

involve complex or unique issues. Expedited arbitration is intended to be a mutually agreed-upon process whereby arbitrator appointments, hearings and awards are acted upon quickly by the parties, FMCS, and the arbitrators. Mandating short deadlines and eliminating requirements for transcripts, briefs and lengthy opinions streamline the process.

- 13. In § 1404.18, paragraph (b) is revised to read as follows:

§ 1404.18 Procedures for requesting expedited panels.

* * * * *

(b) Upon receipt of a joint Request for Arbitration Panel (Form R-43) indicating that both parties desire expedited services, the OAS will refer a panel of arbitrators.

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§ 1404.20 [Removed]

- 14. Section 1404.20 is removed.

§ 1404.21 [Redesignated as § 1404.20]

- 15. Section 1404.21 is redesignated as § 1404.20.

Dated: December 19, 2005.

Maria A. Fried,

General Counsel and Federal Register Contact.

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DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 242

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 100

RIN 1018-AT81

Subsistence Management Regulations for Public Lands in Alaska, Subpart A

AGENCIES: Forest Service, Agriculture; Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: This rule revises and clarifies the jurisdiction of the Federal Subsistence Management Program for certain coastal areas in Alaska in order to further define, in part, certain waters that may never have been intended to fall under the Subsistence Management Program jurisdiction.

DATES: This rule is effective January 26, 2006.

FOR FURTHER INFORMATION CONTACT: Chair, Federal Subsistence Board, c/o U.S. Fish and Wildlife Service, Attention: Thomas H. Boyd, Office of Subsistence Management; (907) 786-3888. For questions specific to National Forest System lands, contact Steve Kessler, Regional Subsistence Program Leader, USDA, Forest Service, Alaska Region, (907) 786-3888.

SUPPLEMENTARY INFORMATION:

Background

In Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA) (16 U.S.C. 3111-3126), Congress found that “the situation in Alaska is unique in that, in most cases, no practical alternative means are available to replace the food supplies and other items gathered from fish and wildlife which supply rural residents dependent on subsistence uses * * *” and that “continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened * * *.” As a result, Title VIII requires, among other things, that the Secretary of the Interior and the Secretary of Agriculture (Secretaries) implement a program to provide for rural Alaska residents a priority for the taking for subsistence uses of fish and wildlife resources on public lands in Alaska, unless the State of Alaska enacts and implements laws of general applicability that are consistent with ANILCA and that provide for the subsistence definition, priority, and participation specified in sections 803, 804, and 805 of ANILCA.

The State implemented a program that the Department of the Interior previously found to be consistent with ANILCA. However, in December 1989, the Alaska Supreme Court ruled in *McDowell v. State of Alaska* that the rural priority in the State subsistence statute violated the Alaska Constitution. The Court’s ruling in *McDowell* caused the State to delete the rural priority from the subsistence statute which therefore negated State compliance with ANILCA. The Court stayed the effect of the decision until July 1, 1990. As a result of the *McDowell* decision, the Department of the Interior and the Department of Agriculture (Departments) assumed, on July 1, 1990, responsibility for implementation of Title VIII of ANILCA on public lands. On June 29, 1990, the Departments published the Temporary Subsistence Management Regulations for Public Lands in Alaska in the **Federal Register** (55 FR 27114). Permanent regulations were jointly published on May 29, 1992

(57 FR 22940), and have been amended since then.

As a result of this joint process between Interior and Agriculture, these regulations can be found in the Code of Federal Regulations (CFR) both in Title 36, “Parks, Forests, and Public Property,” and Title 50, “Wildlife and Fisheries,” at 36 CFR 242.1-28 and 50 CFR 100.1-28, respectively. The regulations contain subparts as follows: Subpart A, General Provisions; Subpart B, Program Structure; Subpart C, Board Determinations; and Subpart D, Subsistence Taking of Fish and Wildlife.

Consistent with Subparts A, B, and C of these regulations, as revised May 7, 2002 (67 FR 30559), the Departments established a Federal Subsistence Board to administer the Federal Subsistence Management Program, as established by the Secretaries. The Board’s composition includes a Chair appointed by the Secretary of the Interior with concurrence of the Secretary of Agriculture; the Alaska Regional Director, U.S. Fish and Wildlife Service; the Alaska Regional Director, U.S. National Park Service; the Alaska State Director, U.S. Bureau of Land Management; the Alaska Regional Director, U.S. Bureau of Indian Affairs; and the Alaska Regional Forester, USDA Forest Service. Through the Board, these agencies participated in the development of regulations for Subparts A, B, and C, and the annual Subpart D regulations.

Jurisdictional Perspective

Federal Subsistence Management Regulations (50 CFR 100.3 and 36 CFR 242.3) currently specify that they apply on “all navigable and non-navigable waters within the exterior boundaries * * *” of the parks, refuges, forests, conservation areas, recreation areas, and Wild and Scenic Rivers. This includes hundreds of thousands of acres of saltwater bays within National Wildlife Refuge boundaries that were not withdrawn prior to Statehood and which the Secretaries have now determined should not have been included in the regulations published on January 8, 1999 (64 FR 1276). We have concluded that our regulations (50 CFR 100.3 and 36 CFR 242.3) should exclude some bays associated with certain Refuges in Western Alaska. Therefore, we are amending the Federal Subsistence Management Regulations for Public Lands in Alaska to reflect the jurisdiction in those areas.

During the early interagency discussions relative to inclusion in fisheries management in the Federal Subsistence Management Program, there does not appear to have been any

intention to specifically extend Federal jurisdiction to various saltwater bays where there was no pre-Statehood withdrawal of submerged lands and waters. Prior to 1999, the Federal Subsistence Management Program clearly and specifically identified the waters under its jurisdiction in the 1992 rule that set out the structure of the Federal Program (57 FR 22940, May 29, 1992). The various saltwater bays under discussion in this rule were not included as public lands in the 1992 rule. The Ninth Circuit Court decision in *Alaska v. Babbitt*, 72 F.3d 698 (1995) (the Katie John decision) held and affirmed the Federal government's position that navigable waters in which the Federal Government holds reserved water rights are public lands for purposes of the subsistence use priority. As work began following the *Katie John* decision to identify these waters, discussion centered on the problem of "checkerboard jurisdiction" (a complex interspersed of areas of State and Federal jurisdiction) as it occurred on rivers within Conservation System Units. Federal officials recognized that in order to provide a meaningful subsistence use priority that could be readily implemented and managed, unified areas of jurisdiction were required for both Federal land managers and the subsistence users. The problems associated with the dual State and Federal management caused by the State's inability to take actions needed to implement the required subsistence use priority are difficult enough without imposing on that situation elaborate and scattered areas of different jurisdictions. Therefore, we determined in the January 1999 regulations that all waters within or adjacent to the boundaries of areas listed in § __.3(b) of those regulations were public lands. This determination provided both the land managers and the public with a means of identifying those waters that are public lands for the purposes of the subsistence use priority.

In the course of implementing the 1999 determinations, the Federal land managers became aware of some unanticipated consequences, particularly with respect to the inclusion of some marine waters as public lands. This current final rule is designed to address some of the problem areas that have been identified since 1999.

Additionally, ANILCA section 103 is very specific that in coastal areas, boundaries for new additions to Federal reservations identified in that Act shall not extend seaward beyond the mean high-tide line to include lands owned by the State of Alaska unless the State concurs. The regulations published in

compliance with that section delineating the National Wildlife Refuge boundaries (48 FR 7890, February 24, 1983) specify that Federal ownership does not extend below mean high tide to include lands owned by the State of Alaska except where the State may agree to that extension. Even though maps show hundreds of thousands of acres of marine waters (exclusive of pre-Statehood withdrawals) within the exterior boundaries of refuges, the Fish and Wildlife Service has never attempted nor intended to exercise any jurisdiction within those areas. The broader inclusion in the 1999 regulations, § __.3(b), of all waters within the boundaries of the listed units, operated to designate some waters as public lands over which the Fish and Wildlife service had not in the past asserted jurisdiction. This final rule addresses that problem and is intended to exclude those waters from the scope of the definition of public lands for the purposes of the ANILCA subsistence use priority.

The boundaries of the National Wildlife Refuges in Alaska were finalized, according to ANILCA, with the **Federal Register** publication of February 24, 1983 (48 FR 7890). Some of these boundaries include marine waters and saltwater bays. Subsistence jurisdiction for the priority use of fish and shellfish extends only where the United States owns the submerged lands or where there are reserved water rights. Therefore, where the submerged lands under marine waters are owned by the State and there is no Federal water right, there is no subsistence jurisdiction. This regulation attempts to make clear which areas within certain refuges are excluded from subsistence management.

Additionally, the final Issue Paper and Recommendations of the Alaska [*Katie John*] Policy Group (attachment to Acting Regional Solicitor Dennis Hopewell's memorandum of June 15, 1995, as amended July 12, 1995), stated that:

Where a federal reservation with reserved water rights includes rivers or streams flowing into marine waters, reserved water rights will apply to all waters above the mouth of said rivers or streams, when the mouth is within the exterior boundaries of the federal reservation. The mouth is defined by a line drawn between the termini of the headlands on either bank of the river. * * *

There are apparently no cases in which the federal government has asserted reservation of rights to marine waters under the Winters doctrine. * * *

Extending the Winters doctrine assertion of reserved water rights to marine waters would be without precedent and would represent a considerable leap in reasoning. * * * Potential appropriation of such waters

remains implausible to any degree that could substantially affect marine water quantity or levels at all but the most restricted of locations (such as some salt chucks).

* * * [T]he rationale behind the federal reserved waters doctrine would not apply to these marine waters. From this standpoint, it would be difficult to establish a need to reserve water in marine waters in order to accomplish the purposes of a reservation, even such a reserve as the Alaska Maritime National Wildlife Refuge that specifically includes the "adjacent seas."

He made the following recommendations:

Where a federal reservation with reserved water rights includes rivers or streams flowing into marine waters, reserved water rights will be asserted to the mouths of those rivers or streams, where the mouths are within the exterior boundaries of the reservation.

Reserved water rights will not be asserted in marine waters except to the extent that the United States has already taken the position that submerged lands underlying marine waters reserved to the United States at the time of Alaska statehood meet the ANILCA definition of public lands.

Thus, neither the 1999 regulations nor this final rule claims that the United States holds a reserved water right in marine waters as defined in the existing regulations.

Public Review and Comment

The Secretaries published a proposed rule (69 FR 70940) on December 8, 2004, soliciting comments on the proposed revisions. During their Winter Council meetings in February and March 2005, all Federal Subsistence Regional Advisory Councils received information on the proposed changes and they and the public had an opportunity to offer comments. The initial comment period upon request of the public was extended to April 1, 2005. As a result of the public announcements soliciting input, we received comments from 24 different entities, including 2 from State of Alaska agencies, 10 from Native organizations, 3 from other organizations, 5 from individuals and 5 from Regional Advisory Councils. Of particular note, was a comment received requesting detailed maps in order to more thoroughly evaluate the proposed changes. Recognizing the validity of that comment, we developed more detailed maps of the areas in question, placed them on our website, and reopened the comment period. We published in the **Federal Register** on August 29, 2005, (70 FR 50999) an announcement of the list of areas to be excluded from Federal Subsistence Management jurisdiction and reopened the comment period through October 21, 2005. As a result of that notice, we received an additional 4

comments: 1 from a State entity, 1 from a Native organization, 1 from an individual, and 1 from a Regional Council. We will address the following comments received during both comments opportunities below.

Analysis of Public Comments

Comment: The government has reserved water rights to use all waters necessary to sustain the habitat of subsistence resources, including waters beyond the boundaries of the CSU's (including upstream and downstream areas). The Federal government should include these areas.

Response: We believe that including all upstream and downstream reaches would constitute an overly broad interpretation of "Federal reserved waters." The Ninth Circuit Court in *Katie John* found the government's interpretation that public lands for the purposes of the Title VIII priority include navigable waters in which the United States holds reserved water rights reasonable and thus upheld it. Consequently, we did not propose to add and are not adding those stretches of water to the Federal Subsistence Management Program's area of jurisdiction.

A Federal reserved water right is a usufruct which gives the right to divert water for use on specific land or the right to guaranty flow in a specific reach of a water course. As such, the water right does not affect the water downstream of the use area and does not have an effect on upstream areas except in times of shortage when a junior use may be curtailed. There is no shortage; therefore, up and downstream waters have not been included.

Comment: Saltwater embayments within national wildlife refuge boundaries are important for subsistence activities and should be considered public lands.

Response: The jurisdiction of the Federal Subsistence Management Program depends not on whether the saltwater bays are important for subsistence, but whether they are public lands. Navigable water bodies can be public lands if there is a Federal reserved water right or if the Federal government retained ownership of the submerged lands. The saltwater bays discussed in these regulations are not considered public lands under the Subsistence Management Program because they do not fall within either of those categories.

Comment: ANILCA, Title VIII is Indian legislation and any ambiguities must be resolved in favor of Alaska Natives.

Response: While Congress did invoke its Constitutional authority over Native affairs and the Commerce and Property clauses as a basis for the Act, Title VIII is not "Indian Legislation" for the purposes of the canon of construction that ambiguities should be resolved in favor of Alaska Natives. See *Hoonah Indian Association v. Morrison*, 170 F.3d 1223, 1228 (9th Cir. 1999). The priority in Title VIII is for rural residents regardless of whether or not they are Alaska Natives, and Alaska Natives who are urban residents do not enjoy the priority.

Comment: The comment period should be extended to allow more opportunity for the public to comment.

Response: Following an initial comment period of 48 days, in response to a number of requests, we extended the comment period an additional 65 days through April 1, 2005, which resulted in a total comment period of 113 days. Additionally, upon making more detailed maps available, we reopened the comment period for another 55 days. The public opportunity for comment has been fully accommodated.

Comment: This proposed rule seems to be an effort to circumvent the *Katie John* ruling.

Response: In promulgating this final rule, the Government is complying with, not circumventing the *Katie John* ruling. The agencies are charged with defining the waters that are public lands. In the course of administering the determinations made in the 1999 regulations, we determined that certain waters that were encompassed within the waters listed in § __.3(b) are not public lands for the purposes of the Title VIII priority. Thus, this final rule is merely a continuation of the process that started with the *Katie John* decision.

Further, the 1999 regulations contemplated this very response. Section __.3(b) of those regulations explicitly stated that "[t]he public lands described in paragraph (b) of this section remain subject to change * * *". This final rule is just a part of that anticipated process. Further, this final rule is itself not forever final and unchangeable, as shown in the new regulation § __.3(e), which is a restatement of the prior regulation.

Comment: The government should clarify that marine waters below mean high tide are excluded in all applicable Federal areas of the State.

Response: Title VIII of ANILCA and the regulations limit the Federal Subsistence Management Program jurisdiction to public lands. Public lands include marine areas where the

Federal government retained ownership of the submerged lands on the date of Alaska Statehood. The Federal Government has consistently recognized that navigable waters that overlay submerged lands that were reserved to the United States at the time of Alaska statehood are public lands for the purposes of the Title VIII subsistence use priority. 57 FR 22942 (May 29, 1992), 64 FR 1279 (January 8, 1999). Some of the waters listed as public lands both in the 1992 and the 1999 regulations were so determined because of reserved ownership of the submerged lands. This final rule continues that recognition. Therefore, because the Federal government did retain some marine submerged lands at Statehood, it would be improper for the regulations to exclude from the Program's jurisdiction all marine waters below mean high tide in all applicable Federal areas of the State. See e.g., *United States v. Alaska*, 521 U.S. 1 (1997).

Comment: The government should exclude all marine waters below mean high tide by removing the "headland-to-headland" portion of the definitions for "inland waters" and "marine waters."

Response: The definition in the regulations recognizes that there can be reserved Federal water rights in rivers and lakes, but not the sea. Therefore, it is necessary to determine where the river ends and the sea begins. In order to do so, the regulations use the methodology found in the Convention on the Territorial Sea and Contiguous Zone from the United Nations Law of the Sea for closing the mouths of rivers. The use of the headland-to-headland delineation across the mouths of rivers is also described in *Shore and Sea Boundaries* by Aaron Shalowitz (1964) and *Water Boundaries* by George Cole (1997). Some rivers are tidally influenced for a significant distance above their mouths. Although submerged lands under portions of rivers which are tidally influenced may be owned by the State or other entity, those stretches are still a part of the river and remain subject to potential Federal reservation of water rights. Rivers and streams have high water marks rather than lines of mean high tide. Upon further review, we have determined that no modifications are necessary in the definitions of "inland waters" and "marine waters" as found in the January 8, 1999, regulations; therefore none are made in this final rule.

Comment: The government should include in regulation the Ninth Circuit Court's criteria in the *Katie John* decision for determining whether waters are "public lands."

Response: The Ninth Circuit did not adopt criteria for determining whether waters are public lands but affirmed the Secretaries' determination that public lands includes, inter alia, water within which there were Federal reserved water rights. It is unnecessary to set forth in regulations the standards to be applied in determining whether reserved water rights are held in any specific waters. The Secretaries have at all times retained for themselves the task of determining what are public lands. Neither this task nor any changes to the subpart A and B portions of the subsistence management regulations has been delegated to the Federal Subsistence Board. The Secretaries are aware of the criteria for determining whether a reserve water right is or is not held in any waters. Further, any additional determinations of waters as public lands will require notice and opportunity to comment on a proposal. Therefore, the public will have ample opportunity to inform the secretaries if they disagree with any such proposal. The Secretaries fully believe that this final rule complies with the applicable criteria.

Comment: The government should correct the regulation's proposed expansion of the Federal priority into "all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries * * *." The Court only expanded the definition of "public lands" outside of Federal reservations into navigable waters where the U.S. has a reserved water right (i.e. where the adjoining water is necessary for the purposes of the reservation)—not "all adjacent" waters.

Response: This comment relies, in part, on a misstatement of the decision of the Court of Appeals in the *Katie John* litigation. The Court of Appeals did not find in that decision that the only navigable waters which are public lands for the purposes of Title VIII subsistence use priority are those waters in which the United States holds a reserved water right. The Court of Appeals only agreed with the United States, that if the United States holds a reserved water right in navigable waters that is a property interest sufficient to make those waters public lands for the purposes of Title VIII of ANILCA. Therefore, the definition of public lands is not limited only to waters in which the United States holds a reserved water right. Contrary to that comment, that definition can extend to other interests.

The Court of Appeals rejected the claim that the navigation servitude was a property interest sufficient to make waters subject to that interest as public lands and rejected the claim that

Congress intended that all waters within the reach of the Commerce Clause were public lands. However, the Government has never relied and does not now rely on either navigational servitude or the extent of the Commerce Clause to define waters that are public lands. Further, the issuance of "adjacent" has only been applied to inland rivers and lakes immediately adjacent to Federal areas. Those waters immediately adjacent provide some of the necessary waters for achieving the purposes for which each Federal area was established. The category of "adjacent waters" has not been applied to any marine waters. This regulation presents no expansion of the existing Federal jurisdiction as published in the January 8, 1999, **Federal Register** (64 FR 1276).

Comment: The government should use the legal boundaries of the Federal conservation system units as published in the **Federal Register**; correct all Federal Subsistence Management Program maps and descriptions consistent with those boundaries; apply for Federal reserved water rights; limit Federal authorities to public lands; and accurately portray the State's management authorities.

Response: This comment does not address the proposed action. The intent in this rulemaking is not to define the boundaries of the various conservation system units. The purpose is to further define for certain coastal regions the waters within the identified conservation system units that are public lands for the purposes of the Federal subsistence use priority. The boundaries of the National Wildlife Refuges are those published in the **Federal Register** in 1983. Under this final rule, the exterior boundaries of these units may not coincide with the waters that are or are not determined to be public lands for purposes of that priority. First, the United States is not claiming that it holds a reserved water right in any of the marine waters listed in the final rule. Second, where it has not been determined that the United States reserved title to the submerged lands beneath the designated marine waters of the various units, the United States has determined that the particular waters are not public lands for the purposes of Title VIII.

It may well be that the maps and other descriptions of the boundaries of the various conservation system units will differ from the maps depicting the waters within the respective units that are public lands for the purposes of the Title VIII subsistence use priority. The navigable marine waters that are deemed to be public lands for the purposes of the Title VIII priority and

the Federal Subsistence management regulations will be the waters depicted on these Federal Subsistence Management Program maps. Upon publication of this final rule, we will update our applicable subsistence maps and descriptions and these will be available to the public.

In all of our publications, we have clearly specified that the Federal Subsistence Management regulations apply only on Federal lands and waters. In addition, this rulemaking does not address the State's management authorities, which are properly a subject of State legislation and regulation. It is not our responsibility to display or portray the areas of State responsibility.

The Federal Subsistence Management regulations, including any regulations set forth in 50 CFR 100 parts C and D and 36 CFR 242 parts C and D, have always been and remain applicable now only to the public lands as defined in those regulations. Whether or not the United States holds a reserved water right is not dependent on any application for those rights. Therefore, it is not necessary to apply for those rights for the purpose of determining that navigable waters are public lands for the purposes of the Federal subsistence use priority. Congress specifically identifies in ANILCA that fish and wildlife resources and water quality and quantity are purposes of most of the conservation system units, therefore implicitly reserving a water right for these purposes. With this reservation, it is unnecessary to quantify an instream flow amount for the purposes of the Title VIII subsistence use priority. This is especially so in Alaska, where the quantity of instream flow is usually not a resource issue. We have revised the wording in the Preamble to reflect the State's concerns over State management authorities.

Comment: The government should reflect that the boundaries of the Federal reservations end at mean high tide and do not extend into marine waters by some vague location of "headlands."

Response: The boundaries of the Federal reservations were established by various previous **Federal Register** publications as directed by ANILCA and are not the subject of this rulemaking. Congress has directed a priority for subsistence uses on the public lands and the Secretaries must implement that directive in accordance with their understanding of what constitutes public lands. In so doing, the Secretaries have not used a vague notion of headlands, but have used internationally recognized standards. We have used the international convention for closure of rivers and

streams as they flow into the sea. This methodology is taken from the Convention on the Territorial Sea and Contiguous Zone from the United Nations Law of the Sea. The use of the headland-to-headland delineation across the mouths of rivers is also described in *Shore and Sea Boundaries* by Aaron Shalowitz (1964) and *Water Boundaries* by George Cole (1997). Although there is a tidal influence up many coastal rivers and streams, the line of mean high tide does not extend up the bodies of flowing water. Therefore, to connect the lines of mean high tide across the mouths of rivers and streams, a line is drawn from headland-to-headland across the mouth consistent with these international standards. Our regulations do not extend seaward of this line into marine waters except in certain areas that were withdrawn or otherwise set aside prior to Statehood.

Comment: The government should not identify specific pre-Statehood withdrawals because of inconsistent legal definitions and the fact that the State disputes title to some of these areas.

Response: The Government has at all times since the promulgations of the permanent Federal subsistence regulations on May 29, 1992 (57 FR 22942), and continued in the regulations promulgated on January 8, 1999 (64 FR 1279), recognized that waters lying above submerged lands are public lands for the purposes of the Federal subsistence use priority. The current regulations as promulgated on January 8, 1999, § _____.3(b), do not separate the waters that are public lands because they are above pre-Statehood reservations or because the United States holds reserved water rights therein, but that list includes both types of waters. This final rule will simply break out the two categories. In designating these waters, we have used the most accurate description available to identify them. Should additional information become available, the Board will consider the information and recommend modification of the regulations at that time, if appropriate.

Comment: The government should not exercise jurisdiction over validly selected lands within the boundaries of conservation system units.

Response: This comment is directed to a portion of the definition of "public lands or public land" set forth in § _____.4 of the regulations. The proposed rule published on December 8, 2004, did not propose any change in this definition. The proposal was only to amend the definitions of "marine waters" and "inland waters." This

comment was, therefore, not relevant to this rulemaking and is not considered herein.

Comment: The government should remove the statement regarding the Secretaries' authority to supersede State fish and wildlife regulations on non-Federal lands outside of the Federal regulations unrelated to reserved water rights.

Response: This comment is directed to a portion of § _____.10(a) of the regulations as promulgated on January 8, 1999. The proposed rule published on December 8, 2004, did not propose any change in this section. This comment was, therefore, not relevant to this rulemaking and is not considered herein.

Comment: We have concerns about the proposed exclusion of Kuskokwim Bay and the boundary as it reaches into the Kuskokwim River.

Response: The official boundaries of the various Federal reservations, including the Yukon Delta National Wildlife Refuge, are those published in the **Federal Register** pursuant to ANILCA. This rule does not change any of those boundaries. In the case of the mouth of the Kuskokwim River, the jurisdiction of the Federal Subsistence Management Program will continue to coincide with the Yukon Delta National Wildlife Refuge boundary at that location.

Comment: Numerous technical errors and discrepancies between the two sets of legal boundary regulations need to be corrected.

Response: The official boundaries of the Federal reservations are those published in the **Federal Register** pursuant to ANILCA. The boundaries of Federal subsistence jurisdiction are not necessarily identical with refuge boundaries and are shown on the best maps available to enable a subsistence user to identify areas of jurisdiction in the field. The Federal maps are as accurate as possible, but the use of varying base maps in different areas results in poor map registration.

Comment: The final regulations and maps need to clearly articulate that the Federal responsibility to assure the subsistence priority outside Federal reservations applies only where there is a Federal reserved water right. Thus, while the maps are an improvement for locating areas where Federal jurisdiction is asserted, the appropriate process must be pursued to define where and how much water is necessary for each reservation in order to legitimize the claim of federal reserved water rights.

Response: This comment incorrectly assumes that only navigable waters in

which the United States holds a reserved water right are public lands and that a Federal reserved water right does not exist until it has been quantified and that a process must be followed to accomplish that quantification. Whether or not the United States holds a reserved water right is not dependent on any application for or quantification of those rights. Therefore, application for and/or quantification of a reserved water right is not a prerequisite for determining the waters in which such rights are held for purposes of defining public lands for the purposes of the Title VIII priority. Title VIII applies whenever there is any reserved water right. This being the case, the quantity of the right is irrelevant and there is no reason to go through a quantification process.

Further, any application for and quantification of a reserved water right is a lengthy and expensive administrative or judicial process. In its decision in *State v. Babbitt*, 72 F.3d at 704, the Court of Appeals expressed hope that the Federal government "will promptly determine which waters are public lands." That task could not be promptly accomplished and rural Alaska residents would continue to be deprived of their Federal subsistence priority for a substantial amount of time if application and quantification of those rights were to be required. This would be contrary to the purposes and intent of Title VIII of ANILCA.

Areas Excluded From Federal Subsistence Management Program Jurisdiction

Under this rule, the following areas are excluded from jurisdiction under the Federal Subsistence Management Program unless future research identifies pre-Statehood withdrawals or other submerged land within these areas that did not pass to the State at the time of Statehood. Maps are now available for these areas. The purpose of these maps is to provide to the subsistence user an overall graphic representation of the extent of the excluded areas. To view maps, go to the Office of Subsistence Management Web site at <http://alaska.fws.gov/asm/home.html>. If you do not have access to the internet, you may contact the Office of Subsistence Management at the address and phone number shown at **FOR FURTHER INFORMATION CONTACT** and we will send the maps to you.

Within the Alaska Peninsula or Izembek National Wildlife Refuge boundaries:

Wide Bay
Agripina Bay
Port Wrangell

- Kujulik Bay
- Chignik Lagoon, including Mallard Duck Bay and Schooner Bay
- Mud Bay
- Anchorage Bay
- Lake Bay
- Castle Bay
- Warner Bay, including Ross Cove
- Devils Bay
- Kuiuukta Bay, including Portage Bay, Windy Bay, Foot Bay, Fishhook Bay, and Herring Lagoon
- Mitrofanina Bay, including Fishrack Bay
- Invanof Bay
- Boulder Bay
- Fox Bay
- American Bay
- Albatross Anchorage
- Pavlof Bay, including Canoe Bay, Jackson Lagoon, and Chinaman Lagoon
- Long John Lagoon
- Dushkin Lagoon
- Bear Bay
- Captain Harbor
- King Cove
- Cold Bay, including Lenard Harbor, Nurse Lagoon, and Kinzarof Lagoon
- Morzhovoi Bay, including Littlejohn Lagoon and Big Lagoon
- Traders Cove
- Bechevin Bay, including Hotsprings Bay
- Herendeen Bay, including Mine Harbor
- Port Moller, including Mud Bay, Right Head, and Left Head
- Within Togiak National Wildlife Refuge boundaries:*
- Tvativak Bay
- Kulukak Bay
- Metervik Bay
- Unnamed bay in sections 18 and 18, T. 16 S., R63 W., S.M.
- Within the Yukon Delta National Wildlife Refuge boundaries:*
- Kangirlvar Bay, including Toksook Bay
- Hazen Bay
- Hooper Bay
- Kokechik Bay
- Unnamed bay west of Point Smith
- Kongishluk Bay

In order to correct any misconceptions regarding Secretarial intent; subsistence regulations, and conservation system unit boundary regulations; and to avoid unnecessary complications and public confusion, we

are issuing the amendments contained herein. Section _____.3(b) includes those areas (Alaska Maritime and Yukon Delta) where marine waters are included, and the regulations apply to both navigable and non-navigable waters. These are the refuge areas where pre-Statehood withdrawals exist. The § _____.3(c) includes those areas where marine waters are not included, but the regulations still apply to both navigable and non-navigable waters. Section _____.3(d) includes those areas where the regulations apply only to the Federal lands non-navigable waters. These are the unassociated BLM lands that are not a part of a conservation system unit and have not been withdrawn from the public domain for specific purposes. Also, the addition of the text “other than military, US Coast Guard, and Federal Aviation Administration lands” is a clarification, inasmuch as the military lands, including US Coast Guard, and Federal Aviation Administration have never been included in the Federal Subsistence Management Program because of national security and defense reasons. These lands have been and are closed to access by the general public, and are, therefore, not available for use by rural Alaska residents for harvest of subsistence resources. Section _____.3(e) restates § _____.3(c) of the January 7, 1999, regulations and provides for future revisions to the geographic scope of the Federal Subsistence Management Program. If additional marine submerged lands are determined to be held by the United States, those lands would be the subject of future rulemakings.

Upon further review, we have determined that no modifications are necessary in the definitions of “inland waters” and “marine waters” as found in the January 8, 1999, regulations; therefore none are made in this final rule.

Because this rule relates to public lands managed by an agency or agencies in both the Departments of Agriculture and the Interior, identical text is incorporated into 36 CFR part 242 and 50 CFR part 100.

Conference With Statutory and Regulatory Authorities

National Environmental Policy Act Compliance

A Draft Environmental Impact Statement (DEIS) for developing a Federal Subsistence Management Program was distributed for public comment on October 7, 1991. That document described the major issues associated with Federal subsistence management as identified through public meetings, written comments, and staff analysis, and examined the environmental consequences of four alternatives. Proposed regulations (subparts A, B, and C) that would implement the preferred alternatives were included in the DEIS as an appendix. The DEIS and the proposed administrative regulations presented a framework for an annual regulatory cycle regarding subsistence hunting and fishing regulations (subpart D). The Final Environmental Impact Statement (FEIS) was published on February 28, 1992.

Based on the public comments received, the analysis contained in the FEIS, and the recommendations of the Federal Subsistence Board and the Department of the Interior’s Subsistence Policy Group, the Secretary of the Interior, with the concurrence of the Secretary of Agriculture, through the U.S. Department of Agriculture—Forest Service, implemented Alternative IV as identified in the DEIS and FEIS (Record of Decision on Subsistence Management for Federal Public Lands in Alaska (ROD), signed April 6, 1992). The DEIS and the selected alternative in the FEIS defined the administrative framework of an annual regulatory cycle for subsistence hunting and fishing regulations. The final rule for Subsistence Management Regulations for Public Lands in Alaska, Subparts A, B, and C, published May 29, 1992, implemented the Federal Subsistence Management Program and included a framework for an annual cycle for subsistence hunting and fishing regulations. The following **Federal Register** documents pertain to this rulemaking:

FEDERAL REGISTER DOCUMENTS PERTAINING TO SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA, SUBPARTS A AND B

Federal Register citation	Date of publication	Category	Details
57 FR 22940	May 29, 1992	Final Rule	“Subsistence Management Regulations for Public Lands in Alaska; Final Rule” was published in the Federal Register .

FEDERAL REGISTER DOCUMENTS PERTAINING TO SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA, SUBPARTS A AND B—Continued

Federal Register citation	Date of publication	Category	Details
64 FR 1276	January 8, 1999	Final Rule (amended)	Amended to include subsistence activities occurring on inland navigable waters in which the United States has a reserved water right and to identify specific Federal land units where reserved water rights exist. Extended the Federal Subsistence Board's management to all Federal lands selected under the Alaska Native Claims Settlement Act and the Alaska Statehood Act and situated within the boundaries of a Conservation System Unit, National Recreation Area, National Conservation Area, or any new forest or forest addition, until conveyed to the State of Alaska or an Alaska Native Corporation. Specified and clarified Secretaries' authority to determine when hunting, fishing, or trapping activities taking place in Alaska off the public lands interfere with the subsistence priority.
66 FR 31533	June 12, 2001	Interim Rule	Expanded the authority that the Board may delegate to agency field officials and clarified the procedures for enacting emergency or temporary restrictions, closures, or openings.
67 FR 30559	May 7, 2002	Final Rule	In response to comments on an interim rule, amended the operating regulations. Also corrected some inadvertent errors and oversights of previous rules.
68 FR 7703	February 18, 2003.	Direct Final Rule	This rule clarified how old a person must be to receive certain subsistence use permits and removed the requirement that Regional Councils must have an odd number of members.
68 FR 23035	April 30, 2003	Affirmation of Direct Final Rule.	Received non adverse comments on the direct final rule (68 FR 7703). Adopted direct final rule.
69 FR 60957	October 14, 2004	Final Rule	Established Regional Council membership goals.

An environmental assessment was prepared in 1997 on the expansion of Federal jurisdiction over fisheries and is available by contacting the office listed under **FOR FURTHER INFORMATION CONTACT**. The Secretary of the Interior with the concurrence of the Secretary of Agriculture determined that the expansion of Federal jurisdiction did not constitute a major Federal action significantly affecting the human environment, and therefore, signed a Finding of No Significant Impact.

Compliance With Section 810 of ANILCA

The intent of all Federal subsistence regulations is to accord subsistence uses of fish and wildlife on public lands a priority over the taking of fish and wildlife on such lands for other purposes, unless restriction is necessary to conserve healthy fish and wildlife populations. A Section 810 analysis was completed as part of the FEIS process. The final Section 810 analysis determination appeared in the April 6, 1992, ROD, which concluded that the Federal Subsistence Management Program may have some local impacts on subsistence uses, but the program is not likely to significantly restrict subsistence uses.

Paperwork Reduction Act

These rules contain no new information collection requirements subject to Office of Management and

Budget (OMB) approval under the Paperwork Reduction Act of 1995. They apply to the use of public lands in Alaska. The information collection requirements described in the rule were approved by OMB under 44 U.S.C. 3501 and were assigned clearance number 1018-0075, which expires August 31, 2006. We will not conduct or sponsor, and you are not required to respond to, a collection of information request unless it displays a currently valid OMB control number.

Other Requirements

Economic Effects—This rule is not a significant rule subject to OMB review under Executive Order 12866. This rulemaking will impose no significant costs on small entities; this rule does not restrict any existing sport or commercial fishery on the public lands, and subsistence fisheries will continue at essentially the same levels as they presently occur. The number of businesses and the amount of trade that will result from this Federal-land related activity is unknown but expected to be insignificant.

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires preparation of regulatory flexibility analyses for rules that will have a significant economic effect on a substantial number of small entities, which include small businesses, organizations, or governmental jurisdictions. The Departments have

determined that this rulemaking will not have a significant economic effect on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This rulemaking will impose no significant costs on small entities; the exact number of businesses and the amount of trade that will result from this Federal-land related activity is unknown. The number of small entities affected is unknown; however, the fact that the effects will be seasonal in nature and will, in most cases, not impact continuing preexisting uses of public lands indicates that the effects will not be significant.

Title VIII of ANILCA requires the Secretaries to administer a subsistence preference on public lands. The scope of this program is limited by definition to certain public lands. Likewise, these regulations have no potential takings of private property implications as defined by Executive Order 12630.

The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. The implementation of this rule is by Federal agencies, and no cost is involved to any State or local entities or Tribal governments.

The Service has determined that these final regulations meet the applicable

standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988 on Civil Justice Reform.

In accordance with Executive Order 13132, the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. Title VIII of ANILCA precludes the State from exercising management authority over wildlife resources on Federal lands.

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), 512 DM 2, and E.O. 13175, we have evaluated possible effects on Federally recognized Indian tribes and have determined that there are no effects. The Bureau of Indian Affairs is a participating agency in this rulemaking.

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, or use. This Executive Order requires agencies to prepare Statements of Energy Effects when undertaking certain actions. As this rule is not a significant regulatory action under Executive Order 13211, affecting energy supply, distribution, or use, this action is not a significant action and no Statement of Energy Effects is required.

William Knauer drafted these regulations under the guidance of Thomas H. Boyd of the Office of Subsistence Management, Alaska Regional Office, U.S. Fish and Wildlife Service, Anchorage, Alaska. Dennis Tol and Taylor Brelsford, Alaska State Office, Bureau of Land Management; Greg Bos, Carl Jack, Rod Simmons, and Jerry Berg, Alaska Regional Office, U.S. Fish and Wildlife Service; Sandy Rabinowitch and Nancy Swanton, Alaska Regional Office, National Park Service; Warren Eastland, Pat Petrivelli, and Dr. Glenn Chen, Alaska Regional Office, Bureau of Indian Affairs; and Steve Kessler, Alaska Regional Office, USDA—Forest Service provided additional guidance.

List of Subjects

36 CFR Part 242

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

50 CFR Part 100

Administrative practice and procedure, Alaska, Fish, National forests, Public lands, Reporting and recordkeeping requirements, Wildlife.

■ For the reasons set out in the preamble, the Secretaries amend Title

36, part 242, and Title 50, part 100, of the Code of Federal Regulations, as set forth below.

PART —SUBSISTENCE MANAGEMENT REGULATIONS FOR PUBLIC LANDS IN ALASKA

■ 1. The authority citation for both 36 CFR part 242 and 50 CFR part 100 continues to read as follows:

Authority: 16 U.S.C. 3,472,551, 668dd, 3101–3126; 18 U.S.C. 355i–3586; 43 U.S.C. 1733.

Subpart A—General Provisions

■ 2. In Subpart A of 36 CFR part 242 and 50 CFR part 100, § __.3 is revised to read as follows:

§ __.3 Applicability and scope.

(a) The regulations in this part implement the provisions of Title VIII or ANILCA relevant to the taking of fish and wildlife on public land in the State of Alaska. The regulations in this part do not permit subsistence uses in Glacier Bay National Park, Kenai Fjords National Park, Katmai National Park, and that portion of Denali National Park established as Mt. McKinley National Park prior to passage of ANILCA, where subsistence taking and uses are prohibited. The regulations in this part do not supersede agency-specific regulations.

(b) The regulations contained in this part apply on all public lands, including all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries of the following areas, and on the marine waters as identified in the following areas:

(1) Alaska Maritime National Wildlife Refuge, including the:

(i) Karluk Subunit: All of the submerged land and water of the Pacific Ocean (Sheliokof Strait) extending 3,000 feet from the shoreline between a point on the spit at the meander corner common to Sections 35 and 36 of Township 30 South, Range 33 West, and a point approximately 1¼ miles east of Rocky Point within Section 14 of Township 29 South, Range 31, West, Seward Meridian as described in Public Land Order 128, dated June 19, 1943;

(ii) Womens Bay Subunit: Womens Bay, Gibson Cove, portions of St. Paul Harbor and Chiniak Bay: All of the submerged land and water as described in Public Land Order 1182, dated July 7, 1955 (U.S. Survey 21539);

(iii) Afognak Island Subunit: A submerged lands and waters of the Pacific Ocean lying within 3 miles of the shoreline as described in Proclamation No. 39, dated December 24, 1892;

(iv) Simeonof Subunit: All of the submerged land and water of Simeonof Island together with the adjacent waters of the Pacific Ocean extending 1 mile from the shoreline as described in Public Land Order 1749, dated October 30, 1958; and

(v) Semidi Subunit: All of the submerged land and water of the Semidi Islands together with the adjacent waters of the Pacific Ocean lying between parallels 55°57'57"00–56°15'57"00 North Latitude and 156°30'00"–157°00'00" West Longitude as described in Executive Order 5858, dated June 17, 1932;

(2) Arctic National Wildlife Refuge, including those waters shoreward of the line of extreme low water starting in the vicinity of Monument 1 at the intersection of the International Boundary line between the State of Alaska and the Yukon Territory; Canada, and extending westerly, along the line of extreme low water across the entrances of lagoons such that all offshore bars, reefs and islands, and lagoons that separate them from the mainland to Brownlow Point, approximately 70 10' North Latitude and 145 51' West Longitude;

(3) National Petroleum Reserve in Alaska, including those waters shoreward of a line beginning at the western bank of the Colville River following the highest highwater mark westerly, extending across the entrances of small lagoons, including Pearl Bay, Wainwright Inlet, the Kuk River, Kugrau Bay and River, and other small bays and river estuaries, and following the ocean side of barrier islands and sandspits within three miles of shore and the ocean side of the Plover Islands, to the northwestern extremity of Icy cape, at approximately 70°21' North Latitude and 161 46' West Longitude; and

(4) Yukon Delta National Wildlife Refuge, including Nunivak Island: the submerged land and water of Nunivak Island together with the adjacent waters of the Bering Sea extending, for Federal Subsistence Management purposes, 3 miles from the shoreline of Nunivak Island as described in Executive Order No. 5059, dated April 15, 1929.

(c) The regulations contained in this part apply on all public lands, excluding marine waters, but including all inland waters, both navigable and non-navigable, within and adjacent to the exterior boundaries of the following areas:

- (1) Alaska Peninsula National Wildlife Refuge;
- (2) Aniakchak National Monument and Preserve;
- (3) Becharof National Wildlife Refuge;

- (4) Bering Land Bridge National Preserve;
- (5) Cape Krusenstern National Monument;
- (6) Chugach National Forest;
- (7) Denali National Preserve and the 1980 additions to Denali National Park;
- (8) Gates of the Arctic National Park and Preserve;
- (9) Glacier Bay National Preserve;
- (10) Innoko National Wildlife Refuge;
- (11) Izembek National Wildlife Refuge;
- (12) Kanuti National Wildlife Refuge;
- (13) Katmai National Preserve;
- (14) Kenai National Wildlife Refuge;
- (15) Kobuk Valley National Park;
- (16) Kodiak National Wildlife Refuge;
- (17) Koyukuk National Wildlife Refuge;
- (18) Lake Clark National Park and Preserve;
- (19) Noatak National Preserve;
- (20) Nowitna National Wildlife Refuge;
- (21) Selawik National Wildlife Refuge;
- (22) Steese National Conservation Area;
- (23) Tetlin National Wildlife Refuge;
- (24) Togiak National Wildlife Refuge;
- (25) Tongass National Forest, including Admiralty Island National Monument and Misty Fjords National Monument;
- (26) White Mountain National Recreation Area;
- (27) Wrangell-St. Elias National Park and Preserve;
- (28) Yukon-Charley Rivers National Preserve;
- (29) Yukon Flats National Wildlife Refuge;
- (30) All components of the Wild and Scenic River System located outside the boundaries of National Parks, National Preserves, or National Wildlife Refuges, including segments of the Alagnak River, Beaver Creek, Birch Creek, Delta River, Fortymile River, Gulkana River, and Unalakleet River.

(d) The regulations contained in this part apply on all other public lands, other than to the military, U.S. Coast Guard, and Federal Aviation Administration lands that are closed to access by the general public, including all non-navigable waters located on these lands.

(e) The public lands described in paragraphs (b) and (c) of this section remain subject to change through rulemaking pending a Department of the Interior review of title and jurisdictional issues regarding certain submerged lands beneath navigable waters in Alaska.

Dated: December 12, 2005.

Gale A. Norton,

Secretary of the Interior, Department of the Interior.

Dated: December 15, 2005.

Dennis E. Bschor,

Regional Forester, USDA Forest Service.

[FR Doc. 05-24340 Filed 12-23-05; 8:45 am]

BILLING CODE 3410-11-M; 4310-55-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[R04-OAR-2005-TN-0005-200522(a); FRL-8015-2]

Approval and Promulgation of Implementation Plans; Tennessee; Nitrogen Oxides Budget and Allowance Trading Program, Phase II

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Tennessee on May 6, 2005. The revision responds to the EPA's regulation entitled, "Interstate Ozone Transport: Response to Court Decisions on the NO_x SIP Call, NO_x SIP Call Technical Amendments, and Section 126 Rules," otherwise known as the "NO_x SIP Call Phase II." This revision satisfies EPA's rule that requires Tennessee to submit NO_x SIP Call Phase II revisions needed to achieve the necessary incremental reductions of nitrogen oxides (NO_x). The intended effect of this SIP revision is to reduce emissions of NO_x in order to help attain the national ambient air quality standard (NAAQS) for ozone. Specifically, this revision addresses compliance plans for NO_x emissions from stationary internal combustion engines.

DATES: This direct final rule is effective February 27, 2006, without further notice, unless EPA receives adverse comment by January 26, 2006. If adverse comment is received, EPA will publish a timely withdrawal of the direct final rule in the **Federal Register** and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Regional Material in EDocket (RME) ID No. R04-OAR-2005-TN-0005, by one of the following methods:

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

2. Agency Web site: <http://docket.epa.gov/rmepub/> RME, EPA's electronic public docket and comment system, is EPA's preferred method for receiving comments. Once in the system, select "quick search," then key in the appropriate RME Docket identification number. Follow the on-line instructions for submitting comments.

3. E-mail: hou.james@epa.gov.

4. Fax: (404) 562-9019.

5. Mail: "R04-OAR-2005-TN-0005" Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960.

6. Hand Delivery or Courier. Deliver your comments to: James Hou, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division 12th floor, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW., Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to RME ID No. R04-OAR-2005-TN-0005. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <http://docket.epa.gov/rmepub/>, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through RME, regulations.gov, or e-mail. The EPA RME Web site and the federal regulations.gov Web site are "anonymous access" systems, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through RME or regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be