

notice to select specific proposed changes. To that end, the agency solicits comments, information, and data useful in assessing the impacts of making changes to the various requirements discussed in this document.

**Authority:** 49 U.S.C. 322, 30111, 30115, 30117 and 30166; delegation of authority at 49 CFR 1.50 and 501.8.

Issued on: November 28, 2000.

**Stephen R. Kratzke,**

*Associate Administrator, Safety Performance Standards.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

#### [I.D. 112400A]

#### 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:** Notice of hearing; final agenda.

**SUMMARY:** This final agenda governs the formal on-the-record hearing regarding the proposed regulations to limit the taking of CI, AK stock of beluga whales by Alaska Natives.

**DATES:** The hearing will commence on Tuesday, December 5, 2000, at 9:30 a.m. AKST.

**ADDRESSES:** The hearing will be held before Judge Parlen L. McKenna of the United States Coast Guard at the United States District Court 222 West 7th Avenue, 2nd Floor Courtroom, Anchorage, Alaska 99513.

**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:** In an effort to recover CI beluga whales to its Optimum Sustainable Population, NMFS issued proposed regulations under the Marine Mammal Protection Act (MMPA) that would limit the subsistence harvest of the whales by Alaska Natives. Section 101(b) of the MMPA provides an exemption to the general moratorium on the taking of marine mammals and permits Alaska Natives to harvest marine mammals for subsistence purposes or for the purpose of creating traditional Native handicrafts and clothing. However, the Federal government may regulate Native subsistence harvest of marine mammals if the stock in question is designated as depleted after regulations specific to the depleted stock are issued and an opportunity for notice and hearing on the record has been provided.

After a depleted determination was made on May 31, 2000 (65 FR 34590),

NMFS issued a proposed rule on October 4, 2000 (65 FR 59164), to regulate subsistence harvest of CI beluga whales by Alaska Natives. The proposed regulation provides that:

(1) Subsistence harvest can only occur under an agreement between NMFS and an Alaska Native organization pursuant to section 119 of the MMPA;

(2) Subsistence harvest shall be limited to no more than two strikes annually until the stock is no longer considered depleted under the MMPA;

(3) The sale of CI beluga whale products shall be prohibited;

(4) All hunting for subsistence purposes shall occur after July 15 each year; and

(5) The harvest of newborn calves, or adult whales with maternally dependent calves shall be prohibited.

All interested persons or parties have been given an opportunity to file a notice of intent to participate in the hearing that will be conducted in accordance with section 103(d) of the MMPA. Such interested persons or parties have also been given an opportunity to file direct testimony and documentary exhibits. Parties who submitted notice of intent to participate in the hearing were advised to submit rebuttal testimony by November 28, 2000. Pursuant to the procedural regulations governing the formal rulemaking hearing that was reinstated on June 27, 2000 (65 FR 39560), Judge Parlen McKenna issued the following notice identifying the participants and the final agenda as follows:

Participant	Interest
Thomas J. Meyer, Esq., NOAA, Office of General Counsel, Juneau, AK	Represents NMFS (i.e., the proponent of the proposed regulations)
Joel and Debra Blatchford, Kasilof, AK	Represents Eskimo whale hunters. Generally supports the proposed regulations. However, he argues that Eskimos should be a party to any co-management agreement governing the harvest of CI beluga whales and one strike should be allocated to the Eskimos.
Steve Silver, Esq., Robertson, Monagle & Eastaugh, Arlington, VA	Represents the Municipalities of Anchorage, Kenai Peninsula Borough, and Matanuska-Susitna Borough. Generally supports the proposed regulations.
Judy Brady, Exec. Dir., Alaska Oil and Gas, and Jeffrey W. Leppo, Esq., Stoel Rives, LLP., Seattle, WA	Represents Alaska Oil & Gas Assoc. ("AOGA"). Generally supports the proposed regulations. AOGA expresses concerns regarding (1) the effectiveness of the co-management agreement strategy; (2) the agency's ability to enforce the regulations and manage the subsistence harvest of CI beluga whales; and (3) whether illegal takes will be counted against the two-strike harvest limit.

Participant	Interest
Michael L. Gosliner, Esq., General Counsel, Marine Mammal Commission, Bethesda, MD	Represents the Marine Mammal Commission ("MMC"). Generally supports the proposed regulations. MMC expresses concern about the allocation of the strikes to Native hunters. MMC challenges NMFS authority to adjust the number of annual strikes through notice and comment rulemaking after adoption of the proposed regulations. MMC expresses concern about the broad prohibition against the sale of CI beluga products, and recommends that the prohibition should only apply to edible portions of beluga whale products. MMC recommends expansion of the prohibition to cover purchase, as well as sale, of edible portions of CI beluga whale. MMC further expresses concern on the ability to differentiate between edible portions of CI beluga whales and other beluga whale stocks in the Anchorage area and recommends a broad prohibition against the sale and purchase of all edible portions of beluga whales in the area. MMC also expresses concern regarding the efficiency of the harvest of CI beluga whales and is equally concerned about the extent to which landed whales are fully utilized. In addition, MMC seeks clarification as to whether the proposed regulation limiting Native harvest applies to all maternally dependent calves or just newborn calves.
John M. Starkey, Esq., Homer, AK	Represents the Native Village of Tyonek ("Tyonek"). Tyonek claims to be the only federally recognized Indian tribe, which is historically known for hunting CI beluga whales and argues that 1 whale should be allotted to the tribe each year under the proposed regulations and management agreement.
Jack K. Sterne, Esq., Trustee for Alaska, Center for Marine Conservation, Anchorage, AK David Avraham Voluck, Esq., Landye Bennett Blumstein, LLP, Anchorage, AK	Trustees for Alaska challenges the methodology and enforceability of the proposed regulations. Represents Cook Inlet Treaty Tribes ("CITT"). CITT is a federally recognized Indian tribe that criticizes the hearing process and procedures and sees it as a serious barrier to meaningful participation by Alaska Natives, who were given less than 1 month to file an initial notice of intent to participate, together with direct testimony. CITT also opposes the proposed regulations. CITT challenges NMFS scientific methodology for estimating the CI beluga whale stock. CITT argues that a more flexible regulatory regime should be applied to CI beluga whales that would easily provide for increasing the number of subsistence strikes if new information becomes available. CITT also claims that it is the sovereign governing tribes in CI and NMFS must deal directly with all the tribes of CI in their contemplated co-management agreement, and challenges authority and ability of NMFS to enforce the contemplated co-management agreement.

## Issues to be Addressed at the Hearing

### A. Population Estimates

1. What numbers are appropriate to use for:
  - a. Carrying capacity (K)
  - b. Current Population size ( $N_{2000}$ )
  - c. Intrinsic rate of growth ( $R_{max}$ )
  - d. The lower bound of the optimum sustainable population level (Maximum Net Productivity Level or MNPL) relative to the carrying capacity
2. Whether 2000 Survey Data will be available. If so, why aren't they being used?
3. Whether the recovery times projected by the National Marine Fisheries Service (NMFS) under different harvest regimes are appropriate?
  - a. Whether recovery factor used by the NMFS is too conservative? If so, what is the appropriate recovery factor?
  - b. Whether there is a consistent formula for estimating the recovery time?
  - c. Have past formulas for population been developed? If so, what are the formulas and why weren't they adopted?
4. What factors, other than Native harvest of Cook Inlet beluga whales, possibly contributed to the observed declines or slower than projected potential recovery of the stock?

a. Whether the estimate of annual removals by Alaska Native subsistence hunters in Cook Inlet is accurate? Is the Cook Inlet Marine Mammal Council's report on 1998 harvest levels available?

b. Whether NMFS has adequately accounted for risks to the population from orca predation, strandings, oil spills, and other stochastic events in calculating potential harvest removals and recovery times?

c. Is there an Inlet-based decline in the availability of food or prey for the Beluga? If so, in what way has this affected the decline and potential recovery of the population?

5. Whether a more flexible model that accounts for uncertainty in key population parameters is available? If so, why wasn't it used?

6. What resources are available for monitoring beluga population and harvest?

a. Will the beluga population be evaluated on an annual basis?

b. Whether the regulations should contain a provision for altering the number of Native harvest strikes if new, valid information changes the analysis of Cook Inlet beluga population?

7. Should a more flexible harvest regime be adopted? If so, what should it be?

### B. Co-Management and Enforcement

1. What is the definition of the term "Alaska Native Organization (ANO)?"

a. How is an ANO recognized?  
b. Are there any ANOs in Cook Inlet with area-wide tribal authority to enforce laws against all members of the area tribes and enter into agreements on behalf of said tribes? How many exist and who are they? Which ANO(s) can enter into co-management agreement with NMFS?

2. What mechanisms are available to enforce the Native harvest limitation and prohibition on the sale of products and foodstuff from Cook Inlet beluga whales?

a. Who has authority to enforce the proposed regulations, if adopted? Will enforcement authority be shared between NMFS and the ANO(s)?

b. What effect, if any, does the recent ruling in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998) have on a tribal government's ability to enforce tribal laws on individuals?

c. How will the strikes under the proposed regulation be allocated? Who will monitor the harvest of Cook Inlet beluga whales to ensure that the season is concluded as soon as the second strike has been made? How will the hunters and tribes be notified of season's closure?

3. Are there methods to increase efficiency?
4. Will there be sufficient funding for enforcement and prosecution?

#### C. Method and Means of Hunting

1. Will illegal takings be counted against the two-strike Native harvest limitation?
2. Will NMFS be able to stop Native harvest of Cook Inlet beluga whales under emergency circumstances by rule making? Will there be a legal mechanism to stop Native harvest of Cook Inlet beluga whales in the event of unrelated mortality that would affect the population recovery?
3. Should juvenile whales be taken instead of mature adults if it is shown to enhance chances of population recovery?
4. Should the proposed July 15 annual commencement date for Native harvest of beluga whales be moved forward to July 1 in view of deteriorating weather conditions?

#### D. Sale of Cook Inlet Beluga Whale Products

1. Whether the term "sale" should include barter and other types of quasi-commercial transactions?
2. Should attempts to sell Cook Inlet beluga whale products and/or foodstuff be deemed a violation? Should the purchase and attempts to purchase Cook Inlet beluga whale products or foodstuff be deemed a violation?
3. For enforcement purposes, should the restriction on the sale of Cook Inlet beluga whale products and/or foodstuff be expanded to prohibit the sale of products and/or foodstuff from other beluga whale stock?
4. Should restrictions be in place for all Cook Inlet beluga whale products, or just edible portions?

#### E. Cultural Interests

1. Are there ways to encourage full utilization of those belugas taken pursuant to the proposed regulations?
2. Is there sufficient emphasis on the importance of Native subsistence harvest in terms of balancing in favor of permitting the proposed harvest?

These issues are subject to change as a result of stipulations of the participants. NMFS and all parties have submitted various documents and written testimony that bears on these issues.

During the hearing, the NOAA Counsel will present his witnesses and documentary evidence first, and the participants will be given an opportunity to cross-examine the witnesses. The other parties listed above will also be given an opportunity to

present witnesses and introduce documentary evidence in the order in which they are listed in this Notice of Final Agenda. Witnesses in the hearing include the following:

(1) For NMFS, Douglas P. DeMaster, Ph.D., Director, National Marine Mammal Laboratory, NMFS; P. Michael Payne, Assistant Regional Administrator for Protected Resources, NMFS;

(2) For Joel and Debra Blatchford: These participants will testify on their own behalf;

(3) For the Municipality of Anchorage, the Matanuska-Susitna Borough, and the Kenai Peninsula Borough: George Weurch, Mayor, Municipality of Anchorage; John Duffy, Acting Manager, Matanuska-Susitna Borough; and Dale Bagley, Mayor, Kenai Peninsula Borough;

(4) For Alaska Oil and Gas Association (AOGA): Judith M. Brady, Executive Director, AOGA;

(5) For the Marine Mammal Commission: Daniel Goodman, Ph.D., Professor, Montana State University;

(6) For the village of Tyonek: Peter Merryman, Chief, Village of Tyonek;

(7) For the Trustees for Alaska: Not yet identified; and

(8) For Cook Inlet Treaty Tribes: Delice calcote, Secretary, Cook Inlet Marine Mammal Council.

Dated: November 27, 2000.

#### Don Knowles,

Director, Office of Protected Resources,  
National Marine Fisheries Service.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 001120324-0324-01; I.D. 110700D]

RIN 0648-AO71

#### Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Extension of Closed Areas

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** This proposed rule would extend the closure of the Hudson Canyon South and Virginia Beach Sea Scallop Closed Areas for 180 days or until such time that a controlled area

access program for these two areas can be implemented through Framework 14 to the Atlantic Sea Scallop Fishery Management Plan (FMP), whichever is sooner. This action, which is necessary to reduce overfishing, would help ensure that fishing mortality rates do not exceed the target thresholds established in the FMP.

**DATES:** Comments must be received no later than 5 p.m., eastern daylight time, January 2, 2001.

**ADDRESSES:** Comments on this proposed rule should be sent to Patricia A. Kurkul, Regional Administrator, Northeast Regional Office, NMFS, 1 Blackburn Drive, Gloucester, MA 01930-2298. Please mark the envelope "Comments - Extension of Mid-Atlantic Scallop Closed Areas." Comments also may be sent via facsimile (fax) to 978-281-9135. Comments will not be accepted if submitted via e-mail or Internet. Comments regarding any ambiguity or unnecessary complexity arising from the language used in this rule should also be sent to Patricia Kurkul. Copies of the Environmental Assessment/Regulatory Impact Review/Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and any other documents supporting this action are available from the Regional Office at the address specified here.

**FOR FURTHER INFORMATION CONTACT:**

Peter W. Christopher, Fishery Policy Analyst, 978-281-9288, fax 978-281-9135, e-mail

peter.christopher@noaa.gov.

**SUPPLEMENTARY INFORMATION:** The 23rd Northeast Regional Stock Assessment Workshop (SAW 23), in March 1997, identified high fishing mortality rates, low stock size, and lack of significant recruitment in the Atlantic sea scallop (scallop) fishery. Based on this finding, scientists involved with SAW 23 determined that fishing effort should be reduced immediately and significantly in the Mid-Atlantic region to preserve spawning stock biomass and improve the yield per recruit. To achieve this, NMFS implemented an interim final rule on April 3, 1998 (63 FR 15324), that established two areas in the Mid-Atlantic region that were closed to all scallop fishing. The closure of these two areas, the Hudson Canyon South and Virginia Beach Closed Areas, was based on a finding that the areas contained large concentrations of small and juvenile scallops that could provide for future recruitment. The interim final rule was subsequently extended for 180 days (63 FR 51862, September 29, 1998) and on March 29, 1999, Amendment 7 to the Atlantic Sea Scallop Fishery Management Plan (FMP) (64 FR 14835)