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Via Regulations.gov Portal

Division of Policy, Performance, and Management Programs
U.S. Fish and Wildlife Service, MS: BPHC
5275 Leesburg Pike
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Re: Docket No. FWS-R7-NWRS-2014-0005; Proposed Rulemaking on Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska

The Citizens' Advisory Commission on Federal Areas in Alaska (CACFA; Commission) has reviewed the proposed rule on fish and wildlife harvest and changes to the public process for Alaska refuges and offers the following comments for your consideration.

GENERAL COMMENTS

The Commission appreciates the Service's efforts at developing a public outreach campaign well in advance of the proposed rule's publication. Though the content of the information distributed was scantily detailed and changed multiple times, it did provide an effective "heads up" on the Service's general intentions, which allowed for advance consideration and discussion of some of the issues. The Commission especially appreciates the multiple presentations made by Service staff in rural communities, something we hope will continue to be part of any management action impacting those vicinities.

On review of the proposed rulemaking and associated documents, the Commission finds multiple inconsistencies with federal laws and executive policy, including undue, unlawful and unjustified interference with state management authorities, laws, policies and programs. More than that, what might otherwise be merely a sovereign squabble has substantial and potentially irreparable consequences to Alaskans, jeopardizing their wild food harvests and ability to participate in the process of opening, closing, restricting and managing the use of Alaska refuges by the public.

The Commission requests the Service withdraw the proposed rulemaking from consideration and immediately engage in consultation and meaningful dialogue with the State of Alaska to resolve any arguable or perceived competing mandates. Alternatively, but in no way preferably, the Commission requests the Service initiate the development of an Environmental Impact Statement to adequately consider the undeniably significant impacts of the proposed rulemaking on Alaska, its citizens and its wildlife. The very management the Service proposes to unilaterally preempt has ensured the health and sustainability of our enviable natural resources, culture, traditions, economy, livelihood and community since statehood. The public participation process Alaskans worked tirelessly to obtain, and which the Service proposes to entirely undermine, has allowed for the respectful and critical accommodation of the unique Alaskan context for decades. Rather than ignore the consequences and immutable impacts to the human environment, the Service must do its due diligence in taking a "hard look" and analyzing what will be lost.

COMPLIANCE WITH THE NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

While the Commission understands the Service is not required by statute to offer the public an opportunity to review the Environmental Assessment (EA) accompanying the proposed rule, the utility of taking comments on such a rough draft is marginalized by its gross insufficiency. Substantial supplementation of the EA would be necessary to evidence a thorough consideration of the impact of the proposed rulemaking; however, the Commission is of the strong opinion that a comprehensive and accurate EA could never result in a Finding of No Significant Impact. As such, the Commission finds an Environmental Impact Statement (EIS) would be the only appropriate and legitimate means of NEPA compliance for this rulemaking effort.

The need to prepare an EIS on matters addressed by the rulemaking has been asserted multiple times by the Service. For example, in a November 13, 2003 letter to the Bristol Bay Subsistence Regional Advisory Council, noting the "*significant public interest in Alaska*" in predator control programs, the Service stated that "*because predator control on the Refuge would be considered a major federal action, it would be subject to the National Environmental Policy Act requiring an Environmental Impact Statement.*" Although the Service simply acknowledged that a predator control program itself would be a major federal action, the regulations governing NEPA at 40 CFR §1508.18 are clear that new or revised rules and the implementation of policies (not just programs) are prime examples of "*major federal actions*."

An EIS is required where a major federal action will significantly affect the quality of the human environment. Under 40 CFR §§1508.3 and 1508.27, "*significantly affect*" includes any "*effects on the quality of the human environment . . . likely to be highly controversial*," establishing "*a precedent for future actions with significant effects*" and actions that may violate "*Federal, State, or local law*." Under 40 CFR §1508.14, the "*human environment*" includes "*the natural and physical environment and the relationship of people with that environment*."

The proposed rule satisfies each of these requirements and more. Besides being a "*major federal action*," as noted above, the rule also "*significantly affects*" the human environment. For instance, the rule relates to highly controversial matters and is undeniably precedent setting, viably threatening a sea-change in how states and the Service work together to manage fish and wildlife throughout the refuge system. Furthermore, considering the mandates and guarantees present in both federal and state law, implementation and enforcement of the proposed regulations could result in violations of both. If even one of these things is something we could credibly argue about, an EIS is warranted.

Highly Controversial

In an October 12, 2006 letter to the Eastern Interior Alaska Subsistence Regional Advisory Council, the Service stated that predator control programs on refuges involving wolves and bears "*would be contentious, would attract intense public scrutiny from many different perspectives (including groups that are opposed to any type of wildlife control), and would likely be challenged in court.*" While this and other statements by the Service attest to the controversy surrounding predator control programs, not necessarily the proposed regulations, the facts and the public's interest do not evidence any tangible distinction.

At the time of this writing, the Service has received over 3400 comments on the proposed rule. A similar 2014 rulemaking effort by the National Park Service for Alaska preserves yielded over 144,000 comments. There have been congressional inquiries, committee hearings and even proposed legislation directed at the proposed rulemaking. National and regional organizations have launched massive campaigns to either support or oppose this effort. One group organized

several meetings statewide to support the rulemaking as a means of fighting against shooting wolves and bears from helicopters. This would presumably relate to multiple aspects of the proposed rule, including the prohibition of "*particularly effective*" methods and means. Suffice it to say, the proposed rulemaking has both inherited and elicited a high degree of controversy.

Precedent Setting

According to 40 CFR §1508.27(b)(6), when evaluating the intensity of an impact, the Service needs to consider the "*degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration*." This sums up multiple aspects of the proposed rule quite well.

First of all, having been repeatedly informed of the Service's understanding that predator control program authorizations require or could require an EIS, the proposed regulation at 50 CFR §36.32(b) apparently establishes the circumstances under which "*future actions with significant effects*" (predator control programs) will be authorized and on what general basis. In proposing that no program will be authorized based solely or primarily on "[d]*emands for more wildlife for human harvest*," the rule also "*represents a decision in principle about a future consideration*."

Additionally, the proposed regulations at 50 CFR §§36.1 and 36.42(b) take one refuge purpose from Title III of the Alaska National Interest Lands Conservation Act of 1980 (ANILCA) and one general consideration from Section 5 of the National Wildlife Refuge System Improvement Act of 1997 (Refuge Improvement Act) to establish both a closure criteria and overarching regulatory mandate for the management of Alaska refuges, without any reference to the other purposes or considerations. The proposed regulation at 50 CFR §36.2 further establishes regulatory definitions for the Refuge Improvement Act component (i.e., "*biological diversity*," "*biological integrity*" and "*environmental health*").

Although this is an Alaska-specific rulemaking effort, the Refuge Improvement Act applies to the entire National Wildlife Refuge System, and this rulemaking proposes to implement it. As such, it is only a matter of time before the Service either opts to or is aptly forced through litigation to apply the mandate and definitions nationwide. This inevitability "*establish*[es] *a precedent for future actions with significant effects*." 40 CFR §1508.27(b)(7) provides that "[s]*ignificance cannot be avoided by . . . breaking* [an action] *down into small component parts*." The fact the proposed rule applies regionally does not make its ultimate effects insignificant.

Violation of Federal, State or Local Law and Requirements

Consideration of 40 CFR §1508.27(b)(10) involves whether a proposed action could run afoul of federal, state or local law and requirements related to the protection of the environment. This makes sense since, under 40 CFR §1502.16(c), an EIS must analyze "*conflicts between the proposed action and the objectives of Federal, regional, State and local . . . land use plans, policies and controls*" and how those conflicts might be reconciled. For example, in considering §1508.27(b)(10), a March 1998 U.S. Forest Service Supervisor decision noted a windstorm recovery project's compliance with the Clean Water Act and the direct implementation of "*State-approved Best Management Practices*" from Texas' "*water quality management plan*."

Through the proposed rulemaking, the Service is seeking to preempt state law regarding the active management of fish, wildlife and habitats. This preemption would significantly interfere with the implementation of state constitutional mandates and carefully crafted state laws, plans, programs, policies and requirements for the protection of invaluable environmental resources on Alaska refuges and throughout the state. And, despite the title of the proposed rulemaking, such

interference could significantly limit opportunities for harvest by federally qualified subsistence users, protected under Title VIII of ANILCA.

The rulemaking's proposed process changes also fundamentally alter the way the public is informed of refuge closures, which will frustrate compliance and enforcement of federal, state and local law. As just one example, minimum notice and effective dates under the proposed regulations mean a hunter in the field without access to the Internet, even just for the day, would be unaware of whether her or his activities were lawful or prohibited.

The Commission requests the Service withdraw the proposed rulemaking and associated draft EA and, if the Service wishes to proceed with this or a similar rulemaking effort, initiate the development of an EIS to comply with NEPA. The Commission further requests the maximum amount of public process be provided to ensure adequate and thorough consideration of the potential impacts and consequences, particularly to Alaskans and our resident wildlife.

PREEMPTION OF STATE MANAGEMENT OF FISH AND WILDLIFE

Section 6(e) of the Alaska Statehood Act of 1958 provided that "*administration and management of the fish and wildlife resources of Alaska shall be retained by the Federal Government under existing laws until . . . the Secretary of the Interior certifies to the Congress that the Alaska State Legislature has made adequate provision for the administration, management, and conservation of said resources in the broad national interest*." On April 9, 1959, the Alaska Legislature enacted House Bill 201 which, on review and following correspondence with state officials, then-Interior Secretary Seaton certified as adequate in a letter to Congress on April 27, 1959. On December 29, 1959, through Executive Order 10857, President Eisenhower confirmed certain game administration and management functions then performed by the federal government would be terminated and assumed by the State of Alaska.

In correspondence with Acting Alaska Governor Wade prior to certification, Secretary Seaton outlined several factors for consideration in developing an adequate conservation program. Of particular relevance, he noted such a program should include "*authority to enter into cooperative programs for education, research, and predator and rodent control*[.]" In concluding his recommendations, he requested "*assurance that these factors . . . have been fully considered and weighted in determining the program and plan the State of Alaska has elected to follow*."

During this time period, "conservation" generally meant using science in managing resources to ensure a sustainable yield, and the zealous federal predator control program was facing increased scrutiny. In 1964, then-Interior Secretary Udall appointed a committee of biologists, led by Dr. Aldo Starker Leopold, to examine the federal program and make recommendations. Dr. Leopold had coincidentally worked on wildlife management policies in Alaska in the 1950s and, just the year before, had advocated for the "*purposeful management of plant and animal communities as an essential step in preserving wildlife resources unimpaired for the enjoyment of future generations*." He and the committee were critical of the federal program but found a definite need for predator control, even supporting use of (subsequently banned) poisoned bait stations.

While social and scientific opinions of "predator control" have shifted since Secretary Seaton recommended Alaska incorporate it into its inaugural game management toolbox, the fact the administration transferred its game management authority to the State of Alaska has not changed. Congress has given the Service some related authorities through explicit statutory grants since 1959 (e.g., Endangered Species Act, Marine Mammal Protection Act), but none allow the preemption of state management to the extent proposed by this rulemaking.

For instance, even as it crafted the terms "*natural diversity*" and "*biological integrity, diversity and environmental health*," Congress did not grant the Service authority to second-guess and unilaterally override state management decisions regarding the methods and means of wildlife harvest in Alaska as proposed in the rule. In §1314(a) of ANILCA, Congress determined that:

> *Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in title VIII of this Act, or to amend the Alaska constitution.*

The exception for Title VIII naturally refers to subsistence management and use, meaning all "non-subsistence" authorities held by the State were left entirely intact by all other provisions in ANILCA – including, for example, the refuge purposes listed in Title III. This grows even clearer in comparing the language in §1314(b) of ANILCA, relating to the Service's authority:

> *Except as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of the public lands.*

Unlike with the State of Alaska's authority to manage fish and wildlife on public lands, Congress indicates here that there are specific provisions in ANILCA which either enlarge or diminish the Service's authority regarding public land management. Since nothing in ANILCA diminishes the State's authorities, however, none of those provisions would enlarge the Service's authorities with respect to the State.

Congress' refusal to amend the Alaska constitution is even more instructive on the issues presented by the proposed rule. The constitutional provisions which authorize and inform state wildlife management, including intensive management programs, were largely the same in 1980 as they are today. ANILCA §1314(a) demonstrates Congress had no intention of amending those provisions, or interfering with the State's established capacity to implement them, including to grant any diminishing authority claimed by the Service under §§302 and 303.

Even while establishing a management consideration in Section 5 of the Refuge Improvement Act to ensure "*biological integrity, diversity, and environmental health*" is maintained, Congress again refused to divest the State of Alaska of its authority. In Section 9, Congress established that ANILCA provisions would prevail in any real or presumed conflict with Refuge Improvement Act provisions. If the Service was not granted the authority to preempt state law in ANILCA, it was not in any way granted that authority by the Refuge Improvement Act.

DEFINITION OF NATURAL DIVERSITY

The proposed rule's inclusion of "*legislative history*" from ANILCA does little more than cherry-pick supportive comments while omitting more germane intent language. The comments which were selected as a component of the preamble were, in one instance, a floor statement offered after the signing of ANILCA or, in another instance, commentary on an early version of ANILCA that did not include any reference to or contemplation of "*natural diversity*" as ultimately used in Title III. This would not be inherently problematic except that the selected language significantly informed both the content and justification of the proposed regulations.

The purpose to "*conserve fish and wildlife populations and habitats in their natural diversity*" on Alaska refuges was added late in the development of ANILCA. As such, congressional intent

language is relatively limited. One inarguable statement of intent can be found in the legislative history at 126 CONG. REC. S15131 (Dec. 1, 1980). On entering the concurrent resolution that led to ANILCA's passage, Alaska Senator Stevens asked that four statements be recorded "*as legislative history for H.R. 39, the Alaska lands bill*." One of those four statements (included below it its entirety) exclusively related to "*Natural Diversity*":

> *Mr. President, title III of the amendment to H.R. 39 which was negotiated with Senator Tsongas, and which was recently adopted by the House of Representatives, contains some new language which has never before appeared in any of the many incarnations of H.R. 39 which have been considered by the Congress over the past four years. Sections 302 and 303 of title III designate as a major purpose of each new or expanding refuge the conservation of fish and wildlife populations and habitats "in their natural diversity."*
>
> *The phrase "in their natural diversity" was included in each subsection of those two sections to emphasize the importance of maintaining the flora and fauna within each refuge in a healthy condition. The term is not intended to, in any way, restrict the authority of the Fish and Wildlife Service to manipulate habitat for the benefit of fish or wildlife populations within a refuge or for the benefit of the use of such populations by man as part of the balanced management program mandated by the Alaska National Interest Lands Conservation Act and other applicable law. The term also is not intended to preclude predator control on refuge lands in appropriate instances.*
>
> *The word "natural" as used in the phrase "in their natural diversity" is specifically not intended to have the same meaning as the term is used in section 815(1). It is well recognized that habitat manipulation and predator control and other management techniques frequently employed on refuge lands are inappropriate within National Parks and National Park Monuments. Section 815(1) recognizes this difference by providing that the level of subsistence uses within a National Park or National Park Monument may not be inconsistent with the conservation of "natural and healthy" fish and wildlife populations within the park or monument, while within National Wildlife Refuges the level of subsistence uses of such populations may not be inconsistent with the conservation of "healthy" populations.*
>
> *Nothing in the phrase "in their natural diversity" in title III is intended to disrupt this well-defined, and long recognized difference in the management responsibilities of the National Park Service and the Fish and Wildlife Service.*

Considering its content, timing and the circumstances of its inclusion in the record, this is the clearest and most defensible statement of congressional intent regarding the management of Alaska refuges to conserve populations and habitats in their "*natural diversity*." And yet, it is not even mentioned in the proposed rule. Moreover, it substantially refutes the effect of and proffered justification for the proposed regulations.

Senator Stevens notes the addition of this new purpose for Alaska refuges was meant to ensure management that could include habitat manipulation and harvest under a balanced management program. Additionally, the appropriate use of "*predator control*" as a legitimate management tool was not to be precluded by the addition. This directly contradicts the statements made by Congressman Udall cited in the preamble and incorporated into the proposed definition of "*natural diversity*." This observation is not presented to provoke a "battle of the excerpts," but to challenge the Service's assumption that Congressman Udall's comments can be unequivocally adopted as bona fide intent language.

Senator Stevens' comments are also wholly relevant to other intent language cited by the Service, though eliciting a very different conclusion. For example, he notes the phrase "*natural*

diversity" was intended to "*emphasize the importance of maintaining the flora and fauna within each refuge in a healthy condition*." He also references the distinction in ANILCA §815(1) between managing subsistence uses consistent with the conservation of "*natural and healthy populations*" (in parks and monuments) and "*healthy populations*" (in refuges), noting use of the term "*natural*" in "*natural diversity*" was distinct from its use in §815(1) since "*habitat manipulation and predator control and other management techniques frequently employed on refuge lands are inappropriate within National Parks and National Park Monuments*." This again reinforces that habitat manipulation and predator control are consistent with managing wildlife in Alaska refuges "*in a healthy condition*."

To support the proposed rule, the preamble cites language from the Senate Committee on Energy and Natural Resources' 1979 report on H.R. 39 related to §815(1), including the following:

> *the phrase "the conservation of healthy populations of fish and wildlife"* [means] *the maintenance of fish and wildlife resources in their habitats in a condition which assures stable and continuing natural populations and species mix of plants and animals in relation to their ecosystems*[.]

This comment resembles the proposed definition of "*natural diversity*" as "*the existence of all fish, wildlife, and plant populations within a particular wildlife refuge system unit in the natural mix and in a healthy condition*[.]" According to the Congressional Record and the Senate Committee report, taken together, a "*healthy condition*" includes the potential for both habitat manipulation and predator control to benefit "*the use of such populations by man*." This interpretation would also be entirely consistent with Section 3 of the Refuge Improvement Act, which required the Service to "*sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants*[.]"

If a single congressman's post-enactment comments can be the sole source of a collective congressional intent, the Commission directs the Service to a February 9, 2016 letter by Congressman Young to the Senate Subcommittee on Fisheries, Water and Wildlife regarding certain provisions the Refuge Improvement Act (which, like Congressman Udall and H.R. 39, he originally sponsored). Congressman Young stated the proposed rule "*is in clear violation of Federal law*" and "*goes against the original intent*" of the Act by, among other things, inappropriately elevating one of the Service's 14 "*broad responsibilities*" through regulation.

Granted, the proposed definition of "*natural diversity*" and draft regulations at 50 CFR §36.32(b) do not impose an absolute prohibition on habitat manipulation and predator control. Even so, the preamble, Congressman Udall's speech and multiple presentations by the Service suggest some irreconcilable conflict with providing for harvest that is not supported by the full legislative history of ANILCA or other laws, including the Refuge Improvement Act. As the rulemaking lacks adequate historical and legal context, the Commission requests – at a minimum – that the proposed regulations at 50 CFR §§36.2, 36.32(b) and 36.42(b) be immediately withdrawn and, if necessary, revisited to ensure defensible consistency with federal law and congressional intent.

CHANGES FROM EXISTING REGULATIONS

The Commission respects that tinkering with discrete aspects of a decades-old regulatory scheme is complicated and challenging. Tracking actual, collateral and incidental changes can be tricky and cumbersome, and finding an approachable way to present and explain those changes to the public can be even trickier. The Commission found presenting the proposed changes in a table format, as the Service did in the preamble, on its website and in multiple handouts, was a useful

technique. Whether the table listed existing language alongside amendment language, when possible, or summarized the current situation and the one being proposed, the tables provided a handy quick reference for most of the significant changes.

Understanding and appreciating these challenges, the Commission would like to draw attention to some potentially confusing features in how the process changes were presented as a table in the proposed rule. If the table purports to "*summarize the changes*" being proposed, it should be structured in such a way that all the changes are represented, even those perceived as editorial or non-substantive. Many process changes were based on type of use, which could have provided a convenient organizational layer, making the inclusion of all changes less cumbersome. Also, provisions that are <u>not</u> being changed should not be listed in the "*Proposed Update*" column.

More problematic are two key, substantive omissions from the table: significant changes to the permanent closure or restriction process and required methods of notice. While it behooves any interested or affected party to review the actual proposed regulations and not rely on the limited information in the table, the two things should still reasonably align.

The following are changes to the permanent closure or restriction process at 50 CFR §36.42(e):

- Process is limited to the take of fish and wildlife and the use of aircraft, snowmachines, motorboats and non-motorized means of surface transportation
  - Removes process for any other (non-subsistence) use of an Alaska refuge
- Changes "shall be made only after" to "will be effective only after"
- Substitutes "notice" with "opportunity for public comment"
- Requires "consultation with the State and affected Tribes and Native Corporations" for closures related to the take of fish and wildlife

Only the last change is accurately recognized in the table. While the second-to-last change is recognized for fish and wildlife-related closures, the table does not recognize this change was also made to the closure process for aircraft, snowmachines, motorboats and non-motorized surface transportation. The table also states that closures "*would continue to be published in the **Federal Register***" (emphasis in original), but this is only true for closures to the take of fish and wildlife or use of aircraft, snowmachines, motorboats and non-motorized surface transportation.

The following are changes to the notice provision at 50 CFR §36.42(f):

- Adds requirement to publish all closures/restrictions on established regional regulation webpage
- Makes all (non-webpage) notice methods a non-exhaustive list by adding "*such as*"
- Removes requirement to post notices at community post offices within affected vicinity
- Removes requirement to designate closure/restriction on a map available for public inspection at the Refuge Manager's office and other places convenient to the public
- Makes all new and (non-removed) current notice methods subject to availability and reasonable likelihood to inform residents in the affected vicinity
  - Subject to availability caveat currently limited to local newspapers
  - Reasonable likelihood caveat currently limited to local radio broadcast
- Adds electronic media "*such as the Internet and email lists*" as new optional method(s)
- Removes firm requirement to post in *both* a newspaper of general circulation *and* a local newspaper if available
- Modifies extent of posting in newspapers
  - General Circulation: changes "*at least one newspaper*" to "*a*" newspaper
  - Local: changes "*at least one local newspaper, if available*" to "*local newspapers*"
- Changes "*broadcast on local radio stations*" to "*broadcast media (radio, television, etc.)*"

- Changes the alternative/supplemental requirement to post "*appropriate signs*" into a firm requirement to post "*signs in the local vicinity or at the Refuge Manager's office*" where available and reasonably likely to inform residents in the affected vicinity

The table summarizes this significant rewrite by noting parts of the first, sixth and ninth changes and promising to continue "*to use the more traditional methods of newspapers, signs and radio*." The summary misses some big changes – both expansive and limiting ones – and significantly oversimplifies the "*Current*" regulations and the proposed changes it does mention.

If tables like this are to be a staple of rulemaking efforts, particularly complex amendments like the proposed rule, the Commission welcomes this approach. However, attention to the details is critical to ensuring the table is an approachable tool for increased understanding.

PRACTICAL CONSEQUENCES OF IMPLEMENTATION

While it is unnecessary in a proposed rule to explore and discuss every possible permutation of impacts under the amended regulations, some rather obvious outcomes and contingencies were not mentioned or well explored in the preamble or associated documents.

Prohibition on "Particularly Effective" Methods and Means

The proposed regulations add a section at 50 CFR §36.32(d)(1)(v), listing the following newly prohibited methods and means of harvest on Alaska refuges:

- Using snares, nets, or traps to take any species of bear
- Using bait unless to trap furbearers or hunt black bears
- Taking wolves and coyotes from May 1 to August 9
- Taking bear cubs or sows with cubs with narrow state law exception (certain months and areas) for customary and traditional uses at a den site

What the regulations do not do is provide any indication of the qualifications for inclusion in this section. There is no explanation of how these authorizations were selected for preemption out of all the state authorizations related to predator harvest. Even knowing the Service included these allowances on finding them "*particularly effective*," there is no way for the State to know when considering a harvest opportunity, or the public to know when requesting an authorization, if it might qualify for preemption on Alaska refuges.

For example, why is it more or less "*particularly effective*" to take a coyote August 9 as opposed to August 10? The EA, which proposes to solely address the prohibitions on "*particularly effective*" authorizations, only makes things more confusing. It states that the May 1 to August 9 prohibition "*could impact the abundance and availability*" of coyotes but, overall, is not expected to change "*the abundance and availability of prey and predator populations*." It further notes the prohibition would keep populations "*managed in their natural 'mix' and in natural densities and levels of variation*." This is the case because of a 13-week general hunting closure for a single species?

Also, there is no definition or guidance on what constitutes a "*particularly effective*" method or mean of harvest. The draft EA contains the closest thing to an actual definition (on page 14):

> *Regulations or activities on refuges in Alaska that allow for unsustainable (i.e. particularly efficient) methods and means for the take of wildlife . . .*

Granted, the phrase is "*particularly efficient*," not "*particularly effective*," but if the Service is equating "*particularly effective*" practices with "*unsustainable*" practices, then no preemption is

necessary. Under state law, including the Alaska constitution, the State is prohibited from authorizing unsustainable methods and means for the take of wildlife.

Despite the Service's stated findings in the proposed rule's section on "*Federalism (Executive Order 13132),*" the seemingly arbitrary preemption of state authority to regulate methods and means of wildlife harvest on all public lands most certainly has "*significant Federalism effects.*" And not just basic tenets of federalism, but exactly the kind of federalism admonished in EO 13132 and related administrative directives, including President Obama's May 20, 2009 memo.

For instance, EO 13132 directs agencies limiting the "*policymaking discretion of the States*" to do so "*only when there is constitutional and statutory authority for the action*" and action "*is appropriate in light of the presence of a problem of national significance*." Neither the preamble nor the EA rationally connect a constitutional provision or statutory grant from Congress to the prohibitions on "*particularly effective*" methods and means of harvest. As noted earlier, the authority is not provided by either ANILCA or the Refuge Improvement Act, and the limited harvest opportunities at stake hardly rise to the level of a nationally significant problem.

Public Notice Limitations

The proposed rule provides that closures or restrictions would be effective after posting on a regional regulatory website. In recognition of the fact "*many individuals in rural Alaska do not have access to high speed Internet*," the Service notes its intent to "*continue to use other methods of communication . . . where available*." This acknowledgement does not adequately explain the proposed amendments to 50 CFR §36.42.

For example, the Service has not explained how or when a notice method would be considered "*available*." Existing regulations at 50 CFR §36.42(f) require, prior to all types of closures or restrictions, the following methods of public notice without any reference to availability:

- Publication in at least one newspaper of general circulation in the State
- Posting at community post offices within the affected vicinity
- Broadcast on local radio stations in a manner reasonably calculated to inform those affected
- Designation on a map available for public inspection in a public place

It is likely there is no reference to availability because these things would always be available. If, on the off-chance one or more of these methods was not available, the Service could satisfy its notice requirements by the posting of appropriate signs. Because the proposed rule eliminates each of these methods as a requirement, having the preamble say they will be used "*where available*" falls quite flat. Since these methods are always available, where is the line being drawn that compels changes to the existing regulations?

Though not mentioned in the preamble, that a method be "*available*" is not the only qualification regarding its use – it must also be "*reasonably likely to inform residents in the affected vicinity.*" Even though this vaguely resembles the existing radio broadcast requirement, this is an entirely new condition for every non-website outreach method. There is no guidance for managers or the public on how a determination would be made to comply. The reason the existing regulations require either designation through the posting of signs or multiple means of outreach is to ensure the reasonable likelihood that residents in the affected vicinity will be informed.

The Service argues these amendments to current public notice guarantees are needed to more effectively engage the public in a fiscally sustainable manner. Neither the proposed rule nor its supporting documentation is clear on why the existing and longstanding requirements for public notice are either ineffective or uneconomical as to merit this unexpected and casual removal.

Signs, post office notices, maps and broadcasts are standard, readily available, inexpensive outreach tools, making the Service's rationale and proposed qualifications very confusing.

Public Participation Limitations

The preamble also acknowledges that "*in-person public meetings will still be the most effective way to engage Alaskans*" and the Service "*intend*[s] *to continue that practice*." Unfortunately, this commitment is not consistently provided for in the proposed rule. In fact, the proposed regulations only require a public meeting when "*opening*" a refuge, and only "*upon request*."

A public hearing is still required if the closure or restriction is related to the use of aircraft, snowmachines, motorboats or non-motorized surface transportation. For the take of fish and wildlife, public hearings are still required for emergency and temporary (but not permanent) closures or restrictions. If any other refuge use is at issue, the proposed regulations do not require a public hearing, or in-person meeting, even if the closure or restriction is permanent.

While the proposed amendments do not prohibit public meetings from being held, they represent an enormous change from the existing regulations and no adequate justification or explanation is provided in either the preamble or EA. There is a passing reference to "*improved consistency*" with the federal subsistence closure process, but only in reference to selective components of the notice and durational requirements for emergency and temporary closures at 36 CFR §242.19/50 CFR §100.19. Also, since the Service's proposed regulations randomly deviate from the federal subsistence closure process, it is hard to see how these changes will "*help minimize confusion*."

No explanation is necessary for continuing to require a public hearing in the vicinity of the area affected by closures or restrictions regarding the use of aircraft, snowmachines, motorboats or non-motorized surface transportation, as the hearing is required under ANILCA §1110(a). However, ANILCA §304(d) also requires a hearing in the affected locality before refusing to permit the exercise of valid commercial fishing rights or privileges, and the use of refuge lands directly incident to such exercise. Under the existing regulations, this is conceivably covered by the requirement for notice and hearing regarding permanent closures or restrictions. Since that requirement is proposed to be eliminated, the resulting regulations would be inconsistent with the local hearing requirement under ANILCA §304(d).

The most noticeable proposed changes to the existing regulations may, in fact, be unintentional. Revisions to 50 CFR §36.42(e) parse out specific permanent closure or restriction processes for special access under ANILCA §1110(a) and for the take of fish and wildlife; however, the revised regulation has no process for the permanent closure or restriction of any other refuge use. When the Commission pointed this out to Service staff, they were adamant this is not the Service's intent. If that is the case, the Commission recommends the Service withdraw all changes to 50 CFR §36.42(e). If necessary, and without removing anything, the Service can still add an "*opportunity for public comment*" for ANILCA §1110(a) access and "*consultation with the State and affected Tribes and Native Corporations*" for the take of fish and wildlife.

The Commission hopes another, less noticeable proposed change is also unintentional; or, at most, simply a drafting preference. Proposed amendments to 50 CFR §§36.42(d)(1) and (e) establish when a temporary or permanent closure or restriction, respectively, becomes "*effective*" regarding ANILCA §1110(a) access:

- §36.42(d)(1) changes "*shall not be effective prior to notice and hearing*" to "*will be effective only after notice and hearing*" and
- §36.42(e) changes "*shall be made only after*" to "*will be effective only after*."

The existing and proposed language is not functionally interchangeable. The only thing assured by the proposed regulations is that a closure or restriction will not be put into effect until after the required process is complete. No assurances are made that input given during the process will have an impact on the Service's decision, just that it will predate the implementation. Under the existing regulations, however, the implication is of assuring an ability to meaningfully participate in the decision-making process. This would not be an issue at all except that the language changes were made, without mention or explanation, and do not appear at all necessary.

IMPACTS TO FEDERAL SUBSISTENCE USERS

Although the proposed rule is titled "*Non-subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*," implementing the regulations, as proposed, will impact federally qualified subsistence users. And even though the Service qualifies the title in the preamble, by stating the rule "*would not change Federal subsistence regulations or restrict the taking of fish and wildlife for subsistence uses under Federal subsistence regulations*," that caveat also mischaracterizes the potential effect of the rulemaking.

Subsistence Fisheries

Amendments to the existing regulations at 50 CFR §§36.11, 36.13 and 36.14 remove recognition of state laws and regulations governing take of fish and wildlife on refuge lands for subsistence uses. The preamble describes this as simply a housecleaning measure to "*reflect Federal assumption of management of subsistence hunting and fishing under Title VIII of ANILCA by the Federal Government from the State in the 1990s*." However, the proposed amendments do much more than make that simple clarification.

The Commission requests the proposed amendments to 50 CFR §§36.11, 36.13 and 36.14 be withdrawn and discussed in detail with the Alaska Department of Fish & Game (ADF&G). It may even be beneficial to include in this discussion the title change for 50 CFR 36, Subpart D, from "*Other Refuge Uses*" to "*Non-subsistence Uses*." The advice and incomparable expertise of the Service's subsistence resource advisory commissions (RACs) should also be incorporated, as should input from the public when the full impact of the proposed changes is determined and can be adequately explained. There is nothing problematic about the existing regulations and it is possible there could be many unintended consequences from the proposed amendments.

For instance, members of the public have contacted the Commission concerned that Alaskans will no longer be able to harvest under state subsistence regulations on Alaska refuges. The Commission has not been able to alleviate those concerns based on the literal impact of the proposed rule. ADF&G manages for subsistence uses under state law, including providing a robust and critical subsistence fisheries program. Although this management does not necessarily operate under or owing to federal regulations, including 50 CFR 36, Subpart B, removing recognition of state law casts a legitimate shadow on its operation on refuge lands.

Existing regulations at 50 CFR §§36.11(d), 36.13 and 36.14 were never limited to subsistence use under Title VIII. In fact, 50 CFR §36.11(d) – which will be removed in its entirety under the proposed rule – simply required state subsistence regulations be "*consistent with applicable Federal law, <u>including but not limited to ANILCA</u>*" (emphasis added). This is still true, even with the assumption of the federal subsistence program by the Secretaries. As contemplated in ANILCA (e.g., Section 802), and fundamental to responsible management in general, working closely with ADF&G, the RACs and the public towards an appropriate regulatory clarification, if one is even necessary, could avoid the unintentional loss of essential harvest opportunities.

Use of Bait

The existing regulation at 50 CFR §32.2 outlines requirements for persons "*engaged in public hunting on areas of the National Wildlife Refuge System*[.]" The proposed amendment to 50 CFR §32.2(h) would newly prohibit all use of bait except for "*black bear baiting*" under state law in Alaska. Both the proposed rule and the draft EA provide the following justification:

> *Implementation of* [Intensive Management] *and many of the recent liberalizations of the general hunting and trapping regulations have direct implications for the management of refuges in Alaska. Predator-prey interactions represent a dynamic and foundational ecological process in Alaska's arctic and subarctic ecosystems, and are a major driver of ecosystem function. Regulations or activities on Alaska refuges that are inconsistent with the conservation of fish and wildlife populations and their habitats in their natural diversity or the maintenance of biological integrity, diversity, and environmental health are in direct conflict with our legal mandates for administering refuges in Alaska under ANILCA, the* [Refuge] *Improvement Act, and the Wilderness Act, as well as with several applicable agency policies (601 FW 3, 610 FW 2, and 605 FW 2).*

Regulations at 36 CFR §242.26(a)/50 CFR §100.26(a) provide for federally qualified subsistence users to "*take wildlife for subsistence uses by any method, except as prohibited in this section or by other Federal statute*." Subparts of both sections provide allowances for the use of bait to harvest black bears and other wildlife. If the Service is eliminating the use of bait other than to harvest black bears under state law in order to comply with federal statutes, as the proposed rule and the EA indicate, the continuation of those provisions for federally qualified subsistence users is at best confusing and forebodes their prohibition, as well.

Public Participation Process

Federal subsistence users are, by definition, rural residents of Alaska. Unlike trying to explore or forecast impacts to subsistence harvest opportunities from the wildlife-related amendments (a very valid concern we hope will be addressed), no speculation is necessary to know that rural Alaska residents are the most disenfranchised group under the process-related amendments.

The proposed amendments only require notice be provided on the Service's website. Other methods, including newspapers, posted signs, maps, radio announcements and notices at post offices in the affected area, would no longer be required. The Commission agrees adding the Internet to the suite of existing tools would be a beneficial update; however, replacing the requirement for other, more locally driven methods of outreach with the Internet is inappropriate. As noted by the Service in the preamble, reliable Internet service is an unrealistic expectation for many rural Alaskans, including those at risk of citation under the proposed and future closures and restrictions. As such, shifting notification to the Service's website could readily cut those most intimately impacted by fishing, hunting, trapping and access closures out of the loop.

Proposed and future refuge closures and restrictions do not impact Alaskans in some abstract or ideological sense. Alaska refuges cover enormous areas of the state, over 76 million acres total, including areas that have been inhabited and utilized for thousands of years. Limiting refuge uses can threaten everything from food and energy security, recreation, public health and safety, family and community bonding, income from commercial and other activities, participating in and passing on cultural traditions and access to and from villages, fish camps, maintained transportation routes, cabins and settlements. While the Service must consider its mandate and national interests, make no mistake, administrative actions are borne on the backs of Alaskans.

The Commission argues, in the strongest possible terms, that input and insights provided by Alaska residents – some of whom live within the external boundaries of the refuges being regulated – are indispensable in the sound management of public lands, and no closure or restriction should be proposed or finalized without actively facilitating their contribution. The Service is lucky to have Alaskan experiences to draw from in its decision making, which the existing regulations recognize. It makes no difference at all that some federal subsistence uses have a public participation process that is not at issue in this proposed rulemaking, because those uses are not the only things that impact or matter to federally qualified subsistence users.

The proposed rule's unceremonious removal of notice and process guarantees respecting local knowledge and participation by the regulated public is disrespectful and disheartening. The Commission requests all changes to the existing public notice and participation process at 50 CFR §36.42 be withdrawn. With no indication in the EA or preamble of a problem that needs fixing, and with inconsistent or nonexistent regulatory manifestations of the Service's stated intent (see above), the Commission has no alternatives to withdrawal it can reasonably suggest.

SPECIFIC COMMENTS

Even though the preamble and the new table at 50 CFR §36.32(d)(1)(v) state that bait may be used to trap furbearers, this is wholly contradicted by the proposed changes to 50 CFR §32.2(h), which would prohibit it. Although it is not uncommon for Alaska-specific regulations at Part 36 to deviate from System-wide regulations at Part 32, in this instance, the regulation in Part 32 has the Alaska exception in it, which the Service is both amending and simultaneously contradicting in another provision. If the Service intended to allow it and, as the EA indicates, only meant to prohibit the harvest of brown bears over bait, the proposed regulations do not reflect that.

The Service proposes to add a new section at 50 CFR §36.32(b), which would displace the current §36.32(b) and make it §36.32(c). The current §36.32(c) was relocated, functionally unchanged, to §36.32(d)(1)(i) through (d)(1)(iii) and (d)(2). With all this shifting, it looks as though the cross-reference in §36.32(d)(1)(ii) was supposed to have been updated. It still directs the reader to §36.32(b) instead of to that section's new proposed location at §36.32(c).

Despite contrary statements in both the preamble and the EA, "*natural diversity*" actually is defined in Service policy. The 1992 policy on "*Population Management at Field Stations*" at 701 FW 1 defines "*natural diversity*" as "[t]*he number and relative abundance of indigenous species which would occur without human interference*." This seems an ironic goal in the immediate vicinity of a field station, which the policy points out. The policy also prescribes that population "*management activities or practices, even those implemented for the benefit of a single species or small group of species, will, to the extent possible, contribute to the widest possible natural diversity of indigenous fish and wildlife and habitat types*." Also, populations are emphasized, as opposed to "*individual members of a population*." While the definition itself is rather rigid, and unlikely to be successful at the Alaska refuge scale, the policy tempers it with considerations that are much more flexible than those contemplated by the proposed rule.

CONCLUSION

So much of the proposed rule has to be revisited, it makes little sense to do anything other than withdraw the entire package. There is nothing about the status quo that is inconsistent with or detrimental to the Service's legal mandates for management of Alaska refuges. For example:

1. As the Service itself points out, the State has not and is not proposing an intensive management program on any refuge in Alaska, and Service policies (listed in the EA) already outline the circumstances under which one might be proposed and considered.

2. The so-called "*particularly effective*" methods of harvest under state regulations do not constitute predator control, are not even effective means of predator control, and the State is constitutionally prohibited from allowing the scenarios proposed by the Service to occur.
3. The fact the Service has to manage refuges for "*natural diversity*" and "*biological integrity, diversity, and environmental health*," along with many other purposes and considerations, is true regardless of whether or how it is stated in regulation.
4. Having the State as a component of agency-specific subsistence regulations at 50 CFR 36, Subpart B, is completely benign and not misleading.
5. Nothing prevents the Service from adding the Internet and other electronic outreach methods when satisfying existing requirements for public notice.
6. The existing closure process is effective, flexible, meaningful and well understood by both the Service and the regulated public.

If some tweaks are necessary due to unexplained administrative challenges (e.g., time required to post in the *Federal Register*, the closure of several refuge offices, shutdowns, lack of effective legal tools to manage) or other issues that were not raised in the preamble or draft EA, launching an LAC-esque stakeholder process to address those concerns could be a great path forward where everyone benefits. The Service does not need to independently dream up ways to solve all its problems on its own – that is the beautiful thing about Region 7, having the benefit of invested and informed Alaskans rich with wisdom, experience, ingenuity and a dedication to stewardship. If you receive a single public comment that makes you reconsider, imagine what more we could have accomplished if that comment was considered earlier in the process.

Even though the Service began its outreach on the proposed rulemaking over a year ago, went to multiple meetings, put out numerous documents, sent letters to tribes, Native Corporations, user groups and the public, this was not a stakeholder process. The issues were generic and changed a number of times, no one was ever provided with any language, and no one was *really asked* how *they* might resolve the real issues. Those contacted were simply told, in general terms, how the Service interpreted things and what it had decided to do about it. At least, this is how it looked to the Commission. Stakeholder processes look different. For one thing, the comment letters are much shorter.

On that note, thank you for this opportunity to comment on the proposed rulemaking. Please do not hesitate to contact the Commission with questions or concerns raised by these comments or otherwise related to these issues.

Yours faithfully,

Sara Taylor
Executive Director