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INTRODUCTION

Pursuant to the Right to Petition Government clause contained in the First Amendment of the U.S. Constitution¹, the Administrative Procedures Act², and the implementing regulations of the United States Fish and Wildlife Service (USFWS), Public Employees for Environmental Responsibility (petitioner or PEER) hereby files the following petition for your consideration.

Of the 575 refuges in the system, 155 have either past, or present, oil or gas activity. 36 refuges contain 1,806 active oil or gas wells.³ A 2003 Government Accountability Office (GAO) investigation determined that, although full information is not available because USFWS has not conducted a complete study, non-federal oil and gas operations have caused damage to refuge resources; on 16 refuges visited by the GAO team, chosen as representative of the system, 15 had suffered contamination from spills.⁴ Individual managers have reported that operators sometimes do not comply with legal requirements or employ best practices in conducting oil and gas operations.⁵ Managers and Department of Interior officials have cited insufficient national guidance as an impediment to their management of oil and gas activity in the refuge system.⁶ Refuge staff reported that in some cases abandoned equipment had not been reclaimed

¹ U.S. Const., amend. I. (“Congress shall make no law ... abridging ... the right of the people ... to petition Government for a redress of grievances.”). United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass’n, 389 U.S. 217, 222 (1967)(the right to petition for redress of grievances is among the most precious of the liberties safeguarded by the Bill of Rights). United States v. Cruikshank, 92 U.S. (2 Otto) 542, 552 (1875)(the Supreme Court has recognized that the right to petition is logically implicit in, and fundamental to, the very idea of a republican form of government).

² 5 USC 553(e) (2005) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

³ GAO-03-517 Oil and Gas on Wildlife Refuges at 3. This data is 8 years old; this number has most likely increased.

⁴ Id at. 18, 53.

⁵ Id at 29.

⁶ Id at 38.

due to difficulty identifying the responsible parties.⁷ USFWS has neglected its duties to promulgate regulations to provide for the conservation of wildlife and their habitats within the System and ensure the biological integrity, diversity, and environmental health are maintained.⁸ This neglect has resulted in significant and unnecessary damage to System resources.

The legal authority for the United States Fish and Wildlife Service to make rules to accomplish the mission of the Refuge System, the conservation, management and restoration of fish, wildlife, plant resources and their habitats, is derived from the Property Clause (Art. IV, section 3, cl. 2) and the Commerce Clause (art. I, section 8, cl. 2) of the United States Constitution. Under the National Wildlife Refuge Administration Act (NWRSA), the Fish and Wildlife Service is responsible for promulgating rules for all the Wildlife Refuges in the country. 16 U.S.C.A. § 668dd(b)6. In accordance with these provisions, PEER requests that the Fish and Wildlife Service promulgate regulations pursuant to these powers under the NWRSA to regulate non-federal oil and gas development within, and bordering the Wildlife Refuge System in a way compatible with the systems goals:

- a) A regulation requiring permits for the operation of non-federal oil and gas activities designed to aid reclamation, encourage the use of drainage, minimize surface disturbance and minimize environmental impact under section (b)6 of the NWRSA. This regulation could be modeled after National Park Service (NPS) rules that have been in place for more than 30 years (see discussion of NPS 9B rule, *infra*).

⁷ GAO-03-517 Oil and Gas on Wildlife Refuges at 30.

⁸ NWRSA Section 4(a)4A,B.

- b) A regulation including oil and gas operations initiated before the date of the regulation, claims which can be accessed without crossing federal lands, and those using “drainage” in the permitting regime.

Such regulations are necessary to further the purpose of the NWRSA to

Ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans. 16 U.S.C.A. § 668dd(a)4B

The USFWS possesses the power to promulgate regulations to protect the preservation goals of the System from damage caused by non-federal oil and gas activity.⁹ In order to meet its management responsibilities, the USFWS must adopt a rule for permitting non-federal oil and gas activity within the system which ensures that operators consider reclamation, waste disposal, expected environmental impact, mitigation strategies to minimize surface disturbance, measures to protect surface and subsurface water quality and alternatives where possible. Accordingly, PEER hereby petitions the Secretary of the Interior to promulgate such a rule.

⁹ 16 U.S.C.A. § 668dd(b)6

**Before the Department of Interior
Fish and Wildlife Service**

Washington, D.C. 20240

In Re: Non-Federal Oil and Gas Activity in National Wildlife Refuges)
Petition for Rulemaking Requiring Permits for Oil and Gas)
Activity in National Wildlife Refuges)

*To the Secretary of the Interior and
the Director, Fish and Wildlife Service*

Petition for Rulemaking

Pursuant to the Administrative Procedure Act, 16 U.S.C. § 553(e), Public Employees for Environmental Responsibility (PEER) hereby petitions the Fish and Wildlife Service to promulgate regulations requiring permits for non-federal oil and gas activity to be conducted within the System, or that use horizontal drilling (drainage) to reach oil or gas from surface sites just outside refuge boundaries.

Standing to File. PEER is a 501(c)(3) non-profit organization incorporated under the laws of the District of Columbia. PEER serves the professional needs of the local, state, and federal employees – the scientists, rangers, and resource managers – charged with the protection of America’s environmental resources, including the resources on wildlife refuges. PEER members have both personal and professional interests in the United States wildlife refuges. As such, PEER is “an interested person” under the Administrative Procedures Act.

ARGUMENT IN SUPPORT OF PETITION

I. BACKGROUND – NON-FEDERAL OIL AND GAS ACTIVITIES ON FEDERAL LAND

Private rights to oil, gas and other minerals exist within the System either because the rights were reserved at the time the surface rights were transferred to the federal government, or because the rights had already been severed from the surface rights at the time of acquisition.¹⁰ Such rights exist primarily throughout the eastern and southern portion of the System, and they are also common throughout federal lands managed by National Park Service (NPS) and National Forest Service. The refuge system presently has over 4,000 active and inactive wells on 115 units, compared to 603 sites in 13 units of the National Park System.¹¹ Yet, the USFWS has made no meaningful attempt to regulate the exercise of such rights, while the NPS has had a permitting regime in place since January 1979.¹²

Although the NPS has required operators to apply for permits, based on submission of a plan of operations, a bond sufficient to reclaim the site should the operator default on its obligation and other mitigation measures, it has determined the rule is inadequate to protect National Park resources. The NPS is currently in the process of promulgating a rule to close a pair of loopholes that exempt 53% of non-federal oil and gas activity in the Park System, those that are either grandfathered in, or that do not

¹⁰ GAO-03-517 Oil and Gas on Wildlife Refuges at 4.

¹¹ Id at 3.

¹² NPS Notice.

require access across park lands. The NPS is also looking into ways to minimize indirect effects from directional drilling operations for which surface activity occurs outside the parks.¹³

In 2003, 36 wildlife refuges had 1800 active oil and gas wells, a number that has likely grown as oil and gas prices reached peak levels.¹⁴ The environmental impact of oil and gas activity on refuge lands has never been fully evaluated, and none is currently subject to a national permitting regime such as the 9B regulation used by NPS. NPS' efforts to increase the coverage of its rule from 47% to 100% of oil and gas activity serves to highlight the urgent need of sister agency USFWS to establish a permitting regime to protect its own System resources.

II. UNREGULATED NON-FEDERAL OIL AND GAS ACTIVITIES INTERFERE WITH THE PURPOSE OF THE REFUGE SYSTEM

Since the early 1900's, Congress has been concerned with maintaining and preserving lands for wildlife across the United States.¹⁵ In 1966, Congress unified all of the wildlife refuges under one system with the National Wildlife Refuge System Administration Act.¹⁶ The main principle behind unifying the system was to “administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife and plant resources and their habitats within the United States for the benefit of present and future generations.”¹⁷ Congress required the Secretary to “ensure that the biological integrity, diversity and environmental health

¹³ NPS Notice.

¹⁴ GAO-03-517 Oil and Gas on Wildlife Refuges at 3.

¹⁵ Lacey Act of 1900; Game & Bird Preserves Act of 1905 16 USC 671, Migratory Bird Treaty Act of 1918.

¹⁶ NWRSA Section 4(a)1.

¹⁷ Id, Section 4(a)2.

of the system are maintained for the benefit of present and future generations of Americans.” NWRSA (a)4B.

In 1997, Congress passed the National Wildlife Refuge System Improvement Act (NWRSA) which strengthened the compatible use standard established in 1966. The Act declares, “The Secretary shall not initiate or permit a new use of a refuge or expand, renew or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use.”¹⁸

That oil and gas activities are often incompatible with the purpose of a refuge is evidenced by the Secretary’s regulation limiting leases of federally owned oil and gas exclusively to operations that can be carried out from outside the refuge using drainage.¹⁹ By not requiring permits for non-federal oil and gas activity, the USFWS allows projects to proceed without protections for System resources in contradiction with its statutory responsibility, and thereby incurs environmental harm and liabilities for reclamation and cleanup.

Oil and gas activity has an impact in many cases that is in direct conflict with the goals of the refuge system. Activities often have a direct adverse impact on wildlife:

- Kenai National Wildlife Refuge (NWR) in Alaska lost enough acreage to oil and gas activity to eliminate food source for up to 136 cow moose and 411 snowshoe hares.²⁰
- Spills in Anahuac NWR in Texas have killed ecologically important fish population, and imposed cleanup costs on USFWS estimated at over \$1million.²¹

¹⁸ NWRSA Section 4(d)(3)(A)(i).

¹⁹ USFWS Handbook 612 FW 2.3, 43 CFR 3101.5-1 and 3100.2.

²⁰ GAO-03-517 Oil and Gas on Wildlife Refuges, at 21.

²¹ Id, at 20.

- In 1980, USFWS estimated that Hopper Mountain NWR lost 63 percent of its potential feeding habitat for the endangered California Condor to oil and gas activity.²²
- In 2002 USFWS reported 348 spills but acknowledged that the figure was incomplete.²³
- A result of the lack of permits is that managers often are unaware of what exactly is going on within the refuge, for example, soil at Atchafalaya and Delta NWRs in Louisiana have levels of contaminants lethal to most species, even though refuge staff are unaware of any major spills.²⁴

III. CONGRESS HAS DELEGATED TO USFWS THE DUTY TO MAINTAIN THE WILDLIFE REFUGE SYSTEM

NWRSIA requires the USFWS to administer the System to “provide for the conservation of fish, wildlife, and plants, and their habitats within the System” and “ensure that the biological integrity diversity and environmental health of the system are maintained.”²⁵ The statute also requires USFWS to maintain adequate water quality to fulfill the purpose of the System, and to monitor the status and trends of fish, wildlife, and plants in each refuge.²⁶

²² GAO-03-517 Oil and Gas on Wildlife Refuges, at 22.

²³ Id.

²⁴ Id.

²⁵ 111 Stat. 1255 (get right cite) section 5(a)4A,B.

²⁶ Id, Section 5(a)F, N.

As the primary agency administering the Endangered Species Act (ESA), USFWS must conduct all of its programs in accordance with the purposes of the act.²⁷ This includes the management of the Refuge System.

USFWS cannot claim to fulfill its duties under NWRSA or ESA with the current lack of regulation of oil and gas activity. At present, USFWS leaves unchecked activities which specific examples show kill fish and plants, destroy habitat, and pollute water. USFWS cannot be monitoring the status and trends of fish, wildlife, and plants on refuges without keeping track of the activities that impact them.

IV. USFWS MUST TAKE ACTION TO MITIGATE DAMAGE TO REFUGE RESOURCES FROM NON-FEDERAL OIL AND GAS ACTIVITY. RULES CAN BE MODELED AFTER NPS RULE 9B.

a. Operating Plans and Standards.

FWS should adopt, in its rule, a requirement that operators submit a proposed plan of operations in order to receive a permit. The operating plan could be modeled after the 9B rule currently employed by NPS.

The Thrust of NPS' 9B rule is primarily informational and lies in its permitting regime. NPS rule 36 CFR Part 9 Subpart B (9B) Section 9.36(a) requires prospective operators to submit applications including a detailed plan of operations which includes: the name and legal address of the operator, owner, or lessee of the rights; a copy of the lease or deed upon which the right to operate is based; a map showing the location and perimeter of the area where the operator has the right to operate; a map showing the location and description of all surface activities and disturbances; a description of the

²⁷ ESA Section 7 (a)1.

equipment to be used and the proposed method of transporting the equipment to and from the site; an estimated timetable of each phase activities for which a permit is sought; a number of technical and geologic factors; a description of steps to be taken to comply with the rule's operating standards; provisions for reclamation; a breakdown of the estimated costs of implementation and reclamation; methods for disposal of all waste and contaminants; a description of the natural, cultural, social and economic environments to be affected within a two mile radius of the site; the anticipated direct and indirect effects of the operations on natural, cultural, social and economic environment; steps to be taken to minimize and mitigate surface disturbances and environmental effects and a discussion of the effects which cannot be mitigated; measures to protect surface and subsurface waters; all feasible alternate methods of operations, their costs and environmental effects; the effects of methods to be taken to achieve reclamation; and any other information necessary for the secretary to determine the legitimacy of the right, approval or disapproval of the permit, or the proper amount of the performance bond to be posted.²⁸

Before issuing a permit, NPS evaluates the information submitted with the plan of operations and performs the relevant analysis required by NEPA and ensure the project does not violate the ESA.²⁹ Without this critical minimum of information and process, it is impossible for USFWS to even know if System resources are being harmed in ways inconsistent with NWRSA objectives, or if projects are having impacts which constitute a "take" under the ESA.

A rule like the Park Service's 9B could go a long way to remedy many of the problems currently associated with non-federal oil and gas activity on refuge land. A

²⁸ 36 CFR Part 9 Subpart B (9B) Section 9.36(a)1-18.

²⁹ Id, Section 9.37(d)(6).

permitting regime would provide System administrators with a list of the activity in individual refuges, better allowing them to evaluate the health of the System. Permits accompanied by a performance bond would free the USFWS from the taxing reclamation obligations which come with discovering abandoned equipment or spills and being unable to locate the operator or finding it insolvent. By reviewing operating plans the USFWS can ensure that operations are up to industry best practices and that the relevant environmental laws, such as the Clean Water Act and the ESA, are not violated. NPS has found regulations also help move the surface activity associated with many oil and gas operations off refuge lands completely by incentivizing the use of drainage by operators seeking a lighter regulatory burden.³⁰ Requiring operators to seek permits from USFWS can also help prevent unnecessary habitat loss. In some cases, where the land overlying a claim is of a particularly high ecological value the Service is enabled by the statute creating the refuge to exchange the claim for another claim of comparable value elsewhere, yet this opportunity for a low cost solution may be overlooked where the impact of claims is not analyzed.³¹

b. Directional Drilling.

Under the current National Park Service 9B rule, if an operator sets up outside of the park's boundaries to reach oil stored under NPS land in a procedure called "drainage" or "directional drilling," then the operations are not subject to 9B regulations. Lack of regulation has incentivized directional drilling which greatly reduces direct effects on Refuge lands. The Park service is now seeking to develop a rule to maintain this

³⁰ NPS Notice .

³¹ 16 U.S.C. §696.

incentive, while minimizing the indirect effects of operations whose surface activity is conducted outside federal lands.³²

PEER encourages the Fish and Wildlife Service to adopt a similar stance regarding directional drilling. Increased use of directional drilling can have the same benefits to Wildlife Refuges as National Parks. A rule should be sought, possibly in conjunction with NPS, or considering the results of NPS' present rulemaking process, to encourage directional drilling where possible, while imposing regulations that minimize indirect effects.

c. Improving on the 9B Rule.

On November 25, 2009, the National Park Service announced notice of a proposed rulemaking and requested public comments regarding revision of existing 9B regulations. The former 9B regulations have been in effect for 30 years without any revisions but in that time a few critical loopholes have been widely exploited by operators. More than 50% of the oil and gas operations fall under some exemption and are therefore not required to follow the regulations put in place to protect the park wildlife and resources. The NPS has sought to remedy this situation by promulgating a rule to close exemptions for drilling operations grandfathered in from before the rule, and for claims which can be reached without crossing park land.³³

PEER encourages the Fish and Wildlife Service to consider these shortfalls as it adopts a similar rule in order to protect the environmental integrity of one of our Nation's greatest natural treasures; it's wildlife refuges.

³² NPS Notice.

³³ Id.

V. CONCLUSION

Federal law requires the USFWS to protect resources of the Federal Wildlife Refuge System. Without USFWS intervention to regulate the exercise of non-federal oil and gas rights within the refuge system, preventable harm to System resources will continue and are likely to worsen as high prices encourage increased efforts at extraction. Damage from unregulated oil and gas activity will have far reaching impacts on our nation's wildlife and threatens to deprive future generations of the resources congress has set aside for their enjoyment.

PEER therefore petitions the USFWS to immediately address the problem of non-federal oil and gas activity by instituting a permitting regime for the exercise of reserved and outstanding rights within the System.