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November 16, 2000

Mr. J. Kenneth Edwards, Refuge Program Specialist
Division of Refuges
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Room 670
Arlington, Virginia 22203

Dear Mr. Edwards:

Thank you for the opportunity to review the U.S. Fish and Wildlife Service Final Compatibility policy and regulations, published in the Federal Register on October 18, 2000 and due to take effect tomorrow. Given the number and diversity of public and agency activities occurring on lands managed by the Fish and Wildlife Service (Service), changes to processes for determining compatible uses deserve close review. This letter, representing the consolidated views of State of Alaska resource agencies, attempts not only to provide substantive comments, but also to clarify the meaning of the final policy and regulations and their potential impacts on state fish and wildlife management. The following comments re-iterate some concerns we raised in the state's December 8, 1999 comments on the draft policy and regulations. I discuss first some general issues, then comment on specific policies and regulations.

Compatibility Determinations for State Fish and Wildlife Management Activities
State fish and wildlife management activities are a state authority recognized by the Refuge Improvement Act and the Alaska National Interest Lands Conservation Act (ANILCA). State management activities overlay refuge management; they are not "refuge uses" and therefore are not subject to a compatibility determination. We strongly urge that the policy and regulations be revised to indicate clearly this exemption to the determination process. The final policy and regulations address this concern, but do not resolve it entirely.

For example, Issue 6 in the Summary of Comments accompanying the final regulations states:

> *. . . we do not require compatibility determinations for State wildlife management activities on a national wildlife refuge pursuant to a cooperative agreement between the State and the Fish and Wildlife Service where the Service has issued a written determination that such activities support fulfilling the refuge purposes or the System mission. We consider proposals for State activities on refuges that are not pursuant to a cooperative agreement a proposal for a refuge use and we will require a compatibility determination.* [emphasis added]

Alaska-specific enabling legislation clearly acknowledges the state's authority to manage fish and wildlife on all Alaska refuges. For an individual Refuge Manager to decide whether the state's activities fulfill refuge purposes is an unacceptable intrusion on the state's ability to fulfill its state-wide responsibilities. Imagine the Refuge Manager who dislikes certain management tools (such as specific sex hunts or homing device implants) and decides these are not necessary activities for the fulfillment of refuge purposes. In the 16 different Alaska refuges, we could end up having some routine activities allowed by one Refuge Manager, but not by another. The final policy gives one individual oversight of a state authority already covered under state and federal laws.

Similarly, Policy 2.10A (FR 62488) states:

> *. . . we do not require compatibility determinations for State wildlife management activities on a national wildlife refuge pursuant to a cooperative agreement between the State and the Fish and Wildlife Service where the Refuge Manager has made a written determination that such activities support fulfilling the refuge purposes or the System mission.* [emphasis added]

The Alaska Department of Fish and Game and the Service have a Master Memorandum of Understanding (MMOU) that applies to ALL refuge lands in the state, recognizing our respective management authorities and determining processes for coordinating activities that affect each agency. This MMOU--in effect now for 18 years--would not meet the final policy's requirement of a Manager determination before the state could conduct its routine management activities. The final policy and regulations would give individual Refuge Managers sweeping authority to deem fish and wildlife-related activities incompatible, thus nullifying the intent of Congress, our state statutory authorities, and the MMOU. The policy should acknowledge all existing agreements that the Service may have that generically recognize state fish and wildlife management authorities and established coordination protocol.

Role of States in Compatibility Determinations

We appreciate that the Service added language to the policy and regulations that acknowledges the role states play in developing and revising plans that address compatibility determinations. However, once the plans are done, the final policy and regulations authorize the Refuge Manager to render new compatibility determinations at any time. There is a 14-day public notice process but no provision for consulting with the state before rendering the determination. The state is thus treated as a member of the public with minimal notice and consultation. We request the policy and regulations be revised to require

Refuge Managers to consult with the state prior to rendering compatibility determinations, since we regard each determination to be a potential revision of the plan.

In addition, we specifically request that 26.41(13) be revised to include consultation with the appropriate state fish and wildlife official when compatibility determinations done outside the Comprehensive Conservation Plan (CCP) process may impact state fish and wildlife management. This includes determinations regarding public access for fishing, hunting, trapping, viewing, and other wildlife-related activities. Whenever uses may affect fish and wildlife, the Refuge Manager should be required to consult with the state fish and wildlife management agency.

As presently written, the regulations do not require the Refuge Manager to solicit refuge-specific data or interpretations of potential impacts from the state fish and wildlife manager, only to consider them "if available." Thus, a Refuge Manager may believe an activity impacts the refuge but he may not have the benefit of the state management agency's data and expert interpretations. The Refuge Manager should consult with the state wildlife agency and attempt to resolve these issues locally rather than through compatibility determinations that curtail refuge uses. We realize the policy defers "sound professional judgement" to the Refuge Manager, but that may be inconsistent with recognition of the state's authorities for fish and wildlife management. Communication between the Service and the state will minimize the potential for such jurisdictional disputes.

Revision of 50 CFR 25.44 and related Mitigation Measures Decisions

The final rule and policy fail to address our concerns about uses of easements. ANILCA Title XI specifically recognizes Alaska's needs for transportation and utility systems. Section 1110(b) provides for adequate and feasible access to inholdings for economic and other purposes, subject to reasonable regulations to protect refuge values. Therefore ANILCA already provides a process to insure that refuge resources are protected. We do not believe the Service has the authority to additionally require that this access meet a compatibility test. Furthermore, the categorical exclusion of mitigation or exchange as a means to make uses of easements compatible is far too restrictive in Alaska refuges, particularly near communities. The Service must incorporate somewhere in the rulemaking a means of accommodating basic needs (sanitation, water, public health, and safety) of adjacent Alaskan communities.

ANILCA Section 1109 specifically states: "*Nothing in this title shall be construed to adversely affect any valid existing right of access.*" RS 2477 rights-of-way--grants to the state that may occur on refuge lands--are valid existing rights managed by the state, and a Refuge Manager cannot eliminate them via compatibility determinations. The state should cooperate with the Service to identify and manage valid RS 2477's, but no requirement of compatibility can legally allow a Refuge Manager to usurp the state's jurisdiction over these trails and easements.

Economic Uses on Refuges

We again recommend that the Service include commercial guiding and transporting as allowed economic uses on refuges, subject to permit stipulations. If policy and regulations do not clearly recognize these uses, future managers may chose to eliminate them under the regulations as

currently written. We also request clarification that trapping which generates income, conducted by the state or public according to state regulations, is an allowed use on refuges.

Comments on Summary of Comments Received

Issue 2: Closed Until Open, and Issue 5: Alaska

The policy and regulations fail to acknowledge fully the many ways in which management of Alaska refuges is unique, including Alaska Wilderness designations. At a minimum, any reference to restrictions on public uses in Alaska should acknowledge regulations at 43 CFR, Part 36 and 50 CFR, Part 36. The final policy appears to acknowledge these Alaska-specific regulations only in Policy 2.16. Lacking appropriate references throughout both documents, the average user of the policy and regulations will not understand the extensive changes ANILCA wrought, such as the “open until closed” arrangement for access and the requirement for hearings and findings of damage prior to closures. These ANILCA access guarantees apply even in wilderness areas and an individual Refuge Manager's compatibility determination cannot override them.

Issue 17: Steps to Prepare a Compatibility Determination

We are concerned about the response that suggests the Service will address "appropriate uses" in future regulations and policy. This response indicates that additional regulations may deny certain refuge uses without determining compatibility--yet another method for denying uses. Additional regulations that specifically list inappropriate uses on all refuges would be redundant with compatibility regulations and policy, which at least allow for public review and comment on a refuge-specific basis. We do not support the concept of "appropriate use" regulations that determine inappropriate uses nationwide. Such a one-size-fits-all approach would be highly problematic and unnecessarily controversially.

Comments on Specific Final Compatibility Regulations

Section 26.41 What is the process for determining if a use of a national wildlife refuge is a compatible use?

This section states that the Service will "usually" complete compatibility determinations as part of the CCP or step-down management planning process. It would likely assist agencies, people proposing activities on a refuge, and the general public if the Service would define "usually." Under what circumstances would the Service postpone a compatibility determination until the plan revision process? When might the Service determine the compatibility of a use earlier? Would this be at the discretion of the Refuge Manager? Since CCPs and step-down plans are typically updated only once a decade, delaying compatibility determinations until plan updates means effectively foreclosing new recreational possibilities.

Comments on Specific Final Compatibility Policy

Section 2.10 C Emergencies

ANILCA and it's implementing regulations supercede Refuge Administration Act authority to suspend uses in Alaska refuges. Regulations that specify how and when emergency and temporary closures can be implemented appear in both 50 CFR, Part 36 and 43 CFR, Part 36. Emergency closures are limited to 30 days as proposed in this section, but temporary closures may be implemented for up to 12 months. We request this section be modified to reflect the

application of these Alaska-specific regulations. In addition, because many Alaska refuges encompass rural villages and Alaska lacks an extensive road system, emergency responses in this state often take much longer than at refuges elsewhere. Alaskan examples abound where flooding, earthquakes, and fire emergencies in villages have resulted in uses on adjacent federal lands for more than 30 days, such as transport of emergency supplies and building repair materials across adjacent refuge lands. We request that the Service clearly recognize ANILCA regulations, including provisions for uses up to 12 months.

Section 2.10 D. (1) (g) Denying a Proposed Use without Determining Compatibility
Using this basis for denying a proposed use without determining compatibility, a Refuge Manager may avoid the compatibility process entirely. We question what "other resource or management objectives" are not already delineated in (a) through (d) of this section. Subsection (g) implies that the Refuge Manager may deny a use based on conflicts with "other resource or management objectives" not contained in any executive order, law, regulation, or refuge plan. Where would such objectives be found? If a manager denies a use on this basis, since it falls outside the compatibility determination process, would the Service provide the public with an opportunity to review and comment?

Section 2.11 D. Existing Right-of-ways
Because so much of Alaska falls within the National Wildlife Refuge System, this policy will substantially impair the state's ability to improve or expand transportation infrastructure. The compatibility requirements for maintenance activities within existing rights-of-way will slow work on, and increase costs for, roads and highways through refuge lands. More importantly, the compatibility requirements of this section are vague and open to interpretation. Thus, one Refuge Manager may find compatible an activity that another may find incompatible.

Section 2.16 What are the Procedures for Appealing a Permit Denial?
We support this provision allowing an appeal process for ANILCA 22(g) lands, but we object to the fact that the policy otherwise provides "*no administrative mechanism to appeal a compatibility determination*." The absence of administrative appeal translates to broad autonomy for individual Refuge Managers, and leaves only one avenue to resolve disputes: litigation that is expensive and damaging to relationships between government entities. We again urge that the policy and rules provide for a clear administrative appeal process for all compatibility determinations.

Thank you again for the opportunity to provide these comments. Should you have any questions, please don't hesitate to contact this office.

Sincerely,

/ss/

Tom Atkinson
Project Review Coordinator

cc: John Katz, Governor's Office, Washington, D.C.
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