

vi. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

35. None.

#### C. Ordering Clauses

36. Accordingly, it is ordered that, pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 309(j), this *Further Notice of Proposed Rule Making* is hereby adopted.

37. It is further ordered that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of this *Further Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

**Marlene H. Dortch,**

Secretary.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 226

[I.D. 101405C]

RIN 0648-AT84

#### Endangered and Threatened Species; Revision of Critical Habitat for the Northern Right Whale in the Pacific Ocean

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

**ACTION:** Proposed rule, reopening of public comment period.

**SUMMARY:** On November 2, 2005, NMFS published a proposed rule to revise current critical habitat (CH) under the Endangered Species Act of 1973 (ESA) for the northern right whale (*Eubalaena glacialis*) by designating areas within the North Pacific Ocean. Two areas are proposed for designation: an area in the southeast Bering Sea and a second area in the Gulf of Alaska south of Kodiak Island. In response to a request, a public hearing on this proposed rule will be held on March 2, 2006, in Anchorage, AK.

**DATES:** The hearing will be held in Anchorage, AK on Thursday, March 2, 2006, from 3 p.m. to 5 p.m. The public

comment period on the proposed rule (70 FR 66332) will reopen on February 10, 2006 so that additional comments submitted at, or in response to the hearing may be considered in the promulgation of the final rule. Any additional comments on this proposed rule must be received on or before March 9, 2006.

**ADDRESSES:** The hearing will be in room 154 of the U.S. Federal Office Building, 222 W. 7th Avenue, Anchorage, AK. Send comments to Kaja Brix, Assistant Regional Administrator, Protected Resources Division, AK Region, NMFS, Attn: Ellen Walsh. Comments may be submitted by:

- E-mail: 0648-AT84-[NPRWCH@noaa.gov](mailto:NPRWCH@noaa.gov). Include in the subject line the following document identifier: Right Whale Critical Habitat PR. E-mail comments, with or without attachments, are limited to 5 megabytes.
- Webform at the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions at that site for submitting comments.
- Mail: P. O Box 21668, Juneau, AK 99802
- Hand delivery to the Federal Building : 709 W. 9th Street, Juneau, AK
- Fax: (907) 586-7012

The proposed rule, maps, stock assessments, and other materials relating to this proposal can be found on the NMFS Alaska Region website <http://www.fakr.noaa.gov/>.

**FOR FURTHER INFORMATION CONTACT:** Brad Smith, (907) 271-3023, e-mail: [Brad.Smith@NOAA.gov](mailto:Brad.Smith@NOAA.gov) or Marta Nammack, (301) 713-1401.

#### SUPPLEMENTARY INFORMATION:

Regulations governing petitions to revise critical habitat under the ESA provide that a public hearing shall be held if any person so requests within 45 days of publication of a proposed regulation (50 CFR 424.16(c)(3)). Notice of such hearing is to be published in the **Federal Register** no later than 15 days prior to the hearing.

#### Comments and Responses

The November 2 proposed rule concerning designation of critical habitat established a comment period ending on January 3, 2006. Twenty-one comments were received on the proposed rule. These comments are summarized below. Responses to these and to comments received during the public hearing will appear in the final rule on this action.

#### Size of Proposed Critical Habitat is Too Large

**Comment:** The southern and western boundaries of the proposed critical habitat in the Bering Sea are based on very few right whale sightings. Eliminating these areas would reduce the extent of the critical habitat from 27,700 to 24,000 square miles but retain approximately 99 percent of all sightings.

**Comment:** The area designated as CH is arbitrary because there is no obvious correlation between copepod abundance and the distribution of the northern right whale.

#### Proposed Critical Habitat is Too Small

**Comment:** The proposed designations fail to address unoccupied right whale habitat. Additional areas outside of the known range of the northern right whale at the time of ESA listing should be included in this designation.

**Comment:** The extent of the areas proposed for designation as critical habitat in the North Pacific Ocean would not be sufficient to provide for the recovery of the northern right whale.

**Comment:** The proposed designation is negatively biased in that it is based on sighting effort which is not consistent over the range of the northern right whale. Therefore, the designation should be expanded to compensate for this bias. Both right whales and their Primary Constituent Elements (PCE's) are likely to occur elsewhere in densities equivalent to those occurring in the designated critical habitats.

**Comment:** The proposed designation should be expanded to recognize the probability of increased importance of adjacent areas, and to be consistent with similar efforts to designate CH for the northern right whale in the North Atlantic Ocean.

**Comment:** The precautionary principle requires NMFS to designate other areas with similar habitat conditions as CH.

**Comment:** The designation should include State of Alaska waters because they have nearly identical features to the proposed CH areas.

**Comment:** NMFS should consider designation of adjacent areas to preserve diversity and act as buffer areas.

**Comment:** NMFS should include in its designation historical right whale habitat which was essential to their conservation.

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

*Comment:* NMFS should include migratory corridors or transitional waters between high use habitats of the northern right whale in its CH designation. This should include the waters from Umnak Pass to Unimak Pass.

*Comment:* NMFS should review data from the past century and designate CH for areas where right whale concentrations overlay known areas of prey abundance.

*Comment:* Critical habitat should be designated to include those physical features which promote fronts, upwelling, and dynamic advection of nutrient-rich waters that promote zooplankton productivity.

#### *Primary Constituent Elements*

*Comment:* Feeding areas should be identified as a Primary Constituent Element (PCE) for the northern right whale.

*Comment:* PCE's are defined too narrowly in the proposed rule. Other elements are also critical to conservation of this species.

*Comment:* By defining PCEs as only the zooplankton species, NMFS has created a situation where impaired water quality and other impacts would not result in adverse modification of the CH.

*Comment:* NMFS should follow the example of the Steller's eider and spectacled eider by identifying PCE's to include all marine waters of appropriate depths, along with the underlying marine benthic community.

*Comment:* PCE's should include ocean passes and channels used by right whales.

#### *Research*

*Comment:* More research is needed to describe PCEs for the northern right whale.

*Comment:* NMFS should increase efforts to place radio tags on right whales.

*Comment:* Additional research is necessary to describe habitat use and preferences, migratory patterns, breeding and calving, and factors affecting the recovery of the northern right whale.

*Comment:* NMFS should dedicate more effort to study vessel interaction and collision avoidance by right whales.

#### *Prohibitions and Activities in Critical Habitat*

*Comment:* Critical habitat must be protected from more than just activities which may affect copepods. Protection is also needed from the effects of ship strikes, fishing gear interaction, changes in sea temperatures and environmental conditions caused by humans.

*Comment:* Designation of CH should not include amendment of fishery management measures as there is no evidence of fisheries interaction, including ship strikes, with right whales in the North Pacific Ocean.

*Comment:* Oil and gas development is incompatible with the ecology and economy of Bristol Bay and the Northeast Pacific Region. Major oil spills, related discharges, seismic activity, and ship strikes are all oil and gas-related actions which constitute adverse modification of CH.

*Comment:* Specific, focused reference to the oil and gas industry as representing a threat to the proposed right whale CH should be removed from the proposed rule.

*Comment:* Designation of CH will open the citizen suit provisions of the ESA and result in litigation and delays in projects. Economic activities that are not impacting right whale recovery will be negatively impacted.

*Comment:* Designation of CH will lead to regulatory creep and increase costs through added consultations and mitigation measures imposed by the Federal Government.

#### *Economic Considerations*

*Comment:* NMFS has correctly characterized both the economic significance of commercial fishing to the region, State, and Nation, and the effective absence of the possibility that commercial fishing can destroy or adversely modify the proposed CH for northern right whales in the Eastern Bering Sea (EBS) and Gulf of Alaska (GOA).

*Comment:* While no adverse economic or operational impacts on commercial fisheries are associated with the proposed designation, a modification of the southern and western boundaries (reduction) of CH in the EBS makes sense and would reduce the possibility of any even hypothetical future impacts on fishing activity.

*Comment:* In addition to the recommended exclusions of areas in the south and west of the proposed CH for northern right whales in the EBS to accommodate commercial fishing, the northern boundary should be moved south (reduced) from the proposed 58°00' N. to 57°30' N., owing to the presence of economically significant commercial fishing activity (bottom trawling) traditionally conducted there.

*Comment:* A substantial portion (especially the southern and eastern sections) of the proposed designation of CH in the EBS coincides with Outer Continental Shelf (OCS) Leasing Areas projected to have high to moderate natural gas production potential, and

moderate oil production potential. The economic and development benefits of these areas (in particular, the Aleutian Basin Area) justify their exclusion under provisions of the ESA.

*Comment:* The communities that are located in remote western Alaska, adjacent to the proposed designation, chronically suffer from inadequate economic development and opportunity. The entire region would benefit from economic diversification, such as that which would accompany oil and gas exploration and development. The proposed designation of CH in the EBS could increase cost, significantly delay, or even prevent such economic development, while contributing nothing to the conservation and recovery of the right whale population.

*Comment:* Inferences about the risk of fishing gear entanglements and/or vessel strikes of right whales in the North Pacific, based upon such experiences in the North Atlantic, are inappropriate and unsupported by evidence or data. The nature and magnitude of fishing and other economic activity within the two marine environments are fundamentally different and not comparable.

*Comment:* The area of the EBS encompassed by the proposed CH boundaries contain the vast majority of groundfish, crab, and halibut resources harvested by commercial fisheries in this region. They have a combined direct economic gross value of well over \$1 billion dollars, annually, and are vital to fishermen, processors, and fishery-dependent communities in Alaska. NMFS should explain how, or if, designation of CH for the right whale would affect fishery management actions that would be pursued if the incidental take of a right whale would occur in commercial fisheries.

*Comment:* The Executive OCS Deferral through 2012 requires that the North Aleutian Basin be excluded from the Five-Year OCS leasing program. This remains a sound decision and any analysis of the proposed designation must recognize that restrictions on petroleum development in the proposed areas impose no new economic costs to society.

*Comment:* MMS estimates reserves of 7 trillion cubic feet of natural gas and 230 million barrels of oil in the North Aleutian Basin. Approximately 20 percent of the high prospective geologic basin lies within the southeast corner of the proposed CH area (approximately 8 percent of the proposed designation of CH in the EBS). At risk, therefore, is about 20 percent of the estimated \$19 billion in Federal revenues, an

estimated 5,000 construction jobs, and sufficient supplies of natural gas, necessary to justify construction and operation of an liquified natural gas (LNG) facility in the area.

*Comment:* Given the critical status of this species and the requirements put forth in sections 4 and 9 of the ESA, the need for protection of right whales and designation of CH outweighs any potential economic impacts of introducing such protection. It is also important to consider the economic benefit of the survival of this species.

*Comment:* NMFS has created, by its own admission, CH that will not be adversely modified by oil or gas exploration activity.

*Comment:* Currently, neither the North Aleutian Basin nor the St. George Basin Planning areas are available for lease, owing to the 2012 deferral order. Many steps must occur before a field in either of these areas could reach production and none of these steps are certain to occur.

*Comment:* The proposed EBS designation incorporates about one third of the (oil and gas) high-potential part of North Aleutian Basin and most of the area of potential in St. George Basin. No exploration drilling has taken place in the North Aleutian Basin (one non-exploratory well was drilled in 1983). Economic studies show that the marginal prices for the North Aleutian Basin are well below current market prices, illustrating economically producible resources could exist at much lower than current prices,

improving the area's feasibility as a potential energy source. If this area becomes available for leasing, if pre-lease oil and gas exploration reveals commercial quantities of petroleum, if market conditions remain favorable, if commercial discoveries are of a scale to support LNG exports, then the direct revenues to federal, state, and local governments could approach \$15 billion over a 30-year life cycle. Indirect benefits and economic multiplier effects to the Alaska economy are also likely to be several billions of dollars.

*Comment:* A basic cost/benefit analysis is submitted for petroleum activities in the North Aleutian Planning Area to demonstrate the economic potential and revenues that may be associated with commercial development. The overall conclusion is economic benefits would accrue to Federal, state, and local governments, as well as the Alaska economy, if a leasing program in the North Aleutian planning area results in commercial development of gas and oil on the scale envisioned by the MMS modeling scenario.

#### *Other Comments*

*Comment:* NMFS should designate CH as Marine Sanctuaries because this would protect other marine assets such as corals.

*Comment:* NMFS should recognize the voluntary conservation efforts of the fishing industry towards public awareness and avoidance of vessel strikes.

*Comment:* The **Federal Register** notice should include data on the

seasonal occurrence of right whales in the proposed CH areas, present an analysis of vessel and fishing gear interaction based on photographic evidence, and discuss the effects of climate change and variable ice patterns on copepods.

*Comment:* The Alaska Outer Continental Shelf oil and gas leasing program has existed for 30 years, during which time the MMS has demonstrated that industry activities can be carried out in a manner that does not jeopardize the continued existence of threatened or endangered species, or adversely affect designated critical habitat.

*Comment:* There is no evidence that commercial trawling in the North Pacific or Eastern Bering Sea results in any adverse impacts on the benthic environment, and certainly none that could adversely impact the PCEs identified under the proposed designation of CH in these areas.

#### **Special Accommodations**

This hearing is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Brad Smith (see **FOR FURTHER INFORMATION CONTACT**) at least 10 business days in advance of the hearing.

Dated: February 6, 2006.

**James H. Lecky,**

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

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