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December 8, 1999

Mr. Jim Kurth
Chief, Division of Refuges
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Arlington, Virginia 22203

Dear Mr. Kurth:

Thank you for the opportunity to review the U.S. Fish and Wildlife Service Draft Compatibility Policy and Regulations, published in the Federal Register on September 9, 1999. Given the number and diversity of public and agency activities occurring on lands managed by the U.S. Fish and Wildlife Service (Service), changes to current regulations and processes for determining compatible uses deserves 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 rule and its potential impacts on state fish and wildlife management.

We found the proposed rule and policy hard to read, sort through, and comprehend. They are not reader friendly, with some sentences up to 50 words long. We hope that future proposed revisions will be clearer and more definitive. We found that the draft policy provided a clearer sense of direction than the proposed rule, our review of which revealed several significant concerns, outlined in greater detail throughout this letter:

- Possible impacts to state fish and wildlife research/rehabilitation/enhancement programs and other routine fish and wildlife management activities.
- Elimination of the option in 50 CFR 25.44 for using mitigation measures to make uses of easement areas of a national wildlife refuge compatible.
- Inadequate appeal process for non-compatible findings.

Potential Impacts to Alaska Department of Fish and Game (ADF&G) Management Activities

Section 25.21(b) of the proposed rule provides direction to the refuge manager for opening an area of the refuge to a new or existing use. Section 26.41 re-affirms and provides further clarification to 25.21(b). The term *Refuge Use* as defined in 25.12(a) of the proposed rule, states:

Refuge Use, and *Use of Refuge* mean a recreational use (including refuge actions associated with a recreational use or other public use), refuge management economic activity, or other use of a national wildlife refuge by the public or **other non-service entity**.

If State fish and wildlife management agencies fall under "**other non-service entity**", even our routine research and management activities will require compatibility determinations. We would object to this possible interpretation. Conversely, if the State fish and wildlife management agency is considered a "**cooperating agency**" under the term *Refuge Management Activity* in 25.12(a), as provided below, a compatibility determination is not required.

Refuge Management Activity means an activity conducted by the Service or a Service-Authorized agent to **fulfill all purposes or at least one or more purposes of the national wildlife refuge, or the National Wildlife Refuge System Mission**. Service-authorized agents include contractors, **cooperating agencies**, cooperating associations, friends organizations, and volunteers.

Further, chapter 3.10 of the draft policy clarifies a *Refuge management activity* to include routine scientific monitoring, studies, surveys, and census. We request the language in this section include existing fish counting facilities (and construction of new facilities) such as weirs, fish counting towers, and sonar or other electronic fishing counting systems and associated support facilities.

Also related to other non Service agencies, **page 49062** of the proposed rule refers to "agency" under regulatory planning and review **Required Determinations (2)** which states:

This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency since the rule pertains solely to management of national wildlife refuges by the Service.

The proposed rule and draft policy do not provide clear direction with regard to State fish and wildlife research and management activities. It is not clear whether or not activities conducted by State fish and wildlife agencies are subject to the compatibility standard or exempt as stated under the Required Determinations Section (2).

Based on our interpretation of the documents, routine State fish and wildlife management activities appear to be exempt from the compatibility standard. This is based on analysis of the proposed rule provided above and the fact that the process for determining whether or not a proposed use or existing use is compatible falls under 50 CFR **Part 26-Public Entry and Use**. We request the proposed rule and draft policy clearly delineate that State fish and wildlife management activities within the exterior boundaries of National wildlife refuges, and reflect that routine State fish and wildlife management activities do not require compatibility determinations.

Revision of 50 CFR 25.44 to Remove Mitigation Measures

The proposed rule would impact the regulation of activities that affect easement interests acquired by the United States. Under existing regulations in 50 CFR 25.44(d) under Subpart D-Permits, "the regional director or designee may require mitigation measures, as determined appropriate, within the easement area, in order to make the proposed use compatible with the purposes for which the easement was acquired."

The supplementary information states the proposed rule would delete this paragraph and paragraph (c) of 29.21-7 on the basis that the proposed paragraph 26.41(b) would not allow the Service to make proposed uses compatible through replacement of lost habitat values or other compensation. The supplementary justification of the amendment to 25.44 appears to extend the compatibility standard to easement interests acquired by the United States. It also provides a distinction between a compatible use as determined in 26.41 and a use that is sufficiently damaging to require mitigation to make the use compatible. This supplementary information should be made clearer by providing some specific examples and a more precise definition of the term "mitigation".

Using the categorical exclusion of mitigation or exchange to make uses of easements compatible may be too restrictive in Alaska refuges, particularly for nearby communities. Some means of accommodating basic needs (sanitation, water, public health and safety) of adjacent Alaskan communities should be incorporated in this rule making.

The possible impacts to State fish and wildlife agency research/rehabilitation/enhancement programs regarding this proposed change are unclear. Certainly ADF&G will want the opportunity to modify or mitigate any portion of a fish restoration/enhancement program if some portion is found to be "non-compatible."

Appeal Process for Non-Compatibility Determinations

The proposed rule and draft policy give the refuge manager wide discretion and autonomy in determining compatible uses, while not providing a clearly articulated appeal process. It is not clear how the current procedures will address what may appear to be arbitrary decisions of compatibility, and how users might be able to adjust their applications to make their uses compatible.

Chapter 3.11 G. 1. of the draft policy states, "*a refuge manager always may re-evaluate the compatibility of a use at any time*", but does not provide a clear procedure for applicants to initiate or appeal those re-evaluations. Chapter 3.16 of the draft policy provides the procedures to appeal a **permit denial for right of way and special use permits** and references Alaska specific procedures in 50 CFR 36. While this policy direction addresses **permits**, it does not address appeals for uses found to be non-compatible by the refuge manager. As an editorial comment, we note that the draft policy cites 50 CFR 36(b)-*definitions* rather than 36(i)-*appeals* for Alaska specific appeals for special use permits.

Other than the two citations provided above, we found no language relating to appeal procedures. Consequently, we request the proposed rule and draft policy provide a clear process for addressing non-compatibility determinations, including State fish and wildlife agencies in the formulation of the appeals process. Compatibility determinations, which include fish and wildlife management and related activities, should require a process for consultation with the State prior to making a determination.

In addition, we request that 26.41(13) be revised to include consultation with the appropriate State fish and wildlife official where compatibility determinations may impact any aspect of State fish and wildlife management, including public access for fishing, hunting, trapping, and other wildlife related activities.

Relationship to ANILCA

On page 49061 under Statutory Authority, the proposed rule states "*the National Wildlife System Improvement Act of 1997 specifically requires that ANILCA take precedence if any conflict arises between the two laws*". While this language is included in the supplementary information of the proposed rule, it is not included in the actual proposed rule. We are thus concerned that this intent could be overlooked in the future. We request the language provided in the supplemental information be included in the actual rule, as it is in Chapter 3.8 of the draft policy. In addition, we request the Service take a pro-active stance with regard to identifying pertinent ANILCA provisions and not wait

for "conflicts" to arise. Requiring comprehensive ANILCA training as a matter of policy for Alaska refuge managers and other appropriate staff could facilitate this. We have had the pleasure of working with a variety of Service staff, particularly refuge planners, and encourage further dialog and cooperation in the implementation of ANILCA.

Section 25.21(a) reiterates the "*long-standing policy and regulation that presumes National Wildlife Refuges are closed until open.*" In Alaska refuges, law and regulation guarantee various forms of access, thus they are open to public access until closed and only closed by those procedures specified in 50 CFR 36.42 and 43 CFR Part 36. Since Alaska refuges fall under the guidance of this national proposed rulemaking and draft policy, we request 25.21(a) reflect that Alaska refuges are open until closed by regulatory procedure, consistent with ANILCA.

Citation-Specific Comments

Part 25

Section 25.12 Definitions for terms used in the rulemaking -- We request that a definition for the term "State conservation management plan" be provided in 25.12 of the proposed rule and 3.6 D. of the draft policy. This will facilitate addressing the role of State fish and wildlife management within exterior boundaries of national wildlife refuges.

Part 26

Section 26.41(a)(8) -- We request the "*anticipated impacts*" language also specify that anticipated impacts will be analyzed using existing and new data if warranted. This is consistent with the proposed rule 25.21 (e) and (f), where compatibility determinations will be re-evaluated if there is significant new information regarding the effects of a particular use. The language as written is overly subjective and gives the manager undue discretion and autonomy. We request this section be revised to include a stipulation allowing generation of new data as well as a process to challenge existing data.

Section 26.41(b) and (c) -- it is unclear why a **proposed use** will not be determined compatible through replacement of lost habitat values or other compensation while an **existing use** determined not compatible can be modified to make it compatible. A proposed use should also be able to be modified to make it compatible.

Part 29

Section 29.1; "**May we allow economic uses on national wildlife refuges?**" -- We recommend defining commercial guiding and transporting as allowed economic uses if not already clearly recognized and allowed within any other parts of refuge regulations.

We also request clarification that regulated trapping conducted by the public or other non-Service entity will be allowed. Trapping is a method of harvest regulated by the State but which generates some income for the trapper. The proposed regulations do not clarify that trapping will be allowed consistent with current state and federal law, while trapping conducted as a Service management tool (e.g., predation control by a contractor) may be considered an "*economic use*" requiring some unspecified additional procedures.

Other Comments

The application of the National Environmental Policy Act (NEPA) should be clarified. If NEPA compliance is required, many small ADF&G projects with limited budgets will become uneconomical.

The relationship of compatibility and refuge special use permits is not clear. On the Kodiak Refuge, for example, the Kodiak Regional Planning Team (KRPT), that has been waiting over two years for a long-term permit for the Spiridon Lake sockeye salmon enhancement project. KRPT has been charged by the state legislature to develop long term planning for the region's commercial fisheries. With only annual Special Use Permits from the refuge, long term planning is impossible and the legislative goal of stability within the commercial fisheries cannot be realized. Considering that the draft policy may require the elimination of a project in an expeditious manner, long-term permits will be increasingly important for planning. Financial security is even more important to ADF&G and the Kodiak Regional Aquaculture Association.

Any increased costs associated with the new compatibility ruling may require closure of small projects to keep others operational. In general we request language in the proposed rule and draft policy that reflects cooperation among managing agencies of the State and the Service, and commits to resolution of issues before they become complex or controversial. One way to reduce unnecessary or duplicative paperwork is to incorporate compatibility determinations into the comprehensive conservation plan process to the extent possible. In fact, given the CCP revisions planned for Alaska refuges over the next few years we strongly encourage emphasis on this approach.

We request language requiring that refuge management decisions be coordinated with adjacent land owners, managers, and users. Compatibility determinations should not unilaterally or indirectly displace high impact uses to adjacent lands where owners/managers may not have the capability to manage or mitigate impacts. A regional or area-wide approach may be more beneficial to local resources. In this regard, we are concerned about the meaning and use of the statement in Federal Register Vol.64 #174: 3.11B3 which says "...must consider...uses of adjacent lands or waters that may exacerbate the effects of a refuge use." Via policy or regulation, we encourage refuge

managers to work with adjacent landowners to mitigate concentrated impacts, and to provide a reasonable range of opportunities across all public lands.

The Service draft refers to individual uses as well as category uses, but the level of detail required for each compatibility review is not clear. If all reviews are case by case, there is concern the refuge manager may be unable to turn around reviews quickly enough. It is in both the Service and the applicants' interest to implement a process that is sufficiently streamlined to avoid replication of decision making processes. It is also not clear how the Service will notify users of differences among refuge uses.

The State encourages the Service to continue categorically allowing refuge use for wildlife-dependent recreation, hunting, fishing, wildlife observation, interpretation, and education. We encourage monitoring of public use and user education on public lands. We support and promote balanced use and balanced development of public lands for outdoor recreation and nature-based tourism. In Alaska, we believe that most recreation uses can be conducted in a manner compatible with protection of refuge resources.

Thank you for the opportunity to provide these comments. If you have any questions, please contact this office.

Sincerely,



Sally Gibert
State CSU Coordinator

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