

**FEDERAL COMMUNICATIONS COMMISSION****47 CFR Part 73**

[DA 08-1858; MB Docket No. 08-204; RM-11492]

**Television Broadcasting Services; Vanderbilt, MI****AGENCY:** Federal Communications Commission.**ACTION:** Final rule.

**SUMMARY:** The Media Bureau grants a petition for reconsideration, reinstates, and grants a petition for rulemaking filed by Cadillac Telecasting, Co., licensee of station WFUP(TV), to add DTV channel 45 at Vanderbilt.

**DATES:** The final rule is effective October 29, 2008.

**FOR FURTHER INFORMATION CONTACT:** Shaun Maher, Media Bureau, (202) 418-1600.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Memorandum Opinion and Order and Order*, MB Docket No. 08-204, adopted and released on September 30, 2008. The full text of this document is available for public inspection and copying during normal business hours in the FCC's Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC 20554. This document will also be available via ECFS (<http://www.fcc.gov/cgb/ecfs/>). (Documents will be available electronically in ASCII, Word 97, and/or Adobe Acrobat.) This document may be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-478-3160 or via e-mail <http://www.BCPIWEB.com>. To request this document in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

The Commission will send a copy of this *Memorandum Opinion and Order*

and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

**List of Subjects in 47 CFR Part 73**

Television, Television broadcasting.  
 ■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 73 as follows:

**PART 73—RADIO BROADCAST SERVICES**

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336.

**§ 73.622 [Amended]**

■ 2. Section 73.622(i), the Post-Transition Table of DTV Allotments under Michigan, is amended by adding channel DTV channel 45 at Vanderbilt.

Federal Communications Commission.

**Clay C. Pendarvis,**

*Associate Chief, Video Division, Media Bureau.*

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 080302353-8620-01]

RIN 0648-AO16

**Taking of the Cook Inlet, Alaska Beluga Whale Stock by Alaska Natives**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS issues final regulations establishing long-term limits on the maximum number of Cook Inlet beluga whales that may be taken by Alaska Natives for subsistence and handicraft purposes. These regulations were developed after proceedings and public comment connected to an on-the-record rule-making and hearings before Administrative Law Judge (ALJ) Parlen L. McKenna (Judge McKenna); consultations with the parties to the hearings, including Alaska Native Organizations; and comments received from the public on the Cook Inlet Beluga Whale Subsistence Harvest Draft Supplemental Environmental Impact

Statement (SEIS). These regulations are intended to conserve and manage Cook Inlet belugas under applicable provisions of the Marine Mammal Protection Act (MMPA) until the whales are no longer depleted under the MMPA.

**DATES:** Effective November 14, 2008.

**ADDRESSES:** Information related to this rule-making process, including the Final SEIS and Record of Decision (ROD), is available on the Internet at the following address: [http://www.fakr.noaa.gov/protected\\_resources/whales/beluga.htm](http://www.fakr.noaa.gov/protected_resources/whales/beluga.htm).

Copies of the Final SEIS, ROD, and other information related to this rule may also be obtained by writing to Kaja Brix, Assistant Regional Administrator for Protected Resources, NMFS Alaska Regional Office, P.O. Box 21668, Juneau, AK 99802.

**FOR FURTHER INFORMATION CONTACT:**

Barbara Mahoney, Alaska Region, Anchorage Field Office, (907) 271-5006; or Thomas Eagle, Office of Protected Resources, (301) 713-2322, ext. 105.

**SUPPLEMENTARY INFORMATION:** This final rule implements long-term limits on the maximum number of Cook Inlet beluga whales that may be taken by Alaska Natives for subsistence purposes. This final rule is based upon the complete record of the hearing process and on comments and other information obtained since receipt of Judge McKenna's recommended decision in November 2005. The action is needed to allow Alaska Natives to continue subsistence harvests that support traditional, cultural, and nutritional needs without preventing or unreasonably delaying the recovery of, and not disadvantaging, this depleted beluga whale stock.

**Background**

The MMPA established a moratorium on the taking of marine mammals, including whales such as the Cook Inlet beluga whale. However, MMPA section 101(b) (16 U.S.C. 1371(b)) provides an exception to the moratorium which allows certain Alaska Indian, Aleut, and Eskimo residents to take any marine mammal, if such taking is for subsistence purposes or for creating and selling authentic Native articles of handicrafts and clothing and is not accomplished in a wasteful manner.

MMPA section 101(b) also authorizes NMFS to prescribe regulations for subsistence harvests on depleted marine mammal stocks. In accordance with MMPA sections 101(b) and 103 (16 U.S.C. 1373), such regulations must be adopted using formal rulemaking procedures, including an agency hearing on the record before an Administrative

Law Judge. The subsistence harvest regulations resulting from the administrative process must be supported by substantial evidence submitted through the administrative hearing proceedings and other authorized sources.

After monitoring a decline in the beluga population from 1994 through 1998, NMFS designated Cook Inlet belugas as a depleted population under the MMPA (65 FR 34590, May 31, 2000). In October 2000 (65 FR 59164, October 4, 2000), NMFS proposed regulations to set upper limits on the number of Cook Inlet beluga whales that could be taken for subsistence purposes by Alaska Natives and to establish other terms and conditions upon which taking of this beluga stock could be authorized through co-management agreements.

In December 2000, the first of two evidentiary hearings on NMFS' proposed rule was held before an Administrative Law Judge in Anchorage, AK. After considering the administrative record, written records forwarded to his office, and stipulations and evidence adduced at the formal hearing, Judge McKenna forwarded his first recommended decision, as approved by the parties, to NMFS on March 29, 2002, for an interim harvest for the years 2001–2004 (67 FR 30646, May 7, 2002); however, provisions governing the taking of belugas during 2005 and subsequent years were not finalized for reasons discussed below. Based on the first ALJ recommended decision, NMFS issued interim regulations (69 FR 1973, April 6, 2004) to govern the subsistence taking of Cook Inlet beluga whales. These regulations included provisions for (1) an interim limit on the number of strikes and an allocation of these strikes on beluga whales by Alaska Natives during the years 2001 through 2004, (2) the requirement for a cooperative agreement pursuant to MMPA section 119 (16 U.S.C. 1388), (3) a prohibition on the sale of certain parts of Cook Inlet beluga whales, (4) a prohibition on the taking of beluga calves and adults with calves, and (5) a restriction on the timing of beluga whale hunts. The impacts of alternatives for the interim harvest regulations, including the preferred alternative, were analyzed in the June 2003 EIS, which is available on the Internet (see **ADDRESSES**). Additional relevant background can be found in the interim harvest rule.

As part of the stipulation the parties submitted to the ALJ after the initial hearing, they agreed to certain principles that the long-term harvest limits should be based upon. The

parties agreed to develop a long-term harvest regime that:

(a) Provides reasonable assurance that the population will recover, within an acceptable period of time, to the point where it is no longer considered depleted under the MMPA;

(b) Takes into account the uncertainty concerning the available knowledge of the population dynamics and vital rates of the Cook Inlet beluga whale population;

(c) Allows for periodic adjustment on the allowable strike levels based upon the results of the population abundance surveys and other relevant information, recognizing the strike level set forth in the 2001–2004 interim harvest regime will not be reduced below this minimum without substantial information (for example documented “unusual mortalities”) demonstrating that subsistence takes must be reduced below this minimum level to allow recovery of the Cook Inlet beluga population from its depleted status); and

(d) Can be readily understood by diverse constituencies.

Concurrent with the issuance of his first recommended decision and publication of the interim harvest rule, Judge McKenna directed the parties to work together to develop long-term harvest limits and for NMFS to submit a proposed harvest plan based on the efforts by the participating agencies and Alaska Natives. Following Judge McKenna's direction, the parties agreed to several elements for the harvest regime in early discussions and to convene a working group of scientific experts (Technical Team) to propose and evaluate alternatives for harvest limits. Among the general agreements was that (1) harvest limits should be established in blocks of multiple years, (2) there should be a mechanism to reduce remaining harvest if an emergency arose during a multi-year block, and (3) there is a minimum abundance threshold below which harvest should not be allowed. The Technical Team agreed upon a population model to create the harvest regime and to evaluate performance of alternative strategies to control harvest limits. As directed by Judge McKenna, NMFS, in consultation with the other parties in the proceeding, drafted a proposal for a long-term harvest plan to complete the rule-making process that was initiated in 2000. NMFS submitted its revised proposed long term harvest plan to Judge McKenna on April 30, 2004.

NMFS proposed the use of 5–year blocks for establishing harvest levels, which would provide a reasonable

planning time for affected Alaska Natives, so that hunters could prepare and proportion the harvest appropriately, while allowing NMFS a certain amount of flexibility to adjust the harvest based on abundance estimates and the rate of population growth. The 5–year blocks were incorporated into subsequent proposals, negotiations, and discussions by agreement of the parties.

The parties were unable to reach full agreement on a long-term harvest plan. To resolve differences, in August 2004, Judge McKenna convened another hearing in Anchorage, Alaska. The following parties participated at the hearing: National Marine Fisheries Service, the Marine Mammal Commission, the Native Village of Tyonek, Joel and Deborah Blatchford, and the Cook Inlet Treaty Tribes. At the hearing, testimony was received into the record addressing NMFS' proposed long-term harvest plan and to consider other parties' proposals.

The hearing addressed a variety of issues, some more significant than others. The significant issues were as follows:

(1) Development of triggers that would stop harvest should the abundance estimate decline to a specific floor;

(2) Development of triggers that would reduce the harvest should NMFS detect a specified probability that the population's growth rate is less than a specific level;

(3) Whether the harvest level should increase if an intermediate vs. low growth rate is determined; and

(4) How NMFS would account for unusually high mortalities and the affect on mortalities of harvest reduction or stoppage.

Following the hearing, Judge McKenna received further submissions and evidence, all of which were incorporated into the record for this final rule.

#### **ALJ's Recommended Decision**

On November 8, 2005, Judge McKenna issued his second recommended decision. This decision recommended a plan for long-term limits on the maximum number of Cook Inlet beluga whales that may be taken by Alaska Natives for subsistence purposes. NMFS announced the availability of Judge McKenna's recommended decision (72 FR 8268, February 16, 2006) and provided a 20–day comment period on the recommended decision. Four letters with comments were received. Summaries of those comments and responses appear below.

*Comment 1:* Hunting should not be allowed to resume on a proposed endangered stock until such time that the Cook Inlet beluga population goals have been achieved.

*Response:* Under these harvest regulations, subsistence harvest is allowed only when the 5-year abundance average is more than 350 belugas. NMFS plans to provide for the recovery of the beluga population while recognizing the needs of Alaska Natives for subsistence purposes. The MMPA provides for the taking of marine mammals by Alaska Natives for subsistence and handicraft purposes. The MMPA also limits the government's authority to restrict harvest of these species by Alaska Natives. There is no legal basis to eliminate opportunity for subsistence harvest of a species that has been proposed as endangered, under the Endangered Species Act (ESA). NMFS determined that this final rule provides reasonable assurance that the harvest would not cause a significant delay in recovery of the Cook Inlet beluga population. Accordingly, the harvest limits in this rule would not jeopardize the continued existence of Cook Inlet beluga whales, and a conference pursuant to ESA section 7(a)(4) was not conducted. If Cook Inlet beluga whales are listed as an endangered species, ESA section 10(e) provisions would apply; however, such listing would not affect this final rule.

*Comment 2:* Hunting should continue and Alaska Native hunters should get at least two belugas per year.

*Response:* Given the lack of population growth since harvest was limited in 1999, hunting as suggested in this comment would not provide reasonable assurance that the harvest would result in an insignificant delay in recovery. Accordingly, it is inconsistent with guiding principles adopted by the parties in the administrative hearing.

*Comment 3:* NMFS should retain the option to reconsider the interim harvest limits that would be established through 2009.

*Response:* NMFS selected Alternative 2 Option B, in which the harvest table would be put into effect immediately (in 2008).

*Comment 4:* If NMFS is not able to meet the level of survey effort capable of detecting population declines with reasonable certainty, sufficient flexibility needs to be incorporated into the harvest plan to add additional protections to the beluga that offsets increased uncertainty in abundance estimates.

*Response:* Conducting annual abundance estimates would provide more frequent information on

population trends, but NMFS cannot guarantee funding for annual estimates during the life of this harvest plan. The harvest plan does not require annual surveys; however, the ability to detect population trends is lower if surveys are conducted less frequently. Greater uncertainty in the growth rate as a result of fewer surveys, however, would likely result in the specification of a lower harvest level in the harvest plan.

*Comment 5:* The harvest management regime should consider population trends over shorter intervals (e.g., 5 to 10 years) rather than relying on the long-term trends relative to 1994.

*Response:* In this final rule, NMFS modified Judge McKenna's recommended decision by calculating population growth rate on the most recent 10-years of abundance estimates (see Decision of the Assistant Administrator for Fisheries, NOAA, for a discussion related to modifying the population growth rate used in long-term harvest limits).

*Comment 6:* NMFS statement that co-management agreements may include provisions regarding the sex composition of the harvest should clarify that the rationale for such limitations would be to minimize the taking of reproductively active females in the harvest.

*Response:* In his recommended decision, Judge McKenna noted that the Commission and NMFS advocated that Alaska Natives should try to harvest male beluga whales because such selection was believed to have less negative effect on the population's reproductive potential. NMFS has adopted Judge McKenna's findings to allow sex composition of the harvest to specified in 5-year co-management agreements and his reasons for this finding (see Decision of the Assistant Administrator for Fisheries, NOAA). NOAA also believes that targeting males would minimize the taking of reproductively active females.

*Comment 7:* Because the 5-year abundance average is already below 350 belugas, the Administrative Law Judge's recommendation for NMFS to commit to and seek funding for beluga studies is underscored.

*Response:* The current low abundance is reason for concern, and NMFS recognizes that additional funding is necessary to monitor the population and identify and address other factors that may be limiting growth of this small population.

#### **Decision of the Assistant Administrator for Fisheries, NOAA**

Pursuant to Section 101(b) of the MMPA, NMFS is authorized to

prescribe regulations for any depleted marine mammal species that is taken for subsistence or for creating and selling authentic native articles of handicrafts and clothing. NMFS prescribes the regulations after notice and hearing conducted pursuant to Section 103. NMFS must demonstrate that the regulations and decision are supported by substantial evidence based on the record in this matter.

In his recommended decision issued in 2005, Judge McKenna identified several issues of fact and law. He provided his recommended findings on issues of fact and rulings on issues of law, and his reasoning for these findings and rulings. He also listed six ultimate findings of fact and rulings of law, and the reasons supporting these findings and rulings. In each instance where a specific determination is made, the decision of the ALJ is referenced. In those instances in which NMFS finds the justification supporting the ALJ's recommended decision persuasive and convincing, we have adopted the decision and rationale without further elaboration. Where we differ with the ALJ's recommended decision, or concur but believe that modification or addition to the ALJ's recommended decision is justified, we have made appropriate determinations. Section 103 of the MMPA requires that NMFS' decision be supported by the evidence on the record and that the evidence be the best scientific evidence available. After reviewing the record, including the 2008 Environmental Impact Statement and its record, it is our conclusion that the decision is well substantiated and based upon the best scientific information available at this time. We have determined that the proposal, procedures, and the decision satisfy the requirements of Section 103 of the MMPA and that the long-term harvest plan will not be to the disadvantage of the marine mammal involved and is otherwise consistent with the policies and purposes of the MMPA. Judge McKenna's findings, rulings, and rationales are summarized below.

#### *Marine Mammal Commission's Standing*

Alaska Native parties requested that the Commission be dismissed from the proceedings, but not strike any information or testimony that the Commission has provided thus far. Judge McKenna rejected this request because it was untimely. Although Judge McKenna noted his reservations about the Commission's participation as a party, he acknowledged that no other parties objected to their participation at

the December 2000 hearing or in any submission to the court, including to his order of June 10, 2004. The request for the Commission's dismissal was raised during the final administrative hearing in August 2004.

#### *Deference to NMFS' Proposals*

The Commission contested NMFS' argument that its proposed plan was entitled to deference by the court. Judge McKenna ruled that NMFS' proposed plan was not entitled to deference because it was a proposal and had not been adopted by the agency (Assistant Administrator for Fisheries).

#### *Burden of Proof*

In response to questions about the burden of proof NMFS must carry in this proceeding, Judge McKenna reasoned that under NMFS' regulations at 50 CFR 228, the hearing is governed by provisions of the Administrative Procedure Act (5 U.S.C. 556 and 557), which provides that a rule may not be issued in this case except in consideration of the record as a whole and in accordance with reliable, probative, and substantial evidence. Judge McKenna noted that the Supreme Court had interpreted the phrase "substantial evidence" to mean the preponderance of the evidence. NMFS further notes that the MMPA provides that regulation of subsistence harvest must be supported by "substantial evidence on the basis of the record as a whole." Judge McKenna concluded that NMFS is entitled to have their harvest plan evaluated under the preponderance of the evidence standard.

#### *Harvest Subserving to Recovery*

A question debated at length in this proceeding was whether or not subsistence harvest should be allowed if there is no detectable population growth. NMFS argued that subsistence hunts are an integral part of Alaska Native culture, and the MMPA allows restriction of subsistence hunts only under very limited circumstances. Alaska Native representatives noted that subsistence harvest had been strictly curtailed since 1999 and the population had not increased as predicted; therefore, if the population were going to die-out regardless of what anyone does, then the hunters should be allowed to hunt the whales. The Commission noted that the purposes and policies of the MMPA (16 U.S.C. 1361) included as a major goal, that marine mammal populations should not be permitted to diminish below their Optimum Sustainable Population (OSP) and that measures should be immediately taken to replenish any

depleted stock. Judge McKenna's ruling on this issue of law stated that subsistence harvest is subservient to recovery of depleted stocks under the MMPA. He reasoned that the MMPA provides that, on the basis of the best scientific evidence available and in consultation with the Commission, NMFS must prescribe regulations regarding the taking and importing of marine mammals as deemed necessary and appropriate, to insure that such taking will not be to the disadvantage of the affected stocks of marine mammals and will be consistent with the MMPA's purposes and policies. Because the MMPA requires regulations on takings so as not to disadvantage the species or stock, subsistence hunting must be subservient to the recovery of a depleted stock.

#### *Population Abundance Threshold*

Although the parties agreed that there was an abundance level below which no harvest should be allowed, there was disagreement about what that abundance level should be. NMFS first proposed a threshold of 260 belugas arguing that at such abundance, there was 95 percent confidence that the population would be at least 200 whales. After considering an Allee effect, inbreeding depression, loss of genetic variability, vulnerability to environmental perturbations due to reduced range or reduced population size, and vulnerability to demographic stochasticity, NMFS believed that loss of genetic variability was the most important factor in considering a minimum abundance subject to harvest. NMFS further believed that harvest from a population of less than 200 belugas could represent an irreplaceable loss of genetic diversity in the beluga population. The Commission presented compelling evidence that the minimum abundance should be higher than 260 belugas. Accordingly, NMFS revised this threshold abundance in its second harvest plan proposal to 350 belugas. Tyonek subsequently proposed a threshold of 310 belugas as sufficient protection for the population. Thus, the contested issue was whether to use an abundance estimate of 310 or 350 beluga whales as the threshold below which no harvest could be allowed. After reviewing the evidence, Judge McKenna ruled there was insufficient evidence to support one of these alternatives over the other. He ruled on this issue as a matter of law, reasoning that Congress enacted a moratorium on subsistence harvest other than that conducted through cooperative agreements with NMFS when the population size was about 367 belugas; furthermore, the

MMPA required that such taking would not disadvantage the stock. Judge McKenna reasoned that allowing a harvest below the abundance level in 1999 (367 belugas), when Congress enacted its moratorium on the unrestricted harvest of Cook Inlet beluga whales, was not the intent of Congress. Considering that the Cook Inlet beluga abundance estimates are not exact population counts, he concluded that NMFS proposed floor of 350 belugas represented a reasonable reflection of Congressional intent.

#### *Immediate Recovery*

Another issue was the recovery rate allowed by the harvest. The Commission argued that the MMPA requires NMFS take immediate action to replenish depleted marine mammal stocks and that Congress' use of the word "immediate" indicated that recovery should be achieved as quickly as possible. The Commission noted the parties' agreed-upon principle that the harvest plan provide "reasonable certainty that the population will recover, within an acceptable period of time, to the point where it is no longer considered to be depleted" and argued that the terms "reasonable certainty" and "acceptable period of time" should be quantified as 95 percent certainty that the population recover in 100 years. The Commission acknowledged use of the 95/25 criterion (95 percent certainty that harvest would delay recovery by no more than 25 percent) as a performance standard in NMFS' second proposal, but remained concerned that the proposal would not be appropriately responsive to situations where harvest levels need to be reduced in response to the population trend. NMFS argued that the second proposal contained sufficient safeguards that allow response to population trends. Judge McKenna considered the entire record and found that NMFS' second proposal was supported by a preponderance of the evidence. He noted that given the future uncertainty of the population dynamics of Cook Inlet beluga whales, independent, intervening variables may foreclose a population recovery within 100 years, an outcome that could materialize even in the absence of a harvest. He added that such variability in potential for recovery could render the proposed benchmarks of 95/25 criterion or 100 years as meaningless. After considering the uncertainties about the population's recovery, Judge McKenna noted that NMFS should view "with a jaundiced eye" that 100 years is an "acceptable period of time" for recovery and that the adoption of a mathematical formula such as the 95/25

criterion should be a goal and not mandatory. Accordingly, he recommended that such criteria be adopted as “goals” so that the decision-maker could use his or her best judgment in the future.

#### *Adjusting Harvest for Low Population Growth Rate*

In its second proposal, NMFS proposed that subsistence harvest be reduced or eliminated under specific criteria when the population growth rate is negative or abnormally low. The first of these criteria was that the harvest should be stopped if the 5-year average population abundance was below 350 whales. This criterion and findings related to it are discussed above (see *Population Abundance Threshold*). The second and third criteria were (1) that the harvest would be reduced if in 2020 there is more than a 20-percent probability that the population growth rate is less than 1 percent and (2) that the harvest would be stopped if there were more than a 20 percent probability that the population growth rate was less than 1 percent in 2035.

The Commission argued that these criteria would respond too slowly to situations where there is continued low growth; however, NMFS noted that the criteria in its second proposal were part of a plan that strictly limited harvest for low growth rate populations. The Cook Inlet Treaty Tribes (CITT) proposed that the minimum harvest should not be below two whales in any year. Judge McKenna rejected the proposal from CITT because the overwhelming evidence in the record did not support such a proposal. Judge McKenna considered the entire record and supported NMFS’ proposed criteria.

#### *Harvest with Small Population and Intermediate Growth Rate*

NMFS’ second proposal, which incorporated most of Tyonek’s proposal, allows the take of five whales over a 5-year interval if the population were growing at an intermediate rate and the 5-year abundance average was between 350 and 399 belugas. Tyonek’s proposal argued for eight strikes over a 5-year period with intermediate population growth rates, suggesting that the smaller allowable take in NMFS’ proposal would not contribute meaningfully to the population’s recovery. NMFS noted that there was a significant likelihood that a population with a 5-year average abundance of 350–399 belugas with an intermediate growth rate would actually be growing at the low rate. Judge McKenna recommended NMFS’ proposal because it was intended to insure that the harvest would not

disadvantage the Cook Inlet beluga population.

#### *Unusual Mortality Events*

Although the parties all agreed there should be a mechanism to reduce the harvest if there were an unusual mortality event, such as a mass stranding in which several whales died, they did not agree on the details governing such a reduction. Most beluga mortalities not related to harvest are reported due to the carcass stranding; therefore, NMFS proposed to use strandings for the basis for normal and unusual mortalities. For any year, NMFS proposed to estimate the actual number of mortalities by expanding the reported number of deaths by a factor of two. An expected number of beluga mortalities may be estimated as a proportion of the population size, and these mortality numbers, for ranges of abundance, are listed under the heading “Expected Mortality Limit” in the Harvest Table. If the reported number of deaths in a year exceeds the Expected Mortality Limit, then the difference (Estimated Excess Mortalities) is subtracted from the current 5-year mean abundance, and the harvest levels for the remainder of the 5-year period are recalculated.

Tyonek argued that the expansion factor of two applied to the number of reported deaths was conservative because dead whales in some parts of the inlet would not likely strand and be reported before they drifted out to sea. Tyonek also questioned whether the same factor should be applied to immature beluga mortalities as is applied to adult whales.

Tyonek asserted that before whale deaths were counted, NMFS should consult with the Cook Inlet Marine Mammal Council through a co-management process to agree upon dead beluga whales that are reported by reliable sources but not confirmed by NMFS. Tyonek also suggested that some years may have higher than expected mortalities and some years may have lower than expected mortalities. Therefore, excess mortality should be estimated as a 5-year average rather than as a single year’s calculation.

NMFS argued that (1) anecdotal information indicates a substantial fraction of dead beluga whales are unreported, (2) few of the observed mortalities are reported in winter, and (3) there is not sufficient data available to quantify the likelihood that a dead beluga will strand and be reported; therefore, an expansion factor of two is reasonable. NMFS also argued that its method for counting mortalities is not necessarily biased by differing

probabilities of an animal stranding or the stranding being reported. Although most strandings are reported in Turnagain Arm, it may be that more deaths occur in or near Turnagain Arm because whales spend much time there when the waters and tides there are most dangerous to whales. NMFS also noted that its interim final harvest regulations reduced harvest directly by the number of excess mortalities, whereas its second proposal applied excess mortalities to the 5-year average abundance and re-estimated harvest levels.

The Commission was concerned that the period since 1999 may have elevated mortality rates, noting that the population has not appeared to grow despite the subsistence harvest restrictions. Thus, mortality may have been unusually high during this period and inappropriate for use as the baseline for normal mortality. The Commission suggested that more research should be conducted to validate the assumptions underlying mortality estimates. NMFS replied that the number of stranded dead whales between 1998 and 2004 remained fairly constant, between 2.6 percent and 4.2 percent of the abundance. This mortality level is below expected mortality rates for most marine mammal populations, therefore, the reported mortality figures are likely not high.

Judge McKenna noted that Tyonek’s and the Commission’s concerns amounted to a request for better science, but better science is not currently available. Furthermore, Tyonek and the Commission both argued about potential problems, which may or may not materialize, but did not indicate there was better evidence than that used by NMFS. Accordingly, Judge McKenna found that NMFS’ proposal was based upon the best available information. He concluded that it was up to NMFS whether to conduct additional research to validate assumptions in its proposal.

#### *Funding for Future Surveys*

NMFS noted that annual surveys were important for the harvest regime to function well, but future surveys were subject to annual appropriations and could not be guaranteed. Tyonek argued that NMFS should enter into discussions with the Alaska Native parties and the Commission to review the need for changes to the harvest limits, should the frequency of future surveys decrease. The Commission also raised concerns because reduced survey effort may reduce the ability to detect a population decline. NMFS argued that their harvest plan allowed for abundance surveys every other year, if

such a frequency could meet the information requirements of the harvest regime, and that there is no need to open negotiations whenever annual surveys do not occur.

Judge McKenna noted that the circumstances that affect availability of funds for future surveys are subject to Congressional appropriations, and did not recommend a position on the need for an automatic review of the harvest plan if surveys were less frequent. Noting that all proposals are science-based, he further recommended that it is a matter for NMFS scientists to determine whether population surveys should be conducted annually or every other year.

#### *“On the Ground” Abundance Estimates*

Alaska Native hunters consistently questioned the accuracy of NMFS' population abundance estimates. Tyonek requested that abundance estimates, which are the basis for the harvest limits, include an “on the ground” count by hunters. Such counts could validate abundance estimates for some parts of Cook Inlet, and survey methodology could be refined accordingly. NMFS states that such “on the ground” surveys were unreliable compared to aerial surveys, which offer a broader visual perspective and provide more robust estimates.

Judge McKenna noted that MMPA section 103(a) (16 U.S.C. 1373(a)) required regulations to be based upon the best available scientific evidence and that testimony during the hearing noted that “on the ground” surveys were not as reliable as aerial surveys. He, therefore, found that it would not be appropriate to incorporate a mechanism into the regulation providing for “on the ground” counting. He recommended that such counts be incorporated into co-management agreements.

The MMPA requires use of the best available scientific evidence or information in regulating the take of marine mammals or in assessing the status of marine mammal stocks. While information on Cook Inlet belugas obtained by hunting the whales may provide additional insights into beluga whale behavior and distribution where relevant, it does not replace aerial surveys as the best available scientific information and will not be used to validate survey results. However, such information could be used to help improve survey efforts and locations and could be incorporated into co-management agreements. Any changes in survey design resulting from these improvements should be made only with due awareness to the consequence that estimates obtained from such

modified surveys may not be comparable to abundance estimates obtained from earlier surveys.

#### *Periodic Review of the Plan*

Noting that the harvest plan contains numerous assumptions and uncertainty about the population, Tyonek argued that the plan should be reviewed through the co-management process every ten years. Furthermore, either party should be able to call for a review before the ten year period if (1) new information becomes available that may affected the plan, (2) the harvest falls below one whale per year, or (3) if the harvest stagnates at low levels. NMFS argued that a review every ten years would be overly restrictive and time-consuming, and that the plan was intended to provide harvest levels until the stock was recovered under the MMPA.

Judge McKenna noted that the MMPA requires that subsistence harvest regulations be reviewed periodically. After considering the arguments of both parties, Judge McKenna found that there is no legal requirement to review the harvest plan every ten years, and NMFS should be able to determine whether the plan requires modification without a formal review process. He added, however, that if the harvest falls below one whale per year, NMFS should seriously consider listing the Cook Inlet beluga whale population under the ESA. NMFS has proposed to list this beluga population under the ESA (72 FR 19854, April 20, 2007) and is considering public comment received on this proposal.

#### *Calculating Population Growth Rate*

In his recommended decision, Judge McKenna supported NMFS' proposal before the second hearing that the population growth rate should be based upon the probability distribution for the population trend using data from 1994 until the date in which it was to be updated. The Commission had suggested that the population growth rate be calculated over shorter time periods that would more accurately reflect the current status of the beluga stock. In supporting this aspect of NMFS proposal, Judge McKenna noted that NMFS second proposal had not been vetted through cross-examination, and that any technical rationale for using the full data set was not clear to him. He recommended, therefore, that NMFS give serious consideration to the Commission's suggestion to use a shorter (e.g., 5–10-year) period to calculate the population growth rate.

After receiving Judge McKenna's recommended decision, NMFS

reconsidered calculating the population growth rate and determined that the long-term harvest limits would use data available for the previous 10 years when using the Harvest Table to set harvest limits for each 5-year period in the future. NMFS second harvest plan established long-term harvest limits, which were supported by Judge McKenna's recommended decision, and would have included the population trend from 1994 to 1998 when the population was subjected to unrestricted hunting. Accordingly, the large decline in the population during these years is not an accurate reflection of population growth under the new harvest regime. Furthermore, the use of data from the previous 10 years would be more responsive to the current and future dynamics of the population and is less likely to result in over- or under-protection.

#### *Technical Team Review of Proposed Rule*

The Commission argued that there was insufficient time after receiving NMFS' second proposal to conduct scientific review and advocated that Judge McKenna focus on the principles in the plan rather than the specific numbers or charts proposed by NMFS. The Commission also argued that the Technical Team be given appropriate guidance (criteria) concerning the decision and given additional time to assess whether the proposed harvest regime meets those criteria. NMFS opposed the request to reconvene the Technical Team.

Judge McKenna rejected the Commission's recommendation to refrain from using specific numbers or charts in the harvest plan. He reiterated that NMFS should view values for underlying principles as goals rather than hard-and-fast rules (see Immediate Recovery). Such an approach would permit NMFS maximum flexibility to balance the recovery needs with the needs of the subsistence hunters in establishing the allowable harvests. Although the Commission's request to reconvene the Technical Team would result in a more complete record, the parties all stipulated that the recommended decision be issued without further hearings. Accordingly, he denied the Commission's request to reconvene the Technical Team.

#### *Sex Composition of the Harvest*

No proposals included regulations addressing the sex composition of the harvest, although the Commission and NMFS advocated that hunters target males because such an approach would have less effect on the population's

reproductive potential. The Commission requested that the final regulations require NMFS to conduct additional research needed to ascertain the impact of a harvest targeted on males and that the regulations include sufficient flexibility for establishing additional requirements in the future with respect to sex and/or age composition of the harvest. NMFS argued that such a regulation is not appropriate and that the sex and age composition issue should be specified in required co-management agreements.

Judge McKenna noted that the scientific community does not know how many males are needed in one generation to genetically contribute to the next generation, or what breeding or social structure is required by Cook Inlet beluga whales. He also noted that the regulation is for long-term harvest limits and that there is considerable uncertainty about the benefits of adding a provision that addresses sex composition of the harvest. He suggested that adding such a provision to the harvest regulations would increase the chances that the final regulations would have to be modified in the future, which, in turn, would have the entire proceedings repeated. Therefore, he found that any provisions governing the sex composition of the harvest should be left to the co-management agreements. NMFS adopts Judge McKenna's ruling related to inclusion of sex composition of the harvest in co-management agreements for the reasons he stated and because targeting males in the hunt would minimize the taking of reproductively active females in the harvest.

#### *Use of Stranded Whales*

Some Alaska Natives requested permission to harvest stranded whales that are going to die anyway. Such harvest would have certain benefits without a cost to the population. Tyonek, however, suggested that such harvest may not be a viable option for all beluga hunters, because weather and inlet conditions could prevent members from reaching Turnagain Arm, where most strandings occur.

Judge McKenna noted that none of the formal proposals to the hearing process included a provision that allowed strikes of stranded whales that are going to die anyway; therefore, he recommended that it was not advisable to include such a provision in the regulations. He also noted there were no scientific criteria to distinguish between whales that were likely to die and those that were likely to survive a stranding. Judge McKenna noted that the issue raised several questions. Who

determines when a whale will not survive? Will the whale count one harvest "take" for the year? Who will share in the harvest of stranded whales? He noted that these questions are best left to the co-management process, and recommended that NMFS resolve this issue within one year from the date of issuance of the final rule.

NMFS has observed belugas live-strand on mudflats at low tide and swim or float off at high tides, so there is no documentation of accessible belugas that are going to die anyway at a later time. That being said, NMFS finds that stranding response is governed under the MMPA and that, pursuant to the MMPA, NMFS issues letters of authorization to qualified experts who, among other things, judge whether a stranded marine mammal is likely to die. Therefore, if NMFS staff, after consulting with a qualified expert working under such a letter of authorization who responded to a Cook Inlet beluga stranding, determines that a stranded Cook Inlet beluga whale is likely to die and would be euthanized for humane reasons, euthanasia may be accomplished through a means that would not prohibit consumption of edible products from the whale.

Judging whether a beluga whale may die as a result of stranding will be subject to uncertainty. Because the population is currently severely depleted, and, as noted above (see *Harvest Subservient to Recovery*), the Alaska Native subsistence exemption was ruled subservient to the MMPA's recovery goal for depleted marine mammal stocks, any determination that a stranded beluga whale is likely to die as a result of the stranding must be supported by sufficient information so that determination is reasonably certain.

The death of a marine mammal from a stranding is unrelated to the subsistence harvest. Therefore, NMFS finds that taking such a whale should not be counted as a "strike" under the harvest limits in this final rule; however, such a death should be added to the stranding database and would, therefore, be added to the unusual levels of mortality (see Unusual Mortality Events), and the harvest could be adjusted if necessary.

A mechanism to share edible portions of stranded beluga whales should be included, as allocation of "strike" under the harvest limits should be included, in co-management agreements for each 5-year period. NMFS expects that a reasonable allocation of strikes or shares of stranded whales among the Alaska Native community within Cook Inlet is best resolved through agreements among the affected Alaska Natives.

Furthermore, members of the Alaska Native community should base the use of marine mammal products under this harvest plan on historical and traditional use of beluga whales. Therefore, the ANOs involved in co-management agreements under these harvest regulations are expected to resolve questions on allocation or sharing before negotiating such agreements for each 5-year period.

#### *Ultimate Findings of Fact and Conclusions of Law*

Judge McKenna's recommended decision also contained ultimate findings of fact and conclusions of law. His ultimate rulings and findings, and the reasons for them, are as follows:

(1) This is a formal rulemaking proceeding commenced pursuant to the authority contained in the MMPA (16 U.S.C. 1361 et. seq.) and the Administrative Procedure Act (5 U.S.C. 556 and 557).

(2) NMFS' second proposed rule is hereby adopted based upon the preponderance of the evidence contained in this record.

(3) NMFS' first proposed rule, Tyonek's first proposed rule, and Tyonek's second proposed rule (to the extent not incorporated into NMFS' second proposal) are hereby rejected. NMFS' first proposal and Tyonek's first proposal are rejected because they were superseded by new proposals. Tyonek's second proposal (to the extent not incorporated into NMFS' second proposal) is hereby rejected based upon the preponderance of the record evidence.

(4) Tyonek's objection to the Commission's standing to participate in this formal rulemaking is untimely and therefore rejected.

(5) NMFS' second proposed rule is supported by the preponderance of the evidence and based on the best scientific evidence available.

(6) Tyonek's second proposed rule (to the extent not incorporated into NMFS' second proposal) is not supported by the preponderance of the evidence because it does not insure that the harvest will not disadvantage the Cook Inlet beluga whale population.

Judge McKenna adopted NMFS' second proposal to the hearing process in its entirety. After receiving his recommended decision, NMFS has received and considered new information since the hearing and based on this information, that proposal is modified in the following respects:

First, NMFS modified its second proposal related to the calculation of the population growth. Judge McKenna recommended, based upon NMFS'

proposal at the hearing, to estimate population growth rate from the entire series of abundance estimates, dating back to 1994. NMFS has modified this recommendation to use only the most recent 10 years of abundance estimates for calculating population growth rate. The three reasons for this modification are as follows (also see *Calculating the Population Growth Rate* for additional discussion of Judge McKenna's recommendation and NMFS' decision):

(1) Judge McKenna noted in his recommended decision that NMFS consider using the Commission's suggestion for a shorter time to calculate population growth rate;

(2) The shorter period would result in a more accurate assessment of current rate of population growth under a regulated harvest because it eliminates a period (1994–1998) of unregulated harvest; and

(3) The shorter period would be more responsive to the current and future dynamics of the population.

NMFS' second modification to the recommended decision is to implement the Harvest Table immediately rather than in 2010. Judge McKenna's recommended decision included, based upon NMFS second proposal, that use of the Harvest Table begin in 2010, allowing a limited harvest of three beluga whales in the 2-year period, 2008 and 2009. NMFS has determined that implementing use of the Harvest Table immediately (starting in 2008) is less likely to disadvantage the population of Cook Inlet beluga whales. At the time of the 2004 hearing on this rule, the population 5-year average abundance exceeded 350 whales although it was suspected, but not confirmed, that the population was continuing to decline even with a limited harvest. Abundance estimates from 2004 and 2005 confirmed that the population was in decline, and the 5-year average abundance was below 350 belugas (the threshold abundance level below which harvest would not be allowed). The 2006 and 2007 abundance estimates were higher than the 2005 estimate, and the declining trend of the population after harvest restrictions were enacted was no longer statistically significantly different from zero. However, the 5-year average abundance (2003–2007) was below 350 whales, and there was no evidence that the population has increased since 1999 when the harvest was first restricted. In his recommended decision, Judge McKenna noted that Congress felt a moratorium on harvest was necessary in 1999 when the abundance was about 350 beluga whales, and he ruled, as a matter of law, that 350 belugas was an

appropriate threshold below which a harvest was not allowed. Based on these considerations, NMFS implements the Harvest Table immediately, rather than in 2010. Because the 5-year average abundance is below 350 whales, the allowable harvest during the next 5-year period, 2008–2012, is zero.

#### Final Rule

This final rule establishes long-term limits to the annual number of Cook Inlet beluga whales that can be taken by Alaska Natives for subsistence and handicraft purposes. The rule completes a provision for such long-term limits that was not finalized when regulations governing the taking of Cook Inlet beluga whales were issued in 2004 (69 FR 17973, April 6, 2004). This final rule establishes only long-term limits and does not modify any other aspect of the 2004 rule (i.e., requirement for co-management agreements, prohibition on sale of Cook Inlet beluga parts, seasonal restriction on taking Cook Inlet beluga whales, and prohibition on taking calves or adults accompanied by calves).

This final rule does not include provisions related to strike allocation for two reasons. First, the purpose of the rule is to establish long-term harvest limits for Cook Inlet beluga whales. Second, the allocation of limited strikes should be an issue determined among the affected ANOs and Alaska Natives. Accordingly, the regulations require allocation issues be addressed in the co-management agreements signed by NMFS and appropriate ANOs, to allow the taking of Cook Inlet beluga whales pursuant to the pertinent provisions of Public Law 106–55 and implementing regulations (50 CFR 216.23(f)(1)).

The harvest limits in this final rule are established for 5-year periods and are displayed in a Harvest Table that was drafted by NMFS and subjected to judicial review through an administrative hearing. The use of 5-year intervals was agreed upon by the parties in the hearing process and was, thus, not among the contested issues. The key requirements for selecting the harvest levels for each 5-year period are (1) the prior 5-year average abundance estimates of Cook Inlet beluga whales, (2) the prior 10-year growth rate, and (3) the total Unusual Mortality Events for Cook Inlet belugas, from sources other than subsistence harvest.

The current 5-year population average is the abundance calculated using peer-reviewed methods, from surveys conducted by, or under the direction of, NMFS scientists, from the five years prior to the start of a 5-year interval. Although NMFS anticipates annual surveys (therefore, five

abundance estimates to be used to calculate of current 5-year population average), future effort depends upon funding appropriations for each year, and availability of future appropriations is not certain. Such surveys are a high priority for NMFS particularly while the population is below 500 whales; is growing slowly, if at all; and is proposed to be listed as an endangered species under the ESA. The use of a 5-year average abundance was not among the contested issues during the hearing process.

The population growth rate is estimated using information obtained in the 10 years prior to each 5-year interval. As noted above (see Decision of the Assistant Administrator), the use of abundance estimates from the most current 10-year period was among the contested issues during the hearing process. This estimate of the population growth rate is a modification of Judge McKenna's recommended decision, which was, in turn, based upon NMFS' proposal to the administrative hearing. However, in his recommended decision, Judge McKenna encouraged NMFS to consider the use of a short period (e.g., 5–10 years) so that the estimate of population growth is most recent.

NMFS scientists will recommend the use of a low, intermediate, or high population growth rate to be used in the model. This recommendation will be based upon criteria included in the final rule that were designed to ensure, with reasonable certainty, that any allowed harvest mortality not prevent the beluga population from recovering to its OSP within an acceptable period. "Reasonable certainty" and "acceptable period" were interpreted as having a goal (but not a hard-and-fast requirement) of being 95 percent confident the harvest would delay the Cook Inlet beluga recovery, to its OSP, by no more than 25 percent of the time the population would recover in the absence of a harvest. These assurances are consistent with the MMPA's goal of immediate recovery for depleted marine mammal stocks, yet allow a small, but important, harvest by Alaska Natives for subsistence or handicraft purposes as a part of their culture.

The relative importance of recovery versus the subsistence use of Cook Inlet belugas was among the contested issues at the administrative hearing, and Judge McKenna ruled that subsistence use was subservient to recovery of the depleted stock under the MMPA.

After calculating the 5-year average abundance and determining whether the current population growth rate was low, intermediate, or high, the number of strikes will be determined from the

Harvest Table included in the harvest regulations, which is in the appropriate row for the 5-year population average and under the appropriate column for the population growth rate. If beluga mortality levels are below the Expected Mortality Limit, during the 5-year interval, the strike limit will remain fixed for the duration of the 5-year interval. If, however, mortality exceeds the Expected Mortality Limit during the 5-year interval, the strike level may be reduced to account for the smaller beluga population. Although all parties in the hearing process agreed that an adjustment for unusual mortality levels was necessary, the details for computing the necessary adjustment were contested.

The adjustment for Unusual Mortality Levels is calculated using an estimate of annual mortality for Cook Inlet beluga whales (other than subsistence harvest), the 5-year-average abundance estimate, and an expected level of mortality for a population with life history traits such as those for beluga whales. For the annual mortality estimate, NMFS multiplies the reported number of stranded, dead Cook Inlet beluga whales reported in a year by a factor of two. NMFS determined that correction factor on the reported number of beluga deaths was warranted, because a certain, but unknown, portion of beluga whales that die during a year do not strand or such strandings are not reported.

The estimated number of deaths is compared to an expected mortality level for a population at the 5-year average population for the beluga whale population during that 5-year interval. The expected mortality level is 6 percent of the lower limit of the abundance range in each row in the Harvest Table; animal populations with life history traits like beluga whales may be expected to lose up to 6 percent of the population due to 'natural' mortality on an annual basis.

Excess mortalities are calculated as the difference between the estimated number of deaths in a year and the expected mortality level. If excess mortalities occur in any year during a 5-year interval, the number of excess mortalities will be subtracted from the 5-year-mean average abundance. If such a subtraction reduces the 5-year-average abundance to a lower range in the Harvest Table, the 5-year strike limit will be reduced accordingly for the remainder of that 5-year interval. For the next 5-year interval, the abundance estimates for that year (or years) in which excess mortalities occur will be reduced by the number of excess mortalities in that year. The reduced abundance estimate would be averaged

in the 5-year average abundance estimate for the upcoming 5-year interval. Although parties in the administrative hearing process contested the details of this adjustment, Judge McKenna found that this method, which was included in NMFS' second proposal, was supported by the preponderance of evidence on the record.

This final rule for establishing 5-year harvest limits for Cook Inlet beluga whales was prepared in accordance with provisions of the MMPA sections 101(b) and 103. Judge McKenna found, and NMFS concurred with his finding, that taking Cook Inlet beluga whales under these limits by Alaska Natives for subsistence purposes would not disadvantage the Cook Inlet beluga stock. Such limited taking would allow Alaska Natives to continue taking Cook Inlet beluga whales for subsistence purposes and would provide reasonable certainty that such taking would mean an acceptable delay in the recovery of the stock to its OSP.

#### **Classification**

##### *National Environmental Policy Act*

On June 20, 2008, NMFS released a Final SEIS that analyzed a range of alternatives to manage a subsistence harvest and promote the whale's recovery. NMFS' primary management action is to establish an upper limit on the number of Cook Inlet beluga whales that can be taken by Alaska Natives for subsistence and handicraft purposes. The harvest alternatives and their environmental impacts were evaluated in the SEIS through a model that examined the length of time it would take for the stock to recover under different harvest alternatives. The preferred alternative provided for the cultural needs of Alaska Natives by allowing a harvest when the population has a 5-year abundance average above 350 belugas. The harvest level is based on the 5-year abundance average and 10 year trend analysis, with an increase in the harvest as the population increases and a decrease in the harvest when the population decreases; and no harvest below a 5-year average of 350 belugas. The Final SEIS also presented an assessment on the impacts of other anthropogenic activities that might impact Cook Inlet beluga whales or their habitat. This assessment included a discussion of the cumulative impacts and evaluated the measures needed for the protection and conservation of important Cook Inlet beluga whale habitats.

A total of 60 submissions were received from 63 people on the Draft

SEIS, including 40 submitted by residents from the Native Village of Tyonek as a form letter. Three people submitted one letter jointly. Most commenters (78 percent) indicated support for Alternative 2, Option B, the preferred alternative. Six people (11 percent) preferred no harvest. No comments were received on Alternative 2A, which followed Judge McKenna's decision, or on Alternative 3, the Progressive Harvest alternative.

##### *Paperwork Reduction Act*

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

##### *Endangered Species Act (ESA)*

This final rule does not affect species listed under the ESA and whose distribution primarily includes the lower part of Cook Inlet, where the subsistence harvest for belugas no longer occurs. These species include humpback and fin whales, the western Distinct Population Segment of Steller sea lions, the southwest Alaska Distinct Population Segment of northern sea otters, and Steller's eider. Therefore, this final rulemaking does not impact any ESA listed species, or their critical habitat. NMFS determined that this final rule provides reasonable assurance that the harvest would not cause a significant delay in recovery of the Cook Inlet beluga population. Accordingly, the harvest limits in this rule would not jeopardize the continued existence of Cook Inlet beluga whales, and a conference pursuant to ESA section 7(a)(4) was not conducted.

##### *Executive Order 12866 and Regulatory Flexibility Act*

This final rule has been determined to be not significant for purposes of Executive Order 12866. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule, final interim rule, and NEPA documents. No comments were received regarding the economic impact of this final rule. A final regulatory flexibility analysis is not required, and none was prepared.

*Executive Order 12898 - Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Section 4-4, Subsistence Consumption of Fish and Wildlife*

Section 4-4, Executive Order 12898, requires Federal agencies to protect populations who consume fish and wildlife as part of their subsistence lifestyle, and to communicate to the public the potential health risks [from contaminants] involved as a result of eating fish and wildlife. NMFS has monitored and evaluated contaminant loads in Cook Inlet and eastern Chukchi Sea beluga populations in Alaska for more than a decade and has published this information and provided this information to the Alaska Department of Health and Social Service, and to Alaska Native communities, as this information becomes available.

*Consultation with State and Local Government Agencies*

In keeping with the intent of Executive Order 13132 to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, NMFS has conferred with state and local government agencies in the course of assessing the status of Cook Inlet beluga whales. State and local governments support the conservation of this beluga stock. NMFS has convened scientific workshops and public meetings, available to all the public, and has routinely exchanged information on the status of these whales with state and local agencies, and Tribal Governments.

*Executive Order 13175-Consultation and Coordination with Indian Tribal Governments and Corporations*

This final rule is consistent with policies and guidance established in Executive Order 13175 of November 6, 2000 (25 U.S.C. 450 note) and the Executive Memorandum of April 29, 1994, (25 U.S.C. note), and the American Indian and Alaska Native Policy of the United States Department of Commerce (March 30, 1995) outline the responsibilities of the National Marine Fisheries Service in matters affecting tribal interests. Section 161 of Public Law 108-199 (188 Stat. 452), as amended by section 518 of Public Law 108-447 (118 Stat. 3287), extends consultation requirements of E.O. 13175 to Alaska Native corporations. Consistent with this Executive Order and the Presidential Memorandum, NMFS has taken several steps to consult and inform affected tribal governments

and corporations and to solicit their input during development of this rule, including the development of co-management agreements with Cook Inlet Marine Mammal Council. The final rule does not impose substantial direct compliance costs on the communities of Indian tribal governments or corporations.

**List of Subjects in 50 CFR Part 216**

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

Dated: October 8, 2008.

**John Oliver,**  
Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

■ For the reasons identified in the preamble, 50 CFR Part 216 is amended as follows:

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

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

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

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

**§ 216.23 Native exceptions.**

\* \* \* \* \*

(f) \* \* \*

(2) \* \* \*

(v) *Taking during 2008 and*

*subsequent years.* (A) Co-management agreements pursuant to paragraph (f)(1) of this section may be established for 5-year intervals beginning in 2008. Agreements must include specific provisions regarding the number and allocation of strikes, hunting practices to promote consistency with limitations in paragraph (f)(2)(ii) of this section, and to improve efficiency of the harvest, mitigating measures, and enforcement. Agreements may include provisions regarding the sex composition of the beluga harvest.

(B) Strike/harvest levels for each 5-year planning interval beginning in 2008 will be determined by the recovery of this stock as measured by the average abundance in the prior 5-year interval and the best estimate of the population growth rate using information obtained in the 10 years prior to each 5-year interval. Criteria for categorizing growth rates are presented below as an algorithm using the estimated abundance, the distribution statistics for growth rates, and the date. Harvest

levels are subject to the Expected Mortality Limit. The established strike levels are presented in the Harvest Table and the following algorithm will be used to determine harvest levels for each 5-year period beginning in 2008.

(1) NMFS will calculate the average stock abundance over the previous 5-year period.

(2) NMFS will calculate a population growth rates from abundance estimates for the most recent 10-year period prior to the next 5-year period.

(3) Using the abundance and growth information obtained in accordance with paragraphs (f)(2)(v)(B)(1) and (f)(2)(v)(B)(2), NMFS will calculate the probabilities that the growth rate within the population would be less than 1 percent, less than 2 percent, or greater than 3 percent. NMFS will then use paragraphs (f)(2)(v)(B)(3)(i) and (f)(2)(v)(B)(3)(vi) of this section to select the proper cell from the Harvest Table to determine the harvest levels for the next 5-year interval.

(i) Is the average stock abundance over the previous 5-year period less than 350 beluga whales? If yes, the Harvest Table provides that the harvest is zero during the next 5-year period. If no, go to (f)(2)(v)(B)(3)(ii) of this section.

(ii) Is the current year 2035 or later and is there more than a 20 percent probability the growth rate is less than 1 percent? If yes, the harvest is zero during the next 5-year period. If no, go to paragraph (f)(2)(v)(B)(3)(iii) of this section.

(iii) Is the current year between 2020 and 2034 and there is more than a 20 percent probability the growth rate is less than 1 percent? If yes, the harvest is three whales during the next 5-year period. If no, go to paragraph (f)(2)(v)(B)(3)(iv) of this section.

(iv) Is the current year 2015 or later and is there more than a 25 percent probability the growth rate is less than 2 percent? If yes, go to the harvest table using the "Low" growth rate column. If no, go to paragraph (f)(2)(v)(B)(3)(vi) of this section.

(v) Is the current year prior to 2015 and is there more than a 75 percent probability the growth rate is less than 2 percent? If yes, go to the harvest table using the "Low" growth rate column. If no, go to paragraph (f)(2)(v)(B)(3)(vi) of this section.

(vi) Is there more than a 25-percent probability the growth rate is more than 3 percent? If yes, go to the harvest table using the "High" growth rate column. If no, go to the harvest table using the "Intermediate" growth rate column.

HARVEST TABLE

5-year population averages	"High" growth rate	"Intermediate" growth rate	"Low" growth rate	Expected Mortality Limit
Less than 350 .....	0	0	0	-
350-399 .....	8 strikes in 5 years	5 strikes in 5 years	5 strikes in 5 years	21
400-449 .....	9 strikes in 5 years	8 strikes in 5 years	5 strikes in 5 years	24
450-499 .....	10 strikes in 5 years	8 strikes in 5 years	5 strikes in 5 years	27
500-524 .....	14 strikes in 5 years	9 strikes in 5 years	5 strikes in 5 years	30
525-549 .....	16 strikes in 5 years	10 strikes in 5 years	5 strikes in 5 years	32
550-574 .....	20 strikes in 5 years	15 strikes in 5 years	5 strikes in 5 years	33
575-599 .....	22 strikes in 5 years	16 strikes in 5 years	5 strikes in 5 years	35
600-624 .....	24 strikes in 5 years	17 strikes in 5 years	6 strikes in 5 years	36
625-649 .....	26 strikes in 5 years	18 strikes in 5 years	6 strikes in 5 years	38
650-699 .....	28 strikes in 5 years	19 strikes in 5 years	7 strikes in 5 years	39
700-779 .....	32 strikes in 5 years	20 strikes in 5 years	7 strikes in 5 years	42
780 + .....	Consult with co-managers to expand harvest levels while allowing for the population to grow			

(C) At the beginning of each 5-year period, an Expected Mortality Limit is determined from the Harvest Table using the 5-year average abundance. During the course of each calendar year, the number of beach casts carcasses and carcasses found floating either reported to NMFS or observed by NMFS personnel will be the number of mortalities for that year. If at the end of each calendar year this number exceeds the Expected Mortality Limit, then an unusual mortality event has occurred. The Estimated Excess Mortalities will be calculated as twice the number of reported dead whales above the Expected Mortality Limit. The harvest will then be adjusted as follows:

(1) The harvest level for the remaining years of the current 5-year period will be recalculated by reducing the 5-year average abundance from the previous 5-year period by the Estimated Excess Mortalities. The revised abundance estimate would then be used in the harvest table for the remaining years and the harvest adjusted accordingly.

(2) For the subsequent 5-year period, for the purpose of calculating the 5-year average, the Estimated Excess Mortalities would be subtracted from the abundance estimates of the year of the excess mortality event so that the average would reflect the loss to the

population. This average would then be used in the table to set the harvest level.

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 648**

[Docket No. 071212833-8179-02]

RIN 0648-XK90

**Fisheries of the Northeastern United States; Atlantic Bluefish Fishery; Quota Transfer**

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

**ACTION:** Temporary rule; inseason quota transfer.

**SUMMARY:** NMFS announces that the State of Florida is transferring commercial bluefish quota to the State of New York from its 2008 quota. By this action, NMFS adjusts the quotas and announces the revised commercial quota for each state involved.

**DATES:** Effective October 9, 2008 through December 31, 2008.

**FOR FURTHER INFORMATION CONTACT:** Emily Bryant, Fishery Management Specialist, (978) 281-9244, fax (978) 281-9135.

**SUPPLEMENTARY INFORMATION:** Regulations governing the Atlantic bluefish fishery are found at 50 CFR part 648. The regulations require annual specification of a commercial quota that is apportioned among the coastal states from Florida through Maine. The process to set the annual commercial quota and the percent allocated to each state is described in § 648.160.

Two or more states, under mutual agreement and with the concurrence of the Administrator, Northeast Region, NMFS (Regional Administrator), can transfer or combine bluefish commercial quota under § 648.160(f). The Regional Administrator is required to consider the criteria set forth in § 648.160(f)(1) in the evaluation of requests for quota transfers or combinations.

Florida has agreed to transfer 100,000 lb (45,359 kg) of its 2008 commercial quota to New York. The Regional Administrator has determined that the criteria set forth in § 648.160(f)(1) have been met. The revised bluefish quotas for calendar year 2008 are: New York,