

shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping

requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 8, 2006.

**William A. Spratlin,**  
*Acting Regional Administrator, Region 7.*

■ Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

#### PART 52—[AMENDED]

■ 1. The authority citation for Part 52 continues to read as follows:

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

#### Subpart AA—Missouri

■ 2. In § 52.1320(c) the table is amended under Chapter 6 by adding entries for “10–6.360,” “10–6.380,” and “10–6.390” to read as follows:

#### § 52.1320 Identification of plan.

\* \* \* \* \*

(c) \* \* \*

#### EPA-APPROVED MISSOURI REGULATIONS

Missouri citation	Title	State effective date	EPA approval date	Explanation
Missouri Department of Natural Resources				
*	*	*	*	*
Chapter 6—Air Quality Standards, Definitions, Sampling and Reference Methods, and Air Pollution Control Regulations for the State of Missouri				
*	*	*	*	*
10–6.360 .....	Control of NO <sub>x</sub> Emissions From Electric Generating Units and Non-Electric Generating Boilers.	10/30/05	8/15/06 [insert FR page number where the document begins].	
10–6.380 .....	Control of NO <sub>x</sub> Emissions From Portland Cement Kilns .....	10/30/05	8/15/06 [insert FR page number where the document begins].	
10–6.390 .....	Control of NO <sub>x</sub> Emissions From Large Stationary Internal Combustion Engines.	10/30/05	8/15/06 [insert FR page number where the document begins].	
*	*	*	*	*

\* \* \* \* \*

[FR Doc. E6–13347 Filed 8–14–06; 8:45 am]

**BILLING CODE 6560–50–P**

#### DEPARTMENT OF THE INTERIOR

#### Fish and Wildlife Service

#### 50 CFR Part 17

#### RIN 1018–AU21

#### Endangered and Threatened Wildlife and Plants; Special Rule for the Southwest Alaska Distinct Population Segment of the Northern Sea Otter

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Final rule.

**SUMMARY:** We, the Fish and Wildlife Service (Service), under the Endangered Species Act (Act), as amended, create a special rule for the southwest Alaska distinct population segment (DPS) of the northern sea otter (*Enhydra lutris kenyoni*). This DPS of the northern sea otter is listed as threatened under the Act. This special rule allows for the limited, noncommercial import and export of items that qualify as authentic

native articles of handicrafts and clothing that were derived from sea otters legally taken for subsistence purposes by Alaska Natives from the listed population. This special rule also allows for cultural exchange by Alaska Natives and activities conducted by persons registered as an agent or tannery under existing law. We also amend our definition of “Authentic native articles of handicrafts and clothing” by striking the stipulation that such items were commonly produced on or before December 28, 1973. This definition change is appropriate in light of a court ruling on the Service’s definition of “Authentic native articles of handicrafts and clothing” and consistent with our current definition of “Authentic native articles of handicrafts and clothing” under the Marine Mammal Protection Act (MMPA) of 1972.

**DATES:** This rule is effective on September 14, 2006.

**ADDRESSES:** The complete file for this final rule is available for inspection, by appointment, during normal business hours at the Marine Mammals Management Office, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, Alaska 99503.

#### FOR FURTHER INFORMATION CONTACT:

Charles Hamilton (see **ADDRESSES**), telephone, 907–786–3800; facsimile, 907–786–3816, e-mail, [Charles\\_Hamilton@fws.gov](mailto:Charles_Hamilton@fws.gov). Persons who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339, 24 hours a day, 7 days a week.

#### SUPPLEMENTARY INFORMATION:

#### Background

On August 9, 2005, we published a final rule (70 FR 46366) to list the southwest Alaska DPS of the northern sea otter as threatened under the Act (Act), as amended (16 U.S.C. 1531 *et seq.*). Section 4(d) of the Act specifies that, for species listed as threatened, the Secretary shall develop such regulations as determined necessary and advisable for the conservation of the species. Our regulations at 50 CFR 17.31 provide that all the prohibitions for endangered wildlife under 50 CFR 17.21, with the exception of § 17.21(c)(5), will generally also be applied to threatened wildlife. Prohibitions include, among others, take, import, export, and shipment in interstate or foreign commerce in the course of a commercial activity. The

general provisions for issuing a permit for any activity otherwise prohibited with regard to threatened species are found at 50 CFR 17.32.

The Service may, however, also develop a special rule for a threatened species that specifies prohibitions and authorizations that are necessary and advisable for the conservation of that particular species. In such cases, some of the prohibitions and authorizations under 50 CFR 17.31 and 17.32 may be appropriate for the species and incorporated into the special rule, but the rule will include special provisions tailored to the specific conservation needs of the listed species. On August 9, 2005, we proposed a special rule for the Southwest Alaska DPS of the northern sea otter (70 FR 46387).

Section 10(e) of the Act provides an exemption for Alaska Natives that allows for the taking and importation of listed species if such taking is primarily for subsistence purposes. Nonedible by-products of species taken in accordance with the exemption, when made into authentic native articles of handicraft and clothing, may be transported, exchanged, or sold in interstate commerce. The Act defines authentic native articles of handicraft and clothing as items composed wholly or in some significant respect of natural materials, and which are produced, decorated or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or other mass copying devices [16 U.S.C. 1539(e)(3)(ii)]. That definition also provides that traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. These exemptions are similar to those under the MMPA (16 U.S.C. 1361 et seq.), which also provides for the conservation of sea otters and which likewise includes special provisions for subsistence harvest and the creation and sale of authentic native articles of handicrafts or clothing by Alaska Natives. For more information on the definition of authentic native articles of handicrafts and clothing, see the Definition Change section of this document.

Both the Act and the MMPA recognize the intrinsic role that marine mammals have played and continue to play in the subsistence, cultural, and economic lives of Alaska Natives. The Service, in turn, recognizes the important role that Alaska Natives can play in the conservation of marine mammals. Amendments to the MMPA in 1994 acknowledged this role by authorizing the Service to enter into cooperative agreements with Alaska

Natives for the conservation and co-management of subsistence use of marine mammals (16 U.S.C. 1388). Since 1997, the Service has entered into annual cooperative agreements with The Alaska Sea Otter and Steller Sea Lion Commission (TASSC) under this section of the MMPA. The TASSC was established in 1988 as the Alaska Sea Otter Commission to represent the interests of subsistence users and sea otter hunters on issues relating to the subsistence harvest of sea otters in Alaska. Through these cooperative agreements, the Service has worked with TASSC to better understand the status and trends of sea otters throughout Alaska. For example, Alaska Natives collect and contribute biological specimens from subsistence-harvested animals for biological analysis. Analysis of these samples allows us to monitor the health and status of sea otter stocks. Additionally, some communities that harvest sea otters conduct skiff surveys of sea otters in their local areas. The results of these surveys may serve to complement the Service's own surveying and monitoring program, and provide us with a better understanding of sea otter distribution and abundance. Further, the Service and TASSC are exploring the development of harvest management programs that are consistent with both sound wildlife management techniques and the socioeconomic requirements of Alaska Native subsistence hunters. We recognize the unique contributions Alaska Natives are able to provide to the Service's understanding of sea otters, and their interest in ensuring that northern sea otter stocks are conserved and managed for healthy populations throughout the range in coastal Alaska.

As discussed in our proposed and final rules listing this DPS of the northern sea otter as threatened (69 FR 6600, 70 FR 46366), since 1989, the annual subsistence harvest of sea otters from the southwest Alaska DPS has averaged fewer than 100 otters per year. During that time period, nearly 80 percent of the harvest occurred in the Kodiak archipelago. Areas that have experienced the most severe population declines within the southwest Alaska DPS have had little or no subsistence harvest. In our final rule to list the southwest Alaska DPS of the northern sea otter as threatened, we found that the current level and geographic distribution of the subsistence harvest was neither negatively nor materially impacting the DPS. Thus, at this time, the harvest of northern sea otters from this DPS and associated creation, sale, and shipment of authentic handicrafts

and clothing are not threats to the DPS. Nor does the Service find that Alaska Native activities associated with subsistence harvests negatively affect our efforts at recovery for this DPS. The Service will continue to monitor the subsistence harvest of sea otters from the southwest Alaska DPS, and will periodically reevaluate the impact of the subsistence harvest on the conservation of the species.

The Service, in accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175 and the Department of the Interior's manual at 512 DM 2, and Secretarial Order 3225, acknowledges our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. During the public comment period following our proposal to list the southwest Alaska DPS of the northern sea otter as threatened (69 FR 6600), Alaska Native tribes and tribally-authorized organizations were among those that provided comments on the listing action. Alaska Natives noted to the Service that prohibitions on export and import under the Act could limit their ability to participate in cultural exchanges that foster the sharing and exchange of ideas, information, gifts, clothing, or handicrafts between Indians, Aleuts, and Eskimos residing in Alaska and Native inhabitants of Russia, Canada, and Greenland. Further, Alaska Natives noted their concern that foreign visitors to the United States might be restricted from leaving the country with their lawfully acquired and possessed authentic Native articles of handicrafts or clothing derived from sea otters from the southwest Alaska DPS, thus limiting Alaska Natives' ability to sell authentic native handicrafts to foreign visitors or tourists.

We are mindful of the unique exemptions from the prohibitions against take, import, and interstate sale of authentic native handicrafts and clothing provided to Alaska Natives under the Act. These exemptions are similar to the exemptions provided Alaska Natives under the MMPA. Furthermore, as discussed above, the Service has determined that, not only is the listed population of northern sea otters subjected to little or no impact from Alaska Native harvest, but TASSC and its constituent members are working with the Service to better understand this DPS and the possible causes for its decline. The Service recognizes that this DPS, and northern sea otters throughout Alaska, could benefit from continued involvement of

the Alaska Native community in the conservation of sea otters. Therefore, we have developed this special rule to provide for the conservation of sea otters, while at the same time accommodating Alaska Natives' subsistence, cultural, and economic interests. This rule aligns the provisions of the Act relating to the creation, shipment, and sale of authentic native handicrafts and clothing by Alaska Natives with what is already allowed under the MMPA.

Under this special rule, except for persons and activities covered by the specific provisions relating to authentic native handicrafts and clothing, cultural exchange, and limited types of travel, all of the prohibitions under 50 CFR 17.31 apply. Thus, import, export, take, possession of unlawfully taken sea otters, interstate or foreign commerce in the course of a commercial activity, and sale would be generally prohibited unless the activity qualifies for a permit for purposes of science, enhancement of propagation or survival, economic hardship, zoological exhibition, education, or other special purpose, or the activity qualifies for incidental take authorization, and the person has received the necessary approval. Who may qualify for such permits and the criteria we use to evaluate applications are found at 50 CFR part 13 and 50 CFR 17.32. The deviations in this rule from the standard provisions found at 50 CFR 17.31 and 17.32 apply only to cultural exchange, limited types of travel, or to activities associated with the creation and sale of authentic native articles of handicrafts and clothing from sea otters taken legally by Alaska Natives.

This special rule is also limited to activities that are not already exempted under the Act. The Act itself provides a statutory exemption to Alaska Natives for the harvesting of sea otters from the wild as long as the taking is for primarily subsistence purposes. The Act then specifies that sea otters taken under this provision can be used to create handicrafts and clothing and that these items can be sold in interstate commerce. Thus this special rule does not regulate the taking or importation of northern sea otters nor the sale in interstate commerce of authentic native articles of handicrafts and clothing by qualifying Alaska Natives; these have already been exempted by statute. The special rule addresses only activities relating to cultural exchange and limited types of travel, and to the creation and shipment of authentic native handicrafts and clothing that are currently allowed under section 101 of the MMPA that are not already clearly exempted under the Act. As discussed

earlier, neither the activities already exempted under the Act nor the associated activities that are allowed under this special rule have been identified as threats to the DPS.

One of the activities addressed in this special rule is cultural exchange between Alaska Natives and Native inhabitants of Russia, Canada, and Greenland with whom Alaska Natives share a common heritage. The MMPA allows the import and export of marine mammal parts and products that are components of a cultural exchange, which is defined as the sharing or exchange of ideas, information, gifts, clothing, or handicrafts. Cultural exchange has been an important exemption for Alaska Natives under the MMPA, and this special rule serves to ensure that such exchanges are not interrupted.

The limited, noncommercial import and export of authentic native articles of handicrafts and clothing that are created from sea otters taken by Alaska Natives may also continue. The special rule clarifies that all such imports and exports involving DPS sea otters need to conform to what is currently allowed under the MMPA, comply with our import and export regulations found at 50 CFR part 14, and be noncommercial in nature. Service regulations define commercial as related to the offering for sale or resale, purchase, trade, barter, or the actual or intended transfer in the pursuit of gain or profit, of any item of wildlife and includes the use of any wildlife article as an exhibit for the purpose of soliciting sales, without regard to the quantity or weight. There is a presumption that eight or more similar unused items are for commercial use. The Service or the importer/exporter/owner may rebut this presumption based upon the particular facts and circumstances of each case (see 50 CFR 14.4).

Finally, this rule adopts the registered agent and tannery process from the current MMPA regulations. In order to assist Alaska Natives in the creation of authentic native articles of handicrafts and clothing, the Service's MMPA implementing regulations at 50 CFR 18.23(b) and (d) allow persons who are not Alaska Natives to register as an agent or tannery. Once registered, agents are authorized to receive or acquire marine mammal parts or products from Alaskan Natives or other registered agents. They are also authorized to transfer (not sell) hides to registered tanners for further processing. A registered tannery may receive untanned hides from Alaska Natives or registered agents for tanning and return. The tanned skins may then be made into

authentic articles of clothing or handicrafts by Alaska Natives. Registered agents and tanneries must maintain strict inventory control and accounting methods for any marine mammal part, including skins, they receive and provide accountings of such activities and inventories to the Service. These restrictions and requirements for agents and tanners allow the Service to monitor the processing of such items while ensuring that Alaska Natives can exercise their rights under the exemption. Adopting the registered agent and tannery process will align Act provisions relating to the creation of handicrafts and clothing by Alaska Natives with the current process under the MMPA.

Any person engaging in activities under this special rule would also want to ensure that their actions are consistent with the other conservation laws that apply to the northern sea otter, including other provisions of the MMPA and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). For example, the exemption for Alaska Natives in section 10(e)(1) of the Act applies to "any Indian, Aleut, or Eskimo who is an Alaskan Native who resides in Alaska" as well as to "any non-native permanent resident of an Alaskan native village." However, the Alaska Native exemption under section 101 of the MMPA is limited to only an "Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean." Because the MMPA is more restrictive, only a person who qualifies under the MMPA Native exemption may legally take sea otters for subsistence purposes, as a take by certain persons under the broader Act Native exemption would not be exempted under the MMPA. This special rule is intended to reconcile Alaska Native subsistence activities under the Act with Alaska Native subsistence activities that have been conducted for more than 30 years under the MMPA, which is more restrictive in some areas than the Act. Therefore, all persons, including those who qualify under the Alaska Native exemption of the Act, should consult the MMPA and our regulations at 50 CFR part 18 before engaging in any activity that may result in a prohibited act to ensure that their activities will be consistent with both laws.

Northern sea otters from the DPS are also listed under Appendix II of CITES. The CITES regulates the import and export of listed specimens, which include live and dead animals and plants as well as parts and items made from the species. The CITES applies to

the transport of legally possessed specimens from this DPS of sea otters over an international border, including driving from Alaska through Canada to a destination elsewhere in the United States. Appendix II specimens may not be exported from a member country without the prior grant of an export permit. Some limited exceptions to this permit requirement exist. For example, member countries may exempt personal and household effects from the permitting requirements. Personal and household effects must be personally owned for noncommercial purposes, and the quantity must be necessary or appropriate for the nature of the trip or stay or for household use. Persons who may cross an international border with a specimen of this DPS should check with the Service and the country of transit or destination in advance as to applicable requirements. Thus, a person engaging in activities involving DPS sea otters must comply with the requirements of the MMPA and CITES, including obtaining any required CITES documents, as well as the requirements of the Act, all of which will work together to conserve animals in the DPS.

This rulemaking revises our regulations at 50 CFR part 17 to include a special rule that allows for activities associated with the use of animals taken by Alaska Natives for subsistence purposes. The special rule encourages cooperative management efforts between the Service and Alaska Natives by recognizing and providing for the cultural, social, and economic activities of Alaska Natives. It supports conservation of the DPS by discouraging excessive harvests and by encouraging self-regulation of the northern sea otter harvest by subsistence hunters in ways that meet the Service's goal for recovery of the DPS. The taking of northern sea otters and the creation, shipment, and interstate sale of authentic native handicrafts and clothing derived from such taking are already exempted under the Act, and neither the take nor the activities associated with the creation and sale of handicrafts and clothing or with cultural exchange have been identified as threats to the DPS. The Service recognizes the important contributions Alaska Natives may make to our recovery effort for this species, including, for example, information gained from biological samples derived from subsistence-harvested animals. Therefore, we find that the regulations are necessary and advisable for the conservation of the southwest Alaska DPS of the northern sea otter.

### Definition Change

This rule also adopts a change to the definition of "Authentic native articles of handicrafts and clothing" similar to that adopted on August 17, 2005, under 50 CFR 18.3 (70 FR 48321). Specifically, this change eliminates the requirement in 50 CFR 17.3 for authentic native articles of handicrafts and clothing to have been commonly produced on or before December 28, 1973. The reasons for this change to the definition at 50 CFR 17.3 are similar to those provided in the final rule published on August 17, 2005, and are explained below.

The Service's definition of "Authentic native articles of handicrafts and clothing" at 50 CFR 17.3 included a requirement that such items were commonly produced on or before December 28, 1973 (the effective date of the Act), and is similar to the previous definition for that term in 50 CFR 18.3 (Service regulations implementing the MMPA), which included a requirement that such items were commonly produced on or before December 21, 1972 (the effective date of the MMPA). These definitions reflected the Service's determination at the time that the exemptions provided Alaska Natives under both the Act and the MMPA were to protect traditional ways of subsistence rather than to provide a means of initiating commercial activities (55 FR 14973, April 20, 1990). However, in 1990, a number of parties challenged our definition at 50 CFR 18.3 as violating the MMPA. On July 17, 1991, in *Didrickson v. U.S. Department of the Interior*, the U.S. District Court for the District of Alaska ruled in favor of the Plaintiffs. The Court ruled that the Service's definition was inconsistent with the language and overall regulatory scheme of the MMPA. This decision was appealed to the Ninth Circuit Court of Appeals, which, on December 28, 1992, affirmed the District Court's ruling. The Circuit Court examined the statutory definition of "Authentic native articles of handicrafts and clothing" and found that there was no statutory requirement that those items be made or sold prior to the date of the MMPA. The cut-off date in the definition at 50 CFR 17.3 was similarly based on the effective date of the Act. The statutory definition of "Authentic native articles of handicrafts and clothing" in the Alaska Native exemption of the Act is identical to the definition in the MMPA. We believe that the analysis of the court in its ruling on our previous definition at 50 CFR 18.3 also applies to our definition at 50 CFR 17.3. Therefore, this final rule changes our definition at 50 CFR 17.3 to delete the provision that

the item be commonly produced on or before December 28, 1973.

### Previous Federal Action

On August 9, 2005, the Service published a final rule (70 FR 46366) listing the southwest Alaska DPS of northern sea otter as threatened under the Act. On that same day the Service also published a proposed rule for this DPS of northern sea otter under Section 4(d) of the Act (70 FR 46387). In that proposed rule, we requested all interested parties to submit comments and suggestions and opened a 60-day public comment period, which closed on October 11, 2005. Simultaneous with our notification of listing the southwest Alaska DPS of northern sea otter as threatened under the Act, we provided information regarding the proposed rule to Federal agencies, State agencies, and Alaska Native Tribes and tribal organizations to request comments.

In accordance with Secretarial Order 3225 regarding the Act and subsistence uses in Alaska, we engaged in government-to-government consultation with Alaska Native organizations (ANOs). Specifically, we attended board meetings of TASSC and the Aleutian Pribilof Islands Association, Inc.; the former is a tribally-authorized ANO that represents the interests of sea otter hunters throughout the State of Alaska, while the latter is a Federally recognized ANO of the Aleut people in Alaska. During these Board meetings, we provided information on both the listing action and the proposed special rule. We also provided written notification to Tribal Organizations in Alaska regarding both the listing of the DPS of northern sea otters as well as the proposed special rule. We also provided a teleconference opportunity, in conjunction with the TASSC Board meeting, during which Alaska Natives and ANOs could provide us with information regarding the proposed rule.

### Summary of Comments and Recommendations

During the public comment period on the proposed special rule, we received a total of 3 comments by electronic mail and 1 comment by regular mail as well as approximately 100 e-mails that were irrelevant to the proposed rule. We received comments from Alaska Native Tribes, ANOs, wildlife protection organizations, and a private citizen. Two commenters opposed the proposed rule, one commenter provided qualified support of the proposed rule, and one commenter supported the proposed rule without providing specific comments.

We address the specific comments received on the proposed rule below.

**Comment:** One commenter opposed the take of northern sea otters by Alaska Natives for any purpose.

**Response:** Section 10(e) of the Act provides an exemption for Alaska Natives to allow for taking of species listed under the Act for subsistence purposes. This exemption is provided by statute. This rule does not affect the existing exemption or the ability of Alaska Natives to take southwest Alaska DPS northern sea otters.

**Comment:** The Service has misapplied the exemption afforded Alaska Natives under the Act allowing take for subsistence purposes because northern sea otters are not being taken for subsistence purposes but “rather for the sole purpose of the creation of handicrafts.”

**Response:** We disagree. The taking of sea otters from the DPS by Alaska Natives as it is currently conducted qualifies as take that is primarily for subsistence purposes. The existing regulations define subsistence as “the use of endangered or threatened wildlife for food, clothing, shelter, heating, transportation and other uses necessary to maintain the life of the taker of the wildlife, or those who depend upon the taker to provide them with such subsistence, and includes selling any edible portions of such wildlife in native villages and towns in Alaska for native consumption within native villages and towns” (50 CFR 17.3). The use of northern sea otter harvested by Alaska Natives is consistent with this definition, with pelts being used to make authentic Native handicrafts and

clothing. These, in turn, may be used by the hunter, or gifted, traded, or sold once the pelt is made into an authentic Native handicraft or clothing. In addition, the exemption provides that the taking must be “primarily” for subsistence purposes and does not require that the taking be solely for subsistence purposes. It is correct, however, that any proposed taking by an Alaska Native that does not fit the requirements of the exemption would have to be separately authorized under the Act or otherwise would be a violation of law.

**Comment:** The Service is authorizing take through this regulation without showing how the regulation is “necessary and advisable to provide for the conservation of [the] species,” as required under section 4(d) of the Act.

**Response:** As explained in the preamble, this special rule does not authorize the taking of northern sea otters from the DPS. Rather, that taking is authorized under Section 10(e) of the Act, which provides an exception for taking and importation of threatened or endangered species by Alaska Natives if the taking is primarily for subsistence purposes and as long as the taking is not accomplished in a wasteful manner. That exception also allows the sale in interstate commerce of authentic native articles of handicrafts and clothing made from specimens taken under the exception. Because the Service is not authorizing take under this regulation, there is no need to show that take of sea otters from the DPS by Alaska Natives is necessary and advisable to provide for the conservation of the species. This rule allows those activities that are

currently authorized under the MMPA and that are not covered by the Act’s statutory exception, and the rule explains how the activities authorized under the rule—cultural exchange, limited types of travel, and the activities related to the creation and shipment of authentic native handicrafts and clothing—meet the standard as necessary and advisable to provide for the conservation of the species.

**Comment:** The Service has failed to support their statement that the harvest by Alaska Natives from the DPS is not negatively or materially impacting the DPS.

**Response:** Our analysis indicates that there is no relationship between the magnitude and geographic distribution of the sea otter harvest and the observed population decline in southwest Alaska (Table 1). For example, areas with some of the most severe population declines, *i.e.*, in excess of 90 percent, such as the Near Islands and Rat Islands in the western Aleutians, have no human settlements or subsistence harvest at all. With the exception of the Kodiak Archipelago where the harvest rate is 1.022 percent, the average reported harvest rates are less than one-tenth of one percent of the estimated population size. Based on these harvest levels for this DPS, which overall, including the Kodiak Archipelago, are 0.178–0.204 percent, or 2 orders of magnitude below the maximum net productivity rate of 20 percent used in our stock assessment reports (67 FR 62979, October 9, 2002), we have concluded that the subsistence harvest is not materially or negatively impacting the DPS.

TABLE 1.—REPORTED SEA OTTER HARVEST BY GEOGRAPHIC SURVEY AREA IN SOUTHWEST ALASKA

Geographic area	Estimated abundance	Average reported harvest (1996–2005)	Average harvest rate (%)
Aleutian Islands .....	3,311–8,742	0.6	0.007–0.018
North Alaska Peninsula .....	11,253	3.8	0.034
South Alaska Peninsula .....	8,568	5.5	0.064
Kodiak Archipelago .....	6,284	64.2	1.022
Kamishak Bay .....	6,918	0	0
All Areas .....	36,334–41,765	74.1	0.178–0.204

**Comment:** The Service has not complied with section 7(a)(2) of the Act, which requires Federal agencies to consult in order to insure that an agency action is not likely to jeopardize the continued existence of any endangered species or any threatened species or result in the destruction or adverse modification of designated critical habitat.

**Response:** The Service is not required to consult on this rule under section 7(a)(2) of the Act. The development of protective regulations for a threatened species are an inherent part of the section 4 listing process. The Service must make this determination considering only the “best scientific and commercial data available.” A necessary part of this listing decision is also

determining what protective regulations are “necessary and advisable to provide for the conservation of [the] species.” Determining what prohibitions and authorizations are necessary to conserve the species, like the listing determination of whether the species meets the definition of threatened or endangered, is not a decision that

Congress intended to undergo section 7 consultation.

**Comment:** The proposed rule is subject to the requirements of the National Environmental Policy Act (NEPA).

**Response:** The rule is exempt from NEPA procedures. In 1983, upon recommendation of the Council on Environmental Quality, the Service determined that NEPA documents need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. The Service subsequently expanded this determination to section 4(d) rules. A 4(d) rule provides the appropriate and necessary prohibitions and authorizations for a species that has been determined to be threatened under section 4(a) of the Act. NEPA procedures would confuse matters by overlaying its own matrix upon the section 4 decisionmaking process. The opportunity for public comment—one of the goals of NEPA—is also already provided through section 4 rulemaking procedures. This determination was upheld in *Center for Biological Diversity v. U.S. Fish and Wildlife Service*, No. 04-04324 (N.D. Cal. 2005).

**Comment:** One commenter supported the proposed rule but sought clarification regarding the scope of the proposed regulation in conjunction with the Alaska Native subsistence take exemption under the Act.

**Response:** As explained in the preamble, this rule will align activities that may be conducted with southwest Alaska DPS sea otters taken by Alaska Natives for subsistence purposes under the Act with those activities that are already exempted under the MMPA. Alaska Native subsistence users will be able to continue to conduct the full range of activities that they currently are able to conduct under the MMPA.

## Required Determinations

### Regulatory Planning and Review

In accordance with the criteria in Executive Order 12866, this final rule is not a significant regulatory action. The Office of Management and Budget makes the final determination under Executive Order 12866.

a. This rule will not have an annual economic impact of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. There are no compliance costs to any sector of the economy. A cost-benefit analysis is not required. We do not expect that any significant economic impacts would result from the promulgation of this special rule. The only expenses related

to this will be to the Federal Government to write the rule and required Record of Compliance, and to publish the final rule in the **Federal Register**.

b. This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

c. This rule will not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This rule will not raise a novel legal issue.

### Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (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). However, no regulatory flexibility analysis is required if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities, and also amended the RFA to require a certification statement. Based on the information that is available to us at this time, we are certifying that this special rule to allow for the limited, noncommercial import and export of items that qualify as authentic native articles of handicrafts and clothing that were derived from sea otters legally taken for subsistence purposes by Alaska Natives from the listed population; the cultural exchange by Alaska Natives with Native inhabitants of Russia, Canada, or Greenland; and limited types of travel, as well as activities conducted by persons registered as an agent or tannery under existing law, will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale.

According to the Small Business Administration (SBA), small entities include small organizations, including any independent nonprofit organization that is not dominant in its field, and small governmental jurisdictions, including school boards and city and town governments that serve fewer than

50,000 residents, as well as small businesses. The SBA defines small businesses categorically and has provided standards for determining what constitutes a small business at 13 CFR 121.201 (also found at <http://www.sba.gov/size/>), which the RFA requires all Federal agencies to follow. To determine if potential economic impacts to these small entities would be significant, we considered the types of activities that might trigger regulatory impacts if the activities were to be allowed as proposed. However, because this special rule maintains the status quo regarding activities that had previously been authorized or exempted under the MMPA, we are certifying that this rule does not have a significant economic impact on a substantial number of small entities, and thus a regulatory flexibility analysis is not required.

### Small Business Regulatory Enforcement Fairness Act

This rule is not a major rule under 5 U.S.C. 804(2). This rule:

a. Does not have an annual effect on the economy of \$100 million or more.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

### Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.):

a. This rule will not significantly or uniquely affect small governments. A Small Government Agency Plan is not required.

b. This rule will not produce a Federal mandate of \$100 million or greater in any year. As such, it is not a significant regulatory action under the Unfunded Mandates Reform Act.

### Takings

In accordance with Executive Order 12630, this rule does not have significant takings implications. We have determined that the rule has no potential takings of private property implications as defined by this Executive Order because, if implemented, this special rule will maintain the status quo regarding activities currently allowed under the MMPA. A takings implication assessment is not required.

### Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism assessment is not required. This rule will not have substantial direct effects on the State, in the relationship between the Federal Government and the State, or on the distribution of power and responsibilities among the various levels of government.

### Civil Justice Reform

In accordance with Executive Order 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order.

### Paperwork Reduction Act

This final rule does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under 44 U.S.C. 3501 *et seq.* The regulation will not impose new record-keeping or reporting requirements on State or local governments, individuals, and businesses, or organizations. We may not conduct or sponsor and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

### Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951), Executive Order 13175, Secretarial Order 3225, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a Government-to-Government basis. We have evaluated possible effects on federally recognized Alaska Native tribes. Because this rule aligns activities that are allowed under the Act with activities that are currently allowed under the MMPA, we have determined that there are no negative effects to Alaska Natives.

### Energy Supply, Distribution or Use (Executive Order 13211)

On May 18, 2001, the President issued Executive Order 13211 on regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. This rule is not a significant regulatory action under

Executive Order 12866 and it is not expected to have any effect on energy supplies, distribution, and use. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required.

### List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

### Regulation Promulgation

■ Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

### PART 17—[AMENDED]

■ 1. The authority citation for part 17 continues to read as follows:

**Authority:** 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

■ 2. In § 17.3, revise the definition for "Authentic native articles of handicrafts and clothing" as follows:

#### § 17.3 Definitions.

\* \* \* \* \*

*Authentic native articles of handicrafts and clothing* means items made by an Indian, Aleut, or Eskimo that are composed wholly or in some significant respect of natural materials and are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) of this subchapter (in the case of marine mammals) may be used as long as no large-scale mass production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted as long as no large-scale mass production results;

\* \* \* \* \*

■ 3. Amend § 17.40 by adding paragraph (p) to read as follows:

#### § 17.40 Special rules—mammals.

\* \* \* \* \*

(p) Northern sea otter (*Enhydra lutris kenyoni*).

(1) *To what population of sea otter does this special rule apply?* The

regulations in paragraph (p) of this section apply to the southwest Alaska distinct population segment (DPS) of the northern sea otter as set forth at § 17.11(h) of this part.

(2) *What provisions apply to this DPS?* Except as noted in paragraph (p)(3) of this section, all prohibitions and provisions of §§ 17.31 and 17.32 of this part apply to the southwest Alaska DPS of the northern sea otter.

(3) *What additional activities are allowed for this DPS?* In addition to the activities authorized under paragraph (p)(2) of this section, you may conduct any activity authorized or exempted under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) with a part or product of a southwest Alaska DPS northern sea otter, provided that:

(i) The product qualifies as an authentic native article of handicrafts or clothing as defined in § 17.3 of this part; and

(A) It was created by an Indian, Aleut, or Eskimo who is an Alaskan Native, and

(B) It is not being exported or imported for commercial purposes; or

(ii) The part or product is owned by an Indian, Aleut, or Eskimo who is an Alaskan Native and resides in Alaska, or by a Native inhabitant of Russia, Canada, or Greenland, and is part of a cultural exchange; or

(iii) The product is owned by a Native inhabitant of Russia, Canada, or Greenland, and is in conjunction with travel for noncommercial purposes; or

(iv) The part or product has been received or acquired by a person registered as an agent or tannery under § 18.23 of this subchapter.

(4) *What other wildlife regulations may apply?* All applicable provisions of 50 CFR parts 14, 18, and 23 must be met.

Dated: July 7, 2006.

**Matt Hogan,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

[FR Doc. E6-13322 Filed 8-14-06; 8:45 am]

**BILLING CODE 4310-55-P**