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December 5, 2001

George Constantino
U.S. Fish and Wildlife Service
1011 E. Tudor Rd.
Anchorage, Alaska 99503

Dear Mr. Constantino,

The State of Alaska has reviewed the September 2001 Southern Intertie Project Draft Environmental Impact Statement (DEIS) with respect to the compatibility determination. The U.S. Department of Agriculture Rural Utilities Service (RUS), in cooperation with the U.S. Fish and Wildlife Service (FWS) and the U.S. Army Corp of Engineers, has prepared the DEIS to satisfy the requirements of the National Environmental Policy Act (NEPA). The DEIS is necessary, in part, because the Intertie Participants Group has filed for a right of way across the Kenai National Wildlife Refuge to construct a 138kV transmission line and associated facilities between the Soldotna Substation on the Kenai Peninsula and the International Substation in Anchorage. Two action alternatives are examined in the DEIS, one located within the boundaries of the refuge, the other located outside the refuge boundaries.

CONTEXT

The purpose of the DEIS is to identify and evaluate significant issues related to the proposed action. The proposed action will require permits subject to review for consistency with the Alaska Coastal Management Program (ACMP). The Division of Governmental Coordination (DGC) will coordinate a consistency review upon receipt of a signed ACMP consistency certification statement and supporting information, and publication of a public notice. This will occur after the completion of the NEPA process. Pre ACMP review comments will be submitted to the RUS under a separate letter. DGC is also providing a coordinated review of the right of way application provided under Title XI of the Alaska National Interest Lands Conservation Act (ANILCA) in addition to the compatibility determination required by the FWS. This letter identifies concerns and consolidated comments of State of Alaska agencies regarding the ANILCA Title XI application and the FWS compatibility determination for the applicant's proposal.

ANILCA TITLE XI and REFUGE COMPATIBILITY

The DEIS appears to inadvertently misconstrue both ANILCA Title XI Section 1104 and 43 CFR 36. Since the latter implements the provisions of Title XI, our discussion focuses on the procedures specified in 43 CFR 36.7. Specifically, page 1-35 of the DEIS states:

*The ANILCA Title XI process also provides that **applicable law** shall apply with respect to the authorization and administration of transportation or utility systems across conservation units, and **includes a determination of compatibility** with the unit's purposes as one of the criteria an agency must consider when reviewing a right-of-way application. (emphasis added)*

There are two separate procedural routes for reviewing and approving a Title XI application. The first involves those cases where the managing agency has an applicable law to issue a right of way permit **and** the area is outside the National Wilderness Preservation System. The second is used when an area involved is within designated Wilderness **or** the agency has no applicable law with respect to issuing a right of way permit.

In the case of the applicant's proposal, the route is outside designated Wilderness and the FWS has an applicable law, the National Wildlife Refuge System Administration Act, which contains the necessary authority (Section 4(d)) for the agency to grant a right of way or easement across a refuge and the route. This then triggers 43 CFR 36.7(a) that identifies 9 points the permitting agency shall consider when making its decision, none of which specifically consider compatibility. A determination that the right of way is compatible with the purposes of the refuge is required when the area involved is within designated Wilderness **or** the agency has no applicable law, but this is not the case with the applicant's proposed route.

This is not to say that a Title XI right of way application is not subject to a compatibility determination. Both ANILCA 304(b) and the National Wildlife Refuge System Administration Act Section 4(d) state that any easement granted under that section is subject to a compatibility determination. The point of this comment to clarify that in this case, the compatibility determination is required by ANILCA 304(b) and the FWS compatibility regulations (50 CFR Parts 25, 26, and 29), not by Title XI as implied in the above excerpt.

The FWS Compatibility Policy, 603 FW 2.8 A., allows the Service to alter the compatibility process for applications for transportation and utility systems. This is not mentioned in the refuge compatibility information provided in the DEIS. Articulating this policy, whether exercised or not, in the context of the Title XI right of way application would have allowed the reviewer a more complete understanding of the compatibility process in this instance. As such, the refuge manager may wish to provide some discussion of this policy when issuing the determination.

We appreciate the opportunity to comment on this compatibility determination. Please contact me at (907) 269-7476 or don_perrin@gov.state.ak.us if you have questions concerning these comments.

Sincerely,

Don Perrin
Project Review Coordinator

cc: Patrick Galvin, Director, Division of Governmental Coordination
Frank Rue, Commissioner, Department of Fish and Game
Pat Pourchot, Commissioner, Department of Natural Resources
Joseph Perkins, Commissioner, Department of Transportation and Public Facilities
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