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Joan Harn, NPS Wild and Scenic Rivers Program Co-Lead
National Park Service
1201 Eye St., NW, 2240
Washington DC, 20005

Dear Ms. Harn:

The State of Alaska reviewed the National Park Service's Draft Director's Order (DO) #46 Wild and Scenic Rivers. The following comments represent the consolidated views of the State's resource agencies.

The draft DO states that the DO and Handbook 46, *which is under development*, will supersede any "conflicting" policies, instructions, or requirements that "may" have been issued previously. The DO needs to be more specific in terms of which documents are being superseded. In addition, Handbook 46 will provide Service staff with more specific guidance on implementing this DO. Considering the substantial effects Wild and Scenic River management can have on existing users of an area as well as on adjacent land managers and those resource managers with overlapping responsibilities (e.g., state fish and wildlife managers), a draft of Handbook 46 needs to be made available for public review and comment. To ensure all interests and concerns are taken into consideration, the public needs to be afforded an opportunity to provide input on the development of all new policy documents that have the potential to replace or modify other publicly-vetted policy documents, such as the NPS 2006 Management Policies (2006 policies), including those directives associated with or referenced in the 2006 policies.

The draft DO generally mirrors the Wild and Scenic Rivers Act (WSRA); however, the draft DO as a national directive, fails to reflect the WSRA *as modified by the Alaska National Interest Lands Conservation Act (ANILCA)* for wild and scenic rivers (WSR) in Alaska. Under ANILCA, WSRs are conservation system units (CSUs), and are subject to ANILCA's many unique provisions, as well as

Service and Department of Interior implementing regulations at 36 CFR Part 13 and 43 CFR Part 36, respectively.

The DO also focuses entirely on the authorities granted the Service under the WSRA but does not explain how the limitations in Section 13 of the WSRA or other Acts, such as ANILCA or the Alaska Statehood Act, affect those authorities. The Service needs to make the DO more inclusive in recognizing and addressing these other applicable authorities and in explaining management limitations. We note that in our experience with the 2006 policies, where ANILCA is called out specifically in the “Hierarchy of Authorities” section, ANILCA-specific requirements are frequently overlooked in planning/management documents. For this reason, we request a specific section in the DO titled “Special Provisions for Alaska Wild and Scenic Rivers.” This would mimic the United States Fish and Wildlife Service’s approach to Alaska-specific requirements in their Wilderness Stewardship guidance, see Chapter 5 of the USFWS guidance (http://www.fws.gov/refuges/whm/pdfs/wildernessPolicy_102808.pdf).

Further, according to the NPS Director’s Order 12 Handbook, it appears the draft DO, which interprets statutory authority in the WSRA and has the potential to negatively impact state lands and management authorities, qualifies as a federal action subject to the National Environmental Policy Act (NEPA). We request an explanation as to how NEPA requirements have been met in the preparation of this DO.

These and other issues are addressed in more detail below.

Section 7 Determinations

The draft DO states that the Service is responsible for determining whether a federally assisted water resources project impacts a river’s outstandingly remarkable values, water quality and free-flowing condition under Section 7 of the WSRA, thus asserting the Service has the authority to approve or disapprove projects on all designated wild and scenic rivers and for projects upstream, downstream, or on a tributary to designated segments, without exception.

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 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 Act¹) 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....[Emphasis added]²

The draft DO also fails to recognize another important statutory difference for components of the wild and scenic river system in Alaska. ANILCA Section 606(a)(1) provides that lands in state and private ownership are excluded from the boundaries of Wild and Scenic Rivers in Alaska.

...shall not include any lands owned by the State or a political subdivision of the State nor shall such boundary extend around any private lands adjoining the river in such manner as to surround or effectively surround such private lands. [Emphasis added]

The draft DO does not discuss how this requirement would be impacted by the WSRA Section 7 determination for a water resource project. The final decision authority to approve or disapprove a water resource project could interfere with constitutionally protected property rights granted to the State of Alaska under the Alaska Statehood Act and to Alaska Native corporations under the Alaska Native Claims Settlement Act as amended.

Decisions regarding water resource projects should be limited to rivers where the submerged lands are not owned by the state, or where the water is not held in trust by the state for the benefit of the public.

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 are 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..."

² 16 U.S.C. § 3103(c). The scope of section 103(c) of ANILCA currently is being litigated in the Ninth Circuit Court of Appeals.

The only exception should be if the Service has an agreement with the state granting specific authority to manage that state's land or assume the state's trust responsibilities for public water.

We request the DO make clear how Section 7 determinations interact with the provisions of ANILCA and ANCSA as well as State sovereignty.

ANILCA Title XI

Congress established the Title XI process in ANILCA to address the potential impact of designating over one hundred million acres of CSUs on Alaska's largely undeveloped transportation and utility network (ANILCA Section 1101). ANILCA Section 1104 established a detailed process for evaluating transportation and utility systems proposed within CSUs and other designated areas and requires federal agencies to participate in the process even though other statutory requirements and regulatory guidance may apply to an individual agency's decision, including Section 7 of the WSRA.

ANILCA Section 1101 states:

Sec. 1101. Congress finds that –

- (a) Alaska's transportation and utility network is largely undeveloped and the future needs for transportation and utility system in Alaska would best be identified and provided for through an orderly, continuous decisionmaking process involving the State and Federal Governments and the public;*
- (b) The existing authorities to approve or disapprove applications for transportation and utility system through public lands in Alaska are diverse, dissimilar, and in some cases, absent; and*
- (c) To minimize the adverse impacts of siting transportation and utility systems within units established or expanded by this Act, and to insure the effectiveness of the decisionmaking process, a single comprehensive statutory authority for the approval or disapproval of applications for such systems must be provided in this Act. [Emphasis added]*

Further, ANILCA Section 1104(a) states:

Notwithstanding any provision of applicable law, no action by any Federal agency under applicable law with respect to the approval or disapproval of the authorization, in whole or in part, of any transportation or utility system shall have any force or effect unless the provisions of this section are complied with. [Emphasis added]

The DO needs to acknowledge the ANILCA Title XI process is not superseded by a Section 7 determination and any such determination must be considered along with the detailed findings required in ANILCA Section 1104(G)(2).

In addition, the DO must acknowledge ANILCA Section 1107(a), which addresses terms and conditions associated with Title XI rights-of-way generally, and ANILCA Section 1107(b), which not only provides for the protection of stream flow and river resources on designated WSRs, but also includes a requirement that proposed projects not interfere with or impede transportation occurring on the rivers.

Any transportation or utility system approved pursuant to this title which occupies, uses, or traverses any area within the boundaries of a unit of the National Wild and Scenic Rivers System shall be subject to such conditions as may be necessary to assure that the stream flow of, and transportation on, such river are not interfered with or impeded, and that the transportation or utility system is located and constructed in an environmentally sound manner. [Emphasis added]

Wild and Scenic River Studies

The draft DO states the Service has authority to conduct WSR studies in the context of a larger planning effort pursuant to Section 5(d)(1) of the WSRA. However, after adding twenty-six rivers in Alaska to the Wild and Scenic River System and mandating the study of twelve additional rivers for potential designation with the passage of ANILCA in 1980, Congress limited the Service's authority to conduct further WSR studies in Alaska to those authorized in ANILCA or future congressionally-authorized studies. ANILCA Section 1326(b) states:

No further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purpose shall be conducted unless authorized by this Act or further Act of Congress. [Emphasis added]

ANILCA defines WSRs as CSUs. Congressional intent to provide finality to the lengthy studies and deliberations that led up to ANILCA is also clearly stated in ANILCA Section 101(d):

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby. [Emphasis added]

The draft DO is clear that the purpose behind implementing Section 5(d)(1) of the WSRA is to study park rivers “...for their eligibility and suitability for inclusion in the NWSRS.” In Alaska, studies conducted pursuant to Section 5(d)(1) of the WSRA violate ANILCA Section 1326(b) and the overarching intent in ANILCA Section 101(d). To be consistent with ANILCA, the DO must exempt the Alaska region from conducting WSR studies pursuant to Section 5(d)(1) of the WSRA.

In addition, the draft DO directs managers to “protect rivers found to be eligible for WSR designation.” There is *no authority* under the WSRA to protect rivers that the Service has administratively found “eligible” for inclusion in the WSR system. The WSRA only gives federal agencies authority to apply interim measures for a limited timeframe to congressionally-authorized study rivers pursuant to Section 5(a).

The direction referenced in the draft DO from Section 4.3.4 of the NPS 2006 Management Policies to protect river values *only* applies to rivers that have been assessed as “suitable” for inclusion in the WSR system. To protect rivers that are merely found to be “eligible” (i.e. administratively determined to be free-flowing and possessing a minimum of one outstandingly remarkable value) but *not* determined by the Service to be “suitable” (i.e. recommended for inclusion in the NWR system pursuant to Section 5(a) of the WSRA) is a gross over-extension of the authority granted federal agencies in the WSRA.

The DO needs to accurately reflect the limited authority granted federal agencies in the WSRA to protect the values of rivers assessed in a congressionally-authorized WSR study, pursuant to Section 5(a) of the WSRA.

Page-Specific Comments

Section 4.1.1 Description, third paragraph: This section states that “*Section 7(a) provides each river designated into the NWSRS with permanent protection from federally licensed or assisted dams, diversions, channelization or other water resources projects....*” Section 7(a) of the WSRA specifies FERC is prohibited from licensing any new dam, water conduit, reservoir, powerhouse, transmission line, or other project works under the Federal Power Act on or directly affecting designated rivers. We request this Section clarify that the prohibitions under Section 7(a) of the WSRA apply only to FERC projects. Federal licensing and assistance cannot be provided on any water resources project that would have a direct and adverse effect on the values for which a river is designated. The Act further says that federal licensing and assistance *can* be provided for developments below or above a designated river or on any tributary if it does not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on the date of the river’s designation. This is very different from the current summary in the draft DO. To ensure accuracy, we request the WSRA be directly quoted.

Page 4.1.2, NPS Management Responsibilities: We request that the following be added to the second sentence in the first bullet.

Federal actions may not proceed unless the NPS has determined in writing that the proposed project fully meets the requirements of the WSRA, and other applicable laws and regulations, such as ANILCA and implementing regulations at 43 CFR Part 36.

Section 4.5 River Parks with Enabling Legislation Similar to the WSRA. Wild and Scenic Rivers are a special designation which is not interchangeable with other river-based park units' enabling legislation. Rivers within park units should be managed in accordance with their enabling legislation, regardless of the similarities to language in the WSRA. The NPS has provided no basis or authority for managing to the WSRA standard for these park units. Moreover, managing to a more restrictive standard could conflict with other purposes or standards in the park units' enabling legislation. We request Section 4.5 be deleted.

Section 4.6.1 Comprehensive River Management Plan: This section directs Comprehensive River Management Plans to "at a minimum" address required components stipulated in Sections 3(d)(1) and 10(a) of the WSRA. The Service does not have authority to expand upon the planning requirements stipulated in the WSRA, except where required by enabling legislation, such as ANILCA. Planning requirements for designated WSRs in Alaska must also be consistent with ANILCA Section 1301. We request the DO recognize the additional planning requirements for WSRs designated under ANILCA.

Section 4.6.1 Comprehensive River Management Plan: The WSRA directs agencies to protect and enhance the values which caused it to be included in the system; there is no direction in the Act to periodically review and update these river values, as indicated in this section. We request the following edit to accurately reflect direction in the WSRA:

WSR managers should periodically review ~~their river's values (free flow, water quality, and outstandingly remarkable values)~~ and their CRMPs to ensure that the plan is appropriately protecting or enhancing the river's values (free flow, water quality, and outstandingly remarkable values) pursuant to Section 10(a) of the WSRA ~~new information and knowledge is incorporated appropriately.~~

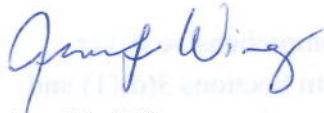
Section 4.6.4 The Nationwide Rivers Inventory (NRI)

This section appears to simply re-state existing policy regarding the NRI. If any changes to existing policy regarding the NRI is proposed, please clarify those changes.

In summary, while some of our comments relate to the national directive (e.g., the need for public review and comment of the DO #46 Handbook, and the need for NEPA review, etc.), we believe the inclusion of a separate section in the DO titled "Special Provisions for Alaska Wild and Scenic Rivers" would most appropriately assist NPS managers in dealing with the unique provisions the ANCSA and ANILCA statutes apply to federal lands in Alaska and could address the additional Alaska specific concerns we have raised in this letter.

Thank you for this opportunity to comment, please contact either my (907-334-2563) or Susan Magee (907-269-7929) if you would like to discuss our comments further.

Sincerely,



Jennifer Wing
ANILCA Project Coordinator

cc: Susan Magee, ANILCA Program Coordinator, Zach Babb, NPS Alaska