DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R7–ES–2008–0105; 92210–1117–0000–FY08–B4]

RIN 1018–AV92

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

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), propose to designate critical habitat for the southwest Alaska Distinct Population Segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*) under the Endangered Species Act of 1973, as amended (Act). In total, approximately 15,225 square kilometers (km^2) (5,879 square miles (mi^2)) fall within the boundaries of the proposed critical habitat designation. The proposed critical habitat is located in Alaska.

DATES: We will accept comments received on or before February 17, 2009. We must receive requests for public hearings, in writing, at the address shown in the **FOR FURTHER INFORMATION CONTACT** section by January 30, 2009.

ADDRESSES: You may submit comments by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *U.S. mail or hand-delivery:* Public Comments Processing, Attn: FWS–R7–ES–2008–0105; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, Suite 222; Arlington, VA 22203.

We will not accept e-mail or faxes. We will post all comments on *http://www.regulations.gov*. This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

Detailed, colored maps of areas proposed as critical habitat in this proposed rule are available for viewing at *http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm*. Hard copies of maps can be obtained by contacting the Marine Mammals Mangement Office (see **FOR FURTHER INFORMATION CONTACT**).

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

SUPPLEMENTARY INFORMATION:

Public Comments

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we request comments or suggestions on this proposed rule. We particularly seek comments concerning:

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

(2) Specific information on:

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

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

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

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

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

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

You may submit your comments and materials concerning this proposed rule by one of the methods listed in the **ADDRESSES** section. We will not consider comments sent by email or fax or to an address not listed in the **ADDRESSES** section.

If you submit a comment via *http://www.regulations.gov*, your entire comment—including any personal identifying information—will be posted on the Web site. If you submit a hardcopy comment that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy comments on *http://www.regulations.gov*.

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

Background

It is our intent to discuss only those topics directly relevant to the designation of critical habitat in this proposed rule. For more information on the southwest Alaska DPS of the northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366). More detailed information on northern sea otter biology and ecology that is directly relevant to designation of critical habitat is discussed under the Primary Constituent Elements section below.

Description and Taxonomy

Sea otters are the only completely marine species of the aquatic lutrinae, or otter subfamily of the family Mustelidae (skunks, weasels, minks, badgers, and honey badgers) (Wozencraft 1993, pp. 310). In an exhaustive systematic review and analysis of sea otter skull morphology, Wilson *et al.* (1991, p. 33–34) concluded there were three subspecies, the Russian sea otter (*Enhydra lutris lutris*) from Asia to the Commander Islands, southern sea otter (*E. l. nereis*) from California, and a newly described subspecies, the northern sea otter (*E. l. kenyoni*), from Alaska.

Currently there are three population stocks of sea otters recognized in Alaska, as defined under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*): (1) Southeast Alaska; (2) southcentral Alaska; and (3) southwest Alaska (Gorbics and Bodkin 2001, p. 632). The southwest Alaska population

stock (DPS) is listed as threatened under the Act.

The sea otter is one of the largest mustelids, and the sexes are moderately dimorphic (two distinct forms). Adult males attain weights of 45 kilograms (kg) (99.2 pounds (lbs)) and total lengths of 148 centimeters (cm) (58.3 inches (in)), and adult females attain weights of 36 kg (79.4 lbs) and total lengths of 140 cm (55.1 in). Size appears to vary among populations and to a large extent may represent the status of the population relative to available food resources.

Fur and the air trapped within it provide the primary source of insulation and buoyancy for the sea otter, and in contrast to most other marine mammals (which rely on a thick blubber layer), there is little or no subcutaneous fat. The ability of the sea otter to thermoregulate is dependent on maintaining the integrity of the pelage (fur), in conjunction with an extremely high metabolic rate (as discussed below). This requires a nearly constant, yet gradual, molt, as well as frequent and vigorous grooming. The color of the pelage ranges from light brown to nearly black. As animals age, they may attain a grizzled appearance, with whitening occurring in the head, neck, and torso regions. Newborn pups have a pale brown, woolly natal pelage until about 3 months of age.

Distribution and Habitat

The southwest Alaska DPS of the northern sea otter ranges from Attu Island at the western end of Near Islands in the Aleutians, east to Kamishak Bay on the western side of lower Cook Inlet, and includes waters adjacent to the Aleutian Islands, the Alaska Peninsula, the Kodiak archipelago, and the Barren Islands.

As a species, sea otters occur only in the North Pacific Ocean. The historical range includes coastal habitats around the Pacific Rim between central Baja California and northern Japan. The range currently occupied extends from southern California to northern Japan, with extralimital sightings in central Baja California and near Wrangel Island in the Chukchi Sea. The northward limits in distribution appear related to the southern limits of sea ice, which can preclude access to foraging habitat. Seasonal and inter-annual variation in the southern extent of sea ice results in constriction and expansion of the sea otter's northern range. During periods of advancing winter sea ice along their northern range, sea otters occasionally become trapped and sometimes die (Nikolaev 1965, p. 35; Schneider and Faro 1975, p. 91). Sea otters attempting to travel tens of kilometers over the Alaska Peninsula to access the ice-free Pacific were observed in 1971 and 1972 (Schneider and Faro 1975, pp. 93–96) and again in 1982, 1999, and 2000 (USGS unpub. data). Although some otters may succeed in such efforts, many apparently die from starvation or predation by wolves (*Canis lupus*), red foxes (*Vulpes vulpes*), and wolverines (*Gulo gulo*). Southern range limits are less well understood but appear to coincide with the southern limits of coastal upwelling, associated canopy-forming kelp forests, and the 20–22° Celsius (68–72° Fahrenheit) isotherm (Kenyon 1969, p. 135; Estes 1980, p. 133).

Sea otters occupy and use all habitats within the nearshore marine ecosystem, from protected bays and estuaries to exposed outer coasts and offshore islands. Because they need to dive to the sea floor to forage (Bodkin 2001, p. 2616), the seaward limit of their usual distribution is defined by their diving ability and is approximated by the 100 meter (m) (328.1 feet (ft)) depth contour. While sea otters may be found at the surface in water deeper than 100 m (328.1 ft), either resting or swimming, they are most commonly observed in waters within a few km of shore (Riedman and Estes 1990, p. 22), and higher densities are frequently associated with shallow water (Laidre *et al.* 2002, p. 1177). Bodkin and Udevitz (1999, p. 22) found 80 percent of the otters in Prince William Sound (PWS) where water depths are less than 40 m (131.2 ft), although the proportion of total habitat within this bathymetric zone was about 33 percent. Where relatively shallow waters or islands extend far offshore, sea otters can also be found in high densities (Kenyon 1969, p. 57). While they periodically haul out on intertidal or supratidal shores (flooded by very high tides), particularly during winter months, and generally remain close to the sea-land interface, no aspect of their life history requires leaving the ocean (Kenyon 1969, pp. 59–104; Riedman and Estes 1990, p. 24). Although sea otter habitat occurs in the nearshore marine environment, it is important to note that activities that occur in the broader Bering Sea and Gulf of Alaska ecosystems may affect their habitat and populations (Estes *et al.* 1998, p. 475).

Sea otters forage in diverse bottom types, from fine mud and sand to rocky reefs. Recent research employing archival time depth recorders recovered from sea otters in southeast Alaska showed that 84 percent of foraging occurred in depths between 2–30 m (6.6–98.4 ft), and that 16 percent of all foraging was between 30–100 m (98.4–328.1 ft) (Bodkin *et al.* 2004, p. 305). Maximum foraging depths averaged 61 m (200.1 ft) and ranged from 35–100 m (114.8–328.1 ft). Less than 2 percent of all foraging dives were greater than 55 m (180.4 ft). Females dove to depths less than 20 m (65.6 ft) on 85 percent of their foraging dives while males dove to depths greater than 45 m (147.6 ft) on 50 percent of their foraging dives. Recent research from California suggests these patterns may be similar among populations (Tinker *et al.* 2006, p. 148).

Previous Federal Actions

The southwest Alaska DPS of the northern sea otter was listed as threatened on August 9, 2005 (70 FR 46366). Critical habitat was considered to be prudent, but not determinable, and therefore was not designated for this DPS at the time of listing. When a not determinable finding is made, we must, within one year of the publication date of the final listing rule, designate critical habitat, unless the designation is found to be not prudent. On December 19, 2006, the Center for Biological Diversity filed suit against the Service for failure to designate critical habitat within the statutory time frame (Center for Biological Diversity *et al.* v. Kempthorne *et al.*, No. 1:06–CV–02151–RMC (D.D.C. 2007)). On April 11, 2007, the U.S. District Court for the District of Columbia entered an order approving a stipulated settlement of the parties requiring the Service on or before November 30, 2008, to submit to the **Federal Register** a determination as to whether designation of critical habitat for the southwest Alaska DPS is prudent, and if so, to publish a proposed rule. We have subsequently reaffirmed that critical habitat for the southwest Alaska DPS of the northern sea otter is prudent. This proposed rule complies with the court order and section 4(b)(2) of the Act. For more information on previous Federal actions concerning the southwest Alaska DPS of the northern sea otter, refer to the final listing rule published in the **Federal Register** on August 9, 2005 (70 FR 46366).

Critical Habitat

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided under the Act are no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against Federal agencies carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. Section 7 of the Act requires consultation on Federal actions that may affect critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by the landowner. Where the landowner seeks or requests Federal agency funding or authorization for an activity that may affect a listed species or critical habitat, the consultation requirements of section 7 of the Act would apply. However, even in the event of a destruction or adverse modification finding, the landowner's obligation is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

For inclusion in a critical habitat designation, habitat within the geographical area occupied by the species at the time it was listed must contain the physical and biological features essential to the conservation of the species. Critical habitat designations identify, to the extent known using the best scientific data available, habitat areas that provide essential life cycle needs of the species (areas on which are found the primary constituent elements, as defined at 50 CFR 424.12(b)). Occupied habitat that contains the features essential to the conservation of the species meets the definition of critical habitat only if those features may require special management considerations or protection. Under the Act, we can designate unoccupied areas as critical habitat only when we determine that the best available scientific data demonstrate that the designation of that area is essential to the conservation needs of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific and commercial data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271)), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be proposed as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, or other unpublished materials and expert opinion or personal knowledge.

Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designated critical habitat may not include all of the habitat areas that we may eventually determine, based on scientific data not now available to the Service, are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be required for recovery of the species.

Areas that support populations, but are outside the critical habitat designation, will continue to be subject to conservation actions we implement under section 7(a)(1) of the Act and our other wildlife authorities. They are also subject to the regulatory protections afforded by the section 7(a)(2) jeopardy standard, as determined on the basis of the best available scientific information at the time of the agency action. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

As required by section 4(b) of the Act, we used the best scientific data available in determining areas occupied at the time of listing that contain features essential to the conservation of the southwest Alaska DPS of the northern sea otter, and areas unoccupied at the time of listing that are essential to the conservation of the DPS, or both. In proposing critical habitat for the southwest Alaska DPS of the northern sea otter, we reviewed the relevant information available, including peer-reviewed journal articles, unpublished reports, the final listing rule, and unpublished materials (such as survey results and expert opinions). In general, sea otters occupy the vast majority of the available habitat within southwest Alaska. Exceptions include portions of Kodiak Island where otters have yet to recolonize their former range, and there may also be some individual islands in the Aleutian archipelago where otters have disappeared (Doroff *et al.* 2003, p. 58). We are not currently proposing any areas outside the geographical area presently occupied by the DPS because designating only occupied areas is sufficient for the conservation of the species.

We have also reviewed available information that pertains to the habitat requirements of this species including research published in peer-reviewed articles and presented in academic theses and agency reports. We also discussed habitat requirements with members of the southwest Alaska sea otter recovery team at several meetings. The sea otter recovery team includes representatives from University of Alaska Fairbanks, Fish and Wildlife Service, University of British Columbia, Marine Conservation Alliance, U.S. Geological Survey (USGS), Alaska Veterinary Pathology Services, Defenders of Wildlife, National Marine Fisheries Service, The Alaska SeaLife Center, Alaska Department of Fish and Game, Smithsonian National Zoological Park, The Alaska Sea Otter and Steller Sea Lion Commission, University of California Santa Cruz, University of Alaska Sea Grant Program, and Sand Point, Alaska.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and the regulations at 50 CFR 424.12, in determining which areas occupied at the time of listing to propose as critical habitat, we consider areas containing the physical and biological features that are essential to the conservation of the species and may require special management considerations or protection. These features are the specific primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement for the conservation of the species. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species.

We derive the specific primary constituent elements (PCEs) for the southwest Alaska DPS from its biological needs, as described in the Background section of this proposed rule and the following information.

Space for Individual and Population Growth and for Normal Behavior

Sea otters exhibit complex movement patterns related to habitat characteristics, social organization, and reproductive biology. It is likely that movements differ among populations depending on whether a population is at or near carrying capacity or has access to unoccupied suitable habitat into which it can expand (Riedman and Estes 1990, p. 58). Most research into sea otter movements has been conducted where unoccupied habitat is available to dispersing animals. Early research in the Aleutian Islands by Kenyon (1969, p. 204) also found that males have larger home ranges than females and described the female sea otter's home range as including 8–16 km (5.0–9.9 mi) of contiguous coastline. Male sea otter home ranges are highly variable. For territorial (breeding) males, the area defended is smaller than that of a female range, but the territory is not necessarily defended year-round and may include larger scale movements to more productive feeding grounds. Breeding may not occur until a male is older (7–10 years) and in an established population. Little is known about the home range of non-breeding males. In the listed region, where dramatic reduction in numbers have occurred, even less is known about movement patterns and home range sizes (A. Doroff, USFWS, pers. comm. 2008).

At present, sea otters occur throughout nearly all of their former range in southwest Alaska, albeit at considerably lower densities than were present prior to the recent population decline that led to the listing of the DPS. Space for individual and population growth and for normal behavior does not appear to be a limiting factor for this DPS.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

The sea otter is a generalist predator, known to consume a wide variety of different prey species (Kenyon 1969, p. 110; Riedman and Estes 1990, p. 36; Estes and Bodkin 2002, p. 847). With few exceptions, their prey consist of sessile, or slow-moving, benthic invertebrates such as mollusks, crustaceans, and echinoderms, including sea urchins. Foraging occurs in habitats with rocky and soft sediment substrates between the high intertidal zone to depths slightly in excess of 100 m (328.1 ft). Preferred foraging habitat is generally in depths less than 40 m (131.2 ft; Riedman and Estes 1990, p. 31), although studies in southeast Alaska have found that some animals forage mostly at depths from 40–80 m (131.2–262.5 ft; Bodkin et. al. 2004, p. 318).

The diet of sea otters is usually studied by observing prey items brought to the surface for consumption, and therefore diet composition is usually expressed as a percentage of all identified prey that belong to a particular prey species or type. Although the sea otter is known to prey on a large number of species, only a few tend to predominate in the diet in any particular area. Prey type and size depends on location, habitat type, season, and length of occupation.

Sea otters can be very diverse in their diets. Different habitats offer different types of prey. There are about 200 known prey species for sea otters, but the dominant ones that tend to sustain the population are crab, clam, urchin, and mussel. The predominately soft-sediment habitats of southeast Alaska, Prince William Sound, and Kodiak Island support populations of clams that are the primary prey of sea otters. Throughout most of southeast Alaska, burrowing clams (species of *Saxidomus, Protothaca, Macoma*, and *Mya*) predominate in the sea otter's diet (Kvitek *et al.* 1993, p. 172). They account for more than 50 percent of the identified prey, although urchins (*S. droebachiensis*) and mussels (*Modiolis modiolis, Mytilus* spp., and *Musculus* spp.) can also be important. In Prince William Sound and Kodiak Island, clams account for 34–100 percent of the otter's prey (Calkins 1978, p. 127; Doroff and Bodkin 1994, p. 202; Doroff and DeGange 1994, p. 706). Mussels (*Mytilus trossulus*) apparently become more important for sea otters as a prey base as the length of occupation by sea otters increases, ranging from 0 percent of their prey base at newly occupied sites at Kodiak to 22 percent of their prey base in long-occupied areas (Doroff and DeGange 1994, p. 709). Crabs (*C. magister*) were once important sea otter prey in eastern Prince William Sound, but apparently have been depleted by otter foraging and are no longer eaten in large numbers (Garshelis *et al.* 1986, p. 642). Sea urchins are minor components of the sea otter's diet in Prince William Sound and the Kodiak archipelago. In contrast, the diet in the Aleutian, Commander, and Kuril Islands is dominated by sea urchins and a variety of fin fish (Kenyon 1969, p. 116; Estes *et al.* 1982, p. 250). Sea urchins tend to dominate the diet of low-density sea otter populations, whereas more fishes are consumed in populations near equilibrium density (Estes *et al.* 1982, p. 250). For unknown reasons, fish are rarely consumed by sea otters in regions east of the Aleutian Islands.

As the population has declined in the past 20 years throughout much of the range of the southwest Alaska DPS of the northern sea otter, prey species such as sea urchins have increased in both size and abundance (Estes *et al.* 1998, p. 474). Recent studies of sea otter body condition indicate improved overall health and suggest that limited nutritional resources were not the cause of the observed population decline (Laidre *et al.* 2006, p. 987). Although food, water, air, light, minerals, or other nutritional or physiological requirements do not appear to be a limiting factor, availability of sufficient prey resources and areas in which to forage is essential to the conservation of the DPS.

Cover or Shelter

Estes *et al.* (1998, p. 473) believe the decline of sea otters in southwest Alaska is the result of increased predation, most likely by killer whales (*Orcinus orca*). These authors examined a suite of information and concluded that the recent population decline was likely not due to food limitation, disease, or

reduced productivity. Several lines of evidence, including increased frequency of killer whale attacks and significantly higher mortality rates in Kuluk Bay on Adak Island, as compared to Clam Lagoon, a protected area that is inaccessible to killer whales, also support this conclusion (Estes *et al.* 1998, p. 473).

A shift in distribution toward the shoreline has also been observed in the western and central Aleutian Islands, which may allow otters easier escape onto the land. In August 2007, the Service and USGS conducted skiff-based surveys in the Near and Rat Island groups in the western Aleutians. In addition to recording the number and approximate location of every otter sighting, observers also recorded the approximate distance to the nearest shore. The median distance to shore for 811 sea otters observed was 10 m (32.8 ft); 90 percent of all otters observed were within 100 m (328.1 ft) (USFWS unpublished information). Aerial survey data indicate that in some areas, the majority of the remaining sea otter population inhabits sheltered bays and coves, which may also provide protection from marine predators (USFWS unpublished information).

Canopy-forming kelps (including species of *Macrocystis, Alaria*, and to a lesser extent *Nereocystis*), provide resting habitat (Kenyon 1969, p. 57; Riedman and Estes 1990, p. 23), and may also provide protection from marine predators (C. Matkin, personal communication). Kelp forests occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition, killer whales may be less likely to forage in shallow, constricted areas less than 2 m (6.6 ft) in depth (C. Matkin, personal communication).

Based on our understanding of threats to the southwest Alaska DPS, we believe that features that provide protection from marine predators, especially killer whales, are essential to the conservation of the DPS.

Sites for Breeding, Reproduction, or Rearing (or Development) of Offspring

There appears to be a positive relationship between shoreline complexity and sea otter density (Riedman and Estes 1990, p. 23). Although not obligatory, headlands, coves, and bays appear to offer preferred resting habitat, particularly to females with pups, presumably because they provide protection from high wind and sea conditions. Surveys of sea otters in southwest Alaska do not indicate that pup production is a limiting factor for the DPS (USFWS and USGS unpublished information).

Habitats Protected From Disturbance or Representative of the Historical, Geographical, and Ecological Distributions of the Species

Within the range of the southwest Alaska DPS of the northern sea otter, the vast majority of sea otter habitats are undisturbed, and are representative of the historical, geographical, and ecological distributions of the species.

Primary Constituent Elements for the Southwest Alaska DPS of the Northern Sea Otter

Within the geographical area occupied by the southwest Alaska DPS of the northern sea otter at the time of listing, we must identify the primary constituent elements (PCEs) laid out in the appropriate quantity and spatial arrangement essential to the conservation of the DPS (i.e., the essential physical and biological features) that may require special management considerations or protections.

Based on the above needs and our current knowledge of the life history, biology, and ecology of the species, we have determined that the southwest Alaska DPS of the northern sea otter's PCEs are:

(1) Shallow, rocky areas where marine predators are less likely to forage, which are waters less than 2 m (6.6 ft) in depth,

(2) Nearshore waters that may provide protection or escape from marine predators, which are those within 100 m (328.1 ft) from the mean high tide line and

(3) Kelp forests that provide protection from marine predators, which occur in waters less than 20 m (65.6 ft) in depth.

(4) Prey resources within the areas identified by PCEs 1–3 that are present in sufficient quantity and quality to support the energetic requirements of the species.

We propose units for designation because each of these units contains sufficient PCEs to support at least one of the species' life history functions. Some units contain all of these and support multiple life processes, while some units contain only a portion of PCEs, necessary to support the species' particular use of that habitat.

Special Management Considerations or Protections

When designating critical habitat, we assess whether the occupied areas contain features that are essential to the conservation of the species and that may require special management considerations or protections. The range of the southwest Alaska DPS of the northern sea otter is sparsely populated by humans. There are only 31 populated communities located within an area that contains approximately 18,000 km (11,184 mi) of coastline. The human population within the range of the DPS is approximately 17,000 persons living in 31 communities (State of Alaska Department of Commerce, Community, and Economic Development Database 2006). The scale of human activities that occur within the proposed critical habitat areas is exceedingly small. Potential activities that could harm the identified physical and biological features include, but are not limited to, dredging or filling associated with construction of airports, seaports, and harbors; commercial shipping; and oil and gas development and production.

Pollution from various potential sources, including oil spills from vessels, or discharges from oil and gas drilling and production, could render areas containing the identified physical and biological features unsuitable for use by sea otters, effectively negating the conservation value of these features. Because of the vulnerabilities to pollution sources, these features may require special management or protection through such measures as placing conditions on Federal permits or authorizations to stimulate special operational restraints, mitigative measures, or technological changes.

The shipping industry transports various types of petroleum products both as fuel and cargo within the range of the southwest Alaska DPS. Information about the types and quantities of both persistent and non-persistent oil has been summarized in a report on vessel traffic within the Aleutians subarea (Nuka Research and Planning Group 2006). Persistent fuels such as #6 bunker oil, bunker C, and IFO 380 have low dissipation and evaporation rates, and will remain on the surface of marine waters or along shorelines much longer than non-persistent fuel such as diesel, gasoline, and aviation fuel. Approximately 3,100 ship voyages occur through the Aleutians each year. Most of these voyages are by bulk and general freight ships (1,300) and container ships (1,200). The median fuel capacity for bulk and general freight ships is 470,000 gallons of persistent fuel oil; for container ships, the median capacity is 1.6 million gallons of persistent fuel oil. In addition, there are about 265 voyages by motor vehicle carriers with an estimated average fuel capacity of 500,000 gallons of persistent fuel oil.

There are also approximately 22 voyages by tanker ships transporting about 400 million gallons of refined oil. The figures quoted above are for the Aleutians subarea only, which includes the North Pacific great circle route from the west coast of North America to Asia. Information about shipping traffic that occurs in other parts of the southwest Alaska DPS is not well-documented, though it is presumably on a much smaller scale compared to what occurs through the Aleutians.

Numerous instances of vessel incidents have been documented in the Aleutians over the past 15 years, including loss of maneuverability, grounding, and oil spills (Nuka Research and Planning Group 2006, p. 29). Nearly 500 incidents affecting the seaworthiness of U.S. vessels were reported in the Aleutians from 1990 through July 2006. U.S. vessels reporting incidents were usually smaller than foreign vessels, and were primarily fishing vessels. An additional 48 incidents affecting seaworthiness of foreign vessels were reported between 1991 and July 2006. The bulk grain ship *M/V Selendang Ayu* which ran aground on Unalaska Island in December 2004, is known to have resulted in the death of two sea otters. The long-term impacts of that spill on sea otter habitat use are not yet known.

Various safeguards have been established since the 1989 *Exxon Valdez* oil spill to minimize the likelihood of another spill of catastrophic proportions in Prince William Sound. Tankers, other vessels, fuel barges, and onshore storage facilities are potential sources of oil and fuel spills that could affect sea otters in the southwest Alaska DPS. A review of the Alaska Department of Environmental Conservation database indicates no crude-oil spills were reported within the range of the southwest Alaska DPS during the 10-year period from July 1, 1995, to June 30, 2005. Of the 520 reported spills of refined products, 82 percent were from vessels; most of these (70 percent) involved quantities smaller than 10 gallons. The majority of vessel spills occurred in the western Aleutian (149), eastern Aleutian (107), and Kodiak, Kamishak, Alaska Peninsula (130) management units. Only 7 spills were reported where the quantity was greater than 5,000 gallons of material. The largest was the *M/V Selendang Ayu*, which spilled 321,052 gallons of IFO 380 fuel and an additional 14,680 gallons of diesel.

In 2006, the U.S. Coast Guard, the State of Alaska, and the National Academies of Science met to begin plans for the development of a comprehensive risk assessment for the Aleutian Islands. Although the probability of occurrence of a catastrophic oil spill may be relatively small, the potential for disastrous consequences suggest that measures to prevent or respond to spills may be important to the recovery of the southwest Alaska DPS. The Coast Guard and Maritime Transportation Act of 2004 (H.R. 2443) requires oil-spill contingency plans for vessels over 400 gross tons that call on U.S. ports. In addition to contingency plans for vessels of this size class, the Alaska Department of Environmental Conservation (ADEC) has both a unified spill-response plan as well as 10 Subarea plans. The southwest Alaska DPS is covered by the Aleutian, Bristol Bay, Kodiak, and Cook Inlet Subarea plans. In addition, ADEC is developing Geographic Response Strategies (GRS) that are designed to be a supplement to the Subarea Contingency Plans for Oil and Hazardous Substances Spills and Releases. The GRS are the current standard for site-specific oil-spill-response planning in Alaska.

The first and primary phase of an oil-spill response is to contain and remove the oil at the scene of the spill or while it is still on the open water, thereby reducing or eliminating impacts on shorelines or sensitive habitats. If some of the spilled oil escapes the first-phase containment and removal, the second, but no less important, phase is to intercept, contain, and remove the oil in the nearshore area. The intent of phase two is the same as phase one: remove the spilled oil before it affects sensitive environments. If phases one and two are not fully successful, a third phase (GRS) is designed to protect sensitive areas in the path of the oil. The purpose of phase three is to protect selected sensitive areas from the impacts of a spill or to minimize that impact to the maximum extent practical. Proposed critical habitat for the southwest Alaska DPS of the northern sea otter will be incorporated into the GRS system to facilitate this additional level of spill response.

Existing commercial fishing activities, and their target species (which are not considered prey for sea otters), within southwest Alaska primarily occur outside of the areas proposed as critical habitat in this rule (Funk 2003, p. 2). With the exception of oil spills from shipwrecks, we do not believe that existing commercial fishing activities in southwest Alaska have the potential to harm the identified physical and biological features for the southwest Alaska DPS of the northern sea otter.

Criteria Used To Identify Critical Habitat

We are proposing to designate critical habitat for the southwest Alaska DPS of the northern sea otter in areas that were occupied at the time of listing and contain sufficient PCEs: (1) To support life history functions essential to the conservation of the DPS, and (2) which may require special management considerations or protection. Much of the range of the DPS occurs within the Aleutian archipelago, and although it is possible that otters have disappeared from some of the small islands since the time of listing, we have no information that indicates any portion should be considered unoccupied habitat. As a result, we consider the Aleutian archipelago to be occupied habitat.

Unlike habitats for terrestrial species, some of the various characteristics of sea otter habitat are poorly mapped. Although shoreline boundaries are reasonably well-documented, the bathymetric data for southwest Alaska exist at a variety of spatial resolutions. Benthic substrate types are also poorly mapped. Other features, such as the distribution and abundance of sea otter prey species, and the spatial extent of kelp beds, may be dynamic over time. This lack of specificity makes it difficult to explicitly identify and map areas that contain the PCEs for this DPS beyond a certain geographic scale.

Areas that provide protection from marine predators are likely the most essential to the conservation of this DPS. Despite the absence of information necessary to map these areas with precision, we can define criteria that will contain the essential PCEs. Kelp forests that provide resting habitat and protection from marine predators occur primarily in waters less than 20 m (65.6 ft) in depth (O'Clair and Lindstrom 2000, pp. 41, 57). In addition to identifying an approximate seaward extent of kelp forests, the 20-m (65.6-ft) depth contour also encompasses the nearshore shallow areas (less than 2 m (6.6 ft)) where marine predators may be less likely to forage. The 20-m (65.6-ft) depth contour also has considerable overlap with the nearshore (<100 m (328.1 ft)) areas where otters can escape predators by hauling out on land. Areas of shallow water less than 20 m (65.6 ft) in depth that are not contiguous with the mean high tide line may provide less protection from marine predators. Nearshore marine waters ranging from mean high tide to 20 m (65.6 ft) in water depth or that occur within 100 m (328.1 ft) of the mean high tide line (or both) therefore contain the necessary PCEs for protection from marine predators

(Figure 1). Based on numerous studies of sea otter foraging depths, as well as the distribution of the remaining sea otter population in nearshore, shallow water areas, we believe that the areas defined by PCEs 1–3 also contain sufficient sea otter prey resources. We have no reason to believe that any of the areas within the proposed critical habitat designation are unable to support the energetic requirements of this species.

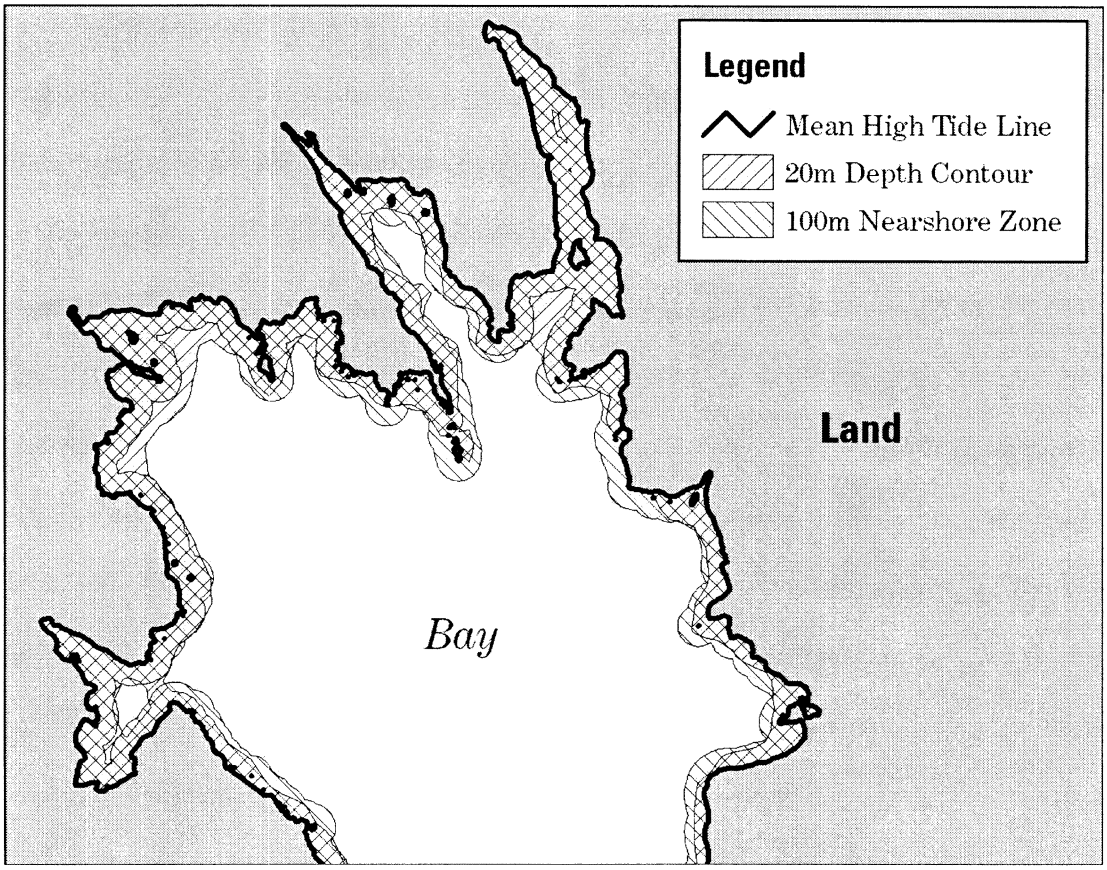


Figure 1. Shaded areas included within either the 20-m (65.6-ft) depth contour or the 100-m (328.1-ft) nearshore zone, or both (i.e., where they overlap) are considered critical habitat for the southwest Alaska DPS of the northern sea otter.

When determining proposed critical habitat boundaries within this proposed rule, we made every effort to avoid including developed areas that lack PCEs for the southwest Alaska DPS of the northern sea otter. The scale of the map we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed areas, such as piers, docks, harbors, marinas, jetties, and breakwaters. Any such structures inadvertently left inside critical habitat boundaries shown on the map of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, Federal actions involving these areas would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the PCEs in the adjacent critical habitat.

Proposed Critical Habitat Designation

We are proposing five units as critical habitat for the southwest Alaska DPS of the northern sea otter. In 2006, the Service convened a Recovery Team to develop a recovery plan for the southwest Alaska DPS of the northern sea otter. As of the publication date of this proposed rule, the Recovery Team has met five times, and a draft recovery plan is in preparation. As the range of the southwest Alaska DPS of the northern sea otter includes approximately 18,000 km (11,184.7 mi) of coastline, the team has proposed that the DPS be subdivided into 5 management units, based on criteria such as habitat type and population trajectory. In the interest of clarity, we propose designating critical habitat units that correspond to the management units proposed by the Recovery Team. Only those areas within each management unit that meet the criteria identified above are being proposed as critical habitat—namely, those areas that contain one or more PCEs and may require special management considerations or protection. Detailed, colored maps of areas proposed as critical habitat in this proposed rule are available for viewing at *http://alaska.fws.gov/fisheries/mmm/seaotters/criticalhabitat.htm.* Hard copies of maps can be obtained by contacting the Marine Mammals

Management Office (see **FOR FURTHER INFORMATION CONTACT**).

The critical habitat areas we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the DPS. Table 1 shows the occupied units. The 5 units we propose as critical habitat are: (1) Western Aleutian Unit; (2) Eastern Aleutian Unit; (3) South Alaska Peninsula Unit; (4) Bristol Bay Unit; and (5) Kodiak, Kamishak, Alaska Peninsula Unit.

TABLE 1—OCCUPANCY OF NORTHERN SEA OTTERS BY PROPOSED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Currently occupied?	Estimated size of unit in km² (mi²)	State/Federal ownership ratio (percent)
1. Western Aleutian	Yes	Yes	1,551 (599)	100/0
2. Eastern Aleutian	Yes	Yes	893 (345)	100/0
3. South Alaska Peninsula	Yes	Yes	4,945 (1,909)	85/15
4. Bristol Bay	Yes	Yes	1,080 (417)	96/4
4a. Amak Island	Yes	Yes	31 (12)	77/23
4b. Izembek Lagoon	Yes	Yes	337 (130)	100/0
4c. Port Moller/Herendeen Bay	Yes	Yes	712 (275)	94/6
5. Kodiak, Kamishak, Alaska Peninsula	Yes	Yes	6,757 (2,609)	89/11
Total			15,226 (5,879)	90/10

We present brief descriptions of all proposed critical habitat units, and reasons why they meet the definition of critical habitat for the southwest Alaska DPS of the northern sea otter, below. Calculation of areas for units and subunits that include the 20-m (65.6-ft) depth contour as a criterion are approximations estimated from GIS data layers of hydrographic survey data compiled by the National Oceanic and Atmospheric Administration (NOAA), the U.S. Geological Survey, and the Service. Consultations under section 7 of the Act should use the best available bathymetric data on a case-by-case basis. In some instances, these data may be based on other units of measurement (such as feet or fathoms), in which case the bathymetric contour that is closest to 20 m (65.6 ft) should be used. For users of NOAA nautical charts, the 10-fathom (60-ft) depth contour is a suitable approximation for the 20-m (65.6-ft) depth contour.

Although no lands above mean high tide are proposed as critical habitat, ownership of lands adjacent to critical habitat may be of interest to reviewers of this proposal (Table 2).

TABLE 2—OWNERSHIP STATUS OF LANDS ADJACENT TO PROPOSED CRITICAL HABITAT

Unit	Federal (percent)	State (percent)	Private (percent)	Alaska Native (percent)
1. Western Aleutian	80.2	0.0	0.0	19.8
2. Eastern Aleutian	10.2	0.0	0.0	89.8
3. South Alaska Peninsula	21.1	0.4	0.0	78.5
4. Bristol Bay	36.7	41.5	0.0	21.8
4a. Amak Island	100.0	0.0	0.0	0.0
4b. Izembek Lagoon	89.4	0.0	0.0	10.6
4c. Port Moller/Herendeen Bay	4.9	66.1	0.0	29.0
5. Kodiak, Kamishak, Alaska Peninsula	30.2	17.4	0.0	52.4
Total	37.9	8.5	0.0	53.6

Unit 1: Western Aleutian Unit

Unit 1 consists of at least 1,551 km² (599 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Hydrographic survey data in the vicinity of Atka and Amlia islands is insufficient to delineate the 20-m (65.6-ft) depth contour, so our area calculation may slightly underestimate the total area of this unit. This unit ranges from Attu Island in the west to Kagamil Island in the east, was occupied at the time of listing, and is currently occupied. The majority (80.2 percent) of the lands bordering this unit are federally owned within the Alaska Maritime National Wildlife Refuge. In addition, all of the proposed critical habitat within this unit is located within State of Alaska waters (defined as those within 3 mi (4.82 km) of mean high tide).

The Western Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

Unit 2: Eastern Aleutian Unit

Unit 2 consists of an estimated 893 km² (345 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This unit ranges from Samalga Island in the west to Ugamak Island in the east, was occupied at the time of listing, and is currently occupied. The majority (89.8 percent) of the lands bordering this unit are owned or selected (but not yet conveyed) by Alaska Natives. In addition, all of the proposed critical habitat within this unit is located within State of Alaska waters.

The Eastern Aleutian Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within the region and along the northern great circle route.

Unit 3: South Alaska Peninsula Unit

Unit 3 consists of an estimated 4,945 km² (1,909 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for this unit have considerably lower spatial resolution than the other units. This unit ranges from Unimak Island in the west to Castle Cape in the east, was occupied at the time of listing, and is currently occupied. The majority (78.5 percent) of the lands bordering this unit are owned or selected (but not yet conveyed) by Alaska Natives. The vast majority (85 percent) of the proposed critical habitat within this unit is located within State of Alaska waters.

The South Alaska Peninsula Unit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region and along the northern great circle route.

Unit 4: Bristol Bay Unit

Unit 4 consists of an estimated 1,080 km² (417 mi²) of the nearshore marine environment. This unit is further subdivided into 3 subunits: (4a) Amak Island; (4b) Izembek Lagoon; and (4c) Port Moller/Herendeen Bay. With the exception of Amak Island, the coastline contained within this unit is relatively simple and lacks kelp forests. For most of this unit, the 20-m (65.6-ft) depth contour used as a criterion for critical habitat in other units does not identify features that provide protection from marine predators, and is applicable only to the Amak Island subunit. Other criteria are used to identify the Izembek Lagoon and Port Moller/Herendeen Bay subunits, as described below. All three subunits within the Bristol Bay unit were occupied at the time of listing, and are currently occupied. Additional information about each subunit is included below.

Subunit 4a: Amak Island Subunit

Subunit 4a consists of an estimated 31 km² (12 mi²), collectively, of the nearshore marine waters ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. This subunit surrounds Amak Island in Bristol Bay, was occupied at the time of listing, and is currently occupied. Large groups of sea otters have been observed within the kelp forests within this subunit (USFWS unpublished information). All of the lands bordering this unit are federally owned within the Alaska Maritime National Wildlife Refuge. Most (77 percent) of the proposed critical habitat within this subunit is located within State of Alaska waters, a small portion of which (1.2 km², 0.46 mi²) is also located within the boundaries of the Izembek State Game Refuge.

The Amak Island Subunit contains all of the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this unit. An environmental impact statement is in preparation, and will be completed prior to the lease sale. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Subunit 4b: Izembek Lagoon Subunit

Subunit 4b consists of an estimated 337 km² (130 mi²) of the nearshore marine environment within the Izembek Lagoon and Moffett Lagoon systems. Sea otters are known to frequent the lagoon system and regularly haul out on the islands and sandbars that form the northern boundary of these systems, such as Glen, Operl, and Neumann Islands (USFWS unpublished information). Large numbers of otters have also been observed hauling out along the edges of the sea ice within the lagoon in winter (USFWS unpublished information). This subunit was occupied at the time of listing, and is currently occupied. The majority (89.4 percent) of the lands bordering this unit are federally owned within the Izembek National Wildlife Refuge. The proposed critical habitat within this subunit is located within State of Alaska waters, most of which (99 percent) is also within the boundaries of the Izembek State Game Refuge.

The Izembek Lagoon Subunit contains some of the PCEs (1, 2 and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Subunit 4c: Port Moller/Herendeen Bay Subunit

Subunit 4c consists of an estimated 712 km² (275 mi²) of the nearshore marine environment within the Port Moller and Herendeen Bay systems. This subunit was occupied at the time of listing, and is currently occupied. Aerial surveys conducted in 2000 and 2004, as well as additional reported observations, indicate that these areas may contain several thousand sea otters at any given time (Burn and Doroff 2005, p. 277; USFWS unpublished information). The seaward boundary of this subunit extends from Point Edward on the Alaska Peninsula to the western tip of Walrus Island, and from Wolf Point on the eastern tip of Walrus Island to Entrance Point on the Alaska Peninsula. The majority (66.1 percent) of the lands bordering to this unit are owned or selected (but not yet conveyed) by the State of Alaska. Most (94 percent) of the critical habitat within this subunit is located within State of Alaska waters, with a portion (140.8 km² (54.4 mi²)) located within the boundaries of the Port Moller State Critical Habitat area.

The Port Moller/Herendeen Subunit contains some of the PCEs (1,2, and 4) essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within Bristol Bay. In addition, offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from this subunit. Additional management considerations and

protections may be needed to minimize the risk of crude-oil spills associated with oil and gas development and production that may impact this subunit.

Unit 5: Kodiak, Kamishak, Alaska Peninsula Unit

Unit 5 consists of an estimated 6,757 km² (2,609 mi²), collectively, of the nearshore marine environment ranging from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters occurring within 100 m (328.1 ft) of the mean high tide line. Available hydrographic survey data for parts of this unit have considerably lower spatial resolution than the other units. This unit ranges from Castle Cape in the west to Tuxedni Bay in the east, and includes the Kodiak archipelago. This unit was occupied at the time of listing, and is currently occupied. Slightly more than half (52.4 percent) of the lands bordering this unit are either owned or selected (but not yet conveyed) by Alaska Natives. The majority (89 percent) of the proposed critical habitat within this unit is located within State of Alaska waters, a small portion which (41.0 km², 15.8 mi²) is also located within the boundaries of the Tugidak Island State Critical Habitat area.

The Kodiak, Kamishak, Alaska Peninsula Unit contains all the PCEs essential for the conservation of the southwest Alaska DPS of the northern sea otter. Special management considerations and protections may be needed to minimize the risk of oil and other hazardous-material spills from commercial shipping within this region.

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that actions they fund, authorize, or carry out are not likely to destroy or adversely modify critical habitat. Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service et. al.,* 245 F.3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected critical habitat would remain functional (or retain the current ability for the PCEs to be functionally established) to serve its intended conservation role for the species.

In addition, under section 7(a)(4) of the Act, Federal agencies must confer with the Service on any agency action that is likely to result in destruction or adverse modification of proposed critical habitat.

If a species is listed or critical habitat is designated, section 7(a)(2) of the Act requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of the species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. As a result of this consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect, and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat, we also provide reasonable and prudent alternatives to the project, if any are identifiable. We define ''Reasonable and prudent alternatives'' at 50 CFR 402.02 as alternative actions identified during consultation that:

- Can be implemented in a manner consistent with the intended purpose of the action,
- Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction,
- Are economically and technologically feasible, and
- Would, in the Director's opinion, avoid jeopardizing the continued existence of the listed species or destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies may sometimes need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Federal activities that may affect the southwest Alaska DPS of the northern sea otter or its designated critical habitat require section 7 consultation under the Act. Activities on State, Tribal, local, or private lands requiring a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from us under section 10 of the Act) or involving some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency) are subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat, and actions on State, Tribal, local, or private lands that are not federally funded or authorized do not require section 7 consultations.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species, or would retain its current ability for the PCEs to be functionally established. Activities that may destroy or adversely modify critical habitat are those that alter the PCEs to an extent that appreciably reduces the conservation value of critical habitat for the southwest Alaska DPS of the northern sea otter.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that, when carried out, funded, or authorized by a Federal agency, may affect critical habitat and therefore should result in consultation for the southwest Alaska DPS of the northern sea otter include, but are not limited to:

(1) Actions that would directly impact the PCEs that provide protection from marine predators. Such activities could include, but are not limited to, dredging, filling, and construction of docks, seawalls, pipelines, or other structures. Loss of the PCEs could result in increased predation pressure on the remaining sea otter population, and potentially affect the conservation of the DPS.

(2) Actions that would reduce the availability of sea otter prey species. Such activities could include, but are not limited to, dredging, filling, construction of docks, seawalls, pipelines, or other structures, and development of new fisheries for sea otter prey species. Otters that are using critical habitat for protection from marine predators must also be able to feed in these areas. Activities that reduce availability of prey may cause otters to forage outside of these protective areas, thus increasing their vulnerability to predators.

(3) Actions that would render critical habitat areas unsuitable for use by sea otters. Such activities could include, but are not limited to, human disturbance or pollution from a variety of sources, including discharges from oil and gas drilling and production or spills of crude oil, fuels, or other hazardous materials from vessels, primarily in harbors or other construction ports for marine vessels. While it is not legal to discharge fuel or other hazardous materials, it does happen more often in these areas than in other areas. These activities could displace sea otters from areas that provide protection from marine predators.

Exemptions and Exclusions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement 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 an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

- An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;
- A statement of goals and priorities;
- A detailed description of management actions to be implemented to provide for these ecological needs; and
- A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The 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.''

Eareckson Air Station, located on Shemya Island within the western Aleutian unit has a completed INRMP that was last updated in 2007. This INRMP recognizes the importance of kelp beds to sea otters (U.S. Air Force 2007, p. 39), and notes that the only impacts to kelp may be from occasional barge traffic. In addition to Eareckson, the Air Force has a completed INRMP for 4 inactive sites (Nikolski, Driftwood Bay, Port Moller, and Port Heiden) within the range of the southwest Alaska DPS (U.S. Air Force 2001). All of these sites were deactivated between 1977 and 1978, and either demolished or removed between 1988 and 1994. Of these, the Port Heiden site is the only one that includes shoreline areas. All critical habitat described in this proposal occurs below the mean high tide line and is therefore not within the boundaries of the Department of Defense facility. Therefore, there are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation.

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary must designate and revise critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the legislative history is clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, in considering whether to exclude a particular area from the designation, we must identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and determine whether the benefits of exclusion outweigh the benefits of inclusion. If, based on this analysis, we make the determination that the benefits of excluding a particular area outweigh the benefits of including it in the designation, then we can exclude the area only if such exclusion would not result in the extinction of the species.

Under section 4(b)(2) of the Act, we must consider all relevant impacts, including economic impacts. We consider a number of factors in a section 4(b)(2) analysis. For example, we consider whether there are lands owned or managed by the Department of Defense (DOD) where a national security impact might exist. We also consider whether the landowners have developed any habitat conservation plans (HCPs) for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation.

In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter are not owned or managed by the Department of Defense, there are currently no HCPs for the southwest Alaska DPS of the northern sea otter, and the proposed designation does not include any tribal lands or trust resources.

We anticipate no impact to national security, Tribal lands, or HCPs from this proposed critical habitat designation. Based on the best available information, we believe that all of these proposed critical habitat units contain the features essential to the southwest Alaska DPS of the northern sea otter. At this time, we have not analyzed areas for which the benefits of exclusion outweigh the

benefits of inclusion; therefore we are not identifying any specific exclusions for the final rule designating critical habitat for the DPS. However, during the development of a final designation, we will be considering economic and other relevant impacts and additional conservation plans, if available, public comments, and other new information such that areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act.

Economics

Section 4(b)(2) of the Act allows the Secretary to exclude areas from critical habitat for economic reasons if the Secretary determines that the benefits of such exclusion exceed the benefits of designating the area as critical habitat. However, this exclusion cannot occur if it will result in the extinction of the species concerned.

In compliance with section 4(b)(2) of the Act, we are preparing an analysis of the economic impacts of proposing critical habitat for the southwest Alaska DPS of the northern sea otter to evaluate the potential economic impact of the designation. We will announce the availability of the draft economic analysis as soon as it is completed, at which time we will seek public review and comment. At that time, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov*, or from the Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**). We may exclude areas from the final rule based on the information in the economic analysis.

Peer Review

In accordance with our joint policy published in the **Federal Register** on July 1, 1994 (59 FR 34270), we are obtaining the expert opinions of at least three appropriate independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data, assumptions, and analyses. We have invited these peer reviewers to comment during this public comment period on our specific assumptions and conclusions in this proposed designation of critical habitat.

We will consider all comments and information we receive during this comment period on this proposed rule during our preparation of a final determination. Accordingly, our final decision may differ from this proposal.

Public Hearings

The Act provides for one or more public hearings on this proposal, if we receive any requests for hearings. We must receive your request for a public hearing within 45 days of the date of publication of this proposal (see the **DATES** section). Send your request to the person named in the **FOR FURTHER INFORMATION CONTACT** section. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the first hearing.

Editorial Changes to the Table at 50 CFR 17.11(h)

We also propose certain editorial changes to the northern sea otter's entry in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h). First, we would update the entry to accurately reflect the citation of the special rule for this DPS, which was published on August 15, 2006, at 71 FR 46864. In that final rule, we inadvertently neglected to update the entry to note the special rule at 50 CFR 17.40(p). Second, we are providing the ''When Listed'' date for the entry. That date was not included when we published the final rule listing the southwest Alaska DPS of the northern sea otter as threatened (70 CFR 46366). These editorial changes would help ensure the entry for the northern sea otter in the List of Endangered and Threatened Wildlife at 50 CFR 17.11(h) is complete and accurate.

Required Determinations

Regulatory Planning and Review

The Office of Management and Budget (OMB) has determined that this rule is not significant and has not reviewed this proposed rule under Executive Order 12866 (E.O. 12866). OMB bases its determination upon the following four criteria:

(a) Whether the rule will have an annual effect of $100 million or more on the economy or adversely affect an economic sector, productivity, jobs, the environment, or other units of the government.

(b) Whether the rule will create inconsistencies with other Federal agencies' actions.

(c) Whether the rule will materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

(d) Whether the rule raises novel legal or policy issues.

Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency must 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 (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended RFA to require Federal agencies to provide a statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

At this time, we lack the available economic information necessary to provide an adequate factual basis for the required RFA finding. Therefore, we defer the RFA finding until completion of the draft economic analysis prepared under section 4(b)(2) of the Act and E.O. 12866. This draft economic analysis will provide the required factual basis for the RFA finding. Upon completion of the draft economic analysis, we will announce availability of the draft economic analysis of the proposed designation in the **Federal Register** and reopen the public comment period for the proposed designation. We will include with this announcement, as appropriate, an initial regulatory flexibility analysis or a certification that the rule will not have a significant economic impact on a substantial number of small entities accompanied by the factual basis for that determination. We have concluded that deferring the RFA finding until completion of the draft economic analysis is necessary to meet the purposes and requirements of the RFA. Deferring the RFA finding in this manner will ensure that we make a sufficiently informed determination based on adequate economic information and provide the necessary opportunity for public comment.

Unfunded Mandates Reform Act

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

(a) This rule would 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, or 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 [T]ribal 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 [T]ribal 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; AFDC 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 Act, 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 that receive Federal funding, assistance, or permits, or that 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 onto State governments.

(b) We do not believe that this rule would significantly or uniquely affect small governments because the areas being proposed for critical habitat designation occur within State of Alaska waters. The State of Alaska does not fit the definition of ''small governmental jurisdiction.'' Waters adjacent to Native-owned lands are still owned and managed by the State of Alaska. In most cases, development around Native villages is happening with funding from Federal or State sources (or both). Therefore, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings

In accordance with E.O. 12630 (Government Actions and Interference with Constitutionally Protected Private Property Rights), we have analyzed the potential takings implications of designating critical habitat for the southwest Alaska DPS of the northern sea otter in a takings implications assessment. The takings implications assessment concludes that this proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter does not pose significant takings implications for lands within or affected by the designation.

Federalism

In accordance with E.O. 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism assessment is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Alaska. The designation of critical habitat in areas currently occupied by the southwest Alaska DPS of the northern sea otter imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the features essential to the conservation of the species are more clearly defined, and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. This information does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. This proposed rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs of the southwest Alaska DPS of the northern sea otter.

Paperwork Reduction Act of 1995

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). 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 (NEPA)

It is our position that, outside the jurisdiction of the Circuit Court of the United States for the Tenth Circuit, we do not need to prepare environmental analyses as defined by NEPA (42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This determination was upheld by the Circuit Court of the United States for the Ninth Circuit (*Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995)).

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(a) Be logically organized;

(b) Use the active voice to address readers directly;

(c) Use clear language rather than jargon;

(d) Be divided into short sections and sentences; and

(e) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one

of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, Government-to-Government Relations with Native American Tribal Governments (59 FR 22951), E.O. 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with Tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to Tribes. As all the proposed critical habitat units occur seaward from the mean high tide line, we have determined that there are no tribal lands occupied at the time of listing that contain the features essential for the conservation, and no tribal lands essential for the conservation, of the southwest Alaska DPS of the northern sea otter. Therefore, we have not proposed designation of critical habitat for the southwest Alaska DPS of the northern sea otter on tribal lands.

We do not expect the proposed critical habitat to have any impact on tribal subsistence activities. All subsistence hunting would take place in or on State lands or waters. Unless subsistence hunting is determined to be ''materially and negatively impacting the DPS,'' then harvest would not be regulated.

Energy Supply, Distribution, or Use

On May 18, 2001, the President issued an Executive Order (E.O. 13211; Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. Offshore oil and gas development are under consideration in the Lease Sale Area 92 in the North Aleutian Basin region immediately offshore from the three subunits of the Bristol Bay proposed critical habitat unit. We do not expect this proposed rule to significantly affect energy supplies, distribution (including shipping channels), or use because most oil and gas development activities would not overlap with the habitats used by northern sea otters, and we would not expect the activities to cause significant alteration of the PCEs. Any proposed development project likely would have to undergo section 7 consultation to ensure that the actions would not destroy or adversely modify designated critical habitat. Consultations may entail modifications to the project to minimize the potential adverse effects to northern sea otter critical habitat. A spill-response plan would have to be developed to minimize the chance that a spill would have negative effects on sea otters or critical habitat. However, we conduct thousands of consultations every year throughout the United States, and in almost all cases, we are able to accommodate both project and species' needs. We expect that to be the case here. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

References Cited

A complete list of all references cited in this proposed rulemaking is available upon request from the Field Supervisor, Marine Mammals Management Office (see **FOR FURTHER INFORMATION CONTACT**).

Author(s)

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

List of Subjects in 50 CFR Part 17

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

Proposed Regulation Promulgation

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

PART 17—[AMENDED]

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

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

2. In § 17.11(h), revise the entry for ''Otter, northern sea'' under ''MAMMALS'' in the List of Endangered and Threatened Wildlife to read as follows:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
MAMMALS							
*	*	*	*	*	*		*
Otter, northern sea.	*Enhydra lutris kenyoni*	U.S.A., (AK, WA).	Southwest Alaska, from Attu Island to Western Cook Inlet, including Bristol Bay, the Kodiak Archipelago, and the Barren Islands.	T	August 9, 2005.	17.95(a)	17.40(p)
*	*	*	*	*	*		*

3. In § 17.95, amend paragraph (a) by adding an entry for ''Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment,'' in the same alphabetical order that the species appears in the table at § 17.11(h), to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

(a) Mammals.

* * * * *

Northern Sea Otter (*Enhydra lutris kenyoni*), Southwest Alaska Distinct Population Segment

(1) Critical habitat units are in Alaska, as described below.

(2) The primary constituent elements of critical habitat for the southwest Alaska distinct population segment (DPS) of the northern sea otter are:

(i) Shallow, rocky areas where marine predators are less likely to forage, which are in waters less than 2 m (6.6 ft) in depth;

(ii) Nearshore waters within 100 m (328.1 ft) from the mean high tide line; and

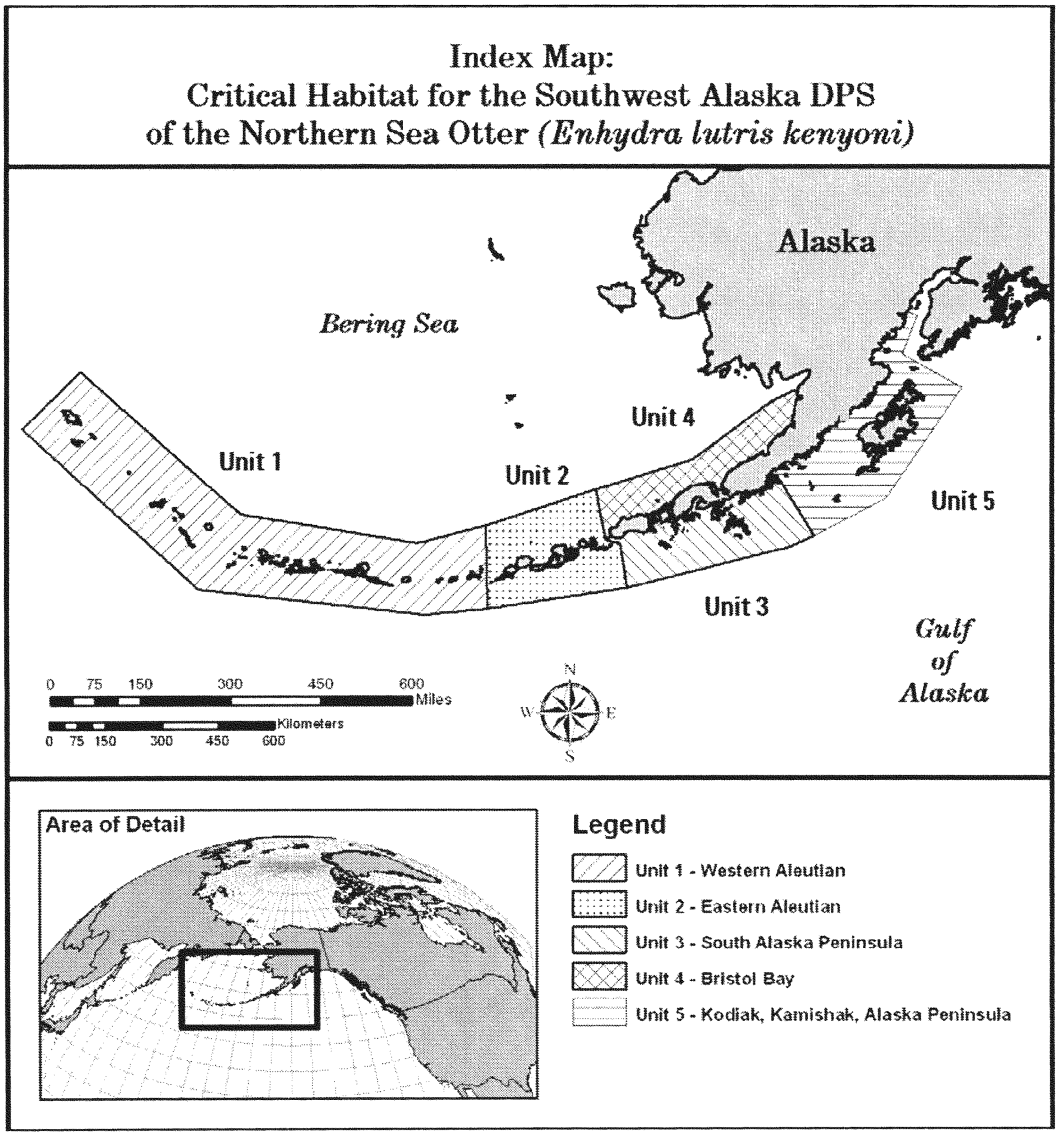
(iii) Kelp forests, which occur in waters less than 20 m (65.6 ft) in depth.

(iv) Prey resources within the areas identified by PCEs 1–3 that are present in sufficient quantity and quality to support the energetic requirements of the species.

(3) Critical habitat does not include manmade structures (including, but not limited to, docks, seawalls, pipelines, or other structures) and the land on which they are located existing within the boundaries on the effective date of this rule.

(4) Critical habitat map units. Boundaries of critical habitat were derived from GIS data layers of hydrographic survey data developed by the National Oceanic and Atmospheric Administration. To estimate the size of each critical habitat unit, the data were projected into Alaska Standard Albers Conical Equal Area on the North American Datum of 1983. Given the large geographic range of this DPS, some two-dimensional areas appear as one-dimensional features at these map scales.

(5) Note: Index Map for critical habitat for the southwest Alaska DPS of the northern sea otter follows:



(6) *Unit 1:* Western Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Adak, Agattu, Alaid, Amatignak, Amchitka, Amlia, Amukta, Anagaksik, Asuksak, Atka, Attu, Aziak, Bobrof, Buldir, Carlisle, Chagula, Chuginadak, Chugul, Crone, Davidof, Elf, Gareloi, Great Sitkin, Herbert, Igitkin, Ilak, Kagalaska, Kagamil, Kanaga, Kanu, Kasatochi, Kavalga, Khvostof, Kiska, Koniuji, Little Kiska, Little Sitkin, Little Tanaga, Nizki, Ogliuga, Oglodak, Rat, Sadatanak, Sagchudak, Salt, Seguam, Segula, Semisopochnoi, Shemya, Skagul, Tagadak, Tagalak, Tanaga, Tanaklak, and Ulak.

(7) *Unit 2:* Eastern Aleutian. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the following islands: Aiktak, Akutan, Amaknak, Arangula, Atka, Avatanak, Baby Islands, Bogoslof, Egg, Hog, Kaligagan, Rootok, Samalga, Sedanka, Tigalda, Ugamak, Umnak, Unalaska, Unalga, and Vsevidof.

(8) *Unit 3:* South Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from False Pass (54.242° N, 163.363° W) to Castle Cape (56.242° N, 158.117° W), and adjacent to the following islands: Andronica, Atkins, Big Koniuji, Bird, Brother, Caton, Chankliut, Chernabura, Cherni, Chiachi, Deer, Dolgoi, Egg, Goloi, Guillemot, Inner Iliask, Jacob, Karpof, Korovin, Little Koniuji, Mitrofania, Nagai, Near, Outer Iliask, Paul, Peninsula, Pinusuk, Poperechnoi, Popof, Road, Sanak, Shapka, Simeonof, Spectacle, Spitz, Turner, Ukolnoi, Ukolnoi, Unga, and Unimak Island from Scotch Cap (54.390° N, 164.745° W) to False Pass.

(9) *Unit 4:* Bristol Bay. This unit contains three subunits:

(i) Subunit 4a: Amak Island. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to Amak Island.

(ii) Subunit 4b: Izembek Lagoon. All waters from mean high tide line that occur within the polygon bounded by Glen, Operl, and Neumann Islands to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 55.249° N, 162.990° W; 55.255° N, 162.984° W from Cape Glazenap to Glen Island; 55.324° N, 162.901° W; 55.333° N, 162.888° W from Glen Island to Operl Island; 55.409° N, 162.683° W; 55.408° N, 162.621° W from Operl Island to Neumann Island; and 55.447° N, 162.582° W; 55.447° N, 162.577° W from Neumann Island to Moffet Point.

(iii) Subunit 4c: Port Moller/Herendeen Bay. All waters from mean high tide line that occur within the polygon bounded by Walrus Island to the north and the Alaska Peninsula to the south, and further defined by the following latitude/longitude coordinates: 56.000° N, 160.877° W; 56.020° N, 160.854° W from Point Edward to Walrus Island; and 56.020° N, 160.805° W; 55.979° N, 160.584° W from Wolf Point to Entrance Point.

(10) *Unit 5:* Kodiak, Kamishak, Alaska Peninsula. All contiguous waters from the mean high tide line to the 20-m (65.6-ft) depth contour as well as waters within 100 m (328.1 ft) of the mean high tide line that occur adjacent to the Alaska Peninsula from Castle Cape (56° 14.5′ N, 158° 7.0′ W) eastward to Cape Douglas (58.852° N, 153.250° W), and northward in Cook Inlet to Redoubt Point (60.285° N, 152.417° W), and adjacent to the following islands: Afognak, Aghik, Aghiyuk, Aiaktalik, Akhiok, Aliksemik, Amook, Anowik, Ashiak, Atkulik, Augustine, Ban, Bare, Bear, Central, Chirikof, Chisik, Chowiet, Dark, David, Derickson, Dry Spruce, Eagle, East Amatuli, East Channel, Garden, Geese, Hartman, Harvester, Hydra, Kak, Kateekuk, Kiliktagik, Kiukpalik, Kodiak, Kulik, Long, Marmot, Miller, Nakchamik, Ninagiak, Nord, Nordyke, Poltava, Raspberry, Sally, Shaw, Shuyak, Sitkalidak, Sitkanak, Spruce, Sud, Sugarloaf, Suklik, Sundstrom, Sutwick, Takli, Terrace, Tugidak, Twoheaded, Ugak, Ugalushik, Uganik, Unavikshak, Ushagat, West Amatuli, West Augustine, West Channel, Whale, and Woody.

* * * * *

Dated: December 1, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

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BILLING CODE 4310–55–P