

Kenai National Wildlife Refuge
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COMPATIBILITY DETERMINATION

The National Wildlife Refuge System Administration Act of 1966, as amended (16 U.S.C. 668dd-668ee) states that “The Secretary is authorized, under regulations as [s]he may prescribe, to – (A) permit the use of any area within the [National Wildlife Refuge] System for any purpose, including but not limited to hunting, fishing, public recreation and accommodations, and access wherever [s]he determines that such uses are compatible’ and that “... 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 and that the use is not inconsistent with public safety.” A compatible use is defined as “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 compatibility determination is to be a written determination signed and dated by the Refuge Manager and Regional Chief of the National Wildlife Refuge System, signifying that a proposed or existing use of a national wildlife refuge is a compatible use or is not a compatible use.

Applicable compatibility regulations in 50 CFR Parts 25, 26, and 29 were published in the Federal Register October 18, 2000 (Vol. 65, No. 202, pp 62458 – 62483).

Use: Subsistence

Refuge: Kenai National Wildlife Refuge

Establishing and Acquisition Authorities: The Refuge was first established as the Kenai National Moose Range by Executive Order 8979 on December 16, 1941. The boundaries were modified, purposes expanded, and name changed to Kenai National Wildlife Refuge under the provisions of the Alaska National Interest Lands Conservation Act (ANILCA) on December 2, 1980 (Public Law 96-487 Stat. 2371).

Refuge Purposes: The Executive Order purpose was primarily to “... protect the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska...”. ANILCA purposes for the Refuge include: “(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to moose, bear, mountain goats, Dall sheep, wolves and other furbearers, salmonids and other fish, waterfowl and other migratory and nonmigratory birds; (ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats; (iii) to ensure to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity with the refuge; (iv) to provide in a manner consistent with subparagraphs (i) and (ii), opportunities for scientific research, interpretation, environmental education, and land management training; and (v) to provide, in a manner compatible with these purposes, opportunities for fish and wildlife oriented recreation.” The Wilderness Act of 1964 (Public Law 88-577) purposes are to secure an enduring resource of wilderness, to protect and preserve the wilderness character of areas within the National Wilderness Preservation System,

and to administer this wilderness system for the use and enjoyment of the American people in a way that will leave them unimpaired for future use and enjoyment as wilderness.

Policy (FWS 603 2.8) directs that pre-ANILCA purposes remain in force and effect, except to the extent that they may be inconsistent with ANILCA or the Alaska Native Claims Settlement Act, and that such purposes only apply to those areas of the Refuge in existence prior to ANILCA. The Executive Order purpose to protect Kenai moose, however, is treated as complimentary to the broader ANILCA purpose of conserving fish and wildlife populations; therefore, no special attention is given the Executive Order purpose in this compatibility review process.

Sec. 4(a) of the Wilderness Act provides that the purposes of the Act are to be within and supplemental to the purposes for which national wildlife refuges are established and administered. These purposes are applied to the approximately 1.3 million acres of Congressionally designated wilderness within the Refuge. While these purposes do not apply to the remaining approximately 700,000 acres of Refuge lands that are not designated as wilderness, we must consider the effects of uses on any Refuge lands that might affect the wilderness areas.

Kenai National Wildlife Refuge is unique in that it is the only Alaska National Wildlife Refuge that does not have an ANILCA purpose to continue to provide for subsistence opportunities. It is also unique in being the only Alaska Refuge with a specific purpose to provide opportunities for wildlife oriented recreation.

National Wildlife Refuge System Mission: The National Wildlife Refuge System Mission is “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.

Description of Use: Subsistence was not considered to be a use of Kenai National Wildlife Refuge when the first Comprehensive Conservation Plan was completed in 1985 and no previous compatibility determinations have been completed for this use. Since then, through a variety of procedural and legal processes, subsistence has become a recognized use of the Refuge. The Federal subsistence program began in 1990 and since has evolved to include the regulation of most subsistence harvest of both fish and wildlife on Federal public lands in Alaska for qualified rural residents. The current subsistence hunting opportunity that is provided above and beyond State of Alaska regulatory options include a 3 black bear harvest limit (with a year-round season) for residents of Ninilchik, Port Graham, and Nanwalek within Game Management Unit 15(C); beginning in fall 2007 residents of Ninilchik may also take 2 black bears year round in GMUs 15A & B by Federal registration permit. A season was also added in 2007 for brown bear for residents of Ninilchik in where a quota of 2 bears may be taken total for the community by registration permit in a to-be-announced season. Other seasons and opportunities include an Aug. 10 to Sept. 20 bull moose (with a spike-fork or 50-inch antlers, or with at least 3 brow tines on either antler) for residents of Ninilchik, Nanwalek, Port Graham, and Seldovia; a late moose season, from October 20 to November 10 for Refuge lands in Unit 15B and C was added in 2006. Other big game, small game, and trapping regulations for qualified subsistence users largely follow the same seasons and bag limits as State regulations. Bag limits are not cumulative (i.e. a subsistence hunter can't legally take a bull moose in the Federal hunt and another moose in the State managed hunt). Separate regulations processes and published booklets are printed annually for fishing and hunting for both State general seasons and Federal subsistence seasons.

During the May 2007 Federal Subsistence Board (Board) meeting the Board approved proposals to: 1) allow residents of Ninilchik to take sockeye, Chinook, coho, and pink salmon in a dip net

and/or rod and reel fishery on the Kasilof River, 2) allow residents of Ninilchik to take lake trout, Dolly Varden, and rainbow trout in the Kasilof River by rod and reel and in Tustumena Lake with gear used through the ice (by jigging or net), 3) allow residents of Ninilchik, Hope, and Cooper Landing to take salmon in the Kenai River by rod and reel or by dip net in designated areas, and 4) allow residents of Hope and Cooper Landing to take lake trout, Dolly Varden, and rainbow trout in the Kenai River by rod and reel. Through these new regulations some of the primary differences between the Federal subsistence fisheries and State managed sport fisheries include: season extensions, increased bag limits, and more flexible methods and means. Permits are required for all of the Federal fisheries and strict reporting requirements are in place. A great deal of fishing opportunity is also afforded subsistence users through State sport fish and personal use fishing regulations and all State regulations apply unless amended by specific Board actions.

Grayling and burbot have no Federal open season; residents of the Cook Inlet Area may take smelt from April 1 to June 15 with a dip net in freshwater without limit, and all other fish may be taken year round without limit (See 2007 – 2008 Subsistence Management Regulations for Harvest of Fish and Shellfish on Federal Public Lands and Waters in Alaska, Subsistence Management Regulations for the Harvest of Fish on Federal Public Lands and Waters in the Kenai and Kasilof River Drainages, and 2006 – 2007 Subsistence Regulations for the Harvest of Wildlife on Federal Public Lands in Alaska).

While legal interpretations of what subsistence is, and who qualifies to participate in the activities, have changed over time, the act of taking fish, game, and plants for use as food or clothing by humans has gone on for as long as people have lived in the area – many thousands of years. The subsistence description here, and this compatibility determination only applies to those uses by qualified rural residents who have recognized subsistence hunting or fishing privileges authorized by the Federal Subsistence Board and regulation. For the Kenai area, little actual harvest has occurred for most fish and wildlife, following this definition, in recent years. Between 1996 and 2006 residents of Ninilchik, Nanwalek (English Bay), Port Graham, and Seldovia reported taking 44 moose on Federal public lands during the Federal subsistence seasons. In contrast, however, during the same period of time the total harvest for these communities was reported at 604 moose. This means that only about 7 percent of the moose harvest has occurred in recent time from the Federal subsistence hunt on the Refuge with the remainder occurring during State seasons either locally (including on the Refuge under State regulations) or elsewhere in the State. From 1996 to 2006 a total of 451 Federal subsistence moose hunting permits were issued to qualifying rural residents, of which 396 reported after the hunt, and 297 of those reporting actually hunted. The preponderance of moose harvested were taken close to the qualifying communities, primarily in Game Management Unit 15(C), followed by Game Management Unit 15 (B). Only 2 moose have been reported to have been harvested by subsistence hunters in Game Management Unit 15 (A) in the last 10 years.

Between 2002 and March 2007 22 subsistence fishing permits were issued to individuals from seven qualifying communities or rural areas (Ninilchik, Moose Point, Chisik Island, Tustumena Lake, Eldred Passage, Cooper Landing, and Hope). Of these permits only 8 were used and the reported harvest was a total of 22 sockeye salmon, 31 coho salmon, 20 lake trout, and 6 Dolly Varden.

Subsistence hunting and fishing by-in-large involve the same practices and methods as used for sport hunting and fishing, although gear types for subsistence fishing over time may transition to the use of other equipment such as nets, traps, or fish wheels. Currently, most fish are taken with rod and reel and birds and mammals are generally taken with modern firearms.

Subsistence Use and Compatibility

The purposes that ANILCA established for the Kenai NWR were unique (compared to the other 15 refuges created under the Act) in three ways. None of the other Alaska refuges were provided purposes for scientific research, interpretation, environmental education, and land management training. None of the other refuges were given a purpose to provide opportunities for fish and wildlife-oriented recreation. Additionally, Kenai NWR was the only refuge not given the purpose “to provide in a manner consistent with the purposes set forth in subparagraphs (i) and (ii), the opportunity for continued subsistence uses by local residents.” This difference does not mean that subsistence cannot occur at Kenai NWR; in fact ANILCA also provides for a general subsistence preference for consumptive use of fish and wildlife on all Federal public lands within Alaska; however, because of the legal ramifications of the compatibility standard, and how it applies only to specific purposes, Kenai NWR is unique in how it must balance subsistence uses in meeting its specific mandated purposes.

The issue regarding the intent of ANILCA in terms of providing for subsistence (in reference to compatibility with refuge purposes) is first raised in Title I, Sec. 101 (c) which states, “ It is further the intent and purpose of this Act consistent with management of fish and wildlife in accordance with recognized scientific principles and purposes for which each conservation system unit is established, designated, or expanded by or pursuant to this Act, to provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so.” While Congress may have believed that subsistence was not occurring on the Kenai Peninsula at the time ANILCA was enacted, further legal scrutiny has advised that without regulatory interference such a lifestyle would have been likely to continue and therefore should not be ignored.

In addition, Title VIII, Sec. 802 (1) states, “[It is hereby declared to be the policy of Congress that] consistent with sound management principles, and the conservation of healthy populations of fish and wildlife, the utilization of the public lands in Alaska is to cause the least adverse impact possible on rural residents who depend upon subsistence uses of the resources of such lands; consistent with management of fish and wildlife in accordance with recognized scientific principles and the purposes for each unit established, designated, or expanded by or pursuant to titles II through VII of this Act, the purpose of this title is to provide the opportunity for rural residents engaged in a subsistence way of life to do so.”

While it is clear that the intent of ANILCA was to provide for continued subsistence use on federal public lands in Alaska, there are two points in the above references that have special meaning in how new subsistence regulations should be implemented at Kenai NWR. First, the intent of ANILCA is to provide continued opportunity for rural residents, not create new opportunity. Second, in pursuit of providing continued subsistence opportunity, the actions must be taken in a manner compatible with the purposes for which the refuge was established. Additionally, Sec. 815 (4) states that “{Nothing in this title shall be construed as} modifying or repealing the provisions of any Federal law governing the conservation or protection of fish and wildlife, including the national Wildlife Refuge Administration Act of 1966...”. Section 304 of the Act also adopts the compatibility standard of the National Wildlife Refuge Administration Act of 1966, directing the Secretary to focus on the established purposes (in Section 303) when deciding which uses to permit on the refuges. So while Kenai NWR is subject to Title VIII of ANILCA, in implementing its subsistence program it must do so in compliance with other provisions of the Act. This may become challenging since the use being administered (subsistence) is not a specific refuge purpose; whereas, competing uses (some wildlife-oriented recreational opportunities) are. Such a situation requires a balanced approach not required for other public lands in Alaska.

Strictly speaking, compatibility only applies to discretionary activities that the Secretary may permit, not to statutory requirements such as Title VIII of ANILCA; however, ANILCA adopts with the statute the doctrine of compatibility, generally as referenced above, and specifically in Section 802 when stating, “to provide for subsistence opportunity for rural residents, consistent with the purposes for which the conservation unit was established” (emphasis added). Implementing Title VIII in general is not subject to a compatibility review. The specifics of the implementation are, if there is discretion on how they are to be implemented. Such discretion is apparent in many implementation decisions, and in and of itself largely dictates the primary need for a Federal Subsistence Board.

Availability of Resources: The current recognized subsistence program managed by the Kenai NWR is relatively small and adequate funding exists to participate in applicable Regional Advisory Council and Federal Subsistence Board meetings, issue permits and answer questions at the Refuge headquarters, conduct periodic surveys of subsistence resources, and monitor and enforce specific subsistence regulations. Should the program grow however, particularly with significant new subsistence fishing opportunities, current resources would not be sufficient to properly manage the program. The addition of a new Refuge staff position and support funding is currently being evaluated.

Anticipated Impacts of the Use: Properly managed, subsistence hunting and fishing opportunities should have little impact on the health and sustainability of Refuge fish and wildlife populations and their habitats. Care must be taken when striving to provide for a subsistence use priority that risk to fish and wildlife populations are not ignored. To date, there have been no such problems realized; however, such issues have arisen, such as proposed take of any bull moose and hunting of bull moose in the rut, both of which would threaten to reduce bull:cow ratios and negatively impact first estrus breeding. Because of these conservation concerns, however, such proposals have been rejected.

Public Review and Comment: This compatibility determination has been prepared while revising the Refuge’s Comprehensive Conservation Plan and Environmental Impact Statement. Future revisions can be accomplished outside of this planning process if deemed necessary and would be completed with public notice and involvement. Legal notice of the draft compatibility determination was published in the Anchorage Daily News and the Kenai Peninsula Clarion on February 25, 2007 which initiated a 45-day public comment period. The notice was also posted on a bulletin board at the Refuge headquarters for the same time period, made available starting February 28, 2007 on a list server fws-akrefugecompatibility@lists.fws.gov to 137 addresses, and made available on the Regional Refuge Planning web site at <http://alaska.fws.gov/nwr/planning/completed.htm>.

Comments on some or all of the (15) compatibility determinations were received from: The State of Alaska, The Wilderness Society, The National Wildlife Refuge Association, Friends of Kenai National Wildlife Refuge, Alaska Trappers Association, Defenders of Wildlife, Kenai Field Office (FWS), and The Humane Society of the United States.

Updated information about subsistence use on Kenai NWR was requested by the State of Alaska and was incorporated into the final compatibility determination. Additional changes in future years are likely and will be reviewed for significance. Any significant change in the use will require a new compatibility determination.

The National Wildlife Refuge Association and Defenders of Wildlife supported the draft determination as written.

Determination (check one below):

_____ Use is Not Compatible

X Use is Compatible With Following Stipulations

Stipulations Necessary to Ensure Compatibility: Each subsistence proposal must be reviewed on a case-by-case basis. This compatibility determination complies with the legal requirements to review all uses of national wildlife refuges in order for them to be permitted, recognizing the unique requirements that ANILCA places on this particular use. The Refuge Manager must look at each proposed change to Kenai NWR subsistence regulations and determine whether the proposal is significant enough to warrant a re-evaluation of this determination. If so, consistent with National policy, a new compatibility determination must be prepared, with public involvement, before the modified use can be permitted. Not all changes to Federal subsistence regulations will necessarily warrant a new compatibility review. For those that are, most should be able to be made compatible with specific stipulations or mitigation measures. In the rare event, however, that a proposed change cannot be made compatible, the Federal Subsistence Board would be informed of the decision and the proposed change could not be legally adopted.

Justification: Subsistence use is a long-standing traditional use of natural resources historically throughout Alaska. It is a protected use on Federal Public Lands in Alaska, and a Congressionally mandated purpose for all refuges in Alaska except for Kenai NWR. At Kenai, the use is also an established priority, but must be balanced with specific mandated purposes. In the rare exception that a specific subsistence use is determined to materially interfere with or detract from a specific Refuge purpose, after efforts to mitigate the impacts, it may not be allowed. With this process in place, utilizing existing policy and regulatory processes, most subsistence uses will be facilitated at Kenai NWR while ensuring the specific Refuge purposes are also achieved in a manner consistent with law and practice.

Signature (Refuge Manager): /s/ Robin L. West 6/13/07
Signature and Date

Concurrence (Regional Chief): /s/ Todd J. Logan 8/14/07
Signature and Date

Mandatory 10-year Re-evaluation Date: 8/14/17