



TRUSTEES FOR ALASKA

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August 19, 2013

Bob Pawlowski
Department of Natural Resources
Division of Oil and Gas
550 West 7th Avenue, Suite 1100
Anchorage, AK 99501
DOG.Comments@alaska.gov

Submitted via email

Re: Comments on Proposed Oil and Gas Regulations

Dear Mr. Pawlowski:

Trustees for Alaska submits the following comments on behalf of the Center for Biological Diversity, Cook Inletkeeper, the Wilderness Society, Alaska Wilderness League, Northern Alaska Environmental Center, and the Sierra Club regarding the Alaska Department of Natural Resources' ("DNR") proposed regulations on oil and gas exploration and development approvals and plans of operations by geographical area.

The commenters have an interest in the regulations. Groups and their members use the state lands that are leased for oil and gas development, and have an interest in conserving the habitats, species, and places that would be the subject of the approvals under the proposed regulations.

DNR proposes both changes to the existing Plan of Operations regulation (11 AAC 83.158) and a new article (11 AAC 83.650–.695) in response to the passage of House Bill 129. These comments are organized to provide specific comments on each regulation in numerical order, with an overarching issue addressed at the end.

11 AAC 83.158. Plan of operations.

Under subsection (e), DNR should add a new subsection (subsection (7)) that requires an applicant to submit information about the fish and wildlife resources and their habitats in the project area, as well as the current and projected uses, including uses and values of fish and wildlife. Requiring this information will allow DNR to determine the impacts of the project, including the cumulative impacts of the project, and whether any amendment to the project as proposed is necessary to protect the State's interest. *See* 11 AAC 83.158(e)–(f); *Sullivan v. Resisting Env'tl. Destruction on Indigenous Lands (REDOIL)*, --- P.3d---, 2013 WL 1281786, at *10–11 (Mar. 29, 2013) (petition for rehearing pending); Alaska Const., art. VIII, §§ 1, 2.

Under the proposed subsection (g), DNR must also provide that a significant amendment to a plan of operations will go through notice and comment prior to approval and DNR must reconsider the impacts of the amended project, including the cumulative impacts. If a project is revised such that the impacts are different than those previously considered, to continue to ensure that the project is in the public interest, Article VIII of the Alaska Constitution requires that DNR consider the impacts of the amended project and provide for public notice of the amended project and impacts, including the cumulative impacts. *Id.* at *10 (citing Alaska Const., art. VIII, §§ 1, 2).

11 AAC 83.660. Geographical area for exploration.

Subsection (a) should include an additional requirement that DNR depict the area on a map. Maps are incredibly helpful in allowing people to understand the scope of a proposed action while geographic descriptions are confusing, difficult to understand, and require the public to hunt down the relevant information.

Subsection (d) should be revised to state that the exploration area will not exceed 15 percent of the lease sale area (15% of the existing areawide lease sale areas is between approximately 300,000 acres and 750,000 acres). In *REDOIL*, the Alaska Supreme Court held that Article VIII, sections 1 and 2 impose a duty on the State to consider the impacts of oil and gas projects, including the cumulative impacts. *Id.* And while the Court concluded that it was reasonable for DNR to defer consideration of these impacts at the leasing phase, the Court was clear that as the project moved into the subsequent phases — including exploration and development — it had to “consider cumulative impacts of the project and provide to the public timely and meaningful notice of its assessment of the cumulative impacts of an oil and gas project as the project evolved through its phases” to comply with the Constitution. *Id.* Specifically, the Court held that “DNR must continue to analyze and consider all factors material and relevant to what is in the public interest after the lease sale phase.” *Id.* If DNR proceeds to review the impacts of exploration or development on as large of a scale as proposed — 30% of the existing areawide areas is between 600,000 and 1,500,000 acres — as a practical matter, the agency will be unable to comply with the Court’s mandate to assess the impacts in a meaningful way and make a reasonable conclusion that the exploration is in the public interest on such a large scale. The exploration area must be considerably smaller to satisfy its constitutional obligations.

For DNR to proceed with the exploration area approval scheme to satisfy its constitutional obligations under *REDOIL*, the exploration area must be considerably smaller than proposed.¹ DNR must change the regulations to encompass smaller areas because it is not

¹ Section 1(7) of SLA 2013, ch. 13 indicates that DNR’s annual supplemental call for information for the lease sale best interest finding (“BIF”) is sufficient to satisfy DNR’s ongoing duty to consider the cumulative impacts as a project moves through the various phases. This is incorrect because the lease sale BIF only considers whether leasing is in the public interest; the Court stated that DNR must determine that each phase is in the public interest. *REDOIL*, 2013 WL 1281786, at *11. While the annual supplement may be sufficient to support DNR’s conclusion that the lease sale (*i.e.*, the disposal) is in the public interest, some process other than

possible as a practical matter for DNR to meaningfully consider the potential impacts, including cumulative impacts, of a specific project when it approves such a large exploration area. In that case, DNR is required to issue a subsequent public notice and impacts assessment for a later permit so that it can meaningfully evaluate the impacts of a project.

11 AAC 83.665. Geographical area for development.

Subsection (a) should include a requirement that DNR depict the area on a map for the same reasons set out above.

For the same reasons set out above regarding proposed 11 AAC 83.660(d), subsection (d) of this proposed regulation should be revised to state that the development area will not exceed 200,000 acres.

Subsection (f) provides that the development area “may encompass one or more oil and gas units under AS 38.05.180(p)...” Subsection (f) should be revised to clarify that, if the area encompasses a unit, the total acreage of the area cannot exceed the acreage limit contained in subsection (d).

11 AAC 83.670. Criteria.

When approving exploration activities, DNR should segregate seismic and related activities from exploratory drilling and related activities. The activities and related impacts are considerably different and are best addressed in two separate documents. Additionally, exploratory drilling carries with it considerably different risks, including the risk of a well blow-out, and the issue of how to manage drill cuttings and drilling muds. By segregating exploration activities in this manner, DNR will be able to take a more focused and detailed look at the potential activities, better understand the impacts of the activities it is authorizing, analyze those impacts, and impose the restrictions or mitigation measures necessary. *See REDOIL*, 2013 WL 1281786, at *10–11. Additional definitions should be added to the proposed 11 AAC 83.695 to define the seismic exploration activities and drilling exploration activities.

Subsection (b)(5) should be revised to include a non-exhaustive list of issues that the Commissioner will consider so that DNR, the public, and prospective permittees have clarity regarding what factors DNR will be considering in making its decision. This list should include, at a minimum, the following issues: the issues raised during the public comment period; fish and wildlife species and their habitats; current and projected uses of the area, including subsistence, fish, and wildlife uses; and the cumulative impacts of the activities being authorized for the exploration or development area, including impacts to subsistence, fish and wildlife and their uses, and historic and cultural resources. *See, e.g.*, AS 38.05.035(g)(1). Consideration of this information is consistent with the Alaska Supreme Court’s holding in *REDOIL* that to satisfy Article VIII DNR must consider the impacts of oil and gas projects “in the future, at each

the lease sale BIF is necessary to comply with Article VIII of the Alaska Constitution for the later phases.

subsequent phase, as more information becomes known, and particularly as DNR decides whether to issue permits for future activities”. 2013 WL 1281786, at *11.

Subsection (c) should be revised to clarify that DNR retains the authority to impose individual stipulations and mitigation measures on specific projects authorized under the exploration or development area approval. This appears to be the intent of that section, but it is unclear whether the section is referring to the approval of the exploration or development area, or a project seeking authorization pursuant to that approval. If that is not the intent of the existing subsection (c), additional language should be added to this subsection clarifying that DNR retains the ability to impose stipulations and mitigation measures on individual projects.

11 AAC 83.675. Public Notice.

Under subsection (a)(2), the public notice should not only include a description of the geographical area, but a map of the area for the reasons set out above.

Subsection (a)(4) is confusing as written and seems to indicate that DNR can issue an exploration area approval and a development area approval at the same time. That is not consistent with DNR’s proposed regulation that allows an exploration or development approval in a writing finding. *See* 11 AAC 83.670(a) (proposed). It should be revised to read: “specify if it is an exploration area or development area, and if it is a development area, if there is also an existing exploration area approval.”

Under subsection (b), DNR should add language stating that it will actually respond in writing to issues raised in the public comments in issuing its finding, not simply consider them in its decision making. The agency’s explanation for its actions and its response to public concerns is very important to its decision making and ensures the public that the agency has engaged in reasoned and informed decision making. *See Trustees for Alaska v. State, Dep’t of Natural Res.*, 795 P.2d 805, 809 (Alaska 1990) (“The facts and premises on which the decision is based should appear in DNR’s decisional document.”); *Ship Creek Hydraulic Syndicate v. State, Dep’t of Transp. & Pub. Facilities*, 685 P.2d 715, 717 (Alaska 1984) (“If serious objections are raised in relation to action the agency proposes, the decisional document should respond to them.”).

Additionally, under *REDOIL*, DNR is required to not only provide public notice of the proposal, but must also provide the public with its assessment of the impacts — including the cumulative impacts — of the approval. Accordingly, DNR should add a new subsection (subsection (9)) that requires that the public notice include the agency’s assessment of the impacts of the exploration activities being authorized. *REDOIL*, 2013 WL 1281786, at *10–11.

11 AAC 83.695. Definitions.

The definition of “Geographical area” should be amended to read: “means a defined sub-area within an area that has been offered for oil and gas, or gas only leasing under AS 38.05.180.” This amendment clarifies that all designated exploration or development geographical areas cannot encompass the entire areawide lease sale area.

Additional Issue — Approval Will Become Stale and Insufficient under *REDOIL*

The proposed regulations will allow an exploration area approval to remain in effect for ten years and a development area approval for five. However, in *REDOIL*, the Court held that the Alaska Constitution requires DNR “to take a *continuing* hard look—including analysis of cumulative impacts—throughout the course of a project.” 2013 WL 1281786, at *11 (emphasis added); *see also id.* at *10 (stating that DNR has a constitutional duty to “take a *continuing* hard look at future development” (internal quotations omitted) (emphasis added)). The Court also stated that DNR has an obligation to consider those impacts “particularly as DNR decides whether to issue permits for future activities.” *Id.* Because of the lengthy duration of the approvals, as resources shift or change, various projects move forward, and the uses of the area change, any cumulative impacts analysis done for an exploration or development area approval will quickly become stale and DNR will not be able to rely on the approval to meet its constitutional duties to continue to evaluate the impacts, particularly as it is considering individual permits. Even if DNR adopts these regulations, DNR will be required to issue supplements to its exploration and development area approval cumulative impacts assessments or to issue new cumulative impacts assessments with individual permits and provide meaningful public notice of that assessment for future projects. *Id.* at *11; Alaska Const., art. VIII §§ 1, 2.

Thank you for the opportunity to submit comments on these proposed regulations. Please contact me with any questions.

Sincerely,

s/ Brook Brisson
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