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Department of the Interior **Fish and Wildlife Service** (FWS) Proposed Rule:
Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge
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**Attorneys for Animals Comment on Proposed Rule:
Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge**

Submitted Electronically via eRulemaking Portal:

<https://www.regulations.gov/comment?D=FWS-R7-NWRS-2017-0058-34314>

Attorneys for Animals, Inc. (AFA) is a Michigan non-profit and 501(c)(3) organization that includes attorneys, law students, law school graduates, and other advocates who work to improve the lives of animals. Founded in the 1990s, our mission is to work within the legal system to encourage efforts to ensure that animals are recognized, treated, and protected as individuals with inherent value. We actively follow legislative, administrative, and policy actions related to the welfare of animals, both in Michigan and nationwide.

We oppose the Proposed Rule to amend the Kenai National Wildlife Refuge's public use regulations and urge the U.S. Fish & Wildlife Service ("FWS" or "the Service") to reject it for the following reasons:

- 1) The Proposed Rule is in conflict with the purposes of The **Alaska National Interest Lands Conservation Act of 1980, (ANILCA)** and other applicable federal law and;
- 2) The Proposed Rule represents arbitrary and capricious agency action in violation of the Administrative Procedures Act (APA) because it reverses long-standing agency policy without adequate justification and;
- 3) The Environmental Assessment (EA) is inadequate under the National Environmental Protection Act (NEPA) because it fails to provide objective analyses to support its conclusions and improperly categorically excludes the Federal trapping permit requirement from review. Furthermore, the proposed changes are highly controversial, necessitating an Environmental Impact Statement (EIS).

When ANILCA became law 40 years ago it had two primary goals: 1) to protect and conserve Alaska's natural lands and wildlife in trust for the national public interest for present and future

generations and 2) to protect subsistence use by indigenous peoples of Alaska. Permissible purposes under ANILCA include research, education, recreation...and subsistence use *in a way that will leave the lands “unimpaired” for future generations*¹ [emphasis added]. The purposes of establishing the Kenai National Wildlife Refuge, specifically, include *conservation of fish and wildlife populations and habitats in their natural diversity*². In essence, the purpose of ANILCA is to keep millions of acres of wild Alaska wild. The proposed rule does nothing to serve these stated goals.

1) THE PROPOSED RULE IS CONTRARY TO THE PURPOSES OF ANILCA AND IS IN CONFLICT WITH OTHER APPLICABLE FEDERAL LAW

FWS states that “[t]he purpose of the Proposed Rule is to align public use regulations on Kenai National Wildlife Refuge (“NWR”) with State of Alaska regulations, align the Service and State management of fish and wildlife to the extent practicable and consistent with Federal law, enhance consistency with harvest regulations on adjacent non-Federal lands and waters, and increase access to Federal lands in furtherance of Secretarial Orders 3347 and 3356.” It (1) adopts Alaska’s regulations allowing baiting of brown bears; and (2) removes the requirement of obtaining a federal permit for trapping, thereby relying on the much less stringent state trapping regulations.

The Proposed Rule ignores statutory requirements and unduly and illegally relies on Secretary’s Orders. It is neither “practicable” nor “consistent” with Federal law, as a review of applicable statutes and the previous rule, when compared to Alaska’s management practices, clearly demonstrate. The following are examples of such inconsistencies:

The **National Wildlife Refuge Administration Act**³, is considered the “organic act” of the NWR system. As explained by FWS itself, it “establishes a unifying mission for the Refuge System, a process for determining compatible uses of refuges, and a requirement for preparing comprehensive conservation plans. This Act states first and foremost that the mission of the NWR System be focused singularly on wildlife conservation.”⁴

The Secretary’s actions are restricted by this statute. Any use of a national wildlife refuge must be “compatible”, defined as a use “that, in the sound professional judgment of the Director, will not materially interfere with or detract from the fulfillment of the mission of the System or the purposes of the refuge.”⁵

“FWS is mandated under the Improvement Act to “ensure that the biological integrity, diversity, and environmental health [BIDEH] of the System are maintained for the benefit of present and future generations of Americans. . .”⁶.

¹ 16 USC 3101 et seq.

² Id. at 303(4)(B)(i).

³ 16 USC 668dd et seq.

⁴ <https://www.fws.gov/refuges/policiesandbudget/mandates.html>

⁵ 16 USC § 668ee(1)

⁶ 16 U.S.C. 668dd(a)(4)(B)

ANILCA defines the purposes for which the Kenai National Wildlife Refuge was established, including “to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, ... bears, ... wolves and other furbearers ...”⁷.

The 2016 Final Rule⁸, which the Proposed Rule would overturn, refused to defer to Alaska’s regulations that allow the baiting of brown bears and required (stronger) federal trapping licenses. Just over four years ago, FWS concluded that “(t)he State of Alaska's ... legal framework for managing wildlife is based on a different principle than the legal framework applicable to management of the National Wildlife Refuge system”.⁹

This difference in philosophy between FWS and Alaska is particularly notable with regard to predator management¹⁰. State management practices for brown bear baiting and relaxed regulation of trapping, which FWS is currently attempting to adopt on federal refuges with the Proposed Rule, were described by the agency a few short years ago as being “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.”¹¹

What has changed to prompt the Proposed Rule? Neither of the laws cited above has been revised. Alaska’s hunting regulations have not been changed to better align with long-standing and science-based federal conservation policy. However, two Secretary Orders were issued in 2017 that are being used, illegally we assert, to authorize the Kenai National Wildlife Refuge to defer to Alaska regulations.¹²

Secretary Order 3447¹³ directed the Interior Department to identify, expand, and enhance recreational hunting opportunities on federal lands. However, “**(t)o the extent there is any inconsistency between the provisions of this Order and any Federal laws or regulations, the laws or regulations will control.**” [emphasis added]

⁷ ANILCA § 303(4)(B)(i)

⁸ <https://www.federalregister.gov/documents/2016/08/05/2016-18117/non-subsistence-take-of-wildlife-and-public-participation-and-closure-procedures-on-national>

⁹ <https://www.federalregister.gov/d/2016-18117/p-26>

¹⁰ <https://www.federalregister.gov/d/2016-18117/p-36>: “The different purposes of State and Federal laws and the increased focus on predator control by the State have resulted in the need for FWS to deviate, in certain respects, from applying State regulations within refuges. This is because 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. State regulations allowing activities on refuges in Alaska 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 Improvement Act, and the Wilderness Act, as well as with applicable agency policies (601 FW 3, 610 FW 2, and 605 FW 2)”.

¹¹ Ibid.

¹² On January 13, 2017, the State of Alaska filed suit challenging the 2016 rule as infringing on its right to manage wildlife on public lands. Other lawsuits by hunting groups are also filed, consolidated and later stayed, *Alaska v. Interior*, No. 3:17-cv-00013 (D. Alaska)

¹³ SO 3447, https://www.doi.gov/sites/doi.gov/files/uploads/revised_so_3447.pdf

In September 2017, the Secretary issued **Order 3356**, “Hunting, Fishing, Recreational Shooting, and Wildlife Conservation Opportunities and Coordination with States, Tribes, and Territories”¹⁴, with a specific directive to upend the 2016 predator management practices to advance “shared wildlife conservation goals/objectives that align predator-management programs, seasons, and methods of take permitted on all Department-managed lands and waters with corresponding programs, seasons, and methods established by state, tribal, and territorial wildlife management agencies **to the extent legally practicable.**” [emphasis added]

Conclusion: FWS is abdicating its responsibilities to follow the laws discussed above, in favor of an uncritical – and politically motivated – adoption of Alaska’s policies regarding trapping, and the baiting of brown bears. These uses are not compatible with the mission of the NWR and, in particular, with the purposes under which the Kenai NWR was established.

2) THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS ACTION BY FWS IN VIOLATION OF THE APA

Arbitrary and capricious agency action is unlawful¹⁵. Specifically, to impose a policy that alters its past practice, an agency must believe that the new policy is better than the old one¹⁶. If the factual findings supporting the new policy contradict those supporting the old policy, the agency must provide a reasoned explanation for the change¹⁷.

The proposed rule reflects an alteration of the Service’s position from its 2016 adoption of public use regulations for the Kenai National Wildlife Refuge. For example, in 2016, FWS found that a prohibition on the baiting of brown bears was:

- 3) necessary to meeting [its] mandates under ANILCA to conserve healthy populations of wildlife in their natural diversity on the Refuge, to meet the Refuge’s Wilderness purposes, and to meet the Refuge’s purpose for providing compatible wildlife-oriented recreational opportunities (both consumptive and non-consumptive). . . . [T]he Service considers allowance of [baiting of brown bears] to be inconsistent with these mandates due to its potential to result in overharvest of this species, with accompanying population-level impacts, due to its high degree of effectiveness as a harvest method and the species’ low reproductive potential. The Service also believes that baiting of brown bears has potential to modify bear behavior and increase human-bear conflicts, and that allowance of this method to take brown bears on the Refuge would result in increased baiting activity and pose an increased risk to public safety¹⁸.

Specifically, FWS found that after liberalized State regulations allowed baiting of brown bears, human-caused mortalities of the bears increased substantially¹⁹. FWS relied on a joint field study

¹⁴ SO 3356, https://www.doi.gov/sites/doi.gov/files/uploads/signed_so_3356.pdf

¹⁵ 5 USC 706(2)(A).

¹⁶ *FCC v Fox TV Stations, Inc*, 556 US 502, 515 (2009).

¹⁷ *Id.*

¹⁸ *Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge*, 81 Fed Reg 27,030 & 27,036 (May 5, 2016).

¹⁹ *Id.*

conducted by the Refuge and U.S. Forest Service which it considered “the best available scientific estimate” of the Kenai Peninsula-wide brown bear population,” and its own population modeling to find that the liberalized State regulations would result in a decline of the 2010 population by about 18 percent²⁰. It further found that continuation of the expected trend could reduce the population to levels posing conservation concerns. FWS made additional specific factual findings regarding the density of the brown bear population, brown bears’ reproductive potential, and their genetic diversity, among other findings, as they relate to conservation concerns. FWS also made specific factual findings regarding the negative public safety repercussions of allowing the baiting of brown bears.

Similarly, FWS determined in 2016 that it was necessary to prohibit discharge of firearms in the areas identified in 50 CFR 36.39(i)(5)(i) “to reduce threats to public safety posed by discharge of firearms along the Russian and Kenai rivers during periods of high visitation for activities including fishing, river floating, hiking, and wildlife observation.”²¹ FWS Service found that “[f]ield observations by Refuge staff and interactions with users and permitted fishing guides and outfitters have documented steadily increasing levels of public use . . . on and along the upper Kenai and Russian rivers,” and that “[p]ublicly available study reports corroborate these observations.”²² “[T]akes of brown bears along the Russian and Kenai rivers during the falls of 2013 and 2014 posed threats to public safety, as bears were shot in close proximity to other users . . . and firearms and ammunition with substantial lethal distances were used in areas where sight distances are extremely limited due to vegetation and river meanders.”²³ The Service also noted, in 2016, that the prohibition would have “negligible impacts on hunting opportunity and harvest levels.”²⁴

In stark contrast with the FWS position in 2016, the Proposed Rule offers absolutely no factual findings in support of the Proposed Rule, let alone conflicting factual findings that would allow FWS to disregard its prior position. Instead, it relies principally on Secretarial Orders to align Federal regulations with State Regulations and requests from the State of Alaska, notwithstanding its recognition in 2016 that “[p]rotection of public safety is a critically important responsibility . . . in managing public use on refuge lands.”²⁵ FWS also found, in 2016, that the regulation it adopted regarding discharge of firearms was consistent with state regulations because it did “not apply to firearms discharge on or along Skilak Lake²⁶.”

Conclusion: FWS has not provided a reasoned explanation for the policy change, rendering the Proposed Rule arbitrary and capricious in violation of the APA.

3) FWS HAS FAILED TO MEET ITS OBLIGATIONS UNDER NEPA

²⁰ Id.

²¹ Id. at 27,034.

²² Id.

²³ Id.

²⁴ Id.

²⁵ Id.

²⁶ Id.

We agree with comments provided by other groups that FWS must comply with NEPA as it existed prior to the final amended rule²⁷ as failing to do so would require a new public comment process. In addition, the amended final NEPA rule will almost certainly be challenged in court, thus, adopting it at the end of the current process would be premature and improper.

The Environmental Assessment (EA) is inadequate under NEPA because it lacks objective analyses.

The EA does not contain objective analyses to support FWS' conclusions concerning environmental impacts as required by NEPA²⁸. In its EA, FWS acknowledges that certain changes could result in negative or uncertain impacts to the refuge but provides no objective analyses to support or justify adopting the proposed changes despite these concerns. The concerns are simply raised and dismissed. For example, the EA acknowledges the fragility of the genetically unique population of brown bears on the Kenai and their low reproduction potential stating that "the Kenai brown bear population remains a relatively small population that is highly sensitive to high adult female and high overall human-caused mortality levels"²⁹. In fact, the EA conclusion that any increase in the taking of brown bear over bait will have small and localized effects directly contradicts the scientific findings by refuge biologists (discussed in the previous section) who expressed concern that increases in overall human-caused mortality levels would result in population decline. In addition, the EA never analyzes how the proposed changes will impact the overall reproductive fitness of the unique Kenai brown bear population or the natural predator-prey balance.

In its discussion of cumulative impacts, the EA mentions but does not thoughtfully consider the impacts of the Swan Lake fire, which destroyed over 100 acres of habitat, or the impacts of development which have put pressure on refuge wildlife, including brown bear habitat and behavior. The incremental impact of the proposed changes will result in significant overall increased pressure on the refuge's brown bear population as well as the natural diversity and habit of all wildlife on the refuge. The EA raises concerns for significant and cumulative impacts and dismisses them as being minor, localized, or unknown.

Conclusion: The EA is wholly inadequate and has not met the criteria for objective analyses as required by NEPA. While we do not take a position today on the proposed changes to increase access and vehicle use on the refuge, it is worth noting that increasing human access and activity is an additional stressor on wildlife habitat with the potential to impact wildlife behavior and territory which USFWS has not adequately considered in its EA.

FWS cannot categorically exclude removal of the Federal trapping permit requirement from its analysis because there are extraordinary circumstances.

The EA did not provide analysis for removal of the refuge-specific federal trapping permit requirement because it concluded the change was "minor" and fell under a categorical exclusion, requiring no further analysis. The EA dismisses the impacts of removing the federal trapping

²⁷ Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43304 (July 16, 2020, effective date September 14, 2020).

²⁸ 43 CFR 46.310(g).

²⁹ Draft Environmental Assessment for Amendment of Public Use Regulations at Kenai National Wildlife Refuge, June 11, 2020

requirement as “minor”, not necessary for any conservation purpose, duplicative, and an unnecessary regulatory burden on the public. However, the differences between State and Federal trapping requirements as summarized in Table 1 of the EA demonstrate that this proposed change is anything but “minor”. Importantly, none of the categorical exclusions listed in 43 CFR 46.210 applies to this proposed change. Even if the proposed change were to fall under the umbrella of a categorical exclusion, there is an exception if there are extraordinary circumstances for individual actions within categorical exclusions³⁰. Removal of the federal trapping permit requirement would lead to a radical departure from long standing past and current practices. For example,

- Under the proposed scenario, there will be no requirement to tag or check traps which is a major change from current practice - under the State permit system, there is no accountability.
- In addition, adopting state permit trapping licensure rules would remove important safety buffers (e.g. the prohibition of trapping within one mile of public roads, campgrounds, and trailheads) which is a significant departure from current practice with human health and safety implications.
- Removal of the federal trapping permit requirement would also do away with the prohibition of setting traps and snares near bait. This restriction minimizes the chances of taking non-targeted wildlife and removing it will lead to wasteful loss of non-targeted animals. This change warrants further discussion in light of the proposed addition of brown bear baiting to the refuge.
- Most importantly, under the state permitting scheme there is no requirement to check traps. This will result in needless suffering and agony for the animals who are not immediately killed in traps.

These important differences are examples of extraordinary circumstances which cannot be categorically excluded from review. The mere fact that the Proposed Rule is highly controversial with uncertain consequences for the brown bear population and the overall character of the refuge would *alone* trigger further analysis. Removal of trapper accountability and safety barriers has obvious public health and safety implications. In addition, the proposed changes set a dangerous precedent for future actions allowing even more access and degradation of the refuge, in direct contravention to its mission. Lastly, the proposed action will have an incremental impact on brown bear behavior and habitat as previously discussed, resulting in a cumulative significant impact on the refuge’s overall brown bear population.

Conclusion: The consequences that would result from removal of the federal trapping permit requirement have not been adequately considered or analyzed. FWS cannot categorically exclude this proposed change from its analysis as it obvious to even the casual reader that it has impacts far beyond mere streamlining of administrative regulatory burden.

NEPA requires an EIS because the proposed changes are highly controversial.

“If the proposed action will have a significant impact on the human environment *or will be controversial*, an EIS is required³¹ [emphasis added]. Thus, an EA is not the appropriate level of

³⁰ 43 CFR 46.205(c) and 46.215.

³¹ NEPA Handbook for the National Wildlife Refuge System, October 2014

analysis required by NEPA for significant actions that are likely to be controversial, as is the case here where the agency is departing from long-standing law and policy and reversing course on a decision it made only four years prior.

Conclusion: As evidenced by the deluge of comments submitted thus far (over 44,000 to date) which have been overwhelmingly opposed to the changes, the Proposed Rule is clearly controversial, requiring an EIS.

OVERALL CONCLUSION

Federal lands are held in trust for the benefit of all citizens, not a subset of citizens and special interest groups. The Proposed Rule is slanted to the benefit of one type of recreational use (namely, hunting/trapping, which represents a very small segment of all permissible uses) to the detriment of other permissible uses and the mandate of the refuge itself. A decision to allow bear baiting and trapping at a tourist destination used largely for other recreational purposes seems especially egregious. For all the above-stated reasons, we respectfully request that FWS reject the Proposed Rule with regard to the proposed changes to trapping and brown bear baiting. In the alternative, FWS should conduct an EIS in which the environmental impacts of these proposed changes are thoroughly and adequately addressed.

Very truly yours,

Attorneys for Animals, Inc.

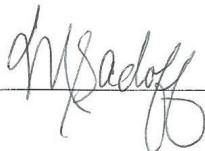
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