

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[DA 00-2161; MM Docket No. 00-172, RM-9963

Radio Broadcasting Services; McConnellsville, OH

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition filed by Donald Staats proposing the allotment of Channel 279A at McConnellsville, Ohio, as the community's second local aural transmission service. Channel 279A can be allotted to McConnellsville in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.7 kilometers (0.4 miles) east of city reference coordinates. The coordinates for Channel 279A at McConnellsville are 39-38-48 North Latitude and 81-50-43 West Longitude.

DATES: Comments must be filed on or before November 13, 2000, and reply comments on or before November 28, 2000.

ADDRESSES: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, as follows: Donald Staats, 2503 Twelfth Ave., Vienna, WV. 26105

FOR FURTHER INFORMATION CONTACT: Arthur D. Scrutchins, Mass Media Bureau, (202) 418-2180.

SUPPLEMENTARY INFORMATION: This is a synopsis of the Commission's Notice of Proposed Rule Making, MM Docket No. 00-172; adopted September 13, 2000 and released September 22, 2000. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Information Center (Room CY-A257), 445 12th Street, SW, Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International Transcription Service, Inc., (202) 857-3800, 1231 20th Street, NW., Washington, DC 20036.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this

one, which involve channel allotments. See 47 CFR 1.1204(b) for rules governing permissible *ex parte* contacts.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

Federal Communications Commission.

John A. Karousos,

Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau.

[FR Doc. 00-25395 Filed 10-3-00; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 000922272-0272-01;I.D. 061600A]

RIN 0648-AO16

Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives

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

ACTION: Proposed rule; notice of hearing; request for comments.

SUMMARY: NMFS is proposing regulations under the Marine Mammal Protection Act (MMPA) that would limit the harvest and use of CI beluga whales. The management objectives of the proposed regulations are to recover this depleted stock to its Optimum Sustainable Population (OSP) level, and to provide for the continued traditional subsistence use by Alaska Natives. The MMPA imposes a general moratorium on the taking of marine mammals; however, it provides an exception to the moratorium that allows Alaska Natives to harvest marine mammals for subsistence use or for traditional Native handicrafts. Under the MMPA, the Federal government may regulate Native subsistence harvest when the stock in question is designated as depleted pursuant to the MMPA and after regulations specific to the depleted stock are issued. NMFS designated the CI beluga whale stock as depleted on May 31, 2000 and believes that control of the harvest is necessary to promote recovery of this stock. NMFS has also prepared a National Environmental Policy Act (NEPA) Draft Environmental Impact Statement (DEIS) on this proposed action. NMFS solicits public comments on the proposed rule and the DEIS.

DATES: Comments on the proposed rule and on the DEIS must be received in the Office of Protected Resources (see **ADDRESSES** no later than 5 pm, eastern standard time, on November 27, 2000.

NMFS has scheduled a formal on-the-record hearing regarding these proposed regulations before Administrative Law Judge Parlen McKenna, to commence at 9 am, December 5, 2000, in Anchorage, Alaska, at the Federal Building. A pre-hearing conference is scheduled at 9 am, November 15, 2000.

Filing Deadlines: By November 1, 2000, any interested person or party must file an initial notice of intent to participate in the hearing, any direct testimony and any documentary evidence. By November 15, 2000, any rebuttal testimony and documentary evidence must be filed. Interested parties should consult procedural regulations at 50 CFR part 228 (65 FR 39560, June 27, 2000) for additional deadlines and hearing procedures.

ADDRESSES: Written comments on the proposed rule and DEIS should be sent to Chief, Marine Mammal Division, Office of Protected Resources, Silver Spring, MD 20910. Comments will not be accepted if submitted via e-mail or Internet.

All filings, including those of NMFS, become part of the record. The record for the proposed rule and the DEIS are available and all original filings and written comments should be filed at: Chief, Marine Mammal Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910. One copy should also be filed at: ALJ Docketing Center, 40 South Gay Street, Room 412, Baltimore, Maryland 21202-4022. Fax copies are accepted at (410) 962-1746 or -1742. Another copy should also be filed at: Judge Parlen McKenna, U.S. Coast Guard Island, Building 54-C, Alameda, California 94501, email PMcKenna@D11.USCG.mil, (510) 437-3361, fax (510) 437-2717.

Also, the record for the proposed rule and the DEIS is available at NMFS Alaska Region, 709 W. 9th St, Federal Building room 461, Juneau, AK 99802. Information related to the hearing and the DEIS will be available on the NMFS, Alaska Region Protected Resources website at: <http://www.fakr.noaa.gov/protectedresources/whales/beluga.htm>

FOR FURTHER INFORMATION CONTACT: Barbara Mahoney, NOAA/NMFS, Alaska Region, Anchorage Field Office, (907) 271-5006, fax (907) 271-3030, or Michael Payne, NOAA/NMFS, Alaska Region, (907) 586-7235, fax (907) 586-7012, or Thomas Eagle, Office of

Protected Resources, (301) 713-2322, ext. 105, fax (301) 713-4060.

SUPPLEMENTARY INFORMATION:

Background

The MMPA was enacted to conserve and protect marine mammals by regulating activities of U.S. citizens and activities of all persons conducted within the jurisdiction of the United States. As such, the MMPA imposes a general moratorium on the taking of marine mammals. However, it also provides an exception to the moratorium by allowing "any Indian, Aleut or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean . . ." to take any marine mammal if such taking is for subsistence purposes or for creating traditional Native handicrafts and is not accomplished in a wasteful manner.

Under the MMPA, the Federal government may regulate Native subsistence harvest when the stock in question is designated as depleted pursuant to the MMPA, and after regulations specific to the depleted stock are issued (16 U.S.C. 1371). Whenever a species or stock of marine mammal subject to taking by Indian, Aleut, or Eskimo has been determined to be depleted, the Secretary of Commerce (Secretary) may limit the harvest using the following procedures, which are found in section 101(b)(3) of the MMPA:

[The Secretary] may prescribe regulations upon such taking of such marine mammals by any Indian, Aleut, or Eskimo described in this subsection. Such regulations may be established with reference to species or stocks, geographical description of the area included, the season for taking, or any other factors related to the reason for establishing such regulations and consistent with the purposes of this Act. Such regulations shall be prescribed after notice and hearing required by section 103 of this title and shall be removed as soon as possible as the Secretary determines that the need for their imposition has disappeared.

On May 31, 2000, NMFS designated the CI stock of beluga whales as depleted pursuant to the MMPA (65 FR 34590). Abundance estimates from surveys conducted between 1994 and 1998 indicated that the number of individuals in this stock declined dramatically during this period. The 1998 estimate (347 animals) was nearly 50 percent lower than the 1994 estimate (653 animals). This represents a decline of 15 percent per year. The Native harvest is the only factor that has been identified to account for the observed level of decline, and, therefore, the control of the harvest is directly related

to the immediate protection for this stock.

Furthermore, reports from Alaska Native hunters and estimates derived from counts made by the Alaska Department of Fish and Game in the 1960s and 1970s indicate that the historical abundance of the stock exceeded 1,000 beluga whales. Observations of Alaska Native hunters also support these numbers. NMFS currently estimates that the maximum historical abundance of the stock is 1,300 whales. This estimate is based on the results of an abundance survey by the Alaska Department of Fish and Game (ADFG) in 1979 that resulted in a minimum abundance estimate of 1,293 whales (Calkins, 1989). Therefore, the extent of depletion (as a proportion of maximum historical abundance) is much greater than the dedicated surveys from 1994-1999 indicate.

The following information is a summary of available information on the abundance, trend and harvest levels for the CI stock of beluga whales. A more detailed discussion of this information is included in the final rule to designate the stock as depleted (65 FR 34590, May 31, 2000) and in the final determination on the status of the stock under the Endangered Species Act (ESA) (65 FR 38778, June 22, 2000).

The CI stock is genetically and geographically isolated from the other Alaskan stocks of beluga whales. When NMFS learned that the harvest may be above levels that the stock could sustain, NMFS initiated studies to document the levels of the harvest and the abundance and trend of the stock. Abundance surveys from 1994 through 1998 indicated a decline from 653 to 347 whales during that period. However, NMFS believes that the stock was in decline when the abundance surveys were initiated.

There are no reliable mortality estimates prior to 1994. Prior to 1994 the harvest estimates do not include an estimate of those struck but lost, nor do they represent a complete effort of harvest. However, Native hunter groups and some individual hunters provided NMFS with documented information on the harvest levels from 1995 through 1998. The sources of these data include estimates by ADFG, the Cook Inlet Marine Mammal Council (CIMMC), and data compiled by NMFS based on reports from hunters, and from the direct observation of harvested whales.

Based on this information, NMFS estimated that the average annual take in this harvest, including whales that were struck and lost, was 65 whales per year from 1994 through 1998. The estimated annual average harvest from

1995 thru 1997 (including struck but lost) was 87 whales. Annual harvest estimates for 1994 thru 1998 are 21 whales (1994), 68 whales (1995), 123 whales (1996), 70 whales (1997) and 42 whales (1998). The harvest, which was as high as 20 percent of the stock in 1996, was sufficiently high to account for the 14 percent annual rate of decline in the stock during the period from 1994 through 1998. The numbers of animals harvested between 1994 and 1998 can account for the estimated decline of the stock during that interval. Therefore, the annual harvest estimates and rate of decline from 1994 through 1998 clearly indicate that the harvest was unsustainable prior to restriction in 1999. Therefore, the protection of this stock of beluga whales is directly related to the control of the harvest.

In 1999, there was no subsistence harvest. On May 21, 1999, President Clinton signed into effect Pub. L. 106-31, 113 Stat. 100 (hereafter referred to as Pub. L. 106-31). As a result of this legislation, and in combination with the voluntary moratorium by the hunters in spring, there were no CI beluga whales harvested in 1999. NMFS and CIMMC have negotiated a co-management agreement under this legislation that authorized the harvest of a single beluga whale in Cook Inlet in 2000.

The 1999 abundance estimate was 357 whales. Although a single year under the restricted harvest is insufficient to detect a population response, the lack of continued decline is an encouraging indication that restricting the harvest could promote recovery of the stock.

The Proposed Regulations

The depleted determination on May 31, 2000 (65 FR 34590), was a preliminary step for the Federal government to regulate the taking of marine mammals by Alaska Natives. NMFS is proposing to regulate the harvest of CI beluga whales by Alaska Natives under section 101(b)(3) of the MMPA. Because Native harvest is believed to be responsible for the observed level of decline, NMFS believes this action is necessary to recover this stock to its OSP level. This proposed rule would provide a long-term mechanism to control the harvest.

NMFS is proposing to regulate the harvest of CI beluga whales by Alaska Natives by requiring: (1) that subsistence hunting can only occur under an agreement between NMFS and an Alaska Native organization pursuant to section 119 of the MMPA; (2) that the harvest shall be limited to no more than two strikes annually until the stock is no longer considered depleted under the MMPA; (3) that the sale of CI beluga

whale products shall be prohibited; (4) that all hunting shall occur after July 15, to minimize the harvest of pregnant females; and (5) that the taking of newborn calves, or adult whales with maternally dependent calves shall be prohibited (calves may remain dependent for several years after birth). The following discussion describes the regulatory measures contained in the proposed rule and the justification for their implementation.

(1) *Subsistence hunting of CI beluga whales can occur only under an agreement between NMFS and an Alaska Native organization pursuant to section 119 of the MMPA:* This provision is based upon Pub. L. 106-31, which provides that the taking of a Cook Inlet beluga whale under (MMPA section 101(b)) shall be a violation of (the MMPA) unless such taking occurs pursuant to a cooperative agreement between (NMFS) and affected (ANOs). It eliminates the primary threat to CI beluga whales because it prohibits hunting CI beluga whales except under an agreement between NMFS and an ANO.

(2) *The harvest shall be limited to no more than 2 strikes annually:* The best estimate of abundance for this stock is currently 357 animals (from 1999 survey). NMFS developed a logistic growth population model to project the recovery of the population (expressed in terms of years to recovery) under various levels of annual harvest and compared this to a no-harvest scenario. Annual changes in the population were then modeled using the following population parameters:

Maximum net productivity rate = 4 percent per year,
 carrying capacity (K) = 1,300 individuals, and
 starting population size = 357 whales (based on NMFS 1999 survey results).

Using this model, the size of the population and recovery time can be estimated for any year, simulating the impacts of differing levels of harvest on recovery times. The results of these analyses are described in detail in the DEIS. Without a harvest, this population should recover to a level where it would no longer be depleted under the MMPA in 22 years (i.e., to the lower level of OSP). In this case, the lower level of OSP would be equal to 60 percent of K (1,300) or 780 whales.

With a harvest of 1 whale per year the population should reach 780 whales in 23 years (a delay in recovery of 1 year). A harvest of 2 whales per year should require approximately 25 years for the population to recover to OSP. Under either harvest scenario, the population is predicted to double in size over the

next 2 decades and reach OSP in 23-25 years (See DEIS for further information).

NMFS' management objectives for CI beluga whales are to recover this stock while still providing an opportunity for a traditional harvest that does not significantly increase the amount of time to recovery. A harvest level of either 1 or 2 whales per year would meet both of those objectives. NMFS will review the harvest and its effect on the stock on a periodic basis, and, if appropriate, may adjust the number of allowable annual strikes through notice and comment rulemaking.

(3) *Prohibition on the sale of Cook Inlet beluga whale products:* The sale of edible portions of subsistence-harvested marine mammals is allowed under certain conditions by the MMPA. Some muktuk (the skin and a thin layer of blubber) from subsistence harvests has appeared in Native food stores in the Anchorage area in recent years. At least some of this muktuk was identified by DNA analyses as having come from CI beluga whales. Some hunters have sold beluga whale meat and muktuk by word-of-mouth within the local Native community. One Native hunter said he supported his family by hunting beluga whales and selling the meat and muktuk to Native families (Anchorage Daily News, 1994). While the amount of CI beluga whale products sold commercially in Anchorage and elsewhere has not been determined, one local Anchorage retailer estimated selling approximately 3,000 lb (1,360.8 kg) of beluga muktuk annually. A single adult beluga may provide 200 lb (90.72 kg) of muktuk. By this measure, the retailer may have sold the muktuk from 15 beluga whales per year.

Some of this product might have come from beluga whales from other stocks. However, NMFS analyzed nine samples of beluga whale muktuk sold in Anchorage from June through November, 1998. The genetic analysis of these samples determined that they came from 5 individual beluga whales, all of which came from the CI population.

NMFS believes that allowing the sale of CI beluga whale products or meat may provide an incentive that is unacceptable given the current depleted status of the population. The concentration of more than 20,000 Alaska Natives in the Anchorage area apparently creates a demand for beluga products that exceeds the level of harvest that the small, isolated stock of CI beluga whales can sustain. Therefore, as part of the regulations on the harvest, NMFS would prohibit the sale of edible portions of CI beluga whales. NMFS will also prohibit the sale of CI beluga whale

products under this rule. NMFS intends to provide for a traditional harvest while eliminating any commercial incentive;

(4) *All hunting shall occur after July 15 of each year:* Calving by beluga whales in CI is generally complete by July 1 of each year; therefore, a harvest season beginning July 15 would minimize the probability of killing a pregnant female. This is consistent with the intent to promote recovery of this stock of whales yet allowing a harvest to occur.

(5) *The taking of calves or adult whales with calves is prohibited:* This prohibition is necessary to ensure that cow-calf pairs are not disturbed. For the purposes of this proposed rule a calf is any beluga whale that is maternally dependent (maternally dependent animals may be a year or more of age). The season limitation and prohibition on taking calves and adults with calves should protect reproductively active adult females.

Other harvest specifics, including specific locations or techniques for taking whales, can be established through a co-management agreement rather than through regulation. This restricts the scope of the regulations to the population effects of the harvest.

Required Procedure for Proposed Regulations

Section 101(b) and section 103(d) of the MMPA require that regulations prescribed to limit the subsistence harvest of Alaska Natives be made on the record after opportunity for an agency hearing.

Notice of Hearing: Newly re-established regulations at 50 CFR part 228 (65 FR 39560, June 27, 2000) contain detailed requirements for the procedures for conducting an agency hearing on the proposed regulations to limit the harvest. People interested in participating in the hearing are advised to review these procedural regulations. The procedures require specific information to be included in the notice of the hearing, and that information follows.

(1) *The nature of the hearing:* The purpose of the hearing is to allow parties affected by the agency's proposed regulations to present additional testimony and evidence for inclusion in the administrative record. At the conclusion of the hearing and after consideration of the whole record, the Administrative Law Judge shall make a recommendation to the Secretary regarding adoption of the regulations.

(2) *The place and date of the hearing:* (see ADDRESSES and DATES).

(3) *The legal authority for the hearing:* The hearing is held under the authority of Section 103 of the MMPA (16 U.S.C. 1373) and implementing regulations (50 CFR part 228).

(4) *The proposed regulations and statements required by section 103(d) of the Act (16 U.S.C. 1373(d)):* See the proposed regulatory text at the end of this document.

(a) *Estimated existing levels of the species and stock:* The worldwide abundance of beluga whales is unknown but, according to International Whaling Commission estimates, exceeds 100,000 whales. Based on the 1999 surveys, the abundance estimate for the CI beluga whale stock, which is discrete and genetically isolated from other stocks of beluga whales in waters under U.S. jurisdiction, is 357 animals.

(b) *Expected impact of the proposed regulations on the OSP of the stock:* The proposed regulations are not expected to alter the existing estimates of the OSP levels of the stocks. The proposed regulations are expected to allow the stock to recover to OSP levels in about 25 years.

(c) *Description of the evidence before the Secretary:*

Related to stock structure: results of a multi-year study on the molecular genetics of beluga whales.

Related to carrying capacity (K): ADFG surveys producing direct counts of beluga whales in CI in the 1960s and 1970s, observations of Alaska Native hunters.

Related to current abundance (1994-1999): results of dedicated aerial surveys conducted by NMFS scientists.

Related to mortality estimates: reports from NMFS contract with CIMMC and NMFS harvest estimates.

Related to productivity rates: life history traits comparable to other small cetaceans and use of the general default value for cetacean maximum net productivity levels.

(d) *Studies by or for the Secretary or recommendations by or for the Marine Mammal Commission (MMC):* Relevant studies include those on stock structure (O'Corry-Crowe, *et al.* 1997), abundance estimates (Hobbs *et al.* in press), Alaska Native harvest (NMFS and CIMMC contract report). Relevant recommendations include those by the Alaska Scientific Review Group (SRG)—list of recommendations related to the harvest regulations; and those by the MMC—see item 17 below. Note that the Alaska SRG was established by NMFS pursuant to the 1994 amendments to the MMPA to provide advice on marine mammal research and conservation to the Secretary.

(5) *Issues of fact which may be involved in the hearing:* Public comments related to the status review and subsequent actions related to CI beluga whales indicate that there may be several disputed facts regarding the biology and conservation of the Cook Inlet Beluga whale populations. Among the potential factual issues are the following:

(A) What is the carrying capacity of the Cook Inlet Beluga whale stock?;

(B) How many Cook Inlet Beluga whales currently exist?; and

(C) Should the subsistence harvest of Cook Inlet Beluga whales be restricted to no more than two annually?

(6) *Draft Environmental Impact Statement (DEIS):* The DEIS is available and may be viewed upon request (see **ADDRESSES**).

(7) *Written advice received from the MMC:* The following summarizes a record of three letters forwarded to NMFS by the MMC with recommendations specific to the CI beluga whale stock. These letters contained additional advice on CI beluga whales (e.g., recommendations to list under the ESA). However, these recommendations did not pertain to the harvest regulations nor directly to the information needed to implement these regulations. Therefore, the additional advice is not included in this summary.

Letter dated January 22, 1999

1. A brief summary of the information that NMFS has reported in various outlets (SRG meetings, reports, Stock Assessment Reports).

2. MMC stated that "Clearly, a main part of the problem with the Cook Inlet beluga population is the fact that the number of animals being killed by Alaska Natives greatly exceeds the number that can be supported by the population on a sustainable basis."

3. The sale of muktuk in Anchorage compounds the problem; therefore, the sale of CI beluga products should be prohibited.

4. MMC stated that the preferred approach for addressing overharvest should be through a co-management agreement.

5. NMFS should act quickly and decisively to protect the stock through rulemaking under the ESA and MMPA to limit the harvest. The process could be completed in as little as 6 weeks; therefore, in time to address the 1999 harvest.

6. If a regulatory approach to limit the harvest is not feasible in a timely manner, NMFS should work with Congress to seek a legislative solution.

7. NMFS should implement a marking, tagging and reporting program for CI beluga.

Letter dated July 23, 1999

1. Based upon the portions of the preliminary analyses provided to the MMC, the MMC advised that the limited information that NMFS had provided would not adequately support a depletion finding.

2. Despite the lack of detailed analyses provided by NMFS, the MMC advised that the population is likely below its OSP and, therefore, should be designated as depleted.

3. The MMC advised to incorporate a discussion of historical abundance or carrying capacity, an estimate of the percentage of historical populations size that would correspond to the maximum net productivity level, and to compare the current population size to the best estimates of historical abundance and MNPL.

Letter dated December 21, 1999

1. The MMC acknowledged the proposed depletion rule and advised to publish a final rule as quickly as possible after the comment period is closed.

2. The MMC recognized that the overharvest by Alaska Natives for subsistence purposes was the primary factor contributing to the decline, acknowledged the special legislation that restricted harvest until October 1, 2000, and recommended that NMFS make it a high priority to implement regulations to govern the harvest by the expiration of the legislation.

3. MMC advised that the co-management process is the preferred approach to establishing harvest limits; however, NMFS should pursue regulations and additional legislation to ensure no gap in protection of the stock.

(8) *Places where records and submitted direct testimony will be kept for public inspection:* See **ADDRESSES**.

(9) *Final date for filing with the Assistant Administrator a notice of intent to participate in the hearing:* See **DATES**.

(10) *Final date for submission of direct testimony on the proposed regulations and the number of copies required:* Parties must submit the original and two copies of all filings. All documents and exhibits must be clearly marked with the docket number of the proceedings (see below). See **ADDRESSES** and **DATES** for deadlines and addresses for filings.

(11) *Docket number assigned to the case:* 000922272-0272-01.

(12) *Place and date of the pre-hearing conference:* (see **ADDRESSES** and **DATES**).

Prior to the conference, the ALJ will determine whether parties may participate by telephone as well as the location of the conference if personal appearances are necessary.

Section 103(e) also requires that NMFS conduct a periodic review of the regulations promulgated pursuant to this section, and modifications may be made in such a manner as the Secretary deems consistent with and necessary to carry out purposes of the Act. This review will compare the results of the survey data with the management of the harvest to determine that the CI beluga whale population is increasing as projected, and to determine whether changes in the harvest or level of harvest could occur without compromising the recovery of the population. NMFS has also scheduled a hearing on the record, consistent with the requirements of this section of the MMPA (see **DATES**).

Discussion

Throughout this process, NMFS has provided an opportunity for comment during the status review of CI beluga whales, following the proposed depleted determination, and at the initiation of the NEPA process. NMFS has also convened workshops and public meetings on this subject. It remains the intent of NMFS to insure that the depleted determination, and any proposed regulations subsequent to this determination, be as accurate and as effective as possible. Therefore, comments or suggestions from the public, Native organizations, other governmental agencies, the scientific community, industry, or other interested parties concerning these issues have always been solicited and taken into account prior to any final action. Throughout this process there has been considerable comment provided on the subsistence harvest of beluga whales in Cook Inlet and its impact on the stock. Some of the most common comments received by NMFS on this subject are reviewed in this section.

The most immediate concerns by those who petitioned NMFS to list the CI beluga whale population under the ESA were (1) the level of mortality as a result of subsistence harvest, and (2) the inability of NMFS, at the time of the petition, to control this harvest. The petitioners further stated that the MMPA was inadequate to protect CI beluga whales. They stated that, under the MMPA, NMFS can pursue a co-management agreement with the tribes in the Cook Inlet region. However, the petitioners noted that such an agreement provided no additional legal

authority to NMFS to prosecute violations of the MMPA. Therefore, there was no guarantee that a harvest would not occur outside of the agreement by Native hunters who were not part of the agreement. Even with a co-management agreement in place, neither NMFS, nor the co-management body, can enforce its recommendations if hunters choose not to comply. As such, the petitioners stated that a co-management agreement was unlikely to reduce the Native hunt to sustainable levels.

NMFS agreed, generally, that the management of the CI beluga whale stock could be achieved through voluntary and cooperative efforts within a traditional Native community, or through a co-management agreement. However, Anchorage provides an exception to what is generally considered as a traditional Native community. Although tribal authority may apply to Alaska Natives who live in local communities, there is a lack of area-wide tribal authorities or traditional Native laws that would apply to the harvest of CI beluga whales by Alaska Natives of non-local origin and now reside in Anchorage. Because of this, and prior to Pub. L. 106-31, an Alaska Native could have harvested beluga whales from Cook Inlet without the approval of local tribal authorities or governing bodies. For this reason, and in this particular situation, NMFS agreed with the petitioners in stating that a co-management agreement would not necessarily provide the level of authority that would ensure that over harvest would not occur outside an agreement.

NMFS received several recommendations to expeditiously enter into a co-management agreement with an Alaska Native Organization (ANO) and most of these suggested that NMFS should coordinate this agreement with CIMMC. A few commenters thought the most effective way to achieve conservation and subsistence goals for CI beluga whales is through a single, comprehensive co-management agreement and this should be an agency priority. A few commenters stated the agreement should strictly limit hunting to personal and family subsistence and ban the sale of beluga whale products.

NMFS agrees that a co-management agreement with an ANO is both desirable and necessary, and has signed into an agreement with CIMMC for the harvest of one CI beluga whale for the year 2000. Further, NMFS has authority to co-manage subsistence harvest under section 119 of the MMPA. However, any restrictions on the level of subsistence harvest through a co-management

agreement would be enforced by tribal authority, not by Federal regulation, unless specific regulations are established under section 101(b) and 103 of the MMPA. As stated earlier, NMFS believes that a co-management agreement would not necessarily provide the level of authority that would ensure that over-harvest would not occur outside of an agreement. Therefore, NMFS believes that the recovery of this stock requires not only the authority of a co-management agreement, but also a Federal authority to protect and conserve CI beluga whales. For that reason, NMFS is proposing these regulations on the subsistence harvest.

One commenter on the proposed depleted determination indicated that if NMFS designates CI beluga whales as depleted, NMFS will regulate the harvest with little regard for the opinions of Alaska Native hunters. NMFS does not believe it is possible to effectively manage the CI beluga whale stock without input from local Native groups in Cook Inlet. Also, NMFS does not want to unilaterally manage CI beluga whales without input from local Natives. NMFS recognizes the importance of beluga whales to the Native Cook Inlet communities. NMFS believes it should work with them to develop a co-management agreement that protects and conserves CI beluga whales while preserving traditional beluga subsistence hunting activities. Co-management will involve both Federal and Tribal authorities.

With these proposed regulations, Federal authority is established to enforce harvest regulation at levels that are sustainable while assuring that the stock can recover. This proposed rule establishes harvest levels until such time the stock reaches the lower level of OSP, i.e., until it is no longer depleted. These regulations will be reviewed and modified as appropriate but remain in effect unless otherwise rescinded or modified through notice and comment rulemaking.

Classification

NEPA

NMFS has prepared an Draft Environmental Impact Statement (DEIS) under the requirements of NEPA. Because the CI beluga whale stock is depleted, NMFS believes that any long term federally-approved harvest plan constitutes a major action subject to the requirements of NEPA. Therefore, these proposed regulations will not be finalized until an Environmental Impact Statement has been finalized and a Record of Decision is made. NMFS has

prepared a DEIS to address actions taken by NMFS to manage and recover this stock. The primary management action proposed is to limit Native subsistence harvest of CI beluga whales. The impact of this action was evaluated in the DEIS through a model that examines the length of time it would take for the stock to recover under different harvest alternatives. The preferred harvest plan provides for the cultural needs of Alaska Natives by allowing up to 2 strikes (multiple strikes on one whale equals one strike), while not significantly extending the time required for this stock to recover. The DEIS also presents an assessment of the impacts of other anthropogenic activities, which occur in Cook Inlet, that might impact the CI beluga whales, or their habitat. This assessment includes a discussion of the cumulative impacts and evaluates the need for measures for the protection and conservation of important CI beluga whale habitat.

Paperwork Reduction Act

This proposed rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980.

ESA

The ESA provides for the conservation of endangered and threatened species of fish, wildlife, and plants. The program is administered jointly by NMFS (for most marine species) and the U.S. Fish and Wildlife Service (for terrestrial and freshwater species). The ESA provides for listing species as either threatened or endangered, based on the biological health of a species. Threatened species are those likely to become endangered in the foreseeable future (16 U.S.C. 1532(20)). Endangered species are those in danger of becoming extinct throughout all or a significant portion of their range (16 U.S.C. 1532(20)). The Secretary, acting through NMFS, is authorized to list selected marine mammals, including beluga whales, and fish species.

On March 3, 1999, NMFS received a petition from seven organizations and one individual to list the CI stock of beluga whale as "endangered" under the ESA. This petition requested emergency listing under section 4(b)(7) of the ESA, designation of critical habitat, and immediate action to implement regulations to regulate the subsistence harvest of these whales. NMFS determined that these petitions presented substantial information which indicated the petitioned actions may be warranted in April 1999 (64 FR 17347).

Upon further review, and taking into account legislative and management measures put in place to regulate the subsistence harvest following receipt of the petition, and measures proposed in this regulation, NMFS, on June 22, 2000, determined that an ESA listing is not warranted at this time. Based on that determination, this proposed rule does not impact any ESA listed species or its habitat.

Executive Order 12866—Regulatory Planning and Review

This proposed rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed action would not have a significant economic impact on a substantial number of small entities as follows:

The proposed rule would limit the subsistence harvest of Cook Inlet, Alaska, beluga whales and require that subsistence hunting can only occur under an agreement between the National Marine Fisheries Service (NMFS) and Alaska Native organizations pursuant to section 119 of the MMPA.

The MMPA imposes a general moratorium on the taking of marine mammals. However, section 101(b) of the MMPA provides an exemption to the taking by allowing Alaskan Natives to harvest marine mammals for subsistence use or for purposes of traditional Native handicraft. Under the MMPA, the Federal Government may regulate Native subsistence harvest after the stock in question is designated as depleted and after formal rulemaking.

NMFS designated the CI beluga whale stock as depleted on May 31, 2000 (65 FR 34590), due to a 50 percent decline in the abundance of the stock between 1994 and 1998. Native harvest is believed to be responsible for the observed decline, and NMFS believes that the control of the harvest is necessary to provide continued protection for this stock.

Therefore, a regulatory flexibility analysis was not prepared.

Executive Order 12898—Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Section 4-4, Subsistence Consumption of Fish and Wildlife, of Executive Order 12898, requires Federal agencies to ensure protection of populations with differential patterns of subsistence consumption of fish and wildlife and to communicate to the public the human health risks of those consumption patterns. NMFS has monitored and evaluated contaminant loads in all

populations of beluga whales in Alaska for nearly a decade, and has reported this information to Alaska Native communities as these analyses have become available. A summary is available in the DEIS.

Consultation with State and Local Government Agencies

In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual State and Federal interest, NMFS has conferred with state and local government agencies in the course of assessing the status of CI beluga whales. State and local governments have expressed support for the conservation of this stock of beluga whales. Dialogue with state and local agencies included an exchange and discussion of scientific information regarding beluga whales, factors that may be affecting them, and their status under the ESA and MMPA.

Executive Order 13084—Consultation and Coordination with Indian Tribal Governments

This proposed rule is consistent with policies and guidance established in Executive Order 13084 of May 14, 1998 (63 FR 27655). Executive Order 13084 requires that if NMFS issues a regulation that significantly or uniquely affects the communities of Indian tribal governments and imposes substantial direct compliance costs on those communities, NMFS must consult with those governments, or the Federal government must provide the funds necessary to pay the direct compliance costs incurred by the tribal governments. NMFS has taken several steps to consult and inform affected tribal governments and solicit their input during development of these proposed regulations including the development of a co-management agreement with the Cook Inlet Marine Mammal Council which provides for the harvest of 1 whale during 2000. This proposed rule does not impose substantial direct compliance costs on the communities of Indian tribal governments.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Exports, Imports, Marine mammals, Transportation.

Dated: September 26, 2000.

William T. Hogarth,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be amended as follows:

**PART 216—REGULATIONS
GOVERNING THE TAKING AND
IMPORTING OF MARINE MAMMALS**

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. In § 216.23, paragraph (f) is added to read as follows:

§ 216.23 Native exceptions.

* * * * *

(f) *Cook Inlet beluga whales.*

(1) *Cooperative Agreement.*

Notwithstanding the provisions of 16 U.S.C. 1371(b) or paragraph (a) of this section, any taking of a Cook Inlet beluga whale by an Alaska Native must be authorized under a cooperative agreement between the National Marine Fisheries Service and an Alaska Native organization(s). The Cook Inlet beluga whale stock includes all beluga whales occurring in waters of the Gulf of Alaska north of 58 degrees North latitude including, but not limited to, Cook Inlet, Kamishak Bay, Chinitna Bay, Tuxedni Bay, Prince William Sound, Yakutat Bay, Shelikof Strait, and off Kodiak Island and freshwater tributaries to these waters.

(2) *Limitations on the Number of Cook Inlet Beluga Whales Taken for Subsistence.* Notwithstanding the provisions of 16 U.S.C. 1371(b) or paragraph (a) of this section, the number of whales that may be taken (killed or struck and lost) each year from the Cook Inlet, Alaska, stock of beluga whales for subsistence purposes shall be limited to no more than two (2) strikes annually until the stock is no longer designated as depleted.

(3) *Prohibition on the Sale of Cook Inlet Beluga Whale.* Notwithstanding the provisions of 16 U.S.C. 1371(b) or paragraph (b) of this section, the sale of products or foodstuffs from Cook Inlet beluga whales is prohibited.

(4) *Season.* Notwithstanding the provisions of 16 U.S.C. 1371(b) or paragraph (a) of this section, all hunting shall only occur after July 15 of each year.

(5) *Beluga calves or adult belugas with calves.* Notwithstanding the provisions of 16 U.S.C. 1371(b) or paragraph (a) of this section, the taking of beluga whale newborn calves, or adult whales with older, maternally dependent calves is prohibited.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 981022265-8265-01; I.D. 101698L]

RIN 0648-AL93

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Fishing in the EEZ Seaward of Navassa Island

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule to prohibit fishing and anchoring of fishing vessels in the exclusive economic zone (EEZ) within 15 nautical miles (nm) seaward from the baseline of Navassa Island.

DATES: Comments must be received no later than 4:30 p.m., eastern daylight savings time, on November 3, 2000.

ADDRESSES: Written comments regarding this proposed rule must be sent to, and copies of a draft environmental assessment supporting this action, may be obtained from Michael Barnette, Southeast Regional Office, NMFS, 9721 Executive Center Drive N., St. Petersburg, FL 33702. Comments also may be sent via fax to 727-570-5583. Comments will not be accepted if submitted via e-mail or Internet. Comments on any ambiguity or unnecessary complexity arising from the language used in this rule should be addressed to Rod Dalton, Southeast Regional Office, NMFS, at the above address.

FOR FURTHER INFORMATION CONTACT: Michael Barnette, telephone: 727-570-5305, fax: 727-570-5583, e-mail: Michael.Barnette@noaa.gov.

SUPPLEMENTARY INFORMATION: The U.S. Territory of Navassa Island is located in the Caribbean Sea approximately 60 nm northeast of Jamaica and 34 nm west of Haiti. The uninhabited island covers an area of approximately 2 square miles (518 hectares).

NMFS has received several inquiries regarding whether fishing activities are permitted in the EEZ seaward of Navassa Island. In addition, a recent scientific expedition to Navassa Island publicized the unique and unprotected marine resources of the area. Important marine resources of this area include reef fish and invertebrates, especially

coral, live rock, sponges, queen conch, and spiny lobsters. NMFS believes these resources are in a relatively pristine condition due to the isolation of this area and its distance from the commercial fishing grounds of the major fishing nations.

Fishing in the EEZ seaward of Navassa Island is subject to regulation under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) (16 U.S.C. 1801 *et seq.*) and the Atlantic Tuna Conventions Act (16 U.S.C. 971 *et seq.*). The Caribbean Fishery Management Council (Council) has authority only over the fisheries in the EEZ of the Caribbean Sea and Atlantic Ocean seaward of the U.S. Virgin Islands and the Commonwealth of Puerto Rico. An amendment to the Magnuson-Stevens Act would be necessary to extend the Council's authority to the EEZ seaward of Navassa Island. However, the Secretary of Commerce has the authority under section 305(d) of the Magnuson-Stevens Act to promulgate such regulations as may be necessary to carry out the provisions and purposes of that act, including conserving and managing the fishery resources in the EEZ not within the authority of a regional fishery management council such as in the EEZ seaward of Navassa Island.

As a precautionary approach to fisheries management, NMFS is proposing this rule to protect the fishery resources in the EEZ seaward of Navassa Island from unregulated harvests until the Magnuson-Stevens Act can be amended to give the Council authority over the fishery resources of the EEZ seaward of Navassa Island, and until conservation and management measures, as recommended by the Council and approved and implemented by NMFS, are in effect. This rule would prohibit all fishing, including fishing for Atlantic highly migratory species, and anchoring of fishing vessels in the EEZ within 15 nm seaward from the baseline of Navassa Island. These measures would apply to vessels of the United States and to all foreign vessels except vessels of the Republic of Haiti.

This proposed rule is intended to protect coral reef resources from directed fishing or bycatch mortality and to prevent possible damage from unregulated fishing gear or from harmful fishing practices, such as the use of explosives or poisons. Establishment of a no-fishing zone would simplify and facilitate enforcement in this remote area. The anchoring prohibition would protect coral habitats from physical damage and facilitate enforcement of the fishing ban.