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February 8, 1999

Mr. John Haubert
Department of the Interior
Room 3230
1849 C Street, NW
Washington, D.C. 20240

Dear Mr. Haubert:

Thank you for the opportunity to provide the State of Alaska's comments on the Department of Interior's (DOI) December 9, 1998, proposed rulemaking for Wild and Scenic Rivers, proposed at 43 CFR Part 39. The following comments represent the consolidated views of the State's resource agencies.

The Proposed Rule Ignores Previous State Comments.

The State of Alaska commented on an almost identical 1996 rulemaking, at that time limited to lands under the jurisdiction of the Bureau of Land Management (BLM) (61 FR 47726 proposed September 10, 1996). We are very disheartened to see that the State's substantive comments had little effect, and that DOI provided no response to or acknowledgement of our effort. For this reason, we are attaching our previous comments submitted in response to the 1996 proposal, dated December 12, 1996, and incorporate them here by reference.

The Proposed Rule inappropriately grants land-use decisions about state-owned land and resources to the Department of Interior.

The proposed regulation does not reflect the requirements of the Wild and Scenic Rivers Act (WSRA), nor the WSRA as it was modified for Alaska by the Alaska National Interest Lands Conservation Act (ANILCA). ANILCA Section provides that lands in state and private ownership are excluded from the boundary of Wild and Scenic Rivers. The proposed regulation makes no provision for this exclusion; rather, it subverts the statutory commitment of ANILCA by requiring permits be denied unless, as indicated in Section 39.4(a)(1) "*The water resource project will not have a direct and adverse effect on the values for which a Wild and Scenic River was designated...*" Paragraphs (a)(2) and (a)(3) contain similarly restrictive language.

While the WSRA grants certain authorities to federal agencies responsible for managing designated rivers, it also contains limitations on those authorities. For example, Section 13 of the WSRA contains the following provisions:

> *(a) Nothing in this Act shall affect the jurisdiction or responsibilities of the States with respect to fish and wildlife....*
> *(d) The jurisdiction of the States over waters of any stream included in a national wild, scenic or recreational river area shall be unaffected by this Act to the extent that such jurisdiction may be exercised without impairing the purposes of this Act or its administration...*
> *(f) Nothing in this Act shall affect existing rights of any State, including the right of access, with respect to the beds of navigable streams, tributaries, or rivers (or segments thereof) located in a national wild, scenic or recreational river area...*

In addition to the general provisions found in the WSRA, ANILCA contains specific provisions for designated rivers within Alaska which also serve to limit the scope of federal agencies' management authorities. It is clear from specific statutory language that, with respect to Alaska components of the wild and scenic river system, Congress intended to limit the extent of the managing agency's authority over activities which may occur on non-federal lands either within or adjacent to a designated river area. For example, ANILCA Section 103(c) states:

> *Only those lands within the boundaries of any conservation system unit which are public lands (as such term is defined in this Act [1]) shall be deemed to be included as a portion of such unit. No lands which...are conveyed to the State, to any Native Corporation or to any private party shall be subject to the regulations applicable solely to public lands within such units...*

These regulations also fail to recognize another important statutory difference for components of the wild and scenic river system in Alaska. ANILCA Section 606(a) amended the WSRA to state that with respect to certain designated components of the wild and scenic river system within Alaska, the boundaries of each of these rivers:

> *...shall not include any lands owned by the State or a political subdivision of the State nor shall such boundary extend around any private land adjoining the river in such manner as to surround or effectively surround such private lands;...*

The designated river segments in Alaska managed under the WSRA by the DOI are included in the ANILCA list of rivers whose boundaries, by definition, do not include non-federal lands.

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[1] Section 102(3) of ANILCA states: "The term "public lands" means land situated in Alaska which after the date of enactment of this Act area Federal lands, except-

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any provision of Federal law..."

The proposed regulations (§39.4) contain criteria under which the DOI will approve federal assistance to, or authorization of, a water resources project. Approval will be granted if it is determined that:

> *(1) The water resources project will not have a direct and adverse effect on the values for which a Wild and Scenic River was designated or a Study River was authorized, by Congress when any portion of the project or construction is within the boundaries of such river;*
>
> *(2) The effects of the water resources project will neither invade nor unreasonably diminish the scenic, recreational, and fish and wildlife values of a designated Wild and Scenic River, when any portion of the project is located above, below, or on any stream tributary thereto.*
>
> *(3) The effects of the water resources project will neither invade nor diminish the scenic, recreational, and fish and wildlife values of a Study River when the project or construction is located above, below, or on any stream tributary congressionally authorized thereto during the study periods;*

In light of provisions in both the WSRA and ANILCA that reserve the State's jurisdiction over its lands and exclude state lands in Alaska from designated river boundaries, we question the authority of DOI to either grant or deny approval for a water resources project on non-federal lands located "*above, below, or on any stream tributary thereto*". DOI authorities over water resources projects under the WSRA only apply to federal lands. The regulations in this section should reflect this limitation. The effect of the proposed language is to directly apply the Wild and Scenic River designation to land that was specifically excluded by Congress in ANILCA and in the WSRA . It defeats the concept of state and private ownership in these areas.

The Proposed Rule inappropriately authorizes an override decision of a local federal agency without a clear appeal process.

The basic thrust of the proposed DOI regulations is to clarify that the DOI agencies have full and final authority over any water resource project that is within, above, below, or on a tributary of a national wild and scenic rivers system. In addition to our objection to this inappropriate extension of federal authority, as just discussed, we also note that an appeal process is not defined. The standards set forth in Section 39.4 are ambiguous, and under any jurisdictional circumstances could lead to varying and arbitrary decisions by individual agency personnel. The final regulations should have a specific section that fully and clearly describes how, where and when an appeal may be filed.

Since a DOI agency could potentially override a decision of another federal agency, this new section should also describe coordination and consultation between the original permitting agency and other federal, state and local agencies involved with the permit. Particular attention should be given to how this coordination and consultation will take place within the 60 days set forth in Section 39.5. The new section should also state whether the DOI decision is a final administrative action so those applicants know when court action may be appropriate for

unresolved disputes. The proposed regulations should also identify how and when input from affected parties would be considered by the final decision maker.

The Proposed Rule is vague about certain important definitions.

The vague definitions within proposed regulation provide DOI with an inappropriate amount of leeway of interpretation.

Water Resource Project. We appreciate the "may" to "would" change from the 1996 proposal. We believe that the language as currently proposed, "*...any project that would affect the free-flowing characteristics...*" is consistent with the language in Section 7(a) and (b) of the WSRA.

We appreciate the deletion of suction dredges from the definition of water resource project in the proposed regulation. We expect that the deletion does not hide their regulation in the relatively general language of the definition. We recommend that either the regulation be changed to make clear that suction dredges are excluded, or that any final Federal Register notice response to comments makes it clear that dredges are excluded.

Study River. We appreciate the changes made in what is now proposed as Section 39.4 to restrict the application of the regulations to congressional authorized study rivers.

Wild and Scenic River and Study River. As indicated previously, the definitions should make it clear that, in Alaska, state and private land, including the waters and beds of navigable rivers, are excluded from the boundaries of the Wild and Scenic River or from a Study River. The change would make the regulations consistent with the statutory commitments of ANILCA and the WSRA with respect to Alaska.

"*...**located below, above, or on any stream tributary thereto***..." (Sections 39.2; 39.3(a)(1); 39.4(a)(2) and (3)). This language inappropriately extends the management intent for a wild and scenic river segment potentially many miles upstream and downstream, relying too heavily on the discretion of DOI managers. In addition, it chills activities on state or private land upstream or downstream from a WSR segment because in the absence of a better definition, the threat of DOI authority is impossible to refute or discount.

"*...**invade nor unreasonably diminish***..." (Sections 39.4(a)(2) and (3)). This undefined phrase, which appears to have been lifted from Section 7(a) of the WSRA, allows unnecessarily wide discretion by the administering agency. We request inclusion of a definition in this context.

The Proposed Rule provides for inappropriate delay, and may cause an impossible cumulative burden on an applicant.

Proposed Section 39.5 is a significant change from the 1996 proposal that does not serve the interests of the applicant. The 1996 proposal indicated that BLM would make a decision within

60 days. The change requires that DOI "will attempt to make a determination…within 60 days." This is a significant change which effectively means that there is no time requirement on DOI.

This time delay is especially troublesome because, in practice, DOI's deliberation will come on top of those of another agency. For example, the Corps of Engineers 404 permit frequently requires 90-120 days but can take much longer. If the DOI's deliberation does not occur *at the same time* as the Corps, delay will be the inevitable result. Thus, the 90-120 time period will become 150-180, even if DOI makes its now discretionary commitment to make decisions within 60 days. The consequence of this delay is that it may in many cases no longer be possible to gather data during the summer, design a project, and then receive approval in time to order equipment and supplies for the following summer. An example will illustrate the problem.

An applicant may gather data during one summer, analyze the data in the fall, design a project, and make an application to the Corps by, say, November 1. If the Corps requires 120 days, approval occurs on February 1. If DOI extends this timeframe by, say 45 days, approval does not occur until March 15th. This does not leave time to order equipment and have it on-site at the start of the field season.

Two changes to the proposed regulation would help solve the problem. First, notice should be given to the applicable DOI agency as soon as an agency receives an application. Second, there should be a time-certain for a DOI decision. That time certain should be 60 days from receipt of the notice or 30-days after the end of a public comment period. Such a schedule would put DOI on the same schedule as EPA or the Corps of Engineers. The current proposal means that DOI will almost always extend the time required to get a Corps of Engineers or EPA permit. That time extension may mean that projects not favored by DOI cannot gather data one summer and be permitted in time to begin development the next.

Coordination with NEPA. When a proposed water resource project requires only an EA, by definition there is no significant impact on the environment, including on a Wild and Scenic River. Thus, authorization under an EA, assuming the EA requires consultation with DOI, should be the equivalent of authorization under these regulations. A separate DOI decision or 60-day delay under this scenario is unnecessary and would only serve to delay a project.

The Proposed Rule is inconsistent with other approval processes.

The proposed regulations outline a process and criteria for approving water resources projects. Title XI of ANILCA and its implementing regulations at 43 CFR Part 36 contain a process for authorizing transportation and utility system corridors to accommodate similar projects (water conduits, transmission lines, bridge and other roadway construction/reconstruction project) in and across conservation system units in Alaska. This process is significantly different than that outlined in these proposed regulations. These regulations should be reviewed in light of the ANILCA Title XI regulations. Any discrepancies in application, timing, requirements for consultation and coordination, approval criteria and appeals processes should be corrected to be compatible with the Title XI regulations.

We appreciate the efforts of DOI to clarify and streamline its regulations. However, in order to achieve this goal with respect to the regulations for management of wild and scenic rivers under it's jurisdiction, we believe additional revisions are necessary to eliminate some of the conflicts between these proposals and the specific provisions in ANILCA.

Sincerely,

Sally Gibert
State CSU Coordinator

cc: John Katz, Governor's Office, Washington, D.C.
John Shively, Commissioner, Department of Natural Resources
Frank Rue, Commissioner, Department of Fish and Game
Gabrielle LaRoche, Director, Division of Governmental Coordination