nov. 14, 2016).

II. Background

The March 28, 2017, Presidential Executive Order (EO) entitled "Promoting Energy Independence and Economic Growth" instructed the Secretary of Interior to review the Service's Rule to ensure it is consistent with the policy set forth in section 1 of the EO.

On March 29, 2017, the Secretary signed Secretary's Order (SO) 3349, "American Energy Independence," which required the Service to conduct a policy review, within 21 days of the SO, of the Rule and report on whether the Rule is fully consistent with that policy.

III. Discussion

The Service has reviewed the Rule and concludes that its intent is consistent with the policy set forth in Section 1 of the March 28, 2017 EO because it aimed to provide clarity to producers and ensure access to NWRS land was consistent across the system. Before this Rule was put in place a single producer working on two different NWRS Units was often required to coordinate access through very different processes and meet varying standards resulting in unnecessary delays for operators. During the National Environmental Policy Act (NEPA) environmental impact statement analysis an alternative was selected with the goal to balance reasonable environmental protection while not unduly burdening oil and gas producers. This approach was selected over the even more restrictive alternative. Nevertheless, there are beneficial enhancements that can be made without further regulatory delays to operators, and to make it consistent with the EO, allowing operators to fully exercise their rights. These options include:

1. Further streamline permitting by developing new CatEx categories to cover activities and reduce permitting time from 180 days to 60 days.
2. Evaluate cost recovery fees in the rule.
3. Emphasize use of initial in-kind reclamation and examine the amount of financial assurances needed for reclamation.
4. Ensure rules are not duplicative of existing local, state, or other federal regulations.
5. Monitor implementation to evaluate the positive or negative impacts to permit applicants

In order to facilitate the review, the EO policy is shown verbatim, with Service answers noted below in bulleted and italicized text:

(a) It is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation. Moreover, the prudent development of these natural resources is essential to ensuring the Nation's geopolitical security.

- *The intent of the Service Rule is consistent with E.O. policy. Access is provided to operators to exercise non-Federal oil and gas rights on National Wildlife Refuges, and their associated activities, are performed in a clean and safe manner with due regard for refuge resources and uses.*
- *The Final Environmental Impact Statement (FEIS), and Cost Benefit Analysis and Regulatory Flexibility Threshold Analyses (CBA/RFA) found the Rule avoids regulatory burdens and should have no discernable effects on rates of exploration and development, rates of production, or rates of employment.*
- *The Service does not have the authority to prohibit oil and gas development on NWRS lands, but the Rule introduces a permit process for new operations centered on flexible, site-specific performance-based standards that improves oil and gas management efficiency and consistency on federally owned lands and resources of the NWRS.*
- *In drafting the Rule, the Service sought direction to achieve goals that would avoid or minimize impacts to wildlife in balance with the costs to the regulated community.*
- *The Rule was designed to avoid regulating activities such as down hole drilling standards or hydraulic fracturing more appropriately addressed by other entities. The focus in developing the Rule was protecting the Service's interest as the surface land manager as compared to a private "surface use agreement" between a landowner and an operator.*
- *The Service did not select a particular alternative from the FEIS specifically because costs (to operators) outweighed the benefits. Gains in refuge resource and visitor use protections were not high enough to justify the costs (Alternative C in FEIS, Modified Rule in CBA/RFA) associated with:*

- *A new permit requirement for operators already conducting production activities on NWRS lands;*
- *Any regulation of operators that use directional drilling from private property to reach targets beneath Service-administered areas; and*
- *Any regulation on inholdings (private surface estate within boundaries of a refuge).*

(b) It is further in the national interest to ensure that the Nation's electricity is affordable, reliable, safe, secure, and clean, and that it can be produced from coal, natural gas, nuclear material, flowing water, and other domestic sources, including renewable sources.

- *As described in the CBA/RFA analyses, one of the most important factor in determining whether an operator will drill wells is the risk assessment that exploration and drilling will lead to successful and economical oil and gas production, and if so, at what level. The regulatory cost of complying with this rule should not be the determining factor on whether an operator decides to explore for or develop their oil and gas resources.*
- *As described in the CBA/RFA analyses, implementation of the Rule will not have a discernable effect on the pace of new exploration and development within units of the NWRS or noticeably affect the amount of oil and gas production from covered wells. Therefore, the reliability and affordability of the Nation's electricity produced from natural gas should not be affected by this rule.*
- *Operators should experience benefits that serve to offset expenditures. Operators proposing new operations should benefit from the efficiencies of a uniform, consistent process, clearly defined operating standards, and flexibility in the means to achieve them, and greater predictability in the length of time needed to secure approval compared to the current condition.*
- *The Rule's permit process involves early coordination between the Service and the regulated community. This benefits operators because the Service can provide operators with information that will be useful in planning oil and gas activities and operations on a refuge. Due to the undeveloped conditions of many National Wildlife Refuges, the surface of the land that an operator needs to access can be covered with forest and other thick vegetation with moist or saturated soil conditions that make operations difficult and costly. Refuge staff are very knowledgeable about conditions on the refuge. Therefore, by engaging with the Service early, the Service can provide operators with invaluable information that will streamline oil and gas operations saving time and costs. For example, utilizing existing roads on a refuge and site planning results in easier and cheaper access for an operator.*
- *Early and frequent coordination also minimizes conflicts between operators and wildlife-dependent recreational users of the refuge, such as hunters, hikers, and birders. Not only can the Service inform operators about timing and areas of the refuge where these other uses occur, but it also establishes safeguards to ensure that refuge visitors do not interfere with an operation (50 CFR 29.114).*

(c) Accordingly, it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law.

- *The Rule promotes cooperation between Refuge Managers and operators in developing preventative measures to avoid or minimize impacts from oil and gas activities. This practice is consistent with state law regarding mineral rights holders that are allowed to use only what is reasonably necessary of the surface estate to explore and develop their minerals, and that operators accommodate surface uses to the maximum extent practicable.*
- *One of the main issues for operators is a lack of clarity of action necessary to comply with the law. Before this rule, operators did not have a clear or consistent process for receiving permission to operate on a National Wildlife Refuge. The Rule should provide consistent guidance for the regulated community in operating on any refuge across the country (except Alaska where the Rule does not apply), as well as timelines for Service review and approval of permits, which minimizes unnecessary delays for operators (50 CFR 29.91).*
- *The Rule's regulatory process facilitates coordination between Federal and State agencies to assist an operator in complying with other applicable Federal and State laws. For example, if there are listed species in the area of operation, the Service coordinates consultation required under Section 7 of the Endangered Species Act with Ecological Services. This saves operators time and money in lieu of them meeting their Endangered Species Act requirements on their own. The same can be said for ensuring consultation requirements are met for compliance with the National Historic Preservation Act's protection of cultural resources by coordinating with the State's Historic Preservation Office. Recently in reviewing a permit for a new well at Delta NWR, Refuges consulted with Ecological Services and the State Historic Preservation Office over the proposed operations, taking the burden off the operator to do so independently, greatly speeding up the time to for the operator to drill their well.*

(d) It further is the policy of the United States that, to the extent permitted by law, all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.

- *The Rule seeks to minimize impacts on refuge air or water quality by addressing fugitive dust, using good air pollution control practices, maintaining hydrologic movement and functions, and implementing erosion control measures. Where existing State or Federal standards meet the Service's surface use goals, the Service defers to those agencies (See 50 CFR 29.111(d-f) and 29.113 of the Rule). For example, there are existing Federal and State standards for air and water quality. An operator can meet the Rule's reporting requirements that include hydraulic fracturing simply by following State-required or voluntary use of FracFocus. (See 50 CFR*

29.121(f)).

(e) It is also the policy of the United States that necessary and appropriate environmental regulations comply with the law, are of greater benefit than cost, when permissible, achieve environmental improvements for the American people, and are developed through transparent processes that employ the best available peer-reviewed science and economics.

- *The necessity and appropriateness of the Rule was informed by reports from the U.S. Government Accountability Office (GAO) (GAO, Report No. GAO-03-517, National Wildlife Refuges: Opportunities to Improve the Management and Oversight of Oil and Gas Activities on Federal Lands, (2003); GAO, Report No. GAO-07-829R, Opportunities Remain to Improve Oversight and Management of Oil and Gas Activities on National Wildlife Refuges, (2007)) and the Office of Inspector General (Office of Inspector General, Report No. CR-EV-FWS-002-2014: Oil and Gas Development on U.S. Fish and Wildlife Service Refuges). The reports identified deficiencies in the Service's management of non-Federal oil and gas operations. A common theme was the notable lack of clear and consistent management guidance to protect refuge resources and uses. Each report identified unnecessary impacts resulting from under-managed oil and gas activities. The Rule is a necessary exercise of the Service's authority to ensure that we are meeting our responsibilities under the National Wildlife Refuge System Administration Act (NWRSA), as amended by the National Wildlife Refuge System Improvement Act (NWRZIA) (16 U.S.C. 668dd et seq.), to protect refuge resources and uses while ensuring that mineral rights holders have reasonable access to develop their non-Federal oil and gas.*
- *As previously described, the Rule's costs on operators are justified by equal or greater benefits in the form of environmental improvements for the American people.*
- *The rulemaking followed a public process for determining the scope of issues and various regulatory avenues to address them. Public participation in the scoping process officially began through publication of an Advance Notice of Proposed Rulemaking and Notice of Intent to Prepare an Environmental Impact Statement (ANPR/NOI/EIS) in the Federal Register (79 FR 10080) on February 24, 2014.*
- *The Service developed the Rule by specifically seeking, substantive public comments regarding the methodologies, assumptions, cost estimates, or environmental benefits used or described in its analyses. Peer reviewed scientific literature as well as the expertise of a Service economist were used in developing the Rule (See FEIS, CBA/RFA).*

IV. Next Steps

Pending Departmental review, the Service stands ready to proceed with additional reviews or information collection as needed.