

THRESHOLD ANALYSIS

RURAL/NONRURAL REVIEW REQUEST FOR RECONSIDERATION RFR07-03

ISSUE

The Kenai River Sportfishing Association (KRSA) submitted a request dated June 30, 2007 (**Appendix A**) that the Federal Subsistence Board (Board) reconsider its actions regarding 36 CFR Part 242 and 50 CFR 100.23, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*. The Board took final action on this matter at a public meeting December 12-13, 2006, in Anchorage. The request was received within the time required by Federal subsistence regulations.

The KRSA's request for reconsideration (RFR) says that there were significant procedural and informational issues that were overlooked. The RFR lists three primary areas of concern: 1) inconsistent use of Federal regulations and selective use of criteria; 2) inappropriate use of executive sessions; and 3) data concerns.

BACKGROUND

Regulatory History

Federal subsistence regulations at 36 CFR 242.15 and 50 CFR 100.15 describe procedures for the Board to make and review rural/nonrural determinations. Those regulations stipulate that rural determinations shall be reviewed on a 10-year cycle, commencing with the publication of the year 2000 census. OSM (2006a) provides a summary of relevant regulations and describes the process undertaken to comply with the requirement to conduct the decennial review.

Existing Federal Regulations

Existing rural/nonrural determinations, following the final rule published May 7, 2007, are described in Federal subsistence regulations at 36 CFR 242.23 and 50 CFR 100.23. OSM (2006a) provides a description of rural/nonrural determinations that had been in place prior to the completion of the decennial review.

Regulatory Language Regarding Requests for Reconsideration

The applicable regulatory language associated with requests for reconsideration can be found in **Appendix B**.

PRELIMINARY ASSESSMENT OF REQUESTER'S CLAIMS

The Board uses three criteria to evaluate a request for reconsideration.

Criterion 1. Information previously not considered by the Board.

There were no claims by the KRSA that there is new information that was not previously considered by the Board.

Criterion 2. The existing information used by the Board is incorrect.

Claim 2.1

The Board failed to use relevant and updated information. The Board action gives the appearance of selectively grouping communities in a manner that arrives at a predetermined outcome.

Preliminary assessment of claim 2.1

OSM (2006a) was not intended to address all communities or areas within which changes may have occurred, but rather those for which additional staff analysis was assigned by the Board. That report provided tables and graphics of historical and current population data and indicators for all five community characteristics identified in regulation. In addition, data was presented on population density, which is a characteristic not identified in regulation. Not all data types were available for all communities and areas, but relevant data were provided to the extent available.

The Federal review of existing rural/nonrural determinations, from the beginning, included multiple opportunities for input from the Subsistence Regional Advisory Councils, the State of Alaska, and the public. The Board review was intended to progressively winnow the scope of candidate communities for potential change in status, or grouping and status, from the approximately 300 places in Alaska. OSM (2006a) was focused on a technical record for communities and areas remaining in the forefront of Board consideration for such changes.

OSM (2006b) provided a summary of Council recommendations and public comments on the proposed rule. Comments concerning consistency of application of the regulations for the review of determinations, and the approach taken to the evaluation of grouping of communities, were addressed in that report, which was prior to the final rule.

In developing the proposed rule, the Board made use of the analysis of communities and areas conducted by Federal staff as reported by OSM (2006a) using the analytical guidelines approved by the Board. While the guidelines the Board used to evaluate the grouping of communities may not represent the only way the question could be approached, it is nonetheless a legitimate approach that builds upon the methodology used to make the initial determinations.

The existing determinations on the Kenai Peninsula, entering this decennial review, consisted of the defined nonrural Kenai Area, Homer Area, and Seward Area groupings, with all other places considered rural. The purpose of using the grouping indicators of proximity/road connectedness, shared high school attendance area, and 30% worker commuting level, as directed by the Board, in this case was to evaluate the indications of whether a subject community under analysis should be considered integrated with one of the three existing groupings.

The three criteria the Board directed staff to apply to the evaluation of the grouping of communities for this decennial review were made known to the public in advance of their application (e.g. OSM 2005). The staff work was consistent with Board direction, and Board rule-making was in conformance with the requirements of the Administrative Procedure Act.

There does not appear to be merit to this claim.

Criterion 3. The Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law.

Claim 3.1

The Board applied Federal regulations inconsistently and used criteria selectively.

Preliminary assessment of claim 3.1

OSM (2006a) provided tables and graphics of historical and current population data and indicators for all five community characteristics identified in regulation. In addition, data was presented on population density, which is a characteristic not identified in regulation. Not all data types were available for all communities and areas, but relevant data were provided to the extent available. That report was not intended to address all communities or areas within which changes may have occurred, but rather those for which additional staff analysis was assigned by the Board.

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The three criteria the Board directed staff to apply to the evaluation of the grouping of communities for this decennial review were made known to the public in advance of their application (e.g. OSM 2005). Although this does not represent the only way in which the grouping of communities could be evaluated, it is a legitimate approach. The staff work was consistent with Board direction, and Board rule-making was in conformance with the requirements of the Administrative Procedure Act.

There does not appear to be merit to this claim.

Claim 3.2

The Board used executive sessions inappropriately.

Preliminary assessment of claim 3.2

The Board has the flexibility to meet in executive session, so long as a decision is not being made on a final rule. Also, comment was received during the proposed rule comment period regarding the Board meeting in executive session, and that concern was addressed in a report (OSM 2006b) made available to the Board and public prior to Board action on the final rule, and is addressed here as well.

The Federal review of existing rural/nonrural determinations, from the beginning, included multiple opportunities for input from the Subsistence Regional Advisory Councils, the State of Alaska, and the public. Board assignment of communities and areas for further analysis was made in a public meeting December 6-7, 2005. At the executive session on June 22, 2006, the Board developed the proposed rule. The publication of this proposed rule was followed by an extensive public comment period, including Board public hearings in four communities. Actions on the final rule were taken in a public meeting on December 12-13, 2006. All communities and areas in Alaska were considered in the course of this review, and changes in rural/nonrural status adopted by the Board were the decision of the Board in conformance with proper rulemaking procedures.

The Board provided ample notice at each step in the process, received numerous comments in response, and made its final decision in a public forum. Consequently, there does not appear to be merit to this claim.

SUMMARY

The Kenai River Sportfishing Association submitted a request that the Federal Subsistence Board reconsider its final rule regarding rural and nonrural determinations. The Board took final action on this matter at a public meeting December 12-13, 2006, in Anchorage. The request was received within the time required by Federal subsistence regulations. The KRSA's request says that there were significant procedural and informational issues that were overlooked. Three primary areas of concern were detailed: 1) inconsistent use of Federal regulations and selective use of criteria; 2) inappropriate use of executive sessions; and 3) data concerns.

The KRSA's RFR made three claims, one of which was categorized in this threshold analysis under criterion 2 (the existing information used by the Board is incorrect), and two of which were categorized under criterion 3 (the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law). This threshold analysis finds that there does not appear to be merit to any of these three claims.

LITERATURE CITED

OSM (Office of Subsistence Management). 2005. Informational summary of initial steps in the decennial review of rural determinations. Federal Subsistence Management Program. February 4, 2005. Posted to OSM Website (<http://alaska.fws.gov/asm/home.html>) in February 2005. Anchorage, AK.

OSM (Office of Subsistence Management). 2006*a*. Rural determinations decennial review: Analysis of communities and areas as assigned by the Federal Subsistence Board. June 23, 2006. FWS, Office of Subsistence Management. Anchorage, AK.

OSM (Office of Subsistence Management). 2006*b*. Rural determinations decennial review: Summary of Council recommendations and public comments on the August 2006 proposed rule and considerations in response. November 27, 2006. FWS, Office of Subsistence Management. Anchorage, AK.

APPENDIX A: Rural/nonrural review request for reconsideration RFR07-03.



Mr. Michael R. Fleagle, Chairman
Federal Subsistence Board
Office of Subsistence Management
3601 C Street, Suite 1030
Anchorage, AK 99503
subsistence@fws.gov

June 30, 2007

Dear Chairman Fleagle,

Please find enclosed a formal request for reconsideration concerning the Rural and Non-Rural Determinations for the Kenai Peninsula.

In accordance with CFR 100.20 the Kenai River Sportfishing Association is requesting the Federal Subsistence Board reconsider their recent actions regarding 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*.

We believe there were significant procedural and informational issues that were overlooked. In our request we detail the issues into three primary areas of concern:

- Inconsistent Use of Federal Regulations and Selective Use of Criteria
- Inappropriate Use of Executive Session, and
- Data Concerns

We hope the Federal Board will choose to reconsider this past action in an effort to make the best possible decisions regarding Federal Subsistence Management on the Kenai Peninsula.

Sincerely,

Ricky Gease
Executive Director



Dedicated to preserving the greatest sportfishing river in the world, the Kenai.

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**Request for Reconsideration of the Rural and Non-Rural Determinations for the
Kenai Peninsula
Submitted by
Kenai River Sportfishing Association**

In accordance with CFR 100.20 the Kenai River Sportfishing Association is requesting the Federal Subsistence Board reconsider their recent actions regarding 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*.

1) Name and Mailing Address:

Kenai River Sportfishing Association
PO Box 1228
Soldotna, AK 99669
(907) 262-8588
ricky@kenairiversportfishing.com

2) Requested Action:

Reconsider and reverse the actions taken by the Federal Subsistence Board designating the communities of Hope, Cooper Landing, and Ninilchik as rural as described in Federal Register/Vol. 72, No. 87/ Monday May 7, 2007 Rules and Regulations. 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C*.

3) Statement of Adverse Impact

Application of the Federal subsistence priority within the Kenai Peninsula is a relatively new phenomenon that will have potentially huge economic and social impacts to the residents of the Peninsula as well as those visiting the Kenai Peninsula. Kenai Peninsula fisheries sustain the vast majority of recreational fishing and Personal Use fishing opportunity in Alaska as well as long term historic commercial fisheries. These uses are cornerstone to the regions economic base.

We are concerned that the application of the Federal Subsistence Priority, if applied inappropriately and without complete adherence to Federal regulations and policy, will have disastrous effects on the fishery resources of the Peninsula, the economy of the region, and the cultural fabric of the communities within the Kenai Peninsula. We are therefore vigilant that as the application of this program takes place that Federal Subsistence Board members adhere to applicable legal requirements, policy, procedure and legislative intent.

Carving up the Peninsula into communities which have been designated rural and non-rural and the granting of a subsistence priority to those communities designated rural carries with it the intent that in times of resource shortage subsistence use will be granted a priority over other uses. If applied hastily, and outside the scope of the existing law, the Federal subsistence priority will be misplaced having unintended consequences that are catastrophic. Presently, the FSB has no formal closure policy and previous actions by the FSB in closing other fisheries within the State have not been consistent. We believe the Board must be judicious in its determinations of Rural and Non Rural as each time the FSB grants C&T for a community that action carries with it the potential to restrict other uses. In the case of the Kenai River, the largest sport fishery for salmon in the world, those consequences can have catastrophic political, social, and economic consequences.

4) Detailed Statement of the Facts

According to 50 CFR 100.15 Rural determination process, the Federal Board shall determine if an area or community in Alaska is rural. A rural determination may be made only for areas with a population of 7,000 or less. An areas characteristic shall be considered in evaluating a community's rural or non-rural status. There are some loosely described characteristics that may be considered which include the use of fish and wildlife, development and diversity of the economy, community infrastructure, transportation and other uses. Additionally, according to subparagraph (6) states that "Communities or areas which are economically, socially, and communally integrated shall be considered as an aggregate".

We believe there were significant deviations from prescribed Administrative Process that make the Boards actions in this matter void and worthy of reconsideration.

A. Inconsistent Use of Federal Regulations and Selective Use of Criteria

We have reviewed the 2006 analysis of Rural Non-rural issues presented by OSM and believe the federal staff has arbitrarily limited the scope of the evaluations to favor a rural decision for selected the communities on the Kenai Peninsula. The analysis clearly omitted application some of the criteria and the exclusion, intentional or not, could have the effect of dramatically altering the Boards final action.

Additionally, we believe the Board has not used a consistent process for each of the communities when making decisions regarding rural stratus. In some cases the Board has used empirical information as the basis of its decision and in other cases the board has substituted public testimony as the basis for the decision. The lack of consistent approach gives the appearance of cherry picking information to help support a predisposed decision.

These oversights can be corrected by reconsidering the previous action, aggregating communities, and deliberating the issue while making full use of all five applicable criteria.

B. Inappropriate Use of Executive Session

Several informal meetings were held within the state and attended by OSM staff where discussions concerning the rural non-rural process took place. Products from these meetings apparently resulted in the formation of criteria and process regarding how the Federal Board would administratively navigate through its decisions concerning rural non-rural determinations for the Kenai Peninsula. Most notably was a session occurring on June 22, 2006 where the Board met to develop a list of communities and areas it believes to be non-rural.

There was insufficient public notice of these meeting as no notice was published in the Federal Register. This in itself is a significant breach of process. The public was excluded from hearing the basis for the Board's decisions on which communities to continue to research and which to omit.

This is a complex process in and of itself. The complexity limits meaningful public involvement. Public involvement is further thwarted when the Federal Board conducts business in inadequately noticed meetings such as this.

This procedural error will be corrected by reconsidering the actions related to rural non-rural and conducting the deliberations in an open public forum with full public notice.

C. Data Concerns

We are extremely concerned that the Board action was apparently based on information that lacked relevant and updated information. The June 23, 2006 analysis provided by OSM staff fails to incorporate comparative changes within communities occurring between 1990 and 2000. The Federal analysis minimizes the changes that have occurred in the past decade and makes little specific reference to specifically what has changed within communities and what has not so that a thoughtful and informed decision can be arrived at by the Board. This oversight is clearly counter to the Board's intent and regulatory guidelines.

There is a recurrent problem with the way the Federal staff are addressing the issue of aggregation of similar communities. The Board action gives the appearance of selectively grouping communities in a manner that arrives at predetermined outcome. Specific criteria once used were selectively omitted from the analysis. For example community residents behavior relative to securing goods and services (shopping) was once considered relevant, has now been dismissed. We believe that the location of food sources, supplies, and services, are elemental when describing the relationship of one community to another.

One major difficulty in rural determinations for Kenai Peninsula communities is how to address subgroups within communities. It is very apparent that the staff analysis concerning the issue of rural determination has placed a very large weight to those factors favoring a rural determination for those sub groups at the expense of looking at the larger picture. The result has been that a community found rural is adjacent to another found non-rural and the difference between these communities is unclear and not documented within the record of decision.

The "analysis" provided by federal staff is full of inconsistencies, errors and omissions. It is intellectually difficult for any objective person to clearly see the distinction between communities deemed to be rural and those deemed to be non-rural based on the information provided by Federal staff, and a review of the Board's record of decision.

The flaw in the analytical procedure has been pointed out by the State of Alaska. The state has recommended the analysis be revised to address deficiencies and failures to consistently consider and present changes that have occurred in the previous decade and address the specific omission of information related to fish and wildlife uses between communities.

The informational errors may be addressed by reconsidering the previous action and requesting Federal staff provide a complete and updated analysis with specific reference to how and on what basis communities are to be considered aggregated.

5) Requested Action

Reconsider and reverse the actions taken by the Federal Subsistence Board designating the communities of Hope, Cooper Landing and Ninilchik as rural as described in Federal Register/Vol. 72, No. 87/ Monday May 7, 2007 Rules and Regulations. 50 CFR 100.23 and 36 CFR Part 242, published in the Federal Register May 7, 2007 *Final Rule Subsistence Management Regulations for Public Lands in Alaska, Subpart C.*

END

APPENDIX B: Federal subsistence management program regulatory language regarding requests for reconsideration.

Subsistence management regulations at 36 CFR Part 242 and 50 CFR Part 100, state the following regarding requests for reconsideration.

§ _____.20 *Request for reconsideration.*

- (a) *Regulations in subparts C and D of this part published in the Federal Register are subject to requests for reconsideration.*
- (b) *Any aggrieved person may file a request for reconsideration with the Board.*
- (c) *To file a request for reconsideration, you must notify the Board in writing within sixty (60) days of the effective date or date of publication of the notice, whichever is earlier, for which reconsideration is requested.*
- (d) *It is your responsibility to provide the Board with sufficient narrative evidence and argument to show why the action by the Board should be reconsidered. The Board will accept a request for reconsideration only if it is based upon information not previously considered by the Board, demonstrates that the existing information used by the Board is incorrect, or demonstrates that the Board's interpretation of information, applicable law, or regulation is in error or contrary to existing law. You must include the following information in your request for reconsideration:*
 - (1) *Your name, and mailing address;*
 - (2) *The action which you request be reconsidered and the date of Federal Register publication of that action;*
 - (3) *A detailed statement of how you are adversely affected by the action;*
 - (4) *A detailed statement of the facts of the dispute, the issues raised by the request, and specific references to any law, regulation, or policy that you believe to be violated and your reason for such allegation;*
 - (5) *A statement of how you would like the action changed.*
- (e) *Upon receipt of a request for reconsideration, the Board shall transmit a copy of such request to any appropriate Regional Council and the Alaska Department of Fish and Game (ADFG) for review and recommendation. The Board shall consider any Regional Council and ADFG recommendations in making a final decision.*
- (f) *If the request is justified, the Board shall implement a final decision on a request for reconsideration after compliance with 5 U.S.C. 551–559 (APA).*
- (g) *If the request is denied, the decision of the Board represents the final administrative action.*