

**DEPARTMENT OF THE INTERIOR****Fish and Wildlife Service****50 CFR Part 36**

[FWS-R7-NSR-2009-0055]

[70133-1265-0000-4A]

RIN 1018-AW15

**Refuge Specific Regulations; Public Use; Kodiak National Wildlife Refuge****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), propose to amend our regulations for Kodiak National Wildlife Refuge (NWR) to codify decisions from our 2007 Kodiak NWR Revised Comprehensive Conservation Plan (CCP). We propose to: amend our current seasonal closure of the O'Malley River area to public use within Kodiak National Wildlife Refuge to allow operation of a bear-viewing program; prohibit camping within one-quarter mile of public use cabins and Federal and State administrative facilities on the Kodiak NWR; and prohibit snowmachine use on approximately 4,972 acres of important brown-bear denning habitat in the Den Mountain area. We also propose technical corrections to the authorities section of our regulations. We seek comments from the public on this proposed rule.

**DATES:** To ensure that we are able to consider your comment on this proposed rule, you must send it on or before December 7, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by November 23, 2009.

**ADDRESSES:** You may submit comments on our proposed rule content by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- U.S. mail or hand delivery: Public Comments Processing, Attn: Docket No. FWS-R7-NSR-2009-0055; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the "Public Availability of Comments" section below for more information).

**FOR FURTHER INFORMATION CONTACT:** Brian Glaspell, (907) 487-0248 (phone); (907) 487-2144 (fax).

**SUPPLEMENTARY INFORMATION:****Background**

Kodiak National Wildlife Refuge was established in 1941 for the purpose of protecting the natural feeding and breeding ranges of brown bears and other wildlife on Uganik and Kodiak Islands. The Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3101 *et seq.*; 43 U.S.C. 1602) expanded the purposes of the refuge. It states the purposes for which Kodiak National Wildlife Refuge was "established and shall be managed include:

(i) to conserve fish and wildlife populations and habitats in their natural diversity including, but not limited to, Kodiak brown bears, salmonoids, sea otters, sea lions and other marine mammals and migratory birds;

(ii) to fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) 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; and

(iv) 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 within the refuge."

Kodiak Refuge now encompasses almost 2 million acres in southwestern Alaska, including about two-thirds of Kodiak Island, all of Uganik and Ban Islands, and a portion of Afognak Island. The City of Kodiak, where refuge headquarters are located, is about 250 air miles south of Anchorage and 20 miles northeast of the refuge boundary, on Kodiak Island.

Kodiak Refuge is characterized by a large range of habitats within a relatively small geographic area. Because of this, the refuge supports some of the highest densities of brown bears, nesting bald eagles, and spawning salmon found anywhere in North America. The mountainous interior of Kodiak Island, with several peaks over 4,000 feet in elevation, is covered by lush, dense vegetation during the summer, with alpine vegetation on the highest slopes. No place on the refuge is more than 15 miles from the ocean. Access to the refuge is by float plane and boat. Kodiak Refuge supports runs of five species of Pacific Salmon (Chinook, sockeye, coho, pink, and chum) and steelhead. Rainbow trout,

Dolly Varden, and Arctic char are also found in refuge waters.

Kodiak Refuge contains some of the best brown bear habitat in the world, and some of the highest concentrations of brown bears found anywhere, with an estimated population of 3,000 bears. These bears feed on spawning salmon and forage throughout most of the refuge. The Karluk River drainage, including the O'Malley River at its upper end, is one of the most important feeding areas for bears, with as many as 200 bears using the Karluk area from mid-June through the end of September.

Under our regulations implementing ANILCA, all refuge lands in Alaska are open to public recreational activities as long as such activities are conducted in a manner compatible with the purposes for which the refuge was established (50 CFR 36.31). Such recreational activities include, but are not limited to, sightseeing, nature observations and photography, hunting, fishing, boating, camping, hiking, picnicking, and other related activities [50 CFR 36.31(a)].

The National Wildlife Refuge Administration Act of 1966 (16 U.S.C. 668dd-668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997, defines "wildlife-dependent recreation" and "wildlife-dependent recreational use" as "hunting, fishing, wildlife observation and photography, or environmental education and interpretation" [16 U.S.C. 668ee(2)]. We encourage these uses, and they receive emphasis in management of the public use of the refuge.

**Proposed Changes**

The 2007 Kodiak Refuge Comprehensive Conservation Plan (CCP) addressed four primary issues: protection of bear concentration areas, management of public use cabins, management of camping areas, and management of the O'Malley River area. When we finalize it, this proposed rule would implement actions described in the CCP intended to address these issues.

**O'Malley River Area and Proposed Bear Viewing Program:**

The O'Malley River is part of the Karluk Lake watershed in the southwestern portion of Kodiak Refuge. Karluk Lake and Karluk River watershed support the largest runs of sockeye salmon on the Kodiak Archipelago. Approximately 20 to 25 percent of these fish spawn in the O'Malley River system. The Karluk Lake drainage also supports one of the highest reported densities of brown bear, with the

highest seasonal concentrations occurring in the O'Malley River area.

Until 1992, the O'Malley River area was open to unregulated public use, including guided and unguided day use and overnight camping. In 1992, after determining that unregulated public use was having unacceptable impacts on feeding bears, Kodiak Refuge established a temporary closure of the O'Malley River area. The closure prohibited all public use and entry, except for participants in a highly structured refuge-sponsored bear-viewing program. The bear-viewing program was a means to allow continued public use while eliminating the unacceptable impacts caused by unregulated activities.

The 1992 Service-run O'Malley River viewing program was successful in reducing human impacts to bears and also proved popular with the public. In 1993, structured O'Malley River bear viewing and the temporary area closure were suspended while a contractor was selected to operate the program in place of the Service. In 1994, the temporary closure was reinstated and the program was successfully operated by a private contractor under a Refuge-issued permit. Although the privately operated viewing program met the Refuge goal of providing public use opportunities while reducing impacts to bears, a challenge to the process used to select the contractor led to cancellation of the program after one season. On July 19, 1995, we issued a permanent regulation, which closed approximately 2,560 acres of the O'Malley River area to all public access, occupancy, and use from June 25 through September 30 [60 FR 37308, July 19, 1995; 50 CFR 36.39(j)]. The O'Malley River area has remained seasonally closed to the public since that time.

During preparation of the 2007 Kodiak Refuge CCP and Environmental Impact Statement, the public expressed significant interest in re-establishing an O'Malley River bear-viewing opportunity. We analyzed the likely impacts of several different viewing program alternatives against the existing seasonal closure. The analysis was greatly facilitated by research conducted in the O'Malley River area during the periods 1991–94 and 2003–04. That research showed that structured bear viewing could occur at O'Malley River, with minimal impacts to bears.

Our final CCP (72 FR 21037; April 27, 2007) calls for us, in cooperation with the Alaska Department of Fish and Game, to develop and implement a bear-viewing program at O'Malley River. The regulation now closing the O'Malley River area to all use on a seasonal basis

would need to be modified to allow this use. When finalized, this proposed rule would allow development of the recommended viewing program to proceed.

#### *Public Use Cabin and Camping Area Management:*

There are currently seven public use cabins on the Refuge, all remotely located and accessible only by float plane or boat. The CCP allows construction of up to two additional cabins and conversion of administrative cabins and cabins on acquired lands to public use. A permit and \$45 per night fee are required to occupy a public use cabin. Permits are available by reservation, and permit holders have exclusive use of reserved cabins and associated facilities (outhouse, meat cache).

Tent camping is unrestricted on most of the Refuge. Camping in close proximity to public use cabins or administrative facilities increases the likelihood of conflict with other users and trespass use of administrative facilities. When finalized, this proposed rule would reduce the likelihood of conflict or trespass by prohibiting camping within one-quarter mile of any State or Federal facility located on Kodiak Refuge lands. The CCP calls for a rule prohibiting camping within one-quarter mile of public use cabins and Federal and State administrative facilities.

#### *Prohibiting Snowmachine Use in Den Mountain Area:*

Under our regulations implementing ANILCA, the use of snowmachines (during periods of adequate snow cover and frozen river conditions) for traditional activities and for travel to and from villages and home sites and other valid occupancies is currently allowed (43 CFR 36.11). However, in studies conducted at locations other than Kodiak, snowmachines have been shown to disturb denning bears, sometimes resulting in den abandonment. Of particular concern are adverse impacts on denning females with cubs. If females abandon dens as a result of snowmachine disturbance, newborn cubs are especially threatened.

On Kodiak Island, studies have documented concentrated bear denning, primarily by adult females, within the Den Mountain area of Kodiak Refuge. Den Mountain is located near places traditionally accessed by snowmachine operators along western Kizhuyak Bay. Terrain in the area affords snowmachine operators relatively unfettered access between the bay and mountain when adequate snow cover exists. Under the

proposed rule, we would continue to allow appropriate use of snowmachines on most of the Refuge, except for approximately 4,972 acres of accessible and important bear denning habitat on Den Mountain. The CCP calls for a regulation closing this area to snowmachine use.

#### *Technical corrections:*

We propose to update the authority citation for the regulation, correct an error in the current regulation, eliminate unneeded references, and conform to current citation format. The revised Statutory Authority citation would read as follows: 16 U.S.C. 460(k) *et seq.*, 742b, 668dd–668ee, 3101 *et seq.*

#### **Request for Comments**

You may submit comments and materials on this proposed rule by any one of the methods listed in the **ADDRESSES** section. We will not accept comments sent by e-mail or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including any personal identifying information—will be posted on the website. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S Fish and Wildlife Service, Alaska Regional Office, Division of Conservation Planning and Policy, 1011 East Tudor Road, Anchorage, AK 99503.

#### **Public Availability of Comments**

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

**Clarity of This Regulation:** We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write

all rules in plain language. This means that each rule we publish must:

- (a) Be logically organized;
- (b) Use the active voice to address readers directly;
- (c) Use clear language rather than jargon;
- (d) Be divided into short sections and sentences; and
- (e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that you find unclear, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

#### **Regulatory Planning and Review (Executive Order (E.O.) 12866)**

This document is not a significant rule.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

(3) This rule does not alter the budgetary effects of entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients.

(4) This rule does not raise novel legal or policy issues.

#### **Regulatory Flexibility Act**

Under the Regulatory Flexibility Act [as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)], whenever a Federal agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions) (5 U.S.C. 601 *et seq.*). However, no regulatory flexibility analysis is required if the head of an agency certifies that the rule would not have a significant economic impact on a substantial number of small entities. Thus, for a regulatory flexibility analysis to be required, impacts must exceed a threshold for "significant impact" and a threshold for a "substantial number of small entities." See 5 U.S.C. 605(b).

SBREFA amended the Regulatory Flexibility Act to require Federal agencies to provide a statement of the factual basis for certifying that a rule would not have a significant economic impact on a substantial number of small entities.

This proposed rule would impact visitor use associated with bear viewing in the O'Malley River area. Modifying the existing O'Malley River closure would create a new, high-quality public recreation opportunity in an area that is otherwise seasonally closed to the public. We estimate an additional 30 to 144 people would visit the Refuge to view bears, generating approximately 120 to 576 additional recreation use-days at the Refuge (assuming an average 4-day visit). These additional recreation use-days represent between 1 and 7 percent of the average recreation use-days on Kodiak Refuge.

Small businesses within the retail trade industry (such as hotels, gas stations, bear-viewing guides, etc.) (NAIC [North American Industry Classification] 44), accommodation and food service establishments (NAIC 72), and air taxi operators (NAIC 48) may benefit from some increased spending generated by additional refuge visitation. Eighty percent of establishments in the Kodiak Island Borough qualify as small businesses. This statistic is similar for retail trade establishments (80 percent), accommodation and food service establishments (67 percent), and transportation establishments (75 percent). Due to the limited bear-viewing season and small number of people (30 to 144 people) who would participate in a bear-viewing program, this proposed rule would have a minimal beneficial effect on these small businesses.

With the small increase in overall visitation anticipated from this proposed rule, it is unlikely that a substantial number of small entities will have more than a small economic effect (benefit) from the increased spending near the Refuge. Therefore, we certify that this rule would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act. An initial/final Regulatory Flexibility Analysis is not required. Accordingly, a Small Entity Compliance Guide is not required.

#### **Small Business Regulatory Enforcement Fairness Act**

This rule is not a major rule under SBREFA [5 U.S.C. 804(2)]. This rule:

- a. Does not have an annual effect on the economy of \$100 million or more.

The additional 30 to 144 visitors participating in bear viewing at Kodiak Island Refuge would generate only a minimal economic impact. Consequently, the benefit of this rule for businesses would not be sufficient to make this a major rule.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. We do not expect the minimal increase in bear-viewing opportunities to significantly affect costs or prices in any sector of the economy.

c. Does 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. This proposed rule represents only a small proportion of recreational spending by a small number of recreational visitors. Therefore, this rule would have no measurable economic effect on the wildlife-dependent industry, which has annual sales of equipment and travel expenditures of \$72 billion nationwide.

#### **Unfunded Mandates Reform Act**

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State local or 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)**

Under the criteria in E.O. 12630, this rule does not have significant takings implications. A takings implication assessment is not required.

#### **Federalism (E.O. 13132)**

Under the criteria in E.O. 13132, this rule does not have sufficient federalism implications to warrant the preparation of a Federalism summary impact statement. A Federalism summary impact statement is not required.

#### **Civil Justice Reform (E.O. 12988)**

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

### Consultation and Coordination with Indian Tribal Governments (E.O. 13175)

In accordance with E.O. 13175, we have evaluated possible effects on federally recognized Indian tribes and have determined there are no effects.

### Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act. This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### National Environmental Policy Act

This rule constitutes a major Federal action significantly affecting the quality of the human environment. We analyzed this rule in accordance with the criteria of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) (NEPA) and our Departmental Manual part 516 chapter 6, Appendix 1. We prepared a draft Environmental Impact Statement (DEIS) under NEPA, and made it available for comment. Finally, we made our final revised CCP and EIS available for a 30-day comment period beginning September 29, 2006 (71 FR 57560). We announced availability of the Record of Decision for the Final Revised CCP and Environmental Impact Statement on April 27, 2007 (72 FR 21037). To obtain a copy of the CCP/EIS, contact Brian Glaspell (see **FOR FURTHER INFORMATION CONTACT**).

### Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106-554).

### Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in E.O. 13211. A Statement of Energy Effects is not required.

### Endangered Species Act Section 7 Consultation

In 2004, a Section 7 consultation under the Endangered Species Act was conducted for the Draft Revised Comprehensive Conservation Plan, Kodiak National Wildlife Refuge. The plan was found to be fully consistent with Section 7 of the Endangered Species Act by the Service and the National Marine Fisheries Service.

### Primary Author

Brian Glaspell, Visitor Services Manager, Kodiak National Wildlife, is the primary author of this rulemaking document.

### List of Subjects in 50 CFR Part 36

Alaska, Recreation and recreation areas, Reporting and recordkeeping requirements, Wildlife refuges.

For the reasons set out in the preamble, we propose to amend title 50, part 36 of the Code of Federal Regulations as follows:

### PART 36—[AMENDED]

1. Revise the authority citation for part 36 to read as follows:

**Authority:** 16 U.S.C. 460(k) *et seq.*, 668dd-668ee, 3101 *et seq.*

2. Amend §36.39 by revising the first sentence of paragraph (j)(1) and paragraph (j)(2) and adding paragraphs (j)(4) and (j)(5) to read as follows:

#### § 36.39 Public use.

\* \* \* \* \*

(j) \* \* \*

(1) *Seasonal public use closure of the O'Malley River Area.* The area within the Kodiak National Wildlife Refuge described in this paragraph (j)(1) is

closed to all public access, occupancy, and use from June 25 through September 30, except for individuals participating in the O'Malley River Bear-Viewing Program. \* \* \*

(2) *Access easement provision.* Notwithstanding any other provision of this paragraph (j), there exists a 25-foot-wide access easement on an existing trail within the Koniag Inc. Regional Native Corporation lands within properties described in paragraph (j)(1) of this section in favor of the United States of America.

\* \* \* \* \*

(4) *Camping prohibition near facilities.* On lands within Kodiak National Wildlife Refuge, you are prohibited from camping within one-quarter mile of public use cabins and Federal and administrative facilities. An administrative facility means any facility or site administered by the U.S. Fish and Wildlife Service or the State of Alaska for public entry or other administrative purposes, including but not limited to cabins, storage buildings, piers, docks, weirs, refuge offices, visitor centers, and public access and parking sites. Maps of the locations of public use cabins and administrative facilities are available from Refuge Headquarters in Kodiak, Alaska.

(5) *Snowmachine prohibition.* Snowmachines, as defined in §36.2, are prohibited within an approximately 4,972-acre area encompassing Den Mountain and adjacent highlands. The summit of Den Mountain is located within Township 29 South, Range 24 West, Seward Meridian, Alaska. Maps of the closed area are available from Refuge Headquarters in Kodiak, Alaska.

Dated: August 27, 2009

**Thomas L. Strickland**

*Assistant Secretary, Fish and Wildlife and Parks*

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**BILLING CODE 4310-55-S**