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Public Comments Processing
Attn: FWS-HQ-NWRS-2012-0086
Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service, MS; BPHC
5275 Leesburg Pike
Falls Church, VA 22041-3803

RE: Comments on Management of Non-Federal Oil and Gas Rights Proposed Rule and Draft Environmental Impact Statement [Docket No. FWS-HQ-NWRS-2012-0086]

Submitted electronically via Federal e-Rulemaking portal: http://www.regulations.gov

Our duty to the whole, including the unborn generations, bids us restrain an unprincipled present-day minority from wasting the heritage of these unborn generations. The movement for the conservation of wild life and the larger movement for the conservation of all our natural resources are essentially democratic in spirit, purpose, and method. – Theodore Roosevelt

Dear Mr. Covington,

We are happy to submit our timely filed comments on the proposed rule by the Fish and Wildlife Service (FWS) regarding management of non-federal oil and gas interests on National Wildlife Refuges (NWRs) and the accompanying Draft Environmental Impact Statement (DEIS). The deadline for comments is February 9, 2016.

The Conservation Law Center (CLC) is a not-for-profit public interest law firm located in Bloomington, Indiana and operates the Conservation Law Clinic under agreements with the Indiana University Maurer School of Law and Indiana University McKinney School of Law. The CLC represents non-profit environmental organizations and governmental entities in conservation matters and works to improve conservation law and policy.

The American Bird Conservancy (ABC) is a not-for-profit membership organization whose mission is to conserve native birds and their habitats throughout the Americas. ABC acts

across the full spectrum of threats to birds to safeguard the rarest bird species, restore habitats, and reduce threats, unifying and strengthening the bird conservation movement.

Since President Theodore Roosevelt declared the Pelican Island National Wildlife Refuge protected in 1903, the National Wildlife Refuge System has grown into the world's largest land system dedicated to wildlife conservation.[1] Initially created as safehavens for migratory birds and waterfowl threatened by market hunters, the System now encompasses a wide range of conservation goals including protecting endangered species, conserving wetlands, enhancing biodiversity, and preserving ecosystems. FWS may permit other uses of refuge land, but the agency's first priority in the management and planning of the Refuge System is conserving these unique aspects of America's heritage.

FWS' proposed rule governing non-federal oil and gas management is an essential update that mostly meets Congress' conservation mandate. The rule requires all new and modified operations on federally-owned lands within refuges to receive a permit and utilize "technologically feasible, least-damaging methods" to minimize damage to refuge resources.[2] The strong performance-based standards for new operations on federally-owned land, if properly enforced, will allow the agency to tailor regulations to the diverse ecosystems in the Refuge System.

However, there are two important issues with the proposed rule. First, the proposed rule exempts new and modified oil and gas operations conducted on the surface of private lands even though such operations can significantly harm refuge lands and wildlife. Second, the proposed rule exempts existing operations on federally owned land that continue to have significant effects on refuges even though regulation is technically and economically feasible. FWS must rectify

[1] Robert L. Fischman and Robert S. Adamcik, *Beyond Trust Species: The Conservation Potential of the National Wildlife Refuge System in the Wake of Climate Change* 51 Nat. Res. J. 1, 26 (2011).
[2] Proposed 50 C.F.R. § 29.50.

these exemptions in the final rule to comply with the NWR Organic Act's conservation mandate. We propose alternative rules that would meet FWS' stewardship responsibilities while avoiding any constitutional takings issues. We also propose additions to the Service's DEIS to fully reflect the environmental effects of the proposed action.

I. The Proposed Rule Unlawfully Exempts New and Modified Operations Commencing on Private Lands From Regulation Even if They Would Significantly Impair Refuge Resources.

FWS proposes to exempt wells drilled outside refuge boundaries or on privately-owned inholdings from any regulation.[3] These operations would require federal oversight only if they require access on, across, or through a NWR, in which case the operators would have to pay an access fee.[4] This exemption ignores the significant impacts that oil and gas operations on privately owned land have on nearby refuge lands and wildlife. Toxic spills, harmful emissions, light, and noise do not stop at property boundaries. FWS should use the full extent of its delegated authority under the Property Clause to regulate operations on private land that may impair refuge resources. Congress' conservation mandate requires such regulations to protect refuges.

A. Threats to Refuges and Wildlife From Oil and Gas Operations on Private Land.

As FWS has acknowledged, oil and gas operations can significantly threaten wildlife and wildlife habitat in refuges. Impacts include surface water quality degradation, soil and groundwater contamination, air quality degradation, increased noise, disruption of wildlife migration routes, night sky intrusion, and wildlife mortality.[5] Studies confirm that species

[3] Proposed 50 C.F.R. § 29.40.
[4] *Id.*
[5] Management of Non-Federal Oil and Gas Rights, 80 Fed. Reg. 77200, 77202–203 (Dec. 11, 2015).

richness and abundance decline near oil and gas operations.[6] Open pits associated with oil and gas operations can entrap and kill birds and other wildlife.[7] Fracking operations can contaminate groundwater and surface water, consume large amounts of water that may exceed natural flows of source rivers, and induce earthquakes.[8]

Many NWR Comprehensive Conservation Plans (CCPs) acknowledge that operations on private land threaten refuges. The Catahoula NWR CCP notes that off-refuge oil operations in the surrounding watershed threaten the refuge:

> Saltwater releases in the area are virtually constant, with numerous oil spills. By the time these contaminants reach the lake, they are well entrained into the water column and generally not visible at the surface, thus not posing a direct acute threat to waterfowl and water birds from oiling, but posing a considerable concern for water quality and chronic impacts to the supporting ecosystems for refuge trust resources.[9]

Likewise, at the Patoka River NWR, discharge of salt brine and "inadequate storage tank containment, open pits of oil, and irresponsible spills or overflowages of crude oil from some of the 82 operating wells/storage tanks within or adjacent to the [refuge] have contaminated surface waters and adversely impacted the area's plant and wildlife resources in the past."[10] The CCP for the Central Arkansas NWR Complex warns that "illegal dumping of saltwater, toxins, chemicals, sludge, and drilling mud, resulting from oil and gas operations upstream of the refuge…could

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[6] M.M. Gilbert and A.D. Chalfoun, *Energy Development Affects Populations of Sagebrush Songbirds in Wyoming*, 75 J. Wildlife Management 816–824 (2011) (increasing density of oil and natural gas wells associated with decreased numbers of sparrows); S.M. Harju et al., *Thresholds and Time Lags in Effects of Energy Development on Greater Sage-Grouse Populations*, 74 J. Wildlife Management 437–448 (2011) (presence of oil and gas wells adjacent to grouse leks resulted in lower male lek attendance in 5 of 7 study areas); Jessie J. Green, G.L. Adams, and R. Adams, *Examining Community Level Variable of Fishes in Relation to Natural Gas Development*, Southeastern Fishes Council, Annual Meeting Program, November 8–9, 2012, New Orleans, Louisiana (proportional abundance of sensitive fish taxa and darters negatively correlated with gas well density).

[7] A.W. Maki, *Of Measured Risks: The Environmental Impacts of the Prudhoe Bay, Alaska Oil Field*, 11 Envtl. Toxicology and Chemistry 1691–1707 (1992); R. Stephenson, *Effects of Oil and Other Surface-Active Organic Pollutants on Aquatic Birds*, 24 Envtl. Conservation 121–129 (1997).

[8] Avner Vengosh, et al., *A Critical Review of the Risks to Water Resources From Unconventional Shale Gas Development and Hydraulic Fracturing in the United States*, 48 Envtl. Sci. Technol. 8334–8348 (2014).

[9] U.S. FWS, Catahoula National Wildlife Refuge Comprehensive Conservation Plan 78–79 (Sept. 2007).

[10] U.S. FWS, Patoka River National Wildlife Refuge and Management Area Comprehensive Conservation Plan Approval 54 (Aug. 2008).

become a problem in the future" and that "potential pollution and excessive water usage associated with drilling in nearby shale formations" pose a threat to habitats and wildlife.[11] The Texas Chenier Plain NWR Complex is at risk for oil spills from offshore production in the Gulf of Mexico.[12] FWS' continued acknowledgment of threats to refuges from oil and gas operations on private land makes its refusal to regulate these operations surprising and irresponsible.

B. Failing to Regulate Operations on Private Land That Impair Refuges Violates the NWR Organic Act and FWS Policy.

The Federal Government enjoys broad authority under the Property Clause to regulate private activity that affects Federal property.[13] The Property Clause allows the Government to regulate activities on private lands to the extent they interfere with the designated purpose of federal lands.[14] FWS properly recognized its authority to regulate non-federal oil and gas operations on federally-owned lands,[15] but declined to regulate operations occurring on private land. The National Wildlife Refuge System Administration Act[16] (NWRSAA), as amended by the National Wildlife Refuge System Improvement Act[17] (NWRSIA), and agency policy require FWS to regulate operations on private land if they would impair the mission of the National Wildlife Refuge System or the designated purposes of individual refuges.

The requirement to regulate operations on private lands that affect refuge resources has two aspects when applied to the proposed rule. First, FWS declined to regulate operations on privately owned inholdings within Refuge System boundaries. Oil and gas operations within

[11] U.S. FWS, Central Arkansas National Wildlife Refuge Complex Draft Comprehensive Conservation Plan and Environmental Assessment 86, 172 (July 2009).
[12] U.S. FWS, Texas Chenier Plain Refuge Complex Final Environmental Impact Statement, Comprehensive Conservation Plan, and Land Protection Plan 21 (May 2008).
[13] U.S. CONST. art. IV, § 3.
[14] *See, e.g.*, *Minnesota v. Block*, 660 F.2d 1240 (8th Cir. 1981) (finding that the Federal government could regulate lands owned by the State of Minnesota to protect a national forest).
[15] 80 Fed. Reg. at 77201–02.
[16] 16 U.S.C. § 668dd.
[17] National Wildlife Refuge System Improvement Act Pub. Law 105-57 (1997).

federal boundaries have the potential to damage federal lands, as the National Park Service noted in proposed revisions to its own non-federal oil and gas regulations. Operations outside the Refuge System also can have surface and subsurface effects on refuge resources. Regulating operations on both inholdings and adjacent lands is necessary to comply with the conservation mandate that Congress set for the Refuge System.

i. Federal law requires FWS to regulate oil and gas operations on private land that would harm the refuge system and its mission.

The NWRSAA, as amended by the NWRSIA, imposes a number of requirements for FWS' management of refuges. The Service must:

a) Provide for the conservation of fish, wildlife, and plants, and their habitats within the System;
b) Ensure that the biological integrity, diversity, and environmental health of the System are maintained for the benefit of present and future generations of Americans;
c) Plan and direct the continued growth of the System in a manner that is best designed to accomplish the mission of the System [and] to contribute to the conservation of the ecosystems of the United States…;
d) Ensure that the mission of the System…and the purposes of each refuge are carried out…;
e) Ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges;
f) Assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the System and the purposes of each refuge.[18]

These directives underline Congress' intent for the Refuge System: "wildlife and wildlife conservation must come first."[19] FWS must regulate oil and gas operations on private land to comply with these six mandates.

First, regulating oil and gas operations on private land is required by Sections 668dd(a)–(b)'s mandates to conserve refuge lands and wildlife and ensure the biological integrity, diversity, and health of refuges. FWS has acknowledged that operations on private land threaten

[18] 16 U.S.C. § 668dd(a)(4)(A)–(F).
[19] H.R. Rep. No. 105-106 (1997), *reprinted in* 1997 U.S.C.C.A.N. 1798-5, 1798-13.

refuges: "events occurring off refuge lands or waters may injure or destroy the biological integrity, diversity, and environmental health of a refuge."[20] Accordingly, the Service states that it "manage[s] for environmental health by preventing chemical contamination of air, water, and soils that may interfere with reproductive physiology or stimulate high rates of mutation. Such contamination includes carcinogens and other toxic substances that are released within or *outside* refuges."[21] Despite recognizing these threats, the proposed rule exposes refuges and their wildlife to damage from oil and gas operations on private land. Failure to take reasonable actions to minimize toxic spills, harmful air emissions, and other threats to refuges and refuges resources would violate FWS's conservation mandate and the agency's own policy.

Second, regulating oil and gas operations on private lands within and near refuges is required by Congress' direction to plan and direct the future growth of the Refuge System to accomplish the System's mission and conserve ecosystems.[22] Private inholdings and lands bordering refuges are often targets for future acquisition. Allowing surface and subsurface contamination of waters and destruction of important habitat would negatively impact the Service's ability to acquire property with high conservation values within and near refuge boundaries, constraining the growth of the system.

Third, regulating operations on private lands is required by FWS' duty to assist in the maintenance of adequate water quality and quantity to fulfill the mission of the Refuge System and individual refuges. Operations on inholdings or adjacent land can contaminate refuge surface waters through spills and discharges. Fracking operations on private land may contaminate groundwater. Fracking operations also use vast quantities of water, which could leave refuges

[20] U.S. FWS, National Wildlife Refuge System Biological Integrity, Diversity, and Environmental Health 601 FW 3.20 (Apr. 16, 2001).
[21] *Id.* at 601 FW 3.10(C)(2) (emphasis added).
[22] 16 U.S.C. § 668dd(a)(4)(C).

without enough water to achieve their designated purposes. The final rule must ensure that oil and gas operations on and near refuges do not compromise water quality or quantity for refuges.

Fourth, regulating operations on private lands is required by FWS' duty to conserve and protect migratory birds and waterfowl. One of FWS's goals for the Refuge System is to "develop and maintain a network of habitats for migratory birds…that is strategically distributed and carefully managed to meet important life history needs of these species across their ranges."[23] Indeed, over 200 refuges were established with the purpose of bird conservation[24] and nearly all refuges are Important Bird Areas. Refusing to regulate operations on private land that may harm refuges threatens these birds and violates the purposes of those 200 refuges individually and the Refuge System as a whole. FWS should revise the proposed rule to ensure that migratory birds within refuges are protected from oil and gas operations occurring on private land.

ii. The National Park System shares a similar mission with the Refuge System and the Park Service proposes to regulate oil and gas operations on private land.

The Refuge System's sibling, the National Park System (NPS), regulates the management of private oil and gas rights beneath NPS lands and currently is revising its regulations to better protect parks from operations commencing on private lands. The existing 9B regulations, as they are commonly called, are designed to ensure that private oil and gas operations are conducted in a manner consistent with the purposes of the Park System and each unit thereof, to "prevent or minimize damage to the environment and other resource values," and "to insure to the extent feasible that all units of the National Park System are left unimpaired for the enjoyment of future generations."[25] Like FWS' proposed rule, the regulations are not intended to result in the taking

[23] U.S. FWS, National Wildlife Refuge System Mission and Goals and Refuge Purposes, 601 FW 1.8 (July 26, 2006).
[24] *Id.* at 601 FW 1.9B.
[25] 36 C.F.R. § 9.30(a).

of a private property interest[26] and require the use of technologically feasible, least-damaging methods.[27] NPS' proposed 9B regulations delete a regulatory exemption for oil and gas operations on private land in recognition of the serious harms operations on inholdings pose to park resources. Existing and proposed 9B regulations also govern downpipe standards from some operations commencing outside NPS boundaries. FWS should follow its sister agency's example given the similar missions and authorities the agencies have in managing their respective land systems.

NPS proposes to change the 9B regulations because existing Park System regulations do not allow the agency to regulate an oil or gas well on a private inholding unless the operator requires access across federal land. The Park Service found "at least 10 instances of sites with oil spills or leaks resulting in contamination of soils and water" within park boundaries that operated without regulation.[28] For example, an operation on private land within the Big Thicket National Preserve is currently exempt from regulation, despite contaminating adjacent federally owned land with storm water runoff, and a large compressor on a private inholding in the Big South Fork National River and Recreation Area causes unabated noise that the Park Service cannot stop under existing regulations.[29] FWS' proposed regulations, which exempt oil and gas operations on inholdings from regulation, would expose wildlife refuges to similar harms. FWS should instead use the National Parks Service's proposed approach for inholdings within federal boundaries: all operators within NPS boundaries must be subject to permitting standards and requirements.[30]

Existing and proposed NPS regulations have some provisions for oil and gas operations outside federal boundaries. An operator on a site outside the boundaries of a Park unit must

[26] *Id.*
[27] 36 C.F.R. § 9.37(a)(1).
[28] General Provisions and Non-Federal Oil and Gas Rights, 80 Fed. Reg. 65572, 65575 (Oct. 26, 2015).
[29] *Id.* at 66575.
[30] *Id.* at 66575.

comply with the 9B regulations if he uses directional drilling to pass "under any land or water the surface of which is owned by the United States."[31] However, the operator does not need to comply with regulations if the Park Service Regional Director determines "that such operations pose no significant threat of damage to park resources, both surface and subsurface, resulting from surface subsidence, fracture of geological formations with resultant fresh water aquifer contamination, or natural gas escape, or the like."[32] The Park Service's proposed rule still requires operators to obtain a permit if downhole activities would cause a significant threat of damage to federally owned lands, waters, or resources within park boundaries, visitor uses or experiences, or visitor or employee health and safety.[33] Again, FWS should follow the Park Service's example and regulate oil and gas operations accessing minerals beneath refuge properties from land outside refuge boundaries. FWS should go even further than NPS' existing and proposed 9B regulations by regulating both surface and subsurface effects from operations outside refuges to the extent they harm refuge resources.

FWS must regulate at least as strenuously as NPS because they share similar missions, responsibilities, and powers for their respective land systems. The Park Service's mission is to "conserve the scenery, natural and historic objects, and wild life in the System units and to provide for [their] enjoyment…in such manner and by such means as will leave them unimpaired for future generations."[34] Similarly, FWS' mission for 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

[31] 36 C.F.R. § 9.32(e).
[32] *Id.*
[33] Proposed 36 C.F.R. § 9.70.
[34] 54 U.S.C. § 100101(a).

the benefit of present and future generations of Americans."[35] FWS' mission in managing the Refuge System is substantially similar to that of the National Parks and requires putting refuge resources and wildlife first. Nothing in either agency's Organic Act places special limitations on the regulation of private and gas operations that would restrict fulfillment of these missions.

FWS acknowledged these similarities, saying that the agency developed the proposed rule "in coordination with the NPS," that the rule "is consistent with [NPS's] proposed rule," and that "an operator working on both NWRS and NPS lands would experience little difference in [regulation]."[36] The substantial differences in regulation for operations on private land show these claims are false. FWS claimed that any variations were necessitated by "differing authorities and missions and the scope of the two agencies' non-Federal oil and gas programs." The NPS and FWS do not have different missions when it comes to managing their respective land systems. Both must conserve their charges for the benefit of future generations. Likewise, both agencies enjoy broad authority to regulate operations that would impair the missions of their land systems. The only difference in the scope of each agency's non-Federal oil and gas programs is each agency's willingness to protect its land system. By all relevant measures, the agencies are the same with regards to their non-federal oil and gas programs. In order to meet its conservation mandate and be consistent with the Park Service, FWS must regulate oil and gas operations on private land that impact refuges.

C. Our Suggested Changes to the Proposed Rule for Oil and Gas Wells on Private Lands That Would Impair Refuges and Refuge Resources.

FWS' justification for exempting operations on private land, although laudable, exposes refuges to the threats outlined above. FWS believes the proposed rule will incentivize developers

[35] 16 U.S.C. § 668dd(a)(2).
[36] 80 Fed. Reg. at 77203.

to drill off refuge land, thereby avoiding surface impacts to refuge resources.[37] This justification anticipates the rare situation where an operator could not feasibly drill off-site and comply with regulations needed to protect refuges, so the operator is forced to drill on refuge land, causing more surface impacts while being subject to the proposed rule. Although motivated by a goal to reduce impacts to refuges, FWS' exemption actually puts refuges at risk from operations on private inholdings and outside refuge boundaries and incentivizes companies to negotiate for outcomes that threaten refuges. To obtain the same, if not greater, benefits as the proposed rule, FWS should adopt the following three step rule for new and modified non-federal oil and gas operations on or near refuges.

First, FWS should require all individuals seeking to access privately-owned oil and gas interests under refuge land to access these minerals from outside refuge boundaries. Nothing restricts FWS from requiring that operators access privately owned mineral rights in a manner that minimizes impacts to refuges; indeed, the Organic Act mandates this approach to conserve refuge resources. This will ensure that the maximum number of operations are located off refuge lands, minimizing surface effects just as effectively as the proposed rule.

As part of the first step, FWS should impose those regulations on off-refuge operations that are necessary to ensure that the refuge experiences minimal harm from oil and gas operations, both individually and cumulatively. For example, a proposed drilling site located upstream of a refuge would require spill prevention and mitigation regulations that a site downstream of a refuge would not. An operation located a half mile away from a refuge containing migratory birds would likely require noise dampening regulations while an operation located five miles away may not. The specific regulations for each off-site oil and gas operation will vary depending on the proposed operation, its location, and the impacted refuge. Similarly

[37] 80 Fed. Reg. at 77204.

tailored regulations are necessary for operations near refuges that do not access oil and gas beneath refuge lands but still affect refuge resources.

Second, if off-site drilling with regulations is not feasible for the applicant, FWS should examine the feasibility of purchasing the private mineral interest. Purchasing the mineral interest avoids all impacts to refuges and ensures that private parties receive fair value for their property. Partnerships with other landowners, States, and conservation organizations may assist in acquiring private mineral interests under refuges. The Park Service sometimes uses this strategy if employing the full range of necessary regulations on private oil or gas operations would constitute a taking of private property.[38]

Third, if neither of the above options is feasible, FWS should allow operations on the refuge itself if the applicant employs technologically feasible, least-damaging methods, pursuant to the proposed rule. Placing this option last avoids concerns about effecting a taking of the private mineral interest while allowing FWS to comply with its statutory mandate to do as much as possible to conserve refuge resources. Our proposed rule, unlike FWS' proposed rule, puts wildlife and wildlife conservation first, as Congress intended.

II. The Proposed Rule Unlawfully Exempts Existing Operations From Regulation Despite Significant Impacts Posed by These Operations and Practicable Means to Reduce Those Impacts.

FWS also proposes to exempt existing oil and gas operations on federally-owned refuge lands from the updated regulations.[39] This exemption applies to existing operations with and without FWS permits.[40] Approximately 4,000 wells on refuges, both active and inactive, are not subject to permits at this time.[41] FWS believes that regulation of these operations is not necessary

[38] 36 C.F.R. § 9.37(a)(3)
[39] Proposed 50 C.F.R. §§ 29.43–29.44.
[40] *Id.*
[41] DEIS at 1-6.

because existing state and federal regulations will be sufficient to protect refuges from existing operations.[42] This strategy improperly delegates FWS' duty to protect refuge resources to other State and Federal agencies. Furthermore, enforcement of existing State and Federal laws is insufficient to meet the standards for refuge protection under the NWR Organic Act. Although it is not always possible to regulate existing oil and gas wells exactly the same way as new operations, FWS should impose reasonable regulations that will protect refuge resources from continuing damage.

FWS mistakenly states that the administrative and operational costs of regulation on the Service and operators could be disproportionate to the environmental benefits of regulating existing operations.[43] The environmental benefits of bringing existing operations with outdated technology into compliance are significant. Forcing operators to cover open pits will reduce mortality of birds and other wildlife. Establishing noise controls or buffers will enhance the quality of habitat, especially for colonial nesting birds whose populations can be impacted by noise near nesting areas. Congress' conservation mandate for the Refuge System requires regulating existing operations on federally-owned land within refuges.

A. Threats to Refuges From Existing Operations.

The threats to refuges from existing operations are similar to those threats from new operations outlined in Section I.A. above. However, the magnitude of these impacts is likely more severe because these operations occur on refuge lands. Any spills would directly impact refuge resources. For example, existing oil and gas operations on the Catahoula NWR are "often associated with oil spills; dust/erosion/hydrological alteration/loss of habitat from oil field roads; loss of habitat; erosion on pipeline rights-of-way; and air, water, soil, sediment, and biota

[42] 80 Fed. Reg. at 77204.
[43] 80 Fed. Reg. at 77204.

pollution."[44] Operations with open pits on refuges threaten the migratory birds and waterfowl that many refuges were created to protect.

FWS believes companies will do the right thing because protecting refuges is in their best interest.[45] The opposite is more likely to be true. Companies have an incentive to operate under the fewest regulations they can to maximize the return on their operations. FWS must assert its authority to protect refuges and ensure that wildlife come first in refuges.

B. Other State and Federal Laws Are Insufficient to Meet FWS' Conservation Mandate For NWRs.

FWS incorrectly believes that implementation of existing State and Federal laws will adequately protect refuges from existing oil and gas operations.[46] If existing laws adequately protected refuges the proposed rule would not be necessary. Instead, existing Federal and State laws have gaps that allow existing oil and gas operations to threaten wildlife and wildlife habitat as well as compromise the mission of individual refuges and the Refuge System as a whole. Moreover, other State and Federal laws applicable to oil and gas operations do not set standards based on wildlife conservation and are insufficient on their own to protect refuges and refuge resources.

Existing federal air pollution laws are insufficient to comply with the Organic Act's conservation mandate. For example, the New Source Performance Standards (NSPS) under the Clean Air Act apply only to operations that were constructed or modified after August 2011.[47] All existing oil and gas operations on refuges constructed before 2011 would not have to comply with the NSPS' restrictions. If existing oil and gas operations are covered by NSPS regulations, they may emit up to six tons per year of volatile organic compounds from storage pools without

[44] Catahoula CCP at 53.
[45] *See, e.g.*, DEIS at ix.
[46] 80 Fed. Reg. at 77204.
[47] 40 C.F.R. § 60.5365.

regulation.[48] This amount of pollution allowed under the NSPS could harm wildlife in refuges or interfere with wildlife-dependent recreation. More generally, the Clean Air Act rarely distinguishes between the quality of the environment receiving pollution. The Prevention of Significant Deterioration (PSD) program provides for extra environmental standards in Class I areas, but only twenty-one NWRs fall into that more protective designation.[49] Relying solely on Clean Air Act requirements to protect refuges from existing oil and gas operations does not meet the Organic Act's conservation mandate.

The Clean Water Act is also insufficient to meet the NWR Organic Act's conservation mandate. The NPDES stormwater permitting program, which limits runoff of pollutants from industrial sites, exempts many oil and gas drilling facilities from any regulation.[50] A stormwater permit is necessary only when the oil or gas facility discharges a "reportable quantity" of oil.[51] A reportable quantity is that amount of pollution that violates a water quality standard, causes a film, sheen, or discoloration of surface water, or causes a sludge or emulsion to be deposited beneath the surface of the water or on the shoreline.[52] Using this standard as the trigger for regulation precludes oversight until damage to a refuge has occurred, instead of preventing that damage in the first place. The NPDES stormwater permitting program for oil and gas operations also ignores the harmful effects that low level discharges of oil and other pollutants can have on ecosystems. Relying on the Clean Water Act to protect refuges from existing oil and gas operations will lead to continued contamination on refuges that violates the Organic Act.

[48] 40 C.F.R. § 60.5365(e).
[49] DEIS at 3-6.
[50] 40 C.F.R. § 122.26(a)(2)(ii).
[51] 40 C.F.R. § 122.26(c)(1)(iii).
[52] 40 C.F.R. § 110.3.

As FWS recognized in the proposed rule, few state regulations on oil and gas operations address "protections necessary for wildlife and its habitat."[53] Only 33% of states' oil and gas regulations meet the State Review of Oil and Natural Gas Environmental Regulations' guidelines for wildlife and environmental impacts.[54] Twenty-eight states allow the use of open pits that pose risks to wildlife.[55] In its DEIS, FWS noted that the proposed "requirements pertaining to non-Federal oil and gas development in refuges would often be complementary to *and beyond* State requirements."[56] If FWS believes it is necessary to go beyond State law requirements for new operations that will use state of the art technology, then it is certainly necessary to go beyond State regulations for existing oil and gas wells that likely use outdated and potentially hazardous methods.

Relying on a patchwork of state laws violates FWS' duty to conserve the Refuge System as a whole. As FWS acknowledges, state laws and regulations vary considerably, "particularly in addressing impacts to surface owners and wildlife."[57] FWS plans to assimilate those parts of each State's laws that do not conflict with the proposed regulation.[58] Applying the proposed rule in states with less protective oil and gas operations would hold back achievement of system-wide missions, such as providing migratory pathways for birds. Congress created many refuges along migration corridors, such as the Mississippi River, to give migratory birds resting stops and habitat along their travels. Poor oil and gas regulation at one stop on a migration corridor puts the entire system of refuges along that corridor at risk. Strong regulations on existing operations that

[53] 80 Fed. Reg. at 77205.
[54] DEIS Appendix B. U.S. FWS, *An Assessment of State Oil and Gas Regulations* B-20 (Aug 2013).
[55] DEIS Appendix B-14.
[56] DEIS at 1-21 (emphasis added).
[57] DEIS at 4-6.
[58] 80 Fed. Reg. at 77204.

apply throughout the U.S. are necessary to minimize impacts of existing oil and gas operations on wildlife refuges and the wildlife that depend upon them.

C. The NPS Recognized That Existing Operations Harm National Parks and Proposed Rules to Regulate Existing Operations.

The Park Service has acknowledged that grandfathered operations can cause problems on Park lands and interfere with the management goals set by Congress. Currently, 45% of active wells within National Park boundaries are exempt from regulation as existing operations. These existing operations have caused "20 instances of hydrocarbon spills and leaks, 3 instances of gas venting, 2 instances of notable noise issues, and 3 instances of notable hydrocarbon odors emanating from the well site."[59] In response to the threats posed by existing operations, NPS's proposed rule on non-federal oil and gas management requires previously exempt operators on federally-owned Park lands to obtain an Operations Permit to continue drilling.[60]

FWS should regulate existing operations on federal lands like the NPS has done. As noted in Section I.B.ii., the NPS and FWS share similar missions for managing their respective land systems. NPS' response to the threats has been further regulation. In contrast, FWS' response to ongoing threats posed by existing operations is to fall back on existing regulations, which the agency acknowledges are generally not protective of wildlife and wildlife habitat.

D. Our Suggested Changes to FWS' Proposed Rule for Existing Oil and Gas Operations in Refuges.

Although it is impossible to regulate the siting of existing operations because wells have already been drilled, FWS can still ensure that remaining impacts are minimized to meet the proposed rule's least damaging, technologically feasible standard. Proposed Park Service regulations on existing operations provide a good template for the rules FWS should adopt to

[59] 80 Fed. Reg. at 65577.
[60] 80 Fed. Reg. at 65577.

protect refuges.[61] FWS must ensure that existing operations minimize spills, noise, air emissions, flaring, stormwater runoff, fugitive dust, and artificial dust. Existing operations must cover open-topped tanks or ponds containing oil or drilling wastes and byproducts to prevent mortality of birds and other wildlife. Although not every operation may be able to fully meet modern standards, FWS should ensure that existing operations meet the proposed rule's technologically feasible, least damaging standard for oil and gas operations.

III. Comments on the Draft Environmental Impact Statement.

NEPA is "our basic national charter for the protection for the protection of the environment."[62] The Act has two purposes: to ensure that federal agencies carefully consider the environmental consequences of their actions and to guarantee that the relevant decisionmaking information is available to the public.[63] As the U.S. Supreme Court has explained, "by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[64]

FWS correctly analyzed regulating new and modified operations on privately-owned land and regulating existing operations on federal land, but failed to choose this rule as its preferred alternative. The DEIS carried three alternatives forward for detailed study. Alternative A, the no-action alternative, would continue regulating private oil and gas operations under existing regulations. Alternative B is the proposed rule. Alternative C, the environmentally preferred

[61] *See* Proposed 36 C.F.R. §§ 9.50–9.53.
[62] 40 C.F.R. § 1500.1(a).
[63] *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Jewell*, 965 F.Supp.2d 67, 74 (D.D.C. 2013).
[64] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

alternative, would regulate new and modified oil and gas operations on private land inside and outside refuge boundaries, as well as regulate existing operations on refuges.[65]

FWS should make Alternative C its preferred alternative, with some modifications. As explained above, Alternative B, the proposed rule, violates the NWRSAA by failing to protect refuges from existing oil and gas operations on federal land and new oil and gas operations on private land. FWS states that Alternative B is preferable mainly because Alternative C, which would regulate existing operations and new operations on private land, would lead to instances of operators locating new wells on refuge lands. FWS should insist that all operators drill off the refuge if feasible. Additionally, Alternative C provides that the Service would waive the regulations if the agency did not "reasonably expect that operational requirements are needed" to protect refuges from operations on inholdings.[66] Instead, operators should be required to get a permit for all operations on inholdings, unless the operator can show that her operation will not cause more than minimal impacts, both individually and cumulatively, on refuge resources.

The DEIS does not contain enough information to support FWS' conclusion that the administrative and operational costs of regulating existing operations within refuges outweigh the environmental benefit. FWS justifies its exemption for existing operations by claiming that most negative environmental impacts from existing operations have already happened, so applying the proposed regulations would not produce many environmental benefits.[67] The EIS does not contain information on what the impacts from existing operations are or whether those impacts are difficult to avoid. Without this information, FWS' conclusion that the costs of regulation outweigh the benefits to refuges is conclusory.

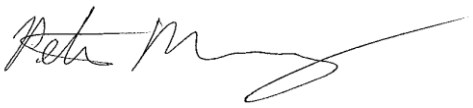
[65] DEIS at iii–v.
[66] DEIS at 2-13.
[67] 80 Fed. Reg. at 77204.

The DEIS also fails to acknowledge how individual refuges have been impacted by oil and gas operations on private land and operations on federal land within refuges. By failing to include this information, FWS has not taken a hard look at the environmental effects of its decision to exempt new oil and gas operations on private land and existing operations on federal land from regulation. FWS should include relevant information from CCPs for refuges, such as the Catahoula and Patoka River NWR CCPs referenced above, that experience ongoing harms from oil and gas operations within and outside their boundaries.

CONCLUSION

Most of the proposed rule will protect migratory birds, waterfowl, and other wildlife that call the National Wildlife Refuge System home. But FWS must do more to put wildlife and wildlife conservation first and conserve refuges for current and future generations of Americans. The proposed rule would exempt new and modified oil and gas operations on private land, both within and outside refuge boundaries, from all regulation. Likewise, existing operations within refuge boundaries would be exempt. FWS should follow the example of its sister agency the National Park Service and regulate new oil and gas operations on inholdings within refuge boundaries and lands outside refuge boundaries and existing oil and gas operations. In order to meet the conservation mandate set by Congress, FWS must go further than NPS' proposed rules and regulate all operations on land outside refuge boundaries that have more than a minimal surface or subsurface effect on refuge resources. Doing any less violates FWS' responsibilities under the NWR Organic Act and elevates private energy extraction over conservation, recreation, and the other priority uses Congress envisioned for this public resource.

Sincerely,



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