


MEMORANDUM

TO: Council, SSC and AP Members
FROM: Chris Oliver 
Executive Director
DATE: May 26, 2009
SUBJECT: Protected Resources Report

ESTIMATED TIME 4 HOURS (All B reports)
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ACTION REQUIRED

Receive report on Protected Resources issues and take action as necessary.

BACKGROUND

A. Steller Sea Lions - Update on Consultation and Schedule for Release of the Draft *Status Quo* Biological Opinion

At this meeting, the Council is scheduled to receive an additional update from NMFS on the schedule for preparation and release of the draft *status quo* Biological Opinion. At its April 2009 meeting, the Council passed a motion to request that NMFS include in the draft BiOp the results of the 2009 Steller sea lion (SSL) pup surveys and the 2009 SSL partial nonpup surveys, and also to include the information contained in a recent paper by Maniscalco et al. (2009) on SSL natality in the Gulf of Alaska region¹. The Council's motion also requested an update from NMFS on the degree to which incorporating this new information may affect the BiOp schedule. A letter was sent to NMFS conveying this request from the Council (Item B-7(a)).

On May 6, 2009, the Council received a letter from the NMFS Alaska Region announcing a delay in issuing the draft BiOp to March 2010 (Item B-7(b)). This letter acknowledges that including additional information will strengthen the analysis.

B. Agreement on the Conservation of Albatrosses and Petrels

The Agreement on the Conservation of Albatrosses and Petrels (ACAP) is a multinational agreement which seeks to conserve albatrosses and petrels by coordinating international activity to mitigate known threats to these species. The U.S. is not a party to this agreement, although the U.S. government has been involved in discussions in recent years to consider becoming a party to this agreement. At a recent meeting of the parties², the countries voted to add three species of northern hemisphere albatrosses to

¹ Maniscalco, J.M., D. Hennen, and P. Parker. 2009. Evidence for high natality rates among Steller sea lions in the Gulf of Alaska. Alaska SeaLife Center Technical Report ASLC-0901. 28 p. (Available from Alaska SeaLife Center, P.O. Box 1329, Seward, AK 99664-1329.)

² Parties to ACAP are Argentina, Australia, Brazil, Chile, France, Ecuador, New Zealand, Norway, Peru, South Africa, Spain, the United Kingdom, and Uruguay.

Annex 1 – short-tailed, black-footed, and Laysan albatross. This annex lists the species of albatrosses and petrels worldwide for which the parties “...shall take (measures) to achieve and maintain a favourable conservation status...”. The Council will be kept informed as further information becomes available.

C. Sea Otter Critical Habitat Designation Comment Period Extended

On Friday, May 8, 2009, the U.S. Fish & Wildlife Service (USFWS) reopened the public comment period on agency’s proposal to designate critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter under the Endangered Species Act. (The proposed rule was published on December 16, 2008, and there was an initial 60-day public comment period that closed on February 17, 2009.) The USFWS chose to reopen the public comment period in response to a number of requests that were received from interested parties and individuals. The current public comment period will remain open through July 1, 2009. A public hearing is scheduled for June 18, 2009, in Anchorage. Additional information on the northern sea otter DPS listing and proposed critical habitat designation is available at <http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm>

The Federal Register notice announcing the extended comment period was sent in a Council mailing in mid-May 2009 (Item B-7(c)). The Council previously commented on the proposed designation of critical habitat (letter is attached as Item B-7(d)).

D. Cook Inlet Beluga Whales

The Council has previously indicated a desire to be kept informed of new information on the Cook Inlet beluga whale. While Council-managed fisheries likely do not overlap the known or inferred distribution of this Distinct Population Segment (DPS) of beluga whale (see map as Item B-7(e)), the status of this DPS is of continuing interest to many. Listed as endangered on October 22, 2008, NMFS is now in the process of designating critical habitat for this DPS. A Federal Register notice requesting information on Cook Inlet beluga whales and their habitat was issued by NMFS on April 14, 2009, and sent in a Council mailing (see Item B-7(f)). At its April 2009 meeting, the Council was advised of a lawsuit by the State of Alaska challenging the ESA listing (Item B-7(g)). No new information on these issues is currently available, but staff will provide the Council updates as they are available in the coming months.

E. Pacific Walrus

On May 18, 2009, the U.S. Fish & Wildlife Service agreed to undertake an analysis to determine if a petition from the Center for Biological Diversity (CBD) to list the Pacific walrus under the Endangered Species Act has merit (the CBD press release is attached as Item B-7(h)). The USFWS has agreed to complete the analysis by September 10, 2009. When this analysis is completed, the USFWS will issue its 90-day finding as to whether the petition from the CBD presents substantial information that a listing may be warranted. If so, the USFWS would undertake a year-long status review and eventually issue a 12-month finding. That document would conclude whether a listing as threatened or endangered is warranted.

[Note: Council staff is currently proceeding with preparation of two documents relating to walrus at the request of the Council. One is an updated discussion paper on groundfish trawl fishery interactions with walrus in northern Bristol Bay, and a second is a discussion paper on a new emerging walrus haulout on Hagemeister Island and options for establishing a protection zone at that site. Both documents will be presented to the Council at a future meeting.]

North Pacific Fishery Management Council

AGENDA B-7(a)
JUNE 2009

Eric A. Olson, Chairman
Chris Oliver, Executive Director



605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Telephone (907) 271-2809

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Visit our website: <http://www.fakr.noaa.gov/npfmc>

April 9, 2009

Robert D. Mecum
Acting Administrator, Alaska Region
National Marine Fisheries Service
P.O. Box 21668
Juneau, AK 99802-1668

Dear Mr. Mecum:

During its April 2009 meeting, the North Pacific Fishery Management Council received a report from staff indicating that the draft Biological Opinion on the effects of the *status quo* Alaskan groundfish fisheries on Steller sea lions (SSL) is still scheduled to be released in August 2009. Part of the staff report on the BiOp schedule included reference to a letter received by the Council from the Marine Conservation Alliance (MCA) that recommended incorporation of new information on Steller sea lions into the draft BiOp, prior to its release. Based on public comment, and its concurrence with the issues raised in the MCA letter, the Council is hereby requesting that NMFS incorporate this new information into the draft BiOp before its release. Further, the Council would like your response as to the implications for the BiOp schedule if the agency indeed does incorporate this new information into the BiOp. Specifically, the information we recommend be included is as follows:

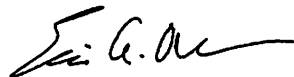
1. 2009 SSL Pup Surveys – Surveys of SSL pups are scheduled to be conducted this year. The last work was done in 2005-2007, and this year's surveys will provide important new information on pup production. These surveys will provide data necessary to assess production/natality and overall population trends which in turn should be a central part of the revised BiOp analysis and any subsequent determinations.
2. 2009 SSL Non-pup Surveys - The overall population of the SSL western distinct population segment (WDPS) has increased approximately 14% over the 2000-2008 period. This is the timeframe for the existing BiOp when many of the mitigation measures we have today were put into place. However, there has been considerable variability within subregions, and suggestions of movement back and forth between the WDPS and the eastern segment. Data from this year's surveys can contribute substantially to a well-informed BiOp, especially to the extent the studies examine the potential movement of SSLs between and within subregions. There are also questions regarding the potential migration of animals into the eastern Gulf of Alaska counts last year, and whether those additional 1,000 animals were of WDPS origin or had migrated from Southeast Alaska. Therefore, it is important to evaluate both the movement of the WDPS between the central, western, and eastern areas of the Gulf of Alaska, as well as movement of the EDPS between the eastern Gulf and Southeast Alaska. Given that animals from the WDPS have been observed moving eastward into Southeast Alaska in the past, and with a finding of EDPS animals moving into the WDPS, this could raise questions regarding not only the status of the eastern Gulf of Alaska population, but the larger question of the treatment of the WDPS and the EDPS as separate population units.

3. **Reproductive Rates** – The question of overall reproductive success (natality) as a factor affecting population trajectory and recovery remains very much in debate. In developing the SSL Recovery Plan, NOAA relied primarily on one study (Holmes, et al 2007) which was based on work in the central Gulf of Alaska. Follow-up studies by Maniscalco and others have recently been released (Alaska Sea Life Center Technical Report ASLC-0901), and their results significantly contradict the results of the 2007 Holmes et al study.

We believe strongly that it is critical to include this new information in the BiOp as it has the potential to significantly affect the findings within that BiOp. The natality information in particular, from Holmes et al, appeared to underpin the chronic nutritional stress findings in the Steller sea lion recovery plan. The new natality information that we are requesting be included in the BiOp could potentially affect those original views relative to nutritional stress and related fisheries interactions.

The Council recognizes that incorporation of this information could potentially delay release of the draft BiOp, and we request that you provide us with your best indication of how the BiOp schedule might be affected. On behalf the Council, thank you for your serious consideration of this request.

Sincerely,



Eric A. Olson
Chairman

CC: Dr. James Balsiger
Dr. Douglas DeMaster
Ms. Kaja Brix



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

National Marine Fisheries Service
P.O. Box 21668
Juneau, Alaska 99802-1668

May 6, 2009


Eric Olson, Chairman
North Pacific Fishery Management Council
605 W. 4th Avenue, Suite 306
Anchorage, Alaska 99501-2252

Dear Mr. Olson:

Thank you for your letter requesting that the National Marine Fisheries Service consider the inclusion of new data into the Biological Opinion (BO) on the federal groundfish fisheries. These data include: 1) 2009 Steller sea lion pup counts scheduled for this summer's field season; 2) non-pup surveys in portions of southeast Alaska and the Gulf of Alaska aimed at evaluating hypotheses about the influence of survey timing and emigration/immigration on the 2008 non-pup survey (also scheduled for 2009 field season); and 3) a draft of a report by Maniscalco et al. from the Alaska Sea Life Center (Technical Report ASLC-0901).

In this particular case, we believe that the new surveys can potentially reduce uncertainty and controversy about important elements in our analysis. Given the current schedule, this information would have been collected, but not integrated into the analysis. Additionally, while we have both the draft Maniscalco report and a review we requested of the report by the Alaska Fisheries Science Center, the authors have not had a chance to fully consider and respond to the reviews. With a relatively short extension of the BO schedule, we can incorporate all of this information into the analyses, interpret information pertinent to understanding trends in abundance and reproduction in light of these new data, and produce a BO that provides a stronger analysis of the effects of the groundfish fisheries on Steller sea lions and their critical habitat. We will plan to have the BO available for Council consideration in March 2010.

Sincerely,


for Robert D. Mecum
Acting Administrator, Alaska Region

cc: Kaja Brix
Samuel Rauch
Sue Salvesson



provided on the Web site for submitting comments.

For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Parties shall send one copy of their comments and reply comments to Best Copy and Printing, Inc., Portals II, 445

12th Street, SW., Room CY-B402, Washington, DC 20554, (800) 378-3160, e-mail FCC@BCPIWEB.com. Comments filed in response to this document will be available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554, and via the Commission's Electronic Comment Filing System (ECFS) by entering the docket number, WT Docket No. 08-165. The comments may also be purchased from Best Copy and Printing, Inc., telephone (800) 378-3160, facsimile (202) 488-5563, or e-mail FCC@BCPIWEB.com.

Federal Communications Commission.
James D. Schlichting,
Acting Chief, Wireless Telecommunications Bureau.

[FR Doc. E9-10815 Filed 5-7-09; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS-R7-ES-2008-0105; 92210-1117-0000-B4]

RIN 1018-AV92

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter (*Enhydra lutris kenyoni*)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of public comment period; notice of public hearing.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period on our proposal to designate critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*) under the Endangered Species Act of 1973, as amended (Act). This action will provide all interested parties with an additional opportunity to submit written comments on our December 16, 2008, proposed rule to designate approximately 15,225 square kilometers (km²) (5,879 square miles (mi²)) as critical habitat.

DATES: We are reopening the comment period until July 1, 2009. For more information, see Public Comments Solicited section below.

ADDRESSES:

Public Comments: You may submit information by one of the following methods:

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

- **U.S. mail or hand-delivery:** Public Comments Processing, Attn: FWS-R7-ES-2008-0105; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

Public Hearing: We will hold one public hearing on June 18, 2009, at the Z.J. Loussac Library in Anchorage, Alaska. There will be an informational meeting with a questions and answer session from 7 p.m. to 7:30 p.m. and we will accept public comments verbally from 7:30 p.m. to 9:30 p.m. In addition to having the opportunity to provide oral comments in person, telephone access will be provided for this hearing. Contact the Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**) for more information about this public hearing.

We will post all information received on <http://www.regulations.gov>. This generally means that we will post any personal information you provide us (see the Public Comments Solicited section below for more details).

FOR FURTHER INFORMATION CONTACT: Douglas M. Burn, Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907/786-3800; facsimile 907/786-3816. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800-877-8339.

SUPPLEMENTARY INFORMATION:

Background

On December 16, 2008, we published a proposed rule to designate approximately 15,225 square kilometers (km²) (5,879 square miles (mi²)) as critical habitat for the southwest Alaska DPS of the northern sea otter (73 FR 76454). We accepted public comments on this proposed rule for 60 days, ending on February 17, 2009. During that period, we received 15 submissions from various individuals, communities, and organizations. Recognizing that the original public comment period partially overlapped with the holiday season, we are reopening the public comment period to provide additional time for concerned individuals to provide input on the proposed designation.

We intend that any final action resulting from this proposal will be as

accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as "critical habitat" under section 4 of the Act (16 U.S.C. 1531 *et seq.*), including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether the benefit of designation would outweigh threats to the species caused by the designation, such that the designation of critical habitat is prudent.

(2) Specific information on:

- The amount and distribution of habitat of the southwest Alaska DPS of the northern sea otter,
- What areas occupied at the time of listing and that contain features essential for the conservation of the species we should include in the designation and why, and
- What areas not occupied at the time of listing are essential to the conservation of the species and why.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Any foreseeable economic, national security, or other potential impacts resulting from the proposed designation and, in particular, any impacts on small entities, and the benefits of including or excluding areas that exhibit these impacts.

(5) Any areas that might be appropriate for exclusion from the final designation under section 4(b)(2) of the Act.

(6) Special management considerations or protections that the proposed critical habitat may require.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

We are also in the process of preparing a draft Economic Analysis of the proposed critical habitat designation, which will be made available for public review and comment. We will publish a separate Notice of Availability for the draft Economic Analysis.

Public Comments Solicited

We will accept written comments and information we receive on or before July 1, 2009. You may submit comments and materials concerning the proposed rule by one of the methods listed in the ADDRESSES section.

If you submit a comment via <http://www.regulations.gov>, your entire comment—including your personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on <http://www.regulations.gov>. Comments previously submitted on the December 16, 2008 proposed rule (73 FR 76454) need not be resubmitted, as they have been incorporated into the public record and will be fully considered in preparation of the final rule. Comments submitted during this reopened comment period also will be incorporated into the public record and will be fully considered in the final rule.

Comments and materials we receive, as well as supporting documentation we used in preparing this notice, will be available for public inspection on <http://www.regulations.gov>, or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Marine Mammals Management Office (see FOR FURTHER INFORMATION CONTACT).

You may obtain copies of the proposed rule on the Internet at <http://www.regulations.gov>, or by mail from the Marine Mammals Management Office in Anchorage, Alaska.

Author

The primary author of this package is the Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: April 29, 2009.

Will Shafroth,

Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. E9-10715 Filed 5-7-09; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 090223227-9691-01]

RIN 0648-AX63

Electronic Filing of Trade Documents for Fishery Products

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

ACTION: Advance notice of proposed rulemaking; request for comments.

SUMMARY: NMFS issues this advance notice of proposed rulemaking to announce that it is revising procedures to file import and export documentation for certain fishery products to meet requirements of the SAFE Port Act of 2006, the Magnuson-Stevens Fishery Conservation and Management Act, other applicable statutes, and obligations that arise from U.S. participation in regional fishery management organizations. Specifically, NMFS intends to integrate the collection of trade documentation within the government-wide International Trade Data System and require electronic information collection through the automated internet portal maintained by the United States Customs and Border Protection. NMFS is seeking advance public comment on the feasibility of electronic reporting by parties involved in an import or export transaction for applicable seafood products.

DATES: Written comments must be received by August 6, 2009.

ADDRESSES: Written comments on this action and requests for background information should be addressed to Christopher Rogers, Trade and Marine Stewardship Division, Office of International Affairs, NMFS. Comments and requests, identified by 0648-AX63, may be submitted by any of the following methods:

- Federal e-Rulemaking portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Mail: Christopher Rogers, Trade and Marine Stewardship Division, Office of International Affairs, NMFS, 1315 East-West Highway, Room 12657, Silver Spring, MD 20910.

- Fax: 301-713-9106, Attn: Christopher Rogers.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change.

North Pacific Fishery Management Council

Eric A. Olson, Chairman
Chris Oliver, Executive Director

Telephone (907) 271-2809



605 W. 4th Avenue, Suite 306
Anchorage, AK 99501-2252

Fax (907) 271-2817

Visit our website: <http://www.fakr.noaa.gov/npfmc>

February 12, 2009

Public Comments Processing
ATTN: FWS-R7-ES-2008-0105
Division of Policy and Directives Management
U.S. Fish & Wildlife Service
4401 N. Fairfax Drive, Suite 222
Arlington, VA 22203

ATTN: Douglas M. Burn
Marine Mammals Management Office
Anchorage, AK

Dear Mr. Burn,

The North Pacific Fishery Management Council (Council) submits these comments on the proposed designation of critical habitat for the Southwest Alaska Distinct Population Segment (DPS) of Northern Sea Otter. The Council manages the crab, scallop, and groundfish fisheries in Federal waters off Alaska, and has previously commented on the proposed listing of this DPS under the Endangered Species Act and has been briefed on the U.S. Fish and Wildlife Service's (USFWS) proposed definition of critical habitat for this DPS.

The USFWS proposes to define critical habitat in a relatively narrow manner as those coastal marine areas off Alaska's coast where the sea otter's preferred prey, particularly sea urchins, are available. These habitats are generally shallow areas along rocky coasts. The proposed critical habitat areas would also include other shallower waters including areas of kelp forests where the sea otter can find refuge from predators, particularly killer whales. Fisheries managed by the Council do not overlap to any appreciable extent the Agency's proposed designated critical habitat. Thus, the Council does not express particular concern over the proposed designation of critical habitat for this sea otter DPS in Alaska, and concurs with the USFWS that a narrow definition of critical habitat is appropriate.

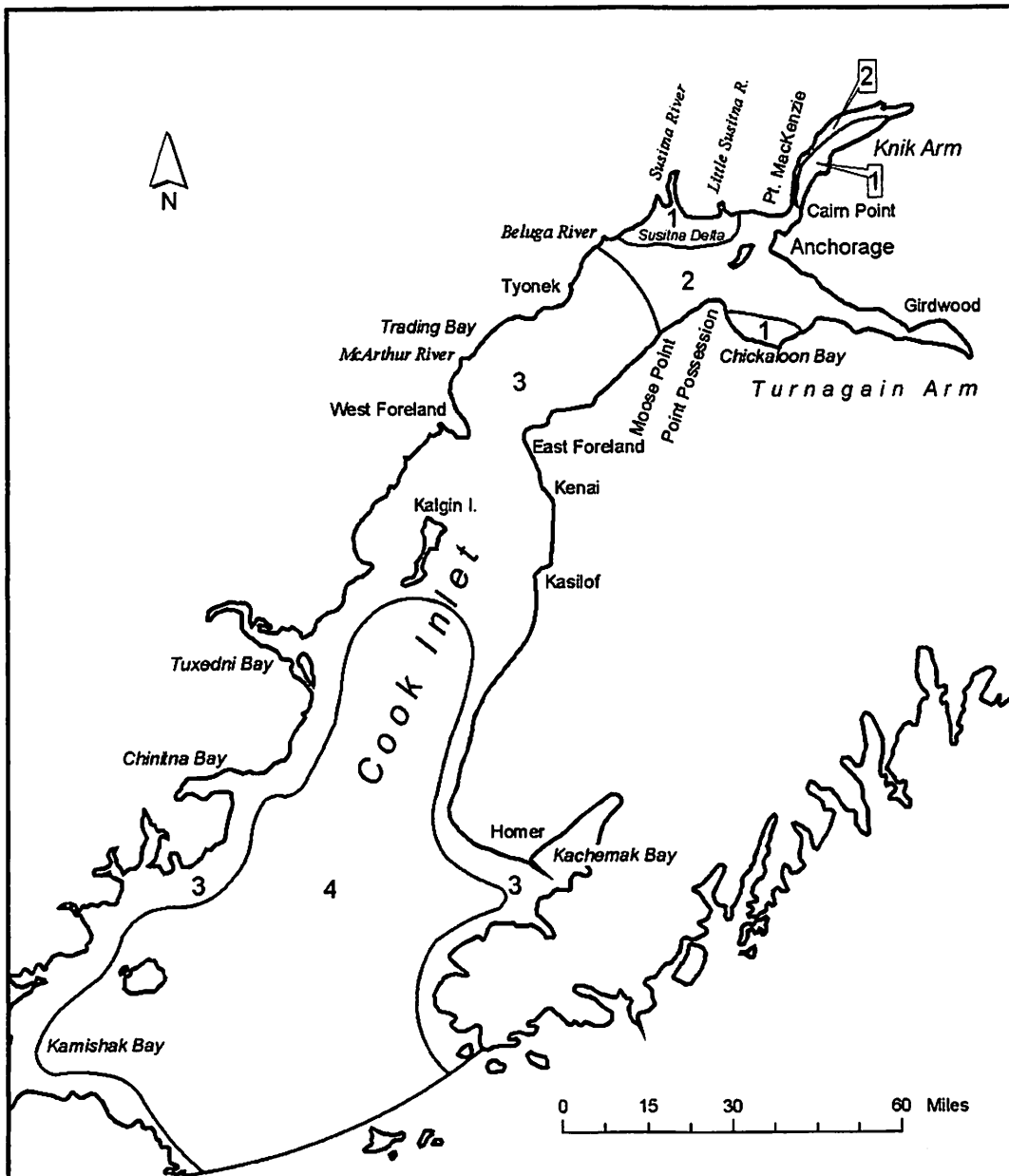
The Council appreciates the opportunity to comment on this proposed action.

Sincerely,

Eric A. Olson
Chairman

cc: Greg Balogh, USFWS

Cook Inlet beluga whale habitat zones (from draft Conservation Plan for the Cook Inlet Beluga Whale (*Delphinapterus leucas*), National Marine Fisheries Service, March 2005). Zones: 1 = high value/high sensitivity habitat; 2 = high value habitat; 3 = winter habitat, secondary summer habitat, historic sites; 4 = remainder of known range.



for existing non-emergency stationary compression ignition engines greater than 500 brake horsepower that are located at major sources, based on a new review of these engines following the first RICE NESHAP rulemaking in 2004. In addition, EPA proposed to amend the previously promulgated regulations regarding operation of stationary RICE during periods of startup, shutdown and malfunction.

Shortly after publication of the proposed rule, several industry groups formally requested that EPA extend the comment period of the proposed rule. They indicated that an extended comment period was necessary due to the complexities of the proposed regulation and the large number of existing sources that are potentially affected. Furthermore, the request letters mention that the proposed regulation has far-reaching impacts on industrial stakeholders and that those impacts cannot be properly evaluated in the 60-day comment period provided by the proposal.

The letters requesting an extension to the comment period can be found in the docket. EPA is hereby extending the comment period, which was set to end on May 4, 2009, to June 3, 2009.

List of Subjects 40 CFR Part 63

Environmental protection, Administrative practice and procedure, Air pollution control, Hazardous substances, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: April 8, 2009.

Elizabeth Craig,

Acting Assistant Administrator.

[FR Doc. E9-8483 Filed 4-13-09; 8:45 am]

BILLING CODE 6560-50-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 090224232-9334-02]

RIN 0648-AX50

Endangered and Threatened Species: Advance Notice of Proposed Rulemaking to Designate Critical Habitat for Cook Inlet Beluga Whales

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

ACTION: Advance notice of proposed rulemaking; request for information.

SUMMARY: We, the National Marine Fisheries Service (NMFS), will be designating critical habitat for the endangered Cook Inlet beluga whale (*Delphinapterus leucas*) under the Endangered Species Act (ESA). The designation will involve areas within Cook Inlet, Alaska. This advance notice of proposed rulemaking (ANPR) identifies issues for consideration and evaluation and solicits comments regarding these issues.

DATES: Comments and information regarding the suggested designation process and areas being considered for designation may be sent to NMFS (See **ADDRESSES**) by May 14, 2009.

ADDRESSES: Comments may be sent to Chief, Protected Resources Division, NMFS, P.O. Box 21668, Juneau, AK, 99802-1668.

FOR FURTHER INFORMATION CONTACT: Brad Smith, (907-271-3023) or Kaja Brix (907-586-7235).

SUPPLEMENTARY INFORMATION:

Rulemaking Background

We are responsible for determining whether species, subspecies, or distinct population segments (DPSs) are threatened or endangered and for designating critical habitat for them under the ESA (16 U.S.C. 1531 *et seq.*). To be considered for listing under the ESA, a group of organisms must constitute a "species" which is defined in section 3 to include "any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." We consider a group of organisms to be a DPS for purposes of ESA listing when it is both discrete from other populations and significant to the species to which it belongs (61 FR 4722; February 7, 1996). We found the Cook Inlet beluga whale population segment to be reproductively, genetically, and physically discrete from the four other known beluga populations in Alaska, and significant because it is in a unique ecological setting for the taxon, and its loss would result in a significant gap in the taxon's range. Following completion of a Status Review of the Cook Inlet beluga whale under the ESA, we published a proposed rule to list this DPS as an endangered species on April 20, 2007. We subsequently extended the date for final determination on the proposed action by 6 months, until October 20, 2008, as provided for by the ESA (section 4(b)(6)(B)(i)). A Final Rule to list the Cook Inlet beluga whale as an endangered species was published on October 22, 2008.

Critical Habitat

Section 4(b)(2) of the ESA requires us to designate critical habitat for threatened and endangered species "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." This section grants the Secretary of Commerce (Secretary) discretion to exclude any area from critical habitat if he determines "the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." The Secretary's discretion is limited, as he may not exclude areas that "will result in the extinction of the species."

The ESA defines critical habitat under section 3(5)(A) as: "(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed . . . upon a determination by the Secretary that such areas are essential for the conservation of the species."

Once critical habitat is designated, section 7 of the ESA requires Federal agencies to ensure they do not fund, authorize, or carry out any actions that will destroy or adversely modify that habitat. This requirement is in addition to the section 7 requirement that Federal agencies ensure their actions do not jeopardize the continued existence of listed species.

Issues for Consideration and Evaluation

Section 4(a)(3) of the ESA requires us to designate critical habitat for threatened and endangered species. We are currently in the information-gathering phase, compiling information to propose critical habitat for the Cook Inlet beluga whale. Sections 3, 4(a), and 4(b) of the ESA suggest a number of questions the agency should consider when designating critical habitat:

- What areas were occupied by the species at the time of listing?
- What physical and biological features are essential to the species' conservation?
- Are those essential features ones that may require special management considerations or protection?
- Are there any areas outside those currently occupied that are "essential for conservation?"

- What are the benefits to the species of critical habitat designation?
- What economic and other relevant impacts would result from a critical habitat designation?
- What is the appropriate geographic scale for weighing the benefits of exclusion and benefits of designation?
- Will the failure to designate any particular area as critical habitat result in the extinction of the species?

Answering these questions involves a variety of biological and economic considerations. To ensure that we have the best scientific data available, we are issuing this ANPR to solicit information before issuing a proposed rule. During the information-gathering phase, we are seeking public input and information (see "Information Solicited" below) and will gather and analyze the best available scientific data to inform critical habitat designations. We will then initiate rulemaking with the publication of a proposed designation of critical habitat, opening a period for public comment and the opportunity for public hearings.

Cook Inlet Beluga Whale Biology and Habitat Use

The beluga whale is a small, toothed whale in the family Monodontidae, a family it shares with only the narwhal. Belugas are also known as "white whales" because of the white coloration of the adults. The beluga whale is a northern hemisphere species, ranging primarily over the Arctic Ocean and some adjoining seas, where it inhabits fjords, estuaries, and shallow water in Arctic and subarctic oceans. Five distinct stocks of beluga whales are currently recognized in Alaska: Beaufort Sea, eastern Chukchi Sea, eastern Bering Sea, Bristol Bay, and Cook Inlet. The Cook Inlet population is numerically the smallest of these, and is the only one of the five Alaskan stocks occurring south of the Alaska Peninsula in waters of the Gulf of Alaska.

A detailed description of the biology of the Cook Inlet beluga whale may be found in the Proposed Listing Rule (72 FR 19854; April 20, 2007). Belugas generally occur in shallow, coastal waters, and while some populations make long seasonal migrations, Cook Inlet belugas reside in Cook Inlet year round. Data from satellite tagged whales documented that Cook Inlet belugas concentrate in the upper Inlet at rivers and bays in the summer and fall, and then tend to disperse into deeper waters moving to mid Inlet locations in the winter. The Traditional Ecological Knowledge (TEK) of Alaska Natives and systematic aerial survey data document a contraction of the summer range of

Cook Inlet belugas. While belugas were once abundant and frequently sighted in the lower Inlet during summer, they are now primarily concentrated in the upper Inlet. This constriction is likely a function of a reduced population seeking the highest quality habitat that offers the most abundant prey, most favorable feeding topography, the best calving areas, and the best protection from predation. An expanding population would likely use the lower Inlet more extensively.

While mating is assumed to occur sometime between late winter and early spring, there is little information available on the mating behavior of belugas. Most calving in Cook Inlet is assumed to occur from mid-May to mid-July (Calkins, 1983), although Native hunters have observed calving from April through August (Huntington, 2000). Alaska Natives described calving areas as the northern side of Kachemak Bay in April and May, off the mouths of the Beluga and Susitna rivers in May, and in Chickaloon Bay and Turnagain Arm during the summer (Huntington, 2000). The warmer waters from these freshwater sources may be important to newborn calves during their first few days of life (Katona *et al.*, 1983; Calkins, 1989). Surveys conducted from 2005 to 2007 in the upper Inlet by LGL, Inc., documented neither localized calving areas nor a definitive calving season, since calves were encountered in all surveyed locations and months (April-October) (McGuire *et al.*, 2008). The warmer, fresher coastal waters may also be important areas for belugas' seasonal summer molt.

Cook Inlet belugas are opportunistic feeders and feed on a wide variety of prey species, focusing on specific species when they are seasonally abundant. Eulachon (locally referred to as hooligan or candlefish) is an important early spring food resource for beluga whales in Cook Inlet, as evidenced by the stomach of a beluga hunted near the Susitna River in April 1998 that was filled exclusively with eulachon (NMFS unpubl. data). These fish first enter the upper Inlet in April, with two major spawning migrations occurring in the Susitna River in May and July. The early run is estimated at several hundred thousand fish and the later run at several million (Calkins, 1989).

In the summer, as eulachon runs begin to diminish, belugas rely heavily on several species of salmon as a primary prey resource. Beluga whale hunters in Cook Inlet reported one whale having 19 adult king salmon in its stomach (Huntington, 2000). NMFS (unpubl. data) reported a 14 foot 3 inch

(4.3 m) male with 12 coho salmon, totaling 61.5 lbs (27.9 kg), in its stomach.

The seasonal availability of energy-rich prey such as eulachon, which may contain as much as 21 percent oil (Payne *et al.*, 1999), and salmon are very important to the energetics of belugas (Abookire and Piatt, 2005; Litzow *et al.*, 2006). Native hunters in Cook Inlet have stated that beluga whale blubber is thicker after the whales have fed on eulachon than in the early spring prior to eulachon runs. In spring, the whales were described as thin with blubber only 2-3 inches (5-8 cm) thick compared to the fall when the blubber may be up to 1 ft (30 cm) thick (Huntington, 2000). Eating such fatty prey and building up fat reserves throughout spring and summer may allow beluga whales to sustain themselves during periods of reduced prey availability (e.g., winter) or other adverse impacts by using the energy stored in their blubber to meet metabolic needs. Mature females have additional energy requirements. The known presence of pregnant females in late March, April, and June (Mahoney and Shelden, 2000; Vos and Shelden, 2005) suggests breeding may be occurring in late spring into early summer. Calves depend on their mother's milk as their sole source of nutrition, and lactation lasts up to 23 months (Braham, 1984), though young whales begin to consume prey as early as 12 months of age (Burns and Seaman, 1986). Therefore, the summer feeding period is critical to pregnant and lactating belugas. Summertime prey availability is difficult to quantify. Known salmon escapement numbers and commercial harvests have fluctuated widely throughout the last 40 years; however, samples of harvested and stranded beluga whales have shown consistent summer blubber thicknesses.

In the fall, as anadromous fish runs begin to decline, belugas again return to consume the fish species found in nearshore bays and estuaries. This includes cod species as well as other bottom-dwellers such as Pacific staghorn sculpin and flatfishes, such as starry flounder and yellowfin sole. This change in diet in the fall is consistent with other beluga populations known to feed on a wide variety of food. Pacific staghorn sculpin are commonly found nearshore in bays and estuaries on sandy substrate (Eschmeyer *et al.*, 1983). Flatfish are typically found in very shallow water and estuaries during the warm summer months and move into deeper water in the winter as coastal water temperatures cool (though some

may occur in deep water year-round) (Morrow, 1980).

The available information indicates that Cook Inlet belugas move throughout much of the Inlet in the winter months. They concentrate in deeper waters in mid Inlet past Kalgin Island, with occasional forays into the upper Inlet, including the upper ends of Knik and Turnagain Arms. While the beluga whales move into the mid to lower Inlet during the winter, ice cover does not appear to limit their movements. Their winter distribution does not appear to be associated with river mouths, as it is during the warmer months. The spatial dispersal and diversity of winter prey likely influence the wider beluga winter range throughout the mid Inlet.

There is obvious and repeated use of certain habitats by Cook Inlet beluga whales. Intensive aerial abundance surveys conducted in June and July since 1993 have consistently documented high use of Knik Arm, Turnagain Arm, Chickaloon Bay and the Susitna River delta areas of the upper Inlet. The high use of these areas by belugas is further supported by data from satellite tagging studies.

We considered habitat type and value in our 2008 Cook Inlet Beluga Conservation Plan (NMFS, 2008). That document stratified Cook Inlet into three regions based upon patterns of beluga habitat use, labeling them as valuable habitat types 1, 2, and 3. Type 1 habitat encompasses habitats with intensive beluga use from spring through fall, and which are important foraging and nursery habitats. Type 1 habitat includes all of Cook Inlet northeast of a line drawn from 3 miles southwest of the Beluga River across to Point Possession. Type 2 habitat is based on less concentrated spring and summer beluga use, and known fall and winter use areas. Type 2 habitat is located south of Type 1 habitat and north of a line at 60.2500 north latitude. It also extends south along the west side of the Inlet following the tidal flats into Kamishak Bay around to Douglas Reef, and includes an isolated section within Kachemak Bay. Type 3 habitat encompasses the remaining portions of their range in Cook Inlet; the southern boundary is an opening into the Gulf of Alaska approximately 85 km across from Cape Douglas to Elizabeth Island. Type 1 habitat is believed to be the most valuable of the three habitat types based on the frequency of use and its importance as feeding and calving habitats.

Areas Occupied by the Species at the Time of Listing

The ESA specifies that critical habitat is that habitat occupied by the species "at the time it is listed" (ESA section 3(5)(A)(i)). The range of Cook Inlet belugas has been previously defined as the waters of the Gulf of Alaska north of 58°N. and freshwater tributaries to these waters based on then-available scientific data (65 FR 34590, May 31, 2000; MMPA Sec. 216.15(g); 76 FR 62919, Oct. 22, 2008). There are few beluga sightings in the Gulf of Alaska outside Cook Inlet. In the 1970s and 1980s, beluga sightings occurred across much of the northern and central parts of Cook Inlet, but in the 1990s the summer distribution narrowed to primarily the northernmost portions of Cook Inlet. More of the Inlet was used by beluga whales during the spring, summer, and fall during the 1970s and 1980s than is presently used. However, because sightings continue to occur over the described range, we consider the present range of this DPS to be occupied habitat. The present range of the listed Cook Inlet beluga is limited to Cook Inlet waters north of a line from Cape Douglas to Cape Elizabeth.

Critical Habitat Boundaries

NMFS' ESA regulations relevant to describing a geographical area and "specific areas" state that "each critical habitat will be defined by specific limits using reference points and lines as found on standard topographic maps of the area" (50 CFR 424.12). These regulations require that we also identify the state(s), county(ies), or other local governmental units within which all or part of the critical habitat is located. However, the regulations note that such political units typically would not constitute the boundaries of critical habitat. In addition, the regulations state that ephemeral reference points (e.g., trees, sand bars) shall not be used in defining critical habitat.

We seek the best scientific information available to make the designations as precise as practicable. During the information-gathering phase, we are seeking information that will allow us to map specific areas, using reference points and lines as found on standard nautical charts and topographic maps, that (1) are currently occupied by the species and (2) contain essential physical and biological features.

We have limited information on the distribution and occurrence of Cook Inlet beluga whales within tributary waters of Cook Inlet. Traditional Knowledge of Alaska Native hunters

tells us these whales have occurred several miles up the Susitna and Beluga Rivers in past years, and whales have been observed above tidewater in the Knik River at Turnagain Arm. We seek more information on habitat in estuaries and freshwater as well as marine areas.

Physical and Biological Features Essential for Conservation

As described in ESA section 3(5)(A)(i), we will assemble the best available information to identify those "specific areas within the geographical area occupied by the species at the time it is listed . . . on which are found those physical or biological features . . . (I) essential to the conservation of the species and (II) which may require special management considerations or protection." Joint NMFS/FWS regulations for listing endangered and threatened species and designating critical habitat at section 50 CFR 424.12(b) state that the agency "shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection" (also referred to as "Essential Features" or "Primary Constituent Elements"). Pursuant to the regulations, such requirements include, but are not limited to the following: (1) Space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. These regulations go on to emphasize that the agency shall focus on essential features within the specific areas considered for designation. These features "may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, geological formation, vegetation type, tide, and specific soil types."

We seek information on the identification of these essential features for purposes of identifying critical habitat.

Special Management Considerations or Protection

Coupled with the identification of essential features, during the information-gathering phase we seek input on whether the above essential features may require special

management considerations or protection. For example, unrestricted passage and access between habitats within upper Cook Inlet may require management of this waterway for projects that have the potential to disrupt passage, such as dams or causeways. Similarly, essential prey species such as king salmon may require special management to ensure long-term viability and to prevent overharvest. We will document the special management considerations and protection associated with the essential features and relate these to the factors affecting the species and/or critical habitat during formal rulemaking (see "Schedule and Contents of Rulemaking").

Areas Outside the Geographical Area Occupied by the Species

Section 3(5)(A)(ii) of the ESA defines critical habitat to include specific areas outside the geographical area occupied by the species only if the Secretary determines them to be essential for the conservation of the species. Section 3(3) of the ESA defines conservation as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." NMFS' ESA regulations at 424.12(e) state that the agency "shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species." We would thus include areas outside the occupied geographical area only if areas within the occupied geographical area were not adequate to support conservation. We seek information on the adequacy of the currently occupied habitat to support conservation of the Cook Inlet beluga DPS, and whether areas that are unoccupied might be "essential for conservation."

Determining Economic and Other Relevant Impacts

Section 4(b)(2) of the ESA requires that the Secretary, in deciding to designate critical habitat, consider economic impacts, impacts to national security, and any other relevant impacts of such designation. We seek information relating to any of these impacts.

The ESA gives the Secretary discretion to exclude any area from critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. During the information-gathering phase, we seek information

regarding the benefits of excluding particular areas from the critical habitat designation and the benefits of including each such area as part of the critical habitat designation. We seek information that would allow us to monetize these effects to the extent practicable, as well as information on qualitative impacts to these effects. We also seek input on what approaches would allow us to determine if excluding a particular area from designation will result in the extinction of the species.

Determining Conservation Value

We seek information on the conservation value of potential critical habitat, based on the quality and quantity of the essential feature(s). We also seek input on the best methods for evaluating the conservation value of potential critical habitat areas. We are interested in information relevant to monetizing the conservation value of an area, to the extent useful measurement can be made, and/or to ranking the conservation benefits in an ordinal manner, if full monetization is not practicable.

The Appropriate Geographic Scale for Weighing the Benefits of Exclusion and Benefits of Inclusion

Cook Inlet is a vast region occupying a variety of habitat types and human presence. Much of it is undeveloped, while portions of the Inlet are adjacent to the most populated areas of the State. Consideration of areas for exclusion presents a problem of scale, wherein we wish to maintain the ecological perspective of important habitat for Cook Inlet beluga whales while allowing meaningful distinction between areas to be evaluated under section 4(b)(2).

In some cases, it may be useful to consider habitat units at a finer scale, for example, along the Municipality of Anchorage's waterfront on lower Knik Arm. We seek input on the scale to be used in this analysis for the balancing test.

Information Solicited

Past critical habitat designations have generated considerable public interest. Therefore, we believe it is important to engage the public early and often in the rulemaking process. This ANPR is a key first step, and we encourage all interested parties to submit comments regarding the issues raised in this notice.

In accordance with agency regulations at 50 CFR 424.13, we will consult as appropriate with affected states, interested persons and organizations, other affected Federal agencies, and, in

cooperation with the Secretary of State, with the country or countries in which the species concerned are normally found or whose citizens harvest such species from the high seas. Data reviewed may include, but are not limited to, scientific or commercial publications, administrative reports, maps or other graphic materials, information received from experts, and comments from interested parties. Specific data needs include:

(1) Information on the past and current numbers and distribution of Cook Inlet beluga whales;

(2) Information describing the habitat type and quality of marine, estuarine, and freshwater habitats for all Cook Inlet beluga whales;

(3) Within areas occupied by Cook Inlet beluga whales, information regarding the physical and biological features that are essential to the conservation of this DPS;

(4) Any special management considerations or protection currently associated with essential physical and biological features within areas occupied by Cook Inlet beluga whales, such as any land use management plan, a state statute, a municipal ordinance, or other binding local enactment;

(5) Any specific areas within the range of Cook Inlet beluga whales that may not qualify for critical habitat designation because they lack essential physical or biological features or may not require special management consideration or protections;

(6) Any specific areas outside the area occupied by Cook Inlet beluga whales that are essential for their conservation;

(7) Any specific areas that should be excluded from critical habitat designation because the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat;

(8) Any current or planned activities in the range of Cook Inlet beluga whales and their possible impacts on areas that may qualify as critical habitat;

(9) Any economic or other relevant impacts that may result from designating critical habitat, regardless of whether those impacts are attributable co-extensively to other causes, in particular those impacts affecting small entities;

(10) Other benefits of excluding or designating a specific area as critical habitat; and

(11) Potential peer reviewers for proposed critical habitat designations, including persons with biological and economic expertise relevant to the designations.

As described in a joint NMFS/FWS policy on ESA information standards

published on July 1, 1994 (59 FR 34271), we will rely on the best and most comprehensive technical information available; gather and impartially evaluate information that disputes official positions; document evaluation of information; use, retain, and reference primary and original sources of information; and conduct management-level review of documents to verify and assure the quality of the science used to make the critical habitat designations. We will review all comments and information resulting from this ANPR prior to making any proposed designations and will include such documents in our public record. The public may review information submitted by contacting NMFS (see ADDRESSES and FOR FURTHER INFORMATION CONTACT) or via the internet at <http://www.fakr.noaa.gov/>.

Dated: April 7, 2009.

James W. Balsiger,
Acting Assistant Administrator for Fisheries,
National Marine Fisheries Service.

[FR Doc. E9-8519 Filed 4-13-09; 8:45 am]

BILLING CODE 3510-22-S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[Docket No. 090224231-9594-01]

RIN 0648-AX54

Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; State Waters Exemption

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes regulations to allow an exemption from the minimum twine-top mesh size for vessels issued Federal scallop permits and fishing exclusively in State of Maine (ME) waters. In addition, the state waters exemption would provide an exemption from scallop days-at-sea (DAS) for limited access DAS scallop vessels, provided the vessel owner declares that the vessel will fish exclusively in ME state waters. The scallop fishery regulations specify that a state may be eligible for a state waters exemption if it has a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the

Atlantic Sea Scallop Fishery Management Plan (FMP). The regulations further state that the Regional Administrator, Northeast Region, NMFS (RA), shall determine which states meet those criteria and shall authorize the exemption for such states by publishing a rule in the *Federal Register*.

DATES: Comments must be received by 5 p.m., local time, on May 14, 2009.

ADDRESSES: Documents supporting this action, including ME's request for the exemption, Amendment 11 to the FMP, and Framework 19 to the FMP, are available upon request from Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930.

You may submit comments, identified by 0648-AX54, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.

- Fax: (978) 281-9135, Attn: Peter Christopher.

- Mail: Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, 55 Great Republic Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Maine State Waters Exemption."

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information. NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

FOR FURTHER INFORMATION CONTACT: Peter Christopher, Policy Analyst, 978-281-9288; fax 978-281-9135.

SUPPLEMENTARY INFORMATION:

Background

Amendment 11 to the FMP (Amendment 11), implemented on June 1, 2008 (73 FR 20090, April 14, 2008), includes a comprehensive new management program for the general category scallop fleet. Amendment 11 created a Northern Gulf of Maine Scallop Management Area (NGOM Area) that includes a total allowable catch (TAC), gear restrictions, and a possession limit for the NGOM Area that are more restrictive than previous

regulations for the area. Under Amendment 11, NMFS determined that the exemptions for ME, New Hampshire (NH), and Massachusetts (MA), should be suspended, pending submission of additional information from those states regarding their state waters fisheries and the potential effects of allowing state waters exemptions under the Amendment 11 scallop regulations. In response, ME requested a state waters exemption and provided background information on the State's current scallop fishery management measures, the potential state waters scallop fishery, and information regarding potential new measures that the State was developing at the time.

The scallop fishery regulations at 50 CFR 648.54(c) specify that a state may be eligible for the state waters exemption if it has a scallop fishery and a scallop conservation program that does not jeopardize the biomass and fishing mortality/effort limit objectives of the FMP. The regulations further state that the RA shall determine which states meet those criteria and shall publish a rule in the *Federal Register*, in accordance with the Administrative Procedure Act, to provide the exemption for such states.

Based on the information submitted, NMFS has preliminarily determined that ME state waters qualify for the state waters exemption program under the FMP. The majority of ME's scallop fishery restrictions are either equally or more restrictive than Federal scallop fishing regulations. The exception is that ME allows vessels to use a minimum mesh size of 5.5-in (14-cm) twine tops on scallop dredges, while the Federal regulations require a 10-in (25.4-cm) minimum twine-top mesh size. The state waters exemption would therefore allow an exemption from the 10-in (25.4-cm) minimum twine-top mesh size. In addition, the state waters exemption would provide an exemption from scallop DAS for limited access DAS scallop vessels, but would not exempt such vessels from any other Federal restrictions other than the minimum twine-top mesh size as noted above. To fish under the exemption, owners of scallop vessels would be required to declare their intent to fish exclusively in ME state waters, subject to more restrictive state measures if applicable. Vessels with Federal Incidental Catch scallop permits would still be confined to the 40-lb (18-kg) limit under Federal regulations. The target total allowable catch was set at 50,000 lb (22,680 kg) for these vessels based partly on the very low possession limit. Allowing these vessels to harvest

STATE OF ALASKA

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January 12, 2009

Certified Mail and Facsimile

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Dr. James W. Balsiger – Certified Receipt No. 70023150000020223740
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Re: Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act; improperly determining endangered status for a Distinct Population Segment of the beluga whale (*Delphinapterus leucas*) found in Cook Inlet, Alaska

Dear Secretary Gutierrez and Dr. Balsiger:

On behalf of the State of Alaska (“Alaska”), we are informing you of our intent to file a civil suit against the Secretary of Commerce and NOAA Fisheries/U.S. National Marine Fisheries Services (collectively, “NMFS”) for violations of the Endangered Species Act, 16 U.S.C. §§1531-1544 (“ESA”), and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (“APA”). This letter is delivered to you pursuant to the 60-day notice requirement of 16 U.S.C. §1540(g)(2)(C). Alaska intends to file a civil suit under 16 U.S.C. § 1540(g)(1)(C) for the Secretary’s failure “to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.” Specifically, Alaska seeks declaratory and injunctive relief as appropriate to correct and enjoin the continued actions by the Secretary in violation of the ESA and its implementing regulations by improperly listing a distinct population segment (“DPS”) of the beluga

The Honorable Carlos M. Gutierrez

January 12, 2009

Dr. James W. Balsiger

Page 2

Re: Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act

whale found in Cook Inlet as in danger of extinction throughout its range and the listing of this DPS as an endangered species.¹ We will also seek legal fees and costs associated with the legal action.

On April 20, 2007, NMFS published a proposed rule to list beluga whales in Cook Inlet as an endangered species (72 FR 19854). On April 22, 2008, NMFS extended the deadline for a final determination to October 20, 2008 (73 FR 21578). This extension was made "for the purposes of soliciting additional data," because several parties "questioned the sufficiency or accuracy of the available data used in the rulemaking," and because NMFS "determined that substantial disagreement exists over a certain aspect of the data presented in the proposed rule," the population trend of beluga whales in Cook Inlet (73 FR 62919). On October 22, 2008, NMFS published the final listing rule determining endangered status for the DPS of beluga whales in Cook Inlet under the ESA (73 FR 62919).

Under the ESA, a species is endangered if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). An endangered determination is to be made by the Secretary "solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas." 16 U.S.C. § 1533(b)(1)(A).

The Secretary must consider whether a species is an endangered species upon considering any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purpose; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a) (1). One or more of NMFS' findings violate the ESA because they were not made "solely on the basis of the best scientific and commercial data available," which is a nondiscretionary mandate of the Secretary under 16 U.S.C. 1533 § (b)(1)(A), or the findings were made in a fashion that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A).

¹ Use of the term DPS in this letter does not mean that Alaska necessarily agrees with the finding by NMFS that beluga whales in Cook Inlet were properly determined to be a DPS.

In particular, the final rule in addressing factor D, the “inadequacy of existing regulatory mechanisms,” failed to properly consider the substantial regulation by the State and its political subdivisions of beluga habitat and food supply covering nearly every aspect of the environment affecting beluga whales in Cook Inlet, including water quality, oil and gas development, coastal and upland development, prey species management, cruise ship regulation, and port development, among many others. These laws, when considered together with existing federal regulations, ensure that beluga whales in Cook Inlet are well protected.

The finding regarding inadequacy of existing regulatory mechanisms violates the ESA because, among other things, NMFS does not identify the best available “scientific and commercial data” identifying the regulatory deficiencies that if addressed would benefit the recovery of beluga whales in Cook Inlet beyond the extensive existing federal, state, and local government laws affecting all aspects beluga habitat and food supply in Cook Inlet.

In addition, NMFS violated the ESA and APA by: (1) failing to adequately consider other conservation or protection efforts by Alaska or its political subdivisions in making the listing determination; (2) failing to provide to Alaska’s agencies an adequate written justification under 16 U.S.C § 1533(i) for those portions of NMFS’ final rule not consistent with the Alaska agencies’ comments; (3) failing to properly document or support its determination under the applicable policy and consistent with recent Ninth Circuit authority that the beluga whales in Cook Inlet comprise a distinct population segment within the definition of a “species;” and (4) failing to provide a public review and comment period on significant studies and documentation used to support the listing, including the April 2008 and October 2008 status reviews and other items or information used by NMFS to resolve “substantial disagreement” over certain aspects of the data presented in the proposed rule.

Additional details supporting our claims are referenced in the comments by Alaska, submitted to NMFS on or about July 31, 2007 and incorporated herein by this reference. The description of measures by political subdivisions of Alaska are included in their charters and ordinances of record and in their respective comments submitted during the comment period on the proposed final rule.

A. Other Conservation and Protection Efforts by Alaska, its Political Subdivisions, and Others Were Not Adequately Considered

Under the ESA, NMFS must consider conservation measures being made by “any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other

conservation practices, within any area under its jurisdiction, or on the high seas.”
16 U.S.C. § 1533(b)(1)(A). Such consideration is a nondiscretionary mandate of the Secretary under 16 U.S.C. § 1533(b)(1)(A). NMFS purported to undertake such a review in the rulemaking at page 62928 in summarizing and addressing “Efforts Being Made to Protect The Species.”

In its comments, Alaska submitted extensive information on the ongoing and planned conservation efforts by state and local entities. See Alaska’s comments, Ch. 3. Overall, Alaska submitted 30 pages of comments on ongoing and planned conservation efforts by state and local entities. NMFS summarized its evaluation of those efforts as follows:

In developing our final listing determination, we have considered the best available information concerning conservation efforts and any other protective efforts by states or local entities for which we have information. We conclude that existing conservation efforts do not provide sufficient certainty of effectiveness to substantially ameliorate the level of assessed extinction risk for Cook Inlet beluga whales. 73 FR 62919, 62928.

Beyond this conclusory assertion, NMFS does not document that it adequately considered the extensive provisions contained in the laws and regulations of Alaska and its political subdivisions addressing all aspects of beluga habitat and food supply and did not explain why these efforts will not be effective. These provisions, together with the final subsistence regulations and agreements in place addressing subsistence harvest of beluga whales in Cook Inlet, preclude the need to list the species at this time. Because NMFS did not document for the final rule that such conservation efforts were adequately considered, the final rule should be withdrawn.

B. NMFS Did Not Adequately Respond Under Section 4(i) to Alaska’s Comments

Under the ESA, if NMFS issues a final regulation that conflicts with comments submitted by a state agency (which under the Act means “any state agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a state”), then NMFS “shall submit to the State agency a written justification for [its] failure to adopt regulations consistent with the agency’s comments.” 16 U.S.C. § 1533(i) (“Section 4(i)”).

Similarly, in the promulgation of the ESA listing regulations in 1984, the Service noted that the requirement in 50 C.F.R. § 424.18(c) that implements Section 4(i) requires

“that State agencies be adequately informed of the basis for any action that is not in agreement with that agency’s recommendation.” 49 FR 38900, 38906 (Oct. 1, 1984).

NMFS has taken an action and adopted a final rule that is not consistent with the Alaska state agencies’ comments and failed to specifically address Alaska’s comments (in the rule or by separate letter). Any post-decision-provided Section 4(i) justification that may later be received is inconsistent with statutory and congressional intent to seriously consider the advice of state agencies in the Federal regulatory process. Because a post-decision rationalization by NMFS of its decision in response to Alaska’s comments is insufficient to comply with Section 4(i), the final rule should be withdrawn.

Alaska also puts NMFS on notice of Alaska’s intent to challenge the adequacy of any Section 4(i) response that NMFS may ultimately provide to Alaska.

C. The DPS Determination Is Not Properly Documented

NMFS “reaffirmed” its DPS determination for the beluga whale in Cook Inlet as part of its listing process and provided a separate rulemaking section and conclusion on “Determination of Species Under the ESA,” 73 FR at 62926. The ESA defines the term “species” to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). Although the statute does not define the term “distinct population segment,” NMFS and the U.S. Fish and Wildlife Service (“FWS”) have jointly adopted a policy statement guiding their evaluation of whether a population group should be treated as a DPS. The DPS policy sets forth two primary factors for consideration: (1) the discreteness of the population segment in relation to the remainder of the species to which it belongs, and (2) the significance of the population segment to the species to which it belongs. DPS Policy, 61 FR 4722, 4725 (Feb. 7, 1996).

The discreteness factor is satisfied if a population segment is “separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” or if a population’s boundaries are marked by international borders. *Id.* The significance factor is analyzed under four non-exclusive factors: (1) whether the population persists in a unique or unusual ecological setting; (2) whether the loss of the population would cause a “significant gap” in the taxon’s range; (3) whether the population is the only surviving natural occurrence of a taxon; and (4) whether the population’s genetic characteristics are “markedly” different from the rest of the taxon. *Id.* A population qualifies as a DPS if it is both discrete and significant. *Id.* If a population is deemed to be a DPS, the inquiry then proceeds to whether it is endangered or threatened. *Id.*

The Honorable Carlos M. Gutierrez

January 12, 2009

Dr. James W. Balsiger

Page 6

Re: Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act

NMFS first found the Cook Inlet population to be discrete "because it is markedly separated from other populations of the same species." 73 FR at 62926.

Under the significance factor, NMFS relied on two of the four non-exclusive factors: (1) persistence in an ecological setting that is unique; and (2) whether the loss of the discrete population segment would result in a significant gap in the range of the species. *Id.* NMFS determined that Cook Inlet is a unique biological setting because it supports the southernmost of the five extant beluga populations in Alaska, and is the only water south of the Alaska peninsula, or within the Gulf of Alaska, that supports a viable beluga whale population. NMFS also claimed that the ecological setting of Cook Inlet was unique based on its incised glacial fjord setting, the large tidal exchanges, and its true estuary. NMFS asserts that no similar habitat exists in Alaska or elsewhere in the United States. On the second factor, because the Cook Inlet population is separated from other beluga populations, NMFS "determined that the loss of the Cook Inlet beluga population segment may result in the complete loss of the species in the Gulf of Alaska, resulting in a significant gap in the range with little likelihood of immigration from other beluga population segments into Cook Inlet." 73 FR at 62926.

These two determinations are inadequately documented in the final rule. The Ninth Circuit recently reviewed the FWS' application of the DPS policy in *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service*, 475 F.3d 1136, 1138 (9th Cir. 2007). In that case, the court upheld the FWS' determination that the Washington population of the western gray squirrel did not qualify as a distinct population segment. The court specifically reviewed the FWS' application of three of the four non-exclusive significance factors, including the "ecological setting" and "significant gap" factors that NMFS relied on here.

The *Northwest Ecosystem Alliance* court noted that the uniqueness of the habitat should be tied to some feature of importance for the species. Here, NMFS essentially asserts that Cook Inlet is important because it contains the southernmost beluga population, is an incised glacial fjord, and experiences large tidal exchanges in a true estuary. But NMFS does not explain how that geological setting interacts either with important characteristics of the beluga whale or is significant for the survival and recovery of the beluga whale. NMFS' explanation of the purported significance of this ecological setting and uniqueness to the species was not adequately considered in the final rule.

Next, NMFS does not explain why the loss of the Cook Inlet population might create a significant gap in the range of the species. "Significant" in this context has its commonly understood meaning, which is "important." *Northwest Ecosystem Alliance*, 475 F.3d at 1146. While the Cook Inlet population may be, as was the Washington gray

squirrel population in *Northwest Ecosystem Alliance*, an isolated, peripheral population at the southern portion of the subspecies' range, that alone may not mean that its loss creates a significant gap in the range of the species. By this measure, NMFS failed to establish the necessary "significance" to classify beluga whales in Cook Inlet as a DPS.

Because NMFS failed to adequately document compliance with its own DPS policy in determining that the Cook Inlet population constitutes a DPS under the ESA, and because of the other violations described above, the final rule should be withdrawn.

D. NMFS Failed to Provide for Additional Public Comment for Supplemental Status Review, Analysis of 2008 Survey Data, and Further Supplemental Status Review.

NMFS created and evaluated, and later relied on in its listing decision, several documents after the close of the public comment period on August 3, 2007. Those items included the April 2008 status review, the October 2008 supplemental status review, NMFS' analysis of 2008 survey data, and preparation of an abundance estimate for 2008. NMFS noted that it had extended the period for issuing the rule by six months "for the purposes of soliciting additional data." 73 FR at 62919. Several parties, including the Alaska Department of Fish and Game, "questioned the sufficiency or accuracy of the available data used in the rulemaking." *Id.* NMFS "determined that substantial disagreement exists over a certain aspect of the data presented in the proposed rule," specifically "disagreement remained over the population trend of beluga whales in Cook Inlet, and whether the population is demonstrating a positive response to the restrictions on subsistence harvest imposed in 1999." *Id.* Alaska requested a six month extension to allow NMFS to obtain and consider additional information but did not waive any applicable requirement for additional public comment, and in fact offered assistance in assessing and evaluating beluga abundance data for 2008. (Letter dated December 24, 2007 from Denby S. Lloyd, Commissioner, Alaska Department of Fish and Game to Dr. William Hogarth, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Association).

Generally, ESA Section 4 mandates that NMFS determine a species listing decision through notice and comment rulemaking. See 16 U.S.C. § 1533(a)(1). The required notice and comment rulemaking procedures include those prescribed by the federal Administrative Procedure Act, 5 U.S.C. § 553, in addition to the specific notice and comment procedures set out in the ESA. See 16 U.S.C. § 1533(b)(4)-(6). The NMFS' obligation to comply with these notice and comment rulemaking procedures is mandatory and not discretionary. See, e.g., *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1395, 1402-1404 (9th Cir. 1995); see also *Center for Biological Diversity v. Norton*, 240 F.Supp.2d 1090, 1106-1107 (D. Ariz. 2003).

NMFS should have re-opened the public comment period to allow public review and comment on the supplemental status review and related items. This lack of opportunity for public review and comment on critical information and to receive the benefit of public review of the data prejudiced Alaska by not allowing public comment or the expertise of other parties to be considered. Because the need for the information from the analysis of the 2008 survey data was important enough to extend the date for the final listing determination, it was similarly important to re-open public review and comment, and therefore, the final rule should be withdrawn to obtain public comment on the new survey data.

E. APA Claims

Although APA related claims are not subject to the requirement of the 60-day notice provision, additionally or in the alternative, we believe that the Secretary's actions in issuing the final rule listing beluga whales in Cook Inlet as endangered were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). The arbitrary and capricious nature of the decision is demonstrated by the listing of a DPS without adequately supporting this designation and ignoring the substantial conservation measures protecting beluga whale habitat and food supply through laws by Alaska and its political subdivisions. The Secretary's finding of inadequacy of existing regulatory mechanisms under 16 U.S.C. § 1533(a)(1)(D) simply ignores these substantial measures under the laws of the state and its political subdivisions to protect beluga whale habitat and food supply which together with subsistence harvest regulation and agreements are sufficient to ameliorate the need to list the species under 16 U.S.C. § 1533 (b)(1)(A). We reserve the right to raise all available APA and ESA claims and to rely on the entire administrative record. Because the Secretary selectively relied on new information obtained after the close of public comment, we also reserve the right to rely on available information outside the official administrative record, when pursuing Alaska's claims under this notice to sue.

In summary, the ESA authorizes Alaska to file suit for the Secretary's failure to perform any nondiscretionary act relating to 16 U.S.C. § 1533. 16 U.S.C. § 1540(g)(1)(C). The 60-day notice is intended to provide you an opportunity to correct the actions taken in violation of the ESA by withdrawing the listing of the beluga whale distinct population segment in Cook Inlet as endangered. We appreciate your consideration of the claims described in this notice and hope that the Secretary will quickly act to resolve these issues.

The Honorable Carlos M. Gutierrez

January 12, 2009

Dr. James W. Balsiger

Page 9

Re: Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act

Please contact me with any questions or to discuss these matters.

Sincerely,



Talis J. Colberg
Attorney General

cc: Robert D. Mecum, Acting Administrator, Alaska Regional Office, NMFS



CENTER for BIOLOGICAL DIVERSITY

Because life is good.

For Immediate Release, May 18, 2009

Contact: Rebecca Noblin, Center for Biological Diversity, (907) 274-1110

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Pacific Walrus Advances Toward Endangered Species Protection Court Settlement Requires Feds to Make Initial Decision by September 10, 2009

ANCHORAGE, Alaska—A federal judge today approved a settlement between the Center for Biological Diversity and the U.S. Fish and Wildlife Service requiring the agency to consider whether the Pacific walrus may warrant the protections of the Endangered Species Act. Under the settlement, the Fish and Wildlife Service must make an initial finding on the Center's petition requesting protection of the walrus by September 10, 2009, with a subsequent decision as to whether the species should be protected the following year.

The Center petitioned the Service to protect the Pacific walrus in February 2008 and filed suit late last year when the agency refused to process the petition. The primary threat to the walrus is the loss of its sea-ice habitat in the face of global warming. The species is also threatened by planned oil development in the Chukchi Sea off Alaska.

"The Endangered Species Act is our nation's strongest law for wildlife protection and, properly applied, can help shepherd the walrus through the stresses brought on by a melting Arctic," said Rebecca Noblin, of the Center for Biological Diversity in Anchorage. "But unless we take drastic action to reduce greenhouse pollution, the grim reaper of global warming will ultimately claim the Pacific walrus as a victim."

Listing under the Endangered Species Act will provide broad protection to the Pacific walrus, including a requirement that U.S. federal agencies ensure that any action they carry out, authorize, or fund will not "jeopardize the continued existence" of Pacific walruses or adversely modify their critical habitat. The statute also requires the secretary of the interior to prepare and implement recovery plans for listed species. Listing of the walrus would not affect subsistence harvest of the species by Alaska natives, which is exempted from the law's prohibitions.

The Pacific walrus is a well-known resident of the Arctic seas between Alaska and Siberia whose existence is intimately linked with the sea ice. The walrus, whose scientific name means "tooth-walking sea horse," uses the sea ice as a platform from which to forage for clams and mussels in the relatively shallow waters over the continental shelf. Female walruses and their calves follow the sea ice year-round and rely on the safety of ice floes for nursing their calves and as essential resting platforms between foraging bouts, since they cannot continually swim. All Pacific walrus are dependent on sea ice for breeding activities in winter.

The rapid melting of sea ice is forcing the Pacific walrus into a land-based existence for which it is not adapted. In 2007, the early and extensive disappearance of summer sea ice pushed females and calves onto land on the Russian and Alaskan coasts in abnormally dense herds. As a result, calves suffered high mortality on land due to trampling by those herds. Walrus calves, unable to swim as long as adults, have also been observed abandoned by their mothers at sea, which has been attributed to the disappearance of the sea ice on which they would normally rest.

At the same time that the walrus's sea-ice habitat is melting away, the species' habitat is being auctioned off to oil companies to extract more fossil fuels that will further accelerate global warming and the melting of the Arctic. In 2008 the Bush administration leased 2.7 million acres of the Chukchi Sea off Alaska to oil companies. The Chukchi Sea is the most important foraging area for Pacific walrus and is also home to one of only two polar bear populations in the United States.

Interior Secretary Ken Salazar is currently reviewing whether to defend from legal challenges the Chukchi leases as well as other Bush regulations authorizing oil companies to harass walrus and polar bears. However, in the past two weeks, Salazar adopted Bush rules that limit protections for the polar bear, and in a court filing defended the validity of the Chukchi leases even though the underlying leasing plan was thrown out by the court. Salazar's responses to two other Chukchi-related cases are due in the coming weeks.

"Unfortunately for the walrus, the polar bear, and the entire Arctic ecosystem, Secretary Salazar seems more inclined to protect Big Oil than America's imperiled wildlife," said Noblin. "While the Pacific walrus took an important step toward legal protection today, unless Secretary Salazar spares its habitat from oil development, in the coming years we will be writing the species' obituary rather than its recovery plan."

The Center for Biological Diversity is a national nonprofit conservation organization with more than 220,000 members and online activists dedicated to the protection of endangered species and wild places.

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