DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR parts 25, 26 and 29

[1018–AE98]

Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule contains the final changes to Parts 25, 26 and 29 of Title 50 of the Code of Federal Regulations (CFR) that describe the process for determining whether or not a use of a national wildlife refuge (refuge) is a compatible use. These changes are necessary to implement the compatibility provisions of the National Wildlife Refuge System Improvement Act of 1997 (NWRSIA–1997) that amends the National Wildlife Refuge System Administration Act of 1966 (NWRSAA–1966). Also, published concurrently in the notice section of this **Federal Register** is our final compatibility policy describing in more detail the process for determining whether or not a use of a refuge is a compatible use.

DATES: This rule is effective November 17, 2000.

FOR FURTHER INFORMATION CONTACT: To obtain copies of this final rule or for additional information, contact: J. Kenneth Edwards, Refuge Program Specialist, Division of Refuges, U.S. Fish and Wildlife Service, 4401 North Fairfax Drive, Room 670, Arlington, Virginia 22203 (Telephone 703/358–1744, Fax 703/358–2248). You may also download a copy from: http://www.fws.gov/r9pdm/home/newfinalrule.html.

SUPPLEMENTARY INFORMATION: We published the Proposed Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997 in the **Federal Register** on September 9, 1999 (64 FR 49056). In addition, we published the Draft Compatibility Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997 in the **Federal Register** on September 9, 1999 (64 FR 49067). We invited the public to provide comments on the proposed rule and draft policy by November 8, 1999. During this 60-day comment period, we received several requests for an extension to the comment period. In order to ensure that the public had an adequate opportunity to review and comment on the proposed rule and draft policy, we extended the comment period until December 8, 1999 (64 FR 62163 and 62217 published November 16, 1999). Therefore, the proposed rule and draft policy were available for public review and comment for 90 days. We revised the proposed rule and draft policy based on comments we received.

Background

The NWRSIA–1997 amends and builds upon the NWRSAA–1966 providing an ''Organic Act'' for the National Wildlife Refuge System. The NWRSIA–1997 clearly establishes that wildlife conservation is the singular National Wildlife Refuge System mission, provides guidance to the Secretary of the Interior (Secretary) for management of the National Wildlife Refuge System, provides a mechanism for refuge planning, and gives refuge managers uniform direction and procedures for making decisions regarding wildlife conservation and uses of the National Wildlife Refuge System.

The NWRSAA–1966 required the Secretary, before permitting uses, to ensure that those uses are compatible with the purposes of the refuge. We built this legal requirement into our policy and regulations. Since 1966, the compatibility standard for refuge uses has helped us manage refuge lands sensibly and in keeping with the general goal of putting wildlife conservation first. The NWRSIA–1997 maintains the compatibility standard as provided in the NWRSAA–1966, provides significantly more detail regarding the compatibility standard and compatibility determination process, and requires that we promulgate the compatibility process in regulations. These regulations will help ensure that compatibility becomes a more effective conservation standard, is more consistently applied across the entire National Wildlife Refuge System, and is more understandable and open to involvement by the public.

The House Report accompanying the NWRSIA–1997 states ''Currently, the law does not include a mission or a definition of a ''compatible use'' for the Refuge System. Refuge managers are responsible for determining, on a case-by-case basis, whether activities on refuges are compatible. Management of the Refuge System has been the focus of numerous studies in the last two decades, including two General Accounting Office reports, two reports of advisory boards to the Interior Department, a report prepared by the USFWS, and several hearings by the former Committee on Merchant Marine and Fisheries, which then had jurisdiction over the Refuge System. These reports and hearings highlighted that refuges have not always been managed as a national system because of the lack of an overall mission for the System. These reports concluded that the lack of an overall mission and management procedures had allowed numerous incompatible uses to be tolerated on wildlife refuges.'' The House Report further states ''H.R. 1420 establishes that the conservation of fish, wildlife, plants and their habitats is the mission of the National Wildlife Refuge System and sets forth the policy and procedures through which the System and individual refuges are to be managed in order to fulfill that mission for the long-term benefit of the American public. H.R. 1420 requires that public use of a refuge may be allowed only where the use is compatible with the mission of System and purpose of the individual refuge, and sets forth a standard by which the Secretary shall determine whether such uses are compatible.'' Lastly, the House Report states ''The Committee expects that this legislation will diminish the likelihood of future litigation by providing a statutory compatibility standard, a process for making those determinations, a clear conservation mission for the System, and a planning process that will ensure greater public involvement in management decisions on refuges.''

The NWRSIA–1997 includes a number of provisions that specifically address compatibility. The following is a summary of those provisions and how they apply to us.

We will not initiate or permit a new use of a national wildlife refuge or expand, renew, or extend an existing use of a national wildlife refuge, unless we have determined that the use is a compatible use and that the use is not inconsistent with public safety. We may make compatibility determinations for a national wildlife refuge concurrently with the development of a Comprehensive Conservation Plan.

On lands added to the National Wildlife Refuge System after March 25, 1996, we will identify, prior to acquisition, withdrawal, transfer, reclassification, or donation of any such lands, existing compatible wildlife-dependent recreational public uses (if any) that we will permit to continue on an interim basis pending completion of a Comprehensive Conservation Plan for the national wildlife refuge.

We may authorize wildlife-dependent recreational uses on a national wildlife refuge when we determine they are compatible uses and are not

inconsistent with public safety. We are not required to make any other determinations or findings to comply with the NWRSAA–1966 or the Refuge Recreation Act of 1962 (RRA–1962) for wildlife-dependent recreational uses to occur except for consideration of consistency with State laws and regulations.

Compatibility determinations in existence on the date of enactment of the NWRSIA–1997, October 9, 1997, will remain in effect until and unless modified. In addition, we will make compatibility determinations prepared during the period between enactment of the NWRSIA–1997 and the effective date of these compatibility regulations under the existing compatibility process. After the effective date of these regulations, we will make compatibility determinations and re-evaluations of compatibility determinations under the compatibility process in these regulations.

We will issue final regulations establishing the process for determining whether or not a use of a national wildlife refuge is a compatible use. These regulations will:

1. Identify the refuge official responsible for making compatibility determinations;

2. Require an estimate of the time-frame, location, manner, and purpose of each use;

3. Require the identification of the effects of each use on national wildlife refuge resources and purposes of each national wildlife refuge;

4. Require that compatibility determinations be made in writing;

5. Provide for the expedited consideration of uses that will likely have no detrimental effect on the fulfillment of the affected national wildlife refuge's purposes or the National Wildlife Refuge System Mission;

6. Provide for the elimination or modification of any use as expeditiously as practicable after we make a determination that the use is not a compatible use;

7. Require, after an opportunity for public comment, reevaluation of each existing use, other than wildlife-dependent recreational uses, if conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use, but not less frequently than once every 10 years, to ensure that the use remains a compatible use. In the case of any use authorized for a period longer than 10 years (such as an electric utility right-of-way), the reevaluation will examine compliance with the terms and conditions of the authorization, not examine the authorization itself;

8. Require, after an opportunity for public comment, reevaluation of each existing wildlife-dependent recreational use when conditions under which the use is permitted change significantly or if there is significant new information regarding the effects of the use, but not less frequently than in conjunction with each preparation or revision of a comprehensive conservation plan or at least every 15 years, whichever is earlier; and

9. Provide an opportunity for public review and comment on each evaluation of a use, unless we have already provided an opportunity during the development or revision of a Comprehensive Conservation Plan for the national wildlife refuge or have already provided an opportunity during routine, periodic determinations of compatibility for wildlife-dependent recreational uses.

Purpose of This Final Rule

The purpose of this final rule is to establish in regulation the process for determining compatibility of proposed refuge uses and procedures for documentation and periodic review of existing uses, and to ensure that we administer proposed and existing uses according to the compatibility provisions of the NWRSIA–1997. Published concurrently in this **Federal Register** is our final compatibility policy, Part 603 Chapter 2 of the Fish and Wildlife Service Manual, which reflects this final rule and provides additional detail for each step in the compatibility determination process.

Summary of Comments Received

We received 506 comment letters by mail, fax or email on our proposed rule and draft policy. They were from Federal, State and local governments, Members of U.S. Congress, Alaska Native Village Corporations, non-government organizations, research institutions and individuals.

Some comments addressed specific elements in the proposed rule and specific elements in the draft policy, while many comments addressed an issue that was common to both the proposed rule and draft policy. Since the comments on the proposed rule and draft policy were so intertwined and oftentimes a comment on an issue was directly related to both the proposed rule and draft policy, we chose to address the comments collectively by issue rather than by proposed rule and draft policy separately. Since we analyzed the comments collectively on the proposed rule and draft policy, we are including a full summary of the comments and our responses in the **SUPPLEMENTARY INFORMATION** section of this final rule only and not in the **SUPPLEMENTARY INFORMATION** section of the notice of our final policy.

We considered all of the information and recommendations for improvement included in the comments and made changes to the proposed rule and draft policy where appropriate. The number of issues addressed in each comment letter varied widely, ranging from one issue to several issues. We identified 28 groups of issues. Following are our responses to those groups of issues.

Issue 1: Jurisdiction

We received one comment suggesting that compatibility applies to Coordination Areas and National Fish Hatcheries under the Refuge Recreation Act of 1962 (RRA–1962). The NWRSIA–1997 states ''* * * the Secretary shall not initiate or permit a new use of a refuge or expand, renew, or extend an existing use of a refuge, unless the Secretary has determined that the use is a compatible use * * *'' The House Report accompanying the NWRSIA–1997 states ''Coordination Areas have been well managed by the States under State laws and regulations, in many cases for decades. However, they are part of the Refuge System. They are specifically excluded from the definition of the term ''refuge'' in new Section 5(11) so as not to require every State management decision to be approved by the USFWS through the processes established by H.R. 1420.'' The NWRSIA–1997 and its legislative history make it clear that although Coordination Areas are in the National Wildlife Refuge System, they are not subject to compatibility requirements as are other areas. National Fish Hatcheries are dealt with in 50 CFR Chapter 70.

One commenter requested that we exempt only military overflights above a refuge from compatibility. The NWRSIA–1997 specifically exempts ''overflights above a refuge'' from determinations of compatibility. The law does not differentiate between military and non-military overflights. This exemption from compatibility applies to all overflights. The Service does not have the authority to change this exemption provided in law.

One commenter suggested adding a statement about communication between the Refuge Manager and personnel at local airports, pilot training schools, and private pilot groups regarding the Federal Aviation Administration's requested minimum altitudes over refuges as the most effective way to protect refuge resources

when the Refuge Manager deals with non-military overflights. We agree that this additional information may help refuge managers deal with non-military overflights and we incorporated it into the policy.

We received comments concerning the effects this rule and policy might have on water rights. A commenter pointed out that the NWRSIA–1997 did not affect any existing water right nor did it create any new reserved water right. The NWRSIA–1997 addressed a number of issues concerning the National Wildlife Refuge System; however, these regulations and policy implement only those sections of the NWRSIA–1997 dealing with compatibility and they do not affect any existing water right nor do they create any new reserved water right.

Issue 2: Closed Until Open

Several organizations wrote in support of the proposed language in 50 CFR 25.21(a) which states clearly that except as otherwise provided, ''all areas acquired or withdrawn for inclusion in the National Wildlife Refuge System are closed to public access until and unless we open the area for a use or uses in accordance with the NWRSAA–1966, the RRA–1962 and this subchapter C.'' This is not new and has been the legal standard for uses within the National Wildlife Refuge System for many years. Several other commenters pointed out, however, that there is a somewhat different standard for Alaska refuges. The compatibility standard is applicable to all refuges no matter where they are located. We are not changing the status of refuge uses in Alaska. See 50 CFR 36 for regulations governing Alaska refuges.

A few commenters also stated that all areas included in the National Wildlife Refuge System should be open for public wildlife-dependent recreational uses. We agree that we should offer these opportunities following the guidelines established by the NWRSIA–1997, but all such uses are still subject to a compatibility review, and we must find them to be compatible before allowing them.

Issue 3: Definitions

We received many comment letters that addressed 12 of the 23 definitions we provided in the proposed rule and draft policy. Several commenters spoke generally about the definitions section and were either supportive of or opposed to our definitions. One commenter felt that the proposed definition changes should not take place at all, and that the definitions provided in the NWRSIA–1997 are both sufficient and better than what we provide in the regulations and policy. One commenter wanted to make sure that the definitions in the regulations follow the intent of the NWRSIA–1997. We believe that the definitions we provide in these regulations and policy are consistent with the NWRSAA–1966, as amended by the NWRSIA–1997. In addition, we believe that these definitions are necessary to consistently apply the compatibility regulations and policy throughout the National Wildlife Refuge System. Lastly, we added one additional definition, Regional Chief, that was not included in the proposed rule and draft policy. Following are discussions of the comments we received on specific definitions.

Compatibility Determination

One commenter believes that the Refuge Manager should not have autonomy in making compatibility determinations. We address this concern in Issue 4: Decision Making Authority and Appeal Process.

Compatible Use

We received several comments on the definition of compatible use. The major concern centered around our proposal to delegate the decision making authority for compatibility determinations from the Director through the Regional Director to the Refuge Manager. We address this concern in Issue 4: Decision Making Authority and Appeal Process. We received comments that addressed the inclusion of ''major'' in the definition of compatible use. Although some expressed support, others requested we delete the word, asserting that the NWRSIA–1997 does not use this qualifier in the definition. They pointed out that it defines a compatible use as one which ''does not materially interfere with or detract from the fulfillment of * * * the purposes of the refuge.'' We agree and have deleted the word ''major'' to conform to the provisions of the NWRSIA–1997. This will not result in changes to current practice, as we have not made such a distinction previously with regard to compatibility determinations.

Comprehensive Conservation Plan

One commenter recommended adding ''maintain and, where necessary, restore the biological integrity, diversity, and environmental health of the Refuge System'' to the definition. We incorporated this recommended change with a slight modification. We are using the term ''ecological integrity'' in lieu of the phrase ''biological integrity, diversity, and environmental health.'' Another commenter stated that ''Preparation of the CCP should be carefully coordinated with the state fish and wildlife agency. To the maximum extent possible, issues dealing with hunting, trapping and fishing regulations should be consistent with state rules and regulations. In addition, issues dealing with management of fish and wildlife habitat should be consistent with state fish and wildlife conservation plans and policies.'' This recommended change is beyond the scope of these regulations and policy but this issue was addressed when we recently published our draft (64 FR 44368 published August 13, 1999) and final (65 FR 33892 published May 25, 2000) refuge planning policy in the **Federal Register**. We stated in our final refuge planning policy that ''We will provide representatives from appropriate State and Tribal conservation agencies * * * the opportunity to serve on planning teams.'' We will provide a formal written request inviting States, Tribes, and other appropriate agencies to join the refuge planning effort at the beginning of the process. Adequate coordination with States, Tribes, other agencies, and the general public includes an invitation to participate, actual participation in our processes, regular and good communication, use of appropriate tools and materials to aid coordination, a sense of team work from all parties, and resulting successful partnerships beyond the planning phase. Our final refuge planning policy provides for all the processes and procedures for us to meet our responsibility for agency coordination. We encourage State and other agency involvement throughout the planning and management processes, including implementation and review. Furthermore, by being a member of the refuge planning team, State agencies will have a direct opportunity to assure that we accurately reflect or respond to their comments in the CCP document or in our analysis. While we recognize the need for input and feedback from others, we recognize the possibility of debate or alternative management direction, if guided solely by other influences. For this reason, while we encourage full input from the States and other entities in our plans, we retain management and decision-making authority for all units of the National Wildlife Refuge System, including approval of CCPs.

Conservation, and Management

Two commenters supported the current definition. One commenter recommended referring to the NWRSIA–

1997 rather than the NWRSAA–1966. The commenter feels that this definition flows from the NWRSIA–1997 rather than the NWRSAA–1966. This definition quotes the definition provided by the NWRSIA–1997 except that it clarifies that ''* * * this Act, * * *'', referred to in the definition in the law, is the NWRSAA–1966. One commenter recommended adding, ''including, but not limited to fishing, hunting and trapping'' after the term ''regulated taking.'' The definition includes ''regulated taking'' as one of several examples of methods and procedures associated with modern scientific resource programs. The examples provided in the definition are protection, research, census, law enforcement, habitat management, propagation, live trapping and transplantation, and regulated taking. These are broad categories of examples and they could all be further expanded upon similar to the recommendation for ''regulated taking.'' However, we believe these examples are clear and it is not necessary to further expand upon any of these examples. One commenter recommends adding restoration to the definition. The definition includes the term ''restore and enhance'' and therefore we believe this recommendation is already incorporated. For these reasons we believe this definition is appropriate as written.

National Wildlife Refuge, and Refuge

Three commenters, the International Association of Fish and Wildlife Agencies and the States of Colorado and West Virginia, stated that the definition should be consistent with the NWRSIA–1997, and its legislative history, and it should not extend our authority beyond our property interest. Whereas The Friends of Oxbow National Wildlife Refuge said ''Some areas, particularly former military bases, may be designed for transfer to the refuge system. The Service has a compelling interest in land and water use within such areas. Because this interest may be subtle or have longer-term implications, individuals or government agencies may overlook it.'' We understand and appreciate the rationale behind this comment, but as we understand the comment, this interpretation of interest refers to a likely future interest of the Service. The word ''interest'' in the definition refers to the extent of that interest, right, or privilege that we possess, not what we may eventually possess. We believe this definition is appropriate as is and consistent with the law.

National Wildlife Refuge System, and System

In the process of addressing comments we decided that we need to clarify the definition of the National Wildlife Refuge System. Essentially, the Service has historically interpreted the NWRSAA–1966 as including all areas administered by us for the protection and conservation of fish and wildlife. (See 50 CFR 25.12(a) National Wildlife Refuge System; 1999.) Because current regulations do not make it clear how those ''areas'' are identified, we are specifying that for those areas not specifically listed in the law or this regulation but that are nevertheless managed by the Service, the Director, only, will determine (in writing) if they are areas administered ''for the protection and conservation of fish and wildlife.'' If so, such areas are included in the System. We are also making clear that if we are directed to manage an area for the protection and conservation of fish and wildlife by a Presidential or Secretarial order, it will be managed as part of the System. Finally, the House Report accompanying H.R. 1420, in discussing the fact that ''coordination areas'' managed by States are not refuges for compatibility determination purposes, they are still part of the System and we have, accordingly, added it to the specific list.

National Wildlife Refuge System Mission, and System Mission

We received comments from The Wildlife Management Institute, The Wildlife Society and The Conservation Force on the definition of National Wildlife Refuge System mission, and System mission. These commenters agreed with the definition that we took directly from the NWRSIA–1997. However, they are concerned that we refer to the National Wildlife Refuge System mission as ''wildlife conservation is the singular'' National Wildlife Refuge System mission. On occasion, although not in these **Federal Register** documents, we also use the term ''wildlife first'' to refer to the National Wildlife Refuge System mission. We agree that the National Wildlife Refuge System mission as stated in the NWRSIA–1997 is the National Wildlife Refuge System mission in its entirety, but we also believe our use of the terms ''wildlife conservation'' and ''wildlife first'' when referring to the National Wildlife Refuge System mission are consistent with the NWRSIA–1997 and supported by the House Report. The House Report states '' * * * the fundamental mission of our Refuge System is wildlife conservation: wildlife and wildlife conservation must come first.'' We did not include the term ''wildlife conservation is the singular'' in either the regulations or policy, only in the preamble of the regulations and policy.

Purpose(s) of the Refuge

One commenter recommended deleting the term ''or derived from'' from the definition. The commenter is concerned that this language could lead to the creation of purposes not specified in the documents listed or not clearly intended by the documents listed. Two commenters recommended adding ''major'' before the word ''purposes'' in the title of this definition. One commenter recommended that we define ''primary purposes'' separately. The NWRSIA–1997 provides the definition of ''purpose(s) of the refuge'' and one adjustment we made was to use ''national wildlife refuge'' in place of ''refuge.'' The term ''or derived from'' is in the law, and we believe it should stay in this definition. The NWRSIA–1997 does not use the word ''major'' in this definition, it is not an operative term in our regulations and policy, and we believe it should not be added. Lastly, we added a statement to this definition that states for refuges that encompass Congressionally designated wilderness, the purposes of the Wilderness Act are additional purposes of the refuge. We are taking this opportunity to add to our regulations and policy the Wilderness Act requirement that the purposes of that Act are ''within and supplemental to the purposes'' of refuges.

Refuge Management Activity

We received several comments on the definition of refuge management activity. One commenter recommended against including the definition in regulations. This commenter feels that a legislative power has been assumed, and that is reserved for Congress. We disagree with the comment regarding our authority and point out that we are authorized to adopt regulations necessary to carry out (implement) the NWRSAA–1966. Another commenter refers to the fact that refuge management activity does not include references to actions to facilitate priority public uses. This commenter feels that the term is too limiting, and could prevent hunting and fishing accommodations. We believe that actions to facilitate priority public uses are more appropriately included in the definition of refuge use rather than refuge management activity and therefore we did not include this change in the definition. A third commenter wishes that the definition would include various monitoring and

studies. We provide several examples of a refuge management activity, like monitoring and studies, in the policy at 2.10 A and therefore we did not include this change in the definition. One commenter recommends the definition specifically include State management activities. We address and incorporate this recommendation in the policy at 2.10 A and therefore we did not include this change in the definition. See Issue 6: When is a compatibility determination required. Three commenters support the definition and agree that there is a difference between a refuge management activity and a refuge use. By defining these terms we are delineating for our refuge managers and the public what is or is not a use under the law.

Refuge Management Economic Activity

We received several comments on the definition of refuge management economic activity. Three commenters recommended eliminating trapping as an example of a refuge management economic activity. One commenter recommended the definition not include guide, outfitter, and trapping activities. We believe it is appropriate to include trapping as an example of a refuge management economic activity because it is an activity that results in generation of a commodity which is or can be sold. One of these three commenters stated that trapping should not be included within this definition because it is a priority public use as part of hunting. The NWRSIA–1997 specifically lists six types of uses as wildlife-dependent recreational uses. The law and House Report discuss these six types of uses in numerous locations and they also describe them as the six priority general public uses of the National Wildlife Refuge System. Trapping is not one of the six priority public uses and is not a part of hunting. Three commenters recommended that the definition be strengthened by including the exclusion of oil and gas leasing, exploration, or production. We believe this recommendation goes beyond the scope of these regulations and policy. One commenter questions our authority to develop a definition in regulations that is not provided by Congress. As we stated above in the response regarding refuge management activity, we are authorized to adopt regulations necessary to carry out (implement) the NWRSAA–1966. Another commenter questioned why we distinguish between refuge management economic activity and refuge management activity. Two commenters feel that, within the definition, the actions that meet refuge management purposes should not be included in this category and the generation of income does not preclude these activities from contributing to refuge purposes. For the reasons discussed in the preamble of the proposed rule, we believe it is important to specifically define refuge management economic activity and we will require compatibility determinations for all refuge management economic activities. By doing so, we are not saying that generation of income precludes them from contributing to management, we are saying we will do compatibility determinations on them. We believe this definition is appropriate as is and necessary to help describe when a compatibility determination is required.

Refuge Use, and Use of a Refuge

A few commenters recommended we clarify that State management activities on refuges are not refuge uses and, therefore, not subject to compatibility. We address this concern in Issue 16: State involvement.

Sound Professional Judgment

Two commenters were against the definition including a reference to the National Wildlife Refuge System Administration Act of 1966. That aspect of the definition currently states ''* * * and adherence to the requirements of the National Wildlife Refuge System Administration Act of 1966 * * *'' The argument for removing this statement from the proposed definition is that issues of compliance must not be confused with the exercise of mostly biological judgment. One commenter not only agrees with the definition adhering to the National Wildlife Refuge System Administration Act of 1966, but recommends adding ''including the act's directive to maintain biological integrity, diversity, and environmental health'' to the definition. Another commenter recommends adding to the definition ''including consideration of biological integrity and diversity, as interpreted by the Agency policy, whether or not the proposed use is an appropriate use under agency policy.'' The law's definition of sound professional judgment specifically includes the term ''and adherence to the requirements of this Act.'' The Act's mandate to ''ensure that the biological integrity, diversity, and environmental health of the System are maintained * * *'' is a significant legal requirement and is foundational for all refuge management decisions. It is not limited to compatibility determinations for refuge uses. We did not add this statement to this definition but we recognized its value with regard to analyzing whether a use is compatible with the mission of the System. Because of that we added this concept in the discussion of ''materially interfere with or detract from'' in section 2.11(B) of our policy and ''anticipated impacts of the use'' in section 2.12(A)(8) of our policy. We are now using the term ''ecological integrity'' in lieu of the phrase ''biological integrity, diversity, and environmental health.''

Wildlife-Dependent Recreational Use, and Wildlife-Dependent Recreation

One commenter recommended we add ''trapping'' to this definition. The NWRSIA–1997 provides this definition and it does not include ''trapping.'' The law specifically lists six types of uses as wildlife-dependent recreational uses. The law and House Report discuss these six types of uses in numerous locations and they also describe them as the six priority general public uses of the National Wildlife Refuge System. Trapping is different from these priority public uses and the NWRSIA–1997 does not include it in this list of six. The Service does not have the authority to add trapping to this definition. We believe the definition is appropriate as is.

Issue 4: Decision Making Authority and Appeal Process

We received a number of comments both in support of and opposition to the Refuge Manager's authority to make compatibility determinations. Associated with this issue, we also received a number of comments requesting an appeal process for compatibility determinations. These comments include 222 individual comments with a common shared theme ''please modify the draft to ensure that the public has an opportunity to appeal decisions that permit potentially harmful activities to occur on refuges.''

The NWRSIA–1997 required, among other things, that we designate the refuge official responsible for making compatibility determinations. We have designated the Refuge Manager to be that person, because the Refuge Manager is in the best position to make an informed decision based on the site-specific nature of compatibility. We believe the House Report supports our decision to delegate the compatibility determination authority to the Refuge Manager. The House Report frequently refers to the Refuge Manager when discussing various elements of compatibility. As an example, the House Report states ''In the exercise of sound professional judgment, the Refuge Manager considers * * *'' We believe that designating the Refuge Manager as

the refuge official responsible for making compatibility determinations is consistent with the intent of the law.

We also recognize the need for National Wildlife Refuge System-wide consistency when considering compatibility. As a number of commenters pointed out, there is a real need for refuge managers to make decisions based on a clear and full understanding of national resource management programs and policies, and the role the individual refuge plays in the larger universe of wildlife conservation. We agree that this is a real concern. To accommodate this concern, in the rule and policy we built in the requirement for refuge managers to receive concurrence from their Regional Chief on all compatibility determinations. We will follow the same compatibility process throughout the National Wildlife Refuge System; however, we will base each compatibility determination on a refuge-specific (refuge purposes) analysis in addition to a National Wildlife Refuge System (System mission) analysis. We have decided to change the required regional office consultation to a required regional office concurrence on all compatibility determinations. We believe this change addresses many of the concerns provided in a number of comments and will help ensure that we look at both large-scale (System mission) and local-scale (refuge purposes) issues when preparing compatibility determinations.

A number of commenters requested that we provide a procedure for administratively appealing compatibility determinations. Our proposed rule and draft policy did not include any changes to our existing appeal procedures. The draft policy simply referenced the locations of the procedures for appealing a permit denial. The NWRSIA–1997 and the House Report were silent on this particular issue. However, on a related issue, the NWRSIA–1997 requires that we provide an opportunity for public review and comment for all compatibility determinations. Although this is not an appeal process, it results in significantly more opportunity for the public to be involved in determinations of compatibility. This is a significant change from our existing compatibility policy and regulations, which do not require an opportunity for public review and comment. When making a compatibility determination, refuge managers will consider all information provided during the public review and comment period. In addition, anyone, at any time, may present relevant information on an existing, proposed, or denied use to the Refuge Manager, and this information may cause us to re-evaluate a use for compatibility. We recognize the fact that frequently we will have both support of and opposition to our decisions on compatibility. However, the law squarely placed the authority and responsibility for making compatibility determinations with the Service. We are providing no administrative mechanism to appeal a compatibility determination except for uses of ANCSA 22(g) lands as discussed in Issue 5: Alaska.

Issue 5: Alaska

We received over 240 letters that addressed issues affecting the proposed rule or draft policy as they relate to Alaska refuges. These included 17 letters from: the State of Alaska; eight Native corporations; five national and one regional conservation organization; the Alaska Professional Hunter's Association; an environmental consulting business; and 225 letters from individuals.

Comments from the 17 letters received from organizations included 159 general comments, not specific to Alaska. We addressed these elsewhere in this document. The 17 letters also had 74 comments specific to the issue of how the compatibility policy and regulations affect Native lands conveyed from refuges under the provisions of the Alaska Native Claims Settlement Act (ANCSA), and how Section 22(g) of ANCSA applies. Additionally, we received 61 comments in these letters that addressed other Alaska-specific issues, generally associated with how the proposed actions relate to various provisions of the Alaska National Interest Lands Conservation Act (ANILCA). Two hundred twenty-two personal letters all contained the same comment in support of the compatibility requirements being applied to ANCSA 22(g) lands, as well as four other comments not specifically related to Alaska. We are responding to the Alaska-related comments in two parts: ANCSA 22(g) Lands; and ANILCA.

ANCSA 22(g) Lands

Congress enacted ANCSA to settle aboriginal land claims of Alaska's Natives by providing land and money in exchange for extinguishment of their land claims. The issue of which lands were available to Natives to select was a hotly debated topic. Ultimately some Federal lands, such as National Park lands, were taken out of the selection process. National wildlife refuge lands were made available by compromise language in the legislation that took the form of Section 22(g) of ANCSA. Section 22(g) of ANCSA reads: ''If a patent is issued to any Village Corporation for land in the National Wildlife Refuge System, the patent shall reserve to the United States the right of first refusal if the land is ever sold by the Village Corporation. Notwithstanding any other provision of this Act, every patent issued by the Secretary pursuant to this Act-which covers lands lying within the boundaries of a National Wildlife Refuge on the date of enactment of this Act [December 18, 1971], shall contain a provision that such lands remain subject to the laws and regulations governing use and development of such Refuge.''

ANCSA had multiple purposes, primarily to settle the land claims issue, but also to provide Native Corporations opportunities for economic growth and prosperity. The balance that Congress struck specific to former refuge lands subject to Section 22(g) assured that by subjecting the lands to the laws and regulations of the refuge, future uses would not be allowed to occur if they materially impaired the values for which the refuge was originally established. Congressional intent is explained in a section by section analysis of ANCSA in Senate Report No. 92–405, at 34: ''[T]his subsection provides that every patent issued by the Secretary pursuant to this section which covers lands lying within the boundaries of a Federal wildlife refuge on the date of enactment of this Act, shall contain a provision that such lands shall remain subject to the laws and regulations governing use and development of refuges as long as the lands continue within its boundaries. The purpose of this provision and limitation is to insure that the activities which take place within the refuges are compatible with the purposes for which the refuge was established. This section also assures continuing review by the appropriate Federal agencies.''

The compatibility review requirement, established formally in law with the passage of the NWRSAA–1966, has been a requirement for the use of 22(g) lands since the time that they were conveyed; however, as with uses on publicly owned refuge lands, such determinations were not required by law to follow any particular process. While the NWRSAA–1966 required uses to be compatible with refuge purposes before they could be permitted, the NWRSIA–1997 (which amended the NWRSAA–1966) for the first time established a process for how compatibility determinations are to be made. The proposed regulations and draft policy will implement these legal requirements. We have noted comments

that expressed concern that the NWRSIA–1997 created new rules that should not be applied to 22(g) lands, and we have provided significant clarifications on how the compatibility review process will be applied to 22(g) lands, and we have included nothing from the NWRSIA–1997 amendments that did not previously have legal foundation in the NWRSAA–1966. Additionally, while the plain reading of ANCSA requires all refuge laws and regulations to apply to 22(g) lands, we have historically maintained that the compatibility requirement is the most basic legal requirement to protect refuge lands against uses that materially interfere with refuges achieving their purposes. We have never proposed to apply any other legal standard to uses of 22(g) lands.

We received 222 personal letters that had a common theme of support for ''clarifying that the compatibility test applies to certain lands in Alaska governed by the Alaska Native Claims Settlement Act.'' Additionally, The Wilderness Society, National Wildlife Refuge Association, Arctic Connections, National Audubon Society, and Defenders of Wildlife voiced support for including ANCSA 22(g) lands in the compatibility policy and regulations. We did this in the proposed rule and draft policy, but we have substantially modified these sections in the final rule and final policy to provide clarification as requested by public comment.

The National Audubon Society commented that, ''[C]ompatibility applies as a minimum standard under the plain language of Section 22(g) (see *National Audubon Society* v. *Hodel,* 1984, where the Court held that Section 22(g) of ANCSA retains this compatibility test for lands selected and conveyed to natives within wildlife refuges in Alaska.) It could be argued that 22(g) actually means much more than conducting compatibility determinations, since the law states that all laws and regulations governing use and development of such Refuge apply.'' Audubon went on to say, however, that the Service may wish to clarify procedural differences that may be desirable for conducting compatibility determinations on 22(g) private inholdings versus refuge lands. We agree, and included clarifications suggested by Audubon and several Native organizations in the final rule.

The National Wildlife Refuge Association wrote: ''[T]he draft policy and regulations state that the compatibility requirements apply to the Alaska Native Claims Settlement Act Section 22(g) lands within Alaskan Refuges. While this is true, Section 22(g) requires that all Refuge rules and regulations be applied. This plain reading of the law should not be ignored. Section 22(g) was an extreme compromise in which Native land claims entitlements were allowed to come from existing National Wildlife Refuges, subject to this very significant covenant. Many argued at the time that settlement lands should not come from Refuges at all. National Park lands were placed off limits, but Refuge lands were offered in the legislation as a compromise. The Section 22(g) restrictions were, however, included as significant protection to the long-term integrity of the Alaskan National Wildlife Refuges subjected to the conveyances. While many Native landowners may object to Refuge regulations being applied to a portion of their lands, the 22(g) covenant must not be further eroded. Language in the final rule should clarify that all rules and regulations apply to the 22(g) lands, in addition to the compatibility requirement.'' Arctic Connections voiced a similar opinion in stating that the proposed regulatory standards for 22(g) lands should be ''at a minimum.'' We understand these concerns; however, after many years experience addressing this issue, we believe that we have met Congressional intent by applying the legal compatibility standard to 22(g) lands. The compatibility standard was the basic feature in refuge law (NWRSAA–1966) at the time ANCSA was enacted. We expect it to continue to provide adequate protection to refuges as adopted here.

Middleton & Timme, P.C., on behalf of Koniag, Inc. took strong exception to the proposed rule and stated that they believe that the proposed regulations, specifically their application of the standards and procedures contained in the NWRSIA–1997 as they were proposed to apply to Native Corporations, fundamentally alter the condition under which the Native Corporations received their land entitlements. They continue by stating that, ''[C]ongress clearly did not intend the 1997, Act to have such an impact on Native Corporations' private property rights.''

We have carefully reviewed these concerns and have clarified specifically how compatibility is to apply to 22(g) lands based on substantial comments from Koniag and others. In doing so, we have been careful to include only procedural elements for conducting compatibility determinations for uses on 22(g) lands that were acceptable under the original NWRSAA–1966 and as suggested by Native Corporations in this rulemaking process. These clarifications are substantial and, while recognizing that 22(g) lands are subject to compatibility review, acknowledge that 22(g) lands are also private lands that deserve special attention. We believe we have the authority to adopt regulations that address compatibility differently from those that deal with our own lands because we are, in effect, stating how we are going to implement and require compliance with a provision in a patent. We do this because the duty imposed by ANCSA is to include the provision in the patent. ANCSA itself does not impose the obligation of refuge laws and regulations. In other words, doing something which would not be allowed by the NWRSAA–1966 or regulations adopted thereunder is not a violation of the NWRSAA–1966, its regulations, or ANCSA. It is a violation of the provision in the patent. Our intent is to give meaning to the requirements of the provision and at the same time give meaning to the nature of the private lands selected per ANCSA.

Comments by Koniag relative to this issue are paraphrased below, with responses given following each issue.

Comment: 43 CFR 2650(4–6) requires that economic uses of 22(g) lands be permitted unless those uses materially impair the refuge.

Response: We believe these regulations are consistent with this provision.

Comment: The definition of compatible use is troubling in that it requires the use to be compatible not only with refuge purposes, but also with the mission of the National Wildlife Refuge System.

Response: The clarifying changes affecting compatibility determinations for 22(g) lands now include only the requirement to be compatible with refuge purposes since the requirement related to the National Wildlife Refuge System mission is a product of the NWRSIA–1997 that was not required at the time ANCSA was enacted. Again, while it may well be interpreted that the reference to refuge laws and regulations included in Section 22(g) meant all past, present, and future laws that Congress passed affecting national wildlife refuges, we have chosen to interpret the language as refuge laws and regulations that were in place at that time, since these were the conditions in which Native Corporations made their ANCSA selections. The sole exception to this is that refuge managers are to complete their compatibility determinations for 22(g) lands evaluating uses against both pre-ANILCA and post-ANILCA refuge purposes (if conflicts ever arise, the ANILCA purposes are to take

precedence). The reason for this is that we believe that Congress passed ANILCA, in its entirety, with knowledge of how it would impact ANCSA. From a practical standpoint, in support of Native interests, this also provides that we prepare compatibility determinations keeping subsistence in mind since subsistence was a Congressionally mandated purpose added to 15 of the 16 Alaska refuges that had not been included prior to the passage of ANILCA.

Comment: The definition of compatible use is troubling because it is whatever the Refuge Manager determines it to be within his ''sound professional judgment.''

Response: A refuge manager does not have unfettered discretion as the comment implies. The law defines compatible use to be one that ''will not materially interfere with or detract from.'' A refuge manager must base the determination on this standard and the procedures adopted in these regulations and policy will require that decision to be verbally and publically analyzed. Because of the desire of several commenters regarding this issue, we have included an appeal process in the final regulation that will allow 22(g) landowners to have their concerns reviewed by the Alaska Regional Director should a refuge manager find a proposed use to be not compatible. Also, refuge managers must receive concurrence from their Regional Chief on all compatibility determinations.

Comment: The 1997 Act gives the Refuge Manager the discretion to deny a use based on public safety even if he determines the use to be compatible.

Response: We have clarified the compatibility regulations as they apply to 22(g) lands and refuge managers will be reviewing only for the compatibility of proposed uses. Public safety is only an issue to the 22(g) landowner if they choose to allow public access to their lands. We do not have the authority to open 22(g) lands to public use and are not responsible for any public use that may occur, either by permission of the 22(g) landowner, or in trespass.

Comment: We do not believe that the 1997 Act applies to 22(g) lands. The Service has apparently taken the view that there is no inconsistency in the regulations and that the proposed regulation will not alter the practice of the Service regarding 22(g) lands. If this is true, the proposed regulations are in dire need of clarification.

Response: The NWRSIA–1997 amended the NWRSAA–1966. The NWRSAA–1966 clearly did apply to 22(g) lands, including the compatibility provisions. This has been so stated in correspondence, legal reviews, and policy discussions for many years. The proposed rule only would have formalized the compatibility determination process: it did not create the requirement to conduct the determination. We have, however, agreed that clarification is warranted in the final rule and 22(g) lands will be treated separately than public refuge lands.

Comment: There is a presumption of incompatibility in the event there is insufficient information to make a compatibility determination.

Response: Refuge managers must make their compatibility determinations on 22(g) lands based on available information and sound professional judgment. It is the responsibility of the applicant to provide information adequate to support the proposed use.

Comment: When a government-sponsored refuge use is competing with a 22(g) use, this situation will involve an inherent conflict for the Refuge Manager. Allowing such interested parties to determine the fate of a corporation's private property rights would violate the most fundamental notions of due process.

Response: Refuge managers have no authority to initiate or actually manage uses on 22(g) lands. They do, however, have responsibility for determining if such uses would have impacts that spill over onto adjacent refuge lands to the degree that they materially interfere with the refuge's ability to achieve its legally mandated purposes. This is the fundamental protection provided to the parent refuges from the effects of uses of 22(g) lands that Congress provided in Section 22(g) of ANCSA. Because of concerns expressed by comments; however, an avenue for appeal was added to the compatibility process for 22(g) lands so that 22(g) landowners have some recourse should a refuge manager determine a use to be not compatible.

Other Native Corporations questioned the applicability of the NWRSIA–1997 to 22(g) lands and expressed the need for significant clarifications on how the compatibility process was to be applied differently to 22(g) lands. Many of the points of clarification followed the concerns expressed by Koniag and are not specifically reiterated. Calista Corporation stated that, ''[W]e believe that ANCSA Section 22(g) lands are a unique class of private lands within the National Wildlife Refuge System and should be treated by separate provision in the Compatibility Regulations.'' We agree. Calista, in addition to discussing the issues of determining compatibility by including the mission of the National Wildlife Refuge System, the need to stress that uses must be allowed unless they will materially interfere with refuge purposes, and concern over the ability to find a use not compatible if there is a lack of data, also raised two new issues. First, they believe that periodic reviews of the compatibility of uses of 22(g) land is unnecessary if these uses do not change substantially. Second, they state that village land use should not be subject to continual review and uncertainty regarding long-range plans and goals. We have clarified in the final rule that, for 22(g) land uses, the 10-or 15-year required review will not apply. We will prepare compatibility determinations only once for a proposed use on 22(g) lands and will revise them only if the use changes significantly, if substantially new information is made available that could affect the determination, or if requested by the landowner. Additionally, land use planning for 22(g) lands will not be subjected to refuge comprehensive conservation planning processes, and compatibility determinations affecting 22(g) lands will not be automatically reviewed when the refuge plans are updated.

Cook Inlet Region, Inc. (CIRI) questioned the applicability of the NWRSIA–1997 but provided nine suggestions for improving the final rule specific to how the Service does compatibility reviews for uses of 22(g) lands. We have already addressed six of these recommendations in response to other comments. CIRI commented that the use of compensatory mitigation should not be totally foreclosed on 22(g) lands. We believe that our policy of not allowing compensatory mitigation is appropriate and can be effectively administered on 22(g) lands. CIRI took exception to the definition of compatible use in its inclusion of the phrase ''wildlife-dependent recreational use,'' stating that this is inappropriate for 22(g) lands, as well as for the rest of lands in Alaska. The concern is understood, but the definition comes from the NWRSIA–1997 and includes all other uses. Compatibility determinations are based on what the specific refuge purposes are. The concern should be lessened by recognizing that specific refuge purposes for Alaska refuges include (in 15 of the 16 refuges) a purpose for subsistence, meaning that in part, we will have to determine proposed uses to be compatible with the continuation of subsistence uses on those refuge lands. CIRI also commented that it should be made clear that compatibility determinations for uses of 22(g) lands

should only be required to the degree that the proposed activity has spill over effects on the adjacent refuge lands, and that uses that do not have this spill over effect should not be subject to a compatibility determination. We agree that compatibility determinations for 22(g) lands are not to be treated as though they are still refuge lands, rather, the proposed uses are to be evaluated against how they would impact refuge lands, not how they would impact the 22(g) lands. We do not agree; however, that where this ''spill over'' effect does not occur, compatibility determinations are not required. The determinations will still be required, but such uses will be found compatible. Finally, CIRI states that its oil, gas, and coal interests in Kenai National Wildlife Refuge are not to be governed by the proposed compatibility determinations. We agree in part. The subsurface property interest conveyed to CIRI for oil, gas, and coal was conveyed under the provisions of ANCSA and, therefore, such property interest is subject to Section 22(g). In this case, however, the ''Terms and Conditions'' settlement referenced by CIRI amounts to a property interest that guarantees CIRI certain rights to explore for and develop petroleum resources. While we retain some ability to regulate surface use and procedures, we cannot deny CIRI reasonable access to their subsurface estate.

King Cove Corporation wrote in support of the conservation goals underlying the NWRSIA–1997 and the proposed regulations, but expressed concerns that the regulations be implemented in a manner that not impinge upon Native traditional uses and needs. Concern was expressed that inadequate instruction was provided to refuge managers on how to determine whether a use materially interfered with refuge purposes. Further, King Cove Corporation suggested that regulations provide that subsistence and other traditional uses made of the resource to foster and support Native culture and the health and welfare of Native peoples, be presumed to be compatible uses, absent a showing of extraordinary circumstances. Seven specific recommendations on improving the final rule were provided by the Corporation. These were similar to recommendations made by other Native Corporations and we addressed them in specific clarifying additions to the final rule. King Cove Corporation also recommended that analysis for compatibility include evaluation of the socioeconomic impacts on affected rural communities. The law does not allow this. Compatibility reviews can only look at effects of proposed uses relative to the legally established purposes of the refuge.

Kaktovik Inupiat Corporation (KIC), and the Alaska Federation of Natives, Inc. (AFN), provided similar comments which addressed approximately 15 issues relative to compatibility requirements for 22(g) lands. We addressed all but three of these issues in previous comments. These include recommendations relative to clarifying that 22(g) lands are different than other refuge lands, re-evaluations of compatibility, discretionary denial authority, appeals, evaluating uses against the National Wildlife Refuge System mission, jurisdictional concerns, and subsistence as a priority use. KIC and AFN raised additional issues related to issuing of refuge permits, compensation for uses of 22(g) lands, and using Sections 1307 and 1308 of ANILCA to implement the regulations. The commenters stated their desire that proposed uses of 22(g) lands not be subject to the Service's permitting system. We accept this. The final rule states that we will require no additional permits for uses of 22(g) lands beyond the completion of a compatibility determination by the Refuge Manager that finds the use to be compatible with refuge purposes. Any conditions necessary to ensure a proposed use is compatible may be included in the compatibility determination. Comments also stated the desire that compensation be granted for uses of 22(g) lands in the same manner as any other private landowner is compensated for the use of their lands. We do not believe this to be an issue in that we do not allow public uses of 22(g) lands and only work on these lands, for management reasons, with the permission of the landowner. This relationship does not prevent us and 22(g) landowners from entering into agreements on uses of the 22(g) lands. Such agreements could include payments, or non-monetary compensation for benefits we would obtain from the 22(g) landowner. The final comment recommending implementation of the regulations through Sections 1307 and 1308 of ANILCA is not acceptable to us. While we support these sections of law, the completion of refuge compatibility determinations is a responsibility imposed by law that can only be carried out by the Service. This is not an authority that we can or should delegate outside of the government. KIC and AFN also asked for clarity that if conflicts arise between the implementation of the NWRSIA–1997 and ANILCA that ANILCA take precedence. We address this concern in our discussion of issues pertaining to ANILCA.

Doyon, Limited wrote that the final policy and regulations should recognize that most lands conveyed to Native Corporations pursuant to ANCSA are not subject to the requirements of Section 22(g) . We agree that only a small percentage of land conveyed under the provisions of ANCSA is subject to the 22(g) restrictions. The compatibility policy and regulations is not applicable to Native land that is not subject to Section 22(g) of ANCSA.

In summary, we have not changed our position on the general applicability of the compatibility standard to ANCSA 22(g) lands, but we have made numerous changes to the final rule and policy based on public comment as indicated above. These changes allow us to conduct compatibility determinations substantially different on the 22(g) lands in recognition of the unique status of these lands and the fact that we are implementing a provision of a patent.

ANILCA

The remaining comments on the proposed rule relative to Alaska address concerns, or needs for clarification, on issues pertaining to ANILCA.

The State of Alaska, the Alaska Professional Hunters Association, The Wildlife Legislative Fund of America, and several Alaska Native organizations all expressed concerns that the legal guidance included in ANILCA on a number of issues was not well presented. It was suggested that the statement in the NWRSIA–1997 on resolving any conflicts that arise between implementation of the NWRSIA–1997 and ANILCA be included in regulations. In adopting these regulations we have been mindful of this provision and have written them to avoid any conflicts. In addition we are not amending any of the regulations applicable to the Alaska refuges contained in 50 CFR Part 36. Additional statements about specific issues such as cabins, snowmachine use, and access rights ensured under Title XI of ANILCA, etc., are not necessary, as they are provided for in those regulations.

The State of Alaska also expressed concern over possible impacts to State fish and wildlife research, rehabilitation, and enhancement programs, elimination of the option in 50 CFR 25.44 for using mitigation measures to make a right-of-way or easement use of a refuge compatible, and over an inadequate appeal process for not compatible findings where no permit is required (such as for general uses like fishing or boating). These are

not Alaska-specific concerns and other State agencies included them in their comments as well. We addressed them collectively elsewhere in this document.

The State of Alaska, The Wildlife Legislative Fund of America, and the Alaska Professional Hunters Association all commented that Alaska refuges are different from lower 48 refuges in that Alaska refuges are considered open until closed. While there are notable differences for many activities on Alaska refuges compared to the lower 48, all uses of Alaska refuges must also be found to be compatible, unless specifically exempted by law. The policy and regulations describing the compatibility determination process apply equally well to all refuges within the National Wildlife Refuge System. These commenters also recommended that commercial guiding and transporting be allowed as economic uses, and that trapping be allowed as well. We generally allow such uses on Alaska refuges, and there is no proposal to change this; however, from a technical aspect, we must find these uses, as well as all other uses, to be compatible with refuge purposes and the National Wildlife Refuge System mission to allow them. With respect to all of the above comments, we are not changing the status of refuge uses in Alaska. See 50 CFR 36 for regulations governing Alaska refuges.

Doyon, Limited (Doyon) wrote that the proposed regulations fail to clarify that oil and gas recovery can be a compatible use within a refuge, and that activities undertaken pursuant to Section 1008 of ANILCA are subject to a different presumption of compatibility than other uses. All uses, including oil and gas related activities (and even including uses that Congress specifically determined to be ''appropriate uses'' such as hunting and fishing) must, by law, be determined to be compatible to be allowed. The assumption made by Doyon that oil and gas related activities on non-North Slope refuge lands may be undertaken unless and until a determination is issued which finds the activities not to be compatible, is incorrect. Only after completing a compatibility determination, and having found the proposed use to be compatible, could we proceed in permitting uses pursuant to Section 1008 of ANILCA. Doyon also commented that the draft compatibility policy improperly expands the authority of the Service to impose ''additional procedural steps'' on Alaska refuges. The additional steps that Doyon is referencing are any of the procedures, or special considerations, that may be specifically required by ANILCA. No other additional steps are included for conducting compatibility determinations for uses of Alaska refuges, except those that may be mandated by ANILCA, or those previously discussed as they specifically apply to ANCSA 22(g) lands. Additionally, Doyon commented that the proposed regulations could presumptively prohibit new uses for an undetermined amount of time (while completing a final comprehensive conservation plan). We have previously completed these plans, as required by ANILCA, for all Alaska refuges. While we will undertake periodic revisions of these plans, compatibility determinations for proposed new uses will not have to wait for completion of the revisions.

Finally, the Becharof Corporation wrote that unless subsistence use is included as a priority in the language of the policy and regulations, the mission statement will undermine the intent of ANILCA provisions by giving recreational hunting and fishing enhanced consideration. The NWRSIA–1997 did recognize hunting and fishing (including subsistence hunting and fishing) as priority public uses that we are to facilitate if we find them to be compatible with refuge purposes and the National Wildlife Refuge System mission. This did not elevate these uses to the status of refuge purposes for which subsistence use is for 15 of the 16 Alaska refuges. Compatibility determinations for these 15 refuges will, by law and regulation, be required to document that uses, including recreational hunting and fishing, do not materially interfere with the ability of the refuges to provide for traditional subsistence uses. This is strong protection for subsistence that the new policy and regulations does not lessen in any way.

In light of the comments related to ANILCA and as discussed in our responses we have made changes to the final rule and policy.

Issue 6: When Is a Compatibility Determination Required

We received many comment letters addressing various facets of when a compatibility determination is and is not required. The comments focused primarily on two aspects of the policy and regulations: not requiring compatibility determinations for refuge management activities, except for refuge management economic activities; and consider State wildlife management activities as refuge management activities, not refuge uses.

Two hundred and twenty-two individual commenters with a common shared theme ''please modify the draft by requiring all of the Fish and Wildlife Service's management activities to pass the compatibility test,'' plus several additional commenters recommended that we require compatibility determinations for all refuge management activities. As a general matter, refuge management activities, defined as an ''activity conducted by the Service or a Service-authorized agent to fulfill one or more purposes of the national wildlife refuge, or the National Wildlife Refuge System mission'' have not historically been subject to compatibility determinations. We have not in the past and do not now consider refuge management activities to be refuge uses, rather refuge management activities are actions that we are obligated to or decide to take in order to help accomplish refuge purposes and/or the National Wildlife Refuge System mission. We have processes in place, including intra-agency section 7 consultation, refuge planning and associated NEPA compliance, to help ensure that we are conducting the appropriate refuge management activities. In addition, our refuge planning process provides an opportunity for public involvement in refuge management decisions. Compatibility is designed specifically for evaluating the anticipated impacts of refuge uses, not refuge management activities. As we discussed in the preamble of the proposed rule, we acknowledge the unique nature of one category of refuge management activities, that is refuge management economic activities, and for the reasons stated in that preamble we believe that compatibility determinations should be required for this category of refuge management activities. For all other refuge management activities, we are not saying that they are or are not compatible, rather we are simply saying that compatibility does not apply. We believe that this is consistent with the NWRSAA–1966.

The International Association of Fish and Wildlife Agencies (International) and several States addressed the importance of distinguishing between ''refuge use'' and ''refuge management activity.'' Most of these comments requested that we clarify that State wildlife management activities on a refuge are not considered a refuge use and, therefore, not subject to a compatibility determination. The International stated that this is consistent with the NWRSIA–1997, and in addition asked that we make this clear in the policy. We agree in part. We added additional language in the policy

stating that, we do not require compatibility determinations for State wildlife management activities on a national wildlife refuge pursuant to a cooperative agreement between the State and the Fish and Wildlife Service where the Service has issued a written determination that such activities support fulfilling the refuge purposes or the System mission. We consider proposals for State activities on refuges that are not pursuant to a cooperative agreement a proposal for a refuge use and we will require a compatibility determination. By law, we cannot allow these activities by the State or any other entity without ensuring that they are compatible. For refuges where the State is proposing a number of wildlife management activities that are not pursuant to a cooperative agreement, we will be able to prepare a single compatibility determination for all the State wildlife management activities.

A few commenters addressed our discussion of circumstances in 2.10 B Other exceptions under which the requirements of compatibility may not be applicable. Commenters suggested we delete portions of this section, add additional examples and add more guidance. We did not accept the recommendation to delete portions of the section because they are necessary to help explain when we should not prepare compatibility determinations. We did not accept the recommendation to add additional examples or to provide more guidance because we did not believe that any clarifying language was necessary.

A few commenters recommended that only military overflights, not all overflights, be exempted from compatibility determinations. The NWRSIA–1997 states ''The provisions of this Act relating to determinations of the compatibility of a use shall not apply to—(A) overflights above a refuge; * * *'' The law does not differentiate between military and non-military overflights. We believe the law exempts all overflights, military or otherwise, from compatibility determinations.

We received several comments regarding the emergency provision that allows us to temporarily allow or initiate any refuge use without making a compatibility determination if it is necessary to protect the health and safety of the public or any fish or wildlife population. We had stated that a temporary action should not exceed 12 months. The general concern was that 12 months was too long to be considered a temporary action. We agree. We have reduced the time frame for temporary actions to not exceed 30 days.

Issue 7: Denying Uses

We received several comments regarding denying a use without determining compatibility and not permitting a use found to be compatible. The majority of these commenters questioned our authority to take these two actions, *i.e.,* deny a proposed use without making a compatibility determination and not allow a use found to be compatible.

As a matter of law, the Secretary acting through the Service clearly has the authority to permit or not permit any use on a national wildlife refuge, the only legal requirement imposed by the NWRSAA–1966 being that those uses permitted must be shown to be compatible. The converse is not true. If an application for a use is denied, it need not be shown that the use is not compatible. In addition, when we determine that a use is compatible, we are not required to allow the use. This authority is not new. We believe this is consistent with the NWRSAA–1966 and is clearly stated in the NWRSIA–1997 House Report, ''Pursuant to Section 4(d) of the NWRSAA, a determination of compatibility must be made by the USFWS prior to permitting an activity to occur, but a determination of compatibility does not require that a particular use be permitted. This legislation does not change that provision.''

Several of the commenters also addressed the vagueness of the term ''is inconsistent'' that we use in our discussion of denying a proposed use without determining compatibility. We agree that this term is somewhat vague. We replaced the term ''is inconsistent'' with the word ''conflicts.''

Issue 8: Sound Professional Judgment

We received comments from several non-government organizations regarding our interpretation and discussion of the term ''sound professional judgment.'' In addition, we received comments from several non-government organizations and one State agency regarding our definition of this term. We addressed the comments regarding the definition earlier in this document under Issue 3: Definitions. Following is a discussion of the comments specific to our interpretation and discussion of sound professional judgment.

One commenter suggests that a closer working relationship between the State fish and wildlife agency and the Refuge Manager would improve the application of sound professional judgment. Another commenter agrees with closer working relationships, and suggests that the Refuge Manager consult a much wider range of professional advice. We agree. When a refuge manager is exercising sound professional judgment, the Refuge Manager will use available information, which could include consulting with others both inside and outside the Service. We added language to that effect in the general discussion of sound professional judgment.

Several commenters said that refuge managers should not consider lack of adequate budgets when considering priority public uses. We do not agree. We believe that we must, by law, consider lack of adequate budgets for all uses, including priority public uses. The NWRSIA–1997 states that ''no other determinations or findings are required to be made by the refuge official under this Act or the Refuge Recreation Act for wildlife-dependent recreation to occur.'' However, regarding this provision in law, the House Report states, ''In the future, no such determination is required to be made for wildlife-dependent recreational uses. However, this does not mean that limited financial and personnel resources must be directed toward maintenance or enhancement of these activities. As noted previously, one element of ''sound professional judgment'' which must be exercised in making a compatibility determination is the availability of resources. This facet of sound professional judgment is intended to allow the manager to consider whether adequate financial, personnel, law enforcement, and infrastructure exists or can be provided in some manner by the USFWS or its partners to properly manage a public use.'' Regarding the definition of sound professional judgment, the House Report states, ''Implicit within this definition is that financial resources, personnel and infrastructure be available to manage permitted activities.'' Therefore, we believe the available resources element of sound professional judgment is required by law to apply to all uses and must be included in these regulations and policy. Lastly, the NWRSIA–1997 goes on to say that if available resources are the only things preventing a priority public use from being compatible, the Refuge Manager must make reasonable efforts to secure resources that are lacking. We address this additional requirement for priority public uses in sections 2.11 A.(2) and 2.12 A.(7) of the policy.

The Wilderness Society, National Audubon Society and National Wildlife Refuge Association suggested we add additional language to the discussion of sound professional judgment regarding maintenance of biological integrity,

diversity, and environmental health. Several additional commenters stated, although in a variety of ways, that we consider biological integrity, diversity, and environmental health when making compatibility determinations and we prohibit uses that are detrimental to any aspect of the ecological health of the refuge. We also received 222 individual letters with a common shared theme stating, ''Please also require that activities do not degrade the biological integrity, diversity, and environmental health of the refuges.'' Since these comments are so closely related we are collectively addressing them as follows. The NWRSIA–1997 states that we must maintain the biological integrity, diversity, and environmental health of the National Wildlife Refuge System. This is an important and fundamental requirement of the law and establishes a baseline for all actions (including refuge management activities and public uses) taken on refuges. As we discussed earlier in Issue 3: Definitions we did not add this statement to this definition but we recognized its value with regard to analyzing whether a use is compatible with the mission of the System. Because of that we added this concept in the discussion of ''materially interfere with or detract from'' in section 2.11(B) of our policy and ''anticipated impacts of the use'' in section 2.12(A)(8) of our policy. We are now using the term ''ecological integrity'' in lieu of the phrase ''biological integrity, diversity, and environmental health.'' One commenter also suggested adding ''not negatively impacting conservation goals.'' We address this comment, in part, in Issue 17: Steps to prepare a compatibility determination where we state that we added to the policy that refuge managers should list all conservation objectives in approved refuge management plans that reasonably might be affected by the proposed use.

Issue 9: Materially Interfere With or Detract From

We received several comments addressing our discussion of ''materially interfere with or detract from.'' Comments ranged from ''the intent of this section, as well as the scope of activities to which it applies, is unclear'' to ''we find this straightforward and particularly endorse.'' Other comments stressed the importance of considering direct and indirect impacts of uses plus the cumulative impacts of all activities on the refuge and specifically endorsed other statements in our discussion of ''materially interfere with or detract from.'' One commenter stated that the words ''lingering or continued adverse'' confuse more than clarify and should be deleted while another commenter stated that the words ''tangible'' and ''lingering and continued adverse'' seem to lower the compatibility standard. As we discuss in Issue 6: Sound professional judgment and Issue 17: Steps to prepare a compatibility determination we made changes that, in part, address some of the comments raised here. In addition, we revised portions of our discussion of ''materially interfere with or detract from'' to clarify this section. We stress that whether some impact is ''tangible'' or ''lingering and continued adverse'' is not necessarily the overriding concern. The primary aspect is how does the use and any impacts from it affect our ability to fulfill the purposes of the refuge and the mission of the System.

Issue 10: Right-of-Ways and Replacement of Lost Habitat Values or Other Compensation

We received many comment letters that addressed issues related to right-of-ways. These included several general comments, many comments specific to the issue of compensatory mitigation, and the transcript from a public meeting held in Aberdeen, South Dakota that addressed how the proposed regulations and draft policy may affect the Highway 12 project in their state. Twenty-three citizens gave testimony at this October 23, 1999 meeting and each raised concerns about impacts the proposed changes might cause.

The comments we received regarding right-of-ways primarily addressed our proposal to amend current regulations to no longer permit the use of compensatory mitigation in order to make a proposed use compatible. This proposed change was supported by 222 letters from individuals that had a shared common theme regarding this and four additional issues.

The Federal Highway Administration stated ''The proposal in the rule and policy to disallow mitigation for uses of refuge land that have not been determined to be compatible may conflict with the laws for Federal land transfer for acquisition of right of way by the FHWA as codified in 23 U.S.C. Section 107(d), Acquisition of Rights-of-Way-Interstate System, and Section 317, Appropriation for Highway Purposes of Lands or in Lands Owned by the United States. These laws establish the process through which the FHWA acquires land on the behalf of State transportation departments from other Federal Agencies for highway improvements and construction.'' Section 107(d) states ''(d) Whenever rights-of-way, including control of access, on the Interstate System are required over lands or interests in lands owned by the United States, the Secretary may make such arrangements with the agency having jurisdiction over such lands as may be necessary to give the State or other person constructing the projects on such lands adequate rights-of-way and control of access thereto from adjoining lands, and any such agency is directed to cooperate with the Secretary in this connection.'' Section 317(a) and (b) state ''(a) If the Secretary determines that any part of the lands or interests in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate. (b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified.'' It has been the practice of the Service to comply with 23 U.S.C. 107(d) and 317(a) and (b). This rule will change the process by which we prepare compatibility determinations for highway right-of-ways but it will not interfere with our ability to continue to comply with 23 U.S.C. 107(d) and 317(a) and (b). By way of clarification, we are not precluding from the compatibility process all aspects of what is commonly thought of as mitigation. Certainly, any right-of-way applicant, including for roads or highways, could modify a proposed use through avoidance, minimization, and other steps (see discussion of mitigation below.) What we are limiting here is the use of that aspect that is referred to as compensatory mitigation. We still will cooperate by working with the Federal Highway Administration and States for redesign, etc. Another method that we can use to cooperate with the Federal Highway Administration, and, where appropriate, accommodate their request,

is through exchanges for fee title or less than fee title interests in land as provided in our policy at Part 342 Chapter 5 Non-Purchase Acquisitions. The criteria for exchanges are, (1) that the exchange be of benefit to the United States, and (2) that the value of the lands or interests in lands be approximately equal or that values may be equalized by the payment of cash by the grantor or by the United States. Exchanges are a valuable method to acquire land or interests in land for Service programs and may be used to accommodate Federal Highway Administration projects. This rule does not change our policy on land or interests in land exchanges.

We proposed to add, in paragraph (b) of 50 CFR 26.41, language that states we will not allow making proposed refuge uses compatible through replacement of lost habitat values or other compensation (sometimes referred to as ''mitigation'' or as a component of mitigation). We also proposed to delete the current paragraph (d) of 50 CFR 25.44, which authorizes us to require ''mitigation measures'' within an easement area to ''make the proposed use compatible'' and to delete current paragraph (c) of 50 CFR 29.21–7, as it applies to the issuance of right-of-way permits, which authorizes us to require ''mitigation measures'' on-or off-site to ''make the proposed use compatible.''

We want to clarify what is ''mitigation'' and what portion of ''mitigation'' we do not allow. The President's Council on Environmental Quality defined the term ''mitigation'' in the National Environmental Policy Act regulations to include: ''(a) Avoiding the impact altogether by not taking a certain action or parts of an action; (b) minimizing impacts by limiting the degree or magnitude of the action and its implementation; (c) rectifying the impact by repairing, rehabilitating, or restoring the affected environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitute resources or environments.'' [40 CFR Part 1508.20(a–e)]. The Service supports this definition of mitigation and considers the specific elements to represent the desirable sequence of steps in the mitigation planning process. When we state in these regulations and policy that we will not allow compensatory mitigation to make a proposed refuge use compatible we are referring only to element (e) of mitigation as defined by the President's Council on Environmental Quality.

Comments were generally either strongly in favor of retaining the existing provisions to allow the continued use of compensatory mitigation, or strongly in favor of our proposal to eliminate those provisions. Support for retaining the existing provisions was largely dominated by three concerns: first, that the proposed changes were too inflexible and could result in many projects that may be considered to be in the general best interest of the American public being delayed, deemed too costly, or prohibited; second, that Congress did not intend for such a far reaching impact in enacting the NWRSIA–1997; and third, that such a policy shift would ultimately be bad for wildlife conservation by discouraging State, local government, and private landowner partners, especially in the establishment of new conservation easement areas. Support for the proposed changes generally voiced our view that a use is either compatible or not, and the fact that some ''incompatible'' impact might be compensated for by doing something to make up for the impacts cannot make a use compatible for purposes of the NWRSAA–1966. Some pointed out that it be made clear that compatibility ''is not for sale'' on national wildlife refuges.

We have spent considerable time reviewing this issue and, based on substantial public comment, believe that some changes in the final policy and regulations are warranted. We understand the Congressional intent regarding existing right-of-ways, which is stated in the House Report, ''There are numerous existing rights-of-way on National Wildlife Refuge System lands for roads, oil and gas pipelines, electrical transmission, communication facilities, and other utilities. The Committee does not intend for this Act to in any way change, restrict, or eliminate these existing rights-of-way, whether established by easement or permit, or to grant the USFWS any authority that does not already exist to do so.''

We have, therefore, amended and clarified our final policy and regulations to reflect the Committee's intent not to change, restrict, or eliminate existing right-of-ways. The policy and regulations also address the unique circumstance presented by existing public highway right-of-ways. In order to continue to serve the purpose for which a right-of-way was issued, public highways must, in certain circumstances, be expanded or realigned. We amended our policy and regulations to accommodate the reasonable need for the minor expansion or realignment of existing public highway right-of-ways. We note that while the Congressional intent is that the Act itself not change, restrict, or eliminate existing right-of-ways, it is also clear that Congress did not alter our authority to do so if warranted on compatibility or other grounds.

Issue 11: Refuge-Specific Analysis

We received several comment letters that generally supported our refuge-specific analysis language in the policy. One commenter recommended adding specific language from our proposed rule preamble to our policy discussion on refuge-specific analysis. They stated this would give added clear and appropriate policy direction to refuge managers. We agree. Therefore, we modified this section to state that we do not require refuge managers to independently generate data to make determinations, but rather to work with available information. The Refuge Manager may work at their discretion with the proponent(s) of the use or other interested parties to gather additional information before making the determination.

Issue 12: Relationship to Management Plans

We received several comment letters that addressed the relationship between compatibility determinations and refuge planning. These comments supported completing compatibility determinations as part of the comprehensive conservation planning process. They stated that this was one way to better address the impacts of the use and reduce unnecessary or duplicative paperwork. We agree that there are many advantages to preparing compatibility determinations concurrently with refuge planning documents, and in the policy we state that we will usually complete compatibility determinations as part of a planning process. In addition, our final refuge planning policy published in the **Federal Register** (65 FR 33892 published May 25, 2000) states we will, ''Complete new compatibility determinations or re-evaluate existing compatibility determinations as part of the CCP process for all individual uses, specific use programs, or groups of related uses associated with the proposed action. Prepared concurrently with the CCP, incorporate the draft compatibility determinations into the draft CCP as an appendix. We require public review and comment for all compatibility determinations. We can achieve this concurrently through

public review and comment of the draft CCP and NEPA document.''

Three State fish and wildlife agencies and the International Association of Fish and Wildlife Agencies, suggested adding to the rule Congressional intent that compatibility determinations be made, to the extent practicable, as part of the comprehensive conservation plan. We agree that this should be stated in the rule as well as in the policy. Therefore, we added language to the regulations that states we will usually complete compatibility determinations as part of the comprehensive conservation plan or step-down management plan process for individual uses, specific use programs, or groups of related uses described in the plan.

Issue 13: Priority Uses

We received several comments from non-government organizations and State agencies regarding priority uses, or special considerations when managing conflict between uses. The NWRSIA–1997 established that compatible wildlife-dependent recreational uses, defined as refuge uses involving hunting, fishing, wildlife observation and photography, and environmental education and interpretation, are to be recognized as the priority general public uses of the National Wildlife Refuge System through which the American public can develop an appreciation for fish and wildlife. The law further requires that opportunities are to be provided for compatible wildlife-dependent recreational uses within the National Wildlife Refuge System, that these uses receive priority consideration over other general public uses in planning and management within the National Wildlife Refuge System, and for increased opportunities for families to engage in such activities within the National Wildlife Refuge System. The law did not establish a hierarchy among the priority public uses, or establish any clear process for determining such a hierarchy. The law was clear, however, that we must determine the priority public uses to be compatible if we are to allow them, and if determined compatible, we should facilitate them whenever possible.

Some commenters expressed concern that the proposed policy would provide guidance to refuge managers that would allow them to find a priority public use not compatible based solely on insufficient information on the effects of the use. They suggested that Congressional intent directed that priority public uses should be determined compatible unless strong evidence demonstrated otherwise. We agree that Congressional intent provided that compatible priority public uses should be facilitated whenever possible, but it is clear that no different standard is to be applied to the actual determination of compatibility. Nonetheless, we acknowledge that there is rarely complete information available on the effects of a proposed use, and that the proposed terminology, ''If available information to the Refuge Manager is insufficient to document that a proposed use is compatible, then the Refuge Manager would be unable to make an affirmative finding of compatibility and we must not authorize or permit the use'' could be improved. Therefore, we have added to the final policy a discussion of how we deal with priority public uses when sufficient information is not available. We believe that this change clarifies this issue, provides adequate priority to the priority public uses, and addresses the comments.

Several commenters also expressed concern with the Justification step in policy and regulations, suggesting we eliminate the language, amend it to exempt priority public uses or amend it to ensure that only those uses which are determined to be compatible will materially enhance the refuge purposes and System mission. The language, as part of a justification for the compatibility finding, would require a description of how the proposed use is reasonably expected to affect fulfilling the refuge's purpose(s) and the National Wildlife Refuge System mission. Most of these comments correctly pointed out that the compatibility standard measures how the proposed use would materially interfere with or detract from the fulfillment of the refuge's purposes or the National Wildlife Refuge System mission. Therefore, we amended this step in regulations and policy to clarify this point.

A number of commenters asked for clarification on how we would determine which use, among priority public uses, would receive the higher priority should conflict between them arise.

Suggestions were also made by some on how such priority decisions should be made, such as the Humane Society of the United States suggesting that consumptive wildlife uses (such as hunting and fishing) be held to a higher standard than non-consumptive wildlife uses (such as wildlife viewing and photography), while the New Mexico Department of Game and Fish requested that we give priority to waterfowl hunting (specifically to manage increasing populations of white geese) over the optimization of waterfowl viewing opportunities. The NWRSIA–1997 did not establish a hierarchy among the priority public uses, and we are not proposing to do so as a matter of general policy. We will continue to try and facilitate all compatible priority public uses to the degree that we are able to do so. If conflicts arise, and restrictions or the elimination of uses are necessary, we will give priority to uses that most positively contribute to the achievement of refuge purposes, the National Wildlife Refuge System mission, and specific refuge management goals.

Two scientific organizations (American Institute of Biological Sciences and The Ornithological Council) suggested that scientific research should be presumed to be compatible unless otherwise determined that it is not, and such activities should be considered in the ''top tier of uses.'' While our experience has been that scientific research and other scientific activities are most often compatible, the NWRSAA–1966 as amended by the NWRSIA–1997 does not give us any authority to treat research differently than other uses. Nonetheless, we encourage many types of natural resource-related research and believe that we can cover many such proposed uses under our expedited compatibility review process.

Many commenters voiced support for the priority public uses, either as a category, or individually. Some expressed concern that more was not stated in the draft documents that illustrated the preference that we must give to wildlife-dependent recreational uses under the provisions of the NWRSIA–1997. The State of Utah voiced support for our position on priority public uses but was concerned that regulations (specific to hunting) were not uniformly used on all refuges in their area. We understand this concern, and support consistency in general, but maintain that different regulations, or permit stipulations, are often necessary to ensure compatibility at different refuges because of different wildlife management issues, refuge purposes, size of the refuge, or other refuge-specific differences.

The Wilderness Society suggested that we prohibit non-priority recreational activities, and commercial uses of refuges unless they can be demonstrated to contribute to the achievement of the National Wildlife Refuge System mission and the refuge purposes, and that they are compatible. While we believe such a policy could ultimately benefit refuges, the suggestion goes beyond both what the NWRSIA–1997 mandates and the general scope of the policy and regulations establishing the

process we will use to determine compatibility of uses.

Several comments suggested that hunting or fishing guides or commercial outfitters, and/or trapping, should be considered priority public uses under the provisions of the NWRSIA–1997. We do not agree. The definition for the priority public uses is clearly provided in the law, and although these are related uses, they are not specifically included in the legal definitions. The most obvious effect beyond these uses not receiving automatic preference over other refuge uses, is the requirement to review compatibility determinations for these uses every 10 years rather than every 15 years. Our interpretation of priority public use only includes the use itself and not uses that are related but separate from the actual use. Another example is that a permitted use that rents boats (that could be used in support of fishing, birdwatching, or waterfowl hunting) would not be considered a priority public use itself in our policy and regulations. We consider it a commercial use subject to the 10 year compatibility review requirement.

Issue 14: Re-evaluation of Uses

We received several comment letters regarding how and when we re-evaluate uses for compatibility. The majority of the commenters recommended we clarify our re-evaluation language. A few of the commenters recommended specific changes.

One commenter recommended reducing the 10- and 15-year maximum re-evaluation period to 5-years for recreational uses. Most of the re-evaluation language in the policy and regulations is taken directly from the NWRSIA–1997. These 10- and 15-year maximum time frames coupled with the other criteria for re-evaluations in our policy and regulations are consistent with the NWRSIA–1997, which provided clear direction on when we will re-evaluate uses for compatibility. We believe that the re-evaluation criteria are sufficient to keep pace with changes in resources and relevant information. The 10- and 15-year re-evaluation criteria is the maximum period of time we can go without a re-evaluation whereas the other criteria may trigger a re-evaluation much earlier. In addition, we note that a refuge manager may re-evaluate a use at any time and specifically state this in our policy.

One commenter recommended we re-evaluate a priority public use whenever it is proposed, even if it has been previously denied. We consider requests for refuge uses whenever we receive them. For priority public uses we aggressively look for ways to allow them. The House Report states we should facilitate priority public uses when they are determined to be compatible and also states that, ''there will be occasions when, based on sound professional judgment, the manager will determine that such uses will be found to be incompatible and cannot be authorized.'' During fiscal year 1999 we welcomed over 33 million priority public use visits to the National Wildlife Refuge System. However, this does not mean that we should allow all priority public uses on all refuges. We agree that priority public uses is a category of uses that we must pay special attention to as directed by the NWRSIA–1997. We believe that we adequately address this special category of uses throughout the policy and do not need to make changes to the re-evaluation section. See Issue 13: Priority uses for more discussion on this topic.

Four commenters, including Edison Electric Institute, Transcontinental Gas Pipe Line Company, Southern Natural Gas Company and El Paso Energy Corporation, specifically addressed our re-evaluation procedures for right-of-ways. Generally, these commenters asked that we further clarify how re-evaluations will be conducted for right-of-ways. We are addressing existing right-of-ways very differently from other types of refuge uses. We have amended and clarified the final policy and regulations to reflect the Congressional intent as stated in the House Report that this law not in and of itself change, restrict, or eliminate existing right-of-ways. We discuss this issue earlier in this document under Issue 10: Right-of-ways and replacement of lost habitat values or other compensation. The commenters also asked us to clarify certain elements of a compatibility determination for re-authorizing an existing right-of-way. They recommended we consider the right-of-way re-authorization based on existing conditions rather than pre-right-of-way conditions. We agree and have amended the regulations and policy to clarify this point.

One commenter acknowledged that the NWRSIA–1997 directs that re-evaluations of uses specifically authorized for a period of longer than 10 years (such as right-of-ways), will examine compliance with the terms and conditions of the authorization, not the authorization itself. They went on to reference a colloquy held between Senator John Chafee, Chairman of the Environment and Public Works Committee, and Senator Bob Graham on September 10, 1997 during passage of the NWRSIA–1997 on the Senate floor. In that exchange, Senator Graham states that: ''[I]n the case of unforseen changes in circumstances, it may occasionally be necessary to adjust a use to ensure that it remains compatible. My understanding is that utility companies have been willing and able to make minor adjustments to their facilities to ensure that they remain compatible. Mr. Chairman, am I correct to understand that this amendment will still allow the flexibility to make such adjustments to facilities that have been authorized for more than 10 years in order to ensure that they remain compatible?'' At which point, Senator Chafee responds: ''That is correct.'' (Catalogued in Congressional Record of September 11, 1997, Page: S9238). Based on this conversation the commenter recommended we modify our regulations and policy to allow the Service to seek modifications to the terms and conditions of permits with a duration exceeding 10 years, if necessary to ensure that the use remains compatible. We agree and have amended the regulations and policy to clarify this point.

One commenter was concerned that we might go beyond our authority when we examine compliance with the terms and conditions of a right-of-way authorization and when we make a new compatibility determination prior to re-authorizing a right-of-way. We have always limited these actions to the extent of our authority to regulate and control the right-of-way. These regulations and policy do not change that authority.

Several commenters suggested that we clarify certain aspects of the re-evaluation language. In particular, we were asked to clarify whether a compatibility re-evaluation is a full blown compatibility determination or something else. We have clarified this in both the policy and regulations. When we re-evaluate a use for compatibility, we will prepare a new compatibility determination following the procedure outlined in policy. For some uses, there may be no significant change in the conditions under which the use is permitted or no significant new information regarding the effects of the use; however, whenever a re-evaluation is triggered we will take a fresh look at the use and complete a new compatibility determination.

Two commenters suggested we clarify how we determine significant change in the conditions under which the use is permitted or significant new information regarding the effects of a use. They also asked that we clarify how new information may be made available to the Refuge Manager. We added language to the policy to clarify this

point. The Refuge Manager will determine whether change in the conditions under which the use is permitted or new information regarding the effects of the use is significant or not. The Refuge Manager will make this decision by considering whether these new conditions or new information could reasonably be expected to change the outcome of the compatibility determination. Any person at any time may provide information regarding changes in conditions and new information to the Refuge Manager. However, the Refuge Manager maintains full authority to determine if this information is or is not sufficient to trigger a re-evaluation.

Issue 15: Public Review and Comment

We received many comment letters regarding the public review and comment portion of the compatibility determination process. Generally, these comments supported this section and requested changes to the following areas: length of the public review and comment period; mechanism by which we seek public review and comment; involvement of State fish and wildlife agencies; level of detail; and types of uses we consider under the expedited compatibility determination process. A few of the commenters complimented our commitment to ''actively seeking to identify individuals and organizations that reasonably might be affected by, or interested in, a refuge use.''

As we discussed in Issue 12: Relationship to management plans we will usually complete compatibility determinations as part of a planning process and we will achieve public review and comment on our compatibility determinations concurrently through public review and comment of the draft plans and NEPA documents. Our refuge planning policy provides a detailed discussion of how we will provide for substantial public involvement throughout the planning process from start to finish. We did not repeat those details in this policy. For compatibility determinations prepared separately from a plan we believe that we have adequately described the public review and comment process and that additional detail is not needed.

Several of the commenters were particularly concerned about the Refuge Manager's ability to reduce the comment period for uses other than minor, incidental, or one-time uses that will likely have no detrimental effect on refuge purposes or the System mission. In response to those comments, we deleted the following: ''This period may be reduced by the Refuge Manager when there is not sufficient time to provide the full 14-days.''

A few of the commenters suggested we consider specific categories of uses such as priority general public uses and electric utility right-of-ways, and minimal impact activities under the expedited compatibility determination process. We agree, in part, with the comments to include minimal impact activities under the expedited process and we adequately addressed this in the draft policy and further clarification is not needed. We did not accept the recommendations to include specific categories of uses, such as priority general public uses and electric utility right-of-ways, under the expedited process.

We addressed the concerns of the States to be more involved in compatibility determinations in Issue 16: State Involvement.

Issue 16: State Involvement

Thirteen States and one non-government organization addressed a State's need to be involved in compatibility determinations. Comments ranged from offering to assist refuge managers with compatibility determinations to requiring State consultation on all compatibility determinations. Although the range of the comments varied considerably, the topic that most frequently came up was the desire of the States to be involved in the compatibility determination process. The majority of these comments also made reference to the importance of completing compatibility determinations during the comprehensive conservation planning process.

The International Association of Fish and Wildlife Agencies, representing all 50 State fish and wildlife agencies, stated that we should reiterate Congressional intent in the NWRSIA–1997 that ''compatibility determinations be made, to the extent practicable, as part of the CCP.'' We agree. We addressed this concern under Issue 12: Relationship to management plans. We believe the relationship between compatibility and comprehensive conservation planning accommodates the desire of the States to be involved in the compatibility determination process. The States will be invited to participate in the comprehensive conservation planning process. We will complete most compatibility determinations concurrently with a comprehensive conservation plan. Therefore, the States will be involved in compatibility determinations early in the process. Because of the close relationship between compatibility and comprehensive conservation planning, and the States' active role on the planning team, we do not need to add an additional step for State involvement in these regulations and policy.

Issue 17: Steps To Prepare a Compatibility Determination

We received many comments that addressed issues on the steps we propose to use in completing compatibility determinations. We have addressed comments on steps related to the determination of available resources (see Issue 8: Sound professional judgment), opportunity for public review and comment (see Issue 15: Public review and comment), preparing the justification for the finding (see Issue 13: Priority uses), and consultation by the Refuge Manager with their Regional Office Supervisor (see Issue 4: Decision making authority and appeal process), elsewhere in this document. Other comments related to the procedural steps we propose to take include: anticipated impacts of the use, description of the use, stipulations, finding of whether a use is compatible or not, and general comments about the proposed compatibility determination process.

Several commenters suggested that further guidance is needed in the policy to ensure that the assessment of anticipated impacts fully captures the extent to which a use detracts from refuge purposes or the National Wildlife Refuge System mission. The National Audubon Society suggested that the compatibility determination should list all relevant refuge conservation objectives. We agree, that where specific management objectives have been adopted through the public planning process, and those objectives clearly support the refuge's ability to fulfill its purposes, steps in the compatibility review process should acknowledge and evaluate how the proposed use would impact those specific refuge management objectives. Therefore, we have amended the policy to include this recommendation.

An individual wrote that refuge managers should have to take into account the impacts to wildlife in not continuing a use. We agree that this is inherent in the review process, that both positive and negative impacts to refuge resources must be evaluated in determining the net effect on the ability of the refuge to achieve its purposes. We did not believe that any clarifying language was necessary, however, on this issue. The Wildlife Legislative Fund of America stated that it was critical that the policy not invite or encourage refuge managers to speculate about possible or

potential problems that could arise, and that they are opposed to management decisions based on conjecture and speculation. We agree in part, and have addressed this potential concern in the discussion of sound professional judgment. We have also made changes to the language affecting the decision process when insufficient information is available to make a decision regarding a priority public use. See Issue 13: Priority uses for more discussion on this topic. We did not change the policy relative to the recommendations received from the Animal Protection Institute that would add steps to the anticipated impacts section to address specifically what effects the use might have on threatened and endangered species or on ''non-target'' wildlife because we believe that the step already required analysis of impacts of the use to all species of wildlife. The National Wildlife Refuge Association requested we amend the section to include language that directs refuge managers to review all associated activities to the use (such as mode of transportation or special equipment that may be required for the intended use). We agree with the concept and believe that we have addressed this issue in the policy at section 2.9 When is a compatibility determination required?. In addition, we added language to section 2.12 What information do we include in a compatibility determination? to further clarify this point.

A suggestion to add steps for the description of use that would describe what time frame the use would be conducted, and what is the purpose of the use, were not incorporated in that we believe we already included these issues in the step, without adding the clarifying language. Similarly, we did not amend the policy, as suggested, to identify whether the use ''and all associated uses are'' compatible or not compatible because we believe that the additional language was not necessary to clarify that we are talking about the use in its entirety (including supporting uses and facilities) as described in detail earlier in the process. However, we added language referring to associated facilities, structures and improvements to the steps where we identify and describe the use. We had already stated in the policy that whenever practicable, the Refuge Manager, should concurrently consider related uses or uses that are likely to have similar effects in order to facilitate analysis of cumulative effects and to provide opportunity for effective public review and comment. The Refuge Manager will determine whether to consider a use individually, a specific use program, or in conjunction with a group of related uses.

The Edison Electric Institute, representing approximately 200 electric utility members, and other commenters, asked that we clarify the difference between the term ''stipulations'' under the proposed steps for making a compatibility determination, and the term ''mitigation.'' Stipulations generally establish the controlling parameters of a use. For example: no right-of-way mowing during the period March 15 to July 15; restore disturbed area with native vegetation; within the areas marked by public use signs; by no more than 45 people at one time; at speeds not to exceed 15 mph. While these might ''mitigate'' the effects of a use they are more correctly stated as ''stipulations'' for the use to be compatible. Mitigation often gives rise to the thought that one could compensate for impacts rather than avoid. In addition, we have added the term ''sufficient'' to the policy as requested by the National Wildlife Refuge Association.

The Safari Club International expressed concern with the proposed changes to 50 CFR 26.41 which requires information ''whether the use is compatible or not compatible * * *'' They felt that this was not adequate and should also require the inclusion of an explanation of the reasoning used in reaching that determination. We agree that this is not enough alone; however, steps in the compatibility determination process also require the inclusion of the anticipated impacts of the use on the refuge's purposes and the National Wildlife Refuge System mission in regulations and a justification for the determination in policy. We believe that this will provide for adequate rationale for the decision being made.

The National Audubon Society requested that a step be added to determine if a use is an ''appropriate use'' and if it was determined not to be, that the use be denied without determining compatibility. We have listed seven reasons that we would deny a use without determining compatibility. While we did not define any of these steps as a determination of appropriateness, all seven steps serve that function, in part. We do, however, agree that we should give additional scrutiny to the question of what are appropriate uses of national wildlife refuges but that this issue goes beyond the question of compatibility covered in these regulations and policy. We will likely address this issue in future regulations and policy. The National Audubon Society also suggested changes that would have us add language addressing indirect impacts of the proposed use on the time, space, or funding available to implement conservation objectives, and would encourage refuge managers to work with any interested party to gather information, and should make an effort to balance data gathering among proponents and opponents of a proposed use. We agree that indirect impacts of a proposed use may include taking away or diverting resources from an activity that would support fulfilling the System mission or refuge purposes and therefore would be a factor in determining whether the proposed use is compatible or not. We added a statement to this effect although we did not use the exact wording provided by the National Audubon Society. Their recommendation to work with all interested parties is encouraged, and we believe that adequate guidance on this issue is included in the rule; however, we do not support the view that information must somehow be balanced among perceived opponents or proponents of a use. We will seek all pertinent information from all interested parties.

We have included a step to the compatibility determination process that would identify whether the use is a priority public use or not based upon a recommendation from the Wildlife Legislative Fund of America. Because of the clear focus on this issue in the NWRSIA–1997, we felt it was warranted to highlight such uses in our compatibility determination process.

Issue 18: Existing Uses Determined To Be Not Compatible

We received several comments regarding what we do with existing uses that are not compatible. The comments ranged from opposed to the provision to need for clarification to strongly supportive of the provision. The NWRSIA–1997 directs us to ''provide for the elimination or modification of any use as expeditiously as practicable after a determination is made that the use is not a compatible use'' in the regulations. In the proposed regulations and draft policy we stated that existing uses determined to be not compatible would be terminated or modified to make them compatible as expeditiously as practicable. In the final regulations and policy, we maintained what we had already proposed and added a statement that says, except with written authorization from the Director, the process for termination or modification will not exceed 6 months from the date that the compatibility determination is signed.

Issue 19: Pre-acquisition Compatibility Determinations

Several commenters addressed the type of uses for which we should prepare pre-acquisition compatibility determinations and one commenter addressed who should make the compatibility determination.

Three commenters recommended that we prepare pre-acquisition compatibility determinations for all existing uses. One commenter supported the language in our draft policy and regulations, and said we should clarify that existing wildlife-dependent recreational public uses do not include private uses. One commenter recommended clarifying what public means. With regard to pre-acquisition compatibility determinations, the NWRSIA–1997 states ''on lands added to the System after March 25, 1996, the Secretary shall identify, prior to acquisition, withdrawal, transfer, reclassification, or donation of any such lands, existing compatible wildlife-dependent recreational uses * * *'' It is clear that this provision of the law does not apply to uses other than wildlife-dependent recreational uses. In addition, the law specifically refers to ''compatible wildlife-dependent recreational uses'' as the ''priority general public uses of the System.'' In the context of pre-acquisition compatibility determinations, we believe that Congress was referring to existing wildlife-dependent recreational public uses rather than existing wildlife-dependent recreational private uses. In order to make this distinction in policy and regulations, we used the word ''public'' in our discussion of pre-acquisition compatibility determinations. We do not believe that we need further clarification in the policy and regulations.

One commenter recommended that the planning team make pre-acquisition compatibility determinations. As discussed elsewhere in this document under Issue 4: Decision making authority and appeal process, we believe that the Refuge Manager is the most appropriate and qualified person to make all compatibility determinations, including pre-acquisition compatibility determinations.

Issue 20: NEPA

We received several comment letters regarding the National Environmental Policy Act (NEPA) and how it relates to compatibility. Generally, the comments addressed the need to follow the NEPA process when completing compatibility determinations.

NEPA requires us to examine the environmental impact of our actions, incorporate environmental information, and utilize public participation, as appropriate, in the planning and implementation of our actions. NEPA compliance is required whenever we take an action. It is the action that triggers NEPA. A compatibility determination is not an action under NEPA, rather it is only one of many factors that we take into account whenever we consider taking an action, *i.e.,* allowing a refuge use. Comprehensive conservation plans and step-down management plans include our decisions about allowing or not allowing refuge uses. These plans will have associated NEPA compliance documentation. As we discussed under Issue 12: Relationship to management plans, we will complete many compatibility determinations concurrently with a planning process. Compatibility determinations are an integral part of our decision about refuge uses; however, it is important to note that compatibility is only one of many factors that we take into account when we consider allowing or not allowing a refuge use. We revised the language to clarify the relationship between NEPA and compatibility.

Issue 21: Policy and Regulations

Two commenters discussed the need to provide more detail in the regulations. They were surprised that we decided to prepare separate regulations and policy documents to implement this provision of the law. They were concerned that a number of the important provisions in the policy document are missing entirely from the regulations. The NWRSIA–1997 requires that we issue final regulations establishing the compatibility determination process. We have accomplished that directive with these final regulations. In addition to regulations in the Code of Federal Regulations (CFR), we chose to concurrently develop more detailed guidance for preparing compatibility determinations in the Fish and Wildlife Service Manual. The compatibility chapter in the Service Manual contains a mix of rules that we must follow as well as general guidance. Publishing compatibility rules in the Service Manual does not diminish the requirements that they contain. Refuge Managers will be bound by those requirements that are mandatory whether or not we publish them in the CFR. In addition, because the compatibility chapter of the policy manual contains rules, we will have to use the same notice and comment procedure utilized to adopt this chapter if we decide to amend or change it. Publishing in the Service Manual rather than the CFR does not affect the strength of any rules that are in the chapter nor does it exempt us from procedural requirements.

Issue 22: Wilderness

One commenter was pleased that we discussed the importance of preserving wilderness and recommended we add ''Unless specifically authorized under the Act establishing the wilderness area, the construction of roads or permanent structures, and the use of motorized equipment or mechanized vehicles is prohibited within wilderness areas unless necessary to preserve the area's wilderness characteristics.'' We state in the policy that for uses proposed for wilderness areas we must first analyze whether the use can be allowed under the terms of the Wilderness Act before we determine if the use is compatible. We also state that if the use can be allowed under the Wilderness Act we must then determine if the use is compatible. This compatibility determination will include the purposes of the Wilderness Act, which makes such purposes supplemental to those of the refuge. We believe the recommended additional language goes beyond the question of compatibility covered in these regulations and policy and will be more appropriate in our future wilderness policy.

Issue 23: Economic Uses

We received a few comments addressing economic uses of refuges. Comments ranged from encouraging economic uses to defining certain economic uses as allowed uses to not allowing economic uses unless they contribute towards achieving refuge purposes and the System mission and do not degrade the biological integrity, diversity and environmental health of the refuge. We already said in the proposed rule that we may allow economic uses when they may contribute to the ''administration'' of the refuge. ''Administration'' of the refuge was intended to mean achieving refuge purposes and the System mission. Therefore, to clarify what we mean we accept the recommendation to replace administration of the refuge with achievement of the refuge purposes and System mission. In the process of addressing comments we decided that section 29.3 refers to the term ''nonprogram uses'' which is a term no longer applicable to the way we currently manage the National Wildlife

Refuge System. Section 29.3 provides no additional information beyond what we provide in section 25.21; therefore, we removed section 29.3.

Issue 24: Allowing a Use

We received a few comments addressing the relationship between compatibility and actually allowing a use. The commenters stated that ''the relationship of compatibility and refuge special use permits is not clear,'' ''compatibility determinations and permitting should be separate but linked processes' and ''we have concerns that there is no specific connection between a ''compatible'' compatibility finding and the granting of an actual permit to conduct the activity.'' We state in the regulations that we may open an area by regulation, individual permit, or public notice, in accordance with 50 CFR 25.31 and we may open an area only after we determine that the use is a compatible use. We may open refuges by a number of methods. Depending on the type of allowed use, the Refuge Manager has several ways to open a specific refuge. For example, to open a refuge to hunting, we revise a list of refuges allowing hunting found at 50 CFR part 32, to open a refuge to wildlife observation we may do so by posting a sign at an appropriate location and to open a refuge for a specific research project we may do so by issuing a special use permit. This is not new. Compatibility determinations are an integral part of our decision about refuge uses; however, it is important to note that compatibility is only one of many factors that we take into account when we consider allowing or not allowing a refuge use. We do not believe that any additional language is necessary to clarify this issue.

Issue 25: Public Safety

One commenter recommended we add ''and not inconsistent with public safety'' in section 26.41 of the regulations and in section 2.3 of the policy. The commenter pointed out that this term was used in the NWRSIA–1997 and should be used in these regulations and policy. We recognize that the NWRSIA–1997 includes this directive, but have included it separate from compatibility. Deciding whether a proposed use is ''not inconsistent with public safety'' is an issue we take into consideration before we prepare a compatibility determination. In the policy at 2.10 D we list a number of situations, including ''inconsistent with public safety,'' when a refuge manager would deny a proposed use without determining compatibility.

Issue 26: Support Letters

We received many comments that stated support for a specific organization's comments. They were: one Native Village Corporation supported the Alaska Federation of Natives comments; one non-government organization supported the Animal Protection Institute's comments; one non-government organization supported the National Audubon Society's comments; one individual supported the Wilderness Society's comments; eight non-government organizations supported the Conservation Force's comments; and 18 non-government organizations supported the National Wildlife Refuge Association's comments.

We considered these letters of endorsement at the same time we considered the information included in the organization's comments that they endorse. Since these letters of endorsement did not include new or additional information, we did not respond to them individually. For example, when we considered the issues included in the Conservation Force's comments, we took into account that eight conservation organizations endorsed their comments. Likewise, when we considered the issues included in the National Wildlife Refuge Association's comments, we took into account that 18 Friends Groups, who support local national wildlife refuges, formally endorsed their comments.

Issue 27: Extend Public Comment Period

We published the proposed rule (64 FR 49056) and draft policy (64 FR 49067) in the **Federal Register** on September 9, 1999. We invited the public to provide comments on the proposed rule and draft policy by November 8, 1999. During this 60-day comment period, we received 12 written requests for an extension to the comment period. In order to ensure that the public had an adequate opportunity to review and comment on the proposed rule and draft policy, we extended the comment period to December 8, 1999 (64 FR 62163 published November 16, 1999). Therefore, the proposed rule and draft policy were available for public review and comment for 90 days.

Issue 28: Unrelated Comments

We received many comment letters that did not include information relevant to the proposed rule and draft policy under review. Generally, these comments either voiced support for the Highway 12 project in South Dakota or voiced opinions about the appropriateness of hunting and trapping on national wildlife refuges. These comments did not contain information that we could use to improve the proposed rule and draft policy.

Revisions to the Proposed Rule

We considered all of the information and recommendations for improvement included in the comments we received during the 90-day public review and comment period. We made changes to the proposed rule and draft policy as discussed in the ''Summary of Comments Received'' section of this document. The following represents a summary of the significant revisions made to the proposed rule and draft policy.

(1) In the proposed regulations and draft policy we stated that lands subject to the patent restrictions imposed by Section 22(g) of ANCSA are subject to the compatibility standard. In the final regulations (25.21(b)) and final policy (2.8(C)) we have provided more detail on how this will be implemented. These changes allow us to conduct compatibility determinations differently with regard to the ANCSA 22(g) lands in recognition of the unique status of these lands.

(2) In the proposed regulations and draft policy we stated that we will not allow making proposed refuge uses compatible with replacement of lost habitat values or other compensation. In the final regulations (26.41(b) and (c)) and final policy (2.11(C) and (D)) we maintain this requirement with one exception. We will not allow making proposed refuge uses compatible with replacement of lost habitat values or other compensatory mitigation, except for maintenance of an existing right-of-way including minor expansions or minor realignments to meet safety standards. This change provides a workable mechanism for dealing with previously approved right-of-ways.

(3) In the proposed regulations and draft policy we stated that prior to approving each compatibility determination, the Refuge Manager will consult with the regional office supervisor. In the final regulations (26.41(a)(14)) and final policy (2.12(A)(14)) we changed the required regional office consultation to a required regional office concurrence on all compatibility determinations. This change will help ensure that we look at both large-scale (System mission) and local-scale (refuge purposes) issues when preparing compatibility determinations.

(4) In the proposed regulations and draft policy we stated that the Refuge Manager may temporarily suspend, allow, or initiate any use in a refuge if

necessary to immediately act in order to protect the health and safety of the public or any fish or wildlife population. We stated in the draft policy that these temporary actions should not exceed 12 months. In the final policy (2.10(C)) we reduced the time frame for these temporary actions to not exceed 30 days.

(5) In the proposed regulations and draft policy we stated that we would re-evaluate compatibility determinations for existing uses whenever any one of a number of criteria was met. In the final regulations (25.21(f), (g), (h) and (i)) and final policy (2.11(H)) we added significant detail to clarify certain aspects of how and when we would re-evaluate compatibility determinations. Among other clarifying language we added the following: Whenever a re-evaluation is triggered we will take a fresh look at the use and complete a new compatibility determination following the procedure outlined in the regulations and policy; whenever we prepare a compatibility determination for re-authorization of an existing right-of-way, we will base our analysis on the existing conditions with the use in place, not from a pre-use perspective; for uses in existence on the effective date of these regulations that were specifically authorized for a period longer than 10 years (such as right-of-ways), our compatibility re-evaluation will examine compliance with the terms and conditions of the authorization, not the authorization itself, however, the Service will request modifications to the terms and conditions of the permits from the permittee if the Service determines that such changes are necessary to ensure that the use remains compatible; and after the effective date of these regulations no uses will be permitted or re-authorized, for a period longer than 10 years, unless the terms and conditions for such long-term permits specifically allows for the modifications to the terms and conditions, if necessary to ensure compatibility.

Required Determinations

Regulatory Planning and Review (E.O. 12866)

The final rule was reviewed by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit analysis for a new approach is provided in (4) below. This rule is administrative, legal, technical, and procedural in nature. This rule establishes the process for determining the compatibility of proposed national wildlife refuge uses as well as the procedures for documentation and periodic review of existing uses. We have been making compatibility determinations since passage of the NWRSAA–1966 in 1966. The NWRSIA–1997, passed in 1997, does not greatly change the compatibility standards so we expect these procedures to cause only minor modifications to existing national wildlife refuge public use programs. We expect a small increase, up to 5 percent, in the amount of public use activities allowed on refuges as a result of this rule.

The appropriate measure of the economic effect of changes in recreational use is the change in the welfare of recreationists. We measure this in terms of willingness to pay for the recreational opportunity. We estimated total annual willingness to pay for all recreation at national wildlife refuges to be $372.5 million in Fiscal Year 1995 (Banking on Nature: The Economic Benefits to Local Communities of National Wildlife Refuge Visitation, DOI/FWS/Refuges, 1997). We expect the compatibility determination process implemented in this rule to cause at most a 5 percent increase in recreational use system-wide. This does not mean that every refuge will have the same increase in public use. Only refuges where increases in hunting, fishing, and non-consumptive visitation are compatible will we allow the increases. Across the entire National Wildlife Refuge System we expect an increase in hunting, fishing, and non-consumptive visitation to amount to no more than a 5 percent overall increase. If the full 5 percent increase in public use were to occur at national wildlife refuges, this would translate to a maximum additional willingness to pay of $21 million (1999 dollars) annually for the public. However, we expect the real benefit to be less than $21 million because we expect the final increase in public use to be smaller than 5 percent. Furthermore, if the public substitutes non-refuge recreation sites for refuges, then we would subtract the loss of benefit attributed to non-refuge sites from the $21 million estimate.

We measure the economic effect of commercial activity by the change in producer surplus. We can measure this as the opportunity cost of the change, *i.e.,* the cost of using the next best production option if we discontinue production using the national wildlife refuge. National wildlife refuges use grazing, haying, timber harvesting, and row crops to help fulfill the National Wildlife Refuge System mission and national wildlife refuge purposes. Congress authorizes us to allow economic activities of national wildlife refuges, and we do allow some. But, for all practical purposes, we invite (almost 100 percent) the economic activities to help achieve a national wildlife refuge purpose or National Wildlife Refuge System mission. For example, we do not allow farming per se, rather we invite a farmer to farm on the national wildlife refuge under a Cooperative Farming Agreement to achieve a national wildlife refuge purpose. Compatibility applies to these economic activities, and this rule likely will have minor changes in the amounts of these activities occurring on national wildlife refuges. Information on profits and production alternatives for most of these activities is proprietary, so a valid estimate of the total benefits of permitting these activities on national wildlife refuges is not available.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency since the rule pertains solely to management of national wildlife refuges by the Service.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. No grants or other Federal assistance programs are associated with public use of national wildlife refuges.

(4) This rule does not raise novel legal or policy issues; however, it does provide a new approach. This rule is significant because of this reason. This rule continues the practice of requiring public use of national wildlife refuges to be compatible. It adds the NWRSIA–1997 provisions that ensure that compatibility becomes a more effective conservation standard, more consistently applied across the entire National Wildlife Refuge System, and more understandable and open to involvement by the public. A benefit/cost assessment of the implementation of this rule follows.

Baseline for analysis—A ''with'' and ''without'' this rule format is used to determine the impact of implementing this rule on activities engaged in by the public on national wildlife refuge lands. The impact on the public of refuge visitation rates translated into public benefits for all wildlife-related and other activities that were determined compatible ''without'' this rule is the proper economic baseline. The Refuge Management Information System data on public visitation for the System for fiscal year 1999 was used to determine the level of baseline wildlife-related

activities. Non-wildlife related activities on refuges such as research and crop production are not estimated in the baseline but their effect on compatibility planning cycles is included in the cost estimate of this rule.

Benefits from implementing this rule—As was estimated under (1) above, it is expected that a maximum of $21 million annually in additional consumer surplus will be attributable to this rulemaking. This is a System-wide estimate of the increase in consumer surplus and covers all public activities on System lands.

Costs of implementing this rule—There are two components of cost that are relevant to this rulemaking action. They are the changes in the allocation of refuge labor from preparing compatibility determinations that include more comprehensive determinations with additional data requirements and public review before implementation and the potential costs associated with increased refuge visitation. The provisions of the NWRSIA–1997 call for preparing new compatibility determinations at least every 15 years for wildlife-dependent recreational uses and at least every 10 years for non-wildlife-dependent recreational uses. This means that over the next 50 years the Service expects to make at least five compatibility determinations for non-wildlife-dependent recreational uses and at least three compatibility determinations for wildlife-dependent recreational uses on all refuges with these uses.

Reallocation of refuge labor—Compatibility determinations require sound professional judgement, experience and consultation time which are labor costs that are fixed costs in the refuge budget and will not change because of this rulemaking. The requirement of consistent, written, and public reviewed compatibility determinations done according to a specific format will help to guarantee the integrity of the wildlife resources on the more than 93 million acres of refuge lands and waters administered by the Service. The allocation of additional time spent preparing and documenting the compatibility determinations with this rule compared to the time spent without this rule is the portion of fixed cost attributable to this rulemaking. For the approximately 429 refuges in the System with public use, the amount of time for refuge managers to become trained and familiar with the new procedures and requirements is estimated to be an average of five working days. The incremental time spent preparing the compatibility determinations using the new format, including public review and comment, is estimated to be an average of five working days. The ten working days per compatibility determination only applies for the first determination. All succeeding determinations will only take an additional five days each. Using the average salary level for a refuge manager, the discounted present value of the labor costs associated with learning and preparing compatibility determinations using the new format amounts to a cost of $5.8 million. The $5.8 million includes, refuge manager training, three iterations of compatibility determinations for wildlife-dependent recreational uses, and five compatibility determinations for non-wildlife-dependent recreational uses. The present value calculation used a real interest rate of 3.6 percent (30 year Treasury Note real rate of interest, OMB circular A–94). The annualized total costs over the 50 years equate to slightly over $242 thousand per year. The analytical cycle for this rulemaking was fifty years, since discounting beyond that time reduced future costs to a negligible amount.

Increased public visitation—In addition to labor costs, the better maintenance of trust resources on refuge lands will likely lead to an increase in public visitation and use. This will require some infrastructure changes, i.e. additional nature trails, visitor center improvements, law enforcement, etc. Some of these costs will be a reallocation of refuge labor and the purchasing of additional supplies. For example, more brochures stating refuge hunting and fishing regulations, building new signs and kiosks for additional wildlife viewing trails. It is anticipated that a 5 percent increase in visitation would require some additional expenditures from existing refuge budgets but how much cannot be determined at this time. However, if each refuge with wildlife viewing and photography opportunities were to build a new one-mile trail for this purpose it would cost approximately $3 million in one time cost and nearly $400 thousand in annual maintenance. Hunting and fishing visits to refuges would increase the time refuge staff devoted to law enforcement activities which would mean a reallocation of time from other duties. This would lead to maintenance delays. There may be a small impact System-wide but it is impossible to attribute any of these effects to specific refuges at this time.

Comparison of total benefits and total costs—The total benefits of this rulemaking are estimated to be $21 million annually. The total annualized costs include slightly over $242 thousand for more comprehensive compatibility determinations and approximately $500 thousand if each refuge built and maintained an additional one-mile, marked nature trail. It is unknown exactly what kind of additional public use facilities would be required and at which refuge. Some refuges may be able to accommodate a small increase in public use without incurring additional cost and some refuges may face significant costs. These costs cannot be determined for sure until the Service has time to implement the new compatibility regulations and the public is given time to react to the new procedures.

However, the estimated public benefits (a more protected and maintained resource base on 93 million acres of Service refuge lands and waters and an increase in refuge visitation, valued at $21 million annually) of this rulemaking substantially outweigh the known ($242 thousand for more comprehensive compatibility determinations) and potential costs (potential facility enhancements and maintenance valued at approximately $500 thousand per year).

Regulatory Flexibility Act

We certify that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Congress created the National Wildlife Refuge System to conserve fish, wildlife, and plants and their habitats and facilitated this conservation mission by providing Americans opportunities to visit and participate in compatible wildlife-dependent recreation, including fishing, hunting, wildlife observation and photography, and environmental education and interpretation as priority general public uses on national wildlife refuges and to better appreciate the value of, and need for, wildlife conservation.

This rule is administrative, legal, technical, and procedural in nature and provides more detailed instructions for the compatibility determination process than have existed in the past. This rule does not change the compatibility standard, but implementation of the National Wildlife Refuge System Improvement Act of 1997 may result in more opportunities for wildlife-dependent recreation on national wildlife refuges. For example, more wildlife observation opportunities may occur at Florida Panther National Wildlife Refuge in Florida or more hunting opportunities at Pond Creek National Wildlife Refuge in Arkansas. Such changes in permitted use are likely

to increase visitor activity near the national wildlife refuge. To the extent visitors spend time and money in the area that they would not have otherwise, they contribute new income to the regional economy and benefit local businesses.

National wildlife refuge visitation is a small component of the wildlife recreation industry as a whole. In 1996, 77 million U.S. residents over 15 years old spent 1.2 billion activity-days in wildlife-associated recreation activities. They spent about $30 billion on fishing, hunting, and wildlife watching trips (Tables 49, 54, 59, 63, 1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation, DOI/FWS/FA, 1997). National wildlife refuges recorded about 29 million visitor-days that year (RMIS, FY 1996 Public Use Summary). A study of 1995 national wildlife refuge visitors found their travel spending generated $401 million in sales and 10,000 jobs for local economies (Banking on Nature: The Economic Benefits to Local Communities of National Wildlife Refuge Visitation, DOI/FWS/Refuges, 1997). These spending figures include spending that would have occurred in the community anyway, and so they show the importance of the activity in the local economy rather than its incremental impact. Marginally greater recreational opportunities on national wildlife refuges will have little industry-wide effect.

Expenditures as a result of this rule are a transfer and not a benefit to many small businesses. We expect the incremental recreational opportunities to be marginal and scattered so we do not expect the rule to have a significant economic effect on a substantial number of small entities in any Region or nationally.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act as discussed in the Regulatory Planning and Review section above. This rule:

a. Will not have an annual effect on the economy of $100 million or more;

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions; and

c. Will not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

Since this rule applies to use of Federally-owned and managed national wildlife refuges, it does not impose an unfunded mandate on State, local, or Tribal governments or the private sector of more than $100 million per year. This rule does not have a significant or unique effect on State, local, Tribal governments, or the private sector. A statement containing the information required by the Unfunded Mandates Reform Act (2 U.S.C. 1531 *et seq.*) is not required.

Takings (E.O. 12630)

In accordance with Executive Order 12630, this rule does not have significant takings implications. Therefore, a takings implication assessment is not required. These regulations may result in increased visitation at refuges and provide for minor changes to the methods of public use permitted within the National Wildlife Refuge System.

Federalism Assessment (E.O. 13132)

As discussed in the Regulatory Planning and Review, and Unfunded Mandates Reform Act sections above, this rule will not have substantial direct effects on the States, in their relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, the Service has determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Civil Justice Reform (E.O. 12988)

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

Paperwork Reduction Act

This regulation does not contain any information collection requirements other than that already approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501). See 50 CFR 25.23 for information concerning that approval.

Section 7 Consultation

The Service has determined that the regulations established by this final rule will not affect listed species or designated critical habitat and therefore, consultation under section 7 of the Endangered Species Act is not required. The basis for this conclusion is that this final rule establishes in regulations the process for determining whether or not a use of a national wildlife refuge is a compatible use. The compatibility determination process described in this final rule is only one step in the decision making process for deciding whether or not to permit a use of a national wildlife refuge. It is the ultimate decision to permit or otherwise implement a particular use that is causative with respect to affecting listed species or their critical habitat. The Service will conduct section 7 consultations when actions it authorizes, funds, or carries out may affect listed species or their critical habitat.

National Environmental Policy Act

We ensure compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(C)) when developing national wildlife refuge comprehensive conservation plans and step-down management plans, and we make determinations required by NEPA before the addition of national wildlife refuges to the lists of areas open to public uses. The revisions to regulations in this document resolve a variety of issues concerning compatibility of national wildlife refuge uses. In accordance with 516 DM 2, Appendix 1.10, we have determined that this rule is categorically excluded from the NEPA process because it is limited to policies, directives, regulations and guidelines of an administrative, financial, legal, technical or procedural nature; or the environmental effects of which are too broad, speculative or conjectural to lend themselves to meaningful analysis. Site-specific proposals, as indicated above, will be subject to the NEPA process.

Available Information for Specific National Wildlife Refuges

Individual national wildlife refuge headquarters retain information regarding public use programs and the conditions that apply to their specific programs, and maps of their respective areas.

You may also obtain information from the Regional Offices at the addresses listed below:

- Region 1—California, Hawaii, Idaho, Nevada, Oregon, and Washington. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, Eastside Federal Complex, Suite 1692, 911 N.E. 11th Avenue, Portland, Oregon 97232–4181; Telephone (503) 231–6214; http://pacific.fws.gov.
- Region 2—Arizona, New Mexico, Oklahoma and Texas. Regional Chief, National Wildlife Refuge System, U.S.

Fish and Wildlife Service, Box 1306, Albuquerque, New Mexico 87103; Telephone (505) 766–1829; http://southwest.fws.gov.

• Region 3—Illinois, Indiana, Iowa, Michigan, Minnesota, Missouri, Ohio and Wisconsin. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, Federal Building, Fort Snelling, Twin Cities, Minnesota 55111; Telephone (612) 713–5300; http://midwest.fws.gov.

• Region 4—Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Puerto Rico and the Virgin Islands. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1875 Century Boulevard, Room 324, Atlanta, Georgia 30345; Telephone (404) 679–7152; http://southeast.fws.gov.

• Region 5—Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, Virginia and West Virginia. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 300 Westgate Center Drive, Hadley, Massachusetts 01035–9589; Telephone (413) 253–8550; http://northeast.fws.gov.

• Region 6—Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah and Wyoming. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, Box 25486, Denver Federal Center, Denver, Colorado 80225; Telephone (303) 236–8145; http://www.r6.fws.gov.

• Region 7—Alaska. Regional Chief, National Wildlife Refuge System, U.S. Fish and Wildlife Service, 1011 E. Tudor Rd., Anchorage, Alaska 99503; Telephone (907) 786–3357; http://alaska.fws.gov.

Primary Author

J. Kenneth Edwards, Refuge Program Specialist, Division of Refuges, U.S. Fish and Wildlife Service, is the primary author of this final rule.

List of Subjects

50 CFR Part 25

Administrative practice and procedure, Concessions, Reporting and recordkeeping requirements, Safety, Wildlife refuges.

50 CFR Part 26

Recreation and recreation areas, Wildlife refuges.

50 CFR Part 29

Public lands—mineral resources, Public lands—rights-of-way, Wildlife refuges.

For the reasons set forth in the preamble, we amend parts 25, 26, and 29 of Title 50, Chapter I, Subchapter C of the Code of Federal Regulations as follows:

PART 25—[AMENDED]

1. The authority citation for part 25 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, and 715i, 3901 *et seq.;* and Pub. L. 102–402, 106 Stat. 1961.

2. Amend § 25.12 by revising the definitions of ''Coordination area,'' ''National wildlife refuge,'' ''National Wildlife Refuge System,'' and ''Service or we'' and adding alphabetically definitions of ''Compatibility determination,'' ''Compatible use,'' ''Comprehensive conservation plan,'' ''Conservation, and Management,'' ''Director,'' ''Fish, Wildlife, and Fish and wildlife,'' ''National Wildlife Refuge System mission, and System mission,'' ''Plant,'' ''Purpose(s) of the refuge,'' ''Refuge management activity,'' ''Refuge management economic activity,'' ''Refuge Manager,'' ''Regional Chief,'' ''Refuge use, and Use of a refuge,'' ''Regional Director,'' ''Secretary,'' ''Sound professional judgment,'' ''State, and United States,'' ''Wildlife-dependent recreational use, and Wildlife-dependent recreation,'' and ''You'' to read as follows:

§ 25.12 What do these terms mean?

(a) * * *

* * * * *

Compatibility determination means a written determination signed and dated by the Refuge Manager and Regional Chief, signifying that a proposed or existing use of a national wildlife refuge is a compatible use or is not a compatible use. The Director makes this delegation through the Regional Director.

Compatible use means a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge.

Comprehensive conservation plan means a document that describes the desired future conditions of a refuge or planning unit and provides long-range guidance and management direction to achieve the purposes of the refuge; helps fulfill the mission of the Refuge System; maintains and, where appropriate, restores the ecological integrity of each refuge and the Refuge System; helps achieve the goals of the National Wilderness Preservation System; and meets other mandates.

Conservation, and *Management* mean to sustain and, where appropriate, restore and enhance, healthy populations of fish, wildlife, and plants utilizing, in accordance with applicable Federal and State laws, methods and procedures associated with modern scientific resource programs. Such methods and procedures include, consistent with the provisions of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), protection, research, census, law enforcement, habitat management, propagation, live trapping and transplantation, and regulated taking.

Coordination area means a wildlife management area made available to a State by cooperative agreement between the U.S. Fish and Wildlife Service and a State agency having control over wildlife resources pursuant to section 4 of the Fish and Wildlife Coordination Act (16 U.S.C. 664 or by long-term leases or agreements pursuant to title III of the Bankhead-Jones Farm Tenant Act (7 U.S.C. 1010 *et seq.*). The States manage coordination areas but they are part of the National Wildlife Refuge System. The compatibility standard does not apply to coordination areas.

Director means the Director, U.S. Fish and Wildlife Service or the authorized representative of such official.

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Fish, Wildlife, and *Fish and wildlife* mean any member of the animal kingdom in a wild, unconfined state, whether alive or dead, including a part, product, egg, or offspring of the member.

* * * * *

National wildlife refuge, and *Refuge* mean a designated area of land, water, or an interest in land or water located within the National Wildlife Refuge System but does not include coordination areas.

National Wildlife Refuge System, and *System* mean all lands, waters, and interests therein administered by the U.S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, coordination areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction as determined in writing by the Director or so directed by Presidential or Secretarial order. The determination by the Director may not be delegated.

National Wildlife Refuge System mission, and *System mission* mean to

administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

* * * * *

Plant means any member of the plant kingdom in a wild, unconfined state, including any plant community, seed, root, or other part of a plant.

Purpose(s) of the refuge means the purposes specified in or derived from the law, proclamation, executive order, agreement, public land order, donation document, or administrative memorandum establishing, authorizing, or expanding a national wildlife refuge, national wildlife refuge unit, or national wildlife refuge subunit. For refuges that encompass Congressionally designated wilderness, the purposes of the Wilderness Act are additional purposes of the wilderness portion of the refuge.

Refuge management activity means an activity conducted by the Service or a Service-authorized agent to fulfill one or more purposes of the national wildlife refuge, or the National Wildlife Refuge System mission. Service-authorized agents include contractors, cooperating agencies, cooperating associations, refuge support groups, and volunteers.

Refuge management economic activity means a refuge management activity on a national wildlife refuge which results in generation of a commodity which is or can be sold for income or revenue or traded for goods or services. Examples include: Farming, grazing, haying, timber harvesting, and trapping.

Refuge Manager means the official directly in charge of a national wildlife refuge or the authorized representative of such official. In the case of a national wildlife refuge complex, this refers to the official directly in charge of the complex.

Regional Chief means the official in charge of the National Wildlife Refuge System within a Region of the U.S. Fish and Wildlife Service or the authorized representative of such official.

Refuge use, and *Use of a refuge* mean a recreational use (including refuge actions associated with a recreational use or other general public use), refuge management economic activity, or other use of a national wildlife refuge by the public or other non-National Wildlife Refuge System entity.

Regional Director means the official in charge of a Region of the U.S. Fish and Wildlife Service or the authorized representative of such official.

Secretary means the Secretary of the Interior or the authorized representative of such official.

Service, We, and *Us* mean the U.S. Fish and Wildlife Service, Department of the Interior.

Sound professional judgment means a finding, determination, or decision that is consistent with principles of sound fish and wildlife management and administration, available science and resources, and adherence to the requirements of the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), and other applicable laws. Included in this finding, determination, or decision is a refuge manager's field experience and knowledge of the particular refuge's resources.

State, and *United States* mean one or more of the States of the United States, Puerto Rico, American Samoa, the Virgin Islands, Guam, and the territories and possessions of the United States.

* * * * *

Wildlife-dependent recreational use, and *Wildlife-dependent recreation* mean a use of a national wildlife refuge involving hunting, fishing, wildlife observation and photography, or environmental education and interpretation. The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), specifies that these are the six priority general public uses of the National Wildlife Refuge System.

* * * * *

You means the public.

3. Revise § 25.21 to read as follows:

§ 25.21 When and how do we open and close areas of the National Wildlife Refuge System to public access and use or continue a use?

(a) Except as provided below, all areas included in the National Wildlife Refuge System are closed to public access until and unless we open the area for a use or uses in accordance with the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), the Refuge Recreation Act of 1962 (16 U.S.C. 460k–460k–4) and this subchapter C. See 50 CFR 36 for details on use and access restrictions, and the public participation and closure process established for Alaska national wildlife refuges. We may open an area by regulation, individual permit, or public notice, in accordance with § 25.31 of this subchapter.

(b) We may open a national wildlife refuge for any refuge use, or expand, renew, or extend an existing refuge use only after the Refuge Manager determines that it is a compatible use and not inconsistent with any applicable law. Lands subject to the patent restrictions imposed by Section 22(g) of the Alaska Native Claims Settlement Act are subject to the compatibility requirements of Parts 25 and 26 of 50 CFR except as otherwise provided in paragraph (b)(1) of this section.

(1) We will complete compatibility determinations for uses of Alaska Native Claims Settlement Act 22(g) lands in compliance with the following requirements:

(i) Refuge managers will work with 22(g) landowners in implementation of these regulations. The landowners should contact the Refuge Manager in advance of initiating a use and request a compatibility determination. After a compatibility determination is requested, refuge managers have no longer than ninety (90) days to complete the compatibility determination and notify the landowner of the finding by providing a copy of the compatibility determination or to inform the landowner of the specific reasons for delay. If a refuge manager believes that a finding of not compatible is likely, the Refuge Manager will notify the landowner prior to rendering a decision to encourage dialog on how the proposed use might be modified to be compatible.

(ii) Refuge managers will allow all uses proposed by 22(g) landowners when the Refuge Manager determines the use to be compatible with refuge purposes.

(iii) Compatibility determinations will include only evaluations of how the proposed use would affect the ability of the refuge to meet its mandated purposes. The National Wildlife Refuge System mission will not be considered in the evaluation. Refuge purposes will include both pre-ANILCA purposes and those established by ANILCA, so long as they do not conflict. If conflicts arise, ANILCA purposes will take precedence.

(iv) A determination that a use is not compatible may be appealed by the landowner to the Regional Director. The appeal must be submitted in writing within forty-five (45) days of receipt of the determination. The appeals process provided for in 50 CFR 36.41(i) (3) through (5) will apply.

(v) Compatibility determinations for proposed uses of 22(g) lands will only evaluate the effects of the use on the adjacent refuge lands, and the ability of that refuge to achieve its purposes, not on the effects of the proposed use to the 22(g) lands.

(vi) Compatibility determinations for 22(g) lands that a use is compatible are not subject to re-evaluation unless the

use changes significantly, significant new information is made available that could affect the compatibility determination, or if requested by the landowner.

(vii) Refuge comprehensive conservation plans will not include 22(g) lands, and compatibility determinations affecting such lands will not to be automatically re-evaluated when the plans are routinely updated.

(viii) Refuge special use permits will not be required for compatible uses of 22(g) lands. Special conditions necessary to ensure a proposed use is compatible may be included in the compatibility determination and must be complied with for the use to be considered compatible.

(c) The Refuge Manager may temporarily allow or initiate any refuge use without making a compatibility determination if necessary to protect the health and safety of the public or any fish or wildlife population.

(d) When we add lands to the National Wildlife Refuge System, the Refuge Manager will identify, prior to acquisition, withdrawal, transfer, reclassification, or donation of those lands, existing wildlife-dependent recreational public uses (if any) determined to be compatible that we will permit to continue on an interim basis, pending completion of the comprehensive conservation plan for the national wildlife refuge. We will make these compatibility determinations in accordance with procedures in § 26.41 of this subchapter.

(e) In the event of a threat or emergency endangering the health and safety of the public or property or to protect the resources of the area, the Refuge Manager may close or curtail refuge uses of all or any part of an opened area to public access and use in accordance with the provisions in § 25.31, without advance notice. See 50 CFR 36.42 for procedures on closing Alaska national wildlife refuges.

(f) We will re-evaluate compatibility determinations for existing wildlife-dependent recreational uses when conditions under which the use is permitted change significantly, or if there is significant new information regarding the effects of the use, or concurrently with the preparation or revision of a comprehensive conservation plan, or at least every 15 years, whichever is earlier. In addition, a refuge manager always may re-evaluate the compatibility of a use at any time.

(g) Except for uses specifically authorized for a period longer than 10 years (such as right-of-ways), we will re-evaluate compatibility determinations for all existing uses other than wildlife-dependent recreational uses when conditions under which the use is permitted change significantly, or if there is significant new information regarding the effects of the use, or at least every 10 years, whichever is earlier. In addition, a refuge manager always may re-evaluate the compatibility of a use at any time.

(h) For uses in existence on November 17, 2000 that were specifically authorized for a period longer than 10 years (such as right-of-ways), our compatibility re-evaluation will examine compliance with the terms and conditions of the authorization, not the authorization itself. We will frequently monitor and review the activity to ensure that the permittee carries out all permit terms and conditions. However, the Service will request modifications to the terms and conditions of these permits from the permittee if the Service determines that such changes are necessary to ensure that the use remains compatible. After November 17, 2000 no uses will be permitted or re-authorized, for a period longer than 10 years, unless the terms and conditions for such long-term permits specifically allows for modifications to the terms and conditions, if necessary to ensure compatibility. We will make a new compatibility determination prior to extending or renewing such long-term uses at the expiration of the authorization. When we prepare a compatibility determination for re-authorization of an existing right-of-way, we will base our analysis on the existing conditions with the use in place, not from a pre-use perspective.

(i) When we re-evaluate a use for compatibility, we will take a fresh look at the use and prepare a new compatibility determination following the procedure outlined in 50 CFR 26.41.

4. Amend § 25.44 by:

a. Revising the heading and paragraphs (b), and (c)(1);

b. Removing paragraph (d); and

c. Redesignating paragraph (e) as (d) to read as follows:

§ 25.44 How do we grant permits for easement area uses?

* * * * *

(b) We require permits for use of easement areas administered by us where proposed activities may affect the property interest acquired by the United States. Applications for permits will be submitted in writing to the Regional Director or a designee. We may grant special use permits to owners of servient estates, or to third parties with the owner's agreement, by the Regional Director or a designee, upon written determination that such permitted use is compatible. If we ultimately determine that the requested use will not affect the United States' interest, the Regional Director will issue a letter of non-objection.

* * * * *

(c) * * *

(1) The permitted use is compatible; and

* * * * *

PART 26—[AMENDED]

5. The authority citation for part 26 continues to read as follows:

Authority: 5 U.S.C. 301; 16 U.S.C. 460k, 664, 668dd, 715i; Pub. L. 96–315 (94 Stat. 958) and Pub. L. 98–146 (97 Stat. 955).

6. Add § 26.41 to read as follows:

§ 26.41 What is the process for determining if a use of a national wildlife refuge is a compatible use?

The Refuge Manager will not initiate or permit a new use of a national wildlife refuge or expand, renew, or extend an existing use of a national wildlife refuge, unless the Refuge Manager has determined that the use is a compatible use. This section provides guidelines for making compatibility determinations, and procedures for documenting compatibility determinations and for periodic review of compatibility determinations. We will usually complete compatibility determinations as part of the comprehensive conservation plan or step-down management plan process for individual uses, specific use programs, or groups of related uses described in the plan. We will make all compatibility determinations in writing.

(a) *What information do we include in a compatibility determination?* All compatibility determinations will include the following information:

(1) The proposed or existing use;

(2) The name of the national wildlife refuge;

(3) The authorities used to establish the national wildlife refuge;

(4) The purpose(s) of the national wildlife refuge;

(5) The National Wildlife Refuge System mission;

(6) The nature and extent of the use including the following:

(i) What is the use? Is the use a priority public use?;

(ii) Where would the use be conducted?;

(iii) When would the use be conducted?;

(iv) How would the use be conducted?; and

(v) Why is the use being proposed?.

(7) An analysis of costs for administering and managing each use;

(8) The anticipated impacts of the use on the national wildlife refuge's purposes and the National Wildlife Refuge System mission;

(9) The amount of opportunity for public review and comment provided;

(10) Whether the use is compatible or not compatible (does it or will it materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge);

(11) Stipulations necessary to ensure compatibility;

(12) A logical explanation describing how the proposed use would, or would not, materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purpose(s) of the national wildlife refuge;

(13) The Refuge Manager's signature and date signed; and

(14) The Regional Chief's concurrence signature and date signed.

(15) The mandatory 10- or 15-year re-evaluation date.

(b) *Making a use compatible through replacement of lost habitat values or other compensatory mitigation.* We will not allow compensatory mitigation to make a proposed refuge use compatible, except by replacement of lost habitat values as provided in paragraph (c) of this section. If we cannot make the proposed use compatible with stipulations we cannot allow the use.

(c) *Existing right-of-ways.* We will not make a compatibility determination and will deny any request for maintenance of an existing right-of-way which will affect a unit of the National Wildlife Refuge System, unless: the design adopts appropriate measures to avoid resource impacts and includes provisions to ensure no net loss of habitat quantity and quality; restored or replacement areas identified in the design are afforded permanent protection as part of the national wildlife refuge or wetland management district affected by the maintenance; and all restoration work is completed by the applicant prior to any title transfer or recording of the easement, if applicable. Maintenance of an existing right-of-way includes minor expansion or minor realignment to meet safety standards.

(d) *Termination of uses that are not compatible.* When we determine an existing use is not compatible, we will expeditiously terminate or modify the use to make it compatible. Except with written authorization by the Director, this process of termination or modification will not exceed 6 months from the date that the compatibility determination is signed.

PART 29—[AMENDED]

7. The authority citation for part 29 continues to read as follows:

Authority: Sec. 2, 33 Stat. 614, as amended, sec. 5, 43 Stat. 651, secs. 5, 10, 45 Stat. 449, 1224, secs. 4, 2, 48 Stat. 402, as amended, 1270, sec. 4, 76 Stat. 645; 5 U.S.C. 301, 16 U.S.C. 668dd, 685, 725, 690d, 715i, 664, 43 U.S.C. 315a, 16 U.S.C. 460k; 80 Stat. 926.

8. Revise § 29.1 to read as follows:

§ 29.1 May we allow economic uses on national wildlife refuges?

We may only authorize public or private economic use of the natural resources of any national wildlife refuge, in accordance with 16 U.S.C. 715s, where we determine that the use contributes to the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission. We may authorize economic use by appropriate permit only when we have determined the use on a national wildlife refuge to be compatible. Persons exercising economic privileges on national wildlife refuges will be subject to the applicable provisions of this subchapter and of other applicable laws and regulations governing national wildlife refuges. Permits for economic use will contain such terms and conditions that we determine to be necessary for the proper administration of the resources. Economic use in this section includes but is not limited to grazing livestock, harvesting hay and stock feed, removing timber, firewood or other natural products of the soil, removing shell, sand or gravel, cultivating areas, or engaging in operations that facilitate approved programs on national wildlife refuges.

§ 29.3 [Reserved]

9. Remove and reserve § 29.3.

10. Amend § 29.21 by:

a. Revising the heading;

b. Removing the paragraph designations and placing the definitions in alphabetical order;

c. Removing the definitions of ''Compatible,'' ''Regional Director,'' ''Secretary,'' and ''Service;'' and

d. Adding a definition of ''Compatible use'' to read as follows:

§ 29.21 What do these terms mean?

Compatible use means a proposed or existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, based on sound professional judgment, will not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the purposes of the national wildlife refuge. The term ''inconsistent'' in section 28(b)(1) of the Mineral Leasing Act of 1920 (30 U.S.C. 185) means a use that is not compatible.

* * * * *

11. Amend § 29.21–7 by removing paragraph (c) and revising the heading to read as follows:

§ 29.21–7 What payment do we require for use and occupancy of national wildlife refuge lands?

Dated: July 28, 2000.

Stephen C. Saunders,

Assistant Secretary, Fish and Wildlife and Parks.

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