

future throughout all or a significant portion of its range. Further, the withdrawal notice stated that the circumstances described under (1), (2), and (3) could result from: insufficient progress in implementation of the Conservation Plan; a failure to modify the Conservation Plan to address new threat(s) or an increase in the severity of threat(s); a failure to modify the Conservation Plan, if necessary, to address threat(s) facing any other populations added to the Gulf of Maine DPS in the future; or the inability of the State of Maine to address threat(s). The notice stated that a decision to reinstate the listing process generally would be made shortly after the end of an annual reporting period.

In the withdrawal notice, the Services committed to making the State of Maine's annual report on the implementation of their Conservation Plan available for review to the public in order to keep interested parties informed and to provide an opportunity for comment. The annual review of the Conservation Plan was part of the Services' broader comprehensive review of the species' status relative to the Act. On January 20, 1999, the first State of Maine annual report on implementation of the Conservation Plan was made available for public review and comment. The Services published a **Federal Register** notice on that day, opening a comment period until March 8, 1999. The Services reviewed all public comments received on the draft annual report and provided a summary of those, along with their own comments, to the State of Maine in March 1999. The Services received a final revised annual report from the State of Maine on April 13, 1999.

The July, 1999, Atlantic salmon status review identifies changes in species status, threats, and protection since the withdrawal notice. The updated status review states that, under current circumstances, it is the opinion of the Biological Review Team that the Gulf of Maine DPS is in danger of extinction. The status review also states that there are now at least eight rivers in the DPS range that still contain functioning populations, but at substantially reduced abundance levels. Recent survey work indicates that a naturally reproducing population that contains historic-river-specific characteristics also remains in Cove Brook and therefore warrants inclusion in the Gulf of Maine DPS. The FWS has designated the Atlantic salmon Gulf of Maine DPS as a candidate for listing. The FWS and NMFS will promptly begin preparation of a proposed rule to list this DPS of

Atlantic salmon under the Endangered Species Act.

Dated: September 30, 1999.

**Jamie Rappaport Clark,**

*Director, U.S. Fish and Wildlife Service.*

Dated: October 6, 1999.

**Penelope D. Dalton,**

*Assistant Administrator for Fisheries,  
National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 990922260-9260-01; I.D. 083199E]

RIN 0648-AM84

#### Designation of the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA) and Response to Petitions

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

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

**SUMMARY:** NMFS proposes to designate the Cook Inlet beluga whale stock as depleted under the MMPA. No Endangered Species Act (ESA) determination on listing this stock as a threatened or endangered species is made at this time. NMFS will issue an ESA determination within 12 months of NMFS's receipt of the petition (April 9, 1999), following the 1999 NMFS aerial survey and other factors which may affect such a determination. This action, pursuant to the MMPA, is necessary to address the sharp decline in the number of Cook Inlet beluga whales. It is intended as a conservation measure to reverse the decline and eventually to rebuild the numbers within the Cook Inlet beluga whale stock.

**DATES:** Comments and information must be received by December 20, 1999.

**ADDRESSES:** Comments should be addressed to the Chief, Marine Mammal Division, Office of Protected Resources, NMFS, 1335 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Michael Payne, NOAA/NMFS, Alaska Region, (907) 586-7235, or Brad Smith, NOAA/NMFS, Alaska Region, Anchorage Field Office, (907) 271-5006.

**SUPPLEMENTARY INFORMATION:**

## Background

The beluga whale, *Delphinapterus leucas*, is a small toothed whale inhabiting arctic and subarctic waters. Alaska contains five separate stocks of beluga whale, the smallest of which occurs in Cook Inlet within south-central Alaska. The Cook Inlet stock is genetically and geographically isolated from the other Alaskan populations of beluga whales.

NMFS has conducted annual surveys of the Cook Inlet beluga whale between 1994 and 1998. Results show a sharp decline in estimated abundance, with the 1998 estimate (347 animals) nearly 50 percent lower than the 1994 estimate (653 animals). Historical estimates of abundance are not available; however, Native hunters have stated their belief that the stock numbered at least 1,000 animals as recently as the 1980s.

The Cook Inlet beluga whale stock is hunted by Alaska Natives. The subsistence harvest levels of Cook Inlet beluga whales have been largely unreported; however the hunter groups and some individual hunters have provided NMFS with documented information on the harvest for 1994-1997. From these data, NMFS estimates the total Cook Inlet subsistence harvest at a mean annual level of 87 whales (including those landed and struck and lost).

At the current decline of 15 percent per year, the Cook Inlet beluga whale stock would be reduced to 50 percent of its current level within 5 years. This level of removal is significant.

As a result of the recent decline in this stock, NMFS initiated a status review of the Cook Inlet beluga whale stock with a request for public comment (63 FR 64228, November 19, 1998). Additionally, NMFS received a petition from the State of Alaska on January 21, 1999, to designate the Cook Inlet beluga stock as depleted under the MMPA. On March 3, 1999, NMFS received another petition from seven organizations and one individual to list the Cook Inlet stock of beluga whale as "endangered" under the ESA. This petition requested emergency listing under section 4(b)(7) of the ESA, designation of critical habitat, and immediate action to implement regulations to regulate the subsistence harvest of these whales. On March 10, 1999, NMFS received a petition to designate the Cook Inlet stock of beluga whales as depleted under the MMPA and to list it as "endangered" under the ESA. NMFS has determined that these petitions present substantial information to indicate that the petitioned action may

be warranted (64 FR 17347, April 9, 1999).

The review process encompassed an examination of the present status and health of the species and promulgation of recommendations for possible designation under the MMPA and/or ESA. To ensure that the status review was comprehensive and based on the best available scientific data, NMFS presented a scientific review of this stock on March 8–9, 1999, in Anchorage, Alaska, and received public comments and recommendations. Comments received by NMFS during the status review comment period are responded to in the following section.

### Comments and Responses

*Comment 1:* NMFS received 18 recommendations to act immediately, either through an ESA listing or an MMPA designation, to protect Cook Inlet beluga whales. One less specific comment recommended whatever action necessary to halt the decline. Several commenters claimed that an ESA listing would take longer than a depleted designation. One noted the timeline for issuance of a final rule on “depleted” status in response to a petition may be considerably shortened if the Secretary determines that there is substantial information available to warrant the final status determination and that further delay would pose a significant risk to the stock’s well-being; a number of other commenters claimed that an ESA listing would be more expeditious than an MMPA designation.

*Response:* NMFS agrees that timely action is necessary to conserve Cook Inlet beluga whales. Because Native harvest is believed to be responsible, in large part, for the observed level of decline in this stock’s numbers since 1994, the immediate need to protect this stock and the comments received in support of an immediate ESA listing are directly related to the need to control this harvest. The MMPA and ESA both provide mechanisms to limit a harvest through regulation; however, the promulgation of regulations to govern the Native harvest requires that the species are listed as threatened or endangered under the ESA or as a depleted stock under MMPA. The procedures required for regulations to limit subsistence harvest also provide for administrative hearings. NMFS does not believe that even an immediate action to list this stock would have allowed sufficient time to promulgate Federal harvest restrictions during the 1999 season.

NMFS considers Native subsistence harvests over the last several years a significant factor in the observed

decline of beluga whales in Cook Inlet. Given the recent passage of legislation that prohibits the subsistence harvest of beluga whales in Cook Inlet until October 1, 2000, unless that harvest occurs as part of a cooperative agreement between NMFS and an authorized Alaskan Native Organization (ANO), the designation of this stock as depleted under the MMPA provides the most expeditious and appropriate Federal response. It protects the Cook Inlet beluga from overharvest during the period, prior to expiration of the amendment, and eliminates the most causal threat to the recovery of this stock of whales, thereby allowing for recovery of their numbers. However, NMFS recognizes that the legislation provides for a temporary limit to the harvest. NMFS will work with the ANOs to develop regulations and cooperative agreements as necessary to ensure that overharvest will not occur in future years.

Because NMFS believes that the maximum protection that can be afforded this stock at this time will be provided through the legislation and a depleted designation and that the immediate threat to this stock is removed, no determination on listing this stock as a threatened or endangered species under the ESA is made at this time. NMFS will issue a determination on ESA listing within 12 months of receipt of the petitions. The final determination will include consideration of the level of removals from the stock during 1999, the results of the 1999 NMFS abundance surveys, the level of total takes during 1999, and any other factors which may affect this stock. For these reasons, NMFS is proposing that the stock be designated as depleted under the MMPA.

*Comment 2:* One commenter expressed support for a co-management agreement as an interim way to address overhunting and as a way to permanently complement stringent ESA and/or MMPA protective measures. At least six other commenters were supportive of this in addition to an MMPA or ESA designation.

Two additional commenters recommended accomplishing the following tasks through a co-management process involving the Cook Inlet Marine Mammal Council (CIMMC), the Alaska Beluga Whale Committee (ABWC), NMFS, and Cook Inlet beluga hunters:

- (1) Restriction of the harvest to one beluga per Cook Inlet hunter per year;
- (2) Restriction of hunting by non-local hunters;
- (3) Funding to CIMMC to allow the group to effectively communicate with

hunters, produce educational materials, meet regularly, and be meaningfully involved in harvest monitoring and research; and

(4) Development of a legal mechanism to enforce the conservation provisions recommended through this co-management process.

A ninth commenter urged NMFS to work with U.S. Fish and Wildlife Service and appropriate Native groups to develop a system of co-management.

Another commenter endorsed the idea of a co-management agreement, but only following an ESA listing and the development of a recovery plan which would stabilize the whales’ population.

Two more commenters encouraged NMFS to work with ABWC and CIMMC to finalize a co-management agreement that would place a moratorium on hunting until ESA or MMPA regulations promoting Cook Inlet beluga recovery are in place. A final commenter recommended that NMFS work closely with CIMMC on co-management while allowing for at least a very small subsistence take by members of Cook Inlet area tribes under some type of permit system.

*Response:* NMFS agrees that the cooperative management of this stock will provide an effective means of conserving and recovering the Cook Inlet beluga while providing for traditional subsistence uses. The Alaska Region (AKR) has worked intensively with the CIMMC and ABWC to foster co-management of the Cook Inlet beluga. NMFS believes that, in the future, co-management will provide for regulation of this stock at sustainable levels. However, no such agreement has been signed at this time, largely because many Cook Inlet hunters are unaffiliated with CIMMC or the Cook Inlet Treaty Tribes, and the ordinances of these tribes do not apply to those hunters. Any such agreement will include harvest levels, practices, enforcement mechanisms, funding, and other parameters necessary to cooperatively manage the Cook Inlet beluga. Before a cooperative agreement will be signed by the NMFS, Department of Commerce, the action will be analyzed under applicable provisions of the National Environmental Policy Act.

*Comment 3:* One commenter recommended that NMFS begin to explore, with the Alaska congressional delegation, the ABWC, the CIMMC, and others, amending the MMPA to limit the allowable subsistence harvest take in Cook Inlet.

*Response:* Several of these organizations and various petitioners approached the Alaska delegation on this issue. As a result, legislation was

recently passed, which states that the taking of a Cook Inlet beluga whale under the exemption provided in section 101(b) of the MMPA between the date of the enactment and October 1, 2000, shall be considered a violation of such Act unless such taking occurs pursuant to a cooperative agreement between the NMFS and affected Alaskan Native Organizations.

*Comment 4:* Six commenters recommended that NMFS take immediate action to ban commercial sale of beluga meat. Five of these six commenters recommended that the first step toward this action is a definition of wasteful take of beluga whales. These commenters felt that this action is needed before any subsistence harvest resumes.

Another commenter recommended, more specifically, prohibition of the sale and commercial use of muktuk from Cook Inlet belugas. This commenter suggested that NMFS work with ABWC and CIMMC to develop a definition of commercial use that clearly allows true subsistence use and does not allow hunting for money.

An eighth commenter suggested a ban on sale of beluga meat by regulation under the ESA [16 U.S.C. 1539(e)(4)].

A final commenter recommended that NMFS restrict the sale of beluga parts only to those Cook Inlet villages with a tradition of taking belugas from the Inlet.

*Response:* NMFS believes that it would be difficult to try to delineate between non-wasteful and wasteful take by quantifying customary and traditional Cook Inlet beluga harvest practices. No present mechanism exists to describe how these practices should be evaluated. The Cook Inlet beluga hunters come from many Alaskan villages, each of which may have its own traditional means of harvest. While some tribes have traditionally utilized beluga whale muktuk, skin, and meat, others retain only the muktuk. Both practices may be considered traditional. NMFS believes that the quantification of customary and traditional practices to discern wasteful and non-wasteful practices is an issue to be addressed in close consultation with the Alaska Native community, and hopefully through a cooperative management process.

With regard to a ban on the commercial sale of beluga whale meat, NMFS agrees that commercial sale of this stock is not desirable. Recent legislation (Stevens' Amendment to the MMPA), limits the Alaska Native subsistence harvest through the year 2000; therefore, no sale of Cook Inlet belugas is taking place at this time.

*Comment 5:* Five commenters recommended an immediate, temporary moratorium on the harvest until NMFS determines what harvest the population can sustain and until an enforceable regulatory scheme is in place.

Three commenters recommended a moratorium for the upcoming season to provide the population an opportunity to stabilize. Two commenters (previously mentioned in the co-management section) recommended a moratorium through co-management until promulgation of ESA/MMPA regulations.

One commenter recommended that a moratorium be declared pending (1) completion of the status review, (2) further clarification of the beluga whale status, and (3) adoption of whatever effective conservation measures are necessary to reverse the present decline. A final commenter recommended a moratorium on hunting of beluga whales with no mention of harvest resumption.

*Response:* Recent legislation has restricted beluga whale hunting in 1999 and 2000 to only that done under a cooperative management agreement between NMFS and an ANO. NMFS intends to authorize the resumption of Native harvest only at very reduced levels that assure that the stock can recover.

*Comment 6:* Three commenters recommended that NMFS immediately issue regulations requiring tagging/reporting of beluga whales that are harvested in any future subsistence hunt. Two additional commenters said that, at a minimum, a tagging/reporting provision should be part of a management/recovery plan.

*Response:* NMFS agrees. On May 24, 1999, NMFS promulgated regulations under section 109(i) of the MMPA to require the marking and reporting of beluga whales harvested from Cook Inlet (64 FR 27925). Under these regulations, Native hunters are required to collect the lower left jawbone from beluga whales harvested in Cook Inlet and to report certain information to NMFS. The jawbone and supporting information will enable NMFS to better determine the number of beluga whales taken in the subsistence harvest, their age and sex category, and the potential effects of the harvest on the Cook Inlet beluga whale stock.

*Comment 7:* Several commenters recommended that NMFS continue working with the state to delete critical Cook Inlet beluga whale habitat from future oil and gas leasing.

*Response:* NMFS has responded to the State of Alaska, Division of Oil and Gas's proposed Cook Inlet area-wide

sale by recommending the deletion of certain tracts within areas of upper Cook Inlet with known concentrations of beluga whales. These areas may be important habitat for feeding/nutrition, calving, molting, and mating, as well as being sites for traditional subsistence harvest. The leasing of the tracts in question was recently halted by court action. In addition, NMFS will continue to work with the State of Alaska to evaluate the effects of oil and gas activities on beluga whales.

*Comment 8:* NMFS should implement an incidental take regulatory process to require oil industry operations to obtain permits before conducting seismic activities, siting drill platforms or drilling wells in Cook Inlet.

*Response:* Section 101(a)(5)(A) of the MMPA directs the Secretary of Commerce to allow, upon request by U.S. citizens, engaged in a specific activity (other than commercial fishing) in a specified geographical region, the incidental, but not intentional, taking of small numbers of marine mammals, if certain findings are made. NMFS has implemented a program for such authorizations, which require that the level of incidental take have only negligible impacts to the population and have no unmitigable adverse effect on the availability of marine mammals for traditional Native subsistence. These authorizations include provisions for monitoring and, where subsistence may be impacted, measures to mitigate any effect on this use and to coordinate with the affected Native community.

*Comment 9:* NMFS should ensure that tissue samples are collected from 100 percent of the landed whales harvested in the future.

*Response:* NMFS agrees and, as previously described, NMFS has promulgated regulations under the MMPA section 109(i) requiring the marking, tagging, and reporting of belugas harvested from Cook Inlet. These regulations require that the lower left jawbone from all harvested whales be collected by hunters and submitted to NMFS. This will provide important management information, including the age and sex of the whale and its genetic profile.

*Comment 10:* Additional studies on beluga tissue samples should be conducted to determine the effect of polyaromatic hydrocarbons on the genetics of beluga whales.

*Response:* At this time, NMFS does not plan to conduct research on the effects of polyaromatic hydrocarbons on beluga whale genetics. However, ongoing research on these whales includes tissue sampling and archival under the Alaska Marine Mammal Tissue Archival

Project (AMMTAP). This project includes a long term tissue bank maintained at the National Institute of Science and Technology. These tissues allow future research on this subject. Additionally, NMFS is currently evaluating tissue collection protocols and analytical procedures under the AMMTAP to see if methodologies may allow for some determination of hydrocarbon exposure among this stock.

*Comment 11:* Although supportive of the efforts by NMFS to provide observers to monitor Cook Inlet gillnet fisheries, the remaining Cook Inlet fisheries that are not currently classified in the MMPA List of Fisheries (LOF) should be reviewed to determine if they should be reclassified as Category I or II fisheries.

*Response:* The level of marine mammal injury or mortality caused incidental to commercial fishing is reviewed annually by NMFS relative to the abundance of each marine mammal stock. Thus, all commercial fisheries are reviewed on an annual basis for justification of their categorization. According to the most recent LOF (64 FR 9067), all Cook Inlet fisheries other than the salmon set and drift gillnet fisheries (which are Category II) warrant placement into Category III (a remote likelihood of causing serious injury or mortality to marine mammals).

*Comment 12:* NMFS should require consultation before state or Federal agencies take action that would affect the fisheries upon which the beluga whale relies.

*Response:* NMFS reviews and comments on all fishery management plans under the Magnuson-Stevens Fishery Management and Conservation Act (Magnuson-Stevens Act). These plans include habitat provisions. NMFS staff will make any appropriate recommendations necessary to protect Cook Inlet beluga whales. Additionally, the Essential Fish Habitat (EFH) mandates of the Magnuson-Stevens Act require any Federal action agency conducting an activity which may adversely affect EFH to consult with NMFS regarding the potential effects of their actions on EFH.

If beluga whales were listed under the ESA, section 7 of that act will require Federal action agencies to consult with NMFS whenever any activity which they conduct, permit, or fund may affect the species. As a depleted stock, NMFS may develop or implement conservation or management measures to alleviate any impacts on areas of ecological significance to the Cook Inlet beluga whale. Under Section 112 (e) of the MMPA, such measures shall be developed and implemented after

consultation with the Marine Mammal Commission and the appropriate Federal agencies and after notice and opportunity for public comment. Therefore, under either act there are consultation provisions provided for stocks that are either depleted (MMPA), or endangered or threatened (ESA).

*Comment 13:* NMFS should work with State fish regulators to ensure Cook Inlet beluga food requirements are being met.

*Response:* The State of Alaska, Department of Fish and Game (ADFG) has offered their assistance in responding to the decline of the Cook Inlet beluga whale. Issues or concerns regarding the State's fisheries management and the health and recovery of the Cook Inlet beluga whales would be discussed between NMFS and ADFG fish management.

*Comment 14:* NMFS should analyze the role of available food sources in the precipitous decline of belugas in Cook Inlet.

*Response:* NMFS is currently conducting a study to obtain life history information on this stock. Data are being systematically collected on stock size, genetics, migratory patterns and distribution of beluga whales within Cook Inlet as well as data on the age, and stock structure, mortalities (including harvest) data, and growth. These are fundamental to designing a management program which will recover the stock and provide continued opportunity for Native harvest. Initial review of fisheries data for Cook Inlet, from State salmon management, does not show strong correlation between run strength and beluga whale numbers. Other non-commercial species of fish, such as eulachon, may be important to the diet of beluga whales, however there is limited information on the occurrence of these fish in Cook Inlet in recent years. NMFS will continue to assess the nutritive requirements of this stock in our research and management planning.

*Comment 15:* NMFS should coordinate with State and Federal agencies to determine the effects of logging activities on food sources.

*Response:* Comment noted. NMFS is unaware of any logging activities which have been shown to directly impact belugas or their prey species. Also, only private land is currently logged in Cook Inlet, and NMFS does not believe additional measures are required to assess and respond to these activities.

*Comment 16:* The cumulative impact of pollution sources need to be considered in management decisions.

*Response:* NMFS will continue to sample beluga tissue for the Alaska Marine Mammal Tissue Archival

Project. Tissue samples will also routinely be sent to the NMFS's Northwest and Alaska Fisheries Science Center for contaminant analysis.

Additionally, NMFS regularly coordinates with the U.S. Environmental Protection Agency, the Alaska Department of Environmental Conservation, and citizen's advocacy groups concerning pollutants in Cook Inlet. Through these efforts, we believe NMFS managers will be alert to issues concerning pollutants and their cumulative effects.

*Comment 17:* NMFS should provide for more enforcement of regulations prohibiting harassment of beluga whales.

*Response:* While more enforcement would allow broader coverage of Cook Inlet, we believe the current level of NMFS enforcement, along with supporting enforcement through the U.S. Fish and Wildlife Service and the Alaska State Troopers, is adequate to respond to the issue of harassment. The harassment of beluga whales is largely confined to waters near Anchorage, where such events are reported. Additionally, NMFS has developed criteria for commercial whale watching tours designed to minimize harassment. NMFS will remain proactive in alerting this industry to harassment issues and the prohibitions under Federal law. At this time, there are no commercial whale watching operations in upper Cook Inlet.

*Comment 18:* Education efforts for recreational boaters, tourism operators and shipping companies should be increased.

*Response:* Comment noted, see above response.

*Comment 19:* NMFS should compile data on vessel traffic to determine if additional regulations are necessary to protect beluga whales from impacts of vessel noise and abundance.

*Response:* Comment noted. Beluga whales are commonly found in areas with high commercial shipping activity and have shown tolerance for frequent passages by large vessels. High speed recreational watercraft, such as jet skis and ski boats, may disturb belugas and result in some displacement from feeding areas. NMFS will monitor such use and would consider actions if it was shown to have a significant adverse effect on these whales.

*Comment 20:* Construction projects should be reviewed by NMFS to ensure that potential threats are minimized.

*Response:* Comment noted. NMFS's Habitat Conservation Division routinely reviews construction throughout south central Alaska and makes recommendations necessary to

minimize or avoid impact to our Federal trust resources, including beluga whales.

*Comment 21:* NMFS must commit resources to monitoring the populations and enforcing regulations.

*Response:* NMFS agrees. The 1999 budget includes funds for the monitoring of upper Cook Inlet waters during the harvest season. We are continuing to develop plans for the cooperative management of the subsistence use of this stock with Alaska Natives; any cooperative agreements must provide enforcement mechanisms, and must recognize the authority of the NMFS in such enforcement.

Two additional commenters recommended that NMFS continue conducting Cook Inlet beluga population and distribution surveys and further monitor risks to their health from other sources (such as pollution, habitat loss, possible changes in food availability and disturbance).

*Response:* Comment noted. NMFS intends to continue research in these matters.

*Comment 23:* One individual recommended formalizing rescue protocol for strandings of beluga whales in Turnagain Arm.

*Response:* NMFS has a marine mammal stranding event program within the State of Alaska. This program brings Federal, State, and private interests together in responding to marine mammal strandings. Because live strandings do occur in upper Cook Inlet, NMFS developed a response plan for these waters. We will seek to improve this response plan as we learn more about these whales and response technology, and will involve both the public and private assets, such as the Seward Sealife Center.

*Comment 24:* One commenter suggested that it would be helpful if NMFS could shed more light on Cook Inlet beluga movement during winter, perhaps through satellite tagging or surgically implanted tags, if technically and practically possible.

*Response:* NMFS has plans to place satellite tags on Cook Inlet belugas in 1999, 2000 and 2001. Similar satellite tags previously placed on the beluga whales have lasted up to four months. To determine early winter movements, NMFS plans on tagging belugas in late summer/early fall during the next few years. Winter surveys were done in 1997, showing some belugas still in Cook Inlet. We plan to conduct winter surveys in the future.

*Comment 25:* One commenter questions NMFS' survey methodologies and recommends investigation into the

survey design and implementation of more consistent surveying.

*Response:* NMFS has flown aerial surveys in Cook Inlet consistently for the last 5 years (since 1994) during the month of June. These surveys provide a thorough coverage of the coast of Cook Inlet (1,388 km) for all waters within approximately 3 km of shore. In addition, there were 1,320 km of systematic transects flown across the Inlet. Most of upper Cook Inlet is surveyed three times, in particular the Susitna Delta where large groups of belugas are found. The month of June is the time when whales are most abundant in Cook Inlet.

*Comment 26:* One commenter recommended that Cook Inlet beluga whale critical habitat be identified and that no commercial activity/development occur within 5 miles of critical habitat areas.

*Response:* NMFS has recommended to the State of Alaska that areas within 5 miles of several rivers entering the upper Inlet, which are known areas of beluga concentrations, be deleted from the proposed Cook Inlet Oil and Gas Lease Sale. Further, as a depleted stock, NMFS may develop or implement conservation or management measures to alleviate any impacts on areas of ecological significance to that stock of marine mammal. Under section 112 (e) of the MMPA, such measures shall be developed and implemented after consultation with the Marine Mammal Commission and the appropriate Federal agencies after notice and opportunity for public comment.

If the stock were to be listed under the ESA, section 4 of that act requires the Secretary to designate any habitat considered to be critical habitat. Section 7 of the ESA also requires Federal action agencies to consult with NMFS or the U.S. Fish and Wildlife Service whenever any activity which they conduct, permit, or fund may affect a species listed under that act.

Therefore, under either act, there are consultation provisions to address activities that may affect beluga whale habitat throughout Cook Inlet provided that the stocks are either depleted (MMPA), or endangered or threatened (ESA).

#### The Depleted Determination

Section 3 of the MMPA (16 U.S.C. 1362(1)) defines the term "depleted" as meaning any case in which

(A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals\* \* \* determines that a species or population

stock is below its optimum sustainable population (OSP); or

(B) a state, to which authority for the conservation and management of a species or population stock is transferred\* \* \* determines that such species or stock is below its OSP; or

(C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973.

Section 3 of the MMPA defines OSP as: with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the optimum carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.

NMFS regulations at 50 CFR 216.3 define OSP as: a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem (K) to the population level that results in maximum net productivity (MNPL). Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or losses due to natural mortality.

Historically, MNPL has been expressed as a range of values (generally 50–70 percent of K) determined theoretically by estimating what size stock in relation to the original stock size will produce the maximum net increase in population (42 FR 12010, March 1, 1977). In 1977, the midpoint of this range was used to determine if a stock was depleted (42 FR 64548, December 27, 1977). The 60-percent value was supported in the final rule governing the taking of marine mammals incidental to commercial fishing operations (45 FR 72178, October 31, 1980).

#### Determination of "Population Stock" or "Stock" Under the MMPA

To designate the Cook Inlet population of beluga whales as a depleted stock under the MMPA, it must qualify as a "population stock" or "stock". Section 3(11) of the MMPA defines "population stock" or "stock" as a group of marine mammals of the same species or smaller taxa in a common spatial arrangement that interbreed when mature. Although this definition is in part a legal concept, stocks, species, and populations are biological concepts that must be defined on the basis of the best scientific data available.

NMFS has considered several lines of evidence regarding the population structure of Cook Inlet beluga whales.

**Distribution of Beluga Whales Within Cook Inlet**

The summer or open water distribution of Cook Inlet beluga whales is considered to be largely confined to waters of Cook Inlet (Laidre et al. 1999). Analysis of aerial surveys for beluga whales and other survey data for the northern Gulf of Alaska suggests no large, persistent groups of beluga whales exists other than in Cook Inlet. This distribution pattern is consistent with western and Arctic beluga whale stocks in Alaska, which are highly philopatric to discrete coastal summering areas. Additionally, the Cook Inlet area is physically separated from the remaining four Alaskan beluga whale stocks by the Alaskan Peninsula, which may act as a partial barrier restricting movement between stocks.

Genetic profiles have been obtained from approximately 470 beluga whales in Alaska and Canada, including 64 animals from Cook Inlet. Mitochondrial DNA analysis of these animals found the Cook Inlet, Bristol Bay, eastern Chukchi Sea, eastern Bering Sea, and Beaufort Sea beluga stocks are all significantly different from each other (O’Corry-Crowe and Dizon, 1999). Of these, the Cook Inlet whales were found to be the most distinct.

Based on the best available information, NMFS has determined that beluga whales in Cook Inlet are a population stock or stock as defined by the MMPA.

**Summary of Factors Supporting a Depleted Determination**

*Aerial Surveys:* Surveys of beluga whales in Cook Inlet, Alaska, were flown during June/July of 1993–98. The surveys provided a thorough coverage of the 1,388 kilometer (km) coastal area of the inlet and have included up to 1,500 km of offshore transects. Coastal transects were flown 1.4 km (0.7 nm) from the tideline, covering most of the area within 3 km of shore. Therefore, 100 percent of the coastal areas were

surveyed most years and, along with offshore transects, systematic surveys encompassed 13–29 percent of the entire Inlet.

Nearly all of the beluga whales seen in Cook Inlet in June/July were concentrated in a few dense groups in shallow areas near river mouths. The largest concentration (generally 120–300 whales by aerial count) has been located in the northern portion of upper Cook Inlet, in the Susitna River delta or Knik Arm. Another group (10–50 whales) has been consistently found between Chickaloon River and Point Possession. Smaller groups (generally <20 whales) occasionally occurred in Turnagain Arm, Kachemak Bay, Redoubt Bay (Big River), and Trading Bay (McArthur River). Over the past three decades, there have been decreases in sightings of beluga whales both in offshore areas and in lower Cook Inlet.

*Abundance Estimates:* Videotapes of beluga whale groups were collected concurrently with counts made by observers during the aerial surveys from 1994–98. The surveys conducted in 1993 were not used in the following abundance estimation analysis because field techniques were still being developed in that year. From these aerial video tapes, 165 counts of 54 whale groups were made. A correction formula was used to account for whales missed underwater. A correction for whales missed due to video resolution was developed by using a second video camera with a telephoto lens focused on a portion of the field of view obtained by the counting video. Whale images in this magnified view were matched to whales in the counting video and the missed whales were noted. Whales were missed either because their image size fell below the resolution of the video or because two whales surfaced so close to each other that their images ran together. The correction method that resulted depended on knowing the average whale image size in the counting videos.

Image sizes were measured for 1,218 whales from 70 different passes over whale groups. Groups for which the average image size was not measured were given the average correction factor from the other groups. Group sizes were estimated as the product of the count, the correction factor for whales missed underwater, and the correction factor for whales missed due to video resolution. These estimated group sizes were used in the abundance calculations.

Annual abundance estimates of beluga whales in Cook Inlet were calculated based on counts made by aerial observers and group sizes estimated from aerial video recordings. Whale group sizes examined in the videos were corrected for subsurface animals (availability bias) and animals that were at the surface but were missed (detection bias). A formula for estimating group sizes from counts by aerial observers was developed by regression of the counts and an interaction term based on encounter rate (whales per second during counting of a group) against the group sizes estimated from the videos.

Significant effects of encounter rate were either positive or negative, depending on the observer. Logistic regression was used to estimate the probability that entire groups were missed during the systematic surveys. Some whale groups may have been missed by both primary observers, but these would have constituted only 1.5 percent of the total estimate. Abundance estimates were 653 (CV = 0.43) in June 1994, 491 (CV = 0.44) in July 1995, 594 (CV = 0.28) in June 1996, 440 (CV = 0.14) in June 1997, and 347 (CV = 0.29) in June 1998. The latest (1998)  $N_{min}$  estimate is 273 and  $N_{best}$  = 347. Monte Carlo simulations indicate a 71–percent probability that a 40–percent decline occurred between the June 1998 abundance survey of the Cook Inlet stock of beluga whales and the June 1994 survey.

Table 1. Estimated Abundance of Beluga Whales in Cook Inlet, Alaska  
(The CV of each estimate is in parentheses.)

Section	1994	1995	1996	1997	1998
Northwest .....	580 (0.47)	444 (0.48)	542 (0.30)	362 (0.09)	292 (0.32)
Northeast .....	48 (1.08)	31 (0.43)	52 (0.37)	76 (0.69)	55 (0.60)
South .....	25 (0.19)	17 (0.43)	0 (0.00)	2 (0.43)	0 (0.00)
Total .....	653 (0.43)	491 (0.44)	594 (0.28)	440 (0.14)	347 (0.29)

**Depleted Determination Summary**

NMFS regulations at 50 CFR 216.3 define OSP as a population size that falls within a range from the population

level of a given species or stock, which is the largest supportable within the ecosystem (K), to the population level that results in maximum net

productivity (MNPL). Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the

population due to reproduction and/or losses due to natural mortality. NMFS has adopted by regulation that MNPL is at 60-percent of K (42 FR 64548). Thus, assuming K was at the 1994 abundance level, a 71-percent probability exists that the Cook Inlet stock of beluga whales was below OSP as of June, 1998, and, therefore, qualifies as a depleted stock under the MMPA.

The support for a depleted determination is strengthened by the fact that K was assumed to be the highest of the NMFS's abundance estimates, in this case the 1994 estimate of 653 animals. The actual carrying capacity of Cook Inlet is probably higher than this number based on previous counts and anecdotal estimates of greater than 1,000 animals prior to 1980. Further, because Native subsistence harvest had occurred throughout the 1980s and 1990s, the 1994 abundance estimate likely reflected a population that had already been significantly exploited. Additionally, the 1998 abundance estimate occurred midway in the harvest season. NMFS documented seven belugas being harvested after the June 1998 survey. These removals, along with whales struck but lost during this time, suggest the actual abundance estimate may be lower than 347.

Finally, traditional knowledge and observations of Alaskan Natives also provide an historical perspective on abundance. Alaskan Natives have reported the Cook Inlet stock comprised an estimated 1,000 whales as recently as the 1980s. Were this figure to be used for the carrying capacity (K), the stock would be at 35 percent of K, significantly below OSP.

Therefore, based on the best scientific information available, NMFS believes that the Cook Inlet stock of beluga whales is significantly below OSP and, as a result, proposes to designate this stock as depleted under the MMPA.

#### Public Comments Solicited

NMFS intends that any final action resulting from this proposal be as accurate and as effective as possible. Therefore, comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning this proposed rule are hereby solicited. Final

promulgation of the regulations on the Cook Inlet beluga whale will take into consideration any additional information received by NMFS, and such communication may lead to a final regulation that differs from this proposal.

NMFS will conduct a public hearing on these proposed regulations on Monday, November 22, from 9 a.m. to 3:30 p.m. at the Anchorage Federal Office Building, Room 154, 222 W. 7<sup>th</sup> Avenue, Anchorage, Alaska.

#### References

- Laidre, K.L., K.E. Sheldon, B.A. Mahoney, and D.J. Rugh. 1999. Distribution of beluga whales and survey effort in the Gulf of Alaska.
- O'Corry Crowe, G. and A.E. Dizon. 1999. Molecular genetic analysis of beluga whale, *Delphinapterus leucas*, population structure and movement patterns in Alaska and Canada with special reference to Cook Inlet.

#### Classification

This rule is not subject to review under Executive Order 12866.

Depletion designations under the MMPA are similar to ESA listing decisions, which are exempt from the requirement to prepare an environmental assessment or environmental impact statement under the National Environmental Policy Act. See NOAA Administrative Order 216-6.03(e)(1). Depletion designations under the MMPA are required to be based solely on the best scientific information available. NMFS has determined that the proposed depletion designation of this stock under the MMPA is exempt from the requirements of the National Environmental Policy Act of 1969, and an Environmental Assessment or Environmental Impact Statement is not required.

Based on the requirement that depletion designations be based solely on the best scientific information available, the analytical requirements of the Regulatory Flexibility Act do not apply. Notwithstanding this, the Assistant General Counsel for Regulation for the Department of Commerce certified to the Chief Counsel for Advocacy, Small Business Administration, that if the Cook Inlet, Alaska, stock of beluga whales is

designated as depleted as proposed, the designation will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. The proposed designation is in response to the stock's recent decline. The MMPA prohibits the harvest of marine mammals, including Cook Inlet beluga whales, with a limited exemption for subsistence hunting by Alaska Natives. Accordingly, the designation will have no economic impact on small entities within the meaning of the Regulatory Flexibility Act.

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

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 13132.

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

Exports, Imports, Marine mammals, Transportation.

Dated: October 8, 1999.

**Andrew. A. Rosenberg,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be 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 § 216.15, a new paragraph (g) is added to read as follows:

#### § 216.15 Depleted species.

\* \* \* \* \*

(g) Beluga whale (*Delphinapterus leucas*), Cook Inlet, Alaska stock. The stock includes all beluga whales occurring in waters of Cook Inlet north of 59° N. lat. including, but not limited to, waters of Kachemak Bay, Kamishak Bay, Chinitna Bay, Tuxedni Bay and freshwater tributaries to these waters.

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