

# STATE OF ALASKA

## ANILCA IMPLEMENTATION PROGRAM Office of Project Management and Permitting

**SEAN PARNELL, Governor**

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May 14, 2010

Gary Wheeler, Refuge Manager  
Kodiak National Wildlife Refuge  
US Fish and Wildlife Service  
1390 Buskin River Road,  
Kodiak, AK 99615

Dear Mr. Wheeler:

The State reviewed the Draft Commercial Fisheries Support Facilities Management Plan for the Kodiak National Wildlife Refuge. The following comments represent the consolidated views of the State's resource agencies.

The State has consistently expressed long-standing concerns regarding management of commercial fishing support facilities from 1984 through the revision of the Kodiak Refuge Comprehensive Conservation Plan (CCP). The 2007 CCP Record of Decision assured us that commercial fishing comments would be addressed in the revision of the 1987 Commercial Fishing Activities Management Plan. Since the State manages the commercial fishery, we have a strong interest in management of the related support facilities upon which these fisheries depend. In 2008 we submitted substantive scoping comments that reiterated our concerns and repeated our request to work with the Service on the Plan revision to resolve these long-standing issues. Given the Refuge's response in the final CCP (Page K-34), which states "*The refuge is always willing to meet with the State to review and discuss issues pertaining to the Commercial Fisheries Management Plan,*" we anticipated additional discussion and were disappointed to find that the draft Plan was completed without coordination with the State. In addition, after reviewing the draft Plan, we are discouraged to find the following long-standing issues remain:

- Lack of established criteria to define "significant *expansion of commercial fishing activities*" consistent with the intent of ANILCA
- The number of permits is arbitrarily limited to the level permitted in 1979
- Insufficient ability to relocate support facilities in response to changes in fishery
- Occupancy of support facilities does not coincide with commercial fishing season

We appreciate the Plan includes some important allowances for fishermen - including ice houses, generator sheds, and availability of three additional one-year permits - and we do not want to delay implementation of these important provisions. However, given the

gravity of our outstanding issues, we strongly urge the Service to meet with state representatives as soon as practicable before the Plan is finalized.

### **“Significant Expansion” and Permit Limit**

As discussed in our 2008 scoping comments, we disagree with the Service’s restrictive interpretation of the Alaska National Interest Lands Conservation Act (ANILCA) Section 304(d) regarding activities permitted in support of commercial fishing. As you already know, Section 304(d) provides the following:

*The Secretary shall permit within units of the National Wildlife Refuge System designated, established, or enlarged by this Act, the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law and the use of Federal lands, subject to reasonable regulation, for campsites, cabins, motorized vehicles, and aircraft landings directly incident to the exercise of such rights or privileges: Provided that nothing in this section shall require the Secretary to permit the exercise of rights or privileges or uses of the federal lands directly incident to such exercise, which he determines, after conducting a public hearing in the affected locality, to be inconsistent with the purposes of a unit of the National Wildlife Refuge System as described in this section and to be a significant expansion of commercial fishing activities within such units beyond the level of such activities during 1979.*

Our scoping comments provide detailed rationale why a more flexible approach to the regulation of commercial fishing support facilities is both possible and justified and within the scope of ANILCA. Rather than repeating our rationale here, we are attaching our original scoping letter for reference. The Plan’s response to comments section does not address why the Plan does not establish criteria for defining a “*significant expansion*” as requested, other than to identify factors that would need consideration. Thus the Plan retains – without sufficient explanation - the policy to limit the number of permits to those issued in 1979. Not allowing for *any* expansion of commercial fishing activities is contrary to ANILCA. However, the plan does state in the “Fishing season of use” section (page 4) that “*Utilization of these facilities for commercial harvest of fish during periods outside the commercial salmon season would from our perspective constitute an increase in activities above the 1979 level;*” therefore, it appears the Refuge has internally established criteria for what constitutes a “*significant expansion.*” We reiterate our request that the public be afforded an opportunity to comment on a clearly identified set of criteria to facilitate an understanding of the basis for the Refuge’s interpretation of this important provision in ANILCA, and allow fishermen an opportunity to plan their commercial fishing activities accordingly.

### **Relocation of Support Facilities**

The process for issuing the three temporary one-year permits provides very little opportunity for fishermen to move their base of operations from one location to another, particularly if stock abundance proves to be lower in-season than pre-season forecasts indicate. Permits need to be available both before and in-season so that fishermen have

the option to move their operations as the abundance of fish dictate. We request the permit distribution process be revised to accommodate these circumstances.

### **Fishing Season of Use**

While we appreciate the plan provides for an exception to allow use outside the established May 15 through September 15 window on a case by case basis; without specific justification, we view the permit requirement as an unnecessary burden to the public. Neither the plan nor the response to comments section provides an explanation for this requirement. In addition, at a public meeting held in Kodiak on January 15, 2008, permit holders expressed concern over the requirement to request additional time and the discretionary authority granted refuge managers to approve or deny a request. While it was noted that you have been responsive to requests for additional time, previous managers were not always as accommodating. Therefore, absent reasonable justification, we request the season of occupancy be expanded to coincide with the outside end of the commercial fishing season.

### **Other General Comments**

#### ***Motorized Vehicle Use***

Public scoping comments indicate that there is some interest in using off-road vehicles (OHV) to transport supplies and materials associated with commercial fishing activities. The *Use of Refuge Lands* section (page 7) states that motorized vehicles were not used in the set net fishery on Kodiak Refuge prior to 1980, are not considered necessary and, therefore, not allowed. It appears the Service is confusing “*other means of surface transportation traditionally employed*” pursuant to ANILCA Section 811 with the ability to allow ORV use pursuant to 43 CFR 36.11(g), which does not include any such traditional use criteria. As the Refuge is aware, ORV use was more limited prior to 1980 because ORVs were not the well-developed all-terrain vehicles that exist today. While they may not have been used in conjunction with the commercial fishery prior to 1980, ANILCA Section 304(d) allows for motorized vehicle use and the Refuge has the discretion to allow ORVs under Moderate Management on designated routes, areas or by special use permit. We note that ORV use is already allowed on State land below mean-high-tide and request the blanket prohibition included in the Plan be replaced with a reference to 43 CFR 36.11(g), to allow managed OHV use a case-by-case basis, where necessary and appropriate.

#### ***Subsistence Use***

The Plan indicates the permitted commercial fishing support cabins may be used for subsistence activities incidental to commercial fishing operations during the authorized season of use. This effectively limits use of the cabins by qualified rural residents for subsistence activities from May 15 to September 15. The Plan does not elaborate on why use of the cabins cannot extend beyond these dates; however, we note Service regulations at 50 CFR 36.33 authorize local residents to use cabins on refuge lands for subsistence activities. We therefore request a revision that allows the Refuge to permit users to occupy their cabins beyond the commercial fishing season on a case-by-case basis for subsistence purposes.

### ***Invasive Plants***

We appreciate the continuing efforts to eradicate invasive plants on the Refuge and the invasive controls in this plan, including not allowing planting of non-native plants at cabin sites. We also recommend including a condition that any introduced fill materials be certified weed free.

### **Page Specific Comments**

Page 3: As previously stated, we appreciate the revised Plan will allow permit holders to build and maintain generator/ice machine buildings. Allowing these facilities will improve the quality of the catch and increase the value of the catch. However, the Plan only allows banyas “*in case of inadequate water supply at site.*” It is not clear why this limit is necessary. A provision for a bath house that provides a banya, shower or other similar facility should be sufficient. This comment also applies to page two of the Compatibility Determination.

Page 4, Fishing Season of Use: We note this section incorrectly states that the Alaska Department of Fish and Game (ADF&G) manages commercial fisheries “*to promote maximum production opportunities.*” We request the Plan instead indicate ADF&G manages fisheries on the sustained yield basis.

Page D-4, Kodiak National Wildlife Refuge General Special Conditions Set Net Site – Commercial Fishing: We support the use of electric fences as a bear deterrent (as mentioned on page A-2 of the Appendix A) and recommend incorporating use of such fences into the permit as a special condition.

### **Compatibility Determination: Commercial Fishing**

Page 1, Use: We request that the Compatibility Determination (CD) be revised to indicate it is related to commercial fishing support facilities on refuge uplands, not commercial fishing.

Page 2, Primary type and size of facilities: See previous comments related to authorization of a bathhouse as opposed to a banya or shower facility. See also Stipulations Necessary to Ensure Compatibility, first bullet.

Page 2, second full paragraph: We request the CD also indicate fisheries are managed by ADF&G on the sustained yield principle.

Page 6, Justification: The introductory sentence states:

*Analysis conducted as part of the Refuge’s original comprehensive conservation planning process found that commercial fishing–related activities on Kodiak Refuge had expanded beyond the 1979 level and that any further expansion of facilities would not be compatible with Refuge purposes.*

The 1987 CCP-EIS (page 431, Appendix N, first paragraph) states:

*Based on the number of sites and facilities, the Service believes that the level of commercial fishing activity on refuge lands **may have** significantly expanded past the 1979 level of activity, and that further expansion **may be** inconsistent with refuge purposes. (Emphasis added)*

We request the introductory sentence be replaced with the quote from the 1987 CCP-EIS.

Thank you for this opportunity to comment. Please contact me at (907) 269-7529 to make arrangements for State and Service representatives to meet and discuss these issues further.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Magee", written in a cursive style.

Susan E. Magee  
ANILCA Project Coordinator

cc: Sally Gibert, ANILCA Program Coordinator

Attachment: 02/15/08 State of Alaska Scoping Comments

# STATE OF ALASKA

**SARAH PALIN, Governor**

## **ANILCA IMPLEMENTATION PROGRAM Office of Project Management and Permitting**

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February 15, 2008

Mr. Gary Wheeler, Refuge Manager  
Kodiak National Wildlife Refuge  
US Fish and Wildlife Service  
1390 Buskin River Road  
Kodiak, AK 99615

Dear Mr. Wheeler:

The State of Alaska appreciates the opportunity to provide you with these scoping comments for the revision of the Commercial Fishing Management Plan (Plan) for the Kodiak National Wildlife Refuge. We have looked forward to working in cooperation with the Refuge on a revision of this Plan for some time, particularly given the response in the 2007 Record of Decision (ROD) for the Kodiak Refuge Comprehensive Conservation Plan that deferred commercial fishing issues to this revision process.

We request the Refuge use this Plan to develop clear policies and guidelines for both permit holders and Refuge staff that provide a consistent, stable understanding of the use and management of commercial fishing support facilities. Lack of consistency under previous refuge managers sometimes led to misunderstandings between Refuge staff and permit holders. Also, while the Plan referenced is a “Commercial Fishing Management Plan” we welcome your intention to rename the revision to more closely reflect the actual activities it regulates – commercial fishing support facilities – not management of commercial fishing. This is a small matter but one that will reduce confusion by the public concerning the respective management responsibilities of the State of Alaska and the Refuge.

We note that there are some differences in the text of the Management Plan Commercial Fishery Activities dated August 27, 1987, handed out at the January 2008 public meeting in Kodiak, and the original copy of the Plan in our files. They appear to be mostly editorial but care should be taken to ensure that no substantive changes in the text or intent of the 1987 Plan are unintentionally carried forward without public scrutiny. To avoid any such inadvertent problems, it may be advisable to only use the original version of the Plan.

In the original 1987 Plan, the Refuge determined that in order to ensure that commercial fisheries support facilities were compatible with Refuge purposes it was necessary to limit the number of facilities to that present in 1979 and to strictly limit the size of the facilities needed in support the fishery. As you are aware, the State then, and now, believes that the Refuge has been overly restrictive in its interpretation of the Alaska National Interest Lands Conservation Act (ANILCA) section 304(d) regarding activities permitted in support of commercial fishing. Section 304(d) provides the following:

*The Secretary shall permit within units of the National Wildlife Refuge System designated, established, or enlarged by this Act, the exercise of valid commercial fishing rights or privileges obtained pursuant to existing law and the use of Federal lands, subject to reasonable regulation, for campsites, cabins, motorized vehicles, and aircraft landings directly incident to the exercise of such rights or privileges: Provided that nothing in this section shall require the Secretary to permit the exercise of rights or privileges or uses of the federal lands directly incident to such exercise, which he determines, after conducting a public hearing in the affected locality, to be inconsistent with the purposes of a unit of the National Wildlife Refuge System as described in this section and to be a significant expansion of commercial fishing activities within such units beyond the level of such activities during 1979.*

Section 304(d) is an example of how Congress intended refuges in Alaska to be managed differently than in the contiguous 48 states. By determining that support for commercial fishing was a permitted use of refuges in Alaska, Congress was giving direction to the Service that they should manage lands in Alaska to assure the continuation of unique uses not found elsewhere in the refuge system.

We understand that in 1987 the Refuge may have been warranted in taking the steps it did to stringently regulate facilities, particularly given the outlook concerning bears, perhaps the most visible refuge resource and a significant purpose in the original creation of the refuge. By that time, the Alaska Native Claims Settlement Act had removed significant acreage from the Refuge and raised the potential for development by private land owners. Hunting effort for deer was dramatically increasing along with the potential for negative human-bear interactions. The Terror Lake Hydroelectric project was coming on line with potential development impacts to habitat. All of these factors raised alarm concerning the future of bears on Kodiak. Implementing a highly-regulated system for facilities on the Refuge was something that the Refuge could do to ensure the future of bears on the island in the face of these other challenges.

However, since 1987 a number of factors have reduced the potential for detrimental impacts to bears. Large amounts of the land turned over to Native corporations were purchased and returned to Refuge control. Deer populations have declined, reducing hunting effort and reducing the potential for negative hunter-bear interactions. Terror Lake did not incur the impacts that were thought possible. Overall, bear populations on the Refuge (and the Kodiak Archipelago for that matter) have increased and their regulated harvest has been incrementally increased in response. With 20 years of

additional studies and observations of bears on Kodiak, as well as a better understanding of the adaptable nature of bears, a more flexible approach to the regulation of commercial fishing support facilities is both possible and justified. A more flexible approach would take into account the cyclical nature of fisheries since commercial fisheries (and the fishery resources they depend on) are not static in abundance of fish, location of effort, or market needs. Adjustments in the management of the facilities used in their support are a necessary element in the continued viability of the fisheries.

Because of the dramatic changes since the 1987 Plan was written, we request the bear section be revised to reflect these changes. We request the section describe current knowledge about the potential impacts of commercial fishing support facilities on bears and make recommendations on how to eliminate or minimize these impacts. The Plan should take advantage of an opportunity to make these facilities on Refuge lands models for how to co-exist with bears – something others living in proximity to bears on private and state lands can look to as an example. ADF&G would welcome the opportunity to work with the Refuge on this portion of the revision.

Foremost on our list of issues, we request that the Plan revision develop criteria to implement Congressional intent in ANILCA Section 304(d) in limiting the fishery to, “...a significant expansion of commercial fishing activities within such units beyond the level of such activities during 1979.” The interpretation of this section affects several components of facilities management: the total number of facilities permitted, the actual “footprint” of facilities on the Refuge, and the duration of occupation. Historically, the Refuge has interpreted that the actual number of facilities (temporary and permanent) must be limited to the number found in 1979, with no possibility of expansion, in order to remain compatible with the purposes of the refuge. In simple terms, the number of permits issued by the Refuge needs careful consideration. For example, the number of permits issued by the Refuge was 26 in 1979, 34 in 1986 and recent figures presented at the January 2008 public meeting in Kodiak reported a total of 24 permits issued in 2007. Given this information, the Plan should provide for an increase in the number of permits, in addition to determining what a significant increase above 1979 levels might be.

The operation of set net sites or sites in support of beach seining operations for commercial fishing often necessitate the use of refuge uplands for support facilities. As fisheries change over the years, the location of the fisheries and, hence, location of upland support sites may need to change. Participation in the fisheries itself is under limited entry, thus the fishery itself is not expanding. However, if fishery location or abundance changes, fishermen with permitted upland sites may occasionally need to use different locations with temporary support facilities. We have previously directed fishermen to the refuge office to request permission to erect tent platforms on a temporary basis during shifts in the fishery. Some fishermen are able to travel to and from their existing sites, but weather and distance preclude this from being a feasible option for others.

It is our understanding that, based on the 1987 Plan, Kodiak refuge staff has rejected requests for temporary use permits needed to support changes in location of the



commercial fishery. We are concerned about the impact this continued prohibition will have on the viability of the commercial fishing industry in the Kodiak area. This also interferes with the Alaska Department of Fish and Game's commercial fisheries management by preventing units of fishing gear to move throughout the area, inhibiting harvest of fish when and where most desirable. If fishermen cannot obtain the permits necessary from the Refuge to erect facilities needed to fish in an area they cannot participate in the fishery.

The size of facilities (the foot print) is also of concern since permit holders may be unnecessarily limited in their ability to participate in the fishery. In particular, permit holders are interested in the ability to construct small buildings to house ice-making machines needed to cool and preserve fish. Small sheds to house ice makers would improve the quality of fish and also reduce associated noise and increase scenic values by removing ice-making machines from open view. We do not believe that Congress intended for these fisheries to remain technologically stagnant and not take advantage of new developments that could improve products (and lessen certain impacts).

Changes in fishery management and market demand call for corresponding changes in the seasonal duration of permits necessary. Permits issued by the Refuge currently allow occupation of facilities from May 15 through September 15, while the commercial fishery now extends from June 1 to October 31 in some districts. Additional time is necessary and appropriate for permit holders to fully participate in the commercial fishery.

Permit holders also need to be able to inhabit their facilities during the winter months to conduct repair or other maintenance projects that may not be feasible during other times of the year. Current Refuge policy does not allow permit holders to do so.

We are also interested in discussion concerning the subsistence use of these facilities outside of the period of time permitted for commercial uses. Public comments have indicated that local area residents may have used these cabins prior to the development of the 1987 Plan for subsistence purposes, a use that is not currently allowed by refuge policy. A review of historic subsistence uses of these facilities is warranted to ensure that subsistence opportunities are being adequately provided.

We recognize that the Service has resource concerns to consider in permitting commercial fishing support facilities on Refuge lands. ANILCA authorized certain uses of refuges, including commercial fishing support activities, and these activities need not be inconsistent with the purposes of the Refuge. The Service has numerous options for reasonable limitations attached to individual special use permits and, with input from the State and stakeholders and using the best information available, we believe new or temporary support facilities can be constructed and used to minimize impacts to habitat, wildlife and other resources. We look forward to working with the Refuge in the revision of this Plan.

Thank you for your consideration of these comments. If you have any specific questions about these comments, please contact Brad Palach at the Alaska Department of Fish and Game, at 907-267-2145.

Sincerely,

/ss/

Sally Gibert  
ANILCA Program Coordinator