June 7, 2010

Richard Voss
Refuge Manager
Arctic National Wildlife Refuge
101 12th Avenue, Room 136
Fairbanks, Alaska 99701-6237

Attention: Sharon Seim

Dear Mr. Voss:

The State of Alaska reviewed the April 7, 2010 Arctic National Wildlife Refuge Comprehensive Conservation Plan (CCP) and Environmental Impact Statement (EIS) Notice of Intent.[1] The following comments represent the views of the Department of Law and supplement those provided in the May 11, 2010 letter from Governor Sean Parnell.

The purpose of the Notice was to advise federal and state agencies and the public of (1) the Service's "intention to conduct detailed planning on this refuge and (2) [to] obtain suggestions and information on the scope of issues to be considered in the EIS and during the development of the CCP."[2] The Notice also explains that the Service will review whether to recommend that Congress place ANWR lands within the National Wilderness Preservation System.[3]

The Service's Notice solicits public comment.[4] The Notice provides that the Service is "looking for meaningful comments that will help determine the desired future conditions of the Refuge and address the full range of purposes."[5] The Notice states, however, that "[s]ome concerns and interests related to the Refuge will not be addressed

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1 75 Fed. Reg. 17763 (April 7, 2010).

2 *Id.* at 17764.

3 *Id.* at 17763-64.

4 *Id.* at 17763.

5 *Id.* at 17764.

in the Revised CCP. For example, the U.S. Congress has reserved for itself in section 1002(i) of ANICLA . . . the decision as to whether or not the Refuge Coastal Plain . . . should be made available for oil and gas development. Therefore, the Service does not have the authority to decide this issue, and we will not consider or respond to comments that support or oppose such development during the CCP process."[6]

When an agency limits the scope of alternatives that it will review, courts apply the "rule of reason" to determine whether an EIS analyzed sufficient alternatives to allow the agency to take a "hard look" at available options.[7] While consideration of alternatives is "the heart of the environmental impact statement"[8] "[a]n agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives."[9] Nevertheless, an alternative must be considered if it falls within the agency's statutory mandate.[10]

Here, the Service has said that it will not consider oil and gas development before it issues a revised CCP and, apparently, the EIS.[11] It explained that drilling in ANWR is off-limits and only Congress has the authority to lift the ban.[12] No other explanation for limiting the comments was given. The Service has therefore concluded that it is unnecessary to require the agency to consider the environmental impacts of a prohibited activity.

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6 75 Fed. Reg. at 17764-65.

7 *New Mexico v. BLM*, 565 F.3d 683, 708 (10th Cir. 2009).

8 40 C.F.R. § 1502.14.

9 *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (emphasis added).

10 *Id.*; *see also Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 866 (9th Cir. 2004) (observing that an agency violates NEPA if it unreasonably narrows the scope of its EIS inquiry in a manner that conflicts with statutory objectives).

11 75 Fed. Reg. at 17764.

12 *See* 16 U.S.C. § 3142(i) ("Until otherwise provided for in law enacted after December 2, 1980, all public lands within the coastal plain are withdrawn from all forms of entry or appropriation under the mining laws, and from operation of the mineral leasing laws, of the United States."); 16 U.S.C. § 3231 (the process for allowing the president to recommend to Congress to open federal lands within Alaska to mineral development does not apply to lands within ANWR).

There are at least three significant problems with the Service's position. *First*, NEPA provides that federal agencies must "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources."[13] There is obviously a conflict over alternative uses for the 1002 Area. Hence, the Service must consider oil and gas development as an alternative.

Second, "[t]he mere fact that an alternative requires legislative implementation does not automatically establish it as beyond the domain of what is required for discussion, particularly since NEPA was intended to provide a basis for consideration and choice by the decision makers in the legislative as well as the executive branch."[14] Thus, the Service's rationale for limiting public comment – i.e., because Congress alone has the power to lift the ban on drilling, it cannot or should not consider oil and gas development as an alternative – is a rationale that courts have rejected.

Third, where an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide to determine the reasonableness of an agency's decision to limit the scope of an EIS.[15] Here, the Service has unreasonably restricted the scope of the public comment period to exclude discussion of oil and gas development because ANILCA expressly requires the Service to consider how oil and gas development will impact wildlife and the environment.

More specifically, ANILCA provides that *the purpose* of Section 1002 "is to provide for a comprehensive and continuing inventory of the assessment of the fish and wildlife resources . . . . an analysis of the impacts of oil and gas exploration development,

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[13] 42 U.S.C. § 4332; *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) ("This 'alternatives provision' . . . requires the agency to give full and meaningful consideration to all reasonable alternatives."); *California v. Block*, 690 F.2d 753 (9th Cir. 1982) (holding that the agency should have considered the alternative of allocating more than one-third of the land to the wilderness category).

[14] *Natural Res. Defense Council, Inc. v. Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972); *see also Save Our Cumberland Mts. v. Kempthorne*, 453 F.3d 334, 343-344 (6th Cir. 2006) (observing that statutory limitations on an agency's decision making authority cannot limit the range of alternatives an agency must consider). *See generally* D. Mandelker *NEPA Law and Litigation* §§ 9:19, 9:24 (2d. ed. 2007) (collecting cases).

[15] *Westlands Water Dist.*, 376 F.3d at 866.

and production, and to authorize exploratory activity within the coastal plain[.]"[16] The statute goes on to provide that the Secretary must also provide Congress with recommendations "with respect to whether further exploration for, and the development and production of, oil and gas within the coastal plain should be permitted and, if so, what additional legal authority is necessary to ensure that the adverse effects of such activities on fish and wildlife, their habitats, and other resources are avoided or minimized."[17] Similarly, Section 1005 of ANILCA provides that the Secretary "shall work closely with the State of Alaska and Native Village and Regional Corporations in evaluating the impacts of oil and gas exploration, development, and production . . . on the wildlife resources of these lands[.]"

Accordingly, because the Department of Interior, and therefore the Service, is expressly required by statute to evaluate the impacts of oil and gas exploration, it is a violation of NEPA for the Service to limit the scope of public comments on this issue.

Indeed, the Service's decision to restrict public comment begs several questions: How can the Service know if new information exists related to the environmental effects of oil and gas development if it refuses to consider public comments on this issue? And how can the Service say that it is "looking for meaningful comments that will help determine the desired future conditions of the Refuge and address the full range of purposes" but then go on to limit the scope of public comment?

Moreover, assuming the duty to evaluate how oil and gas activities will affect the environment is ongoing, which appears to be a fair assumption,[18] the Service must

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[16] 16 U.S.C. § 3142(a).

[17] 16 U.S.C § 3142(h)(6).

[18] *See Natural Defense Council v. Lujan*, 768 F.Supp. 870, 885-87 (D. D.C. 1991) ("An agency's duty under NEPA is a continuing one. Indeed, the Supreme Court has explained that this duty continues even after a project requiring an EIS is approved. 'It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.' *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). *So long as the decision making process is still pending the broad dissemination of relevant environmental information will be promoted by supplementation, if and when appropriate*.") (emphasis added). *See also* 40 C.F.R. § 1502.9(c)(1) (regulations *require* that supplements to either draft or final environmental impact statements "shall" be prepared if "(i) The agency makes substantial

consider the environmental impacts of oil and gas development in ANWR as part of the NEPA process if there is new information related to oil and gas development that would affect the environment.[19] Given that the final CCP and EIS may result in the Service making a recommendation to Congress on whether to designate the 1002 Area "Wilderness," it seems inappropriate that the agency would disregard comments that highlight how such a designation would, *inter alia*, foreclose oil and gas exploration and production despite (1) recent technological advances that allow for exploration and development in a manner that minimizes environmental impacts and (2) the recent plans to develop Point Thomson, which is located on 1002 Area's doorstep and would likely diminish any environmental harm associated with developing in the 1002 Area.[20]

In short, restricting public comments on matters related to oil and gas development in ANWR likely violates NEPA.[21] We therefore request that the Service issue a corrected Notice of Intent that complies with its legal obligations under NEPA.

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changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.").

[19] *Id*.

[20] The decision to make the 1002 Area a wilderness area will also impact the environment because it will undermine the nation's movement towards energy independence, result in the loss of jobs and revenue for the state and federal treasury, and will shorten the life of TAPS. *See, e.g.*, *Natural Defense Council*, 768 F. Supp. at 888 ("Prolonging the useful life of the Trans-Alaska Pipeline System will, at the least, prolong the duration of environmental impacts posed by that particular structure, and is an "impact on the region" that should be considered [as part of an EIS].").

[21] *Id.* at 885-87 (holding that the Dept. of Interior could not exempt new studies discussing the impacts oil and gas reserves and development on ANWR from the NEPA's public comment process).