



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

Department of Natural Resources
CITIZENS' ADVISORY COMM'N ON FEDERAL AREAS
Sara Taylor, Executive Director

101 Airport Road
Palmer, AK 99645
Phone: 907.269.3645
dnr.cacfa@alaska.gov

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Via Regulations.gov Portal

U.S. Fish & Wildlife Service
National Wildlife Refuge System
Alaska Regional Office
1011 E. Tudor Road, MS 211
Anchorage, AK 99503

Re: Proposed Public Use Regulations for the Kenai National Wildlife Refuge, FWS-R7-NWRS-2014-0003

The Citizens' Advisory Commission on Federal Areas (CACFA; the Commission) has reviewed the proposed public use regulations for the Kenai National Wildlife Refuge (KNWR; the Refuge) and offers the following comments for consideration in developing the final rule.

PUBLIC MEETING NOTICE AND SCHEDULE

The Commission was disappointed to see the Federal Register notice did not include a public meeting schedule, including times and locations, or even a commitment to issue a schedule in the future or in another venue. Instead, the notice only provided for public meetings on demand, establishing a July 6 deadline for any meeting requests. 80 FED. REG. 29277, 29277 (May 21, 2015). There was no guarantee such requests would be granted, or that any meetings would be provided at all. The Commission feels this approach, while potentially convenient for administrative purposes, may have unduly limited public engagement and sends the wrong message about the importance of public meetings to the rulemaking process in Alaska.

Public meetings are the most effective information dissemination and gathering tool available in Alaska, owing primarily to its dispersed population, nascent infrastructure and limited Internet capabilities. Even while KNWR is on the road system, Alaskans as a whole are very vested in its management, as well as in any proposed rulemaking which may be precedent-setting for refuges in Alaska. And it is important for all affected users, who tend to be very busy during the summer months, to be assured some time has been set aside for them to learn about the issues and voice any concerns.

The Alaska National Interest Lands Conservation Act (ANILCA) and implementing regulations at 50 CFR 36 specifically recognized the importance of public meetings for proposed rulemaking. 50 CFR 36.42 provides that "*restrictions shall be made only after public notice and public hearings in the affected vicinity and other locations as appropriate, and after publication in the Federal Register.*" The importance of public meetings was also recognized at the national level in the Administrative Procedure Act, which further tied those meetings to the Federal Register notice. 5 USC 553(b) provides that the Federal Register notice shall include "*a statement of the time, place, and nature of public rule making proceedings.*"

Two public meetings were held during the comment period, in Anchorage and Soldatna, including both an open house and opportunity to submit comments and provide testimony. I attended the meeting in Anchorage and found it to be exceedingly well done, with knowledgeable staff, helpful maps, informational breakdowns, copies of the rulemaking and a detailed “Q&A.” Considering the effort and preparation that went into the meeting, it is even more disappointing that it was not noticed in the Federal Register, and that meeting opportunities were not provided to all the communities that participated in public meetings during development of the Revised Comprehensive Conservation Plan (CCP) from which this rulemaking stems.

While it is too late for the proposed rule at issue, the Commission is deeply concerned that future rulemaking efforts for Alaska refuges will incorporate this “public meeting on demand” language in the Federal Register notice. This approach is disingenuous to the statutory and regulatory requirements for rulemaking in Alaska by creating the impression that public meetings are optional and/or only available to those communities that express an interest. Moreover, the Federal Register notice itself is the most widely distributed document associated with the proposed rule; it is the venue with the greatest potential for notifying the public of opportunities to participate. Administrative challenges (e.g., timing of the Federal Register notice, logistics with setting meetings at the regional level) could be overcome in some other way which maintains the letter and spirit of the notice and hearing guarantee to Alaskans for proposed closures and restrictions.

NEED FOR CERTAIN PROPOSED REGULATIONS

With almost 60,000 pages in the Code of Federal Regulations purely devoted to “Rules and Regulations,” there exists a regulatory burden on the public that is virtually unascertainable. This burden is brutally apparent in Alaska, where refuge users must navigate the confluences of national, Alaska-specific and refuge-specific regulations on enormous areas of land. Here, more so than other states, a minimalist and accessible set of rules is key to the use and enjoyment of our public lands.

Some mitigation of this burden can be found in law and policy. For instance, as noted in the preamble, Executive Orders 13563 and 12866 require that regulations impose the least burden on society, identify and assess alternatives to regulation, employ best available science, promote predictability and reduce uncertainty. ANILCA Section 304 and implementing regulations require refuge regulations to be only those which are “*necessary and appropriate*” to ensure activities are compatible with refuge purposes.

Refuge management in Alaska also has a fundamentally exclusive design which shields the regulated public. Unilateral flexibility to create things like group limits, designated areas, access closures, etc., is very limited compared to refuges in other states. To accommodate the profound equilibrium established under ANILCA, detailed justification, deliberation, restraint, information, thresholds, traditions, alternatives and innovation are all essential components of “reasonable regulations” in Alaska. In short, Alaska has its own, special toolbox for public land managers to draw from in meeting their mandates and objectives, including through the regulatory process.

The Commission is concerned that the scope and specificity of the proposed rule does not adequately account for these considerations and requirements. The proposed regulations appear inexplicably redundant, replicative of non-regulatory processes and insufficiently justified to support expansive limitation. To ensure the public is readily capable of understanding what is expected of them on refuge lands in Alaska, and that no more is asked of them than is clearly warranted under the circumstances, the Commission makes the following observations and requests for consideration in developing the final rule.

Redundancy: Snowmachines

Refuge-specific regulations at 50 CFR 36.39(i)(4)(viii) currently prohibit snowmachines from being used “for the harassment of wildlife.” The 2007 compatibility determination (CD) on “Snowmachine Use” references the “illegal chasing or harassment of wildlife” and reiterates that “[h]arassment of wildlife with snowmachines is prohibited.” System-wide regulations at 50 CFR 27.51 also prohibit unauthorized actual and attempted disturbance and injury to animals on national wildlife refuges.

The preamble to the proposed rule only supports the need to “[p]rohibit the use of snowmobiles to pursue, chase, or herd wildlife” by noting the rule “implement[s] management direction and/or specific actions identified in the CCP and its record of decision that are intended to address” the CCP’s four primary public use-related issues. The preamble does not explain how existing regulations prohibiting harassment, disturbance and injury have proven to be insufficient at also prohibiting the herding, hazing, pursuit or driving of wildlife by snowmachine. Please clarify the need for this Refuge-specific prohibition.

Replication: Bear Baiting

The preamble notes that, aside from hunting black bears over bait under the terms and conditions of a special use permit, all hunting over bait is “in effect prohibited on the Refuge.” 80 FED. REG. at 29280. The Commission assumes this is in reference to 50 CFR 32.2(h), which provides that “[t]he unauthorized distribution of bait and the hunting over bait is prohibited on wildlife refuge areas. (Baiting is authorized in accordance with State regulations on national wildlife refuges in Alaska),” and to 50 CFR 36.39(i)(5)(ii), which provides that a special use permit is “required prior to baiting black bears” on the KNWR.

The preamble mentions a stipulation in the special use permit which “allows baiting only for the take of black bears.” 80 FED. REG. at 29280. The Commission assumes this is in reference to Special Condition 3 in Addendum P to a 2015 permit, which actually states “permittees and their designees authorized to hunt black bears over bait under a Special Use Permit for black bear baiting may not harvest brown bears within the Permit’s designated black bear baiting area.” Since anyone that might harvest a brown bear at a black bear bait station under state regulations is necessarily operating under a special use permit, this seems to be a non-issue. The preamble even notes that the “restriction is currently addressed through a stipulation on the refuge special use permit.” 80 FED. REG. at 29280.

Without commenting on whether the Refuge can legally preempt state harvest regulations through a permit stipulation, or at all, the need for this regulation is entirely unclear. Some justification for choosing the regulatory route is warranted beyond providing “additional notice and clarification for the public of this intent.” *Id.* The Commission strongly opposes regulations being promulgated where a significant number of non-regulatory “notice and clarification” options are available. Please explain how this regulation is necessary or withdraw it from consideration until the need becomes apparent.

Replication: Natural Resource Collection

One way in which Alaska refuges are unique within the National Wildlife Refuge System is that Alaska refuges are “open until closed.” This distinction is noted in the preamble to the proposed rule, as outlined in the Alaska-specific regulation at 50 CFR 36.31 (“[p]ublic recreational activities within the Alaska National Wildlife Refuges are authorized as long as such activities are conducted in a manner compatible with the purposes for which the areas were established”). Statutory, regulatory and policy requirements dictate that a

CD be prepared for all uses, and while developing CDs for every conceivable activity in Alaska would be an expensive and laborious undertaking, Alaska refuges have consistently married the requirements over time with general CDs reflecting common, known uses and individual CDs for less common or case-specific uses.

Until now, this has been the unanimous approach to natural resource collection on Alaska refuges – a CD with stipulations to ensure the activity remains compatible with refuge purposes and a written justification for any limitations on the use. In the proposed rule, the Refuge is opting to convert the CD approach into one where regulation is the format for limitation *and* authorization. In fact, the preamble describes the regulation as proposing the “*allowance of natural resource collection*” (emphasis added). The Commission believes this deviation is unnecessary, inefficient and inconsistent with the “open until closed” concept.

The Revised CCP and 2007 “Natural Resource Gathering” CD for the Refuge provided the initial indication a shift was underway. In particular, the CD noted antler and plant collection “*may be formally authorized through future regulatory change,*” stated that new regulations would be developed to “*officially authorize*” the uses, and cited national regulations at 50 CFR 27 without clarifying how they fit into the Alaska refuge context. Under the law and refuge policy, the CD is both the “formal” and “official” means of authorizing natural resource collection, notwithstanding System-wide limitations on natural resource gathering provided in 50 CFR 27 from which Alaska is relevantly exempt pursuant to, among other things, 50 CFR 36.31.

While “authorization” of the use is properly endorsed through a CD, limitations imposed for antler collection could be considered appropriate content for a regulation. Under 50 CFR 36.42(b), however, certain management considerations must be entertained when limiting allowed activities, whether done in the context of a CD or a regulation. No mention is made of those considerations in the proposed rule, or how the specific limitations were established as necessary to ensure the use is compatible. The point of having a limitation in regulation, as opposed to a CD, is that it would provide *more* information, not less.

This approach also sets a precedent for the allowance of *all* recreational activities on Alaska refuges, not just natural resource collection. And where developing a CD for every conceivable activity would be both expensive and laborious, that process would pale in comparison to developing regulations. The purpose of 50 CFR 36.31 is to eliminate the need for activity-specific regulations. Establishment of CDs has a reliable public process and tends to be done during the development of revised CCPs. 603 FW 2.11(F), (I). CDs are approachable, responsive to management concerns and well-suited to reinforce the compatibility standard.

The Commission asks that the Refuge withdraw this proposed regulation and continue managing recreational activities through CDs. Rulemaking is not required as the use is already allowed under 50 CFR 36.31 and the 2007 CD. The proposed regulation only serves to confuse the issue and sets a poor precedent for the management of recreational activities on Alaska refuges. If anything, the regulation should be limited to the restrictions established on antler collection, including detailed justification for those limitations as necessary to ensure compatibility, consistent with 50 CFR 36.42(b).

Justification: Limitations on Use of Firearms

The expanded restrictions on discharging firearms on the Kenai and Russian Rivers appear to be a new addition to the regulations which was not part of CCP development or its deliberative process. Particularly for this reason, the limited information provided in the proposed rule is not adequate to inform the public of the issues, need for closure or even what is being gained through prohibition.

The preamble gives two reasons why this closure is warranted: public safety and enhanced consistency with State regulations in the Kenai River Special Management Area (KRSMA). 80 FED. REG. at 29280. However, there is no explanation of how the regulation will address public safety. For example, the preamble does not note whether or when “intensive public use” of the area (e.g., sport fishing and river floating) and big game hunting seasons overlap. No mention is made of the State’s hunting closures in the area during the summer months. No examples of persistent user conflicts or incidents prompting safety concerns are identified. No distinction is made between safety concerns from big game hunting versus what would appear to be identical concerns from waterfowl hunting and trapping. No explanation is given for how the use of archery equipment presents a more acceptable level of public safety. As to the second reason given, consistency with KRSMA regulations at 11 AAC 20.850 is marginally obtained, at best, since the use of firearms is still allowed and the regulation goes beyond KRSMA boundaries.

Since this use and associated concerns were not part of the CCP, and thus not privy to any internal or public vetting, please consider withdrawing the rule and initiating a Limits-of-Acceptable-Change (LAC) planning process with stakeholders, including the State of Alaska. Various organizations, interest groups, government entities and the general public can participate in the process to identify the issues and intelligently develop defensible and workable solutions. While not very well known to the public, the LAC process has been used successfully many times in Alaska, including for the Upper Kenai River, and is a suggested framework for resolving a number of issues identified in the Revised CCP.

If the Refuge chooses to forgo this collaborative process, the Commission requests this regulation be withdrawn. The proposed rule does not provide enough information regarding the issues at stake or how the regulation serves to address them. Without knowing what the concerns are, the public cannot meaningfully comment on the need for regulation or propose any alternatives short of large-scale closure.

Justification: Limitations on Camping and Group Sizes

In accordance with ANILCA and implementing regulations at 50 CFR 36 and 43 CFR 36, deliberation and justification are required to restrict protected public uses. Certain factors for consideration are emphasized which are “*necessary to ensure that the activity or area is being managed in a manner compatible with the purposes for which the Alaska National Wildlife Refuge area was established.*” 50 CFR 36.42(b) (emphasis added). Moreover, for the public to meaningfully comment on the proposals, or to debate and offer viable alternatives to restriction, the issues must be articulated and supported, along with detailed explanations of considerations brought to bear in the rulemaking determination. These things cannot be implied.

The preamble justifies the proposed prohibition on “*dispersed camping within 100 yards of the Kenai River in certain locations*” as necessary “*to enhance protection of sensitive riverbank habitats.*” 80 FED. REG. at 29279. However, no sensitive habitats or threats to those habitats from dispersed camping are identified or described, including any mention of sensitive riverbank habitats or how limiting use to designated sites for no more than three consecutive nights might enhance or detract from any habitat protection goals. No citations are provided where such information might be found. No details are given on where designated sites are, on what basis they will be selected and marked, or how the public will be informed or engaged.

The Commission appreciates the proposed rule provides some accommodation for dispersed camping within 100 yards of the Kenai River, which the Revised CCP foreclosed entirely in its preferred alternative (the most restrictive of the alternatives for this issue). However, without knowing why, where and to what end, it is impossible to understand how this regulation will be implemented. Neither the Record of Decision nor the

Revised CCP explained the reason for the initial management choice. An explanation is necessary to evaluate this management decision as it is implemented through the proposed rule, even if it is more relaxed than the limitation initially proposed in the CCP.

The proposed rule also imposes a 15-person maximum group size on the Canoe Routes. Even though the preamble purports to discuss “*in more detail*” all “*substantive changes*” to existing regulations, 80 FED. REG. at 29278, this limitation is proposed with no justification or explanation regarding its aim or necessity. A mandatory group size limit is a substantive change to current management, but this change is of particular significance since it omits the opportunity clearly provided in the Revised CCP to have a larger group through a special use permit. The Commission requests this intended accommodation be provided in the final rule, along with an explanation of why the limitation is necessary to ensure compatible public use.

While it may seem that proposing rulemaking pursuant to a CCP revision can be scant on detail, owing to issue development and public participation during planning, that is not always the case. Sometimes the proposal is an extension of the plan, was never explained in the plan, omits elements of the plan, or is otherwise taken out of context. The size and complexity of most CCP/EISs make it unfair to assume the public can simply look the justification up, particularly where infused into multiple aspects of the plan. Proposed rules do not need to be 50 pages, but the agency needs to ensure ready access to pertinent justification and data to support public consideration and comment. In all rulemaking efforts, please err on the side of lengthy and detailed justification to support user limitations and impacts.

STATE MANAGEMENT OF FISH AND GAME

The preamble provides an overview of the relationship between the U.S. Fish & Wildlife Service and the State with respect to regulating hunting and trapping in the Refuge. 80 FED. REG. at 29279. Even so, it does not offer any insight as to how that relationship informed the proposed rule. For example, regarding the above limits on the discharge of firearms along the Kenai and Russian Rivers, no indication is given that this proposal was ever presented to the Alaska Board of Game consistent with the commitment to “*utilize the State’s regulatory process to the maximum extent allowed by Federal law,*” even though the limit almost exclusively targets big game hunting opportunities. Likewise, no indication is given in the proposed rule of how the Refuge utilized the State’s process prior to proposing limits in the Skilak Wildlife Recreation Area or on the take of any other animals at authorized black bear bait stations.

The preamble notes such restrictions are “*necessary to ensure that hunting and trapping are regulated in a manner . . . compatible with Kenai NWR’s established purposes and the Refuge System mission*” and consistent with “*Service policy, directives and approved management plans,*” as well as to “*minimize conflicts between authorized users of the Refuge*” and “*protect public safety.*” 80 FED. REG. at 29279. And yet, with the exception of “*consistency with Service, policy, directives, and approved management plans,*” no explanation is given as to how the proposals would accomplish these goals. In accordance with the Refuge’s commitments to working with the State, and considering Congressional recognition of the State of Alaska’s responsibility and authority for the management of fish and wildlife on the public lands in Alaska, *significant* and detailed justification is required to unilaterally preempt state law on the Refuge.

The Commission requests that the Refuge explain in detail how deviating from state regulations is necessary and appropriate, describe how the 1982 Master Memorandum of Understanding was complied with in those instances, withdraw any proposal where it was not complied with, and commit to working closely with the State and other stakeholders to resolve these issues to the benefit of all refuge users.

AIRCRAFT USE

The Commission appreciates accommodations in the proposed rule to improve access to the Refuge via aircraft. These openings provide, and in many cases restore, invaluable opportunities to visit, enjoy and care for the Refuge and its resources. The proposals also resolve a number of enforcement issues and greatly increase the timing and diversity of recreational activities and traditions refuge users can now experience.

The Commission remains concerned, however, that many closures remain in effect where openings could be implemented. Opening additional lakes would be consistent with the statutory purpose of providing opportunities for fish and wildlife-oriented recreation and could be managed compatible with other refuge purposes and related management objectives. The CCP's Environmental Impact Statement indicated a somewhat increased but acceptable level of impacts from opening additional lakes to aircraft access.

Aircraft regulations for the KNWR at 50 CFR §36.39(i)(1) were originally promulgated in 1986 primarily to protect nesting and brooding trumpeter swans. At that time, it was estimated that only about 30 pairs of swans nested on the refuge. The 1985 CCP established a management objective of 40 pairs and the restrictions were an effort to achieve that management objective. The Revised CCP indicated the number of breeding pairs has increased to more than 60 pairs since 1985 and the 2005 census for the Kenai unit found 282 pairs, meaning the management rationale for these existing closures is no longer an issue. Rulemaking presents the optimum time for these issues to be revisited and changes made, where warranted, or not made, where explained, to maintain a set of reasonable regulations which ensure compatible use of the Refuge.

Also, while the Commission is highly supportive of the relaxed timing restrictions on the operation of aircraft on lakes where nesting trumpeter swans and/or their broods are present, the proposed rule provides no reference to the commitment in the CCP's Record of Decision to review trumpeter swan brood data and reevaluate the extent of this closure and its limitation on backcountry access. Please clarify the status of this commitment and its relationship, if any, to the proposed regulation change.

Thank you for this opportunity to comment on the proposals. If you have any questions or concerns, please do not hesitate to inquire. Continuing and productive dialogue on these issues is welcome and appreciated.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Sara Taylor', with a long horizontal flourish extending to the right.

Sara Taylor
Executive Director

CC: Susan Magee, Statewide ANILCA Coordinator, ANILCA Implementation Program
Brad Palach, ANILCA Coordinator, Alaska Department of Fish & Game
Ted Spraker, Chairman, Alaska Board of Game