

LISA MURKOWSKI, Alaska, *Chairman*

JOHN BARRASSO, Wyoming
JAMES E. RISCH, Idaho
MIKE LEE, Utah
JEFF FLAKE, Arizona
STEVE DAINES, Montana
BILL CASSIDY, Louisiana
CORY GARDNER, Colorado
ROB PORTMAN, Ohio
JOHN HOEVEN, North Dakota
LAMAR ALEXANDER, Tennessee
SHELLEY MOORE CAPITO, West Virginia

MARIA CANTWELL, Washington
RON WYDEN, Oregon
BERNARD SANDERS, Vermont
DEBBIE STABENOW, Michigan
AL FRANKEN, Minnesota
JOE MANCHIN III, West Virginia
MARTIN HEINRICH, New Mexico
MAZIE HIRONO, Hawaii
ANGUS S. KING, Jr., Maine
ELIZABETH WARREN, Massachusetts

COLIN HAYES, STAFF DIRECTOR
PATRICK J. MCCORMICK III, CHIEF COUNSEL
ANGELA BECKER-DIPPMANN, DEMOCRATIC STAFF DIRECTOR
SAM E. FOWLER, DEMOCRATIC CHIEF COUNSEL

United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

WWW.ENERGY.SENATE.GOV

April 1, 2016

Dan Ashe, Director
U.S. Fish and Wildlife Service
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

RE: Proposed Rule on Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, FWS-R7-NWRS-2014-0005

Dear Director Ashe:

I write to express my concerns with the proposed rule and draft environmental assessment on *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*, FWS-R7-NWRS-2014-0005 (Proposed Rule) and the rulemaking process more generally as conducted by the U.S. Fish and Wildlife Service (Service).

Because agency rules have significant impacts, the procedures used to engage in rulemaking are themselves significant. In this instance, the Service's procedures have failed to provide stakeholders and the public in Alaska with an adequate voice. The Service's initial comment period on this Proposed Rule was just 60 days, despite promises of at least 90 days and precedent within the Department of the Interior of 120 days on similar regulations. Although the Service did grant an extension of an additional 30 days, which I appreciate, it has been brought to my attention by stakeholders and the public in Alaska that this extension may be meaningless because the Service failed to update the online link to submit comments on the Proposed Rule to reflect the extension in a timely fashion. Instead, the link informs the public that the comment period has closed.¹ To address the process issues with this rulemaking, I request that the comment period on the Proposed Rule and draft environmental assessment be extended an additional 30 days.

I have serious questions and concerns about the proposed rule and the draft environmental assessment. First and foremost, the proposed rule is fundamentally flawed because it fails to recognize that states, not the federal government, have primary authority over wildlife management. Congress gave federal agencies primary authority to manage wildlife *only* in those instances where there is specific statutory delegation. The clear intent under the Alaska National Interest Lands Conservation Act, under the Refuge Improvement Act, and under the Alaska Constitution is for federal policy to be

¹ The link on the USFWS National Refuge Website (http://www.fws.gov/alaska/nwr/ak_nwr_pr.htm) to submit comments directed to the initial comment period webpage, which informs viewers the comment period is now closed. As a result of my staff raising this concern with your staff and my outreach on social media, a more direct link has recently been posted but valuable time for the public to comment has been lost. In addition, the link to the closed comment period continues to appear when stakeholders search for the Proposed Rule online.

consistent with state policy and for there to be a robust and genuine consultation process between the state and federal agencies. Additionally, President Clinton signed an Executive Order on “Federalism” and the consultation required with State and local governments when the Federal government preempts state law (E.O. 12866). President Obama signed Executive Order E.O. 13132 expanding on the previous Executive Order. As a starting point, I ask that you provide documentation of how the Service has met all the requirements of both executive orders on Federalism that are required when a federal agency preempts state law.

The Proposed Rule would have deep effects on both rural and urban Alaskans. Despite cleverly titling the rule “non-subsistence” it is clear to Alaskans that this proposed rule *will* impact subsistence activities. It is my understanding that the majority of the Federal Subsistence Regional Advisory Councils (RACs) that operate under the Office of Subsistence Management within the Service have met and are opposing the Proposed Rule. The concerns of the RACs should be given great weight and attention, especially because a significant reason the comment period was extended was to accommodate the RACs’ meeting schedules. In addition, Service staff in Alaska noted that rural residents were having trouble viewing the draft Environmental Assessment because of internet connection limitations. This demonstrates the problem with moving solely to internet notification for the land closure and land restriction process. Alaska is unique and uniquely vast, and in-person consultation is necessary to ensure that Alaskan voices are not excluded due to technological limitations. What has the Service done to address concerns unique to rural Alaskans?

Non-rural Alaskans are currently eligible to participate in subsistence activities under state regulations. An issue of particular concern to many Alaskans is the changes the Proposed Rule would make to the subsistence status quo. For example, if a young person moves to Anchorage to go to college and start their career, if this rule is finalized I understand they would no longer be able to go back and help their grandparents with subsistence activities on refuge lands, not even to help pull in a fishing net. This threatens not only state jurisdiction, but also the preservation and promotion of cultural activities. In the definition for “sport hunting” in the proposed rule, you define it to include state subsistence activities. This definition is alarmingly misleading, as is the title of the rule. Even with this misleading definition, the title of your rule is inaccurate. At best, it is about “Federal non-subsistence” activities (an adjective not included in the title), but a more accurate definition would be “Preemption of state subsistence activities.” Please explain the justification for burying crucial points in misleading definitions and failing to include the adjective “Federal” in the title.

I have also heard concerns that the Proposed Rule applies to fishing activities. Preemption of state authority is crystal clear in this area as the state has specific subsistence fishing regulations. The draft Environmental Assessment does not address the potential impacts the proposed rule would have on fishing; why not? If covering fishing activities was not the intent, why is a rule your agency is trying to finalize on a very rushed timeline drafted so poorly as to not be clear as to whether it covers fishing activities?

It also appears that the Service has failed to engage in tribal consultation with respect to the Proposed Rule. It is my understanding that tribes were simply sent “heads up” notification letters and that is all the “consultation” they were provided. I’m sure you’re familiar with President Obama’s November 5, 2009 Memorandum for the Heads of Executive Departments and Agencies on Tribal Consultation (E.O. 13175). Can you please provide documentation of how your process of consultation met the requirements of the Executive Order, including the consultation required with Alaska Native corporations?

As I'm sure you are aware, I have been a sponsor of legislation for the past several Congresses known colloquially as the "Sportsmen's Act." This legislation fights unreasonable land closure practices by the Forest Service and the Bureau of Land Management (BLM). It seeks to ensure more reasonable temporary closure periods, to prevent temporary closures from morphing into permanent closures without sufficient public notice and opportunity for public comment, and to provide greater transparency and accountability for access to public land. With this Proposed Rule, the Service seems to be heading in exactly the wrong direction with regard to the refuge closure process. You've provided no justification for doubling the temporary closure period beyond administrative ease. Please explain your justification for changing the refuge closure process.

For these reasons, the best course of action is for the U.S. Fish and Wildlife Service to withdraw the Proposed Rule on *Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska*. The Service should instead work cooperatively with the State of Alaska to address any concerns it may have in a manner that respects the state's primacy to manage fish and wildlife in Alaska.

Thank you for your consideration and I look forward to a prompt response.

Sincerely,



Lisa Murkowski
Chairman