



**Billing Code 4310–55**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR 29**

**[Docket No. FWS–HQ–NWRS–2012–0086; FXRS12610900000-134-FF09R200000]**

**RIN 1018–AX36**

**Non-Federal Oil and Gas Development Within the National Wildlife Refuge System**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Advance notice of proposed rulemaking; notice of intent to prepare an environmental impact statement.

**SUMMARY:** The U.S. Fish and Wildlife Service (Service) is seeking comments to assist us in developing a proposed rule on managing activities associated with non-Federal oil and gas development on lands and waters of the National Wildlife Refuge System (Refuge System). Non-Federal oil and gas development refers to oil and gas activities associated with any private, state, or tribally owned mineral interest where the surface estate is administered by the Service as

part of the Refuge System. The proposed rule will clarify and expand existing regulations. We seek public input on how to manage non-Federal oil and gas operations on Refuge System lands to avoid or minimize, to the greatest possible extent, adverse effects on natural and cultural resources, wildlife-dependent recreation, and refuge infrastructure and management; ensure a consistent and effective regulatory environment for oil and gas operators; and protect public health and safety. The Service lacks comprehensive regulations to manage non-Federal oil and gas operations on the Refuge System, which has led to unnecessary adverse impacts on refuge resources, as well as an uncertain and inconsistent regulatory environment for oil and gas operators on refuges.

This notice of intent starts the scoping process in compliance with the National Environmental Policy Act (NEPA) and its implementing regulations. Currently, we are planning for the programmatic environmental impact statement (PEIS) to focus on the national effects of the rulemaking, realizing that further environmental analysis of the more localized effects may be required with implementation of the rule. As part of the scoping process, the Service seeks public comment on the scope of the proposed rule; the NEPA alternatives to be considered; and the physical, biological, social, and economic effects that should be analyzed in the draft PEIS.

**DATES:** Submit comments on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

**ADDRESSES:** You may submit comments by one of the following methods:

- *Electronically:* Go to the Federal eRulemaking Portal: <http://www.regulations.gov>. Search for FWS–HQ–NWRS–2012–0086, which is the docket number for this

rulemaking. You may submit a comment by clicking on “Comment Now!” If your comments will fit in the provided comment box, please use this feature of <http://www.regulations.gov>, as it is most compatible with our comment review procedures. If you attach your comments as a separate document, our preferred file format is Microsoft Word. If you attach multiple comments (such as form letters), our preferred format is a spreadsheet in Microsoft Excel.

*By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–HQ–NWRS–2012–0086; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We will not accept email or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see Public Participation under SUPPLEMENTARY INFORMATION for more information).

**FOR FURTHER INFORMATION CONTACT:** Scott Covington, (703) 358–2427.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

In many refuges of the Refuge System, the Federal Government does not own the subsurface mineral rights, and, subject to State and Federal law, the mineral rights owners have the legal authority to develop oil and gas resources. Additionally, some refuges had existing oil and gas wells and associated infrastructure and pipelines when acquired by the Service. Based

on our best available data as of 2012, 103 refuges and 4 wetland management districts have oil and gas operations (oil and gas wells, injection wells for enhanced oil recovery and produced water disposal, and pipelines), including more than 5,000 wells (oil, gas, injection) and almost 1,700 actively producing oil and gas wells (these estimates include wells in both Federal and non-Federal minerals). For purposes of this rulemaking, non-Federal minerals are considered the rights to develop oil and gas resources held by private, tribal, state or other entities. With Federal minerals, the development rights are held by the U.S. government. The smaller proportion of these wells is in Federal minerals, which are administered by the Bureau of Land Management (BLM) primarily under 43 CFR 3101.5. Some Federal regulations do apply to development of non-Federal minerals (e.g., 40 CFR 60, 61, and 63). However, the Service lacks comprehensive regulations to manage non-Federal oil and gas operations on the Refuge System, which has led to unnecessary adverse impacts on refuge resources, as well as an uncertain and inconsistent regulatory environment for oil and gas operators on refuges. The proposed rule will clarify and expand existing regulations at 50 CFR 29.32.

In 2003, the Government Accountability Office (GAO) issued a report (GAO-03-517) to Congress highlighting the opportunities to improve management and oversight of oil and gas operations on the Refuge System. One of the main recommendations of the report was to clarify the Service's permitting authority of non-Federal oil and gas operations through regulations. Several other land management agencies have regulations that cover oil and gas development, including the Department of the Interior's National Park Service (NPS) and BLM, and the U.S. Department of Agriculture's Forest Service (FS). An update by GAO in 2007 (GAO-07-829R) followed the 2003 report reasserting the recommendation that the Service take the necessary steps to apply a consistent and reasonable set of regulatory and management controls over all oil

and gas activities occurring on the Refuge System to protect the public's surface interests. We believe that rulemaking is necessary for the Service to create a consistent and reasonable set of regulatory management controls for non-Federal oil and gas operations on the Refuge System. This request for comments and ideas on the rulemaking will improve the process.

The legal authority for the Service to promulgate regulations is derived from the Property Clause (art. IV, section 3, cl. 2) and the Commerce Clause (art. I, Section 8, cl. 3) of the United States Constitution and from various statutes enacted by Congress for the administration of the Refuge System. The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. 668dd–668ee), states that the mission of the Refuge System is 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 of Americans” and grants authority to the Service to establish policies and regulations for the administration and management of the Refuge System.

The Service is not currently proposing any specific approach for managing non-Federal oil and gas operations; accordingly, no regulatory findings are associated with this advance notice of proposed rulemaking. Comments received will help the Service determine the scope of any future rulemaking. Lastly, the Service's sister agency, the National Park Service, in 2009 issued an ANPR on this issue for their Park Units, 74 FR 61596 (November 25, 2009). If commenters wish to review the comments the Park Service received, a copy of its analysis of received comments can be obtained at

*[http://www.nature.nps.gov/geology/oil\\_and\\_gas/documents/2011-01-11%20ANPR\\_Comment\\_Analysis\\_Report.pdf](http://www.nature.nps.gov/geology/oil_and_gas/documents/2011-01-11%20ANPR_Comment_Analysis_Report.pdf)*

## **Information Requested**

The Service is interested in ideas from the public on ways we can improve existing management and oversight of non-Federal oil and gas operations. In addition, we request your help in identifying the significant issues and NEPA alternatives that we should consider in determining the scope of the PEIS for this rulemaking initiative. The Service intends to use input from the public to help us develop the proposed rule and prepare the draft PEIS. After receiving public comments and ideas, we will publish the proposed rule and notice of availability of the draft PEIS in the **Federal Register** for public review and comment. In particular, the Service encourages the public to provide comments and suggestions on the management and oversight issues described in the body of this notice. When commenting, please indicate which of the listed issues your comments address and to which question you are responding. If your comments cover issues outside of those listed, please identify them as “other.”

The Service also recognizes its government-to-government relationship with federally recognized Native American Tribes and seeks their comments in this notice. Tribal representatives may submit comments through the process described below, which will include those comments in the public record. Alternatively, tribal representatives may contact Scott Covington at (703) 358-2427 for additional information or to initiate government-to-government consultation.

## **Issue 1: Plans of Operations and Special Use Permits**

The Service requires entities, such as people, organizations, or companies, to get a Special Use Permit for any refuge use not generally open to the public. The permitting process

allows the Service to ensure that refuge resources, as well as public health and safety, are protected to the greatest extent practicable before allowing the use on a refuge. In their existing regulations, the NPS and FS require that oil and gas development operators file a proposed plan of operations or operating plan and acquire a permit for use of the Federal surface estate.

Operations encompass all activities associated with oil and gas, and include, but are not limited to: reconnaissance to gather natural and cultural resources information; line-of-sight surveying and staking; geophysical exploration; exploratory drilling; production (site selection, well pad development, drilling, stimulation, and production), gathering, storage, processing, and transport of petroleum products; inspection, monitoring, and maintenance of equipment; well "work-over" activity; construction, maintenance, and use of pipelines; well plugging and abandonment; reclamation of the surface; and construction or use of roads, or other means of access or transportation, on, across, or through federally owned or controlled lands or waters. The plan of operations includes reasonable operating standards with which an operator should comply in conducting all phases of oil and gas operations, as well as any other necessary requirements for the operator to meet to ensure compliance with Federal and State law. The Service believes that requiring a plan of operations, followed by issuance of a special use permit once the plan is approved, is the most effective way to increase oversight and management of non-Federal oil and gas operations on the Refuge System.

*Questions:*

a. Should NPS and/or FS requirements serve as a model for managing oil and gas operations on Refuge System lands? If so, should the FWS take special note of specific aspects of either set of requirements in crafting its own regulations?

b. Do you have recommendations for alternatives to the processes described above that would allow for effective oversight and management of non-Federal oil and gas operations on the Refuge System? What are the benefits and costs of suggested alternatives?

c. Do you know of ways that the Service could implement an efficient and effective permitting process similar to that described above or recommended in the previous question, that reduces the burden of compliance for both operators and refuge staff?

## **Issue 2: Operating Standards**

One of the major goals of the Service in this proposed rulemaking is to ensure that operators conduct their operations in a way that minimizes impacts to natural and cultural resources when operating on a refuge, such as locating operations away from sensitive habitats for endangered and threatened species, other priority wildlife resources, cultural resources, watercourses, visitor centers, public use areas such as trails and wildlife viewing areas, and administrative structures and facilities. The Service is aware that various agencies and industry groups have developed standards (e.g., American Petroleum Institute, Bureau of Land Management Gold Book, State operating standards, EPA's Natural Gas STAR program and New Source Performance Standards for VOC emissions) that, if the Service adopts as part of the rule, may reduce the effects that non-Federal oil and gas operations on refuges may have on refuge resources. The Service may adapt the standard to meet requirements identified in the Refuge Administration Act. As an alternative, because operating standards may change based on the geological formation, habitat, new technology, and other factors, we could leave some flexibility in the proposed rule by not incorporating particular operating standards. Instead, we could

provide criteria that operators could address in their plan of operations in what they believe to be the best technical and management practices.

*Questions:*

a. Do you have recommendations for how the Service can best ensure that operators are conducting operations under effective, enforceable operating standards in our proposed rule?

b. How can the Service best verify that operators are complying with applicable standards?

c. How can the Service best ensure that the standards selected are effective and enforceable? Please provide examples with data.

d. Do you have recommendations for the Service in developing a proposed rule that can adapt to technological advances in oil and gas development?

e. What criteria could be used as targets in plans of operation using best technical and management practices, and how would compliance be assessed?

**Issue 3: Financial Assurances**

The Refuge System has sustained significant damages to refuge resources from leaks and spills, inadequate plugging, abandonment and reclamation. The Service must ensure that taxpayers do not incur the costs of restoring refuge resources from irresponsible non-Federal oil and gas operations. In their regulations, the NPS requires that an operator file a performance bond or other acceptable method of financial assurance for all types and phases of non-Federal oil and gas operations. The objective of requiring a bond is to ensure that if an operator becomes insolvent or defaults on his/her obligations under an approved plan of operations, adequate funds will be available to the agency to carry out the plugging and reclamation requirements. The FS

regulations give the Authorization Officer the discretion to require a performance bond; however, justification for the bond should be documented in the administrative record. The bond ensures that adequate funds will be available to restore the site, remove equipment and contaminated soil, and revegetate the area.

*Questions:*

a. Should the FWS simply adopt the financial assurance instruments and process used by one of our sister agencies (e.g., performance bonds, irrevocable letters of credit, and cash)? If so, please describe the advantages or disadvantages of the different systems with a recommended model.

b. Are there alternatives to the existing financial assurance instruments used by our sister agencies (e.g., performance bonds, irrevocable letters of credit, and cash) that will protect the taxpayer if refuge resources are damaged by non-Federal oil and gas operations on lands and waters of the Refuge System?

c. If so, please describe the advantages or disadvantages of one type of instrument over another, and how it would be designed.

d. What is the best and most efficient way to ensure that financial assurances are maintained when ownership of the operation is transferred or sold?

**Issue 4: Access Fees**

Operators often need to cross Federal or private lands where they have no preexisting rights to do so. Operators must obtain permission from the Service for such access to Refuge System lands (50 CFR 29.21). The NPS, FS, and BLM, as well as (in most cases) adjacent private land owners, charge fees for this access. The oil and gas industry generally recognizes such fees today as a cost of doing business. The FWS, as with other surface owners in split-

estate situations, generally has a responsibility to provide reasonable access to oil and gas operators wanting to access their non-Federally owned subsurface estate. However, we also have clear responsibilities to protect and maintain the surface values for which we manage these lands. As a result, the Service wants to encourage operators to access their oil and gas operations from existing roads that the Service administers, and at a time, place, and manner that protects refuge resources to the maximum extent practicable.

*Questions:*

- a. What is a fair and reasonable method for the Service to calculate fees for the privilege of access across federally owned lands?
- b. How could the Service establish incentives for operators to use existing roads or limit access to protect refuge resources in the proposed rulemaking?

**Issue 5: Noncompliance**

To ensure protection of refuge resources and public health and safety, the Service will need to define a practical method for dealing with operators who are not in compliance with the established plan of operations or operating standards, or both. The Service has several options for handling operators who are noncompliant, including, but not limited to: notifying and working with operators to bring them into compliance; issuing formal notices of noncompliance; assessing penalties for failure to comply with a notice of noncompliance; and for more egregious cases, filing a civil action in Federal court seeking an injunction or restraining order to halt operations.

*Questions:*

a. What are the most effective means for the Service to encourage compliance with an established plan of operations and operating standards?

b. Are there new and emerging technologies, techniques, and verification systems that would improve effectiveness and efficiency of monitoring and verifying compliance with regulations and permit requirements?

c. Are some penalties and/or deterrence techniques more effective than others to ensure compliance?

d. Could a system be designed based on transparency of plans, operations, and practices that would foster use of better practices and compliance, and make it easier for the Service and public to understand oil and gas operations?

#### **Issue 6: Existing Operations**

Many operators are already exploring, drilling, and producing non-Federal oil and gas on Refuge System lands. Our goal is to ensure that we bring existing operations into compliance with any new rulemaking as seamlessly as possible to meet effective best management practices when operating on lands and waters of the Refuge System. We do not want to disrupt existing operations or impose an unreasonable burden on operators or Refuge System field staff.

##### *Questions:*

a. What is a fair and reasonable timeline for the Service to bring existing operations into compliance with the new regulations?

b. Is there a way to stagger certain aspects of compliance that would make it less burdensome on both operators and Refuge System staff?

## **Issue 7: Impacts from the Proposed Rulemaking**

The PEIS will analyze a range of reasonable alternatives for regulating non-Federal oil and gas exploration, development, and production, and the potential environmental impacts on refuge resources, such as threatened and endangered species, waterfowl, migratory birds, air and water quality, soils, vegetation, wetlands, cultural resources, viewsheds, and soundscapes. The PEIS will also analyze effects on oil and gas operators, visitor experiences, public safety, adjacent lands, our changing environment, and refuge operations.

### *Question:*

- a. Keeping the limited scope of the PEIS in mind, what do you believe are the important national impacts for the Service to analyze in the PEIS for a proposed rule on non-Federal oil and gas operations on the Refuge System (e.g., impacts to daily refuge operations, costs involved in monitoring)?
- b. What unique legislation or legal consideration should the PEIS take into account when analyzing potential impacts on specific regions or states?

## **Public Participation**

The Service seeks responses from the public to the questions above. We also seek any relevant comments on other issues that are related to this proposed rulemaking. We especially seek recommendations for effective and efficient approaches to managing non-Federal oil and gas development on the Refuge System. After analyzing the comments received from this notice, we will determine how to proceed with a proposed rulemaking.

All submissions received must include the Service docket number for this notice. Before including your address, phone number, e-mail address, or other personal identifying information

in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

The Service will continue to solicit public input through a collaborative process as we develop the proposed rule and PEIS. We will also include additional background information on non-Federal oil and gas operations on the Refuge System at the following Web site:

*<http://www.fws.gov/refuges/oil-and-gas/>*.

Dated: February 18, 2014.

**Rachel Jacobson,**

*Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.*

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