



THE STATE
of **ALASKA**
GOVERNOR BILL WALKER

ANILCA Implementation Program

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Michael Brady, Refuge Manager
Kodiak National Wildlife Refuge
1390 Buskin River Road
Kodiak, AK 99615

Dear Mr. Brady:

The State of Alaska reviewed the Draft Karluk Lake Nutrient Modification Compatibility Determination (CD), which evaluates whether a fertilization project proposed by the Kodiak Regional Aquaculture Association is a compatible use, as defined in the National Wildlife Refuge System Improvement Act (NWRISA). The following comments represent the consolidated views of state resource agencies.

The State does not object to the U.S. Fish and Wildlife Service's (Service) decision in the 2016 Finding of No Significant Impact (FONSI) for the Proposed Karluk Lake Nutrient Enrichment Project (Karluk Lake Project). However, we are concerned that the rationale provided in the CD unnecessarily limits use of fishery rehabilitation and enhancement projects. Further, the CD does not comply with the direction provided by Congress in the Federal Appropriation Bill of 2017 (Report 114-281)¹ to publish a CD that identifies approved tools for fish rehabilitation activities, which are authorized in the August 2008 Kodiak Refuge Comprehensive Conservation Plan (CCP). Instead, the CD re-evaluates the Karluk Lake Project² in the context of compatibility. Further, in finding the use not compatible with the purposes of the Kodiak Refuge and the refuge system, the CD uses the same justification found in the Non-Subsistence Take of Wildlife, and Public Participation and Closures Procedures, on National Wildlife Refuges in Alaska rulemaking (Wildlife Rule), which was rescinded in 2017 by Public Law 115-20 under the Congressional Review Act (CRA). The CRA

¹ Karluk Lake. – The Committee is extremely disappointed with the Service's January 2016 decision to deny a special use permit to conduct nutrient enrichment in Karluk Lake within the Kodiak National Wildlife Refuge. The final Environmental Assessment was inadequate and failed to recognize the measurable benefits of ongoing enrichment programs in other areas in the State of Alaska. While fish populations have recently increased in Karluk Lake, the Environmental Assessment did not adequately consider that nutrient enrichment may have helped fish populations in prior years and is an important tool for future years. The Committee understands that the Refuge's Comprehensive Conservation Plan includes provisions for and outlines means to rehabilitate fish stocks on the Refuge, including lake enrichment. **In an effort to look at this issue in a more balanced manner, the Service is directed to move forward with a formal compatibility determination on the Refuge's Comprehensive Conservation Plan for fish rehabilitation and publish a list of approved tools that can be used to accomplish such rehabilitation.** (Emphasis added)

² Refuge Manager's decision in the Finding of No Significant Impact (FONSI) dated January 20, 2016 was to continue the current management of the fishery and not allow fertilization of Karluk Lake because the sockeye salmon population was within its historic range of abundance and was sustainable in the long-term; therefore, the enrichment program was unnecessary.

prevents the Service from embarking on similar future rulemaking. Embodying the same flawed justification for a different activity in a compatibility determination is inconsistent with the the CRA.

Of foremost concern is the CD's lack of reference or consideration of Section 304(e) of the Alaska National Interest Lands Conservation Act (ANILCA), which directs that "Where compatible with the purposes of the refuge unit, the Secretary may permit, subject to reasonable regulations and in accord with sound fisheries management principles, scientifically acceptable means of maintaining, enhancing, and rehabilitating fish stock." Instead, the decision in the 2016 FONSI for the Proposed Karluk Lake Nutrient Modification Environmental Assessment and the CD appear to be based on narrow interpretations of the Biological Integrity, Diversity, and Environmental Health policy (601 FW 3, "BIDEH" policy) and the refuge purpose found at ANILCA Section 303(5)(B), "...to conserve fish and wildlife populations (and) habitats in their natural diversity." Similar to our concerns with the justification provided in the Wildlife Rule as applied to state management of wildlife,³ we are concerned that this sets a poor precedent for the consideration of future fish restoration or enhancement projects throughout the Alaska Region and, potentially, the refuge system. The BIDEH Policy is so narrowly interpreted that alterations in escapement goals for salmon or management actions for other species (terrestrial or aquatic) that may alter abundance for harvest would likely not be compatible with the purposes of any refuge in Alaska. The CD would require that fish and wildlife be managed for natural fluctuations, superseding the state's ability to manage stable populations for subsistence and other consumptive uses under the sustained yield concept. As such, if the decision in the CD is not revisited, the impacts to users, including for subsistence, need to be given more consideration under the National Environmental Policy Act and ANILCA Section 810.

Congress' specific direction in Section 304(e) provides that rehabilitation and enhancement activities are not implicitly at odds with the refuge purpose to conserve fish and wildlife populations in their natural diversity. Moreover, the BIDEH policy should not be interpreted to override Congress' specific direction for these activities. The Service's national BIDEH policy stems from Section 5 of the NWRSIA and is only one of 14 directives applicable to the management of the refuge system. There is no basis in law or legislative history for singling the BIDEH policy out as the overriding management directive superior to all other directives of the NWRSIA, or the enabling ANILCA legislation, which provides more specific direction for management of Alaska refuges and prevails in the event there is a conflict between provisions in the two Acts.⁴ As currently written, the CD improperly precludes both rehabilitation and enhancement as tools for the conservation of resources within the refuge.

Additionally, while we appreciate the CD's reference to State of Alaska Stock of Concern designations as described under the Policy for the Management of Sustainable Salmon Fisheries, we disagree with its use as the only trigger for application of enhancement or rehabilitation proposals. Instead, such a designation could be considered as part of the decision-making process but not as the only criterion. There may be instances where this designation is not applied at all but rehabilitation and enhancement efforts may be considered and subsequently authorized. The CD also appears to indicate that the Stock of Concern designations were considered during the development of the 2008 Kodiak CCP planning process, which is inaccurate. We request the statement in the CD be corrected (page 3).

The CD finds that based on Service policy, nutrient modification "at this time" *will* "materially interfere with and detract from the purposes of the refuge and the mission of the NWRS" (i.e. incompatible). The CD also states that fisheries restoration activities will only be authorized on refuges in Alaska if among other criteria, the

³ See State of Alaska Comments dated April 6, 2016, submitted by Governor Walker.

⁴ "Conflicts of Laws. – If any conflict arises between any provision of this Act and any provision of the Alaska National Interest Lands Conservation Act, then the provision in the Alaska National Interest Lands Conservation Act shall prevail." (Section 9(b) of the NWRSIA)

activity is found compatible. Since the compatibility finding appears to be based on narrow interpretations of the BIDEH policy, future approvals would not be possible. The CD therefore needs to clarify what is meant by “at this time” so that the basis for the current decision and circumstances under which future approvals could be obtained are clear. We also request the CD accurately refer to the refuge’s first listed purpose as one of several purposes, and not the “primary” purpose (page 4). Further, consistent with the State’s previous comments on the Wildlife Rule, we request the Service refrain from referencing the quote by Senator Udall (page 4, 126 Cong. Rec. H12, 352-53) in the CD and future documents. The statement was made after ANILCA passed and cannot be considered valid legislative history and should not be presented as such.

Sections 2.2.11.10 and 2.2.11.10 of the 2008 CCP provide guidance on restoration and enhancement projects. During the CCP planning process, rehabilitation projects such as the fertilization project at Karluk Lake and the temporary incubation project at Upper Thumb River were referenced to ensure these types of projects would be considered in the future, along with the acknowledgement that “The Refuge will continue to support similar restoration actions provided they are compatible with the Refuge purposes and the Refuge System Mission” (Section 2.2.11.10, page 2-62). The State worked cooperatively with the Service during development of the CCP to arrive at this understanding. The current CD however, unnecessarily limits its application, nullifying our cooperative efforts.

While we agree that given current sockeye salmon status, the Karluk Project is unnecessary at this time, we are concerned that the CD would prevent such a project if needed in the future. We request the Service conduct a thorough review of the laws, policies, and the current refuge CCP to inform a revised CD that honors Congress’ request to provide a thorough understanding of when and how rehabilitation and enhancement projects could be implemented on the refuge. Specifically, we request the Service amend the Karluk Lake Project FONSI and the CD to reflect consideration of ANILCA Section 304(e), the 2008 Kodiak Refuge CCP, and the NWRSA to retain flexibility for fair consideration of future proposed fisheries projects on Alaska refuges.

Lastly, I have recently become aware of several other Alaska Region refuge compatibility determinations that have been prepared and/or released with limited coordination with the State. As the State ANILCA Program Coordinator, it is my responsibility to coordinate with all state agencies with an interest in a refuge-related proposed action. This approach helps to ensure federal agencies are consulting with the appropriate state agencies and staff, and that they receive a consolidated response from the State. The Service has historically worked through the State’s ANILCA Program Coordinator on refuge-related issues and given recent conversations with Service staff, it appears we will be working together to clarify and re-establish those communication protocols and processes. I look forward to future cooperative efforts with the Service on this CD and other issues and projects.

Sincerely,



Susan Magee
ANILCA Program Coordinator

cc: Greg Siekaniec, Alaska Regional Director, USFWS
Mitch Ellis, Chief of Refuges, Alaska Region
Ryan Mollnow, Regional Hunting and Fishing Chief, Alaska Region