



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

ANILCA Implementation Program

OFFICE OF PROJECT MANAGEMENT AND PERMITTING

550 West 7th Avenue, Suite 1430
Anchorage, AK 99501-3561
Main: 907.269-7529
Fax: 907-269-5673

June 8, 2020

Via Regulations.gov Portal

Public Comments Processing
U.S. Fish and Wildlife Service
MS: JAO/1N
5275 Leesburg Pike
Falls Church, VA 22041

Re: Proposed Rulemaking: USFWS National Wildlife Refuge System; Use of Electric Bicycles,
Docket No. FWS-HQ-NWRS-2019-0109 [RIN 1018-BE68]

Via Regulations.gov Portal

U.S. Department of Interior
Director (630) **Bureau of Land Management**
Mail Stop 2134 LM
1849 C St. NW
Attention RIN 1004-AE72
Washington, DC 20240

Re: Proposed Rulemaking: BLM Increasing Recreational Opportunities Through the Use of Electric
Bikes [RIN 1004-AE72]

Via Regulations.gov Portal

Jay Calhoun, Regulations Program Manager
National Park Service
1849 C Street NW
MS-2472
Washington, DC 20240

Re: Proposed Rulemaking: NPS General Provisions; Electric Bicycles [RIN 1024-AE61]

To Whom it May Concern:

The State of Alaska reviewed the Federal Register Notices for the three proposed rules, referenced above, to implement Secretarial Order (SO) 3370 "Increasing Recreational Opportunities through the use of Electric Bikes." The following comments represent the consolidated views of state resource agencies.

SO 3370 states its overarching purpose and intent is "...to increase recreational opportunities for all Americans, especially those with physical limitations, and to encourage the enjoyment of lands and waters managed by the Department of Interior." The SO also states an added intent is to simplify and unify Department of Interior (DOI) regulation of electric bicycles (e-bikes) and to decrease regulatory burden. Because of this added direction in the SO to simplify and unify DOI regulations,

the following comments are directed at the three DOI land management agencies implementing the SO in Alaska, the National Park Service (NPS), the U.S. Fish and Wildlife Service (USFWS), and the Bureau of Land Management (BLM).¹

In response to this order, all three DOI land management agencies have proposed rules that overcomplicate the SO's directive to allow e-bikes where other types of bicycles are allowed and not allow e-bikes where other types of bicycles are prohibited. Also, all three agencies take a different approach to implementing the SO in ways that limit e-bike access on DOI lands. As such, it is questionable that the SO's added intent to simplify, unify, and reduce regulatory burden, will be accomplished with these separate rulemakings. A better and more efficient approach would be for DOI to issue one rule that applies to all three agencies, similar to DOI regulations at 43 CFR 36, which provides direction to all three land management agencies on how to implement Title XI of the Alaska National Interest Land Conservation Act (ANILCA).

Almost 40% (an estimated 197.2 million acres) of DOI managed lands are in Alaska, and all three DOI agencies proposing rules to implement the SO manage conservation system units (CSUs) designated by ANILCA. These CSUs are subject to unique provisions that apply only in Alaska.² However, none of the proposed rules recognize ANILCA or that bicycles are a form of surface transportation allowed in all CSUs, including designated Wilderness, pursuant to ANILCA Section 1110(a).³ As such, the national regulations referenced in the proposed rules, which restrict the use of bicycles, are not applicable to CSUs in Alaska. Instead, DOI regulations that implement Section

¹ The Bureau of Reclamation also issued a proposed rule to implement SO 3370 but these comments do not address that proposed rule because the Bureau of Reclamation does not manage ANILCA-designated units in Alaska.

² ANILCA Section 102(4) defines conservation system unit as “**any unit in Alaska of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Trails System, National Wilderness Preservation System**, or a National Forest Monument including existing units, units established, designated, or expanded by or under the provisions of this Act, additions to such units, and any such unit established, designated, expanded hereafter.” [Emphasis added]

³ ANILCA Section 1110(a) Notwithstanding any other provision of this Act or other law, the Secretary **shall permit**, on conservation system units national recreation areas, and national conservation areas, and those public lands designated as wilderness study, the use of snowmachines (during periods of adequate snow cover, or frozen river conditions in the case of wild and scenic rivers), motorboats, airplanes, and **non-motorized surface transportation methods** for traditional activities (where such activities are permitted by this Act or other law) and for travel to and from villages and homesites. Such use shall be **subject to reasonable regulations** by the Secretary to protect the natural and other values of the conservation system units, national recreation areas, and national conservation areas, and **shall not be prohibited unless, after notice and hearing in the vicinity of the affected unit or area, the Secretary finds that such use would be detrimental to the resource values of the unit or area**. Nothing in this section shall be construed as prohibiting the use of other methods of transportation for such travel and activities on conservation system lands where such use is permitted by this Act or other law. [Emphasis added]

1110(a) of ANILCA at 43 CFR 36.11 apply, and unless the federal land management agency has followed the required closure process to implement a restriction or closure by regulation, bicycles are allowed everywhere within CSUs (and other areas) designated by ANILCA, including National Wild and Scenic Rivers, designated Wilderness, Wilderness Study Areas, National Recreation Areas, and National Conservation Areas.

While we recognize e-bikes are *not* specifically protected as a method of access allowed under ANILCA Section 1110(a), to properly implement the full intent of the SO in Alaska and *allow e-bikes where other types of bikes are allowed* and to *simplify, unify, and reduce regulatory burden*, the proposed rules need to recognize this statutory allowance for bicycle use on DOI lands in Alaska. This will serve to establish a baseline in areas where bicycles are already allowed. By not allowing e-bikes where bicycles are already allowed, e-bikes are being unnecessarily restricted beyond the intent of the SO. Given Alaskan's keen awareness of the access provisions in ANILCA, the proposed rule(s) will unnecessarily create confusion and add regulatory burden to users who will continue to be able to use bicycles in CSUs and other areas designated by ANILCA (where not restricted by regulation pursuant to 43 CFR 36.11(h)) but will not be allowed to use e-bikes unless they are subsequently allowed by individual land managers. And, all three rules require land managers to follow lengthy public processes of varying kinds (i.e., regulatory, planning, and/or compatibility determination), which are additionally subject to requirements under the National Environmental Policy Act. Further, all these processes are entirely dependent upon the availability of individual agency resources. We are concerned that leaving the decision up to the discretion of individual Park Superintendents, Refuge Managers, and BLM Field Managers, who manage upward of thirty-eight separate ANILCA-designated units in Alaska alone, is a recipe for inconsistency and lost opportunities for the public.

The extensive processes associated with the rules appear to be largely driven by fears regarding safety, speed, crowding, and user conflicts, which only serves to restrict, rather than, facilitate access to the federal lands managed by these three agencies. According to a Boulder County Parks and Open Space report "Literature Review, Recreation Conflicts Focused on Emerging E-bike Technology" several studies show that it is those unfamiliar with e-bikes who have concerns. Once exposed to e-bikes, concerns about them decrease for many. Early studies indicate that e-bikes are used for recreation by older adults and those with physical limitations. Though limited, an early study also indicates impacts to physical trail conditions are more typical to those caused by mountain bikes and significantly less than impacts caused by dirt bikes.

As proposed, the rules will result in lost opportunities for recreational and other uses in Alaska, including access for general and subsistence hunting. Both the FWS and NPS proposed rules, without additional agency action, will prohibit the use of e-bikes for subsistence use, even in areas where local rural residents use off highway vehicles (OHVs) under Section 811 of ANILCA. Not only will trails and coastal shorelines open to other types of bicycles be closed to e-bikes, in winter, e-bikes will be prohibited in areas where snowmachines are allowed to operate when snow and ice conditions protect the underlying land. In Alaska, the proposed rules will result in situations where e-bikes would not be allowed in areas where bicycles, motor vehicles, or OHVs are allowed.

To implement the full intent of the SO, we re-iterate our recommendation for DOI to issue one set of regulations (or at this point, three consistent sets of regulations) for Alaska. The regulation(s) can model an allowance for class 1-3 e-bikes after the allowance in ANILCA Section 1110(a), where

other types of bicycles are allowed, unless restricted by regulation in specific areas for specific reasons, such as areas where extensive use would damage sensitive habitat or affect the resource values for which the unit was created.⁴ A similar process also applies to the subsistence access provision in ANILCA Section 811, as implemented by NPS and USFWS regulations at 36 CFR 13.460 and 50 CFR 36.12, respectively.⁵ Implementation of this process would expand opportunities to use class 1-3 e-bikes, a new clean and quiet method of access, on all federally-managed lands, as intended by the SO, and at the same time, give federal land management agencies discretion to manage the use, where needed. This regulatory process has been in place in Alaska since shortly after the passage of ANILCA in 1980 (commonly referred to as “open until closed”) and has worked well across CSUs, resulting in few restrictions to ANILCA protected access methods while protecting resource values in CSUs.

Office of Information and Regulatory Affairs Review

All three Federal Register Notices indicate the Office of Information and Regulatory Affairs (OIRA) review will occur, with separate decisions, at the final rule stage. OIRA’s review of these rules may have been more beneficial at the proposed stage of rulemaking as it could have identified agency inconsistencies with the DOI SO up front. We request the OIRA review consider all DOI agency e-bike rules collectively, as well as separately, to ensure they are consistent with the SO. In doing so, OIRA will recognize that the intent of the SO would be better met if the rules were aligned and incorporated a more seamless process, particularly in Alaska where the regulations applicable to bicycles are different from the national regulations. Given the vast size and remote nature of federal lands in Alaska, where there are few roads and trails, Alaska’s transportation needs are different. Rules that implement the SO in accordance with national rules, and not Alaska’s rules, will not increase opportunities for e-bike users in Alaska.

⁴ 43 CFR 36(h) *Closure procedures*. (1) The appropriate Federal agency may close an area on a temporary or permanent basis to use of aircraft, snowmachines, motorboats or nonmotorized surface transportation only upon a finding by the agency that such use would be detrimental to the resource values of the area.

⁵ 50 CFR 36.12(b) The Refuge Manager may restrict or close a route or area to the use of snowmobiles, motorboats, dog teams or other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses if the Refuge Manager determines that such use is causing or is likely to cause an adverse impact on public health and safety, resource protection, protection of historic or scientific values, subsistence uses, conservation of endangered or threatened species, or other purposes and values for which the refuge was established.

36 CFR 13.460(b) The Superintendent may restrict or close a route or area to use of snowmobiles, motorboats, dog teams, or other means of surface transportation traditionally employed by local rural residents engaged in subsistence uses if the Superintendent determines that such use is causing or is likely to cause an adverse impact on public health and safety, resource protection, protection of historic or scientific values, subsistence uses, conservation of endangered or threatened species, or the purposes for which the park area was established

In summary, for all DOI agencies, we request that:

- OIRA conduct a review of the proposed final rules and consider consistency, both between DOI agencies, as well as with the SO;
- Each rule recognizes and discusses the application of and the unique management requirements statutorily and regulatorily required of DOI land managers by ANILCA and its implementing regulations; and
- Each agency rule implement the specific instructions the SO assigns to their Director, as identified in the agency specific comments that follow.

Agency-specific Comments

National Park Service Proposed Rule

The SO directs the NPS to:

- develop a proposed rule to revise 36 CFR § 1.4 and any associated regulations to be consistent with this Order,
- add a definition for e-bikes consistent with 15 U.S.C. § 2085, and
- expressly exempt all e-bikes as defined in Sec. 4a from the definition of motor vehicles;

We appreciate the NPS proposed rule adds a definition for “Electric bicycles” consistent with 15 USC § 2085, to 36 CFR §1.4, and revises the definition of “Motor vehicle” in §1.4 so that it excludes electric bicycles.

In addition to the SO, the NPS issued Policy Memorandum (PM) 19-01 to provide further direction with implementing the SO in NPS units nationwide. While re-emphasizing the intent of the SO, the PM misses the mark on how bicycle use in Alaska park units is regulated, even though 65% of NPS park lands are in Alaska.

The NPS Alaska Region initially implemented the SO and PM through their proposed 2020 Alaska Park Compendium entries. The State’s February 14, 2020 comments to the Alaska Region on those entries identified the same inconsistencies noted in these comments, as well as others; however, they were not meaningfully addressed by the Alaska Region in their Compendia response to comments. Therefore, in the context of this proposed rule, we incorporate those comments by reference.

The following revisions to 36 CFR Part 4 “Vehicles and Traffic Safety”, subsection 4.30 “Bicycles” would help to improve consistency with the SO and accommodate allowances for bicycles in designated wilderness, where authorized by Federal law, such as ANILCA:

- (i) *Electric bicycles.*
 - (1) The use of an electric bicycle may be allowed on park roads, parking areas, ~~and~~ administrative roads and trails, and other areas that are otherwise open to bicycles. The Superintendent will designate the areas open to electric bicycles and notify the public pursuant to 36 CFR 1.7.

- (2) The use of an electric bicycle is prohibited in locations not designated by the Superintendent under paragraph (i)(1) of this section.
- (3) Except where use of motor vehicles by the public is allowed, using the electric motor to move an electric bicycle without pedaling is prohibited.
- (4) Possessing an electric bicycle in a wilderness area established by Federal statute is prohibited, except where bicycles or motorized methods of access are allowed by other Federal Statute.
- (5) A person operating or possessing an electric bicycle is subject to the following sections of this part where it that applies to bicycles: Sections 4.12, 4.13, 4.20, 4.21, 4.22, 4.23, and 4.30(h)(3)-(5).
- (6) Except as specified in this section, the use of an electric bicycle is governed by State law, which is adopted and made a part of this section. Any act in violation of State law adopted by this paragraph is prohibited.
- (7) Superintendents may limit or restrict or impose conditions on electric bicycle use, or may close any park road, parking area, administrative road, trail, or portion thereof to such electric bicycle use, or terminate such condition, closure, limit or restriction after:

(i) ~~Taking into consideration~~ Determining that such use is likely to cause an adverse impact(s) on public health and safety, natural and cultural resource protection, and other management activities and objectives;

US Fish and Wildlife Service Proposed Rule

The SO directs the USFWS to do the following:

- Revise 50 CFR § 25.12 “What do these terms mean” and any associated regulations to be consistent with this Order;
- add a definition for-bikes consistent with 15 U.S.C. § 2085 “Low-speed electric bicycles;” and
- expressly exempt all e-bikes as defined in Sec. 4a from falling under the definition of off-road vehicle

We appreciate the proposed rule acknowledges that management of Alaska refuges differs from refuges outside Alaska in that they are “open until closed” but that is the only distinction recognized in the proposed rule; and, the proposed rule fails to describe how this “open until closed” distinction affects management regarding bicycles (and e-bikes pursuant to the SO) in Alaska refuges. As noted above, the USFWS proposes to amend the national regulations at 50 CFR 27 that apply to bicycle use outside Alaska, without acknowledging that, in Alaska, bicycle use is managed pursuant to 43 CFR 36.11.

The proposed rule does not include a definition for e-bikes, consistent with 15 USC § 2085 and 50 CFR § 25.12. We request the final rule add a definition for e-bikes under 50 CFR § 25.12 and propose the following definition:

e-bike means a two- or three-wheeled vehicle with fully operable pedals and an electric motor of not more than 750 watts (1 h.p.), that meets the requirement of one of the three classes below. E-bikes shall be allowed where other types of bicycles are allowed; and

prohibited where other types of bicycles are not allowed. E-bikes are exempt from the definition of off-road vehicles or motorized vehicle.

(1) Class 1 e-bike shall mean an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of 20 miles per hour.

(2) Class 2 e-bike shall mean an electric bicycle equipped with a motor that may be used exclusively to propel the bicycle, and that is not capable of providing assistance when the bicycle reaches the speed of 20 miles per hour.

(3) Class 3 e-bike shall mean an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of 28 miles per hour.

The USFWS proposes to add a new paragraph (m) to 50 CFR 27.31 “General provisions regarding vehicles.” The new paragraph includes the following, as well as the proposed e-bike definition: “(m) If the refuge manager determines that electric bicycle (also known as an e-bike) use is a compatible use on roads or trails, any person using the motorized features of an e-bike as an assist to human propulsion shall be afforded all the rights and privileges, and be subject to all of the duties, of the operators of non-motorized bicycles on roads and trails.”

We recognize that refuge uses must be found compatible (i.e. ...based on sound professional judgement, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge (603 FW 2.1(B)). However, under the SO, the USFWS is directed to treat e-bikes as they treat other bicycles and be “allowed where other types of bicycles are allowed” and “not allowed where other types of bicycles are prohibited.” They are not to be considered a new type of recreational use. Given this direction, e-bikes can be allowed where other types of bicycles have been determined to be compatible either in 50 CFR 26.34 “What are the special regulations concerning public access, use and recreation for individual national wildlife refuges” or within refuge specific compatibility determinations for specific activities, such as *Recreational Trail Use*, or *Wildlife Observation, Photography, Interpretation, and Environmental Education*, or within the refuge’s Comprehensive Conservation Plan.

The direction in the SO can be achieved most simply by deleting the proposed 50 CFR 27.31(m) and instead amending the definition in 50 CFR 25.12 (as requested above) to define e-bikes and exempt them from the definitions of off-road vehicles and motorized vehicle. Addressing e-bikes in a Subpart on “Disturbing violations: with vehicles” is inconsistent with the direction in the SO to *expressly exempt* [emphasis added] e-bikes from falling under the definition of off-road vehicle (ORV).

Bureau of Land Management Proposed Rule

The SO directs BLM to do the following:

- revise 43 CFR 8340.0-5 “Definitions” and any associated regulations to be consistent with the order,

- add a definition for e-bikes consistent with 15 USC 2085, and
- expressly exempt e-bikes from the definition of off-road or motorized vehicles (OHVs).

The approach BLM takes in the proposed rule defies logic and fails to meet the intent of the order -- to allow e-bikes wherever other types of bicycles are allowed and to simplify, unify, and reduce regulatory burden. BLM's approach is especially perplexing given that it is a multiple use agency and advertises itself on its Recreation and Visitor Services webpage as America's Great Outdoors, providing the largest acreage available for recreation in America, with bicycling listed as one of its primary recreation activities. The proposed rule is also inconsistent with the NPS and USFWS proposed rules and fails to mention that bicycle use is allowed in all ANILCA-designated CSUs managed by BLM in Alaska.

BLM's proposed rule excludes e-bikes from the definition of ORV but, in defiance of the SO, only where certain criteria are met, including "[W]here the authorized officer has expressly determined, as part of a land-use planning or implementation level decision, that E-bikes should be treated the same as non-motorized bicycles." The SO clearly states: *While e-bikes are operable in the same manner as other types of bicycles and in many cases they appear virtually indistinguishable from other types of bicycles, the addition of a small motor has caused regulatory uncertainty regarding whether e-bikes should be treated in the same manner as other types of bicycles or, alternatively, considered to be motor vehicles. This uncertainty must be clarified.*

We propose the final rule include the following revisions for the definition of e-bike at 8340.0-5(a)(5) consistent with the SO.

(5) E-bikes, as defined in paragraph (j) of this section:

- ~~(i) While being used on roads and trails upon which mechanized, non-motorized use is allowed;~~
- ~~(ii) That are not being used in a manner where the motor is being used exclusively to propel the E-bike; and~~
- ~~(iii) Where the authorized officer has expressly determined, as part of a land-use planning or implementation level decision, that E-bikes should be treated the same as non-motorized bicycles;~~
and

(j) Electric bicycle (also known as an E-bike), means a two- or three-wheeled vehicle with fully operable pedals and an electric motor of not more than 750 watts (1 h.p.), that meets the requirement of one of the three classes below. E-bikes shall be allowed where other types of bicycles are allowed; and prohibited where other types of bicycles are not allowed. They are not considered off-road vehicles for the purposes of this Chapter.

- (1) Class 1 electric bicycle shall mean an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of 20 miles per hour.
- (2) Class 2 electric bicycle shall mean an electric bicycle equipped with a motor that may be used exclusively to propel the bicycle, and that is not capable of providing assistance when the bicycle reaches the speed of 20 miles per hour.
- (3) Class 3 electric bicycle shall mean an electric bicycle equipped with a motor that provides assistance only when the rider is pedaling, and that ceases to provide assistance when the bicycle reaches the speed of 28 miles per hour.

We recognize the purpose of having the e-bike definition included in Part 8340 is to exempt e-bikes from the definition of off-road vehicle. However, it is unclear why a new provision on e-bikes is proposed at 43 CFR 8342.2(d) as 43 CFR Part 8340 Off-Road Vehicles (8340.0-1 -8344.1), which establishes criteria for designating public lands as open, limited or closed to the use of off-road vehicles and for establishing controls governing the use and operation of off-road vehicles in such areas. The SO clearly states in Section 5a v) that the Director of BLM is to expressly exempt **all** e-bikes as defined in Sec. 4a from the definition of off-road vehicles or motorized vehicles. It is, therefore, inappropriate for BLM to include a subsection on how to issue decisions to authorize the use of e-bikes on public lands in the Off-Road Vehicles section of the regulations.

We request that the proposed provision at 43 CFR 8342.2(d) be removed from the final rule. Depending upon the amount of use e-bikes eventually generate, the appropriate management tool will be the same tool as is currently used for other types of bicycles.

Thank you for this opportunity to comment. Please contact me at (907) 269-7529 or susan.magee@alaska.gov 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: Stephen Wackowski, Senior Advisor for Alaska Affairs, US Department of Interior