



October 5, 2016

VIA Email Transmittal:

Mr. Stuart Levenbach, Ph.D
Policy Analyst Natural Resources and Environment Branch,
Office of Information and Regulatory Affairs
Executive Office of the President
725 17th St. NW Rm 10202
Washington, DC 20503

Request for Review by Office of Information and Regulatory Affairs

RIN: 1024-AD78, National Park Service; Non-Federal Oil and Gas Rights, proposed rule published October 26, 2015 (80 Fed. Reg. 65572).

RIN: 1018-AX36, National Wildlife Refuge System; Management of Non-Federal Oil and Gas Rights, APRN published February 24, 2014 (79 Fed. Reg. 10080).

Dear Mr. Levenbach:

The American Petroleum Institute (“API”) is a national trade association representing over 640 member companies involved in all aspects of the oil and natural gas industry. API’s members include producers, refiners, suppliers, pipeline operators, and marine transporters, as well as service and supply companies that support all segments of the industry. API member companies are leaders of a technology-driven industry that supplies most of America’s energy, supports more than 9.8 million jobs and 8 percent of the U.S. economy, and since 2000, has invested nearly \$2 trillion in U.S. capital projects to advance all forms of energy, including alternatives.

The Independent Petroleum Association of America (“IPAA”) is the national association representing the thousands of independent crude oil and natural gas explorer/producers in the United States. It also operates in close cooperation with 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies which provide services and supplies to the domestic industry.

API and IPAA understand that your office is reviewing rules proposed by the National Park Service and the U.S. Fish and Wildlife Service (the Services) to regulate operations on privately held minerals that lie beneath lands administered by the Services as units in the National Park System or as National Wildlife Refuges. Our more detailed comments to each rule as originally proposed are attached for your reference.

Our comments proceed from the well-established principle of common law that when an individual owns the minerals of a parcel but not the surface, the mineral rights owner is entitled to reasonable use of the surface to recover the minerals. In the case of both Services, as the systems of parks and

monuments or wildlife refuges have expanded over the years from lands retained by the federal government in the West to include units created through the acquisition of surface lands from private interests in other regions of the country, there are many instances where mineral interests are retained by private owners or were previously severed from the surface estates acquired.

In the case of units of the National Park System, this is reflected in the non-federal oil and gas operations noted in the notice of the proposed rule, most of which occur in states such as Texas, the southeast or the Ohio Valley, where establishment of NPS units followed settlement and the private ownership and use of both surface and mineral estates by many decades or more. Private inholdings are found within the majority of NPS units, even in those carved out of federal lands in the West, commonly where mining claims were patented within the boundaries of a NPS unit established subsequent to the initial prospecting and patenting.

In the case of units of the National Wildlife Refuge System, such lands are primarily acquired by the United States pursuant to the Migratory Bird Conservation Act (“MBCA”). With respect to acquisitions of land from private parties, the MBCA provides:

[R]ights-of-way, easements, and reservations retained by the grantor or lessor from whom the United States receives title under this or any other Act for the acquisition by the Secretary of Interior of areas for wildlife refuges shall be subject to rules and regulations prescribed by the Secretary of Interior for the occupation, use, operation, protection, and administration of such areas as inviolate sanctuaries for migratory birds or as refuges for wildlife; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of Interior, to such rules and regulations as may be prescribed by him from time to time.

16 U.S.C. § 715e (emphasis added). In addition, Congress explicitly decided to eliminate an amendment to the National Wildlife Refuge System Administration Act (“NWRSA”) in 1966 that would have specifically provided the Secretary of Interior with regulatory authority over the surface use of NWRSA lands by holders of mineral interests. *See Caire v. Fulton*, 1986 U.S. Dist. LEXIS 31049, *17-18 (W.D. La. 1986). Although the NWRSA was substantially amended in 1997 by the National Wildlife Refuge System Improvement Act (“Improvement Act”), the Improvement Act did not include specific authority addressing mineral rights and it retained, in similar form, the original provisions of the NWRSA that generally allow the Secretary to permit certain uses and prescribe regulations. *Compare* 16 U.S.C. § 668dd(d) *with* Public Law 89-669, Oct. 15, 1966. In other words, Congress took no action in the Improvement Act to alter the balance it struck in 1966 when it expressly chose not to regulate the surface use of NWRSA lands by mineral interest holders. Consistent with this legislative history, the Service has long interpreted its authority over holders of subsurface mineral rights to be limited.¹

API and IPAA believe that a new rule is not necessary in either case, and will only result in duplicative layers of regulatory oversight. We believe that the record shows that the present 9B regulations have equipped the NPS to carry out its responsibilities under 54 U.S.C. § 100101 in a

¹ *See* Memorandum from Gale Norton, Assoc. Solicitor, Conservation and Wildlife, to the Assistant Sec’y, Fish and Wildlife and Parks (Dec. 22, 1986); FWS Service Manual pt. 612; *see also Caire*, 1986 U.S. Dist. LEXIS at *36 (holding that United States “forfeited by statutory exception and stipulation its authority to require entry permits and impose regulatory schemes on owners and their assigns of specifically reserved mineral interests”). The General Accounting Office has also taken the position that the current version of the NWRSA does not address the Service’s authority over subsurface mineral interest holders. *See* GAO, *U.S. Fish & Wildlife Serv.: Opportunities Remain to Improve Oversight & Mgmt. of Oil & Gas Activities on Nat’l Wildlife Refuges*, GAO-07-829R (Wash., D.C. June 29, 2007) (“We continue to believe that such information is necessary for DOI to adequately inform the Congress regarding the need for additional authority. Moreover, we believe it is for Congress, not DOI, to weigh the needs of the refuge lands and the interests of mineral owners and, ultimately, to determine what oversight authority would be appropriate.”). *See also* 80 Fed. Reg. at 77,213 (“OIRA has determined that this proposed rule is significant, because it may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in the Executive order.”).

manner that achieves a balance between the purposes for which units in the National Park System are managed with the valid existing rights of a modest number of owners of mineral rights under surface lands within National Park System units. Under those regulations, an operator must obtain NPS approval of a proposed plan of operations before commencing non-federal oil and gas operations in an NPS unit. 36 C.F.R. § 9.32(b). Among other things, the plan of operations must show that the operator is exercising a bona fide property right to non-federal oil and gas in an NPS unit and provide detailed information on the proposed operation, how access to the site of operations will be achieved, mitigation measures planned, reasonable alternatives to what the operator proposes, a description of foreseeable environmental impacts from the proposed operations, and a performance bond. *Id.* § 9.36(a).

In the case of units in the National Wildlife Refuge system, the Proposed Rule cites a 2015 report by the Office of the Inspector General, but that report addresses certain instances involving reclamation of oil and gas operations on Refuges and does not document any systematic problems with pre-reclamation activities.² The Proposed Rule for units of the National Wildlife Refuge System also ignores that NWRS lands are unique. Each Refuge has a different acquisition history, and the nature of the federal government’s interests in Refuges varies significantly. Refuges are also subject to specifically tailored conservation plans, and each Refuge must have its own comprehensive conservation plan (“CCP”). 16 U.S.C. § 668dd(e)(1)(A). Congress directed the Service to manage each Refuge in a manner consistent with the CCP and to revise the plan if significant relevant changes occur. *Id.* § 668dd(e)(1)(E). NWRS lands have different easement and access exceptions, different mineral extraction rights, different management plans, and different obligations to facilitate oil and gas development. Moreover, mineral rights law varies among states, and the interpretation of a deed or land sale contract between a private party and the government will also vary by state. *See, e.g., Petro-Hunt, LLC v. United States*, 365 F.3d 385, 393 (5th Cir. 2004)

The Inspector General’s report prepared for the U.S. Fish and Wildlife Service found that Service-related administrative issues, such as understaffing, the failure to monitor, and the failure to train employees are a significant part of the problem the Service perceives. These issues are not remedied by more regulations, but rather by the sufficient staffing of Service field offices and the provision of adequate training so that the Service has the capacity and expertise to work with oil and gas operators. A more prudent approach would be for the Service to continue to manage oil and gas activities under the guidelines it issued in 2012—“Management of Oil and Gas Activities on National Wildlife Refuge System Lands”—for a sufficient period of time, and with necessary staffing, resources, and training, to accurately determine the areas in which those guidelines are effective and the areas in which they are not, if any. At that time, if the Service believes formal regulations are necessary to manage oil and gas activities, it can do so in an informed and targeted manner, consistent with applicable law.

Both Proposed Rules are duplicative of existing state and federal laws and regulations. For example, the Environmental Protection Agency may have authority to regulate certain aspects of operations (either directly or through a state agency) pursuant to the Clean Water Act, the Clean Air Act, or the Resource Conservation and Recovery Act. The proposed regulations are duplicative of, and potentially inconsistent with, these federal laws. *See, e.g.,* 50 C.F.R. §§ 29.111, 29.113, 29.114, and 29.117 (as proposed). In every state in which the Services have identified active and inactive wells, state oil and gas commissions have adopted regulations that protect the environment through comprehensive drilling, development, and production standards; setbacks; ground water protection measures; financial assurance requirements; spill reporting; and reclamation requirements.

The objectives sought by each Service in the promulgation of new rules can be achieved in each

² Final Evaluation Report—U.S. Fish and Wildlife Service’s Management of Oil and Gas Activities on Refuges, Office of the Inspector General, Report No. CR-EV-FWS-0002-2014.

instance through reliance on existing federal and state regulations. These regulations reflect and achieve a regulatory balance between the objectives for which units of the National Park System or the National Wildlife Refuge System have been established, and the valid existing mineral rights and derivative uses that may be found within the boundaries of those units. The present federal and state regulations authorize processes that emphasize planning, consultation, preparedness, financial assurance, and mitigation, and equip responsible personnel in both Services with the tools to assure that these outcomes are recognized by operators and achievable in practice.

We urge your office not to endorse either of the Proposed Rules, and to refer the matter of regulation of operations on private mineral estates found within units of either system to the respective agency for reconsideration.

Thank you for considering this request.

Very truly yours,



Richard Ranger
Senior Policy Advisor
American Petroleum Institute



Dan Naatz
Senior Vice President of Government
Relations and Public Affairs
Independent Petroleum Association of America

Attachments:

Re: RIN: 1018-AX36, API/IPAA Comments April 25, 2014 Re: FWS-HQ-NWRS-2012-0086. Non-Federal Oil and Gas Development Within the National Wildlife Refuge System, advance notice of proposed rulemaking published in the Federal Register on February 24, 2014 (79 Fed. Reg. 10080).

Re: RIN: 1024-AD78, API/ IPAA Comments December 23, 2015 RIN 1024-AD78 NPS. *General Provisions and Non-Federal Oil and Gas Rights*, proposed rule published in the Federal Register on October 26, 2015 (80 Fed. Reg. 65572).

