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Alaska Department of Natural Resources
Division of Oil and Gas, Attention: Bob Pawlowski
550 W. 7th Avenue, Suite 1100
Anchorage, Alaska 99501

RE: Public Comment – Proposed Regulations – Oil and Gas Exploration and Development by Geographical Area and Plans of Operations

Dear Mr. Pawlowski:

I am writing to comment on proposed changes to 11 AAC 83 regarding oil and gas exploration and development by geographical area and plans of operations.

As a general matter, the regulations do not appear to match DNR's legislative testimony regarding how the department intended to implement AS 38.05.035(o). The testimony repeatedly indicated this would be a planning process, a way for communities and the public to assess where, when and how exploration and development activities would occur, and a way to determine areas where such activities should be avoided.

Yet the regulations establish a process with little opportunity for the public to engage in a meaningful planning discussion.

I. Comments on the Proposed Regulations

11 AAC 83.660 and 11 AAC 83.665. Geographical area for exploration and Geographical area for development.

In defining a geographical area, the proposed regulations say that a geographical area for exploration or development will exclude communities listed in the Alaska Community Database Online.

In order to assure uniform application of the law, the regulations should include a description of the boundaries for community exclusion areas, such as whether the area is based on a community's official boundaries or some other criteria – also, whether an exclusion area will extend beyond a community's official boundaries and, if so, how far.

Regarding where geographical areas will be established, committee minutes on HB 129 show Division of Oil and Gas Director Bill Barron as testifying that

> [T]he division would establish, by regulation, the geographical areas for the exploration or development using a public process. For example, the DNR would identify the geographical areas in the Kenai area for exploration, which might encompass the entire west side of Cook Inlet, but it would likely also identify small discrete packages for the actual exploration. He envisioned this would be done by regulations. Additionally, the public process associated with establishing those geographical areas will engage with the public upfront.

He also said

> If the areas are established through the public process when the DNR develops its regulations, the public has yet another opportunity to weigh in and specify the size, location, and purpose of a geographical area. He anticipated that would be the type of engagement with the public the DNR would encourage.[1]

The proposed regulations authorize DNR to define a geographical area using general criteria. Before authorizing exploration or development in the area, the department will provide public notice that describes the areal extent of the geographical area. Lacking is the process described during testimony on HB 129, that is, an opportunity for the public to "weigh in and specify the size, location, and purpose of a geographical area."

In order to provide an early opportunity for engagement with the public on the establishment of geographical areas through the regulatory process, the proposed regulations should specify the size, location and purpose of each area.

11 AAC 83.670. Criteria.

The proposed regulation says that the department may authorize exploration or development within a geographical area upon a written finding that exploration or development in the geographical area will best serve the state's interests.

It is difficult to understand the purpose of this section. The first two criteria for evaluating whether exploration or development best serves the state's interests appear to be general statements similar to the findings in AS 38.05.180(a)(2) regarding oil and gas leasing. The third criteria – maximizing use of resources consistent with the public interest – is a constitutional requirement. All of these should be inherent in any decision DNR makes and do not add anything new or of added value to the process. This is particularly true since these factors

[1] House Resources Committee Minutes, March 15, 2013.

presumably were considered as part of a best interest finding for a lease sale area and, without knowing when or where specific project activities will occur, there will be little new information to consider at this point in the process.

The other issue is what happens if DNR finds that exploration or development in a geographical area is not in the state's best interest and so may not authorize exploration and development in the area. Wouldn't this violate state oil and gas leases that grant a lessee the right to explore and develop the leasehold? If exploration or development in an area does not best serve the state's interests, would the state be put in the position of having to buy back the leases?

If it's unrealistic for DNR to find that exploration or development will not best serve the state's interest, what is the point of the finding?

11 AAC 83.675. Public notice.

The information required to be provided in a public notice provides little guidance for how the public can meaningfully engage in a DNR decision regarding the size of a geographical area, the types of activities allowed or the conditions a lessee will be required to follow. What happens if people provide comments disagreeing with the size of an area or the activities allowed, or have different conditions they would like to see required? Will there be a DNR decision accepting or rejecting such comments? Will there be an opportunity to appeal? Will DNR hold public hearings?

If DNR is going to prepare some sort of finding under 11 AAC 83.670, that finding should also be subject to public notice and comment with an opportunity to appeal the finding.

II. Other Recommendations

The process proposed in the regulations is not likely to provide added value from this new layer of review. As Ms. Woolf pointed out during her testimony on HB 129, most areas have already undergone an extensive planning effort. She said that "Basically, the process under the bill represents yet another layer of planning on top of the area plan..." and that DNR wants to make it clear that DNR "wants public input from across the entire geographical area, in particular, to identify any concerns prior to exploration and development."[2]

To increase the value of the new layer of review and to provide communities and the public with an opportunity to identify concerns prior to exploration and development, consider developing a planning process where local governments can

(a) identify land and water uses and activities important to their community;

[2] House Resources Committee Minutes, March 15, 2013.

(b) provide conditions applicable to oil and gas activities necessary to mitigate impacts to identified land and water uses and activities; and

(3) designate areas of significant ecological, historic, cultural and aesthetic value; areas suitable for oil and gas development; areas used for subsistence; and areas in need of special protection.

In addition, rather than assessing oil and gas resources as described in 11 AAC 83.670(a)(1), DNR should assess other natural resources and their existing uses in an area, how oil and gas activities may conflict with these uses, and how to reconcile any conflicts.

Using this information, DNR will be able to identify and hopefully reconcile many concerns prior to exploration and development, including incorporating measures identified by communities as necessary to address local issues and that minimize adverse impacts of oil and gas activities.

As described below, DNR will still need to provide public notice and an opportunity to comment for individual projects. But with a plan in place that identifies and deals with most local concerns, there may be fewer conflicts and concerns over specific oil and gas exploration and development lease activities.

III. Public Notice for Plans of Operations

Through AS 38.05.035(o) and the proposed regulations, DNR is creating an additional layer of review for oil and gas exploration and development with the stated intent of ending public notice and comment on plans of operation for individual projects.[3]

Ending public notice on plans of operation will violate AS 38.05.035(e)(1)(C). For oil and gas projects, AS 38.05.035(e)(1)(C) provides that DNR may do a phased review for an oil and gas disposal when "before the next phase of the project may proceed, public notice and the opportunity to comment are provided under regulations adopted by the department . . ."

Though DNR did not adopt regulations as required by the statute, it established a practice of ensuring the requirements of AS 38.05.035(e)(1)(C) were met through the best interest findings for oil and gas lease sale areas. The findings state that the statute is met because, "before the next phase of the project may proceed, ADNR provides public notice and the opportunity to comment on proposed plans of operations in the lease sale area."[4]

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[3] On page 2, the regulation packet Dear Alaskan letter states:

> "If a plan of operations complies with the terms and conditions in both the Best Interest Finding and the DNR decision authorizing exploration or development in a geographical area, the DNR may approve those plans of operations without a separate public notice."

[4] North Slope Foothills Areawide Sale Best Interest Finding.

Now, long after the fact, DNR cannot decide that the way the phasing statute is met is through public notice of exploration and development in geographical areas. If DNR fails to provide public notice for plans of operation as required under the best interest findings, DNR will be out of compliance with AS 38.05.035(e)(1)(C) and with its own findings.[5]

IV. Cumulative Impacts

In the recent Alaska Supreme Court decision, *Sullivan v. REDOIL,* the Court found that DNR has a constitutional duty to analyze and consider cumulative impacts throughout all phases of an oil and gas project, and to provide timely and meaningful notice of DNR's cumulative impact analysis.

It is clear from this decision that DNR has a constitutional duty to provide for a cumulative impact analysis when authorizing exploration or development in a geographical area. Unfortunately, DNR currently lacks the statutory authority to develop regulations to govern the required analysis. Consequently, even if DNR enacts the proposed 11 AAC 83 regulations, implementation will need to wait until cumulative impacts can be appropriately addressed.

It should also be noted that the Court decision says that the requirement to assess cumulative impacts and provide meaningful notice applies as more information becomes known, including when specific projects are identified and permit decisions are being made. This means that there will also need to be a cumulative impact analysis with timely and meaningful public notice for individual lease projects even when exploration or development activities are authorized for a geographical area.

Thank you for consideration of these comments.

Sincerely,

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[5] HB 129 did not resolve this issue. AS 38.05.035(o) does not address the public notice requirements of AS 38.05.035(e)(1)(C).