DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AF95

Endangered and Threatened Wildlife and Plants; Final Determination of Critical Habitat for the Alaska-Breeding Population of the Steller's Eider

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for the Alaska-breeding population of the Steller's eider (*Polysticta stelleri*), a threatened species listed pursuant to the Endangered Species Act of 1973, as amended (Act). Critical habitat for the Alaska-breeding population of the Steller's eider includes breeding habitat on the Yukon-Kuskokwim Delta (Y–K Delta) and 4 units in the marine waters of southwest Alaska, including the Kuskokwim Shoals in northern Kuskokwim Bay, and Seal Islands, Nelson Lagoon, and Izembek Lagoon on the north side of the Alaska Peninsula. These areas total approximately 7,333 square kilometers (approximately 2,830 square miles (mi^2); 733,300 hectares; 1,811,984 acres) and 1,363 km (852 miles (mi)) of shoreline.

Section 4 of the Act requires us to consider economic and other impacts of specifying any particular area as critical habitat. We solicited data and comments from the public on all aspects of the proposed rule and economic analysis. Section 7 of the Act prohibits destruction or adverse modification of critical habitat by any activity funded, authorized, or carried out by any Federal agency.

DATES: The effective date of this rule is March 5, 2001.

FOR FURTHER INFORMATION CONTACT: Ted Swem, Northern Alaska Ecological Services, U.S. Fish and Wildlife Service, 101 12th Ave., Rm 110, Fairbanks, AK 99701 (telephone 907/456–0203; facsimile 907/456–0208).

SUPPLEMENTARY INFORMATION:

Background

The Steller's eider was first described by Peter Simon Pallas in 1769, and given the scientific name *Anas stelleri* Pallas. After seven name changes, it was grouped with other eiders as *Somateria stelleri.* It is now considered distinct from the other eiders, and is the only species in the genus *Polysticta* (American Ornithologists' Union 1983). This genus is grouped with the other sea ducks under the Tribe Mergini (eiders, scoters, mergansers, and allies), Subfamily Anatinae (ducks), and the Family Anatidae (swans, geese, and ducks).

The Steller's eider is the smallest of four eider species; both sexes are approximately 45 centimeters (17–18 inches) long (Bellrose 1980). The plumage of the breeding adult male is white, black, and chestnut. The head is white with black eye patches and light green tinging on the forehead, lores (space between bill and eye), and below the eye. The chin and throat are black, separated from a broad black collar around the lower neck by a white ring. The shoulders and back are also black and each tertial (inner wing) feather is bicolored longitudinally, with the inner half being white and the outer half being bluish-black, giving the back a striped appearance when the wing is folded. The speculum (patch of colored feathers on the wing) is dark blue and the breast and belly are chestnut shading to black posteriorly. A black spot is present on each side of the breast. The flanks, rump, and under-tail feathers are black, and the wedge-shaped tail is dark brown. Males in eclipse plumage (dull plumage assumed prior to molt) during late summer and fall are entirely mottled brown except the wings are like the adult breeding male's and the upper wing-coverts are white. Females and juveniles are mottled brown year-round, and the female adult has a blue speculum bordered in white.

Geographic Range

Three breeding populations of Steller's eiders are recognized, two in Arctic Russia and one in Alaska. The majority of Steller's eiders breed in Russia and are identified by separate breeding and wintering distributions (Nygard *et al.* 1995). The Russian Atlantic population nests west of the Khatanga River and winters in the Barents and Baltic seas. The Russian Pacific population nests east from the mouth of the Khatanga River and winters in the southern Bering Sea and northern Pacific Ocean, where it presumably intermixes with the Alaska-breeding population. Neither Russia-breeding population is listed as threatened or endangered; only Steller's eiders that nest in Alaska are listed as threatened under the Act.

This rule for critical habitat addresses the Alaska-breeding population of Steller's eiders, the only population listed under the Act, but individuals from the Alaska-breeding population are visually indistinguishable from unlisted Russia-breeding Steller's eiders. During the autumn molt, winter, and spring migration staging periods, the listed Alaska-breeding population intermixes with the more numerous and unlisted Russian Pacific population in marine waters of southwest Alaska. During these times, it is unknown whether the Alaska-breeding population concentrates in distinct areas or disperses throughout the species' marine range.

The historical breeding range of the Alaska-breeding population of Steller's eiders is not clear. The historical breeding range may have extended discontinuously from the eastern Aleutian Islands to the western and northern Alaska coasts, possibly as far east as the Canadian border. In more recent times, breeding occurred in two general areas, the Arctic Coastal Plain on the North Slope, and western Alaska, primarily on the Y–K Delta. Currently, Steller's eiders breed on the western Arctic Coastal Plain in northern Alaska, from approximately Point Lay east to Prudhoe Bay, and in extremely low numbers on the Y–K Delta.

On the North Slope, anecdotal historical records indicate that the species occurred from Wainwright east, nearly to the Alaska-Canada border (Anderson 1913; Brooks 1915). There are very few nesting records from the eastern North Slope, however, so it is unknown if the species commonly nested there or not. Currently, the species predominantly breeds on the western North Slope, in the northern half of the National Petroleum Reserve—Alaska (NPR–A). The majority of sightings in the last decade have occurred east of the mouth of the Utukok River, west of the Colville River, and within 90 km (56 mi) of the coast. Within this extensive area, Steller's eiders generally breed at very low densities.

The Steller's eider was considered a locally ''common'' breeder in the intertidal, central Y–K Delta by naturalists early in the 1900s (Murie 1924; Conover 1926; Gillham 1941; Brandt 1943), but the bird was reported to breed in only a few locations. By the 1960s or 70s, the species had become extremely rare on the Y–K Delta, and only six nests have been found in the 1990s (Flint and Herzog 1999). Given the paucity of early recorded observations, only subjective estimates can be made of the Steller's eider's historical abundance or distribution on the Y–K Delta.

A few Steller's eiders were reportedly found nesting in other locations in western Alaska, including the Aleutian Islands in the 1870s and 80s (Gabrielson and Lincoln 1959), Alaska Peninsula in

the 1880s or 90s (Murie and Scheffer 1959), Seward Peninsula in the 1870s (Portenko 1989), and on Saint Lawrence Island as recently as the 1950s (Fay and Cade 1959). It is unknown how regularly these areas were used or whether the species ever nested in intervening areas.

After breeding, Steller's eiders move to marine waters where they undergo a flightless molt for about 3 weeks. The majority are thought to molt in four areas along the Alaska Peninsula: Izembek Lagoon (Metzner 1993; Dau 1999a; Laubhan and Metzner 1999), Nelson Lagoon, Herendeen Bay, and Port Moller (Gill *et al.* 1981; Petersen 1981; Dau 1999a). Additionally, smaller numbers are known or thought to molt in a number of other locations along the western Alaska coast, around islands in the Bering Sea, along the coast of Bristol Bay, and in smaller lagoons along the Alaska Peninsula (Swarth 1934; Dick and Dick 1971; Petersen and Sigman 1977; Wilk *et al.* 1986; Dau 1987; Petersen *et al.* 1991; Day *et al.* 1995; Dau 1999a). Others molt in the Russian Far-East, primarily near Kamchatka, but where these individuals nest is undetermined.

Only rudimentary information on the marine distribution of Alaska-breeding Steller's eiders is available. Recoveries of banded Steller's eiders suggest that the Alaska-breeding population intermixes with Russian-Pacific breeders in southwest Alaska during molt. Steller's eiders banded during molt at Izembek and Nelson lagoons have been found during the breeding season near Barrow (Jones 1965; Service, U.S. Geological Survey, and North Slope Borough, unpub. data) as well as in a number of locations in Russia (Jones 1965). More recently, satellite telemetry tracked post-breeding movements of three individuals that bred at Barrow in 2000. Two of the three apparently molted near the Kuskokwim Shoals and the third is believed to have molted at Seal Islands on the north side of the Alaska Peninsula (Service unpub. data.).

In general, wintering Steller's eiders occupy shallow, near-shore marine waters in much of southwest and south coastal Alaska. They are found around islands and along the coast of the Bering Sea and north Pacific Ocean from the Aleutian Islands, along the Alaska Peninsula and Kodiak Archipelago, east to lower Cook Inlet. Along open coastline, Steller's eiders usually remain within about 400 meters (m) (400 yards (yd)) of shore normally in water less than 10 m (30 feet (ft)) deep (C. Dau, Service, pers. comm. 1999) but can be found well offshore in shallow bays and lagoons or near reefs (C. Dau, pers. comm. 1999; D. Zwiefelhofer, Service, pers. comm. 1999). An unknown number of Steller's eiders winter along the Russian and Japanese coasts. They have been reported from the Anadyr Gulf (Konyukhov 1990), Komandor (Commander) and Kuril islands in Russia (Kistchinski 1973; Palmer 1976), and near Hokkaido Island in northern Japan (Brazil 1991).

Prior to spring migration, thousands to tens of thousands of Steller's eiders stage at a series of locations along the north side of the Alaska Peninsula, including several areas used during molt and winter such as Port Heiden, Port Moller, Nelson Lagoon, and Izembek Lagoon (Larned *et al.* 1994; Larned 1998). From there, they cross Bristol Bay, and it is thought that virtually the entire Alaska-wintering adult population spends days or weeks feeding and resting in northern Kuskokwim Bay and in smaller bays along its perimeter (W. Larned, Service, pers. comm. 1999). The number seen there varies among years, presumably due to variation in sea ice conditions that may slow northward migration in some years. An estimated 42,000 have concentrated in early May in Kuskokwim Bay when lingering sea ice has delayed northward migration (Larned *et al.* 1994). Steller's eiders also concentrate along the southwest coast of the Y–K Delta and southern coast of Nunivak Island during spring migration (Larned *et al.* 1994).

Steller's eiders move north through the Bering Strait between mid-May and early June (Bailey 1943; Kessel 1989). Subadults may remain in wintering areas or along the migration route during the summer breeding season, as they have been noted in Nelson Lagoon in July (M. Petersen, U.S. Geological Survey, pers. comm. 1999), around Nunivak Island from July to October (B. McCaffery, Service, pers. comm. 1999) and offshore and along the lagoons of St. Lawrence Island in summer (Fay 1961). Steller's eiders have been seen in lagoons along the northwest coast of Alaska in late July, and these also may be subadults (Day *et al.* 1995).

Fall migration is protracted, with Steller's eiders moving south through the Bering Strait from late July through October (Kessel 1989), depending on age and sex of individuals and whether migration takes place before or after wing molt (Jones 1965). Fall migration routes are poorly understood, but groups have been seen passing near shore at Nunivak Island (Dau 1987) and Cape Romanzof (McCaffery and Harwood 1997).

Population Status

Determining population trends for Steller's eiders is difficult; however, the Steller's eider's breeding range in Alaska appears to have contracted, with the species disappearing from much of its historical range in western Alaska (Kertell 1991) and possibly a portion of its range on the North Slope. In areas where the species still occurs in Alaska, the frequency of occurrence (the proportion of years in which the species is present) and the frequency of breeding (the proportion of years in which the species attempts to nest) have both apparently declined in recent decades (Quakenbush *et al.* 1999).

We do not know whether the species' breeding population on the North Slope is currently declining, stable, or improving. Although Steller's eiders are counted there during extensive aerial waterfowl and eider surveys, few are seen in most years because the species occurs at very low density and the surveys sample only a small proportion of the suitable breeding habitat. Based on observations at Barrow, we have found that breeding population size and breeding effort vary considerably among years, therefore, detecting statistically significant population trends and accurately estimating population size is difficult.

Despite the difficulty in detecting statistically significant trends with North Slope aerial survey data, these data can be used to estimate breeding population size. Several dozen Steller's eiders are usually detected during aerial breeding-pair waterfowl surveys on the North Slope each year (Service unpub. data (a)). These surveys sample 2–3 percent of the suitable waterfowl breeding habitat annually. When extrapolated to the entire study area, the number of sightings suggests that hundreds or low thousands (point estimates ranged from 534 to 2,543 in 1989–1999) of Steller's eiders would be detected if the entire region were surveyed each year. Actual population size is probably higher, however, because these estimates are made with the assumption that all Steller's eiders within the sample area are detected. Based on knowledge of other waterfowl species, this is almost certainly not the case, but information is inadequate to estimate a species-specific visibility correction factor. Based on these observations, it seems reasonable to estimate that hundreds or thousands of Steller's eiders occur on the North Slope. Similar aerial surveys are conducted on the Y–K Delta, but no Steller's eiders have been detected in these surveys so population size and

trends cannot be estimated. Nonetheless, comparison of historical and recent observations indicate that a reduction in the species' abundance has occurred on the Y–K Delta (Kertell 1991).

Previous Federal Action

In December 1990, James G. King of Juneau, Alaska, petitioned us to list the Steller's eider under the Act. In May 1992, we determined that listing was warranted but precluded by higher listing priorities elsewhere. In 1992, a status review of the species concluded that listing the Alaska-breeding population as threatened was warranted, although the available information did not support listing the species worldwide (57 FR 19852). A proposed rule to list the Alaska-breeding population of Steller's eiders as threatened was published in the **Federal Register** on July 14, 1994 (59 FR 35896). Appropriate Federal and State agencies; borough, city, and village governments; scientific and environmental organizations; and other interested parties were contacted and encouraged to comment. Shortly thereafter, a new Service policy (July 1, 1994; 59 FR 34270) was implemented requiring that listing proposals be reviewed by at least three independent specialists. The comment period was reopened in June 1995 to seek peer review, and appropriate parties were again contacted and encouraged to comment. A final determination on whether listing was warranted was further delayed by a national moratorium on listing (Public Law 104–6) implemented in April 1995, which prevented final determination on listing actions for the remainder of the fiscal year; that moratorium was later extended until April 1996.

We received comments on listing Steller's eiders from a total of nine parties during the two comment periods. Of the comments, four supported listing, four were neutral, and one, the Alaska Department of Fish and Game, opposed listing. We also received peer review from five recognized experts on eider or sea duck population monitoring, modeling, or management; all five supported listing the Alaska-breeding population of Steller's eiders as threatened or endangered. Two environmental organizations (The Wilderness Society and Greenpeace) recommended designating critical habitat in current and historical breeding habitat, wintering habitat along the Alaska Peninsula, and other marine areas. The North Slope Borough supported listing but, although not specifically mentioning ''critical habitat,'' recommended against additional special protection near the village of Barrow. Of the five independent experts who provided peer review, four commented on critical habitat designation. One suggested studies of breeding ecology to identify critical habitat requirements, one recommended designating critical habitat near Barrow, one suggested ''absolute protection'' for Steller's eiders nesting anywhere in Alaska, and one mentioned that protecting ''coastal molting and wintering range'' was perhaps more important than breeding habitat.

On June 11, 1997, we listed the Alaska-breeding population of Steller's eiders (62 FR 31748) as threatened. That decision included a determination that designation of critical habitat was not prudent at that time. Service regulations (50 CFR 424.12(a)(1)) state that designation of critical habitat is not prudent if designation would not be beneficial to the species. Section 7(a)(2) of the Act requires Federal agencies to ensure, in consultation with the Service, that activities they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species. At the time of our determination, we stated that critical habitat designation would provide no additional benefit to Steller's eiders because protection of the species' habitat would be ensured through section 7 consultations, the recovery process, and, as appropriate, through the section 10 habitat conservation planning process.

We initiated recovery planning for the Steller's eider in 1997. The Steller's Eider Recovery Team was formed, consisting of eleven members with a variety of expertise in Steller's eider biology, conservation biology, population biology, marine ecology, Native Alaskan culture, and wildlife management. The Recovery Team is developing a draft Steller's Eider Recovery Plan, and we expect the draft Recovery Plan to be available for review in 2001.

In October 1998, The Wilderness Society and seven other national and regional environmental organization filed a lawsuit in Federal District Court objecting to the Department of the Interior decision to undertake oil and gas leasing in the National Petroleum Reserve-Alaska, *Wilderness Society, et al.* v. *Babbitt,* Civ. No. 98–02395 (D.D.C.). One of the Plaintiffs claims in this litigation is that the Service's failure to designated critical habitat (i.e., the ''not prudent'' determination) for spectacled and Steller's eiders was arbitrary and capricious and in violation of the Act. This claim is currently being litigated.

In March 1999, the Southwest Center for Biological Diversity, Center for Biological Diversity, and Christians Caring for Creation filed a lawsuit in Federal District Court in the Northern District of California against the Secretary of the Department of the Interior for failure to designate critical habitat for five species in California and two in Alaska. These species include the Alameda whipsnake (*Masticophis lateralis euryxanthus*), the zayante band-winged grasshopper (*Trimerotropis infantilis*), the Morro shoulderband snail (*Helmintholglypta walkeriana*), the Arroyo southwestern toad (*Bufo microscaphus californicus*), the San Bernardino kangaroo rat (*Dipodomys merriami parvus*), the spectacled eider (*Somateria fischeri*), and the Steller's eider.

In the last few years, a series of court decisions have overturned Service determinations regarding a variety of species that designation of critical habitat would not be prudent (e.g., *Natural Resources Defense Council* v. *U.S. Department of the Interior*, 113 F. 3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt*, 2F. Supp. 2d 1280 (D. Hawaii 1998)). Based on the standards applied in those judicial opinions and the availability of new information concerning the species' habitat needs, we recognized the value in reexamining the question of whether critical habitat for Steller's eider would be prudent. Accordingly, the Federal Government entered into a settlement agreement whereby we agreed to readdress the prudency of designating critical habitat for Steller's eider.

After reviewing the best scientific and commercial data available, we proposed to withdraw the previous finding that the designation of critical habitat for the Steller's eider was not prudent. On March 13, 1999 (65 FR 13262), we proposed to designate nine areas in northern, western, and southwestern Alaska as critical habitat for the Steller's eider. On April 19, 2000 (65 FR 20938) we extended the comment period until June 30, 2000. On July 5, 2000 (65 FR 41404) we extended the comment period until August 31, 2000. On July 31, 2000 (65 FR 46684) we published the notice to hold a public hearing. On August 24, 2000 (65 FR 51577) we announced the availability of the draft economic analysis and extended the public comment period until September 24, 2000.

We have made this final critical habitat determination based upon the best scientific and commercial information available. However, we

recognize that we do not have complete information on the distribution of this species at all times of the year. If information becomes available indicating that additional or fewer areas are essential for the conservation of the species, or may need special management considerations and protections, we may reevaluate our critical habitat designation, including proposing additional critical habitat or proposing deletion or boundary refinement of existing critical habitat.

State of Knowledge of the Steller's Eider

The Alaska-breeding population of the Steller's eider was listed as threatened in June, 1997 (62 FR 31748). At that time, we noted that there was considerable uncertainty about the historical distribution and abundance of Steller's eiders in Alaska. Although qualitative information suggested that the range of the species had contracted over the last century, there was inadequate quantitative information available to assess population size or trends. Thus, the decision to list the Alaska-breeding population was based primarily upon the near disappearance of Steller's eiders from the Y–K Delta and the indication that they may have abandoned the eastern North Slope.

At the time of listing, the available information was also inadequate to identify the factor or factors causing the species' decline in Alaska. However, we concluded that destruction or modification of habitat did not appear to have played a major role in the decline in the Steller's eider as a nesting species in Alaska because—(1) only a very small proportion of the species' vast and remote habitat in Alaska had been modified by humans; (2) other waterfowl species continue to occur or nest in large numbers in the limited areas with human presence and impact; and (3) the only place where the Steller's eider is currently known to regularly nest in Alaska is near Barrow, where they nest near gas pipelines, roads, airports, and other forms of human disturbance and habitat modification. Possible factors that may have contributed to the species' decline were mentioned in the final listing rule (62 FR 31748), including changes in the numbers or diet of predators, hunting (directly through shooting and/or indirectly through the ingestion of spent lead shot pellets in wetlands), and changes in the marine environment that could affect Steller's eider food or other resources. Although we speculated on possible factors causing decline, there was little or no information demonstrating that any had actually caused the species' decline or would limit recovery.

In the three years since listing, research and survey efforts have begun to provide additional information on the species' ecology. Most recent information on the distribution of Steller's eiders on the North Slope is derived from two extensive, standardized aerial surveys that sample for waterfowl breeding pairs and eiders across much of the Arctic Coastal Plain. Although these surveys include a vast area, the sampling intensity is low (the waterfowl breeding pair and eider surveys sample approximately 2 and 4 percent of the Arctic Coastal Plain each year, respectively). Low sampling intensity, combined with a low density of Steller's eiders, results in very few Steller's eiders being detected by these surveys. In 1999 and 2000, intensive aerial surveys specifically targeting Steller's eiders with a sampling intensity of 50 percent were conducted in a block near Barrow, and in additional blocks near Admiralty Bay and Atqasuk in 1999 and 2000, respectively (Martin 2000a). These Steller's eider surveys provided considerable new information, including an indication that 200–500 pairs of Steller's eiders may have occupied an area south of Barrow comprising approximately 2,700 km^2 (1,055 mi^2) in both 1999 and 2000 (Martin 2000a). This finding contrasts with the waterfowl breeding pair and eider surveys, which provided inadequate information to estimate population size (and failed to detect any Steller's eiders in the survey overlap area in 2000). This important finding indicates that the population size and density of Steller's eiders may be considerably higher than that indicated by waterfowl breeding pair and eider surveys. No Steller's eiders were seen in the Admiralty Bay or Atqasuk blocks during the intensive Steller's eider surveys, although the species has been observed in these blocks during low-intensity waterfowl and eider surveys in other years. Given the tremendous annual variation in breeding population size and performance that is characteristic of the Steller's eider, it is premature to draw conclusions about the absence of Steller's eider observations in these blocks during a single survey year. However, the apparent striking difference in density between these survey blocks indicates the uneven distribution of the species and highlights the need for additional intensive surveys throughout other portions of the species' range on the North Slope.

Another information gap that was noted at the time the Alaska-breeding population of Steller's eiders was listed pertains to non-breeding season distribution. There is considerable information on the use of Izembek and Nelson lagoons, and to a lesser extent other nearby areas on the Alaska Peninsula, during molt and winter. In these areas, repeated surveys have quantified the variation in use within and among years. In contrast, there is much less information from the majority of the species' vast marine range in Alaska. In some areas, surveys have only been conducted during fall and/or spring, have only been conducted a very few times, or have never been conducted (such as large portions of the Kodiak Archipelago). Thus, our understanding of distribution and how it varies within and among years is very inadequate for large portions of the species' non-breeding range. In February and March, 2000, aerial shoreline surveys were conducted along thousands of kilometers of coastal southwestern Alaska in order to document the distribution of Steller's eiders (Larned 2000b). In general, these surveys found Steller's eiders occurring over a wide area in groups of dozens or hundreds, rather than larger concentrations of thousands. Exceptions were Izembek and Nelson lagoons, where 17,571 and 10,391 Steller's eiders were found in March 2000, respectively (Larned 2000b). Further surveys are needed in marine areas in the future to better understand distribution and how it varies within and among years.

Another aspect of non-breeding season distribution that is poorly understood pertains to the Alaska-breeding population. In general, our knowledge of the marine distribution and ecology of Steller's eiders pertains to the species as a whole, which is comprised of both the unlisted Russia-breeding population and the listed Alaska-breeding population. If the Alaska-breeding population selectively uses portions of the species' broader range, those areas are disproportionately essential for the listed population's recovery. However, the available information has been inadequate to evaluate whether the populations mix freely or are somewhat segregated in the marine environment. During 2000, three adult Steller's eiders that bred near Barrow had satellite transmitters attached to follow movements after the breeding season. Two spent the molt period at the Kuskokwim Shoals in northern Kuskokwim Bay while the other spent this period at Seal Islands, a lagoon on the north side of the Alaska

Peninsula (Martin 2000b). Although the sample size is very small, these observations may suggest selective use of molting areas by members of the Alaska-breeding population because all three individuals molted in areas thought to support comparatively small molting populations (limited survey data showed that about 5,000 may molt near the Kuskokwim Shoals and 5,000–10,000 may molt at Seal Islands). Additional satellite telemetry is planned to acquire greater sample size and to follow birds through the winter; this will provide additional information on the specific areas used during molt and winter by the Alaska-breeding population.

In summary, since listing we have initiated satellite telemetry efforts to delineate the marine distribution of the Alaska-breeding population of Steller's eiders. Additionally, because Steller's eiders are infrequently observed during standard aerial waterfowl surveys, we have increased intensive aerial survey efforts on the North Slope to better elucidate distribution and abundance. However, both of these efforts are preliminary and will require continued efforts to produce adequate information. Significant data gaps remain in our understanding of abundance and distribution on the North Slope, marine distribution during the non-breeding season (and how the distribution of the Alaska-breeding population compares to that of the Russia-breeding population), factors causing decline and constraining recovery, and how the current status of the species compares to historical status. Each of these data gaps complicates the evaluation of critical habitat and determining which areas are essential for the species' recovery. We anticipate that development and completion of a Steller's Eider Recovery Plan will enhance our efforts to understand the roles of environmental, physiological, and behavioral factors in achieving recovery of this species.

Critical Habitat

Critical habitat is defined in section 3 of the Act as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered or a threatened species to the point at which listing under the Act is no longer necessary.

Section 4(b)(2) of the Act requires that we base critical habitat proposals upon the best scientific and commercial data available, after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude any area from critical habitat designation if the benefits of such exclusion outweigh the benefits of including such area as part of the critical habitat, provided the exclusion will not result in the extinction of the species (section 4(b)(2) of the Act).

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of critical habitat with regard to actions carried out, funded, or authorized by a Federal agency. Section 7 also requires conferences on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. In our regulations at 50 CFR 402.02, we define destruction or adverse modification as ''* * * the direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.'' Aside from the added protection that may be provided under section 7, the Act does not provide other forms of protection to lands designated as critical habitat. Because consultation under section 7 of the Act does not apply to activities on private or other non-Federal lands that do not involve a Federal nexus, critical habitat designation does not afford any additional protections under the Act against such activities.

Section 4 of the Act requires that we designate critical habitat at the time of listing and based on what we know at the time of the designation. When we designate critical habitat at the time of listing or under short court-ordered deadlines, we will often not have sufficient information to identify all areas of critical habitat. We are required, nevertheless, to make a decision and thus must base our designations on what, at the time of designation, we know to be critical habitat.

In order to be included in a critical habitat designation, the habitat must first be ''essential to the conservation of the species.'' Within the geographic range occupied by the species critical habitat designations identify, to the extent known using the best scientific and commercial data available, habitat areas that provide essential life cycle needs of the species (i.e., areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)) and may require special management considerations or protection.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential and that may require special management considerations or protection. Essential areas should already have the features and habitat characteristics that are necessary to sustain the species. It should be noted; however, that not all areas within the occupied geographic range of the species that contain the features and habitats that supports the species are essential and they may or may not require special management or protection. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. If the information available at the time of designation does not show that an area provides essential life cycle needs of the species, then the area should not be included in the critical habitat designation. Within the geographic area occupied by the species, we will not designate areas that do not now have the primary constituent elements , as defined at 50 CFR 424.12(b), that provide essential life cycle needs of the species.

Our regulations state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by the species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' (50 CFR 424.12(e)). Accordingly, when the best available scientific and commercial data do not demonstrate that the conservation needs of the species require designation of critical habitat outside of occupied areas, we will not designate critical habitat in areas outside the geographic area occupied by the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that decisions made by us represent the best scientific and commercial data available. It requires our biologists, to the extent consistent with the Act and with the use of the best scientific and commercial data available, to use

primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should be the listing package for the species. Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by states and counties, scientific status surveys and studies, and biological assessments or other unpublished materials (i.e., gray literature). Our peer review policy requires that we seek input from at least three scientists who are knowledgeable in subject matter relevant to each rule.

Critical habitat designations do *not* signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Designating critical habitat does not, in itself, lead to recovery of a listed species. Designation does not create a management plan, establish numerical population goals, prescribe specific management actions (inside or outside of critical habitat), set aside areas as preserves, or directly affect areas not designated as critical habitat. Specific management recommendations for critical habitat are most appropriately addressed in section 7 consultations for specific projects, or through recovery planning.

Designation of critical habitat can help focus conservation activities for a listed species by identifying areas, both occupied and unoccupied, which contain or could contain the habitat features (primary constituent elements described below) that are essential for the conservation of that species. Designation of critical habitat alerts the public as well as land-managing agencies to the importance of these areas.

Our decision to not designate critical habitat throughout all of our proposed critical habitat units does not imply that these non-designated areas are unimportant to Steller's eiders. Projects with a Federal nexus that occur in these areas, or anywhere within the range of Steller's eiders, which may affect Steller's eiders must still undergo section 7 consultation. Our decision to not designate critical habitat in these areas does not reduce the consultation requirement for Federal agencies participating in, funding, permitting, or carrying out activities in these areas.

Methods

In determining which areas are essential to the conservation of Steller's eiders and may require special management considerations or protection, we used the best scientific and commercial information available. Our information sources included data from banding, satellite telemetry, aerial surveys, ground plot surveys, ground-based biological investigations, maps, Geographic Information System data, traditional ecological knowledge, and site-specific species information and observations. We discussed our critical habitat proposal at 19 public meetings and one public hearing. We convened a meeting of experts in the field of eider biology to provide us with information useful in setting criteria and boundaries for habitats essential to the conservation of the Steller's eider. Experts from whom we sought information included representatives of State and Federal agencies, the University of Alaska, a private consulting firm, and local government. We also sought peer review of the proposed rule from six recognized experts in eider or sea duck ecology; two submitted comments. Additionally, we considered 334 comments received during the open comment period, including written comments, oral comments received during meetings and one public hearing, and comments received by E-mail, regular mail, facsimile, and telephone.

We made a concerted effort to solicit traditional ecological knowledge regarding habitats that are important to Steller's eiders. We contacted representatives of regional governmental and non-profit Native organizations and asked them to recommend individuals who may have traditional ecological knowledge of eiders and their habitats and who may be willing to review the Steller's eider critical habitat proposal. We attempted to contact all individuals identified by the regional representatives, and provided those individuals who agreed to review the proposal with copies of the proposed rule and additional informational materials. Comments submitted by these and other individuals with traditional ecological knowledge, transmitted either in written form or orally during the course of public meetings, have been considered during the development of the final rule.

We reviewed available information that pertains to the habitat requirements and preferences of this species. Comments received through the public review process provided us with valuable additional information to use in decision making, and in assessing the potential economic impact of designating critical habitat for the species.

Criteria Used To Identify Critical Habitat

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12 in determining which areas to propose as critical habitat, we are required to base critical habitat determinations on the best scientific and commercial data available and to consider those physical and biological features that are essential to the conservation of the species and that may require special management considerations and protection. Such requirements include but are not limited to: space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, rearing of offspring; and habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species. Primary constituent elements for each critical habitat unit are described below (see Determination).

We considered qualitative criteria in the selection of specific areas or units for Steller's eider critical habitat. Such criteria focused on (1) identifying areas where Steller's eiders consistently occur at relatively high densities; (2) identifying areas where Steller's eiders are especially vulnerable to disturbance and contamination due to flightlessness; and (3) identifying areas essential to survival and recovery given our best available data.

In defining critical habitat boundaries, we made an effort to avoid developed areas, such as towns and other similar lands, which do not contain the primary constituent elements of Steller's eider critical habitat. Existing man-made features and structures within the

boundaries of the mapped units, such as buildings, roads, pipelines, utility corridors, airports, other paved areas, and other developed areas do not contain one or more of the primary constituent elements and are therefore not critical habitat. Federal actions limited to those areas, therefore, would not trigger a section 7 consultation, unless they may affect the species and/or primary constituent elements in adjacent critical habitat. Additionally, some areas within the boundaries of the critical habitat units may not contain the primary constituent elements and therefore are not critical habitat. For example, waters greater than 9 m (30 ft) deep are not believed to be used by Steller's eiders and are not described as primary constituent elements. Regardless of the boundaries of the critical habitat units, all waters greater than 9 m (30 ft) deep are not critical habitat.

Critical Habitat Designation

The designated critical habitat described below constitutes our best assessment of areas essential for the conservation of Steller's eiders and is based on the best scientific and commercial information available. The essential features found on the designated areas may require special management consideration or protection to ensure their contribution to the species' recovery. Our critical habitat designation of selected areas does not imply that areas not designated may not require special management considerations or protections.

Area of designated critical habitat by land ownership is shown in Table 1.

TABLE 1.—APPROXIMATE CRITICAL HABITAT AREA (HA [1]) BY UNIT AND OWNERSHIP

Unit	Federal	State	Native	Total
Yukon-Kuskokwim Delta	190,800	0	65,300	256,100
Kuskokwim Shoals	287,600	93,700	0	381,300
Seal Islands	0	6,300	0	6,300
Nelson Lagoon (incl. Port Moller and Herendeen Bay)	0	53,300	0	53,300
Izembek Lagoon	0	36,300	0	36,300
Total	478,400	189,600	65,300	733,300

[1] Units are hectares. To convert to km^2, multiply hectares by 0.01; to convert to acres, multiply hectares by 2.471; to convert to mi^2, multiply hectares by 0.00386.

Unit 1: Yukon-Kuskokwim Delta

The Yukon-Kuskokwim Delta critical habitat unit includes the vegetated intertidal zone of the central delta from the Askinuk Mountains to northern Nelson Island. This unit is comprised of 15 entire townships and 564 sections within 27 additional townships and encompasses 2,561 km^2 (256,100 ha) (980 mi^2). This unit is one of only two known breeding sites for the Alaska-breeding populations. The boundaries have been modified from those proposed to eliminate upland habitat not likely to be used by Steller's eiders, resulting in an 18 percent reduction in area for this unit. Primary constituent elements of Steller's eider critical habitat in this unit include all land within the vegetated intertidal zone, along with all open-water inclusions within that zone. The vegetated intertidal zone includes all lands inundated by tidally influenced water often enough to affect plant growth, habit, or community composition. Waters within this zone are usually brackish. Vegetative communities within this zone include, but are not limited to, low wet sedge tundra, grass marsh, dwarf shrub/graminoid (consisting of grasses and sedges) meadow, high and intermediate graminoid meadow, mixed high graminoid meadow/dwarf shrub uplands, and areas adjacent to open water, low wet sedge and grass marsh habitats. Within the indicated border, existing human development and areas not within the vegetated intertidal zone (e.g., barren mudflats and lands above the highest high tide line) are not considered critical habitat.

Approximately 75 percent of the Yukon-Kuskokwim Delta Nesting Unit is located within the Yukon Delta National Wildlife Refuge, although a portion (up to 10 percent) is subject to selection by Native Village or Regional Corporations, under the terms of the Alaska Native Claims Settlement Act of 1971. The remainder of the proposed unit (approximately 25 percent) has been conveyed to Native Village or Regional Corporations.

Unit 2: Kuskokwim Shoals

The Kuskokwim Shoals critical habitat unit is a subset of the proposed Kuskokwim Bay critical habitat unit. The final designated unit differs from the proposed unit in two ways: (1) the southern portion (one of two discontinuous portions of the proposed unit) has been eliminated; and (2) the boundaries of the northern portion of Kuskokwim Bay have been modified to reflect comments we received on the proposal and further analysis of eider distributional data (see Summary of Changes from Proposed Rule section, below). The Kuskokwim Shoals critical habitat unit includes a portion of northern Kuskokwim Bay from the mouth of the Kolavinarak River to near the village of Kwigillingok, extending 17–38 km (approximately 11–24 mi) offshore. This unit encompasses approximately 3,813 km^2 (1,472 mi^2) of marine waters and about 184 km (115 mi) of shoreline (including the shoreline of barrier islands). This area is used by more than 5,000 Steller's eiders during molt, including individuals known to be from the listed, Alaska-breeding population, and is thought to be extremely important during spring staging, when tens of thousands of Steller's eiders congregate there prior to moving northward as the sea ice breaks up and recedes. The primary constituent elements for the Kuskokwim Shoals Unit are marine waters up to 9 m (30 ft) deep and the underlying substrate, the associated invertebrate fauna in the water column, and the underlying marine benthic community.

Unit 3: Seal Islands

The Seal Islands lagoon was originally proposed as a subunit of the North Side of the Alaska Peninsula unit but is now identified separately. It includes all waters enclosed within the Seal Islands lagoon and marine waters 400 m (¼ mile) offshore of the islands and adjacent mainland between 159° 12′ W and 159° 36′ W. It encompasses 63 km^2 (24 mi^2) and 104 km (65 mi) of shoreline. Thousands of Steller's eiders molt in the Seal Islands, including at least one individual known to be from the listed, Alaska-breeding population, and significant numbers congregate there again in spring prior to migration. The primary constituent elements in the

Seal Islands include waters up to 9 m (30 ft) deep, the associated invertebrate fauna in the water column, the underlying marine benthic community, and where present, eelgrass beds and associated flora and fauna.

Unit 4: Nelson Lagoon

The Nelson Lagoon critical habitat unit includes all of Nelson Lagoon (and a 400 m (¼ mile) buffer offshore of the Kudobin Islands and the mainland west to 161° 24′ W) and portions of Port Moller and Herendeen Bay. This complex was originally proposed as a subunit of the North Side of the Alaska Peninsula unit but is now identified separately. The boundary has been changed where it crosses Port Moller and Herendeen Bay to reflect further data analysis and comments on the proposed units (see Rationale for the Final Designation section, below). This unit encompasses 533 km^2 (205 mi^2) and 238 km (149 mi) of shoreline. This lagoon system is used by tens of thousands of Steller's eiders during molt, including individuals known to be from the listed, Alaska-breeding population. Tens of thousands also winter in this area during many winters, and numbers build again during spring, as up to 36,000 stage in the area prior to or early in spring migration. The primary constituent elements in Nelson Lagoon include waters up to 9 m (30 ft) deep, the associated invertebrate fauna in the water column, the underlying marine benthic community, and where present, eelgrass beds and associated flora and fauna.

Unit 5: Izembek Lagoon

Izembek Lagoon was originally proposed as a subunit of the North Side of the Alaska Peninsula unit but is now identified separately. It includes all waters of Izembek Lagoon, Moffett Lagoon, Applegate Cove, and Norma Bay, and waters 400 m (¼ mile) offshore of the Kudiakof Islands and adjacent mainland between 162° 30′ W and 163° 15′ W. It encompasses 363 km^2 (140 mi^2) of marine waters and 297 km (186 mi) of shoreline. Like the Nelson Lagoon complex, this lagoon system is extremely important to Steller's eiders, being occupied during molt, winter, and spring staging by tens of thousands of individuals, including some known to be from the listed, Alaska-breeding population. The primary constituent elements in Izembek Lagoon include waters up to 9 m (30 ft) deep, the associated invertebrate fauna in the water column, the underlying marine benthic community, and where present, eelgrass beds and associated flora and fauna.

Rationale for the Final Designation

We stated in our proposed rule: ''In the absence of clearly defined recovery objectives or criteria, determining which physical and biological features are essential for recovery is difficult. After considering these complicating factors, we believe it is essential to the recovery of the species to maintain the existing population on the North Slope and allow for recovery of the greatly depressed population on the Y–K Delta. Therefore, we believe that the following three components are essential for the conservation of the Alaska-breeding population of Steller's eiders:

(1) The North Slope breeding subpopulation and its habitat must be maintained sufficiently to sustain healthy reproduction and allow for potential population growth;

(2) The Y–K Delta subpopulation must be increased in abundance to decrease the Alaska-breeding population's vulnerability to extirpation; and

(3) Molting, wintering, and spring staging habitat in the marine environment must be maintained to ensure adequate survival during the nonbreeding season.''

We believe that those general statements about the conservation needs of the Steller's eider are accurate. However, in this final designation we have made a concerted effort to refine and translate those general statements into a critical habitat designation that will provide the greatest conservation benefit to the species possible. Therefore, this final rulemaking reflects significant changes to critical habitat areas from the proposed rulemaking. We have substantially reduced the area of some critical habitat units and completely eliminated others. We have not added area to existing critical habitat units or added new critical habitat units. The proposed rule was based on the best scientific and commercial information available when the proposed rule was developed. The settlement agreement mandated a short time line for our evaluation of critical habitat. Consequently, when we developed the proposed rule we included all areas that we thought might be essential to the conservation of the species, based on the best available commercial and scientific information.

Following publication of the proposed rule we thoroughly evaluated all available information to more precisely identify those areas essential to the conservation of the species (see methods). Specific rationale for retention, modification, or exclusion of the proposed critical habitat in this final rulemaking is explained in detail below.

Proposed North Slope Unit

The proposed North Slope Unit encompassed approximately 40,884 km^2 (15,785 mi^2) on the Arctic Coastal Plain. The boundaries of the proposed unit were drawn to include about 96 percent of the breeding-season observations of Steller's eiders made during aerial surveys and all intervening suitable wetland habitat. None of this proposed unit is designated as critical habitat at this time.

We recognize the importance of breeding habitat to support recovery of the Alaska breeding population of the Steller's eider. In the proposed rule, we stated: ''The North Slope breeding subpopulation and its habitat must be maintained sufficiently to sustain healthy reproduction and allow for population growth.'' This need is exacerbated by the near extirpation of the species from the Y–K Delta, which likely has significantly reduced the species' distribution and abundance in Alaska. When we published our proposal to designate critical habitat we believed that the critical habitat designation should broadly identify those areas that we believe are essential to the conservation of the species. The comments we received in response to the proposal suggested that we should define critical habitat in a more specific and precise manner. Further, some of the commenters believed that our proposed designation was not consistent with the Act's definition of critical habitat (see Summary of Comments and Recommendations section). Therefore, we carefully reviewed the best available information to ensure that our approach and the designation itself provided the greatest benefit to the eider and met the requirements of the Act.

It is very difficult to determine what area, or areas, of the North Slope is essential for the conservation for the species. Ideally, to define what is essential for recovery of the Alaska-breeding population of Steller's eider we would have information on the historical abundance and distribution. The lack of recovery objectives for the species also complicates making a determination as to what areas are essential for recovery. More importantly, we lack reliable scientific data about the habitat preferences of nesting females and females with broods. Therefore, we are currently unable to ascertain why females nest in some areas, but not in another that appear to be similar. However, we can use the actual distribution of a species as evidence of which areas have the

habitat features essential to the conservation of the species, even if we do not have sufficient information to describe precisely what discriminates those areas from other similar areas that lack the essential feature.

For example, the regularity of use, combined with the density, number, or proportion of the population that occupies an area, may be indicative of an area's importance. Thus, we evaluated all available information on distribution to identify areas of concentration under the assumption that areas regularly used by dense aggregations, large numbers, or a high proportion of the population are likely to be more important to the species. In order to correctly interpret these data, we requested that eider experts review the available distributional information and provide their individual expert opinions on what is essential for recovery. Finally, we scrutinized all comments received during the public comment period for relevant information or opinion on this topic (we specifically invited comment on what areas are essential for recovery; see 65 FR 13273).

Our best understanding of the bird's range on the North Slope comes from annual aerial waterfowl surveys that sample the Arctic Coastal Plain. These data show that observations of the species, although scant in number, are very widely distributed across the Arctic Coastal Plain west of the Colville River (Quakenbush *et al.* 1999; Martin 2000a). With the exception of near the village of Barrow, at the northernmost point of Alaska, there are no concentration areas where the number or density of Steller's eiders is notable on a regional scale. Similarly, with the exception of Barrow, there are no areas where Steller's eiders have been detected regularly, suggesting the species occurs intermittently over most of its North Slope range. A gradient in density of observations is detectable, however, with the highest density occurring near Barrow. Approximately 10 percent of the total observations occurred within a few miles of Barrow, an area that comprises <1 percent of the species' range on the North Slope. Density declines with distance from Barrow, with approximately 20 percent of the observations occurring within 5 percent of the range, 50 percent occurring within about 30 percent of the area, and 70 percent of the observations occurring within 57 percent of the species' current range. Thus, although Steller's eiders occur over a vast area on the North Slope, the available data suggest that the Barrow area is the core of the species' North Slope breeding distribution, with density generally decreasing as distance from Barrow to the south, east and west, increases.

This conclusion, however, does not clearly identify what specific area or areas are essential for the species' conservation. Assuming that density correlates with importance for conservation, the area near Barrow is likely most important to the species, and the importance decreases with distance from this core area. We believe that this core area near Barrow, where density and regularity of breeding appear to be notably higher than elsewhere, is essential for the Steller's eider's conservation. However, this area encompasses only a small proportion of the species' range (about 1 percent) and numbers (about 10 percent) on the North Slope. Thus, it is likely that this area alone is inadequate to support recovery, and the area considered to be essential must include additional area. However, adding additional area results in including incrementally more locations where the species has been observed but those locations are separated by increasingly more intervening area where no Steller's eiders have ever been observed. During aerial surveys that sample the Arctic Coastal Plain, only 136 records of Steller's eiders have been obtained over the entire 11-year aerial survey record, an average of about 12 observations per year. The combined area sampled over 11 years totaled about 933,000 km^2, so on average, one Steller's eider was detected per 6,860 km^2 surveyed. This average is lower further from Barrow; outside of the 30 percent of the species' range nearest to Barrow where about half of the observations have occurred, detections have averaged about one per 10,000 km^2 surveyed.

The specificity with which we can designate critical habitat is constrained by the limited information currently available (see *State of Knowledge of the Steller's Eider* section). Nine Steller's eider experts provided six different opinions on what area is required to conserve the species, ranging from all of the species' currently known range to none (based on inadequate data), with four intermediate variations intended to capture different proportions of the recent sightings. Although we specifically invited comment on where boundaries delimiting this area should be drawn, few commenters provided information or opinion on this topic. Two commenters suggested that the species' entire range, as defined by all known historical and recent observations, is essential for recovery, while numerous others contended that our proposed critical habitat boundaries were inappropriate and went well beyond the Act's definition of critical habitat. Others suggested that the lack of recovery criteria and paucity of hard data preclude a science-based determination of what area is essential. Unfortunately, none of the information presented helped us in determining which specific areas were essential to the conservation of the Steller's eider because each was based on assumptions of eider biology that may or may not be confirmed in future scientific studies.

Nonetheless, the Act requires us to identify areas to be designated as critical habitat based upon the best available information. However, the relative benefits to the species of such a designation must also be weighed in our decision as to where to designate critical habitat. Subsection 4(b)(2) of the Act allows us to exclude areas from critical habitat designation where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species.

The benefits of including lands in critical habitat are often relatively small. The principal benefit of any designated critical habitat is that activities that may affect it require consultation under section 7 of the Act. Such consultation would ensure that adequate protection is provided to avoid adverse modification of critical habitat. However, it is important to note that, as a result of the Alaska-breeding population of Steller's eider being listed as a threatened species, we already consult on activities on the North Slope that may affect the species. While these consultations do not specifically consider the issue of adverse modification of critical habitat, they address the very similar concept of jeopardy to the species. Under most circumstances, consultations under the jeopardy standard will reach the same result as consultations under the adverse modification standard. Implementing regulations (50 CFR Part 402) define ''jeopardize the continued existence of'' and ''destruction or adverse modification of'' in virtually identical terms. Jeopardize the continued existence of means to engage in an action ''that reasonably would be expected * * * to reduce appreciably the likelihood of both the survival and recovery of a listed species.'' Destruction or adverse modification means an ''alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.'' Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species, in the case of critical

habitat by reducing the value of the habitat so designated. Thus, actions that result in an adverse modification determination are nearly always found to also jeopardize the species concerned, and the existence of a critical habitat designation does not materially affect the outcome of consultation. Additional measures to protect the habitat from adverse modification are not likely to be required.

Since the Alaska-breeding population of the Steller's eider was listed in 1997, we have consulted with Federal agencies on a variety of actions to evaluate impacts to the species on the North Slope. In most cases, the consultations have determined that the actions would not adversely affect Alaska-breeding population of the Steller's eiders because the projects occurred during seasons when the eiders are absent and no permanent impact to habitat would result or because only a minimal amount of habitat would be affected or would occur in areas where the species occurs at low densities. In only a few cases have we determined that a proposed project included habitat alterations that might adversely affect Alaska-breeding population of Steller's eiders. Our biological opinions on these consultations provided reasonable and prudent measures designed to minimize the incidental take of the proposed projects on Alaska-breeding population of Steller's eiders. When applicable, the reasonable and prudent measures included provisions to minimize the proposed project's impact to habitat. Therefore, because of the species' abundant habitat on the North Slope and the protections provided though the current consultation process, we can envision no benefit that critical habitat designation would have imparted in the consultations conducted to date. Furthermore, we have considered the Steller's eider's conservation needs, and we believe that future section 7 consultations on any proposed action on the North Slope that would result in an adverse modification conclusion would also result in a jeopardy conclusion. Thus, the principal regulatory benefit from a critical designation for the listed population of Steller's eider on the North Slope is expected to be small.

There are also educational benefits associated with designation as critical habitat, such as informing the public which areas are important for the long-term survival and conservation of the species. Critical habitat could also potentially foster a sense of ownership for the resource, encouraging concerned individuals to act as caretakers of important habitat. However, such benefits are largely negated by our inability to identify specific areas (other than the area around Barrow) on the North Slope that are essential to conservation of the species (*i.e.,* providing meaningful educational information is dependent upon the ability to provide meaningful information on the conservation needs of the species). Furthermore, we have been working closely with North Slope residents for years in order to engender support for eider conservation. We have worked with the North Slope Borough on cooperative research, survey, and educational efforts for Steller's eiders since 1991, six years prior to the species' listing under the Act. We are currently engaged in several cooperative efforts to alleviate threats and develop a long-term conservation strategy to protect Steller's eider habitat. Because these efforts were under way before critical habitat designation was proposed (and before the species was listed, in some cases), we are certain that North Slope residents and their local governments are well aware of the species' plight and the need to address threats and protect important habitat. Likewise, most Federal projects on the North Slope are conducted, funded, or permitted by relatively few Federal agencies. As a result, the Federal agencies involved with activities on the North Slope are aware of the Alaska-breeding population of the Steller's eider's threatened status and the need to consult, and additional educational benefits would be very limited. For all these reasons, then, we believe that designation of critical habitat has little educational benefit on the North Slope.

In contrast, the benefits of excluding the North Slope from critical habitat designation appear to be greater than the benefits of including it. We acknowledge that some portion of the proposed North Slope unit is essential to the recovery of the species. Moreover, we believe that these lands may require special management considerations and protections given the extent of oil and gas exploration and development has occurred in the area and may reasonably be anticipated in the future. However, to designate an area at this time, without a more reliable biological basis, would likely convey an inaccurate message about the size and location of the area needed for recovery. We believe that to designate a small area, such as that near Barrow, would exclude considerable habitat that will likely ultimately prove to be important to the species. Conversely, to designate a significantly larger area would undoubtedly result in the designation of considerable area where the species has never been observed and that may not contain essential habitat features. We believe there are strong implications regarding habitat importance that are associated with critical habitat designation. Delineating critical habitat on the North Slope at this time may mislead Federal agencies and others wishing to carry out activities on the North Slope about the areas that are truly essential to the recovery of the species. Although we have adequate information to delineate other areas as being essential for Steller's eiders at this time, we do not believe that we currently have adequate information to do so on the North Slope.

One potential benefit of excluding an area from a critical habitat designation is that doing so can foster unique conservation efforts. The North Slope Borough (Borough) has taken a leadership role in such an effort for conserving Steller's eiders. The Borough invited the Service to join them in eider studies in 1991, six years before listing, and subsequently commented in support of listing at the time the species was proposed to be classified as threatened. The Borough has provided funds, logistic support (particularly housing and laboratory space) and personnel for studies at Barrow, without which most of the work accomplished to date would have been impossible. The Borough has served as an essential liaison to the local community, facilitating access to private lands otherwise closed to investigation, and involving local citizens in research and educational programs. The Borough has consistently believed that conservation within their jurisdiction could best be accomplished in the absence of a critical habitat designation, and refraining from designation in the Barrow area would be the best way to encourage the continuation and expansion of our mutual conservation efforts. The local-Federal partnership approach has resulted in considerable progress on conservation of Steller's eiders and their habitat, and provides substantial incentive for all parties to avoid altering the existing cooperative relationship.

Compared with all other portions of the breeding range, the greatest potential for future take (from all sources) occurs in the immediate vicinity of Barrow, because of the relatively high density of Steller's eiders and intensity of human activity. With the support of the Borough, the Service has initiated a conservation planning effort for Barrow with the goal of maintaining or increasing the number of Steller's eider breeding pairs and their productivity. The plan is envisioned as a

comprehensive package that will combine elements of habitat preservation on private lands held by the village corporation, community-wide education and outreach, and research/monitoring. The success of this effort depends on the continued cooperation of the Borough and local landowners. We believe that not designating critical habitat in the Barrow region will foster unique conservation partnerships that are essential to the conservation of the species.

In summary, at this time the benefits of including the North Slope in critical habitat for the Steller's eider include minor, if any, additional protection for the eider and would serve little or no educational functions. The benefits of excluding the North Slope from being designated as critical habitat for the Steller's eider include the preservation of a unique local-Federal partnership that we believe is essential to future conservation actions, and elimination of the negative effects that we believe would result from a designation based on the limited biological information currently available to us. We have determined that the benefits of exclusion of the North Slope from critical habitat designation outweigh the benefits of delineating critical habitat on the North Slope. Our conclusion with respect to this balancing is made in the context of designating other areas as critical habitat for the Steller's eider. Not only are we designating marine areas, in which Steller's eider populations are more concentrated and hence more vulnerable to a single adverse action, but we are also designating breeding habitat in the Y–K Delta. The differing facts relating to those areas lead to different results under the balancing required by section 4(b)(2). Furthermore, we have determined that excluding the North Slope will not result in the extinction of the species. Consequently, in accordance with subsection 4(b)(2) of the Act, these lands have not been designated as critical habitat for the Steller's eider.

We will continue to protect occupied breeding habitat on the North Slope as appropriate through section 7 consultations, the section 9 prohibition on unauthorized take, and other mechanisms. We will expand our conservation efforts with the Native community, industry, local governments, and other agencies and organizations on the North Slope to address the recovery needs of the eider. Additionally, we will soon complete the development of a Steller's eider recovery plan which will include the identification and implementation of recovery actions. We will continue our efforts to document the distribution and abundance of Steller's eiders on the North Slope and research into the factors causing decline. We will continue our efforts to develop a visibility correction factor for the species, which will be integral to developing abundance estimates. Further, we will continue to investigate the breeding habitat needs of the Steller's eider on the North Slope and to improve our ability to delineate any areas essential to the conservation of the species. Our FY 2001 budget included $600,000 earmarked by Congress to fund work by the Alaska Sea Life Center (ASLC) and the Service on recovery actions for the spectacled and Steller's eiders, including the development of better information upon which to base critical habitat delineations. We will work closely with the ASLC to identify the studies that would be most helpful. In particular, we will seek studies that would provide information that will help us to identify the habitat needs of both eider species, and we will seek the assistance of our partners in carrying out such studies.

Should additional information become available that changes our analysis of the benefits of excluding any of these (or other) areas compared to the benefits of including them in the critical habitat designation, we may revise this final designation accordingly. Similarly, if new information indicates any of these areas should not be included in the critical habitat designation, we may revise this final critical habitat designation. If, consistent with available funding and program priorities, we elect to revise this designation, we will do so through a subsequent rulemaking.

Unit 1: Yukon-Kuskokwim Delta Nesting Unit (Proposed Unit 2)

The proposed Yukon-Kuskokwim Delta Nesting Unit encompassed approximately 3,114 km^2 (1,202 mi^2) on the outer coastal zone of the central Y–K. The boundaries of the proposed unit were drawn to encompass historical (pre-1970s) and recent nest sites and intervening areas. The boundaries of the Yukon-Kuskokwim unit have been modified from those proposed to reflect further analysis of topography information from large scale (1:63,360 scale) maps, information from biologists with extensive field experience in the area, and the advice of eider experts. We excluded land that appeared to be over 7.6 m (25.0 ft) in elevation, and areas that field biologists described as not suitable for eiders (e.g., an area outside of the vegetated intertidal zone). Field reconnaissance indicates that the plant communities found on areas above 7.6 m in elevation do not provide the habitat thought to be used by Steller's eiders in the Y–K Delta. Further, no known historical or recent nest sites occur in the proposed critical habitat that has been excluded from this final rule. Therefore, we believe that the excluded area is not essential to the conservation of the species. The proposed area not included in this final rule is 55,359 ha (136,792 ac), a 17.7 percent reduction in total area.

Definitive population trend information was lacking at the time this species was listed (62 FR 31748), but population decline was inferred from an apparent contraction of range, particularly in western Alaska. The recovery plan, including recovery goals, is still in preparation. It is reasonable, however, to predict that re-establishment of a viable breeding population on the Y–K Delta will be an element of the plan, given that the decision to list the species was based, to a large extent, on its near-disappearance from the Y–K Delta. Increasing the abundance of the Y–K Delta subpopulation will likely decrease the listed, Alaska-breeding population's vulnerability to extirpation; therefore we consider the habitat contained within this unit essential to the conservation of the species.

We believe that special management considerations and protections may be needed for the essential features (constituent elements) found within Unit 1, because lead shot present in the environment is affecting the quality of the species habitat and poses a continuing threat to the species.

Proposed Units 3–9: Marine Units

The following units in Alaskan marine waters were proposed as critical habitat:

Unit	Area (km^2)	Shore-line (km)
Nunivak Island	205	612
Kuskokwim Bay	12,848	730
Alaska Peninsula—North Side	2,008	1,029
Eastern Aleutians	892	2,397
Alaska Peninsula—South Side	3,420	5,344
Kodiak Archipelago	1,344	3,902
Kachemak Bay/Ninilchik	1,142	444

The majority of the proposed marine units were eliminated from this final rule. The four units that are designated as critical habitat are subsets of the proposed Kuskokwim Bay and North Side of the Alaska Peninsula units. The designated units and their areas are:

Unit	Area (km^2)	Shoreline (km)
Kuskokwim Shoals	3,813	184
Seal Islands	63	104
Nelson Lagoon (including portions of Port Moller and Herendeen Bay)	533	238
Izembek Lagoon	363	297

As noted previously, we will designate as critical habitat only those specific areas that are essential for the conservation of the species. As with the North Slope and Y–K Delta, lack of information on Steller's eiders greatly complicates designation in marine areas as well. One eider expert noted that the uncertainty surrounding Steller's eider marine ecology and distribution is at least an order of magnitude greater than that concerning breeding areas. In general, the best information on Steller's eider marine ecology comes from areas where the species aggregates in large numbers, such as Izembek and Nelson lagoons, and where repeated surveys have been conducted for many years. There is little or no information from other areas within the species' extensive marine range, where surveys have been sporadically or never conducted. Furthermore, Alaska-breeding Steller's eiders, which this critical habitat designation is intended to protect, are indistinguishable from the much more-numerous Russia-breeding Steller's eiders during the non-breeding season. Therefore, our understanding of distribution may be incorrect if the listed Alaska-breeding population tends to concentrate in one or more specific portions of the species' broader marine range.

Despite the uncertainty surrounding Steller's eider marine distribution and ecology, there is one striking difference between breeding and non-breeding season distribution. During the breeding season, Steller's eiders occur at very low and relatively even densities whereas there is a tremendous density gradient in marine areas during the non-breeding season. Although the species occupies a huge range during the non-breeding season, most Steller's eider concentrate in a few areas, with tens of thousands occupying a few square miles in some cases. Thus, despite the difficulty in determining exactly what specific areas are essential for recovery, the gradient in density provides information useful in evaluating relative importance of various areas. Clearly, those areas where large concentrations occur are more important, and the birds more vulnerable because small-scale habitat impacts could potentially affect a significant proportion of the population. Therefore, we used the number of birds occurring in each area as an indicator of how important that area is to the species. This approach was recommended by the eider experts, who identified the density or number of birds occupying an area as a useful index of importance. Additionally, many commenters, including the Alaska Department of Fish and Game, National Audubon Society, and a number of local governments, suggested that those areas such as Izembek and Nelson lagoons used by large concentrations are clearly essential for the species' recovery, whereas there is insufficient information to reach conclusions about whether areas with small concentrations are essential. As a result, we established a numerical criterion to be used in rating relative importance, such that areas regularly used by >5,000 Steller's eiders and occasionally used by >10,000 are considered to be essential for the species' recovery. Although this criterion excludes a number of areas used by hundreds or thousands of Steller's eiders, given the relative abundance of the Alaska- and Russia-breeding populations, it is likely that the vast majority of Steller's eiders throughout their marine range are not members of the listed population.

There is also considerable uncertainty over whether the Alaska-breeding population uses all portions of the species' broad range in Alaskan marine waters or concentrates in one or a few portions of that range. Until last year, 2000, the only available information on the Alaska-breeding population's marine distribution consisted of a few band recoveries showing that some individuals that nested near Barrow molted in Izembek or Nelson lagoons. These observations were not surprising given that surveys show that the vast majority of Steller's eiders molting in Alaskan waters do so in these lagoons (Jones 1965, Petersen 1981). Satellite telemetry provided new information last year when three individuals that bred on the North Slope were tracked during the molt period; two are believed to have molted near the Kuskokwim Shoals and one molted near the Seal Islands (Martin 2000b). Although the sample size is very small, these observations were somewhat surprising in that all three individuals molted in areas thought to support comparatively small molting populations (limited survey data showed that about 5,000 may molt near the Kuskokwim Shoals and 5,000–10,000 may molt at Seal Islands). Thus, these observations suggest that the listed Alaska-breeding population may not mix randomly with the Russia-breeding population during the non-breeding season. As a result, we established a second criterion to be used such that only those areas known to be used by the listed Alaska-breeding population would be considered essential.

Therefore, recognizing the limitations of our understanding of the listed population's use of marine waters in Alaska, we have designated as critical habitat those areas clearly demonstrated to be of importance to Alaska-breeding Steller's eiders by the currently available information. To this end, we designate as critical habitat those areas that meet the following two criteria: (1) They are regularly used by a significant concentration of Steller's eiders, defined as ~5,000 birds in most years and >10,000 in ≥1 year; and (2) they are known to be used by individuals from the listed, Alaska-breeding population. Additionally, because these areas are used by significant numbers of Steller's eiders, we believe that special management considerations or protection may be needed to conserve the essential habitat features (constituent elements) found there. As a result of the dense aggregations occurring in these areas, a relatively small amount of habitat perturbation as might be caused by even a small oil spill could affect a significant number of Steller's eiders and possibly a significant proportion of the listed population. Therefore, we believe these areas meet the definition of critical habitat. The following four areas meet these criteria:

Unit 2: Kuskokwim Shoals

The Kuskokwim Shoals Unit is a modified subunit of the proposed Kuskokwim Bay Unit (Unit 4). The proposed unit contained two disjunct sections, the north side of Kuskokwim Bay and south side of Kuskokwim Bay. The designated unit differs from the proposed unit in that the south side of Kuskokwim Bay portion has been deleted and the boundaries of the north side of Kuskokwim Bay have been refined.

The Kuskokwim Shoals is known to be of importance to Steller's eiders during molt and for staging during spring migration. Use during molt is indicated by two surveys in 1996 and 2000 which found 5,439 and 5,101 Steller's eiders in this area, respectively (although there were differences in methodologies and flight paths between the two surveys) (McCaffery 2000). Additionally, satellite telemetry showed that two of three breeding Steller's eiders outfitted with transmitters at

Barrow in 2000 molted in this area, suggesting that the listed population may selectively use this area, making its importance disproportionately greater than what is indicated by the number of birds molting there.

A series of surveys has shown that large numbers of Steller's eiders stage near the Kuskokwim Shoals during spring migration, apparently foraging along the edge of the extensive shorefast ice that lingers into late April in this region. The maximum number of Steller's eiders detected in this area during aerial surveys conducted during six years between 1992 and 2000 varied from approximately 5,000 to 42,000 (Larned *et al.* 1994; Larned 1994, 1997, 1998, 2000).

The boundaries of the Kuskokwim Shoals unit have been modified from those for the northern portion of the proposed Kuskokwim Bay Unit to reflect additional analysis of aerial survey data, bathymetry information, and a comment from the Groundfish Forum, a commercial fishing association, which suggested that the proposed unit included waters deeper than those believed to be used by Steller's eiders. The Groundfish Forum pointed out that although we identified as suitable habitat waters ≤10 m (30 feet deep), much of the western edge of the proposed unit exceeded this depth. Unfortunately, bathymetry data from this region are scant, making fine-scaled analysis of water depth impossible, so we more closely examined the available aerial survey data to evaluate whether the boundaries should be adjusted to more closely fit the area known to be used by Steller's eiders. As a result of this analysis, we modified the boundaries, eliminating considerable area on the offshore side of the proposed unit where no flocks of Steller's have been detected during aerial surveys.

None of the southern portion of the proposed Kuskokwim Bay Unit is designated as critical habitat. Although between 4,126 and 6,271 Steller's eiders have been counted there during spring staging surveys, the birds were widely separated in disjunct bays and shoreline segments, with no individual segment being used by >5,000 birds. Additionally, the second part of this criterion was not met in that in no years were >10,000 detected. Finally, the second criterion, documented use by the listed population, was not met. Therefore, we determine that the available information does not support designating this area as essential for the recovery of Alaska-breeding Steller's eiders at this time.

Unit 3: Seal Islands

The Seal Islands Unit is one of several disjunct bays, lagoons, and nearshore areas included in the proposed North Side of the Alaska Peninsula Unit. The boundaries of the Seal Islands Unit are left unchanged from those described in the proposed rule.

Steller's eiders concentrate in the Seal Islands lagoon in both spring and fall. Although the area has been inadequately surveyed for Steller's eiders, ''thousands'' are believed to molt in this lagoon (Dau 1999a). Emperor goose surveys, although designed and timed to optimally inventory other species, have detected an average of 5,661 and maximum of 16,200 Steller's eiders in the lagoon during autumn (late September/early October) and an average of 1,349 and maximum of 10,444 during spring (late April/early May). Additionally, between 2,015 and 7,180 were counted in late April during Steller's eider spring migration surveys, further indicating the area's importance to a large number of Steller's eiders. Finally, satellite telemetry data showed that one of three Steller's eiders that bred near Barrow in 2000 and were tracked with satellite telemetry molted in the Seal Islands lagoon. Thus, we conclude that the Seal Islands lagoon meets both criteria and should be considered essential for the conservation of Steller's eiders.

Unit 4: Nelson Lagoon Unit

The Nelson Lagoon complex, which includes Nelson Lagoon, Herendeen Bay, and Port Moller is another subunit contained within the proposed North Side of the Alaska Peninsula Unit. The boundaries of the unit were modified from those proposed to eliminate portions of Herendeen Bay and Port Moller where Steller's eiders have not been detected in significant numbers during aerial surveys.

Use of the Nelson Lagoon complex by huge numbers of Steller's eiders is well documented (Jones 1965, Petersen 1981). Repeated surveys during molt have counted an average of 39,567 (n=10 surveys) and a range of 29,690 to 57,988 (Dau 1999a). Dense aggregations also winter in the Nelson Lagoon complex, although ice cover may force them elsewhere during variable portions of colder winters. Numbers during winter averaged 20,487 with a range of 9,616 to 51,050 (n=17; Dau 1999b). Large numbers can remain (or possibly rebuild) in late spring as well, as 12,000–27,000 have been counted there during Steller's eider spring migration surveys. In addition to the very large numbers using this lagoon complex annually, banding data have demonstrated that Steller's eiders molting in Nelson Lagoon include members of the Alaska-breeding population. Therefore, we determine that this area is essential for the conservation of Alaska-breeding Steller's eiders.

Subsequent to publication of the proposed rule, we re-evaluated the available survey data to determine if modifying the proposed boundaries was warranted. We paid particular attention to the upper reaches of Herendeen Bay and Nelson Lagoon because our initial analysis conducted in preparation of the proposed rule raised questions about the use of these areas that we were unable to answer prior to publishing the proposal. Additionally, the Aleutians East Borough, in comments submitted during the public comment period, requested that we exclude from designation waters with 5 mi (8 km) of the community of Nelson Lagoon and the fish processing facility at Port Moller to minimize economic impacts to affected communities.

Data collected during three aerial surveys in 1997–2000 contain GPS locational data that allow fine-resolution spatial analysis (previous surveys conducted in this area do not). These observations show that Steller's eiders occur in dense clusters throughout most of Nelson Lagoon, including the area surrounding the community of Nelson Lagoon. In these three surveys, 46 flocks with a total of 5,297 Steller's eiders were seen within 8 km (5 mi) of the community of Nelson Lagoon, and nine flocks with a total of 1,163 Steller's eiders (including one flock with 500) were observed within 1.6 km (1 mile) of the community. These observations indicate that the waters near the community are used by significant numbers of Steller's eiders, and we cannot conclude that this area does not contribute significantly to the overall importance of the lagoon complex to the species. As a result, we believe that the waters near the community of Nelson Lagoon are essential for the species' recovery. Furthermore, as explained in the Economic Analysis and Summary of Comments and Recommendations sections below, we do not believe that designation of critical habitat will have significant economic impacts or constrain community development at Nelson Lagoon or other communities. Therefore, there is no demonstrated basis for excluding these waters from critical habitat designation as a result of economic impacts.

In contrast, further examination of Steller's eider survey data shows that

there are few observations of Steller's eiders in the northeast portion of Port Moller near the fish processing facility. Because our intent is to designate as critical habitat those areas where the species regularly occurs in significant numbers, we have modified the southern boundaries of the critical habitat unit in both Herendeen Bay and Port Moller to exclude portions of those lagoons where Steller's eiders are not regularly seen. Likewise, we have modified the boundary of the critical habitat unit to exclude the waters in northeast Port Moller where significant aggregations have not been documented. The new boundary runs from the eastern tip of Wolf Point on Walrus Island to the shoreline 5.5 km (3.4 mi) north of Harbor Point (at the tip of Moller Spit). Thus, the designated critical habitat includes the waters adjacent to Moller Spit, where aggregations have regularly been encountered, but excludes the northeast portion of the lagoon of Port Moller, including the fish processing facility at Port Moller (the processing facility is approximately 2 km (1.25 mi) outside the boundary of the critical habitat unit). An appropriately scaled map showing the boundaries of designated critical habitat in this area can be acquired by contacting the U.S. Fish and Wildlife Service, Anchorage Field Office, 605 West 4th Avenue, Room G–61, Anchorage, AK 99501 (telephone 907/271–2787 or toll-free 800/272–4174; facsimile 907/271–2786).

Unit 5: Izembek Lagoon

As with the previous two units, the Izembek Lagoon Unit is a subunit of the proposed North Side of the Alaska Peninsula Unit. The boundaries of the Izembek Lagoon Unit are left unchanged from those described in the proposed rule.

Izembek Lagoon is used by dense aggregations of Steller's eiders during molt, winter, and spring. Tens of thousands molt there each year, with 27 censuses between 1975–1996 averaging 23,300 birds (range 6,570–79,970; Dau 1999a). Tens of thousands also remain through winter in most years, although distribution and numbers are affected by ice cover and vary from year to year (Dau 1999). Numbers may build again during spring, as up to 79,000 have been counted during goose surveys in late April/early May (Dau 1999b). In addition to dense aggregations of Steller's eiders regularly occurring at Izembek, band recoveries show that the birds molting there include members of the Alaska-breeding population. Therefore, we determine that Izembek Lagoon meets both criteria and is considered essential for the conservation of the Steller's eider.

The remaining units that we proposed as critical habitat, which include Nunivak Island, the Eastern Aleutians, South Side of the Alaska Peninsula, Kachemak Bay/Ninilchik, and Kodiak Archipelago, do not meet the definition of critical habitat based on the criteria that we believe best identify the areas essential for the conservation of Alaska-breeding Steller's eiders. Although in some cases thousands of Steller's eiders have been counted in these areas, none of the areas regularly contain >5,000 individuals. The single exception, Port Heiden, is apparently used by thousands of Steller's eiders (an average cannot be calculated with the currently available data), but use by individuals from the Alaska-breeding population has not been documented. Therefore, we determine that the available information does not demonstrate that any of these areas are essential for the recovery of the Alaska-breeding population of the Steller's eider.

Summary of Critical Habitat Designation

We have designated critical habitat for Steller's eiders in one terrestrial and four marine areas: Y–K Delta, Kuskokwim Shoals, Seal Islands, Nelson Lagoon (including Nelson Lagoon and portions of Port Moller and Herendeen Bay), and Izembek Lagoon. We believe all of these areas meet the definition of critical habitat in that they contain physical or biological elements essential for the conservation of the species and may require special management considerations or protection. Designation of these areas will highlight the conservation needs of the species, and perhaps increase the degree to which Federal agencies fulfill their responsibilities under section 7(a)(1) of the Act.

In accordance with the regulations implementing the listing provisions of the Act (50 CFR 424.12(h)), we have not proposed any areas outside the jurisdiction of the United States (*e.g.,* within Russian waters).

In addition to the areas that we have designated as critical habitat, other areas currently used by Steller's eiders include the North Slope and marine waters in western, southwestern, and southcoastal Alaska. In addition, there may be other areas used by this species that are unknown to us. The best available information did not suggest that there is any currently unoccupied habitat that is essential to the conservation of the species; therefore, no unoccupied critical habitat was designated.

The areas we have designated as critical habitat are those areas that the best available commercial and scientific information indicates are essential to the conservation of Steller's eiders. Should additional information on the value of any area to Steller's eiders become available, we will consider that information in future decisions to designate critical habitat.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out do not destroy or adversely modify critical habitat to the extent that the action appreciably diminishes the value of the critical habitat for the survival and recovery of the species. Individuals, organizations, states, local governments, and other non-Federal entities are affected by the designation of critical habitat only if their actions occur on Federal lands, require a Federal permit, license, or other authorization, or involve Federal funding.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is proposed or listed as endangered or threatened and with respect to its critical habitat, if any is designated or proposed. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a proposed species or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory. After a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation we would ensure that the permitted actions do not destroy or adversely modify critical habitat.

When we issue a biological opinion concluding that a project is likely to result in the destruction or adverse

modification of critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, which are consistent with the scope of the Federal agency's legal authority and jurisdiction, which are economically and technologically feasible, and that the Director believes would avoid destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation with us on ongoing actions for which formal consultation has been completed if those actions may affect designated critical habitat.

Activities on Federal lands that may affect the Steller's eider or its critical habitat will require section 7 consultation. Activities on private or state lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers (Army Corps) under section 404 of the Clean Water Act, or some other Federal action, including funding (e.g., from the Federal Highway Administration, Federal Aviation Administration, or Federal Emergency Management Agency) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to evaluate briefly in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. Activities that may result in the destruction or adverse modification of critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for both the survival and recovery of the Steller's eider is appreciably reduced. We note that such activities may also jeopardize the continued existence of the species. Activities that, when carried out, funded, or authorized by a Federal agency, may directly or indirectly adversely affect critical habitat include, but are not limited to:

(1) Draining, filling, or contaminating wetlands and associated surface waters;

(2) Filling, dredging, or pipeline construction in marine waters;

(3) Commercial fisheries that harvest or damage the benthic or planktonic flora or fauna in marine waters;

(4) Spilling or discharging petroleum or other hazardous substances; or

(5) Discharge of sediment or toxic substances into freshwater systems that drain into adjacent nearshore marine waters.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of both the survival and recovery of a listed species. Actions likely to result in the destruction or adverse modification of critical habitat are those that would appreciably reduce the value of critical habitat for both the survival and recovery of the listed species.

Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to result in the destruction or adverse modification of critical habitat would almost always result in jeopardy to the species concerned, particularly when the area of the proposed action is occupied by the species concerned. In those cases, critical habitat provides little additional protection to a species, and the ramifications of its designation are few or none. However, if occupied habitat becomes unoccupied in the future, there is a potential benefit from critical habitat in such areas.

Federal agencies already consult with us on activities in areas currently occupied by the species to ensure that their actions do not jeopardize the continued existence of the species. These actions include, but are not limited to:

(1) Regulation of activities affecting waters of the United States by the Army Corps under section 404 of the Clean Water Act and/or section 10 of the Rivers and Harbors Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Regulation of commercial fisheries by the National Marine Fisheries Service;

(4) Law enforcement in United States Coastal Waters by the U.S. Coast Guard;

(5) Road construction and maintenance by the Federal Highway Administration;

(6) Regulation of airport improvement activities by the Federal Aviation Administration jurisdiction;

(7) Military training and maneuvers on applicable DOD lands;

(8) Regulation of subsistence harvest activities on Federal lands by the U.S. Fish and Wildlife Service;

(9) Regulation of mining and oil development activities by the Minerals Management Service;

(10) Regulation of home construction and alteration by the Federal Housing Authority;

(11) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency;

(12) Construction of communication sites licensed by the Federal Communications Commission;

(13) Wastewater discharge from communities and oil development facilities permitted by the Environmental Protection Agency; and

(14) Other activities funded by the U. S. Environmental Protection Agency, Department of Energy, or any other Federal agency.

All areas designated as critical habitat are within the geographical area occupied by the species and contain physical and biological features that are likely to be used by Steller's eiders during portions of the year. Thus, we consider all critical habitat to be occupied by the species. Federal agencies already consult with us on activities in areas currently occupied by the species or if the species may be affected by the action to ensure that their actions do not jeopardize the continued existence of the species. Thus, we do not anticipate additional regulatory protection will result from critical habitat designation.

We recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that

critical habitat designations do *not* signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the section 9 take prohibition, as determined on the basis of the best available information at the time of the action. We specifically anticipate that federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Summary of Comments and Recommendations

Our critical habitat proposal was published in the **Federal Register** on March 13, 2000 (65 FR 13262). The proposal requested all interested parties to submit comments on the specifics of the proposal including information, policy, and proposed critical habitat boundaries as provided in the proposed rule. In particular, we sought comments on: (1) the reasons why an area should or should not be designated as critical habitat; (2) information on the abundance and distribution of Steller's eiders and their habitat; (3) what areas are essential for the conservation of the species and which areas may require special management protection or consideration; (4) current or planned activities in proposed critical habitat and their possible impacts on proposed critical habitat; and (5) any foreseeable economic or other impacts resulting from the proposed designation of critical habitat. The comment period was initially open from March 13, 2000, until May 12, 2000. The comment period was extended on April 19, 2000 (65 FR 20938), July 5, 2000 (65 FR 41404), and August 24, 2000 (65 FR 51577), finally closing on September 25, 2000. We extended the comment period on these three occasions to accommodate Alaska Natives, who spend considerable time away from their homes engaged in subsistence activities. Additionally, we requested comment on the Economic Analysis after notifying the public of its availability on August 24, 2000 (65 FR 51577). This comment period ran concurrently with the last 30 days of the comment period on the proposed rule, also closing on September 25, 2000. The resulting comment period lasted from March 13, 2000, to September 25, 2000 (197 days).

We solicited comments from all interested parties, and we particularly sought comments concerning Steller's eider distribution and range, whether critical habitat should be designated, and activities that might impact Steller's eiders. Notice of the proposed rule was sent to appropriate State agencies, borough and local governments, Federal agencies, Alaska Native corporations and organizations, scientific and environmental organizations, commercial fishing and oil industry representatives, and other interested parties. In addition, we invited public comment through the publication of notices in the following newspapers: Juneau Empire (March 24–27, 2000), Fairbanks Daily News-Miner (March 24–26, 2000), Anchorage Daily News (March 24–26, 2000), Arctic Sounder (March 23, 2000), Bristol Bay Times (March 23, 2000), Dutch Harbor Fisherman (March 23, 2000), and Tundra Drums (March 23, 2000).

We also conducted a series of public meetings to discuss the proposal to designate critical habitat for Steller's eiders, and one public hearing at which public testimony was accepted (65 FR 46684). Meetings to discuss critical habitat designation were held with agency, industry, Native and environmental organization representatives at our Region 7 Regional Office, Anchorage, AK, on February 1 and 2, 2000; with the Association of Village Council Presidents staff in Bethel on February 7, 2000; the public and local government representatives in Barrow on February 16, 2000; Waterfowl Conservation Committee in Bethel AK from February 22–24, 2000; the public in Toksook Bay on February 25, 2000; the public in Chevak on March 1, 2000; and at the Alaska Forum on the Environment in Anchorage on February 9, 2000. Although these meetings were conducted prior to publication of the proposal to designate critical habitat, the concept of critical habitat, the likelihood of proposed critical habitat for Steller's eiders, and the process for designation was discussed to encourage public involvement and comment after the opening of the comment period. After the proposal was published, meetings were held with the Nome Eskimo Community IRA Council in Nome on May 5, 2000; the public in Sand Point on September 18, 2000; and the local tribal council in Sand Point on September 19, 2000. A series of public informational meetings was held in North Slope villages: Nuiqsut on August 21, 2000; Wainwright on August 23, 2000; Point Lay on August 24, 2000; and Atqasuk on August 25, 2000. A public hearing, at which public testimony was recorded, was held at Barrow on August 28, 2000 (65 FR 46684). Notices announcing these North Slope meetings and the public hearing were published in advance in the Fairbanks Daily News-Miner (July 30, August 2 and 4, 2000), Anchorage Daily News (July 30, August 1 and 2, 2000), and Arctic Sounder (August 3, 10, and 17, 2000). Additionally, the Service met with eider experts at the Campbell Creek Science Center in Anchorage, AK on September 21–22, 2000. After the close of the comment period, public interest continued and further informational meetings (at which public comment was not sought or accepted) were held with the Kodiak/Aleutians Regional Advisory Council on September 27, 2000; and the Bristol Bay Regional Advisory Council at Naknek, Alaska on October 13, 2000.

We also requested six experts on eider biology to peer review the proposed critical habitat designation; two submitted comments, which have been taken into consideration in developing this final rule.

We received a total of 334 oral and written comments on the proposed critical habitat designation. Fifteen individuals or parties submitted oral testimony at the public hearing at Barrow; seven of these submitted a written record of their comments. We also recorded issues raised by participants at public meetings; these issues were recorded but we did not record the number of individuals raising the same issue. Comments were received from: representatives of ten Federal agencies and one Federally elected official, the State of Alaska and three elected state officials or bodies; five Borough governments; 13 local governments; 25 Native organizations; and 276 individuals, private companies, or non-Native organizations. Forty commenters expressed support for designating critical habitat; 277 opposed designation; and 17 provided information but no position on designation. We reviewed all comments received for substantive issues and new information on Steller's eiders and critical habitat.

Comments pertaining to the designation of critical habitat were grouped into 4 general issues with 56 specific comments relating to critical habitat designation and the economic analysis. The issues, comments, and our

responses are presented in the following summary.

Issue 1: Biological Justification and Methodology

Comment 1: Many respondents had comments concerning habitat as a factor in the species conservation. These included comments that habitat is not limiting the species' population size; habitat loss is not a threat to the species; loss of breeding habitat did not cause the species' decline and is not limiting recovery; and critical habitat is not needed for survival and recovery.

Our response: The information available when Steller's eiders were listed in 1997 did not show that habitat loss or degradation was a threat to the species. However, it has not yet been proven that habitat deterioration has *not* contributed to the decline of the Steller's eider in Alaska. Recent research has shown that ingestion of spent lead shot is affecting adult survival in another threatened species, the spectacled eider (Somateria fischeri), on the Y–K Delta. Although it has not been demonstrated that this has contributed to decline of the Steller's eider on the Y–K Delta, there is insufficient information to discount the role of this form of habitat degradation in the species' decline at this time. Moreover, we do not know to what extent other contaminants, predation, and increased human disturbance are degrading the quality of eider habitats.

An examination of threats that are limiting a species survival and recovery and to what degree those threats are limiting, are key components of our decision of whether a species warrants listing as threatened or endangered. For the Steller's eider, that determination was made in 1997 when the species was listed. After we decide that a species warrants listing, the Act directs us to identify and designate critical habitat. For those areas within the current range of the species, critical habitat can be any area that contains physical or biological features that are essential to the conservation of the species and that may require special management consideration or protection. For areas outside the current range of the species, critical habitat can be any area that is considered essential for the conservation of the species; we need not consider whether special management consideration or protection is needed. Our evaluation of the available information shows that the areas we have designated are essential to the species and may require special management consideration or protection.

As for whether critical habitat is needed for survival and recovery, the Act obligates us to designate, to the maximum extent prudent, those areas that meet the definition of critical habitat. It does not require us to determine that the act of designating land as critical habitat is a necessary step in ensuring the survival or achieving recovery of the species.

Comment 2: Many respondents stated that no new data are available to justify a reversal of the original determination that designating critical habitat was not prudent, or to support designation of critical habitat as proposed; the reasons for the species' decline are unknown.

Our response: As discussed above (see ''State of Knowledge of the Steller's Eider), we have gathered additional information since the listing of this species in 1997. As a result of this new information, we now have a better idea of which habitats are essential to Steller's eider conservation. Additionally, several of our past determinations that critical habitat designation would not be prudent have been overturned by courts in recent years (e.g., *Natural Resources Defense Council* v. *U.S. Department of the Interior,* 113 F.3d 1121 (9th Cir. 1997); *Conservation Council for Hawaii* v. *Babbitt,* 2 F. Supp. 2nd 1280 (D. Hawaii 1998)). Although this information is not biological in nature, we reassessed the potential benefits of critical habitat designation in light of these decisions.

We believe that new biological information and recent court rulings support our conclusion that the designation of critical habitat is prudent. Should credible, new information suggest that our designation of critical habitat should be modified, we will reevaluate our analysis and, if appropriate, propose to modify this critical habitat designation. In reaching our current decision, we have considered the best scientific and commercial information available to us at this time, as required by the Act.

We agree that the reasons for the species' decline are largely unknown (see Proposed Designation of Critical Habitat for the Steller's Eider; 65 FR 13268) However, nothing in the Act or its implementing regulations limit critical habitat designation to species or situations where the factors causing decline are fully understood. This form of uncertainty, therefore, does not constitute adequate justification for not designating critical habitat.

Comment 3: Several respondents stated that we need to base our decisions on objective studies based on science.

Our response: We believe that all of the studies that we used as a basis for our decisions were scientifically sound and objective. One of the challenges that faced us was that the biology, historical usage patterns, distribution, and population trend information is not complete for Steller's eider, thus we attempted to use the best available scientific and commercial information and reasoned professional judgment to make our critical habitat determinations. As a result of the extended public comment period and extensive number of comments received in both written and oral form, we also attempted to integrate information provided by the public into this final rule. The respondents were not specific in saying which documents or studies they felt were non-objective or unscientific. All of the studies that we used in our decision-making process are part of our administrative record and available for public review.

Comment 4: A few respondents stated that there were insufficient data to describe primary constituent elements.

Our response: We disagree. In accordance with the regulations, primary constituent elements 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, host species or plant pollinator, geologic formation, vegetation type, tide, and specific soil types (50 CFR 424.12). In addition, the regulations state that we are to make our determinations based upon the best scientific data available (50 CFR 424.12). We believe that we have described the primary constituent elements of the different habitats used by this species using the best scientific data available. Additional data may have allowed us to describe primary constituent elements in more detail, but the lack of this additional data does not preclude us from describing the primary constituent elements using the information that we have.

Comment 5: Several commenters noted that critical habitat designation could hamper recovery by suggesting that threats to the bird are located in one place when they are actually located elsewhere.

Our response: As we have previously stated, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. Therefore, it is very important to understand that critical habitat designations do *not* signal that habitat outside the designation is unimportant or may not

be required for recovery. However, even given that limitation, we do not believe that our final critical habitat designation will hamper the recovery of the Steller's eider.

Comment 6: One respondent stated that our proposals did not encompass enough of the species' range to ensure recovery, and that areas proposed may actually be population sinks.

Our response: The proposed rule included nearly the entire current range of the Steller's eider (excluding migratory corridors). We do not believe that areas outside of the proposed borders would have contributed markedly to the species' survival and recovery. Our final rule excludes large portions of the proposal. However, this is not meant to imply that habitat outside the designation is unimportant or may not be required for recovery.

With the exception of near Barrow, we have very little information on Steller's eider productivity with which to evaluate whether areas are population sinks (areas where mortality exceeds production, but where populations are maintained through immigration from other areas). Even at Barrow, where the species occurs at a comparatively higher density than elsewhere on the North Slope and a road network and other facilities make them easier to study, the data are inadequate to evaluate reproductive performance and survival at this time. Unquestionably, this will be one area of interest and research as a recovery plan for the species is developed and implemented.

Comment 7: One commenter suggested that critical habitat should include additional areas beyond those proposed, including the North Slope east of the Colville River, portions of Saint Lawrence Island, Nelson Island, Nunivak Island, the Alaska Peninsula, inland Y–K Delta, St. Michael, and the Seward Peninsula. Marine areas that should be designated include waters near the Pribilof Islands, south side of the Kenai Peninsula, and Prince William Sound.

Our response: Although there are records of Steller's eiders occurring and/or nesting in each of the areas mentioned in this comment, records are widely separated spatially and temporally. On the North Slope, there are a combined total of three nest records from east of the Colville River; there is one nest record from Saint Lawrence Island; one account from 1924 saying the ''species nests'' on Nelson Island; no nest records from Nunivak Island; one from the Alaska Peninsula (in 1872); none from inland Y–K Delta; none from St Michael; and one from the Seward Peninsula (in 1879) (Quakenbush *et al.* 1999). The species also occurs irregularly or in very low numbers in the marine areas mentioned: Steller's eiders are not detected during most sea duck surveys near the Pribilof Islands (A. Sowls, Service, pers. comm. 1999); 0–11 per year have been seen on the south side of the Kenai Peninsula (with none seen in 9 of 12 years); and 0–68 per year have been seen (with none in 10 of 20 years) in Prince William Sound (Service 1998). Although we acknowledge that the species may occur (or may have historically occurred) in each of these areas, the patterns of low and irregular use are inadequate to conclude that these areas are essential for the conservation of the Alaska-breeding population of the Steller's eider.

Comment 8: One respondent stated that commercial fishing operations were not responsible for the decline in eider populations, and therefore critical habitat should not restrict commercial fishing.

Our response: We are not aware of data indicating that commercial fisheries are or are not responsible for declines in eider populations. We note that, with respect to commercial fisheries, possible ways in which eiders or their habitat may be affected now or in the future include: (1) large numbers of small fuel and oil spills, including the practice of discharging oily bilge water; (2) fundamental changes in the marine ecosystem brought about by harvest or overharvest of fish and shellfish; (3) vessel strikes in which eiders collide with fishing vessels using bright lights during inclement weather; (4) the alteration of the benthic environment by trawling gear. Again, we do not mean to imply that the commercial fishing industry is currently affecting the species in these ways. We currently lack the information we need to determine whether fisheries are affecting Steller's eiders. Further analysis of potential effects of the fishing industry on Steller's eiders will be considered in future section 7 consultations with the National Marine Fisheries Service on fisheries management issues.

Comment 9: A few respondents note that eiders are tolerant of development, implying that designation of critical habitat in these areas is unnecessary.

Our response: We agree that Steller's eiders occur in developed areas. Steller's eiders regularly nest on the outskirts of the village of the Barrow. Additionally, large numbers occur in or near marine harbors in southwestern Alaska during the non-nesting season. However, the presence of a species near developed areas is not proof that development does not adversely affect that species. Development may affect species in a number of ways, such as altering distribution or decreasing productivity or survival rates. At this time, the effects of development on Steller's eiders are unknown.

Comment 10: Four local governments stated that the ''broad brush'' proposed designation of critical habitat goes well beyond the limited criteria set forth for identifying critical habitat. For example, the Service proposed to define critical habitat in marine units as waters up to 30 feet in depth with a substrate that supports either eel grass beds or invertebrate fauna to allow feeding by the birds, yet the proposed critical habitat included significant waters that far exceed that definition.

Our response: The proposed marine critical habitat units do contain considerable marine waters that exceed 30 feet in depth or that provide substrate unsuitable to support benthic forage for Steller's eiders. The scale at which the critical habitat determinations are made limit our ability to finely map only those areas that are 30 feet in depth or less. Moreover, information available on water depth is not wholly comprehensive in its coverage, and the seafloor is not uniform in contour. However, within the boundaries of described critical habitat units, only that area that contains the primary constituent elements (waters ≤ 30 feet in depth) is critical habitat. Therefore, all waters > 30 ft (9m) in depth *are not* critical habitat, even though they may be within the broader boundaries of a critical habitat unit. We note, however, that because the area designated as critical habitat is greatly reduced from that proposed, the vast majority of marine waters of concern to these commenters have been deleted from this final rule.

Comment 11: The Kodiak Island Borough commented that the entire coastline of the Kodiak Archipelago was included in the proposed critical habitat despite considerable variation in habitat type and quality.

Our response: The proposed Kodiak/Afognak Island Unit was removed from this final rule. It is likely that the habitat heterogeneity referred to by the Kodiak Island Borough in part explains the lack of identified large aggregations of Steller's eiders near the archipelago.

Comment 12: Two respondents (the Aleutians East Borough and City of Unalaska) expressed concern that the amount of marine waters proposed as critical habitat is overly broad. To designate such a large area must be based upon the assumption that the

Alaska-breeding population occurs separately from the Russia-breeding population, in one as yet undefined location. To designate the entire range of the species in Alaska because the Alaska-breeding population may concentrate in a subset of this range is overly protective.

Our response: The threatened Alaska-breeding population is thought to occur during the non-breeding season in southwestern Alaskan marine waters, as does the unlisted Russia-breeding population. Because individuals from the two populations are visually indistinguishable, it is largely unknown whether the less-numerous Alaska-breeding population disperses throughout the range of the more-numerous Russia-breeding population or concentrates in one or more distinct areas within this broad region. This greatly complicates identifying which areas are essential for the conservation of the listed, Alaska-breeding population.

The uncertainty over the distribution of the Alaska-breeding population is the primary factor causing us to greatly reduce the area designated as critical habitat from that proposed. As explained in the Rationale for the Final Designation section, we restricted our designation to areas where very large aggregations of Steller's eiders regularly occur. We note that in these areas banding or telemetry data show that the individuals from the listed population occur. We believe the criteria we established for evaluating the significance of habitat utilized by the species are appropriate and helped to identify those areas known to be essential to the listed population.

Comment 13: Several local governments in southwest Alaska asked that the Service not designate critical habitat within 5 miles of established communities in order to alleviate economic impacts and to allow community development to proceed unaffected by critical habitat.

Our response: Because many of the areas proposed as critical habitat for Steller's eiders have not been designated as such in this final rule, only two communities or developed sites are within or proximal to critical habitat. The community of Nelson Lagoon and a seasonally operated fish processing facility at Port Moller were within the boundaries of the proposed Nelson Lagoon Critical Habitat Unit. The boundaries of the Nelson Lagoon Critical Habitat Unit were modified to reflect more detailed spatial analysis of Steller's eider observation data conducted subsequent to publication of the proposed rule. Because few Steller's eiders have been observed in northeast Port Moller, the boundary has been modified and the fish processing facility is now approximately 2 km (1.25 mi) outside the northeastern boundary. However, the waters near the community of Nelson Lagoon are used by significant numbers of Steller's eiders, and we conclude that they contribute significantly to the overall importance of the lagoon complex to the species. As a result, we believe that the waters near the community of Nelson Lagoon are essential for the species' recovery. Furthermore, we do not believe that the designation of critical habitat will have significant economic impacts or constrain community development at Nelson Lagoon or other communities (see more detailed explanation in Summary of Comments and Recommendations, Issue 3: Economic Issues, below, and in the Economic Analysis section, below). Therefore, there is no demonstrated basis for excluding the area within 5 mi (or any other distance) of the community of Nelson Lagoon.

Issue 2. Policy and Regulations

Comment 14: Three commenters (including the House Resource Committee of the Alaska State Legislature, the Aleutians East Borough, and the City of Unalaska) stated that critical habitat designation is not needed for much of the area proposed because it is contained within National Wildlife Refuges, State Game Refuges, or State Critical Habitat Areas.

Our response: We appreciate that there are many areas in the State of Alaska and across the country that have been established as Federal or State conservation areas and that these areas play a critical role in conserving our Nation's wildlife legacy. Additionally, we value the relationship that exists between the Service and the State of Alaska that benefits the rich wildlife heritage of Alaska. The designation of critical habitat on Federal or State conservation units does not suggest that these areas and their managing agencies are not protecting wildlife and their habitats. The designation of critical habitat reinforces that these areas are essential to the conservation of the listed species and highlights to the public the importance of these areas. If such an area contains habitat known to be essential to the conservation of the species and may require special management consideration, we will designate the area as critical habitat.

Comment 15: A few commenters contended that critical habitat should not be designated until a recovery plan for the species is developed and/or recovery goals are established. Others argued that critical habitat should be designated only if called for by a recovery plan.

Our response: Section 4(a)(3) of the Act requires that critical habitat be designated when species are listed, which occurs before, and in fact initiates, recovery plan development. While having a recovery plan in place would be extremely helpful in identifying areas that are essential for the conservation of Steller's eiders, it is not required under the Act. As recovery planning for the Steller's eider proceeds, if new information suggests that designated critical habitat units be modified or eliminated, we will initiate appropriate actions. Likewise, if additional areas are found to be essential to the conservation of the species we will consider designating them as critical habitat.

Comment 16: Many respondents stated that they thought critical habitat would create a need for section 7 consultations on projects with a federal nexus, and that consultation would be costly, cause permitting delays, potentially preclude some development, or cause widespread unemployment.

Our response: The designation of critical habitat for the Steller's eider does not impose any additional requirements or conditions on property owners or the public beyond those imposed by the listing of the eider in 1997 as a threatened species. All landowners, public and private, are responsible for making sure their actions do not result in the unauthorized taking of a listed species, regardless of whether or not the activity occurs within designated critical habitat. Take is defined as ''harass, harm, pursue, hunt, shoot, wound, capture, collect, or attempt to engage in any such conduct.'' Take is further defined by regulation to include ''significant habitat modification or degradation that actually kills or injures wildlife,'' which was upheld by the U.S. Supreme Court in *Sweet Home Chapter of Communities for a Great Oregon et al.* v. *Babbitt,* 515 U.S. 687 (1995).

Furthermore, all Federal agencies are responsible for ensuring that the actions they fund, permit, or carry out do not result in jeopardizing the continued existence of a listed species, regardless of critical habitat designation. ''Jeopardize the continued existence of'' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR

402.02). Because we designated only areas within the geographic range occupied by the Steller's eider, any activity that would result in an adverse modification of the eider's critical habitat would virtually always also jeopardize the continued existence of the species. Federal agencies must consult pursuant to section 7 of the Act on all activities that will adversely affect the eider taking place both within and outside designated critical habitat.

The consultation process for Steller's eiders will be affected by critical habitat designation only to the extent that Environmental Impact Statements, Environmental Assessments, Biological Assessments, and other National Environmental Policy Act documents must consider the effect of the project on critical habitat. However, these documents already must address the effects of the project on habitat (in the absence of critical habitat designation). Therefore, we anticipate that the additional workload burden created by critical habitat will amount to changes in terminology and organization of these documents. Any marginal increase in consultation costs will ultimately be borne by the lead Federal agency in the consultation process or its designated representative.

We disagree with those commenters who believe that the consultation workload that is due to critical habitat is 30 percent, 50 percent, or 90 percent of the total consultation workload. Since our consultation process, regardless of the designation of critical habitat, would include an evaluation of the proposed action in terms of the habitat effects on the species, we do not anticipate that our portion of the section 7 consultation process will take any longer to complete due to the presence of critical habitat. Therefore, we do not believe that any permitting delays will result from this designation. Similarly, we do not believe that critical habitat designation will, by itself, preclude development. The Act authorizes us to require only minor changes to projects that are likely to adversely affect listed species. Only when a project will jeopardize the continued existence of a listed species, or will destroy or adversely modify critical habitat can we require more than minor changes (called ''reasonable and prudent alternatives''). We believe that the threshold for reaching ''adverse modification'' is equal to that of ''jeopardy.'' Consequently, we cannot envision how an action could cause adverse modification of occupied eider critical habitat without also jeopardizing the species. As a result, any reasonable and prudent alternatives that we may require would have come about due to the listing of the species, with or without critical habitat. Therefore, we believe that the existence of critical habitat alone will not preclude development.

Finally, we stand by the determination in our economic analysis that critical habitat will not have a notable economic impact. Consequently, we do not believe that it will create jobs or cause jobs to be lost.

Comment 17: Many respondents stated that they thought critical habitat afforded no additional benefits beyond those already provided by listing.

Our response: It has long been our position that the benefits afforded by critical habitat were small relative to the benefits provided by listing. As such, we chose to focus scarce resources towards the listing of additional species. Our position should not be misinterpreted to mean that we believe critical habitat affords no additional benefits. To the contrary, we believe critical habitat may enhance management on Federal lands, and may help prevent adverse impacts on private lands resulting from Federal actions. The courts have repeatedly asserted that we have an obligation to designate critical habitat under the Act, and any decision not to do so should be the exception rather than the rule. We believe that the designation of critical habitat serves to educate and inform agencies, organizations, and the public that conservation of species requires cooperative maintenance of intact, functional habitat.

Comment 18: Many respondents pointed out that the Act prohibits designating a species' entire range as critical habitat.

Our response: Section 3(5)(C) of the Act states that, except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by an endangered or threatened species. Unfortunately, in the case of the Steller's eider, the information on historical distribution is so limited that accurately defining the species' entire range (which would include both areas currently occupied and unoccupied areas that could be occupied) is impossible. Thus, we cannot evaluate what proportion of the species' entire potential range was proposed for designation as critical habitat. However, at this time we are designating only a small proportion of the area originally proposed as critical habitat. Thus, we believe that we are designating as critical habitat only a very small proportion of the species' total range.

Comment 19: Several respondents stated that we need to balance protection and development.

Our response: There are provisions for balancing protection and development in sections 6, 7, and 10 of the Act. In addition, we balance protection and development in the critical habitat designation process by conducting an economic analysis. Our analysis concluded that the economic effects on development would be minimal or non-existent. Therefore, we believe that we have considered both protection and development in our deliberations.

Comment 20: Several commenters expressed concern that designation of critical habitat will result in restrictions on development, subsistence hunting and fishing, commercial fishing, and transportation.

Our response: We are unaware of any information indicating any new State or local laws, restrictions, or procedures will result from critical habitat designation. Should any State or local regulation be promulgated as a result of this rule, this would be outside our authority under the Act. Projects funded, authorized, or carried out by Federal agencies, and that may affect critical habitat, must undergo consultation under section 7 of the Act on the effects of the action on critical habitat. However, as discussed in the Critical Habitat section above, we do not expect consultations to result in restrictions that would not already be required to avoid or minimize take of the species, which is required regardless of the designation of critical habitat.

Comment 21: One commenter stated that village residents believe that they will be adversely affected by the designation of critical habitat.

Our response: We understand the commenter's reservations, however, we continue to maintain that the designation of critical habitat does not impose any additional requirements or conditions on the public beyond those resulting from the listing of the Steller's eider in 1997 as a threatened species.

Comment 22: Two respondents stated that we should have consulted the recovery team in our decision-making process.

Our response: We did not request the Recovery Team to make recommendations or provide formal comments on the critical habitat proposal. That is not the role of the Recovery Team provided for in the Act. However, we did consider comments from individual members of the recovery team as part of the public review and comment process. On September 21–22, 2000, in Anchorage, AK, we convened a meeting of experts

in the field of Steller's eider biology. We invited all local eider experts and all members of the Steller's eider recovery team. At this meeting, we sought input from the experts on what habitats they believed to be essential to the recovery of the species. A transcript of this meeting is part of our administrative record, and it was considered in our decision-making process, as were comments received by mail, fax, phone, e-mail, and in public meetings and our public hearing in Barrow, AK.

Comment 23: One respondent said that designating such a huge area as critical habitat may trivialize the concept of critical habitat.

Our response: The Act requires that we designate critical habitat to the maximum extent prudent. For wide-ranging species, this may result in large expanses of land or water falling within critical habitat borders.

Comment 24: One respondent compares the listing of the short-tailed albatross with that of the Steller's eider, and asked why it is prudent to designate critical habitat for the eider, but not for the albatross when the criteria for determination are nearly identical.

Our response: The decline in abundance of short-tailed albatrosses was notable in that it was directly attributable to one cause; direct persecution of the birds by humans such that the species was driven to the brink of extinction (and in fact, for many years, the short-tailed albatross was thought to have been extinct). When commercial harvest of this species discontinued, the species population began to grow at near its maximum biological potential. There is nothing about this species' habitat that is preventing it from growing at or near its biological maximum capacity for growth. The current population is but a tiny fraction of the number of birds that the habitat once supported. In short, we know what caused this species to decline, and it's decline was completely unrelated to anything in its habitat. We also know that there is no aspect of short-tailed albatross habitat in the U.S. that is preventing it from recovering nearly as fast as it is capable of doing (65 FR 46643). Such may not be the case for the Steller's eider.

We do not know why the Steller's eider has declined, but lacking evidence of excessive direct take by humans, we believe it is possible that changes in the quality of the species' habitat (marine or terrestrial) may have contributed to or caused its decline. Furthermore, certain aspects of its habitat (e.g., lead shot on the breeding grounds or changes in the marine environment) may be slowing or preventing recovery. As such, special management protections and considerations may be needed, and the designation of critical habitat is appropriate.

Comment 25: Several commenters stated that we did not consult with Alaska Native communities or local/tribal governments regarding our critical habitat proposals.

Our response: Due to the short deadline we were working under, which resulted from a settlement agreement, we did not consult with Alaska Native communities prior to proposing to designate critical habitat. However, we attempted to notify all potentially affected communities, local and regional governments regarding the proposed designation after it was published in the **Federal Register** on March 13, 2000 (65 FR 13262). As noted earlier, we published notices in the **Federal Register** announcing the proposed designation of critical habitat, and the availability of the draft economic analysis. We extended our public comment period three times at the request of Alaska Natives. We sent letters and informational materials pertaining to the proposal, draft economic analysis and notices of the comment period extensions to over 300 individuals, communities, and local and regional Native governments potentially affected by the proposed critical habitat. We provided a briefing opportunity on the proposal for Alaska Native representatives at the commencement of the comment period. We contacted specific individuals with traditional ecological knowledge of eiders and solicited their comments. We discussed our critical habitat proposal at 19 meetings (13 of which were public meetings and 16 of which had Natives in attendance). We held meetings in the Native/rural villages and towns of Chevak, Toksook Bay, Bethel, Barrow, Point Lay, Wainwright, Nuiqsut, Atqasuk, Sand Point, and Nome. At those meetings that were held during the public comment period, meeting attendees were given the opportunity to comment on the proposal and we gave equal weight to oral and written comments on the proposal.

Comment 26: Two respondents stated that we are not in compliance with the National Environmental Policy Act and that an Environmental Impact Statement should be completed.

Our response: We have determined that we do not need to prepare either an Environmental Impact Statement or Environmental Assessment, as defined under the authority of the National Environmental Policy Act of 1979 (NEPA), in connection with regulations adopted pursuant to section 4(a) of the Act. The Ninth Circuit Court determined that NEPA does not apply to our decision to designate critical habitat for an endangered or threatened species under the Act because: (1) Congress intended that the critical habitat procedures of the Act displace the NEPA requirements; (2) NEPA does not apply to actions that do not change the physical environment; and (3) to apply NEPA to the Act would further the purposes of neither statute (*Douglas County* v. *Babbitt,* 48 F.3d 1495, (9th Cir. 1995)). Alaska is within the jurisdiction of the Ninth Circuit Court of Appeals.

Comment 27: Several commenters said that we should explain in detail why the proposed critical habitat is essential to the species' survival and recovery. Commenters also stated that we should identify more explicitly the criteria used to determine what areas are considered essential and what special management or protections are needed.

Our response: Please see the ''Critical Habitat'' section of this Final Rule. As described above, we identified the habitat features (primary constituent elements) that provide for the physiological, behavioral, and ecological requirements essential for the conservation of Steller's eiders. Within the occupied range of the Steller's eider, we identified areas which provide the primary constituent elements and which met the criteria discussed under ''Criteria Used to Identify Critical Habitat'' in this rule. Then, based in part on public comments and information from eider experts, we selected qualifying portions of these areas we believe essential for the conservation of the Steller's eider and that may require special management considerations or protections.

Comment 28: Some commenters stated that ''adverse modification'' and ''jeopardy'' are two different standards and thus disagreed with our position that critical habitat will impose no additional regulatory burden.

Our response: Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of both the survival and recovery of a listed species. Actions likely to result in the destruction or adverse modification of critical habitat are those that would appreciably reduce the value of critical habitat for both the survival and recovery of the listed species. Common

to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the common threshold in these definitions, actions likely to result in the destruction or adverse modification of critical habitat would almost always result in jeopardy to the species concerned, particularly where, as here, only habitat within the geographic range occupied by the Steller's eider is designated as critical habitat. The designation of critical habitat for the Steller's eider does not add any new requirements to the current regulatory process. This critical habitat designation adds no additional requirements not already in place following the species' listing.

Comment 29: Some commenters stated that the proposed critical habitat designation was inconsistent with the guidelines set forth in the Act because it encompassed more habitat than is necessary for the conservation of the species.

Our response: The critical habitat areas identified in the proposed rule constituted our best assessment of the areas needed for the species' conservation using the best available scientific and commercial data available to us at the time. During the public comment period for the proposed rule, we received additional information and recommendations from eider experts, individuals with traditional environmental knowledge of the species' habitat needs and patterns of use, and other individuals and organizations enabling us to refine our assessment of the areas needed to ensure survival and recovery of the species. The critical habitat designated in this rule reflects our assessment of the areas needed for the conservation of Steller's eiders in accordance with the parameters set forth in ESA sections 3(5)(A) and 4(b)(2) and as described in the section of this rule titled ''Criteria Used to Identify Critical Habitat.'' We will continue to monitor and collect new information and may revise the critical habitat designation in the future if new information supports a change.

Comment 30: Several commenters stated that our previous determination that designation of critical habitat was ''not prudent'' was the appropriate decision. These commenters criticized us for agreeing to re-evaluate critical habitat for the Steller's eider in response to litigation, and stated that additional biological information should be necessary before critical habitat is re-evaluated.

Our response: At the time the initial ''not prudent'' determination was made for this species, we believed that designation afforded few, if any, benefits to the species beyond those conferred by listing. Federal Courts have not agreed with our analysis of the befits of critical habitat and during the last several years have overwhelmingly ruled that the Service must in almost all cases designate critical habitat for listed species. In light of recent court rulings, we opted to reconsider our earlier prudency decision, as stipulated in the terms of a settlement agreement, rather than expend our resources on protracted litigation.

We recognized that there may be informational or educational benefits associated with critical habitat designation. Moreover, we have acquired additional information concerning the biology and ecology of this species that have helped us identify more specifically the areas that are essential to its conservation. Recent satellite telemetry data has provided new information on molting areas of Alaska-breeding Steller's eiders. While there is still much to be learned about this species, the information currently available to us supports our determination that designation of critical habitat is prudent, and that the areas we are designating as critical habitat are essential to the conservation of the species and may require special management considerations or protections.

Comment 31: One commenter stated the designation of critical habitat should not occur until discussions had been held to ensure that the designation is consistent with international management regimes, such as those under the auspices of the Migratory Bird Treaty Act and the Arctic Council's working group for the Conservation of Arctic Flora and Fauna.

Our response: We agree that collaboration and consistency with international efforts to conserve the eider are very important. We have a working relationship with eider experts in Russia, and our research and management efforts are complementary to those conducted under other conservation programs. We will continue to coordinate with other research and conservation entities. The parameters set forth in the Act and the settlement agreement preclude deferral of designation of critical habitat for this species pending discussions of the type suggested by the commenter.

Comment 32: One respondent pointed out that critical habitat designation will result in the need to reinitiate section 7 consultation on projects on which consultation has previously been completed.

Our response: We agree. Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions when critical habitat is designated subsequent to consultation. However, this reinitiation need be undertaken only if the action is ongoing. We are in the process of contacting Federal agencies to inform them that they should review their ongoing actions that were previously consulted upon to determine if reinitiation of consultation is warranted.

Comment 33: One commenter asked whether critical habitat designation would shorten the permitting process for the oil industry or reduce the obligation of the oil industry to seek Native concurrence.

Our response: We believe that designating critical habitat will neither simplify nor complicate the Federal permitting process for any actions, including oil exploration or development. Because the only regulatory effect of critical habitat designation is through section 7 of the Act, which only affects Federal actions and permitting, it should not affect interactions between Alaska Natives and any industry.

Comment 34: Several commenters stated that additional law enforcement focused on illegal spring subsistence harvest would be a more effective way of achieving recovery than designation of critical habitat.

Our response: We do not know with certainty what caused the decline of Steller's eiders, but the available evidence suggests that subsistence harvest of this species is minimal and is not likely the primary cause of the decline. We have worked successfully with Alaska Natives to minimize spring harvest of Steller's eiders, and current efforts to implement recent amendments to the Migratory Bird Treaty Act are expected to enhance these efforts.

Comment 35: One commenter indicated that preventative measures such as critical habitat designation are cheaper as well as more productive and efficient than piecemeal restoration of habitat after environmental damage has occurred.

Our response: We agree. Designation of critical habitat helps focus awareness on the habitat needs of listed species. It also enables us to work with other federal agencies to ensure that activities they fund, permit, or carry out do not adversely modify or destroy habitat that is essential to the conservation of listed species.

Issue 3: Economic Issues

Comment 36: Many commenters disagreed with our assessment that the designation of critical habitat for the Steller's eider would not lead to any

new section 7 consultations and our conclusion, as a result, that economic impacts of the proposed designation would be minimal.

Our response: Because the Steller's eider is a federally protected species under the Act, Federal agencies are already required to consult with us on any actions they authorize, fund, or carry out that may affect the species. For Federal actions that may adversely affect Steller's eiders, Federal agencies need to enter into a formal section 7 consultation process with us to avoid violating section 9 of the Act, which makes it unlawful for any person to ''take'' a listed species. The term ''take'' is defined by the Act (section 3(18)) to mean ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' The U.S. Supreme Court clarified the definition of harm to include adverse modification of habitat (*Sweet Home Chapter of Communities for a Great Oregon, et al.* v. *Babbitt,* 515 U.S. 687 (1995).

We are only designating critical habitat that is occupied by Steller's eiders, is essential to the conservation of the species and may require special management considerations or protection. While this designation will require Federal agencies to further consider whether the actions they authorize, fund, or carry out within designated critical habitat boundaries may affect habitat, it is unlikely that an agency could conclude that an action may affect designated critical habitat without simultaneously concluding that the action may also affect the eiders given the presence of eiders within designated critical habitat.

To properly portray the effects of critical habitat designation, we must first compare the section 7 requirements for actions that may affect critical habitat with the requirements for actions that may affect a listed species. Section 7 prohibits actions funded, authorized, or carried out by Federal agencies from jeopardizing the continued existence of a listed species or destroying or adversely modifying the listed species' critical habitat. Actions likely to ''jeopardize the continued existence'' of a species are those that would appreciably reduce the likelihood of both the survival and recovery of a listed species. Actions likely to result in the destruction or adverse modification of critical habitat are those that would appreciably reduce the value of critical habitat for both the survival and recovery of the listed species. Common to both definitions is an appreciable detrimental effect on both survival and recovery of a listed species. Given the similarity of these definitions, actions likely to result in the destruction or adverse modification of critical habitat would almost always result in jeopardy when the area of the proposed action is occupied by Steller's eiders.

While Federal agencies will be required to consider the effect of their actions on critical habitat in determining whether or not to consult with us under section 7 of the Act, the designation of critical habitat for Steller's eiders will not affect activities undertaken within critical habitat boundaries that do not involve a Federal nexus. While any person, public or private, is required to ensure that their actions do not result in the taking of a Federally listed species, only Federal agencies are required to consult with us about their action's effect on designated critical habitat under section 7 of the Act. Persons undertaking activities within critical habitat boundaries that do not have a Federal nexus (i.e., Federal funds or permits) and that do not result in either the direct or indirect taking of a Federally protected species are not required to consult with us concerning the effect their activities may have on designated critical habitat.

Comment 37: Many commenters stated that by designating critical habitat for Steller's eiders, section 7 consultation costs would likely increase due to the extra resources needed to determine whether a proposed government action could result in the destruction or adverse modification of designated critical habitat.

Our response: We disagree that the designation of critical habitat for Steller's eiders would significantly increase the costs associated with conducting a section 7 consultation. First, as previously described, we have only proposed to designate occupied habitat as critical habitat and as a result the designation would not result in an increase in section 7 consultations because any Federal action that may affect a species' designated critical habitat, which would trigger a section 7 consultation, would also affect the listed species itself due to its presence in the area. For those Federal actions that we find may likely adversely affect a species or its critical habitat, we already consider habitat impacts of the proposed action along with whether or not an action is likely to jeopardize a listed species or constitute ''take'' pursuant to section 9 of the Act during the formal section 7 consultation process. As a result, the designation of critical habitat in the areas already occupied by Steller's eiders will not add any appreciable time or effort required by an action agency, third party applicant, or by our personnel to conduct a section 7 consultation.

Comment 38: Some comments stated that the economic analyses failed to consider the effect of reinitiating previously conducted consultations to consider an action's effect on designated critical habitat.

Our response: Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated. Because we have already considered the habitat impacts of the action during the consultation process, we do not believe that any significant resources would be expended by either the action agency or by our personnel to comply with the reinitiation requirement. We anticipate fulfilling the requirements of 50 CFR 402.16 by sending a letter to an action agency undertaking activities on which we have already consulted, and requesting that they make a determination as to whether the ongoing action may affect designated critical habitat. Because habitat impacts were already considered as part of the initial consultation, we believe that most, if not all, non-jeopardy activities already consulted upon will likely not adversely modify or destroy critical habitat. We are committed to working with all Federal agencies that may be affected by the designation of critical habitat to expedite any consultations that require reinitiation.

Comment 39: The draft economic analysis failed to consider that Nationwide permits will no longer be allowed without a section 7 consultation.

Our response: The conditions, limitations, and restrictions of the Army Corps Nationwide permit program state in 33 CFR 330.4 that no activity is authorized by any nationwide permit if that activity is likely to jeopardize the continued existence of a threatened or endangered species as listed or proposed for listing under the Act or to destroy or adversely modify the critical habitat of such species. Federal agencies are required to follow their own procedures for complying with the Act while non-federal permittees are required to notify the District Engineer (DE) if any Federally listed (or proposed for listing) endangered or threatened species or critical habitat might be affected or is in the vicinity of the project. In such cases, the prospective permittee may not begin work under authority of the nationwide wetland permit until notified by the DE that the requirements of the Act have been

satisfied and that the activity is authorized. If the DE determines that the activity may affect any Federally listed species or critical habitat, the DE must initiate section 7 consultation in accordance with the Act. Because we are only designating occupied habitat as critical habitat for Steller's eiders, prospective permittees already are required to notify the Army Corps of their activities within these areas. As a result, we do not anticipate that critical habitat designation for Steller's eiders would result in any additional section 7 consultations with the Army Corps concerning activities needing a general permit to proceed.

Comment 40: Some commenters stated that minor permitting delays, resulting from an increase in section 7 consultations, can result in a year-long delay given the limited operation windows due to climate conditions in Alaska. As a result, these commenters believed that marginal projects may face funding losses as financing capital is withdrawn due to increased uncertainty associated with such a project.

Our response: We disagree that there will be an increase in section 7 consultations that will be attributable to critical habitat designation. Federal agencies are already required to consult with us in situations where actions they undertake, fund, or permit may jeopardize the eiders. We do not believe that the designation of critical habitat will lengthen the section 7 process because we already consider habitat impacts as part of the consultation process. Because we are only designating critical habitat in areas that are occupied by the eiders, we do not believe that there will be an increase in section 7 consultations due to the designation.

Comment 41: Several commenters stated that the draft economic analyses failed to adequately address critical habitat effects on the North Slope petroleum economy, including the costs associated with section 7 consultations and project modifications, which may result in project delays and reduced development, associated effects on the regional, State, and national oil prices and economies, and land value impacts in areas where production may be curtailed.

Our response: Our draft economic analysis for the proposed critical habitat rule discussed the potential economic impacts to the oil and gas industry operating on the North Slope. Specifically, we discussed the responsibilities of the Bureau of Land Management and the Minerals Management Service in managing oil and gas exploration and production drilling in this area and their current responsibility to consult with us on activities they authorize, fund, or carry out that may affect Steller's eiders. The analyses discussed previous consultations with these Federal agencies concerning oil and gas activities and concluded that for section 7 consultations for which a ''not likely to adversely affect'' determination was made by the agency, and for which we concurred, we fully expect to concur with a corresponding determination that such an action is not likely to result in the destruction or adverse modification of critical habitat. Only for those actions resulting in jeopardy to Steller's eiders would we expect to meet the threshold for destruction or adverse modification of critical habitat during the section 7 process. Similarly, we believe that property value decreases, to the extent that they can be attributed to Steller's eiders and result in actual restrictions in land use, would be a result of the listing of the species as a federally protected species and not because of critical habitat designation. Consequently, we do not believe that critical habitat designation, as proposed, would have an adverse effect on oil and gas industry operations on the North Slope nor have any indirect effects on the regional or State economy.

In this final rule, however, we have withdrawn the North Slope unit from critical habitat designation. As a result, the concerns expressed in this comment are no longer an issue relevant to the final designation.

Comment 42: One commenter believed that the economic analyses failed to adequately address potential benefits associated with critical habitat designation.

Our response: We believe that the benefits to the species that result from critical habitat will be non-economic in nature. Critical habitat designation for Steller's eiders may heighten public and agency awareness of the habitat needs of Steller's eiders. Other benefits may result from Federal agencies becoming more aware of their obligation to consult on their activities as per section 7 of the Act. However, because we are designating only occupied habitat as critical habitat for Steller's eiders, we believe that the economic consequences (both positive and negative) associated with the designation are limited. We arrive at this conclusion because the designation of critical habitat is unlikely to have any significant effect on both current and planned economic activities within the designated areas. For reasons previously stated, Federal agencies are already required to consult with us on activities that may affect Steller's eiders.

Comment 43: The analysis ignores the effect that critical habitat designation may have on commercial fisheries, such as those occurring in the Bering Sea, along the Alaska Peninsula, and in Cook Inlet based on judicial rulings on the fisheries impact on critical habitat for Steller sea lions.

Our response: On July 20, 2000, U.S. District Court Judge Thomas S. Zilly issued an injunction on all groundfish trawl fishing within federally regulated waters of the Bering Sea/Aleutian Islands and the Gulf of Alaska within Steller sea lion critical habitat. The judge issued this injunction because he found that the NMFS failed to issue a legally adequate biological opinion addressing the combined, overall effects of the North Pacific groundfish trawl fisheries on Steller sea lions and their critical habitat pursuant to the Act. It is important to note that while the judge limited fishing within Steller sea lion critical habitat, he issued the injunction primarily out of concern that NMFS failed to comply with section 7 of the Act. Consequently, we do not believe that critical habitat designation for the Steller sea lion played a significant role in the judge's decision to issue the injunction but rather was simply used by the judge to determine the boundaries of the injunction.

Our analyses did not address the potential effects of third-party lawsuits directly due to the limited information and experience that critical habitat designation could have on such a lawsuit. However, we recognize that it is possible that some third parties may elect to sue us over future decisions we may make about whether an activity adversely modifies critical habitat. As of yet, we have not faced any such lawsuits and because we are only designating occupied eider habitat as critical habitat, we find it highly unlikely that we would ever determine that a Federal action could adversely modify critical habitat without simultaneously jeopardizing the continued existence of Steller's eiders due to the similarity between the two definitions.

Our economic analyses did address the potential for impacts to commercial fisheries resulting from proposed critical habitat designation. In these analyses we described how we have conducted semi-annual formal consultations with NMFS on the management of Bering Sea fisheries. To date, we are unaware of any Steller's eiders having been taken by these fisheries. As a result, we discontinued formal consultations on this fishery and began conducting only informal consultations. We do not anticipate that

the designation of critical habitat will change our approach to consultations. As a result, we do not expect any adverse economic impacts to occur in Kuskokwim Bay, Seal Islands, Nelson Lagoon, or Izembek Lagoon Steller's eider critical habitat areas as a result of this final rule. Therefore, we believe the potential for a third-party lawsuit that could affect the commercial fishing industry as a result of critical habitat designation is minimal.

Comment 44: Several commenters stated that the economic analysis is flawed because it does not quantify any of the expected impacts that may result from critical habitat designation.

Our response: The draft economic analyses did not identify any potential impacts associated with critical habitat designation for Steller's eiders. As a result, the analysis was unable to quantify any effects. Although the analyses acknowledged the possibility of impacts associated with project delays and other activities due to section 7 consultations (the Act only requires Federal agencies to consult with us concerning the effect their actions may have in critical habitat areas), we are only designating occupied habitat as critical habitat for Steller's eiders. Because Federal agencies are already required to consult with us concerning the effect their activities may have on Steller's eiders in these areas, we do not believe that the designation will result in any additional impacts. While the Act requires Federal agencies to consult with us on activities that adversely modify critical habitat, we do not believe that within areas being designated as critical habitat for Steller's eiders there will be any Federal government actions that will adversely modify critical habitat without also jeopardizing Steller's eiders due to their presence in designated critical habitat areas.

We have also recognized that, in some instances, the designation of critical habitat could affect the real estate market because participants may incorrectly perceive that land within critical habitat designation is subject to additional constraints. However, we do not believe that this effect will result from the designation of critical habitat for Steller's eiders. We arrived at this determination based on the fact that we believe that critical habitat designation for Steller's eiders will not add any additional protection, beyond that associated with the addition of the species to the list of federally protected species. Additionally, in regard to private lands that may be nearby designated areas, we believe that critical habitat designation for Steller's eiders will not add any additional protection, nor impact landowners, beyond that associated with the addition of the species to the list of Federally protected species. Any resulting real estate market would likely be temporary and have a relatively insignificant effect as it becomes apparent that critical habitat for Steller's eiders does not impose additional constraints on landowner activities beyond that currently associated with the listing of the species.

Comment 45: Some commenters stated that the analysis does not consider the cumulative impact of added uncertainty for projects.

Our response: While our economic analyses identified some of the concerns stakeholders may have regarding our concern over current or anticipated activities on eider critical habitat, we do not believe that the designation of critical habitat for Steller's eiders will impose any additional restrictions or considerations on projects having a Federal nexus. While section 7 consultations could lead to project delays if they are not properly anticipated for by project planners, we do not believe that the designation of critical habitat will result in any new or additional section 7 consultations above and beyond those that would be required due to an activity's potential to affect Steller's eiders. We already consider the impact that an action has on the eider's habitat as part of our current section 7 process so we do not believe that the section 7 process will take any longer than it currently does once critical habitat is designated.

Comment 46: Some commenters believed that we failed to adequately address the requirements of the Small Business Regulatory Enforcement Fairness Act in our draft economic analysis.

Our response: The Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act, generally requires an agency to prepare a regulatory flexibility analysis of any rule requiring public notice and comment under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. We are certifying that this rule will not have a significant economic impact on a substantial number of small entities and, as a result, we do not need to prepare either an initial or final regulatory flexibility analysis.

We have based our finding on the fact that this rule will not result in any significant additional burden to the regulated community, regardless of the size of the entity. Our economic analysis identified several potential impacts associated with critical habitat designation, including increased consultation costs, project modification costs, and potential temporary decreases in property values. However, because we have only designated property that is within the geographic range occupied by Steller's eiders and because Steller's eiders are already a Federally protected species, other Federal agencies are already required to consult with us on activities that they authorize, fund, or carry out that have the potential to jeopardize the species. Any associated costs related to these section 7 consultations, including project modifications, will therefore be attributable to the listing of the species and not to designation of critical habitat due to the similarity in the definition of jeopardy and adverse modification.

Issue 4: Other Relevant Issues

Comment 47: Many respondents were concerned that designating critical habitat will invite lawsuits by those aiming to obstruct oil development on the North Slope.

Our response: While we cannot predict future litigation, it is not our intent to facilitate litigation through critical habitat designation. However, we cannot use the threat of litigation as an excuse for not designating critical habitat. The Act and regulations at 50 CFR 424.12 require us to designate critical habitat to the maximum extent prudent, and require that we base critical habitat determinations on the best scientific and commercial data available and that we consider those physical and biological features that are essential to the conservation of the species and that may require special management considerations and protection.

In this final rule, however, we have withdrawn the North Slope unit from critical habitat designation. As a result, the concerns expressed in this comment are no longer an issue relevant to the final designation.

Comment 48: A few respondents asked whether it is possible that there will be additional time in which to submit comments and whether another draft will be presented for public comment before the final rule.

Our response: Our public comment period of 197 days greatly exceeds the 60-day public comment period required by regulation. We extended the comment period on three separate occasions to accommodate interested parties. We believe that we allowed ample time for comments. Our proposed

rule, published on March 13, 2000, and the draft economic analysis represent the only documents for which public comment will be sought relative to this rulemaking. However, we welcome at any time new information on the life history, distribution, and status of the Steller's eider, as well as information on the quality, quantity, and viability of the habitats it uses.

Comment 49: A few respondents asked whether critical habitat would be the first step towards making the area a refuge.

Our response: Critical habitat designation is completely unrelated to the formation of wildlife refuges, and in no way affects, or is a precursor to, establishment of a wildlife refuge. Critical habitat can be designated on existing parks and refuges, state and private lands. Such designation carries with it no implication of future land ownership change, nor does it allow for public access to private land.

Comment 50: One respondent stated that our proposal resulted from a politically motivated decision.

Our response: Our proposal resulted from an out-of-court settlement in which we agreed to re-examine our initial decision that designation of critical habitat for this species was not prudent. We objectively reexamined the best scientific and commercial data available to us at the time, determined that designation of critical habitat was prudent, and developed the proposal upon which this final rule is based.

Comment 51: One respondent stated that designating critical habitat ensures collaboration between Federal, State, and Private agencies and industries, and that designation will foster comprehensive planning and wise management.

Our response: We pursue comprehensive planning and management opportunities regardless of the presence of critical habitat. However, we note that the heightened awareness surrounding conservation issues and the delineation of critical habitat areas on maps has resulted in agencies becoming more fully aware of the need to consult with us as per section 7 of the Act. As we discussed for the Proposed North Slope Unit under the *Rationale for the Final Designation* section, in the unique circumstances surrounding the Barrow area, we believe the exclusion of areas from a critical habitat designation can also provide a conservation benefit to the species.

Comment 52: One respondent stated that designating as critical habitat the large area proposed on the Arctic Coastal Plain would harm listed eiders by irreparably damaging cooperative and collaborative working relationships between the Service and local and Native governments.

Our response: We regard working relationships with local and Native governments to be essential for effecting the recovery of Steller's eiders on the North Slope. We note numerous cooperative conservation actions that are in progress, including jointly conducted or funded research and monitoring projects, efforts to eliminate the use of lead shot by waterfowl hunters, and public education projects. We agree that any action that damages these cooperative efforts will harm listed eiders. However, the Act and our regulations are clear in that critical habitat must be designated if doing so is prudent. It should be noted that in this final rule, we have withdrawn the North Slope unit from critical habitat designation for reasons described in the *Rationale for the Final Designation* section.

Comment 53: One respondent challenged our metric/English conversions (40 km = 25 mi; 30 feet = 10 m) used to describe critical habitat units, contending the imprecision in this conversion could cause ambiguity in unit boundaries.

Our response: We have revised these conversions where appropriate. The conversion 30ft/10m was changed to 30 ft/9m, while one quarter mile/400 m and 25 miles/40 km were left unchanged in order to maintain the appropriate number of significant digits.

Comment 54: One respondent stated that the risks of not designating or designating too small an area appear greater than the risks of designating too large an area.

Our response: We believe that any risks associated with the designation of critical habitat derive from misperceptions surrounding critical habitat, and the way in which these misperceptions may affect working relationships between parties with conflicting interests or goals. Conversely, we do not believe that there are notable risks to the listed species that would result from a failure to designate critical habitat.

Comment 55: One respondent asked whether critical habitat remains forever or is eliminated once the species is delisted.

Our response: Critical habitat is eliminated when the species is delisted.

Comment 56: Two oil companies commented that the original listing of eiders and subsequent critical habitat designation may have indirect negative effects on eiders by stimulating more intrusive research on the North Slope and elsewhere, resulting in increased disturbance during nesting.

Our response: The only regulatory effect of critical habitat designation is through section 7 of the Act, which requires Federal agencies to consult with the Service on actions they permit, fund, or conduct that may adversely affect listed species or adversely modify or destroy critical habitat. We believe that neither the need to consult nor the outcome of consultations will be affected by critical habitat designation because we currently consider the potential habitat impacts of proposed projects during consultation. While listing may stimulate research on eiders and recovery, any research on the North Slope or elsewhere in the species' occupied range that might result in ''take'' would require a section 10(a)(1)(A) permit from the Service. If the authorization of such a permit may affect a listed species, an intra-agency section 7 consultation on permit issuance must be initiated. Any such consultation will consider the direct, indirect, interrelated, and interdependent effects of the action. No permits would be issued if significant adverse impacts were anticipated.

Summary of Changes From the Proposed Rule

Based on a review of public comments received on the proposed determination of critical habitat for the Steller's eider, we re-evaluated our proposed designation of critical habitat for the species. This resulted in five significant changes that are reflected in this final determination. These are the (1) elimination of the proposed North Slope unit; (2) revision of the proposed Kuskokwim Bay unit to include the northern portion, now called the Kuskokwim Shoals unit, and to exclude the southern portion; (3) elimination of the proposed Nunivak Islands, Eastern Aleutians, Alaska Peninsula—south side, Kodiak Archipelago and Kachemak Bay/Ninilchik units; (4) elimination of most of the proposed North Side of the Alaska Peninsula unit, and; (5) separate designation of Seal Islands, Nelson Lagoon, and Izembek Lagoon units. A detailed discussion of the basis for changes from the proposed rule can be found under *Rationale for the Final Designation* section above.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial data available and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from

critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

Economic effects caused by listing the Alaska-breeding population of the Steller's eider as a threatened species and by other statutes are the baseline against which the effects of critical habitat designation are evaluated. The economic analysis must then examine the incremental economic and conservation effects and benefits of the critical habitat designation. Economic effects are measured as changes in national income, regional jobs, and household income. An analysis of the economic effects of Steller's eider critical habitat designation was prepared (Industrial Economics, Incorporated, 2000) and made available for public review August 24, 2000 (65 FR 51577). The final analysis, which reviewed and incorporated public comments, concluded that no significant economic impacts are expected from critical habitat designation above and beyond that already imposed by listing the Steller's eider The most likely economic effects of critical habitat designation are on activities funded, authorized, or carried out by a Federal agency. The analysis examined the effects of the proposed designation on: (1) Re-initiation of section 7 consultations, (2) length of time in which section 7 consultations are completed, and (3) new consultations resulting from the determination. Because areas proposed for critical habitat are within the geographic range occupied by the Steller's eider, activities that may affect critical habitat may also affect the species, and would thus be subject to consultation whether or not critical habitat is designated. We believe that any project that would adversely modify or destroy critical habitat would also jeopardize the continued existence of the species, and that reasonable and prudent alternatives to avoid jeopardizing the species would also avoid adverse modification of critical habitat. Thus, no regulatory burden or associated significant additional costs would accrue because of critical habitat above and beyond that resulting from listing. Our economic analysis does recognize that there may be costs from delays associated with reinitiating completed consultations after the critical habitat designation is made final.

A copy of the final economic analysis may be obtained by contacting the Northern Alaska Ecological Services office (see **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

This document has been reviewed by the Office of Management and Budget (OMB), in accordance with Executive Order 12866. OMB makes the final determination under Executive Order 12866.

(a) This rule will not have an annual economic effect of $100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. A cost-benefit and economic analysis is not required. The Steller's eider was listed as a threatened species in 1997. Since then, we have conducted 5 formal section 7 consultations with other Federal agencies to ensure that their actions would not jeopardize the continued existence of the species. We have also issued 5 section 10(a)(1)(A) incidental take permits for research activities that might affect Steller's eiders. We have issued no section 10(a)(1)(B) incidental take permits for this species or within the range of this species.

The areas designated as critical habitat are currently within the geographic range occupied by the Steller's eider. Under the Act, critical habitat may not be adversely modified by a Federal agency action; it does not impose any restrictions on non-Federal persons unless they are conducting activities funded or otherwise sponsored or permitted by a Federal agency (see Table 2 below). Section 7 requires Federal agencies to ensure that they do not jeopardize the continued existence of the species. Based upon our experience with the species and its needs, we conclude that any Federal action or authorized action that could potentially cause adverse modification of designated critical habitat would currently be considered as ''jeopardy'' under the Act. Accordingly, the designation of areas within the geographic range occupied by the Steller's eider does not have any incremental impacts on what actions may or may not be conducted by Federal agencies or non-Federal persons that receive Federal authorization or funding. Non-Federal persons that do not have a Federal ''sponsorship'' of their actions are not restricted by the designation of critical habitat although they continue to be bound by the provisions of the Act concerning ''take'' of the species.

(b) This rule will not create inconsistencies with other agencies' actions. As discussed above, Federal agencies have been required to ensure that their actions do not jeopardize the continued existence of the Steller's eider since the listing in 1997. The prohibition against adverse modification of critical habitat is not expected to impose any restrictions in addition to those that currently exist because all designated critical habitat is within the geographic range occupied by the Steller's eider. Because of the potential for impacts on other Federal agency activities, we will continue to review this action for any inconsistencies with other Federal agency actions.

(c) This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients. Federal agencies are currently required to ensure that their activities do not jeopardize the continued existence of the species, and as discussed above we do not anticipate that the adverse modification prohibition (resulting from critical habitat designation) will have any significant incremental effects.

(d) This rule will not raise novel legal or policy issues. This final determination follows the requirements for determining critical habitat contained in the Endangered Species Act.

TABLE 2.—ACTIVITIES POTENTIALLY AFFECTED BY STELLER'S EIDER LISTING AND CRITICAL HABITAT DESIGNATION

Categories of activities	Activities involving a Federal action potentially affected by species listing only [1]	Additional activities involving a Federal action potentially affected by critical habitat designation [2]
Federal Activities Potentially Affected [3]	Activities that the Federal Government carries out such as scientific research, land surveys, law enforcement, oil spill response, resource management, regulation of commerce, and construction/expansion of physical facilities.	None.
Private Activities Potentially Affected [4] ..	Activities that also require a Federal action (permit, authorization, or funding) such as scientific research, commercial fishing, sport and subsistence hunting, shipping and transport of fuel oil and, and village maintenance, construction and expansion.	None.

[1] This column represents impacts of the final rule listing the Steller's eider (June 11, 1997; 62 FR 31748) under the Endangered Species Act.
[2] This column represents the impacts of the critical habitat designation above and beyond those impacts resulting from listing the species.
[3] Activities initiated by a Federal agency.
[4] Activities initiated by a private entity that may need Federal authorization or funding.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

In the economic analysis, we determined that designation of critical habitat will not have a significant effect on a substantial number of small entities. As discussed under Regulatory Planning and Review above and in this final determination, this designation of critical habitat for the Steller's eider is not expected to result in any restrictions in addition to those currently in existence. As indicated on Table 1 (see Critical Habitat Designation section) we have designated property owned by Federal, State and local governments, and private property.

Within these areas, the types of Federal actions or authorized activities that we have identified as potential concerns are:

(1) Regulation of activities affecting waters of the United States by the Army Corps under section 404 of the Clean Water Act;

(2) Regulation of water flows, damming, diversion, and channelization by Federal agencies;

(3) Regulation of commercial fisheries by the National Marine Fisheries Service;

(4) Law enforcement in United States Coastal Waters by the U.S. Coast Guard;

(5) Road construction and maintenance by the Federal Highway Administration;

(6) Regulation of airport improvement activities by the Federal Aviation Administration jurisdiction;

(7) Military training and maneuvers on applicable DOD lands;

(8) Regulation of subsistence harvest activities on Federal lands by the U.S. Fish and Wildlife Service;

(9) Regulation of mining and oil development activities by the Minerals Management Service;

(10) Regulation of home construction and alteration by the Federal Housing Authority;

(11) Hazard mitigation and post-disaster repairs funded by the Federal Emergency Management Agency;

(12) Construction of communication sites licensed by the Federal Communications Commission;

(13) Wastewater discharge from communities and oil development facilities permitted by the Environmental Protection Agency; and

(14) Other activities funded by the U.S. Environmental Protection Agency, Department of Energy, or any other Federal agency.

Many of these activities sponsored by Federal agencies within critical habitat areas are carried out by small entities (as defined by the Regulatory Flexibility Act) through contract, grant, permit, or other Federal authorization. As discussed in section 1 above, these actions are currently required to comply with the listing protections of the Act, and the designation of critical habitat is not anticipated to have any additional effects on these activities.

For actions on non-Federal property that do not have a Federal connection (such as funding or authorization), the current restrictions concerning take of the species remain in effect, and this final determination will have no additional restrictions.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

In the economic analysis, we determined whether designation of critical habitat would cause (a) any effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions in the economic analysis, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will only be affected to the extent that any Federal funds, permits or other authorized activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed in section 1, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated.

(b) This rule will not produce a Federal mandate of $100 million or greater in any year, that is, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments.

Takings

This critical habitat designation is restricted to Federal and State marine waters and no private lands are included. Therefore, this rule does not have significant takings implications and a takings implication assessment is not required.

Federalism

In accordance with Executive Order 13132, the rule does not have significant Federalism effects. A Federalism

assessment is not required. The designation of critical habitat within the geographic range occupied by the Steller's eider imposes no additional restrictions to those currently in place, and therefore has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the survival of the species are specifically identified. While this definition and identification does not alter where and what federally sponsored activities may occur, it may assist these local governments in long range planning (rather than waiting for case by case section 7 consultations to occur).

Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We designate critical habitat in accordance with the provisions of the Endangered Species Act. The determination uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the Steller's eider.

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

This rule does not contain any information collection requirements for which OMB approval under the Paperwork Reduction Act is required.

National Environmental Policy Act

We have determined that an Environmental Assessment and/or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969 need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Endangered Species Act, as amended. A notice outlining our reason for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244). This final determination does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951) and 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. We have determined that there are no Tribal lands essential for the conservation of the Steller's eider because they do not support core Steller's eider populations, nor do they provide essential linkages between core populations. Therefore, critical habitat for the Steller's eider has not been designated on Tribal lands.

References Cited

A complete list of all references cited in this proposed rule is available upon request from the Northern Alaska Ecological Services Office (see **ADDRESSES** section) or from the U.S. Fish and Wildlife Service, Alaska Region webpage at: http://www.r7.fws.gov/es/te.html

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.11(h) revise the entry for Steller's eider under ''BIRDS'' to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*		*		*
BIRDS							
*	*	*	*		*		*
Eider, Steller's	*Polysticta stelleri*	USA (AK); Russia	U.S.A. (AK breeding population only).	T	616	17.95(b)	NA
*	*	*	*		*		*

3. Amend § 17.95 (b) by adding critical habitat for the Steller's eider (*Polysticta stelleri*) in the same alphabetical order as this species occurs in 17.11 (h) to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(b) Birds.

* * * * *

Steller's Eider (*Polysticta stelleri*)

1. Critical habitat units are depicted for the Yukon—Kuskokwim Delta (Unit 1), Kuskokwim Shoals (Unit 2), Seal Islands (Unit 3), Nelson Lagoon (Unit 4), and Izembek Lagoon (Unit 5) on the maps below. The maps are for reference only; the areas in critical habitat are legally described below.

2. Within these areas, the primary constituent elements are those habitat components that are essential for the primary biological needs of feeding, roosting, molting, and wintering. The primary constituent elements for Unit 1 include the vegetated intertidal zone and all open water inclusions within this zone. The primary constituent elements for Units 2, 3, 4, and 5 are marine waters up to 9 m (30 feet) deep and the underlying substrate, the associated invertebrate fauna in the water column, the underlying marine benthic community, and where present, eelgrass beds and associated flora and fauna. Critical habitat does not include those areas within the boundary of any unit that do not fit the description of primary constituent elements for that unit.

3. Critical habitat does not include existing human structures, such as buildings, roads, pipelines, utility corridors, airports, other paved areas,

docks, wharves, buoys, or other developed areas.

4. In the following maps and legal descriptions, all geographic coordinates are in North American Datum 1927.

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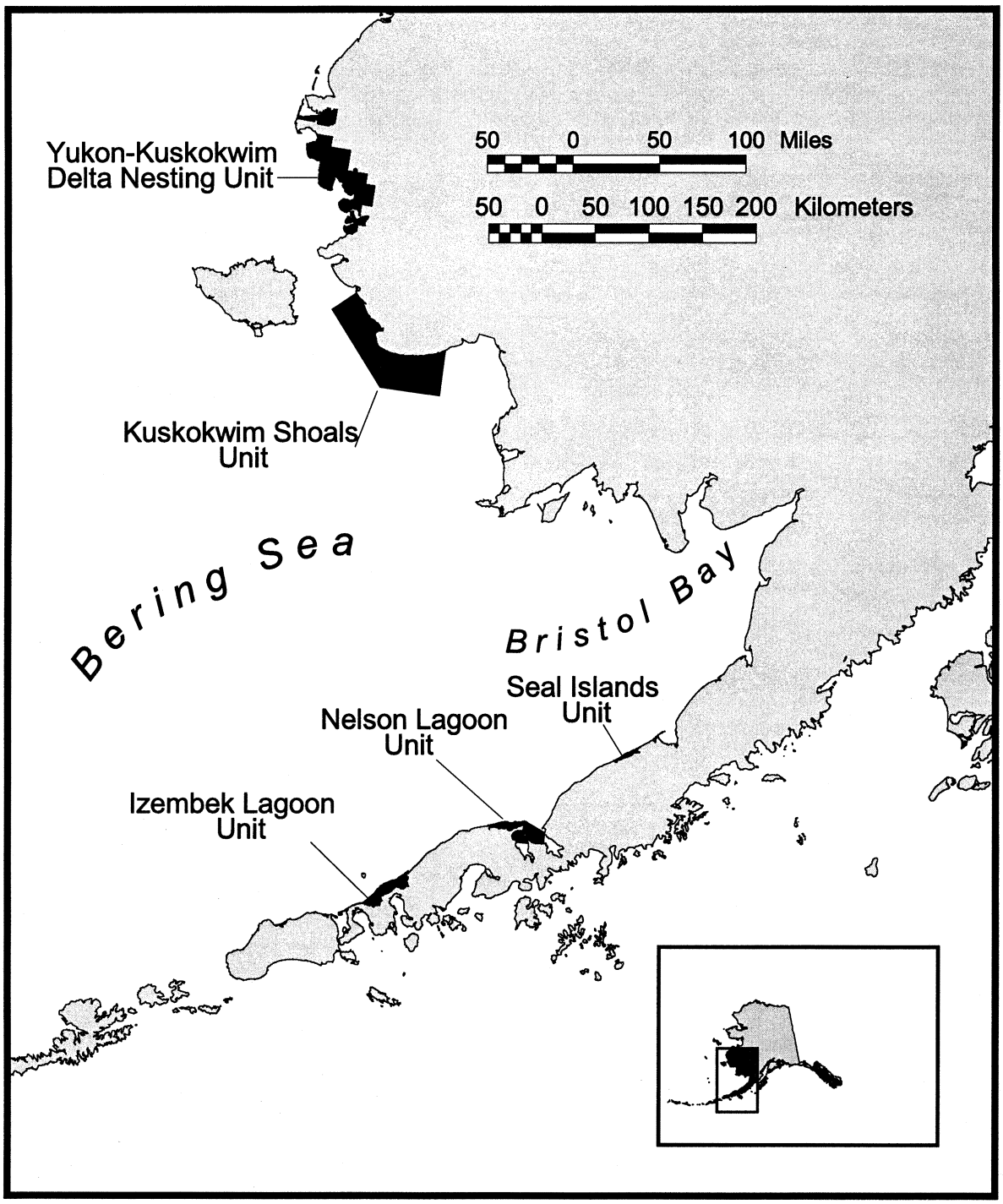

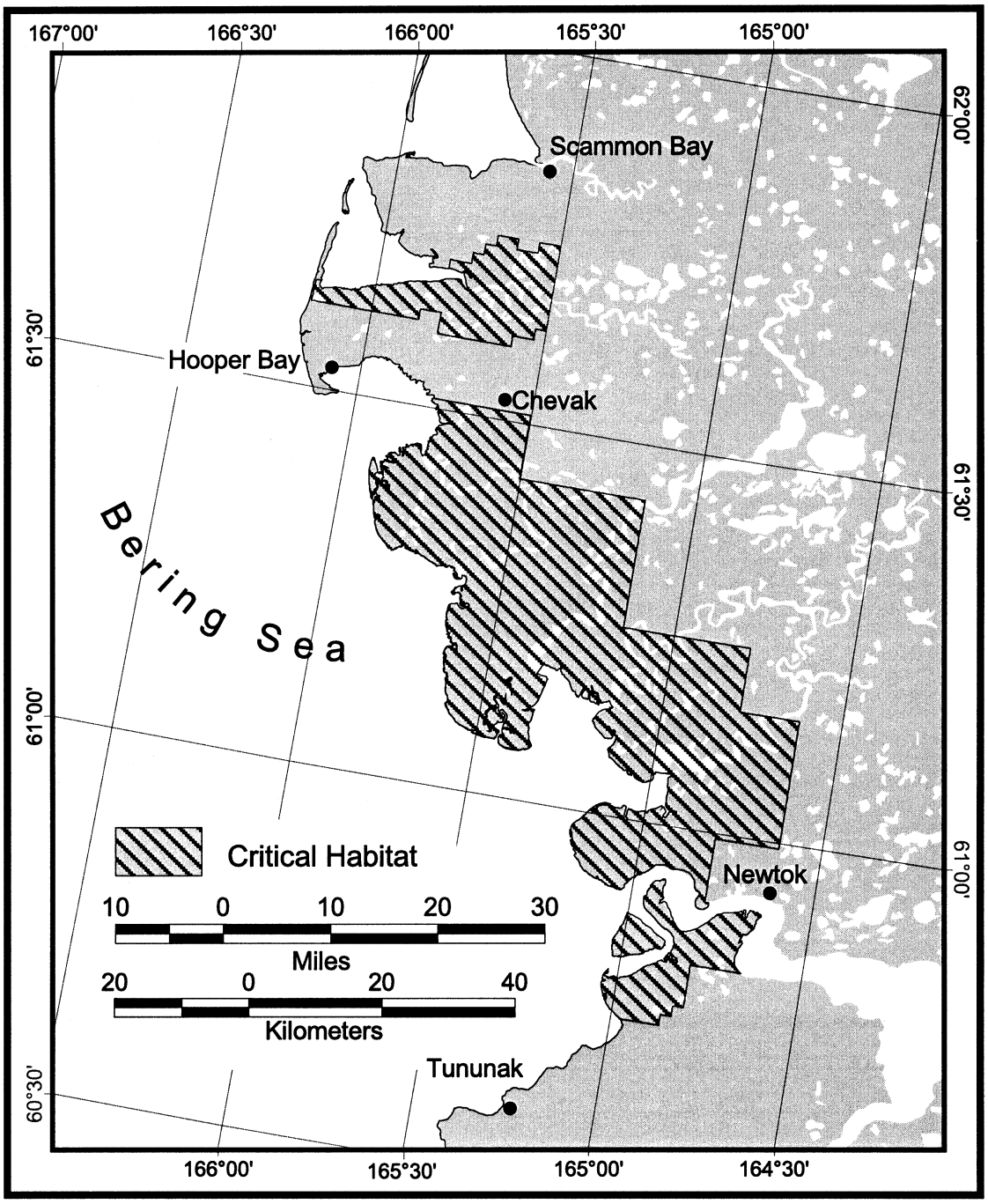

Unit 1. Yukon—Kuskokwim Delta

Seward Meridian: T19N, R91W, Sections 24, 25, 26, 33, 34, 35, 36; T19N, R90W, Sections 13, 14, 17, 18, 19–36; T18N, R90W, Sections 1–24, 26–33; T18N, R91W, Sections 1–5, 7–28, 33–36; T18N, R92W, Sections 10–30; T18N, R93W, Sections 21–27; T16N, R91W, Sections 1–36; T16N, R92W, Sections 1–4, 10–15, 21–36; T16N, R93W, Section 36; T15N, R89W, Sections 1–36; T15N, R90W, Sections 1–36; T15N, R91W, Sections 1–36; T15N, R92W, Sections 1–36; T15N, R93W, Sections 1,2, 11–14, 23–26, 36; T14N, R89W, Sections 1–36; T14N, R90W, Sections 1–36; T14N, R91W, Sections 1–29, 32–36; T14N, R92W, Sections 1–18, 24; T14N, R93W, Sections 1, 12; T13N, R87W, Sections 1–36; T13N, R88W, Sections 1–36; T13N, R89W, Sections 1–36; T13N, R90W, Sections 1–36; T13N, R91W, Sections 1–5, 8–17, 20–29, 32–36; T12N, R87W, Sections 1–36; T12N, R88W, Sections 1–29, 31–36; T12N, R89W, Sections 1–35; T12N, R90W, Sections 1–4, 9–14, 23–25; T12N, R91W, Sections 1–36; T12N, R92W, Sections 1–4, 9–16, 21–28, 34–36; T11N, R87W, Sections 1–36; T11N, R88W, Sections 1–36, T11N, R89W, Sections 1–6, 9–12, 25–36; T11N, R91W, Sections 1–6; T10N, R88W, Sections 1–26, 29–33, 35, 36; T10N, R89W, Sections 1–35; T10N, R90W, Sections 1, 2, 11–14, 24, 25; T9N, R87W, Sections 1–35; T9N, R88W, Sections 1, 4–10, 13–36; T9N, R89W, Sections 13, 14, 23–26, 35, 36; T8N, R89W, Sections 1–5, 7–24, 26–34; T8N, R90W, Sections 1–2, 11, 13, 14, 23–26, 36.

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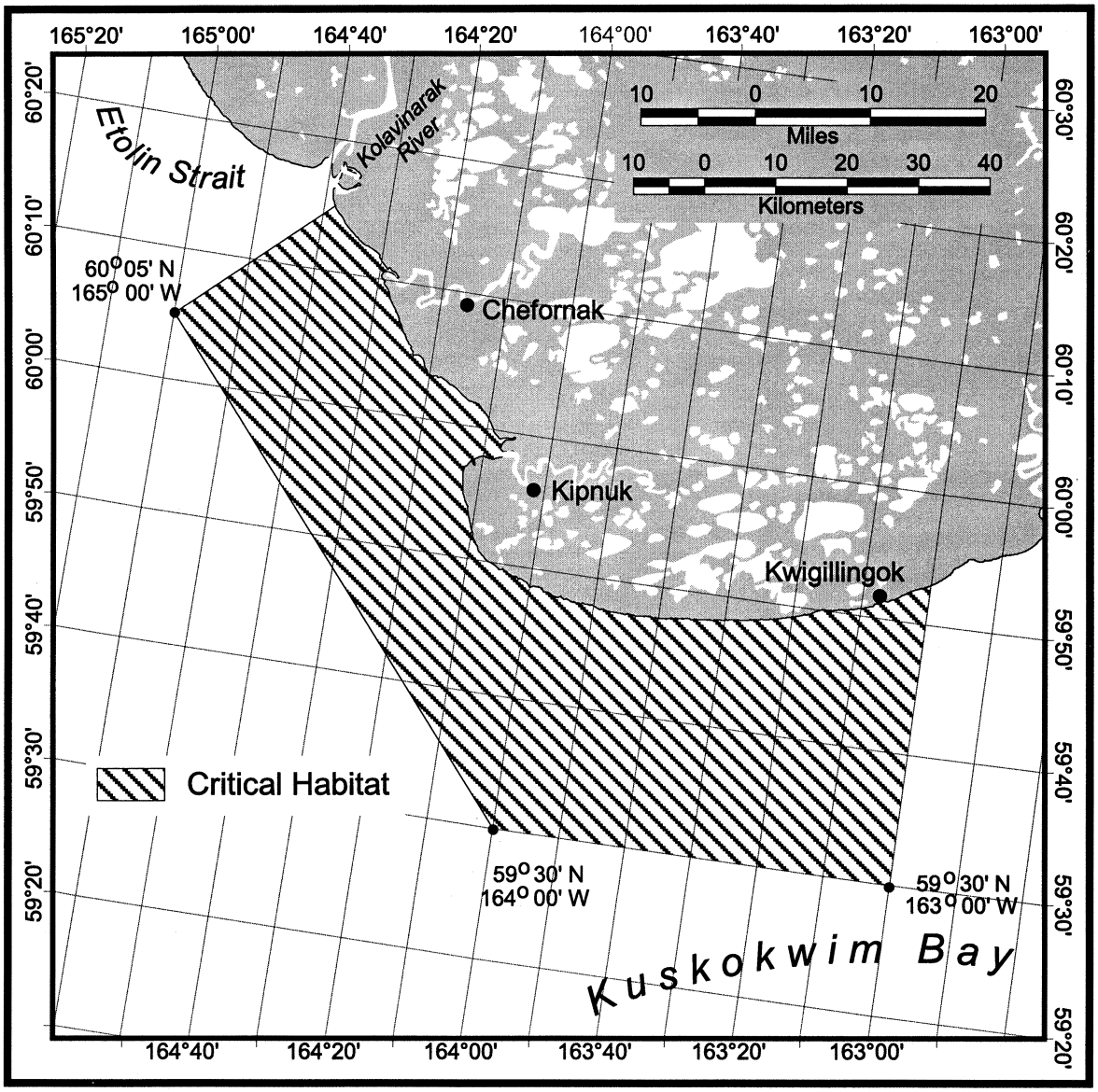

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Unit 2. Kuskokwim Shoals Unit

Beginning at a point of land on the line of mean high tide of Etolin Strait of the Bering Sea at latitude 60° 15″ North, approximately 2.5 kilometers (1.6 miles) south of the mouth of the Kolavinarak River, and the true point of beginning of the lands to be described.

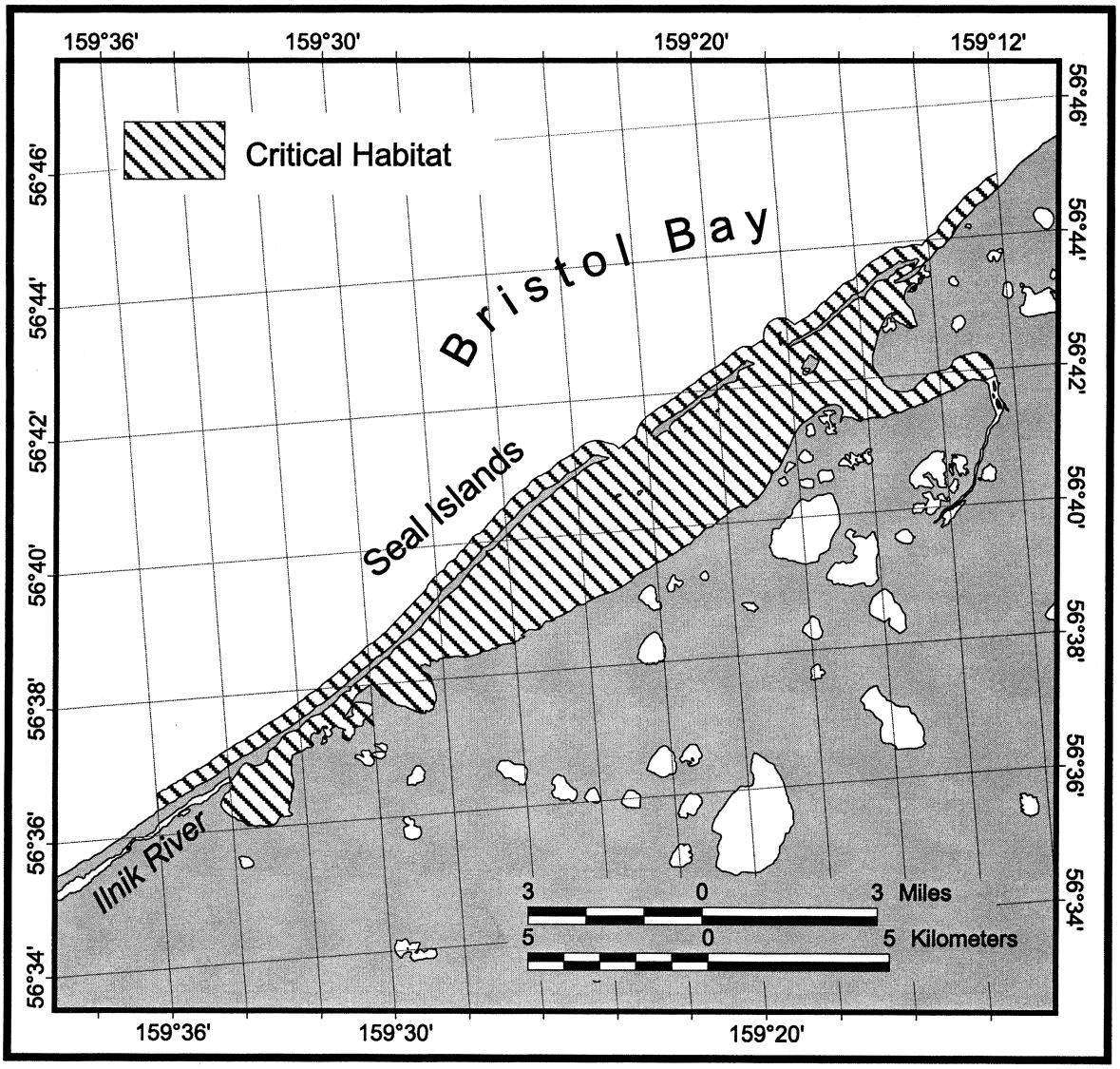
Thence southeasterly and easterly with the line of mean high tide of the Bering Sea, common with the boundary of the Yukon Delta and Alaska Maritime National Wildlife Refuges as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 149 kilometers (93 miles), to a point on the line of mean high tide at longitude 163° 00′ West, approximately 8 kilometers (5 miles) east of the Kwigillingok River mouth;

Thence south along the line of longitude 163° 00′ West, approximately 43 km (27 miles), to the point in the waters of Kuskokwim Bay, Bering Sea, at latitude 59° 30′ North, longitude 163° 00′ West;

Thence west along the line of latitude 59° 30′ North, approximately 56 kilometers (35 miles), to a point in the waters of Kuskokwim Bay, Bering Sea, at latitude 59° 30′ North, longitude 164° 00′ West;

Thence northwesterly, approximately 86 kilometers (54 miles), to a point in the waters of Etolin Strait, Bering Sea, at latitude 60° 05′ North, longitude 165° 00′ West;

Thence northeasterly, approximately 27 kilometers (17 miles), to the line of mean high tide of Etolin Strait at latitude 60° 15′′ North, and the true point of beginning.



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Unit 3. Seal Islands Unit

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at longitude 159°12′ West, and the True Point of Beginning of the lands to be described.

Thence southwesterly, northeasterly, and southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, to encompass the Seal Islands lagoon and closing the mouth of the Ilnik River, approximately 52 kilometers (32 miles);

Thence northwest with the line of mean high tide of Bristol Bay, common with said refuge boundary approximately 14 kilometers (9 miles) to a point at the entrance to Seal Island lagoon at approximate longitude 159°23′ West;

Thence southwest, with the line of mean high tide of Bristol Bay, common with said refuge boundary, approximately 16 kilometers (10 miles) to a point at longitude 159°36′ West:

Thence north with the line of longitude 159°36′ West to a point in the waters of Bristol Bay at a distance of 400 meters (¼ mile) perpendicular to the line of mean high tide;

Thence in a northeasterly direction, parallel to the coastline of Bristol Bay and the ocean side of the Seal islands, closing the entrances to Seal Island lagoon, for approximately 30 kilometers (19 miles) to a point in Bristol Bay at longitude 159°12′ West, and at a distance of 400 meters (¼ mile) perpendicular to the line of mean high tide;

Thence south with the line of longitude 159°12′ West, to the line of mean high tide of Bristol Bay, and the True Point of Beginning.

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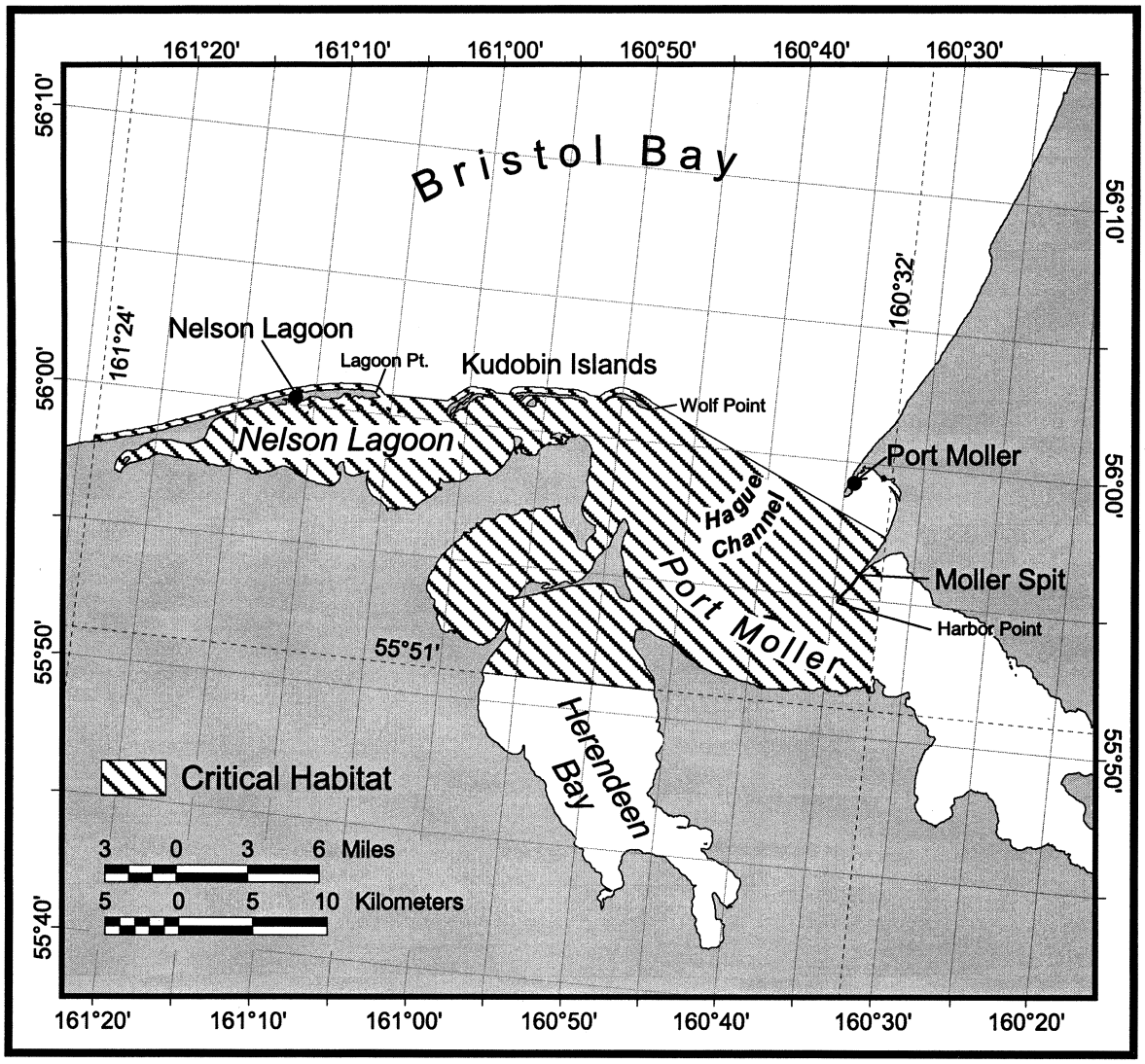

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Unit 4. Nelson Lagoon Unit

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea, approximately 5.5 kilometers (3.4 miles) north of Harbor Point, on Moller Spit, at longitude 160°32′ West, and the True Point of Beginning of the lands to be described.

Thence southwesterly and northeasterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 10 kilometers (6.2 miles) to a point at longitude160°32′ West;

Thence south with the line of longitude 160°32′ West, crossing Port Moller, approximately 9 kilometers (5.6 miles) to a point at the mean high tide line on the south shore of Port Moller;

Thence westerly and southerly with the line of mean high tide of Port Moller and Herendeen Bay common with said refuge boundary approximately 24 kilometers (15 miles) to a point at latitude 55°51′ North;

Thence west with the line of latitude 55°51′ North, crossing Herendeen Bay approximately 11.7 kilometers (7.3 miles) to a point at the mean high tide line on the west shore of Herendeen Bay;

Thence northerly, westerly, and northeasterly with the line of mean high tide of Herendeen Bay and Nelson Lagoon, common with said refuge boundary; approximately 94 kilometers (58 miles) to Lagoon Point, within Section 22 of Township 48 South, Range 76 West;

Thence southwesterly with the line of mean high tide of the Bering Sea, common with said refuge boundary, approximately 20 kilometers (12 miles) to a point at longitude 161°24′ West;

Thence north along the line of longitude 161°24′ West to a point in the waters of Bristol Bay at a distance of 400 meters (¼ mile) perpendicular to the line of mean high tide;

Thence in a northeasterly direction, parallel to the coastline of Bristol Bay and the ocean side of the Kudobin Islands, approximately 40 kilometers (25 miles) to a point at longitude160°48′ West, at a distance of 400 meters (¼ mile) offshore Wolf Point on Walrus island;

Thence southeast, approximately 18 kilometers (11.1 miles), closing the entrance to the Hague Channel to a point at the mean high tide line of Port Moller at 160°32′ West, the True Point of Beginning.

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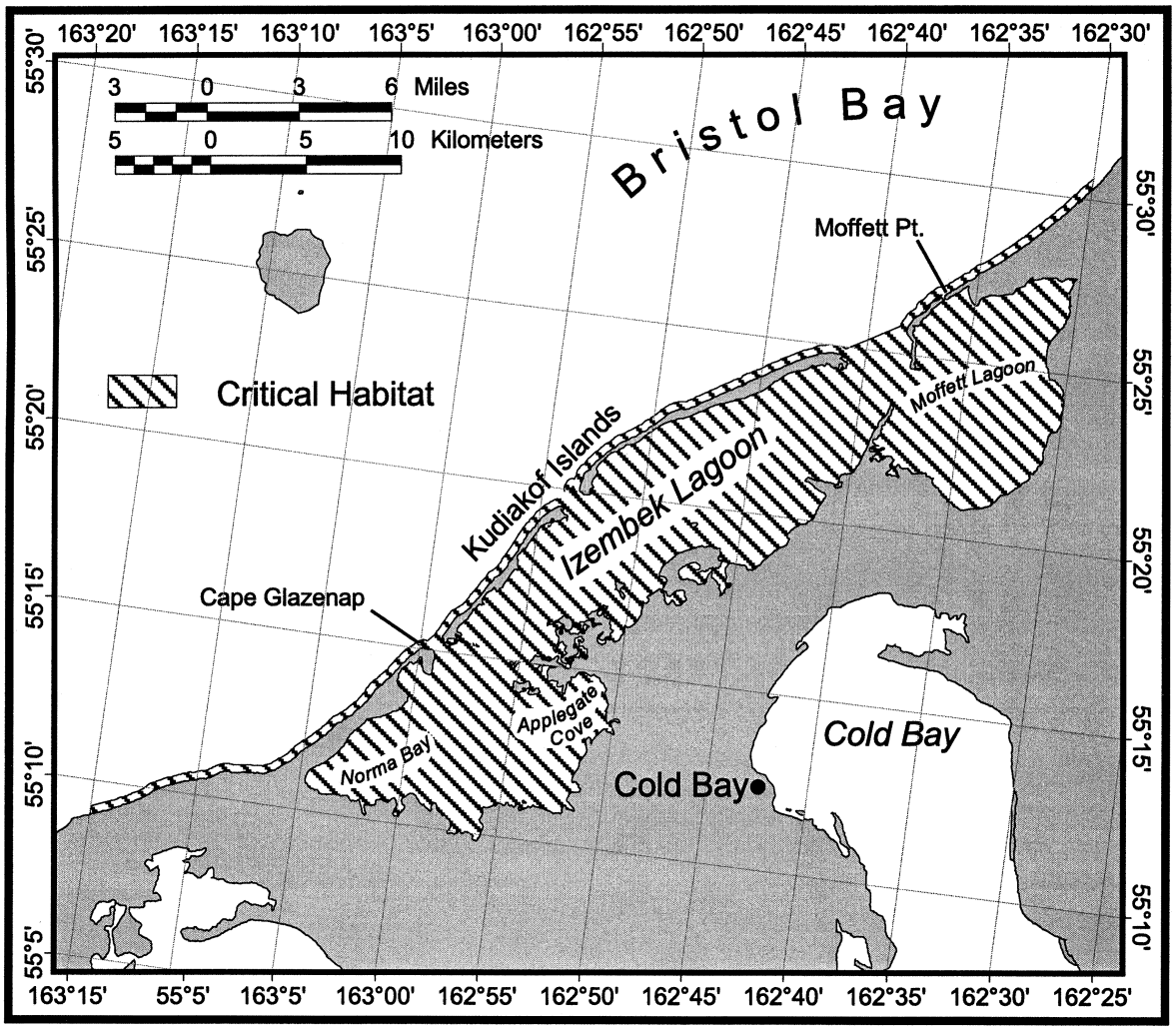

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Unit 5. Izembek Lagoon Unit

Beginning at a point of land on the Alaska Peninsula on the line of mean high tide of Bristol Bay of the Bering Sea at longitude 162°30′ W and the True Point of Beginning of the lands to be described.

Thence southwesterly, with the line of mean high tide of Bristol Bay, common with the boundary of the Alaska Maritime National Wildlife Refuge as established by the Alaska National Interest Lands Conservation Act (Public Law 96–487) on December 2, 1980, approximately 9 kilometers (5.6 miles) to Moffet Point located at approximately 55°27′ N, 162°37′ W;

Thence continuing with the line of mean high tide, inside the boundary of the Izembek National Wildlife Refuge, northeasterly, southwesterly, and northeasterly to encompass Moffett and Izembek Lagoons, Applegate Cove, and Norma Bay, approximately 55 miles to Cape Glazenap, at approximately 55°15′ N, 163°00′ W;

Thence southwest with the line of mean high tide of Bristol Bay, common to the Alaska Maritime refuge boundary, approximately 177 kilometers (110 miles) to a point at longitude 163°15′ W;

Thence north along the line of longitude 163°15′ W to a point in the waters of Bristol Bay at a distance of 400 meters (¼ mile) perpendicular to the line of mean high tide;

Thence in a northeasterly direction, parallel to the coastline of Bristol Bay and the ocean side of the Kudiakof Islands, closing the entrances to Izembek Lagoon, for approximately 64 kilometers (40 miles) to a point in the waters of Bristol Bay at longitude 162°30′ W, and at a distance of 400 meters (¼ mile) perpendicular to the line of mean high tide;

Thence south along the line of longitude 162°30′ W, to the line of mean high tide and the True Point of Beginning.

* * * * *

Dated: January 10, 2001.

Stephen C. Saunders,

Acting Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 01–1334 Filed 2–1–01; 8:45 am]

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