

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Parts 28 and 29

[Docket No. FWS–HQ–NWRs–2012–0086; FXRS1261090000–156–FF09R24000]

RIN 1018–AX36

Management of Non-Federal Oil and Gas Rights

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), are finalizing regulations governing the exercise of non-Federal oil and gas rights outside of Alaska in order to improve our ability to protect refuge resources, visitors, and the general public’s health and safety from potential impacts associated with non-Federal oil and gas operations located within refuges. The exercise of non-Federal oil and gas rights refers to oil and gas activities associated with any private, State, or tribally owned mineral interest where the surface estate above such rights is administered by the Service as part of the Refuge System. The existing non-Federal oil and gas regulations have remained unchanged for more than 50 years and provide only vague guidance to staff and operators. This rule will make the regulations more consistent with existing laws, policies, and industry practices. It is designed to provide regulatory clarity and guidance to oil and gas operators and refuge staff, provide a simple process for compliance, incorporate technological improvements in exploration and drilling technology, and ensure that non-Federal oil and gas operations are conducted in a manner that avoids or minimizes impacts to refuge resources.

DATES: This rule is effective December 14, 2016.

ADDRESSES: Supplementary documents prepared in conjunction with preparation of this rule, including an economic analysis and an environmental impact statement, and the public comments received on the proposed rule are available at www.regulations.gov at Docket No. FWS–HQ–NWRs–2012–0086.

FOR FURTHER INFORMATION CONTACT: Scott Covington, U.S. Fish and Wildlife Service, Division of Natural Resources and Planning, MS: NWRs, 5275 Leesburg Pike, Falls Church, VA 22041; telephone 703–358–2427.

SUPPLEMENTARY INFORMATION:

Executive Summary

This rule revises the existing regulations at subpart C, part 29, of title 50 of the Code of Federal Regulations (CFR) and adds new regulations at subpart D of 50 CFR part 29 to govern the exercise of non-Federal oil and gas rights within refuges outside of Alaska. This revision improves the effectiveness of the Service to protect refuge resources and uses from avoidable, unnecessary impacts by non-Federal oil and gas operations. It will also bring consistency and clarity for both operators and the Service as to the process by which operators may access non-Federal oil and gas on the National Wildlife Refuge System (NWRs). The Service defines the National Wildlife Refuge System to consist of all lands, waters, and interests therein that it administers (25 CFR 25.12) and does not apply its regulations to the non-Federal lands found within refuge boundaries (*i.e.*, inholdings).

The Service promulgated the current regulations at 50 CFR 29.32 to govern the exercise of non-Federal mineral rights on the NWRs more than 50 years ago, and they have not been updated since. The current regulations outline a general policy to minimize impacts to refuge resources to the extent practicable from all activities associated with non-Federal mineral exploration and development where access is on, across, or through federally owned or controlled lands or waters of the NWRs. However, they have been ineffective at protecting refuge resources because they do not provide operators or refuge staff with an explicit process or requirements for operating on refuge lands, resulting in inconsistency in protections for refuge resources and uses.

Therefore, updating these regulations is a necessary exercise of the Service’s authority to ensure that we are meeting our responsibilities under the National Wildlife Refuge System Administration Act (NWRsAA), as amended by the National Wildlife Refuge System Improvement Act (NWRsIA) (16 U.S.C. 668dd *et seq.*), to protect refuge resources and uses while ensuring that mineral rights holders have reasonable access to develop their non-Federal oil and gas.

Key components of the rule include:

- A permitting process for new operations;
- A permitting process for well-plugging and reclamation for all operations;
- Information requirements for particular types of operations;
- Operating standards so that both the Service and the operator can readily identify what standards apply to particular operations;

- Fees for new access beyond that held as part of the operator’s oil and gas right;

- Financial assurance (bonding);
- Penalty provisions;
- Exemption of refuges in Alaska from these requirements;
- Codification of some existing Service policies and practices.

Background

Advance Notice of Proposed Rulemaking, Proposed Rule, and Public Comment Period

This rulemaking effort began on February 24, 2014, when we issued an advance notice of proposed rulemaking (ANPR) (79 FR 10080) to assist us in developing the proposed rule. The ANPR had a 60-day comment period, ending April 25, 2014. On June 9, 2014, we reopened the comment period for another 30 days, ending July 9, 2014 (79 FR 32903). We received comments from unaffiliated private citizens (36), conservation organizations (14), State agencies (8), counties (2), Alaska Native Corporations (2), a tribal agency, oil and gas owners and operators (6), business associations (5), and a Federal agency, along with almost 80,000 form letter comments from members of two environmental organizations. The majority of commenters were in favor of strengthening and expanding the regulations to better protect refuge resources and values. Some commenters requested that we not revise the existing regulations, while others questioned whether the Service had the statutory authority to regulate non-Federal oil and gas operations on refuges.

We utilized these comments to prepare the proposed rule, which we published on December 11, 2015 (80 FR 77200), and opened, with the associated draft Environmental Impact Statement (EIS), a 60-day comment period. During this comment period we received approximately 39,600 responses (mostly form letters) indicating general support regulating oil and gas activities on refuges and our proposed rule. However, many commented that the proposed rule did not go far enough in regulating these activities, with some requesting a ban on any oil and gas activity, or at least hydraulic fracturing, in refuges. We also received 12 letters from State agencies, oil and gas associations, oil companies, and an individual opposing the rulemaking. Primary reasons for opposition are that these entities believe that the Service lacks authority to regulate private oil and gas and existing State and Federal regulations are sufficient to protect refuges. More information on the ANPR,

proposed rule, and public comments is available at <http://www.fws.gov/refuges/oil-and-gas/rulemaking.html> and also at www.regulations.gov at Docket No. FWS-HQ-NWRS-2012-0086.

A detailed discussion of all changes made after consideration of comments on the proposed rule is contained in the *Summary of and Response to Public Comments* section below.

Non-Federal Oil and Gas on the NWRS

Non-Federal oil and gas rights exist within the NWRS in situations where the oil and gas interest has been severed from the estate acquired by the United States, either because:

- The United States acquired property from a grantor that did not own the oil and gas interest; or
- The United States acquired the property from a grantor that reserved the oil and gas interest from the conveyance.

Non-Federal oil and gas interests can be held by individuals, partnerships, for-profit corporations, nonprofit organizations, tribes, or States and their political subdivisions. We recognize that interests in non-Federal oil and gas are property rights that may be taken for public use only with payment of just compensation in accordance with the Fifth Amendment of the U.S. Constitution. Application of this rule is not intended to result in the taking of a property interest, but rather to impose reasonable regulations on activities that involve or affect federally owned lands and resources of the NWRS to avoid or minimize impacts from such activities to the maximum extent practicable.

These regulations do not apply to the development of the Federal mineral estate, including Federal oil and gas, which are administered by the Bureau of Land Management (BLM), under the Mineral Leasing Act and the Federal Land Policy and Management Act. In areas where oil and gas rights are owned by the United States, and leasing is authorized, the applicable regulations are found at 43 CFR part 3100 *et seq.* There is a general prohibition to leasing Federal oil and gas on refuge lands (43 CFR 3101.5-1). These regulations do not apply to refuges located in Alaska.

Examples of non-Federal oil and gas operations conducted on refuges include: Geophysical (seismic) exploration; exploratory well drilling; field development well drilling; oil and gas well production operations, including installation and operation of well flowlines and gathering lines; enhanced recovery operations; well plugging and abandonment; and site reclamation.

Impacts of Oil and Gas Activities on Refuge Resources and Uses

Oil and gas activities have the potential to adversely impact refuge resources and uses in some or all of the following manners:

- Surface water quality degradation from spills, storm water runoff, erosion, and sedimentation;
- Soil and groundwater contamination from existing drilling mud pits, poorly constructed wells, improperly conducted enhanced recovery techniques, spills, and leaks;
- Air quality degradation from dust, natural gas flaring, hydrogen sulfide gas, and emissions from production operations and vehicles;
- Increased noise from seismic operations, blasting, construction, oil and gas drilling and production operations;
- Reduction of roadless areas on refuges;
- Noise and human presence effects on wildlife behavior, breeding, and habitat use;
- Disruption of wildlife migration routes;
- Adverse effects on sensitive and endangered species;
- Viewshed (an area of land, water, or other environmental element that is visible to the human eye from a fixed vantage point) intrusion by roads, traffic, drilling equipment, production equipment, pipelines, etc.;
- Night sky intrusion from artificial lighting and gas flares;
- Disturbance to archaeological and cultural resources associated with seismic exploration and road/site preparation, associated with maintenance activities, or by spills;
- Visitor safety hazards from equipment, pressurized vessels and lines, presence of hydrogen sulfide gas, and leaking oil and gas that can create explosion and fire hazards;
- Wildlife mortality from oil spills or entrapment in open-topped tanks or pits, poaching, and vehicle collisions;
- Fish kills from oil and oilfield brine spills; and
- Vegetation mortality from oilfield brine spills.

Service Authority To Regulate Non-Federal Oil and Gas Activities

As noted in the preamble to the proposed rule, one of the principal recommendations of the 2003 Government Accountability Office report to Congress was for the Service to clarify its regulatory authority with respect to the exercise of non-Federal oil and gas rights within the Refuge System. We provided in the preamble to the

proposed rule an explanation of the basis for the Service's authority. As further discussed below, the Service received opposing public comments on its analysis. While some commenters asserted that the Service lacked the authority to regulate such private property rights, others agreed that we do have this regulatory authority.

After carefully considering the public comments, as well as engaging in further discussions with the Office of the Solicitor of the Department of the Interior, the Service concludes that the National Wildlife Refuge System Administration Act, as amended in 1997 by the National Wildlife Refuge System Improvement Act (NWRSA) (16 U.S.C. 668dd *et seq.*), provides us the statutory authority to promulgate these regulations. In turn, Congress's authority to enact the NWRSA is the Property Clause of the United States Constitution, which provides it the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art IV, sec. 3, cl. 2.

In 1997, Congress declared the Service's mission to be: "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." (16 U.S.C. 668dd(a)(2)). The NWRSA further directs the Secretary of the Interior, in administering the System, to:

- Provide for the conservation of fish, wildlife, and plants, and their habitats within the NWRS;
- Ensure that the biological integrity, diversity, and environmental health of the NWRS are maintained for the benefit of present and future generations of Americans;
- Ensure that the mission of the NWRS and the purposes of each refuge are carried out;
- Ensure effective coordination, interaction, and cooperation with owners of land adjoining refuges and the fish and wildlife agency of the States in which the units of the NWRS are located;
- Assist in the maintenance of adequate water quantity and water quality to fulfill the mission of the NWRS and the purposes of each refuge;
- Recognize compatible wildlife-dependent recreational uses as the priority general public uses of the NWRS through which the American public can develop an appreciation for fish and wildlife;

- Ensure that opportunities are provided within the NWRs for compatible wildlife-dependent recreational uses; and

- Monitor the status and trends of fish, wildlife, and plants in each refuge.

To carry out its mission and these statutory directives to administer the Refuge System, Congress provided the Service the authority to issue regulations to carry out the NWRsAA (16 U.S.C. 668dd(b)(5)), as well as to prescribe regulations to “permit the use of any areas within the System for any purpose. . . .” (16 U.S.C. 668dd(d)(1)(A)). In this regard, the

statutory authority of the Service is substantially similar to that of the National Park Service (NPS), which since 1979 has regulated the exercise of non-federal oil and gas rights within the Park System on the basis of its authority to issue regulations “necessary or proper for the use and management of System units” (54 U.S.C. 100751).

The rule “applies to all operators conducting non-Federal oil and gas operations outside of Alaska on Service-administered surface estates held in fee or less-than fee (excluding coordination areas) or Service-administered waters within the boundaries of the refuge to the extent necessary to protect those property interests.” Thus, the regulation directly relates to the Service mission “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 . . .” and various statutory directives, including the conservation of fish and wildlife within the NWRs and ensuring their biological integrity. The rule, therefore, falls within the Service’s authority to issue regulations to carry out the NWRsAA (16 U.S.C. 668dd(b)(5)). Regulating the use of Service-administered surface estates and waters also falls within the Service’s statutory authority to issue regulations to “permit the use of any areas within the System for any purpose. . . .”

Several relatively recent appellate court decisions support our interpretation of the NWRsAA. In *Burlison v. United States* (533 F.3d 419 (6th Cir. 2008)), the appeals court held that the Service’s authority to permit the use of roads on refuge lands included the power to reasonably regulate a reserved easement within a refuge:

We do conclude, however, that the Fish and Wildlife Service may legitimately exercise the sovereign police power of the Federal Government in regulating the easement. Section 668dd(d)(1)(B) delegates the power to the Secretary of the Interior (and the Fish and Wildlife Service) “under such

regulations as he may prescribe,” to “permit the use of . . . any areas within the System for purposes such as . . . roads.”

Id. at 438. *Burlison* also relied on the decision of the U.S. Court of Appeals Eighth Circuit in *Duncan Energy Co. v. United States Forest Service*, 50 F.3d 584 (8th Cir. 1995), which upheld the Forest Service’s authority to regulate non-Federal oil and gas rights on the basis of statutory authority that is also very similar to that of the NWRsAA:

Under the Bankhead-Jones Farm Tenant Act, Congress directed the Secretary of Agriculture “to develop a program of land conservation and land utilization.” 7 U.S.C. Sec. 1010 (1988). The Act directs the Secretary to make rules as necessary to “regulate the use and occupancy” of acquired lands and “to conserve and utilize” such lands. 7 U.S.C. Sec. 1011(f) (Supp.V.1993). The Forest Service, acting under the Secretary’s direction, manages the surface lands here as part of the National Grasslands, which are part of the National Forest System. See 16 U.S.C. Sec. 1609(a) (1988). Congress has given the Forest Service broad power to regulate Forest System land. See, e.g., 7 U.S.C. Sec. 1011 (1988 & Supp.V.1993); 16 U.S.C. Sec. 551 (Supp.V.1993).

Id. at 589. Similarly, the U.S. Court of Appeals for the Fifth Circuit has interpreted the NWRsAA to authorize the Service to regulate access and use of refuge lands by holders of valid interests in land. *School Board of Avoyelles Parish v. United States Department of the Interior* (647 F.3d 570 (5th Cir. 2011)). The School Board administered an enclosed estate within the refuge and under Louisiana property law was entitled to a right of passage over neighboring property to the nearest public road. The Service did not dispute that a right to cross refuge lands existed, but asserted it could condition such use, and imposed permit limits on the times of day and types of vehicles that could use the right-of-way to access the enclosed estate. Reversing the district court, the Fifth Circuit affirmed the authority under the NWRsAA and Service regulations to require a permit and to impose reasonable conditions for “any person entering a national wildlife refuge” even where that person held property rights afforded under the laws of Louisiana. Citing *Burlison* and a series of Supreme Court and circuit court cases interpreting the Property Clause, the Fifth Circuit held that requiring a permit for entry and use, and imposing reasonable restrictions on the exercise of the non-Federal property rights, was well within Federal authority under the Property Clause.

The primary arguments that the Service lacks the necessary regulatory authority are based on the analysis contained in a 1986 memorandum from

the Associate Solicitor, Division of Conservation and Wildlife (“1986 Opinion”) that concluded the Service then lacked the authority from Congress to adopt regulations requiring permits for access by holders of mineral interests, unless the authority was provided for in the deed by which the United States acquired title to the surface estate. That opinion relied in part on *Caire v. Fulton*, 1986 U.S. Dist. LEXIS 31049 (W.D. La. 1986), an unpublished district court decision, where the United States had explicitly agreed during eminent domain proceedings to delete from the proposed deed a provision authorizing Service regulation of the oil and gas interests not being acquired.

The 1986 Opinion was also premised on a provision of the Migratory Bird Conservation Act (MBCA), originally enacted in 1929 and amended in 1935, that now provides:

The Secretary of the Interior may do all things and make all expenditures necessary to secure the safe title in the United States to the areas which may be acquired under this subchapter, but no payment shall be made for any such areas until the title thereto shall be satisfactory to the Attorney General or his designee, but the acquisition of such areas by the United States shall in no case be defeated because of rights-of-way, easements, and reservations which from their nature will in the opinion of the Secretary of the Interior in no manner interfere with the use of the areas so encumbered for the purposes of this subchapter, but such rights-of-way, easements, and reservations retained by the grantor or lessor from whom the United States receives title under this subchapter or any other Act for the acquisition by the Secretary of the Interior of areas for wildlife refuges shall be subject to rules and regulations prescribed by the Secretary of the Interior for the occupation, use, operation, protection, and administration of such areas as inviolate sanctuaries for migratory birds or as refuges for wildlife; and it shall be expressed in the deed or lease that the use, occupation, and operation of such rights-of-way, easements, and reservations shall be subordinate to and subject to such rules and regulations as are set out in such deed or lease or, if deemed necessary by the Secretary of the Interior, to such rules and regulations as may be prescribed by him from time to time. (16 U.S.C. 715e)

The Service broadly construes its statutory authority to issue regulations “to permit the use of any area within the System for any purpose” and that the NWRsAA, not the MBCA, is therefore the controlling authority with respect to regulating non-federal oil and gas rights. While the specific facts of the unreported decision in *Caire* have always suggested that it was of limited precedential value, the Fifth Circuit’s

decision in *Avoyelles Parish* is the controlling juridical authority to apply in that circuit. Moreover, even if the MBCA provisions were construed to limit the applicability of the NWRSA authority, which clearly it does not, those limits would apply only to lands acquired under that Act. As of the end of Fiscal Year 2015, approximately 31.3 percent of the total 8,100,204.93 acres of Federal lands and interests in lands in 252 of the Nation's approximately 560 National Wildlife Refuges have been purchased under authority of the MBCA.

In our review of various deeds used by the Service over the years to acquire lands and interests in lands that make up the NWRS, we find many variations were used and that it is not possible to review or summarize here all such provisions, or ensure that we are familiar with the circumstances surrounding each acquisition of NWRS lands that did not include oil and gas rights. As part of the pre-application meeting with the Service (see § 29.91), and/or the submission of a permit application (see § 29.94), we will provide the opportunity to receive copies of any deeds and other relevant information that the applicant believes would control or otherwise limit the applicability of any provision of this rule to the particular applicant's operations. We intend this process to ensure on a case-by-case basis that the Service fully considers all relevant information concerning the particular acquisitions before imposing specific requirements on the applicant's operations. The Service will respect applicable deed conditions; however, the rule requirements will apply to the extent that they do not conflict with such deed conditions, which we believe will be the situation in most cases. The Solicitor's Office has withdrawn the 1986 Opinion on the basis that the opinion is out of date and does not reflect the current state of law with regard to the Service's full authorities to manage lands within units of the NWRS. The Solicitor will be issuing a new opinion in the near future that sets out the supporting legal analysis of the underlying authorities upon which the Service is adopting this rule.

Final Rule

Summary of Final Rule

The rule generally requires that operators receive permits for new non-Federal oil and gas activities on the NWRS; provide a regulatory framework to achieve the necessary protections for refuge resources; and improve regulatory consistency to the benefit of

both refuge resources and oil and gas operators. The rule contains performance-based standards that provide flexibility to resource managers and operators to use evolving technologies within different environments to achieve the standards. It establishes standards for surface use and site management, specific resource protections, spill prevention and response, waste management, and reclamation. Additionally, the rule contains procedures for permit applications and Service review and approval. Finally, there are provisions for financial assurance (bonding), access fees, mitigation, change of operator, permit modification, and prohibitions and penalties. We incorporated public input received during the rulemaking process to shape the rule.

Permitting Approach

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. Under the rule, the Service requires the following:

a. *New operations are by permit only.* Operators conducting new operations must obtain an operations permit before commencing new or modified operations within a refuge (§ 29.42). This requirement addresses exploration, drilling, production, enhanced recovery operations, transportation, plugging, and reclamation operations. We encourage operators to contact the Service early in the process so that the Service can provide suggestions to improve the application. Additionally, an operator will be authorized to begin operations only after the operator has received all other required State and Federal permits.

b. *Operations under an existing Service permit may continue under the terms of that permit*, but must comply with existing Federal, State, and local laws and regulations and the applicable general terms and conditions of this rule (§ 29.43). Operators are required to obtain a new permit or amend their existing permit if they propose to conduct new operations or modify their existing operations (*i.e.*, proposed activities outside the scope of their existing approval that will have impacts on refuge resources as determined by the Service). At the time of reclamation, the Service will review existing permits and modify them as necessary to ensure compliance with all Service reclamation standards.

c. *Operators with operations not under a Service permit* being conducted prior to the effective date of this rule, or prior to a boundary change or

establishment of a new refuge, are considered "pre-existing operators" and may continue to operate as they have been, but they must comply with existing Federal, State, and local laws and regulations and the applicable general terms and conditions of this rule (§ 29.44). Additionally, these operators are required to obtain an operations permit for any new operations or for any modification to their existing operation. Finally, once production operations cease, the operator must obtain an operations permit for plugging and reclamation, or to maintain their well(s) in extended shut-in status.

d. *All operators must have a permit* for plugging and reclamation and comply with all Service reclamation standards.

e. When pre-existing operations are transferred, the new operator must obtain an operations permit.

f. *Wells drilled from outside refuges or on non-Federal inholdings to access non-Federal minerals* are exempt from these regulations.

g. *Operations on refuges in Alaska* are exempt from these regulations.

However, the performance-based standards of this rule may be used, as appropriate, as guidance in determining how an operator would meet the various requirements of ANILCA and ANCSA to protect refuge resources and uses.

The Service finds that this permitting process is the best way to manage oil and gas operations and protect refuge resources on the NWRS and using time, place, and manner stipulations are the most effective way for the Service to avoid or minimize impacts. The "place" factor in the "time, place, and manner" equation is often most important in terms of ability to protect an environmental resource. The risks created by a poorly selected location cannot easily be overcome with even the best operational methods. Conversely, proper site selection can do much to mitigate the effects of accidents or environmentally unsound practices. The "time" factor restricts the timing of operations to remove or minimize impacts on resources that are only seasonally present. The "manner" factor is the method in which oil and gas activities are conducted, using best management practices. Therefore, requiring a permit that contains such stipulations is the most effective way to avoid or minimize impacts of new operations.

Proper site planning, timing restrictions, and best management practices established through the permit process for new operations will accomplish great improvements in resource protection. Because existing

operations with a special use permit already have stipulations in those permits that have been implemented to protect refuge resources and uses, they are allowed to continue their operations under the terms of that permit.

Furthermore, the Service is not requiring a permit for operators with existing operations not currently under a permit (pre-existing operations) because a majority of the impacts avoided or mitigated under the permit have already occurred, and the permit process can result in substantial administrative and operational costs on both the Service and the operator. These costs (similar to those of permitting new operations) could be disproportional to the environmental benefits gained where the operator's well has already been drilled and the area of operations (access route, well site, production facilities, and routes for gathering lines) has already been established.

Our analysis found that the Service could eliminate many of the ongoing, unnecessary impacts to refuge resources and uses resulting from the production phase of pre-existing operations by enforcing State laws and regulations on Service-administered lands and waters. Making violation of applicable State laws related to oil and gas a prohibited act under the rule allows the Service to enforce these requirements as Federal requirements, and so gives us greater enforcement capabilities in ensuring that unnecessary impacts from these operations, such as leaks and spills, are avoided or minimized. This approach to permitting allows the Service to focus its limited time and resources on those new operations that create the highest level of incremental impacts. Also, by requiring all operators, pre-existing, existing with a Service-issued permit, and new, to have a permit for plugging and reclamation, we can ensure rehabilitation of impacted habitat.

When a well is drilled on inholdings or non-Federal adjacent lands, impacts to refuge resources are avoided or minimized to a great extent. Therefore, the Service's approach of exempting downhole aspects of these operations that occur within a refuge from the regulations is intended to provide an incentive for operators to use drilling from a surface location not administered by the Service in order to reach their oil and gas rights under the refuge-administered surface estate. However, anytime an operator needs to physically cross Service land for access, including access to a non-Federal surface location, such as an inholding, to conduct operations, then the operator must comply with the applicable provisions of this subpart for obtaining approval

from the Service for such access, including obtaining an operations permit covering the new access or modification to the existing access.

Operating Standards

The Service developed this rule using a suite of performance-based standards that establish goals and define a desired level of protection for refuge resources and uses. This approach provides flexibility to resource managers and operators to best protect refuge resources and uses over time and across various environments by uses of varied technologies and methods. Resource managers and operators will identify and develop specific actions and best management practices that are then incorporated into operations permits. In contrast, prescriptive regulations define specific requirements of time, place, and manner and may not fully consider how these measures achieve the desired level of resource protection or how they may apply in different environments. The Service examined other Federal and State oil and gas regulations and determined that the performance-based standards approach provided the most efficient means of successfully avoiding or minimizing the effects of oil and gas operations on refuge resources and visitor uses. A one-size-fits-all (*i.e.*, prescriptive) approach does not work due to the widely differing environments found at the various refuges with non-Federal oil and gas rights across the country. A performance-based standards model has been successfully used by NPS for more than 35 years and applied in the context of a permit that contains specific actions an operator must take to meet the regulatory standards.

In developing and analyzing the rule and alternatives, the Service found that the preponderance of impacts and risks of impacts to refuge resources associated with exploration and development of oil and gas emanate from surface activities. However, mishaps below the surface can adversely affect the surficial groundwater systems that are important to the success of many national wildlife refuges. This finding holds true for operations that include the use of hydraulic fracturing. The Service found that well drilling and production operations that include the use of hydraulic fracturing have similar types of surface activities (*e.g.*, road and pad construction, tractor-trailer truck traffic, use of water, use of chemicals, use of large diesel-powered engines, generation of waste) as operations that do not include hydraulic fracturing. Hydraulic fracturing operations, particularly those used in combination

with horizontal drilling techniques to access oil or gas in shale or other "tight" formations, usually increase the scope, intensity, and duration of activities commonly associated with oil and gas well drilling and completion, as well as the pressures to which the well casings are subjected.

In the context of this rule, the term "hydraulic fracturing" means those operations conducted in an individual wellbore designed to increase the flow of hydrocarbons from the rock formation to the wellbore through modifying the permeability of reservoir rock by applying fluids under pressure to fracture it. It does not include the comprehensive list of all oil and gas activities associated with development that happens to include hydraulic fracturing. While the rule's operating standards are not specific to hydraulic fracturing operations, they were developed with the expectation that hydraulic fracturing will occur on refuge lands and give the Service the ability to effectively manage the additional impacts that hydraulic fracturing may have on refuge resources and uses.

The Service notes that BLM has recently promulgated regulations addressing hydraulic fracturing on Federal and Indian lands at 43 CFR part 3160 (80 FR 16128, March 26, 2015). We carefully considered the recently promulgated BLM oil and gas regulations on hydraulic fracturing. (The Service also notes that those regulations have been set aside by the U.S. District Court in Wyoming, and that decision is on appeal to the United States Court of Appeals for the Tenth Circuit.) The Service and BLM take different approaches to operating standards because of our differing statutory bases for regulating the exercise of oil and gas rights. Specifically, the BLM has regulatory authority over the development of the Federal mineral estate, including Federal oil and gas resources under Federal and Indian lands. Instead, these Service regulations address private property rights within refuges and are based on the authorities and directives of the NWRSA, including "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." Therefore, the Service's regulations are focused on avoiding or minimizing impacts to federally owned and administered lands and resources of the NWRS to the maximum extent

practicable by using the most technologically feasible, least damaging oil and gas development methods to protect refuge resources and uses.

The rule maintains the non-prescriptive operating standards from the proposed rule, which are similar to the existing NPS regulations in 36 CFR, subpart B (the “9B” regulations), and provide operators flexibility to design operations while protecting refuge resources, uses, and visitor health and safety. The Service’s approach is to review an operator’s submissions to determine if they are avoiding or minimizing impacts to the maximum extent practicable, and if not, to include in the operating permits the terms and conditions that will ensure that they do so.

State Regulations

The Service’s goal in this rule is to provide a regulatory regime that complements State regulatory programs to the benefit of the surface estate and the resources for which we are entrusted, while not compromising the ability of operators to develop their resource. The Service and State oil and gas agencies have fundamentally different missions. The Service’s legal mandate is to conserve fish, wildlife, and plant resources and their habitats for the benefit of present and future generations. In contrast, State oil and gas regulations typically focus on the protection of mineral rights and “conservation” of the oil and gas resources (*i.e.*, minimizing waste of oil and gas resources). From a regulatory perspective, management of oil and gas operations is necessary in order for the Service to protect its surface resources and meet its congressionally mandated mission.

The Service’s intention is to avoid or minimize potential procedural and operational duplication of State programs, while working cooperatively to achieve common objectives between the Service, States, and operators. The Service received several comments from the public on the effectiveness of State regulations in protecting refuge resources and uses, and that issue is discussed further below in our response to comments.

In the context of enforcing State oil and gas regulations, the Service focus is on noncompliance issues that have the potential to adversely affect refuge resources and visitor uses. Making violation of non-conflicting provisions of State oil and gas law and regulations a prohibited act under the rule allows us to enforce on refuges as a matter of Federal law, the same requirements already imposed on operators by a State.

States may not have enough inspectors to ensure companies are meeting State standards. Louisiana, the State with the most non-Federal oil and gas production on refuge lands, recently reported that it lacks an adequate number of inspectors and its inspection rate is too low. Under this rule, Refuge Law Enforcement will work cooperatively with States to ensure that operators on refuges are meeting Service and State regulatory requirements with a minimum of duplication.

Summary of and Response to Public Comments

A summary of substantive comments and Service responses is provided below followed by a table that sets out changes we have made to the proposed rule based on the analysis of the comments and other considerations.

Authority

1. *Comment:* We received comments both in opposition to and in support of our general authority to manage oil and gas operations on Refuge lands. Commenters opposing our authority generally noted that they believe the Service has limited authority to regulate oil and gas operations based on the authority by which the Service acquired the land and specific deed language in the Migratory Bird Conservation Act (MBCA; 16 U.S.C. 715e) and the Supreme Court decision in *United States v. Little Lake Misere Land Co.* (412 U.S. 580, 597–98 (1973)), which interpreted the MBCA to require the Service to express in the deed language that non-Federal mineral rights will be subject to regulation. Commenters also cited subsequent case law and the legislative history of both the National Wildlife Refuge System Administration Act, as amended by the National Wildlife Refuge System Improvement Act (16 U.S.C. 668dd) (NWRSA and NWRRIA), to contend that the Service has not since been granted specific authority to regulate non-Federal mineral rights and so, absent specific deed language, the Service is limited to common law in protecting refuge resources and uses from impacts associated with oil and gas operations.

Other commenters expressed support for our general authority and responsibility to promulgate regulations to manage non-Federal oil and gas based on the Property Clause of the Constitution (U.S. Const.) and the NWRRIA, as well as subsequent case law that has held that the Service does have the authority to reasonably regulate access to private rights on the NWRSA (see *Sch. Bd. of Avoyelles Par. v. U.S. Dep’t of Interior*, 647 F.3d 570, 581,

581 n.4 (5th Cir. 2011); *Burlison v. United States*, 533 F.3d 419, 434–35 (6th Cir. 2008)).

Service Response: We have carefully considered all the comments, and the Service concludes that the NWRSA, as amended by the NWRRIA, provides us the statutory authority pursuant to Congress’ Property Clause powers to promulgate and implement these regulations as further explained in the preamble to the proposed rule. Furthermore, we conclude these regulations are also consistent with common law principles that a mineral rights holder’s access to their minerals cannot unreasonably impact the surface estate. These regulations respect an operator’s right to use the surface estate on refuges while protecting and minimizing impacts to refuge resources and uses to comply with the unique mission of these public lands “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.” (16 U.S.C. 668dd(a)(2)). For additional information on our authorities, see the section on *Service Authority to Regulate Non-Federal Oil and Gas Activities*. With regard to the comment citing the Supreme Court Case *U.S. v. Little Lake Misere Land Co.*, as we state in the *Service Authority to Regulate Non-Federal Oil and Gas Activities* section, the Service will respect applicable deed conditions, however, the rule requirements will apply to the extent that they do not conflict with such deed conditions.

Acquisition of Minerals Under the NWRSA

2. *Comment:* The Service received several comments suggesting that the Service consider buying all non-Federal mineral rights to ensure complete protection of refuge resources and uses from these activities.

Service Response: The Service has determined that acquisition of all mineral rights in refuges is financially infeasible and unnecessary to protect refuge resources and uses. While the Service did not undertake a costly and time-intensive evaluation of the fair market value of the non-Federal oil and gas rights within the NWRSA, in the EIS associated with this rulemaking we did consider full acquisition of such oil and gas rights, but this alternative was dismissed from further consideration because it was financially infeasible and unnecessary. Relying on our general knowledge of what acquiring a mineral right can cost in areas where there is potential for oil and gas development,

we conclude that it would be too costly for the Service to acquire all mineral rights that exist within the NWRS.

Additionally, the Service concludes that it can sufficiently protect refuge resources and uses as required by the NWRSAA and provide access to operators for developing their non-Federal oil and gas rights under this rule, and so acquisition of all mineral rights is unnecessary. Under the rule, the Service will determine on a case-by-case basis, and in collaboration with prospective operators, whether a proposed operation meets the operating standards and approval standards contained in this rule. If the proposed operation cannot meet Service standards for protecting refuge resources and uses, the Service has general statutory authority to acquire the mineral right from a willing seller in those instances.

Rule's Function With State and Federal Regulations

3. *Comment:* Several comments stated that State regulations fully accomplish all the necessary protections of NWRS resources and uses, and, therefore, the proposed rule is duplicative and unnecessary. Commenters contended that many of the operational restrictions of the proposed rule were duplicative or in conflict with State regulations, although no specific examples were provided. The Service also received comments that supported the Service's analysis that State regulations are not uniformly designed or intended to fully protect the surface owner's interests or, as in this case, mandates of the Service to protect NWRS resources and uses.

Service Response: While developing the proposed rule, the Service reviewed the oil and gas regulations of 43 States. Because of the differences between the objectives of State regulation and the rule, we found that State regulations do not fully address necessary protections for the conservation of fish and wildlife resources and public use on refuges. The Service's legal mandate is to conserve fish, wildlife, and plant resources and their habitats for the benefit of present and future generations. In contrast, State oil and gas regulations typically focus on the protection of mineral rights and conservation of oil and gas resources (*i.e.*, minimizing waste). States do provide for protection of surface and groundwater via well design requirements, setbacks, and oil pollution control measures. However, State programs vary in these areas, and also in regard to protection of many other surface resources and surface use conflicts.

Most States are consistent in deferring to landowners and operators to work out many of the details of surface uses, and formal surface use agreements between landowner and operator are common. In some States, like Oklahoma and New Mexico, oil and gas companies are required by statute to enter into these agreements before production begins. A surface use agreement may direct the specific locations of access routes, drilling sites, and flowlines that are placed on the property. Timing considerations may be critical for protections of wildlife that may be present only seasonally. The final regulations provide a consistent set of procedures and operational standards which when incorporated into an operations permit are the functional equivalent of a "surface use agreement" between the Service and operator.

Furthermore, the Service has carefully designed this rule to work in concert with the State oil and gas regulatory processes. The Service has analyzed which aspects of State oil and gas regulatory regimes are generally sufficient for protecting refuge resources and uses and which are not, and have sought to regulate in this rule only those activities where State regulatory regimes are not generally sufficient. Our analysis found the preponderance of impacts to refuge resources and uses associated with oil and gas activities emanate from surface uses, not the downhole aspects of an operation. Our analysis also found that there is a possibility of impacts to groundwater from downhole operations, so the rule provides the Service with the ability to go further than State regulations when necessary to protect groundwater.

Accordingly, the rule does not regulate most downhole activities related to an operation, including well construction and blowout prevention. The regulation does include a downhole operating standard to prevent the escape of fluids to the surface and for isolation and protection of usable water zones throughout the life of a well. Otherwise, the Service finds that State regulations are sufficient to ensuring that downhole operations are protective of refuge resources and uses, as well as public safety. As this example shows, the Service regulations avoid unnecessary procedural and operational duplication with State programs, and reflect the Service's intention to work cooperatively with States and operators to achieve common objectives.

4. *Comment:* Additionally, the Service received comments that recommended the Service not rely on State regulations to protect refuge resources and uses from the impacts associated with pre-

existing operations, believing that the Service has been somewhat contradictory in its analysis that State regulations are not sufficient, but then relying on State regulations to protect refuge resources and uses from pre-existing operations in the proposed rule.

Service Response: The Service has considered these comments and would like to clarify its prior explanation why relying on existing Federal and State regulatory regimes is sufficiently protective. As required by Executive Order (E.O.) 12866, the Service analyzed the costs and benefits of each regulatory requirement being considered. This analysis found that new operations create the greatest additional impacts on refuges and that proper site planning, timing restrictions, and best management practices (BMPs) through a permit system accomplish the greatest improvement in resource protection. The permit process focuses on the full suite of time, place, and manner considerations on those new operations that create the highest level of incremental impacts. By applying a reclamation standard for all operations on refuges, including pre-existing operations, the rule also ensures long-term rehabilitation of habitat damaged by all operations.

While applying the full regulatory requirements to pre-existing operations may provide some incremental protection for refuge resources and uses, it would not retroactively eliminate a majority of the impacts to refuge resources and uses that have already taken place as a result of pre-existing operations. For example, pre-existing wells have already been drilled, the area of operations (access route, well site, production facilities, and routes for gathering lines) established, and impacts to refuge resources, such as to geology and soils, wetlands, and wildlife-dependent recreation, have all occurred prior to this rule being effective.

In terms of ongoing impacts from production, our analysis indicates that an operator's compliance with State laws will serve to improve protection of refuge resources and uses from ongoing impacts from these operations, in areas such as removal of waste, storage of chemicals, and leak and spill prevention. Where individual States' regulations do not specifically address an issue, the Service will continue to work cooperatively with operators to reduce impacts, or risks of impacts, to refuge resources and uses. This approach enables managers to focus limited resources on those operations with the greatest possible impacts to refuge resources and uses rather than an

indiscriminate administration of permits for the approximately 4,000 pre-existing operations. A general permit requirement would necessitate the Service to roughly double its oil and gas management resources from current levels, while the administrative costs to operators of pre-existing wells would be approximated to be initially \$1,800 per well annually. Our analysis indicates these costs, in general, would be inefficiently applied and disproportionately high in general relative to the benefits to refuge resources and uses.

Scope: Inholdings

5. *Comment:* The Service received comments both expressing a lack of authority for the Service in regulating inholdings as well as comments asserting that the Service has both the authority and the responsibility to regulate operations on private lands, including inholdings, under the Property Clause and the NWRSIA, which commenters contend granted the Service the authority to regulate outside the boundaries of the Refuge to the extent that such activities interfere with the designated purpose of Federal lands (citing *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir.1981)). Some commenters also noted that the Service has taken a different approach from the NPS and suggested the Service adopt the NPS approach to inholdings.

Service Response: The Service has carefully considered these comments; however, the Service has concluded that no change should be made in the rule, which appropriately balances refuge protection, private property rights, and feasibility of administration. As discussed in the Final EIS, there are some potential cross-boundary impacts from oil and gas development on refuge resources and uses, such as spills or leaks migrating into refuge lands or waters or noise disturbance on wildlife and visitor experience. The Service has always worked, and will continue to work, with operators on inholdings and adjacent lands to mitigate or avoid any potential cross-boundary impacts, particularly those that may impact species protected under the Endangered Species Act. For instance if an operator were proposing to site an operation close to a refuge boundary, we might ask them to set the operation back, ensure they have proper spill or leak protection methods, and site the operation away from any waterways that flow into a refuge. Furthermore, even when exempted from these regulations, operators do not have a right to cause unreasonable damage to refuge resources and uses and are responsible

for any damage done from their operations (e.g., leaks or spills). Existing Federal and/or State laws provide enforcement remedies for activities on non-Federal lands that damage Refuge resources and uses. Additionally, by not imposing regulations on inholdings or non-Federal adjacent lands, the Service is incentivizing operators to locate such operations off refuges.

As to the differences between the proposed revisions to the NPS 9B regulations (80 FR 65572; October 26, 2015) and this rule, an operator working on both NWRS and NPS lands will experience little difference in regulatory resource and use protections, regulatory structure based on performance standards, operations permit processes and requirements, monitoring and compliance, and other terms and conditions. However, there are some variations between the two proposed rules necessitated by differing authorities and missions and the scope and resources of the two agencies' non-Federal oil and gas programs. The existing and future potential for operations on inholdings within the NPS is much smaller than that of the NWRS, and, therefore, the administrative burden is more manageable for NPS's oil and gas program to regulate activities on inholdings to the extent necessary to protect park resources and uses.

In designing this rule, the Service has carefully considered the environmental benefits of these regulations in light of the Service's mission and limited resources and has chosen to prioritize regulation of activities on Service lands. As noted above, the Service defines the National Wildlife Refuge System to consist of all lands, waters, and interests therein that it administers (25 CFR 25.12) and does not apply its regulations to the non-Federal lands found within refuge boundaries (i.e., inholdings). Furthermore, the Service has concluded that it can manage the cross-boundary impacts from inholdings and non-Federal adjacent lands through cooperation with operators instead of through direct regulation, which places a heavy administrative burden on the Service and operators.

Scope: Operations on Non-Federal Land

6. *Comment:* The Service received similar comments regarding directional drilling operations on non-Federal land as it did for inholdings, recommending that the Service extend regulations beyond the NWRS to operations on private lands as described in the Modified Proposed Rule alternative of the DEIS. We also received comments from others that the Service has no

authority to do so. Some commenters also noted that the Service has taken a different approach from the NPS and suggested the Service adopt the NPS approach to directional drilling operations.

Service Response: The Service has considered these comments; however, we have not extended the rule to operations on inholdings and non-Federal adjacent lands from which there is directional drilling under Service-administered surface estate. The Service has a clear legal and policy directive to protect refuge lands and resources, and having oil and gas operations sited off refuge property is preferable to having impacts occur on refuge lands. Our analysis shows avoiding the cost and time delay of Service regulation provides an incentive for operators to drill from a non-Federal surface location to reach their oil and gas rights within a refuge. Exempting downhole operations that occur inside a refuge from these regulations will result in fewer wells drilled on refuge-administered lands and waters resulting in an overall benefit to refuge resources and uses (avoidance or minimization of direct impacts).

If the Service extended its regulation beyond the NWRS as evaluated in Alternative C of the EIS, the Service could require actions, such as noise abatement or visual screening, which serve to reduce cross-boundary effects on Service resources and uses. However, these benefits to resources and uses could evaporate, and many adverse consequences could occur, if just a small percentage of wells that otherwise would have been located outside a refuge are drilled in a refuge. Gains in resource protection under Alternative C would likely be lost due to loss of the incentive to locate operations outside the refuge. Locating all operations (surface and downhole) inside the boundary of a refuge would subject refuge resources and values to the long-term impacts of surface occupancy within the park—impacts that would last years, if not decades. Therefore, the Service concludes the best course of action is to maintain the incentive in the proposed rule to encourage operators to locate operations outside a refuge.

The Service will continue to work with operators, landowners, and other permitting agencies to address issues that may arise from operations on non-Federal adjacent lands. For example, the Service could advocate for setbacks from the refuge boundary or waterways and strong spill control and response measures to reduce the risk of damage to refuge resources from accidents. As mentioned above, even where exempt

from these regulations, operators do not have a right to cause unreasonable damage to refuge resources and uses and are responsible for any damage done from these operations (e.g., leaks or spills).

Additionally, based on the comments the Service received, it appears that some commenters misunderstood the NPS rule as related to operations on non-Federal lands outside the park boundary from which there is directional drilling underneath a park unit. NPS's regulatory authority over directional drilling operations begins at the subsurface point where the proposed operations (borehole) cross the park boundary and enter federally owned or administered lands or water, and applies to all infrastructure and activities within a park unit. Additionally the NPS provides an exemption to the operations permit requirement for these in-park operations if it determines they "pose no significant threat of damage to park resources." In the many decades that the NPS has had this exemption in place, it has not made a single finding that such operations pose a significant threat. In only a few instances has NPS included in its determination suggestions to the operator to modify its planned operations in any way.

The Service has concluded that the risk of any impacts to refuge resources by the Service not regulating the portion of a wellbore beneath a refuge is exceedingly low. The Service has carefully designed this rule to ensure that it is prioritizing its limited resources on those oil and gas activities that have the greatest impact to refuge resources and uses. Commenters from both industry and non-governmental organizations have asked the Service to ensure it has the resources to effectively implement this rule. The Service has carefully analyzed its resources and capabilities and has specifically tailored this rule to ensure maximum refuge protection within the constraints of its management capabilities. The Service agrees with commenters that it must ensure that it has sufficient resources to implement the rule in order for it to be successful. Balancing the low risk of impacts from the downhole aspects of these directional-drilling operations on refuge resources and uses with the high administrative costs of regulating all of these operations, the Service has exempted these operations in the rule.

Hydraulic Fracturing and Regulation of Downhole Activities

7. *Comment:* Several commenters requested that the Service ban hydraulic fracturing completely from the NWRS.

Service Response: The Service considered these comments, as well as other information and studies provided by commenters regarding hydraulic fracturing, and we have concluded that the additional information provided did not justify a change from the proposed rule's approach to hydraulic fracturing. Comments requesting the ban on hydraulic fracturing used the term to encompass all the activities and impacts that are associated with oil and gas development that happens to use hydraulic fracturing. These comments did not provide new information to the Service.

The information provided by commenters was available and considered by the Service in developing the proposed rule. The Service has determined that the actual process of hydraulic fracturing does not create impacts or risks of impacts that are so elevated above those of conventional oil and gas operations in general that a hydraulic fracturing ban is justified. It is the Service's policy that "scientific and scholarly information that we consider in our decision-making must be robust, of the highest quality, and the result of the most rigorous scientific and scholarly processes as can be achieved" (212 FW 7).

As the Service has noted in the EIS accompanying the rule, studies show that oil and gas operations that include hydraulic fracturing stimulation methods can negatively affect surrounding resources and the environment and can increase the risks of such impacts where appropriate measures are not taken before, during, and after hydraulic fracturing operations (e.g., improper cementing of casing and well integrity issues or surface mismanagement of fracking and flowback fluids). However, studies also show that proper implementation of such measures can substantially reduce—to a level close to that of conventional well operations—the risks to the surrounding environment from hydraulic fracturing operations.

Based on the Service's review of studies provided during the public comment period, we do not find that a ban on hydraulic fracturing completion methods in refuges is necessary or appropriate at this time. The Service will continue to revisit and update its policy as more information on hydraulic fracturing completion methods becomes available. Further, the Service notes that well completion programs using hydraulic fracturing were not given approval under the proposed rule. The rule also does not give such approval, and includes operating and approval standards developed with the

knowledge that hydraulic fracturing operations will likely be proposed by operators and were designed to ensure that operators employ technologically feasible least-damaging methods that will not impact refuge resources and uses. The Service will consider hydraulic fracturing operations on a case-by-case basis and analyze potential impacts on refuge resources and uses under the regulations' approval standards.

8. *Comment:* The Service was asked to clarify how the rule would, or would not, be impacted by BLM's impending fracking rule and associated litigation.

Service Response: As explained in the proposed rule, we have taken different approaches to regulating hydraulic fracturing activities based on our different statutory authorities and the specific needs of the NWRS. The Service has concluded that our rule is consistent with our statutory authorities and, therefore, should not be affected by the pending litigation.

9. *Comment:* The Service received several comments recommending that the Service extend its regulations to more comprehensively cover all aspects of downhole operations, particularly with regard to wellbore construction standards for operations that include use of hydraulic fracturing. Commenters also requested that the Service require baseline flowback requirements. On the other hand, the Service received comments that that Service regulation will only duplicate existing State and Federal requirements that fully address these downhole issues.

Service Response: The Service analyzed both the costs and benefits of further regulating downhole operations on the NWRS through this rulemaking and found the increased costs necessary to hire and maintain engineering staff to oversee our own separate downhole requirements and standards would not likely provide a comparable benefit in reduction of impacts or risks of impacts to surface resources. The Service reviewed and considered the comments and studies provided by the public on this issue, but found they did not change the Service's analysis of the benefits. On the other hand, the Service did identify additional costs for both the Service and industry if the Service were to regulate downhole operations. The Service would need additional specialized technical staff to evaluate proposals and subsequently monitor and inspect downhole operations for compliance. Industry costs would involve providing downhole well construction information such as drilling, mud, casing, cementing, and stimulation programs. This information

is developed as a matter of course by industry, so there would be some minimal costs to provide copies of these programs.

Recognizing the public concern regarding impact to water resources from these activities and the Service's responsibility to ensure that it protects these resources, the rule does include standards for well control and isolation and protection of usable water (§ 29.119(a)(3) and (4)). The standard serves to inform the public and the operators that the Service retains regulatory control for management and protection of all its resources including groundwater. However, as discussed above, the Service would have to substantially augment its engineering capacity to review, approve, and monitor downhole well construction. Comprehensive Service regulation of downhole wellbore construction and maintenance for the isolation and protection of usable water would duplicate state programs in many areas, and thus provide a diminished return in terms of reduction of risks to groundwater. Additionally, the rule includes provisions (information requirements, operating standards, and reporting requirements) that address the management of wastes including flowback fluids. Under the rule, all new hydraulic fracturing operations will be conducted under new operations permits or modifications to existing Service-approved permits. Thus, new operations under the rule are required to provide for management of flowback fluids, including tanks to capture and temporarily store flowback fluids, no use of earthen pits, and prompt removal of wastes from the refuge.

Easements

10. *Comment:* Some commenters requested clarity on the applicability of these regulations to easements.

Service Response: The definition of the National Wildlife Refuge System includes less than fee interests in land such as easements (50 CFR 25.12). Therefore, the exercise of non-federally owned oil and gas rights underneath the Service's easement estate are subject to these regulations to the extent necessary to protect the interests held by the United States under the easement (see § 29.40(b)). The Service holds many unique and varied easement interests throughout the United States. For this reason, it is difficult to generalize how the rule applies to any particular easement. To determine the applicability of these regulations, the Service will review the terms of the legal instrument by which the United States acquired or reserved its easement

interest to determine what regulation is appropriate in relation to that interest. Oil and gas operations will be subject to some and not necessarily all, of the requirements and standards of this subpart. Depending on the easement interest acquired, the Service may require an operator to obtain a permit from the Service to ensure that operations minimize the destruction of vegetative cover, control spread of invasive species, and/or avoid ecologically sensitive habitats by using technologically feasible, least-damaging methods. On the other hand, if an operator avoids burning, draining, filling, or dredging wetlands on one of the Service's conservation easements acquired for the purpose of protecting wetlands, the operator is likely exempt from these regulations.

Ultimately, the Service wants to ensure it is notified of operations that may affect the Service's less-than-fee interests and work cooperatively with the landholder and mineral rights holder, if different, to minimize or avoid impacts to our conservation interest in the land. However, the Service will continue to provide reasonable access to mineral rights holders for the development of their mineral rights, as we do on fee-title lands of the NWRS. The Service will work with operators and landowners in determining what is reasonable to protecting the Service's property interests under the easement.

Oil and Gas Operations in Alaska

11. *Comment:* The Service received several comments on how the proposed rule would affect oil and gas operations on refuges in Alaska and asking for clarification from the Service on how the rule would work in conjunction with the Alaska National Interest Lands Conservation Act (94 Stat. 2371; Pub. L. 96-487) and implementing regulations (43 CFR part 36). The Service got several comments recommending that the Service should clarify and revise the rule to fully recognize the controlling role of ANILCA and its implementing regulations in Alaska, and to address other issues. For instance, the Service received a comment to specifically replace the multiple references to ANILCA with the following blanket provision stating that ANILCA and implementing regulations at 43 CFR part 36 govern access, including but not limited to access to inholdings in Alaska, in lieu of the provisions of the non-Federal oil and gas regulations in subpart D: "In lieu of the provisions of this subpart, authorization and management of access in Alaska, including but not limited to access to inholdings, shall be governed by the

applicable provisions in 43 CFR part 36." Additionally, it was recommended that the final regulations should clarify that the only operations permit that would be required with regard to access across the NWRS associated with oil and gas development activities on private inholdings in Alaska would be a right-of-way issued pursuant to title XI of ANILCA and the regulations at 43 CFR part 36.

Service Response: We agree with the many comments we received that our rule was unclear about how this rule applies to operations in Alaska. After careful consideration of comments received on this issue, the Service has concluded that the rule does not need to include operations in refuges in Alaska as the existing Departmental regulations implementing section 1110(a) of ANILCA, access to inholdings, provide sufficient protection of refuge resources and use. The Service has revised § 29.41 "When does this subpart apply to me?" to clarify that the rule does not apply to operators in Alaska. In addition to this revision, the Service has removed any reference to ANILCA in other provisions of this rule. The specific references in various parts of the proposed rule were more confusing than helpful.

Refuges in Alaska will continue to be governed by title XI of the Alaska National Interest Lands Conservation Act (ANILCA; 16 U.S.C. 410hh-410hh-5, 16 U.S.C. 3101 *et seq.*, 43 U.S.C. 1601 *et seq.*), and the Department's implementing regulations and standards found at 43 CFR part 36. Additionally, section 22(g) of the Alaska Native Claims Settlement Act of 1971 (ANCSA) (43 U.S.C. 1601-1624) and its implementing regulations found at 50 CFR 25.21 will continue to apply to lands conveyed to Alaska Native Corporations that are within the boundaries of a National Wildlife Refuge in existence on the date of enactment of ANCSA. However, the performance-based standards outlined in this rule may be used, as appropriate, as guidance in determining how an operator would meet the various requirements of ANILCA and ANCSA to protect refuge resources and uses. ANILCA provides the Service with the authority to ensure that operators accessing non-Federal mineral rights underneath refuges in Alaska must work cooperatively with the Service through a permitting process outlined in section 1110 and 43 CFR part 36 to avoid or minimize impacts from these operations to refuge resources and uses. For example, under the ANILCA regulations, the Service may require an operator to: Obtain a permit for

operations on federally owned surface estate; provide the Service with financial assurance; restrict the time, place, and manner of activities as necessary to protect refuge resources and uses; and ensure the operation is properly plugged and reclaimed after production operations are complete.

12. *Comment:* The Service also received comments asking to further clarify that this rule would not be used to regulate activities conducted on Alaska Native Corporation (ANC)-owned or other non-Federal lands in Alaska.

Service Response: The scope of this rule is limited to activities on Federal lands within the National Wildlife Refuge System. In the case of refuges in Alaska, it does not apply to inholdings or non-Federal adjacent lands. Commenters generally seemed to be clear about the scope of this rule on this point, and, therefore, the Service concludes it does not need to clarify this further in the final rule. As discussed above, access through refuges to ANC-owned or other non-Federal lands in Alaska will continue to be governed by ANILCA, ANCSA, and their implementing regulations.

13. *Comment:* The Service also received comments recommending that the Service clarify further how the operations standards outlined in the proposed rule would apply to operations under an ANILCA permit. Based on concern about how some of the standards would further limit landowners' ability to specify route or method of access and, therefore, diminish their rights to adequate and feasible access to inholdings as authorized under ANILCA, these commenters asked that the Service not apply these operation standards to operations in Alaska. On the other hand, the Service also received comments asking that the final rule avoid citing specific sections of the operating standards that may apply to operations under an ANILCA permit, because doing so would raise doubts about the application of the rest of the rule to these operations (see 80 FR 77206; December 11, 2015).

Service Response: As discussed above, this rule does not apply to oil and gas operations in Alaska. However, the Service has developed these operating standards through a thorough analysis of what is needed to properly protect refuge resources and uses. Therefore, to the extent consistent with these existing ANCSA and ANILCA regulations, the Service may use these standards as guidance in approving operations and issuing permits under existing regulations applicable to

Alaska. The standards that will be applicable will be determined on a case-by-case basis and will only be used if consistent with the standards outlined in ANILCA and its implementing regulations.

14. *Comment:* Other commenters recommended that the Service apply the rule more comprehensively to operations in Alaska, believing that ANILCA is not sufficient at protecting NWRS resources and uses from impacts of oil and gas operations.

Service Response: The Service has concluded that ANILCA provides sufficient regulation of oil and gas operations in Alaska where the Service has been able to effectively work with operators to minimize or avoid impacts to refuge resources and uses while providing operators access to their minerals under the existing regulations. As discussed above, implementation of the existing ANILCA regulations provides stringent protection of refuge resources and uses and provides the Service the appropriate tools for regulating non-Federal oil and gas operations on refuge-administered surface estate. As one commenter suggested, if the Service does, in the future, decide we need different tools to effectively manage oil and gas resources in Alaska, we can propose revisions to the ANILCA implementing regulations.

15. *Comment:* The Service received a comment highlighting the fact that the statutory authority and obligation to review and approve geological and geophysical exploration plans per section 1002 of ANILCA (16 U.S.C. 3142) (and associated regulations at 50 CFR part 37) has expired (see Memorandum Decision and Order, U.S. District Court for the District of Alaska (*State of Alaska v. Jewell, et al.* Case No. 3:14-cv-00048-SLG)), and recommending that the final rule should clarify that the Service cannot accept further applications for geological or geophysical exploration for oil and gas in the coastal plain of the Arctic Refuge. The comment also recommended that the final rule should also explicitly mention prohibitions on oil and gas leasing, development, and production in the Arctic National Wildlife Refuge (16 U.S.C. 3143).

Service Response: The Service agrees that we cannot accept any further application for geological or geophysical exploration in the coastal plain of the Arctic National Wildlife Refuge and that oil and gas leasing is prohibited in the refuge for the reasons stated in the comment; however, the recommended revisions are not necessary in the final rule because they are outside the scope of this rulemaking.

Existing Production Operations Under a Service Permit

16. *Comment:* The Service received comments that the proposed rule was unclear as to which provisions of this subpart applied to existing operators under a Service-issued permit.

Service Response: The Service agrees with the commenter that the proposed rule was not clear as to which provisions of the rule applied to existing operators with a Service-issued permit. For operations being conducted under § 29.43, all administrative or operational requirements that are specific to obtaining or operating under an operations permit issued under this subpart do not apply. The operator with an existing permit may continue to operate under the terms and conditions of that Service-issued permit, unless the operator proposes to modify its operations or propose new operations not covered by the existing Service-issued permit, such as plugging and reclamation. If an operator wishes to modify their operations or proposes new operations outside the scope of their existing Service-issued permit, the permit will need to be amended such that any modification or new operation meets applicable operating standards of the rule. We have revised § 29.43 accordingly.

17. *Comment:* Several commenters recommended that operators conducting production operations under a currently approved special use permit should be required to obtain a new permit under the proposed rule, as the Service considered in Alternative C of the DEIS, to ensure that they are following certain performance-based standards regarding waste management and disposal, leaks, spills, and pits.

Service Response: The Service has been very successful at working with operators through these Special Use Permits (SUP) to ensure that impacts to refuge resources and uses are avoided and minimized. As explained above, the Service has concluded that a new permit requirement for these existing operations would bring little to no beneficial impacts to refuge resources and uses, and would impose an unnecessary administrative burden on the Service and operators by requiring a new permit to replace the existing permit. In issuing permits to existing operators, the Service considered and included many provisions to protect refuge resources and uses, such as waste management and disposal, spill prevention, and spill response. Some SUPs have authorized the creation of reserve pits, while others have prohibited them. Such inconsistency in

the future has been addressed and eliminated by this rule. The Service has decided that requiring these operators to get a new permit is not reasonable or appropriate, considering that these operators have been cooperative in working with the Service to protect refuge resources and uses and have reasonable expectations from their work with us that the operations permitted by the Service in their SUP are sufficient. However, as discussed above, any modifications to their operations or proposals for new operations not covered by the original permit are subject to all applicable requirements of part 29.

Also, the Service has further clarified in § 29.43, as discussed above, that an existing operator must comply with the Service's plugging provisions at §§ 29.180 and 29.181. Some commenters stated there should be a clear requirement for operators with an approved SUP to provide financial assurance prior to proceeding with plugging and reclamation. The Service's intent under § 29.43 is to allow operators who have cooperated with the Service in conducting activities under a Service-issued permit to continue under the terms and conditions that have been agreed upon. While financial assurance would provide the benefit of ensuring the public does not become responsible for plugging and reclamation costs should an operator default or abandon their operation, based on the knowledge and experiences of current and past refuge managers engaged in oil and gas oversight, we were not able to identify any well becoming orphaned by an operator within the past 20 years. Therefore, the Service declines to add a financial assurance provision at great cost to these operators with little benefit to refuge resources and uses. However, if an operator's original permit did not include authorization to conduct plugging and reclamation, the operator would be required to amend their Service-issued permit or obtain a new operations permit, either of which requires compliance with the plugging and reclamation provisions of this rule, including providing financial assurance.

Pre-Existing Operations

18. *Comment:* The Service received several comments suggesting the Service clarify how pre-existing operations would be subject to provisions of the rule absent a new permit requirement. One commenter expressed concern that the proposed rule did not include a mechanism for ensuring pre-existing operations are following the requirements of the rule. Additionally, commenters wanted more clarity as to

what general terms and conditions apply to pre-existing operations.

Service Response: The Service agrees that the rule should further clarify which provisions of the subpart would apply to these classes of operations. For operations being conducted under § 29.44, all administrative or operational requirements that are specific to obtaining or operating under an operations permit issued under this subpart do not apply unless the operator chooses to obtain a new operations permit instead of amending their existing permits under the terms and conditions of that permit. We have made this clarification in the rule at § 29.44. Additionally, we agree the language needs to be clearer as to the plugging and reclamation responsibilities of a pre-existing operator. After production operations have been completed, a pre-existing operator must obtain an Operations Permit from the Service, either to maintain the well in shut-in status or to plug and reclaim operations in compliance with this subpart. The Service has made this clarification in § 29.63. Finally, the Service has made specific revisions to the rule at § 29.64 that identify the specific "General Terms and Conditions" applicable to pre-existing operations.

The Service has concluded it does not need to impose a permit requirement on pre-existing operators in order to notify them of the applicable requirements of the rule or to ensure they are in compliance with its requirements. The Service has a duty to ensure that all pre-existing and existing operators are notified of the requirements of the rule. The Service is working on guidance documents for all classes of operators, including pre-existing operators. Additionally, the Service has already developed relationships with many of the pre-existing operators. The Service will be in contact with operators to ensure they are informed about the requirements of the rule.

19. *Comment:* Some commenters agree with the Service's proposed approach not to require operations permits for pre-existing operations during the production phase. Other commenters believe that pre-existing operations should be subject to the same requirements as new operations under the rule (as the Service considered in Alternative C of the DEIS), specifically requiring a new permit for pre-existing operators that would ensure that they are following the applicable performance-based standards of the proposed rule, including waste management and disposal, spill prevention and response, and the

general prohibition on the use of pits, for example; and/or obtaining financial assurance for the full cost of plugging and reclamation during the production phase.

Service Response: After weighing the comments on both sides of the issue, the Service has decided to continue the approach outlined in the proposed rule that a pre-existing operator not be required to get a permit or post financial assurance during the production phase of its operation. In the cost-benefit analysis and environmental impact statement, the Service evaluated the range of alternatives related to the management of pre-existing operations from no additional regulatory oversight to full regulatory oversight. The Service did identify unnecessary impacts to refuge resources and uses related to the ongoing production phase of pre-existing operations, but also recognized the potential to apply a different, more efficient approach to address many of the refuge resource and use issues for this class of operation.

The primary issue with pre-existing operations, as identified by refuge managers, is that reclamation has not been typically or consistently performed in a way that restores disturbed areas to productive habitat. This issue is addressed by the rule. First, in accordance with § 29.63 (which has been revised to clarify), after production operations have been completed, a pre-existing operator must obtain an Operations Permit from the Service, either to maintain the well in shut-in status or to plug and reclaim operations in compliance with this subpart, including the requirement that an operator obtain financial assurance at this time. Second, a pre-existing operator is subject to the reclamation standards of § 29.117(d), which provides for removing all above-ground structures, equipment, roads, well pads, and contaminating substances, reestablishing native vegetation, restoring conditions to pre-disturbance hydrologic functions, and restoring disturbed areas to productive habitat.

Our analysis found that the Service could eliminate many of the ongoing, unnecessary impacts to refuge resources and uses resulting from the production phase of pre-existing operations by making violation of non-conflicting State laws and regulations relating to oil and gas operations a prohibited act in the rule. Though not required to obtain a Service operations permit during production, the Service would have greater authority to ensure these operations are in compliance with applicable laws because Refuge Law Enforcement would be able to enforce

State law on the NWRS. Any violation of State laws on the NWRS would constitute a violation of the law under the rule, and all applicable penalties and prohibitions would apply.

State laws usually address ongoing impacts from these pre-existing operations, such as waste disposal and prevention and cleanup of leaks and spills. Where an individual State's regulations do not specifically address an issue, the Service would continue to work cooperatively with State agencies and operators to reduce impacts or risks to refuge resources and uses. For example, in an assessment of State regulations conducted by the Ground Water Protection Council (GWPC) for the U.S. Department of Energy (DOE), the GWPC found that 23 of 27 oil-producing States assessed required oil production site storage tanks to have secondary containment dikes to contain leaks and spills (GWPC 2014). Additionally, the GWPC (2014) reported that 23 of the 27 States require reporting and remediation of spills and 13 of the 27 States specify cleanup standards for spills. Some States also have siting or setback requirements for pits (production skim pits and reserve pits) with some States prohibiting the use of pits in 100-year floodplains or in areas with shallow aquifers (GWPC 2014). An operator's compliance with these types of laws and the Service's ability to assist in the enforcement of these laws would provide additional protection to refuge resources and uses.

While full regulation of pre-existing operations during their production phase would provide some additional protection to refuge resources and uses, it would not be able to remedy a majority of the impacts to refuge resources and uses caused when the operators chose the time, place, and manner of these pre-existing operations. For example, on existing operations, the operator's well has already been drilled and the area of operations (access route, well site, production facilities, and routes for gathering lines) were established, and impacts to refuge resources, such as geology and soils, wetlands, and wildlife-dependent recreation, occurred prior to the acquisition of a refuge. The Service could require actions not addressed by applicable State rules—site maintenance for erosion control, vegetation management, noise abatement, housekeeping, for examples—by imposing a permit requirement and undergoing the associated administrative processes and costs. Our analysis estimated that approximately 4,000 wells operated by perhaps 400 different operators would fall under the

operations permit requirement. Many wells could be grouped under a single operations permit by an operator, but the volume of operations permit applications required would likely exceed 1,000. The Service would need to roughly double its oil and gas management resources from current levels, while the administrative costs to operators of pre-existing wells is estimated to be approximately \$1,800 per well.

Based on our analysis, we determined enforcing a pre-existing operator's compliance with State laws and regulations best meets the purposes and needs of revising the existing rule and will provide the maximum protection of refuge resources when balanced with the cost to operators and to the Service for administration. This approach enables managers to focus limited resources on those operations with the greatest possible impacts to refuge resources and uses rather than an indiscriminate administration of permits for the approximately 4,000 pre-existing operations. Comments from the public have not provided us with substantial new information that would change our analysis or conclusion.

20. Comment: The Service received a comment requesting that we revise the definition of "modification," so that a pre-existing operation must obtain a permit when they transfer operators.

Service Response: After considering this comment, the Service agrees that a change in operator should trigger the requirement that the new operator obtain an Operations Permit from the Service. However, revising the definition of modification is not the best way to accomplish this objective. Instead, the Service has revised the rule language to replace "operation" with "operator" in § 29.44 to clarify that the exempt status follows an operator not an operation. Also, in § 29.171, we have included language that would allow an operator to continue operations for 90 days while the operator files the permit application and posts bond to ensure continuity of new operations. The new operator would need to obtain an Operations Permit that meets operating standards and general terms and conditions of the rule, including posting of financial assurance. The Service will not require a change in the time or place of these operations, but rather will ensure that any ongoing unnecessary impacts from these operations are avoided or minimized by requiring the new operator to employ "technologically feasible, least damaging methods" moving forward. This change in what constitutes loss of pre-existing status ensures that more

operations on the NWRS will be operating under Service standards sooner, and provides greater protection of refuge resources and uses from the ongoing unnecessary impacts of pre-existing operations.

21. Comment: We received comments from the public requesting that the rule require more than just basic information from pre-existing operators on refuge lands (e.g., mitigation, spill control, emergency preparedness plans). Commenters stated that the Service should require other important information necessary for the proper management and conservation of refuge resources from these pre-existing operators. For instance, one comment suggested that the Service's requirement in proposed § 29.61 for a scaled map that delineates only an "area of operation" may not be sufficiently detailed to provide refuge managers with baseline information to monitor operations, changes in operations, and violations, and that the Service should require a scaled map, as well as detailed schematics of existing wells and infrastructure.

Service Response: After further considering these comments, the Service has concluded that some additional, basic information from pre-existing operators would enhance the protection of refuge resources through better documentation of the equipment, materials, and operational practices being used on location. Additional operational information will also help to establish an operator's reclamation responsibilities as well as a baseline for determining whether future actions constitute a modification as defined under § 29.50. Therefore, the Service has amended the rule at § 29.61 to require pre-existing operators to also submit to the Service: a brief description of the current operations and any anticipated changes to the current operations, including documentation of the current operating methods, surface equipment, and materials produced or used.

22. Comment: Some commenters requested that the Service delete the phrases "subject to the provisions of this subpart" and "subject to applicable requirements of this subpart" from proposed §§ 29.43 and 29.44, believing that subjecting pre-existing operations and existing operations currently under a Service permit retroactively was inappropriate.

Service Response: In developing the rule, the Service identified several key objectives that needed to be addressed in considering the extent to which to regulate pre-existing operations and operations already being conducted

under Service authorization. These objectives included that: (1) These operations not create additional unnecessary impacts on refuge resources and uses; and (2) all operations within refuges are eventually plugged and reclaimed to Service standards. Pre-existing operations and existing operations are subject to specific provisions of this rule that ensure that these objectives are met and that future activities of these operators do not result in additional, unnecessary impacts. Therefore, subjecting these operations to these provisions is not inappropriate, as the commenter suggested, because the provisions are not focused on retroactively regulating past activities and impacts of these operations (*i.e.*, time, place, or manner of operations) but rather on regulating new or modified activities and impacts of these operations.

Financial Assurance

23. *Comment:* Some commenters expressed the desire that the Service go beyond what was in the proposed rule and periodically review reclamation costs and corresponding requirements for financial assurance, and update these estimates as necessary to accurately reflect the cost of reclamation upon the decommission of the well.

Service Response: The concern that financial assurance amounts will become outdated and insufficient to ensure reclamation was already addressed in proposed § 29.152, which we, therefore, have not revised. The Service may require, or the operator may request, an adjustment to the financial assurance amount because of any circumstance that increases or decreases the estimated costs of plugging and reclamation. Cost changes due to inflation would be a circumstance that would allow the Service to require an adjustment in the amount of financial assurance.

24. *Comment:* The Service also received comments that requiring financial assurance above and beyond financial assurance already required by the State is not necessary because the State bonds are sufficient. Commenters stated that this additional financial assurance requirement was “unfair and unreasonable,” and should only be done on a case-by-case basis as necessary to supplement bonds already lodged with the State.

Service Response: The Service’s rule does not rely on State bonds to ensure timely well plugging and site reclamation to Service standards for two primary reasons: (1) Bonds furnished to operators by the State are not usually directly available to the Service to plug

and reclaim that particular site; and (2) State bonding programs do not typically require well plugging and reclamation to Service standards. State bond amounts are generally insufficient in themselves to cover the actual costs of plugging and reclamation. However, States administer well plugging funds with money derived from sources other than forfeited bonds, *e.g.*, permitting fees, taxes on production, or penalties. Most States with regulations overseeing oil and gas activities have developed programs for plugging and reclaiming orphaned wells, and, theoretically, the State may have sufficient funds to plug and reclaim orphaned wells on the NWRs. However, many State programs remain backlogged with a number of orphaned wells that need to be plugged or reclaimed.

Orphaned wells on Federally managed lands do not usually rank as top priorities on State lists for plugging. (Office of Inspector General, Report No. CR–EV–FWS–002–2014: Oil and Gas Development on U.S. Fish and Wildlife Service Refuges). So the bond that an operator furnishes to the State is often not available to ensure that wells are plugged and areas of operation reclaimed in the event of operator default or abandonment of the operation. Even where a State may expeditiously address plugging of an orphaned well on a refuge, State plugging programs typically do not require restoration of a site in a manner that meets Service standards in the rule (§ 29.117(d)). For these reasons, State bonds are typically not sufficient to ensure protection of refuge resources in the event that an operator defaults or abandons his or her operation.

However, in the event that a State and the Service were in formal agreement that State plugging funds would be used to plug a well directly upon its becoming orphaned as well as to conduct site reclamation, the Service would consider this to be a condition under § 29.152 that would justify reducing the financial assurance required by the Service.

Modification of Operations and Permits

25. *Comment:* The Service received several comments requesting clarity of the proposed rule’s definition of “modification” (proposed § 29.50). Some commenters wanted the Service to clarify the definition to ensure it includes certain changes. Specifically, one commenter suggested the Service amend the definition to read: “Examples of a modification could include, but are not limited to, drilling additional wells from the same pad, conducting hydraulic fracturing or other well

stimulation activities, creating additional surface disturbance (expanding the footprint of a well pad, realigning a road, constructing new pipelines or gathering lines), or converting a natural gas well into a wastewater disposal well so that the resulting modification has notable impacts to the refuge resource.”

Service Response: The Service agrees that many of the examples listed by the commenters require a pre-existing operator to obtain a new permit or an operator under an existing Service-issued permit to obtain an amendment to its permit, including drilling additional wells from the same pad, conducting hydraulic fracturing or other well stimulation activities, creating additional surface disturbance (expanding the footprint of a well pad, realigning a road, constructing new pipelines or gathering lines), or converting a natural gas well into a wastewater disposal well, will also likely be considered “modifying” an operation. The Service had identified several examples in the preamble of the proposed rule, and examples of a modification include drilling additional wells from the same pad, creating additional surface disturbance (*e.g.*, expanding the footprint of a well pad, realigning a road), or converting a natural gas well into a wastewater disposal well, as these modifications will have impacts beyond the scope, intensity, and/or duration of existing impacts. This provision was not intended to apply to minor actions, such as repositioning of surface facilities within the current footprint of pre-existing operations, minor changes in color schemes, or minor, non-routine maintenance actions.

The Service has decided it is not necessary to revise the definition of “modification” in the rule to include these specific examples. Instead, these examples and others the Service develops in the future will be included in guidance documents provided to pre-existing operators and holders of existing Service authorizations as well as Service staff who will administer the rule.

26. *Comment:* Another commenter recommended two changes to the regulations addressing modification of existing operations. First, the commenter asked the Service to add the word “significant” before “additional impacts” in the definition for “modifying.” This change would clarify that modified permits are not (and should not be) required for minor modifications to operations that do not result in significant changes in effects to the environment. Second, proposed

§ 29.160 should be modified to clarify that the Service may amend a permit only when there is a “significant” or “substantial” modification to the permitted operation.

Service Response: The Service considered the addition of the word “significant,” as well as other adjectives to provide more clarity for what the Service would consider to be a “modification.” However, we decided that adding any such language was not useful, because such terms themselves remained subject to various interpretations. For instance, an operator, the Service, or a non-governmental organization or individual may have very different beliefs as to what constitutes a “significant” impact to refuge resources and uses. Therefore, we have provided several examples of what would likely constitute a modification (see above) to provide some clarification to our intentions in regulating modifications, and as previously stated we will provide further guidance documents for this purpose. However, determining whether a change is a “modification” of the operation must be done on a case-by-case basis because the details of when, where, and how such changes are accomplished will determine whether such a change is “beyond the scope, intensity, and/or duration of existing impacts.” Therefore, the Service did not revise the rule as suggested by this comment.

Performance-Based Standards

27. *Comment:* The Service received conflicting comments regarding our proposed approach of regulating oil and gas operations based on performance-based standards. Some commenters requested that the Service require prescriptive actions, at least in some instances. For example, one commenter suggested the general reclamation standard to “remove or neutralize contaminating substance” (§ 29.117(d)(3)) be modified to include a strict prohibition of onsite remediation of contaminants. Also, the Service received comments that these performance-based standards leave too much discretion to the Service to either be too lenient with operators or too strict.

Service Response: Pursuant to Executive Order 12866 (58 FR 51735), “[e]ach agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt” (E.O. 12866(b)(8)). Consistent with the direction provided in E.O.

12866, and as stated in the proposed rule, the rule is based on performance-based standards rather than prescriptive operating standards. A prescriptive standard may seem stricter because it ensures that an operator follows a certain practice that seems like it would protect refuge resources and uses and allows the operator no flexibility to use a less-protective standard. However, in implementation, these standards can, in some instances, have the unintended consequence of actually being more harmful to refuge resources and uses. For example, onsite remediation of a hydrocarbon spill may result in less overall impacts or risks of impacts by reducing heavy truck traffic than a prescriptive standard of requiring offsite removal of soils, which also increases the potential for introduction of invasive plant species associated with import of new fill material. The flexibility for refuge managers and operators to accomplish a desired end allows site-by-site evaluation of alternatives that are least damaging overall. Additionally, science and technology are constantly advancing, and new methodologies used today are much more environmentally protective than those available only a few years before. If these trends continue in the future, the performance-based standards in the rule easily adapt to those changing methodologies and will be at least as effective in the future as they are today.

In response to comments that using performance-based standards leaves too much discretion to the Service, this rule will be accompanied by detailed guidance for both operators and Service staff on what are current best management practices for meeting these standards. This guidance will provide consistency of interpretation and application of the standards across the NWRS and decrease the possibility that the discretion afforded refuge managers will be misapplied. Furthermore, through compliance with the National Environmental Policy Act (NEPA) process at the site-specific permit level, the public will have the opportunity to review and comment on Service proposals.

28. *Comment:* Other commenters were generally supportive of the more flexible approach, but recommend that the Service remove what they saw as more prescriptive standards in the rule in favor of more general goals to be achieved. For example, a commenter recommended removing the proposed regulations requiring the installation and maintenance of secondary containment, applying seasonal restrictions, and specifying the location,

type, and design of facilities (proposed §§ 29.111–29.119) as unreasonable, burdensome, and unlawfully diminishing the value of the mineral estate. The commenter suggested that the Service replace these standards with more general goals to be achieved to “the extent technologically and economically feasible, and a requirement to use best management practices.”

Service Response: The Service recognizes that some arguably prescriptive management practices are included in the suite of performance-based standards. The observation that an operator must install and maintain secondary containment is a good example (§ 29.111(b)). In part, the provision is prescriptive, but acknowledges the widespread use of the best management practice of secondary containment by industry and regulatory agencies to capture spills, prevent their spread, and facilitate their cleanup. In this instance, the Service does not envision any alternatives that would exclude the use of secondary containment and still meet the “technologically feasible, least damaging method” standard, and so the provision serves to inform operators and the public of an aspect of the rule’s approach to managing contaminating substances. Additionally, the requirement still leaves flexibility for the refuge manager and operators to decide on the design and operation of the secondary containment system. Similarly, in a few other instances the Service has included practices that we find to be more informative but which may be seen as somewhat prescriptive; however, we have maintained flexibility for site-specific implementation. The rule includes the necessary general goals applied with the overall standard of technologically feasible, least damaging methods. The rule will result in best management practices being identified and included in the site-specific operations permit.

29. *Comment:* One commenter asked whether what is practical for a particular operator would be a consideration in what is “technologically feasible, least damaging methods.”

Service Response: While we do consider economics in determining appropriate methods, we look at what is feasible in terms of industry-wide practice, not what is affordable for a specific operator. The Service does not intend to allow operators to use methods that unreasonably harm refuge resources and uses just because the operators don’t have the adequate financial resources to employ

technologically feasible, least damaging methods.

30. *Comment:* The Service also received a comment that it does not have the authority to permit only the “least damaging” operational methods and that the Service’s use of the term “technologically feasible, least damaging methods” is not appropriate and should be replaced with “feasible methods” that are technologically and economically feasible, as determined by the best industry practices available. This commenter contended that the Service may only recommend, not require, the “least damaging” methods, stating that the mineral interest owner is not required to conduct its operations in a manner that is not economically or technologically feasible in order to access its mineral rights.

Service Response: The Service has considered this comment and does not agree. First, we note that NPS has in fact used this standard for new operations since January 1979. This term, defined at § 29.50, ensures that the Service does not go beyond what is technologically feasible in the methods required of an operator and considers the industry-wide economics of those methods in making those decisions. It also ensures that an operator uses those methods that are least damaging of refuge resources and uses, which is a responsibility of the Service to maintain under the NWRSA. Therefore, the Service concludes that requiring “technologically feasible, least damaging methods” is well within the authority of the Service.

31. *Comment:* The Service received several comments recommending that the Service remove any ambiguous language contained in the proposed rule, including the term “greatest extent practicable” found at proposed § 29.32. Commenters were concerned that such language would allow the operators the unnecessary ability to pressure the Service into allowing methods that are based more on economic factors rather than NWRS resource and use protection.

Service Response: In response to these comments, the Service went back to the regulations to review for any ambiguous language. The Service did use these terms quite frequently in the preamble to the proposed rule where it outlined the Service’s general intent regarding the proposed rule. The Service has avoided using such ambiguous terms in the preamble to the final rule. When the Service reviewed the proposed rule text in consideration of this comment, we found that the term “greatest extent practicable” only appeared at § 29.32, which is a revised version of a general policy statement of the Service related

to managing all non-Federal mineral rights. This language remains from the previous regulations found at § 29.32 and pertains to rights other than oil and gas rights, so the Service decided not to revise this language at this time. Other than this section, the Service found one other instance of ambiguous language in the proposed rule (see in proposed § 29.111(g) “to the extent reasonably practicable”) and has removed such language.

Timeline for Approval

32. *Comment:* The Service sought comment on whether the 180-day timeline for final action is reasonable. The Service received some comments stating that this timeline was too long for operators to wait to get authorization on their permits. Other commenters suggested that this timeline was too short and would hinder the Service’s ability to fully comply with NEPA requirements.

Service Response: The Service has considered these comments, but has determined that the timeline from the proposed rule should be maintained in the final rule. The timeline does provide for hard deadlines and limits the Service’s discretion to delay the processing of Operations Permit applications. For instance, under the rule, the Service has 30 days to conduct its “initial review” to determine whether an operator’s application is complete, request more information from the operator, or inform the operator that more time is necessary and provide written justification for the delay. Once the application is deemed complete, the Service must generally take final action within 180 days. Any additional time after the 180 days may be taken only if the operator agrees to additional time, or that time is necessary for the Service to comply with applicable laws and regulations. The Service’s purpose in using the 180-day timeframe is to provide operators with greater certainty regarding the permitting process. While the Service cannot always guarantee meeting this deadline and has, therefore, provided an extension provision in the rule, it is the Service’s intention to process these permits as quickly as possible and not unreasonably impede a private mineral rights owner’s right to access those minerals.

33. *Comment:* One commenter recommended that the Service add a provision to the regulations that would provide a Categorical Exclusion under NEPA for permits issued under this subpart and additionally include a provision that compliance with the terms of the permit is “deemed to be not

likely to adversely affect any species listed under the federal Endangered Species Act.”

Service Response: The Service declines to adopt the commenter’s recommendation because it is beyond the scope of this rulemaking and we do not currently have the record that we would need to demonstrate to the Council on Environmental Quality to establish a new categorical exclusion. As the Service gains experience in implementing the rule, we may find that it is appropriate to pursue adoption of a new categorical exclusion. Similarly, with respect to the inclusion in the rule of a provision regarding compliance with the Endangered Species Act (ESA), we are unable to accept the recommendation because such determinations must be made on a case-by-case basis in compliance with section 7 of the ESA (16 U.S.C. 1531 *et seq.*).

Information Requirements and Public Access to Information

34. *Comment:* The Service received some comments that the proposed information requirements for permit applications (50 CFR 29.94–29.97) were extraordinarily extensive and unduly burdensome. These commenters believed that these sections, as well as § 29.121(f), also unlawfully require the disclosure of confidential and/or proprietary information and requested that any provisions requiring the disclosure of such information be removed. These commenters also requested that the Service scale down information requirements to only the basic information needed for the Service to assess the location and type of operations that will be undertaken.

Service Response: The Service carefully considered what information was necessary from operators so that the agency could properly administer non-Federal oil and gas activities on the NWRS and ensure that operators avoid or minimize impacts to refuge resources and uses. We analyzed each of the information requirements in compliance with the Regulatory Flexibility Act to ensure that the benefit of these information requirements to NWRS resources and uses were appropriate based on the administrative costs to the operator and the Service, and we concluded that all information requirements in the rule are appropriate. Furthermore, we understand that information requirements can be burdensome on operators, so in instances where the Service needs information gathered in compliance with other Federal or State laws under this rule, the Service does not require an

operator to duplicate that information but rather provide the Service copies (see, e.g., §§ 29.61(d), 29.121(g)).

35. *Comment:* Commenters suggested that the Service information requirements are inadequate because they do not require full disclosure of chemicals used for hydraulic fracturing prior to obtaining a permit. They questioned how the Service could do a full analysis of the environmental risks of a hydraulic fracturing operation if they did not have all of the information regarding chemical uses by the operator. Commenters also stated that proposed § 29.210 would allow operators to avoid any obligations to disclose the identity of fracking chemicals used simply by submitting nothing more than an affidavit in support of their claim that the information is confidential and the Service would have no power to disclose the information to the public if the operator were to provide it.

Service Response: While an operator will be able to provide an affidavit to support the protection of proprietary or confidential information, an operator still must provide the Service any information the agency needs to fully assess the environmental impacts of an operator's activities, including all chemical uses in the operation. Information requirements included under § 29.95(p) include identification of contaminating or toxic substances used or expected to be encountered during operations, including material safety sheets. In the rule, the Service also used the "including, but not limited to" term in the list of information requirements to reserve the ability to require additional information (see § 29.96) if necessary.

The information requirements of § 29.95(p) provide the Service with the necessary information upfront to sufficiently analyze the environmental risks of a hydraulic fracturing operation and to ensure that operators are following best management practices for storing and removing these chemicals. The post-operational chemical disclosure information that operators commonly provide via FracFocus is for the different purpose of identifying specific sources of contamination and responsible parties should contamination occur.

36. *Comment:* One commenter requested the Service provide an easy way for the public to access information about proposed operations and report perceived violations, including the option for anonymity to encourage workers and others with sensitive positions to report problems.

Service Response: The Service's approval of any proposed operations on

the NWRS will be done in compliance with NEPA, and the Service will provide the public with information about proposed operations and the opportunity to participate as afforded by that Act. As for reporting perceived violations, contact information for each refuge is readily available and is the fastest and most efficient way of notifying the Refuge of any perceived violations. We encourage the public and workers to contact that refuge with any concerns they may have regarding perceived violations by these operators. Such information can be provided to the refuge anonymously through letters, phone calls, or any other means that will allow an individual to feel comfortable doing so.

Penalty and Enforcement Provisions

37. *Comment:* The Service received several comments recommending that the final rule provide for robust enforcement of rule requirements and include specific penalties for non-compliance. For instance, commenters requested specific provisions regarding notifying and working with operators to bring them into immediate compliance; issuing formal written notices of non-compliance; specific penalties for non-compliance; seeking civil penalties for failure to comply with a notice of non-compliance; and for more egregious cases, filing a civil action in Federal court seeking an injunction or restraining order to stop damaging operations. One commenter also suggested that the Service adopt NPS current regulations for approval of an operations permit (50 CFR 9.37(a)) believing that the language contained in that section, if adopted by the Service, would provide the Service the ability to deny a permit if it is not protective enough of a refuge.

Service Response: The Service considered these comments, but concluded that modifying our enforcement provisions as the commenter suggested is not warranted. In speaking with Refuge law enforcement, the Department of Justice, and the Solicitor's Office, the Service finds these provisions provide sufficient tools for the Service to ensure compliance with this subpart on penalty and enforcement. Administrative corrective actions are not normally contained within the prohibited acts sections of regulations. The Service would adopt the recommended progressive enforcement action suggested by the comment through Service policy.

Furthermore, the rule provides the Service the ability to deny a permit if the operator does not meet several

requirements (§ 29.103). The Service finds that these requirements are both more specific and clearer than the language suggested by the commenter. These requirements have been carefully crafted to ensure that the Service's approval (or denial) process for an Operations Permit meets the objectives of the rulemaking to ensure operations avoid or minimize impacts to refuge resources and uses.

38. *Comment:* Additionally, a commenter requested that the Service provide further clarity on how prohibited acts and penalties apply to pre-existing operations and recommended that violation of the informational requirements, modifications, reclamation, general terms and conditions, and other operational requirements in §§ 29.60–29.64 be added to prohibited acts and penalties for pre-existing operations at § 29.190.

Service Response: The Service agrees with the commenter that the proposed rule could have been clearer as to which provisions apply to pre-existing requirements or not and has revised the rule accordingly at § 29.60 through § 29.64 and § 29.190. A violation by a pre-existing operator of informational requirements, modifications requirements, reclamation requirements, and applicable general terms and conditions is considered a prohibited act and subject to applicable penalties.

Appeals

39. *Comment:* The Service received comments that the two-tiered appeals process proposed in the regulations is unreasonable and unduly burdensome. There should be a single, expedited administrative appeal available for challenges to actions taken by the Service under the proposed regulations. This administrative decision should be directly appealable in Federal court.

Service Response: The appeals process outlined at § 25.45 is the process by which the Service currently reviews all appeals of the Service's permit decisions for public uses on refuge lands. The Service will not provide a different appeals process under this subpart, because we find that the current process works well and that the changes requested would lead to less consistency and efficiency for the administration of permits by the Service. The two-tiered appeals process provides additional opportunities to resolve disagreements, while preserving opportunities for judicial review of final agency action under the Administrative Procedure Act. As to the other concern raised by the commenter, we revised § 29.200 to clarify that the decision of

the Regional Director will constitute the Service's final agency action.

Finally, in reviewing the appeals process under the proposed rule as it would relate to pre-existing operations, the Service realized that it needed to revise this section to provide an operator the opportunity to appeal decisions made by the Service that do not apply to a permit granted by the Service and so has added the following provision to § 29.200: "The process set forth in § 25.45 is to be used for any written decision concerning approval, denial, or modification of an operation made by the Service under this subpart."

Access

40. *Comment:* The Service received comments requesting the final rule contain a provision stating that the Service cannot place conditions on operations in a permit that only allows an operator to access and traverse Federal lands (*i.e.*, in order to access operations on non-Federal lands).

Service Response: In administering access across Federal lands, the Service is required by law to analyze the impacts of authorizing that access under NEPA. Through that analysis, the Service may find impacts to refuge resources and uses resulting from operations on non-Federal land resulting from the authorization of that access. In those cases, the Service will work with those requesting access across Federal lands to minimize or avoid those impacts, and, if agreeable to both the Service and the operator, those avoidance or mitigation measures may be included in the access permit. However, as stated in the proposed rule and maintained in the rule, the Service has made clear that we are permitting the access and not regulating the operations on non-Federal land. Accordingly, no change in the regulatory text is required.

Fees

41. *Comment:* Some commenters suggested that the Service ensure that they are assessing the appropriate and/or additional fees of operators in order to ensure that the Service has adequate funding to administer these operations. Additionally, the Service received comments stating that the agency should have full authority to charge fees to cover annual inspections as well as any more frequent inspections needed during construction and pre-production activities, as well as for repeat violators or higher risk operations. Commenters recommended that the Service replace "may" with "will" at § 29.120(c), not understanding why the Service would

not charge for the costs of processing and administering temporary access permits and operations permits, particularly in an era of limited agency budgets. Other commenters stated that fees cannot be required for access or administering operating permits that are already within the scope of the operator's oil and gas right or other right provided by law and that there should be no fees for emergency access. Additionally, they stated that if an access fee can be applied, then it must be reasonable and cannot burden the underlying oil and gas right or otherwise diminish the value of the mineral estate.

Service Response: After considering these comments, the Service did not revise the rule with respect to fees charged by the Service for either access or administering operations permits. Related to access fees, the Service is not charging for access that is pursuant to a deeded or statutory right to use the refuge-administered lands without payment, but only for access that is granted as a privilege "outside the scope of an operator's oil and gas right" for which the fees are subject to the provisions of the Refuge Revenue Sharing Act (16 U.S.C. 715s). Such access is a special benefit that warrants a user charge commensurate with fees and charges for similar privileges and products made by private land owners in the vicinity or in accordance with local value (see 50 CFR 29.5). In terms of recovery costs of permit administration and operations monitoring allowed under § 29.120(c), the Service uses "may" instead of "will" to provide flexibility to refuge managers and foster cooperation with operators. In some instances, operators may choose to share the costs with the Service in administering permits in order to expedite the process. For example, an operator may provide funding for a third-party contractor to prepare an environmental assessment for the Service during the permitting process. Periodic and annual inspections are aspects of administering a permit, and charging fees for such activities fall under that section. With flexibility in charging fees, operators and refuge managers may develop a mix of self-reporting and refuge monitoring that reduces administrative requirements on both parties.

Implementation

42. *Comment:* The Service got one comment suggesting that the Service have refuge-specific management plans.

Service Response: The Service appreciated this comment and will further consider it in implementing the

rule. The Service already has developed refuge-specific oil and gas management plans through Comprehensive Conservation Plans, Habitat Management Plans, or other planning documents created to manage specific refuges. On refuges where there is the potential of oil and gas development, they include management strategies for these operations. The Service will continue to develop and update these plans as necessary to ensure they are consistent with this rule.

43. *Comment:* Several commenters from industry and non-governmental organizations expressed concern that the Service does not have adequate staffing to properly implement the rule. In particular, some commenters expressed the need to ensure that, along with this rule, the Service has the necessary level of funding, staffing, and training to properly implement the rule, as highlighted by the 2007 Government Accountability Office (GAO) report that assessed the status of oil and gas operations on the National Wildlife Refuge System in 2007. Their report highlighted the inadequacy of the Service's current regulations and, in part, led to the promulgation of these proposed revisions. The GAO stated that "[w]e recommend[] that FWS determine the level of staffing necessary to adequately oversee oil and gas operations and seek the necessary funding to meet those needs through appropriations, the authority to assess fees, or other means." The report further stated, "we recommend that FWS ensure that staff are adequately trained to oversee oil and gas activities" (GAO-07-829R). One comment requested the Service scale back the rule based on its limited resources. Another comment suggested that this rule may require assessing additional fees on operations, periodically ensuring that fees are adequate to cover the costs of monitoring and enforcement.

Service Response: In crafting the proposed and final rules, the Service carefully considered the administrative burden the rule placed on operators and Service staff and on the resources required by the Service to successfully implement the rule. Therefore, the Service has weighed the cost of administration versus the resource benefits gained from regulation and decided on several occasions that were discussed in the responses to several comments above that the cost-benefit analysis did not support a more stringent regulatory regime. As promulgated, the rule prioritizes and regulates those activities with the largest potential impacts on refuge resources and uses. As discussed above, this is

one of the main reasons the Service for the most part has declined to regulate downhole activities associated with operations and to exempt inholdings and non-Federal adjacent lands from the rule.

The Service currently has dedicated staff that manages oil and gas development on National Wildlife Refuge System lands. This rule brings more consistency and guidance to staff already dedicated to these issues. While there are additional responsibilities involved in processing operations permit applications and monitoring operations, the Service has determined this increase in need can be effectively met with the reallocation of refuge staff and resources. Additionally, the rule contains cost recovery or cost-sharing provisions that help ensure the Service has the necessary resources to implement the rule effectively and efficiently.

Section-by-Section Recommendations

The Service received several other recommendations on specific section revisions to the proposed rule. The Service has considered all of these recommendations and has made changes, as appropriate, to provisions of the rule as discussed below and/or outlined in the table in the section *Changes from the Proposed Rule*.

44. *Comment:* The Service received comments requesting that the definition of “access” (proposed § 29.50) be revised so that “access” does not include use of an aircraft when the aircraft doesn’t take off of or land on Service-administered lands or waters. On the other hand, the Service received other comments recommending that the Service carry over the definition of “access” to the final rule, at least subjecting aircrafts landing on non-Federal lands to timing limitations to avoid disturbing wildlife.

Service Response: The Service has considered these comments and has revised § 29.50 to clarify that access does not include aircrafts that both take off from and land on inholdings or non-Federal adjacent lands, because the Service does not have the authority to condition aircraft landings outside of the NWRS.

45. *Comment:* The Service received a comment asking that the Service further clarify the process for authorizing use of water outside of a State right and that it should be done in line with a compatibility determination.

Service Response: The Service has concluded that determining sources of water for use in operations is best evaluated using the procedures and performance standards of the rule.

Absent a demonstration by the operator that they have a right to use the water (e.g., State-held water right, specific deed language), water use, transportation, and storage on a refuge would be evaluated for the technologically feasible, least damaging method. Considerations would include, among other things, the volume of water needed, capacity of water sources to meet those needs and resulting consequences on aquatic resources, and transportation and storage methods.

46. *Comment:* The Service received a comment suggesting the definition for “usable water” includes water for wildlife purposes so that shallow-water aquifers, seeps, and springs will be protected for wildlife on the NWRS.

Service Response: The definition for usable water does not need to be changed in the rule in order for the Service to protect water for wildlife purposes. The rule includes hydrologic standards (§ 29.113) and fish and wildlife protection standards (§ 29.112), as well as other standards, that serve to maintain water quality and quantity for use by wildlife. The term “usable water” is a specific term and definition that has been developed and used by other Federal agencies (i.e., the Environmental Protection Agency (EPA) and BLM) to ensure protection of specific resources that may be impacted by oil and gas operations or other activities. So the Service did not revise this definition.

47. *Comment:* The Service received a comment requesting that the Service remove fuel drums, pipes, oil, contaminated soil, etc., with any residue of oil or hazardous chemicals from the definition of “waste,” because they include “contaminating substances” and should be defined and treated as such.

Service Response: The Service intends that these terms are not mutually exclusive, and something may be both “waste” and a “contaminating substance.” An operator must comply with the applicable rule requirements for dealing with each.

48. *Comment:* We received comments requesting that the Service increase the distance an operator is required to place operations away from surface waters from 500 feet to 2 miles based on BLM’s determination that “surface and groundwater contamination, due to oil and gas development . . . occurred between 1,000 to 1,800 feet from . . . drilling” in Colorado (BLM Grand Junction Resource Management Plan FEIS at 6-271).

Service Response: The Service is aware of this BLM finding, but has concluded that a revision of the rule is

not necessary to protect surface and groundwater resources from contamination. The establishment of setbacks of operations from sensitive resources such as surface waters or wetlands is based on common knowledge that providing time and space to react to incidents such as spills or poor operating practices is key to minimizing risks. However, there is no single setback distance that is appropriate for all conditions of proposed activities and environmental conditions. Environmental conditions may provide natural or human-made barriers that would justify a reduced setback. On the other hand, site conditions such as steep slopes or annually high precipitation can enhance pathways between the activity and resource, and thus justify greater setbacks.

Regulatory establishment of a “good offset” that considers both the activities and the average environmental conditions provides a beginning point for site location considerations. Additionally, having a regulatory process for adjusting site-specific setbacks—either lower or higher—based on project and environmental conditions is the key to successful use of setbacks. Through the Service’s own analysis in the associated EIS, we continue to believe that 500 feet provides the necessary time and space in the majority of circumstances. However, the rule (§ 29.113) appropriately gives the ability to the Service to require an even greater setback if conditions, such as those highlighted by the comment, would justify a greater setback distance. We also recognize that exceptions to the setback are sometimes essential to balancing overall impacts of an operation. A prime example occurs in coastal environments where the practice of locating drilling operations in open water has been demonstrated to be least damaging by avoiding the impacts of cutting and dredging drilling slips and canals into sensitive marshland. Therefore, the Service believes that flexibility in this standard is appropriate and gives the Service the ability not only to ensure the least damaging methods to refuge resources and uses, but also to ensure that an operator has reasonable access to their minerals based on a case-by-case determination.

49. *Comment:* The Service received comments recommending that we include provisions in the final rule that require an operator to collect additional information, such as water and soil samples and wildlife surveys, prior to beginning operations.

Service Response: In response to these comments, it is our intention that reconnaissance surveys will be used to collect this type of information and any other necessary natural and cultural resource conditions the Service deems necessary to ensure protection of refuge resources and uses. We acknowledged above that proposed § 29.94 was not clear, and we have revised the rule to clarify that reconnaissance surveys will be used to collect this type of baseline information.

50. *Comment:* The Service received comments stating that the Service does not have the authority to require mitigation for impacts by mandating that operators provide for “habitat creation, habitat restoration, land purchase, or other compensation” and recommending that proposed § 29.120(g) be eliminated from the regulations as it amounts to an access fee that unreasonably and unlawfully restricts access to mineral rights.

Service Response: After considering these comments, the Service has revised proposed § 29.120(g), redesignated as § 29.120(f) in the final rule, to clarify that mitigation tools must be mutually agreed upon by the Service and the operator. The Service believes this provision is within the scope of the Service’s authority under the NWRSA to protect refuge resources and uses, and may in some circumstances be appropriately used by an operator to offset impacts to refuge resources and lost use.

51. *Comment:* The Service received comments recommending that the Service expand the monitoring and reporting requirements. For instance, some commenters recommended that the Service decrease the reporting time from 90 days to 30 days and include explanations of what happened, why it happened, who was involved, the results, and how the company intends

to prevent similar incidents in the future.

Service Response: The Service finds that these recommendations are not warranted. This provision in the rule is intended to provide the Service with information about occurrences on the NWRS. Due to the nature of accident investigations and the time it may take to get the official report, we concluded that 90 days is an appropriate timeframe. There are also existing State and Federal laws governing various accident occurrences, and we have determined that additional regulatory provisions are not needed at this time to better enable the Service to protect Refuge resources and uses.

Changes From the Proposed Rule

After taking the public comments into consideration and after additional review, the Service made the following substantive changes in the rule:

§ 29.40	Revised to clarify the scope of this rule as related to Alaska inholdings and waters within NWRS boundaries.
§ 29.41	Revised to clarify that this rule does not apply to operations in Alaska.
§ 29.42	Revised to remove provisions related to operations in Alaska.
§ 29.43	Revised to clarify which provisions of the rule apply to existing operators with a Service-issued permit and to clarify requirements in regards to plugging and reclamation.
§ 29.44	Revised to clarify requirements for pre-existing operators in regard to plugging and reclamation. Also, replaced “operation” with “operator” to clarify that exemption from a permit requirement applies to a pre-existing operator, not the operation.
§ 29.50	Revised to: (1) clarify that access does not include aircrafts that both take off from and land on inholdings or non-Federal adjacent lands; (2) clarify that the term “area of operations” can include pre-existing, proposed, and approved areas; (3) clarify that “modifying” applies to a changes in existing operations; (4) remove the definition of right-of-way (ROW) permits as it was only applicable to operations in Alaska.
§ 29.61	Revised to require additional information from pre-existing operators, including a brief description of the current operations and any anticipated changes to the current operations; and documentation of the current operating methods, surface equipment, and materials produced or used.
§ 29.62	Revised to clarify that the requirement to obtain an operations permit for a new operation or a modification will be limited to that new operation or modification, not the entire existing operation.
§ 29.63	Revised to clarify that pre-existing operators must plug and reclaim their operations in compliance with this rule.
§ 29.64	Revised to clarify which additional provisions of the rule would apply to the various classes of operations.
§ 29.70	Removed language regarding operations in Alaska.
§ 29.90	Removed language regarding operations in Alaska.
§ 29.92	Revised to clarify that if an operator is using previously submitted information, they should reference it in the permit application.
§ 29.94	Revised to remove language regarding an unnecessary ROW form; also revised to clarify the Service’s authority to require an operator to collect certain natural and cultural resource information if necessary and other minor changes to and deletions of unnecessary language for clarity.
§ 29.101	Removed language regarding operations in Alaska.
§ 29.111	Revised to remove ambiguous and repetitive language and be consistent with the NPS 9B regulations; also added paragraph (h) related to operation setbacks from surface water locations previously found in the hydrological standards section.
§ 29.112	Revised to clarify our standards for protecting wildlife.
§ 29.113(a)	Combined the provision related to operation setbacks from surface water locations with the general facility design and management standard for setbacks from refuge structures or facilities in § 29.111(h).
§ 29.117(d)(5)	Revised to clarify the objective of grading requirements during reclamation.
§ 29.118	Deleted provisions related to geophysical operations in Alaska; and revised paragraph (d)(3) to clarify that an operator must not leave a site in a condition that poses hazards to wildlife.
§ 29.119(b)(5)	Revised to clarify that an operator must not leave a site in a condition that poses hazards to wildlife.
§ 29.120(d)	Revised to clarify that any use of Federal water on the NWRS absent a demonstrated right must be approved by the Service as the technologically feasible, least damaging method.
§ 29.120(e)	Moved to § 29.103(b)(3) to clarify that providing a statement under penalty of perjury that an operator is in compliance with applicable State and Federal laws is part of the permit approval process.
§ 29.120(g)	Revised to clarify that mitigation must be mutually agreed upon and that it may be required to offset impacts to refuge resources or lost uses. Redesignated as § 29.120(f).
§ 29.121(e)	Revised to clarify that an operator would need to provide the Service with information only to the extent necessary to demonstrate compliance with a Service-issued permit.
§ 29.140	Removed language regarding operations in Alaska.
§ 29.141	Removed (c) as the Service does not currently have the authority to accept in-kind services to offset fees.

§ 29.151	Revised to clarify that operator is responsible for reclaiming any disturbances inside or outside of their area of operation and that an operator is liable for the full cost of reclamation.
§ 29.160	Revised to clarify that an operator will be given a chance to respond to the Service's notice of a proposed modification to their operations.
§ 29.171	Revised to include the requirement that, when a pre-existing operator transfers operations, the new operator must obtain an Operations Permit from the Service. Also revised to allow continuity of operations while they file the permit application.
§ 29.180	Revised to clarify that this section applies to any Service-issued permit (i.e., existing operators under a Service-issued permit) not just an Operations Permit granted under this rule for new operations; and revised language from "continuously inactive for a period of 1 year" to "has no measurable production quantities for 12 consecutive months" to provide further clarity on when an operator must plug a well.
§ 29.190	Deleted provisions related to operations in Alaska.
§ 29.190(e)	Revised to separate violations of Federal and State law into two different prohibited acts, (e) and (f), and to make wording consistent with other Service regulations.
§ 29.192	Revised to clarify that a violation will not affect your ability to get a permit for plugging and reclamation.
§ 29.200	Revised to clarify that an operator must administratively appeal under § 25.45 before going to Federal court. Also, revised to clarify that this process would be used to appeal all written decisions made under this subpart, not just those made under a permit. Finally, removed language regarding operations in Alaska.
§ 29.210(g)	Revised to clarify that for information provided under both § 29.210(d) and § 29.210(e), after reviewing an operator's affidavit or a third party's affidavit claiming exemption from public disclosure, the Service may find that information is not exempt from public disclosure and make that information available 10 business days after providing notice.

Compliance With Other Laws, Executive Orders, and Department Policies

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. OIRA has determined that this rule is significant, because it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the executive order.

Executive Order 13563 reaffirms the principles of Executive Order 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. Executive Order 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. This rule is consistent with these requirements.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*, whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available

for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

We certify that this rule would not have a significant economic effect on a substantial number of small entities under the RFA (5 U.S.C. 601 *et seq.*). This certification is based on the cost-benefit and regulatory flexibility analysis found in the report entitled Non-Federal Oil and Gas Rulemaking Economic Analysis, which can be viewed at <http://www.fws.gov/refuges/oil-and-gas/rulemaking.html>, by clicking on the link entitled Non-Federal Oil and Gas Rulemaking Economic Analysis or at www.regulations.gov in Docket No. FWS-HQ-NWRS-2012-0086.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

- (a) Would not have an annual effect on the economy of \$100 million or more;
- (b) Would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; and
- (c) Would not have significant adverse effects on competition, employment,

investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

These conclusions are based on the cost-benefit and regulatory flexibility analysis found in the report entitled Non-Federal Oil and Gas Rulemaking Economic Analysis, which can be viewed at <http://www.fws.gov/refuges/oil-and-gas/rulemaking.html>, by clicking on the link entitled Non-Federal Oil and Gas Rulemaking Economic Analysis or at www.regulations.gov in Docket No. FWS-HQ-NWRS-2012-0086.

Unfunded Mandates Reform Act (UMRA)

This rule would not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule would not have a significant or unique effect on State, local, or tribal governments or the private sector. It addresses use of refuge lands, and would impose no requirements on other agencies or governments. A statement containing the information required by the UMRA (2 U.S.C. 1531 *et seq.*) is not required.

Takings (Executive Order 12630)

This rule is not intended to result in the taking of private property or otherwise have takings implications under Executive Order 12630. The provisions of this rule would afford access to operators exercising non-Federal mineral rights under reasonable regulation. No other private property is affected. A takings implication assessment is not required.

Federalism (Executive Order 13132)

Under the criteria in section 1 of Executive Order 13132, the rule does not have sufficient Federalism

implications to warrant the preparation of a federalism summary impact statement. It addresses use of refuge lands, and would impose no requirements on other agencies or governments. A federalism summary impact statement is not required.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

- (a) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and
- (b) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Consultation With Indian Tribes (Executive Order 13175 and Department Policy)

The Department of the Interior strives to strengthen its government-to-government relationship with Indian tribes through a commitment to consultation with Indian tribes and recognition of their right to self-governance and tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined that it has no substantial direct effects on federally recognized Indian tribes, but we offered consultation under the Department's tribal consultation policy with all interested tribes. On January 25, 2016, during the public comment period, we consulted with Doyon Limited, an Alaska Native Corporation, at their request.

Paperwork Reduction Act of 1995 (PRA)

This rule contains a collection of information that we have submitted to OMB for approval under the PRA (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

As part of our continuing efforts to reduce paperwork and respondent burdens, we invited the public and other Federal agencies to comment on any aspect of the reporting burden associated with this information collection. While we received no comments that were specific to the information collection portion of the rule, we did receive several comments that relate to the information collection portion of the rule. These comments and

our responses can be found in *Information Requirements and Public Access to Information* in the Summary of and Response to Public Comments portion of the preamble. We made no changes to the information collection portion of the rule based on these comments. However, we have made two changes to the rule that impact information collection.

The first change expands the information an operator of pre-existing wells is required to submit to the refuge manager. In addition to requiring operators of pre-existing wells to submit right-to-operate documentation, company contact information, a plat of existing area of operations, and copies of plans and permits required by local, State, and Federal agencies, operators must also submit to the Service: A brief description of the current operations and any anticipated changes to the current operations; as well as documentation of the current operating methods, surface equipment, and materials produced or used. These new information collection requirements are, as follows: Pre-existing Operations (§ 29.61). Within 90 days after the effective date of these regulations, or after a boundary change or establishment of a new refuge, pre-existing operators without a Service-issued permit must submit:

- Documentation of the right to operate within the refuge.
- Contact information (names, phone numbers, and addresses) of the primary company representative; the representative responsible for field supervision; and the representative responsible for emergency response.
- A brief description of the current operations, and any anticipated changes to the current operations.
- Scaled map clearly delineating the existing area of operations.
- Documentation of the current operating methods, surface equipment, materials produced or used, and monitoring methods.
- Copies of all plans and permits required by local, State, and Federal agencies.

The second change to the final rule that impacts information collection is that if an operator transfers their operations to another operator this results in the loss of pre-existing status for that operation, and the new operator will need to obtain an Operations Permit. As a result, this operator must provide all applicable information required by this rule for obtaining an Operations Permit. These new information collection requirements are as follows:

Change of Operator (§ 29.171)

Section 29.171(a). When operations conducted under § 29.44 are transferred, the transferee must apply for an operations permit and include the information requested in FWS Form 3–2469 within 90 days of the transfer. The new operator may continue operating, but must provide to the Service within 30 calendar days from the date of the transfer:

- Documentation demonstrating that the operator holds the right to operate within the refuge.
- Names, phone numbers, and addresses of the primary company representative, the representative responsible for field supervision, and the representative responsible for emergency response.

Section 29.171(b). If operations conducted under § 29.43 or an operations permit are transferred, the transferee must provide the following within 30 days of commencing operations:

- Right-to-operate and contact information required under § 29.171(a).
- Written agreement to conduct operations in accordance with all terms and conditions of the previous operator's permit.
- Financial assurance that is acceptable to the Service and made payable to the Service.

For further information on these changes, see the "Response to Comments" section.

Below is a summary of the information collection associated with non-Federal oil and gas operations on National Wildlife Refuge System lands. Operators do not need to resubmit information that is already on file with the Service, provided the information is still current and accurate. Documents and materials submitted to other Federal and State agencies may be submitted, if they meet the specific requirements of the Service.

OMB Control No: 1018–0162.

Title: Management of Non-Federal Oil and Gas Rights on National Wildlife Refuge System Lands, 50 CFR part 29, subpart D.

Service Form Number(s): 3–2469.

Description of Respondents: Businesses that conduct oil and gas exploration on national wildlife refuges.

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: On occasion.

Total Annual Nonhour Cost Burden: None.

Activity/requirement	Estimated number of annual responses	Completion time per response (hours)	Estimated total annual burden hours
Preexisting Operations (§ 29.61)	40	50	2,000
Temporary Access Permit Application (§ 29.71)	35	17	595
Accessing Oil and Gas Rights from Non-Federal Surface Location (§ 29.80)	5	1	5
Pre-application Meeting for Operations Permit (§ 29.91)	45	2	90
Operations Permit Application (§§ 29.94–29.97)	45	140	6,300
Financial Assurance (§§ 29.103(b), 29.150)	45	1	45
Identification of Wells and Related Facilities (§ 29.119(b))	45	2	90
Reporting (§ 29.121):			
Third-Party Monitor Report (§ 29.121(b))	300	17	5,100
Notification—Injuries/Mortality to Fish and Wildlife and Threatened/Endangered Plants (§ 29.121(c))	20	1	20
Notification—Accidents involving Serious Injuries/Death and Fires/Spills (§ 29.121(d))	20	1	20
Written Report—Accidents Involving Serious Injuries/Deaths and Fires/Spills (§ 29.121(d))	20	16	320
Report—Verify Compliance with Permits (§ 29.121(e))	240	4	960
Notification—Chemical Disclosure of Hydraulic Fracturing Fluids uploaded to FracFocus (§ 29.121(f))	5	1	5
Permit Modifications (§ 29.160(a))	10	16	160
Change of Operator:			
Transferring Operator Notification (§ 29.170)	20	8	160
Acquiring Operator's Requirements for Wells Not Under a Service Permit (§ 29.171(a))	19	40	760
Acquiring Operator's Acceptance of an Existing Permit (§ 29.171(b))	1	8	8
Extension to Well Plugging (§ 29.181(a)):			
Application for Permit	10	140	1,400
Modification	5	16	80
Public Information (§ 29.210):			
Affidavit in Support of Claim of Confidentiality (§ 29.210(c) and (d))	1	1	1
Confidential Information (§ 29.210(e) and (f))	1	1	1
Maintenance of Confidential Information (§ 29.210(h))	1	1	1
Generic Chemical Name Disclosure (§ 29.210(i))	1	1	1
Total	934		18,122

National Environmental Policy Act (NEPA)

This rule constitutes a major Federal action with the potential to significantly affect the quality of the human environment. We have prepared the final environmental impact statement (FEIS) under the requirements of the NEPA of 1969 (42 U.S.C. 4321 *et seq.*). The FEIS is available at <http://www.fws.gov/refuges/oil-and-gas/rulemaking.html>, by clicking on the link entitled “Non-Federal Oil and Gas FEIS” and at www.regulations.gov at Docket No. FWS–HQ–NWRS–2012–0086.

In addition, EPA published a notice announcing the final EIS, as required under section 309 of the Clean Air Act (42 U.S.C. 7401 *et seq.*), on August 19, 2016, at 81 FR 55456. The EPA is charged under section 309 of the Clean Air Act to review all Federal agencies’ environmental impact statements (EISs) and to comment on the adequacy and the acceptability of the environmental impacts of proposed actions in the EISs. On February 9, 2016, the Service received a “no objection” finding from the EPA that concluded that the draft EIS did not identify any potential environmental impacts requiring

substantive changes to the proposal. Elsewhere in today’s **Federal Register** is a notice announcing the availability of the record of decision.

Effects on the Energy Supply (Executive Order 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A statement of Energy Effects is not required.

Drafting Information

This final rule reflects the collective efforts of Service staff in the NWRS, Division of Natural Resource and Conservation Planning, Branch of Wildlife Resources, refuges, and field offices, with assistance from the Department of the Interior, Office of the Solicitor.

List of Subjects

50 CFR Part 28

Law enforcement, Penalties, Wildlife refuges.

50 CFR Part 29

Oil and gas exploration, Public lands—mineral resources, Public lands—rights-of-way, Reporting and recordkeeping requirements, Wildlife refuges.

Final Regulation Promulgation

In consideration of the foregoing, the Service amends 50 CFR parts 28 and 29 as follows:

PART 28—ENFORCEMENT, PENALTY, AND PROCEDURAL REQUIREMENTS FOR VIOLATIONS OF SUBCHAPTER C

- 1. The authority citation for part 28 is revised to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, 685, 690d, 715i, 725; 43 U.S.C. 315a.

- 2. Revise the heading of part 28 to read as set forth above.

- 3. Revise § 28.11 to read as follows:

§ 28.11 Purpose of regulations.

The regulations in this part govern enforcement, penalty, and procedural requirements for violations of subchapter C of this chapter.

PART 29—LAND USE MANAGEMENT

- 4. The authority citation for part 29 is revised to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, 685, 690d, 715i, 725, 3161; 30 U.S.C. 185; 31 U.S.C. 3711, 9701; 40 U.S.C. 319; 43 U.S.C. 315a; 113 Stat. 1501A–140.

Subpart C—Mineral Operations

■ 5. Revise § 29.32 to read as follows:

§ 29.32 Non-Federal mineral rights.

(a) Non-Federal mineral rights owners within the National Wildlife Refuge System, not including coordination areas, must, to the greatest extent practicable, conduct all exploration, development, and production operations in such a manner as to prevent damage, erosion, pollution, or contamination to Service-administered lands, waters, facilities, and to wildlife thereon. So far as is practicable, such operations must also be conducted without interference to the operation of the refuge and disturbance to the wildlife thereon.

(1) Physical occupancy must be kept to the minimum space necessary to conduct efficient mineral operations.

(2) Persons conducting mineral operations on Service-administered lands and waters must comply with all applicable Federal and State laws and regulations for the protection of wildlife and the administration of the area.

(3) All waste and contaminating substances must be kept in the smallest practicable area, confined so as to prevent escape as a result of rains and high water or otherwise, and removed from Service-administered lands and waters as quickly as practicable in such a manner as to prevent contamination, pollution, damage, or injury to Service-administered lands, waters, or facilities, or to wildlife thereon.

(4) Structures and equipment must be removed when the need for them has ended, and, upon the cessation of operations, the habitat in the area of operations must be restored to the extent possible to pre-operation conditions.

(b) Nothing in this section will be applied so as to contravene or nullify rights vested in holders of mineral interests on refuge lands.

■ 6. Add subpart D to read as set forth below:

Subpart D—Management of Non-Federal Oil and Gas Rights**Purpose and Scope**

Sec.

- 29.40 What are the purpose and scope of the regulations in this subpart?
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 29.42 What authorization do I need to conduct operations?
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Subpart D—Management of Non-Federal Oil and Gas Rights

Purpose and Scope

§ 29.40 What are the purpose and scope of the regulations in this subpart?

(a) The purpose of this subpart is to ensure that operators exercising non-Federal oil and gas rights within the National Wildlife Refuge System (NWRS) outside of Alaska use technologically feasible, least damaging methods to:

(1) Protect Service-administered lands and waters, and resources of refuges;

(2) Protect refuge wildlife-dependent recreational uses and experiences and visitor or employee health and safety; and

(3) Conserve refuges for the benefit of present and future generations of Americans.

(b) This subpart applies to all operators conducting non-Federal oil and gas operations outside of Alaska on Service-administered lands held in fee or less-than fee (excluding coordination areas) or Service-administered waters to the extent necessary to protect those property interests. These regulations do not apply to non-Federal surface locations within the boundaries of a refuge (*i.e.*, inholdings), except to the extent that activities associated with those operations, including access to an inholding, occur on Service-administered lands or waters.

(c) This subpart is not intended to result in a taking of any property interest. The purpose of this subpart is to reasonably regulate operations to protect Service-administered lands and waters, resources of refuges, visitor uses and experiences, and visitor or employee health and safety.

§ 29.41 When does this subpart apply to me?

This subpart applies to you if you are an operator who conducts or proposes to conduct non-Federal oil or gas operations on Service-administered lands or waters outside of Alaska.

§ 29.42 What authorization do I need to conduct operations?

(a) You must demonstrate to the Service that you have the right to operate in order to conduct operations on Service-administered lands or waters.

(b) Except as provided in §§ 29.43 or 29.44, before starting operations, you must obtain a temporary access permit under §§ 29.70 through 29.73 for reconnaissance surveys and/or an operations permit under §§ 29.90 through 29.97.

§ 29.43 If I am already operating under Service authorization, what do I need to do?

If you already have a Service-issued permit, you may continue to operate according to the terms and conditions of that approval, subject to the provisions of this subpart. If you propose to conduct new operations, modify your existing operations, conduct well plugging or reclamation operations, or obtain an extension of the well plugging requirement to maintain your well in shut-in status, you must either amend your current authorization or obtain an operations permit in accordance with §§ 29.90 through 29.97, Operations Permit: Application, and such new operations or modifications will be subject to the applicable provisions of this subpart. Additionally, your existing operations are subject to the following regulations:

(a) § 29.120(b) and (d)–(g) and § 29.121(a) and (c)–(f);

(b) § 29.170(a);

(c) §§ 29.180 and 29.181;

(d) § 29.190; and

(e) § 29.200.

§ 29.44 If I am operating without prior Service authorization, what do I need to do?

Any operator that has commenced operations prior to December 14, 2016 in accordance with applicable local, State, and Federal laws and regulations may continue without an operations permit. However, your operation is subject to the requirements of §§ 29.60 through 29.64, Pre-Existing Operations, and the requirements that when you propose to conduct new operations, modify your pre-existing operations, conduct well plugging and reclamation operations, or obtain an extension of the well plugging requirement to maintain your well in shut-in status, you must obtain an operations permit in accordance with §§ 29.90 through 29.97, Operations Permit: Application, and all applicable requirements of this subpart.

Definitions

§ 29.50 What do the terms used in this subpart mean?

In addition to the definitions in §§ 25.12, 29.21, and 36.2 of this subchapter, the following definitions apply to this subpart:

Access means any method of entering or traversing on or across Service-administered lands or waters, including but not limited to: Vehicle, watercraft, fixed-wing aircraft, helicopter, unmanned aerial vehicle, off-road vehicle, mobile heavy equipment, snowmobile, pack animal, and foot. Access does not include the use of aircraft, including, but not limited to, airplanes, helicopters, and unmanned

aircraft vehicles, that do not land on, or are not launched from, Service-administered lands or waters.

Area of operations means the area of Service-administered lands or waters on which operations are carried out, including roads or other areas that you are authorized to use related to the exercise of your oil and gas rights.

Contaminating substance means any toxic or hazardous substance that is used in or results from the conduct of operations and is listed under the Clean Air Act (42 U.S.C. 7401 *et seq.*), Clean Water Act regulations at 40 CFR parts 112 and 116, the Resource Conservation and Recovery Act regulations at 40 CFR part 261, or the Hazardous Materials Transportation Act regulations at 49 CFR part 172. This includes, but is not limited to, explosives, radioactive materials, brine waters, formation waters, petroleum products, petroleum byproducts, and chemical compounds used for drilling, production, processing, well testing, well completion, and well servicing.

Gas means any fluid, either combustible or noncombustible, that is produced in a natural state from the earth and that maintains a gaseous or rarefied state at ordinary temperature and pressure conditions.

Oil means any viscous combustible liquid hydrocarbon or solid hydrocarbon substance that occurs naturally in the earth and is easily liquefiable on warming.

Modifying means changing operations in a manner that will result in additional impacts on refuge resources, visitor uses, refuge administration, or human health and safety beyond the scope, intensity, and/or duration of existing impacts. In order to determine if activities would have additional impacts, you must consult with the Service.

Operations means all existing and proposed functions, work, and activities in connection with the exercise of oil or gas rights not owned by the United States and located on Service-administered lands or waters.

(1) Operations include, but are not limited to: Access by any means to or from an area of operations; construction; geological and geophysical exploration; drilling, well servicing, workover, or recompletion; production; hydraulic fracturing, well simulation, and injection wells; gathering (including installation and maintenance of flowlines and gathering lines); storage, transport, or processing of petroleum products; earth moving; excavation; hauling; disposal; surveillance, inspection, monitoring, or maintenance of wells, facilities, and equipment;

reclamation; road and pad building or improvement; shot hole and well plugging and abandonment, and reclamation; and all other activities incident to any of the foregoing.

(2) Operations do not include reconnaissance surveys as defined in this subpart or oil and gas pipelines that are located within a refuge under authority of a deeded or other right-of-way.

Operations permit means a permit issued by the Service under this subpart authorizing an operator to conduct operations on Service-administered lands or waters.

Operator means any person or entity, agent, assignee, designee, lessee, or representative thereof exercising or proposing to exercise non-Federal oil and gas rights on Service-administered lands or waters.

Reconnaissance survey means an inspection or survey conducted by qualified specialists for the purpose of preparing a permit application. A reconnaissance survey:

(1) Includes identification of the area of operations and collection of natural and cultural resource information within and adjacent to the proposed area of operations.

(2) Does not include surface disturbance activities except for minimal disturbance necessary to perform cultural resource surveys, natural resource surveys, and location surveys required under this subpart.

Right to operate means a deed, lease, memorandum of lease, designation of operator, assignment of right, or other documentation demonstrating that you hold a legal right to conduct the operations you are proposing on Service-administered lands or waters.

Service, we, us and *our* means the U.S. Fish and Wildlife Service.

Technologically feasible, least damaging methods are those that we determine, on a case-by-case basis, to be most protective of refuge resources and uses while ensuring human health and safety, taking into consideration all relevant factors, including environmental, economic, and technological factors and the requirements of applicable law.

Temporary access permit means a permit issued by the Service authorizing an operator to access that operator's proposed area of operations to conduct reconnaissance surveys to collect basic information necessary to prepare an operations permit application.

Third-party monitor means a qualified specialist, who is not an employee, agent, or representative of the operator, nor has any conflicts of interest that could preclude objectivity in monitoring

an operator's compliance, and who has the relevant expertise to monitor operations for compliance with applicable laws, regulations, and permit requirements.

Usable water means an aquifer or its portion that:

(1)(i) Supplies any public water system; or

(ii) Contains a sufficient quantity of ground water to supply a public water system and either:

(A) Currently supplies drinking water for human consumption; or

(B) Contains fewer than 10,000 mg/l total dissolved solids; and

(2) Is not an exempted aquifer.

Waste means any material that is discarded. It includes, but is not limited to: Drilling fluids and cuttings; produced fluids not under regulation as a toxic or hazardous substance; human waste; garbage; fuel drums; pipes; oil; refined oil and other hydrocarbons; contaminated soil; synthetic materials; manmade structures or equipment; or native and nonnative materials.

You means the operator, unless otherwise specified or indicated by the context.

Pre-Existing Operations

§ 29.60 Do I need an operations permit for my pre-existing operation?

No. Pre-existing operations are those conducted as of December 14, 2016 without an approved permit from the Service or prior to a boundary change or establishment of a new refuge. Your pre-existing operations may be continued without an operations permit, but you are required to operate in accordance with applicable local, State, and Federal laws and regulations, and are subject to applicable provisions of this subpart, including requirements for a permit when you propose to conduct new operations or to modify pre-existing operations.

§ 29.61 What information must I provide to the Service?

You must submit the following information to the Service where your pre-existing operation is occurring by February 13, 2017 or 90 days after a boundary change or establishment of a new refuge:

(a) Documentation demonstrating that you hold the right to operate on Service-administered lands or waters.

(b) The names, phone numbers, and addresses of your:

(1) Primary company representative;

(2) Representative responsible for field supervision; and

(3) Representative responsible for emergency response.

(c) A brief description of your current operations, and any anticipated changes to current operations, including:

(1) A scaled map clearly delineating your existing area of operations;

(2) Documentation of the current operating methods, surface equipment, materials produced or used, and monitoring methods; and

(3) Copies of all plans and permits required by local, State, and Federal agencies, including a Spill Prevention Control and Countermeasure Plan if required by Environmental Protection Agency regulations at 40 CFR part 112.

§ 29.62 What if I intend to conduct new operations or modify my pre-existing operations?

(a) You must obtain an operations permit before conducting operations that are begun after December 14, 2016 for those new operations in accordance with §§ 29.90 through 29.97, Operations Permit: Application, and all applicable requirements of this subpart.

(b) You must obtain an operations permit prior to modifying your pre-existing operations for that modification in accordance with §§ 29.90 through 29.97, Operations Permit: Application, and all applicable requirements of this subpart.

§ 29.63 What plugging and reclamation requirements apply to my pre-existing operations?

Upon completion of your production operation, you are subject to the reclamation standards in § 29.117(d). You must obtain an operations permit in accordance with §§ 29.90 through 29.97, Operations Permit: Application, and all applicable requirements of this subpart, prior to plugging your well and conducting site reclamation.

§ 29.64 What other provisions apply to my operations?

Your pre-existing operations are also subject to the following regulations in this part 29:

(a) § 29.120(b), (d), (f), and (g) and

§ 29.121(a) and (c)-(f);

(b) § 29.170(a);

(c) §§ 29.180 and 29.181;

(d) § 29.190; and

(e) § 29.200.

Temporary Access Permits

§ 29.70 When do I need a temporary access permit?

You must apply to the Service and obtain a temporary access permit to access your proposed area of operations in order to conduct reconnaissance surveys within a refuge. This permit will describe the means, routes, timing, and other terms and conditions of your access determined by the Service to

result in only the minimum disturbance necessary to perform surveys.

§ 29.71 How do I apply for a temporary access permit?

You must submit the information requested in FWS Form 3–2469 (Oil and Gas Operations Special Use Permit Application) to the refuge in which you propose to conduct operations. Information includes, but is not limited to:

- (a) The name, legal address, and telephone number of the operator, employee, agent, or contractor responsible for overall management of the proposed operations;
- (b) Documentation demonstrating that you hold the right to operate on Service-administered lands or waters;
- (c) The name, legal address, telephone number, and qualifications of all specialists responsible for conducting the reconnaissance surveys (only required if the assistants/subcontractors/subpermittees will be operating on Service-administered lands or waters without the permittee being present);
- (d) A brief description of the intended operation so that we can determine reconnaissance survey needs;
- (e) A description of the survey methods you intend to use to identify the natural and cultural resources;
- (f) A map (to-scale and determined by us to be acceptable) delineating the proposed reconnaissance survey area in relation to the refuge boundary and the proposed area of operations; and
- (g) A description of proposed means of access and routes for conducting the reconnaissance surveys.

§ 29.72 When will the Service grant a temporary access permit?

Within 30 calendar days of receipt of the application for a reconnaissance survey, we will advise you whether the application fulfills the requirements of §§ 29.70 through 29.71 and issue you a temporary access permit or provide you with a statement of additional information that is needed for us to conduct review of your application.

§ 29.73 How much time will I have to conduct my reconnaissance surveys?

Your temporary access permit will be in effect for a maximum of 60 calendar days from the date of issuance, unless a longer term is approved in the permit. We may extend the term of the permit for a reasonable period of time, based upon your written request that explains why an extension is necessary.

Accessing Oil and Gas Rights From a Non-Federal Surface Location

§ 29.80 Do I need a permit for accessing oil and gas rights from a non-Federal location?

No. Using directional drilling from a non-Federal surface location to reach your oil and gas rights within a refuge is exempt from these regulations. However, you are encouraged to provide the Service the names, phone numbers, and addresses of your primary company representative, representative responsible for field supervision, and representative responsible for emergency response at least 60 calendar days prior to conducting your operation. If you require access across Service-administered lands or waters, that access is subject to applicable provisions of this subpart, including obtaining an operations permit for any new access or modification of existing access.

Operations Permit: Application

§ 29.90 Who must apply for an operations permit?

Except as otherwise provided in §§ 29.43, 29.44, 29.70, and 29.80, if you are proposing to conduct operations on Service-administered lands or waters outside of Alaska, you must submit an application (FWS Form 3–2469) for an operations permit to the Service.

§ 29.91 What should I do before filing an application?

You should participate in a pre-application meeting with the Service to allow for an early exchange of information between you and the Service with the intent of avoiding delays in your application process.

- (a) For the meeting, you should provide:
 - (1) Documentation demonstrating that you hold the legal right to operate on Service-administered lands or waters; and
 - (2) An overview of your proposed operation and timing.
- (b) The Service will provide guidance on the permitting process and information on available resource data, and identify additional data needs.

§ 29.92 May I use previously submitted information?

- Yes.
 - (a) You do not need to resubmit information that is already on file with the Service, provided that such information is still current and accurate. You should reference this information in your oil and gas operations permit application.
 - (b) You may submit documents and materials submitted to other Federal and

State agencies noting how the information meets the specific requirements of §§ 29.93 through 29.97.

§ 29.93 Do I need to submit information for all possible future operations?

No. You need only provide information for those operations for which you are seeking immediate approval. Approval of activities beyond the scope of your application may be subject to a new application and approval process.

§ 29.94 What information must be included in all applications?

All applications must include the information requested on FWS Form 3–2469, including, but not limited to:

- (a) The name, legal address, and telephone number of the operator, employee, agent, or contractor responsible for overall management of the proposed operations.
- (b) Documentation demonstrating that you hold the legal right to operate within the refuge.
- (c) A description of the natural features of your proposed area of operations, such as: Streams, lakes, ponds, wetlands, estimated depths to the top and bottom of zones of usable water and topographic relief.
- (d) The location of existing roads, trails, railroad tracks, pipeline rights-of-way, pads, and other disturbed areas.
- (e) The location of existing structures that your operations could affect, including buildings, pipelines, oil and gas wells including both producing and plugged and abandoned wells, injection wells, freshwater wells, underground and overhead electrical lines, and other utility lines.
- (f) Descriptions of the natural and cultural resource conditions from your reconnaissance survey reports or other sources collected for your proposed area of operations, including any baseline testing of soils and surface and near-surface ground waters within your area of operations that reasonably may be impacted by your surface operations.
- (g) Locations map(s) (to-scale and determined by us to be acceptable) that clearly identifies:
 - (1) Proposed area of operations, existing conditions, and proposed new surface uses, including the boundaries of each of your oil and gas tracts in relation to your proposed operations and the relevant refuge boundary.
 - (2) Proposed access routes of new surface disturbances as determined by a location survey.
 - (3) Proposed location of all support facilities, including those for transportation (e.g., vehicle parking areas, helicopter pads, etc.), sanitation,

occupation, staging areas, fuel storage areas, refueling areas, loading docks, water supplies, and disposal facilities.

(h) The method and diagrams, including cross-sections, of any proposed pad construction, road construction, cut-and-fill areas, and surface maintenance, including erosion control.

(i) The number and types of equipment and vehicles, including an estimate of vehicular round trips associated with your operation.

(j) An estimated timetable for the proposed operations, including any operational timing constraints.

(k) The type and extent of security measures proposed at your area of operations.

(l) The power sources and their transmission systems for the proposed operations.

(m) The types and quantities of all solid and liquid waste generated and the proposed methods of storage, handling, and disposal.

(n) The source, quantity, access route, and transportation/conveyance method for all water to be used in operations, including hydraulic fracturing, and estimations of any anticipated wastewater volumes generated, including flowback fluids from hydraulic fracturing, and the proposed methods of storage, handling, and recycling or disposal.

(o) The following information regarding mitigation actions and alternatives considered:

(1) A description of the steps you propose to take to mitigate anticipated adverse environmental impacts on refuge resources and uses, including, but not limited to, the refuge's land features, land uses, fish and wildlife, vegetation, soils, surface and subsurface water resources, air quality, noise, lightscares, viewsheds, cultural resources, and economic environment.

(2) A description of any anticipated impacts that you cannot mitigate.

(3) A description of alternatives considered that meet the criteria of technologically feasible, least damaging methods of operations, as well as the costs and environmental effects of such alternatives.

(p) You must submit the following information about your spill control and emergency preparedness plan. You may use a spill prevention control and countermeasure plan prepared under 40 CFR part 112 if the plan includes all of the information required by this section. You must submit:

(1) The names, addresses, and telephone numbers of the people whom the Service can contact in the event of a spill, fire, or accident, including the

order in which the individuals should be contacted.

(2) The notification procedures and steps taken to minimize damage in the event of a spill, fire, or accident.

(3) Identification of contaminating substances used within your area of operations or expected to be encountered during operations.

(4) Trajectory analysis for potential spills that are not contained on location.

(5) Identification of abnormal pressure, temperature, toxic gases or substances, or other hazardous conditions at your area of operations or expected to be encountered during operations.

(6) Measures (e.g., procedures, facility design, equipment) to minimize risks to human health and safety, and the environment.

(7) Steps to prevent accumulations of oil or other materials deemed to be fire hazards from occurring in the vicinity of well locations and lease tanks.

(8) The equipment and methods for containment and cleanup of contaminating substances, including a description of the equipment available at your area of operations and equipment available from local contractors.

(9) A stormwater drainage plan and actions intended to mitigate stormwater runoff.

(10) Material safety data sheets for each material you will use or encounter during operations, including expected quantities maintained at your area of operations.

(11) A description of the emergency actions you will take in the event of injury or death to fish and wildlife or vegetation.

(12) A description of the emergency actions you will take in the event of accidents causing human injury.

(13) Contingency plans for conditions and emergencies other than spills, such as if your area of operations is located in areas prone to hurricanes, flooding, tornadoes, fires, or earthquakes.

(q) A description of the specific equipment, materials, methods, and schedule that will be used to meet the operating standards for reclamation at § 29.117.

(r) An itemized list of the estimated costs that a third party would charge to complete reclamation.

§ 29.95 What additional information must be included if I am proposing geophysical exploration?

If you propose to conduct geophysical exploration, you must submit the information requested on FWS Form 3–2469, including, but not limited to:

(a) A map showing the positions of each survey line including all source

and receiver locations as determined by a locational survey, and including shot point offset distances from wells, buildings, other infrastructure, cultural resources, and environmentally sensitive areas;

(b) The number of crews and numbers of workers in each crew;

(c) A description of the acquisition methods, including the procedures and specific equipment you will use, and energy sources (e.g., explosives, vibroseis trucks);

(d) A description of the methods of access along each survey line for personnel, materials, and equipment; and

(e) A list of all explosives, blasting equipment, chemicals, and fuels you will use in the proposed operations, including a description of proposed disposal methods, transportation methods, safety measures, and storage facilities.

§ 29.96 What additional information must be included if I am proposing drilling operations?

If you are proposing to drill a well, you must submit the information requested on FWS Form 3–2469, including, but not limited to:

(a) A description of the well pad construction, including dimensions and cross sections of cut-and-fill areas and excavations for ditches, sumps, and spill control equipment or structures, including lined areas;

(b) A description of the drill rig and equipment layout, including rig components, fuel tanks, testing equipment, support facilities, storage areas, and all other well-site equipment and facilities;

(c) A description of the type and characteristics of the proposed drilling mud systems; and

(d) A description of the equipment, materials, and methods of surface operations associated with your drilling, well casing and cementing, well control, well evaluation and testing, well completion, hydraulic fracturing or other well stimulation, and well plugging programs.

§ 29.97 What additional information must be included if I am proposing production operations?

If you are proposing to produce a well, you must submit the information requested on FWS Form 3–2469, including, but not limited to:

(a) The dimensions and the to-scale layout of the well pad, clearly identifying well locations, noting partial reclamation areas; gathering, separation, metering, and storage equipment; electrical lines; fences; spill control

equipment or structures, including lined areas, artificial lift equipment, tank batteries, treating and separating vessels, secondary or enhanced recovery facilities, water disposal facilities, gas compression and/or injection facilities; metering points; sales point (if on lease); tanker pickup points; gas compressor, including size and type (if applicable); and any other well site equipment.

(b) A general description of anticipated stimulations, servicing, and workovers.

(c) A description of the procedures and equipment used to maintain well control.

(d) A description of the method and means used to transport produced oil and gas, including vehicular transport; flowline and gathering line construction and operation, pipe size, and operating pressure; cathodic protection methods; surface equipment use; surface equipment location; maintenance procedures; maintenance schedules; pressure detection methods; and shutdown procedures.

(e) A road and well pad maintenance plan, including equipment and materials to maintain the road surface and control erosion.

(f) A vegetation management plan on well sites, roads, pipeline corridors, and other disturbed surface areas, including control of noxious and invasive species.

(g) A stormwater management plan on the well site.

(h) A produced water storage and disposal plan.

(i) A description of the equipment, materials, and procedures proposed for well plugging.

Operations Permit: Application Review and Approval

§ 29.100 How will the Service process my application?

We will conduct initial review of your application to determine if all information is complete. Once your information is complete, we will begin formal review.

§ 29.101 How will the Service conduct an initial review?

(a) Within 30 calendar days of receipt of your application, the Service will notify you in writing that one of the following situations exists:

(1) Your application is complete, and the Service will begin formal review;

(2) Your application does not meet the information requirements, in which case we will identify the additional information required to be submitted before the Service will be able to conduct formal review of your application; or

(3) More time is necessary to complete the review, in which case the Service will provide the amount of additional time reasonably needed along with a justification.

(b) If you submit additional information as requested under paragraph (a)(2) of this section, and the Service determines that you have met all applicable information requirements, the Service will notify you within 30 calendar days from receipt of the additional information that either:

(1) Your application is complete, and the Service will begin formal review; or

(2) More time is necessary to complete the initial review, in which case the Service will provide the amount of additional time reasonably needed along with a justification.

§ 29.102 How will the Service conduct a formal review?

For those applications for which the Service determines that the applicant holds a valid property right, the Service will conduct a formal review of your application by:

(a) Evaluating the potential impacts of your proposal on Service-administered lands and waters, or resources of refuges; visitor uses or experiences; or visitor or employee health and safety in compliance with applicable Federal laws; and

(b) Identifying any additional operating conditions that would apply to your approved application.

§ 29.103 What standards must be met to approve my application?

(a) In order to approve your operations permit application, the Service must determine that your operations will:

(1) Use technologically feasible, least damaging methods; and

(2) Meet all applicable operating standards.

(b) Before operations begin, you must submit to the Service:

(1) Financial assurance in the amount specified by the Service and in accordance with the requirements of §§ 29.150 through 29.154, Financial Assurance;

(2) Proof of liability insurance with limits sufficient to cover injuries to persons or property caused by your operations; and

(3) A statement under penalty of perjury, signed by an official who is authorized to legally bind the company, stating that proposed operations are in compliance with any applicable Federal law or regulation or any applicable State law or regulation related to non-Federal oil and gas operations and that all information submitted to the Service is true and correct.

§ 29.104 What actions may the Service take on my operations permit application?

(a) We will make a decision on your application within 180 days from the date we deem your application complete unless:

(1) We and you agree that such decision will occur within a shorter or longer period of time; or

(2) We determine that an additional period of time is required to ensure that we have, in reviewing the permit application, complied with all applicable legal requirements.

(b) We will notify you in writing that your permit application is:

(1) Approved, with or without operating conditions; or

(2) Denied, and provide justification for the denial. Any such denial must be consistent with § 29.40(c).

Operating Standards

§ 29.110 What are the purposes of the Service's operating standards?

The purposes are to:

(a) Protect Service-administered lands and waters, and refuge resources; wildlife-dependent visitor uses and experiences; and visitor and employee health and safety; and

(b) Ensure use of technologically feasible, least damaging methods. The operating standards give us and the operator flexibility to consider using alternative methods, equipment, materials design, and conduct of operations.

§ 29.111 What general facility design and management standards must I meet?

As a permittee, you must:

(a) Design, construct, operate, and maintain access to your operational site to cause the minimum amount of surface disturbance needed to safely conduct operations and to avoid areas we have identified as containing sensitive resources.

(b) Install and maintain secondary containment materials and structures for all equipment and facilities using or storing contaminating substances. The containment system must be sufficiently impervious to prevent discharge and must have sufficient storage capacity to contain, at a minimum, the largest potential spill incident.

(c) Keep temporarily stored waste in the smallest area feasible, and confine the waste to prevent escape as a result of percolation, rain, high water, or other causes. You must regularly remove waste from the refuge and lawfully dispose of the waste in a direct and workable timeframe. You may not establish a solid waste disposal site on a refuge.

(d) Use engines that adhere to applicable Federal and State emission standards.

(e) Construct, maintain, and use roads in a manner to minimize fugitive dust emissions.

(f) Design, operate, and maintain your operations and equipment in a manner consistent with good air pollution control practices so as to minimize emissions and leaks of air pollutants and hydrocarbons, including intentional releases or flaring of gases.

(g) Control the invasion of noxious and invasive plant and animal species in your area of operations from the beginning through final reclamation.

(h) Avoid conducting ground-disturbing operations within 500 feet of any surface water, including an intermittent or ephemeral watercourse, or wetland, or any refuge structure or facility used by refuges for interpretation, public recreation, or administration. We may increase or decrease this distance consistent with the need to protect Service-administered structures or facilities, visitor uses or experiences, or visitor or employee health and safety; or to ensure that you have reasonable access to your non-Federal oil and gas. Measurements for purposes of this paragraph are by map distance.

§ 29.112 What fish and wildlife protection standards must I meet?

To protect fish and wildlife resources on the refuge, you must:

(a) Along with your employees and contractors, adhere to all refuge regulations for the protection of fish, wildlife, and plants;

(b) Ensure that you, your employees, and contractors have been informed and educated by the refuge staff on the appropriate protection practices for wildlife conservation;

(c) Conduct operations in a manner that does not create an unsafe environment for fish and wildlife by avoiding or minimizing exposure to physical and chemical hazards; and

(d) Conduct operations in a manner that avoids or minimizes impacts to sensitive wildlife, including timing and location of operations.

§ 29.113 What hydrologic standards must I meet?

You must:

(a) Construct facilities in a manner that maintains hydrologic movement and function.

(b) Not cause measurable degradation of surface water or groundwater beyond that of existing conditions.

(c) Conduct operations in a manner that maintains natural processes of erosion and sedimentation.

§ 29.114 What safety standards must I meet?

To ensure the safety of your operations, you must:

(a) Maintain your area of operations in a manner that avoids or minimizes the cause or spread of fire and does not intensify fire originating outside your operations area;

(b) Maintain structures, facilities, improvements, and equipment in a safe and professional manner in order not to create an unsafe environment for refuge resources, visitors, and employees, by avoiding or minimizing exposure to physical and chemical hazards; and

(c) Provide site-security measures to protect visitors from hazardous conditions resulting from your operations.

§ 29.115 What lighting and visual standards must I meet?

(a) You must design, shield, and focus lighting to minimize the effects of spill light on the night sky or adjacent areas; and

(b) You must reduce visual contrast in the landscape in selecting the area of operations, avoiding unnecessary disturbance, choosing appropriate colors and materials for roads and permanent structures, and other means.

§ 29.116 What noise reduction standards must I meet?

You must prevent or minimize all noise that:

(a) Adversely affects refuge resources or uses, taking into account frequency, magnitude, or duration; or

(b) Exceeds levels that have been identified through monitoring as being acceptable to or appropriate for uses at the sites being monitored.

§ 29.117 What reclamation and protection standards must I meet?

(a) You must promptly clean up and remove from the refuge any released contaminating substances in accordance with all applicable Federal, State, and local laws.

(b) You must perform partial reclamation of areas that are no longer necessary to conduct operations. You must begin final reclamation within 6 months after you complete your authorized operations unless we authorize a different reclamation period in writing.

(c) You must protect all survey markers (e.g., monuments, witness corners, reference monuments, and bearing trees) against destruction, obliteration, or damage from operations. You are responsible for reestablishment, restoration, and referencing of any monuments, corners, and bearing trees

that are destroyed, obliterated, or damaged by your operations.

(d) You must complete reclamation by:

(1) Plugging all wells;

(2) Removing all above-ground structures, equipment, roads, and all other manmade material and debris resulting from operations;

(3) Removing or neutralizing any contaminating substances;

(4) Reestablishing native vegetative communities, or providing for conditions where ecological processes typical of the ecological zone (e.g., plant or wildlife succession) will reestablish themselves;

(5) Grading to conform the contours to pre-existing elevations as necessary to maximize ecological function;

(6) Restoring conditions to pre-disturbance hydrologic movement and functionality;

(7) Restoring natural systems using native soil material that is similar in character to the adjacent undisturbed soil profiles;

(8) Ensuring that reclamation does not interfere with visitor use or with administration of the refuge;

(9) Attaining conditions that are consistent with the management objectives of the refuge, designed to meet the purposes for which the refuge was established; and

(10) Coordinating with us or with other operators who may be using a portion of your area of operations to ensure proper and equitable apportionment of reclamation responsibilities.

§ 29.118 What additional operating standards apply to geophysical operations?

If you conduct geophysical operations, you must do all of the following:

(a) Use surveying methods that minimize the need for vegetative trimming and removal.

(b) Locate source points using industry-accepted minimum safe-offset distances from pipelines, telephone lines, railroad tracks, roads, power lines, water wells, oil and gas wells, oil- and gas-production facilities, and buildings.

(c) Use equipment and methods that, based upon the specific environment, will minimize impacts to Service-administered lands and waters, and resources of refuges; visitor uses and experiences; and visitor and employee health and safety.

(d) If you use shot holes, you must:

(1) Use biodegradable charges;

(2) Plug all shot holes to prevent a pathway for migration for fluids along any portion of the bore; and

(3) Leave the site in a clean and safe condition that will not impede surface

reclamation or pose a hazard to wildlife or human health and safety.

§ 29.119 What additional operating standards apply to drilling and production operations?

If you conduct drilling and production operations, you must meet all of the following standards:

- (a) To conduct drilling operations, you must:
- (1) Use containerized mud circulation systems for operations;
 - (2) Not create or use earthen pits;
 - (3) Take all necessary precautions to keep your wells under control at all times, using only employees, contractors, or subcontractors trained and competent in well control procedures and equipment operation, and using industry-accepted well control equipment and practices; and
 - (4) Design, implement, and maintain integrated casing, cementing, drilling fluid, completion, stimulation, and blowout prevention programs to prevent escape of fluids to the surface and to isolate and protect usable water zones throughout the life of the well, taking into account all relevant geologic and engineering factors.
- (b) To conduct production operations, in addition to meeting the standards of paragraphs (a)(1) through (a)(4) of this section, you must do all of the following:
- (1) Monitor producing conditions for early indications that could lead to loss of mechanical integrity of producing equipment.
 - (2) Maintain all surface equipment and the wellhead to prevent leaks or releases of any fluids or air pollutants.
 - (3) Identify wells and related facilities with appropriate signage. Signs must remain in place until the well is plugged and abandoned and the related facilities are removed. Signs must be of durable construction, and the lettering must be legible and large enough to be read under normal conditions at a distance of at least 50 feet. Each sign must show the name of the well, name of the operator, and the emergency contact phone number.
 - (4) Remove all equipment and materials when not needed for the current phase of your operation.
 - (5) Plug all wells, leaving the surface in a clean and safe condition that will not impede surface reclamation or pose a hazard to wildlife or human health and safety, in accordance with § 29.117.

General Terms and Conditions

§ 29.120 What terms and conditions apply to all operators?

The following terms and conditions apply to all operators, regardless of

whether these terms and conditions are expressly included in the permit:

(a) You must comply with all applicable operating standards in §§ 29.111 through 29.119; these operating standards will be incorporated in the terms and conditions of your operations permit. Violation of these operating standards, unless otherwise provided in your operations permit, will subject you to the Prohibited Acts and Penalties provisions of §§ 29.190 through 29.192.

(b) You are responsible for ensuring that all of your employees, agents, contractors, and subcontractors comply fully with the requirements of this subpart.

(c) You may be required to reimburse the Service for the costs of processing and administering temporary access permits and operations permits.

(d) You may not use any surface water or groundwater from a source located on a refuge unless you have demonstrated a right to use that water or the use has been approved by the Service as the technologically feasible, least damaging method.

(e) You agree to indemnify and hold harmless the United States and its officers and employees from and against any and all liability of any kind whatsoever arising out of or resulting from the acts or omissions of you and your employees, agents, representatives, contractors, and subcontractors in the conduct of activities under a Service-issued permit.

(f) You will be required to take all reasonable precautions to avoid, minimize, rectify, or reduce the overall impacts of your proposed oil and gas activities to the refuge. You may be required to mitigate for impacts to refuge resources and lost uses. Mutually agreed to mitigation tools for this purpose may include providing alternative habitat creation or restoration, land purchase, or other resource compensation.

(g) You are responsible for unanticipated and unauthorized damages as a direct or indirect result of your operations. You will be responsible for the actions and consequences of your employees and subcontractors. You will also be responsible for any reclamation of damages to refuge resources directly or indirectly caused by your operations through the occurrence of severe weather, fire, earthquakes, or the like thereof.

§ 29.121 What monitoring and reporting is required for all operators?

(a) The Service may access your area of operations at any time to monitor the effects of your operations to ensure

compliance with the regulations in this subpart.

(b) The Service may determine that third-party monitors are necessary to ensure compliance with your operations permit and to protect Service-administered lands and waters, or the resources of refuges, visitor uses and experiences, and visitor or employee health and safety.

(1) The Service's determination will be based on the scope and complexity of the proposed operation, reports that you are required to submit under paragraph (e) of this section, and whether the refuge has the staff and technical ability to ensure compliance with the operations permit and any provision of this subpart.

(2) A third-party monitor will report directly to the Service at intervals determined by the Service. We will make the information reported available to you upon your request.

(3) You will be responsible for the cost of the third-party monitor.

(c) You must notify the Service within 24 hours of any injuries to or mortality of fish, wildlife, or endangered or threatened plants resulting from your operations.

(d) You must notify the Service of any accidents involving serious personal injury or death and of any fires or spills on the site immediately after the accident occurs. You must submit a full written report on the accident to the Service within 90 days after the accident occurs.

(e) Upon our request, you must submit reports or other information necessary to verify compliance with your permit or with any provision of this subpart. To fulfill this request, you may submit to us reports that you have submitted to the State under State regulations, or that you have submitted to any other Federal agency to the extent they are sufficient to verify compliance with permits or this subpart.

(f) If your operations include hydraulic fracturing, you must provide the Service with a report including the true vertical depth of the well, total water volume used, and a description of the base fluid and each additive in the hydraulic fracturing fluid, including the trade name, supplier, purpose, ingredients, Chemical Abstract Service Number (CAS), maximum ingredient concentration in additive (percent by mass), and maximum ingredient concentration in hydraulic fracturing fluid (percent by mass). The report must be either submitted through FracFocus or another Service-designated database.

§ 29.122 For how long is my operations permit valid?

Operations permits remain valid for the duration of the operation. Provisions of § 29.160 apply.

Access Fees**§ 29.140 May I cross Federal property to reach the boundary of my oil and gas right?**

The Service may grant you the privilege of access on, across, or through Service-administered lands or waters to reach the boundary of your oil and gas right. You should contact the Service to determine if additional permits are necessary for access.

§ 29.141 Will the Service charge me a fee for access?

(a) The Service will charge you a fee if you require use of Service-administered lands or waters outside the boundary or scope of your oil and gas right:

(1) If you require new use of Service-administered lands or waters, we will charge you a fee based on the fair market value of that use.

(2) Fees under this section will not be charged for access within the scope of your oil and gas right or access to your right that is otherwise provided for by law.

(b) If access to your oil and gas right is across an existing refuge road, we may charge a fee according to a posted fee schedule.

§ 29.142 Will I be charged a fee for emergency access to my operations?

No.

(a) The Service will not charge a fee for access across Service-administered lands or waters beyond the scope of your oil and gas right as necessary to respond to an emergency situation at your area of operations if we determine after the fact that the circumstances required an immediate response to either:

(1) Prevent or minimize injury to refuge resources; or

(2) Ensure public health and safety.

(b) You will remain liable for any damage caused to refuge resources as a result of such emergency access.

Financial Assurance**§ 29.150 When do I have to provide financial assurance to the Service?**

You will need to provide financial assurance as a condition of approval for your operations permit when you submit your application. You must file financial assurance with us in a form acceptable to the Service and payable upon demand. This financial assurance is in addition to any financial assurance

required by any other Federal or State regulatory authority.

§ 29.151 How does the Service establish the amount of financial assurance?

(a) You are responsible for completing reclamation of your disturbances, whether within or outside your permit area, in accordance with this subpart and the terms of your permit. If you fail to properly complete reclamation, you will be liable for the full costs of completing the reclamation. We will base the financial assurance amount upon the estimated cost that a third-party contractor would charge to complete reclamation in accordance with this subpart. If the cost of reclamation exceeds the amount of your financial assurance, you will remain liable for all costs of reclamation in excess of the financial assurance.

(b) The Service will reduce the required amount of your financial assurance during the pendency of operations by the amount we determine is represented by in-kind reclamation you complete during your operations.

§ 29.152 Will the Service adjust the amount required for my financial assurance?

The Service may require, or you may request, an adjustment to the financial assurance amount because of any circumstances that increase or decrease the estimated costs established under § 29.151.

§ 29.153 When will the Service release my financial assurance?

(a) Your responsibility under the financial assurance will continue until either:

(1) The Service determines that you have met all applicable reclamation operating standards and any additional reclamation requirements that may be included in your operations permit; or

(2) A new operator assumes your operations, as provided in § 29.170(b).

(b) You will be notified by the Service within 30 calendar days of our determination that your financial assurance has been released.

§ 29.154 Under what circumstances will I forfeit my financial assurance?

(a) You may forfeit all or part of your financial assurance if we cannot secure your compliance with the provisions of your operations permit or a provision of this subpart. The part of your financial assurance forfeited is based on costs to the Service to remedy your noncompliance.

(b) In addition to forfeited financial assurance, we may temporarily:

(1) Prohibit you from removing all structures, equipment, or other materials from your area of operations;

(2) Require you to secure the operations site and take any necessary actions to protect Service-administered lands and waters, and resources of the refuge; visitor uses; and visitor or employee health and safety; and

(3) Suspend review of any permit applications you have submitted until we determine that all violations of permit provisions or of any provision of this subpart are resolved.

(4) Seek recovery as provided in § 29.151 for all costs of reclamation in excess of the posted financial assurance.

Modification to an Operation**§ 29.160 Can I modify operations under an approved permit?**

The Service may amend an approved temporary access permit or an operations permit to adjust to changed conditions or to address unanticipated conditions, either upon our own action or at your request.

(a) To request a modification to your operation, you must provide, in writing, to the Service, your assigned permit number, a description of the proposed modification, and an explanation of why the modification is needed. We will review your request for modification under the approval standards at §§ 29.72 or 29.103. You may not implement any modification until you have received the Service's written approval.

(b) If the Service needs to amend your temporary access permit or operations permit, you will receive a written notice that:

(1) Describes the modification required and justification;

(2) Specifies the time within which you must notify the Service that you either accept the modifications to your permit or explain any concerns you may have; and

(3) Absent any concerns, specifies the time within which you must incorporate the modification into your operations.

Change of Operator**§ 29.170 What are my responsibilities if I transfer my right to operate?**

(a) If your operations are being conducted under § 29.44, you must notify the Service in writing within 30 calendar days from the date the new operator acquires the rights to conduct operations. Your written notification must include:

(1) The names and addresses of the person or entity conveying the right and of the person or entity acquiring the right;

(2) The effective date of transfer;
 (3) The description of the rights, assets, and liabilities being transferred and which ones, if any, are being reserved by the previous operator; and
 (4) A written acknowledgement from the new operator that the contents of the notification are true and correct.

(b) If your operations are being conducted under § 29.43 or an operations permit:

(1) You must provide notice under paragraph (a) of this section.

(2) You remain responsible for compliance with your operations permit, and we will retain your financial assurance until the new operator:

(i) Adopts and agrees in writing to conduct operations in accordance with all terms and conditions of your operations permit;

(ii) Provides financial assurance with us that is acceptable to the Service and made payable to the Service; and

(iii) Receives written notification from the Service that transfer of the operations permit has been approved.

§ 29.171 What must I do if operations are transferred to me?

(a) If another operator transfers operations conducted under § 29.44, as the transferee you may continue operating under the requirements of that section, but:

(1) Within 30 calendar days from the date of the transfer, you must provide to the Service:

(i) Documentation demonstrating that you hold the right to operate; and

(ii) The names, phone numbers, and addresses of your:

(A) Primary company representative;

(B) Representative responsible for field supervision; and

(C) Representative responsible for emergency response.

(2) Within 90 days, or as otherwise agreed to by the Service, submit an operations permit application in compliance with §§ 29.90–29.97, Operations Permit: Application, that must be approved in compliance with applicable provisions of this subpart and under the timelines outlined in §§ 29.100–29.103, Operations Permit: Application Review and Approval.

(b) If another operator transfers operations conducted under § 29.43 or an operations permit, you must within 30 days of commencing transferred operations:

(1) Provide documentation demonstrating that you hold the right to operate.

(2) Provide the names, phone numbers, and addresses of your:

(i) Primary company representative;

(ii) Representative responsible for field supervision; and

(iii) Representative responsible for emergency response.

(3) Agree in writing to conduct operations in accordance with all terms and conditions of the previous operator's permit.

(4) File financial assurance with us that is acceptable to the Service and made payable to the Service.

(5) Receive written approval from the Service for the transfer of the operation's permit.

(c) You may modify operations transferred to you in accordance with § 29.160.

Well Plugging

§ 29.180 When must I plug my well?

Except as provided in § 29.181, you must plug your well, in accordance with the standards and procedures outlined in this subpart, when any of the following occurs:

(a) Your drilling operations have ended and you have taken no further action on your well within 60 calendar days;

(b) Your well, which has been completed for production operations, has no measurable production quantities for 12 consecutive months; or

(c) The period approved in your permit to maintain your well in shut-in status has expired.

§ 29.181 Can I get an extension to the well plugging requirement?

(a) You may apply for either an operations permit or a modification to your approved operations permit to maintain your well in a shut-in status for up to 5 years. Provide the information requested on FWS Form 3–2469, including, but not limited to:

(1) An explanation of why the well is shut-in or temporarily abandoned and your future plans for utilization;

(2) A demonstration of the mechanical integrity of the well; and

(3) A description of the manner in which your well, equipment, and area of operations will be maintained in accordance with the standards in the subpart.

(b) Based on the information provided under this section, we may approve your application to maintain your well in shut-in status for a period up to 5 years. We may condition an extension on an adjustment of your financial assurance.

(c) You may apply for additional extensions by submitting a new application under paragraph (a) of this section.

Prohibited Acts and Penalties

§ 29.190 What acts are prohibited under this subpart?

The following acts are prohibited:

(a) Operating in violation of the terms or conditions of a temporary access permit, an operations permit, a permit under § 29.43, or any applicable provision of this subpart, including §§ 29.60–29.64 for pre-existing operations.

(b) Damaging Service-administered lands or waters, or resources of a refuge, as a result of failure to comply with the terms or conditions of a temporary access permit, an operations permit, operations being conducted under §§ 29.43 or 29.44, or any provision of this subpart.

(c) Conducting operations without a temporary access permit or an operations permit, unless conducting operations under §§ 29.43 or 29.44.

(d) Failure to comply with any suspension or revocation order issued under this subpart.

(e) Failure to comply with the applicable provisions of Federal law or regulation including this subchapter.

(f) Failure to comply with the applicable provisions of the laws and regulations of the State wherein any operation is located unless further restricted by Federal law or regulation including this subchapter.

§ 29.191 What enforcement actions can the Service take?

If you engage in a prohibited act:

(a) The Service may suspend and/or revoke your approved operations permit and your authorization for operations as set forth at § 29.43 and § 29.44; and/or

(b) All prohibited acts are subject to the penalty provisions set forth at § 28.31 of this subchapter.

§ 29.192 How do violations affect my ability to obtain a permit?

Until you comply with the regulations in this subpart, we will not consider a request to conduct any new operations, except plugging and reclamation operations, on Service-administered lands or waters.

Appeals

§ 29.200 Can I, as operator, appeal Service decisions?

Yes. If you disagree with a decision made by the Service under this subpart, you may use the appeals process in § 25.45 of this subchapter. The process set forth in § 25.45 will be used for appeal of any written decision concerning approval, denial, or modification of an operation made by the Service under this subpart. No

Service decision under this subpart that is subject to appeal to the Regional Director or the Director shall be considered final agency action subject to judicial review under 5 U.S.C. 704 until the Regional Director has rendered his or her decision on the matter. The decision of the Regional Director will constitute the Service's final agency action, and no further appeal will lie in the Department from that decision.

Public Information

§ 29.210 How can the public learn about oil and gas activities on refuge lands?

(a) Interested parties may view publicly available documents at the refuge's office during normal business hours or by other means prescribed by the refuge. The availability for public inspection of information about the nature, location, character, or ownership of refuge resources will conform to all applicable laws and implementing regulations, standards, and guidelines.

(b) The refuge will make available for public inspection any documents that an operator submits to the Service under this subpart except those that the operator has identified as proprietary or confidential.

(c) For the information required in § 29.121(f), the operator and the owner of the information will be deemed to have waived any right to protect from public disclosure information submitted through FracFocus or another Service-designated database.

(d) For information required under this subpart that the owner of the information claims to be exempt from public disclosure and is withheld from the Service, a corporate officer, managing partner, or sole proprietor of the operator must sign and the operator must submit to the authorized officer an affidavit that:

(1) Identifies the owner of the withheld information and provides the name, address, and contact information for a corporate officer, managing partner, or sole proprietor of the owner of the information;

(2) Identifies the Federal statute or regulation that would prohibit the Service from publicly disclosing the

information if it were in the Service's possession;

(3) Affirms that the operator has been provided the withheld information from the owner of the information and is maintaining records of the withheld information, or that the operator has access and will maintain access to the withheld information held by the owner of the information;

(4) Affirms that the information is not publicly available;

(5) Affirms that the information is not required to be publicly disclosed under any applicable local, State, tribal, or Federal law;

(6) Affirms that the owner of the information is in actual competition and identifies competitors or others that could use the withheld information to cause the owner of the information substantial competitive harm;

(7) Affirms that the release of the information would likely cause substantial competitive harm to the owner of the information and provides the factual basis for that affirmation; and

(8) Affirms that the information is not readily apparent through reverse engineering with publicly available information.

(e) If the operator relies upon information from third parties, such as the owner of the withheld information, to make the affirmations in paragraphs (d)(6) through (d)(8) of this section, the operator must provide a written affidavit from the third party that sets forth the relied-upon information.

(f) The Service may require any operator to submit to the Service any withheld information, and any information relevant to a claim that withheld information is exempt from public disclosure.

(g) If the Service determines that the information submitted under paragraphs (d) or (e) of this section is not exempt from disclosure, the Service will make the information available to the public after providing the operator and owner of the information with no fewer than 10 business days' notice of the Service's determination.

(h) The operator must maintain records of the withheld information

until the later of the Service's release of the operator's financial assurance or 7 years after completion of operations on refuge lands. Any subsequent operator will be responsible for maintaining access to records required by this paragraph during its operation of the well. The operator will be deemed to be maintaining the records if it can promptly provide the complete and accurate information to the Service, even if the information is in the custody of its owner.

(i) If any of the chemical identity information required in this subpart is withheld, the operator must provide the generic chemical name in the submission required. The generic chemical name must be only as nonspecific as is necessary to protect the confidential chemical identity, and should be the same as or no less descriptive than the generic chemical name provided to the Environmental Protection Agency.

Information Collection

§ 29.220 Has the Office of Management and Budget approved the collection of information?

The Office of Management and Budget reviewed and approved the information collection requirements contained in this subpart and assigned OMB Control No. 1018-0162. We use the information collected under this subpart to manage non-Federal oil and gas operations on Service-administered lands or waters for the purpose of protecting wildlife and habitat, water quality and quantity, wildlife-dependent recreational opportunities, and the health and safety of employees and visitors on the NWRS. We may not conduct or sponsor and you are not required to respond to a collection of information unless it displays a currently valid OMB control number.

Karen Hyun,

Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2016-27218 Filed 11-10-16; 8:45 am]

BILLING CODE 4333-15-P