Authority: 16 U.S.C. 1531–1543; subpart B, § 223.201–202 also issued under 16 U.S.C. 1361 *et seq.*; 16 U.S.C. 5503(d) for § 223.206(d)(9).

Dated: June 27, 2006.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

[FR Doc. 06–6017 Filed 7–5–06; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 051018271–6157–02; I.D. 101405C]

RIN 0648–AT84

Endangered and Threatened Species; Revision of Critical Habitat for the Northern Right Whale in the Pacific Ocean

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Final rule.

SUMMARY: We, the National Marine Fisheries Service (NMFS), issue a final rule to revise the current critical habitat for the northern right whale (*Eubalaena glacialis*) by designating additional areas within the North Pacific Ocean. Two specific areas are designated, one in the Gulf of Alaska and another in the Bering Sea, comprising a total of approximately 95,200 square kilometers (36,750 square miles) of marine habitat. As described in the impacts analysis prepared for this action, we considered the economic impacts, impacts to national security, and other relevant impacts and concluded that the benefits of exclusion of any area from the critical habitat designation do not outweigh the benefits of inclusion. As a result, we did not exclude any areas from the designation. We solicited information and comments from the public in a proposed rule. This final rule is being issued to meet the deadline established in a remand order of the United States District Court for the Northern District of California.

DATES: This rule becomes effective August 7, 2006.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection by appointment during normal business hours at the National Marine Fisheries Service, Protected Resources Division, Alaska Region,709 W. 9th Street, Juneau, AK. The final rule, maps, and other materials relating to this proposal can be found on the NMFS Alaska Region website *http://www.fakr.noaa.gov/*.

FOR FURTHER INFORMATION CONTACT: Brad Smith, (907) 271–3023, or Marta Nammack, (301) 713–1401.

SUPPLEMENTARY INFORMATION: The Endangered Species Act of 1973, as amended [16 U.S.C. 1531, *et seq.*] (ESA), grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants, and habitats of such species that have been designated as critical. The U.S. Fish and Wildlife Service (FWS) and the NMFS share responsibility for administering the ESA. Endangered and threatened species under the jurisdiction of NMFS are found in 50 CFR 224.101 and 223.102, and include the endangered northern right whale.

Background and Previous Federal Actions

The northern right whale is a member of the family Balaenidae and is closely related to the right whales that inhabit the Southern Hemisphere. Right whales are large baleen whales that grow to lengths and weights exceeding 18 meters and 100 tons, respectively. They are filter feeders whose prey consists exclusively of zooplankton. Right whales attain sexual maturity at an average age of 8–10 years, and females produce a single calf at intervals of 3–5 years (Kraus *et al.*, 2001). Their life expectancy is unclear, but is known to reach 70 years in some cases (Hamilton *et al.*, 1998; Kenney, 2002).

Right whales are generally migratory, with at least a portion of the population moving between summer feeding grounds in temperate or high latitudes and winter calving areas in warmer waters (Kraus *et al.*, 1986; Clapham *et al.*, 2004). In the North Pacific, individuals have been observed feeding in the Gulf of Alaska, the Bering Sea and the Sea of Okhotsk. Although a general northward movement is evident in spring and summer, it is unclear whether the entire population undertakes a predictable seasonal migration, and the location of calving grounds remains completely unknown (Scarff, 1986; Scarff, 1991; Brownell *et al.*, 2001; Clapham *et al.*, 2004; Shelden *et al.*, 2005). Further details of occurrence and distribution are provided below.

In the North Pacific, whaling for right whales began in the Gulf of Alaska (known to whalers as the ''Northwest Ground'') in 1835 (Webb, 1988). Right whales were extensively hunted in the western North Pacific in the latter half of the 19th century, and by 1900 were scarce throughout their range. Right whales were protected worldwide in 1935 through a League of Nations agreement. However, because neither Japan nor the USSR signed this agreement, both nations asserted authority to continue hunting right whales until 1949 when the newly-created International Whaling Commission (IWC) endorsed this ban. Despite this ban, a total of 23 North Pacific right whales were legally killed by Japan and the USSR under Article VIII of the International Convention for the Regulation of Whaling (1946), which permits the taking of whales for scientific research purposes. However, it is now known that the USSR illegally caught many right whales in the North Pacific (Doroshenko, 2000; Brownell *et al.*, 2001). In the eastern North Pacific, 372 right whales were killed by the Soviets between 1963 and 1967; of these, 251 were taken in the Gulf of Alaska south of Kodiak, and 121 in the southeastern Bering Sea (SEBS). These takes devastated a population that, while undoubtedly small, may have been undergoing a slow recovery (Brownell *et al.*, 2001).

As a result of this historic and recent hunting, right whales today are among the most endangered of all whales worldwide. Right whales were listed in 1970 following passage of the Endangered Species Conservation Act (ESCA) of 1969, and automatically granted endangered status when the ESCA was repealed and replaced by the ESA. Right whales are also protected under the Marine Mammal Protection Act of 1972. We issued a Recovery Plan for the northern right whale in 1991, which covered both the North Atlantic and North Pacific (NMFS, 1991). Some researchers consider the North Pacific right whale to exist in discrete eastern and western populations. Brownell *et al.* (2001) noted that there was no evidence for exchange between the western and eastern Pacific, and that the two populations had different recovery histories; consequently, they argued that these stocks should be treated as separate for the purpose of management, a division which we have acknowledged in Stock Assessment Reports (Angliss and Lodge, 2004).

In the western North Pacific (the Sea of Okhotsk and adjacent areas), current abundance is unknown but is probably in the low to mid-hundreds (Brownell *et*

al., 2001). There is no estimate of abundance for the eastern North Pacific (Bering Sea, Aleutian Islands and Gulf of Alaska), but sightings are rare. Most biologists believe the current population is unlikely to exceed a hundred individuals, and is probably much smaller. Prior to the illegal Soviet catches of the 1960s, on average, 25 whales were observed each year in the eastern North Pacific (Brownell *et al.*, 2001); in contrast, the total number of records in the 35 years from 1965 to 1999 was only 82, or an average of 2.3 whales per annum.

Since 1996, NMFS and other surveys (directed specifically at right whales or otherwise) have detected small numbers of right whales in the SEBS, including an aggregation estimated at 24 animals in the summer of 2004. Photo-identification and genetic data have identified 17 individuals from the Bering Sea, and the high inter-annual resighting rate further reinforces the idea that this population is small. Right whales have also been sighted in the northern Gulf of Alaska, including a sighting in August 2005. However, the overall number of northern right whales using habitats in the North Pacific other than the Bering Sea is not known.

The taxonomic status of right whales worldwide has recently been revised in light of genetic analysis (see Rosenbaum *et al.*, 2000; Gaines *et al.*, 2005). Applying a phylogenetic species concept to molecular data separates right whales into three distinct species: *Eubalaena glacialis* (North Atlantic), *E. japonica* (North Pacific), and *E. australis* (Southern Hemisphere). We recognized this distinction for the purpose of management in a final rule published on April 10, 2003 (68 FR 17560), but subsequently determined that the issuance of this rule did not comply with the requirements of the ESA, and thus rescinded it (70 FR 1830; January 11, 2005). At this time, right whales in the North Atlantic and North Pacific are both officially considered to be ''northern right whales'' (*Eubalaena glacialis*) under the ESA; however, right whales in the North Pacific often are referred to as *E. japonica*, given the wide acceptance of this taxon in both the scientific literature and elsewhere (e.g., by the IWC).

Critical Habitat Designation History

Three areas in the North Atlantic Ocean were designated as critical habitat for northern right whales in 1994: the Great South Channel, Cape Cod Bay, and waters of the Southeastern United States off Florida and Georgia. In rejecting a petition to revise designated critical habitat, we outlined steps we would take to propose any revisions to that designated critical habitat that might be supported by new information and analysis (68 FR 51758; August 28, 2003).

We issued a proposed rule on November 2, 2005 (70 FR 66332), to revise current critical habitat for the northern right whale in the North Pacific Ocean.

Previous Federal Action and Related Litigation

In October 2000, we were petitioned by the Center for Biological Diversity to revise the critical habitat for the northern right whale by designating an additional area in the North Pacific Ocean. In February 2002, we announced our decision that we could not designate critical habitat at that time because the essential biological and habitat requirements of the population were not sufficiently understood. However, in June 2005, a Federal court found this reasoning invalid and remanded the matter to us for further action (*Center for Biological Diversity* v. *Evans*, Civ. No. 04–4496, N.D. Cal. June 14, 2005). In compliance with that order, we are revising the current critical habitat for this species by designating areas within the Gulf of Alaska and Bering Sea as critical habitat under the ESA.

Summary of Comments and Responses

We requested comments on the proposed rule to revise critical habitat for the northern right whale (70 FR 66332; November 2, 2005). To facilitate public participation, the proposed rule was also made available on our regional website. Comments were accepted via standard mail, e-mail, and fax. Additionally, a public hearing on this action was held March 2, 2006, in Anchorage, Alaska. The public comment period for the proposed rule was reopened between February 10 and March 9, 2006, so that additional comments submitted at or in response to the hearing were considered in the promulgation of the final rule.

We have considered all public comments, and we address them in the following summary. For readers' convenience we have assigned comments to major issue categories, and, where possible, have combined similar comments into single comments and responses.

Size of Proposed Critical Habitat is Too Large

Comment 1: The southern and western boundaries of the proposed critical habitat in the Bering Sea are based on very few right whale sightings. Eliminating these areas would reduce the extent of the critical habitat from 27,700 to 24,000 square miles but retain approximately 99 percent of all sightings.

Response: The proposed boundaries reasonably represent the area in which sightings of feeding right whales have occurred and which are most likely to describe current concentrations of zooplankton prey (i.e., primary constituent elements, or PCEs). We have closely followed the provisions of the ESA and Federal regulations by premising this designation on the current existence of the PCEs within the geographic area occupied by the species at the time of listing. The area described by the proposed critical habitat boundary encompasses a high percentage of all sightings since the right whale was listed as endangered under the ESA in 1973 (182 of 184). As discussed in more detail below in response to Comment 9, we consider these more recent records to be reliable indicators of current feeding distribution, and, therefore, of the presence of the PCEs. Given the very limited survey effort, we believe that the sightings used to delineate the critical habitat are significant, and that there is no reasonable basis upon which to revise the proposed boundary to exclude sightings near the southern and western boundaries.

Comment 2: The area designated as critical habitat is arbitrary because there is no obvious correlation between zooplankton abundance and the distribution of the northern right whale.

Response: For the reasons described in the section on Critical Habitat Identification and Designation below, we have concluded that consistent sightings of right whales - even of single individuals and pairs - in a specific area during spring and summer over a long period of time is sufficient information that the area is a feeding area containing suitable concentrations of zooplankton.

Proposed Critical Habitat is Too Small

Comment 3: The proposed designations fail to address unoccupied right whale habitat. Additional areas outside of the known range of the northern right whale at the time of ESA listing should be included in this designation.

Response: Section 3(5)(A)(i) of the ESA requires us to identify specific areas within the geographical area occupied by the species that contain physical or biological features that may require special management considerations or protection. Section 3(5)(A)(ii) requires that specific areas outside the geographical area occupied by the species only fall within the

definition of critical habitat if the Secretary determines that the area is essential for conservation. Our regulations further provide that we will designate unoccupied areas ''only when a designation limited to [the species'] present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)).'' The ESA requires the Secretary to designate critical habitat at the time of listing. If critical habitat is not then determinable, the Secretary may extend the period by 1 year, ''but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.''

We found no information that would support designation of critical habitat in unoccupied areas. While historic data include sightings and other records of northern right whales outside of the geographic area occupied by the species at the time it was listed, we do not have information allowing us to determine that the specific areas within the geographical area occupied by the species are inadequate for conservation, such that unoccupied areas are essential for conservation.

Comment 4: The extent of the areas proposed for designation as critical habitat in the North Pacific Ocean would not be sufficient to provide for the recovery of the northern right whale.

Response: Our ability to identify critical habitat as defined in the ESA is limited by the level of information available to describe the biology and ecology of the northern right whale in the North Pacific Ocean. We have identified two specific feeding areas within which are found biological features essential to the conservation of the species and which may require special management considerations or protection. We may revise this designation in the future as additional information regarding the habitat and biological and ecological needs of the right whale becomes available. For example, the designation may be revised to encompass additional areas in which zooplankton concentrations are found to occur or the physical or biological features that comprise suitable calving grounds when the locations of those grounds become known.

Comment 5: The proposed designation is negatively biased in that it is based on sighting effort, which is not consistent over the range of the northern right whale. Therefore, the designation should be expanded to compensate for this bias. Both right whales and the PCEs are likely to occur elsewhere in densities equivalent to those occurring in the designated critical habitats.

Response: The ESA defines critical habitat, in part, as those areas occupied by the species at the time of listing on which the identified PCEs are found. Although the current sighting data may be biased by effort, they are the best available data that can be used as a proxy for PCEs to determine whether PCEs are found on the designated areas. We have insufficient basis to conclude that the PCEs are found in other areas for which we do not have sighting data that can be used as a proxy for the presence of PCEs.

Comment 6: The precautionary principle requires NMFS to designate other areas with similar habitat conditions as critical habitat.

Response: As explained above in response to Comment 2, we have used recent sighting records of feeding right whales as a proxy for the location of PCEs necessary to describe critical habitat. The ESA does not permit designation of ''similar'' areas unless the PCEs are found in these areas. We do not have information indicating that the PCEs are found on areas other than those designated.

Comment 7: The designation should include State of Alaska waters because these waters and the proposed critical habitat areas have nearly identical ecological characteristics.

Response: We have used recent sighting records of feeding right whales as a proxy for the location of PCEs necessary to describe critical habitat. All relevant sightings occurred outside of the territorial sea of the State of Alaska, and we were, therefore, unable to conclude that the PCEs are found in State of Alaska waters. Therefore, these waters do not meet the definition of critical habitat and cannot be designated as such even though they may have physical features similar to the features found in the designated areas.

Comment 8: Our data demonstrate right whales are found through Unimak Pass and eastward to Kodiak Island. These waters also contain important features or serve important biological needs and should be added to the areas proposed for designation.

Response: We have few data describing the migratory movements of northern right whales in the North Pacific Ocean. While it is likely right whales move through major ocean passes, we cannot determine at this time which passes right whales use. We will continue to collect information on the right whale's habitat use to identify migration corridors and determine whether PCEs are found within these areas.

Comment 9: NMFS should review data from the past century and designate critical habitat for areas where right whale concentrations overlay known areas of prey abundance.

Response: We considered the utility of historic data in identifying and designating critical habitat. Many records of the commercial whalers are general in nature, and do not provide specific locations, information on the numbers of whales present at the time of the sighting or harvest, nor descriptions of their behavior (e.g., whether the sightings indicated feeding behavior). Therefore, we concluded that the more recent sightings data from the time of listing represented the best evidence of the current presence of the PCEs in specific feeding areas.

Comment 10: Critical habitat should be designated to include those physical features which promote fronts, upwelling, and dynamic advection of nutrient-rich waters that promote prey productivity.

Response: Research on northern right whales has found these animals are able to locate prey in certain densities needed to meet their metabolic needs. Recent research indicates that right whales are feeding specialists that require exceptionally high densities of prey (Baumgartner and Mate, 2003; Baumgartner, *et al.*, 2003). The physical and biological parameters necessary to produce these ''lenses'' of highly concentrated zooplankton in the North Pacific are not understood. While the commenter identifies features that provide for the production of zooplankton and may act as forcing mechanisms for the concentration of these zooplankton, we currently lack information on whether those features actually concentrate the prey into aggregations sufficiently dense to encourage and sustain feeding by right whales. Lacking such information, we rely on the presence of zooplankton, as evidenced by feeding right whales, to identify critical habitat as required by the ESA.

Primary Constituent Elements

Comment 11: Feeding areas should be identified as a PCE for the northern right whale.

Response: NMFS regulations at 50 CFR 424.12(b) state that, ''[i]n determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following: food, water, air, light, minerals, or other

physiological or ecological requirements.'' The regulations also state that, ''[p]rimary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quantity or quality, host species or plant pollinator, geologic formation, vegetation type, tide, and specific soil types.'' We relied on the presence of feeding right whales to identify indirectly the specific areas within which the PCEs are currently found. We believe that this approach identifies feeding areas to the best of our ability within the constraints imposed by available data.

Comment 12: PCEs are defined too narrowly in the proposed rule. By defining PCEs as only the zooplankton, NMFS has created a situation in which oil and gas exploration activity, fishing or fishery related activities, and processing waste discharge activities would not result in the adverse modification of the critical habitat.

Response: We have reviewed the available science and life requisites of the northern right whale, and have identified the PCEs described in this rule. Adverse modification of the critical habitat would result from Federal agency actions that impair the function of the PCEs to the extent the PCEs would not provide for the conservation needs of the right whales. For example, our analysis concludes that Outer Continental Shelf (OCS) oil and gas exploration and production has the potential to adversely affect the PCEs through impaired water quality, to the extent that the PCEs would not serve their conservation function, resulting in adverse modification of the critical habitat.

As more research is completed and we learn more of the biological and ecological requirements of right whales in the North Pacific, we may identify additional PCEs and propose additional revisions of the critical habitat.

Comment 13: NMFS should follow the example of the Steller's eider and spectacled eider by identifying PCEs to include all marine waters of appropriate depths, along with the underlying marine benthic community.

Response: PCEs will vary depending on the biology, life history, and behavior of the species. Right whales frequent a variety of marine habitats and do not appear constrained by water depth, temperature or salinity. We believe that in identifying the PCEs for right whales as species of zooplankton in areas where they concentrate in sufficient densities to encourage and sustain feeding, we have adhered to the ESA definition and have developed a critical habitat designation that will protect the habitat features essential to right whale conservation.

Research

Comment 14: More research is needed to describe PCEs for the northern right whale.

Response: Our Alaska Region, the National Marine Mammal Laboratory, and other NOAA components are now involved in research on the northern right whale in the North Pacific Ocean. We understand that there is a need to better identify and describe the habitat for these whales along with their basic biology, and we will continue to conduct and advocate research in this area.

Comment 15: NMFS should increase efforts to place radio tags on right whales.

Response: Our scientists, in collaboration with scientists from the Greenland Institute of Natural Resources, have recently published the results from the first successful tagging of a North Pacific right whale in the Bering Sea (Wade *et al.*, 2006 in Biology Letters). A satellite-monitored radio tag attached to one of two whales tagged in the Bering Sea functioned for 40 days and helped lead to the discovery of at least two calves and the largest group of right whales observed in this region since the 1960s. Although we have no immediate plans to tag additional right whales in 2006, we agree that such work is a high priority and should continue.

Comment 16: NMFS should dedicate more effort to study vessel interaction and collision avoidance by right whales.

Response: A photographic record is being gathered as new right whale sightings are recorded from dedicated research efforts in the Bering Sea and Gulf of Alaska. A review of these photographs is planned to look for evidence of entanglement and ship strikes. We have no reports of fishing gear interaction with right whales within U.S. waters in the North Pacific, although there is one record suggestive of a fishing gear interaction with a right whale in the eastern North Pacific within waters outside U.S. jurisdiction. Collisions with ships have been a major source of mortality of right whales in the North Atlantic Ocean. However, we have found no record of any collisions in the North Pacific Ocean. Nevertheless, the fishing industry, through the Marine Conservation Alliance, has recently taken action to increase awareness of this issue among commercial fishing vessels operating in Alaska, and has distributed literature and informational posters. The commercial fishing industry is extending this outreach to the shipping industry and to Russian fisheries.

Prohibitions and Activities in Critical Habitat

Comment 17: Critical habitat must be protected from more than just activities that may affect zooplankton. Protection is also needed from the effects of ship strikes, fishing gear interaction, changes in sea temperatures and environmental conditions caused by humans.

Response: The commenter suggests that we may designate critical habitat solely to prevent ships strikes and fishing gear interactions (i.e., ''take'') of individual right whales. We conclude that, at the current time, vessel and gear interactions do not affect the whales' habitat, but rather are take issues which are prohibited by section 9 of the ESA and are properly addressed in jeopardy analyses in section 7 consultations on Federal actions or in incidental take permit applications evaluated pursuant to section 10 of the ESA. As noted above in the response to comment 16, we have no record of a ship striking a right whale in the North Pacific Ocean and no record of fishing gear interaction in waters of the North Pacific Ocean under U.S. jurisdiction, despite the presence of NMFS-certified fishery observers aboard crab and groundfish fishing vessels operating in these waters. The likelihood of such interactions must be evaluated by Federal agencies in section 7 consultations. Moreover, section 9 of the ESA already prohibits such take.

We have designated this critical habitat based upon the presence of zooplankton aggregated in sufficient concentrations to encourage and sustain right whale feeding. At this time we do not have sufficient knowledge of the biology and habitat requirements of right whales in the North Pacific Ocean to identify PCEs related to water temperatures or other environmental conditions.

Comment 18: Oil and gas development is incompatible with the ecology and economy of Bristol Bay and the Northeast Pacific Region. Major oil spills, related discharges, seismic activity, and ship strikes are all oil and gas-related actions which constitute adverse modification of critical habitat.

Response: Federal agencies authorizing, funding or carrying out actions that may affect designated critical habitat must consult with us pursuant to section 7 of the ESA. Federal agencies must insure that the actions they authorize, fund or carry out are not likely to destroy or adversely modify critical habitat or jeopardize the

continued existence of the northern right whale.

Comment 19: Specific, focused reference to the oil and gas industry as representing a threat to the proposed right whale critical habitat should be removed from the rule.

Response: Oil and gas activities are discussed in this final rule because of the potential for impacts to critical habitat from these activities. However, although we recognize there is a potential for impacts, the amount of future anticipated OCS oil and gas related activities in the proposed right whale critical habitat and the regulatory requirements imposed by Minerals Management Service (MMS) on OCS operators to minimize the potential for adverse impacts suggest that right whale critical habitat would not be adversely modified. Further, any potential risks of adverse modification from specific oil and gas activities will be analyzed and addressed in the context of a section 7 consultation where Federal agencies are required to ensure that the actions they authorize, fund or carry out are not likely to destroy or adversely modify critical habitat or jeopardize the continued existence of the northern right whale. We have had extensive ESA Section 7 consultations with the MMS regarding oil and gas leasing action on the Alaska OCS, none of which has resulted in a determination that OCS oil and gas activities were likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. In addition, we found in the impacts analysis prepared for the proposed rule that oil and gas exploration, development, and commercial production represent a relatively low risk to critical habitat for the right whale.

Comment 20: Designation of critical habitat will open the citizen suit provisions of the ESA and result in litigation and delays in projects. Economic activities that are not impacting right whale recovery will be negatively impacted.

Response: The ESA requires the Secretary to designate critical habitat to the maximum extent prudent and determinable. As a result of the designation, section 7 of the ESA requires each Federal agency to insure that any action it authorizes, funds or carries out is not likely to destroy or adversely modify the critical habitat. The citizen suit provision of the ESA authorizes any person to commence a civil suit to enjoin any other person, including a Federal agency, from violating any provision of the ESA, including section 7. We have no control over litigation commenced by other persons pursuant to the citizen suit provision and cannot evaluate the commenter's assertions because they are speculative. However, we note that economic activities that do not impact the conservation value of the critical habitat for the right whale are unlikely to be affected significantly by the citizen suit provision.

Comment 21: Designation of critical habitat will lead to regulatory creep and increased costs through added consultations and mitigation measures imposed by the Federal Government.

Response: As noted in the response to comment 20, the designation requires each Federal agency to insure that any action it authorizes, funds or carries out is not likely to destroy of adversely modify critical habitat. Each Federal agency proposing an action that may affect critical habitat must consult with us. The designation of critical habitat is likely to result in additional consultation costs, although these additional costs are difficult to quantify. The designation of critical habitat may, in some circumstances, result in additional mitigation for Federal actions that affect the critical habitat. All of these additional costs are identified to the extent practicable in the impacts analyses prepared for the proposed and final rule and would be borne largely by the Federal agencies involved in or affected by the consultations.

Economic Considerations

Comment 22: NMFS has correctly characterized both the economic significance of commercial fishing to the region, States, and the nation, and the effective absence of the possibility that commercial fishing can destroy or adversely modify the proposed critical habitat for northern right whales in the Eastern Bering Sea (EBS) and Gulf of Alaska (GOA).

Response: Comment noted.

Comment 23: While no adverse economic or operational impacts on commercial fisheries are associated with the proposed designation, a modification of the southern and western boundaries (reduction) of critical habitat in the EBS makes sense and would reduce the possibility of any even hypothetical future impacts on fishing activity.

Response: We find no compelling reason to alter the boundaries of the critical habitat on the basis of, and as described in, this comment. The boundaries are based upon the best available information regarding the location of zooplankton in sufficient concentrations to encourage and sustain feeding by northern right whales. Concerns about ''the possibility of any even hypothetical future impacts on fishing activity'' are purely speculative. Thus, we see no reason to change our conclusion that the benefits of excluding this area from the designation do not outweigh the benefits of including the area.

Comment 24: In addition to the recommended exclusions of areas in the south and west of the proposed critical habitat for northern right whales in the EBS to accommodate commercial fishing, the northern boundary should be moved south (reduced) from the proposed 58°00′ N. to 57°30′ N., owing to the presence of economically significant commercial fishing activity (bottom trawling) traditionally conducted there.

Response: For the same reasons cited in the response to comment 23 immediately above, we find no basis for changing our conclusion that the benefits of excluding the area do not outweigh the benefits of including it in the designation.

Comment 25: A substantial portion (especially the southern and eastern sections) of the critical habitat proposed to be designated in the EBS coincides with OCS Leasing Areas projected to have high to moderate natural gas production potential, and moderate oil production potential. The economic and development benefits of these areas (in particular, the Aleutian Basin Area) justify their exclusion under provisions of the ESA.

Response: This comment presumably refers to the ''Aleutian Basin Area,'' which is a different area far to the west (south of Navarin Basin and north of Bowers Basin) and is not associated with the proposed critical habitat area. The comment should instead refer to the North Aleutian Basin, which overlaps part of the proposed right whale critical habitat.

However, the supporting materials accompanying this and other comments pertaining to petroleum development in the EBS suggest that the risks and uncertainty associated with oil and gas development in OCS areas that overlap the critical habitat do not justify exclusion of the area under section 4(b)(2) of the ESA. Based upon the best available information, it appears that the probability of oil or gas production within (or immediately adjacent to) the right whale critical habitat is uncertain within the 10-year timeframe of our assessment. MMS reports that there are no commercial production facilities in operation, currently under development, or 'permitted' for future development within these critical habitat areas. Neither has oil and gas

exploration taken place in most of the EBS OCS region.

MMS has revealed that, while the industry desires to include the North Aleutian Basin OCS Planning Area in the 2007–2012 Lease Sale program, this is only possible through the rescission of a Presidential withdrawal of this (and adjacent) area(s) that is in effect until July 2012. Even if the withdrawal were rescinded in time to include the North Aleutian Basin in the upcoming lease sale offering, MMS projects that this specific area would likely not be ut up for lease sales until 2010 and again in 2012, and then only if the area were to be included in MMS lease sale planning. Even in the most optimistic scenario envisioned by MMS analysts, substantial development (and certainly commercial production) would involve many years, perhaps even decades, of planning, design, review, consultation, and approval. Consequently, the prospects for oil and gas exploration and development in this area are uncertain at this time. Therefore, we cannot conclude that the benefits of excluding this area for oil and gas purposes exceed the benefits of inclusion.

Comment 26: The communities located in remote western Alaska adjacent to the proposed designation chronically suffer from inadequate economic development and opportunity. The entire region would benefit from economic diversification, such as that which would accompany oil and gas exploration and development. The proposed designation of critical habitat in the EBS could increase the cost of, significantly delay, or even prevent such economic development, while contributing nothing to the conservation and recovery of the right whale population.

Response: As we have noted elsewhere in this final rule, the designation requires each Federal agency to insure that any action it authorizes, funds or carries out is not likely to destroy of adversely modify the critical habitat. In furtherance of that requirement, each Federal agency proposing action that may affect the critical habitat must consult with us on the effects of the action on the critical habitat. The ESA imposes these requirements to avoid the likelihood of destruction or adverse modification of the habitat that is critical to the conservation of the species. Federal agency actions that do not affect the conservation value of the critical habitat for right whales are unlikely to be appreciably affected by this designation. The impact analysis accompanying this rule analyzes the economic impacts of the designation and discusses the numerous uncertainties associated with oil and gas development in the critical habitat area. As a result of that analysis, we concluded that the economic impacts do not outweigh the benefits of designating critical habitat and that exclusion of any areas from the critical habitat designation pursuant to section 4(b)(2) of the ESA was not justified.

Comment 27: Inferences about the risk of fishing gear entanglements and/or vessel strikes of right whales in the North Pacific, based upon such experiences in the North Atlantic, are inappropriate and unsupported by evidence or data. The nature and magnitude of fishing and other economic activity within the two marine environments are fundamentally different and not comparable.

Response: As noted above in the response to comment 16, we have no record of a ship striking a right whale in the North Pacific Ocean and no record of fishing gear interaction in waters of the North Pacific Ocean under U.S. jurisdiction. Collisions with ships and entanglements in fishing gear have resulted in right whale mortalities in the North Atlantic Ocean. The likelihood of such interactions in the critical habitat areas designated in the North Pacific will be evaluated by Federal agencies in section 7 consultations. Moreover, section 9 of the ESA already prohibits take resulting from ship strike and fishing gear entanglements.

Comment 28: The area of the EBS encompassed by the proposed critical habitat boundaries contains the vast majority of groundfish, crab, and halibut resources harvested by commercial fisheries in this region. They have a combined direct economic gross value of well over $1 billion dollars annually, and are vital to fishermen, processors, and fishery-dependent communities in Alaska. NMFS should explain how, or if, designation of critical habitat for the right whale would affect fishery management actions that would be pursued if the incidental take of a right whale were to occur in commercial fisheries.

Response: The impacts analyses prepared for this designation evaluate the likely impacts of critical habitat designation on commercial fisheries. These analyses conclude that designation will impose minimal increased consultation costs on us, and that we do not expect any fishing or fishing related activity (e.g., at sea processing, transiting) would be restricted or otherwise altered as a result of the designation. If an injurious or lethal incidental take of a right whale were to occur in the commercial fisheries, right whale avoidance measures may be required in commercial fisheries to avoid future interactions. These measures would be required to prevent take of the endangered right whale and would not be attributable to the designation of critical habitat.

Comment 29: The Executive OCS Deferral through 2012 requires that the North Aleutian Basin be excluded from the 5-year OCS leasing program. This remains a sound decision, and any analysis of the proposed designation must recognize that restrictions on petroleum development in the proposed areas impose no new economic costs to society.

Response: Comment noted.

Comment 30: MMS estimates reserves of 7 trillion cubic feet of natural gas and 230 million barrels of oil in the North Aleutian Basin. Approximately 20 percent of the high prospective geologic basin lies within the southeast corner of the proposed critical habitat area (approximately 8 percent of the proposed designation of critical habitat in the EBS). At risk, therefore, is about 20 percent of the estimated $19 billion in Federal revenues, an estimated 5,000 construction jobs, and sufficient supplies of natural gas necessary to justify construction and operation of an liquefied natural gas facility in the area.

Response: The above resource estimates are based on outdated information and should instead state that, ''MMS estimates resources of 8.6 trillion cubic feet of natural gas and 750 million barrels of oil in the North Aleutian Basin (mean estimates).''

As reported in MMS documents submitted as public comment on the proposed critical habitat designation, leases issued in the 1998 North Aleutian Basin lease sale (Sale 92) were subsequently bought back, and, therefore, a systematic drilling program has not been conducted in the area. Therefore, the size of the estimated reserves remains unconfirmed. Given the uncertainty surrounding the existence of commercial quantities of gas and oil in this area, it is impossible to fully quantify the value of petroleum reserves in the area. The subsequent extrapolation that 5,000 jobs will be lost and a liquified natural gas pipeline and plant will be at risk is based only on this uncertainty regarding the amount of exploitable natural gas and oil and speculation regarding exploration and development. MMS data suggest that even the most optimistic scenario envisioned for this area's development would involve many years, perhaps decades, before these potentialities could be realized and only then if the

moratorium on OCS activities in the area is lifted. As noted in the response to comment 25 and in the economic analysis supporting this final rule, we conclude that the benefits of excluding any particular area from the designation do not outweigh the benefits of inclusion based on the speculative nature of these impacts.

Comment 31: Given the critical status of this species and the requirements of sections 4 and 9 of the ESA, the need for protection of right whales and designation of critical habitat outweighs any potential economic impacts of introducing such protection. It is also important to consider the economic benefit of the survival of this species.

Response: For the reasons described here and in the impacts analysis prepared for the designation, we determined that the benefits of excluding any particular area from the designation do not outweigh the benefits of inclusion.

Comment 32: NMFS has created, by its own admission, critical habitat that will not be adversely modified by oil or gas exploration activity.

Response: We have designated critical habitat pursuant to the ESA, which defines occupied critical habitat as areas that contain those physical or biological features essential to the conservation of the species and which may require special management considerations or protection. We have consulted extensively with the MMS regarding oil and gas leasing action on the Alaskan OCS, and we concur that none of these consultations has resulted in a determination that OCS oil and gas activities were likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. In addition, we found in the impacts analysis prepared for the proposed rule that oil and gas exploration, development, and commercial production represent a relatively low risk to critical habitat for the right whale. Although we recognize there is a potential for impacts, the amount of future anticipated OCS oil and gas related activities in the proposed right whale critical habitat and the regulatory requirements imposed by MMS on OCS operators to minimize the potential for adverse impacts suggest that right whale critical habitat would not be destroyed or adversely modified. Further, any potential risks of adverse modification from specific oil and gas activities will be analyzed and addressed in the context of an ESA section 7 consultation where Federal agencies must insure that the actions they authorize, fund or carry out are not likely to destroy or adversely modify critical habitat or jeopardize the continued existence of the northern right whale.

Comment 33: Currently, neither the North Aleutian Basin nor the St. George Basin Planning areas are available for lease, owing to the 2012 deferral order. Many steps must occur before a field in either of these areas could reach production, and none of these steps are certain to occur.

Response: According to MMS documentation, the St. George Basin Planning Area is not part of the 2012 deferral order and could be considered for leasing by MMS in the proposed 2007 to 2012 OCS 5-year OCS Leasing (although it is currently not included in the proposed plan). The comment regarding the North Aleutian Basin Planning Area is noted.

Comment 34: The proposed EBS designation incorporates about one-third of the (oil and gas) high-potential part of North Aleutian Basin and most of the area of potential in St. George Basin. No exploration drilling has taken place in the North Aleutian Basin (one non-exploratory well was drilled in 1983). Economic studies show that the marginal prices for the North Aleutian Basin are well below current market prices, illustrating economically producible resources could exist at much lower than current prices, improving the area's feasibility as a potential energy source. If this area becomes available for leasing, pre-lease oil and gas exploration reveals commercial quantities of petroleum, market conditions remain favorable, and commercial discoveries are of a scale to support liquified natural gas exports, then the direct revenues to Federal, state, and local governments could approach $15 billion over a 30-year life cycle. Indirect benefits and economic multiplier effects to the Alaska economy are also likely to be several billions of dollars.

Response: MMS documentation notes that the ''one non-exploratory well drilled in 1983'' refers to the COST well that provides information on stratigraphy, which informs the evaluation of resource potential and planning of an exploration effort.

Otherwise, as noted in response to an earlier comment, the conclusions referenced in this comment are predicated upon a number of hypothetical actions and outcomes and a fundamental assumption of the value of petroleum resources in the area. The probability of occurrence of each of these actions is uncertain at this time, as is the value of petroleum resources in the area.

Comment 35: A basic cost/benefit analysis conducted by the MMS is submitted for petroleum activities in the North Aleutian Planning Area to demonstrate the economic potential and revenues that may be associated with commercial development. The overall conclusion is economic benefits would accrue to Federal, state, and local governments, as well as the Alaska economy, if a leasing program in the North Aleutian planning area results in commercial development of gas and oil on the scale envisioned by the MMS modeling scenario.

Response: We reviewed the submitted economic analysis discussed in detail above in response to similar comments on the potential value of oil and gas reserves in the subject area. The MMS report points out the series of assumptions based on available data and modeling that must be made about fundamental aspects of the area's petroleum potential to draw any conclusions about the value of petroleum resources in the area and economic impacts of opening lease sales in this area. MMS did not ask us to exclude any particular area within the critical habitat area under section 4(b)(2) of the ESA, and we find no compelling evidence that justifies an exclusion. Indeed, at present, these areas are explicitly withdrawn from OCS lease sale by Presidential order.

Other Comments

Comment 36: NMFS should designate critical habitat as marine sanctuaries because this would protect other marine assets such as corals.

Response: The National Marine Sanctuary Program is administered by the National Oceanic and Atmospheric Administration's National Ocean Service. Designation of areas as marine sanctuaries is beyond the scope of this action to designate critical habitat pursuant to the ESA.

Comment 37: NMFS should recognize the voluntary conservation efforts of the fishing industry towards public awareness and avoidance of vessel strikes.

Response: We have recognized and appreciate the efforts of the fishing industry to educate fishery participants to recognize right whales and use avoidance techniques to mitigate certain possible effects of fishing on this endangered species.

Comment 38: The **Federal Register** notice should include data on the seasonal occurrence of right whales in the proposed critical habitat areas, present an analysis of vessel and fishing gear interaction based on photographic evidence, and discuss the effects of

climate change and variable ice patterns on zooplankton.

Response: The seasonal occurrence of right whales in the critical habitat areas is described here as generally during spring and summer. Specific months are identified for certain sighting data. Acoustic data provide some additional insight to the seasonal occurrence; acoustic recording packages deployed in the SEBS recorded right whale calls from May through November (Munger *et al.*, 2000). This action is to designate critical habitat in the North Pacific for the right whale; analysis of vessel and gear interaction are take issues which are properly addressed in ESA section 7 consultations on Federal actions authorizing fisheries or in incidental take permit applications evaluated pursuant to section 10 of the ESA, and therefore are not included with this final rule. We have no reliable information regarding the effects of climate change and variable ice patterns on zooplankton production, distribution, and concentration in the North Pacific.

Comment 39: The Alaska OCS oil and gas leasing program has existed for 30 years, during which time the MMS has demonstrated that industry activities can be carried out in a manner that does not jeopardize the continued existence of threatened or endangered species, or adversely affect designated critical habitat.

Response: We have consulted extensively with the MMS regarding oil and gas leasing actions on the Alaskan OCS, and we concur that none of these has been determined likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat designated for another listed marine mammal species, the Steller sea lion. In addition, we found in the impacts analysis prepared for the proposed rule that oil and gas exploration, development, and commercial production represent a relatively low risk to critical habitat for the right whale. Although we recognize there is a potential for impacts that could result in destruction or adverse modification of critical habitat, the amount of future anticipated OCS oil and gas related activities in the proposed right whale critical habitat and the regulatory requirements imposed by MMS on OCS operators to minimize the potential for adverse impacts suggest that right whale critical habitat would not be destroyed or adversely modified. Further, any potential risks of destruction or adverse modification from specific oil and gas activities will be analyzed and addressed in the context of an ESA section 7 consultation where Federal agencies must insure that the actions they authorize, fund or carry out are not likely to destroy or adversely modify critical habitat or jeopardize the continued existence of the northern right whale.

Comment 40: There is no evidence that commercial trawling in the North Pacific or EBS results in any adverse impacts on the benthic environment, and certainly none that could adversely impact the PCEs identified under the proposed designation of critical habitat in these areas.

Response: Comment noted. We have considered the potential impact of commercial fishing, including trawling, on the described PCEs. Although we conclude that these activities may affect the PCEs, we find it unlikely that these activities would result in destruction or adverse modification of critical habitat. We concur that bottom trawling does not likely have the potential to destroy or adversely modify right whale critical habitat by impacting the identified PCEs. We take no position on the commenter's assertion that there is no evidence that commercial trawling in the North Pacific or EBS results in any adverse impacts on the benthic environment, because the benthic effects of trawling are not the subject of the current critical habitat designation action.

Critical Habitat Identification and Designation

Geographical Area Occupied by the Species at the Time of Listing

The ESA defines critical habitat (in part) as areas within the geographical area occupied by the species at the time it was listed under the ESA. Because this geographical area has not been previously described for the northern right whale in the Pacific Ocean, it is necessary to establish this range when designating critical habitat. The northern right whale was listed as endangered in 1973. Prior to the onset of commercial whaling in 1835, right whales were widely distributed across the North Pacific (Scarff, 1986; Clapham *et al.*, 2004; Shelden *et al.*, 2005). By 1973, the northern right whale in the Pacific Ocean had been severely reduced by commercial whaling. Sighting data from this remnant population are too sparse to identify the range of these animals in 1973. However, no reason exists to suspect that the right whales that remain alive today inhabit a substantially different range than right whales alive during the time of the Soviet catches; indeed, given the longevity of this species, it is likely that some of the individuals who survived that whaling episode remain extant. Both the SEBS and the western GOA (shelf and slope waters south of Kodiak) have been the focus of many sightings (as well as the illegal Soviet catches) in recent decades. In general, the majority of northern right whale sightings (historically and in recent times) in the Northeast Pacific have occurred from about 40§ N to 60§ N latitude. There are historical records from north of 60§ N latitude, but these are rare and are likely to have been misidentified bowhead whales. Right whales have on rare occasions been recorded off California and Mexico, as well as off Hawaii. However, as noted by Brownell *et al.* (2001), there is no evidence that either Hawaii or the west coast of North America from Washington State to Baja California were ever important habitats for right whales. Given the amount of whaling effort as well as the human population density in these regions, it is highly unlikely that substantial concentrations of right whales would have passed unnoticed. Furthermore, no archaeological evidence exists from the U.S. west coast suggesting that right whales were the target of local native hunts. Consequently, the few records from this region are considered to represent vagrants. The geographical area occupied by the northern right whale at the time it was listed under the ESA extends over a broad area of the North Pacific Ocean as depicted in Figure 1.

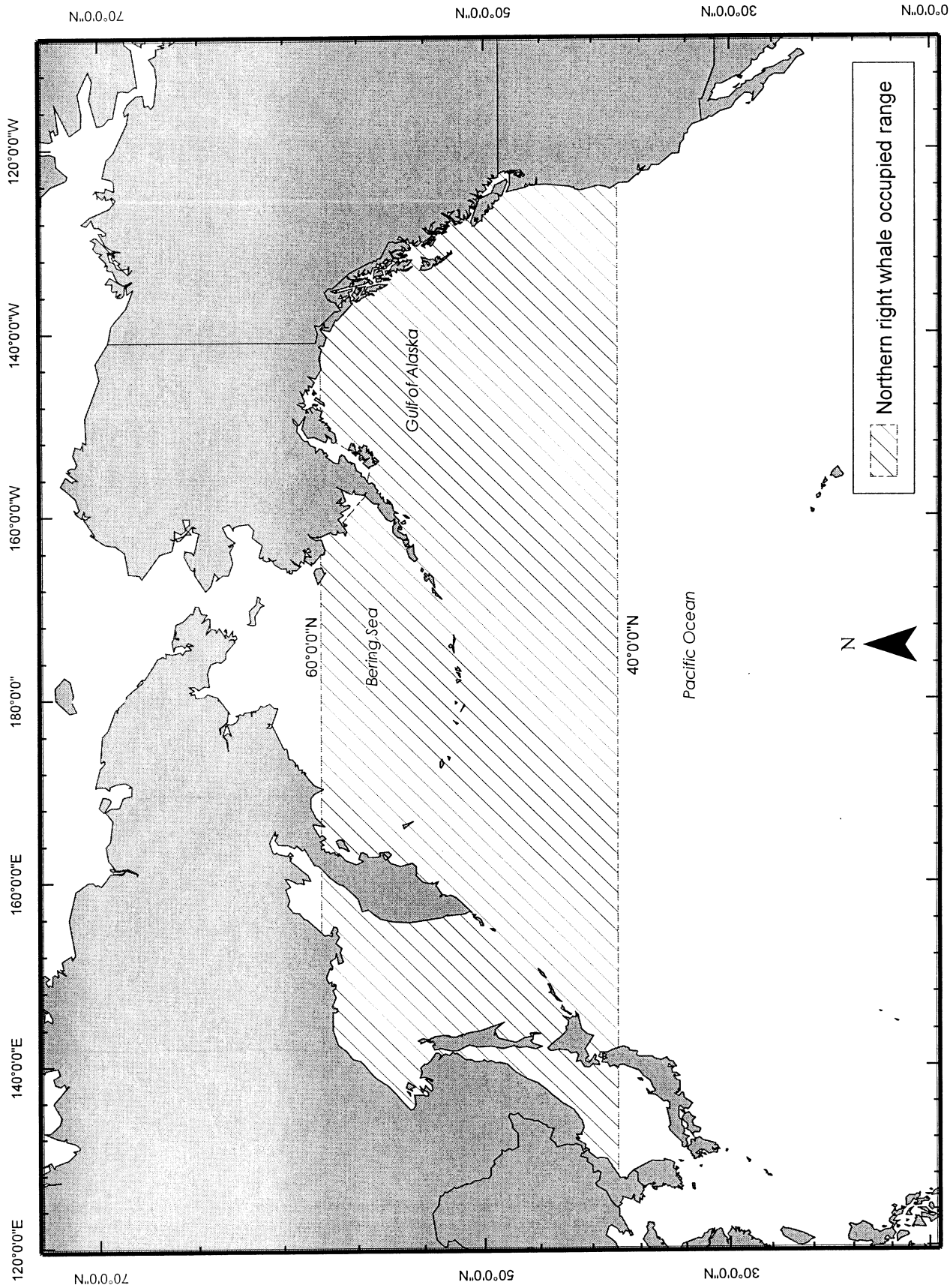


Figure 1. Occupied range of Northern right whales in the North Pacific at time of listing under the Endangered Species Act.

Unoccupied Areas

ESA section 3(5)(A)(ii) further defines critical habitat to include ''specific areas outside the geographical area occupied'' if the areas are determined by the Secretary of Commerce (Secretary) to be ''essential for the conservation of the species.'' 50 CFR 424.12(e) specifies that NMFS ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' We are not designating any areas not occupied at the time of listing because it is not known whether any unoccupied areas are essential to the conservation of the species. Future revisions to the critical habitat of the northern right whale may consider new information which might lead to designation of areas outside the area occupied by these whales.

Physical or Biological Features Essential to the Conservation of the Species (Primary Constituent Elements)

In determining what areas are critical habitat, 50 CFR 424.12(b) requires that NMFS consider those physical or biological features that are essential to the conservation of a given species and that may require special management considerations or protection, including 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, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species. The regulations further direct NMFS to ''focus on the principal biological or physical constituent elements . . . that are essential to the conservation of the species,'' and specify that the ''[k]nown primary constituent elements shall be listed with the critical habitat description.'' The regulations identify PCEs as including, but not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.'' An area must contain one or more PCEs to be eligible for designation as critical habitat; an area lacking a PCE may not be designated in the hope it will acquire one or more PCEs in the future.

Our scientists considered PCEs for the northern right whale in the Pacific Ocean during a workshop held during July 2005. Unfortunately, many data gaps exist in our knowledge of the ecology and biology of these whales, and very little is known about the PCEs that might be necessary for their conservation. The life-requisites of these whales for such factors as temperatures, depths, and substrates are unknown, or may be highly variable. One certainty is the metabolic necessity of prey species to support feeding by right whales. Examination of harvested whales in the North Pacific and limited plankton tows near feeding right whales in recent years show that several species of large copepods and other zooplankton constitute the primary prey of the northern right whale in the North Pacific Ocean.

The PCEs for the northern right whale in the North Pacific Ocean are species of large copepods and other zooplankton in areas where they concentrate in densities sufficient to support and encourage feeding. Specifically, these are: *Calanus marshallae*, *Neocalanus cristatus*, *N. plumchris*. and *Thysanoessa raschii*, a euphausiid whose very large size, high lipid content and occurrence in the region likely makes it a preferred prey item for right whales (J. Napp, pers. comm.). Although the proposed rule referred to each of these species of zooplankton as a ''copepod,'' the final rule correctly identifies *T. raschii* as a euphausiid. A description of the critical habitat areas below establishes the presence of these PCEs within those areas. In addition to the physical presence of these PCEs within the critical habitat, it is likely that certain physical forcing mechanisms are present that act to concentrate these prey in densities that allow for efficient foraging by right whales. Evidence indicates that there may in fact be critical or triggering densities below which right whale feeding does not occur. The PCEs essential for the conservation of the northern right whale in the North Pacific and these physical forcing or concentrating mechanisms contribute to the habitat value of the areas to be designated.

Special Management Considerations or Protection

An occupied area may be designated as critical habitat if it contains physical and biological features that are essential to conservation and that ''may require special management considerations or protection.'' 50 CFR 424.02(j) defines ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' We considered whether the zooplankton in areas where they concentrate in densities sufficient to support and encourage feeding, which have been identified as the PCEs for the northern right whale in the North Pacific Ocean, may require special management considerations or protection.

Zooplankton can be affected by physical and chemical alterations within the water column both by natural processes such as global climate change or the Pacific Decadal Oscillation, as well as by pollution from various potential sources, including oil spills and discharges resulting from oil and gas drilling and production. The OCS oil and gas exploration and development permits or authorizations already are routinely conditioned with operational restraints, mitigative measures, or technological changes to protect the marine environment from these impacts. While such management measures and protections are not necessarily designed to protect these zooplankton in right whale feeding areas per se, they could be useful in protecting these PCEs for the conservation of northern right whales in the North Pacific Ocean. Therefore, we find that these PCEs may require special management considerations or protection.

Critical Habitat

The current abundance of northern right whales in the North Pacific Ocean is considered to be very low in relation to historical numbers or their habitat's carrying capacity, which is not determined. The existence of a persistent concentration of right whales found within the SEBS since 1996 is somewhat extraordinary in that it may represent a substantial portion of the remaining population. These areas of concentration where right whales feed are characterized as containing the PCEs described above. We consider these feeding areas, supporting a significant assemblage of the remaining right whales in the North Pacific, to be essential for right whale conservation. For the reasons given below, we have based designation of critical habitat on these areas, rather than where right whales have appeared sporadically or in transit. We have been able to substantiate the assumption that these areas are right whale feeding areas by observations of feeding behavior, direct sampling of plankton near feeding right whales, or records of stomach contents of dead whales. These assumptions underlie the critical habitat areas shown in Figure 2 and described below. Two areas are designated, as depicted in

Figure 2: an area of the SEBS and an area south of Kodiak Island in the GOA.

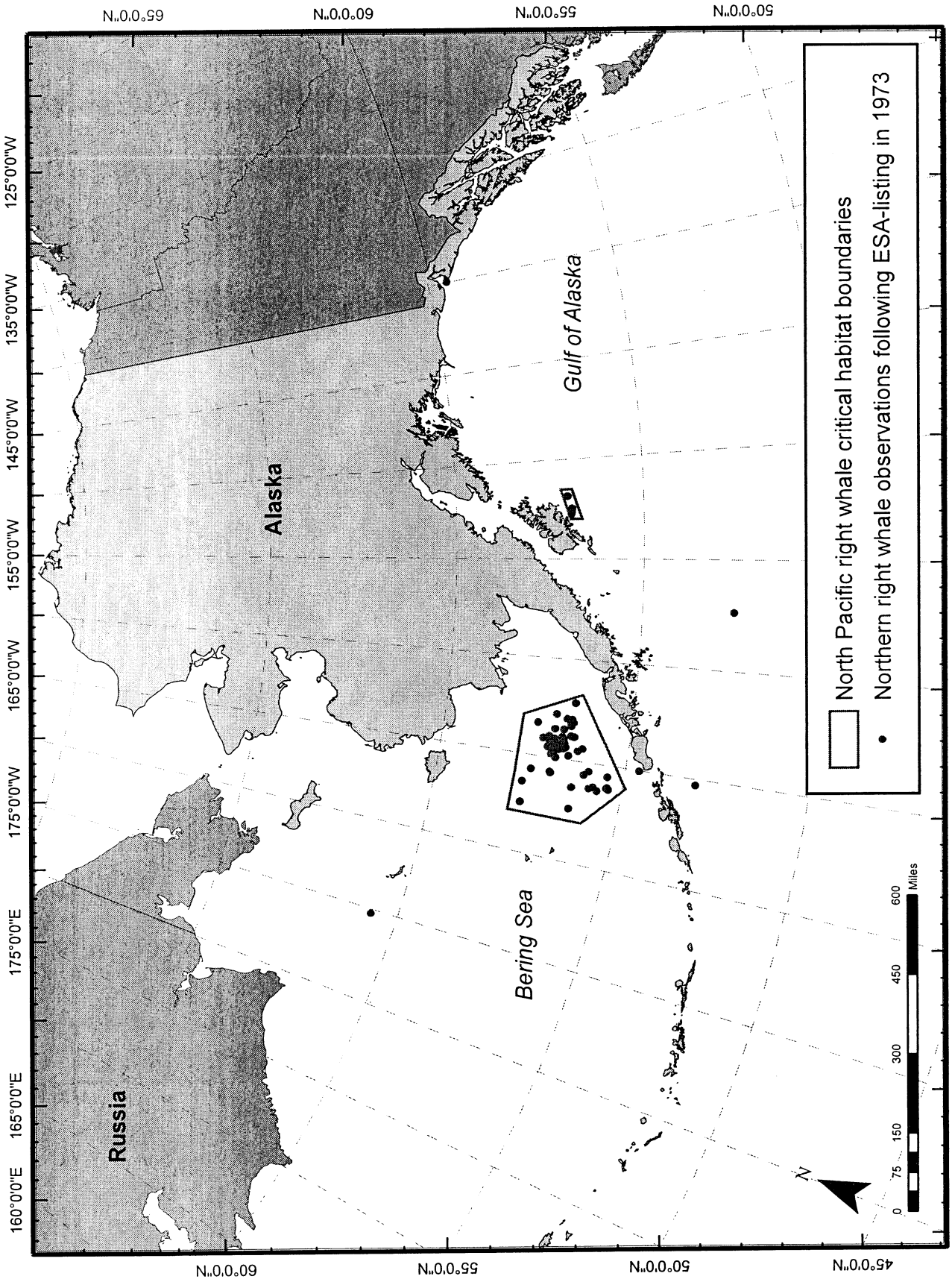


Figure 2. Critical habitat for Northern right whales in the North Pacific.

Shelden *et al.* (2005) reviewed prey and habitat characteristics of northern right whales in the North Pacific. They noted that habitat selection is often associated with features that influence abundance and availability of the whales' prey. Right whales in the North Pacific are known to prey upon a variety of zooplankton species. Availability of these zooplankton greatly influences the distribution of the small North Pacific population on their feeding grounds in the SEBS and GOA. Right whales are known to feed on zooplankton patches of very high density, and these patches may typically be small and unpredictably distributed over space and time (Mayo and Marx, 1990).

Typical zooplankton sampling is too broad-scale in nature to detect patches of these densities, and directed studies employing fine-scale sampling cued by the presence of feeding right whales are the only means of doing this (Mayo and Marx, 1990). Accordingly, there may be no obvious correlation between the abundance and distribution of zooplankton (as measured by broad-scale oceanographic sampling) and the distribution of right whales (M. Baumgartner, in prep.) In light of this, we must rely upon the whales themselves to indicate the location of important feeding areas in the North Pacific.

Aggregations of right whales in high latitudes can be used with high confidence as an indicator of the presence of suitable concentrations of prey, and thus of feeding behavior by the whales. Right whales feed daily during spring and summer, and studies in the North Atlantic have consistently found an association between concentrations of whales and feeding behavior, with dense zooplankton patches recorded by oceanographic sampling around such groups of whales (Mayo and Marx, 1990; Baumgartner *et al.*, 2003, 2003b). In the North Atlantic, an analysis of sighting data by NMFS indicated that a density of 4 or more right whales per 100 nm^2 was a reliable indicator of a persistent feeding aggregation (Clapham and Pace, 2001), and this has been used for Dynamic Area Management fisheries closures to reduce the risk of right whales becoming entangled in fishing gear in North Atlantic fisheries. While this metric is a reliable indicator of the presence of persistent feeding aggregations in the North Atlantic, it is not necessarily the only metric suitable for application in the North Pacific; the much smaller population of right whales in the eastern North Pacific Ocean typically results in sightings of single animals or pairs. Unlike with larger groups, such small numbers sometimes indicate transient passage through an area and thus cannot be unequivocally linked with feeding behavior. However, while sporadic sightings of right whales in such small numbers generally would not be considered a reliable indication of a feeding area, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over a long period of time is sufficient indication that the area is a feeding area containing suitable concentrations of zooplankton.

Therefore, in the absence of data that describe the densities, as well as presence, of the PCEs themselves, the distribution of right whales is used here as a proxy for the existence of suitably dense zooplankton patches and thus to identify the areas designated as critical habitat. We have used sighting records since the time of listing to make this determination because these records are more recent and are taken to be a more reliable indicator of current distribution than historical sightings, especially given that most of the latter relate to animals that were removed from the population by whaling.

Southeastern Bering Sea

We designate critical habitat in the Bering Sea (Figure 2), described as an area delineated by a series of straight lines connecting the following coordinates in the order listed: 58°00′ N/168°00′ W; 58°00′ N/163°00′ W; 56°30′ N/161°45′ W; 55°00′ N/166°00′ W; 56°00′ N/168°00′ W and returning to 58°00′ N/168°00′ W. The area described by these boundaries lies completely within the waters of the United States and its Exclusive Economic Zone, outside of waters of the State of Alaska. State waters extend seaward for 3 nautical miles; very few sightings occurred within this area. Right whale encounters occurring after ESA-listing in 1973 totaled 182 within this area, out of 184 encounters north of the Aleutian Islands during this time period.

Gulf of Alaska

We designate critical habitat in the GOA (Figure 2), described as an area delineated by a series of straight lines connecting the following coordinates in the order listed: 57°03′ N/153°00′ W, 57°18′ N/151°30′ W, 57°00′ N/151°30′ W, 56°45′ N/153°00′ W, and returning to 57°03′ N/153°00′ W. The area described by these boundaries lies completely within the waters of the United States and its Exclusive Economic Zone. Right whale encounters occurring after ESA-listing in 1973 totaled 5 within this area, out of 14 encounters in the GOA during this time period.

Existence of the PCEs Within the Critical Habitat Southeastern Bering Sea Slope Waters

The Bering Sea slope is a very productive zone, sometimes referred to as the 'Greenbelt,' where annual primary production can exceed that on the adjacent shelf and basin by 60 percent and 270 percent, respectively (Springer *et al.*, 1996). Physical processes at the shelf edge, such as intensive tidal mixing, eddies and up-canyon flow, bring nutrients to the surface, thereby supporting enhanced productivity and elevated biomass of phytoplankton, zooplankton, and fish. Northern right whales in the western North Pacific have been observed in association with oceanic frontal zones that produce eddies southeast of Hokkaido Island, Japan, and southeast of Cape Patience (Mys Terpeniya), Sakhalin Island, in the Okhotsk Sea (Omura *et al.*, 1969). Whether or not the Bering Slope Current, or eddies shed from it, support production or entrain right whale prey is unknown.

From August to October in 1955 and 1956, Soviet scientists observed aggregations of *Calanus* between the Pribilof Islands and the Aleutian Islands (around 170§ W long.) that were identified as *C. finmarchicus*, though, as mentioned above, were probably *C. marshallae* (Klumov, 1963). Flint *et al.* (2002) also report high concentrations of *C. marshallae* at frontal zones near the Pribilof Islands, with especially high biomass noted for the subthermohaline layer. This oceanographic front effectively separates slope and outer shelf *Neocalanus* spp. from the inshore middle shelf community of *C. marshallae* (Vidal and Smith, 1986). Right whales were found on both sides of this frontal zone (that coincides with the shelf break at 170 m) during both the 19th and 20th centuries. This is similar to the habitat described by Baumgartner *et al.* (2003a) for right whales feeding in the North Atlantic. Six right whales that were caught under scientific permit in late July-early August 1962–63 in Bering Sea slope waters had exclusively consumed *N. cristatus* (*C. cristatus*: Omura *et al.*, 1969). Although oceanic species such as *Neocalanus* usually enter diapause and migrate to depths greater than 200 m by late summer in the slope waters of the Bering Sea (Vidal and Smith, 1986), right whales may still be able to use these resources by targeting regions where the bottom mixed layer forces the zooplankton into shallower, discrete layers (e.g. Baumgartner *et al.*, 2003a).

Southeastern Bering Sea Middle-Shelf Waters

The SEBS shelf has been the focus of intense oceanographic study since the late 1970s (e.g. Schumacher *et al.*, 1979; Coachman, 1986; Napp *et al.*, 2000; Hunt *et al.*, 2002a; Hunt *et al.*, 2002b), largely due to the considerable commercial fishing effort in the area (National Research Council, 1996). Coachman (1986) described the now well-established hydrographic domains of the inner-, middle- and outer-shelf, separated by a front or transition zone at roughly the 50–m (inner front) and 100–m (outer front) isobaths. During the 1990s, research focused on these domains demonstrated dynamic advection of nutrient-rich Bering slope water onto the shelf in both winter and summer, via eddies, meanders and up-canyon flow (Schumacher and Stabeno, 1998; Stabeno and Hunt, 2002). These intrusions of nutrient-rich water, physical factors related to water column stratification, and long summer day length result in a very productive food web over the SEBS shelf (e.g., Livingston *et al.*,1999; Napp *et al.*, 2002; Coyle and Pinchuk, 2002; Schumacher *et al.*, 2003). Specifically, copepod species upon which right whales feed (e.g. *C. marshallae*, *Pseudocalanus* spp. and *Neocalanus* spp.) are among the most abundant of the zooplankton sampled over the middle shelf (Cooney and Coyle, 1982; Smith and Vidal, 1986). Small, dense patches (up to densities greater than 500 mg/m–3) of euphausiids (*T. raschii*, *T. inermis*), potential right whale prey, have also been reported for waters near the SEBS inner front (Coyle and Pinchuk, 2002).

Zooplankton sampled near right whales seen in the SEBS in July 1997 included *C. marshallae*, *P. newmani*, and *Acartia longiremis* (Tynan, 1998). *C. marshallae* was the dominant copepod found in these samples as well as samples collected near right whales in the same region in 1999 (Tynan *et al.*, 2001). *C. marshallae* is the only ''large'' calanoid species found over the SEBS middle shelf (Cooney and Coyle, 1982; Smith and Vidal, 1986). Concentrations of zooplankton were significantly higher in 1994–98 than in 1980–81 by at least an order of magnitude (Napp *et al.*, 2002) and Tynan *et al.* (2001) suggest that this increased production may explain the presence of right whales in middle shelf waters. However, at least three right whales were observed in 1985 in the same location as the middle shelf sightings reported in the late 1990s (Goddard and Rugh, 1998).

Gulf of Alaska

The central GOA is dominated by the Alaskan gyre, a cyclonic feature that is demarcated to the south by the eastward flowing North Pacific Current and to the north by the Alaska Stream and Alaska Coastal Current, which flow westward near the shelf break. The bottom topography of this region is rugged and includes seamounts, ridges, and submarine canyons along with the abyssal plain. Strong semi-diurnal tides and current flow generate numerous eddies and meanders (Okkonen *et al.*, 2001) that influence the distribution of zooplankton.

Copepods are the dominant taxa of mesozooplankton found in the GOA and are patchily distributed across a wide variety of water depths. Three large herbivorous species comprise more than 70 percent of the biomass: *N. cristatus*, *N. plumchrus*, and *Eucalanus bungii* (Cooney 1986, 1987). In northern GOA shelf waters, the late winter and spring zooplankton is dominated by calanoid copepods (*Neocalanus* spp.), with a production peak in May; this is a cycle that appears resistant to environmental variability associated with El Niño/ Southern Oscillation (ENSO) (Coyle and Pinchuk, 2003). In oceanic waters (50§ N lat., 145§ W long.), *N. plumchrus* dominate (Miller and Nielsen, 1988; Miller and Clemons, 1988) and have demonstrated dramatic shifts in the timing of annual peak biomass from early May to late July (Mackas *et al.*, 1998). From late summer through autumn, *N. plumchrus* migrate to deep water ranging from 200 m to 2000 m depending on location within the GOA (Mackas *et al.*, 1998). The three right whales caught under scientific permit on August 22, 1961, south of Kodiak Island had all consumed *N. plumchrus* (*C. plumchrus*: Omura *et al.*, 1969), potentially by targeting areas where adult copepods remained above 200 m (e.g. Baumgartner *et al.*, 2003a).

The area designated as critical habitat within the SEBS presents several similarities to that to be designated within the GOA. Both areas are influenced by large eddies, submarine canyons, or frontal zones that enhance nutrient exchange and act to concentrate prey. These areas lie adjacent to major ocean currents (the ACC and the Aleutian ocean passes) and are characterized by relatively low circulation and water movement (P. Stabeno, pers. com.).

Right Whale Sightings as a Proxy for Locating the PCEs

As noted above, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over an extended period of time can be used with high confidence as an indicator of the presence of the PCEs in a feeding area. We have used sighting records since the time of listing to make this determination because these records are more recent and are taken to be a more reliable indicator of current distribution of feeding whales than historical sightings, especially given that most of the latter relate to animals that were removed from the population by whaling and are thus no longer extant. Of the 184 post-listing right whale sightings reported north of the Aleutian Islands, 182 occurred within the critical habitat in the Bering Sea. Since 1996, right whales have been consistently sighted in this area over a period of years during the spring and summer feeding seasons. For example, NMFS surveys alone recorded between two and four sightings in 1996 (Goddard and Rugh, 1998), 13 sightings in 2000 (Le Duc, et al) and over 23 sightings in 2004. Single right whales as well as pairs and aggregations up to five animals were sighted during this period, and all sightings were within 100 nm^2 of one another. Based on consideration of these factors, we conclude that the right whale sightings in the specific area in the Bering Sea described in Figure 2 are a suitable proxy for the presence of the PCEs, and, therefore, designate this area as critical habitat for the northern right whale in the North Pacific Ocean.

Recent sightings of right whales are fewer in number in the GOA than in the Bering Sea. However, three individuals were sighted recently in the critical habitat in the GOA. These sightings occurred at a time when right whales typically feed in the North Pacific Ocean. In July 1998, a single right whale exhibiting behavior consistent with feeding activity was observed among a group of about eight humpback whales (Waite, Wynne and Mellinger, 2003). In August 2004, a NMFS researcher observed a single right whale among a group of humpbacks. In August 2005, a NMFS researcher reported yet another sighting of a right whale within 250 to 500 meters of groups of humpback and fin whales. Acoustic monitoring of the area conducted in summer 2000 recorded what appeared to be right whale calls in the area on September 6 (Waite, Wynne and Mellinger, 2003). Compared to the Bering Sea sightings, the GOA right whale sightings do not provide as strong an indication of feeding behavior. However, individual right whales have been directly observed in 1998, 2004, and 2005 and

detected acoustically in 2000 during the spring and summer feeding seasons in the specific area in the GOA described in Figure 2. It is also instructive that one of these animals was exhibiting feeding behavior at the time it was observed. Based on consideration of these factors, we conclude that the right whale sightings in the specific area in the GOA described in Figure 2 are a reasonably reliable proxy for the presence of the PCEs, and, therefore, designate this area as critical habitat for the northern right whale in the North Pacific Ocean.

Exclusions from Designation

Section 4 (b)(2) of the ESA states that critical habitat shall be designated on the basis of the best scientific and commercial data available and after taking into consideration the economic impact, impacts to national security, and any other relevant impact. Any area may be excluded from critical habitat if the benefits of exclusion are found to outweigh those of inclusion, unless such exclusion would result in the extinction of the species. We are to apply the statutory provisions of the ESA, including those in section 3 that define ''critical habitat'' and ''conservation,'' to determine whether a proposed action might result in the destruction or adverse modification of critical habitat.

Based upon the best available information, it appears that the probability of oil or gas production within (or immediately adjacent to) the right whale critical habitat is uncertain within the 10-year timeframe of our assessment. MMS reports that there are no commercial production facilities in operation, currently under development, or 'permitted' for future development within these critical habitat areas. Neither has oil and gas exploration taken place in most of the EBS OCS region.

During the preparation of this final rule, we became aware that the oil and gas industry has expressed renewed interest in exploring for and developing petroleum resources in the EBS, with most interest being expressed in the North Aleutian Basin OCS Planning Area. This OCS area resides in the southeast corner of the proposed critical habitat, and, according to MMS estimates, represents approximately 8 percent of the total critical habitat area being proposed for designation in the EBS. MMS also reports that the State of Alaska has announced support for oil and gas development in this region, although local groups are divided on the issue. The Governor of Alaska stated that ''[he] hope[s] that public and industry input will provide the secretary and the state with adequate information to decide whether or not to ask the President to lift the current withdrawal and allow a sale during the 2007 - 2012 program.'' Through communication between NMFS and MMS, and the MMS comments submitted in response to publication of the proposed rule to revise critical habitat, we have a substantially fuller understanding of the potential effects of critical habitat designation on the MMS OCS program. MMS has revealed that, while the industry desires to include the North Aleutian Basin OCS Planning Area in the 2007–2012 Lease Sale program, this is only possible through the rescission of a Presidential withdrawal of this (and adjacent) area(s) that is in effect until July 2012. Even if the withdrawal were rescinded in time to include the North Aleutian Basin in the upcoming lease sale offering, MMS projects that this specific area would likely not be put up for lease sales until 2010 and again in 2012, and then only if the area were to be included in MMS lease sale planning. Even in the most optimistic scenario envisioned by MMS analysts, substantial development (and certainly commercial production) would involve many years, perhaps even decades, of planning, design, review, consultation, and approval. Consequently, the prospects for oil and gas exploration and development in this area are uncertain at this time. Moreover, even if the withdrawal were lifted and the area opened for exploration and development, monetary benefits accruing from oil and gas production in this area over the 10-year analytical horizon we used to evaluate the economic and socioeconomic impacts of the critical habitat revision are uncertain. Therefore, we cannot conclude that the benefits of excluding this area for oil and gas purposes exceed the benefits of inclusion.

While we expect to consult on fishery-related proposed actions that ''may affect'' critical habitat, none of these consultations would be expected to result in a finding of ''adverse modification,'' and thus none would be expected to result in imposition of costs on commercial fishery participants. Because fisheries do not target or affect the PCEs for northern right whales, it follows that no fishing or related activity (e.g., at-sea processing, transiting) would be expected to be restricted or otherwise altered as a result of critical habitat designation in the two areas being designated. We did not find any specific areas in which the costs exceed benefits for fishing activities that may affect critical habitat, and, therefore, we have not excluded any areas from designation. We point out, however, that if an injurious or lethal incidental take of a right whale were to occur in the commercial fisheries, right whale avoidance measures may be required in commercial fisheries to avoid future interactions. These measures, however, would be required to prevent take of the endangered right whale and would not be attributable solely to the designation of critical habitat.

This action is anticipated to result in consultations on seafood processing waste discharges with the Environmental Protection Agency (EPA); Department of Defense (DoD) authorized military ''underway training'' activities; and U.S. Coast Guard (USCG) oil spill response plan approval, among others. It is unlikely that these activities will result in an ''adverse modification'' finding and, thus, no mandatory modifications would be imposed. It must follow then that no ''costs'' are imposed as a result of designation beyond the small costs attributable to inter-agency (occasionally intra-agency) consultation. As explained in the impacts analysis prepared for this action, some larger benefit accrues to society as a result of designation, including the educational value derived from identification and designation of the critical habitat areas within which the PCEs are found. Thus, we believe that the benefits of exclusion are outweighed by the benefits of inclusion of the designated areas.

Our analysis (available on the NMFS Alaska Region website *http://www.fakr.noaa.gov/*) did not find any specific areas that merit exclusion in consideration of economic impacts, nor have we determined that national security interests or other relevant impacts warrant the exclusion of any specific areas from this designation.

Effects of Critical Habitat Designation

Section 4(b)(8) of the ESA requires that we evaluate briefly and describe, in any revision of designated critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require that an ESA section 7 consultation be conducted. Such activities include, but are not limited to, oil and gas leasing and development on the OCS, Federal management of high seas fisheries in territorial waters and the Exclusive Economic Zone of the United States, dredge and fill, mining,

pollutant discharges, other activities authorized or conducted by the Army Corps of Engineers and the EPA, and military training exercises and other functions of the U.S. armed forces.

This designation of critical habitat will provide these agencies, private entities, and the public with clear notification of the existence of critical habitat for northern right whales and the boundaries of the habitat. This designation will also assist these agencies and others in evaluating the potential effects of their activities on critical habitat and in determining if ESA section 7 consultation with us is needed.

Required Determinations

Regulatory Planning and Review

This rule has been determined to be significant for purposes of Executive Order (E.O.) 12866. As part of our exclusion process under section 4(b)(2) of the ESA, the economic benefits and costs of the critical habitat designations are described in our draft economic report (NMFS, 2005). This approach is in accord with OMB's guidance on regulatory analysis (OMB Circular A–4, Regulatory Analysis, September 17, 2003).

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule and a final regulatory flexibility analysis (FRFA) for this final rule incorporating the IFRA and comments received on the economic impacts of the rule. These documents are available upon request (see **ADDRESSES**). These Regulatory Flexibility Act analyses evaluate the potential effects of the critical habitat designation on federally regulated small entities. The reasons for the action, a statement of the objectives of the action, and the legal basis for the rule are discussed earlier in the preamble. A summary of the analyses follows.

The small entities that may be directly regulated by this action are those that seek formal approval (e.g., a permit) from, or are otherwise authorized or funded by, a Federal agency to undertake an action or activity that ''may affect'' critical habitat for the northern right whale. Submission of such a request for a Federal agency's approval or funding, from a small entity, would require that agency (i.e., the ''action agency'') to consult with NMFS (i.e., the ''consulting agency'').

Consultations vary, from simple to complex, depending on the specific facts of each action or activity for which application is made. Attributable costs are directly proportionate to complexity. In the majority of instances projected to take place under the critical habitat designation, these costs are expected to accrue solely to the Federal agencies that are party to the consultation. In only the most complex of formal consultations might it be expected that a private sector applicant could potentially incur costs directly attributable to the consultation process itself. Furthermore, if destruction or adverse modification of critical habitat is found at the conclusion of formal consultation, the applicant must implement modifications to avoid such effects. These modifications could result in adverse economic impacts.

An examination of the Federal agencies with management, enforcement, or other regulatory authority over activities or actions within, or immediately adjacent to, the critical habitat area, resulted in the following list. Potential action agencies may include: the EPA, USCG, DoD, MMS, and NMFS. Activities or actions with a nexus to these Federal agencies that are expected to require consultation include: EPA permitting of seafood processing waste discharges at-sea; USCG oil spill response plan approval, as well as emergency oil spill response; DoD authorization of military training activities in the Bering Sea and Aleutian Islands (BSAI) and GOA; MMS oil and gas exploration and production permitting; and NMFS fishery management actions in the BSAI and GOA.

A 10-year post-designation analytical horizon was adopted, during which time we may reasonably expect to consult an estimated 27 times on critical habitat-related actions with one or more of the action agencies identified above. The majority of the consultations are expected to be informal, projected to represent approximately 52 percent of the total. The more complex and costly formal consultations are projected to account for, perhaps, 37 percent; while the simplest and least costly pre-consultation are expected 11 percent of the time. These figures reflect the best estimates information and experience can presently provide.

On the basis of the underlying biological, oceanographic, and ecological science used to identify the PCEs that define critical habitat for the right whale in the Pacific, as well as the foregoing assumptions, empirical data, historical information, and accumulated experience regarding human activity in the BSAI and GOA, we recognize the potential for oil and gas exploration and production activity to destroy or adversely modify northern right whale critical habitat, though adverse modification is unlikely.

As previously indicated, MMS has authority over OCS oil and gas permitting. An examination of published information from the MMS Alaska Region reveals that three MMS OCS planning areas overlap some portion of the northern right whale critical habitat areas. Previously, we have consulted extensively with the MMS regarding oil and gas leasing actions on the Alaskan OCS, and we concur that none of these has been determined likely to jeopardize the continued existence of any listed species or destroy or adversely modify critical habitat. In addition, we found in the impacts analysis prepared for the proposed rule that oil and gas exploration, development, and commercial production represent a relatively low risk to critical habitat for the right whale. Although we recognize there is a potential for impacts that could result in destruction or adverse modification of critical habitat, the amount of future anticipated OCS oil and gas related activities in the proposed fright whale critical habitat and the regulatory requirements imposed by MMS on OCS operators to minimize the potential for adverse impacts suggest that right whale critical habitat would not be destroyed or adversely modified. Further, any potential risks of destruction or adverse modification from specific oil and gas activities will be analyzed and addressed in the context of an ESA section 7 consultation where Federal agencies must insure that the actions they authorize, fund or carry out are not likely to destroy or adversely modify critical habitat or jeopardize the continued existence of the northern right whale.

Further, MMS sources indicate that in only one of these has there been any exploratory well drilling (i.e., St. George Basin). A total of 10 exploratory wells were permitted, all of which were completed in 1984 and 1985, and no subsequent associated exploration activity occurred. It appears that there

has been no activity on the part of the lease holders in this or the other referenced areas to seek authorization to undertake additional exploratory activity or develop production facilities. MMS reports no planned or scheduled OCS lease sales for these areas, at least through 2007 (the latest projected date MMS has published on its web site). This suggests that the only private sector entities that potentially could be directly regulated and adversely impacted by the designation would be those entities that own the lease rights to develop oil and gas production facilities in these areas. However, during the preparation of the proposed rule we became aware that the oil and gas industry has expressed recent interest in exploring and developing oil and gas resources in the North Aleutian Basin OCS Planning Area and that the State of Alaska announced support for this activity.

When MMS records were consulted as to the identity of the entities holding leases to the wells in the St. George Basin, six businesses were listed for the 10 permitted exploratory wells. These include: SHELL Western E&P Inc. (2 wells); ARCO Alaska Inc. (3 wells); EXXON Corp. (2 wells); Mobile Oil Corp. (1 well) (now merged with EXXON); GULF Oil Corp. (1 well); and CHEVRON USA Inc. (1 well). These data were last updated, according to the MMS website, March 17, 2005. None of these entities could reasonably be characterized as ''small,'' for RFA purposes. All are widely recognized multi-national corporations and employ more than ''500 full-time, part-time, temporary, or any other category of employees, in all of their affiliated operations worldwide'' (the criterion specified by SBA for assessing entity size for this sector).

Under the Regulatory Flexibility Act, the preferred alternative was compared to the ''No Action'' (or status quo) alternative and an alternative proposed by the petitioner, the Center for Biological Diversity. NMFS rejected the ''No Action'' alternative because it did not comply with the remand order in *Center for Biological Diversity* v. *Evans*, Civ. No. 04–04496 (N.D. Cal. June 14, 2005) or satisfy the agency's obligations under the ESA. NMFS rejected the petitioner's alternative because the best scientific information available did not support a finding that the physical or biological features essential for conservation of the right whale in the North Pacific Ocean are found throughout the area identified by the petitioner, and thus the area did not meet the ESA definition of critical habitat.

Because our analysis did not identify costs to any small entities attributable to the critical habitat designation action, there is no identified alternative that imposes lesser impacts on this group while achieving the requirements of the ESA and the objectives of this action.

The action does not impose new recordkeeping or reporting requirements on small entities. The analysis did not reveal any Federal rules that duplicate, overlap or conflict with the final action. No comments were received on the IRFA identifying analytical deficiencies or objecting to the reported RFAA interpretations and conclusions

Military Lands

The Sikes Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan (INRMP). The recent National Defense Authorization Act for Fiscal Year 2004 (Public Law No. 108–136) amended the ESA to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(I) of the ESA (16 U.S.C. 1533(a)(3)(B)(I)) now provides that ''[t]he Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' We have determined no military lands would be impacted by this rule.

E.O. 13211

On May 18, 2001, the President issued an Executive Order on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

We have considered the potential impacts of this action on the supply, distribution, or use of energy and find the designation of critical habitat will not have impacts that exceed the thresholds identified above.

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

In accordance with the Unfunded Mandates Reform Act, we make the following findings:

(a) This final rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5) (7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon state, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to state, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement.) ''Federal private sector mandate'' includes a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance; or (ii) a duty arising from participation in a voluntary Federal program.'' The designation of critical habitat does not impose a legally binding duty on non-Federal government entities or private parties. Under the ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of

critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply; nor would critical habitat shift the costs of the large entitlement programs listed above to state governments.

(b) Due to the prohibition against take of this species both within and outside of the designated areas, we do not anticipate that this final rule will significantly or uniquely affect small governments. As such, a Small Government Agency Plan is not required.

Takings

In accordance with E.O. 12630, this final rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat affects only Federal agency actions. Private lands do not exist within the critical habitat and therefore would not be affected by this action.

Federalism

In accordance with E.O. 13132, this final rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of Commerce policies, we have requested information from, and will coordinate development of, this critical habitat designation with appropriate State of Alaska resource agencies. The designation may have some benefit to State and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the survival of the northern right whale are specifically identified.

Civil Justice Reform

In accordance with E.O. 12988, the Department of the Commerce has determined that this final rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the E.O. We are designating critical habitat in accordance with the provisions of the ESA. This final rule uses standard property descriptions and identifies the PCEs within the designated areas to assist the public in understanding the habitat needs of the northern right whale.

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

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

National Environmental Policy Act

We have determined that an environmental analyses as provided for under the National Environmental Policy Act of 1969 for critical habitat designations made pursuant to the ESA is not required. See *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996).

Government-to-Government Relationship With Tribes

The longstanding and distinctive relationship between the Federal and tribal governments is defined by treaties, statutes, executive orders, judicial decisions, and agreements, which differentiate tribal governments from the other entities that deal with, or are affected by, the Federal Government. This relationship has given rise to a special Federal trust responsibility involving the legal responsibilities and obligations of the United States toward Indian Tribes and the application of fiduciary standards of due care with respect to Indian lands, tribal trust resources, and the exercise of tribal rights. E.O. 13175 - Consultation and Coordination with Indian Tribal Governments- outlines the responsibilities of the Federal Government in matters affecting tribal interests.

We have determined designation of critical habitat for the northern right whale in the North Pacific Ocean would not have tribal implications, nor affect any tribal governments or issues. None of the critical habitat occurs on tribal lands or affects tribal trust resources or the exercise of tribal rights. In addition, as discussed above and in the economic analysis supporting this rulemaking, we consider economic impacts of designation on oil and gas activity in the area to be speculative.

References Cited

A complete list of all references cited in this rulemaking can be found on the NMFS Alaska Region's website at *http://www.fakr.noaa.gov/* and is available upon request from the NMFS office in Juneau, Alaska (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: June 29, 2006.

William T. Hogarth,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, 50 CFR part 226 is amended to read as follows:

PART 226—DESIGNATED CRITICAL HABITAT

■ 1. The authority citation of part 226 continues to read as follows:

Authority: 16 U.S.C. 1533.

■ 2. In § 226.203, the section heading and the introductory text are revised; paragraphs (a), (b), and (c) are redesignated as paragraphs (a)(1), (a)(2), and (a)(3), respectively; and new paragraph (a) heading and paragraph (b) are added to read as follows:

§ 226.203 Critical habitat for northern right whale (*Eubalaena glacialis*).

Critical habitat is designated in the North Atlantic Ocean, Bering Sea, and the Gulf of Alaska for the northern right whale as described in paragraphs (a) and (b) of this section. The textual descriptions of critical habitat are the definitive source for determining the critical habitat boundaries. General location maps are provided for critical habitat in the North Pacific Ocean for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) *North Atlantic Ocean.* * * *

* * * * *

(b) *North Pacific Ocean*—(1) *Primary Constituent Elements.* The primary constituent elements essential for conservation of the northern right whale are the copepods *Calanus marshallae*, *Neocalanus cristatus*, and *N. plumchris*, and the euphausiid *Thysanoëssa raschii*, in areas of the North Pacific Ocean in which northern right whales are known or believed to feed, as described in paragraphs (b)(2) and (3) of this section.

(2) *Bering Sea.* An area described by a series of straight lines connecting the following coordinates in the order listed:

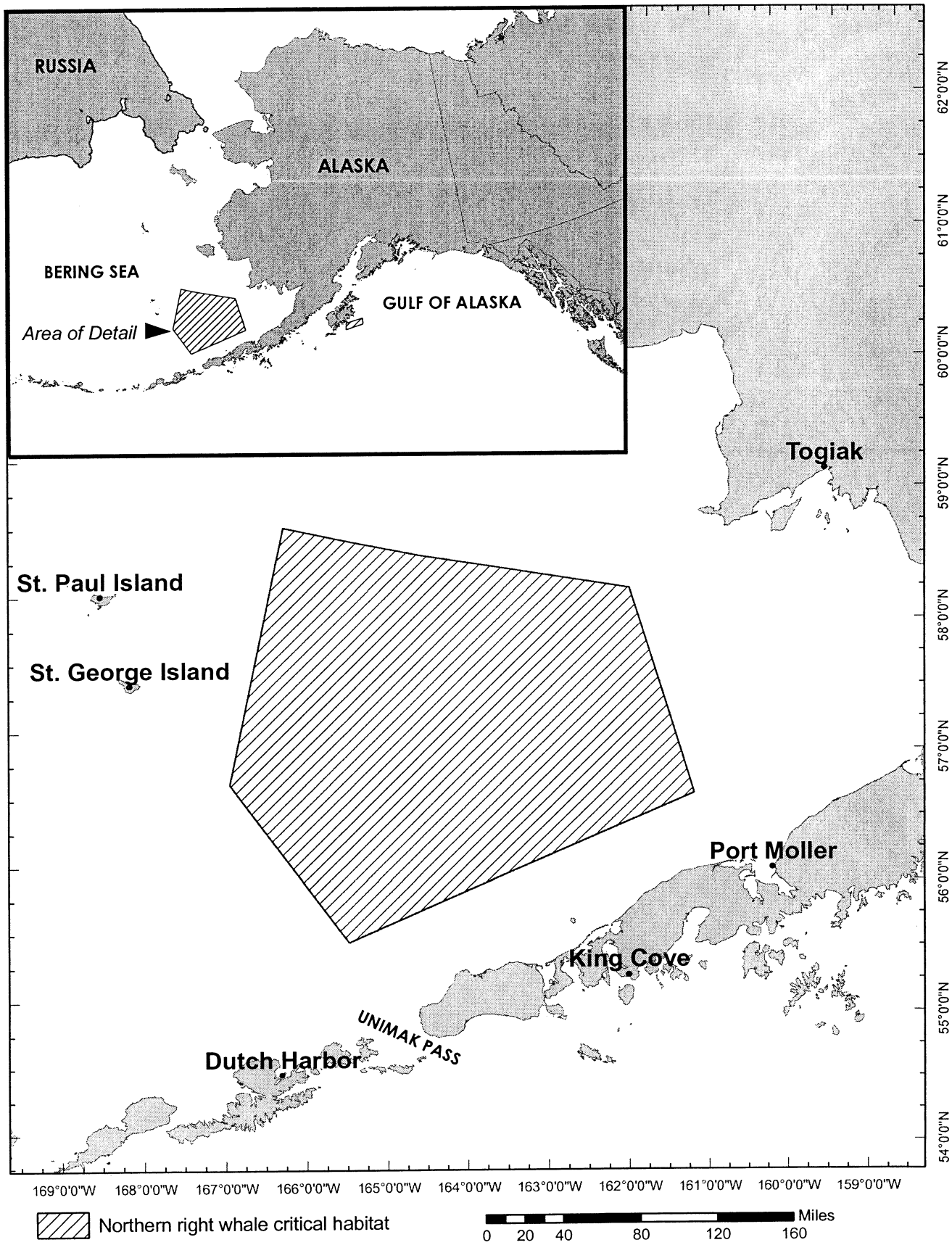
58°00′ N/168°00′ W
58°00′ N/163°00′ W
56°30′ N/161°45′ W
55°00′ N/166°00′ W
56°00′ N/168°00′ W
58°00′ N/168°00′ W.

(3) *Gulf of Alaska.* An area described by a series of straight lines connecting

the following coordinates in the order listed:

57°03′ N/153°00′ W
57°18′ N/151°30′ W
57°00′ N/151° 30′ W
56°45′ N/153°00′ W
57°03′ N/153°00′ W.

(4) Maps of critical habitat for the northern right whale in the North Pacific Ocean follow:


RUSSIA
ALASKA
BERING SEA
GULF OF ALASKA
Area of Detail
Togiak
St. Paul Island
St. George Island
Port Moller
King Cove
UNIMAK PASS
Dutch Harbor
62°0'0"N
61°0'0"N
60°0'0"N
59°0'0"N
58°0'0"N
57°0'0"N
56°0'0"N
55°0'0"N
54°0'0"N
169°0'0"W
168°0'0"W
167°0'0"W
166°0'0"W
165°0'0"W
164°0'0"W
163°0'0"W
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161°0'0"W
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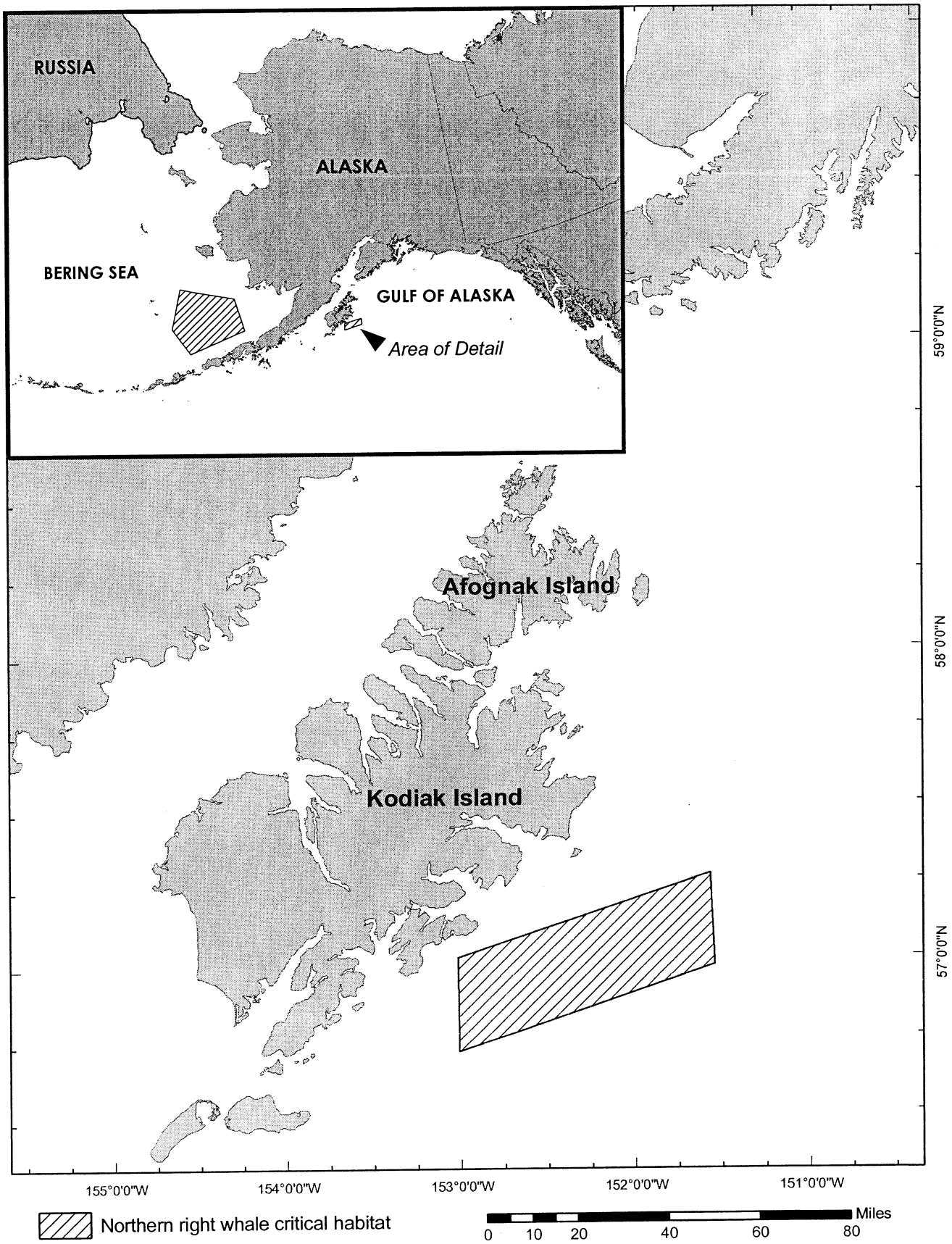
159°0'0"W
Northern right whale critical habitat
Miles
0 20 40 80 120 160


RUSSIA
ALASKA
BERING SEA
GULF OF ALASKA
Area of Detail
Afognak Island
Kodiak Island
59°0'0"N
58°0'0"N
57°0'0"N
155°0'0"W
154°0'0"W
153°0'0"W
152°0'0"W
151°0'0"W
Northern right whale critical habitat
Miles
0 10 20 40 60 80

[FR Doc. 06–6014 Filed 6–30–06; 1:05 pm]
BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 050719189–5286–03; I.D. 062706A]

RIN 0648–AT33

International Fisheries; Pacific Tuna Fisheries; Restrictions for 2006 Longline Fisheries in the Eastern Tropical Pacific Ocean; Fishery Closure

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

ACTION: Temporary rule; closure.

SUMMARY: NMFS is closing the U.S. longline fishery for bigeye tuna in the Inter-American Tropical Tuna Commission (IATTC) Convention Area for the remainder of 2006, because the bigeye tuna catch in the Convention Area has reached the 150–metric ton (mt) limit for 2006. This action, implemented under the regulations for the Pacific Tuna Fisheries will contribute to efforts to end overfishing of bigeye tuna in the eastern tropical Pacific Ocean (ETP), consistent with recommendations by the IATTC that have been approved by the Department of State (DOS) under the Tuna Conventions Act. This action is intended to limit fishing mortality on the bigeye tuna stock caused by longline fishing in the Convention Area and contribute to the long-term conservation of the bigeye tuna stock at levels that support healthy fisheries.

DATES: Effective 12:01 a.m. (0001 hrs) Hawaii Standard Time (HST) on July 6, 2006, through 12:01 a.m. (0001 hrs) HST on January 1, 2007.

FOR FURTHER INFORMATION CONTACT: J. Allison Routt, Sustainable Fisheries Division, Southwest Region, NMFS, (562) 980–4030.

SUPPLEMENTARY INFORMATION: The United States is a member of the IATTC, which was established under the Convention for the Establishment of an Inter-American Tropical Tuna Commission signed in 1949 (Convention). The IATTC was established to provide an international arrangement to ensure the effective international conservation and management of highly migratory species of fish in the Convention Area. The Convention Area for this purpose is defined to include the waters of the ETP bounded by the coast of the Americas, the 40° N. and 40° S. parallels, and the 150° W. meridian. The IATTC has maintained a scientific research and fishery monitoring program for many years and annually assesses the status of stocks of tuna and the fisheries to determine appropriate harvest limits or other measures to prevent overexploitation of tuna stocks and promote viable fisheries. Under the Tuna Conventions Act, 16 U.S.C. 951–962, NMFS must publish regulations to carry out IATTC recommendations and resolutions that have been approved by DOS. The Southwest Regional Administrator also is required by regulations at 50 CFR 300.25(b)(3) to issue a direct notice to the owners or agents of U.S. vessels that operate in the ETP of actions recommended by the IATTC and approved by the DOS. A notice to the fleet was sent May 31, 2005, advising the U.S. bigeye tuna longline fleet of the bigeye tuna quota in the ETP for the 2005 and 2006 fishing years. The 150–mt quota and procedure to close the U.S. longline bigeye fishery upon reaching the quota in 2006 was established by a final rule published on November 22, 2005 (70 FR 70549).

The IATTC recommended and the DOS approved a measure whereby the U.S. longline fishery for bigeye tuna in the Convention Area will close for the remainder of calendar year 2006 if the catch of bigeye tuna by U.S. longline vessels in the Convention Area reaches 150 mt (the amount estimated to have been caught by the U.S. longline fishery in the Convention Area in 2001). The measure recommended by the IATTC and approved by DOS states that no bigeye tuna may be caught and retained by a nation's longline bigeye tuna vessels in the Convention Area during the remainder of the calendar year 2006 once the nation's longline harvest of bigeye in the Convention Area has reached the nation's catch level for bigeye tuna harvested in the Convention Area by longline in 2001.

NMFS has determined that the 150–mt catch level has been reached, and hereby closes the U.S. longline fishery for bigeye tuna in the Convention Area for the remainder of the year 2006. It is, therefore, prohibited for a U.S. longline bigeye tuna vessel to catch and retain bigeye tuna in the Convention Area from the effective date of this action through December 31, 2006.

Classification

This action is consistent with the Tuna Conventions Act and regulations for the Pacific Tuna Fisheries found at 50 CFR 300.25.

This action responds to the best available information obtained from the fishery. For the reasons set forth below, the Assistant Administrator for Fisheries (AA) finds good cause under 5 U.S.C. § 553(b)(B) to waive the requirement for prior notice and opportunity for public for this action, which closes the U.S. bigeye tuna longline fishery in the IATTC Convention Area for the remainder of the 2006 fishing season. Similarly, the AA finds good cause to waive the 30-day delay in the effective date for this action under 5 U.S.C. 553(d)(3). Providing prior notice and opportunity for public comment is impracticable and contrary to the public interest because it would take time to effectuate, resulting in continued harvest of bigeye tuna by the U.S. longline fleet over the 2001 catch levels. Exceeding the quota violates US obligations to conserve bigeye tuna under the Convention. In 2003, 2004, and 2005, IATTC stock assessment scientists concluded that the bigeye tuna stock is at a level below that which would produce the average maximum sustainable yield. Furthermore, NOAA has determined that bigeye tuna in the Pacific are subject to overfishing, using the standards for ''overfishing'' in the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.* At this time, the public's interests are best served by immediately closing this fishery. Closing this fishery now will ensure that the U.S. does not exceed the U.S. longline bigeye tuna quota, and will contribute to maintaining the bigeye tuna stocks at levels that will sustain the stocks at maximum sustainable yield for the future. For the same reasons, the AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. § 553(d)(3).

This action is authorized by 50 CFR 300.25(b), and is exempt from review under Executive Order 12866.

Authority: 16 U.S.C. 951–961 *et seq.*

Dated: June 29, 2006.

James P. Burgess,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

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