


MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver 
Executive Director
DATE: September 26, 2005
SUBJECT: Protected Resources Report

ESTIMATED TIME 2 HOURS

ACTION REQUIRED

Receive report on protected resources issues and take action as appropriate.

BACKGROUND

A. Right whale critical habitat

On June 14, 2005, U.S. District Court Judge William Alsup remanded to NMFS the matter of revising critical habitat (CH) for the northern right whale (Item B-6(a)). The Judge's order specifies that NMFS shall do one of the following: 1) issue a proposed rule in the Federal Register designating an area of the Pacific Ocean as critical habitat, or 2) issue a FR notice explaining why no CH should be designated due to a more paramount statutory consideration. NMFS convened a workshop on July 21 at the National Marine Mammal Lab to review available information on right whale habitat use in the North Pacific and to discuss alternate areas that might be considered CH. Maps that show northern right whale occurrence in the North Pacific based on old whaling records and contemporary observations and satellite tagging studies are attached as Item B-6(b).

On August 17, NMFS provided the Council with their plan on how the agency will comply with the Court order (Item B-6(c)). Over the past several months, NMFS has worked to develop a CH designation. The Judge's order requires that the FR notice of the Proposed Rule designating CH be published no later than October 28. All rulemaking must be completed by June 30, 2006. NMFS intends to provide a 60-day comment period on the proposed rule designating CH, and thus the Council will have the opportunity to review the proposed rule during its December 2005 meeting. Staff from the NMFS Office of Protected Resources Management will be available to answer questions.

B. Interim Joint Protocol Committee

In early 2005, the Alaska Board of Fisheries (BOF) received several proposals to allow pollock trawl fishing inside State waters. These proposed fisheries would occur partially within Steller sea lion protection areas that are currently closed to pollock fishing by the Council and NMFS. At its April 2005 meeting, the Council received a request from the BOF to review these proposals. At that meeting, the Council recommended to the BOF that three representatives from each body be convened in an Interim

Joint Protocol Committee to jointly review the proposals for State water pollock trawl fisheries since they could affect both State and Federal fishing regulations.

The Interim Joint Protocol Committee met several times to review the proposals – on May 25, June 14-15, July 14, and most recently August 30, 2005. Minutes of these meetings have been posted on the Council's web site; draft minutes from the August 30 meeting are attached as Item B-6(d). During these meetings, NMFS was asked to comment on whether the proposed pollock fisheries would likely adversely affect Steller sea lions and thus trigger the need for a formal Section 7 consultation under the Endangered Species Act. NMFS responded that one proposal, for a small fishery south of Seward, would not likely adversely affect Steller sea lions. However, NMFS indicated during the August 30 meeting that the proposals for a pollock fishery near Jude Island and near Adak would likely adversely affect Steller sea lions, and likely would require a formal consultation process if the BOF wishes to proceed further. NMFS agreed to provide their review of these proposals in a letter to the BOF.

During its August 30 meeting, the Committee made no recommendations to either the BOF or the Council, although the BOF indicated it will take up the issue of the three proposed State water pollock fisheries at its October 15-16, 2005 meeting (Item B-6(e)). The Committee likely will not meet again on this issue, and there is no action required at this time. However, the Council may wish to discuss possible contingency plans in the event that the BOF takes action to allow for a State pollock trawl fishery in the Jude Island or Adak areas.

C. Update on ESA Section 7 Consultation on Salmon Bycatch

Under the terms of the Incidental Take Statement in the 2000 Biological Opinion authorizing the groundfish fisheries of the BSAI and GOA, a bycatch limit of 55,000 Chinook salmon was established for the BSAI groundfish fisheries. This limit was set so that the potential take of threatened or endangered salmonid Evolutionarily Significant Units (ESUs) would be minimized. These ESUs are native to streams in Oregon and Washington but may occur during their marine phase in waters of the GOA and occasionally the BSAI. During the 2004 BSAI groundfish fishery, the bycatch of Chinook salmon exceeded 55,000 Chinook salmon (catch was approximately 62,500), thereby triggering a reinitiation of Section 7 consultation under the ESA.

On December 1, 2004, the NMFS Alaska Region initiated a consultation on this issue with the Northwest Region of NMFS. On July 27, 2005 the Northwest Region completed their review of the issue and provided a letter to NMFS Alaska Region. That letter is attached as Item B-6(f). The Northwest Region has concluded that the Alaska Region should continue monitoring of Chinook bycatch in the BSAI groundfish fisheries and continue consultation on this matter with the Northwest region to stay current with ongoing developments and take further action as appropriate. In their letter, the Northwest Region supports the Council's recent efforts to develop alternative ways to reduce salmon bycatch in the BSAI groundfish fisheries.

Chinook bycatch in the 2005 BSAI groundfish fisheries was 40,866 fish as of September 17, 2005.

D. Reinitiation of ESA Consultation on BSAI and GOA Groundfish Fisheries

At its June 2005 meeting, the Council requested that staff prepare a discussion paper on reinitiation of formal Section 7 consultation on the BSAI and GOA groundfish fisheries. That discussion paper is attached as Item B-6(g). The issue before the Council is to decide how to proceed – i.e., whether or not to pursue a reinitiation of formal consultation. Those decision elements are provided in the attached discussion paper.

E. List of Fisheries for 2005

As required by the Marine Mammal Protection Act, NMFS annually publishes a List of Fisheries (LOF) that places all U.S. commercial fisheries into one of three categories based on the level of serious injury or mortality to marine mammals that occur in each fishery. The Proposed Rule for the LOF for 2005 was published December 2, 2004 (69 FR 70094) and was reviewed by the Council at its February 2005 meeting. NMFS is considering changes that will affect certain Alaskan groundfish fisheries; the agency proposes to place the following fisheries into Category II:

- BSAI Pacific cod longline
- BSAI Greenland turbot longline
- BSAI pollock trawl
- BSAI flatfish trawl
- Bering Sea sablefish pot

The Proposed Rule also includes a proposal to add two marine mammal stocks to the list of marine mammal species and stocks that interact with the BSAI P. cod longline fishery: eastern North Pacific resident killer whale and eastern North Pacific transient killer whale.

At the Council's February 2005 meeting, the Council decided to send a letter to NMFS with its comments on the LOF for 2005 (Item B-6(h)). In that letter, dated February 28, 2005, the Council recommended that the Agency review its analysis procedures for re-categorizing the above five Alaskan groundfish fisheries, and in particular consider the SSC's comments on the analysis procedures which were included with the Council's letter.

On August 25, 2005 NMFS published in the Federal Register a notice of availability of an EA (Item B-6(i)) that examines alternative procedures for listing various fisheries in the three categories. That EA was sent out in a Council mailing on September 23; the Executive Summary is attached as Item B-6(j); NMFS has opted to select as its preferred option the status quo. Comments on the EA and the proposed alternatives are due October 24, 2005.

F. Marine Mammal Commission Annual Meeting

The U.S. Marine Mammal Commission will convene its 44th annual meeting in Anchorage on October 12-14, 2005. The Council has been invited to present an overview of issues associated with groundfish fishery interactions with marine mammals in the Alaska EEZ. Chris Oliver and Doug DeMaster plan to collaborate on a presentation for the Commission. The MMC has also requested a briefing on the Council's current planning efforts for implementing ecosystem-based fishery management.

G. SSL Recovery Team

The Steller Sea Lion Recovery Team met in Homer August 15-19, 2005 to complete their work on a draft Recovery Plan for the eastern and western stocks of SSL. During the Team's meeting, various sections of the draft plan were debated and edited, and the Team put considerable effort into developing recovery criteria and recovery action recommendations. Despite these efforts, the Team was unable to meet a September 1 deadline to complete the draft and has requested further time to complete the plan. NMFS and the team have not decided on a revised timeline or process for completion of the plan. NMFS hopes to compile a draft plan for public review by early 2006.

H. Short-tailed Albatross Recovery Plan

The U.S. Fish & Wildlife Service recently released for public review a draft Recovery Plan for the endangered short-tailed albatross. The Recovery Plan provides a list of recovery criteria that, when met, would allow the USFWS to consider downlisting the species to threatened or delisting. These criteria are presented under Agenda B-5. The Recovery Plan will be provided to the Council.

Currently the Alaskan groundfish fisheries are authorized under a Biological Opinion and Incidental Take Statement issued September 18, 2003. The ITS provides for an incidental take of:

- Up to 4 short-tailed albatross every 2 years in the hook and line groundfish fisheries in the BSAI and GOA, and
- 2 short-tailed albatross in the trawl fisheries of the BSAI and GOA over the time period the BiOp remains in effect.

The fixed gear sectors of the groundfish fishing industry are deploying streamers or other measures to avoid interactions between short-tailed albatrosses and fishing gear, and are supporting continued research on new ways (e.g. integrated weight groundline) to minimize these interactions. The trawl industry is involved in a cooperative research program with NMFS and the University of Washington on short-tailed albatross interactions with trawl warps and third wire gear with a goal of finding methods to minimize trawl gear interactions with these seabirds.

I. Northern Sea Otter Listing Final Rule

On August 9, 2005 the U.S. Fish & Wildlife Service published a Final Rule listing under the Endangered Species Act the southwest Alaska Distinct Population Segment (DPS or "stock") of northern sea otter as threatened. The designation was effective September 8, 2005. NMFS is in the process of consulting with the USFWS on the marine fisheries in the Alaskan EEZ; more information was provided under Agenda B-2, NMFS Management Report and B-5, USFWS Report. An information release on the listing is attached as Item B-6(k).

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY,
a non-profit corporation, DOUGLAS L.
LEVINGTON, an individual, DIANE
LADOUCEUR, an individual, and KIERAN
MULVANEY, an individual,

Plaintiffs,

v.

DON EVANS, Secretary of Commerce.
U. S. Department of Commerce, and WILLIAM
T. HOGARTH, Assistant Administrator for
Fisheries, National Marine Fisheries Service,

Defendants.

No. C 04-04496 WHA

**ORDER GRANTING
SUMMARY JUDGMENT
IN FAVOR OF PLAINTIFFS
AND AGAINST DEFENDANTS**

INTRODUCTION

One of the most endangered mammals is the right whale. It was among the first group of species to be listed as endangered in 1971. After 34 years, the agency responsible has yet failed to designate any critical habitat in the Pacific Ocean. This order directs the agency to make the required statutory decision by **OCTOBER 28, 2005**.

In this action, the Center for Biological Diversity and certain individuals seek declaratory and injunctive relief against the National Marine Fisheries Service for unreasonable delay in the determination and designation of critical habitat for the right whale in the Pacific Ocean. Plaintiffs assert defendants' violations of the Endangered Species Act, 16 U.S.C. 1532

1 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. 706(1) and (2). Relief is granted for the
2 following reasons.¹

3 **STATEMENT**

4 **1. RIGHT WHALE.**

5 The right whale is the most endangered of all large whale species. A baleen whale, it
6 has a thick body and a huge head that accounts for about one-third of its length. Adults range
7 between 45 and 55 feet in length and weigh up to 70 tons. It has distinctive callosities on the
8 head.

9 Right whales were once abundant throughout the Pacific and Atlantic. Prized for their
10 oil and easy to catch, commercial whaling during the nineteenth century decimated the species.
11 By 1935, they were so near extinction that the League of Nations convinced the whaling nations
12 to stop hunting them; in 1949, with the passage of international whaling regulations, the Pacific
13 population gained international protection. In the 1960's, however, right whales were still being
14 poached in the Pacific. Today, right whales are injured by collisions with large vessels and net
15 entanglement and by habitat degradation through pollution, sea-bed mining and oil-and-gas
16 exploration. The Pacific population may now be as few as "tens of animals," as even NMFS
17 now acknowledges (67 Fed. Reg. 7660, 7660 (2002)).

18 **2. PROCEDURAL HISTORY.**

19 The right whale was listed as an endangered species in 1971 (*id.* at 7661). In 1991, the
20 NMFS issued the "Final Recovery Plan for the Northern Right Whale." The recovery plan
21 called for the identification and protection by 1996 of "critical habitat(s)" — habitats essential
22 to the survival and recovery of right whales in the Pacific Ocean (AR 18 at 79). The plan stated
23

24 ¹ The scientific name of the right whale is the Northern Right Whale, *Eubalaena glacialis*. In 2003,
25 NMFS published a Federal Register Notice that listed the Right Whale in the Pacific Ocean as a distinct species,
26 *Eubalaena japonica*, *i.e.* as distinct from the Atlantic version (68 Fed. Reg. 17560-62 (2003)). In 2005, after
27 plaintiffs filed this action, defendants announced that they were rescinding the 2003 action because NMFS had
28 allegedly failed to meet procedural requirements. The notice further stated that the agency would conduct a
status review to determine whether more than one species exists. At the hearing of this case, government
counsel acknowledged that the separate listing would have triggered, at least arguably, an independent statutory
duty to designate critical habitat in the Pacific Ocean. This order does not reach any such further issues.
Rather, this order treats, as does the government, the right whale as a single species.

1 that the recovery plan team could not yet determine what habitat areas were critical to the
2 survival of the right whales in the Pacific (*id.* at 47). Nevertheless, the recovery team
3 recommended that once areas essential to the survival and recovery were identified in the
4 Pacific, those areas should be protected under the Act (*id.* at 48). The plan gave a time-frame
5 of five years (*i.e.*, until 1996) to identify critical habitat for right whales in the Pacific (*id.* at
6 79).

7 In 1994, the NMFS designated three “critical habitats” for right whales in the Atlantic
8 (59 Fed. Reg. 28793, 28805 (1994)). No Pacific habitat was designated. Nor was any
9 designated in 1996, as called for in the plan — or ever, which provoked this suit. In 2000, the
10 CBD submitted a formal petition to NMFS to revise the critical habitat designation to include a
11 zone off of the Alaskan coast. The petition identified areas concentrated in the middle shelf and
12 inner front of the southeast Bering Sea to be designated as a critical habitat for the right whale
13 in the Pacific Ocean. NMFS agreed that “the petition present[ed] substantial scientific
14 information that the designation of a critical habitat may be warranted” and took the petition
15 under consideration (66 Fed. Reg. 29773 (2001)).

16 In 2002, however, even after receiving many comments supporting designation, NMFS
17 declined to designate any Pacific habitat. Despite “agree[ing] that designation of critical habitat
18 may be a necessary component of any effort to conserve and recover” the right whale, NMFS
19 concluded that the extent of the critical habitat could not be determined at that time because of
20 alleged inadequate information (67 Fed. Reg. at 7662). Significantly, NMFS stated that “the
21 most reasonable conclusion is that a smaller area than that petitioned may contain physical and
22 biological features that are essential to the conservation of the species” (*id.* at 7664).
23 Nonetheless, NMFS did not designate even the “smaller area” as critical habitat but said that it
24 would continue to analyze the issues (*id.* at 7665). That was in 2002. Now in 2005, NMFS has
25 yet to designate any critical habitat for the right whale in the entire Pacific Ocean. The 2002
26 notice further stated that a draft plan was expected to be available for comment later the same
27 year for the Pacific right whale (*id.* at 7662). Although there have been multiple internal draft
28 recovery plans for the right whales in the Pacific since 2002, no plan has been released.

1 ANALYSIS

2 Under the Endangered Species Act, when the Secretary lists a species as endangered, the
3 Secretary is required to publish “concurrently” a final regulation designating critical habitat “to
4 the maximum extent prudent” unless the Secretary determines that the critical habitat is not then
5 “determinable” (§ 1533(a)(3)). (“The Secretary” refers to the Secretary of the Interior or the
6 Secretary of Commerce, depending on the species; here it means the latter, who, in turn, has
7 delegated the responsibility to NMFS.) If a habitat determination is not then possible, then the
8 Secretary must publish a final critical habitat designation “to the maximum extent prudent”
9 within one year following the listing (*ibid.*). The regulations give “not prudent” a very narrow
10 meaning: “Not prudent” is defined as “not . . . beneficial to the species” or “increasing the
11 degree of [takings] threat to a species” (50 C.F.R. 424.12(a)(1)(i)-(ii)).

12 Thereafter, any “interested person” may petition for a revision in the critical habitat
13 (§ 1533(b)(3)(D)(i)). Within ninety days, the Secretary must “make a finding as to whether the
14 petition presents substantial information indicating that the revision may be warranted” (*ibid.*).
15 Upon a so-called “positive finding,” the Secretary must then determine and publish “how he
16 intends to proceed with the requested revision” within one year following the petition
17 (§ 1533(b)(3)(D)(ii)). Specifically:

18 Within 12 months after receiving a petition that is found under
19 clause (i) to present substantial information indicating that the
20 requested revision may be warranted, the Secretary shall determine
how he intends to proceed with the requested revision, and shall
promptly publish notice of such intention in the Federal Register.

21 The standards governing critical habitat revisions are the same as for original
22 designations (§ 1533(B)(2)):

23 The Secretary shall designate critical habitat, and make revisions
24 thereto, under subsection (a)(3) of this section on the basis of the
25 best scientific data available and after taking into consideration the
26 economic impact, the impact on national security, and any other
27 relevant impact, of specifying any particular area as critical
28 habitat. The Secretary may exclude any area from critical habitat
if he determines that the benefits of such exclusion outweigh the
benefits of specifying such area as part of the critical habitat,
unless he determines, based on the best scientific and commercial
data available, that the failure to designate such area as critical
habitat will result in the extinction of the species concerned.

1 To the “maximum extent prudent and determinable,” the Secretary has an ongoing duty to
2 revise such designations “as appropriate” (§ 1533(a)(3)(A)).

3 In combined effect, these provisions inform the statutory phrase “how he intends to
4 proceed” in the habitat-revision paragraph. With respect to a petition for habitat revision, the
5 Secretary has these options: (i) publish a proposed rule revising the critical habitat or finding
6 that a statutory factor (*e.g.*, economic impact or national security) overrides the need for species
7 protection or (ii) find that revision of critical habitat is either not “prudent” or not
8 “determinable.” The Secretary must chose one of the above and publish his intent within one
9 year of the petition.

10 The Act permits any person to commence a civil action against the Secretary “where
11 there is alleged a failure of the Secretary to perform any act or duty under
12 section 1533 . . . which is not discretionary with the Secretary” (§ 1540(g)(1)(C)). Under the
13 APA, an aggrieved person may sue to set aside final agency action that is arbitrary and
14 capricious and to compel an agency to act when it reasonably delays action. *Norton v. Utah*
15 *Wilderness Alliance*, 124 S. Ct. 2373, 2379–80 (2004); *Biodiversity Legal Foundation v.*
16 *Norton*, 285 F. Supp. 2d 1, 7–8 (D.D.C. 2003).

17 * * *

18 In the present action, NMFS, acting as the Secretary’s delegate, did, in fact, respond to
19 the petition by publishing “how [it] intends to proceed.” The notice stated (in 2002) that NMFS
20 would study the problem (67 Fed. Reg. 7660). This was, in effect, a finding that a revision was
21 not “determinable” and a ruling that no Pacific habitat at all would be made at that time. No
22 suggestion was made that a designation would be imprudent.²

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25 ² Since the filing of this complaint, the agency has noticed that it will conduct a status review of the
26 listing of the right whale in the Pacific and issue a final rule and any necessary critical habitat designation by
27 2006 (70 Fed. Reg. 1830, 1831 (2005)). The agency relies on this representation to attempt to side-step the
28 entire “unreasonable delay” issue by arguing that because it is in the process of listing the Pacific population of
right whales as a separate species and in doing so will designate critical habitat, the issues plaintiffs present are
moot (Def. Cross-Mot. SJ at 8). This argument is not valid. For the last fourteen years the agency has said that
it plans to designate critical habitat for the right whale in the Pacific and it has not – there is no reason to believe
that the agency will now follow-through with promulgating the rule without judicial intervention.

1 The circumstances presented are very similar to those in *Biodiversity Legal*
2 *Foundation v. Norton*, 285 F. Supp. 2d 1 (D.D.C. 2003) (“*BLF*”). There, Judge Rosemary M.
3 Collyer held that the Secretary of Interior (through the Fish and Wildlife Service) had
4 unreasonably withheld agency action in violation of the Administrative Procedure Act, 5 U.S.C.
5 555(b), 706(1). There, the FWS had promulgated a statutory multi-species recovery plan
6 calling for a revision and revision of a critical habitat designation based on distribution surveys.
7 This, Judge Collyer held, created a legal duty to revise the designation upon issuance of the
8 plan. By the time of the court decision in 2003, the delay had become four years. That delay —
9 plus the other considerations set forth in *In re International Chemical Workers Union*, 958 F.2d
10 1144, 1149 (D.C. Cir. 1992) — led Judge Collyer to order relief.

11 The present record presents an even stronger case for relief. The right whale was listed
12 as endangered 34 years ago, yet no Pacific habitat has ever been designated — despite the
13 statutory duty to determine to revise (or not) critical habitat in a timely manner and the duty to
14 act based on the best scientific data available. See *BLF*, 285 F. Supp. at 16; *Fund for Animals,*
15 *Inc. v. Rice*, 85 F3d 535, 547 (11th Cir. 1996). The surviving Pacific right whales are numbered
16 “in the tens.” The 1991 recovery plan here committed the agency to “identifying and protecting
17 as necessary habitat(s) essential to the survival and recovery of the North Pacific Right Whale”
18 by 1996 (AR 18 at 79). The plan stated that “North Pacific right whale habitats . . . and certain
19 geographic areas are probably essential for meeting the biological requirements of the
20 North Pacific right whales” (AR 18 at 51). Although critical habitat was designed for the
21 Atlantic in 1994, no critical habitat has ever been designated for the Pacific — then or now.
22 By the reasoning in *BLF*, NMFS has been overdue on the designation since at least 1996. The
23 delay here has thus been at least nine years, if not 34 years.

24 Another consideration under *BLF* is the extent to which the delay has undermined the
25 statutory scheme. It is true that the Act places more priority on original designations than over
26 later revisions. Yet, again, it must be remembered that no Pacific habitat has yet been
27 determined for 34 years. The Pacific fleet of right whales is verging on extinction now,
28 numbering “in the tens” by the agency’s own admission (67 Fed. Reg. at 7660). Without

1 question, the delay has been severe in light of the statutory goal. *See Babbitt v. Sweet Home*
2 *Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 690 (1995). Indeed, the Act does
3 not contemplate critical habitat as an afterthought in the preservation of a species; Congress
4 considered the critical habitat designation an essential component of preservation of a species:
5 “classifying a species as endangered or threatened is only the first step in insuring its survival.
6 Of equal or more importance is the determination of the habitat necessary for the species’
7 continued existence.” H. R. Rep. No. 94–887, at 3 (1976).

8 Another *BLF* consideration is the consequence of further delay. Put differently, it is
9 theoretically conceivable that right whales would be able to protect themselves in the face of
10 more delay and/or that there are no imminent threats to them in the Pacific, such that more
11 delay could be tolerated. For example, in the 1991 recovery plan, the agency surmised that
12 natural conditions — such as extremely low abundance and scattered distribution rather than
13 direct human interaction — posed the greatest threat to recovery of the right whales in the
14 Pacific (AR 18 at 2). The administrative record, however, illustrates that over the last decade,
15 increasing amounts of contaminants in the sea and the larger, faster, ocean-going fishing vessels
16 that are being built are increasing the danger of collision and death for right whales in the
17 Pacific. Given that there are a few precious right whales left in the Pacific and even fewer
18 females, delay — of any length of time — brings the species closer to extinction.

19 Another *BLF* consideration is whether there are any difficulties faced by the agency in
20 carrying out the congressional mandate. While the defendants do not raise this issue in their
21 briefs, the administrative record illustrates that one of the difficulties faced by the agency in
22 determining critical habitat is the impact a designation would have on commercial fishing and
23 transportation businesses. As an example, in a memorandum regarding critical habitat, an
24 Alaskan administrator writes “[f]urther actions to establish additional critical habitat for any
25 species will likely be met with concern by the Alaskan Congressional delegation, the State of
26 Alaska, and various private interests in particular the commercial fishing and transportation
27 industries” (AR 39 at 5). While the Act directs the agency to analyze all impacts of critical
28 habitat, including economic impact, the agency may not exclude an area from critical habitat if

1 it is determined that failure to designate that area as a critical habitat will result in extinction of
2 the species, as quoted above (*See also* 50 C.F.R. 424.19 (2004)).

3 A final factor makes this case an even stronger case for relief than in *BLF*. Here, the
4 agency has all but admitted that the record presented a case for at least designating a smaller
5 geographic region in the Pacific than that proposed by plaintiff — yet the agency designated no
6 critical habitat at all in the Pacific Ocean. In its final decision, the agency denied CBD's
7 petition yet stated that “[t]he most reasonable conclusion is that a much smaller area than that
8 petitioned may contain physical and biological features that are essential to the conservation of
9 the species, but information is insufficient to extrapolate that conclusion to the entire area
10 petitioned” (67 Fed. Reg. 7660, 7664). Furthermore, numerous correspondences in the
11 administrative record indicate the agency's willingness to designate critical habitat. For
12 example, a July 2003 agency memo reads “[we] are now prepared to go forward with a
13 Proposed Rule sometime this winter to designate some portion of the Bering Sea as a critical
14 habitat” (AR 467). The agency even drafted a proposed rule — although it was never published
15 for public comment (AR 412).

16 Congress instructed the agency to act on the basis of the “best scientific data available”
17 (§ 1533(b)(1)(A)). As the Ninth Circuit has said:

18 The Endangered Species Act requires agencies to make
19 determinations on the basis of the best scientific data available.
20 Thus, a review of ESA case law provides insightful and analogous
21 provisions and analysis. In *Conner v. Burford*, 848 F.2d 1441,
22 1454 (9th Cir. 1988), this court held [*1071] that ***an agency's***
23 ***claim of insufficient information to prepare comprehensive***
24 ***biological opinions violated the ESA requirement that opinions***
25 ***use best data available***, and ordered the agency to comply with the
26 ESA requirement. *See also Greenpeace v. Nat'l Marine Fisheries*
27 *Serv.*, 55 F. Supp. 2d 1248, 1261–62 (W.D. Wash. 1999) (best
28 scientific data available standard requires less than conclusive
proof; Secretary must issue biological opinion); *Defenders of*
Wildlife v. Babbit, 958 F. Supp. 670, 679–81 (D.D.C. 1997)
(Secretary must determine whether any species is threatened or
endangered using the best available evidence).

Brower v. Evans, 257 F.3d 1058, 1070-71 (9th Cir. 2001) (emphasis added).

Here, the best available evidence supports critical habitat designation. Beginning in
1996, small groups of right whales — including calves — were seen congregating, feeding and

1 engaging in courtship behavior in the southeast Bering Sea. According to the Marine Mammal
2 Commission, (a federal body of marine mammal experts charged with making
3 recommendations to NMFS) concluded that (AR 44)

4 the repeated occurrence of right whales in summer and fall months,
5 coupled with the fact that the petitioned area lies within a broader
6 area in which whaling records document that right whales were
7 once abundant, provides a reasonable basis for concluding that the
8 petitioned area contains physical or biological features essential for
9 the species' survival.

10 Under the best available standard, Congress required the agency to consider the scientific
11 information available *at the time* of consideration, giving the species the benefit of the doubt.
12 *See e.g. Conner v. Buford, 848 F.2d 1441, 1454 (9th Cir. 1998).*

13 Congress did not contemplate paralysis while critical habitat issues were studied to
14 death. Congress wanted, "to the maximum extent prudent," prompt protection based on the
15 "best scientific data available" so long as the data is adequate to make a "determination." No
16 critical habitat will ever be knowable with geographic exactitude. The interwoven character of
17 our ecology here on Earth bars that. Our best approximations must do, at least so Congress
18 concluded. As stated by the Ninth Circuit in *Brower v. Evans, 257 F.3d 1058, 1070 (2001)*,
19 "scientific findings in marine mammal conservation are often necessarily made from incomplete
20 or imperfect information." The record presented to the agency seems clearly to have presented
21 a strong case for designating at least the smaller zone referenced by the agency itself — yet the
22 agency punted by calling for more study (67 Fed. Reg. 7664).

23 To be sure, the Act is controversial. Economic interests, often with political influence,
24 can be expected to resist efforts to designate critical habitat. Congress took this into account. It
25 charged the Secretary, in making critical habitat designations, to consider "the economic
26 impact, the impact on national security, and any other relevant impact." The Secretary "may
27 exclude any area from critical habitat if he determines that the benefits of exclusion outweigh
28 the benefit of [inclusion] unless he determines, based on the best scientific and commercial data
available, that the failure to [include] will result in the extinction of the species concerned."
Hard decisions are called for. Commercial interests will legitimately prevail in some. The
species will legitimately prevail in others. But Congress expected the hard decisions to be

1 made. Except where designations are simply not determinable, the agency must act based on
2 the best evidence available to the maximum extent prudent.

3 NMFS had a statutory duty to make the hard decision, *i.e.*, to designate or not, unless it
4 reasonably found the habitat was not determinable. The agency's conclusion that the issue was
5 not "determinable" was not supported by administrative record and was arbitrary and
6 capricious. The agency was legally obligated to make the hard decision based on the evidence
7 available. The agency's failure to do so not only amounted to an unreasonable delay but was
8 "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law"(5 U.S.C.
9 706).³

10 CONCLUSION

11 For the foregoing reasons, plaintiff's motion for summary judgment is **GRANTED** and
12 defendant's cross motion for summary judgment is **DENIED**. It is unnecessary to reach any
13 other issues raised.

14 1. This matter is **REMANDED** to NMFS with instructions to use the
15 best available evidence to do one of the following two alternatives by

16 **OCTOBER 28, 2005:**

17 (a) Issue a proposed rule in the Federal Register designating an
18 area of the Pacific Ocean as critical habitat for the right whale, or

19 (b) Issue a Federal Register notice explaining why no Pacific
20 critical habitat should be designated due to a more paramount statutory
21 consideration (*e.g.*, commercial or national security interests), if the statutory
22 standards can be met.

23
24 ³Under the APA,

25 any agency's action may be arbitrary and capricious if the agency has relied on
26 factors which Congress has not intended it to consider, entirely failed to consider
27 an important aspect of the problem, offered an explanation for its decision that
28 not be ascribed to a difference in view or the product of agency expertise.

Brower, 257 F.3d at 1065.

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2. NMFS shall complete all rulemaking on the subject of the Pacific critical habitat for the right whale by **JUNE 30, 2006**.

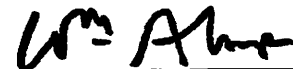
3. NMFS shall designate an agency management official to carry out this remand order and to accept responsibility here in Court for failure to comply with this remand order. This designation must be filed by **JULY 15, 2005**.

4. NMFS shall file a progress report on compliance with this order on **SEPTEMBER 1, 2005**, and a further status conference shall be held on **SEPTEMBER 15, 2005**, at 11 A.M.

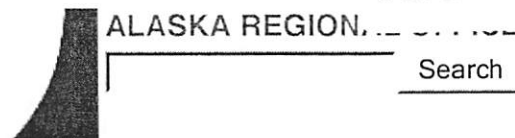
5. The Court shall retain jurisdiction to enforce this order.

IT IS SO ORDERED.

Dated: June 14, 2005.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE



[Home](#) | [Protected Resources](#) | [Alaska Whales](#) | [Critical Habitat Order](#)

Critical Habitat for the Northern Right Whale

Several of the following are PDF files which require free Adobe Acrobat Reader software to view, navigate and print. Adobe also offers free tools for the visually disabled.

Status of NMFS' response to Judge Alsup's order to designate Critical Habitat for the northern right whale in the Pacific Ocean

By ruling dated June 14, 2005, U.S. District Court Judge William Alsup remanded to the National Marine Fisheries Service (NMFS) the matter of revising critical habitat for the northern right whale in the Pacific Ocean. The remand includes orders for NMFS to publish a conclusive determination by October 28, 2005 by either proposing designation of an area in the North Pacific ocean as critical habitat for right whales or by explaining why such designation should not occur due to more paramount statutory considerations.

NMFS began that process by holding an agency workshop at the National Marine Mammal Laboratory in Seattle July 21, 2005, to review all of the available science on the biology of right whales, their prey, and relevant biological and physical features of the environment. NMFS is also undertaking an economic analysis, as required by the Endangered Species Act, to evaluate the costs associated with this designation.

NMFS will issue a determination by October 28, 2005, in compliance with the Judge's order. A final rule is required by June 30, 2006.

The attached figures present observations of north pacific right whales in U.S. waters from 1940 to 2005 and for the broader timeframes of the 1800s, the 1900s and the late 20th Century. The information in these figures is one of the bases for evaluating designation of critical habitat and shows the locations of harvested whales, as well as recent sightings and acoustic recordings of north pacific right whales.

- Observations of North Pacific Right Whales in US Waters from 1940 to 2005 (727 kb)
- Historic and current habitat use by North Pacific right whales *Eubalaena japonica* in the Bering Sea and Gulf of Alaska: Figures from Sheldon, K.W., S.E. Moore, J.M. Waite, P.R. Wade and D.J. Rugh, 2005. (421 kb)

Observations of North Pacific Right Whales in U.S. Waters from 1940 to 2005



Legend

- ☆ Observations made following listing under the Endangered Species Act (1973 to present)
- Observations 1941-1967, prior to listing under the Endangered Species Act

Observation data was gathered from scientific studies, historic whaling reports and incidental sightings, compiled in Sheldon, K., S.Moore, J.Waite, P.Wade and D.Rugh. 2005. Historic and current habitat use by North Pacific Right Whales *Eubalaena japonica* in the Bering Sea and Gulf of Alaska. Mammal Review 35:129-155.



Data mapped by NOAA
Fisheries Service, Alaska Region,
Protected Resources Division.
August 2005

0 125 250 500 750 1,000 Miles

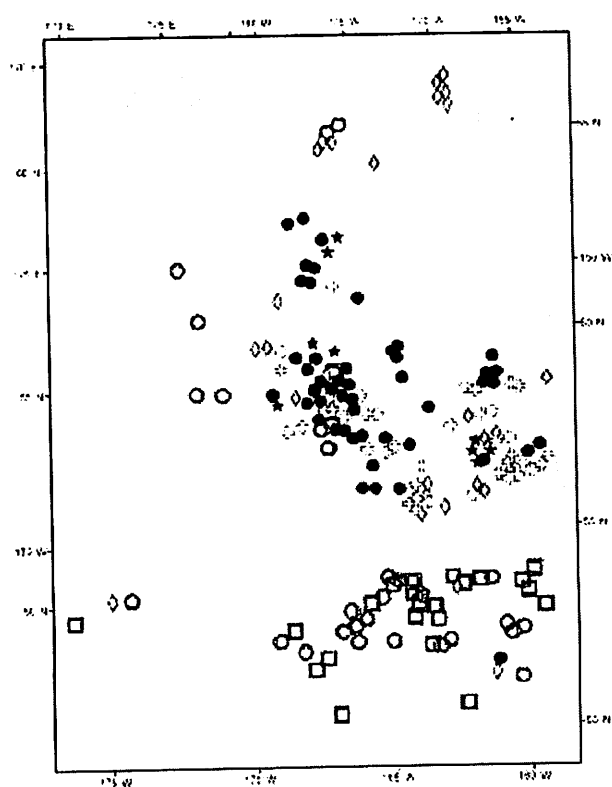


Fig. 3. Locations of American whaleships 1839-1904 on days when North Pacific right whales were taken in waters west of 160°W and east of 180°W. Symbol shape denotes month: January (closed triangles), May (open squares), June (open circles), July (open diamonds), August (open crosses), September (closed circles) and October (closed stars) (see text for references).

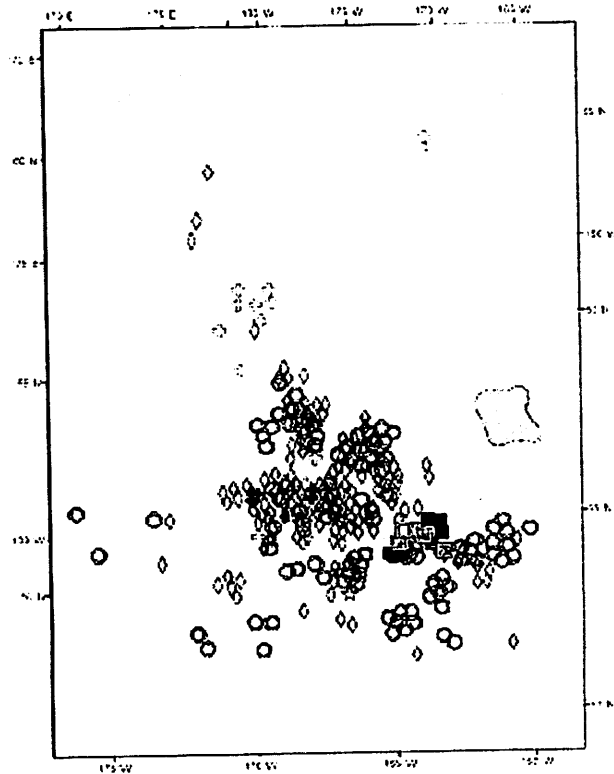


Fig. 5. Sightings of North Pacific right whales in waters west of 160°W and east of 180°W from 1924 to 1968. Symbols denote data sets: shore whaling station at Akutan & Alaska 1924-39 [catches = closed squares, sightings/ unsuccessful chases = open squares], Japanese catcher-boats 1941-68 (catches by month = July (closed diamonds), August (closed crosses); sightings by month = June (open circles), July (open diamonds), August (open crosses) and September (open stars)], and Soviet whaling 1963 and 1967 (hatched polygon) (see text for references).

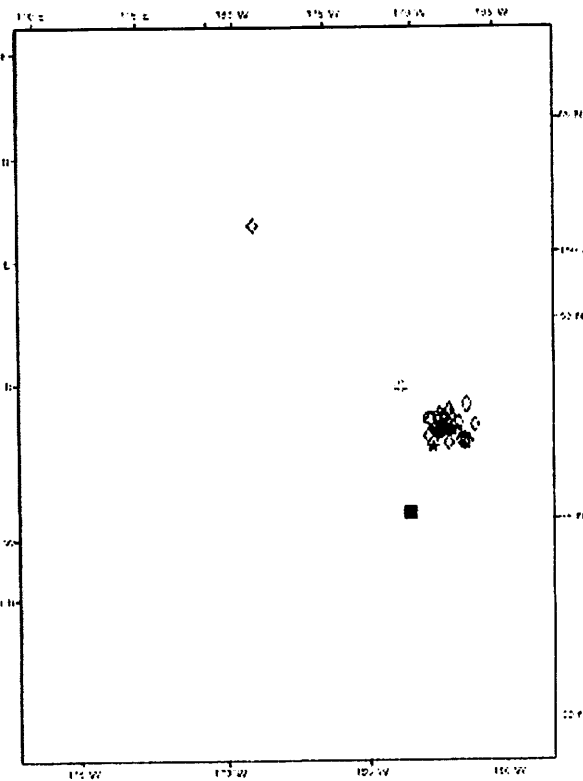


Fig. 11. Sightings of North Pacific right whales in waters west of 160°W and east of 180°W from 1982 to 2002. Symbol shape denotes month: April (closed square), June (open circles), July (open diamonds), August (open crosses), September (closed circles) and October (closed stars) (see text for references).

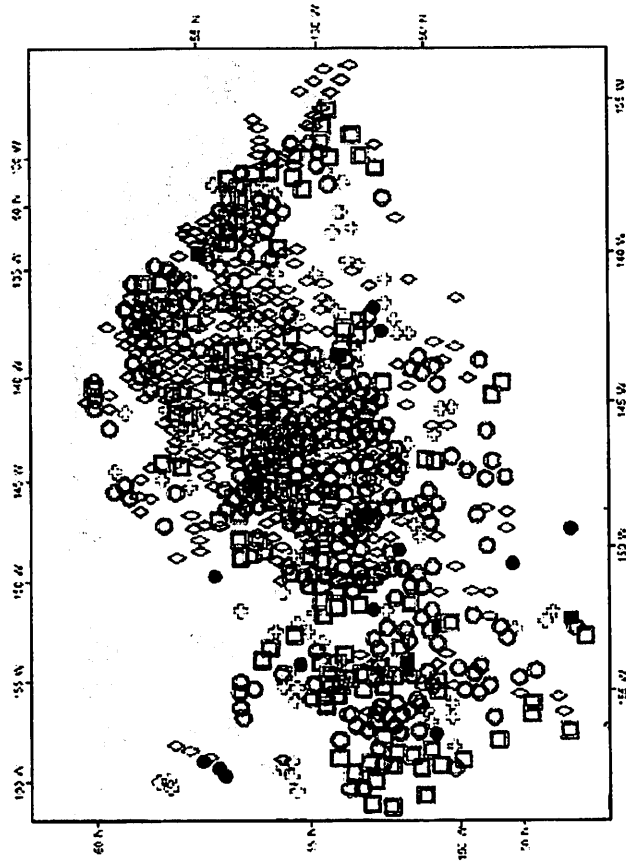


Fig. 4. Locations of American whaleships 1839-1914 on days when North Pacific right whales were taken in waters east of 160°W. Symbol shape denotes month: January (closed triangles), April (closed squares), May (open squares), June (open circles), July (open diamonds), August (open crosses), September (closed circles), October (closed stars) and December (closed diamonds) (see text for references).

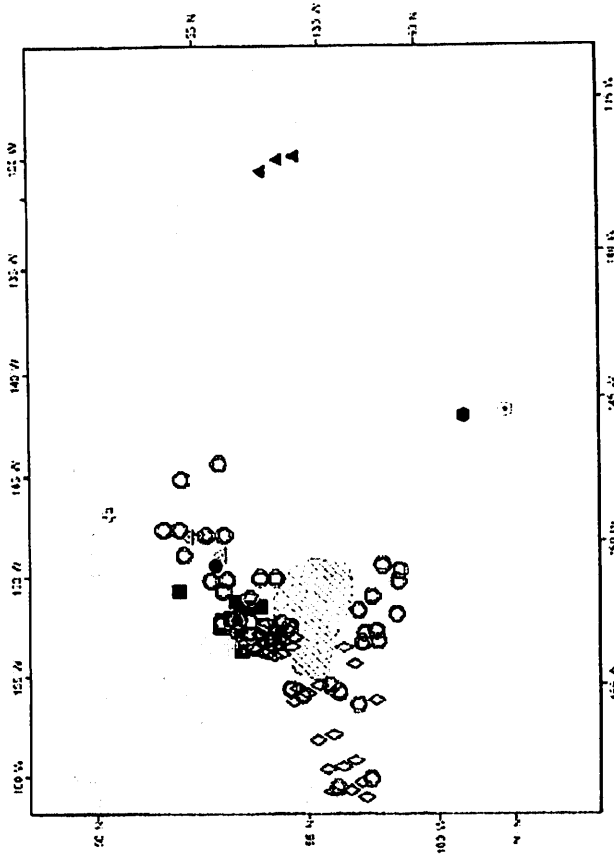


Fig. 6. Sightings of North Pacific right whales in waters east of 160°W from 1924 to 1968. Symbols denote data sets: shore whaling station at Port Hebron 1924-37 (catches = closed squares, sightings/unsuccessful catches = open squares) and Naden Harbour, Canada (June catches = closed triangles), weather ships post 1955 (open triangles), Japanese catcher-boats 1941-61 (catches by month = August (closed circles), sightings by month = May (open triangles), June (open circles), July (open diamonds) and August (open crosses)), and Soviet whaling 1963-64 (closed circles) and 1963-66 (thatched polygon) (see text for references).



AGENDA B-6(c)
 OCTOBER 2005
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
 P.O. Box 21668
 Juneau, Alaska 99802-1668

August 17, 2005

RECEIVED
 AUG 18 2005

N.P.F.M.C.

Stephanie Madsen
 Chair, North Pacific Fishery Management Council
 605 West 4th Avenue, Suite 306
 P.O. Box 103136
 Anchorage, AK 99510

Dear Stephanie,

On June 14, 2005, U.S. District Court Judge William Alsup remanded to NOAA's National Marine Fisheries Service (NMFS) the matter of revising critical habitat for the northern right whale in the Pacific Ocean, as petitioned by the Center for Biological Diversity in 2000. The remand includes orders for NMFS to publish a conclusive determination by October 28, 2005 by either proposing designation of an area in the North Pacific ocean as critical habitat for right whales or by explaining why such designation should not occur due to a more paramount statutory consideration.

NMFS is preparing a proposed rule to designate some portion of the North Pacific Ocean as critical habitat for the northern right whale. We began that process by holding an agency workshop at the National Marine Mammal Laboratory in Seattle on July 21, 2005, to review the available science on the biology of right whales, their prey, and relevant biological and physical features of the environment. We are also undertaking an economic analysis, as required by the Endangered Species Act, to evaluate the costs associated with this designation.

NMFS intends to publish a proposed rule on or before October 28, 2005, followed by a 60 day public comment period and the opportunity for a public hearing. The final rule and a final economic analysis, which might provide a basis for the exclusion of any area from designation as critical habitat, must be published under court order by June 30, 2006. The proposed rule will include a description of the area(s) proposed, maps depicting the area and boundaries, and a list of those activities that may affect or adversely modify the critical habitat or which may be affected by the designation of critical habitat.

The petition from the Center for Biological Diversity recommended critical habitat designation of portions of the Bering Sea, based on persistent observations of right whales northeast of Unimak Pass and certain common oceanographic features. The sightings of right whales in the southeastern Bering Sea have continued since 2000,



and now include cow/calf pairs. We also have documented recent sightings and acoustic recordings of right whales south of Kodiak Island in the Gulf of Alaska. We currently are assessing options for proposed critical habitat in the Bering Sea and Gulf of Alaska. This assessment includes an evaluation of these observations, historical takes of right whales, and foreign whaling activities during the mid 1900's.

We will continue to coordinate with the Council throughout this process, and would be pleased to report periodically on our progress and developments, as well as provide a presentation to the Council at the October 2005 meeting. Please direct any questions you may have to Kaja Brix at (907) 586-7824.

Sincerely,

Kaja Brix
for Susan J. Salveson
Acting Administrator,
Alaska Region

Interim Joint Protocol Committee, North Pacific Fishery Management Council and Alaska Board of Fisheries

Meeting on Board of Fisheries Proposals for Pollock Trawl Fisheries in State Waters
August 30, 2005

DRAFT MINUTES

1. The Committee convened in the Hawthorne Suites Hotel in Anchorage, August 30, 2005 at 10:30 AM. This Committee meeting was chaired by Art Nelson, Chairman of the Alaska Board of Fisheries. Committee members present were Mr Nelson, Stephanie Madsen, Mel Morris, Ed Dersham, Dave Benson, and Sue Salveson. The Committee approved the agenda.
2. The Committee approved the minutes of Committee meetings held June 14-15 and July 14, 2005.
3. During this meeting, the Committee reviewed certain reference handouts which were provided to the Committee and the public. These reference materials are not appended to these minutes as they are lengthy – but they are available from the Board of Fisheries or the North Pacific Fishery Management Council offices.

Review of State Board of Fisheries Proposals

1. Earl Krygier, Alaska Dept. of Fish & Game, provided the Committee with an overview of a modified State proposal for a pollock fishery in the Western GOA. Mr Krygier provided a map of the Pavlov Bay area near Jude Island showing a revised area open for pollock trawling in State waters. Mr Krygier noted that this is a revision to the revised Jude Island proposal previously developed by the State. Mr Krygier explained that this revised proposal is in response to the NMFS review of the earlier Jude Island proposal. This new proposal, then, is a modified revised Western GOA proposal that contains some of the same features as the earlier version (e.g. trip limits, harvest caps, use of VMS, etc.), but includes a smaller area that would be open to pollock fishing.
2. The Committee discussed how NMFS and the Council would consider a new State pollock fishery in the annual specifications process. The State intends this to be a State parallel fishery with the quota coming from the Federal TAC.
3. Art Nelson asked if NMFS had reviewed this revision to the revised Jude Island proposal. Sue Salveson reported that NMFS has not had time nor staff resources to conduct a review, but would be willing to do so. Kaja Brix, Chief of the Protected Resources Division, NMFS, indicated that NMFS Protected Resources Division had briefly looked at this proposal. Ms Brix felt that NMFS may not be able to offer much more new information on the proposed fishery's impact on Steller sea lions that would be in addition to that already provided for the earlier revised Jude Island proposal. Given the proposed fishery would occur in sea lion critical habitat, it is likely the agency's reply would be that a more detailed review would have to be conducted in a formal Section 7 consultation process.

4. Stephanie Madsen asked what might be the consequences to the Federal ESA process if the BOF takes action to open a State pollock fishery in this area of the W GOA. Ms Brix replied that the details of such a scenario would be evaluated in the formal consultation process.
5. Dave Benson pointed out a discrepancy in the description of the area involved in the W GOA proposal (revised modified Jude Island proposal). It was later clarified that the State's W GOA proposal, that is now modified to encompass a smaller open area around Jude Island, also provides for pollock fishing in other State waters between 157 degrees and 163 degrees W longitude. Denby Lloyd referenced BOF document RC 30 that clarifies the BOF's intent. The proposal encompasses part of the Central GOA region (between 157 and 159) and part of the W GOA (159 to 163). Only the proposed open areas in the Jude Island/Pavlov Bay area involve opening Steller sea lion closed areas; other State waters proposed for pollock fishing would not involve sea lion protected areas. The proposal includes vessel size restrictions, tendering limits, and vessel limits for all State waters that would be opened to pollock fishing in this area.
6. The Committee discussed further the potential effects of the proposed State pollock fishery on C GOA and W GOA fishery participants.

NMFS Review of Proposed Revised Jude Island Proposal

1. Ms Salvesson reported to the Committee that NMFS has reviewed the earlier version of the Jude Island proposal and provided the results of this review in a memorandum dated August 8. Shane Capron provided the Committee with a review of that memorandum and some of the reasoning the agency considered in its reply.
2. Mr Capron stated that NMFS believes that further review of the earlier Jude Island proposal would require formal Section 7 consultation. Mr Capron provided the Committee with an overview of how this review differed from the agency's earlier review of the BOF's Seward area pollock fishery proposal (which the agency determined would not require formal consultation). Mr Capron noted that the issue is a judgment by the agency as to whether the impacts would likely be insignificant, discountable, or completely beneficial. In the Seward proposal, NMFS believes that impacts on Steller sea lions would be very minor and insignificant, but at Jude Island that kind of finding could not be reached, particularly given the historic and current production of sea lions on the Jude Island haulout.
3. Mr Lloyd asked about the difference in sea lion use of the 0-3 nm zone around a haulout or rookery versus sea lion use of areas 0-3 nm from any point of land. Mr Capron referenced the 2003 Supplement to the Biological Opinion that compared two sets of data on dive filtered telemetry that suggested that use of all shoreline areas from 0-3 nm is important to sea lions, not just in a radius of 0-3 nm from the point of a haulout or rookery site.

Modified State Proposal for Pollock Fishery in the Adak Area

1. Mr Krygier presented an overview of a revised proposal for a pollock fishery in the Aleutian Islands area. The proposal was presented on a handout provided by the State at the meeting. The proposal contains several suboptions: one opening certain State waters 1-3 nm offshore (keeping closed the 0-1 nm zone and 0-20 nm around rookeries), and another opening State waters 0-3 nm offshore (retaining 0-3 nm closures around haulouts

DRAFT

- and 0-20 nm closures around rookeries). The proposal also provides four suboptions for quota amounts. The proposal also includes specific provisions for vessel size restrictions, season options, and harvest methods.
2. Mr Krygier provided maps showing historic pollock harvest data from the central Aleutian Islands area. Mr Krygier also noted that the State proposal contains a provision to include a tradeoff closure at Dalnoi Point on St. George Island as part of a proposed opening of fishing area in the Aleutians.
 3. Sue Salveson noted that tradeoffs can be considered only during a formal consultation process; Ms Madsen noted that the St. George Traditional Council does not wish to have Dalnoi Point included as a tradeoff option during analysis of State water pollock fishery proposals.
 4. Ms Salveson indicated that since this proposal would allow fishing close to shore in Steller sea lion critical habitat, the proposal most likely would have to be evaluated in a formal Section 7 consultation. Mr Nelson indicated that the BOF would like to have NMFS make an initial review and provide that information to the Board, perhaps at their October 2005 meeting. Mr Nelson stated that the BOF was particularly interested in NMFS' analysis of the various suboptions for open areas and quotas.

ESA Consultation Process

1. Chris McNulty of the Office of General Counsel, NOAA, reviewed the procedures that NMFS must follow in the event the BOF would take an action that would trigger formal Section 7 consultation. Mr McNulty referenced a flow chart which was included in the briefing package, noting that the timeline presented is very ambitious and requires a significant amount of staff analysis in a very short period of time in order to have a final rule in place for 2006.
2. Steven Daugherty, Assistant Attorney General, State of Alaska, asked how such a consultation process might mesh with a possible Council discussion of a Federal reinitiation of consultation this fall. Ms Brix suggested that a BOF action could be included in such a consultation, but only if the action were delayed to 2007. If a 2006 fishery is authorized by the BOF, then NMFS would have to immediately consult in order to avoid possible Section 7(d) issues and potential litigation. Ms Madsen noted that these issues will be discussed by the Council at the October meeting.

Public Comment

1. Clem Tillion, testifying for the Aleut Corp, stated that the issue of importance is whether a proposal would result in a finding of jeopardy to Steller sea lions; Mr Tillion feels that the State's revised Aleutian Islands proposal would not cause jeopardy to sea lions.
2. Julie Bonney, Alaska Groundfish Data Bank, noted that the revised Jude Island proposal includes a change in the fishery in both the western and the central GOA. Her concern is potential reallocation of harvest opportunity in the central GOA. Ms Bonney also noted that the Council is working on a comprehensive GOA rationalization analysis that includes as an important feature the preservation of historic participation, and that catch history should also be part of any potential BOF action in the central GOA. Ms Bonney also noted that any potential reallocation could affect multiple GOA communities.
3. Sandra Moller with the Aleut Enterprise Corporation thanked the Committee for providing the ESA consultation flow chart. Ms Moller requested an additional chart that illustrates the

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emergency rule making process; she would like to know how emergency rule making could be used to get the Aleut pollock fishery started.

4. Paul MacGregor, At-Sea Processors Association, requested an additional flow chart that illustrates how new Steller sea lion data, research findings, and other information would be integrated into a comprehensive consultation process; Mr MacGregor felt that such a process would help with making decisions on new proposals such as those provided by the BOF at this meeting. Mr MacGregor cautioned that even if the BOF authorizes a new State water pollock fishery in sea lion critical habitat with a delayed opening date of 2007, such an action would still require the Council and NMFS to engage in a consultation process that could delay the broader consultation envisioned by the Council.

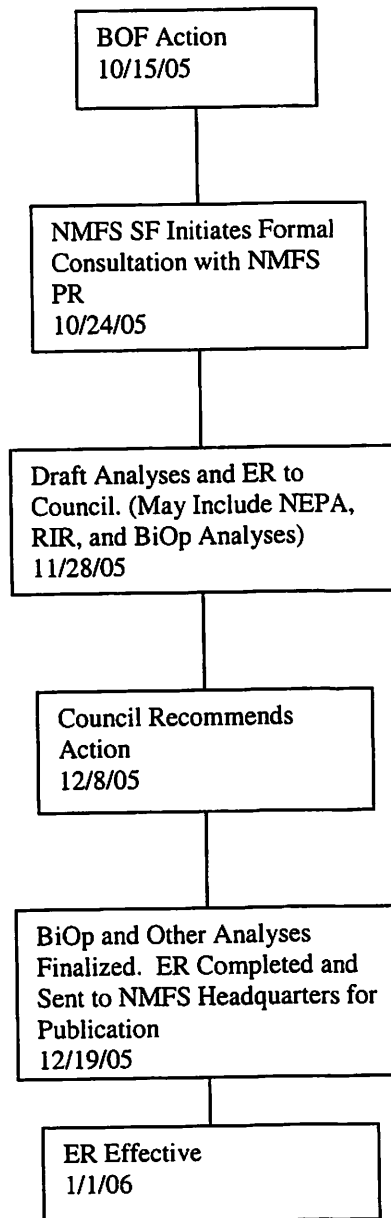
Additional Proposal Discussions

1. The Committee discussed what information the members might take back to their respective groups (Council and BOF). Ms Madsen noted that the Council would likely not take any further action at this time until the BOF takes an action that could affect the Federal fisheries. Ms Salveson noted that the Council could develop at their October meeting a strategy for dealing with a BOF action, including a time frame for a consultation process.
2. Mr Benson asked about the status of the Steller Sea Lion Recovery Plan. Ms Brix reported that the plan is being drafted now. NMFS intends to use that plan to help guide the agency's future management of sea lions.
3. Mr Nelson asked NMFS to review the new revised Jude Island proposal and the revised Aleutian Islands proposal and how long that review would take. Ms Salveson reported the agency could complete such a review in about a month. Ms Madsen noted that such a review would also likely include an analysis of the cumulative effects of all of the proposed State water pollock fisheries.

The meeting adjourned at approximately 2:00 PM.

ESA Consultation Process for Potential 2005 Board of Fisheries Action

This flowchart illustrates the formal consultation process under the Endangered Species Act (ESA) on the federal groundfish fisheries that would result in the event that reinitiation is triggered by the Board of Fisheries (BOF) opening certain State waters to pollock fishing in 2006. Formal consultation may result in either no federal action or in emergency action. The flowchart shows the process for formal consultation resulting in emergency action (ER).



If NMFS is unable to complete this process by January 1, 2006, NMFS may be required to close all or a portion of the groundfish fisheries until the BiOp can be completed in order to comply with the ESA. Additionally, the groundfish fisheries may be at risk of litigation under ESA sections 7(a) and 7(d).

~DRAFT~

ALASKA BOARD OF FISHERIES
STATE WATERS POLLOCK/TRAWL
October 15 – 16, 2005, Alyeska Resort, Girdwood
TENTATIVE AGENDA

NOTE: This tentative agenda is subject to change throughout the course of the meeting.

This Tentative Agenda is provided to give a general idea to the public of the board's anticipated schedule. The board will attempt to hold to this schedule; however, the board is not constrained by this Tentative Agenda. Those of you who wish to testify must sign-up by the deadline. Public testimony will continue until those present at the meeting are heard; the board will continue working through its agenda immediately upon conclusion of public testimony.

Saturday, October 15, 8:30 a.m.

OPENING BUSINESS

Call to Order; Introductions of Board Members and Staff
Board Member Ethics Disclosures

STAFF REPORTS

PUBLIC AND ADVISORY COMMITTEE ORAL TESTIMONY²

Deadline for SIGN-UP TO TESTIFY will be announced at the meeting. Public testimony will continue until those who are present at the meeting are heard.

TENTATIVE: Committee of the Whole³

Central Gulf of Alaska, Western Gulf of Alaska, and South Alaska Peninsula/Aleutian Islands state waters trawl

Sunday, October 16, 8:30 a.m.

Committee of the Whole (continue if needed)³

Central Gulf of Alaska, Western Gulf of Alaska, and South Alaska Peninsula/Aleutian Islands state waters trawl

BOARD DELIBERATIONS

MISCELLANEOUS BUSINESS, including Petitions, Findings, Resolutions, Letters, Other
ADJOURN

SPECIAL NOTES:

1. This agenda is TENTATIVE and subject to change during the meeting. A list of staff reports and roadmap will be available at the meeting. Scheduled updates will be posted at the meeting, and can be obtained by calling the board's recorded message phone. Phone Number: **1-800-764-8901** [In Juneau call: 465-8901]
2. Advisory Committee representatives can present their reports either at the beginning or end of the "Oral Public Testimony." The advisory committee representative should notify the board secretary whether they prefer to present their report at the beginning or end of public testimony.
3. ***The board will not conduct its committee process during this meeting. The board may convene a committee of the whole to discuss the proposal concerning Central Gulf of Alaska, Western Gulf of Alaska, and South Alaska Peninsula/Aleutians Islands state waters trawl fisheries. No written committee reports will be distributed. However, the board will take oral and public testimony on all issues, and will deliberate as indicated. The order of deliberations will be determined by the chair and will be announced at the meeting.***



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Northwest Region
7600 Sand Point Way N.E., Bldg. 1
Seattle, WA 98115

JUL 27 2005

RECEIVED
NATIONAL MARINE FISHERIES
ADMINISTRATION
2005 AUG - 1 AM 11:14

MEMORANDUM FOR: Ron Berg
Acting Regional Administrator, Alaska Region

FROM: *for* D. Robert Lohn *[Signature]*
Regional Administrator, Northwest Region

SUBJECT: Request for Reinitiated ESA Section 7 Consultation
Regarding the Bering Sea and Aleutian Island Groundfish
Fishery

I am writing in response to your request for reinitiation of consultation regarding the incidental take of Chinook salmon listed under the Endangered Species Act (ESA) in the Bering Sea and Aleutian Island (BSAI) groundfish fishery. Your initial request for reinitiation came to me in a memo dated December 1, 2004. Your recent memo of June 29, 2005 provided new information relevant to our review.

The BSAI groundfish fishery has been the subject of a series of ESA related consultations conducted by both the Northwest and Alaska regions. The Northwest Region consulted on the BSAI Groundfish Fishery Management Plan (FMP) regarding ESA listed salmon species most recently in a biological opinion dated December 22, 1999. The Alaska Region has also consulted on the BSAI Groundfish FMP often with particular attention to concerns for Steller sea lions, marine mammals, and other non-salmonids. However, in an opinion on the FMP dated November 30, 2000, the Alaska Region incorporated existing considerations for listed salmonids, and reiterated the Chinook salmon bycatch limits and other terms and conditions contained in the 1999 biological opinion. The request for reinitiation of consultation therefore requires reference to both the 1999 and 2000 opinions. However, in response to your request, and because the more substantive considerations of salmonid interactions are contained in the Northwest Region's opinions, our reinitiation will focus on the November 1999 opinion.

The incidental take statement of the 1999 biological opinion indicates that the bycatch of Chinook salmon in the BSAI fisheries should be minimized to the extent possible and should not exceed 55,000 Chinook per year. Since 1999 the bycatch of Chinook in the fishery increased from 14,600 to 54,900 in 2003 and 62,500 in 2004. The high bycatch in 2004 triggered your request to reinitiate consultation.

The 1999 biological opinion reviewed information related to the stock composition of Chinook caught in the fishery, and concluded that the take of listed Chinook in the BSAI fisheries was likely a relatively rare event with some of the far north migrating Evolutionarily Significant Units (ESUs) more likely caught than others. We are not



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aware of any new information that contradicts these conclusions. Your recent memos updated information related to coded wire tag recoveries and are consistent with prior observations that recoveries from listed ESUs are rare. You mention additional efforts taken by the observer program to collect samples for genetic stock identification work. Better information regarding stock composition is needed and we support that effort.

In your recent memo you report that the bycatch of Chinook in 2005 through June 11 is approximately 27,700 compared to a similar catch-to-date last year of 31,500. If the bycatch proceeds at a similar rate through the remainder of the season, the bycatch will be very close to 55,000 by the end of the year. You indicate that the Chinook Salmon Savings Areas will be closed for the year once the 29,000 limit for the area is reached. We are aware through reports from the North Pacific Fishery Management Council (Council) of renewed attention related to the Chinook bycatch issue and presume that voluntary efforts, pending future regulatory actions, will help keep bycatch down for the remainder of the year and beyond. However, questions about the efficacy of these actions and uncertainty regarding the final tally in 2005 and beyond suggest the need for continued monitoring and attention to actions that will further reduce the bycatch of Chinook.

Our respective staffs have continued to confer since receiving your initial request for reinitiation in December 2004. From my perspective, there continue to be three outstanding questions: 1) whether the Chinook bycatch will again exceed 55,000 fish in 2005 or beyond, 2) why the bycatch rate has increased in recent years and finally exceeded 55,000 in 2004, and 3) what additional actions have been or can be taken to further reduce the bycatch of Chinook. Together, we do not have answers to these questions at this time, but expect to learn more in the future.

It is not clear why bycatch has increased in recent years. It is reasonable to hypothesize that higher Chinook abundance is contributing to the higher bycatch rates. However, it is apparent that we do not know a lot about the status or distribution of the contributing stocks. Many of the indicators you mention in your memo of June 29, 2005 under Chinook Salmon Abundance are neutral or down, particularly for the more northerly stocks. The observations from 2004 that bycatch rates outside the Chinook Catch Savings Areas were actually higher than those inside, suggest that distribution patterns may be changing or were at least different than expected in 2004.

I am aware that the Council is taking steps to reduce the bycatch of Chinook and has initiated two different amendment packages. The alternatives seem to be focusing on a review of the efficacy, or use of alternative Chinook catch savings areas, and/or the use of a voluntary rolling hotspot closure system. The Council is currently reviewing related alternatives, but final action is not scheduled to occur until October 2005. Associated rulemaking would not be completed until 2006.

Given the above described uncertainties and the status of events, I believe that it is appropriate to continue to monitor the Chinook bycatch in the BSAI fisheries, and actions taken by the Council and industry to minimize bycatch as required by the December 1999

biological opinion. Continuing consultation between the Alaska and Northwest regions provides a means to stay current on ongoing developments and take further action as appropriate. In the meantime, the incidental take statements of the recent biological opinions provide for the BSAI fisheries exemption from ESA section 9 take prohibitions.

I appreciate your efforts and those of the Council and industry to minimize the bycatch of Chinook salmon. My hope is that your continued attention will lead to a reduction in the bycatch of Chinook and help resolve the related uncertainties.

cc: Lisa Lindeman, GCAK
Jonathan Pollard, GCAK
Mike Bancroft, GCNW
Peter Dygert, NWR
Melanie Brown, AKR

04-91

**Considerations Relevant to the Process of Reinitiating Formal Section 7 Consultation on
the Groundfish Fisheries of the North Pacific for
Species Listed under the Endangered Species Act**

Prepared by:

Bill Wilson

North Pacific Fishery Management Council
October 2005

Background

At the June 2005 Council meeting, the Council discussed the possibility of reinitiating formal section 7 consultation under the Endangered Species Act (ESA) on listed species (e.g., Steller sea lions, whales, turtles, salmon). The federal fishery in Alaska currently operates under the Biological Opinions from a series of formal Section 7 consultations and associated incidental take statements:

- November 2000 Biological Opinion on the Fishery Management Plans and associated regulations for the groundfish fishery in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska.
- October 2001 Biological Opinion on the federally managed pollock, Pacific cod, and Atka mackerel fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska and parallel fisheries for pollock, Pacific cod, and Atka mackerel as authorized by the State of Alaska within 3 nm of shore.
- June 2003 Supplement to the October 2001 Biological Opinion on the pollock, Pacific cod, and Atka mackerel fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska.

The Council has previously been advised that programmatic consultations (and their resulting biological opinions) should be re-evaluated about every five years. The November 2000 Biological Opinion (FMP BiOp) on the Fishery Management Plans for the BSAI and GOA is now approaching 5 years old, although subsequent opinions have evaluated new information and thus kept the FMP BiOp current. The goal of this paper is to highlight the pertinent issues in order to assist the Council in determining whether reinitiation of consultation on the FMP BiOp is necessary or desirable.

In recent meetings, the public has testified before the Council to request the reconsideration of the current Steller sea lion (sea lion) protection measures. Some believe the FMP BiOp is out of date and no longer applicable to the current condition of the federal fisheries. In addition, some have voiced an opinion that new information on sea lions and fishery interactions has dated the analyses and conclusion in the FMP BiOp. For example, changes in how fisheries are prosecuted and changes in our understanding of certain groundfish stocks have occurred since 2000, plus changes have been made to some fisheries through informal consultation.

Numerous proposals have been made to the Council to amend the sea lion conservation measures considered in the October 2001 Biological Opinion (2001 BiOp). These include a request by the

St. George Traditional Council to review and reconsider protection measures around St. George Island including the haulout at Dalnoi Point. Other suggestions for changes include a proposal by the Alaska Board of Fisheries to open nearshore areas (state waters; 0-3 nm from shore) in Steller sea lion critical habitat to a state water pollock fishery in certain waters of the Central and Western GOA and in the Aleutian Islands. NMFS has determined that some of these types of changes would likely require formal consultation. To facilitate such changes, the Council may wish to consider the entire suite of changes it would like to make in the BSAI and GOA fisheries, then determine whether it would like to recommend proceeding with a new consultation (with appropriate consideration of current information on the biology of Steller sea lions and their critical habitat).

The Formal Section 7 Consultation Process Under The ESA

Under provisions of section 7(a)(2)¹ of the ESA, a federal agency that authorizes an activity that may impact a listed species must consult with NMFS (or the U.S. Fish & Wildlife Service) to ensure that its actions will not jeopardize the continued existence of that listed species nor destroy or adversely modify its designated critical habitat. In the case of federal groundfish fisheries, the Sustainable Fisheries Division of NMFS (OSF) represents the action agency, and consults with the Protected Resources Division (PRD) with determinations made by the Regional Administrator of NMFS for the Alaska Region. In this case (FMP BiOp), the "proposed action" under consideration is authorizing the Fishery Management Plans for the groundfish fisheries of the GOA and the BSAI and their implementing regulations. The Council's role here would be to define the proposed action and recommend that the consultation process be reinitiated.

Once a consultation has already been prepared on an action (e.g., the FMP BiOp, or the 2001 BiOp), certain conclusions about impacts to listed species and critical habitat and other determinations under the ESA have already been reached. When reinitiating such consultations, the process is somewhat different than if no consultation had ever been conducted. For example, it has already been determined that certain federal groundfish fisheries adversely affect Steller sea lions and salmon (as articulated in the respective Biological Opinions) which is why an incidental take permit is provided to allow that take which would otherwise be unlawful under section 9² of the ESA. In contrast, the FMP BiOp concluded that the federal groundfish fisheries were not likely to have adverse impacts on other listed species such as whales and turtles.

Reinitiation of formal consultation must occur if (50 CFR §402.16):

¹SEC. 7.

(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.-

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (b) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

²SEC. 9.

(a) GENERAL.-

(1) Except as provided in sections 6(g)(2) and 10 of this Act, with respect to any endangered species of fish or wildlife listed pursuant to section 4 of this Act it is unlawful for any person subject to the jurisdiction of the United States to-

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 4 of this Act and promulgated by the Secretary pursuant to authority provided by this Act.

- (a) the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) a new species is listed or critical habitat designated that may be affected by the identified action.

Thus, the Council may request reinitiation of formal consultation based on any of these four criteria; in the case currently being contemplated by the Council, the issues are primarily proposed new actions giving rise to effects not previously considered.

If a request for reinitiation of consultation is made for the FMP BiOp based on, for example, changes to the action, then the following information must be provided to NMFS, usually in the form of a "biological assessment", in order to begin the official process of consultation³:

- A description of the action to be considered
- A description of the specific area that may be affected by the action
- A description of any listed species or critical habitat that may be affected by the action
- A description of the manner in which the action may affect any listed species or critical habitat and an analysis of cumulative effects
- Relevant reports, including any EISs, EAs, or biological assessments
- Any other relevant information on the action, the affected species, or critical habitat

The consulting agency (PRD) then determines if the package is complete, and notifies the action agency (OSF) that this information is sufficient to begin consultation. From the date that formal consultation is initiated, NMFS is allowed 90 days for the consultation and another 45 days to prepare and submit a biological opinion. This 135-day time period can be extended by mutual agreement. For a reinitiation of the FMP BiOp and reconsideration by the Council of the proposed action, the statutory time period likely will not be sufficient given the potential complexity of the process. Therefore, OSF would need to work out a schedule with PRD to complete the consultation and biological opinion.

For changes to the regulations or the FMPs, the Council will need to prepare an appropriate NEPA document (i.e., EA or EIS), which will describe the likely impacts to the environment. The EA or EIS can be prepared concurrently with the consultation process, and should include all of the required elements of a biological assessment. The consultation should be concluded before the final EA or EIS is issued. An integral part of this process and timeline is the presentation of a draft biological opinion to the Council for review and comment.

The outcome of the consultation will be a biological opinion that will state the opinion of the consulting agency as to whether or not the proposed action is likely to jeopardize the continued existence of any listed species such as Steller sea lions or result in the destruction or adverse modification of critical habitat. If the action is determined to jeopardize any listed species or

³ 50 CFR 402.12 and 402.14

adversely modify critical habitat, one or more reasonable and prudent alternatives (RPAs) would be provided by NMFS. The RPAs modify the proposed action such that jeopardy and adverse modification are then avoided.

For listed species likely to be taken incidental to the action, an incidental take statement (ITS) may be provided as long as that take does not jeopardize the species. The take authorized in an ITS is take that is incidental to the action and non-intentional. The ITS exempts the action agency (and those persons operating within the proposed activity; e.g. fishermen) from provisions in section 9 of the ESA that prohibit the take of a listed species. An ITS typically provides for the take of a species as either the amount or the extent of take. The groundfish fisheries currently operate under two incidental take statements. The ITS in the FMP BiOp covers fisheries other than pollock, Pacific cod, and Atka mackerel, while the Biological Opinion prepared in 2001 provides coverage for those three fisheries.⁴ Incidental take of salmon is provided for in the FMP BiOp.

FMP or Project Level Consultation

If the Council intends to consider substantial alterations to the current Steller sea lion conservation measures, it would be advisable for OSF to request reinitiation of consultation on the FMP BiOp. Given the time that has passed since the FMP BiOp was published and the perceived need to revisit the analyses made in that document, it would be appropriate to reconsider an FMP level consultation as opposed to a consultation on the three fisheries that were subject to the 2001 BiOp. This FMP level consultation likely would also address the impacts and analyses contained in the 2001 BiOp and its Supplement. This ultimately would allow for the issuance of a single Biological Opinion governing all of the groundfish fisheries authorized under the FMPs and their implementing regulations. NMFS prefers this approach to a more limited consultation on the 2001 BiOp.

Action Before the Council

Determine if the Council wishes to recommend reinitiation of section 7 consultation. Factors the Council may wish to consider include the applicability of the four "triggers" at 50 CFR 402.16 (see previous page of this memo), level of public support, time and staff resources, and other Council priorities.

Determine the Proposed Action

The first major task is for the Council to develop or define the proposed action. Determining the proposed action is an important step as it establishes the nature of the consultation and the bounds within which the consultation will occur. The Council should determine how this

⁴ The FMP level BiOp and the 2001 BiOp ITSs allows direct incidental take of Steller sea lions of 30 and 15 animals per year for all BSAI and GOA groundfish fisheries, respectively, and some unspecified level of sub-lethal harm; the ITS provides exemption from the prohibitions of ESA Section 9 as long as NMFS complies with specified Reasonable and Prudent Measures and associated Terms and Conditions contained in the ITS.

process will occur. Note that consultation is not initiated until the proposed action is developed. The current BiOps remain in force until the new opinion is completed and published.

Developing the proposed action could be done through a Council committee, such as the Steller Sea Lion Mitigation Committee (SSLMC), or it might be accomplished through a process involving the entire Council. Public participation should be an important consideration in the development of a new proposed action, if that is the desired approach. The Council could choose to recommend a consultation only on the action as is currently implemented, that is, the current FMPs and regulations, as amended since the FMP BiOp. The Council may choose a more broad reconsideration of all conservation measures that might be developed through a committee process as well as new scientific information on SSLs and their interactions with fishing activities. Other mechanics of the process should also be considered, such as whether the Council or its committee would issue a call for proposals, and what might be the bounds of, or justification required in, such proposals.

The initial process of developing the proposed action could take some time. Numerous Council meetings may be needed to develop the action. The Council could set a schedule for this step, or start the process and then determine a schedule at a subsequent meeting. After these steps are completed, the Council can review the proposals and determine what elements it wants to include. A starting point could be the action evaluated in the FMP BiOp, as modified in the 2001 BiOp and in subsequent amendments to the FMPs and regulations. The Council could then add or subtract elements that the Council feels are appropriate.

The Council could consider some or all of the elements that have been brought to the Council and discussed in recent years by industry, communities, the State, or the Council:

- Earlier start of the EBS pollock "A" season
- Change in P. cod fishing dates in the EBS
- Dalnoi Point SSL trawl closures on St. George Island
- Nearshore pollock fishery opportunities in AI region for the Aleut Corp
- BOF proposals for State pollock (parallel) fisheries in the central and western GOA and AI

An important issue that will need to be worked out early in the process is the role of the State of Alaska. One approach is for the Council to request cooperation of the State such that the State-managed parallel groundfish fisheries will be part of the proposed action. All other State fisheries, including State groundfish fisheries that are not parallel fisheries, could be addressed in the cumulative effects section of the biological opinion. However, the State could request that other State fisheries such as the Pacific cod, herring, and salmon fisheries also be included in the consultation. A compelling rationale could be made for this approach, although it would complicate the consultation. The benefits include section 9 coverage for the State as well as a more comprehensive approach to Steller sea lion conservation and recovery and fisheries management in Alaska.

As the Council considers the approach and develops its proposed action, it should be aware that the action must avoid jeopardy and adverse modification. The larger the deviation from the

current measures, the more likely that jeopardy issues could develop during the consultation phase. The NMFS PRD would participate in this process and would provide guidance to the Council or its committee on measures that will likely not be feasible under the jeopardy and adverse modification standards.

Since the FMP BiOp, new information has become available related to the causes of the current decline and its possible relationship to commercial fisheries. The most notable change is to the perspective on which areas around a rookery or haulout are most important. An expanded discussion of these factors can be found in the 2001 BiOp's 2003 Supplement in section IV(B). In general NMFS' guidelines for conservation are the following:

Closure areas:

- 0-3 nm closed 100%
- 3-10 nm closed 75%
- 10-20 nm closed 50%
- Critical habitat overall, including foraging areas closed 50%

Temporal dispersion:

- Seasonal (first half/second half) apportionment of catch at 50/50

Catch limitations (localized depletion):

- Critical habitat catch limits (or other) for those fisheries known to be concentrated in space and/or time

NMFS' hierarchy of concern (from most to lesser) by gear type has been trawl, fixed gears (pot and hook-&-line), and then jig gear (see 2001 BiOp's 2003 Supplement section IV(B)). NMFS also views juveniles and adult females as the most important component of the population when considering changes to conservation measures.

This process would likely involve the use of trade offs in order to maintain a sufficient level of conservation while providing for fishing opportunities in some areas and times that would not otherwise be available. It is not likely that the BUMP analysis tool⁵ will be used again, although the SSLMC started development of such a tool for review by the SSC, but stopped work at the Council's request. NMFS would participate in the process of evaluating proposed changes, but there is no trade-off analysis procedure currently available for use by the Council.

The Alternatives for Consideration

The no action alternative would represent the status quo, i.e., the current FMPs and implementing regulations. This includes those changes made since the FMP BiOp.

⁵ The BUMP analysis tool was a qualitative model used during the work by the Council's RPA Committee to evaluate the degree to which alternative fishery management measures would impact the Steller sea lion population trajectory. See DeMaster (2001) unpublished white paper.

The Council then may recommend several alternatives, including eventually its preferred alternative, or the proposed action, which would consist of the above action with changes as proposed by the Council. In order to comply with the requirements of NEPA and other laws, the Council may need to consider several alternatives.

Council Involvement in the Consultation

While the consultation would be officially between Sustainable Fisheries and Protected Resources Divisions, the Council would be integrated into the process. The Council could use its SSLMC to work out the details in the proposed alternatives. In this case, NMFS PRD and OSF staff would participate in that committee's activities.

Other Issues to Consider

SSL Recovery Plan

NMFS intends to complete the revised Steller Sea Lion Recovery Plan before finalizing the next biological opinion. The recovery plan will provide a context for recovery such that decisions about jeopardy and adverse modification can be made with the knowledge of the recovery criteria and the recovery strategy. The draft plan is expected to be available for review by early 2006. The recovery plan will be helpful to the Council regarding necessary actions to facilitate recovery of sea lions and the most important threats limiting recovery.

Redesignation of sea lions under the ESA

The Steller sea lion recovery plan will identify delisting and downlisting criteria regarding the endangered and threatened status of the western and eastern populations of Steller sea lions. A status review may be recommended in the recovery plan. This process of finalizing the recovery plan and initiating a status review will take some time, and could occur at the same time as the consultation process.

Conservation of Steller sea lions

It is important to consider that during the consultation, not only will changes to the current action be considered, but also those actions that would be necessary to avoid jeopardy and adverse modification. Since the last consultation, there have been many changes to fish stocks, new research publications and findings, and changes to the action such as the TAC setting process, etc. Also there are new data on the structure and the dynamics of the Steller sea lion population, and the Recovery Plan will provide additional insights into important measures for future SSL management. Combined, this information could lead to new approaches to groundfish fishery management in the Alaskan EEZ. All of these issues would be integral to the process of reinitiating consultation on the FMP BiOp.

North Pacific Fishery Management Council

AGENDA B-6(h)
OCTOBER 2005

Stephanie Madsen, Chair
Chris Oliver, Executive Director



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February 28, 2005

Michael Payne
Chief, Marine Mammal Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Payne:

As required by the Marine Mammal Protection Act, the National Marine Fisheries Service (NMFS) published the draft List of Fisheries for 2005 (LOF) on December 2, 2004. The North Pacific Fishery Management Council reviewed the Proposed Rule (69 FR 70094) and received comments from its Statistical and Scientific Committee (SSC) and the public during its December 2004 and February 2005 meetings. The Council hereby submits its comments on the Proposed Rule; our comments fall into two general categories: A) The process for public review of the LOF, and B) Procedures for analysis of data for changing the category listing for five groundfish fisheries in the North Pacific. The Council asks that NMFS consider the following comments in finalizing the LOF for 2005 and when preparing future Lists.

A. The Public Review Process

The Council is concerned about the small amount of time provided to Councils and the public to meaningfully review the draft LOF, the Federal Register notice, and particularly the data and reports used by NMFS and their resultant rationale for assigning various fisheries to categories. The Council appreciates NMFS granting an extension of time to provide comments on the Proposed Rule, and we understand NMFS is considering the preparation of an analysis of the environmental effects of the LOF pursuant to the requirements of the National Environmental Policy Act (NEPA). The Council supports the decision by NMFS to prepare this NEPA analysis since some of the proposed changes for 2005 could have impacts on some Council/NMFS-managed fisheries in the North Pacific. The Council requests an opportunity to review this NEPA document, take public comment, and to provide comments to NMFS; we also would like another opportunity to comment on the LOF for 2005 after reviewing the NEPA analysis.

B. Analysis Supporting Fishery Categorization

NMFS is considering changes in the LOF that will affect certain Alaskan groundfish fisheries; the agency proposes to place the following fisheries into Category II:

- BSAI Pacific cod longline
- BSAI Greenland turbot longline
- BSAI pollock trawl
- BSAI flatfish trawl
- Bering Sea sablefish pot

The Proposed Rule also includes a proposal to add two marine mammal stocks to the list of marine mammal species and stocks that interact with the BSAI Pacific cod longline fishery: eastern North Pacific resident killer whale and eastern North Pacific transient killer whale.

The Council's comments on NMFS' analysis procedure are based on a review by its SSC, and fall into four general categories: serious injury/mortality (SIM) extrapolation methodology, conditions under which SIM data are collected, the representativeness of SIM data, and fishery interaction with overlapping marine mammal stocks. These comments generally focus on the analytical procedures followed by scientists at the Alaska Fisheries Science Center related to fishery interactions with marine mammal stocks in the Alaskan Exclusive Economic Zone.

1. Extrapolating SIM Incidents to an Entire Fishery

Incidents of serious injury and mortality in commercial fisheries are rare. Sampling rare events is problematic. In practice, unusual observations are often characterized as "outliers" and omitted from data used for estimation. While incidents of mortality and serious injury are unusual, it would not be appropriate to treat observed incidents as "outliers". When unusual observations are retained in data used for estimation, they can have a pronounced influence on the resulting estimates. The best defense against unusual observations exerting undue influence on the resulting estimates is to increase sample size as much as practicable. This would argue for basing the estimates on an average of the full time series of observations.

2. Fishery Conditions Under Which SIM Data are Collected

Data used in the LOF determination may have been generated under conditions that are not characteristic of current fisheries. For federally managed fisheries, this problem involves a tradeoff of increased observations over a longer time series and changes in the characteristics of fishing gear, and how and where that gear is used. The choice of a 5-year window is reasonable, but so would a longer or shorter window. The problem with many state-managed fisheries is the lack of recent verifiable information about marine mammal mortalities and serious injuries. Unless new information is developed for these fisheries through a verifiable sampling program, there does not seem to be a good alternative to continued use of estimates based on old information. Because estimated mortalities and serious injuries in state-managed fisheries affect overall estimates of mortality-serious injury for the state fisheries and related federally managed fisheries, it may be expedient to use funding earmarked for management of federal fisheries to develop a monitoring or sampling program for marine mammal mortalities in the state-managed fisheries.

3. Scaling Observed SIM Incidents to Unobserved Periods

Scaling from observed mortality to estimated mortality necessitates specific assumptions regarding the representativeness of observed hauls. These assumptions and the limitations of these assumptions are not unique to scaling observed mortality to estimates mortality; similar assumptions and limitations are at play in the estimation of target and incidental catches of fish. Specifically, it is assumed that the likelihood of incidence of serious injury or mortality is invariant across vessel size, fishing location, fishing time, gear configuration, etc. Concern about these types of limitations was instrumental to the decision to segregate the six fisheries defined in 2003 into the 22 fisheries defined for 2005. Because the area fished by unobserved vessels are not coincident with the areas fished by observed vessels, scaling observed mortality-serious injury incidents to include catches by unobserved vessels may not provide good estimates of overall mortality-serious injury incidents. Scaling observed incidents of mortality and serious injury from observed hauls to unobserved hauls on observed vessels may be less problematic. However, if observers are notified by crew whenever mortality-serious injury incidents occur, it may be

that all hauls are, in effect, observed for mortality and serious injury to marine mammals. If all hauls are, in effect, observed for mortality and serious injury to marine mammals, the observations are for the population of hauls and should not be expanded for unobserved hauls on observed vessels.

4. Fishery Interaction with Overlapping Marine Mammal Stocks

In the case of all five groundfish fisheries proposed for a change to Category II in the North Pacific, these fisheries reportedly interact with two whale stocks. Because these marine mammal stocks overlap in space and time, and because the patterns of overlap are not well understood, the analysts were not comfortable with assigning particular SIM events to either whale stock. During its October 2004 meeting, the Council's SSC suggested that one approach to this dilemma would be to weight the mortality-serious injury events by the probability that they involved marine mammals from particular population sub-units. The analysts have instead taken the stance that because they cannot rule out the possibility that particular mortality-serious injury events involved animals from particular population sub-units, the LOF determination with respect to each population sub-unit should allow for the possibility that mortality-serious injury event involved animals from that population sub-unit. While the approach taken by the analysts is not inappropriate for estimating the mortality-serious injury incidence for particular population sub-units, the Summary of Analysis should clearly note that it would not be consistent to sum the mortality-serious injury incidence across population sub-units. Samples taken from marine mammals killed incidental to fishing may help to assign particular mortality-serious injury incidents to particular population sub-units. While on-going research on the distribution of marine mammal stocks may help assign particular mortality-serious injury incidents to particular population sub-units, the lack of information about the stability of stock distributions over time may preclude using new information to assign historic mortality-serious injury incidents. In addition, the Council's SSC notes that research on the distribution of marine mammal stocks may lead to the definition of additional population sub-units.

During its February 2005 meeting, the Council received additional comments from its SSC. These comments reiterated the above four concerns, and detailed additional concerns. These SSC comments are provided in the attached, and the Council requests that NMFS consider them in its consideration of the LOF, not only for 2005 but also for subsequent years.

In summary, the Council is concerned about the overall impact of moving the five Alaskan EEZ groundfish fisheries from Category III to Category II. As the above comments suggest, there is uncertainty in NMFS' methodologies for assigning SIM incidents and extrapolating those incidents to an entire fishery. This uncertainty raises questions about the appropriateness of NMFS moving these five fisheries to Category II at this time until better data are generated. These and all groundfish fisheries under the Council's are now prosecuted under very different conditions than were extant in the 1990s. Rationalization programs have been instituted, and new management authorities have been developed that have collectively reduced the "race for fish" in the Alaskan EEZ, and thus promote more careful and directed fishing practices that avoid bycatch, reduce interaction with marine mammals and seabirds, and promote safety and economic stability.

The Council appreciates the opportunity to comment on this important issue.

Sincerely,

Stephanie Madsen
Chair

Attachment

DRAFT
MINUTES
SCIENTIFIC STATISTICAL COMMITTEE
February 7-9, 2005

The Scientific and Statistical Committee met during February 7-9, 2005 at the Madison Renaissance Hotel in Seattle, WA. Members present were:

Gordon Kruse, Chair	Pat Livingston, Vice Chair	Keith Criddle
Steve Hare	Sue Hills	Anne Hollowed
Terry Quinn	David Sampson	Farron Wallace
Doug Woodby	Mark Herrmann	Seth Macinko
Ken Pitcher	Franz Mueter	

Members absent:

George Hunt

Election of Officers

Gordon Kruse was elected Chair and Pat Livingston was elected Vice Chair.

B-7 Protected Species

Bill Wilson (Council staff) presented eight reports on protected resource issues. Robyn Angliss (NMML) presented additional information on the list of fisheries, and Ann Edwards (NRC Research Associate and visiting scholar at UW) presented information on the seabird – offal project. Public testimony was presented by Gerry Merrigan (Prowler Fisheries), Thorn Smith (North Pacific Longline Association), and Ed Richardson (Pollock Conservation Cooperative).

List of Fisheries for 2005

The SSC previously commented on the analyses and assumptions that went into the List of Fisheries for 2005 report in our October and December 2004 minutes. Four main issues were highlighted: (1) the sampling of incidents of serious injury and mortality of marine mammals, which are rare events, and the appropriate length of time series of observations to use to estimate the frequency of these rare events, (2) the need for observers to estimate the frequency of serious injury and mortality in state-managed fisheries, (3) the assignment of observed mortalities to more than one marine mammal stock per occurrence, and (4) the appropriateness of procedures used to estimate incidents of serious injury and mortality for unobserved hauls and fisheries. **The SSC feels that these issues remain to be addressed, but they are not easily resolved and the SSC intends to continue a dialogue with analysts to provide advice on their long-term solution.** Here, the SSC adds additional comment on these issues.

Measures of Fishing Effort

The SSC discussed the appropriateness of the use of total catch as a proxy for fishing effort. Given the data availability, it is understandable that catch has been used in this way, especially when aggregating across diverse gear types. However, now that some aggregate fisheries are being disaggregated into finer, discrete fishery units based on target species and gear, direct estimates of fishing effort units might be

used. **The SSC encourages the analysts to explore the use of direct measures of fishing effort (instead of using catch as a proxy for effort) in future analyses at least when and where possible.**

Sample Size

There is a trade off between sample size and precision of estimates of rates of incidents of serious injury and mortality. On the one hand, estimation of rates of occurrence by fishery has the potential to discriminate differential rates among various fisheries. On the other hand, splitting of limited data into finer fishery units leads to the possibility of generating biased estimates associated with small sample sizes. The same goes for the length of the time series used to estimate the frequency of rare events. The analysts provided good justifications for selecting a 5-year period (rather than, say, a 10-year period); one reason is that fisheries change over time so that historical rates may not apply to contemporary fisheries. However, use of a shorter time period can increase the influence of a single rare observation on the average used for estimation. **The SSC recommends that the analysts further consider the tradeoff between the desire for finer spatial and temporal resolution of incidental take estimates and the potential for introduced bias associated with small sample sizes used to make these estimates.**

Assignment of Individual Incidental Takes to more than One Stock

The SSC reconsidered the issue of assigning a particular take (e.g., killer whale) to more than one stock (e.g., transient vs. resident ecotype) for the affected fishery when it is uncertain to which marine mammal stock the take belongs. The approach taken was to assign the take to both stocks when the stock origin was uncertain. In such instances, another approach would be to apportion the take among stocks from a probabilistic weighting based on the observed proportions of the two ecotypes in the region in which the take occurred. The SSC noted that the particular approach used depends on the purpose of the analysis. For instance, if the goal is to obtain best estimates of takes by stock and fishery or to predict future takes, then the probabilistic approach may be most appropriate when data are adequate to estimate the proportions. If instead the goal is to estimate the maximum possible number of takes of a particular stock by a particular fishery, then the dual-assignment approach may be best because it is most conservative. **The SSC urges the analysts to clearly note the procedure used and its caveats, so that others using summary tables do not mistakenly double count the number of actual number of takes when stock of origin is uncertain.** Robyn Angliss noted that when genetic samples are taken, the take can be correctly assigned appropriately to the correct stock and the take is not listed under both ecotypes. The SSC anticipates that this "double-counting issue" will become less of a problem as the database of genetic samples is built and the database of confirmed stock identifications becomes more adequate.

Estimation Procedure for Total Take

Most of the SSC discussion concerned the statistical methods used to estimate the number of takes and the confidence interval for those estimates. **The SSC recommends that future analyses should address some additional considerations, including assumptions about the statistical distribution (e.g., discrete versus continuous, symmetrical versus asymmetrical) from which the sample is drawn. For instance, the common assumption that samples are taken from a continuous normal distribution can lead to a negative lower bound on the confidence interval. Of course, the number of takes cannot be less than zero. So, the analyst might want to consider a lognormal distribution or a censored normal distribution to ensure that the confidence interval does not include negative numbers.**

The SSC also discussed the effect of rounding the estimated number of takes to an integer (i.e., whole number of animals). **This procedure makes sense from a practical standpoint, but the SSC notes that this rounding requires that adjustments to the confidence interval need to be made. Moreover,**

the SSC would like to see an explicit statement of the rounding rule used to rounding up to a whole number of animals.

Finally, the SSC recommends that a more detailed discussion of strata (page 9 of Perez 2003) is needed, particularly regarding how the analysts calculated regional and annual estimates of incidental takes. The SSC was especially uncomfortable with the way in which unobserved takes were combined with observed takes. The SSC understands that takes volunteered by vessel crew during unobserved hauls occurred on vessels with observers only. The SSC is comfortable with the approach to extrapolate estimates of takes from the observed portion of a fishery to the unobserved portion of the same fishery, but the addition of volunteered (unobserved takes) is problematic and alters the statistical properties of the estimates in unknown ways, because the number of hauls represented by these volunteered accounts is undefined.

Other Issues

The SSC recommends that the analysis should use the most recent estimates of killer whale abundance for the area west of Kodiak. The estimates, based on considerable survey effort, indicate much larger populations than previously thought. Inclusion of these data would increase the estimate of PBR and might affect the classification of some fisheries.

The two documents reviewed by the SSC do not address the issue of serious injuries associated with entanglement and escape of marine mammals in active and discarded fishing gear and marine debris. Steller sea lions and northern fur seals are particularly vulnerable. This source of serious injury or mortality occurs regularly but the extent is unknown and difficult to estimate. It is likely this source of mortality could be much greater than the incidental take in commercial fisheries. Common entanglements include fragments of netting, packing bands, loops of line around the neck and ingested hooks from long-line fisheries and commercial and sport trolling. **The SSC recommends that future analyses should describe how the cumulative effects of all mortality sources have been taken into account.**

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 041108310-5222-03; I.D. 100104H]

RIN 0648-AS78

List of Fisheries for 2005

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of availability; proposed rule; reopening of public comment period.

SUMMARY: On December 2, 2004, the proposed List of Fisheries (LOF) for 2005 under the Marine Mammal Protection Act (MMPA) was published in the *Federal Register*. NMFS subsequently prepared a draft Environmental Assessment (EA) on the process for classifying U.S. commercial fisheries on the LOF. NMFS is reopening the comment period on the proposed 2005 LOF for an additional 60 days to allow the public to concurrently review and comment on both the draft EA and proposed 2005 LOF.

DATES: Comments must be received by October 24, 2005.

ADDRESSES: Send comments on the proposed 2005 LOF and draft EA to Chief, Marine Mammal Conservation Division, Attn: List of Fisheries, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. Comments may also be sent via email to 2005LOF.comments@noaa.gov or the Federal eRulemaking portal: <http://www.regulations.gov> (Follow instructions for submitting comments).

Comments regarding the burden-hour estimates, or any other aspect of the collection of information requirements

contained in the proposed rule, should be submitted in writing to the Chief, Marine Mammal Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 and to David Rostker, OMB, by e-mail at David_Rostker@omb.eop.gov or by fax to 202-395-7285.

Copies of the draft EA for this action are available on the NMFS Office of Protected Resources website, which is listed under the Electronic Access portion of this document.

FOR FURTHER INFORMATION CONTACT: Kristy Long, Office of Protected Resources, 301-713-2322; David Gouveia, Northeast Region, 978-281-9300; Juan Levesque, Southeast Region, 727-551-5779; Cathy Campbell, Southwest Region, 562-980-4060; Brent Norberg, Northwest Region, 206-526-6733; Bridget Mansfield, Alaska Region, 907-586-7642; Chris Yates, Pacific Islands Region, 808-944-2235.

Individuals who use a telecommunications device for the hearing impaired may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. Eastern time, Monday through Friday, excluding Federal holidays.

SUPPLEMENTARY INFORMATION:**Electronic Access**

The proposed 2005 LOF *Federal Register* notice and draft EA for this action can be downloaded from the NMFS Office of Protected Resources website at <http://www.nmfs.noaa.gov/pr/interactions/lof/>.

Background

On December 2, 2004, the proposed List of Fisheries for 2005 under the Marine Mammal Protection Act was published in the *Federal Register* (69 FR 70094). NMFS must categorize each commercial fishery on the LOF into one of three categories under the MMPA based on the level of serious injury and

mortality of marine mammals that occurs incidental to the fishery. NMFS must publish in the *Federal Register* any necessary changes to the LOF after notice and opportunity for public comment. In the proposed LOF for 2005, NMFS proposed several fishery classification, fishery name, and organizational changes. In particular, NMFS proposed to reclassify the California/Oregon thresher shark/swordfish drift gillnet (≥14 in. mesh) from Category II (occasional incidental mortality and serious injury) to Category I (frequent incidental mortality and serious injury) and to reclassify the Northeast bottom trawl, Mid-Atlantic bottom trawl, and five Alaska fisheries from Category III (remote likelihood of or no known incidental mortality and serious injury) to Category II. The five Alaska fisheries include the following: Bering Sea and Aleutian Islands (BSAI) flatfish trawl, BSAI Greenland turbot longline, BSAI pollock trawl, Bering Sea sablefish pot, and Gulf of Alaska Pacific cod longline.

NMFS extended the comment period on the proposed 2005 LOF for an additional 30 days (70 FR 776, January 5, 2005). In that *Federal Register* notice, NMFS also announced its intent to prepare an EA on the process for classifying fisheries on the LOF. NMFS is reopening the comment period on this proposed action to allow the public an opportunity to review and comment on the draft EA and supplement any previous comments on the proposed 2005 LOF. Therefore, NMFS is reopening the public comment period on the proposed LOF for 2005 for an additional 60 days.

Dated: August 22, 2005.

William T. Hogarth,

*Assistant Administrator for Fisheries,
National Marine Fisheries Service.*

[FR Doc. 05-16939 Filed 8-24-05; 8:45 am]

BILLING CODE 3510-22-S

Prepared by:
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
U.S. Department of Commerce



Pursuant to:
National Environmental Policy Act Section 102(2)(C)

DRAFT Environmental Assessment of the List of Fisheries Under Section 118 of the Marine Mammal Protection Act

August 2005

Abstract

In 1994, Congress amended the MMPA to address the incidental mortality and serious injury (bycatch) of marine mammals in U.S. commercial fisheries. MMPA section 118 established a system for classifying commercial fisheries according to their levels of marine mammal bycatch and created the take reduction plan (TRP) process to reduce that bycatch. The National Marine Fisheries Service (NMFS) is required to reexamine this classification of commercial fisheries, known as the List of Fisheries (LOF), at least annually and publish any changes in the *Federal Register*. This environmental assessment analyzes the process by which NMFS currently classifies U.S. commercial fisheries on the LOF. The preferred alternative, also the no action alternative, proposes to continue the current classification scheme. No significant impacts are anticipated as a result of the proposed action.

Please send comments on this environmental assessment to:

Michael Payne
Chief, Marine Mammal and Sea Turtle Conservation Division
Office of Protected Resources
National Marine Fisheries Service
Silver Spring, MD 20910
Phone: 301-713-2322
Fax: 301-427-2522
2005LOF.comments@noaa.gov

EXECUTIVE SUMMARY

Serious injury and mortality of marine mammals incidental to commercial fishing operations (bycatch) is a primary threat to many marine mammal species. In 1994, Congress amended the MMPA to address the incidental mortality and serious injury of marine mammals in U.S. commercial fisheries. MMPA section 118 established a system for classifying commercial fisheries according to their levels of marine mammal bycatch and created the take reduction plan (TRP) process to reduce that bycatch (NMFS 1995b, 1995c). The National Marine Fisheries Service (NMFS) is required to reexamine this classification of commercial fisheries, known as the List of Fisheries (LOF), at least annually and publish any changes in the *Federal Register* after notice and opportunity for public comment. This environmental assessment (EA) analyzes this fisheries classification process

NMFS has identified Alternative 1, the No Action Alternative as the preferred alternative for the proposed action. Alternative 1 would maintain the status quo, thus not presenting any changes to NMFS' current process for classifying U.S. commercial fisheries on the LOF. NMFS would continue to categorize each commercial fishery based on the two-tiered approach and the current definitions of Category I, II, and III fisheries.

Under the two action alternatives, Alternatives 2a and 2b, NMFS would use an alternate scheme to classify U.S. commercial fisheries according to the level of serious injury and mortality of marine mammals incidental to each fishery. Specifically, NMFS would continue to use a two-tiered, stock specific approach, but would change the definitions of Category II and III fisheries. Therefore, the action alternatives differ in the threshold (5% versus 0.5%) used to differentiate Category II fisheries from Category III fisheries.

Alternative 2a would define a Category II fishery as one that annually incidentally seriously injures or kills a particular stock at levels greater than 5% and less than 50% of that stock's PBR. Therefore, a fishery would be classified in Category III if less than 5% annual mortality and serious injury of a stock occurs incidental to that fishery.

Alternative 2b would define a Category II fishery as one that annually incidentally seriously injures or kills a particular stock at levels greater than 0.5% and less than 50% of that stock's PBR. Therefore, a fishery would be classified in Category III if less than 0.5% annual mortality and serious injury of a stock occurs incidental to that fishery.

Alternative 2a would potentially result in the fewest number of fisheries classified in Category II and therefore, fewer fisheries would potentially be required to reduce bycatch through take reduction planning. Further, if these fisheries were not required to have observer coverage, NMFS's ability to accurately estimate fisheries bycatch would diminish. Alternative 2a would be the least protective of marine mammal stocks and thus not consistent with the objectives of the MMPA.

Alternative 2b would potentially result in the greatest number of fisheries classified in Category II and therefore, more fisheries would potentially be required to reduce bycatch through take reduction planning. Under this conservative approach, Alternative 2b potentially protects the greatest number of marine mammal stocks. However, regardless of the number of fisheries in

Category II, NMFS is limited with respect to how many fisheries could actually be addressed through take reduction planning. Thus, in terms of conservation impacts, Alternative 2b does not differ from the No Action alternative.

Because Alternative 2a would affect the greatest number of fisheries, it would have the largest number of potential, minor, direct and indirect, negative impacts on fishery socioeconomics. Alternative 2b would have the fewest of such impacts, while Alternative 1 would result in no new impacts. Under all alternatives, impacts on fishermen are expected to be minor. Generally, the opportunity costs are lost fishing time and potential income while a take reduction team meets. The opportunity costs to all fishery participants would result from potential take reduction measures, such as time and area closures, that may reduce their fishing effort. Direct costs to fishers would be based on future take reduction plan (TRP) measures. All future TRP measures would be analyzed in subsequent NEPA documents before being finalized. In addition to time and area restrictions as mentioned above, such measures could include gear modification or replacement, which would likely result in direct costs to the fishermen as they would have to alter their gear or purchase new types of gear.

The preferred alternative, Alternative 1, would not result in any significant, adverse impacts on the human environment, including protected marine populations, commercial fisheries, fishermen, or other regulatory programs. None of the alternatives would be likely to adversely affect essential fish habitat or species listed under the Endangered Species Act.



U.S. FISH AND WILDLIFE SERVICE
Region 7 - Alaska
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News

05-19

For Immediate Release
August 9, 2005

Contact: Bruce Woods (907) 786-3695

**U.S. FISH AND WILDLIFE SERVICE LISTS NORTHERN SEA OTTERS IN SOUTHWEST ALASKA AS
"THREATENED" UNDER ENDANGERED SPECIES ACT**

The southwest Alaska Distinct Population Segment of the northern sea otter (*Enhydra lutris kenyoni*) was designated as a threatened species today by the U.S. Fish and Wildlife Service and placed under the protection of the Endangered Species Act (ESA.) This means that any Federal agencies that fund, authorize or conduct any activities which might affect this population of sea otters must consult with the Service under Section 7 of the Endangered Species Act before proceeding. Individuals who believe that activities they may conduct might harm these sea otters are asked to contact the Service to inquire about permits.

The Service has also proposed a special rule associated with Alaska Natives' traditional and cultural uses of this population of sea otters. This special rule would align provisions relating to the creation, shipment, and sale of authentic Native handicrafts and clothing by Alaska Natives under the ESA with what is already allowed under the Marine Mammal Protection Act. The proposed rule would provide for the conservation of sea otters, while at the same time accommodating Alaska Natives' subsistence, cultural, and economic interests. This proposal was published in the Federal Register today, and public comments are requested. Comments may be submitted to: fw7_swakseaotter@fws.gov.

A Proposed Rule regarding the listing was published in the Federal Register on February 11, 2004. Following that publication, the Service accepted comments during a 120-day public comment period (twice the normal length), which closed on June 10, 2004. Of the 6,770 comments received 6,743 supported listing, 16 comments opposed listing, and 11 neither supported nor opposed the action but instead commented upon possible ramifications.

In addition to holding the comment period, the Service conducted public meetings at six locations in Alaska and a public hearing in Kodiak, Alaska. The Final Rule, published today in the Federal Register, was updated to reflect comments and information received during the public comment period, public hearings and public meeting. Substantial comments regarding the ruling are discussed in the published Final Rule, as well. The designation will become effective 30 days after today's publication.

Under the ESA, "species" is defined broadly to include species, subspecies, and also to include Distinct Population Segments, or DPS, of vertebrate species. A DPS is a portion of a vertebrate species or subspecies that is discrete from the remainder of its taxon and also is significant to that taxon. The ESA defines a "threatened" species as one that is likely to become endangered in the foreseeable future. An "endangered" species is defined as being in danger of extinction throughout all or a significant portion of its range.

The Final Rule describes the southwest Alaska DPS of the northern sea otter as occurring in nearshore waters from the Aleutian Islands to Cook Inlet, including waters adjacent to the Aleutians, the Alaska

Peninsula, and the Kodiak archipelago. This corresponds to the range of the southwest stock of sea otters recognized in 2002 by the Service in accordance with provisions of the Marine Mammal Protection Act. Two other stocks of sea otters in Alaska that also were recognized in 2002, the southcentral and southeast stocks, are believed to be stable or increasing and are not included in the Final Rule published today.

Between the mid 1700s and the early 1900s, commercial hunting of sea otters brought the entire species to the brink of extinction. When they became protected from commercial harvest in 1911 under the International Fur Seal Treaty, only 13 small remnant populations were known to still exist, including six in southwest Alaska. Following this protection, otters from 11 of these populations gradually recovered and recolonized their former range in southwest Alaska and some other portions of their historic range.

A substantial decline in the southwest Alaska sea otter population appears to have begun in the mid- to late 1980s. In the Aleutians, there were approximately 55,000 to 74,000 sea otters in the mid-1980s, representing almost half of the world's estimated population at that time. Aerial surveys since that time, however, indicate a progressive decline in the number of otters in the Aleutians, where the current population is estimated to be less than 9,000 animals. Survey results also show substantial declines have occurred in the Alaska Peninsula, where the counts of sea otters have declined by more than 65 percent since the mid 1980s. In the Kodiak Archipelago, surveys indicate the number of otters has declined more than 55 percent since the late 1980s. Overall, the DPS has declined an estimated 56 to 68 percent over the past 10 to 15 years, and recent surveys (in 2003-2004) indicate the decline is continuing over most of the population's range.

The cause of the population decline is not clear. Production of young does not appear to be reduced, nor is there evidence that starvation, disease, or contaminants are involved. There also is no evidence that entanglement in commercial fishing gear or competition with fishermen for prey species is playing a significant role in the decline, and annual subsistence harvest by Alaska Natives is believed to be too low to contribute significantly to the decline. Some evidence points to predation by orca whales as a possible cause of the decline in the Aleutian Island chain. However, additional research will be needed before the cause of the decline can be confidently identified.

During the 120-day public comment period, Alaska Natives, Organizations, and Tribes expressed concerns that the listing would limit traditional and cultural uses of this sea otter population that are allowed under the exemptions included in the Marine Mammal Protection Act. As noted above, subsistence harvest is not thought to contribute significantly to the decline. Therefore, the Service has proposed the special rule announced above to permit traditional Alaska Native uses of the population to continue.

The Final Rule listing the southwest DPS of the otter as threatened does not include a proposal for designating critical habitat. As explained in the Proposed Rule, critical habitat is not determinable at this time. As part of the request for public comments on the proposal to list the DPS, the Service sought information regarding features and specific areas that the Service should consider for a future critical habitat proposal. If the Service does propose critical habitat for the DPS in the future, the public would have an opportunity to comment on such a proposal.

Now that the Alaska DPS of the sea otter is listed as threatened under the ESA, a recovery plan will be developed that will bring together efforts by Federal, State, Alaska Native groups, local agencies, and private entities for the conservation of the DPS. A copy of the final rule and, other information about this threatened sea otter population, is available at <http://alaska.fws.gov/current.htm>.

You can subscribe to the U.S. Fish and Wildlife Service, Alaska Region listserver to have our press releases sent to your e-mail address automatically by sending a message to: listserv@www.fws.gov. Please indicate that you would like to subscribe to FWS-Alaska news and give your name in the body of the message.

The U.S. Fish and Wildlife Service is the principal federal agency responsible for conserving, protecting, and enhancing fish, wildlife, and plants and their habitats for the continuing benefit of the American people. The Service manages the 95-million-acre National Wildlife Refuge System, which encompasses 542 national wildlife refuges, thousands of small wetlands and other special management areas. It also operates 69 national fish hatcheries, 64 fishery resource offices, and 81 ecological services field stations. The agency enforces federal wildlife laws, administers the Endangered Species Act, manages migratory bird populations, restores nationally significant fisheries, conserves and restores wildlife habitat such as wetlands, and helps foreign governments with their conservation efforts. It also oversees the Federal Aid program that distributes hundreds of millions of dollars in excise taxes on fishing and hunting equipment to state fish and wildlife agencies.

- FWS -

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visit our home page at <http://www.fws.gov>*



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
P.O. Box 21668
Anchorage, Alaska 99502-1668

September 30, 2005

Art Nelson
Chairman of the Alaska Board of Fisheries
900 West 5th Avenue, Suite 400
Anchorage, Alaska 99501

Dear Mr. Nelson,

This letter is in response to issues raised during the August 30, 2005 meeting of the Interim Joint Protocol Committee (committee) of the Board of Fisheries (BOF) and North Pacific Fishery Management Council (Council). At that meeting you requested that the National Marine Fisheries Service (NMFS) review the revised proposals for pollock fisheries in the Aleutian Islands and in the western Gulf of Alaska near Jude Island, provide a summary of the rationale for previous NMFS guidance on other proposals discussed by the Committee, and provide additional information regarding the consultation process under the Endangered Species Act (ESA) and the potential implications for Federal fisheries if the BOF moves forward on proposed changes to pollock fisheries in State waters. This document is intended to summarize previous correspondence and provide additional background information to inform the BOF before it takes action on these proposals. In general, proposals to modify the Steller sea lion conservation measures by reducing the amount of area closed to fisheries for pollock, Pacific cod, or Atka mackerel would result in the reinitiation of consultation under the ESA.

Interim Joint Protocol Committee

The committee was formed to facilitate the development of a proposal to open portions of Steller sea lion critical habitat¹ in the Aleutian Islands (AI) to pollock fishing without triggering a reinitiation of the 2001 Biological Opinion. The committee met four times between May and August of 2005 to determine which proposals might go forward without triggering formal consultation. The committee reviewed the consultation process under the ESA and generally agreed that it's unlikely that a jointly managed AI fishery could be implemented without triggering formal consultation (details described below). However, the committee members did request NMFS' review of two proposals for the Gulf of Alaska (GOA) pollock fishery which were thought to have less of an impact on Steller sea lions.

NMFS provided two preliminary written decisions to the committee. The first was that the Central GOA proposal (with some changes) would not cause reinitiation of consultation. However, the second proposal for the western GOA (Jude Island) would likely trigger a reinitiation of consultation. After these analyses were provided in July and August, and prior to the August 30 meeting, the committee again modified the AI and Jude Island proposals. The modifications were intended to mitigate the potential adverse effects on Steller sea lions described by NMFS. Unfortunately, insufficient time and staff resources were available for NMFS to respond by the end of August. A description of these modified proposals and NMFS' response are provided below.

¹ Critical habitat is listed at 50 CFR § 226.202.



Background on consultation under the ESA

All Federal actions that may affect listed species under the ESA, including management of groundfish fisheries, must be reviewed under section 7(a)(2) of the ESA. In doing so, each Federal agency must insure that its actions do not jeopardize the existence of threatened or endangered species or destroy or adversely modify their critical habitat. Federal fisheries in Alaska have been formally consulted on under section 7 at both the fishery management plan level (2000 Biological Opinion) and at the fishery specific project level (2001 Biological Opinion and 2003 Supplement).

The Federal and State parallel fisheries in Alaska currently operate under a series of formal section 7 consultations:

- November 2000 Biological Opinion on the fishery management plans and associated regulations for the groundfish fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska.
- October 2001 Biological Opinion on the federally managed pollock, Pacific cod, and Atka mackerel fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska and parallel fisheries for pollock, Pacific cod, and Atka mackerel as authorized by the State of Alaska within 3 nm of shore.
- June 2003 Supplement to the October 2001 Biological Opinion on the pollock, Pacific cod, and Atka mackerel fisheries in the Bering Sea and Aleutian Islands Area and the Gulf of Alaska.

Because a series of consultations currently exist for the Steller sea lion conservation measures² which insure protection for Steller sea lions, any changes to the action (groundfish fishery) must be evaluated to determine whether the consultations would remain valid or would need to be reinitiated in order to update them with the proposed changes. Regulations at 50 CFR § 402.16(b) describe a series of triggers, which when met, would require the Federal agency to reinitiate consultation under section 7 of the ESA:

- (a) the amount or extent of taking specified in an incidental take statement is exceeded;
- (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) a new species is listed or critical habitat designated that may be affected by the identified action.

The third trigger (c) above applies to the proposals being considered by the BOF for changes to State parallel pollock fisheries, which were previously consulted on under the 2001 Biological Opinion. The expert agency (NMFS) is required to determine whether the proposed change to the action consulted on would modify the action in a manner that would cause an effect to Steller sea lions or their critical habitat that was not considered in previous biological opinions (2001 Biological Opinion). Generally, if the potential effect is discountable, insignificant, or completely beneficial then reinitiation of consultation would not be required.³

The ESA does not envision a process by which actions are extensively modified through informal consultations. Although some committee members expressed a desire to implement the AI

² Steller sea lion conservation measures are at 50 CFR § 679.

³ See the ESA Section 7 Consultation Handbook at page 3-12 (1998).

pollock fishery and other changes without reinitiating consultation, NMFS does not believe that this approach would be consistent with the ESA. In most cases, changes to the pollock fisheries will require formal consultation unless the activities can be shown to be discountable, insignificant, or completely beneficial as described above. Given that the State water pollock fisheries occur within critical habitat and have been determined by NMFS to adversely affect Steller sea lions (2001 Biological Opinion), changes to these fisheries that result in determinations of insignificant effect will be unlikely.

The ESA requires the examination of likely adverse interactions between humans and listed species through the formal consultation process under section 7(a)(2). Formal consultation results in the expert agency providing a document termed a "biological opinion." In that opinion, NMFS must determine whether the proposed action is likely to jeopardize the continued existence of a listed species, or adversely modify or destroy designated critical habitat. In contrast to the informal consultation process and reinitiation trigger, the jeopardy/adverse modification standard requires a substantially greater level of impact to the listed species or its critical habitat before a proposed action is considered to have exceeded that standard. Thus, while many proposed actions may require formal consultation (due to a likely adverse affect), only a fraction of those actions will actually exceed the jeopardy/adverse modification standard.

The current proposals for pollock fisheries in the AI and GOA would take place entirely within State waters. Because these proposals are non-Federal, the action (a State fishery) would not require consultation under section 7 of the ESA (i.e., non-Federal actions are exempt from the requirements of section 7). However, State managed parallel fisheries underwent consultation in the 2001 Biological Opinion. If changes were made to State parallel fishery regulations, and a new consultation was triggered for the Federally managed fisheries, then it is likely that the opinion would no longer cover the parallel fisheries (unless the State again requested to be a party to that consultation).

Considerations when determining potential impacts on Steller sea lions

In 2001, groundfish fishery regulations were implemented to reduce fishery interactions with Steller sea lions based on a variety of information including the at-sea distribution of Steller sea lions (i.e., satellite telemetry data). Subsequently, new regulations were implemented in 2002 as outlined in the 2001 Biological Opinion and its 2003 Supplement. These regulations relied on measures similar to those historically employed from 1991-2000: establishment of zones in portions of critical habitat that excluded certain fisheries, temporal/spatial allocations of catch to disperse fisheries and reduce the likelihood of localized depletion of prey, and catch limits in some areas.

The court-ordered remand of the 2001 Biological Opinion resulted in the 2003 Supplement, which compared the distribution of groundfish fisheries in 1999 and 2002. These years were chosen because the 2000 BiOp had found that the 1999 groundfish fisheries for Pacific cod, pollock, and Atka mackerel (as a whole) jeopardized the continued existence of the western distinct population segment (DPS) of Steller sea lion and adversely modified its critical habitat. Fisheries in 2002 were the first conducted under the modified suite of measures designed in 2001 to avoid jeopardy and adverse modification. The comparison of fishery distributions between 1999 and 2002 in the 2003 Supplement revealed that the conservation measures, for the most

part, met their objectives for the pollock fisheries in the Gulf of Alaska. NMFS' guidelines for Steller sea lion conservation and fisheries management⁴ are the following:

Closure areas (distance from a listed rookery or haulout site):

0-3 nm closed 100%

3-10 nm closed 75%

10-20 nm closed 50%

Critical habitat overall, including foraging areas closed 50%

Temporal dispersion:

Season apportionment of catch at least 50/50

Catch limitations (to avoid localized depletion):

Critical habitat catch limits (or other) for those fisheries known to be concentrated

Gear Types:

NMFS' hierarchy of concern by gear type is trawl, fixed gears (pot and hook-&-line), and then jig gear

Nutritional stress is likely a contributing factor to the current decline of the western DPS of Steller sea lion. Our understanding of the foraging requirements and habits of Steller sea lions indicates that pollock, Pacific cod, and Atka mackerel are very important prey resources and that access to those prey fields near rookeries and haulouts remains an important need. Additionally, a variety of readily available prey resources may be necessary for survival. Some research indicates that diet diversity may be an important indicator of survival. Winter remains the time period that may be the most important especially for juveniles that lack sophisticated diving ability and yet require large amounts of prey to get their needed caloric intake. For juveniles, access to a consistent prey resource may be very important due to both their energetic requirements as well as their inability to consume large amounts of prey at any one time. Changes in prey availability which reduces the predictability of that prey item or which changes the structure of the prey resource (e.g., school structure, depth, etc.) might compromise a juvenile or pregnant female, especially in the winter. This might also make them susceptible to killer whale predation if increased foraging times are required to obtain prey. Numerous energetic bottlenecks have been proposed, including the weaning period for pups, juvenile foraging in winter, and adult females pregnant and/or lactating in winter. These time periods are energetically expensive for the animals and also occur during times in which prey may be less available to them in nearshore areas.

The 2001 Biological opinion explicitly states that trawl fishing is the most likely fishing activity to negatively impact Steller sea lions both indirectly by removing large quantities of pollock from foraging areas and directly by entanglement in fishing gear. A trawl fishery for pollock within the primary foraging zones of juveniles and adult females has a high potential to negatively impact both age groups. The 0-3 and 3-10 nm closure zones are believed to be the primary foraging areas for juvenile and adult female sea lions. Juvenile sea lions foraging in the Gulf of Alaska spend between 68% and 88% of their time within 10 nm of shore depending upon season and age (2003 Supplement, Table II-9). Adult females utilize the 0-10 nm zone extensively in the summer but range farther during the winter. Because they forage close to shore, juveniles and

⁴ As described in the 2003 Supplement section IV(B), pages 35-42. These guidelines were based on the best available information at the time the document was completed. Future consultations will be required to review and either reaffirm or revise these guidelines based upon the best available information.

adult females have been defined as the most likely groups to be negatively impacted by competition with fisheries inside critical habitat. A decline in juvenile survival and lower reproductive success for adult females due to reduced prey availability have been identified as possible causes for the decline.

Assessing impacts of fisheries on Steller sea lions and their critical habitat

To understand the impacts of fisheries on Steller sea lions and their critical habitat we need to take a close look at the likely impacts to each individual area which may be affected by proposed changes to fisheries. This is important because not all marine areas are equally important to Steller sea lions. For example, areas around large rookeries are likely to be much more important to Steller sea lions during the summer than occasionally used haulouts. Based on research using satellite telemetry, areas closer to rookeries and haulouts are used more heavily by Steller sea lions than more distant areas. Within critical habitat, Steller sea lion prey species, including pollock, Pacific cod, Atka mackerel, salmon, and herring may potentially be modified by fisheries.

When assessing a proposed change to the Steller sea lion conservation measures, NMFS staff employ a process which examines each rookery or haulout site and associated critical habitat area which may be exposed to the proposed action; determines the number of Steller sea lions which may be affected (population counts); considers the proposed changes to fisheries, the potential impacts on Steller sea lion foraging requirements; and any other specific pertinent information important to that site or action. In many cases, proposed changes to fisheries involve relatively small geographic areas when compared to the entire critical habitat area for the western DPS of Steller sea lion. As such, proposed actions may seem small when viewed on a large scale but may have substantial impacts when considered at a local or sub-population scale. It is also important to consider whether any special considerations exist which make the area unique, if it protects important prey species, or if it is likely to be important to the recovery of the population as a whole.

For each proposed change to fishery conservation measures implemented under the 2001 Biological Opinion, NMFS generally will consider the following information:

- Number of adult and juvenile sea lions likely to be affected (summer and winter counts)
- Number of pups and adult females likely to be affected (pup counts; estimates of fecundity)
- Importance of the site to the recovery of the population (number of rookeries and haulouts affected; population trends)
- Important foraging areas or aggregations of prey
- Biomass of prey available
- Prey consumption by sea lions in the affected areas
- Overlap of prey consumed/harvested between Steller sea lions and fisheries
- Type of fishery (e.g., trawl, hook and line, or pot) and number of vessels
- Amount, rate, and location of fishery removals
- Seasonal timing of the fishery
- Mitigating factors or additional mitigation which might be possible

Generally, determinations are made through a weight of argument approach utilizing the information described above.

Proposed Fishery Changes and NMFS' Response

During the joint protocol committee process, three changes to the pollock fishery in State waters were proposed: Aleutian Islands, Cook Inlet/Resurrection Bay, and Jude Island. Each of these proposals and their subsequent modifications have been responded to by NMFS in writing. As discussed above, time and staff resource constraints prevented NMFS from responding to the BOF's August modifications to the AI and Jude Island proposals until now. Our response to all three proposals is provided below.

Aleutian Islands:

The first proposal to open areas of critical habitat within the AI to pollock fishing was reviewed during the Council's Steller Sea Lion Mitigation Committee process. NMFS responded in a letter dated July 16, 2004, to Chris Oliver that the proposed action would result in the reinitiation of the 2001 Biological Opinion and that "it is difficult to consider a scenario in which formal consultation would not be necessary for the development of a pollock fishery within critical habitat in the AI." After this review, the BOF took up a series of proposals to implement a parallel pollock fishery inside state waters in the AI and in the GOA. NMFS sent a letter on March 4, 2005, to Art Nelson, Chairman of the BOF, expressing concern over the proposed changes to the Steller sea lion conservation measures. In that letter NMFS stated that the proposal would likely trigger a reinitiation of the 2001 consultation on the Federally managed groundfish fisheries due to new impacts which were not previously considered in the 2001 Biological Opinion.

The BOF further refined the AI proposal (attached) and through the protocol committee process, requested NMFS' review. The proposal contains several sub-options including an opening for State waters within 1-3 nm of shore (keeping closed the 0-1 nm zone and 0-20 nm zone around rookeries), and another option which would open State waters 0-3 nm offshore (retaining 0-3 nm closures around haulouts and 0-20 nm closures around rookeries). The proposal also provides four sub-options for quota amounts and includes specific provisions for vessel size restrictions, season options, and harvest methods. For the June 14-15 meeting of the committee in Juneau, NMFS provided an updated packet of information on trends and abundance of Steller sea lions in the Aleutians, prey composition in the diet, pup counts and trends, a summary of telemetry data, summary of catch data for the AI, and information about the area closed in the AI and the link to determinations made in the 2001 Biological Opinion (the no jeopardy or adverse modification decision). Pollock is an important component of the diet of Steller sea lions in the central Aleutians during the winter. For three sites near Adak which were sampled in the winter of 2002, the frequency of occurrence of pollock in scats was 8, 27, and 46%. In two of the sites pollock was more frequently found than Atka mackerel. In addition, the area proposed to be open to fishing would occur in the most critical areas to foraging Steller sea lions.

Although the current proposal makes further modifications which may reduce the impacts of the fishery on Steller sea lions, it still would be likely to trigger a reinitiation of consultation for the Federal fisheries. Any substantial nearshore pollock fishery would have an impact on individual Steller sea lions which must be considered by NMFS in a formal consultation. Although mitigation measures considered in the proposal (e.g., 1,000 mt catch limit, additional closed areas around rookeries and haulouts) are not adequate to avoid consultation requirements, they may be helpful in avoiding a potential jeopardy determination during the reinitiation of the 2001 Biological Opinion.

Cook Inlet/Resurrection Bay:

NMFS provided a response to a proposal to open areas near Cook Inlet (July 13, 2005). The proposal would open state waters (0-3 nm) between 149° and 150° W longitude for pollock

fishing with trawl gear. The proposal contained two options, the first was a State managed fishery and the second was a parallel fishery in State waters which would operate off the Federal Total Allowable Catch (TAC). In the July 13 memorandum NMFS determined that option A (State fishery) would be unlikely to trigger a reinitiation of consultation, and that option B (parallel fishery) would also avoid reinitiation if a similar harvest limit of 1,500 mt was adopted as proposed under option A.

The rationale for this determination was based on the limited use by Steller sea lions of haulout sites in the proposed open areas (Rugged Island, Chiswell Island, and Sea Lion Rocks), especially during the winter. Because the fishery was proposed as a winter only fishery, the overlap between the fishery and Steller sea lions and the potential for competition was small. Two of the three sites had no animals on them when surveyed in 1999, and one site had 368 animals counted in 1993 and 150 animals in 1976. NMFS determined that this proposal would result in an insignificant impact given the relatively small adjustment to existing conservation measures and minimal potential interaction between a dispersed small boat fishery and only about 100-200 animals.

Jude Island:

NMFS provided a response to a proposal to open areas near Jude Island (August 8, 2005). The proposal would open State waters within the 10-20 nm zone around Jude Island with the exception of the area extending 10 nm from Olga Rocks (also designated critical habitat). In the August 8 memorandum, NMFS determined that the proposal would likely trigger a reinitiation of consultation.

The proposal would open nearshore areas to pollock trawl fishing in an area with numerous sea lion haulout and rookery sites. Pollock is the dominant year round prey item for sea lions in this area (based on frequency of occurrence). Nearshore fisheries for pollock would likely remove important prey resources that are an important component of critical habitat. Fisheries, although limited to smaller vessels, are likely to remove substantial quantities of pollock, thereby potentially affecting critical habitat. Under the 2001 Biological Opinion, this area was considered to be an important closure area such that other nearby areas could be opened within the 0-10 nm zone. Further opening of areas in critical habitat in this region may have an adverse impact on sea lions and their critical habitat.

The revised Jude Island proposal currently has two options. Option 1 (same as above) would open State waters within the 10-20 nm zone around Jude Island with the exception of the area extending 10 nm from Olga Rocks. Option 2 would open State waters within 10-20 nm around Jude Island only in the area within Pavlof Bay (see attached map). The area within 20 nm of Jude Island is designated critical habitat and is currently closed to fishing by Federally permitted vessels under the Steller sea lion protection measures (50 CFR § 679.22).

Option 2 reduces the amount of area to be opened. The resulting change may or may not reduce the amount of catch which might be removed in the open area. Although avoiding some overlap with Steller sea lions, the fishery would be expected to have more than an insignificant impact on foraging Steller sea lions and their critical habitat. This region is a relatively concentrated area of Steller sea lion rookeries and haulouts which are inhabited year-round by substantial numbers of Steller sea lions. Any significant changes to the conservation measures in this area would be likely to trigger re-initiation due to the removal of key prey items within near-shore critical habitat during the winter in a key foraging area for substantial numbers of Steller sea lions.

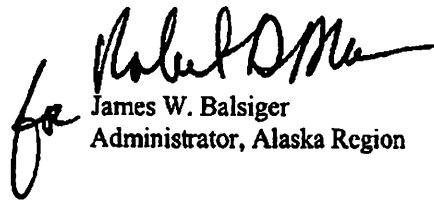
Future Coordination between NMFS, the BOF, and the Council

The State and the BOF have jurisdiction over fishing activities which occur in State waters (0-3 nm). The State parallel fisheries, which occur in 0-3 nm, have been operating for many years and underwent consultation during the 2001 Biological Opinion which considered conservation measures extending from the shore out to 200 nm in the U.S. EEZ. This comprehensive approach to conservation represented a partnership between the BOF, Council, and NMFS and required both Federal and State regulatory changes.

The joint protocol committee process was intended to keep that partnership going. The goal was to develop new pollock fishing opportunities that would not result in a reinitiation of consultation. Unfortunately, the committee process was limited due to previous consultation history and by the necessity to consult formally on any substantial changes to the pollock fishery as implemented under the Steller sea lion conservation measures. The result has been an approach to try to implement fishery changes through the BOF process such that those fisheries would only occur in State waters (0-3 nm). Although entirely within the purview of the BOF to do this, it has a number of drawbacks to the partnership approach. First, the actions taken by the BOF are likely to require reinitiation of consultation and, potentially, mitigation measures in the Federally managed fishery. Second, the fishery is constrained to only 0-3 nm. This not only limits the functionality of the fishery but concentrates effort in nearshore areas which may have the greatest adverse impact on Steller sea lions, especially in the AI. Third, through the section 7 consultation process under the ESA, incidental take may be exempted from the section 9 prohibitions if the action is not likely to jeopardize listed species or adversely modify designated critical habitat.

The Council at its October meeting will begin considering whether to reinitiate consultation on the 2000 BiOp (in coordination with NMFS office of Sustainable Fisheries). The BOF could work with the Council during this process by requesting that NMFS also consider the parallel fisheries under the consultation (similar to the request made in 2001 to include the parallel fisheries). In the formal consultation process, the BOF could propose pollock fisheries which occur both in State and Federally managed waters. NMFS would then consult under section 7 on the entire suite of management measures.

Sincerely,


James W. Balsiger
Administrator, Alaska Region

ATTACHMENT 1

Alaska Board of Fisheries Interim Joint Protocol Committee Proposal Adak pollock Fishery (August 30, 2005)

Problem and Purpose Statement Strawman for Adak

The primary goal of the Alaska Board of Fisheries strawman proposal is to develop management options for pollock harvests in state waters near Adak, in the Aleutian Islands, that provide access for a small boat fishery that provides a means for the Congressional intent to develop a small vessel fishery adjacent to the community of Adak

Adak

Problem: The U.S. Congress, in Section 803 of the Consolidated Appropriations Act of 2004 (HR 2673, now Public Law 108-199) required that future directed fishing allowances of pollock in the Aleutian Islands be allocated to the Aleut Corporation. The Aleut Corporation was unsuccessful in harvesting its allocation outside of critical habitat during the 2005 season and sought access to safer, nearshore state waters via a proposal to the Alaska Board of Fisheries.

Purpose: To provide community economic development via a pollock fishery in the safer, nearshore state waters of the Aleutian Islands.

NMFS Proposal Evaluation Information

- 1) The geographic extent of the proposal.

The current information that NMFS has indicates most of the SSL juveniles are within 0 – 1 mile from shore (the information was not aggregated by proximity to rookeries and haulouts). Therefore two options are considered:

Option 1.) Open all state waters between 174° to 178° W longitude 1 – 3 miles, except continue rookery closure 0 – 20 miles.

Option 2.) Between 174° to 178° W longitude state waters 0 - 3 miles around haulouts and 0-20 miles around rookeries shall remain closed, the rest of state waters, 0 – 3 miles, are opened.

- 2) Type, size, number and capacity of vessels: State waters described above would only be open to pelagic trawl vessels 58 feet in length or less, generally having a harvest capacity of less than 100,000 pounds. It is expected that less than 12 vessels would participate.

3) How much fish will be harvested and how will it be seasonally apportioned?
Harvest Options: (Could also limit to fishing to 3 days/week – vessel choice by weather – to further reduce possible depletion concerns.)

- Option 1) 1,500 mt, A-season only
- Option 2) 3,000 mt, A-season only
- Option 3) 3,775 mt (25% of the 15,100 mt Aleut allocation for 2005/2006 as described in the February 24, 2005 Federal Register notice. This will move to 50% of the Aleut TAC allocation after 2008.) A-season harvest only through 2008.
- Option 4) No limit up to the TAC (19,000 mt), A-season 40%/B-season 60% split remains in place.

4) Methods for monitoring harvest and harvest area compliance:

- 1) VMS will be required on all vessels fishing pollock in state waters between 174° to 178° W longitude.
 - 2) No codend transfers are allowed; each vessel must deliver its catch directly to a plant where the unsorted catch can be observed to account for bycatch of rockfish, which are a concern to managers.
- 5) Limitations on participation: Because Adak is so far a distance from GOA communities where 58' vessels are available, only a few contracted vessels are likely to travel from Sandpoint to Adak for the A-season harvest.
- 6) When will fishing occur: Fishing will occur at the same time as the non-critical habitat open areas in federal waters, except that the Board will allocate the small vessel harvest only during the A-season.
- 7) Type and method of harvest: As described above and the same as that which occurs under NMFS rules and seasons in the federal/parallel Aleutian Islands pollock fishery.

Discussion

The goal of opening the state waters of the Aleutian Islands from 174° to 178° W longitude is to support community development by providing a safe fishing area (near the lee of islands and headlands) which will allow for the development of a small vessel fleet in Adak. Access to state waters is particularly important for small vessels fishing in the Aleutian Islands. Weather conditions in this area can be extreme and these vessels need either safe harbor and/or weather protection while working in the lee of land. The most dangerous time for small pollock trawlers is after haul back, when the net is brought on board to dump the catch into the hold. Without protection from heavy weather behind headlands, a vessel could turn turtle.

Also, concern by NMFS about bycatch species has also been expressed. To assure that vessels fish cleanly and accurately report catch and bycatch on a load-by-load basis, the Board can require that each unsorted net tow be placed into the hold to account for EFH, salmon, rockfish and other bycatch. Observers can also be required at any plant processing Adak pollock to insure that the entire net haul is observed at the plant. Prohibition of tendering in this area will assure that the entire haul is plant observed.

State-enforced pelagic trawling over coral and rough bottom types in the Aleutian Islands will keep nets from contacting the sensitive bottom habitat. This is to comply with the Council's intent to protect sensitive EFH in the Aleutian Islands.

Section 108 of the M-S Act requires that for the first five years up to 25% of the total available pollock harvest in the Aleutians can be taken by vessels less than 60' LOA. This Congressional intent may best be met with pollock harvested in state waters to provide for development of the small boat Aleutian Islands pollock fishery.

Lastly, the Traditional Aleut Council of the Pribilof Island of St. George has requested a review and, if warranted, and expansion of the Steller sea lion protection measures to include 0 – 10 mile closure around the Dalnoi Point haulout. The Aleut community of Adak supports the Dalnoi Point haulout closure as a trade-off for the requested Board of Fisheries opening of state waters to commercial fishing adjacent to their community near two haulouts and in other critical habitat in state waters in the Aleutian Islands. Considering that the only three rookeries in the Central Aleutian Islands where SSL populations are not increasing are west of the 178° W longitude line, and that the June 2004 NMFS document on SSL indicates that pollock only account for 2.7% of the SSL prey in the Central Aleutians during the winter (December through April, 1990-1998). Since the Board's proposed action is also a winter event, the impact on pollock would be small. Additionally, Atka mackerel, which by itself accounts for 65% of prey selection, is a high-energy, abundant prey available year round in the central Aleutians. Therefore it is unlikely that the proposed fishery near Adak would impact SSL, even if the 2001 BiOp presumption of nutrition and fishery activity were correct.

ATTACHMENT 2

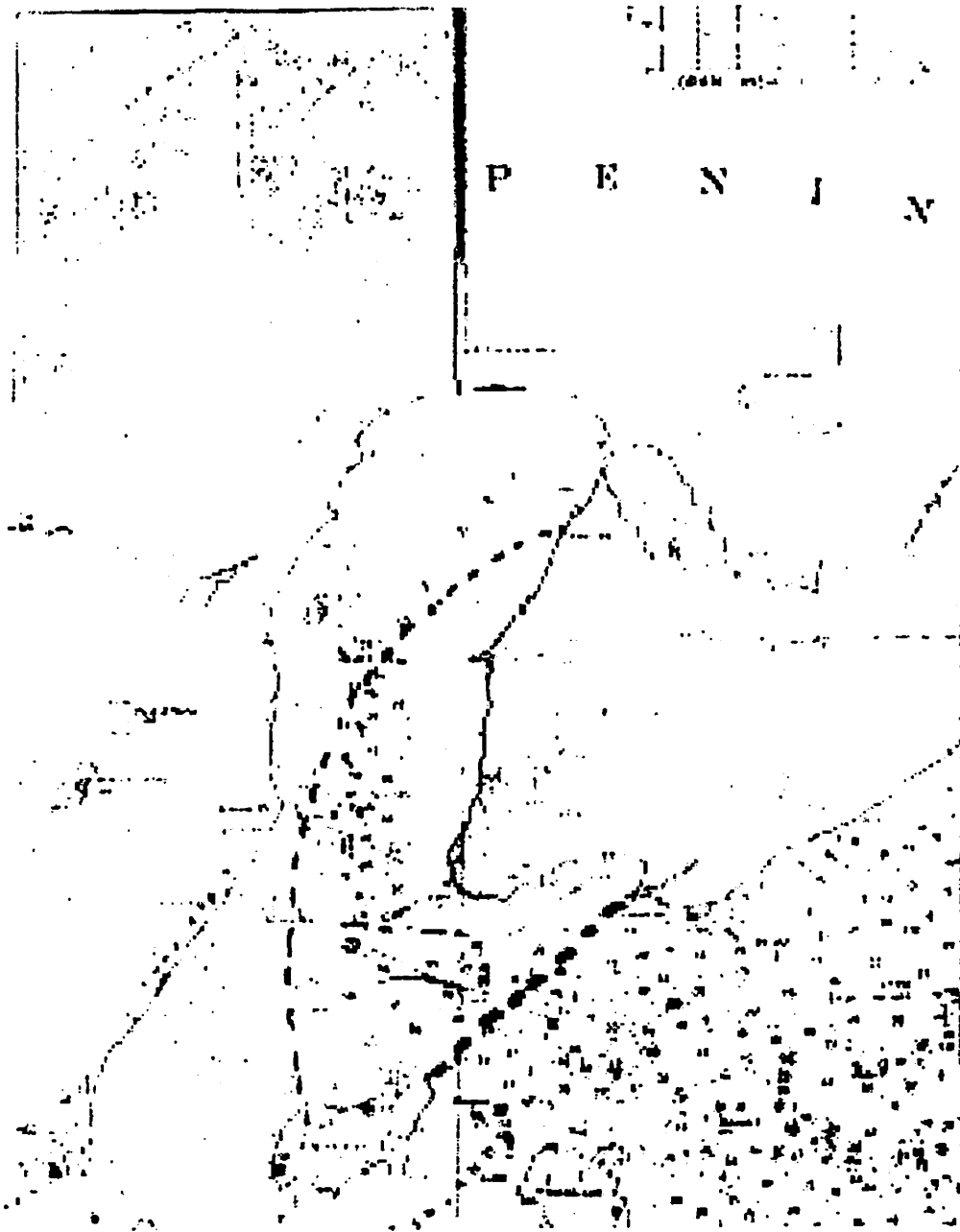
In NMFS review of the Board's western Gulf of Alaska pollock proposal, they note a number of new areas being used by SSL for both rookeries and haulouts. Considering this extension of areas, the NMFS believed that the Board's proposal might impact SSL under the constraints of the 2001 BiOp. The Board would like the NMFS to consider the following suboption provided below (1b) as an alternative that we believe would address the concerns in the NMFS document.

NMFS Proposal Evaluation Information

1. (a) The geographic extent of the proposal is to open a portion of state waters not currently open in the WGOA parallel fishery in the area of the ring between 10 and 20 miles of the Jude Island SSL haulout as demonstrated on maps developed by NMFS and provided to the NPFMC, BOF and ADF&G during previous Interim Joint Protocol Committee meetings (this is not intended to affect the Olga Rocks 10 mile SSL protective haulout closure).

(b) The geographic extent of this alternate proposal is to open a portion of state waters not currently open in the WGOA parallel fishery in that area formed by boundaries established on the eastern shoreline of Pavlof Bay on the Alaska Peninsula including waters of the bay within the 20-mile radius of Jude Island to the shoreline from the entrance of Canoe Bay to Cape Tolstoi, on through Coal Bay to Seal Cape, and from a line drawn from Seal Cape southwesterly to and including the north shore of Ukolnoi Island (see attached chart).

As a final note, the Board would expect that the NMFS reflect upon the fact that SSL are increasing in numbers in this area and are expanding the use of rookeries and haulouts; all under the current fishery regime. Much of this fishery occurs in State waters in proximity to some of these newly described haulouts (Haystacks) and rookeries (Whaleback). Therefore, one might conclude that the current harvest of pollock in state waters does not appear to impact SSL recovery in the WGOA.



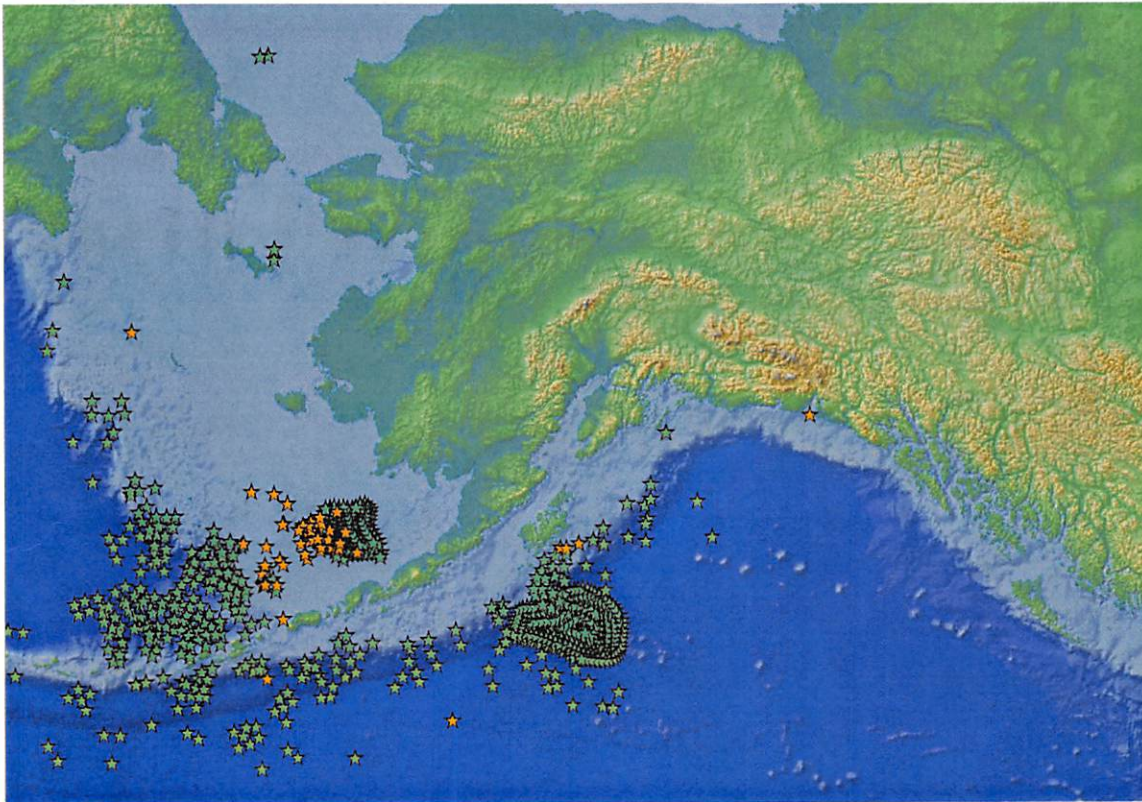
Map of proposed open areas under modified Jude Island proposal option (b).

North Pacific Right Whales

DRAFT

MARINER ADVISORY

The right whale population in the eastern North Pacific is the most endangered stock of whales in the world, with fewer than 100 individuals remaining. Right whales are slow swimmers that sometimes feed at or near the surface. They show little or no instinct to avoid vessels and are vulnerable to ship strikes. They also tend to roll when they meet an obstacle, which may result in gear entanglement. North Pacific right whales have been observed over the central Bering Sea shelf and off Kodiak Island in recent years.



★ sightings from 1979 – 2004 ★ sightings from 1941 – 1967

DO

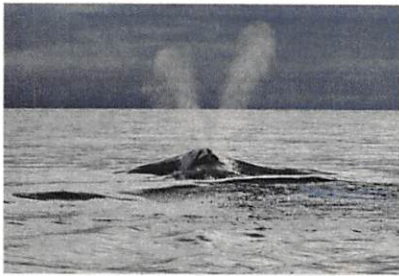
1. Look out for whales.
2. Log the time and location of right whale sightings.
3. Immediately notify federal fisheries observer of right whale sightings.
4. If no federal fishery observer, photograph whale for sighting confirmation and send sighting report to address on reverse side.
5. Notify nearby vessels and ask them to stay away.
6. Remain at least 100 yards from whales.
7. If a whale approaches your vessel, take the vessel out of gear (neutral) and allow the whale to pass.
8. Leave the area at a slow, safe speed, ASAP.



DON'T

1. Set or haul gear of any type close to whales.
2. Approach within 100 yards of any whale.
3. Place your vessel in the path of oncoming whales, forcing them to surface.
4. Remain near a right whale.
5. Operate your vessel at anything greater than a slow, safe speed near whales.

RIGHT WHALE



V-shaped, bushy blow



Callosities



No dorsal fin, smooth



Triangular, all black

HUMPBACK WHALE



Tall, slender and/or low, bushy



Grooves and knobs



Dorsal fin, hump with knuckles



Scalloped edge

GRAY WHALE



Bushy, heart shaped



Barnacles



No dorsal fin, knuckles



Broad and rounded

Right whales may be confused with humpback and gray whales.

Look for these important differences. Right whales are baleen (filter-feeding) whales. They have bowed lower lips that enfold a narrow arching rostrum, the beak-like upper jaw. North Pacific right whales grow to about 60 feet (18.3 meters) in length, and adults average 50 tons. They have robust bodies with large heads that are one fourth of the body length. There are a series of callosities – areas of raised, roughened, white colored skin on the chin, above the eyes, on the lower lip, behind the blowholes and on the rostrum. The skin is usually black, with white patches on the belly. Right whales have no dorsal (back) fin, and no throat grooves. They have large paddle-like flippers and very broad triangular tails with straight edges. Their blow is V-shaped and up to 16 feet (5 meters) high. Note: never use blow shape alone to identify whales because this characteristic will change depending on weather conditions and whale behavior.

REPORT SIGHTINGS AND SEND PHOTOGRAPHS TO:

Large Whale Research
National Marine Mammal Lab
Alaska Fisheries Science Center
NMFS, NOAA
7600 Sand Point Way N.E.
Seattle, WA 98115-6349

(206) 526-4045 voice
(206) 526-6615 fax

<http://nmml.afsc.noaa.gov/>



Marine Conservation Alliance

promoting sustainable fisheries to feed the world

P O Box 20676
Juneau, AK 99802
(907) 523-0731
(907) 523-0732 fax

- Alyeska Seafoods
- Alaska Druggers Association
- Alaska Groundfish Data Bank
- Alaskan Leader Fisheries
- Alaska Pacific Seafoods
- Aleutian Islands Brown Crab Coalition
- Aleutian Pribilof Island Community Development Association
Atkasut, Aika, False Pass, Nelson Lagoon, Nikolaki, St. George
- At-Sea Processors Association
- Bristol Bay Economic Development Corp.
Alakanngik, Clark's Point, Dillingham, Egegik, Ekuk, Etwuk, King Salmon, Lewelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Toquak, Twin Hills, Ugashik
- Central Bering Sea Fishermen's Association
St. Paul
- City of Unalaska
- Coastal Villages Region Fund
Cheloniuk, Chevok, Eak, Goodnews Bay, Hooper Bay, Kipnuk, Kooniginuk, Kwillinguk, Mekoryuk, Nipisatuk, Napasitak, Newtok, Nighmuisu, Oscarville, Platman, Quinhagak, Scammon Bay, Toksook Bay, Tunstulak, Tununak
- Groundfish Forum
- High Seas Catchers Cooperative
- Icicle Seafoods
- McCarty and Associates
- Mid-Water Trawlers Cooperative
- Mothership Group
Excellence
Ocean Phoenix
V' Golden Alaska
- North Pacific Fisheries Research Foundation
- North Pacific Longline Association
- Norton Sound Economic Development Corporation
Brevig Mission, Diomedes, Elm, Gambell, Golovin, Koyuk, Nome, Saint Michael, Sarvoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, White Mountain
- Pacific Seafood Processors Association
- Prowler Fisheries
- Southwest Alaska Municipal Conference
- Trident Seafoods Corp.
- United Catcher Boats
Alaskan Catcher Vessel Assoc.
Arctic Enterprise Assoc.
Northern Victor Fleet
Peter Pan Fleet Cooperative
Unalaska Co-op
Unalaska Fleet Cooperative
Westward Fleet Cooperative
- U.S. Seafoods
- Waterfront Associates
- Western Alaska Fisheries, Inc.
- Yukon Delta Fisheries Development Association
Alakanuk, Emmonak, Grayling, Kotlik, Mountain Village, Nunam Iqa

Press Release
FOR IMMEDIATE RELEASE

October 6, 2005

Contact:
Meighan McFalls, Brown Lloyd James
(212) 486-7070 / cell (917) 439-6081

Marine Conservation Alliance and NOAA to Release North Pacific Right Whale Guide

Joint initiative to protect world's most endangered whale

Anchorage, Alaska: Today, at the October meeting of the North Pacific Fishery Management Council (NPFMC), the Marine Conservation Alliance (MCA) and the National Oceanographic and Atmospheric Administration (NOAA) unveiled a joint initiative to protect the North Pacific right whale, one of the world's most endangered whales. The MCA is a coalition of seafood industry harvesters, processors and coastal communities from Alaska. The MCA and NOAA are initiating an educational campaign to inform the fishing fleet and the public about right whales and the need to protect them.

"This is a terrific example of proactive work by the fishing industry in support of the world's rarest whale," said Dr. Phil Clapham of the National Marine Mammal Laboratory at the Alaska Fisheries Science Center.

"The population of right whales in the eastern North Pacific is so critical that anything we can do to promote the recovery of this population is urgently needed. Increasing the awareness of the status of this population, as well as the need to avoid future vessel strikes, is certainly a step in the right direction," said Dr. Doug DeMaster, the head of NOAA's Alaska Fisheries Science Center.

"Although there have been no documented interactions with eastern stock North Pacific right whales and commercial fishing, the industry is taking steps now to educate the fleet and maintain that solid record," said Thorn Smith, an MCA board member who spearheaded the effort for the industry.

The already small population of right whales in the eastern North Pacific was devastated by Soviet illegal whaling catches in the 1960's, bringing it perilously close to extinction. Since 1996 a small number of these whales have been sighted over the central Bering Sea shelf and off Kodiak Island. Some 25 individual whales have been identified, and the total eastern population may be less than 100 - making it the most endangered whale in the world.

North Pacific right whales grow to about 60 feet in length, and adults average 50 tons. The skin is usually black, with white patches on the belly. Right whales have no dorsal (back) fin, and no throat grooves. They have large paddle-like flippers and very broad triangular tails. Their blow is V-shaped, and up to 16 feet high.

Right whales are slow swimmers that sometimes feed at or near the surface. They show little or no instinct to avoid vessels, and tend to roll when they meet an obstacle, which may result in fishing gear entanglement. To date there have been no observed interactions between eastern North Pacific right whales and fishing vessels - no ship strikes, no gear entanglement.

In order to identify and protect the whales, the Marine Conservation Alliance has partnered with the NOAA Alaska Fisheries Science Center to produce the North Pacific Right Whale Guide. The guide provides notice to mariners and federal fishery observers that the whales are highly endangered. It describes the whales, and includes a chart of all sightings since 1941. The guide includes DO's and DONT's for captains navigating fishing vessels. On the back it has comparative photographs of right whales, humpback whales, and gray whales to ensure proper identification.

“This is another effort on behalf of the North Pacific fishing industry to be proactive, to get ahead of a conservation issue,” said Dave Benton, Executive Director of MCA. “We wanted to take constructive positive steps to ensure that our oceans are healthy and our industry is managed for long term health and stability of the marine ecosystem.”

Five thousand North Pacific Right Whale Guides will be printed, laminated in plastic, and delivered to vessels fishing off Alaska. Copies may be translated into Russian and Japanese and provided to fleets around the Pacific Rim as well.

For more information:

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National Marine Mammal Laboratory
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email: phillip.clapham@noaa.gov

Mr. David Benton, Marine Conservation Alliance
(907) 321-0499