

January 21, 2010

To: 9B Rulemaking Team
Geologic Resources Division, NPS
PO Box 25287, Denver, CO 80225

From: Public Employees For Environmental Responsibility

Subject: RIN 1024-AD78
Advanced Notice of Proposed Rulemaking - 36 CFR Part 9, Subpart B
(November 25, 2009, 74 FR 61596)

Public Employees For Environmental Responsibility (PPER) endorses the National Park Service (NPS) intent to revise the existing regulations that govern the development of nonfederally-owned oil and gas rights in the national park system. The current regulations are found at Title 36, Part 9, Subpart B.

The NPS first published regulations to govern operations in connection with nonfederal oil and gas rights in 1978, with only a few minor revisions since then. For over thirty years, NPS Regional Offices, and parks with active oil and gas operations, applied these rules. The experience has identified areas in which the rules need to be clarified, simplified and crafted to better protect the natural and cultural resources within park boundaries.

In 1962 Congress established a national seashore at Padre Island, Texas. That legislation was arguably the first in which Congress directed the NPS to exclude from Federal acquisition subsurface oil and gas rights and to regulate the exercise of such rights. In 1974 Congress enacted similar provisions for the new national preserves it established at Big Cypress, Florida and Big Thicket, Texas. The national park system now contains several parks, in addition to the three listed above, where nonfederal oil and gas rights exist and may be under development. Units like Padre Island, Big Thicket and Big Cypress added a degree of complexity to the national park system to which the NPS was unaccustomed.

The NPS has a long history of regulating public conduct in parks, dating to the first NPS system-wide rules in 1936. Regulating a specific industrial activity, in connection with private or State-owned mineral rights, was a new arena for the NPS. The 1978 regulations were promulgated with a great deal of caution as was appropriate for the entry of the NPS into a wholly new regulatory field. Consequently, the 1978 regulations tied the NPS authority to regulate too closely to the requirement that the rules only applied to an operator who needed to access the oil and gas on, through, or across Federal parklands.

In the 1970 General Authorities Act, Congress itself redefined the national park system to include “any area of land or water now or hereafter administered by the Secretary of the Interior through the National Park Service...” 16 U.S.C. 1c. The earlier definition

enacted in 1953 limited the “national park system to “...all federally-owned or controlled lands...” The 1970, and current definition, includes all lands and waters. Since the promulgation of the 1978 regulations, numerous court decisions have upheld the authority of the Congress, the Secretary of the Interior and the NPS to govern conduct on all lands within the boundaries of a national park system area.

The NPS responded in several ways to congressional acts and judicial rulings that alerted the NPS to its broad authority under the Organic Act (16 U.S.C. 3.). In 1983 the NPS adopted new system-wide regulations at 36 CFR Parts 1 and 2 that, for the first time, applied its police powers to nonfederal lands in some parks, for ten specific provisions. In 1994 the NPS adopted 36 CFR Part 6 that governs the disposal of solid waste on all lands, in all units of the national park system, without regard to land title.

Now is an appropriate time for the NPS to exercise its full authority under the Organic Act to govern all nonfederal oil and gas operations throughout the national park system. True, doing so would impose a regulatory requirement on some operators. But doing so would also simplify and clarify the existing rules under which confusion as to which operations are exempt is inevitable. In the end, doing so will better protect the natural and cultural resources of the parks for future generations.

The Advanced Notice of Proposed Rulemaking) has properly identified several areas which are ripe for review and revision. PEER endorses them all. But PEER suggests that the Rulemaking Team examine something that the ANPR does not mention – the regulation of operations in parks, in connection with nonfederal minerals, other than oil and gas.

If the NPS, under the Organic Act, may regulate all (or even some, as it now does under existing 9B) operations in parks in connection with nonfederal oil and gas, the same authority empowers the NPS to regulate nonfederal minerals, other than oil and gas, within the parks.

Operations in connection with mining claims are governed by 36 CFR Part 9, Subpart A. Operations in connection with nonfederal oil and gas are governed by 36 CFR Part 9, Subpart B. ***At present, there are no regulations that govern operations in parks in connection with nonfederal minerals, other than gas.*** Nonfederal mineral rights, other than oil and gas, exist in many areas of the national park system. Nonfederal mineral rights, other than oil and gas are being developed in several parks. These rights include sand and gravel and coal. Where the NPS governs these operations, if at all, the NPS must apply a patchwork of ill-fitting rules, such as 36 CFR 5.6 – Commercial Vehicles.

PEER acknowledges that a rule written to govern oil and gas operations will not perfectly fit operations for solids like coal or gravel because the nature of the operations varies considerably. However, certain provisions of the 9B’s such as requirements for plans of operations, posting of surety, reclamation and NPS procedural conduct (plan processing, appeals process, etc) can easily be made applicable to nonfederal minerals, other than oil and gas. Broadening the 9B rules to include nonfederally-owned minerals, other than oil

and gas would rely on statutory authorities identical to those already cited for 9B, with a few minor additions, e.g. the enabling acts for New River Gorge. This approach would obviate the need for an entirely new and separate rulemaking.

PEER requests that the NPS give serious consideration to making certain provisions of a revised 9B rule applicable to nonfederal minerals, other than oil and gas. This would be done simply by appending to an applicable section the sentence: “[T]his section (or subsection)) also applies to operations in connection with nonfederally-owned minerals, other than oil and gas.” Minor additions would be required to the “scope” and “definitions” section as well.

PEER looks forward to commenting on a proposed rule. We hope it is forthcoming soon.

Cordially,

Jeff Ruch
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