

STATE OF ALASKA

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July 31, 1991

Mr. Walter Stieglitz
Regional Director
U.S. Fish and Wildlife Service
1011 E. Tudor Road
Anchorage, AK 99503-6199

Attn: Mr. Daryle R. Lons

Dear Mr. Stieglitz:

The State of Alaska has reviewed the proposed revisions of the U.S. Fish and Wildlife Service (FWS) regulations concerning special use permit fees to conduct commercial uses on national wildlife refuges in Alaska. This letter contains the consolidated comments of State resource agencies.

The State has three primary objections to the proposed regulations.

- 1) SCOPE--the regulations exceed the authorities of the FWS by requiring payment of fees for services provided while on State-owned navigable waters.
- 2) CONTENT--the alternative chosen is the most cumbersome of the possible alternatives for both the FWS to administer and the potential permittees to fulfill;
- 3) PROCESS--the regulations were drafted without notice to and consultation with other agencies in the spirit of the Alaska Land Use Council policy #004/82, as endorsed by FWS. The above problems could likely have been avoided if FWS had sought adequate consultation and coordination with the State prior to the proposed rulemaking.

Scope of the Regulations

The words "or related waters" should be deleted in #1, General Provisions; #2 Deductions and Discounts; and Table 1. The proposed fee revisions should not apply to activities on "related waters."

In the absence of a definition of "related waters", we assume the FWS definition includes State-owned shorelands, tidelands, and watercolumns. It thus appears that the FWS intends to require special use permits and fees for activities that occur on State-owned land and water. This is unacceptable.

Activities occurring on State-owned lands are not subject to FWS management, but subject to State management. The FWS only has authority to require special use permits and to charge use fees for activities occurring on federal lands. The regulations should reflect this.

The position proposed in these regulations is not consistent with the decision made by FWS in the Togiak Public Use Management Plan. The regulations should reflect the learning and conclusions that occurred through the Togiak effort. Early drafts of the Togiak PUMP included reference to "related waters." The term was later dropped. The nexus or connection between activities on State-owned land or water and the purposes of the refuge did not justify FWS extending its authorities over State-owned land and water. To insert in the regulations wording that implies there is a nexus across the board on all "related waters" is inappropriate.

Content of the Proposed System

Under the proposed regulations, permittees estimate their adjusted gross incomes prior to each year's use of refuge lands and then pay a fixed fee according to the appropriate category in a fee schedule. The problems with the proposed systems are:

- A) The difference between estimated and actual income is not adjustable at the end of the year, except under documented, unusual circumstances beyond the permittee's control. This will likely cause permittees to consistently underestimate income, anticipating likely cancellations, weather problems, non-collectibles, and equipment downtime. Low estimates cause FWS to lose income, and the permittee potentially incriminates himself. There is no benefit for the permittee to more accurately estimate "the total of all customer payments to be received".
- B) The penalty for "providing significantly inaccurate income estimates will, with due process, be considered grounds for revocation of the permit and could result in legal action". Why put either the FWS or the permittee through unnecessary

and expensive legal action, when the system can provide a mechanism for adjusting fee payments at the end of the season? Both the Forest Service (FS) and Bureau of Land Management's (BLM) systems require fees to be paid prior to the use period based on estimated use; however, after the use period the permittee calculates actual fees owed, then the difference is paid or refunded. We recommend this system also be adopted by FWS.

- C) In the Supplementary Information section of the publication, the FWS justifies the selected fee system based on four reasons. We disagree with three of those reasons:

FWS reason (1): "equitable to all commercial use permittees".

This system, with many administrative determinations to be made by individual managers, will be subject to value judgements and personality biases (as the questions below illustrate) and could not be equitable.

The proposed system authorizes refuge managers to review "all of the permittee's financial records, including Internal Revenue Service income reporting forms". The refuge manager determines if the permittee has provided "significantly inaccurate income estimates". There are no guidelines for when or why a refuge manager would initiate such a review. The regulations contain no criteria for determining what is "significantly inaccurate". Such value judgements will result in unnecessary reviews by the refuge manager and requirements for compliance by the permittee, all of which could be largely avoided by simply providing a system for the permittee to adjust the estimates to actual figures after the use period, then pay or be refunded the difference.

The administration of this system is further complicated by additional value judgements required of the refuge manager:

- a. Inaccurate information provided by the permittee will result in "revocation of the permit", "legal action", "Financial penalties", or "denial of future permit" for FWS lands. The regulations contain no guidelines for the refuge manager regarding

which action is appropriate to pursue under given circumstances.

- b. Under what conditions does the refuge manager determine "special circumstances may justify fee reductions/fee waivers"?
- c. The refuge manager **"may authorize"** a partial refund **"under unusual circumstances, where the permittee can sufficiently demonstrate that the level of actual commercial use was significantly less than the estimated level because of reasons beyond the permittee's control."** Guidelines are needed for the refuge manager to authorize a refund. Definition is needed of "unusual circumstances". Criteria should be identified for determining how a permittee can "sufficiently demonstrate". Further guidance is needed to determine when a use is "significantly less" than estimated. The refuge manager would likely welcome guidance to determine when reasons really are "beyond the permittee's control" . Without these additional components, the administration of the system creates unnecessary discretion to complicate fulfillment by the permittee.

FWS reason (3): "reasonably consistent with the fee schedule of other Federal agencies in Alaska"

We believe that the FWS proposed system is enough different from the systems of BLM and FS to complicate permitting for commercial operators. Fee systems for all public lands in Alaska should be as consistent as agency mandates will allow in order to ease the regulatory burden.

FWS reason (4): "cost effective for the government to administer"

Of the alternatives considered, we believe the FWS has chosen the MOST costly to administer. A single fixed fee, fee schedule based on type of activity and clients, or a fee schedule for payment after the use period would all be less costly systems to administer. A single fixed fee, fee schedule based on type of activity and clients, or a fee schedule for payment

after the use period would all be less costly systems to administer.

- D. The administration of the proposed system is further complicated by the provision that "fees will only be refunded above the amount that is needed to fully recover the government's expenses in administering the permit". How are the government's expenses determined? by whom? When are they revised? Who determines what amount is need? To reduce administrative discretion and complexity, it would seem more appropriate to establish a minimum fee such as proposed in alternative 1.
- E. Permittees are not allowed to deduct the fees they charge for reimbursement services (except some lodging) between their place of business and the actual use area of the refuge. It seems inappropriate to force permittees into providing piecemeal services in order to avoid paying fees to the refuge for nonrefuge use; e.g., require the client to pay all lodging, meals, and gear acquisition on nonrefuge lands rather than including that in the package price of the activity.

Regulation Review Policy Intent

The Alaska Land Use Council, of which FWS was a member, intended to "facilitate early involvement by member agencies in the promulgation of significant regulations affecting land management or use in Alaska." The purpose was to provide opportunities to reduce the regulatory burden on Alaskans and streamline consistent administration of public lands:

"All regulations having an impact on land management in Alaska should be reviewed and where possible consolidated into joint, multi-agency regulations. This will not only facilitate cooperative and cost effective management of Federal lands in Alaska, but is consistent with President Reagan's regulatory reform program."

While the Council was not re-authorized last year, the State believes that the above philosophy continues to serve the public interest. Given that all federal land managers in Alaska have a uniform mandate to adopt a user fee system and have management mandates which do not conflict in this matter, a consolidated

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approach to joint, multi-agency regulations should be adopted. At a minimum, we urge the FWS to adopt a user fee system identical to that of BLM and the FS, consistent with agency mandates.

Sincerely,



Paul C. Rusanowski, Ph.D.
Director

cc: Honorable Harold Heinze, Commissioner, DNR
Honorable Carl Rosier, Commissioner, DFG
Honorable John Sandor, Commissioner, DEC
Honorable Frank Turpin, Commissioner, DOT/PF

**FWS FEE STRUCTURE STATE LETTER
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