in the western North Atlantic. U.S. Dep. Commer. NOAA Tech Memo. NMFS–SEFSC–444, 115 pp.

USFWS and NMFS (United States Fish and Wildlife Service and National Marine Fisheries Service). 1992. Recovery plan for the Kemp's ridley sea turtle (*Lepidochelys kempii*). NMFS, St. Petersburg, Fl. 40 pp.

White, M. 2004. Observations of loggerhead sea turtles feeding on discarded fish catch at Argostoli, Kefalonia. Marine Turtle Newsletter. 105:7–9.

List of Subjects in Part 50 CFR Part 223

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

Dated: April 2, 2008.

James W. Balsiger,

Acting Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

■ For the reasons set forth in the preamble, 50 CFR part 223 is amended as follows:

PART 223—THREATENED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 223 continues to read as follows:

Authority: 16 U.S.C. 1531–1543; subpart B, § 223.12 also issued under 16 U.S.C. 1361 et. seq.; 16 U.S.C. 5503(d) for § 223.206(d)(9).

■ 2. In § 223.206, paragraph (d)(11) is revised to read as follows:

§ 223.206 Exemptions to prohibitions relating to sea turtles.

* * * * *

(11) *Restrictions applicable to sea scallop dredges in the mid-Atlantic*—(i) Gear Modification. During the time period of May 1 through November 30, any vessel with a sea scallop dredge and required to have a Federal Atlantic sea scallop fishery permit, regardless of dredge size or vessel permit category, that enters waters south of 41°9.0′ N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone must have on each dredge a chain mat described as follows. The chain mat must be composed of horizontal (''tickler'') chains and vertical (up-and-down) chains that are configured such that the openings formed by the intersecting chains have no more than 4 sides. The length of each side of the openings formed by the intersecting chains, including the sweep, must be less than or equal to 14 inches (35.5 cm). The chains must be connected to each other with a shackle or link at each intersection point. The measurement must be taken along the chain, with the chain held taut, and include one shackle or link at the intersection point and all links in the chain up to, but excluding, the shackle or link at the other intersection point.

(ii) Any vessel that enters the waters described in paragraph (d)(11)(i) of this section and that is required to have a Federal Atlantic sea scallop fishery permit must have the chain mat configuration installed on all dredges for the duration of the trip.

(iii) Vessels subject to the requirements in paragraphs (d)(11)(i) and (d)(11)(ii) of this section transiting waters south of 41°9.0′ N. latitude, from the shoreline to the outer boundary of the Exclusive Economic Zone, will be exempted from the chain-mat requirements provided the dredge gear is stowed in accordance with § 648.23(b) and there are no scallops on-board.

[FR Doc. 08–1107 Filed 4–2–08; 3:31 pm]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 070717354–8251–02]

RIN 0648–AV73

Endangered and Threatened Species; Designation of Critical Habitat for North Pacific Right Whale

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

ACTION: Final rule.

SUMMARY: We, NMFS, designate critical habitat for the North Pacific right whale in this rulemaking. The North Pacific right whale was recently listed as a separate, endangered species, and because this was a newly listed entity, we were required to designate critical habitat for it.

DATES: This rule is effective on May 8, 2008.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this final rule, are available for public inspection by appointment duringnormal business hours at the NMFS Alaska Region, 709 W. 9th Street, Juneau, AK 21688.

FOR FURTHER INFORMATION CONTACT: Brad Smith, NMFS Alaska Region (907) 271–5006; Kaja Brix, NMFS, Alaska Region, (907) 586–7235; or Marta Nammack, (301) 713–1401, ext. 180. The final rule, references, and other materials relating to this determination can be found on our website at *http://www.fakr.noaa.gov/*.

SUPPLEMENTARY INFORMATION:

Background

On December 27, 2006, we published a proposed rule (71 FR 77694) to list the North Pacific right whale (*Eubalaena japonica*) as an endangered species pursuant to the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*), and we listed this species as endangered on March 6, 2008 (73 FR 12024). On October 29, 2007, we published a proposed rule (72 FR 61089) to designate critical habitat for the North Pacific right whale. We proposed the same two areas that we had previously designated as critical habitat for the northern right whale in the North Pacific Ocean (71 FR 38277, July 6, 2006). We now designate these same areas as critical habitat for the North Pacific right whale. A description of, and the basis for, the designation follows.

Critical Habitat Designations Under the ESA

Section 3 of the ESA defines critical habitat as ''(i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and which may require special management considerations or protection; and (II) specific areas outside the geographical area occupied by the species at the time it is listed upon a determination by the Secretary to be essential for the conservation of the species.'' Section 3 of the ESA (16 U.S.C. 1532(3)) also defines the terms ''conserve,'' ''conserving,'' and ''conservation'' to mean ''to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.''

In determining what areas meet the definition of critical habitat, 50 CFR 424.12(b) requires that we ''consider those physical or biological features that are essential to the conservation of a given species including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species.'' The regulations refine our task by directing us to ''focus on the principal biological or physical

constituent elements . . . that are essential to the conservation of the species,'' and specify that the ''known primary constituent elements shall be listed with the critical habitat description.'' The regulations identify primary constituent elements (PCEs) as including, but not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.'' An area within the geographic area occupied by the species must contain one or more PCEs to be eligible for designation as critical habitat; an area upon which no PCE is found may not be designated in the hope it will acquire one or more PCEs in the future.

Section 4 of the ESA requires that, before designating critical habitat, the Secretary consider economic impacts, impacts on national security, and other relevant impacts of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if the benefits of exclusion outweigh the benefits of inclusion, unless excluding an area from critical habitat will result in the extinction of the species concerned. Once critical habitat is designated, section 7(a)(2) of the ESA requires that each Federal agency, in consultation with and with the assistance of NMFS, ensure that any action authorized, funded, or carried out by such agency is not likely to result in the destruction or adverse modification of critical habitat.

Geographical Area Occupied by the Species

The ESA defines critical habitat (in part) as areas within the geographical area occupied by the species at the time it was listed under the ESA. Prior to the onset of commercial whaling in 1835, right whales were widely distributed across the North Pacific (Scarff, 1986; Clapham *et al.*, 2004; Shelden *et al.*, 2005). By 1900 they were scarce throughout their range. Japan and the USSR did not sign a League of Nations agreement in 1935 to protect right whales, so they continued right whaling until 1949, when the newly created International Whaling Commission endorsed the ban. After this, 23 North Pacific right whales were legally killed by Japan and the USSR under Article VIII of the International Convention for the Regulation of Whaling (1946), which permits the taking of whales for scientific research purposes. However, it is now known that the USSR illegally caught many right whales in the North Pacific (Doroshenko, 2000; Brownell *et al.*, 2001; Ivashchenko, 2007). By 1973, the North Pacific right whale had been severely reduced by commercial whaling. Sighting data from this remnant population are too sparse to identify the range of these animals in 1973. However, no reason exists to suspect that the right whales that remain alive today inhabit a substantially different range than right whales alive during the time of the Soviet catches; indeed, given the longevity of this species, it is likely that some of the individuals who survived that whaling episode remain alive now. Consequently, recent habitat use is unlikely to be different today.

Both the SEBS and the western GOA (shelf and slope waters south of Kodiak) have been the focus of many sightings (as well as the illegal Soviet catches) in recent decades. In general, the majority of North Pacific right whale sightings (historically and in recent times) have occurred from about 40° N to 60° N latitude (lat.). There are historical records from north of 60° N lat., but these are rare and are likely to have been misidentified bowhead whales. North Pacific right whales have on rare occasions been recorded off California and Mexico, as well as off Hawaii. However, as noted by Brownell *et al.* (2001), there is no evidence that either Hawaii or the west coast of North America from Washington State to Baja California were ever important habitats for right whales. Given the amount of whaling effort as well as the human population density in these regions, it is highly unlikely that substantial concentrations of right whales would have passed unnoticed. Furthermore, no archaeological evidence exists from the U.S. west coast suggesting that right whales were the target of local native hunts. Consequently, the few records from this region are considered to represent vagrants.

For the foregoing reasons, we determine that the geographical area occupied by the North Pacific right whale at the time of ESA listing extends over a broad area of the North Pacific Ocean, between 120° E and 123° W longitude and 40° N and 60° N latitude, as shown in Figure 1.

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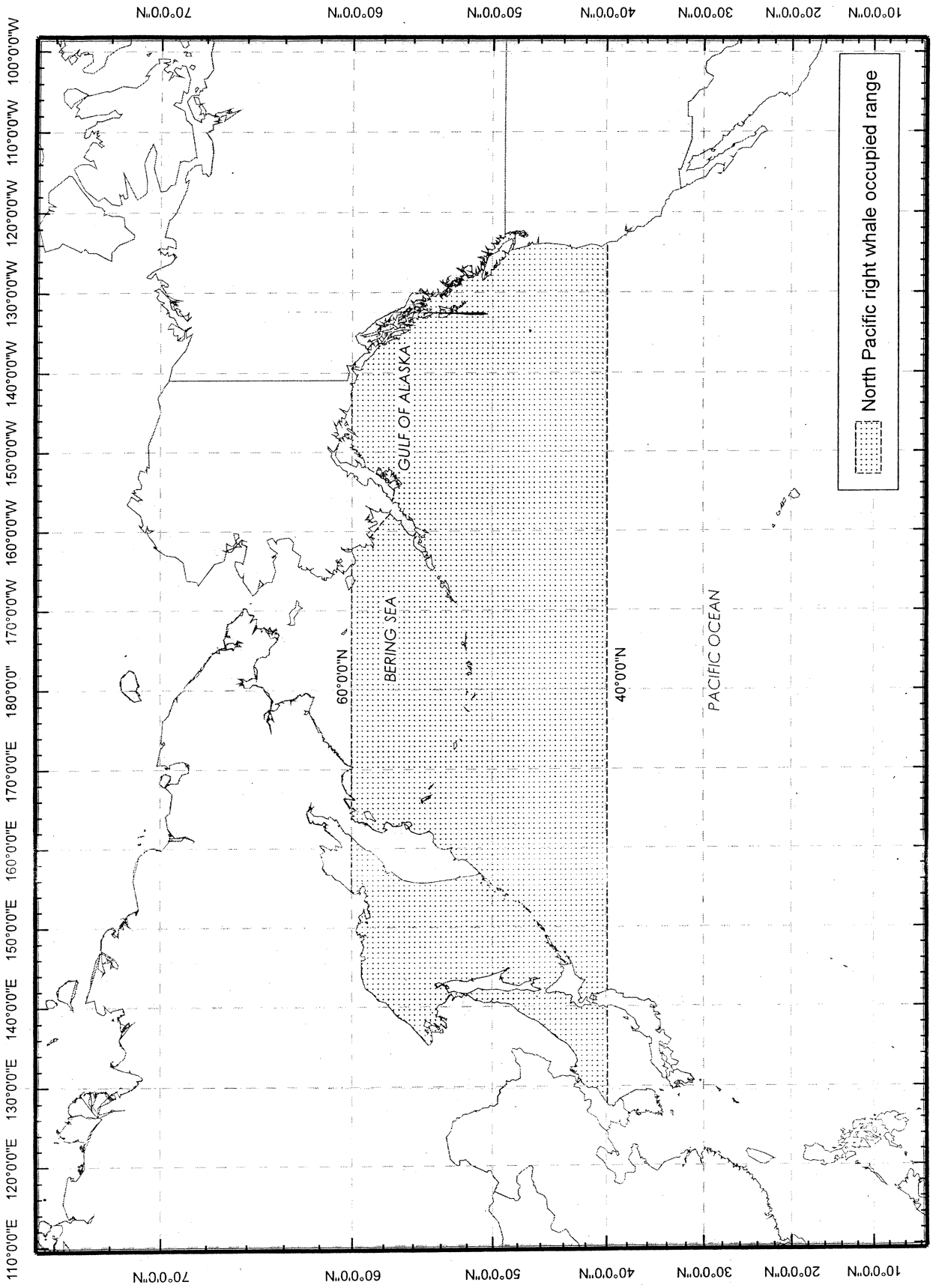

Figure 1. Occupied range of North Pacific right whales at time of listing under the Endangered Species Act.

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Unoccupied Areas

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

Primary Constituent Elements (PCEs)

NMFS scientists considered PCEs for right whales in the North Pacific during a workshop held during July 2005. Unfortunately, many data gaps exist in our knowledge of the ecology and biology of these whales, and very little is known about the PCEs that might be necessary for their conservation. The life-requisites for such factors as temperatures, depths, substrates, are unknown, or may be highly variable. One certainty is the metabolic necessity of prey species to support feeding by right whales. Examination of harvested whales in the North Pacific and limited plankton tows near feeding right whales in recent years show these whales feed on several species of zooplankton. Several species of large copepods and other zooplankton constitute the primary prey of the North Pacific right whale. Therefore, we have determined that the PCEs for the North Pacific right whale are species of large zooplankton in areas where right whale are known or believed to feed. In particular, these are the copepods *Calanus marshallae*, Neocalanus cristatus, and *N. plumchrus*, and a euphausiid, *Thysanoessa raschii*, whose very large size, high lipid content, and occurrence in the region likely makes it a preferred prey item for right whales (J. Napp, pers. comm.). A description of the critical habitat (below) establishes the presence of these PCEs within the designated areas. In addition to the physical presence of these PCEs within the critical habitat, it is likely that certain physical forcing mechanisms are present which act to concentrate these prey species in densities which allow for efficient foraging by right whales. There may in fact be critical or triggering densities below which right whale feeding does not occur. Such densities are not presently described for North Pacific right whales in the North Pacific, but have been documented in the Atlantic. Accordingly, the critical habitat encompasses areas in which the physical and biological oceanography combines to promote high productivity and aggregation of large copepods into patches of sufficient density for right whales. The PCEs, essential for the conservation of the North Pacific right whale, and these physical forcing or concentrating mechanisms, contribute to the habitat value of the areas designated.

Special Management Considerations or Protection

An occupied area may be designated as critical habitat if it contains physical or biological features that ''may require special management considerations or protection.'' 50 CFR 424.02(j) defines ''special management considerations or protection'' to mean ''any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.'' We considered whether the copepods and other zooplankton which have been identified as the PCEs for the North Pacific right whale may require special management considerations or protection. The designated critical habitat areas support extensive and multi-species commercial fisheries for pollock, flatfish, cod, various crabs, and other resources (but not salmon, as salmon fisheries in Alaska are restricted to State waters, except in the case of trolling which is permitted in Federal waters but only immediately adjacent to the Southeast Alaska coastline; these areas are not included in the designated critical habitat areas). We believe the identified PCEs would not be harmed by these federally managed fisheries. However, plankton communities and species are vulnerable to physical and chemical alterations within the water column due to both natural processes, as well as pollution from various potential sources, including oil spills and discharges from oil and gas drilling and production. Because of the vulnerabilities to pollution sources, these PCEs may require special management or protection through such measures as conditioning Federal permits or authorizations through special operational restraints, mitigation measures, or technological changes. The 2005 wreck of the M/V *Selendang Ayu* near Unalaska caused the release of approximately 321,000 gallons (1,215,117 litres) of fuel oil and 15,000 gallons (56,781 litres) of diesel into the Bering Sea. That incident has precipitated recommendations for regulations which would improve navigational safety in the area for the protection of the marine environment. While such measures are not targeted towards protecting copepods or zooplankton per se, they would act to conserve these PCEs.

PCEs in the Critical Habitat and Related Physical Processes

The current abundance of North Pacific right whales is considered to be very low in relation to historical numbers or their carrying capacity, which is not determined. The existence of a persistent concentration of North Pacific right whales found within the SEBS since 1996 is somewhat extraordinary in that it may represent a significant portion of the remaining population. These areas of concentration where right whales feed are characterized by certain physical and biological features which include nutrients, physical oceanographic processes, certain species of zooplankton, and long photoperiod due to the high latitude. These feeding areas, supporting a significant assemblage of the remaining North Pacific right whales, are critical in terms of their conservation value. We have been able to substantiate this conclusion with observations of feeding behavior, direct sampling of plankton near feeding right whales, or records of stomach contents of dead whales. These conclusions underlie the designation of the critical habitat areas shown in Figure 2 and described below. Two areas are designated: an area of the SEBS and an area south of Kodiak Island in the GOA.

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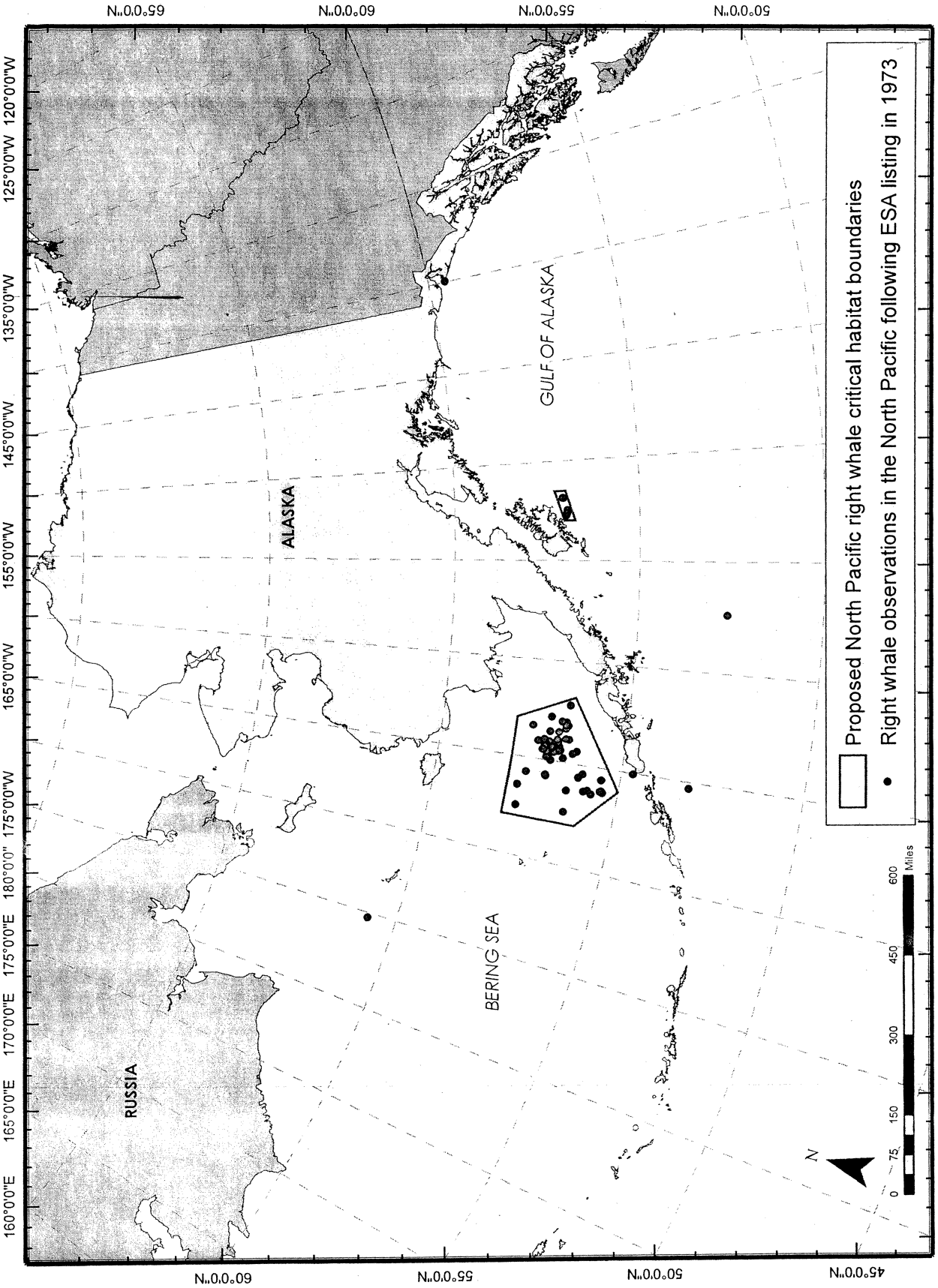

Figure 2. Proposed critical habitat for North Pacific right whales.

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Shelden *et al.* (2005) reviewed prey and habitat characteristics of North Pacific right whales. They noted that habitat selection is often associated with features that influence abundance and availability of a predator's prey. Right whales in the North Pacific are known to prey upon a variety of zooplankton species. Availability of these zooplankton greatly influences the distribution of right whales on their feeding grounds in the SEBS and GOA. Right whales require zooplankton patches of very high density, and zooplankton are typically small and distributed over space and time (Mayo and Marx, 1990). Typical zooplankton sampling is too broad-scale in nature to detect patches of these densities, and directed studies employing fine-scale sampling cued by the presence of feeding right whales are the only means of doing this (Mayo and Marx, 1990). Accordingly, there may be no obvious correlation between the abundance and distribution of prey copepods and euphausiids (as measured by broad-scale oceanographic sampling) and the distribution of right whales (M. Baumgartner, in prep.). In light of this, we must rely upon the whales themselves to indicate the location of important feeding areas in the North Pacific. Aggregations of right whales in high latitudes can be used with high confidence as an indicator of the presence of suitable concentrations of prey, and thus of feeding behavior by the whales. Right whales feed daily during spring and summer, and studies in the North Atlantic have consistently found an association between concentrations of whales and feeding behavior, with dense copepod patches recorded by oceanographic sampling around such groups of whales (Mayo and Marx, 1990; Baumgartner *et al.*, 2003a, 2003b). In the North Atlantic, an analysis of sighting data by NMFS indicated that a density of four or more right whales per 100 nm^2 was a reliable indicator of a persistent feeding aggregation (Clapham and Pace, 2001), and this had been used for Dynamic Area Management fisheries closures to reduce the risk of right whales becoming entangled in fishing gear. While this metric is a reliable indicator of the presence of feeding aggregations in the North Atlantic, it is not necessarily the only metric suitable for application in the North Pacific; the much smaller population of right whales in the eastern North Pacific Ocean typically results in sightings of single animals or pairs. Unlike with larger groups, such small numbers sometimes indicate transient passage through an area and thus cannot be unequivocally linked with feeding behavior. However, while sporadic sightings of right whales in such small numbers generally would not be considered a reliable indication of a feeding area, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over a long period of time is sufficient indication that the area is a feeding area containing suitable concentrations of copepods.

Therefore, in the absence of data which describe the densities, as well as presence, of the PCEs themselves, sightings of right whales is used here as a proxy for the existence of suitably dense copepod and euphausiid patches and thus to identify the areas proposed herein for designation as critical habitat. Figure 2 depicts the designated critical habitat and the best available sightings data.

Gulf of Alaska

We designate critical habitat in the GOA (Figure 3), described as an area delineated by a series of straight lines connecting the following coordinates in the order listed: 57° 03′ N/153° 00′ W, 57° 18′ N/151° 30′ W, 57° 00′ N/151° 30′ W, 56° 45′ N/153° 00′ W, and returning to 57° 03′ N/153 00′ W. The area described by these boundaries lies completely within the waters of the United States and its Exclusive Economic Zone (EEZ) and outside of waters of the State of Alaska. State waters extend seaward for 3 nautical miles from the shoreline; very few sightings occurred within State waters. The best available sightings data on right whales in this area totaled 5 out of 14 encounters in the GOA.

Southeastern Bering Sea

We also designate critical habitat in the Bering Sea (Figure 4), described as an area delineated by a series of straight lines connecting the following coordinates in the order listed: 58° 00′ N/168° 00′ W, 58° 00′ N/163° 00′ W, 56° 30′ N/161° 45′ W, 55° 00′ N/166° 00′ W, 56° 00′ N/168° 00′ W and returning to 58° 00′ N/168° 00prime; W. The area described by these boundaries lies completely within the waters of the United States and its EEZ and outside of waters of the State of Alaska. State waters extend seaward for 3 nautical miles from the shoreline. Because very few sightings occurred within 3 nautical miles of shore, State waters are not included in the proposed critical habitat. The best available information on right whale encounters occurring totaled 182 within this area, out of 184 encounters north of the Aleutian Islands.

Physical Processes and the Existence of PCEs Within the Critical Habitat

Southeastern Bering Sea Slope Waters

The Bering Sea slope is a very productive zone, sometimes referred to as the ''Greenbelt'', where annual primary production can exceed that on the adjacent shelf and basin by 60 percent and 270 percent, respectively (Springer *et al.*, 1996). Physical processes at the shelf edge, such as intensive tidal mixing, eddies, and up-canyon flow bring nutrients to the surface, thereby supporting enhanced productivity and elevated biomass of phytoplankton, zooplankton, and fish. Western North Pacific right whales have been observed in association with oceanic frontal zones that produce eddies southeast of Hokkaido Island, Japan, and southeast of Cape Patience (Mys Terpeniya), Sakhalin Island, in the Okhotsk Sea (Omura *et al.*, 1969). Whether the Bering Slope Current, or eddies shed from it, support production or entrain right whale prey is unknown.

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

Southeastern Bering Sea Middle-Shelf Waters

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

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

Gulf of Alaska

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

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

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

Right Whale Sightings as a Proxy for Locating the PCEs

As noted above, consistent sightings of right whales - even of single individuals and pairs – in a specific area in spring and summer over an extended period of time can be used with high confidence as an indicator of the presence of the PCEs in a feeding area. We have used recent sighting records to make this determination because these records are a more reliable indicator of current distribution of feeding whales than historical sightings, especially given that most of the latter relate to animals that were removed from the population by whaling and are thus no longer extant. Of the 184 recent right whale sightings reported north of the Aleutian Islands, 182 occurred within the specific area designated as critical habitat in the Bering Sea. Since 1996, right whales have been consistently sighted in this area over a period of years during the spring and summer feeding seasons. For example, NMFS surveys alone recorded between two and four sightings in 1996 (Goddard and Rugh, 1998), 13 sightings in 2000 (Le Duc *et al.*, 2004) and over 23 sightings in 2004. Single right whales as well as pairs and aggregations of up to five animals were sighted during this period, and all sightings were within 100 nm^2 of one another. Based on consideration of these factors, we conclude that the right whale sightings in the specific area in the Bering Sea described in Figure 4 are a suitable proxy for the presence of the PCEs in this area.

Recent sightings of right whales are fewer in number in the GOA than in the Bering Sea. However, three individuals were sighted recently in the critical habitat area designated in the GOA. These sightings occurred at a time when right whales typically feed in the North Pacific Ocean. In July 1998, a single right whale exhibiting behavior consistent with feeding activity was observed among a group of about eight humpback whales (Waite *et al.*, 2003). In August 2004, a NMFS researcher observed a single right whale among a group of humpbacks. In August 2005, a NMFS researcher reported yet another sighting of a right whale within 250 to 500 meters of groups of humpback and fin whales. Acoustic monitoring of the area conducted in summer 2000 recorded what appeared to be right whale calls in the area on September 6 (Waite *et al.*, 2003). Compared to the Bering Sea sightings, the GOA right whale sightings do not provide as strong an indication of feeding right whales. However, individual right whales have been directly observed in 1998, 2004, and 2005 and detected acoustically in 2000 during the spring and summer feeding seasons in the specific area in the GOA described in Figure 3. It is also instructive that one of these animals was exhibiting feeding behavior at the

time it was observed. Based on consideration of these factors, we conclude that the right whale sightings in the specific area in the GOA described in Figure 3 are a reasonably reliable proxy for the presence of the PCEs in this area.

Response to Comments

Comment 1: A commenter supports our February 2002 finding that critical habitat cannot be designated for the (North Pacific right whale) because the essential biological requirements of the population were not sufficiently understood.

Response: In October 2000, we were petitioned to revise the critical habitat for the northern right whale by designating an additional area in the North Pacific Ocean. In February 2002, we announced our decision that critical habitat could not be designated at that time because the essential biological and habitat requirements of the population were not sufficiently understood. However, in June 2005, a Federal court found this reasoning invalid and remanded the matter to us for further action (*Center for Biological Diversity* v. *Evans*, Civ. No. 04–4496, N.D. Cal. June 14, 2005). In compliance with that order, we subsequently revised the northern right whale's critical habitat by designating areas within the Gulf of Alaska (GOA) and Bering Sea as critical habitat under the ESA. We believe that relating the presence of feeding concentrations of right whales in the North Pacific Ocean to habitat attributes was, and remains, an appropriate basis upon which to designate critical habitat for the North Pacific right whale.

Comment 2: There is no supporting evidence that: (1) concentrations of sightings are not due to sampling area; (2) concentration of Primary Constituent Elements are distinctly different in the designated areas; or (3) the population of the North Pacific right whale shows any specific habitat preference.

Response: Survey effort directed toward right whales has not been evenly distributed throughout their range. This is largely due to their very small population size, very large range, and limits on research funding. The area in the southeastern Bering Sea (SEBS) where right whales have often been observed since 1996 has received relatively greater survey effort. However, we are required to base critical habitat designations using the best scientific data available, including survey effort, and we have done so here.

We believe the described PCE (zooplankton species) concentrations are distinctly different in the designated areas. Our scientists concluded that aggregations of right whales in high latitudes can be used with high confidence as an indicator of the presence of suitable concentrations of prey, and thus of feeding behavior by the whales. Shelden *et al.* (2005) reviewed prey and habitat characteristics of northern right whales in the North Pacific and noted that habitat selection is often associated with features that influence abundance and availability of the whales' prey. Right whales in the North Pacific are known to prey upon a variety of zooplankton species. Availability of these zooplankton greatly influences the distribution of these whales on their feeding grounds in the SEBS and GOA. Because few data exist to describe the concentrations of these primary constituent elements between areas, we must rely upon the whales themselves to indicate the location of such concentrations, which are important feeding areas in the North Pacific.

Regarding habitat preference, right whales feed daily during spring and summer, and studies in the North Atlantic have consistently found an association between concentrations of whales and feeding behavior, with dense zooplankton patches recorded by oceanographic sampling around such groups of whales. In the North Pacific, we believe the persistent presence of right whales within a certain area during summer months strongly indicates the presence of zooplankton concentrations in right whale feeding grounds.

Comment 3: The proposed critical habitat designations fail to provide for recovery, so the designation should include unoccupied right whale habitat.

Response: Section 3(5)(A)(i) of the ESA requires us to identify specific areas within the geographical area occupied by the species that contain physical or biological features that may require special management considerations or protection. Section 3(5)(A)(ii) requires that specific areas outside the geographical area occupied by the species only fall within the definition of critical habitat if the Secretary determines that the area is essential for conservation. Our regulations further provide that we will designate unoccupied areas ''only when a designation limited to [the species'] present range would be inadequate to ensure the conservation of the species (50 CFR 424.12(e)).''

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

Comment 4: The extent of the areas proposed for designation as critical habitat in the North Pacific Ocean is not sufficient to provide for the recovery of the northern right whale. NMFS should also designate as critical habitat those areas which were historically used by right whales in the North Pacific. NMFS should provide critical habitat designations that are over-inclusive, rather than under-inclusive.

Response: Our ability to identify critical habitat as defined in the ESA is limited by the level of information available to describe the biology and ecology of the North Pacific right whale. We have identified two specific areas within which are found biological features essential to the conservation of the species and which may require special management considerations or protection. The available scientific information on this species limits our ability to identify any additional specific areas meeting the definition of critical habitat. We anticipate modifications to the present designation may occur as more scientific information becomes available. For example, as we gather more information, the designation may be revised to encompass: (1) additional areas in which zooplankton concentrations are found to occur; or (2) the physical or biological features that comprise suitable calving grounds.

Comment 5: The precautionary principle requires NMFS to designate other areas with similar features or habitat conditions as critical habitat.

Response: It is unclear what ''similar features'' the commenter refers to here. We have used recent sighting records of feeding right whales as a proxy for the location of PCEs necessary to describe critical habitat. The ESA does not permit designation of specific areas containing features ''similar'' to the PCEs identified. The PCEs must be found in designated areas. Research on northern right whales indicates that these animals are able to locate prey in densities needed to meet their metabolic needs. Recent research indicates that right whales are feeding specialists that require exceptionally high densities of prey. The physical and biological parameters necessary to produce these ''lenses'' of highly concentrated zooplankton in the North Pacific are not

understood. While other areas in the North Pacific may contain features that provide for the production of zooplankton and that may act as forcing mechanisms for the concentration of these zooplankton, we currently lack information as to whether the features in those areas actually concentrate the prey into aggregations sufficiently dense to encourage and sustain feeding by right whales. Similarly, we do not have sufficient information to characterize the areas designated as critical habitat based on other physical or biological characteristics. Lacking such information, we rely on the presence of zooplankton, as evidenced by recent observations of feeding right whales, to identify critical habitat for the North Pacific right whale.

Comment 6: The primary constituent elements should be revised to include those habitat components that are essential for the primary biological needs of feeding, reproducing, resting, and migrating, and include all marine waters, along with associated marine aquatic flora and fauna in the water column, and the underlying marine benthic community.

Response: As stated above, existing scientific information is not sufficient to describe the essential habitat components for many of the biological needs identified in the comment. For instance, the calving areas of the North Pacific right whales remain unknown, making it impossible to describe the essential features of such habitat. As noted in the previous response, we do not have sufficient information at this time to characterize the areas designated as critical habitat based on other physical or biological characteristics.

Comment 7: The proposed critical habitat designation is inconsistent in basing designation on sighting effort, which is not consistent over the range of the North Pacific right whale. NMFS also fails to include historical data which show concentrations of North Pacific right whales in other areas that can be assumed to have important habitat attributes. The designation should be expanded. Specifically, this should include the SEBS, including the southern portion of the shelf break and the area of high prey and whale concentration to the west of the shelf break.

Response: The ESA defines critical habitat, in part, as those areas occupied by the species at the time of listing on which the identified PCEs are found. We have insufficient basis to conclude that the PCEs are found in other areas, or occurred in the past century. The current sighting data are the best available data that can be used to determine that the PCEs are found on the designated areas. We considered the utility of historic data in identifying and designating critical habitat. Many records of the commercial whalers are general in nature and do not provide specific locations, information on the numbers of whales present at the time of the sighting or harvest, or descriptions of their behavior (e.g., whether the sightings indicated feeding behavior). Therefore, we concluded that the more recent sightings data from the time of listing represented the best evidence of the current presence of the PCEs in specific feeding areas.

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

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

Comment 9: More research is needed to describe PCEs for the North Pacific right whale.

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

Activities That May Be Affected by This Designation

Section 4(b)(8) of the ESA requires that we evaluate briefly and describe, in any proposed or final regulation to designate critical habitat, those activities involving a Federal action that may adversely modify such habitat or that may be affected by such designation. A wide variety of activities may affect critical habitat and, when carried out, funded, or authorized by a Federal agency, require that an ESA section 7 consultation be conducted. Such activities include, but are not limited to, oil and gas leasing and development on the Outer Continental Shelf (OCS), Federal management of high seas fisheries in territorial waters and the EEZ of the United States, dredge and fill, mining, pollutant discharges, other activities authorized or conducted by the Army Corps of Engineers and the Environmental Protection Agency (EPA), and military training exercises and other functions of the U.S. Armed Forces.

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

Exclusion Process

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

Based upon the best available information, it appears there exists some probability of oil or gas exploration activities within (or immediately adjacent to) the North Pacific right whale critical habitat within the next 10 years. There are no commercial production facilities in operation, currently under development, nor permitted for future development, within these critical habitat areas. As only exploratory activities are expected within the next 10 years, there is little expectation that Federal actions in the oil and gas sector will have the potential to destroy or adversely modify the critical habitat within the analytical time horizon.

While we expect to consult annually on fishery related proposed actions that may affect the critical habitat, none of these actions would be expected to destroy or adversely modify the critical habitat; thus, none would be expected to result in imposition of costs on commercial fishery participants. Because fisheries do not target or affect the PCEs for the North Pacific right whale, no fishing or related activity (e.g., at-sea processing, transiting) would be expected to be restricted or

otherwise altered as a result of critical habitat.

This action is anticipated to result in consultations with EPA on seafood processing waste discharges; with the DoD on military ''underway training'' activities it authorizes; and with the U.S. Coast Guard (USCG) and MMS on approvals of oil spill response plans, among others. It is unlikely that these activities will destroy or adversely modify the critical habitat; thus, no mandatory modifications would be required. It follows that no costs, beyond the small costs attributable to inter-agency (occasionally intra-agency) consultation, result from this designation. As explained in the impacts analysis prepared for this action, some larger benefit accrues to society as a result of designation, including the educational value derived from identification and designation of the critical habitat areas within which the PCEs are found. Thus we believe that the benefits of exclusion are outweighed by the benefits of inclusion. Our analysis (see ADDRESSES) did not find any specific areas which merit such exclusion in consideration of economics, nor have we determined that national security interests or other relevant impacts warrant the exclusion of any specific areas from this designation.

The results of our 4(b)(2) analysis are further summarized in the CLASSIFICATION section below.

Classification

National Environmental Policy Act (NEPA)

We have determined that we need not prepare environmental analyses for critical habitat designations made pursuant to the ESA. See *Douglas County* v. *Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 516 U.S. 1042 (1996).

Regulatory Flexibility Act (RFA)

Critical habitat designations are subject to the RFA. Under the RFA (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of proposed rulemaking, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility analysis (IRFA) for the proposed rule and a final regulatory flexibility analysis (FRFA) for this final rule. The FRFA incorporates the IRFA and any comments received on the economic impacts of the rule. These documents are available upon request (see **ADDRESSES**). A summary of the analysis follows.

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

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

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

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

On the basis of the underlying biological, oceanographic, and ecological science used to identify the PCEs that define critical habitat for the North Pacific right whale, as well as the foregoing assumptions, empirical data, historical information, and accumulated experience regarding human activity in the BSAI and GOA, it is believed that only OCS oil and gas exploration and production has the potential, albeit relatively small, to ''destroy or adversely modify'' right whale critical habitat.

As previously indicated, MMS has authority over OCS oil and gas permitting. An examination of published information from the MMS Alaska Region reveals that three MMS OCS planning areas overlap some portion of the right whale critical habitat areas. Further, MMS sources indicate that in only one of these has there been any exploratory well drilling (i.e., St. George Basin). Ten exploratory wells were permitted, all of which were completed in 1984 and 1985 (with no subsequent associated exploration activity). It appears that there has been no recent OCS oil and gas activity in and adjacent to the areas designated as critical habitat. MMS reported no planned or scheduled OCS lease sales for these areas through 2007 (the end of the last 5–year Lease-Sale planning cycle). However, both seismic acquisition and leasing took place in the adjacent North Aleutian Basin Planning Area through Sale 92 held in 1988. Leases were held until 1995, when a ''buy-back'' settlement was reached between leaseholders and the Federal government. There are no current OCS lease holdings in the St. George Basin or North Aleutian Basin Planning Areas. In January 2007, the President modified the Presidential withdrawal for the North Aleutian Basin, allowing the Secretary of the Interior to offer this OCS planning area for leasing during the next 5–year OCS leasing program (2007- 2012). The 2007–2012 program now includes a lease sale in the North Aleutian Basin to be held in 2011. MMS may also offer a sale in the North Aleutian Basin which would be confined to a small portion of the planning area previously offered during lease sale 92 in 1988.

When MMS records were consulted as to the identity of the entities that previously held lease rights to the wells in the St. George Basin, six businesses were listed for the ten permitted exploratory wells. These include: SHELL Western E&P Inc. (2 wells); ARCO Alaska Inc. (3 wells); EXXON Corp. (2 wells); Mobile Oil Corp. (1 well) (now merged with EXXON); GULF Oil Corp. (1 well); and CHEVRON USA Inc. (1 well). MMS records also indicate that the following nine companies submitted bids, jointly or individually, on blocks in the North Aleutian Basin under lease sale 92 held in 1988: Chevron, Unocal, Conoco, Murphy, Odeco, Amoco, Shell, Mobil, and Pennzoil. These data were last updated, according to the MMS website, on March 17, 2005. It would appear that none of these entities could reasonably be characterized as ''small entities'' for RFA purposes. All are widely recognized multi-national corporations and employ more than ''500 full-time, part-time, temporary, or any other category of employees, in all of their affiliated operations worldwide'' (the criterion specified by SBA for assessing entity size for this sector).

The preferred alternative was compared to the mandatory ''No Action'' (or status quo) alternative. In addition, a third alternative was analyzed and its expected benefits and costs contrasted with the status quo and preferred alternatives. That alternative was based upon the proposed areas of the Bering Sea identified in an October 2000 petition that requested critical habitat be designated for the northern right whale within the North Pacific Ocean.

The action does not impose new recordkeeping or reporting requirements on small entities. No comments were received on the IRFA identifying analytical deficiencies or objecting to the reported RFAA interpretations and conclusions, or on the economic impacts of the rule.

Regulatory Planning and Review - Executive Order (E.O.) 12866

This rule to designate critical habitat for the North Pacific right whale has been determined to be significant for purposes of Executive Order (E.O.) 12866. As part of our exclusion process under section 4(b)(2) of the ESA, the economic benefits and costs of the proposed critical habitat designations are described in our economic report. Data are not available to express all costs and benefits of designation in monetary terms. Indeed, many costs and benefits accrue outside of traditional markets and, therefore, are not typically associated with a monetary measure (e.g., subsistence activities). While these benefits and costs cannot be either monetized nor quantified, they are nonetheless important to a full evaluation and understanding of the designation. These benefits and costs have been fully characterized in qualitative terms. Application of a benefit/cost framework is fully consistent with E.O. 12866.

This rule designates as critical habitat for the North Pacific right whale the same critical habitat that was designated for the northern right whale in the eastern North Pacific Ocean in 2006 (71 FR 38227; July 6, 2006). The analysis provided largely mirrors the analysis provided in the 2006 rulemaking, updated as necessary to account for new information, and does not result in any substantive changes to the analytical conclusions.

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

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

Federalism

E.O. 13132 requires agencies to take into account any federalism impacts of regulations under development. It includes specific consultation directives for situations where a regulation will preempt state law, or impose substantial direct compliance costs on state and local governments (unless required by statute). Neither of these circumstances is applicable to this critical habitat designation. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual State and Federal interest, we provided the proposed rules to the relevant state agencies in each state in which the North Pacific right whale is believed to occur, and these state agencies were invited to comment. We have requested information from, and will coordinate development of, the critical habitat designation with appropriate State resource agencies in Alaska. The designation may have some benefit to State and local resource agencies in that the areas essential to the conservation of the species are more clearly defined, and the PCEs of the habitat necessary to the survival of the North Pacific right whale are specifically identified.

Government-to-Government Relationship With Tribes – E.O. 13175

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

We have determined the designation of critical habitat for the North Pacific right whale in the North Pacific Ocean will not have tribal implications, nor affect any tribal governments or issues. None of the designated critical habitat includes tribal lands, affects tribal trust resources, or affects the exercise of tribal rights.

Military Lands

The Sikes Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete, by November 17, 2001, an Integrated Natural Resource Management Plan. The National Defense Authorization Act for Fiscal Year 2004 (Public Law No. 108–136) amended the ESA to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(I) of the ESA (16 U.S.C. 1533(a)(3)(B)(I)) now provides: ''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.'' We have determined no military lands would be impacted by this proposed rule.

Executive Order 13211.

On May 18, 2001, the President issued an Executive Order (E.O.) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy. We have considered the potential impacts of this action on the supply, distribution, or use of energy, and we find the designation of critical habitat will not have impacts that exceed the thresholds identified above.

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

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

This final rule designating critical habitat for the North Pacific right whale will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5) (7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; 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 ESA, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legal duty to avoid destruction or adverse modification of critical habitat is borne by 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 the critical habitat designation shift the costs of the large entitlement programs listed above to State governments. Due to the prohibition against take of this species both within and outside of the designated areas, we do not anticipate that this final rule will significantly or uniquely affect small governments. Thus, a Small Government Agency Plan is not required.

Takings

In accordance with E.O. 12630, this final rule does not have significant takings implications. Under E.O. 12630, ''Actions undertaken by governmental officials that result in a physical invasion or occupancy of private property, and regulations imposed on private property that *substantially affect its value or use*, may constitute a taking of property'' [emphasis added]. The critical habitat designation can not be expected to substantially affect the value or use of property. A takings implication assessment is not required.

The designation of critical habitat confers the ESA section 7 protection against ''the destruction or adverse modification of [critical] habitat.'' The designation of critical habitat in this rule affects only Federal agency actions, and will not increase or decrease the current restrictions on private property concerning take of right whales. Private lands do not exist within or near the designated critical habitat and therefore would not be affected by this action.

Civil Justice Reform

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

References Cited

A complete list of all references cited in this rulemaking is available upon request from the NMFS (see **ADDRESSES**).

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: April 1, 2008.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

■ For the reasons set out in the preamble, we amend part 226, title 50 of the Code of Regulations as set forth below:

PART 226—DESIGNATED CRITICAL HABITAT

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

Authority: 16 U.S.C. 1533.

■ 2. In § 226.203, the section heading is revised, the introductory text is removed, paragraph (a) heading is removed, paragraph (b) is removed in its entirety, and paragraphs (a)(1), (a)(2), and (a)(3) are redesignated as paragraphs (a), (b), and (c), respectively, to read as follows:

§ 226.203 Critical habitat for northern right whales.

* * * * *

■ 3. Section 226.215 is added to read as follows:

§ 226.215 Critical habitat for the North Pacific Right Whale (*Eubalaena japonica*).

(a) *Primary Constituent Elements.* The primary constituent elements of the North Pacific right whale are the copepods *Calanus marshallae*, *Neocalanus cristatus*, and *N. plumchris*, and the euphausiid *Thysanoessa raschii*, in areas of the North Pacific Ocean in which North Pacific right whales are known or believed to feed, as described in paragraphs (b) and (c) of this section.

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

58° 00′ N/168° 00′ W
58° 00′ N/163° 00′ W

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

(c) Gulf of Alaska. An area described by a series of straight lines connecting the following coordinates in the order listed:

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

(d) Maps of critical habitat for the North Pacific right whale follow:

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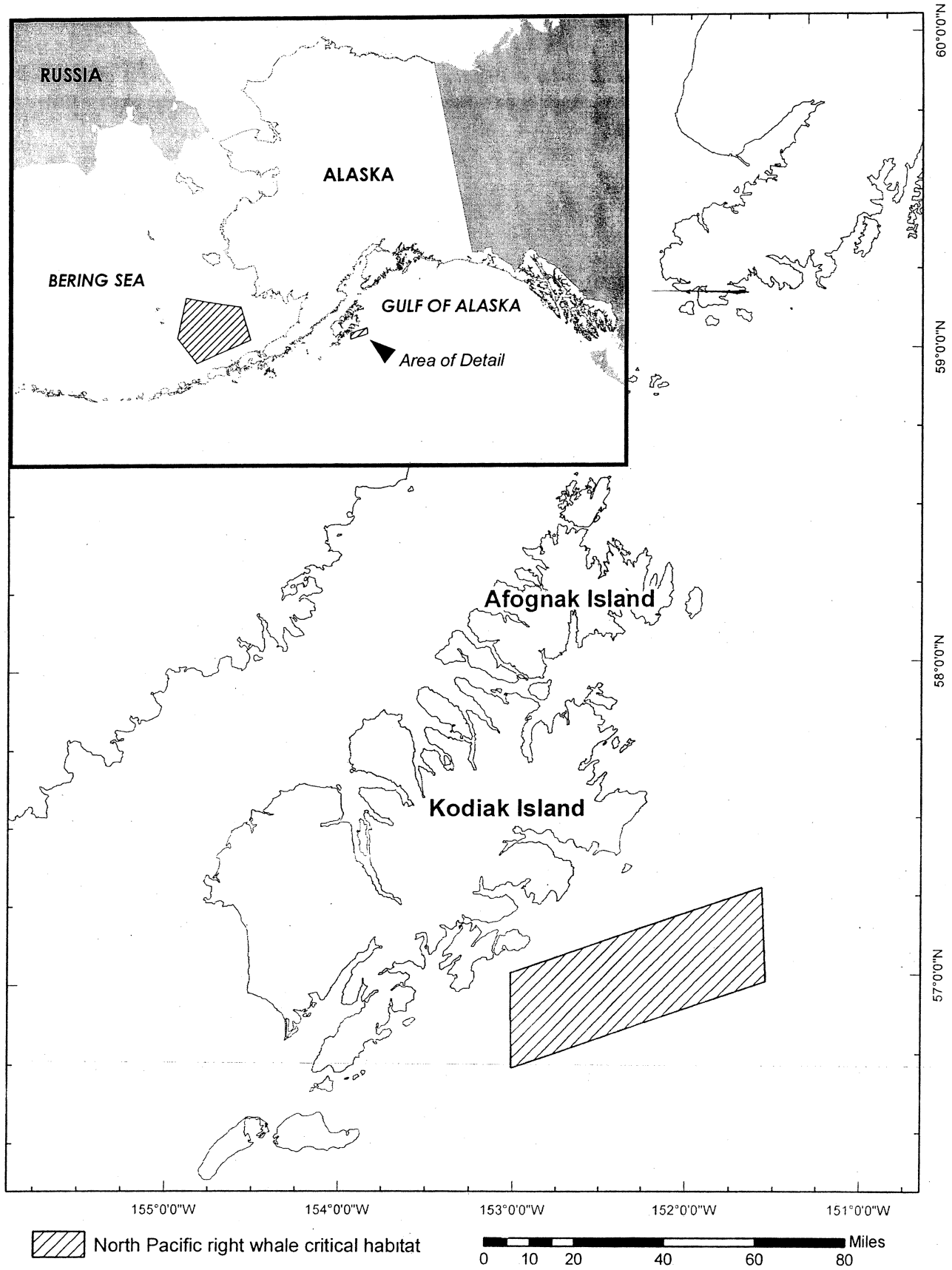
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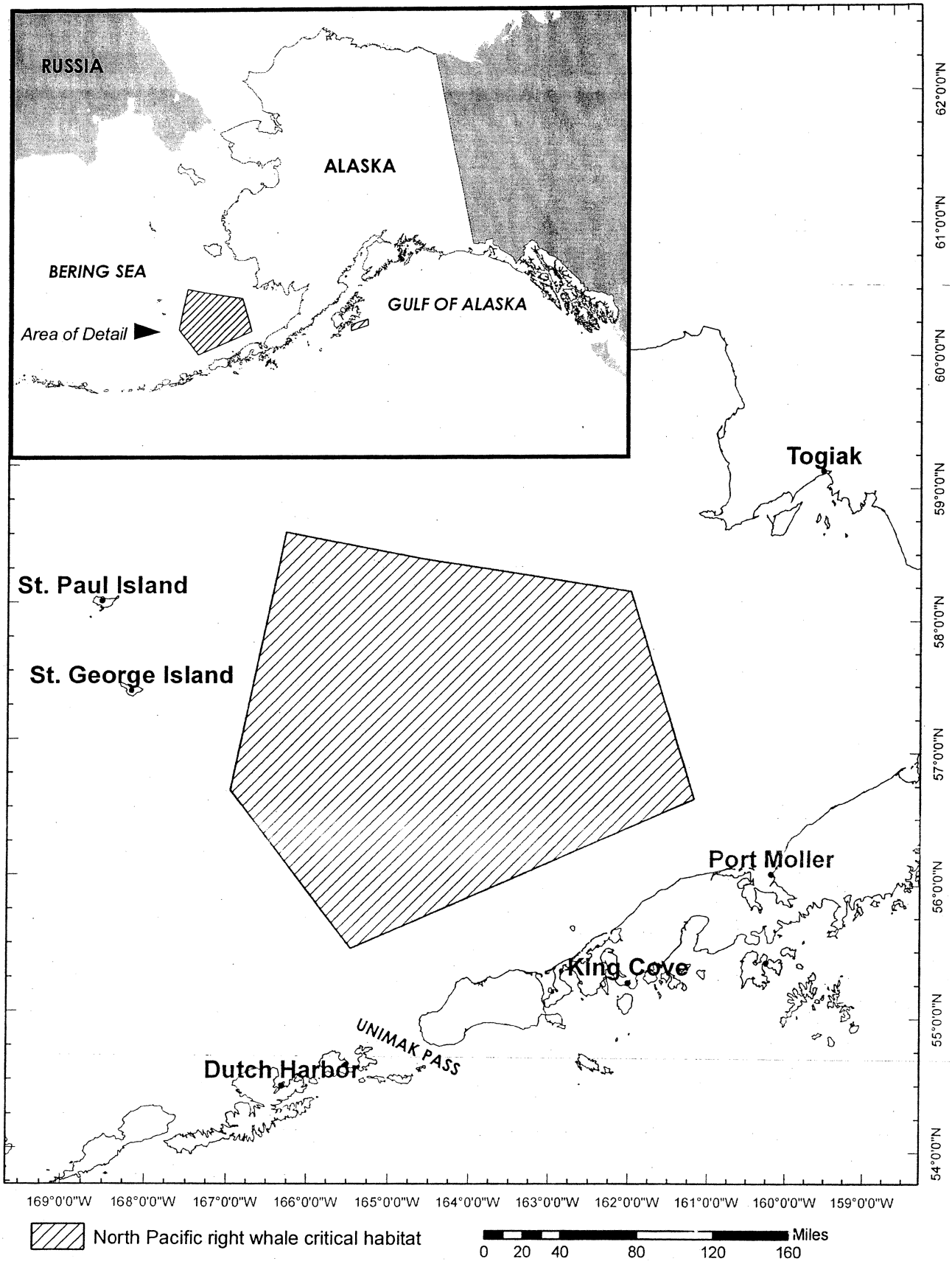

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