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Alaska Lands Update

SHELL VACATES ARCTIC OFFSHORE OPERATIONS “FOR THE FORESEEABLE FUTURE”

Royal Dutch Shell has announced it will be abandoning its offshore exploration projects in the Arctic. After drilling to 6800 feet this summer 70 miles offshore at the “Burger J” well, Shell was required to leave the area on September 28 at the end of a shortened drilling season.

Shell was the only large company still making a strong offshore push in Alaska. In 2014, Chevron put its Arctic projects on hold “indefinitely” due to “economic uncertainty.” Statoil and ConocoPhillips have also abandoned or sat on plans to drill in the Arctic, back when oil prices were significantly higher. Some estimates say oil prices need to be \$80-\$90/barrel to make production profitable in the U.S. Arctic, \$70-\$90/barrel in the European Arctic and \$50-\$60/barrel in the Russian Arctic.

While Shell alluded to economics and oil prices as motivating the withdrawal, as well as a “disappointing exploration outcome,” it also cited the “challenging and unpredictable federal regulatory environment in offshore Alaska.”

Just a few of the possible constraints since the leases were awarded include:

- federal authorization effectively prohibiting simultaneous drilling while still requiring two rigs to be on site;
- a February 2015 announcement to create a new set of federal rules for drilling off the north coast of Alaska;
- legal challenges to the sufficiency of federal environmental review documents related to the 2008 lease sale, which required suspension of operations and two major rewrites;
- the moratorium following the Deepwater Horizon oil spill and subsequent heightened safety requirements and the April 2015 release of new proposed well control regulations;
- administrative inability to authorize drilling into oil-bearing zones from 2012 until August 17 of this year;
- a 2013 Department of the Interior request to have interested companies “rank” areas of the Chukchi to lease, breaking with a long-standing policy to open whole planning areas; and,
- administrative failure to respond to a 2014 lease extension request that would ensure a viable and safe timeline for production. All of Shell’s 400+ leases will be expired by 2020.

Due to staffing issues, the Alaska Lands Update will be available at least quarterly, and on a monthly basis whenever possible. Thank you for your patience and continued interest!

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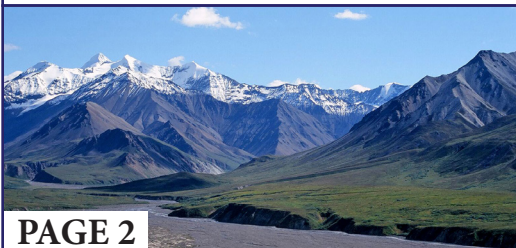
CLEAN WATER ACT RULE

On June 29, the Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (ACOE) finalized regulations in an attempt to define areas where the federal government has authority to require permitting under the Clean Water Act of 1972. A series of lawsuits from states, organizations and industry were filed almost immediately when the rulemaking became final. On August 27, the day before the rule was set to go into effect, a North Dakota U.S. District Court judge prevented the agencies from implementing the rule in Alaska and 12 other states.

What happened: Alaska and 12 other states (including North Dakota) filed a lawsuit in federal court against the EPA and ACOE arguing, among other things, that the final rule was invalid and unenforceable. The states asked for a preliminary injunction to prevent the rule from being implemented while the matter is litigated. The judge granted that request and, in a subsequent order, denied a separate request to apply the injunction outside of those 13 states.

What this means: the new regulations will not be in effect in Alaska so long as the preliminary injunction is in place, potentially throughout the litigation process. However, the rule is currently in effect in 37 states.

Why: the judge found the states will likely succeed at trial and that the harm to the federal government from delay was slight compared with the irreparable harm to the states from implementation of the rule.



JURISDICTIONAL ISSUES

To successfully bring a claim in federal court, the court must have *jurisdiction* (meaning the ability to “speak the law”) for the case to proceed. In lawsuits filed against the EPA and ACOE targeting the final rule, the federal government has argued that U.S. District Courts do not have jurisdiction because of a provision in the Clean Water Act stating that lawsuits on certain issues must be filed initially in U.S. Courts of Appeal.

Murray Energy lawsuit: Murray Energy Corporation, the largest underground coal mining company in the U.S., filed a lawsuit against the EPA and ACOE in a West Virginia U.S. District Court. On August 26, the judge dismissed the lawsuit for lack of jurisdiction, agreeing with the government that the lawsuit must be filed in a U.S. Court of Appeals.

Another multi-state lawsuit: 11 states (including Georgia) filed a lawsuit in a Georgia U.S. District Court similar to the one filed by Alaska and others. On August 27, the judge dismissed the lawsuit for lack of jurisdiction, also agreeing with the government that suit must be filed in a U.S. Court of Appeals.

Consolidation: at the agencies’ request, all lawsuits targeting the final rule that were filed in the U.S. Courts of Appeal will be combined into one lawsuit before the 6th Circuit Court of Appeals.

What this means: out of four separate multi-state lawsuits and a number of others, the only judge yet to find jurisdiction in U.S. District Court is appropriate was the North Dakota judge in the suit brought by Alaska and 12 other states. While Alaska’s case proceeds to trial in U.S. District Court for North Dakota, other cases will either have the jurisdictional issue resolved or will proceed to trial in the 6th Circuit.

WHAT DOES THE RULE DO?

The Clean Water Act of 1972 (33 U.S.C. 1251 *et seq.*) provided in part that nothing can be discharged into “**waters of the United States**” without a permit or exemption, including wastewater and fill material (rocks, earth, etc.). This applies throughout the country, including on public and private lands.

Other than references to “navigable waters,” the Act does not specifically define what areas would be considered “waters of the United States.” For over 40 years, agencies, states, legislators and courts have sought to define those areas and clarify for the public when certain activities must be authorized. The final rule is the agencies’ latest attempt to develop a definition consistent with the statute and various legal opinions.

The rule includes several creative and new approaches to defining which areas require authorization and which do not, including:

- a “hydrologic connection” approach, where potentially impacting navigable waters means a permit is required;
- a “per se” approach, where activities in all areas meeting relatively discretionary criteria automatically require a permit; and,
- a “geographical distance” approach, where activities in all areas within a certain distance from navigable waters require a permit.

The rule also redefines which areas and activities can receive an exemption.

Agencies’ position: the final rule helps the public and agencies better understand Clean Water Act requirements.

Criticism: the final rule was not properly developed and is inconsistent with the statute, agency authorities, Congressional intent, previous court decisions and the U.S. Constitution.

The Commission’s [comments](#) and Senate [testimony](#) on the proposed rulemaking can be accessed on our website.

Reports From the Courts

LANDS INTO TRUST

Alaska has appealed a court ruling allowing Alaska Native lands to be taken into trust by the federal government. When land is taken into trust, title is given to the federal government to be held for the benefit of an individual Alaska Native or tribe. The scope of federal, state and Native control over trust lands in Alaska is unclear.

Background: in 2006, four tribes and one individual challenged an Alaska exemption to the federal government's ability to take lands into trust, which had been in effect since 1980.

In March 2013, the U.S. District Court for the District of Columbia found that nothing in existing law prevents the government from taking Alaska Native-owned land into trust and that the Alaska exemption may violate 1994 amendments to the Indian Reorganization Act. The U.S. abandoned its appeal and amended its regulations in December 2014 to remove the Alaska exemption. The appellate court delayed full implementation of the amended regulations and gave the State of Alaska additional time to examine the issues.

What happened: on August 24, the State filed its opening brief in its appeal of the court's ruling. The appeal will proceed in the District of Columbia Circuit Court of Appeals, during which time the Interior Department may not take lands into trust in Alaska.

KING COVE ROAD

An Alaska U.S. District Court judge has dismissed a lawsuit targeting the Interior Department's refusal to authorize a limited-use road from King Cove to Cold Bay, 11 miles of which would pass through part of the Izembek Refuge.

Background: federal legislation passed in 2009 authorizing a land exchange to permit construction of a road between King Cove and Cold Bay to provide necessary access for health and safety. The exchange would grant the federal government 56,000 acres, of which 46,000 would be designated as wilderness, in exchange for 206 acres.

In late 2013, Interior Secretary Sally Jewell rejected the land exchange, citing "irreversible damage" to wildlife. Since that denial, King Cove has had to facilitate over 30 emergency evacuations. Despite promises made at the time, the Interior Department has not offered alternatives or opportunities for dialogue.

What happened: last year, King Cove and others filed a lawsuit claiming the denial stemmed from a flawed process and improper use of discretion. In a September 8 order dismissing the case, the judge found no violation of federal law, noting an analysis of "public health and safety impacts" was not required and that Congress gave the Secretary discretion to reject the exchange following an environmental review, which "probably doomed the project."

Denali National Park and Preserve is currently seeking input on its **vision for trails management** as the park approaches its 2017 Centennial and as part of a future Trails Management Plan. The first vision for trails was included in the original 1986 General Management Plan (GMP). The GMP has been significantly amended since to address both the Front Country (1997) and the Backcountry (2006), and many trail projects identified in those revisions have been completed.

In addition to developing a vision for trails management, the park is pursuing an Environmental Assessment of a Nenana River Trail, a Mount Healy Overlook Loop Trail and trail connections to an improved Day Use Area along Riley Creek. Planning documents may be accessed at <http://parkplanning.nps.gov/denalitrailsplan>; requests for paper copies may be made by contacting the park at (907)683-6241.

The public is specifically invited to comment on hiking opportunities, possible future trails, limiting trail development, bicycle and pet use on trails, construction and maintenance standards, signage, use of winter and river trails and any related trail topic.

The park will be accepting comments through **Thursday, October 31, 2015**. Submissions may be emailed to:

dena_planning@nps.gov

or posted by **10pm Alaska Time** to:

<http://parkplanning.nps.gov/denalitrailsplan>

Not online? Comments may also be submitted by calling (907)683-6241 or in-person at park headquarters.

No formal comment periods are currently open for Bureau of Land Management land use plans in Alaska. The following websites provide documents and updated information on current efforts of interest:

Squirrel River Management Plan: <https://eplanning.blm.gov/epl-front-office/eplanning/projectSummary.do?methodName=renderDefaultProjectSummary&projectId=36163>

Eastern Interior Resource Management Plan: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=11100>

Bering Sea-Western Interior Resource Management Plan: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=renderDefaultPlanOrProjectSite&projectId=36665&dctmId=0b0003e8804de363>

Central Yukon Resource Management Plan: <https://eplanning.blm.gov/epl-front-office/eplanning/planAndProjectSite.do?methodName=dispatchToPatternPage¤tPageId=45823>

Several bills, many with bipartisan support, have been recently introduced in the U.S. Senate to **improve federal regulatory processes**.

Here are brief summaries of a few of them (*no votes scheduled at this time*):

S. 708 | the “Regulatory Improvement Act” (King, I-ME). Sets up a Regulatory Improvement Commission, appointed by Congress and the President, to research and advise Congress on regulations in need of streamlining, consolidating or eliminating.

S. 1607 | the “Independent Agency Regulatory Analysis Act” (Portman, R-OH). Authorizes President to require independent agencies comply with requirements applicable to other agencies.

Three bills from Senators Heitkamp, D-ND, and Lankford, R-OK:

S. 1817 | the “Smarter Regulations Through Advance Planning and Review Act.” Requires agencies developing rulemaking to include a plan to revisit the rule later and ensure it is meeting its objectives without unnecessary costs.

S. 1818 | the “Principled Rulemaking Act.” Requires agency consider alternatives to rulemaking, costs and benefits and impose the least burden on society.

S. 1820 | the “Early Participation in Regulations Act.” Requires public notice 90-days before agencies publish certain proposed rules.

The **National Park Service** recently published **new** National Environmental Policy Act (NEPA) guidance online at <http://www.nps.gov/orgs/1812/epc.htm>

HERE ARE LINKS TO SIMILAR ~ WEB RESOURCES ~

U.S. Forest Service

<http://www.fs.fed.us/emc/nepa/index.htm>

U.S. Fish and Wildlife Service

Projects: <http://www.fws.gov/alaska/nwr/planning/nepa.htm>

Guidance: <http://www.fws.gov/r9esnepa/>

Bureau of Land Management

<http://www.blm.gov/wo/st/en/prog/planning/nepa.html>

The **Bureau of Indian Affairs** issued notice of a [request](#) to **continue collecting information on ownership of reindeer by non-Natives in Alaska**. A permit and annual reporting are required to have a reindeer for any purpose; those desiring to use or possess reindeer will be required to complete and submit four forms to the Bureau.

Comments on the information requested by those forms may be submitted through **Friday, October 16, 2015**, to OIRA_Submission@omb.eop.gov (*email address includes an underscore*) with a copy to keith.kahklen@bia.gov.

Not online? Comments may be submitted by fax to *both* of the following numbers: (202)395-5806 [attn: Desk Officer] and (907)586-7120 [attn: Keith Kahklen]. Contact Keith Kahklen at (907)586-7618 for more information.

The **U.S. Fish and Wildlife Service** issued notice of its decision to extend the comment period on its proposed **Native American Policy**, first opened for public comment on August 2. The draft policy is at <http://www.fws.gov/policy/draft510fw1.pdf>; the existing policy can be found at <http://www.fws.gov/policy/native-american-policy.pdf>.

The draft policy’s purpose is to establish a framework on which to base federal interactions with American Indian tribes and Alaska Native Corporations and individuals by (1) recognizing the sovereignty of federally-recognized tribes; (2) expressing an intent to work on a “government-to-government” basis with tribes; and, (3) providing guidance on “co-management, access to and use of cultural resources, capacity development, law enforcement, and education.”

The Service is accepting comments through **Wednesday, October 21, 2015**, via email to scott_aiken@fws.gov (*email address includes an underscore*).

Not online? Comments and document requests may be submitted by mail to Scott Aiken, Native American Programs Coordinator, US Fish and Wildlife Service, 911 NE 11th Avenue, Portland, OR 97232.

CITIZENS’ ADVISORY COMMISSION ON FEDERAL AREAS

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<http://dnr.alaska.gov/commis/cacfa>

As of August 2015, the Commission no longer has a staffed office in Fairbanks.

The Commission’s next meeting will be in Anchorage on October 23 & 24 at the Legislative Information Office.

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