responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to remove an erroneously approved State rule from the SIP, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This proposed rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant. This proposed rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 19, 2007.

Russell L. Wright, Jr.,

Acting Regional Administrator, Region 4.

[FR Doc. E7–21245 Filed 10–26–07; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 226

[Docket No. 070717354–7361–01]

RIN 0648–AV73

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

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

ACTION: Proposed rule; request for comment.

SUMMARY: We, NMFS, completed a status review of the northern right whale and have determined that the right whale in the North Pacific Ocean is a separate and distinct species from the right whales in the North Atlantic Ocean and southern hemisphere. We also find the species to be described in the North Pacific Ocean, the North Pacific right whale (*Eubalaena japonica*), is in danger of extinction throughout its range. We have proposed to list this species as endangered pursuant to the Endangered Species Act of 1973 (ESA). Here we propose to designate critical habitat for this species. Two specific areas are proposed for designation: one in the Gulf of Alaska (GOA) and another in the Bering Sea. Our most recent mapping calculation indicates this area comprises a total of approximately 36,800 square miles (95,325 square kilometers) of marine habitat. We solicited comments from the public on all aspects of the proposal, including information on the economic, national security, and other relevant impacts of the proposed designation. We may revise this proposal and solicit additional comments prior to final designation to address new information received during the comment period.

DATES: Comments on this proposed rule must be received by close of business on December 28, 2007. Requests for public hearings must be made in writing by December 13, 2007.

ADDRESSES: You may submit comments, identified by 0648–AV73, by any one of the following methods:

- Electronic submissions: Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*. Follow the instructions at that site for submitting comments.
- Mail: Kaja Brix, Assistant Regional Administrator, Protected Resources Division, Alaska Region, NMFS, Attn: Ellen Sebastian, P. O Box 21668, Juneau, AK 99802
- Hand delivery to the Federal Building : 709 W. 9th Street, Juneau, Alaska .
- Fax: (907) 586–7012, Attn: Ellen Sebastian.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* without change. All Personal Identifying Information (for example, name, address, etc.) 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. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

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, or Marta Nammack, (301) 713–1401.

SUPPLEMENTARY INFORMATION: The ESA, as amended [16 U.S.C. 1531 *et seq.*], grants authority to and imposes requirements upon Federal agencies regarding endangered or threatened species of fish, wildlife, or plants, and habitats of such species that have been designated as critical. The U.S. Fish and Wildlife Service and NMFS share responsibility for administering the ESA. Endangered or threatened species under the authority of NMFS are found in 50 CFR parts 223 and 224.

Background

The North Pacific right whale (E. japonica) is a member of the family Balaenidae and is closely related to the right whales that inhabit the North Atlantic and the Southern Hemisphere. Right whales are large baleen whales that grow to lengths and weights exceeding 18 meters and 100 tons, respectively. They are filter feeders whose prey consists exclusively of zooplankton (notably copepods and euphausiids; see below). Right whales attain sexual maturity at an average age of 8–10 years, and females produce a single calf at intervals of 3–5 years (Kraus *et al.*, 2001). Their life expectancy is unclear, but is known to reach 70 years in some cases (Hamilton *et al.*, 1998; Kenney, 2002).

Right whales are generally migratory, with at least a portion of the population moving between summer feeding grounds in temperate or high latitudes and winter calving areas in warmer waters (Kraus *et al.*, 1986; Clapham *et al.*, 2004). In the North Pacific, the feeding range is known to include the GOA, the Aleutian Islands, the Bering Sea, and the Sea of Okhotsk. Although a general northward movement is evident in spring and summer, it is unclear whether the entire population undertakes a predictable seasonal migration, and the location of calving grounds remains completely unknown (Scarff, 1986; Scarff, 1991; Brownell *et al.*, 2001; Clapham *et al.*, 2004; Shelden et al,. 2005). Further details of occurrence and distribution are provided below.

In the North Pacific, whaling for right whales began in the GOA (known to whalers as the ''Northwest Ground'') in 1835 (Webb, 1988). Right whales were extensively hunted in the western North Pacific in the latter half of the 19th century, and by 1900 were scarce throughout their range. Right whales were protected worldwide in 1935 through a League of Nations agreement. However, because neither Japan nor the USSR signed this agreement, both nations were theoretically free to continue right whaling until 1949, when

the newly-created International Whaling Commission (IWC) endorsed this ban. Following this, a total of 23 North Pacific right whales were legally killed by Japan and the USSR under Article VIII of the International Convention for the Regulation of Whaling (1946), which permits the taking of whales for scientific research purposes. However, it is now known that the USSR illegally caught many right whales in the North Pacific (Doroshenko, 2000; Brownell *et al.*, 2001; Ivashchenko, 2007). In the eastern North Pacific, 372 right whales were killed by the Soviets between 1963 and 1967; of these, 251 were taken in the GOA south of Kodiak, and 121 in the Southeastern Bering Sea (SEBS). These takes devastated a population that, while undoubtedly small, may have been undergoing a slow recovery (Brownell *et al.*, 2001).

As a result of this historic and recent hunting, the North Pacific right whale today is among the most endangered of all whales worldwide. Right whales were listed in 1970 following passage of the Endangered Species Conservation Act (ESCA) of 1969, and automatically granted endangered status when the ESCA was repealed and replaced by the ESA. Right whales were also protected in U.S. waters under the Marine Mammal Protection Act of 1972. NMFS issued a Recovery Plan for the northern right whale in 1991 which covered both the North Atlantic and North Pacific (NMFS, 1991).

We have assumed the existence of a single species of right whales in the North Pacific (Hill *et al.*,1997). However, some authors (e.g., Klumov, 1962; Brownell *et al.*, 2001) have discussed the possibility that North Pacific right whales exist in discrete eastern and western North Pacific populations. In particular, Brownell *et al.* (2001) pointed to the different catch and recovery histories of the eastern and western management units as support for such a division. During the 1983 IWC right whale workshop (IWC, 1986), the Scientific Committee recommended distinguishing two North Pacific management units, but stated no conclusion can be reached concerning the identity of biological populations. At this writing, sub-division of this species remains equivocal, and we consider all North Pacific right whales to belong to the single species, *E. japonica*.

In the western North Pacific (the Sea of Okhotsk and adjacent areas), current abundance is unknown but is probably in the low to mid-hundreds (Brownell *et al.*, 2001). There is no estimate of abundance for the eastern North Pacific (Bering Sea, Aleutian Islands, and GOA), but sightings are rare; most biologists believe the current population is unlikely to exceed a hundred individuals, and is probably much smaller. Prior to the illegal Soviet catches of the 1960s, an average of 25 whales was observed each year in the eastern North Pacific (Brownell *et al.*, 2001); in contrast, the total number of records in the 35 years from 1965 to 1999 was only 82, or 2.3 whales per annum.

Since 1996, NMFS and other surveys (directed specifically at right whales or otherwise) have detected small numbers of right whales in the SEBS, including an aggregation estimated at 24 animals in the summer of 2004. Photo-identification and genetic data have identified 35 individuals from the Bering Sea, and the high inter-annual resighting rate further reinforces the idea that this population is small. Right whales have also been sighted in the northern GOA, including a sighting in August 2005 and September 2006, both of which occurred in the same area south of Kodiak Island. However, the overall number of North Pacific right whales using habitats other than the Bering Sea is not known.

The taxonomic status of right whales worldwide has recently been revised in light of genetic analysis (see Rosenbaum *et al.*, 2000; Gaines *et al.*, 2005). Applying a phylogenetic species concept to molecular data separates right whales into three distinct species: *Eubalaena glacialis* (North Atlantic), *E. japonica* (North Pacific) and *E. australis* (Southern Hemisphere). We formally recognized this distinction for the purpose of management in a final rule published on April 10, 2003 (68 FR 17560), but subsequently determined that the issuance of this rule did not comply with the requirements of the ESA, and thus rescinded it (70 FR 1830, January 11, 2005) prior to beginning the process anew. We published a proposed rule on December 27, 2006 (71 FR 77694), to list the North Pacific right whale, *E. japonica*, separately as an endangered species.

Critical Habitat

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

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

CH for the Northern Right Whale

On July 6, 2006, we published a Final Rule (71 FR 38277) to revise the CH for the northern right whale by designating areas within the North Pacific Ocean as CH under the ESA. Two specific areas were designated, one in the GOA and another in the Bering Sea. These are the same areas being proposed here for the North Pacific right whale. In our 2006 Final Rule (71 FR 38277; July 6, 2006) we stated the critical habitat comprised approximately 36,750 square miles (95,200 sq km) of marine habitat. However, our most recent mapping calculation indicates that the area is approximately 95,325 square miles (36,800 square miles) of marine habitat. A description of, and the basis for, the proposed designation follow.

Geographical Area Occupied by the Species

The ESA defines CH (in part) as areas within the geographical area occupied by the species at the time it was listed under the ESA. Because this geographical area has not been previously described for the North Pacific right whale, it is necessary to establish this range when proposing to designate CH.

Prior to the onset of commercial whaling in 1835, right whales were widely distributed across the North Pacific (Scarff, 1986; Clapham *et al.*, 2004; Shelden *et al.*, 2005). By 1973, the North Pacific right whale had been

severely reduced by commercial whaling. Sighting data from this remnant population are too sparse to identify the range of these animals in 1973. However, no reason exists to suspect that the right whales that remain alive today inhabit a substantially different range than right whales alive during the time of the Soviet catches; indeed, given the longevity of this species, it is likely that some of the individuals who survived that whaling episode remain extant now. Consequently, recent habitat use is unlikely to be different from that at or before the time of listing.

Both the SEBS and the western GOA (shelf and slope waters south of Kodiak) have been the focus of many sightings (as well as the illegal Soviet catches) in recent decades. In general, the majority of North Pacific right whale sightings (historically and in recent times) have occurred from about 40° N to 60° N latitude (lat.). There are historical records from north of 60° N lat., but these are rare and are likely to have been misidentified bowhead whales. North Pacific right whales have on rare occasions been recorded off California and Mexico, as well as off Hawaii. However, as noted by Brownell *et al.* (2001), there is no evidence that either Hawaii or the west coast of North America from Washington State to Baja California were ever important habitats for right whales. Given the amount of whaling effort as well as the human population density in these regions, it is highly unlikely that substantial concentrations of right whales would have passed unnoticed. Furthermore, no archaeological evidence exists from the U.S. west coast suggesting that right whales were the target of local native hunts. Consequently, the few records from this region are considered to represent vagrants. The geographical area occupied by the North Pacific right whale at the time of ESA listing extends over a broad area of the North Pacific Ocean, between 120° E and 123° W longitude and 40° N and 60° N latitude, as depicted in Figure 1.

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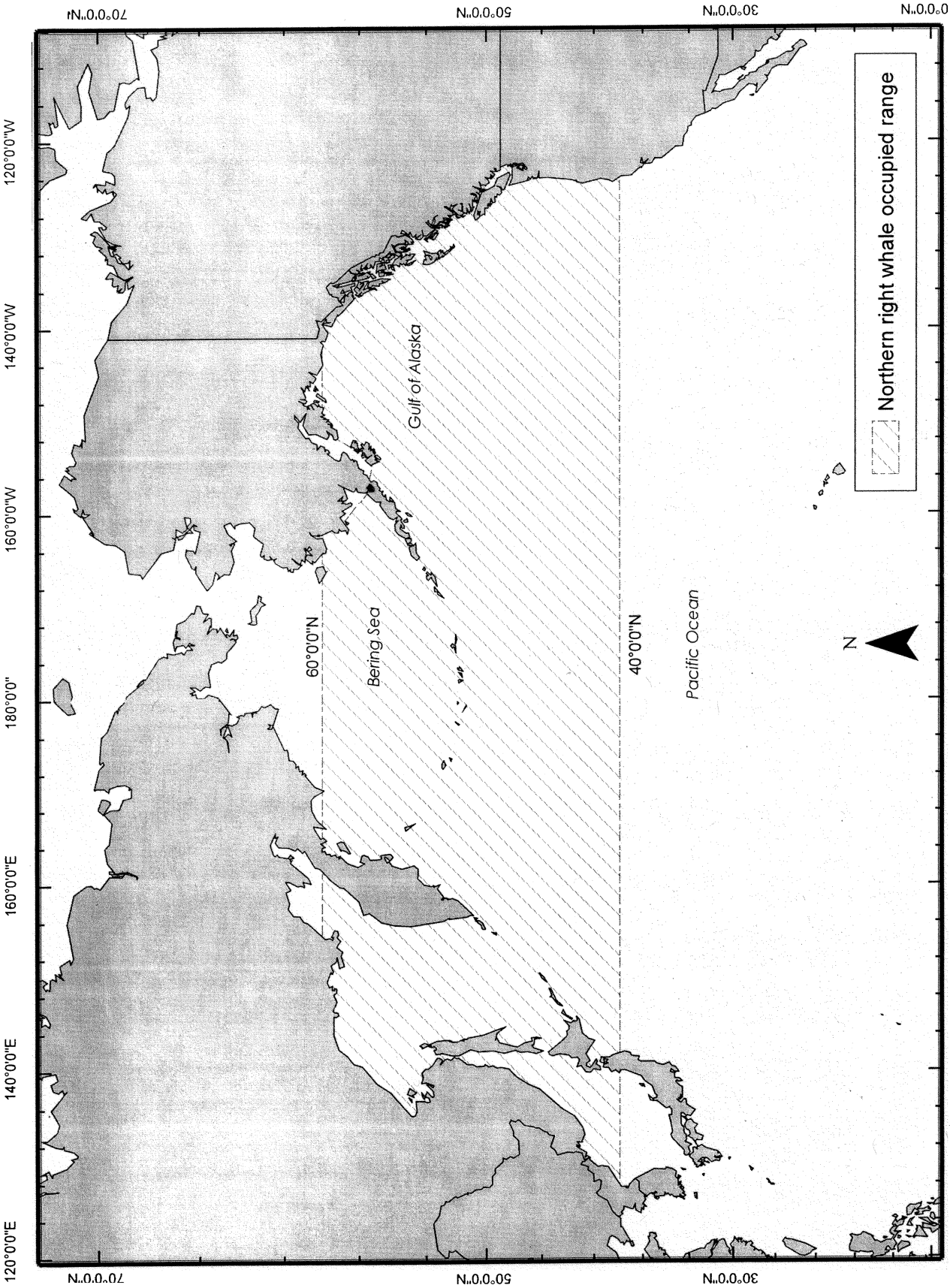

Figure 1. Occupied range of Northern right whales in the North Pacific at time of listing under the Endangered Species Act.

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Unoccupied Areas

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

Physical or Biological Features Essential to the Conservation of the Species

In determining what areas are CH, 50 CFR 424.12(b) requires that we ''consider those physical or biological features that are essential to the conservation of a given species including space for individual and population growth and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for breeding, reproduction, and rearing of offspring; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distribution of a species.'' The regulations further direct us to ''focus on the principal biological or physical constituent elements . . . that are essential to the conservation of the species,'' and specify that the ''known primary constituent elements shall be listed with the critical habitat description.'' The regulations identify primary constituent elements (PCE) as including, but not limited to: ''roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.'' An area must contain one or more PCEs to be eligible for designation as CH; an area lacking a PCE may not be designated in the hope it will acquire one or more PCEs in the future.

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

Special Management Considerations or Protection

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

We request comment on the extent to which the designated PCEs may require special management considerations or protection. The contributions of these management measures are also relevant to the exclusion analysis under section 4(b)(2) of the ESA, and will be considered further in a later section of this notice.

Proposed Critical Habitat

The current abundance of North Pacific right whales is considered to be very low in relation to historical numbers or their carrying capacity (not determined). The existence of a persistent concentration of right whales found within the SEBS since 1996 is somewhat extraordinary in that it may

represent a significant portion of the remaining population. These areas of concentration where right whales feed are characterized by certain physical and biological features which include nutrients, physical oceanographic processes, certain species of zooplankton, and long photoperiod due to the high latitude. We consider these feeding areas, supporting a significant assemblage of the remaining North Pacific right whales, to be critical in terms of their conservation value. We have based our proposed designation of CH on these areas, rather than where right whales have appeared singly, in low numbers, or in transit. We have been able to substantiate this assumption with observations of feeding behavior, direct sampling of plankton near feeding right whales, or records of stomach contents of dead whales. These assumptions underlie the proposed CH areas shown in Figure 2 and described below. Two areas are proposed: an area of the SEBS and an area south of Kodiak Island in the GOA.

Shelden *et al.* (2005) reviewed prey and habitat characteristics of North Pacific right whales. They noted that habitat selection is often associated with features that influence abundance and availability of a predator's prey. Right whales in the North Pacific are known to prey upon a variety of zooplankton species. Availability of these zooplankton greatly influences the distribution of right whales on their feeding grounds in the SEBS and GOA. Right whales require zooplankton patches of very high density, and zooplankton are typically small and distributed over space and time (Mayo and Marx, 1990). Typical zooplankton sampling is too broad-scale in nature to detect patches of these densities, and directed studies employing fine-scale sampling cued by the presence of feeding right whales are the only means of doing this (Mayo and Marx, 1990). Accordingly, there may be no obvious correlation between the abundance and distribution of prey copepods and euphausiids (as measured by broad-scale oceanographic sampling) and the distribution of right whales (M. Baumgartner, in prep.) In light of this, we must rely upon the whales themselves to indicate the location of important feeding areas in the North Pacific. Aggregations of right whales in high latitudes can be used with high confidence as an indicator of the presence of suitable concentrations of prey, and thus of feeding behavior by the whales. Right whales feed daily during spring and summer, and studies in the North Atlantic have consistently found an association between concentrations of whales and feeding behavior, with dense copepod patches recorded by oceanographic sampling around such groups of whales (Mayo and Marx, 1990; Baumgartner *et al.*, 2003a, 2003b). In the North Atlantic, an analysis of sighting data by NMFS indicated that a density of four or more right whales per 100 nm2 was a reliable indicator of a persistent feeding aggregation (Clapham and Pace, 2001), and this had been used for Dynamic Area Management fisheries closures to reduce the risk of right whales becoming entangled in fishing gear. While this metric is a reliable indicator of the presence of feeding aggregations in the North Atlantic, it is not necessarily the only metric suitable for application in the North Pacific; the much smaller population of right whales in the eastern North Pacific Ocean typically results in sightings of single animals or pairs. Unlike with larger groups, such small numbers sometimes indicate transient passage through an area and thus cannot be unequivocally linked with feeding behavior. However, while sporadic sightings of right whales in such small numbers generally would not be considered a reliable indication of a feeding area, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over a long period of time is sufficient indication that the area is a feeding area containing suitable concentrations of copepods.

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

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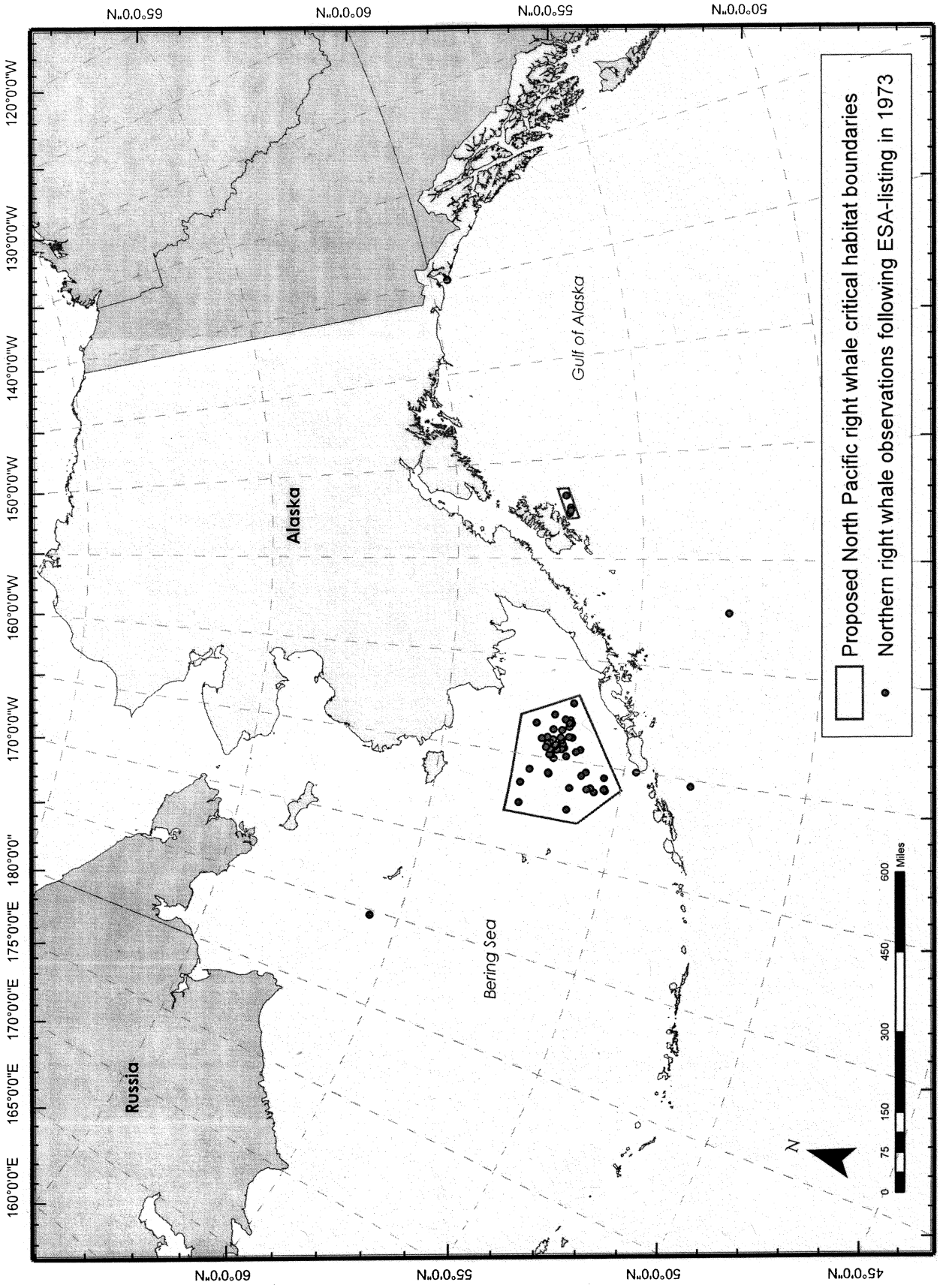
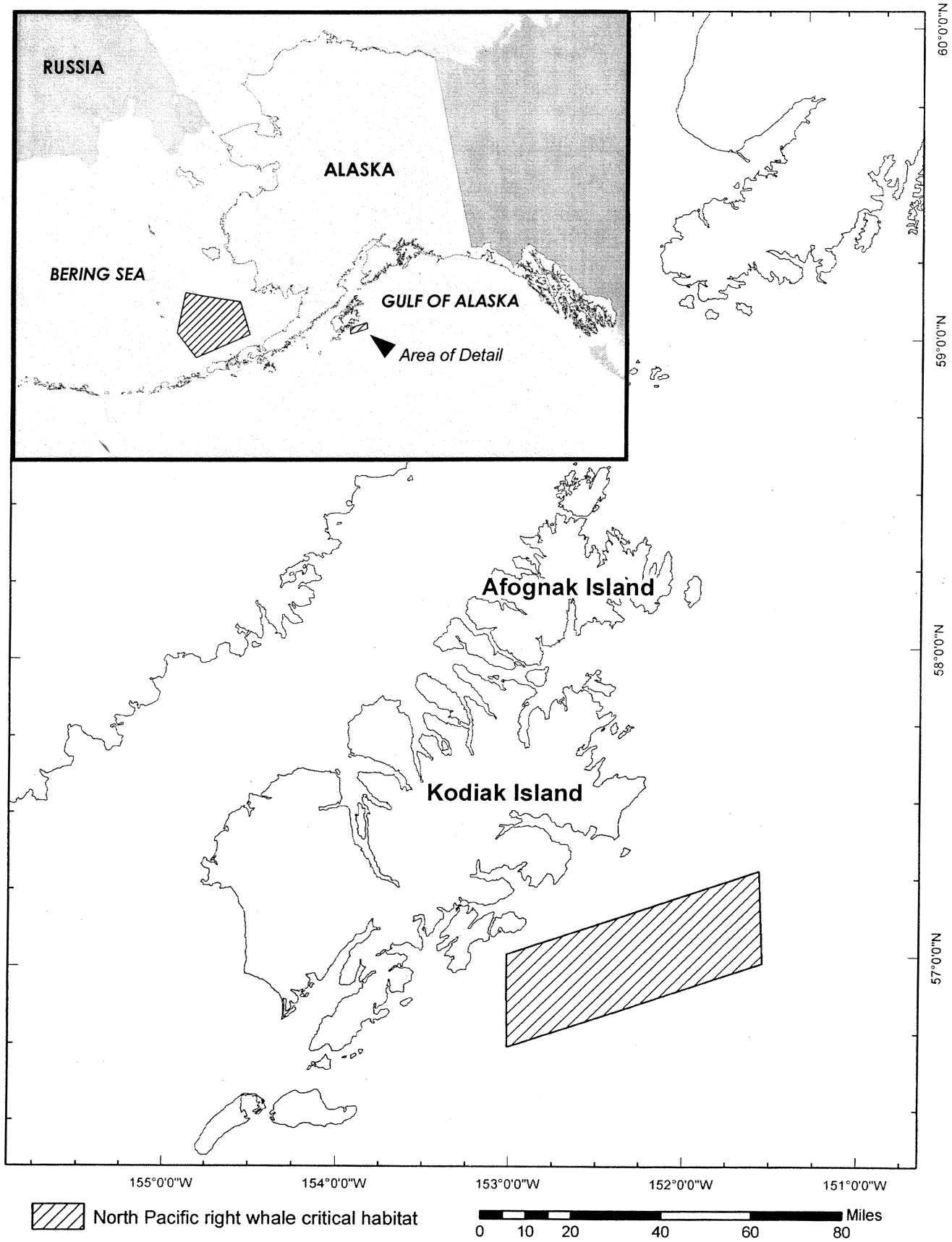


Figure 2. Proposed critical habitat for Northern right whales in the North Pacific.

Gulf of Alaska

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


RUSSIA
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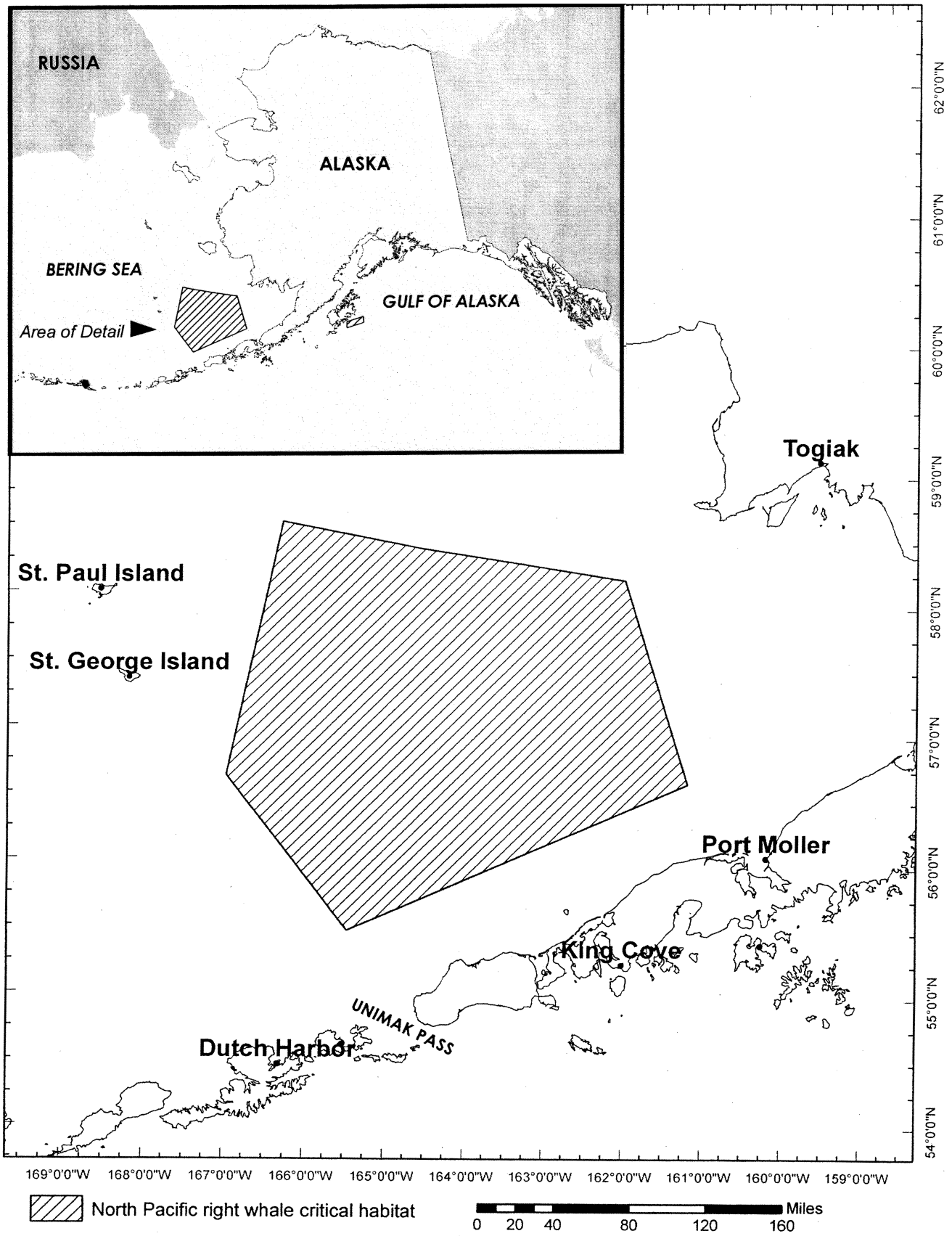
North Pacific right whale critical habitat
Miles
0 10 20 40 60 80

Southeastern Bering Sea

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



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Physical Processes and the Existence of PCEs Within the Proposed Critical Habitat

Southeastern Bering Sea Slope Waters

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

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

Southeastern Bering Sea Middle-Shelf Waters

The SEBS shelf has been the focus of intense oceanographic study since the late 1970s (e.g. Schumacher *et al.*, 1979; Coachman, 1986; Napp *et al.*, 2000; Hunt *et al.*, 2002a; Hunt *et al.*, 2002b), largely due to the considerable commercial fishing effort in the area (National Research Council, 1996). Coachman (1986) described the now well-established hydrographic domains of the inner-, middle- and outer-shelf, separated by a front or transition zone at roughly the 50 m (inner front) and 100 m (outer front) isobaths. During the 1990s, research focused on these domains demonstrated dynamic advection of nutrient-rich Bering slope water onto the shelf in both winter and summer, via eddies, meanders, and up-canyon flow (Schumacher and Stabeno, 1998; Stabeno and Hunt, 2002). These intrusions of nutrient-rich water, physical factors related to water column stratification, and long summer day length results in a very productive food web over the SEBS shelf (e.g. Livingston *et al.*,1999; Napp *et al.*, 2002; Coyle and Pinchuk, 2002; Schumacher *et al.*, 2003). Specifically, copepod species upon which right whales feed (e.g., *C. marshallae*, *Pseudocalanus* spp., and *Neocalanus* spp.) are among the most abundant of the zooplankton sampled over the middle shelf (Cooney and Coyle, 1982; Smith and Vidal, 1986). Small, dense patches (to >500 mg/m–3) of euphausiids (*T. raschii*, *T. inermis*), potential right whale prey, have also been reported for waters near the SEBS inner front (Coyle and Pinchuk, 2002).

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

Gulf of Alaska

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

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

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

Right Whale Sightings as a Proxy for Locating the PCEs

As noted above, consistent sightings of right whales - even of single individuals and pairs - in a specific area in spring and summer over an extended

period of time can be used with high confidence as an indicator of the presence of the PCEs in a feeding area. We have used recent sighting records to make this determination because these records are a more reliable indicator of current distribution of feeding whales than historical sightings, especially given that most of the latter relate to animals that were removed from the population by whaling and are thus no longer extant. Of the 184 recent right whale sitings reported north of the Aleutian Islands, 182 occurred within the specific area proposed as critical habitat in the Bering Sea. Since 1996, right whales have been consistently sighted in this area over a period of years during the spring and summer feeding seasons. For example, NMFS surveys alone recorded between two and four sightings in 1996 (Goddard and Rugh, 1998), 13 sightings in 2000 (Le Duc *et al.*, 2004) and over 23 sightings in 2004. Single right whales as well as pairs and aggregations of up to five animals were sighted during this period, and all sightings were within 100 nm2 of one another. Based on consideration of these factors, we conclude that the right whale sightings in the specific area in the Bering Sea described in Figure 2 are a suitable proxy for the presence of the PCEs and therefore propose this area as critical habitat for the North Pacific right whale. Recent sightings of right whales are fewer in number in the GOA than in the Bering Sea. However, three individuals were sighted recently in the specific area proposed as critical habitat in the GOA. These sightings occurred at a time when right whales typically feed in the North Pacific Ocean. In July 1998, a single right whale exhibiting behavior consistent with feeding activity was observed among a group of about eight humpback whales (Waite *et al.*, 2003). In August 2004, a NMFS researcher observed a single right whale among a group of humpbacks. In August 2005, a NMFS researcher reported yet another sighting of a right whale within 250 to 500 meters of groups of humpback and fin whales. Acoustic monitoring of the area conducted in summer 2000 recorded what appeared to be right whale calls in the area on September 6 (Waite, Wynne and Mellinger, 2003). Compared to the Bering Sea sightings, the GOA right whale sightings do not provide as strong an indication of feeding right whales. However, individual right whales have been directly observed in 1998, 2004, and 2005 and detected acoustically in 2000 during the spring and summer feeding seasons in the specific area in the GOA described in Figure 2. It is also instructive that one of these animals was exhibiting feeding behavior at the time it was observed. Based on consideration of these factors, we propose that the right whale sightings in the specific area in the GOA described in Figure 2 are a reasonably reliable proxy for the presence of the PCEs and therefore proposes this area as critical habitat for the North Pacific right whale.

Activities Which may be Affected by This Designation

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

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

Exclusion Process

Section 4 (b)(2) of the ESA states that CH shall be designated on the basis of the best scientific data available and after taking into consideration its economic impact, the impact on national security, and any other relevant impact. Any area may be excluded from CH if the benefits of exclusion are found to outweigh those of inclusion, unless such exclusion would result in the extinction of the species. We will apply the statutory provisions of the ESA, including those in section 3 that define ''critical habitat'' and ''conservation'' to determine whether a proposed action might result in the destruction or adverse modification of CH. Based upon the best available information, it appears that the probability of oil or gas exploration activities within (or immediately adjacent to) proposed right whale critical habitat is very low, certainly within the 10–year time frame of our assessment. Likewise, there are no commercial production facilities in operation, currently under development, nor 'permitted' for future development, within these critical habitat areas. Unless contrary information emerges suggesting exploration and development are imminent, there is little expectation that Federal actions in the oil and gas sector will have the potential to ''destroy or adversely modify'' critical habitat as proposed under this action, within the analytical time horizon.

The oil and gas industry has expressed current interest in exploring and developing oil and gas resources in the North Aleutian Basin OCS Planning Area. We also understand that the State of Alaska has announced support for this activity. However, we lack specific information regarding this potential exploration and development activity and have been unable to gather information on these activities. Therefore, we specifically request comment on the type of exploration and development activities under consideration and the likelihood for such activities to occur, a description of the areas in the North Aleutian Basin that may be affected by any such activities, the extent to which the activities may affect the proposed critical habitat, and any other issues that may be relevant to the analysis of impacts and the exclusion process under section 4(b)(2) of the ESA. Any information we acquire and public comments received on these issues will be considered in analyzing the impacts of the designation of critical habitat and in the section 4(b)(2) exclusion process.

While we expect to consult annually on fishery related proposed actions that ''may affect'' the proposed CH, none of these consultations would be expected to result in a finding of ''adverse modification,'' and thus none would be expected to result in imposition of costs on commercial fishery participants. Because fisheries do not target or affect the PCEs for the North Pacific right whale, it then follows that no fishing or related activity (e.g., at-sea processing, transiting) would be expected to be restricted or otherwise altered as a result of critical habitat designation in the two areas being proposed. We did not find any specific areas in which the costs exceed benefits for activities that may affect CH, and we have therefore not proposed the exclusion of any areas from designation.

This action is anticipated to result in consultations with EPA on seafood processing waste discharges; with the Department of Defense (DoD) on military ''underway training'' activities it authorizes; and with the U.S. Coast Guard (USCG) and Minerals Management Service (MMS) on approvals of oil spill response plans, among others. It is unlikely that these activities will result in an ''adverse modification'' finding, and, thus, no mandatory modifications would be imposed. It must follow then that no ''costs'' are imposed as a result of designation beyond the small costs attributable to inter-agency (occasionally intra-agency) consultation. As explained in the impacts analysis prepared for this action, some larger benefit accrues to society as a result of designation, including the educational value derived from identification and designation of the critical habitat areas within which the PCEs are found. Thus we believe that the benefits of exclusion are outweighed by the benefits of inclusion. Our analysis (available on the NMFS Alaska Region website *http://www.fakr.noaa.gov/*) did not find any specific areas which merit such exclusion in consideration of economics, nor have we determined that national security interests or other relevant impact warrant the exclusion of any specific areas from this proposed designation. We solicit comments on these benefits and costs as well as our determinations.

Public Comments Solicited

We request interested persons to submit comments, information, and suggestions concerning this proposed rule to designate CH for the North Pacific right whale. Comments or suggestions from the public, other concerned governments and agencies, the scientific community, industry, or any other interested party concerning this proposed rule are solicited. Comments particularly are sought concerning:

(1) Maps and specific information describing the amount, distribution, and use type (e.g., feeding, calving, migration) of the North Pacific right whale;

(2) Information as to the identification of physical or biological features which may be essential to the conservation of the North Pacific right whale;

(3) Information on whether the copepods and euphausiids in feeding areas identified by NMFS as PCEs, or any other physical or biological features that may be essential to the conservation of the North Pacific right whale, may require special management considerations or protection;

(4) Information regarding the benefits of excluding any portions of the proposed CH, including the regulatory burden that designation may impose;

(5) Information regarding the benefits of designating particular areas as CH;

(6) Current or planned activities in the areas proposed for designation, and their possible impacts on proposed CH;

(7) Any information regarding potential oil and gas exploration and development activities in the North Aleutian Basin OCS Planning Area, including information on the type of exploration and development activities under consideration and the likelihood for such activities to occur, a description of the areas in the North Aleutian Basin that may be affected by any such activities, the extent to which the activities may affect the proposed critical habitat, and any other issues that may be relevant to the analysis of impacts and the exclusion process under section 4(b)(2) of the ESA;

(8) Any foreseeable economic or other potential impacts resulting from the proposed designation; and

(9) Whether specific unoccupied areas not presently proposed for designation may be essential to the conservation of the North Pacific right whale.

You may submit your comments and materials concerning this proposal by any one of several methods (see **ADDRESSES**). The proposed rule, maps, fact sheets, and other materials relating to this proposal can be found on the NMFS Alaska Region website at http://www.fakr.noaa.gov/. We will consider all comments and information received during the comment period on this proposed rule in preparing the final rule. Accordingly, the final decision may differ from this proposal.

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 regulation to designate CH. Requests for public hearing must be made in writing (see **ADDRESSES**) by December 13, 2007. Such hearings provide the opportunity for interested individuals and parties to give comments, exchange information and opinions, and engage in a constructive dialogue concerning this proposed rule. We encourage the public's involvement in such ESA matters.

Classification

Regulatory Planning and Review

This proposed rule has been determined to be significant for purposes of Executive Order (E.O.) 12866. As part of our exclusion process under section 4(b)(2) of the ESA, the economic benefits and costs of the proposed critical habitat designations are described in our draft economic report. Data are not available to express all costs and benefits of CH designation in monetary terms. Indeed, many costs and benefits accrue outside of traditional markets and, therefore, are not typically associated with a ''monetary'' measure (e.g., subsistence activities). In such cases, an effort has been made to ''quantify'' benefits and costs in measurable units. Finally, some benefits and costs cannot be either monetized, nor quantified, yet are important to a full evaluation and understanding of a proposed action. In these instances, benefits and costs have been fully characterized in ''qualitative'' terms. Application of a benefit/cost framework is fully consistent with E.O. 12866.

In July 2006, NMFS revised the existing critical habitat for northern right whales to include critical habitat in the eastern North Pacific (71 FR 38227, July 6, 2006). Subsequently, it was determined that the North Atlantic and North Pacific populations of northern right whale are, in fact, distinct species. This rule, therefore, proposes as critical habitat for the North Pacific right whale (currently proposed for listing 71 FR 77694, December 27, 2006) the same critical habitat that was finalized in 2006. The proposal would not have any additional effect because the habitat proposed for designation is the same that was designated in the previous rule. The analysis provided largely mirrors the analysis provided in the previous rulemaking, updated as necessary to account for new information, and does not result in any substantive changes to the analytical conclusions.

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 prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (i.e., small businesses, small organizations, and small government jurisdictions). We have prepared an initial regulatory flexibility analysis (IRFA), and this document is available upon request (see **ADDRESSES**). This IRFA evaluates the potential effects of

the proposed CH 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'' CH for the North Pacific right whale. Submission of such a request for a Federal agency's approval, from a small entity, would require that agency (i.e., the 'action agency') to consult with NMFS (i.e., the 'consulting agency').

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

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

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

On the basis of the underlying biological, oceanographic, and ecological science used to identify the PCEs that define CH for the North Pacific right whale, as well as the foregoing assumptions, empirical data, historical information, and accumulated experience regarding human activity in the BSAI and GOA, it is believed that only one federally authorized activity (among all those identified in the analyses and referenced above) has the potential to ''destroy or adversely modify'' right whale CH, albeit believed to be a relatively small potential. This one class of activity is OCS oil and gas exploration and production.

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

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

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

Because there appear to be no identifiable economic costs to any small entities attributable to the CH designation action, there cannot be an alternative to the proposed action that imposes lesser impacts, while achieving the purpose of the ESA and the objectives of this action, than are reflected in the preferred alternative.

The action does not impose new recordkeeping or reporting requirements on small entities. The analysis did not reveal any Federal rules that duplicate, overlap or conflict with the proposed action.

Military Lands

The Sikes Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to

complete, by November 17, 2001, an Integrated Natural Resource Management Plan. The National Defense Authorization Act for Fiscal Year 2004 (Public Law No. 108–136) amended the ESA to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the ESA (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.'' We have determined no military lands would be impacted by this proposed rule.

Executive Order 13211

On May 18, 2001, the President issued an Executive Order (E.O.) on regulations that significantly affect energy supply, distribution, and use. E.O. 13211 requires agencies to prepare Statements of Energy Effects when undertaking any action that promulgates or is expected to lead to the promulgation of a final rule or regulation that (1) is a significant regulatory action under E.O. 12866 and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy.

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

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

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

(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 CH 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 CH 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 CH, the legally binding duty to avoid destruction or adverse modification of CH 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 CH shift the costs of the large entitlement programs listed above to State governments.

(b) Due to the prohibition against 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 CH affects only Federal agency actions. Private lands do not exist within the proposed CH 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 CH 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 the North Pacific right 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 section 7 consultations to occur).

Civil Justice Reform

In accordance with E.O. 12988, the Department of the 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 E.O. We are proposing to designate CH 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 North Pacific right 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

We have determined that an environmental analysis as provided for under the National Environmental Policy Act of 1969 for CH 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 With Tribes

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

We have determined the proposed designation of CH for the North Pacific right whale in the North Pacific Ocean would not have tribal implications, nor affect any tribal governments or issues. None of the proposed CH occurs on tribal lands, affects tribal trust resources, or the exercise of tribal rights. The North Pacific right whale is not hunted by Alaskan Natives for traditional use or subsistence purposes.

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**)

List of Subjects in 50 CFR Part 226

Endangered and threatened species.

Dated: October 23, 2007.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, 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. In § 226.203, the section heading and the introductory text are revised; and the headings for paragraphs (a) and (b) are revised to read as follows:

§ 226.203 Critical habitat for right whales.

Critical habitat is designated for right whales in the North Atlantic and North Pacific Oceans as described in paragraphs (a) and (b) of this section. The textual descriptions of critical habitat are the definitive source for determining the critical habitat boundaries. General location maps are provided for critical habitat in the North Pacific Ocean for general guidance purposes only, and not as a definitive source for determining critical habitat boundaries.

(a) North Atlantic right whale (*Eubalaena glacialis*)—* * *

* * * * *

(b) North Pacific right whale (*Eubalaena japonica*)—* * *

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[FR Doc. 07–5367 Filed 10–26–07; 8:45 am]

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