Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R05–OAR–2007–1130; FRL–9087–8]

Approval and Promulgation of Air Quality Implementation Plans; Minnesota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve a site-specific revision to the Minnesota sulfur dioxide (SO_2) State Implementation Plan (SIP) for the Rochester Public Utilities Silver Lake Plant (RPU–SLP), located in Rochester, Minnesota. In its October 16, 2007, submittal, the Minnesota Pollution Control Agency (MPCA) requested that EPA approve certain conditions contained in RPU–SLP's revised Federally enforceable joint Title I/Title V document into the Minnesota SO_2 SIP. The request is approvable because it satisfies the requirements of the Clean Air Act.

DATES: Comments must be received on or before January 4, 2010.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R05–OAR–2007–1130, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: mooney.john@epa.gov.*
- *Fax:* (312) 692–2551.
- *Mail:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR 18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604.
- *Hand Delivery:* John M. Mooney, Chief, Criteria Pollutant Section, Air Programs Branch (AR 18J), U.S. Environmental Protection Agency, 77 West Jackson Boulevard, Chicago, Illinois 60604. Such deliveries are only accepted during the Regional Office normal hours of operation, and special arrangements should be made for deliveries of boxed information. The Regional Office official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding Federal holidays.

Please see the direct final rule which is located in the Rules section of this **Federal Register** for detailed instructions on how to submit comments.

FOR FURTHER INFORMATION CONTACT: Christos Panos, Environmental Engineer, Criteria Pollutant Section, Air Programs Branch (AR–18J), Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 353–8328, *panos.christos@epa.gov.*

SUPPLEMENTARY INFORMATION: In the Rules section of this **Federal Register,** EPA is approving the state's SIP submittal as a direct final rule without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. EPA will not institute a second comment period. Any parties interested in commenting on this action should do so at this time. Please note that if EPA receives adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, EPA may adopt as final those provisions of the rule that are not the subject of an adverse comment. For additional information, see the direct final rule which is located in the Rules section of this **Federal Register.**

Dated: November 17, 2009.

Walter W. Kovalick Jr.,

Acting Regional Administrator, Region 5.

[FR Doc. E9–28677 Filed 12–1–09; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 090224232–91321–03]

RIN 0648–AX50

Endangered and Threatened Species: Designation of Critical Habitat for Cook Inlet Beluga Whale

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, the National Marine Fisheries Service (NMFS), propose to designate critical habitat for the Cook Inlet beluga whale (*Delphinapterus leucas*) distinct population segment under the Endangered Species Act (ESA). Two areas are proposed, comprising 7,809 square kilometers (3,016 square miles) of marine habitat. We solicit comments from the public on all aspects of the proposal.

DATES: Comments and information regarding this proposed rule must be received by close of business on February 1, 2010. Requests for public hearings must be made in writing and received by January 19, 2010.

ADDRESSES: Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources, Alaska Region, NMFS, ATTN: Ellen Sebastian. You may submit comments, identified by ''RIN 0648–AX50'' by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal eRulemaking Portal website at *http://www.regulations.gov*.
- Mail: P.O. Box 21668, Juneau, AK, 99802–1668.
- Fax: 907–586–7557
- Hand deliver to the Federal Building: 709 West 9th Street, Room 420A, Juneau, AK.

All comments received are a part of the public record and generally will be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business

Information or otherwise sensitive or protected information. NMFS will accept anonymous comments (enter N/A in the required fields, if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, WordPerfect, of Adobe portable document file (PDF) format only.

The proposed rule, maps, status reviews, and other materials relating to Cook Inlet beluga whales and this proposal can be found on our Web site at: *http://www.fakr.noaa.gov/*.

FOR FURTHER INFORMATION CONTACT: Kaja Brix, NMFS, Alaska Region, (907) 586–7824; or Marta Nammack, NMFS, (301) 713–1401.

SUPPLEMENTARY INFORMATION:

Rulemaking Background

We are responsible for determining whether species, subspecies, or distinct population segments (DPSs) are threatened or endangered and for designating critical habitat for these species under the Endangered Species Act (ESA) (16 U.S.C. 1531 *et seq.*). To be considered for listing under the ESA, a group of organisms must constitute a ''species'' which is defined in section 3 of the ESA to include ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' We consider a group of organisms to be a DPS for purposes of ESA listing when it is both discrete from other populations and significant to the species to which it belongs (61 FR 4722; February 7, 1996). We previously found the Cook Inlet beluga whale population segment to be reproductively, genetically, and physically discrete from the four other known beluga populations in Alaska and significant because it is in a unique ecological setting for the taxon, and its loss would result in a significant gap in the taxon's range. Following completion of a Status Review of the Cook Inlet beluga whale under the ESA, we published a proposed rule to list this DPS as an endangered species on April 20, 2007 (72 FR 19854). We subsequently extended the date for final determination on the proposed action by 6 months, until October 20, 2008 (73 FR 21578), as provided for by the ESA (section 4(b)(6)(B)(i)). We published a Final Rule to list the Cook Inlet beluga whale as an endangered species on October 22, 2008 (73 FR 62919). Initiating the process for designation of critical habitat, we published an Advance Notice of Proposed Rulemaking on April 14, 2009 (74 FR 17131).

We considered various alternatives to the critical habitat designation for the Cook Inlet beluga whale. The alternative of not designating critical habitat for the Cook Inlet beluga whale would impose no economic, national security, or other relevant impacts, but would not provide any conservation benefit to the species. This alternative is not .proposed because such an approach does not meet the legal requirements of the ESA and would not provide for the conservation of Cook Inlet beluga whale. The alternative of designating all eligible occupied habitat areas also was considered and rejected because some areas within the occupied range were not considered to be critical habitat, and did not contain the identified physical or biological features that are essential to the conservation of the Cook Inlet beluga.

An alternative to designating critical habitat within all eligible occupied areas is the designation of critical habitat within a subset of these areas. Under section 4(b)(2) of the ESA, we must consider the economic impacts, impacts to national security, and other relevant impacts of designating any particular area as critical habitat. We have the discretion to exclude any particular area from designation as critical habitat if the benefits of exclusion (i.e., the impacts that would be avoided if an area were excluded from the designation) outweigh the benefits of designation (i.e., the conservation benefits to the Cook Inlet beluga whale if an area were designated), so long as exclusion of the area will not result in extinction of the species. Exclusion under section 4(b)(2) of the ESA of one or more of the areas considered for designation would reduce the total impacts of designation. The determination to exclude any particular areas depends on our ESA 4(b)(2) analysis, which is described in detail in the ESA 4(b)(2) analysis report. Under this proposed rule (the preferred alternative), we do not propose to exclude any areas. The total estimated economic impact associated with this proposed rule is $157,000 to $472,000 (discounted at 7 percent) or $187,000 to $571,000 (discounted at 3 percent). We propose this alternative because it results in a critical habitat designation that provides for the conservation of the Cook Inlet beluga whale, without economic effects of sufficient significance to warrant any exclusions from that designation. Other areas within their range did not contain the identified physical or biological features that are essential to the conservation of the Cook Inlet beluga. This alternative also meets the requirements under the ESA and our joint NMFS-USFWS regulations concerning critical habitat.

Critical Habitat

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

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

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

Issues for Consideration and Evaluation

Section 4(a)(3) of the ESA requires us to designate critical habitat for threatened and endangered species. We are currently proposing to designate critical habitat for the Cook Inlet beluga whale. We have considered a number of issues in developing this proposed rule:

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

• Are there any areas outside those currently occupied that are ''essential for conservation?''

• What economic, national security, and other relevant impacts would result from a critical habitat designation?

• What is the appropriate geographic scale for weighing the benefits of exclusion and benefits of designation?

• Will the exclusion of any particular area from the critical habitat designation result in the extinction of the species?

Answering these questions involves a variety of considerations that we outline below.

Cook Inlet Beluga Whale Biology and Habitat Use

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

A detailed description of the biology of the Cook Inlet beluga whale may be found in the Proposed Listing Rule (72 FR 19854; April 20, 2007). Belugas generally occur in shallow, coastal waters, and while some populations make long seasonal migrations, Cook Inlet belugas reside in Cook Inlet year round. Data from satellite tagged whales documented that Cook Inlet belugas concentrate in the upper Inlet at rivers and bays in the summer and fall, and then tend to disperse into deeper waters moving to mid Inlet locations in the winter. The Traditional Ecological Knowledge (TEK) of Alaska Natives and systematic aerial survey data document a contraction of the summer range of Cook Inlet belugas over the last 2 decades of the twentieth century. While belugas were once abundant and frequently sighted in the lower Inlet during summer, they are now primarily concentrated in the upper Inlet. This constriction is likely a function of a reduced population seeking the highest quality habitat that offers the most abundant prey, most favorable feeding topography, the best calving areas, and the best protection from predation. An expanding population would likely use the lower Inlet more extensively.

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

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

In the summer, as eulachon runs begin to diminish, belugas rely heavily on several species of salmon as a primary prey resource. Beluga whale hunters in Cook Inlet reported one whale having 19 adult king salmon in its stomach (Huntington, 2000). NMFS (unpubl. data) reported a 14 foot 3 inch (4.3 m) male with 12 coho salmon, totaling 61.5 lbs (27.9 kg), in its stomach.

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

In the fall, as anadromous fish runs begin to decline, belugas again return to consume the fish species found in nearshore bays and estuaries. This includes cod species as well as other bottom-dwellers such as Pacific staghorn sculpin and flatfishes, such as starry flounder and yellowfin sole. This change in diet in the fall is consistent with other beluga populations known to feed on a wide variety of food. Pacific staghorn sculpin are commonly found nearshore in bays and estuaries on sandy substrate (Eschmeyer *et al.*, 1983). Flatfish are typically found in very shallow water and estuaries during the warm summer months and move into deeper water in the winter as coastal water temperatures cool (though some may occur in deep water year-round) (Morrow, 1980).

The available information indicates that Cook Inlet belugas continue to move within the Inlet during the winter months. They concentrate in deeper waters in mid Inlet past Kalgin Island, with occasional forays into the upper Inlet, including the upper ends of Knik and Turnagain Arms. While the beluga whales move into the mid Inlet during the winter, ice cover does not appear to limit their movements. Their winter

distribution does not appear to be associated with river mouths, as it is during the warmer months. The spatial dispersal and diversity of winter prey likely influence the wider beluga winter range throughout the mid and lower Inlet.

There is obvious and repeated use of certain habitats by Cook Inlet beluga whales. Intensive aerial abundance surveys conducted in June and July since 1993 have consistently documented high use of Knik Arm, Turnagain Arm, Chickaloon Bay and the Susitna River delta areas of the upper Inlet. Ninety-six to one hundred percent of all belugas sighted during these surveys were in the upper Inlet near Anchorage (Rugh *et al.*, in review). The high use of these areas by belugas is further supported by data from satellite tagging studies.

The range of Cook Inlet belugas has been previously defined as the waters of the Gulf of Alaska north of 58.0° N. and freshwater tributaries to these waters based on then-available scientific data (65 FR 34590, May 31, 2000; MMPA Sec. 216.15(g); 76 FR 62919, Oct. 22, 2008). There are few beluga sightings in the Gulf of Alaska outside Cook Inlet. In the 1970s and 1980s, beluga sightings occurred across much of the northern and central parts of Cook Inlet, but in the 1990s the summer distribution narrowed to primarily the northernmost portions of Cook Inlet. More of the Inlet was used by beluga whales during the spring, summer, and fall during the 1970s and 1980s than is presently used. However, because sightings continue to occur over the entire described range, we consider the present range of this DPS to be occupied habitat. The present range of the listed Cook Inlet beluga is limited to Cook Inlet waters north of a line from Cape Douglas to Cape Elizabeth (Figure 1).

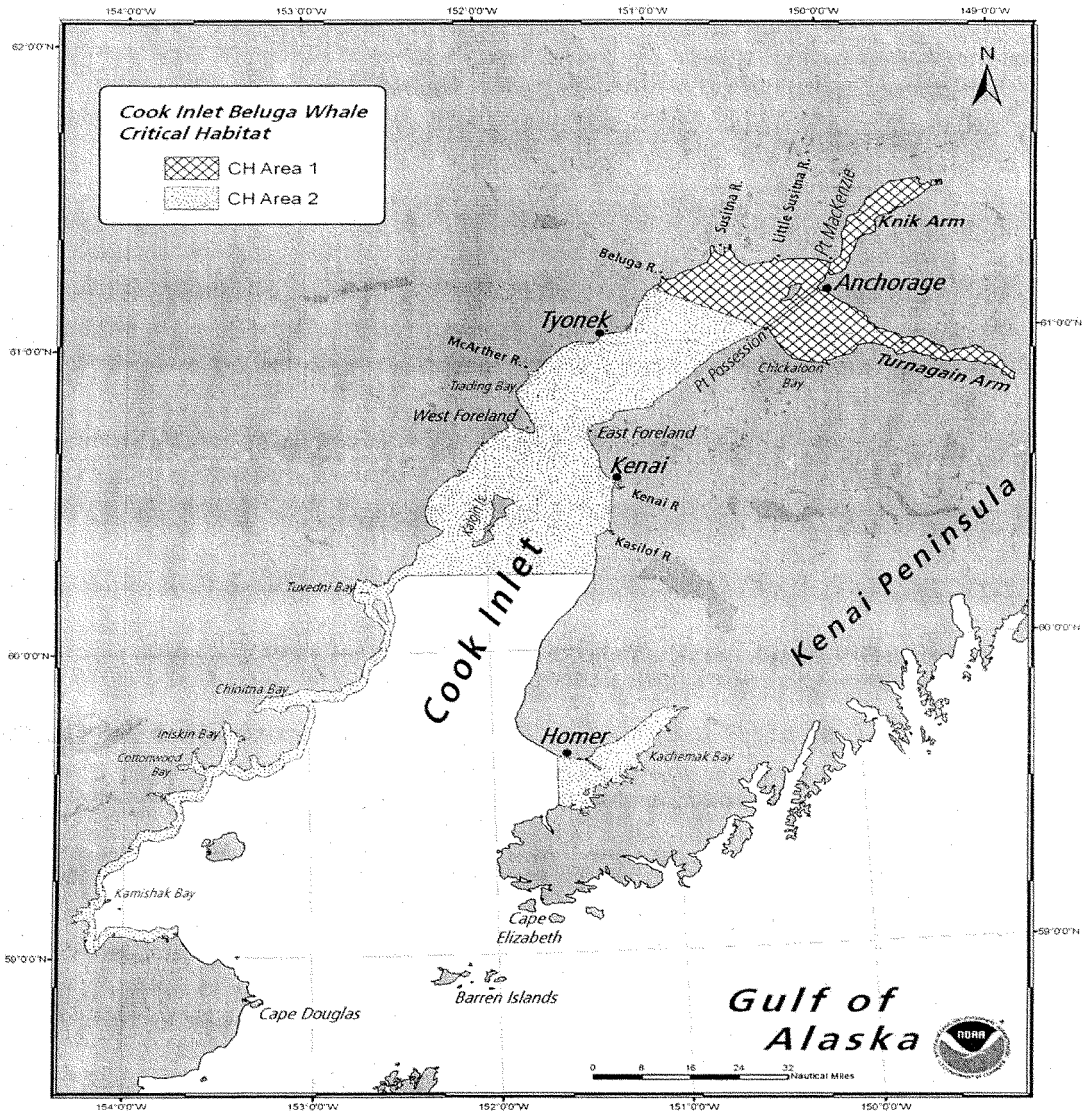
Proposed Critical Habitat

After considering comments received in response to the Advance Notice of Proposed Rulemaking (74 FR 17131; April 14, 2009), sighting reports, satellite telemetry data, TEK, scientific papers and other research, the biology and ecology of the Cook Inlet DPS of beluga whales, and information indicating the presence of one or more of the identified PCEs within certain areas of their range, we have identified the ''specific areas'' within the geographical area occupied by the Cook Inlet beluga whale to be proposed as critical habitat. We propose to designate critical habitat within the following areas (Figure 1).

Area 1: Area 1 encompasses 1,918 square kilometers (741 sq. mi.) of Cook Inlet northeast of a line from the mouth of Threemile Creek (61° 08.5′ N., 151° 04.4′ W.) to Point Possession (61° 02.1′ N., 150° 24.3′ W.). This area is bounded by the Municipality of Anchorage, the Matanuska-Susitna Borough, and the Kenai Peninsula borough. The area contains shallow tidal flats, river mouths or estuarine areas, and is important as foraging and calving habitats. Mudflats and shallow areas adjacent to medium and high flow accumulation streams may also provide for other biological needs, such as molting or escape from predators (Shelden *et al.*, 2003). Area 1 also has the highest concentrations of belugas from spring through fall as well as the greatest potential for adverse impact from anthropogenic threats.

Many rivers in Area 1 habitat have large eulachon and salmon runs. Two such rivers in Turnagain Arm, Twenty-mile River and Placer River, are visited by belugas in early spring, indicating the importance of eulachon runs for beluga feeding. Beluga use of upper Turnagain Arm decreases in the summer and then increases again in August through the fall, coinciding with the coho salmon run. Early spring (March to May) and fall (August to October) use of Knik Arm is confirmed by studies by Funk *et al.* (2005). Intensive summer feeding by belugas occurs in the Susitna delta area, Knik Arm and Turnagain Arm.

Figure 1. Proposed critical habitat for Cook Inlet beluga whales.



Whales regularly move into and out of Knik Arm and the Susitna delta (Hobbs *et al.*, 2000; Rugh *et al.*, 2004). The combination of satellite telemetry data and long-term aerial survey data demonstrate beluga whales use Knik Arm 12 months of the year, often entering and leaving the Arm on a daily basis (Hobbs *et al.*, 2005; Rugh *et al.*, 2005, 2007). These surveys demonstrate intensive use of the Susitna delta area (from the Little Susitna River to Beluga River) and Chickaloon Bay (Turnagain Arm) with frequent large scale movements between the delta area, Knik Arm and Turnagain Arm. During annual aerial surveys conducted by NMML in June-July, up to 61 percent of the whales sighted in Cook Inlet were in Knik Arm (Rugh *et al.*, 2000, 2005). The Chickaloon Bay area also appears to be used by belugas throughout the year.

Belugas are particularly vulnerable to impacts in Area 1 due to their high seasonal densities and the biological importance of the area. Because of their intensive use of this area (e.g., foraging, nursery, predator avoidance), activities that restrict or deter use of or access to Area 1 habitat could reduce beluga calving success, impair their ability to secure prey, and increase their susceptibility to predation by killer whales. Activities that reduce anadromous fish runs could also negatively impact beluga foraging success, reducing their fitness, survival, and recovery. Furthermore, the tendency for belugas to occur in high concentrations in Area 1 habitat predisposes them to harm from such events as oil spills.

Area 2: Area 2 consists of 5,891 square kilometers (2,275 square miles) of less concentrated spring and summer beluga use, but known fall and winter use areas. It is located south of Area 1, north of a line at 60° 25.0' N., and includes nearshore areas south of 60° 25.0' N. along the west side of the Inlet and Kachemak Bay on the east side of the lower inlet.

Area 2 is largely based on dispersed fall and winter feeding and transit areas in waters where whales typically occur in smaller densities or deeper waters. It includes both near and offshore areas of the mid and upper Inlet, and nearshore areas of the lower Inlet. Due to the role of this area as probable fall feeding areas, Area 2 includes Tuxedni,

Chinitna, and Kamishak Bays on the west coast and a portion of Kachemak Bay on the east coast. Winter aerial surveys (Hansen, 1999) sighted belugas from the forelands south, with many observations around Kalgin Island. Based on tracking data, Hobbs *et al.* (2005) document important winter habitat concentration areas reaching south of Kalgin Island.

Belugas have been regularly sighted at the Homer Spit and the head of Kachemak Bay, appearing during spring and fall of some years in groups of 10–20 individuals (Speckman and Piatt, 2000). Belugas have also been common at Fox River Flats, Muddy Bay, and the northwest shore of Kachemak Bay (NMFS unpubl. data), sometimes remaining in Kachemak Bay all summer (Huntington, 2000).

Dive behavior indicates beluga whales make relatively deeper dives (e.g., to the bottom) and are at the surface less frequently in Area 2, and hence are less frequently observed (Hobbs *et al.*, 2005). It is believed these deep dives are associated with feeding during the fall and winter months (NMFS unpubl. data). The combination of deeper dives, consistent use of certain areas, and stomach content analyses indicate that belugas whales are actively feeding in these areas. Hence, deeper mid Inlet habitats may be important to the winter survival and recovery of Cook Inlet beluga whales.

Physical and Biological Features Essential for Conservation

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

Scientific research, direct observation, and TEK indicate fish are the primary prey species of the Cook Inlet beluga whale, and that certain species are especially important. This importance may be due to feeding strategies of the whales, physical attributes of the prey (e.g., size), the caloric value of the prey, the availability of the prey, and the life-history aspects of the whales, among other considerations. Two fish species that are highly utilized by Cook Inlet beluga whales are king or Chinook salmon and Pacific eulachon. Both of these species are characterized as having very high fat content, returning to the upper Inlet early in the spring, and having adult (spawning) returns which occupy relatively narrow timeframes during which large concentrations of fish may be present at or near the mouths of tributary streams.

Analysis of stomach contents and research of fatty acid signatures within beluga blubber indicate the importance of other species of fish and invertebrates to the diets of these whales. The most prominent of these are other Pacific salmon (sockeye, chum, and coho), Pacific cod, walleye pollock, saffron cod, and yellowfin sole. Beluga whales are also known to feed on a wide variety of vertebrate and invertebrate prey species. However, the aforementioned fish species occupy a prominent role in their foraging and energetic budgets and are considered essential to the beluga whale's conservation.

NMFS research has considered the distribution of the Cook Inlet beluga whale and its correlations with behavior, habitat function, and physical parameters (Goetz *et al.*, 2007). While these whales are highly mobile and capable of ranging over a large portion of Cook Inlet on a daily basis, in fact they commonly occupy very discrete areas of the Inlet, particularly during summer months. These areas are important feeding habitats, whose value is due to the presence of certain species of prey within the site, the numbers of prey species within the site, and the physical aspects of the site which may act to concentrate prey or otherwise facilitate feeding strategy. In upper Cook Inlet, beluga whales concentrate offshore from several important salmon streams and appear to use a feeding strategy which takes advantage of the bathymetry in the area. The channels formed by the river mouths and the shallow waters act as a funnel for salmon as they move past waiting belugas. Dense concentrations of prey may be essential to beluga whale foraging. Hazard (1988) hypothesized that beluga whales were more successful feeding in rivers where prey were concentrated than in bays where prey were dispersed. Fried *et al.* (1979) noted that beluga whales in Bristol Bay fed at the mouth of the Snake River, where salmon runs are smaller than in other rivers in Bristol Bay. However, the mouth of the Snake River is shallower, and hence may concentrate prey. Research on beluga whales in Bristol Bay suggests these whales preferred certain streams for feeding based on the configuration of the stream channel (Frost *et al.*, 1983). This study theorized beluga whales' feeding efficiencies improve in relatively shallow channels where fish are confined or concentrated. Bathymetry and fish density may be more important than sheer numbers of fish in beluga feeding success. Although beluga whales do not always feed at the streams with the highest runs of fish, proximity to medium to high flow river systems is also an important descriptor in assigning importance to feeding habitats. Research has found beluga distribution in Cook Inlet is significantly greater near mudflats and medium and high flow accumulation rivers. (These waters were categorized in Goetz *et al.* (2007) using a digital elevation model, similar to drainage basins. A complete list of these waters may be found on the NMFS website *http://www.fakr.noaa.gov/*.) Beluga whales are seldom observed near small flow tributaries.

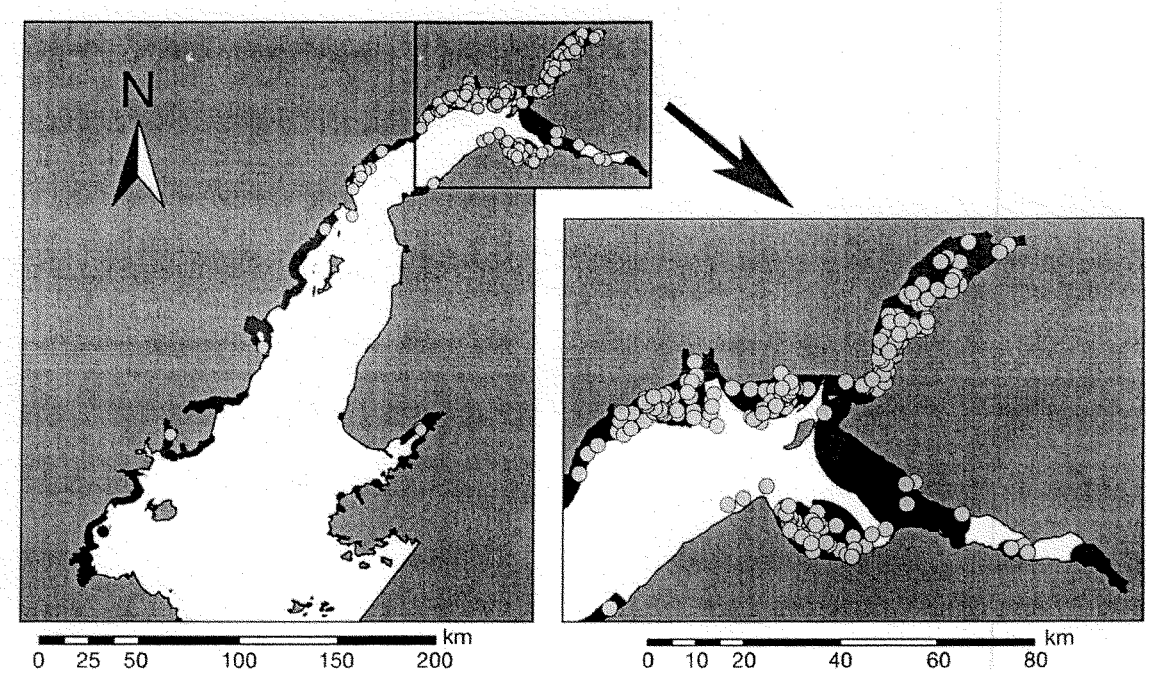
Cook Inlet beluga whales are preyed upon by killer whales, their only known natural predator. We have received reports of killer whales throughout Cook Inlet, and have responded to several instances of predation within Turnagain Arm, near Anchorage.

Given the small population size of the Cook Inlet beluga whales, predation may have a significant effect on beluga recovery. In addition to directly reducing the beluga population, the presence of killer whales in Cook Inlet may also increase stranding events. We consider killer whale predation to be a potentially significant threat to the conservation and recovery of these

whales. Beluga whales may employ several defense strategies against killer whale predation. One strategy is to retreat to shallow estuaries too shallow for the larger killer whales. These areas might also provide acoustical camouflage due to their shallow depths, silt loads, and multiple channels.

Because of their importance in the Cook Inlet beluga whale's feeding strategy, as predator escape terrain, and in providing other habitat values, we consider ''mudflats,'' identified here as shallow and nearshore waters proximate to certain tributary streams, to a be physical feature essential to the conservation of the Cook Inlet beluga whale. Figure 2 presents the location of this feature within Cook Inlet.

Figure 2. Cook Inlet beluga whale habitat use (black) as predicted by the proximity to mudflats and high and medium flow waters, with beluga sightings from summer aerial surveys (1993-2004) shown as dots (Goetz et al., 2007).



For purposes of describing and locating this feature, and after consultation with the author of the model presented in Goetz *et al.* (2007), we determined spatial extent of this feature may best be described as being within the 30–foot (9.1 m) depth contour and within 5 miles (8.0 km) of medium and high flow accumulation rivers.

It appears Cook Inlet beluga whales have lower levels of contaminants stored in their bodies than other populations of belugas. Because these whales occupy the most populated and developed region of the state, they must compete with various anthropogenic stressors, including pollution. These whales often occur in dense aggregations within small nearshore areas, where they are predisposed to adverse effects of pollution. Beluga whales are apex predators, occupying the upper levels of the food chain. This predisposes them to illness and injury by biomagnification of certain pollutants. Another population of beluga whales found in the Gulf of St. Lawrence in Canada is characterized by very high body burdens of contaminants. There, high levels of PCBs, DDT, Mirex, mercury, lead, and indicators of hydrocarbon exposure have been detected in belugas. These substances are well-known for their toxic effects on animal life and for interfering with reproduction and resistance to disease. Many of these contaminants are transferred from mother to calf through nursing.

Given present abundance levels, the impact of any additional mortalities to

the extinction risk for this DPS, the sensitivity of beluga whales to certain pollutants, their trophic position and biomagnifications, the fact that large numbers of Cook Inlet beluga whales typically occupy very small habitats, and that their range includes the most populated and industrialized area of the state, we consider water quality to be an important aspect of their ecology, and essential to their conservation within both areas 1 and 2.

Cook Inlet beluga whales do not occupy an extensive range, and are not known to undertake migrations. Within their occupied range, however, these whales move freely and continuously. The range of the Cook Inlet beluga whale is neither biologically nor physically uniform. It ranges between shallow mudflats, glacial fjords, deep waters with marine salinities, vegetated shallows of predominantly freshwaters, and areas of the upper Inlet in which heavy ice scour, extreme tidal fluctuations, high silt content, low temperatures, and high turbidity work to limit any intertidal or persistent nearshore organisms. Beluga whales have adapted here by utilizing certain areas over time and space to meet their ecological needs. While much remains to be understood of their ecology and basic life history, it is apparent a large part of their movement and distribution is associated with feeding. Feeding habitat occurs near the mouths of anadromous fish streams, coinciding with the spawning runs of returning adult salmon. These habitats may change quickly as each species of salmon, and often each particular river, is characterized as having its individual run timing. Calving habitat is poorly described, but may depend on such factors as temperatures, depths, and salinities. Predator avoidance may be a very important habitat attribute, and is likely to exist only in shallows within Turnagain and Knik Arms of the upper Inlet. Causeways, dams, and non-physical effects (e.g., noise) can interfere with whale movements. It is essential to the conservation of Cook Inlet beluga whales that they have unrestricted access within and between the critical habitat areas.

Beluga whales are known to be among the most adept users of sound of all marine mammals, using sound rather than sight for many important functions, especially in the highly turbid waters of upper Cook Inlet. Beluga whales use sound to communicate, locate prey, and navigate, and may make different sounds in response to different stimuli. Beluga whales produce high frequency sounds which they use as a type of sonar for finding and pursuing prey, and likely for navigating through ice-laden waters. In Cook Inlet, beluga whales must compete acoustically with natural and anthropogenic sounds. Man-made sources of noise in Cook Inlet include large and small vessels, aircraft, oil and gas drilling, marine seismic surveys, pile driving, and dredging. The effects of man-made noise on beluga whales and associated increased ''background'' noises may be analogous to a human's reduced visual acuity when confronted with heavy fog or darkness.

Anthropogenic noise above ambient levels may cause behavioral reactions in whales (harassment) or mask communication between these animals. The effects of harassment may also include abandonment of habitat. At louder levels, noise may result in temporary or permanent damage to the whales' hearing. Empirical data exist on the reaction of beluga whales to in-water noise (harassment and injury thresholds) but are lacking regarding levels that might elicit more subtle reactions such as avoiding certain areas. Noise capable of killing or injuring beluga whales, or that might cause the abandonment of important habitats, would be expected to have consequences to this DPS in terms of survival and recovery. We consider ''quiet'' areas in which noise levels do not interfere with important life history functions and behavior of these whales to be an essential feature of this critical habitat. This feature is found in both areas 1 and 2.

Based on the best scientific data available of the ecology and natural history of Cook Inlet beluga whales and their conservation needs, we have determined the following physical or biological features are essential to the conservation of this species:

1. Intertidal and subtidal waters of Cook Inlet with depths <30 feet (9.1 m) (MLLW) and within 5 miles (8.0 km) of high and medium flow accumulation anadromous fish streams;

2. Primary prey species consisting of four (4) species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole;

3. The absence of toxins or other agents of a type or amount harmful to beluga whales;

4. Unrestricted passage within or between the critical habitat areas; and

5. Absence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet beluga whales.

All of these features are found or identified within the areas proposed as critical habitat.

Critical Habitat Boundaries

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

We have limited information on the distribution and occurrence of Cook Inlet beluga whales within tributary waters of Cook Inlet. Traditional Knowledge of Alaska Native hunters tells us these whales have occurred several miles up the Susitna and Beluga Rivers in past years, and whales have been observed above tidewater in the Knik River at Turnagain Arm. We propose critical habitat be bounded on the upland by Mean Higher High Water (MHHW) datum, the lower reaches of certain important tributary waters entering the Inlet, and the following descriptions:

(1) Area 1. All marine waters of Cook Inlet north of a line connecting Point Possession (61.04° N., 150.37°. W) and the mouth of Threemile Creek (61.0855° N., 151.0440° W.), including waters of the Susitna River south of 61.33.33 N latitude, the Little Susitna River south of 61.30° N. latitude, and the Chikaloon River north of 60.8833° N. latitude.

(2) Area 2. All marine waters of Cook Inlet south of a line connecting Point Possession (61.04° N., 150.37° W.) and the mouth of Threemile Creek (61.0855° N., 151.0440° W.) and north of 60.25° N latitude, including waters within 2 nautical miles (3.2 km) of MHHW along the western shoreline of Cook Inlet between 60.25° N. latitude and the mouth of the Douglas River (59.04° N., 153.45° W.); all waters of Kachemak Bay east of 40.00 W longitude; and waters of the Kenai River below the Warren Ames bridge at Kenai, Alaska.

Special Management Considerations or Protection

An occupied area may be designated as critical habitat only if it contains physical and biological features that ''may require special management considerations or protection.'' It is important to note the term ''may require special management considerations or

protection'' refers to the physical or biological features, rather than the area proposed as critical habitat. Neither the ESA nor NMFS regulations define the ''may require'' standard. We interpret it to mean that a feature may presently or in the future 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 PCEs identified for Cook Inlet beluga whales may require special management considerations or protection. In our initial determination, we considered whether there is:

(a) Presently a negative impact on the feature(s);

(b) A possible negative impact on the feature in the future;

(c) Presently a need to manage the feature(s); or

(d) A possible need to manage the feature(s) in the future.

Intertidal and subtidal waters of Cook Inlet with depths <30 feet (MLLW) and within 5 miles (8.0 km) of high and medium flow anadromous fish streams support important beluga feeding habitat because of their shallow depths and bottom structure, which act to concentrate prey and aid in feeding efficiency by belugas. The physical attributes of this PCE could be modified or lost through filling, dredging, channel re-alignment, dikes, and other structures. Within navigable waters, the Army Corps of Engineers has jurisdiction over these actions and structures and administers a permit program under the Rivers and Harbors Act and Clean Water Act. In establishing these laws, it was the intent of the U.S. Congress to regulate and manage these activities. The Clean Water Act (CWA) was created to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. Section 404 of the CWA regulates the discharge of fill materials into these waters, noting concerns with regard to water supplies, shellfish beds, fishery areas, and spawning and breeding areas. The intent of Congress to protect these features indicates that they may require special management considerations or protection.

Four (4) species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole constitute the most important food sources for Cook Inlet beluga whales as identified through research and as held by the traditional wisdom and knowledge of Alaska Natives who have participated in the subsistence hunting of these whales. Stomach analysis of Cook Inlet beluga whales has found these species constitute the majority of consumed prey by weight during summer/ice free periods. All of these species are targeted by commercial fisheries, and some are prized by sport fishermen. The recognition of harm due to overexploitation and the need for continued management underlie the efforts of the state and Federal government to conserve these species. The fisheries in state waters of Cook Inlet are managed under various management plans. In addition to commercial fisheries, State plans manage subsistence, sport, guided sport, and personal use fisheries. Federal fisheries management plans provide for sustainable fishing in Federal waters of lower Cook Inlet. These regulatory efforts indicate that these four fish species may require special management considerations or protection.

Cook Inlet is the most populated and industrialized region of the state. Its waters receive various pollutant loads through activities that include urban runoff, oil and gas activities (discharges of drilling muds and cuttings, production waters, treated sewage effluent discharge, deck drainage), municipal sewage treatment effluents, oil and other chemical spills, fish processing, and other regulated discharges. The U.S. Environmental Protection Agency (EPA) regulates many of these pollutants, and may authorize certain discharges under their National Pollution Discharge Elimination System (section 402 of the CWA). Management of pollutants and toxins is necessary to protect and maintain the biological, ecological, and aesthetic integrity of Cook Inlet's waters. Accordingly, ensuring the absence of toxins or other agents of a type or amount harmful to beluga whales may require special management considerations or protection.

Certain actions may have the effect of reducing or preventing beluga whales from freely accessing the habitat area necessary for their survival. Dams and causeways may create physical barriers, while noise and other disturbance or harassment might cause a behavior barrier, whereby the whales reach these areas with difficulty or, in a worst case, abandon the affected habitat areas altogether due to such stressors. Most in-water structures would be managed under several on-going Federal regulatory programs (e.g., CWA). Regulation for behavior barriers is less clear. Any significant behavioral reaction with the potential to injure whales may be prohibited under the provisions of the ESA and MMPA. However, it is unclear whether these two acts could manage this proposed feature in the absence of designation of critical habitat and recognition of this PCE. The unrestricted passage within or between critical habitat areas may require special management considerations or protection.

We have discussed the importance of sound to beluga whales, and concern for man-made noise in their environment. There exists a large body of information on the effects of noise on beluga whales. Research on captive animals has found noise levels that result in temporary threshold shifts in beluga hearing. Based on this research and empirical data from belugas in the wild, we have established in-water noise levels that define when these animals are harassed or injured. We consider the threshold for acoustic harassment to be 160 dB re: 1 μPa for impulsive sounds (e.g., pile driving) and 120 dB re: 1 μPa for continuous noise.

No specific mechanisms presently exist to regulate in-water noise, other than secondarily through an associated authorization. Even then, there is some question whether the authorizing state, local, or Federal agency has the authority to regulate noise. Because of the importance of the ability to use sound to Cook Inlet beluga whales, the absence of in-water noise at levels harmful to the whales is an essential feature that may require special management considerations or protection.

While these PCEs are currently subject to the aforementioned regulatory management, there remain additional and unmet management needs owing to the fact that none of these management regimes is directed at the conservation and recovery needs of Cook Inlet beluga whales. This reinforces the finding that each of the identified PCEs ''may require special management considerations.''

Areas Outside the Geographical Area Occupied by the Species

Section 3(5)(A)(ii) of the ESA defines critical habitat to include specific areas outside the geographical area occupied by the species only if the Secretary determines them to be essential for the conservation of the species. Section 3(3) of the ESA defines conservation as ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' NMFS' ESA regulations at 424.12(e) state that the

agency ''shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'' We are not proposing to designate any areas not occupied at the time of listing because any such areas are presently unknown (if they exist), and the value of any such habitat in conserving this species cannot be determined.

Activities That May be Affected by This Action

Section 4(b)(8) of the ESA requires that we describe briefly and evaluate, in any proposed or final regulation to designate critical habitat, those activities that may destroy or 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 consultation under section 7 of the ESA. Such activities include: coastal development; pollutant discharge; navigational projects (dredging); bridge construction; marine tidal generation projects; marine geophysical research; oil and gas exploration, development, and production; Department of Defense activities; and hydroelectric development. We do not propose to include in critical habitat any manmade structures and the land on which they rest within the described boundaries that were in existence at the time of designation. While these areas would not be directly affected by designation, they may be affected if a Federal action associated with the area/structure (e.g., a discharge permit from the EPA) might have indirect impacts to critical habitat.

Consistent with recent agency guidance on conducting adverse modification analyses, 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. These activities are discussed further in the following sections.

Impacts of Designation

ESA Section 4(b)(2) provides that ''the Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, impact to national security, and any other relevant impact of specifying any particular area as critical habitat.'' The primary impact of a critical habitat designation comes from the ESA section 7(a)(2) requirement that Federal agencies ensure their actions are not likely to result in the destruction or adverse modification of critical habitat. Determining this impact is complicated by the fact that section 7(a)(2) contains the additional requirement that Federal agencies must ensure their actions are not likely to jeopardize the species' continued existence. The true impact of designation is the extent to which Federal agencies modify their actions to ensure their actions are not likely to adversely modify the critical habitat–beyond any modifications they would make because of the listing and requirement to avoid jeopardizing the continued existence of the listed species. Additional impacts of designation include state and local protections that may be triggered as a direct result of designation, and benefits that may arise from education of the public to the importance of an area for species conservation. We did not identify state or local protections that may be triggered by this proposed designation, but have identified educational benefits. We discuss educational benefits in the ''Benefits of Designation'' section below.

We have sought to predict the incremental change in Federal agency activities as a result of critical habitat designation and the adverse modification prohibition, beyond the changes predicted to occur as a result of the listing and the jeopardy prohibition, to the fullest extent practicable, given available information and scientific knowledge. We examined the types of activities that may be federally authorized, funded, or undertaken that have the potential to affect Cook Inlet beluga whale critical habitat. We identified several specific categories of activities and/or economic sectors that may affect Cook Inlet beluga critical habitat and, therefore, would be subject to ESA section 7's adverse modification requirements. These include: fishing (commercial, sport, personal-use, and subsistence), marine transportation (vessel traffic, port development, transshipment of goods, ferry and cruise ship activity), energy (oil and natural gas, coal, geothermal, wind, and tidal generation), tourism/recreation, cultural and social (Alaska Native access), large-scale infrastructure (Knik Arm crossing, highway and bridge retrofitting projects along Turnagain Arm), public education/science (environmental education, public policy development, and decision-making), national defense (Fort Richardson and Elmendorf AFB), and water quality management (waste water discharges, municipal treatment facilities, oil and other toxin spills).

We next considered the range of modifications we might recommend during consultation on these activities to avoid the destruction or adverse modification of Cook Inlet beluga whale critical habitat. A draft economic report describes in detail the actions that may be affected, the potential range of modifications we might recommend for those actions, and the estimate of economic impacts that might result from such changes (Entrix, 2009). The report describes the likelihood of an ESA section 7 consultation resulting in changes to each type of action. This report is available on the NMFS Alaska Region Web site at *http://www.akr.noaa.gov/*. We are soliciting comments on our analysis of impacts and their potential benefits and costs.

General Analytic Approach

To evaluate potential impacts of designation, we first identified activities or actions that may affect Cook Inlet beluga whale critical habitat and, therefore, be subject to ESA section 7 consultation. We then identified and assessed the costs of the critical habitat designation to each of these, as well as any substantial benefits to recreation, subsistence uses, education, and the other sectors identified above.

When there were sufficient empirical data and supporting information, we used an incremental approach in assessing the economic and other impacts of the critical habitat designation. When there was insufficient information with which to objectively disentangle impacts between those occurring from the listing and those occurring from the critical habitat designation, we identified the impacts as co-extensive. In other words, in those situations, we identified all potential costs and benefits resulting from section 7 consultation, regardless of whether they are wholly and uniquely attributable to ''adverse modification'' or whether they result from the ''jeopardy'' prohibition of section 7. Next, based upon an extensive national survey of U.S. Fish and Wildlife Service (USFWS) section 7 consultations, we apportioned the co-extensive impacts in such a way as to isolate only those costs attributable to critical habitat designation. (In 2002, Industrial Economics, Inc. (IEc.) reviewed the consultation records from several U.S. Fish & Wildlife Service field offices across the country and analyzed the administrative costs of such consultations, based on data from the Federal Government Schedule Rates, Office of Personnel Management, 2007. IEc. developed an algorithm to allocate co-extensive costs between those that

are attributable to the listing decision and those that are attributable to the critical habitat designation. NMFS relied on that algorithm to similarly apportion co-extensive impacts here.)

We allocated the impacts to each critical habitat area. In considering potential impacts for each area, we kept in mind certain analytical limitations. First, not all activity types are equally likely to incur changes as a result of ESA section 7 consultation within each activity type. Second, estimates are based on potential changes, so there is a wide range of estimated impacts. Third, in balancing the benefits of designation against the benefits of exclusion, we gave greater weight to changes we considered ''likely'' or ''potential,'' than to changes we considered ''unlikely.''

Benefits of Designation

The primary benefit of designation is that section 7 of the ESA requires all Federal agencies to ensure their actions are not likely to destroy or adversely modify critical habitat. This is in addition to the requirement that all Federal agencies ensure their actions are not likely to jeopardize the species' continued existence. Another benefit of designation is that it provides notice of areas and features important to species conservation, and information about the types of activities that may reduce the conservation value of the habitat, which can be effective for education and outreach.

In addition to the direct benefits of critical habitat designation to the Cook Inlet beluga whales, there will be ancillary benefits. These other benefits may be economic in nature, or they may be expressed through beneficial changes in the ecological functioning of Cook Inlet. For example, an increase in the beluga whale population could induce growth of an active whale watching industry sector, with benefits flowing to a wide range of suppliers of support goods and services (e.g., lodging, restaurants, tourist services, marine services). Another example could be the resumption of traditional subsistence harvests of beluga whales in Cook Inlet, to the extent that designation of critical habitat may result in the recovery of this population to levels that would sustain a harvest. This consequence would have important social and cultural value. Yet another example could be reduced levels of pollution in Cook Inlet, with associated benefits accruing to a suite of ecological services, culminating in an improved quality of life for Cook Inlet residents and visitors, alike. With sufficient information, it is possible to monetize many of the benefits of critical habitat designation.

To determine the direct benefits of critical habitat designation, we would have to first quantify the ecological and biological benefits accruing to the Cook Inlet beluga whale population expected from ESA section 7 consultation (for example, the number of whales saved or the increase in their longevity, health, productivity, etc., deriving from protection of critical habitat), and then translate those benefit streams into dollars (for example, using information about society's willingness-to-pay to achieve these outcomes). For the ancillary benefits, monetizing impacts would require quantifying the effects of critical habitat protection to these other potential sources of benefits, and then translating these impacts into comparable (i.e., discounted present value) dollars, employing the appropriate rate of social time preference, and projecting the schedule at which benefits would accrue, over time.

While conceptually achievable, we are not aware of any such analysis having been completed for Cook Inlet beluga whales or their critical habitat. A research project that intends to address these specific issues for the Cook Inlet beluga whale has been initiated by researchers at NOAA's Alaska Fisheries Science Center. That research is in the very early design and development stage, with even preliminary results not anticipated for, perhaps, several years.

ESA section 4(b)(2) requires us also to consider impacts other than economic impacts. These can be equally difficult to monetize; for example, we lack information to monetize the benefits to national security from excluding certain areas from the critical habitat designation. Given the lack of information that would allow us either to quantify or monetize the benefits of designating critical habitat, we have determined the ''qualitative conservation benefits'' of designating each of the two particular areas identified as critical habitat for Cook Inlet beluga whales.

In determining the benefit of designation for each area, we considered a number of factors. We took into account the physical and biological features present in the area, the types of human activities that may threaten these features occurring in and/or adjacent to the area, and the likelihood that designation would lead to changes in those activities, either because of an ESA section 7 consultation or because of the educational effect of designation. We also considered that each area is unique and supports a distinct and critical aspect of the whales' life history. This consideration is described in the 4(b)(2) preparatory analysis supporting this proposed rule and summarized above (Proposed Critical Habitat).

Designation of critical habitat in Area 1 is likely to improve the ability of an ESA section 7 consultation to focus on Cook Inlet nearshore areas, beluga prey species, water quality, and passage conditions, as essential biological features of the whales' habitat. As the most industrialized and populated region of the State, Area 1 receives high volumes of waste discharge. Designation of this area as critical habitat is likely to improve the ability of a section 7 consultation to affect water quality management activities, though we have little information at this time to predict what those actions may be, or how such actions may be changed, as a result of section 7 consultation. We believe critical habitat designation will provide significant conservation benefits to beluga whales, particularly in Area 1, because of its educational value for all users of the upper Inlet. If we can publicly highlight that the area is ''critical habitat'' for the whales, it will strengthen the messages to all users, whether industrial, municipal, commercial, tribal, recreational, or residential of their impacts upon, and responsibility for, the upper-Inlet area. Because Area 1 contains most of what we consider high-value foraging habitat, designation is likely to increase awareness of this habitat value and the need for special attention to issues that might degrade, diminish, or otherwise adversely impact this habitat.

Area 2 contains areas known to provide foraging and overwintering areas for Cook Inlet belugas, and is generally more remote and less intensively developed than Area 1. Designation of critical habitat will heighten public awareness of the beluga's use of, and dependence upon, this habitat. It would also have many of the benefits described for Area 1.

ESA Section 4(a)(3)(B)(i) Analysis

Section 4(a)(3)(B)(i) of the ESA provides: ''The Secretary shall not designate as critical habitat any lands or other geographic 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 a plan provides benefit to the species for which critical habitat is proposed for designation.'' In response to the ANPR, we have received a request from the U.S. Air Force to

exempt Elmendorf Air Force Base (EAFB) from the designated critical habitat. The Air Force seeks this exemption based on the existence of an Integrated Natural Resource Management Plan (INRMP), consistent with Public Law 108–136. However, because this military property extends seaward to MHHW and we have not proposed to designate as critical habitat any tributary waters within the EAFB areas covered by the INRMP, no portions of the EAFB areas overlap with the proposed critical habitat. Section 4(a)(3)(B)(i)'s exemption is therefore unnecessary and inapplicable to those areas. In the event that the proposed critical habitat boundaries might change in the final rule, we will evaluate this request and the benefit of the Elmendorf INRMP in providing for the conservation of the Cook Inlet beluga whale.

We have also considered exclusion under ESA section 4(a)(3)(B)(i) for a military live-fire practice range on Fort Richardson, near Anchorage. The Eagle River Flats range (ERF) provides training in artillery such as mortars. While the boundaries for the ERF (i.e., the MHHW line) do not overlap with the proposed critical habitat, the firing range includes the lower reaches of Eagle River which could have been included in the designation (similar to the Susitna and Little Susitna Rivers). Research by Fort Richardson has documented beluga whale use, including feeding behavior, within this portion of Eagle River.

We have considered the INRMP for Fort Richardson and whether that plan provides benefit for the Cook Inlet beluga whale. Based on our consideration of these factors, we conclude the Fort Richardson INRMP provides benefits for the Cook Inlet beluga whale and the exclusion of the ERF is consistent with section 4(a)(3)(B)(i) of the ESA. Therefore, the proposed designation does not include any area within the ERF. However, areas outside the area covered by the INRMP, such as those areas outside of and surrounding the ERF range, are not subject to the exemption contained in section 4(a)(3)(B)(i).

ESA Section 4(b)(2) Analysis

We have described the specific areas that fall within the ESA section 3(5) definition of critical habitat and that are eligible for designation as critical habitat. Section 4(b)(2) of the ESA requires the Secretary to consider the economic impact, impact on national security, and any other relevant impact of designation. The Secretary has the discretion to exclude any particular area from designation if he determines the benefits of exclusion outweigh the benefits of designation of that particular area, based upon best scientific and commercial data. The Secretary may not exclude an area from designation if exclusion will result in the extinction of the species. The authority to exclude any particular area from the critical habitat designation is discretionary.

To determine the ''benefits of excluding a particular area,'' we considered the previously-discussed Federal activities that have the potential to be changed, as a direct result of a section 7 consultation and application of the prohibition against destroying or adversely modifying critical habitat. We considered changes to those actions that could potentially be required to avoid destroying or adversely modifying critical habitat, regardless of whether the changes could also potentially be required to avoid jeopardizing the whales' continued existence. When both ''adverse modification'' and ''jeopardy'' considerations were present, we apportioned the respective shares of the impacts of consultation, as described above, in the discussion of our General Analytic Approach. We also considered economic benefits of excluding each ''particular'' area, and considered national security benefits of excluding particular areas, based on military ownership, interests, or control.

ESA section 4(b)(2) does not specify a method for the weighing process. Agencies are frequently required to balance benefits of regulations against impacts. Executive Order (E.O.) 12866 most recently established this requirement for Federal agency regulation. Executive branch guidance from the Office of Management and Budget (OMB) suggests that benefits should first be monetized (converted into dollars). Benefits that cannot be monetized should be quantified (converted into units). Where benefits can be neither monetized nor quantified, agencies are to describe the expected benefits (U.S. Office of Management and Budget, Circular A–4, September 17, 2003 (OMB, 2003)).

The draft economic report (Entrix, 2009) describes in detail, the actions that may be affected and the estimate of economic impacts that might result from critical habitat designation.

Section 4(b)(2) of the ESA requires that we balance the benefit of designation against the benefit of exclusion for each particular area. The benefit to the species of designation depends upon the conservation value of the area, the seriousness of the threats to that conservation value, and the extent to which an ESA section 7 consultation or the educational aspects of designation will address those threats. If a threat bears a closer relationship to the destruction or adverse modification prohibition of section 7, we can begin to understand and give weight to the incremental benefit of designation, beyond the protection provided by listing and the jeopardy prohibition. We have identified the anthropogenic threats that face each area, and the likelihood that the destruction or adverse modification prohibition will enhance our ability to address those threats. Based upon the best available science, and the Regulatory Impact Review (RIR)/4(b)(2) preparatory analysis/Initial Regulatory Flexibility Analysis (IRFA), we believe designation of critical habitat will enhance our ability to address many of these threats, either through an ESA section 7 consultation or through ongoing public outreach and education. Because some of these threats bear a stronger relationship to adverse modification than to jeopardy, we also believe there is an incremental benefit of designation beyond the protection afforded by the jeopardy prohibition.

The benefit of designation also depends on the conservation value of the area. The habitat areas for Cook Inlet beluga whales are unique and irreplaceable. Each of the proposed critical habitat areas supports a distinct aspect of the whales' life history, and the conservation function of each area complements the conservation function of the other. Therefore, designation of each critical habitat area benefits the conservation function of the other area. For all of the reasons discussed above, we consider the benefit of designation of each area (when taken in its entirety) to be high. The benefit of exclusion of an area depends on some of the same factors – the likelihood of an ESA section 7 consultation and the extent to which an activity is likely to change, either in response to critical habitat designation, or as a result of that consultation. As with the benefit of the designation-side of the equation, if a threat bears a closer relationship to the adverse modification prohibition of section 7, we can begin to understand and give weight to the incremental cost of designation (benefit of inclusion) beyond the cost associated with listing and the jeopardy prohibition. In balancing the potential costs of designation, we also considered the nature of the threats and the relevance of section 7's destruction or adverse modification prohibition to each threat. Because adverse modification and jeopardy bear an equally strong

relationship to many activities, we gave these costs of designation moderate weight. We recognize that we have not monetized (quantified) the costs that may be associated with the education benefit of designation.

Section 4(b)(2) requires consideration of national security interests, in addition to any economic factors. Possible impacts to national security due to designation of critical habitat include: preventing, restricting, or delaying training access to these sites; restricting or delaying training activities; and delaying response times for troop deployments and overall operations. The benefit of excluding these particular areas may include that the Department of Defense would only be required to comply with the jeopardy prohibition of ESA section 7(a)(2) and not the adverse modification prohibition. However, unless the areas excluded include areas outside and beyond the military properties, it is possible that consultation would continue to include impacts to critical habitat, because of the requirement to consider indirect, as well as direct impacts.

Two military installations may be affected by designation of critical habitat for Cook Inlet beluga whales. These are the Fort Richardson Army Base and Elmendorf Air Force Base, both located immediately adjacent to the critical habitat Area 1. Additionally, the Department of Defense has operational issues associated with the Port of Anchorage. The draft economic report presents economic costs associated with designation for the two installations.

In response to the ANPR, we received a request to delete the Port of Anchorage (POA) from the proposed critical habitat. The POA cites the designation of the Port as a Strategic Military Seaport by the Department of the Army's Military Surface and Distribution Command as justification for their request. We have requested additional information from the POA regarding this specific request for inclusion in the final 4(b)(2) analysis, but we do not propose this exclusion. Therefore, at present, no finding has been made on this request.

We did not identify other relevant impacts of designation beyond economic impacts and impacts on national security.

At present, we believe that the benefits of excluding any particular area do not outweigh the benefits of designating those areas as critical habitat, given the endangered status of the whales, the uniqueness of the habitat, the fact that threats to habitat were a primary concern leading to our endangered finding, and the fact that designation will enhance the ability of an ESA section 7 consultation to protect the critical elements of this habitat.

Public Hearings

50 CFR 424.16(c)(3) requires the Secretary to promptly hold at least one public hearing if any person requests one within 45 days of publication of a proposed rule to designate critical habitat. Such hearings provide the opportunity for interested individuals and parties to give opinions, exchange information, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in this matter. Based on the level of past interest in Federal actions concerning Cook Inlet beluga whales, we intend to conduct at least one public hearing. A notice of this and any additional hearings will appear in the **Federal Register**, local newspapers, and on our website at least 2 weeks prior to the meeting.

Classifications

Clarity of the Rule

E.O. 12866 requires each agency to write regulations and notices that are easy to understand. We invite your comments on how to make this proposed rule easier to understand, including answers to questions such as the following: (1) Are the requirements in the proposed rule clearly stated? (2) Does the proposed rule contain technical jargon that interferes with its clarity? (3) Does the format of the proposed rule (grouping and order of the sections, use of headings, paragraphing, etc.) aid or reduce its clarity? (4) What else could we do to make this proposed rule easier to understand? You may send comments on how we could make this proposed rule easier to understand to one of the addresses identified in the **ADDRESSES** section.

Regulatory Planning and Review

In accordance with E.O. 12866, this document is a significant rule and has been reviewed by the OMB. As noted above, we have prepared several reports to support and assess the 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 draft economic report (i.e. RIR/4(b)(2) preparatory analysis/IRFA).

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

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must either certify that the action is not likely to result in significant adverse economic impacts on a substantial number of small entities; or 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). NMFS has prepared an initial regulatory flexibility analysis (IRFA) and this document is available upon request or see our web site (see **ADDRESSES**). This IRFA evaluates the potential effects of the proposed critical habitat designation on federally regulated small entities. The reasons for the action, a statement of the objectives of the action, and the legal basis for the proposed rule, are discussed earlier in the preamble. 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 Cook Inlet beluga whale. Submission by a small entity of such a request for a Federal agency's approval would require that agency (i.e., the 'action agency') to consult with NMFS (i.e., the 'consulting agency').

Consultations vary from simple to highly 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 the most complex formal consultations, a private sector applicant might incur costs directly attributable to the designation consultation process. For example, if the formal consultation concludes that the proposed activity is likely to destroy or adversely modify critical habitat, the applicant will have to implement modifications to avoid such effects. These modifications have the potential to result in adverse economic impacts, although they need not necessarily do so.

An examination of the Federal agencies with management, enforcement, or other regulatory authority over activities or actions within, or immediately adjacent to, the proposed critical habitat area, resulted

in the following list: the Army Corps of Engineers (COE), EPA, Minerals Management Service (MMS), Maritime Administration (MARAD), U.S. Coast Guard (USCG), Department of Defense (DOD), NOAA Fisheries Service (NMFS), Federal Highway Administration (FHWA), Federal Energy Regulatory Commission (FERC), and Federal Aviation Administration (FAA). Activities or actions with a nexus to each, and which may be expected to require some level of consultation, include: COE permits for structures and work in waters of the United States; EPA permitting of discharges under the National Pollutant Discharge Elimination System; MMS oil and gas exploration and production permitting in Federal waters of Cook Inlet; MARAD permits for the Port of Anchorage expansion; USCG permits for spill response plans; DOD activities at the Army's Fort Richardson and Air Force's Elmendorf facilities; NMFS authorizations of commercial fisheries, and review of subsistence harvest allowances; FHWA funding of highway and bridge improvements along Turnagain Arm; FERC permits for turbine electrical generation projects (wind and tidal); FAA permitting of regional airport expansions and development.

A 10-year ''post-critical habitat designation'' analytical horizon was adopted, during which time NMFS may reasonably expect to consult 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'' (we estimate ninety percent of all consultations would be informal). In each of these, no adverse impacts would accrue to the entity seeking a permit, authorization, etc. The more complex and costly ''formal'' consultations are projected to account for, perhaps, ten percent. Here, NMFS and the Federal action agency may develop alternatives that prevent the likelihood that critical habitat will be destroyed or adversely affected. The extent to which these ''formal'' consultations will result in more than de minimus third party costs, as well as whether such third parties constitute small entities for Regulatory Flexibility Act purposes, cannot be predicted, a priori. Often, no consultation will be necessary, as all questions can be resolved through the ''technical assistance'' process.

We lack sufficient information to estimate precisely the number of consultations that may result in a determination of destruction or adverse modification to critical habitat. However, on the basis of the underlying biological, oceanographic, and ecological science used to identify the PCEs that define critical habitat for the Cook Inlet beluga whale, as well as the foregoing assumptions, empirical data, historical information, and accumulated experience regarding human activity in Cook Inlet, we believe that various federally authorized activities have the potential to ''destroy or adversely modify'' Cook Inlet beluga whale critical habitat. While we are unable to predict in advance exactly which activities might result in the destruction of adverse modification of the proposed critical habitat, we note that such activities are restricted to those actions impacting the identified essential features, or PCEs. Importantly, however, an action that may adversely affect a PCE is not necessarily one that will result in the destruction or adverse modification of the proposed critical habitat.

Executive Order 13211

On May 18, 2001, the President issued an 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.

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

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

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

(a) This proposed rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute or regulation that would impose an enforceable duty upon State, local, tribal governments, or the private sector and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandate'' includes a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. (At the time of enactment, these entitlement programs were: Medicaid; 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 under section 7. While non-Federal entities who receive Federal funding, assistance, permits or otherwise require approval or authorization from a Federal agency for an action may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above to State governments.

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

Takings

In accordance with E.O. 12630, the proposed rule does not have significant takings implications. A takings implication assessment is not required. The designation of critical habitat

affects only Federal agency actions. Private lands do not exist within the proposed critical habitat and therefore would not be affected by this action.

Federalism

In accordance with E.O. 13132, this proposed rule does not have significant federalism effects. A federalism assessment is not required. In keeping with Department of Commerce policies, we request information from, and will coordinate development of, this proposed critical habitat designation with appropriate state resource agencies in Alaska. The proposed 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 Cook Inlet beluga whale are specifically identified. While making this definition and identification does not alter where and what federally sponsored activities may occur, it may assist local governments in long-range planning (rather than waiting for case-by-case ESA section 7 consultations to occur).

Civil Justice Reform

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

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

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

National Environmental Policy Act

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

Government-to-Government Relationship

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. Public Law 108–199 (2004), codified in notes to 25 U.S.C.A. § 450, requires all Federal agencies to consult with Alaska Native corporations on the same basis as Indian tribes under this Executive Order.

NMFS has determined the proposed designation of critical habitat for the Cook Inlet beluga whale in Cook Inlet, Alaska, would not have tribal implications, nor affect any tribal governments or Native corporations. Although the Cook Inlet beluga whale may be hunted by Alaska Natives for traditional use or subsistence purposes, none of the proposed critical habitat areas occurs on tribal lands, affects tribal trust resources, or the exercise of tribal rights.

References Cited

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

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: November 24, 2009.

James W. Balsiger,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, we propose to 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. Add a new § 226.220 as follows:

§ 226.220 Critical habitat for the Cook Inlet beluga whale.

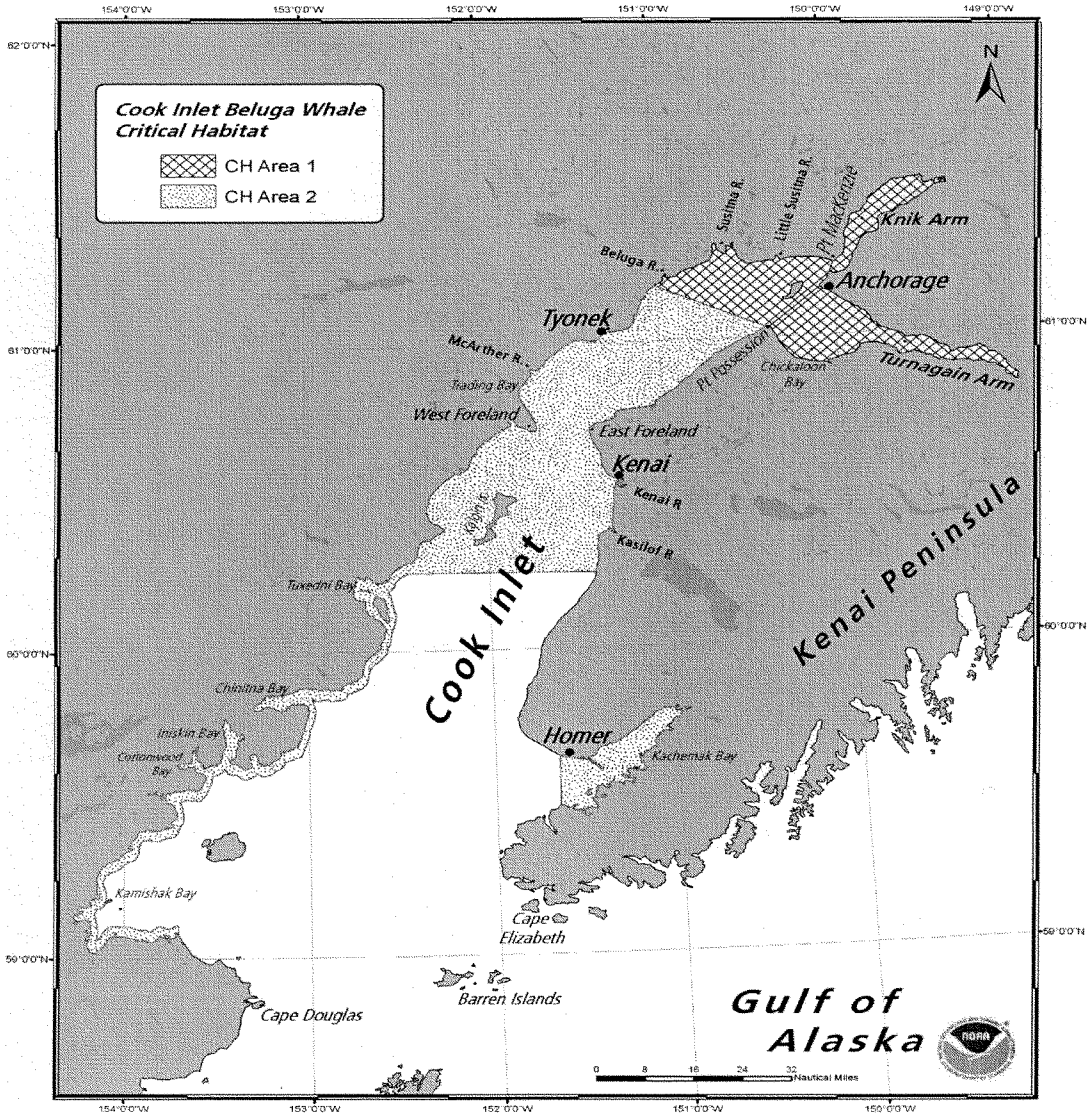
Critical habitat is designated in Cook Inlet, Alaska, for the Cook Inlet beluga whale as described in paragraphs (a) and (b) of this section. The textual description of this critical habitat is the definitive source for determining the critical habitat boundaries. General location maps are provided for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries. Critical habitat does not include manmade structures and the land on which they rest within the designated boundaries described in (a) (1) and (a) (2) that were in existence as of [*Insert effective date of the FINAL RULE*].

(a) *Critical Habitat Boundaries.* Critical habitat includes two specific marine areas in Cook Inlet, Alaska. These areas are bounded on the upland by Mean Higher High Water (MHHW) datum, other than the lower reaches of three tributary rivers. Critical habitat shall not extend into the tidally-influenced channels of tributary waters of Cook Inlet, with the exceptions noted in the descriptions of each critical habitat area.

(1) *Area 1.* All marine waters of Cook Inlet north of a line from the mouth of Threemile Creek (61° 08.5' N., 151° 04.4' W.) connecting to Point Possession (61° 02.1' N., 150° 24.3' W.), including waters of the Susitna River south of 61° 20.0' N., the Little Susitna River south of 61° 18.0' N., and the Chikaloon River north of 60° 53.0' N.

(2) *Area 2.* All marine waters of Cook Inlet south of a line from the mouth of Threemile Creek (61° 08.5' N., 151° 04.4' W.) to Point Possession (61° 02.1' N., 150° 24.3' W.), including waters within 2 nautical miles seaward of MHHW along the western shoreline of Cook Inlet between 60° 25' N. and the mouth of the Douglas River (59° 04' N., 153° 46.0' W.); all waters of Kachemak Bay east of 151° 40.0' W.; and waters of the Kenai River below the Warren Ames bridge at Kenai, Alaska.

(b) A map of the proposed critical habitat for Cook Inlet beluga whale follows.



(c) *Primary constituent elements.* The primary constituent elements essential to the conservation of Cook Inlet beluga whales are:

(1) Intertidal and subtidal waters of Cook Inlet with depths <30 feet (MLLW) and within 5 miles of high and medium flow anadromous fish streams.

(2) Primary prey species consisting of four (4) species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye pollock, saffron cod, and yellowfin sole.

(3) The absence of toxins or other agents of a type or amount harmful to beluga whales.

(4) Unrestricted passage within or between the critical habitat areas.

(5) The absence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet beluga whales.

[FR Doc. E9–28760 Filed 12–1–09; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 635

[Docket No. 0907171140–91141–01]

RIN 0648–XQ38

Atlantic Highly Migratory Species; 2010 Atlantic Bluefin Tuna Quota Specifications

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

ACTION: Proposed rule; request for comments; notice of public hearings.

SUMMARY: NMFS proposes 2010 fishing year specifications for the Atlantic bluefin tuna (BFT) fishery to set BFT quotas for each of the established domestic fishing categories. This action is necessary to implement recommendations of the International Commission for the Conservation of Atlantic Tunas (ICCAT), as required by the Atlantic Tunas Convention Act (ATCA), and to achieve domestic management objectives under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). NMFS solicits written comments and will hold public hearings to receive oral comments on these proposed actions.

DATES: Written comments must be received on or before January 4, 2010.

The public hearing dates are:

1. December 14, 2009, 3 p.m. to 5 p.m., Silver Spring, MD.

2. December 15, 2009, 3 p.m. to 5 p.m., Gloucester, MA.

ADDRESSES: You may submit comments, identified by ''0648–XQ38'', by any one of the following methods: