



Testimony

Of

Dan Naatz, Vice President of Federal Resources & Regulatory Affairs
The Independent Petroleum Association of America

To

Committee on Natural Resources

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The Independent Petroleum Association of America (IPAA) represents thousands of independent oil and natural gas explorers and producers, as well as the service and supply industries that support their efforts. Independent producers develop 95 percent of American oil and natural gas wells, produce 54 percent of American oil and produce 85 percent of American natural gas. The average independent has been in business for 26 years and employs 12 full-time and three part-time employees. IPAA's members are truly the face of small business in the oil and natural gas industry and support more than 2 million direct jobs in the United States.

This testimony is in regards to an advanced notice of proposed rulemaking (ANOPR) on Non-Federal Oil and Gas Development within the National Wildlife Refuge System (NWRFS) that the United States Fish and Wildlife Service (FWS) released in February. IPAA is concerned with the nature of this advanced notice of proposed rulemaking and we submitted extensive comments that describe the challenges with the ANOPR in late April. Unfortunately, this rule is similar to many other rules that we have seen come from The Obama Administration; it's a solution in search of a problem. Ultimately, we believe the imposition of additional regulations on non-federal oil and gas development within the National Wildlife Refuge System is unnecessary, has not been justified by FWS, is constrained by the bounds on FWS' legal authority, and will only result in duplicative layers of regulatory oversight.¹ We requested that FWS refrain from future rulemaking in this regard in our official comments.

After doing a thorough analysis of the intent and scope of the rule, we believe this rulemaking is premature. As we mentioned in the introduction, the Obama Administration has consistently sought to regulate areas that are already regulated. Another example of duplicative regulation is the Bureau of Land Management's hydraulic fracturing and well stimulation rule that attempts to solve an issue of groundwater contamination that simply does not exist. Administration officials, academics, and experts in the field have all testified that hydraulic fracturing, which has been done over 2 million times, does not contaminate groundwater.

In regards to this particular advanced notice, IPAA has many questions regarding FWS' authority to regulate development within refuge boundaries. Mineral owners have the legal right to explore for and extract oil and gas from their mineral estates, a fact FWS recognizes.² Mineral rights represent a dominant estate, taking precedence over other rights associated with property, including surface rights.³ As a result, FWS is limited in its authority to inhibit operations, including horizontal drilling from

¹ Domestic oil and gas production from lands within the National Wildlife Refuge System is also consistent with federal energy policy, as set forth in the Comprehensive National Energy Strategy announced by the United States Department of Energy in April of 1998, the Energy Policy and Conservation Act, 42 U.S.C. § 6201, et seq., the National Energy Policy, Executive Order No. 13212, 66 Fed. Reg. 28,357 (May 18, 2001), and the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594.

² See, e.g., Nat'l Wildlife Refuge Sys., Oil & Gas FAQs, available at: <http://www.fws.gov/refuges/oil-and-gas/faqs.html>.

³ See, e.g., *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926-27 (Colo. 1997); *DuLaney v. Okla. State Dep't of Health*, 868 P.2d 676, 680 (Okla. 1993); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013).



private lands, to access minerals under a refuge, and we would expect FWS to adhere to the legal bounds of its authority.⁴

One of our biggest concerns is that the lack of jurisdiction that we believe the Service may have with this rulemaking. FWS has not identified a specific statutory grant of authority to issue this ANOPR.⁵ In a 2003 report, the Government Accountability Office (“GAO”) recommended that FWS work with the Department of the Interior’s Office of the Solicitor to seek from Congress any necessary additional authority over outstanding and reserved mineral rights.⁶ In response, the Department of the Interior professed its belief that it had the requisite authority to oversee oil and gas development. As late as 2007, however, GAO disagreed:

[W]e do not believe that DOI has adequate information on which to base this claim. In particular, *FWS . . . has yet to publicly clarify the extent of its current authority over private mineral rights.* We continue to believe that such information is necessary for DOI to adequately inform the Congress regarding the need for additional authority. Moreover, *we believe it is for Congress, not DOI, to weigh the needs of the refuge lands and the interests of mineral owners and, ultimately, to determine what oversight authority would be appropriate.*⁷

Since 2007, FWS has not publicly clarified its authority in this regard. Again, for a rule that we believe will provide zero environmental benefit, we believe the first step from the FWS should be clarification of their authority before they proceed with a formal rulemaking.

Overregulation without environmental benefit undoubtedly steers investment away from those properties. We have seen similar occurrences happen with overregulation of federal minerals. By having application for permit to drill (APD) times that nearly triple⁸ those of state processing applications, investment has been driven off of federal minerals. An EIA report shows this decline.⁹ In the same

⁴ Nor is the scope of FWS’ authority uniform across refuge lands. On each individual refuge, the issue of mineral ownership must be addressed on a case-by-case basis since the law of mineral rights varies among states, the government’s land acquisition contracts contain different mineral rights reservations, and contract interpretation may depend on the legal rules in place at the time of the contract. *See, e.g., Petro-Hunt, LLC v. United States*, 365 F.3d 385, 393 (5th Cir. 2004) (concerning private parties’ efforts to quiet title to mineral rights in federally-owned land). *See also* discussion *infra* p. 4 and notes 13-14. With so many variables, any regulatory regime would be confusing, lacking in uniform applicability, and potentially subject to perpetual legal challenges.

⁵ In the Federal Register notice regarding this proposed rulemaking, FWS only points generally to the Property and Commerce Clauses of the United States Constitution and the National Wildlife Refuge System Administration Act of 1966, as amended, for its authority to promulgate these rules. 79 Fed. Reg. 10,080, 10,081 (Feb. 24, 2014).

⁶ GAO, *Nat’l Wildlife Refuges: Opportunities to Improve the Mgmt. & Oversight of Oil & Gas Activities on Fed. Lands*, GAO-03-517 (Wash., D.C.: Aug. 28, 2003).

⁷ GAO, *U.S. Fish & Wildlife Serv.: Opportunities Remain to Improve Oversight & Mgmt. of Oil & Gas Activities on Nat’l Wildlife Refuges*, GAO-07-829R (Wash., D.C.: June 29, 2007) (emphasis added).

⁸ http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/statistics/apd_chart.html

⁹ Link from E+C Committee Website:

<http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=http%3A%2F%2Fenergy.com>



respect, FWS also fails to provide a legitimate purpose and need for additional regulation in regards to non-federal minerals on National Wildlife Refuge Lands. In particular, there is insufficient data to support the necessity of a rulemaking at this time. While FWS has begun to collect information on “Oil-Related Leaks and Spills on National Wildlife Refuges,”¹⁰ that data set is limited, and the information reflects only the identity of the substance leaked and the quantity discharged. It does not conclude that such spills have had an adverse impact to the refuges or that operators categorically fail to address and remediate spills. To the contrary, FWS personnel have indicated they are working positively with operators.¹¹ Combined with this data collection, in April 2012, FWS introduced a management program handbook: “Management of Oil and Gas Activities on National Wildlife Refuge System Lands.” Insufficient time has passed to allow either FWS or oil and gas operators to determine the efficacy of that tool. A rulemaking premised on these same un-tested management guidelines is premature. We urge the FWS to complete an analysis of gaps that may exist in their current practices before moving forward with another unnecessary and costly rulemaking to the American taxpayers.

While we understand that FWS appears to believe that the current regulatory structure leads to “an uncertain and inconsistent regulatory environment for oil and gas operators on refuges,”¹² our members do not share this concern. To the contrary, as discussed further below, the existing regulatory structure provides operators and mineral estate owners with the flexibility needed to develop mineral interests consistent with their legal rights.

Much of what FWS contemplates in this rulemaking seems to suggest that there are insufficient regulations in place to protect refuge resources. We believe that sufficient regulations already exist to protect Refuge resources.

Federal regulations already apply to development of non-federal minerals (*see, e.g.*, 40 C.F.R. 60, 61, 63), as do state and tribal regulations. FWS suggests that additional regulation is necessary because state oil and gas commissions have a different mission, suggesting that they do not adequately address environmental concerns. This contention is incorrect. In every state in which FWS has identified active and inactive wells,¹³ oil and gas commissions have adopted regulations that protect the environment through comprehensive drilling, development, and production standards; setbacks; ground water protection measures; financial assurance requirements; spill reporting; and reclamation requirements.¹⁴

Unlike other federal lands programs, the National Wildlife Refuge System is unique in terms of how the United States came to acquire the land. Each Refuge carries a different acquisition history, which means that the federal government’s interest in, and administration of, each Refuge must vary. For example,

ommerce.house.gov%2Fsites%2FrepUBLICans.energycommerce.house.gov%2Ffiles%2F20140410CRS-US-crude-oil-natural-gas-production-federal-non-federal-areas.pdf&ei=P7VzU-LIG4_LsASD9oDgBA&usg=AFQjCNGCL4GQlkDec1ymQxNi7FkeO0HpOw&sig2=6uUDn8sbVaoF3ApJUAYwnw

¹⁰ See U.S. Fish & Wildlife Serv., “Oil-Related Leaks & Spills on Nat’l Wildlife Refuges” provided to the Committee on Natural Resources (undated).

¹¹ *Id.* at 1.

¹² 79 Fed. Reg. at 10,081.

¹³ See discussion of this data, *infra* p. 5.

¹⁴ See, e.g., La. Admin. Code tit. 43: IX, XI, XIII, XVIII, XIX (2013); Okla. Admin. Code §§ 165:10-1-1 (2013), *et seq.*



the Lower Hatchie National Wildlife Refuge in Tennessee was acquired by deeded conveyance from a private owner and subject to existing easements for pipelines, public highways and roads at the time of the government's acquisition.¹⁵ Nearby Reelfoot National Wildlife Refuge, conversely, is comprised of 2,300 acres that FWS owns outright and 7,860 acres that the State of Tennessee leases to the United States.¹⁶ In addition to differences in ownership conditions, certain Refuges are subject to unique management mandates; the National Wildlife Refuge System in Alaska, for instance, is subject to a unique statutory regime under the Alaska Native Claims Settlement Act¹⁷ and the Alaska National Interest Lands Conservation Act of 1980.¹⁸ Various refuge lands come with different easement and access exceptions, different mineral extraction rights, and different obligations to facilitate oil and gas development. FWS personnel must also engage in differing levels of intergovernmental cooperation from refuge to refuge.

Each Refuge is further subject to a different conservation plan. In 1997, Congress enacted the National Wildlife Refuge System Improvement Act,¹⁹ amending the Refuge Act and mandating that FWS develop comprehensive conservation plans ("CCP") for each national wildlife refuge.²⁰ Adoption of a CCP involves a deliberation process that includes a public comment period. Congress directed FWS to manage each refuge in a manner consistent with the completed CCP and to revise the plan at any time if conditions that affect the Refuge are deemed to have changed significantly.²¹ The development of the CCP often includes a public NEPA process resulting in the preparation of an Environmental Assessment. For several refuges, the CCP also requires adoption of an additional Management Plan. These extensive proceedings for developing refuge-specific CCPs underscores that a "one-size fits all" approach to oil and gas regulation is incompatible with the needs of any specific refuge.

Finally, FWS' own data refutes the conclusion that oil and gas production has impacted refuges universally. The National Wildlife Refuge System includes more than 560 refuges, 38 wetland management districts and other protected areas encompassing 150 million acres of land and water from the Caribbean to the remote Pacific. There is at least one national wildlife refuge in every state and territory. Yet FWS' Fact Sheet on "Nonfederal Oil and Gas Development on National Wildlife Refuge System Lands" recognizes that half of all active wells are found on just *five refuges*. Information FWS compiled²² shows that despite the fact that the System contains over 600 protected areas, only 46 have known and confirmed active wells, and 23 of those have five or fewer active wells.

IPAA's member companies are committed to finding creative solutions to problems that exist within the scope of oil and natural gas development, but we believe this advance notice falls short of providing real

¹⁵ See *Burlison v. United States*, 533 F.3d 419 (6th Cir. 2008).

¹⁶ See *Bunch v. Hodel*, 793 F.2d 129 (6th Cir. 1986).

¹⁷ Pub. L. No. 92-203, 85 Stat. 688 (1971).

¹⁸ Pub. L. No. 96-487, 94 Stat. 2371 (1980).

¹⁹ Pub. L. No. 105-57, 111 Stat. 1252-1260 (codified as amended at 16 U.S.C. §§ 668dd-668ee).

²⁰ 16 U.S.C. § 668dd(e)(1)(A).

²¹ 16 U.S.C. § 668dd(e)(1)(E).

²² FWS provided this information to the Committee on Natural Resources with a disclaimer noting limitations on the source of the information, including an explanation that "[e]rrors are inherent in the collection of data on thousands of wells."



environmental benefit. IPAA's member companies are committed to being smart, responsible environmental stewards of the land, but only when the regulation solves a gap in regulation.

Thank you for the opportunity to participate in today's hearing.

The following is a summary of those cases in which the Independent Petroleum Association of America (IPAA) has been a party that involved the Department of the Interior over the last five years.

1. **Defenders of Wildlife, et al. v. Jewell, et al.** (6/19/2013)
 - a. Statute: Endangered Species Act (ESA)
 - b. Action: Legal proceeding brought by environmental organizations challenging the decision of the U.S. Department of the Interior (DOI) and the U.S. Fish and Wildlife Service (“Service”) to withdraw a proposal to list the dunes sagebrush lizard) as an endangered species pursuant to the ESA.
 - c. IPAA moved to intervene in the case.

2. **Center for Sustainable Economy v. Sally Jewell, et al.** (10/25/2012)
 - a. Statute: Outer Continental Shelf Lands Act (OCSLA)
 - b. Action: Petition for review of the August 27, 2012 decision of the Secretary of the Interior, acting through the Bureau of Ocean Energy Management ("BOEM"), to approve the Proposed Final Outer Continental Shelf Oil and Gas Leasing Program for 2012-2017 and the Final Programmatic Environmental Impact Statement relied upon to justify that Program.
 - c. IPAA moved to intervene in the case.

3. **Oceana, et al. v. Bureau of Ocean Energy Management, et al.** (6/18/2012)
 - a. Statute: National Environmental Policy Act (NEPA), ESA, Administrative Procedure Act (APA)
 - b. Action: Challenge brought by environmental organizations, against DOI, related to Lease Sale 216/222 in the Central Gulf in the aftermath of Macondo. Petitioners alleged BOEM did not follow NEPA by relying on a Supplemental Environmental Impact Statement (SEIS) that failed to adequately consider the impacts of the Macondo spill. Petitioners also raised claims under OCSLA, ESA and APA.
 - c. IPAA moved to intervene in the case.

4. **Oceana, et al. v. Bureau of Ocean Energy Management, et al.** (12/13/2011)
 - a. Statute: NEPA, OCSLA
 - b. Action: Challenge brought by environmental organizations, against DOI, related to Lease Sale 218 in the Central Gulf in the aftermath of Macondo. Petitioners alleged BOEM did not follow NEPA by relying on a SEIS that failed to adequately consider the impacts of the Macondo spill.
 - c. IPAA moved to intervene in the case.

5. **Center for Biological Diversity v. Salazar, et al.** (10/22/2010)
 - a. Statute: NEPA, OCSLA
 - b. Actions: Challenge by environmental groups against DOI's decision to lift the Secretary's July 12, 2010 suspension on deep water drilling. Complaint alleged that DOI failed to adequately consider NEPA requirements.
 - c. IPAA moved to intervene.

6. **Wildearth Guardians v. Salazar** (8/31/2010)
 - a. Statute: ESA
 - b. Action: Challenge brought by environmental groups against DOI's determination that the Lesser Prairie-Chicken, warrants listing under the ESA but that the immediate proposal and timely promulgation of a final rule listing the species "is precluded by pending proposals" to determine whether any higher priority species is an endangered or threatened species and that the Secretary is making "expeditious progress" in adding and removing species from the endangered or threatened species list.
 - c. IPAA moved to intervene in the case.

7. **Natural Resources Defense Council Inc., et al. v. U.S. Dept. of Interior** (6/30/2010)
 - a. Statute: NEPA
 - b. Action: Environmental organizations challenged BOEM's July 1, 2004 decision to issue a Finding of No Significant Impact for geological and geophysical exploration for mineral resources in the Gulf of Mexico Outer Continental Shelf ("OCS"). Plaintiffs are challenging BOEM's conclusion that no Environmental Impact Statement ("EIS") is required to assess the impact of such exploration activities under NEPA among other issues.
 - c. IPAA moved to intervene in the case.

8. **Hornbeck Offshore Services, et al. v. Salazar, et al.** (6/24/2010)
 - a. Statute: APA, OCSLA
 - b. Action: The complaint alleged that the May Directive and the Notice to Lessees were not adequately explained and justified in violation of the APA. District court sided with industry, issuing an injunction that prohibited the moratorium for going into effect. Defendants, Sec. Ken Salazar; the United States Department of the Interior; Administrator "Bob" Abbey; and the Bureau of Ocean Energy Management, Regulation, and Enforcement, appealed to the United States Court of Appeals for the Fifth Circuit from the decision of the U.S. District Court for the Eastern District of Louisiana that granted plaintiffs (i.e. industry's) request for injunctive relief against government's moratorium on drilling of new deep water wells in the Gulf of Mexico.

- c. IPAA filed an amicus brief in support of the injunction against the Administration's moratorium.
9. **Center for Biological Diversity v. Ken Salazar, et al.** (6/01/2010)
- a. Statute: NEPA, OCSLA, APA
 - b. Action: Environmental petitions challenged DOI decision to approve Initial Exploration Plan Control No. 9503 (OCS-G 27099, Block 23, Eugene Island Area). Environmental groups alleged that DOI failed to adequately consider the potential impacts of the decision on the sensitive Gulf of Mexico ecosystem and wildlife. Additionally, environmentalists argued they had been deprived of procedural rights affording public participation in decision-making.
 - c. IPAA filed a motion to intervene in the case.
10. **Gulf Restoration Network, Inc., et al v. Ken Salazar, et al.** (5/18/2010)
- a. Statute: National Environmental Policy Act, Outer Continental Shelf Lands Act, Administrative Procedure Act
 - b. Action: Case involves environmental organizations' challenge to Notice to Lessees issued by the DOI. Environmental petitioners argue that DOI violated the Outer Continental Shelf Leasing Act OCSLA by issuing a Notice to Lessees without requiring the company (BP) to conduct blowout-out and worst case oil spill response analysis; NEPA (failure to undertake an EIS); and the APA (failure to allow notice and comment on Notice to Lessees).
 - c. IPAA filed a motion to intervene.
11. **Defenders of Wildlife v. Minerals Management Service, et al.** (5/17/2010)
- a. Statute: NEPA, APA, OCSLA
 - b. Action: Environmental organization action against DOI alleging that DOI by issuing categorical exclusions under NEPA related to exploratory drilling operations in the immediate after of Macondo. Environmental petitioners argued that and Environmental Impact Statement is warranted.
 - c. IPAA moved to intervene in this case.