



June 4, 2018

Susanna Henry, Refuge Manager
Togiak National Wildlife Refuge
U.S. Fish and Wildlife Service
P.O. Box 270 MS 569
Dillingham, AK 99576

Dear Ms. Henry:

The State of Alaska reviewed the Draft Compatibility Determination (CD) for Commercial Film, Video, and Audio Production (Commercial Filming) in Wilderness and Non-Wilderness, which is applicable to the Togiak National Wildlife Refuge (Refuge) and the Hagemester Island portion of the Alaska Maritime National Wildlife Refuge. The following comments represent the consolidated views of state agencies.

The State supports the CD's overall determination that commercial filming is a compatible use within the refuge. However, we are concerned that certain statements within the body of the CD are either inconsistent with current Service policy or regulation, or could place categorical limitations on commercial filming activities that are unnecessary for compatibility, and would be better addressed through the special use permitting process.

The proposed CD replaces a commercial filming CD, which was finalized in 2014. While Refuge Policy at 603 FW 2 indicates a CD may be re-evaluated at any time, existing CDs must be re-evaluated when 1) a comprehensive conservation plan (CCP) is being revised or at least every 10-15 years depending on type of use; 2) conditions under which the use is permitted change significantly; or 3) if there is significant new information regarding the effects of use. The draft CD does not explain the need for this revision yet there are noticeable differences between the two CDs in terms of allowances, justification, and tone. Since the CCP is not under revision and the previous CD has not expired, we request the Service identify the change in conditions or new information that is driving the need for the revision. In addition, the 2014 CD included a discussion of the value of commercial filming for education and interpretation related to wilderness and for the wildlife-dependent priority public uses, which has been removed in the draft CD. We request this discussion, which is still valid, be retained and incorporated into the final revised CD. These and other issues are addressed in more detail below.

Compatibility Standard

On May 14, 2018, the Service posted a notice on Facebook seeking public comment on the CD, noting the CD "...would only allow those filming proposals that educate and inform the public about Togiak Refuge and its resources and whose filming activities do not pose a threat to natural or cultural resources." While Facebook is recognized as an informal social media communication platform, the statement in the post conflicts with the standard established in the

Service's Compatibility Policy (603 FW 2) to determine whether a use *materially interferes with or detracts from* the System Mission and refuge purposes:

*(2) While refuge managers should be looking for tangible impacts, the fact that a use will result in a tangible adverse effect, or a lingering or continuing adverse effect is not necessarily the overriding concern regarding "materially interfere with or detract from." These types of effects should be taken into consideration **but the primary aspect is how does the use and any impacts from the use affect our ability to fulfill the System mission and the refuge purposes.** (603 FW 22.11(b)(2), emphasis added)*

Stating or implying that only commercial filming compatible with refuge purposes will be allowed was specifically addressed in the response to comments on the 2013 NPS and USFWS commercial filming final rule, which states "The statement is based on the requirements of the National Wildlife Refuge System Improvement Act of 1997 ([Pub. L. 105-57](#)), which requires that refuge managers discontinue or not approve activities that are inappropriate or incompatible with the refuge's mission. For example, a refuge manager may make a determination that the photography activity is inappropriate or incompatible with the refuge's mission if the activity would negatively impact a threatened species, not on the basis of the possible content of the photograph" (78 FR 52087). We request the Service review the CD, including the justification section (Page 6, first paragraph) and examples of commercial filming activities (Page 3), and revise or broaden as needed, to ensure the final CD and any future related decisions are consistent with refuge policy.

Excluded Equipment and Activities

Several items that were allowed in the 2014 CD have been excluded in the revised CD, including props, models, and drones. No explanation is provided for these exclusions or their effect, if any, on compatibility. Excluding props and models effectively amounts to a prohibition on commercial filming for advertising. We understand that a project-specific CD could be completed to allow this use; however, additional time would be required to process a request, which could effectively discourage a potential applicant from applying for a permit. It is difficult to understand how a person wearing a branded jacket, for example, would "materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge." Further, filming a person wearing a jacket for a television commercial involves the use of a model and a prop, which is allowed under 43 CFR 5.12. Conditions for allowing advertising are also specifically addressed in 8 RM 16 (16.4(E)) "All advertising photography requires an A-V Productions Permit. Advertisements must not imply endorsement by the Service." 43 CFR 5 also does not restrict the use of props and models. The Federal Register notice for the final regulation reassured the public several times that decisions "...will be based on the potential impact on cultural and natural resources and values and not on the content of the film or photograph." (78 FR 52090) Also, in modern journalism the line between advertising and storytelling is often blurred. We request that props and models be removed from the list of excluded items, triggering the need for an individual CD, and instead apply any necessary stipulations on props and models during the special use permitting process. Similarly, rather than excluding drones, we request the Service apply any necessary stipulations on drone use during the special use permitting process, which is the approach taken in other refuge commercial filming CDs (e.g. West Tennessee NWR Complex CD).

Availability of Resources

The 2014 CD states that adequate refuge personnel and funds are available to manage filming at expected and projected levels, while the proposed CD indicates that personnel and funds are available to manage filming *at expected levels*. Whereas the 2014 CD described monitoring for filming as fitting well with ongoing monitoring of recreational users, the proposed CD makes no such assurance and instead states that a lack of resources for monitoring may be grounds for denial. To understand the change in tone and approach, we request the Refuge explain whether the projected level of commercial filming use and the Refuge's ability to manage and monitor filming has changed since the 2014 CD.

The CD adds the availability of resources to monitor the project as additional grounds for denial of permits beyond the seven specific grounds for denial listed in 43 CFR 5.5. This seems unnecessary considering the Service is authorized to recoup costs under 50 CFR 27.71, "We will collect and retain cost recovery charges associated with processing permit requests and monitoring the permitted activities." We request that the Service simply refer to 43 CFR 5 and 50 CFR 27 for permitting requirements rather than placing new unexplained permitting requirements in a CD.

ANILCA Section 810

The Description of Use section (page 2) states that the CD examines commercial filming activities that "...do not have an effect on subsistence opportunities as defined in ANILCA Section 810." This statement indicates that only commercial filming activities that have no effect on subsistence use will be authorized. Avoiding and minimizing impacts to subsistence uses and resources is an important consideration required by the Alaska National Interest Lands Conservation Act (ANILCA). However, ANILCA Section 810 does not require that other activities have no effect on subsistence uses and resources. Instead, ANILCA requires federal land management agencies to evaluate potential impacts to subsistence uses and resources, including access, and follow specific public notice procedures and decision criteria when evaluating proposed uses of refuge lands, which includes ways to avoid and minimize impacts to subsistence uses. We request the CD be revised to replace the above language with a statement that individual proposed commercial filming activities will be evaluated on a case by case basis, consistent with ANILCA Section 810.

Group Size Limits

The CD generally states that group size limits described in the 2010 Revised Togiak National Wildlife Refuge Public Use Management Plan (PUMP) will be followed. Commercial group size limits in the PUMP apply to guided float use. Other group size limits applicable to public use must be implemented by regulation to be enforceable. The Service has not promulgated regulations to implement the group size limits described in the 2010 PUMP affecting public use. Applying group size limits that were analyzed in a planning process for different commercial activities may preclude commercial filming activities that would otherwise be compatible. We request this limitation be removed from the CD and instead apply any group size limitations determined necessary on a case by case basis as stipulations during the special use permitting process.

Commercial Filming in Designated Wilderness

Section 4(d)(6) of the Wilderness Act states "Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the **recreational or other wilderness purposes** of the areas." (emphasis added) The

quote in the CD truncates this provision and instead states commercial services are allowed "...to the extent necessary for activities which are proper for realizing...the purposes of the area." As such, the CD implies that only refuge purposes are considered when evaluating commercial services but Section 4(b) of the Wilderness Act identifies wilderness purposes as "...wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical uses." Further, commercial filming, which is an important means to connect the American people to wilderness, would be unnecessarily hampered by the first excessively narrow criterion identified in the CD for authorizing commercial filming, which is whether the film "could be made outside of Wilderness." The second criterion "likely to promote the purposes of the Wilderness area" also appears to stem from the truncated quote of Section 4(d)(6) of the Wilderness Act, which as explained above is different from full text. Further, the criteria are not consistent with Service policy at 610 FW 2.12-13. We therefore request the two criteria be removed from the CD and instead reference applicable policy at 610 FW 2.12-13 and Alaska specific guidance at 610 FW 5.

Similarly, the Service's policy at 8 RM 16.1 is inaccurately described in the justification section (page 6, 1st paragraph), implying a higher standard than established in the policy, which does not require that a production support refuge purposes. We request the CD fully quote the policy, which states "The policy of the Service is to provide refuge access and/or assistance to legitimate producers of audio and/or visual recordings. Such assistance or access will not be provided if production operations are incompatible with refuge or Service objectives. Priority consideration is extended to producers of wildlife and natural resource related audio or visual materials."

State Coordination

The State did not receive direct notice of the draft CD either prior to or upon its release for public review. Recently, several other Alaska Region refuge compatibility determinations have been prepared and/or released with limited coordination with the State. Coordination with the State ANILCA Program ensures the Service is reaching out to and consulting with all appropriate state agencies and staff that have an interest in a proposed action, and receives 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. We look forward to future cooperative efforts with the Service on this CD and other issues and projects.

Page-Specific Comments

Page 2, Description of Use: We request the CD specifically state that it does not apply to news-gathering activities as defined at 43 CFR 5.12.

Page, 2, Description of Use: The CD recognizes ANILCA's unique allowances for access on refuges and in wilderness. The CD should also list bicycling as a non-motorized method of access allowed under ANILCA Section 1110(a), which is becoming a more common way to travel in Alaska's backcountry.

Page 4, first paragraph: The discussion of potential conflicts between local subsistence moose hunters and non-resident moose hunters is unrelated to the topic of commercial filming and should be deleted.

Page 6, Justification: The references to regulations for commercial filming should include 50 CFR 27.71, in addition to 43 CFR 5.

Thank you for this opportunity to comment. Please contact me at (907) 269-7529 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'S. Magee', written in a cursive style.

Susan Magee
ANILCA Program Coordinator

cc: Mitch Ellis, Chief of Refuges, Alaska Region