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Citizens' Advisory Commission on Federal Areas

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December 28, 2015

Via Federal eRulemaking Portal

Edward O. Kassman, Jr.
Geological Resources Division
National Park Service
P.O. Box 25287
Denver, CO 80225

Re: RIN 1024-AD78, National Park Service Proposed Rule on Non-Federal Oil and Gas Rights

Mr. Kassman,

The Citizens' Advisory Commission on Federal Areas (CACFA; Commission) appreciates this opportunity to comment on the proposed amendments to existing regulations at 36 C.F.R. 9B affecting non-federal oil and gas operations located within National Park Service (NPS) units. Concerns identified in the Commission's February 28, 2011, letter to Sandy Hamilton regarding the December 2010 Notice of Intent to prepare a programmatic environmental impact statement were not addressed in the proposed rule and are incorporated here by reference.

The Commission again requests the existing exemption for units of the National Park System in Alaska remain in effect. A System-wide rulemaking effort cannot efficiently or comprehensive capture the unique Alaska context, particularly considering the large number of necessary state-specific deviations pursuant to the Alaska National Interest Lands Conservation Act (ANILCA). The proposed rule is actually a good example of this challenge, as a number of the proposed amendments and existing provisions implicate but fail to accommodate specific direction in ANILCA and Congressional intent for Alaska. The Alaska exemption was and is the appropriate solution, as regulations implementing ANILCA provide the NPS with ample authority to regulate operations consistent with the suite of legal obligations associated with Alaska parks.

In the alternative, the Commission strongly advises that rulemaking with respect to Alaska units be deferred pending the outcome of the appeal in *Sturgeon v. Frost*, currently before the U.S. Supreme Court. If the 2014 9th Circuit decision cited on 80 FED. REG. 65572, 65573 (Oct. 26, 2015) is overturned, remanded and/or substantively altered, the entire proposed rule will likely need to be revised and reissued for public comment. Exempting Alaska from this effort, however, will allow the rulemaking to proceed regardless of the outcome of the appeal. Further, should additional regulations governing oil and gas operations in Alaska be warranted, those provisions would be significantly more effective as a component of the NPS' Alaska-specific regulations, enhancing both regulatory compliance and clarity for property owners and lessees.

Should the NPS instead opt to proceed with the rulemaking, as proposed, the Commission offers the following comments for consideration.

As provided in 36 C.F.R. §9.30(a), existing regulations only apply to "*activities within any unit of the National Park System in the exercise of rights to oil and gas not owned by the United States* ***where access is on, across or through federally owned or controlled lands or waters***" and only "*impose reasonable regulations on* ***activities which involve and affect federally-owned lands***" (emphasis added). The possibility of expanding application of the regulations through amendment was implied in the Advance Notice of Proposed Rulemaking, but only as a matter of revisiting the "*exercise of the NPS's discretion*." 74 FED. REG. 61596, 61598 (Nov. 25, 2009). No support was provided, or has been provided in the proposed rule, for the NPS' authority to regulate activities solely occurring on private lands, such as those "*under privately owned lands just inside the boundary of a park unit, and for which access to those lands is solely maintained without crossing park owned or administered lands*," *id.* at 61598, or for certain operations located outside park boundaries using directional drilling techniques.

The extent of the proposed rule is also confused by the fact the NPS purports to retain the existing clarification in the Part 9B regulations that it only relates to "*activities that involve and affect federally-owned lands*." 80 FED. REG. at 65574, quoting 36 C.F.R. §9.30(a). However, the proposed amendment at §9.30(c) eliminates the requirement an activity "*involve*" federal lands and instead provides that the regulations apply to "*operations affecting federally owned or administered lands, waters, and resources of NPS units, visitor uses and experiences, and visitor and employee health and safety*" (the Commission assumes "*and*" means "*or*" where appropriate, as provided elsewhere in the proposed rule). Actual use of federal lands provided a clear trigger in the existing 9B regulations for the NPS to lawfully assert or not assert jurisdiction. The proposed rule and associated documents fail to provide any support for expanding the regulations to govern operations which do not or may not involve using federally owned/managed resources.

Quotes from the 1916 NPS Organic Act on 80 FED. REG. at 65573 reference the authority to "*regulate the use of the National Park System*" and to promulgate regulations "*necessary or proper for the use and management of System units*." Although the NPS argues this "*includes the authority to regulate the exercise of non-federal oil and gas rights within park boundaries*," the statute only appears to support such authority if it relates to use of the unit itself. This would apply, then, only to activities requiring the use of park lands, such as activities governed by the existing 9B regulations. The statute does not support any regulation of activities solely occurring on private land, regardless of whether impacts to the park unit are possible or even likely, as the non-impairment standard can only be applied where the NPS has jurisdiction to regulate.

A cursory review of the cited judicial opinions also fails to confirm any authority to manage activities solely occurring on private land within or adjacent to park units. For example, the 5th Circuit opinion in *Dunn-McCampbell Royalty Interest v. National Park Service*, cited on 80 FED. REG. at 65573, relates to the right of ingress and egress for subsurface estate owners. In fact, although the NPS refers to this case as recognizing the "*authority to promulgate the 9B regulations . . . as a valid exercise of NPS's Organic Act*," *id.*, the 5th Circuit specifically noted "[*t*]*hose regulations are not at issue here*," *Dunn McCampbell*, 630 F.3d 431, 434 (5th Cir. 2011). The court merely observed the area at issue was to be administered consistent with the NPS Organic Act, except as otherwise provided for under its enabling statute, *see id.* at 433, and the opinion only examines the enabling statute's exceptions to the Organic Act. The court does not review authorities under the Organic Act itself, and explicitly not regarding 9B regulations. The court does not even address whether the area-specific regulations which actually are at issue are a proper exercise of the NPS' authority under the Organic Act. *See id.* at 436 FN9.

Alaskans are very familiar with *U.S. v. Vogler*, 859 F.2d 638 (9th Cir. 1988), cited on 80 FED REG. at 65573 as supporting the NPS' "*authority to regulate non-federal interests within units of the National Park System*." As with the above case, this case is also an inholder access dispute, specifically regarding the non-permitted transport of large off-road vehicles via park trails in the Yukon-Charley Rivers National Preserve to be used in developing mining claims. Furthermore, the regulations at issue in this case relate to mining activity within National Park System areas, governed by a specific Congressional grant of authority in Pub. L. No. 94-429, §2, 90 Stat. 1342 (Sept. 28, 1976). That statute gave the NPS authority to regulate "*all activities resulting from the exercise of valid existing mineral rights on patented or unpatented mining claims within any area of the National Park System*." *See also* 16 U.S.C. §1902. This specific grant of authority does not evidence a general grant of authority to regulate <u>any</u> non-federal interest.

The other two cases cited to support the "*authority to regulate non-federal interests within units of the National Park System*" – *U.S. v. Garfield County*, 122 F. Supp. 2d 1201 (D. Utah 2000), and *Southern Utah Wilderness Alliance v. BLM*, 425 F.3d 735 (10th Cir. 2005) – are also about motorized access and rights-of-way across federally owned lands. In short, none of the cited statutory provisions or court opinions in any way support the NPS' claim of expanded authority to regulate oil and gas activities solely occurring on private land lacking any NPS-administered less than fee interest; yet, the proposed amendments to the existing 9B regulations do just that.

For example, existing regulations at 36 C.F.R. §9.32(e) already allow the NPS an opportunity to evaluate potential impact to park lands and resources from "*directional drilling techniques which result in the drill hole crossing into the unit and passing under any land or water the surface of which is owned by the United States*." Exemption is available where those operations "*pose no significant threat of damage to park resources, both surface and subsurface*." This exemption is critical to ensure the exercise of jurisdiction and oversight is appropriate. While the proposed rule mostly retains the threshold for obtaining an exemption, it is no longer a total exemption, and operations which never touch or involve federally owned surface estate are subjected to regulations and penalties. The proposed rule provides no statutory authority to make this change.

Also with respect to this change, considering the breadth of associated impacts to the states, private land owners, local governments and Native groups, the statements of findings pursuant to the Unfunded Mandates Reform Act and Federalism on 80 FED. REG. at 65584 and 65585, respectively, appear too narrow. Even though both findings describe the rule as addressing "*use of national park lands*," that is only true for certain aspects. For instance, should a land owner choose to survey, explore or develop its oil and gas resources, either within or adjacent to a park unit, it would be required to obtain a permit or in other ways submit to NPS jurisdiction and oversight, even if fully operating on private, Native, state or local government-owned lands. This highly significant change over the current regulatory scheme has not apparently received the thorough assessments required by 2 U.S.C. §1531 *et seq*. and Executive Order 13132.

The statement of findings under the Takings analysis is also overly narrow, stating that "[*t*]*he proposed rule would continue to allow operators reasonable access across federally owned surface to develop non-federal mineral rights. No other private property is affected.*" 80 FED. REG. at 65585. While the Commission is not arguing that the NPS intends the rulemaking to result in a taking of private property interests, which is explicitly denied throughout the preamble and in the proposed rule, narrow statements like these belie the thorny reality of what the amended regulations actually accomplish.

The implications of the NPS' expanded assertion of jurisdiction beyond simply "*access across federally owned surface*" are also not sufficiently explored from a practical perspective. As just one example, the proposed rule notes financial assurances will be required to protect "*the American taxpayers*" from paying for reclamation where an operator "*defaults on its obligations*," and that the amount will be "*commensurate with the cost of restoring the federally owned surface estate*." 80 Fed. Reg. at 65582, 65584. The proposed regulations do not explain how the NPS will calculate potential damage to federally owned resources where an operation is limited to non-federal land. Also, for operators employing directional drilling techniques, the regulations require proof of a "*legal right to operate in an NPS unit*." *Id.* at 65585. How would an operator demonstrate this if, for instance, passing underneath federal surface estate is merely a choice in lieu of having infrastructure within external park boundaries? These and many other rippling ramifications from the inherent complexity in a System-wide rule on an entire industry were avoided by the limited application of the existing 9B regulations. The NPS cannot simply expand that application without exploring those ramifications in detail in the proposed rule.

Regarding regulation of activities which do "*involve and affect federally owned lands*," since the preamble and the proposed regulation at §9.130(b) note access in Alaska will be governed by regulations at 43 C.F.R. Part 36, the Commission assumes this refers to all access-related issues. There is some conflicting language on this point in the preamble, however, which also notes "*the regulations at 43 CFR part 36, which implements §1110(b)*." 80 FED. REG. at 65582. Further, the proposed regulation at §9.130 is entitled "*May I cross Federal property to reach the boundary of my oil and gas right?*" and other proposed regulations (e.g., application review, access fees) do not appear to contemplate an exemption or cross-reference for Alaska.

Access in Alaska park units is governed by the "*single comprehensive statutory authority for the approval or disapproval of applications*," 16 U.S.C. §3161, Congress provided in ANILCA. As such, ANILCA §1110(b) and all other provisions for transportation and utility systems require deference to ANILCA and Alaska-specific regulations. For example, it is unclear whether the provisions regarding temporary access permits will be imposed in Alaska. Temporary access needs not covered by ANILCA §1110 are addressed in §1111 (43 C.F.R. §36.12).

Fees for Alaskan inholders (or compensatory mitigation in lieu of payment) would not be appropriate considering the right to adequate and feasible access guaranteed under ANILCA §1110(b). Moreover, the Advance Notice of Proposed Rulemaking implicated that the fee would not apply to access for operators with "*a right to reasonably use the federally owned surface estate*" and alluded to examples of access fees as appropriate "*where the operator has no pre-existing right to cross Federal lands*." 74 FED. REG. at 61599. ANILCA provided a right of access across federally owned surface estate in Alaska park units, including for roads, pipelines, utility lines and other related facilities for economic or other purposes. As such, and consistent with NPS' proposed justification, provisions for charging access fees should not apply in Alaska.

Regarding the elimination of existing regulations at 36 C.F.R. §9.30(b) and (c), the NPS notes these will be included in "*guidance materials*" to be developed following the final rule. 80 FED. REG. at 65576. The Commission would like to request the guidance be issued for public review and comment prior to finalization. In particular, while information in §9.30(b) simply redirects to other provisions in certain instances, both the regulated public and the NPS would benefit from a meaningful review opportunity of any substantive revision to the information in §9.30(c).

Assuming the NPS has permitting authority, some of the informational requirements listed are also required by the State of Alaska under its permitting authority (e.g., water usage, wastewater discharge, cultural resources, spill control, emissions control technology). The NPS even requires numerous operating and reclamation standards, including the use of "*technologically feasible, least damaging methods*," regardless of what the State requires. *See* 80 FED. REG. at 65580-83 and proposed §9.30(a). The Commission questions whether the NPS has the expertise necessary to fully evaluate these aspects of the operation, most especially to question alternatives or compliance with state requirements. To avoid significant duplication of effort, and undue interference with state management authorities, please clarify to what extent a state permit, either in progress or issued, may satisfy the NPS' requirements and interest in these operational details.

Thank you for this opportunity to comment on the proposed rulemaking. Should you have any questions or require more information or clarification, please do not hesitate to inquire.

Yours faithfully,

Sara Taylor
Executive Director

cc: Mark Myers, Commissioner, Department of Natural Resources, State of Alaska
Sue Magee, Statewide ANILCA Coordinator, State of Alaska